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PROCEEDINGS AND DEBATES OF THE 92d CONGRESS, FIRST SESSION

SENATE—*Tuesday, September 28, 1971*

The Senate met at 10 a.m. and was called to order by the President pro tempore (Mr. ELLENDER).

PRAYER

The Chaplain, the Reverend Edward L. R. Elson, D.D., offered the following prayer:

O Father God, whose love never fails and whose grace is sufficient for all our need, in this moment set aside from daily duties, we pause to seek Thy wisdom and direction.

"Holy Spirit, truth divine, dawn upon this soul of mine;
"Word of God and inward light, wake my spirit, clear my sight.

"Holy Spirit, power divine, fill and nerve this will of mine.
"By Thee may I strongly live, bravely bear, and nobly strive.

"Holy Spirit, right divine, King within my conscience reign;
"Be my Law, and I shall be firmly bound, forever free."

—Rev. Samuel Longfellow.

Hear this our prayer, for Thy name's sake. Amen.

THE JOURNAL

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the reading of the Journal of the proceedings of Monday, September 27, 1971, be dispensed with.

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

VACATING OF ORDER FOR SENATOR HARTKE TO SPEAK TODAY

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the order for the distinguished Senator from Indiana (Mr. HARTKE) to proceed for 15 minutes this morning, which was granted on yesterday, be vacated.

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

COMMITTEE MEETINGS DURING SENATE SESSION

Mr. MANSFIELD. Mr. President, I ask unanimous consent that all committees may be authorized to meet during the session of the Senate today.

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

THE DEHUMANIZATION OF FOREIGN POLICY

Mr. MANSFIELD. Mr. President, an article was published in last Sunday's Washington Post entitled "The Dehumanization of Foreign Policy," written by Anthony Lake and Roger Morris.

It states in part:

It is a world apart from piles of decomposing bodies in a ditch outside Hue or a village bombed in Laos, the burn ward of a children's hospital, or even a cemetery or veterans' hospital here.

Mr. President, I ask unanimous consent to have the article printed in the RECORD.

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

THE DEHUMANIZATION OF FOREIGN POLICY

(By Anthony Lake and Roger Morris)

Once the shock of our experience in Vietnam wears off, we might let ourselves believe that it was all too extraordinary to be anything but an aberration. But the hard truth about the making of our Vietnam policy is that it was not really so unique at all. Leslie Gelb has well described how Vietnam was the product of conscious choice rather than high-level inadvertence. The system within the executive branch worked.

Our policy was not only the product of specific mistakes and the normal mechanical perversity of the system. It reflected a basic mental set—the way nearly all of us, in government and out, have been looking at international affairs and foreign policy.

Some readers of the Pentagon Papers, for example, have professed shock that in all those words, in all those options weighed and calculations made, there was so little mention of the enormous human costs and consequences of the policy—either here at home or in Indochina. But such costs and consequences are far too rarely weighed formally in major foreign policy decisions.

The Papers reveal that human costs were almost invariably approached in terms of their effect on public opinion here, or in making tactical decisions (as in choosing bombing targets). They were not formally considered in making the strategic decisions which determined our course of action.

Whether in the State Department, the Defense Department or the White House, whether in Democratic or Republican administrations, the same dehumanized pattern of decision making on all foreign policy issues has been evident. It is the way nations traditionally carry on their business in the world. Vietnam is only special for the United States in the sheer magnitude of wasted human suffering and the direct toll on our society.

BLOODLESS ABSTRACTIONS

The issue, then, is not the men or the particular period of this tragedy. We cannot forget our own enthusiasm when the architects of our foreign policies in the last decade came in to dispel the malaise of the Eisenhower years. And, even in retrospect they remain the epitome of what our society produces to manage its dealings with other nations. The blame the Presidents who heeded them is to dodge the harder question of why they (and so many of us at lower levels along with them) thought and acted as they did.

The answer to that question begins with a basic intellectual approach which views foreign policy as a lifeless, bloodless set of abstractions. A liberalism attempting to deal with intensely human problems at home abruptly but naturally shifts to abstract concepts when making decisions about events beyond the water's edge. "Nations," "interests," "influence," "prestige"—all are disembodied and dehumanized terms which encourage easy inattention to the real people whose lives our decisions affect or even end. This conceptual approach is shared in our school classrooms no less than in our bureaucrats' offices.

Then, too, there is the important influence of bureaucratic rules of behavior. The same bureaucracy which thinks of the world in abstract images, and which prizes at least the illusion of pragmatic decision-making, imposes a style of behavior on its members which precludes open and forceful concern with human issues. The men involved in making decisions on Vietnam in the early 1960s were aware of, and must have been privately concerned with, the human dimensions of their decisions. But such concern as they felt was not allowed to be included in their formal, written recommendations and analyses. It simply is not done.

A WORLD APART

This produces an all too vivid and tangible method and behavior. We remember, more clearly than we care to, the well carpeted stillness and isolation of those government offices where some of the Pentagon Papers were first written. The efficient staccato of the typewriter, the antiseptic whiteness of nicely margined memoranda, the affable, authoritative and always urbane men who wrote them—all of it is a spiritual as well as geographic world apart from piles of decomposing bodies in a ditch outside Hue or a village bombed in Laos, the burn ward of a children's hospital in Saigon, or even a cemetery or veterans' hospital here. It was possible in that isolated atmosphere, and perhaps psychologically necessary, to dull one's awareness of the direct link between those memoranda and the human sufferings with which they were concerned.

Reasonable, decent men around tables in those quiet, carpeted rooms simply cannot imply that the other fellow, who supports a "tougher" policy, is a heartless murderer. Subordinates do not wish to tell superiors that they will be acting immorally if they choose the "tougher" option. Policy—good, steady policy—is made by the "tough-minded." To talk of suffering is to lose "effectiveness," almost to lose one's grip. It is seen as a sign that one's "rational" argu-

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ments are weak. So the human factor has been consigned, in the big decisions, to the column of "other considerations"—regrettably inapplicable because, as we are told so often, we are living in a tough, immoral world.

The implied choice is posed between "people" and the "effectiveness" of a policy. The imagined consequences in those abstract terms—prestige, interests, credibility—are unfailingly greater than the potential price people must pay.

This does not touch on the myriad of other influences that quarantine a decision from contact with the human consequences: the obsessive quality of bureaucratic infighting, the immersion in technical details, or the personal hesitations of men caught up in a career system.

THE HUMAN PRICE

How would a more humanistic foreign policy look? This obviously requires more study to see how specific policies would be affected. It would not necessarily always be more interventionist or isolationist or pacifist. It would have one essential element: It would require weighing human costs and benefits as one of the principal and unashamedly legitimate considerations in any decision. This does not mean simply adding a section on "Human Factors" to National Security Council option papers, in the same way that there is occasionally a pro forma attachment on "Congressional Reaction." These considerations are not somehow external, separable from the substance of a decision. In reality, human beings are what foreign policy, no less than domestic policy decisions—and government itself—are all about. When men sit around a conference table in Washington, or draft options in their quiet offices, this reality must be no less in their minds than the abstract and often fuzzy notions of "national advantage" in which we are accustomed to deal. These abstractions can only have meaning when considered in human terms. Now, they seem to have some grotesque life of their own.

Weighing human considerations does not mean that human costs can be avoided. No policy-maker could freeze himself into automatic inaction whenever faced by a decision which would involve suffering or death.

But we must face the magnitude of the human costs involved in some exchange of short-run sacrifice for long-run advantage. And we must never overstate future fears in order to justify or minimize the horror already with us. For example, invoking the fear of nuclear war or Communist world domination cannot be used to justify the hideous casualties in Indochina unless a far better case can be made that Armageddon would have followed an American failure to fight in Vietnam.

In government today, the assumption is that these choices rarely need to be formally posed, if at all, until domestic political opposition (and public opinion, informed by media coverage of the human tragedies involved) is stimulated to hinder or stop a particular policy. Even then, the question is how long the government can afford politically to continue to pursue its course of action.

THE OTHER SIDE

Thus the current administration believes that "interests" have amply justified the further death and suffering in Southeast Asia entailed in its plans for a slow and indefinite withdrawal from Vietnam. When the President evokes the "pitiful, helpless giant," he reflects what has been a national inability to see the other pitiable, helpless human side of the equation. There is a tragic and perverse high-mindedness in the continuing appeal to American men to die for intangible and often transient notions of international balances of power. In the end, such arguments are infinitely elastic. Since the methodology of thought is without humanistic restraints, there is no veto for human consideration anywhere along the way.

Yet marginal benefits of "interest" must yield at some point to human costs. That is the choice—the stopping point—we have never reached in Vietnam.

And so we face the prospect of a withdrawal which may substitute the dimly perceived horror of Laos-style bombing for the presence of American ground forces. We face the prospect of more soldiers, and many more innocent Asian civilians, dying to buy a "decent interval" which would partially preserve one notion of American prestige.

There are other examples outside Vietnam. This abstract approach accounts for raising the level of military aid to Latin American countries while economic aid and reforms for human welfare continue to languish. It also explains why we are ready to sell civilian aircraft to Portugal and South Africa which will almost certainly be used to support their racial tyrannies. It was the reason why we could obscure to ourselves and others—and thus contribute to—the awful magnitude of suffering and death in Biafra after its collapse in the civil war with Nigeria. And we made bloodless yet bloody calculations of "national interest" in deciding to keep supplying the arms to Pakistan which had been agreed upon before it undertook the savage repression in East Bengal.

We will be compounding the tragedy of Vietnam if we conclude that our policies there were wrong simply because they didn't work. It would be equally myopic to see in the Pentagon Papers only a tale of blunders and deception. A final, crucial lesson is that 'American foreign policy-makers find the courage to face—formally and explicitly—the human consequences of their decisions.

STUDENT REGISTERING AND VOTING

Mr. MANSFIELD. Mr. President, there is a good deal of discussion going on today about students voting, whether they should vote at the college or university which they attend or in their hometowns.

The University of Montana happens to be in Missoula, Mont.

An editorial published in the Missoulian, for Tuesday, September 7, 1971, entitled "Clearly Best" states in part:

Missoula County Clerk and Recorder Veramae Crouse says that when University students try to register here they are encouraged not to. They know the issues better back in their home towns, Mrs. Crouse said, and that is the reason they are encouraged to register and vote back home.

But if they assert that they not only live here but plan to live here, that Missoula has become their home, then no obstacle is placed to prevent their registering and voting in Missoula, she said.

Mr. President, this is a State and national problem. It is a good way to face up to the questions confronting our new voters recently enfranchised.

I ask unanimous consent to have the entire editorial printed in the RECORD.

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

CLEARLY BEST

The problem of where college students should register and vote is a hot problem in some places, but not here. Nor will it become a problem here unless some legal ruling throws present practice out of whack.

Missoula County Clerk and Recorder Veramae Crouse says that when University students try to register here they are encouraged not to. They know the issues better back in their home towns, Mrs. Crouse said, and that is the reason they are encouraged to register and vote back home.

But if they assert that they not only live here but plan to live here, that Missoula has become their home, then no obstacle is placed to prevent their registering and voting in Missoula, she said.

The problem has become a national problem due to the new constitutional amendment which extends the voting age to all persons 18 years old and older. These are the younger people, generally single and without households to head, even bachelor households, and where they should vote is a question bothering many public officials.

The problem is especially acute in small communities which contain large institutions of higher education. The fear is that the students will politically dominate some of those communities, committing them to expensive programs for which the minority of permanent residents will have to pay.

Last week United States Atty. Gen. John N. Mitchell said Congress should pass no law giving students the right to vote in their college communities. Such a law, he said, would discriminate against servicemen and others who must vote back in their home towns. He said, however, that his department would issue the states no guidelines concerning the matter.

At the opposite extreme, some communities use student population for census purposes and get grant money and legislative representation because of the students' presence. Students so counted should be allowed to vote in the communities which count them, said the Georgia state attorney general.

The entire matter should be left to the individual states. But it appears likely that the U.S. Supreme Court eventually will be asked to decide.

Meanwhile, Montana's practice seems best. It is likely that most newly-arrived students by choice will prefer to vote back home because that is where they know the issues and the candidates.

Yet after two or three years of spending most of their time in Missoula, a time of learning and often of political awakening, it would be natural if many shifted their registrations here. It is conceivable, but unlikely, that a student bloc vote will develop of such proportions as to significantly alter Missoula County elections.

The problem of the student vote in Missoula should not be much of a problem, and the present registration practice as outlined by Mrs. Crouse is clearly best.

ORDER OF BUSINESS

Mr. SCOTT. Mr. President, I yield back my time.

ORDER OF BUSINESS

The PRESIDENT pro tempore. Under the order previously entered, the distinguished Senator from Virginia (Mr. BYRD) is now recognized for 15 minutes.

MILITARY PROCUREMENT AUTHORIZATION—SECTION 503

Mr. BYRD of Virginia. Mr. President, I shall speak briefly today in regard to section 503 of the military procurement bill.

Last week, by a vote of 46 to 36, the Senate sustained the action of the Committee on Armed Services in approving section 503. That section would end the dependency of the United States on Communist Russia for a vital defense material.

For the past 5 years, as a result of an embargo on trade with Rhodesia, the United States has not been able to purchase chrome ore from that nation. Chrome ore is a vital defense material essential for nuclear submarines, jet aircraft, and missiles.

The chief source of chrome ore is Rhodesia, but since that source has been cut off from the United States, this country now imports 60 percent of its chrome from Communist Russia.

The Committee on Armed Services did not regard this as a logical situation and, as a result, wrote section 503 into the procurement bill. An effort was made to strike that section from the bill.

The Senate took a vote on it last Thursday, and when the vote was counted it was 46 to 36 to sustain the action of the Committee on Armed Services.

Yesterday, the distinguished chairman of the Committee on Foreign Relations, the Senator from Arkansas (Mr. FULBRIGHT), presented an amendment to the pending legislation which seeks to change section 503 and give to the President of the United States the option to determine whether this vital defense material, chrome ore, can be imported from Rhodesia.

I want to make a few comments in regard to the statements made yesterday by the distinguished Senator from Arkansas (Mr. FULBRIGHT).

As he told the Senate, his proposal would give the option to the President. In other words, the Senate is being asked not to make the decision itself, but to let the President make the decision.

Mr. President, I happen to be one of those Senators who feel that, through the years, the Senate and Congress have given too much power to the Chief Executive.

I was under the impression that the distinguished Senator from Arkansas was perhaps the foremost advocate in the Senate of the Senate's retrieving some of the power it has given to the executive branch in years gone by.

Certainly his speeches would indicate that he favors the Senate's reasserting itself in the field of foreign policy. Yet his proposal would go directly contrary to that. His proposal now is that the Senate not act on this matter but leave the determination in the hands of the President. Of course, following that kind of a course is the reason the Senate, over a period of time, has given away so much of its power.

The Senator from Arkansas favors the Senate's retaining power if he feels that the Senate will go along with his views. Apparently, however, he favors giving the President the power if he feels that the President will sustain the position which he, the Senator from Arkansas, favors.

Mr. President, it seems to me that the Senate should either have a policy of asserting the responsibilities and prerogatives of this body, or, if it does not want to do that, the alternative is to give those powers to the Chief Executive. I happen to agree with the assertions frequently made on the floor of the Senate by the distinguished and able and beloved majority leader, the Senator from Montana, that the Senate should face up to its responsibilities. I do not favor forfeiting these responsibilities and prerogatives.

I think the Senate should face up to its responsiblities in these matters. I do not favor taking the easy way out by turning the matter over to the President.

That is why our country has got itself in the fix that it is in now. The House of Representatives and the Senate—and I suppose the Senate is even more responsible in this regard than is the House of Representatives—have continually over the years abdicated its responsibilities to the Chief Executive.

It has done that with the same reasoning the distinguished chairman of the Foreign Relations Committee is using in the amendment which he submitted yesterday. He feels that the President of the United States will subscribe to his position on this matter. So he is willing to give him the power.

The Senate demonstrated this past week that it will not subscribe to the Senator from Arkansas' position in this matter. So he wants to take the power away from the Senate and the House of Representatives and give it to the President.

That is his privilege, of course.

However, in one way I think it is amusing that the proposal should be made by the distinguished chairman of the Foreign Relations Committee who, for the last 5 years, has been making speeches that advocate an opposite policy.

In another way, it is sad, in that I feel the Senate has made progress in the last 2 or 3 years in reasserting its responsibilities, particularly in the field of foreign policy.

Yes it is sad that one of the leaders in this fight has reversed his position and now wishes to turn the matter over to the President.

In the course of the debate yesterday, the distinguished Senator from Arkansas (Mr. FULBRIGHT) asked the Senator from Virginia, "Is it not a fact that the administration does not agree with the Senator from Virginia's view on this matter?"

Mr. President, the Senator from Virginia does not go around asking the administration whether it agrees or disagrees with his views.

The Senator from Virginia feels—perhaps incorrectly—that a U.S. Senator is supposed to give these matters some thought and then act in accordance with his convictions.

I am not here to represent the administration. I do not think any Senator in casting his vote is here to represent the administration, whoever the administration may be—Republican or Democrat. That is not the point.

I have no hesitancy in taking a course opposite from that which the State Department wants. I have been watching the State Department for a good many years. I watched it for many years as a newspaper editor. I have been watching it in recent years as a U.S. Senator. I have seen how many mistakes and errors the State Department has made. I am not going to be concerned with whether or not my views coincide with those of the State Department.

I am going to try to do what I think is logical and sound. And if it does not have the approval of the State Department, it is all right with me.

Mr. President, there is another aspect of this matter that I want to comment on. I also want to have printed in the RECORD a telegram which I received from the director of District 19 of the United Steelworkers of America.

I will read two short paragraphs and then ask unanimous consent that the text of the telegram be printed in the RECORD.

The telegram is from William J. Hart, director, District 19, United Steelworkers of America.

The telegram reads in part:

> I am concerned with the black and white steelworkers in Pennsylvania maintaining their jobs in the specialty steel industry. If favorable disposition of the Byrd proposal is not obtained, there will be no specialty steel industry in Pennsylvania or the United States.

Mr. President, we need jobs in this country. Yet the course of action that the Federal Government has been following and will continue to follow, unless the amendment included in the pending measure by the Senate last week is retained, will be putting more people out of work. That is going in the wrong direction.

It seems to me that it is certainly not very logical for the Government to take a course of action that puts people out of work, the steelworkers of our Nation.

I am going to do what little I can to help protect the jobs of those steelworkers.

That is an additional reason for the proposal. It is not the main reason. The main reason is that we want to end the dependency of the United States on the Soviet Union for a vital defense material. That is the main reason. However, an additional reason is that by so doing we will protect the jobs of the steelworkers of our Nation.

I do not have an intimate knowledge of the steel industry. However, I accept the word of Mr. Hart, director of District No. 19 of the United Steelworkers, that unless the amendment is retained in the bill the jobs of the black and white people in this specialty steel industry will go down the drain.

I do not want to see more of those people made jobless.

Mr. President, I ask unanimous consent that the telegram to which I have referred be printed in the RECORD at this point.

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

TARENTUM, PA.,
September 22, 1971.

Hon. HARRY F. BYRD, JR.,
Old Senate Office Building,
Washington, D.C.:

I was in attendance on July 8, 1971, when Allegheny Ludlum Industries Inc. vice president E. F. (Andy) Andrews appeared before the African Affairs Subcommittee of the Foreign Relations Committee of the United States Senate in Washington, D.C. I fully endorse the position taken by Mr. Andrews. I am concerned with the black and white steelworkers in Pennsylvania maintaining their jobs in the specialty steel industry. As you know Western Pennsylvania is the specialty steel capitol of the world and if the Pennsylvania specialty steel companies do not receive favorable disposition to the Byrd bill section 503 of H.R. 8687 or S. 1404, there will be no specialty steel industry in Pennsylvania or the United States, as a member of the executive board of the United Steelworkers of America I wish to be recorded as in favor of the Byrd bill Section 503 of H.R. 8687 or S. 1404 and I would appreciate any assistance you can render on this important subject.

Sincerely,

WILLIAM J. HART,
Director, District 19, United Steelworkers of America.

ORDER OF BUSINESS

The President pro tempore. Under the order previously entered, the Senator from Texas is recognized for 15 minutes.

Mr. COOK. Mr. President, will the Senator yield to me for a minute

Mr. BENTSEN. Mr. President, I am glad to yield to the Senator from Kentucky.

DEATH OF REPRESENTATIVE WATTS

Mr. COOK. Mr. President, it is with deep regret that I note the passing of the honorable Congressman from Kentucky, John Clarence Watts.

In the brief but abundant history of our great Nation there are few who have served with the dedication, humility and consistency of Representative Watts. A native of central Kentucky, John Watts chose to spend his entire life in the service of the good people of that area. Graduating from the law school of the University of Kentucky in 1927, private practice soon gave way to a permanent career in public service, first as a police court judge in his native Nicholasville, Ky., and later a county attorney, a State representative, majority leader in the State house, State commissioner of motor transportation and county party chairman. Elected to the U.S. House of Representatives in a special election in 1951, Congressman Watts worked quietly but industriously for over 20 years for both the people of his home State and the entire Nation. As the second ranking member of the House Ways and Means Committee and an active member of the Joint Committees on Internal Revenue Taxation and the Reduction of Federal Expenditures, the skill, judgment and conscious dedication which he displayed soon earned him the love and respect of all who knew or worked with him.

This Nation, the Congress and my State in particular will sorely miss John Watts, a man who served with all that he could give.

LEAVE OF ABSENCE

Mr. COOK. Mr. President, I ask unanimous consent that I be excused from attendance in the Senate today so that I may attend the funeral of the late Representative Watts of the Sixth District of Kentucky at Nicholasville, Ky.

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

DEFENSE RESEARCH AND DEVELOPMENT

Mr. BENTSEN. Mr. President, I rise to express my deep concern about the cyclical manner of the boom-or-bust philosophy by which our research and development programs in this country have been handled for many years.

One of the most important areas of the Department of Defense budget is that of research, development, test and engineering. Our success therein can insure the future military capability of our country. Our failure could spell disaster.

Unlike some other areas, research and development requires continuity, for it builds on previously developed and carefully nurtured expertise.

I recently talked to a friend of mine who owned a factory that employed many top scientists. I asked him whether he would rather have his factory burned down or have his scientists disbanded, and later to try to bring them back to work. He said:

> The answer is easy. I would rather lose the factory. That is brick and mortar. I could recoup that in a year. But if these scientists and top engineers were dispersed across the country, to try to bring them back again would be much more difficult. Too often we fail to realize these people are a national asset.

There must be some continuity in our research and development program.

It cannot be expected to be productive if it is subjected to spasmodic attention. Scientific and technical capability in this area, once lost, is not easily regenerated. It is for this reason that I deplore the downward trend of our defense research and development budget over the last several years. This bill represents a reversal of this trend, and considers the need for continuing and building on vital research.

Some like to allege that research and development fuels the arms race. This allegation fails to recognize that research supplies our decisionmakers with options and insurance, not hardware. We absolutely must have those options; the alternative is nuclear holocaust or slavery.

Production of a specific weapons system requires a separate decision in which we in the Congress have a very definite role in assessing the implications of such a decision. It is the responsibility of all of us, however, to insure that we and future decisionmakers are not forced into untenable positions by shortsighted decisions made today.

Thus, a failure to adequately fund defense research and development today represents placing a lien on the future security of this country. To be sure, research and development does develop security options for future decisionmakers in the form of specific military systems but it also does much more than that and I would like to explore this briefly with you.

Research and development in one sense is the most important program of the Department of Defense. Coming from a State where the miracle of agricultural production is a reality, I think of research and development as being analagous to the magic of that industry. So it is that the seeds of research, wisely planted, provide the nursery from which our future weapons strength grows.

We spend billions of dollars to further our knowledge in every field of science, to pick and choose among these efforts and apply this knowledge to develop and improve our military weapons so that the future security of the United States will be guaranteed. Why, then, are we told by the leaders of the Defense Establishment that we are in danger of being overtaken by the Soviets in technology? The warnings of the Secretary of Defense, the Director of Defense Research and Engineering, and other high level officials of the Defense Department are ominous. They portend the resignation by the United States from its dominant role throughout the years in the development of superior weapons.

Let me be more specific. The appearance of Sputnik in 1957 came as a shock, a rude awakening. The United States was jolted out of its complacency in the manned space era. However, this was a field of technology which was entirely new and whose potential military significance was not clearly recognized. Belatedly, we applied our resources to match the Soviets. The cost, obviously, was much greater than it would have been had the United States followed a research program prior to the "crash" effort generated by sputnik, than if we had planning and continuity on this type program.

The dramatic use by the Egyptians in the Middle East war of a surface-to-surface missile with such devastating effect caused a shock which is still reverberating throughout our naval surface forces. This first appearance of the Styx missile should not have been a surprise. From a technologic point of view, the United States could have achieved this capability through the normal developmental process if our naval leaders had had the necessary resources. Unfortunately, the preponderance of our resources was used in the development of other naval capabilities during those years.

Research and development is the tool by which we create new technology from pure science. Technology which can serve to increase our security at lower force levels.

If we are going to cut back on defense or reduce our number of troops and go back to 2.2. million men while the Russians build their force to 3.5 million troops we must have superior technology and that calls for continuous research and development.

The research and development portion of our defense budget determines force quality while the remainder of the budget largely determines force quantity.

Hence, research and development must, be necessity, be out of phase with overall defense budget trends. Thus, as we seek to preserve force effectiveness or quality at lower force levels our research and development efforts, the determiner of force quality, must be expanded. In addition, research and development can and must be a vehicle for lowering costs and improving reliability of our military equipment.

If we are looking at a military budget in excess of $70 billion it is important that we have some thinking and planning before we make public commitments on our weapons systems, that we have a thorough job done in research and development in order to get our money's worth.

The use of prototype development, which promises to fulfill these objectives, is receiving well deserved emphasis now by the Department of Defense. Development of the AX close support aircraft is a case in point.

Last week we were talking about building three prototypes of the B–1. This is the type development that is necessary for us to have savings in this enormous program.

Research and development permits us to know what is possible and hence to respond in an orderly way to new threats. If one were to start from scratch every time a new threat appeared, the response would tend to be, more often than not, uncoordinated, lacking in specific direction and wasteful of the precious resources which we may seek to preserve by short-sighted budget cuts in the research and development area.

A continuing and vital research and development program also provides us with the reservoir of technical expertise which enables us to respond rapidly to operational needs as they develop, resulting often in decreased hazards for our men in the field.

Frankly, I have agreed with some cuts in the military and I voted for a great number of those cuts, but it is my strong belief that research and development is not the place to cut, that we absolutely must have continuity in this program in order that we can have problem solving men working in groups, developing the kinds of systems needed for the protection of this country.

Important as the above responsibilities of our defense research and development efforts are, we must recognize that research and development is not an area in which we compete solely with ourselves. The Soviets have made a massive and continuing commitment to technological superiority. Their achievements in high-yield weapons, heavy-lift helicopters and ram-jet engines have been truly impressive. Their defense research and development expenditures now exceed our own by the equivalent of almost $3 billion. This differential, coupled with their demonstrated scientific skill, if maintained over an extended period of time can only result in weapons systems of superior quality and performance in the hands of a formidable potential adversary. Scare talk? Yes, because after the evidence presented in testimony, I very much fear that we may fall behind.

I think we have parity in this situation today but if we compare the curves of United States and Soviet research and development spending and extrapolate them into the future we can see that they will soon be far beyond us in technology and technical superiority.

The secrecy of the Soviet system, unlike our own, does not permit us to examine their program to determine in what areas they may be focusing their efforts. Information concerning activities in the Soviet Union is certainly fragmentary. It is only by our broad technological competence, based on exploration of many technical alternatives in a variety of fields, that we can evaluate the implications of fragmentary intelligence, information, and determine the potential implications to our security. Hence, we must be armed with an adequate and continuing research and development effort if we are to prevent a technological surprise which could dramatically shift the balance of power. I think even those who sincerely disagree with the expenditure in this bill will concede that such a dramatic shift would invite adventures which would cost many times more than the request here.

In summary, as we seek to preserve force effectiveness at lower force levels—with reduced manpower, and this I support—I can think of no better vehicle than a strong, vital defense research and development program. I am convinced that the future security of this Nation is dependent on the research and development decisions which we make today. In the past several years we have seriously eroded the research and development base which took us so long to develop. It is now time to reverse this dangerous trend.

I yield back the remainder of my time.

TRANSACTION OF ROUTINE MORNING BUSINESS

The PRESIDENT pro tempore. Under the previous order, there will now be a period for the transaction of routine morning business for not to exceed 15 minutes, with each Senator limited to 3 minutes.

The Senator from Montana is recognized.

ORDER FOR ADJOURNMENT UNTIL 10 A.M.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in adjournment until the hour of 10 o'clock tomorrow morning.

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

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

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

The second assistant legislative clerk proceeded to call the roll.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

ORDER FOR THE RECOGNITION OF SENATOR MONDALE TOMORROW

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that on tomorrow, immediately following the remarks of the distinguished Senator from Virginia (Mr. BYRD), the distinguished Senator from Minnesota (Mr. MONDALE) be recognized for not to exceed 15 minutes.

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

ORDER OF BUSINESS

The PRESIDENT pro tempore. Is there further morning business?

Mr. BYRD of West Virginia. Mr. President, how much time remains of the period for the transaction of routine morning business?

The PRESIDENT pro tempore. The time for the transaction of routine morning business has expired.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the period for the transaction of routine morning business be extended for not to exceed 10 minutes.

The PRESIDENT pro tempore. Is there objection? Without objection, it is so ordered.

PRESERVATION OF HISTORIC MONUMENTS

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 377, S. 1152.

The PRESIDENT pro tempore. The bill will be stated by title.

The legislative clerk read as follows:

A bill (S. 1152) to facilitate the preservation of historic monuments, and for other purposes.

The PRESIDENT pro tempore. Is there objection to the present consideration of the bill?

There being no objection, the Senate proceeded to consider the bill, which had been reported from the Committee on Interior and Insular Affairs with amendments on page 2, line 20, after the word "rehabilitation", to strike out "recreation" and insert "restoration"; and, on page 3, line 1, after the word "for", to insert "public"; so as to make the bill read:

S. 1152

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 203 of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 484), is further amended by redesignating section 203(k)(3) as section 203(k)(4) and by adding a new section 203(k)(3) as follows:

"(k)(3) Without monetary consideration to the United States, the Administrator may convey to any State, political subdivision, instrumentalities thereof, or municipality, all of the right, title, and interest of United States in and to any surplus real and related personal property which the Secretary of the Interior has determined is suitable and desirable for use as a historic monument, for the benefit of the public. No property shall be determined to be suitable or desirable for use as a historic monument except in conformity with the recommendation of the

Advisory Board on National Parks, Historic Sites, Buildings and Monuments established by section 3 of the Act entitled 'An Act for the preservation of historic American sites, buildings, objects, and antiquities of national significance, and for other purposes', approved August 21, 1935 (49 Stat. 666), and only so much of any such property shall be so determined to be suitable or desirable for such use as is necessary for the preservation and proper observation of its historic features.

"(A) The Administrator may authorize use of any property conveyed under this subsection for revenue-producing activities if the Secretary of the Interior (i) determines that such activities are compatible with use of the property for historic monument purposes, (ii) approves the grantee's plan for repair, rehabilitation, restoration, and maintenance of the property, and (iii) approves the grantee's plan for financing repair, rehabilitation, restoration, and maintenance of the property. The Secretary shall not approve a financial plan unless it provides that incomes in excess of costs of repair, rehabilitation, restoration, and maintenance shall be used by the grantee only for public park or recreational purposes. The Administrator may not authorize any uses under this subsection until the Secretary has examined and approved the accounting and financial procedures used by the grantee. The Secretary may periodically audit the records of the grantee, directly related to the property conveyed.

"(B) The deed of conveyance of any surplus real property disposed of under the provisions of this subsection—

"(i) shall provide that all such property shall be used and maintained for historic monument purposes in perpetuity, and that in the event that the property ceases to be used or maintained for that purpose, all or any portion of the property shall, in its then existing condition, at the option of the United States, revert to the United States; and

"(ii) may contain such additional terms, reservations, restrictions, and conditions as may be determined by the Administrator to be necessary to safeguard the interest of the United States.

"(C) 'States' as used in this subsection, includes the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States."

SEC. 2. Section 13(h) of the Surplus Property Act of 1944 (50 U.S.C. App. 1622(h)) is repealed.

The PRESIDENT pro tempore. Without objection, the amendments are agreed to.

Mr. PERCY. Mr. President, today we are considering a bill, S. 1152, designed to protect the preservation of certain historic monuments. The legislation has been presented by the administration as a desirable alteration in its conveyance procedures for Government historic properties.

The bill provides that, without monetary consideration, the administrator of General Services may convey to a State or local government any surplus real or related property, which the Secretary of the Interior has determined to be suitable for use as an historic monument for the benefit of the public and that appropriate and compatible revenue-producing activities may be permitted on that property.

Under the Surplus Property Act of 1944, surplus Federal properties are conveyed without cost to the States and local government for historic preservation. However, no commercial uses have been previously allowed. Because expenses of rehabilitation and maintenance in old buildings are especially high, preservation of a particular site may not be feasible unless some productive use can be made of the property or some portion of it. By allowing revenue-producing activities, it may be possible to maintain and develop certain historic monument sites that would otherwise be left to deteriorate. One example is the old U.S. Mint in New Orleans which sits idle. Funds to make the building a living museum could be provided from revenue-producing activities in the building itself.

Often, in the absence of funds, private interests have obtained these sites and been allowed to destroy them to make room for commercial ventures. S. 1152 would relieve the burden of renovation, and maintenance from the State and local government and place it on the monument itself. This concept may be called adaptive reuse. Through adaptive reuse a building may become self-supporting, while remaining under Government administration, by renovation for some appropriate activities which would provide funds for its maintenance and operation.

Determination of which activities are appropriate for preservation will be made by the Secretary of the Interior who approves the grantee's plan to repair, rehabilitate, restore and maintain the property. The responsible, professional judgment of the Advisory Board on National Parks which must report to the Secretary, would prevent any frivolous or improper use of the properties conveyed, as well as ensuring that only those monuments most worthy of preservation are considered for conveyance. The Administrator of the General Services Administration further approves the grantee's plan for financing and payment to the United States of the fair property value. A significant feature on the bill is that payment is required only from the income received from the revenue-producing use of the property, and then only after the grantee has recovered all costs of restoration and maintenance.

In allowing revenue producing activities, S. 1152 provides that any extra revenue produced by the monument above and beyond what is paid to the Federal Government shall be used by the grantee exclusively for park and recreational purposes. An advantage of this requirement, as opposed to a limitation that the money be used strictly for historic monument purposes, is that it might enable the local government to use the money for the upkeep of any recreational area within that particular political jurisdiction although the nearest historic monument or park might be in another city.

Two further improvements that S. 1152 offers over the existing legislation is that the new law would grant the real and personal property to a State or local government for use as a historic monument in perpetuity, abolishing the former 20-year limitation. Although the 20-year requirement is contained in current law, it has been the practice of GSA to convey such properties in perpetuity. This practice should be formalized to provide the long term protection which should be afforded historic properties.

In addition, S. 1152 removes the requirement that surplus properties must have a historic significance of 50 years prior to its being declared surplus. Elimination of the 50-year requirement is necessary to preserve sites related to the space program or the advances in atomic energy.

Mr. President, I believe that this bill is an important step toward Government responsibility in the area of historic preservation. It does not increase the responsibility of GSA to renovate and maintain historic buildings—meaning no additional cost to the Federal Government. What it does do is to make the donation of historic buildings more practical.

All too often in the past, historic monuments have been lost due to the lack of financial resources or public interest in their preservation. Monuments that illustrate the history of our country, the development of our architecture, the growth of the Federal Government, and the foundation of our cities have been thoughtlessly destroyed. Now we must look to a time when new and creative uses can be made of historic properties insuring their continued existence as historic reminders and as places of recreation and study for future generations. I am pleased at the need for such legislation indicated by the distinguished senior Senator from New York, Senator JAVITS. I urge that the Senate approve S. 1152.

Mr. JAVITS. Mr. President, I support S. 1152, Senator PERCY'S fine bill to facilitate the preservation of historic monuments.

The existing law—section 13(h) of the Surplus Property Act of 1944—permits the conveyance of surplus property determined by the Secretary of the Interior to be suitable and desirable for use as a historic monument, but the statute contains no authorization for any use of the property other than as a historic monument so that the essential revenue producing potentials of such buildings are not permitted. S. 1152 would repeal section 13(h) of the Surplus Property Act of 1944, thus permitting the conveyance of surplus property which is determined to be historically significant to the United States by the Secretary of the Interior, and for the first time would permit such property to be used for revenue producing activities which are determined by the Secretary to be compatible with the use of the property for historic monument purposes.

Many of our urban areas which are rapidly deteriorating contain buildings of great historic and cultural value, buildings which may be lost as our downtown areas continue to decline. To restore these buildings as empty monuments, however, does little to inhibit the decline of the neighborhood. If we are to reverse this process and save our cities, if we are to inject a new economic and social life into our downtown areas, we must enable innovative approaches which will stabilize those areas and restore the vitality of our urban environment. S. 1152 authorizes the conveyance of surplus property and permits such historic buildings to become an active part of the business and cultural life of its city. This creative reuse not only enhances the city, but preserves the building as part of the

lifestyle of that city. Thus, this bill would permit the use of a historic building in a manner which would generate the necessary capital to preserve the building as well as its urban environment.

One example of the benefits to be gained from passage of such a bill exists in my own Manhattan, the New York City Customs House. This building, erected in 1901–07, is a seven-story stone building designed in the electric French style by Cass Gilbert, and is a gem of architectural design. Should this property be declared surplus, however, under the present law the city of New York could aquire the building but could do nothing with it. If S. 1152 becomes law, a device would be provided to establish the transferee's right to use the building for commercial purposes, which would support primary educational and cultural purposes. Thus a wide range of cultural and educational activities, including housing of museum exhibits in the great halls, conducting study programs, lectures and research programs could be established.

Such creative reuse of historical structures will certainly lead the way in preserving our urban areas as well as preserving monuments of great cultural and historic value.

It is quite fitting, in line with President Nixon's stated policy set forth in Executive Order 11593, that:

The Federal Government shall provide leadership in preserving, retaining, and maintaining the historic and cultural environment of the Nation.

That such a bill as this one should have received such prompt consideration and reporting by the Senate Interior Committee and should now be brought to the floor of the Senate. I urge that this innovative and necessary bill be enacted into law.

The PRESIDENT pro tempore. The bill is open to further amendment. If there be no further amendment to be proposed, the question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading, was read the third time, and passed.

Mr. PERCY. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. BYRD of West Virginia. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

COMMUNICATIONS FROM EXECUTIVE DEPARTMENTS, ETC.

The PRESIDENT pro tempore laid before the Senate the following letters, which were referred as indicated:

REPORT OF COMMISSION ON THE ORGANIZATION OF THE GOVERNMENT OF THE DISTRICT OF COLUMBIA

A letter from the Chairman, Commission on the Organization of the Government of the District of Columbia, Washington, D.C., transmitting, pursuant to law, a report of that Commission, to September 22, 1971 (with an accompanying report); to the Committee on the District of Columbia.

PETITIONS

Petitions were laid before the Senate and referred as indicated:

By the PRESIDENT pro tempore:

A resolution adopted by the City of Beverly Hills, California, relating to excessive noise generated by aircraft; to the Committee on Commerce.

The petition of Faine B. McCoy, of Asheville, North Carolina, relating to S. 1874, the Children's Dental Health bill; to the Committee on Labor and Public Welfare.

REPORTS OF COMMITTEES

The following reports of committees were submitted:

By Mr. BURDICK (for Mr. BIBLE), from the Committee on Interior and Insular Affairs, without amendment:

S. 539. A bill for the relief of Grant J. Merritt and Mary Merritt Bergson (Rept. No. 92–379).

By Mr. BURDICK (for Mr. JACKSON), from the Committee on Interior and Insular Affairs, without amendment:

S. 1151. A bill to authorize the Secretary of the Interior to revise a repayment contract with the San Angelo Water Supply Corporation, San Angelo project, Texas, and for other purposes (Rept. No. 92–380).

EXECUTIVE REPORTS OF COMMITTEES

As in executive session, the following favorable reports of nominations were submitted:

By Mr. FULBRIGHT, from the Committee on Foreign Relations:

Nathaniel Davis, of New Jersey, a Foreign Service officer of class 1, to be Ambassador Extraordinary and Plenipotentiary to Chile;

Henry C. Catto, Jr., of Texas, to be Ambassador Extraordinary and Plenipotentiary to El Salvador;

William G. Bowdler, of Florida, a Foreign Service officer of class 1, to be Ambassador Extraordinary and Plenipotentiary to Guatemala;

Philip C. Halib, of California, a Foreign Service officer of class 1, to be Ambassador Extraordinary and Plenipotentiary to the Republic of Korea;

John E. Reinhardt, of Maryland, a Foreign Service information officer of class 1, to be Ambassador Extraordinary and Plenipotentiary to the Federal Republic of Nigeria;

Herman Kleine, of Maryland, to be an Assistant Administrator of the Agency for International Development; and

Leo Cherne, of New York, Thomas B. Curtis, of Missouri, Harry S. Flemming, of Virginia, and William French Smith, of California, to be members of the U.S. Advisory Commission on International Educational and Cultural Affairs.

INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first time and, by unanimous consent, the second time, and referred as indicated:

By Mr. SCOTT:

S. 2585. A bill for the relief of Wing Chung; and

S. 2586. A bill for the relief of Marta C. DeJesus. Referred to the Committee on the Judiciary.

By Mr. ELLENDER:

S. 2587. A bill for the relief of Dr. Dilip Sen, his wife Swati Sen and minor child, Arundhuti Sen. Referred to the Committee on the Judiciary.

By Mr. McCLELLAN (for himself and Mr. HRUSKA):

S. 2588. A bill to amend chapter 73 of title 18, United States Code. Referred to the Committee on the Judiciary.

By Mr. SCHWEIKER (by request):

S. 2589. A bill to provide for the establishment of a National Weather Modification Regulating Commission to regulate all weather modification activities, and for other purposes. Referred to the Committee on Commerce.

By Mr. HART:

S. 2590. A bill for the relief of Bradley William Maga. Referred to the Committee on the Judiciary.

By Mr. TOWER:

S. 2591. A bill for the relief of Dr. Constante S. Avecilla. Referred to the Committee on the Judiciary.

By Mr. HARTKE:

S. 2592. A bill to amend the tariff and trade laws of the United States to promote full employment and restore a diversified production base; to amend the Internal Revenue Code of 1954 to stem the outflow of U.S. capital, jobs, technology and production, and for other purposes. Referred to the Committee on Finance.

By Mr. HUMPHREY:

S. 2593. A bill to establish a comprehensive national program of child nutrition and nutrition education. Referred to the Committee on Agriculture and Forestry.

By Mr. YOUNG:

S. 2594. A bill to amend section 805 of the Agricultural Act of 1970 relating to the storage of emergency hay harvested from set-aside acreage. Referred to the Committee on Agriculture and Forestry.

By M. McCLELLAN (by request):

S. 2595. A bill to amend the act entitled "An act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of international conventions, and for other purposes", approved July 5, 1946, as amended. Referred to the Committee on the Judiciary.

By Mr. BROOKE (for himself, Mr. HART, Mr. HARTKE, Mr. HATFIELD, Mr. HUMPHREY, and Mr. MONTOYA):

S. 2596. A bill to prohibit the imposition of inequitable residency requirements as a condition of voting for Senator, Representative, or Delegate. Referred to the Committee on Rules and Administration.

By Mr. ANDERSON (for himself, Mr. FULBRIGHT, Mr. SCOTT, and Mr. PELL):

S. 2597. A bill to amend the Act of August 22, 1949 (63 Stat. 623), so as to authorize the Board of Regents of the Smithsonian Institution to plan and construct museum support and depository facilities. Referred to the Committee on Rules and Administration.

By Mr. CHILES:

S. 2598. A bill for the relief of Garvin L. D. McMakin, CT2, United States Navy. Referred to the Committee on the Judiciary.

By Mr. MAGNUSON (for himself, Mr. COTTON, Mr. ERVIN, and Mr. METCALF):

S. 2599. A bill to provide for the application of the prohibitions contained in the Sherman Act to the business of organized professional baseball. Referred to the Committee on the Judiciary.

By Mr. WILLIAMS:

S. 2600. A bill to authorize the involuntary recall of the Coast Guard Ready Reserve to duty in time of natural disaster. Referred to the Committee on Commerce.

By Mr. BIBLE:

S. 2601. A bill to provide for increases in appropriation ceilings and boundary changes

in certain units of the national park system, and for other purposes. Referred to the Committee on Interior and Insular Affairs.

By Mr. TOWER:

S.J. Res. 160. Joint resolution amending the provision of law which denies Federal disaster assistance to properties which could have been covered by flood insurance but were not. Referred to the Committee on Banking, Housing and Urban Affairs.

By Mr. FONG (for himself, Mr. BAKER, Mr. BIBLE, Mr. HOLLINGS, Mr. HUMPHREY, Mr. METCALF, Mr. MUSKIE, and Mr. PROXMIRE):

S.J. Res. 161. Joint resolution proposing an amendment to the Constitution of the United States with respect to the eligibility of naturalized citizens to hold the office of President. Referred to the Committee on the Judiciary.

By Mr. BENTSEN:

S.J. Res. 162. Joint resolution to amend the Disaster Relief Act of 1970 to authorize disaster loans with respect to certain losses arising as the result of recent natural disasters, and for other purposes. Referred to the Committee on Public Works.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. McCLELLAN (for himself and Mr. HRUSKA):

S. 2588. A bill to amend chapter 73 of title 18, United States Code. Referred to the Committee on the Judiciary.

THE JURY INTEGRITY ACT OF 1971

Mr. McCLELLAN. Mr. President, I am today introducing for myself and the distinguished Senator from Nebraska (Mr. HRUSKA) the "Jury Integrity Act of 1971" to meet a problem that will arise assuming the proposed new Federal Rules of Evidence are promulgated. It also manifests my deeply held conviction that review of these rules and congressional action to remedy their defects or to block them altogether should not await their promulgation but should proceed at the same time that the rules themselves are under consideration by the Judicial Conference and its Committees.

My immediate fear is that proposed rule 606 would inevitably serve as an invitation to unscrupulous defense counsel and guilty defendants to bully and browbeat Federal jurors after the conclusion of the trial. The rule in question would overturn long established Federal precedent and permit a juror to impeach his verdict by testimony or affidavit as to all but his mental or emotional reactions in arriving at that verdict.

Mr. President, from the time of Lord Mansfield's application of the doctrine, "Nemo turpitudinem suam allegans audietur," to the testimony of a juror on his own misconduct in the landmark case of *Vaise* v. *Delaval*, 1 Term R. 11 (K.B. 1785), until the present day, the incompetence of the juror to impeach his own verdict has been well recognized. (See 8 *Wigmore* § 2354 (McNaughton Rev. 1961)). The reasons set out by the Supreme Court in *McDonald* v. *Pless*, 238 U.S. 264, 267–68 (1915) are ample and cogent to support the rule:

> Let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

Mr. President, these are not idle fears. I have noted with growing concern the trend for ingenuous defense counsel and recalcitrant defendants to resort to any and all means they can to destroy our very system of justice. What day goes by that we do not hear of some new ploy, some new artifice, some new tactic of obstruction designed to harass and intimidate those charged with the administration of the rule of law?

Mr. President, fear is becoming an ever present factor in the administration of justice and it is no longer a stranger to the jury room. One of the jurors in the trial of the infamous Black Panther Bobby Seale is quoted as saying that the fear of the jurors in that case was so great that three jurors were trembling and shaking with the thought that they would be killed if they let their conscience and judgment guide their vote. The New York Times, May 28, 1971, p. 34, col. 1. Can we afford to tolerate new intrusions into the sanctity of the deliberative process of jurors that will only contribute to an increase of this sort of fear? Where will we find jurors brave enough to vote their consciences if they know that the sanctity of the juror room itself will be the routine subject matter of post-trial litigation in all major cases?

I am aware, of course, that reasons have been advanced to reconsider current Federal law and to permit a juror to impeach his verdict in certain instances. Indeed, I recognize that there are constitutional considerations in this area to which we must be sensitive. See *Parker* v. *Gladden*, 385 U.S. 363 (1966). But I remain unpersuaded that it is wise to permit the sort of broadgaged inquiry into the conduct of the jurors' deliberations in a criminal case that would be permitted by this proposed rule. There seems little need to concern ourselves with civil litigation as the incidence of bribery and jury intimidation is far more remote therein. It is because I am concerned that my judgment in this field will go unheeded that I propose this legislation today.

Mr. President, I cannot guarantee the outcome of the events now set in motion. It may well be that this rule will not be adopted by the court. I would hope that this will occur. It may well be that Congress will see fit to revise or block the adoption of this and other rules. Only future developments can tell how these issues will be faced and resolved. But I intend to do what is in my power to protect Federal jurors and the sanctity of their deliberations no matter how the issues are faced or resolved in the context of the rules.

Mr. President, the bill I introduce today would attempt to deter the sort of conduct that I would prefer to see forestalled by the retention of our current rules on jury competency. Essentially, the bill would criminalize any attempt on the part of a defendant in a criminal action or those acting in his behalf to communicate with any member of the jury which sat on his case during or after the conclusion of the trial, unless such were done under the supervision of the court. Any extra-judicial communication would be covered as the nuances of intimidation and influence are too subtle to be otherwise dealt with. At the same time, the way is left open for legitimate and controlled inquiry when such is deemed necessary to the course of justice.

I realize, Mr. President, that this bill is far from a perfect answer to the problem of jury harassment. It does not, for example, deal with the potentially abusive situation presented by permitting journalists and other newsmen to draw out of jurors statements which impune the integrity of the jury system. I am not convinced that a petit juror should be left wholly free to volunteer information to whomever he wishes. It might be better to place petit jurors under the same sort of secrecy that surrounds the grand juror. Judge J. Edward Lumbard in his John Randolph Tucker Lecture (Trial by Jury and Speedy Justice, 28 *Wash. and Lee Law Rev.* 309, 320 (1971)) observed:

> As we have seen, the jurors themselves are frequently put on trial in criminal case of public interest. In some cases this process has been continued after trial by questioning the jurors and asking them to make public statements. In my opinion, no court or judge should permit any questioning of jurors after the trial, except in those rare instances where counsel present to the court some good reason to believe that there has been criminal or grossly improper conduct which may have tainted the verdict. Jurors should be free to express their views freely and completely, whatever those views may be short of constituting criminal conduct such as bribery, coercion, or assault. The jury system can work satisfactorily only if jurors know and are assured that what they say in the jury room is confidential and not subject to exposure by any juror, except as the court may order for good reason. Accordingly, I recommend that by statute or court rule, trial judges should be required to instruct juries that they are under a duty to keep secret everything that happens in their deliberations, and to instruct counsel not to question jurors without court order, and that failure to observe these instructions will be treated as contempt of court.

But I am convinced that he should be free from embarassment and vexatious encounters. I realize that such a suggestion has constitutional overtones and raises a number of problems presented by the relationship between the rights of fair trial and free press. These questions can be developed in hearings.

It might be asked, too, not only whether the bill's coverage should be broadened, but whether it can be without becoming too broad. Can it be, for example, extended without necessarily criminalizing communications to a member of a juror's family? In a different vein, would it be a good idea to restrict it to situations in which a specific intent to harass or annoy is present? Would such a bill still be capable of being en-

forced? Should it apply to the government as well as the defendant? I do not now have answers to these questions, Mr. President, but I hope that they might be developed in the course of hearings.

Mr. President, I ask unanimous consent that the text of the Jury Integrity Act of 1971 be printed in the RECORD at this point.

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

S. 2588

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Jury Integrity Act of 1971."

SEC. 2. Chapter 73, Title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 1512. Communication with petit jurors

"(a) Whoever, being or having been a defendant in a criminal case or an attorney, agent or other person acting on the defendant's behalf, questions, interviews or otherwise communicates with any juror with respect to the verdict or deliberations of the jury in such case, either before or after verdict or judgment in such case, except in the presence of and upon motion to the court with good cause shown, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

SEC. 3. The analysis of chapter 73 of Title 18, United States Code, is amended by adding at the end thereof the following new item:

"1512. Communication with petit jurors."

By Mr. HARTKE:

S. 2592. A bill to amend the tariff and trade laws of the United States to promote full employment and restore a diversified production base; to amend the Internal Revenue Code of 1954 to stem the outflow of U.S. capital, jobs, technology and production, and for other purposes. Referred to the Committee on Finance.

THE FOREIGN TRADE AND INVESTMENT ACT OF 1972

Mr. HARTKE. Mr. President, to survive in the rapidly changing world economy of the seventies, America must take a new, hard look at its work trade position. Today, we face an international trade crisis which threatens the livelihood of most Americans and the status of this country as a world industrial leader.

The Foreign Trade and Investment Act of 1972 which I am introducing today, provides dramatic new tools for meeting this challenge. The events of the late sixties, and the more sweeping ones of recent weeks affecting our currency and balance of payments, prove that the old remedies have not worked. The textbook theories of the thirties and forties no longer apply in today's world of international trade. The pet explanations and panaceas of the past have not been effective in treating our trade sickness.

The danger signs are unmistakable: Heavy unemployment continues; our factories work well below capacity; inflation continues unabated—all at a time when other industrial nations are enjoying little unemployment, near peak production and rising standards of living.

If enacted, this bill would be a giant step toward restoring America's economic health and regaining balance in international trade and investment. Without it the heavy export of jobs, technology and capital by companies based in this country, will continue unabated. As well, the torrent of imports that has already wiped out whole industries will gradually erode our industrial base.

This present trend has been encouraged by our present trade and tax laws which make no requirement that free trade also be fair trade.

The Foreign Trade and Investment Act of 1972 seeks to protect the best interests of America against the worst practices of international corporations. It seeks to meet the challenge of foreign imports by better insuring that American manufacturers can compete equitably with foreign producers.

Specifically, the bill provides: First, that the special advantages for American businessmen who control factories overseas are removed from our tax laws. These advantages are outdated and only their removal will help stop the export of American jobs, American know-how, and American dollars.

Second, that the billions of dollars that have gone outside this country without concern for the well-being of American jobholders, or those who need jobs, will be subjected to new controls. The United States can no longer let other nations control the investment of American dollars.

Third, that the technology produced by American genius will be better supervised and controlled, so that American workers are more fully benefited from these advances.

Fourth, that the trade of the United States will be based on new tenets which recognize that we must produce a wide variety of goods within our own borders if we are to remain industrially self-sufficient. For this purpose, a new agency is established which would have wide authority to fix quotas on presently unregulated imports.

This new agency would represent American industry, labor and the public. The agency would set quotas based on the level of production during the 1965–69 period, when our economy was still moving ahead at home, the agency would not stop trade, nor would it set up a wall of price-increasing tariffs. Rather, it would establish a system whereby domestic industry would be gainsaved from unfair competition.

No one claims that every problem in the United States has been caused by the failure to act or to adopt new policies on international trade and investment. But no one can claim either that many of the problems in the industries affected by unemployment—the old and the new—are not intertwined with problems that have been developing from a lack of attention to the need for solutions to modern problems in trade and payments.

Americans know that new business forms have developed—often spawned by obsolete features of the tax laws. Multinational firms and banks—huge enterprises which produce different products in different countries while using a U.S. base for management—now span the globe. The bill treats this problem.

American taxpayers want a fair chance to reap the benefits of their tax dollars spent on American technology. But as fast as the technology for space or electronic equipment is developed and the patent is received, that technology is often transferred abroad—with the help of U.S. tax laws and the U.S. Government. The bill treats this problem.

American consumers want to buy imported products from time to time, and this bill will not stop such products from entering the country. But American consumers want to know where the imported unit and its parts were made and not be fooled by an American brand name on the front. Americans want to know that the American price they pay is related to the cost of the product—and not a windfall for importers and retailers.

There is no dispute that American businessmen and workers want to make goods in America for sale here. No one wants an economy of salesmen, for we know that a nation cannot be strong unless it has a strong base of productive industry. Right now, even though only 73 percent of U.S. industrial capacity is being used, the growth of many major companies continues and their profits increase because their production operations are abroad.

We see no reason to encourage this production abroad. Under current law, a U.S. corporation with a foreign factory receives credit against its U.S. tax for tax payment to a foreign government. But that same corporation cannot take credit against its U.S. tax for the State taxes it pays. This bill would end that loophole and make it equally advantageous to invest in Indiana as it is to invest in Ireland.

The bill also closes the loophole which now gives tax advantages for U.S. citizens who stay abroad 17 out of 18 months. The corporation with a foreign plant may continue to send its managerial personnel from the United States, but there is no reason to pay no taxes to the U.S. Government while he is abroad.

Similarly, the tax breaks or lack of taxes on licenses and royalties that U.S. firms enjoy abroad would be changed. The transfer of U.S. technology is a matter of concern to Government officials and trade experts and has led to congressional studies of the problem. This bill would help stop the export of American jobs due to transferred technology while those studies go on.

In short, the tax provisions of the Foreign Trade and Investment Act would end the giveaway of American jobs and tax dollars now created through holes in the tax law that encourage foreign production and technology transfers by U.S. firms.

In this bill the key word is production. If our economy expands, the rest of the world can continue to participate on an increasing basis. If our economy declines, the rest of the world must understand that America's problems at home need attention.

Those who suggest that the United States become a "service economy" have been unable to explain what they mean.

They seem to think that U.S. business wants to leave the country, that autoworkers do not want to make cars, that steelworkers do not want to make steel, that textile workers, garment workers, and aircraft employees will gladly give up their jobs. "Service" employment is not possible without a production base. When a parts plant shuts down, the people who work in the stores in the community lose their jobs. Service employment declines. The tax base is eroded, and public service jobs are lost. American workers are important to the United States—all kinds of workers, unskilled and skilled, professional, services and technical. Yet the more the United States ignores what has happened from the transfer of production out of the country since 1965, the less chance it will have to bring about full employment in the 1970's.

In sum, this bill would discourage American business investment abroad and limit the flow of imports into this country. We can no longer afford to export American jobs and technology at the expense of our own industry, all in the name of "free trade."

Mr. President, I ask unanimous consent that a section-by-section analysis of this bill, as well as a copy of the bill itself, be printed in the RECORD immediately following my remarks.

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

S. 2592

A bill to amend the tariff and trade laws of the United States to promote full employment and restore a diversified production base; to amend the Internal Revenue Code of 1954 to stem the outflow of U.S. capital, jobs, technology and production, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Foreign Trade and Investment Act of 1972".

PREAMBLE

In order to accomplish the domestic and foreign policy goals of the United States, it is necessary to promote and maintain a fully employed, innovative and diversified production base in the United States. In recent years rapidly increasing imports, sometimes promoted by foreign government assistance or unregulated unfair trade practices, have all but eliminated certain domestic industries, and are threatening to destroy critical portions of the United States production base. It is the intent of Congress, in enacting this statute, to insure that this destruction does not occur.

To this end, this statute should be interpreted to insure that the production of goods which have historically been produced in the United States is continued and maintained. To the extent that production of such goods has been transferred abroad, it is the intent of Congress that this production be encouraged to return to the United States. Moreover, as new products are developed and marketed in the United States this legislation should be administered such that a fair proportion of such production is maintained in the United States.

TITLE I

SECTION 101. Except as otherwise expressly provided, whenever in this Act an amendment is expressed in terms of an amendment to a section or other provision, the reference shall be considered to be made to a section or other provision of the Internal Revenue Code of 1954.

SEC. 102. TAXATION OF EARNINGS AND PROFITS OF CONTROLLED FOREIGN CORPORATIONS

(a) IN GENERAL.—Part III of subchapter N of chapter 1 (relating to income from sources without the United States) is amended by inserting after subpart H thereof the following:

"SUBPART I—CONTROLLED FOREIGN CORPORATIONS

"Sec. 991. Amounts included in gross income of United States shareholders.
"Sec. 992. Definitions.
"Sec. 993. Rules for determining stock ownership.
"Sec. 994. Exclusion from gross income of previously taxed earnings and profits.
"Sec. 995. Adjustments to basis of stock in controlled foreign corporations and of other property.
"Sec. 996. Records and accounts of United States shareholders.

"SEC. 991. AMOUNTS INCLUDED IN GROSS INCOME OF UNITED STATES SHAREHOLDERS.

"(a) AMOUNTS INCLUDED.—

"(1) IN GENERAL.—If a foreign corporation is a controlled foreign corporation for an uninterrupted period of 30 days or more during any taxable year, every United States shareholder of such corporation who owns (within the meaning of section 993(a)) stock in such corporation on the last day in such year on which such corporation is a controlled foreign corporation shall include in its gross income, for its taxable year in which or with which such taxable year of the corporation ends, its pro rata share of the corporation's earnings and profits for such year.

"(2) PRO RATA SHARE OF EARNING AND PROFITS.—A United States shareholder's pro rata share referred to in paragraph (1) is the amount—

"(A) which would have been distributed with respect to the stock which such shareholder owns (within the meaning of section 993(a)) in such corporation if on the last day, in its taxable year, on which the corporation is a controlled foreign corporation it had distributed pro rata to its shareholders an amount (i) which bears the same ratio to its earnings and profits for the taxable year, as (ii) the part of such year during which the corporation is a controlled foreign corporation bears to the entire year, reduced by

"(B) an amount (i) which bears the same ratio to the earnings and profits of such corporation for the taxable year, as (ii) the part of such year described in subparagraph (A) (ii) during which such shareholder did not own (within the meaning of section 993(a)) such stock bears to the entire year.

"(b) EARNINGS AND PROFITS.—For purposes of this subpart, under regulations prescribed by the Secretary or his delegate, the earnings and profits of any foreign corporation, and the deficit in earnings and profits of any foreign corporation, for any taxable year—

"(1) except as provided in section 312(m)(3), shall be determined according to rules substantially similar to those applicable to domestic corporations,

"(2) shall be appropriately adjusted for deficits in earnings and profits of such corporation for any prior taxable year beginning after December 31, 1971,

"(3) shall not include any item of income which is effectively connected with the conduct by such corporation of a trade or business within the United States unless such item is exempt from taxation (or is subject to a reduced rate of tax) pursuant to a treaty obligation of the United States, and

"(4) shall not include any amount of earnings and profits which could not have been distributed by such corporation because of currency or other restrictions or limitations imposed under the laws of any foreign country.

"(c) COORDINATION WITH ELECTION OF A FOREIGN INVESTMENT COMPANY TO DISTRIBUTE INCOME.—A United States shareholder who for his taxable year, is a qualified shareholder (within the meaning of section 1247(c)) of a foreign investment company with respect to which an election under section 1247 is in effect shall not be required to include in gross income, for such taxable year, any amount under subsection (a) with respect to such company.

"(d) COORDINATION WITH FOREIGN PERSONAL HOLDING COMPANY PROVISIONS.—In the case of a United States shareholder who, for his taxable year, is subject to tax under section 551(b) (relating to foreign personal holding company income included in gross income of United States shareholders) on income of a controlled foreign corporation, the amount required to be included in gross income by such shareholder under subsection (a) with respect to such company shall be reduced by the amount included in gros income by such shareholder under section 551(b).

"SEC. 992. DEFINITIONS.

"(a) UNITED STATES SHAREHOLDER DEFINED.—For purposes of this subpart, the term "United States shareholder" means, with respect to any foreign corporaton, a domestic corporation which owns (within the meaning of section 993(a)), or is considered as owning by applying the rules of ownership of section 993(b), 10 percent or more of the total combined voting power of all classes of stock entitled to vote of such foreign corporation.

"(b) CONTROLLED FOREIGN CORPORATION DEFINED.—For purposes of this subpart, the term "controlled foreign corporation" means any foreign corporation of which more than 50 percent of the total combined voting power of all classes of stock entitled to vote is owned (within the meaning of section 993(a)), or is considered as owned by applying the rules of ownership of section 993(b), by United States shareholders on any day during the taxable year of such foreign corporation.

"SEC. 993. RULES FOR DETERMINING STOCK OWNERSHIP.

"(a) DIRECT AND INDIRECT OWNERSHIP.—

"(1) GENERAL RULE.—For purposes of this subpart, stock owned means—

"(A) stock owned directly, and

"(B) stock owned with the application of paragraph (2).

"(2) STOCK OWNERSHIP THROUGH FOREIGN ENTITIES.—For purposes of subparagraph (B) of paragraph (1), stock owned, directly or indirectly, by or for a foreign corporation or foreign estate (within the meaning of section 7701(a)(31)) or by or for a partnership or trust shall be considered as being owned proportionately by its shareholders, partners, or beneficiaries. Stock considered to be owned by a person by reason of the application of the preceding sentence shall, for purposes of applying such sentence, be treated as actually owned by such person.

"(b) CONSTRUCTIVE OWNERSHIP.—For purposes of section 992, section 318(a) (relating to constructive ownership of stock) shall apply to the extent that the effect is to treat any domestic corporation as a United States shareholder within the meaning of section 992(a), or to treat a foreign corporation as a controlled foreign corporation under section 992(b), except that—

"(1) In applying subparagraphs (A), (B), and (C) of section 318(a)(2), if a partnership, estate, trust, or corporation owns, directly or indirectly, more than 50 percent of the total combined voting power of all classes of stock entitled to vote of a corporation, it shall be considered as owning all of the stock entitled to vote.

"(2) In applying subparagraph (C) of section 318(a)(2), the phrase '10 percent' shall be substituted for the phrase '50 percent' used in subparagraph (C).

"SEC. 994. EXCLUSION FROM GROSS INCOME OF PREVIOUSLY TAXED EARNINGS AND PROFITS.

"(a) EXCLUSION FROM GROSS INCOME.—For purposes of this chapter, the earnings and profits for a taxable year of a foreign corporation attributable to amounts which are, or have been, included in the gross income of a United States shareholder under section 991(a) shall not, when such amounts are distributed directly, or indirectly through a chain of ownership described under section 993(a), to—

"(1) such shareholder (or any domestic corporation which acquires from any person any portion of the interest of such United States shareholder in such foreign corporation, but only to the extent of such portion, and subject to such proof of the identity of such interest as the Secretary or his delegate may by regulations prescribe), or

"(2) a trust (other than a foreign trust) of which such shareholder is a beneficiary, be again included in the gross income of such United States shareholder (or of such domestic corporation or of such trust).

"(b) EXCLUSION FROM GROSS INCOME OF CERTAIN FOREIGN SUBSIDIARIES.—For purposes of section 991(a), the earnings and profits for a taxable year of a controlled foreign corporation attributable to amounts which are, or have been, included in the gross income of a United States shareholder under section 991(a), shall not, when distributed through a chain of ownership described under section 993(a), be also included in the gross income of another controlled foreign corporation in such chain for purposes of the application of section 991(a) to such other controlled foreign corporation with respect to such United States shareholder (or to any other United States shareholder who acquires from any person any portion of the interest of such United States shareholder in the controlled foreign corporation, but only to the extent of such portion, and subject to such proof of identity of such interest as the Secretary or his delegate may prescribe by regulations).

"(c) ALLOCATION OF DISTRIBUTIONS.—For purposes of subsections (a) and (b), section 316(a) shall be applied by applying paragraph (2) thereof, and then paragraph (1) thereof—

"(1) first, to earnings and profits attributable to amounts included in gross income under section 991(a), and

"(2) then to other earnings and profits.

"(d) DISTRIBUTIONS EXCLUDED FROM GROSS INCOME NOT TO BE TREATED AS DIVIDENDS.—Any distribution excluded from gross income under subsection (a) shall be treated, for purposes of this chapter, as a distribution which is not a dividend.

"SEC. 995. ADJUSTMENTS TO BASIS OF STOCK IN CONTROLLED FOREIGN CORPORATIONS AND OF OTHER PROPERTY.

"(a) INCREASE IN BASIS.—Under regulations prescribed by the Secretary or his delegate, the basis of a United States shareholder's stock in a controlled foreign corporation, and the basis of property of a United States shareholder by reason of which it is considered under section 993(a)(2) as owning stock of a controlled foreign corporation, shall be increased by the amount required to be included in its gross income under section 991(a) with respect to such stock or with respect to such property, as the case may be, but only to the extent to which such amount was included in the gross income of such United States shareholder.

"(b) REDUCTION IN BASIS.—

"(1) IN GENERAL.—Under regulations prescribed by the Secretary or his delegate, the adjusted basis of stock or other property with respect to which a United States shareholder or a United States person receives an amount which is excluded from gross income under section 994(a) shall be reduced by the amount so excluded.

"(2) AMOUNT IN EXCESS OF BASIS.—To the extent that an amount excluded from gross income under section 994(a) exceeds the adjusted basis of the stock or other property with respect to which it is received, the amount shall be treated as gain from the sale or exchange of property.

"SEC. 996. RECORDS AND ACCOUNTS OF UNITED STATES SHAREHOLDERS

"(a) RECORDS AND ACCOUNTS TO BE MAINTAINED.—The Secretary or his delegate may by regulations require each person who is or has been, a United States shareholder of a controlled foreign corporation to maintain such records and accounts as may be prescribed by such regulations as necessary to carry out the provisions of this subpart.

"(b) TWO OR MORE PERSONS REQUIRED TO MAINTAIN OR FURNISH THE SAME RECORDS AND ACCOUNTS WITH RESPECT TO THE SAME FOREIGN CORPORATION.—Where, but for this subsection, two or more persons would be required to maintain or furnish the same records and accounts as may by regulations be required under subsection (a) with respect to the same controlled foreign corporation for the same period, the Secretary or his delegate may by regulations provide that the maintenance or furnishing of such records and accounts by only one such person shall satisfy the requirements of subsection (a) for such other persons."

(b) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) Section 864(c)(4)(D) is amended to read as follows:

"(D) No income from sources without the United States shall be treated as effectively connected with the conduct of a trade or business within the United States if it consists of dividends, interest, or royalties paid by a foreign corporation in which the taxpayer owns (within the meaning of section 958(a)), or is considered as owning (by applying the ownership rules of section 958(b)), more than 50 percent of the total combined voting power of all classes of stock entitled to vote."

(2) Section 951 is amended by adding at the end thereof the following:

"(e) TAXABLE YEARS ENDING AFTER DECEMBER 31, 1971.—No amount shall be required to be included in the gross income of a United States shareholder under subsection (a) (other than paragraph (1)(A)(ii) of such subsection) with respect to a taxable year of a controlled foreign corporation ending after Deecmber 31, 1971."

(3) Section 1016(a)(20) is amended by striking out "section 961" and inserting in lieu thereof "sections 961 and 995".

(4) Section 1246(a)(2)(B) is amended by inserting "or 991" after "section 951" and by inserting "or 994" after "section 959".

(5) Section 1248 is amended—

(A) by striking out subsection (b);

(B) by revising subsection (d)(1) to read as follows:

"(1) Amounts included in gross income under section 951 or 991.—Earnings and profits of the foreign corporation attributable to any amount previously included in the gross income of such person under section 951 or 991, with respect to the stock sold or exchanged, but only to the extent the inclusion of such amount did not result in an exclusion of an amount from gross income under section 959 or 994.";

(C) by striking out in subsection (d)(3) "section 902(d)" and inserting in lieu thereof "subsection (h)", and by adding at the end of such subsection "No amount shall be excluded from the earnings and profits of a foreign corporation under this paragraph with respect to any United States person which is a domestic corporation for any taxable year of such foreign corporation ending after December 31, 1971."; and

(D) by adding at the end thereof the following:

"(h) Less Developed Country Corporation Defined.—For purposes of this section, the term "less developed country corporation" means—

"(1) a foreign corporation which, for its taxable year, is a less developed country corporation within the meaning of section 955(c)(1) or (2), and

"(2) a foreign corporation which owns 10 percent or more of the total combined voting power of all classes of stock entitled to vote of a foreign corporation which is a less developed country corporation within the meaning of section 955(c)(1), and—

"(A) 80 percent or more of the gross income of which for its taxable year meets the requirement of section 955(c)(1)(A); and

"(B) 80 percent or more in value of the assets of which on each day of such year consists of property described in section 955(c)(1)(B)."

(c) EFFECTIVE DATES.—

(1) Except as provided in paragraph (2), the amendments made by this section shall apply with respect to taxable years of foreign corporations ending after December 31, 1971, and to taxable years of United States shareholders within which or with which such taxable years of such foreign corporations end.

(2) The amendments made by subsection (b)(4) shall apply with respect to sales or exchanges occurring in taxable years beginning after December 31, 1971.

SEC. 103. REPEAL OF FOREIGN TAX CREDIT ALLOWED CORPORATIONS

(a) IN GENERAL.—Section 901 (relating to taxes of foreign countries and of possessions of the United States) is amended—

(1) by revising subsection (a) to read as follows:

"(a) ALLOWANCE OF CREDIT.—In the case of a taxpayer other than a corporation, who chooses to have the benefits of this subpart, the tax imposed by this chapter shall, subject to the applicable limitations of section 904, be credited with the amounts provided in the applicable paragraph of subsection (b). Such choice for any taxable year may be made or changed at any time before the expiration of the period prescribed for making a claim for credit or refund of the tax imposed by this chapter for such taxable year. The credit shall not be allowed against the tax imposed by section 56 (relating to minimum tax for tax preferences).";

(2) by revising subsection (b)(1) to read as follows:

"(1) CITIZENS.—In the case of a citizen of the United States, the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; and";

(3) by revising subsection (b)(4) to read as follows:

"(4) NONRESIDENT ALIEN INDIVIDUALS—In the case of any nonresident alien individual not described in section 876, the amount determined pursuant to section 906; and"; and

(4) by striking out subsections (d) and (e).

(b) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) Section 78 is repealed.

(2) Section 535(b)(1) is amended by striking out "and income, war profits, and excess profits taxes of foreign countries and possessions of the United States (to the extent not allowable as a deduction under section 275(a)(4)), accrued during the taxable year or deemed to be paid by a domestic corporation under section 902(a)(1) or 960(a)(1)(C) for the taxable year," and by inserting in lieu thereof "accrued during the taxable year,".

(3) Section 545(b)(1) is amended by striking out "and income, war profits, and excess profits taxes of foreign countries and possessions of the United States (to the extent not allowable as a deduction under section 275(a)(4)), accrued during the taxable year or deemed to be paid by a domestic corporation under section 902(a)(1) or 960(a)(1)(C) for the taxable year," and by inserting in lieu thereof "accrued during the taxable year,".

(4) Section 841 is repealed.

(5) Section 882(c) is amended by striking out paragraph (3).

(6) Section 884 is amended by striking out paragraph (4).

(7) Section 902 is repealed.

(8) Section 906 is amended—

(A) by striking out "and foreign corporations" in the heading thereof;

(B) by striking out in subsection (a) "or a foreign corporation" and "(or deemed, under section 902, paid or accrued during the taxable year)";

(C) by striking out in subsection (b)(3) "or 881 (relating to income of foreign corporations not connected with United States business)"; and

(D) by striking out subsection (b)(4).

(9) Section 904(g) is repealed.

(10) Section 960 is repealed.

(11) Section 1503 is amended to read as follows:

"SEC. 1503. COMPUTATION AND PAYMENT OF TAX.

"In any case in which a consolidated return is made or is required to be made, the tax shall be determined, computed, assessed, collected, and adjusted in accordance with the regulations under section 1502 prescribed before the last day prescribed by law for the filing of such return."

(c) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to taxable years beginning after December 31, 1971.

SEC. 104. DEPRECIATION ON FOREIGN ASSETS.

(a) EARNINGS AND PROFITS OF FOREIGN CORPORATIONS.—Section 312(m) (relating to effect of depreciation on earnings and profits) is amended by striking out paragraph (3) and inserting in lieu thereof the following:

"(3) FOREIGN CORPORATIONS.—In applying paragraph (1) or (2) for purposes of computing the earnings and profits of a foreign corporation, the amount of depreciation which would be allowable for the taxable year with respect to any property shall be determined on the basis of the useful life of such property in the hands of such foreign corporation."

(b) DEPRECIATION ON PROPERTY LOCATED OUTSIDE THE UNITED STATES.—Section 167 (relating to depreciation) is amended by redesignating subsection (m) as subsection (n) and by inserting immediately after subsection (l) the following:

"(m) DEPRECIATION ON PROPERTY LOCATED OUTSIDE THE UNITED STATES.—In the case of any property which either is located outside the United States or is used predominantly outside the United States (other than property described in section 48(a)(2)(B)(i), (ii), (iii), (iv), (v), or (vi)), subsection (b) shall not apply and the term "reasonable allowance" as used in subsection (a) shall be an allowance computed under the straight line method on the basis of the useful life of the property in the hands of the taxpayer."

(c) EFFECTIVE DATES.—The amendments made by this section shall apply with respect to taxable years beginning after June 30, 1972.

SEC. 105. TRANSFER OF PATENTS, ETC., TO FOREIGN CORPORATIONS.

(a) RECOGNITION OF GAIN.—Section 367 (relating to foreign corporations) is amended by adding at the end thereof the following:

"(e) TRANSFER OF PATENTS, ETC., TO FOREIGN CORPORATIONS.—Notwithstanding any other provision of this subtitle, any grain realized on a transfer of a patent, an invention, model, or design (whether or not patented), a copyright, a secret formula or process, or any other similar property right to any foreign corporation in an exchange to which this section is applicable shall be recognized."

(b) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to transfers of property made after the date of enactment of this Act.

SEC. 106. EXCLUSION FOR EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES.

(a) LIMITED OF EXCLUSION.—Section 911(c) (relating to special rules) is amended by adding at the end thereof the following:

"(8) Certain compensation not excludable.—No amount received for services performed—

"(A) for a domestic corporation or a domestic partnership. or

"(B) for a controlled foreign corporation (within the meaning of section 992(b)), may be excluded under subsection (a)."

(b) EFFECTIVE DATE.—The amendment made by this section shall apply with respect to amounts received for services performed after the date of enactment of this Act.

SEC. 107. SUBMISSION OF REPORT ON INTERNATIONAL TAX COMPLIANCE.

Not later than December 31, 1972, the Treasury Department shall submit to the Congress a report on the administration of the income tax imposed by the Internal Revenue Code of 1954 as it applies to business activities carried on outside the United States by U.S. corporations, whether directly or through foreign entities. Such report shall include, but not be limited to, a discussion and analysis of the enforcement and compliance problems encountered by the Treasury Department in such administration.

TITLE II—UNITED STATES FOREIGN TRADE AND INVESTMENT COMMISSION

SEC. 201. ORGANIZATION OF THE COMMISSION—MEMBERSHIP

(a) The United States Foreign Trade and Investment Commission (referred to in this subtitle as the "Commission") shall be composed of three Commissioners to be hereafter appointed by the President by and with the advice and consent of the Senate. No person shall be eligible for appointment as a Commissioner unless he is a citizen of the United States, and, in the judgment of the President, is possessed of qualifications requisite for developing expert knowledge of foreign trade and investment problems and efficiency in administering the provisions of this part. Not more than two of the Commissioners shall be members of the same political party. One member of the Commission shall be a representative of public interests, one shall be a representative of labor interests, and one shall be a representative of industrial interests.

(b) Terms of office of the Commissioners first taking office after July 1, 1972, shall expire, as designated by the President at the time of nomination, one at the end of every second year following July 1, 1972. The term of office of a successor to any such Commissioner shall expire six years from the date of the expiration of the term for which his predecessor was appointed, except that any Commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed, shall be appointed for the remainder of such term.

(c) The President shall annually designate one of the Commissioners as Chairman and one as Vice Chairman of the Commission. The Vice Chairman shall act as Chairman in case of the absence or disability of the Chairman. A majority of the Commissioners in office shall constitute a quorum, but the Commission may function notwithstanding vacancies. No Commissioner shall actively engage in any other business, vocation, or employment than that of serving as a Commissioner.

(d)(1) Whenever, in any case calling for findings of the Commission in connection with any authority conferred upon the President by law to make changes in import restrictions, a majority of the Commissioners voting are unable to agree upon findings or recommendations, the findings (and recommendations, if any) of any one of the Commissioners may be considered by the President as the findings and recommendations of the Commission.

(2) Whenever, in any case in which the Commission is authorized to make an investigation upon its own motion, upon complaint, or upon application of any interested party, one-half of the number of Commissioners voting agree that the investigation should be made, such investigation shall thereupon be carried out in accordance with the statutory authority covering the matter in question. Whenever the Commission is authorized to hold hearings in the course of any investigation and one-half of the number of Commissioners voting agree that hearings should be held, such hearings shall thereupon be held in accordance with the statutory authority covering the matter in question.

TITLE III—QUANTITATIVE RESTRAINTS ON IMPORTS

SEC. 301.—QUANTITATIVE RESTRAINTS FOR 1972 AND SUCCEEDING YEARS.

(a) The total quantity of each category of goods (as defined in section 303 (f)), produced in any foreign country which may be entered during the calendar year 1972 shall not exceed the average annual quantity as determined by the Commission of such category produced in such country and entered during the calendar years 1965 to 1969.

(b) (1) The total quantity of each category of goods produced in any foreign country which may be entered during any calendar year after 1972 shall not exceed the sum of —

(A) the total quantity determined for such category for such country under subsection (a) or this subsection for the immediately preceding calendar year, and

(B) the increase (or decrease) applicable under paragraph (2).

(b)(2) (A) The Commission shall increase (or decrease) the total quantity of each category of goods produced in any foreign country which may be entered during any calendar year after 1971 by an amount which the Commission estimates is necessary in order to make the total quantity of imports in each category bear the same relationship to United States production of the goods in such category as existed during the period 1965–69.

(B) The Commission may make additional decreases in quotas where it determines that the level of imports provided for under this section is inhibiting the production of any manufactured product.

(C) Any increase (or decrease) under this paragraph for any category for any calendar year shall be the same percentage for all foreign countries.

(D) A determination shall be made under this paragraph for each category for each foreign country for each calendar year after 1972 without regard to the nonapplication (or partial nonapplication) of this subsection to such category for such country for such year by reason of subsection (d) of this section or Section 302.

(c)(1) Any annual quantitative limitation under subsection (a) or (b) shall be applied on a calendar quarter or other intra-annual basis if the Commission determines that such application is necessary or appropriate to carry out the purposes of this section.

(2) If the application of subsection (a) or (b) to any category for any foreign country begins or resumes after the first day of any calendar year, the amount of the quantitative limitation for such category for such

country for the remainder of such calendar year shall be the annual amount determined under subsection (a) or (b), adjusted pro rata according to the number of full months remaining in the calendar year after the date of such beginning or such resumption.

(d) The quantitative restraints provided for in this section shall not be applied to any category of goods for which the Commission has determined that * * *.

(1) a voluntary bilateral or multilateral government to government agreement has been entered into pursuant to section 302 which effectively limits imports of such category, or

(2) quantitative controls have been imposed pursuant to some other law, or existing government-to-government international agreement.

(3) failure to import the goods would cause long-term disruption of U.S. markets, or

(4) the domestic industry producing competing goods has consistently failed to make technological innovations required to remain competitive with foreign producers.

(e) Any quota established under this section for an item which is used in the production of goods in the United States, may be increased by the Commission to a level which will not inhibit the production of such goods.

(f) If, at any time, the Commission determines that any country quota established under this section will not be filled, it shall so inform the President, and shall distribute the quota among new or existing suppliers as the President may direct.

(g) Any action taken under subsection (d), (e), or (f) of this section shall not take effect before the 30th day after the day on which notice of such action is published in the Federal Register.

SEC. 302. ARRANGEMENTS OR AGREEMENTS REGULATING IMPORTS.

(a) The President is authorized to conclude bilateral or multilateral arrangements or agreements with the governments of foreign countries regulating, by category, the quantities of articles produced in such foreign countries which may be exported to the United States or entered and to issue regulations necessary to carry out the terms of such arrangements or agreements. In concluding any arrangement or agreement under this subsection, the President shall take into account conditions in the United States market, the need to avoid disruption of that market, and such other factors as he deems appropriate in the national interest.

(b) Whenever a multilateral arrangement or agreement concluded under subsection (a) is in effect among the countries, including the United States, which account for a significant part of world trade in the article concerned and such arrangement or agreement contemplates the establishment of limitations on the trade in the article produced in countries not parties to such arrangement or agreement, the Commission may by regulation prescribe the total quantity of the article produced in each country not a party to such arrangement or agreement which may enter.

SEC. 303. ADMINISTRATION.

(a) The rulemaking provisions of subchapter II of chapter 5 of title 5, United States Code, shall apply with respect to proceedings under this chapter.

(b) All quantitative limitations established under this title or pursuant to any arrangement or agreement entered into under this title, all exemptions established under this title and all extensions or terminations thereof, and all regulations promulgated to carry out this title shall be published in the Federal Register. The Commission shall certify to the Secretary of the Treasury for each period the total quantity of each category of goods produced in each foreign country the entry of which is affected by such a quantitative limitation on importation; and the Secretary of the Treasury shall take such action as may be necessary to insure that the total quantity so entered during such period shall not exceed the total quantity so certified.

(c) There shall be promulgated as a part of the appendix to the Tariff Schedules of the United States, Annotated, all quantitative limitations and exemptions established under this title or pursuant to any arrangement or agreement entered into under this title and all quantitative limitations otherwise established pursuant to law, or to an agreement entered into pursuant to section 302.

(d) One year after the passage of this Act, and by July 1 of each succeeding year, the Commission shall publish a report to the Congress reviewing actions taken by it under this title during that year.

(e) The term "category" means a grouping of goods as determined by the Commission, for the purposes of this title, using the five-digit and seven-digit item numbers applied to such articles in the Tariff Schedules of the United States, Annotated, as published by the United States Tariff Commission. Groupings shall not be made that will adversely affect the assembly or production of any item or component in the United States.

(f) In order to make the estimate required by section 301(b)(2)(A) the Commission shall each year make an estimate of the United States production during the preceding U.S. fiscal year of the goods, commercially the same as those contained in each category of goods. Such estimate shall be based on the best information available at the time when the estimate is made, and shall be reviewed and updated annually. Such estimates of the U.S. production together with the resulting import quotas for the succeeding year shall be published by the Commission on or before October 1 of each year. The Commission shall change its estimates when it determines that existing estimates for that year are substantially in error.

(g) The term "entered" means entered, or withdrawn from warehouse, for consumption in the customs territory of the United States.

(h) The term "produced" means manufactured or produced.

(i) The term "foreign country" includes a foreign instrumentality.

TITLE IV—AMENDMENTS TO THE ANTIDUMPING AND COUNTERVAILING DUTY ACTS

SEC. 401. AMENDMENTS TO THE ANTIDUMPING ACT.

The Antidumping Act of 1921 is hereby amended to read as follows:

"SEC. 201. (a) Whenever a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value and an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States, there shall be levied. collected, and paid on such merchandise, in addition to any other duties imposed thereon by law, a special dumping duty in an amount equal to the difference between the purchase price or the exporter's sales price and the foreign market value (or, in the absence of such value, the constructed value).

"(b) The United States Foreign Trade and Investment Commission (hereinafter called the "Commission") is hereby authorized to investigate complaint(s) filed with it on behalf of any industry by a firm or group of workers, to make such investigation as it deems necessary, and to issue orders to effectuate the provisions of this Act. Commission proceedings and actions under this Act shall be completed within four months of the filing of a complaint, and shall be in accordance with the provisions of subchapter II of chapter 5 of title 5 of the United States Code. Any final order entered in any such proceeding shall be made on the record after opportunity for a Commission hearing and shall be subject to judicial review in the manner prescribed in chapter 158 of title 28 of the United States Code and to the provisions of chapter 7 of title 5 of the United States Code.

"(c) Whenever the Commission has reason to believe or suspect from information presented to it, that the purchase price is less, or that the exporter's sales price is less or likely to be less, than the foreign market value or, in the absence of such value, than the constructed value, it shall forthwith publish notice of that fact in the Federal Register and shall direct the withholding of appraisement reports as to such merchandise entered, or withdrawn from warehouse, for consumption, not more than one hundred and twenty days before the question of dumping has been raised by or presented to it, until the further order of the Commission, or until the Commission has completed its investigation in regard to such merchandise.

"SEC. 202. (a) Upon information of the issuance of an order by the Commission providing for the imposition of a special dumping duty, the Secretary of the Treasury (hereinafter referred to as the "Secretary") shall, through the proper officers, impose the special dumping duty on all imported merchandise, whether dutiable or free of duty, of a class or kind prescribed in the Commission's order, entered, or withdrawn from warehouse, for consumption, not more that one hundred and twenty days before the question of dumping was raised by or presented to the Commission, and as to which no appraisement report has been made before such order has been made. (Plus conforming changes in subsequent sections.)

SEC. 402. AMENDMENTS TO THE COUNTERVAILING DUTY LAW.

The Countervailing Duty Law (Section 303 of the Tariff Act of 1930, 19 USC § 1303) Is Amended to Read as Follows:

SEC. 303. Countervailing Duties.

Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation shall pay or bestow, directly or indirectly, and bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The United States Foreign Trade and Investment Commission is hereby authorized to investigate complaint(s) filed under this section or upon its initiative and to issue orders to effectuate the provisions of this section. Such orders shall be made on the record after opportunity for a hearing. Upon information of the issuance of an order by the Foreign Trade and Investment Commission, the Secretary of the Treasury shall, through the proper officers, impose the additional duty prescribed therein. Foreign Trade and Investment Commission proceedings and actions under this section shall be completed within four months of the filing of a complaint, and shall be in accordance with the provisions of subchapter II of chap-

ter 5 of title 5 of the United States Code, and any final order entered in any such proceeding shall be subject to judicial review in the manner prescribed in chapter 158 of title 28 of the United States Code.

TITLE V—AMENDMENTS TO THE TRADE EXPANSION ACT OF 1962—ADJUSTMENT ASSISTANCE

SEC. 501. PETITIONS AND DETERMINATIONS

Sec. 301 of the Trade Expansion Act of 1962 is hereby amended to read as follows:

"SEC. 301. PETITIONS AND DETERMINATIONS.

"(a) (1) A petition for tariff adjustment under section 1981 of this title may be filed with the Foreign Trade and Investment Commission by a trade association, firm, certified or recognized union, or other representative of an industry.

(2) A petition for a determination of eligibility to apply for adjustment assistance under Part II of this subchapter may be filed with the Foreign Trade and Investment Commission by a firm or its representative, and a petition for a determination of eligibility to apply for adjustment assistance may be filed with the Foreign Trade and Investment Commission by a group of workers or by their certified or recognized union or other duly authorized representative.

(3) Whenever a petition is filed under this subsection, the Foreign Trade and Investment Commission shall transmit a copy thereof to the Secretary of Commerce.

(b) (1) Upon a request of the President, upon resolution of either the Committee on Finance of the Senate or the Committee on Ways and Means of the House of Representatives, upon its own motion, or upon the filing of a petition by the petitioner under subsection (a) (1) of this section the Foreign Trade and Investment Commission shall promptly make an investigation to determine whether, an article is being imported into the United States in such increased quantities, either actual or relative as to contribute substantially (whether or not such increased imports are the major factor or the primary factor) toward causing or threatening to cause serious injury to the domestic industry producing an article which is like or directly competitive with the imported article.

For the purposes of section 301 (b) (I) of the Trade Expansion Act of 1962 (19 U.S.C. 1901 (b) (1)), as amended by this Act, the term 'industry' means the aggregate of those firms or appropriate subdivisions thereof which produce a product or component threatened by imports. Where the product or component is produced in a distinct part or section of an establishment, whether or not the firm has one or more establishments, such part or section shall be considered an appropriate subdivision.

(2) In making its determination under paragraph (1), the Foreign Trade and Investment Commission shall take into account all economic factors which it considers relevant, including idling of productive facilities, inability to operate at a level of reasonable profit, unemployment or underemployment, loss of fringe benefits, and decreased or stagnant wages.

(3) No investigation for the purpose of paragraph (1) shall be made, upon petition filed under subsection (a) (1) of this section, with respect to the same subject matter as a previous investigation under paragraph (1), unless one year has elapsed since the Foreign Trade and Investment Commission made its report to the President of the results of such previous investigation.

(c) (1) In the case of a petition by a firm for a determination of eligibility to apply for adjustment assistance under part II of this subchapter, the Foreign Trade and Investment Commission shall promptly make an investigation to determine whether, an article like or directly competitive with an article produced by the firm is being imported into the United States in such increased quantities either actual or relative as to contribute substantially (whether or not such increased imports are the major factor or the primary factor) toward causing or threatening to cause, serious injury to such firm. In making its determination under this paragraph, the Foreign Trade and Investment Commission shall take into account all economic factors which it considers relevant, including idling of productive facilities of the firm, inability of the firm to operate at a level of reasonable profit, unemployment or underemployment in the firm, loss of fringe benefits, and decreased or stagnant wages.

(2) in the case of a petition by a group of workers for a determination of eligibility to apply for adjustment assistance under part III of this subchapter, the Foreign Trade and Investment Commission shall promptly make an investigation to determine whether, an article like or directly competitive with an article produced by such workers' firm, or an appropriate subdivision thereof, is being imported into the United States in such increased quantities (either actual or relative) as to contribute substantially (whether or not such increased imports are the major factor or the primary factor) toward causing or threatening to cause, unemployment or underemployment of a significant number or proportion of the workers of such firm or subdivision.

(d) (1) In the course of any investigation under subsection (b) (1) of this section, the Foreign Trade Investment Commission shall, after reasonable notice, hold public hearings and shall afford interested parties opportunity to be present, to produce evidence and to be heard at such hearings.

(2) In the course of any investigation under subsection (c) (1) or (c) (2) of this section, the Foreign Trade and Investment Commission shall, after reasonable notice, hold public hearings if requested by the petitioner, or if, within 10 days after notice of the filing of the petition, a hearing is requested by any other party showing a proper interest in the subject matter of the investigation, and shall afford interested parties an opportunity to be present, to produce evidence, and to be heard at such hearings.

(e) Should the Foreign Trade and Investment Commission find with respect to any article, as the result of its investigation, the serious injury or threat thereof described in subsection (b) of this section, it shall find the quantitative restriction on such article which is necessary to prevent or remedy such injury and shall make such modification of the quantitative restraints determined under title II of this Act as is necessary to put into effect the determination made under this section.

(f) (1) The Foreign Trade and Investment Commission shall report to the President the results of each investigation under this section and include in each report any dissenting or separate views. The Foreign Trade and Investment Commission shall furnish to the President a transcript of the hearings and any briefs which may have been submitted in connection with each investigation.

(2) The report of the Foreign Trade and Investment Commission of its determination under subsection (b) of this section shall be made at the earliest practicable time, but not later than six months after the date on which the petition is filed (or the date on which the request or resolution is received or the motion is adopted, as the case may be). Upon making such report to the President, the Foreign Trade and Investment Commission shall promptly make public such report, and shall cause a summary thereof to be published in the Federal Register.

(3) The report of the Foreign Trade and Investment Commission of its determination under subsection (c) (1) or (c) (2) of this section with respect to any firm or group of workers shall be made at the earliest practicable time, but not later than sixty days after the date on which the petition is filed.

(g) Foreign Trade and Investment Commission proceedings under this title shall be in accordance with the provisions of subchapter II of chapter 5 of title 5 of the United States Code. Any final order entered in such proceeding shall be made on the record after opportunity for a Commission hearing and shall be subject to judicial review in the manner prescribed in chapter 158 of title 28 of the United States Code and to the provisions of Chapter 7 of title 5 of United States Code.

SEC. 502. PRESIDENTIAL ACTION AFTER FOREIGN TRADE AND INVESTMENT COMMISSION DETERMINATION.

Section 302 of the Trade Expansion Act of 1962 is hereby amended to read as follows:

"SEC. 302. PRESIDENTIAL ACTION AFTER FOREIGN TRADE AND INVESTMENT COMMISSION DETERMINATION—GENERAL AUTHORITY

"(a) After receiving a report from the Foreign Trade and Investment Commission containing an affirmative finding under section 301(b) of this title with respect to any industry, the President may—

(1) provide, with respect to such industry, that its firms may request the Secretary of Commerce for certifications of eligibility to apply for adjustment assistance under part II of this subchapter,

(2) provide, with respect to such industry, that its workers may request the Secretary of Labor for certifications of eligibility to apply for adjustment assistance under part III of this subchapter, or

(3) take any combination of such actions."

(Plus conforming changes in subsequent sections)

TITLE VI—FOREIGN INVESTMENT AND TECHNOLOGY EXPORT CONTROLS

SEC. 601(a). The President is hereby authorized to prohibit any person within the jurisdiction of the United States from engaging in any transaction involving a direct or indirect transfer of capital to or within any foreign country or to any national thereof when in the judgment of the President the transfer would result in a net decrease in employment in the United States. The President is hereby authorized to issue regulations to effectuate this section.

(b) Any person who violates a valid regulation issued under authority of subsection (a) shall be liable to a fine of not more than $100,000 and imprisonment for not more than one year for each violation.

SEC. 602(a) The President is hereby authorized to prohibit any holder of a United States patent from manufacturing the patented product or using the patented process, or from licensing others to manufacture the patented product or using the patented process, outside the territory of the United States when in the judgment of the President such prohibition will contribute to increased employment in the United States. The President is hereby authorized to issue regulations to effectuate this section.

(b) The patent of any patentee who violates any regulation validly issued hereunder shall be unenforceable in the Courts of the United States.

TITLE VII—OTHER FOREIGN TRADE PROVISIONS

SEC. 701. Reports by the Export-Import Bank of Washington and other agencies.

(a) Section 635g of title 12 of the United States Code is hereby amended to read as follows:

"The Export-Import Bank of Washington shall transmit to the Congress semiannually a complete and detailed report of its operations. The report shall be as of the close of business on June 30 and December 31 of each year."

The report shall include detailed information from which a judgment can be made of the effects Bank operations are having on United States exports, imports and employment.

(b) Section 2394(a) of title 22 of the United States Code is hereby amended to read as follows:

"(a) The President shall, while funds made available for the purposes of this chapter remain available for obligation, transmit to the Congress after the close of each fiscal year a report concerning operations in that fiscal year under this chapter. Each such report shall include information on the operation of the investment guaranty program and on progress under the freedom of navigation and non-discrimination declaration contained in section 2151 of this title.

Each such report shall also contain a detailed review of the extent to which projects financed under any foreign assistance program are exporting their output to the United States, and the extent to which section 2370(d) of title 22 has been complied with.

(c) A new subsection C is added to section 2 of title 29 of the United States Code as follows:

"2c. The Bureau of Labor Statistics shall collect, collate and report at least once each year, or, more often if necessary, full and complete statistics on the conditions of workers employed by the United States Government and United States Corporations outside the territorial limits of the United States and the products and distribution of the products of the same. For purposes of this subsection a worker shall be deemed to be employed by a United States corporation if the business organization employing him is more than 10% beneficially owned or controlled by United States Corporations."

SEC. 702 (a) No producer, manufacturer or dealer shall ship or deliver for shipment in commerce any goods containing foreign made components unless such goods are clearly marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article or container will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country or countries of origin of the foreign made components.

(b) No producer, manufacturer or dealer shall advertise for sale in Commerce any goods containing foreign made components unless such advertising clearly indicates to an ultimate purchaser in the United States the English name of the country or countries or origin of the foreign made components.

(c) The Secretary of Labor is hereby authorized to issue such regulations as he deems necessary to effectuate this section.

(d) Whoever willfully violates this section shall be fined not more than $10,000 for each violation.

Sec. 703. (a) Schedule 8, part 1, subpart B of the Tariff Schedules of the United States (19 U.S.C. 1202) is amended—

(1) by striking out item 807.00;

(2) by striking out item 806.30;

(3) by striking out headnote 3; and

(4) by redesignating headnote 4 as headnote 3.

(b) The amendments made by subsection (a) shall apply with respect to articles entered, or withdrawn from warehouse, for consumption after the ninetieth day after the date of enactment of this Act.

SEC. 704. Section 481(a) of the Tariff Act of 1930 (19 U.S.C. 1481 (a)) is amended—

(1) by redesignating paragraph (10) thereof as paragraph (11);

(2) by striking out "and" at the end of paragraph (9); and

(3) by inserting immediately after such paragraph (9) the following new paragraph:

"(10) Such information as to product description as is required to be made a part of the entry by provisions of the Tariff Schedules of the United States Annotated issued pursuant to section 484(e) of this Act; and."

SECTION-BY-SECTION ANALYSIS OF THE FOREIGN TRADE AND INVESTMENT ACT OF 1972

TITLE I

Section 101. The bill would modernize the tax laws by ending certain tax incentives that now encourages U.S. firms to invest overseas.

Section 102. Taxation of earnings and profits of controlled foreign corporations.

Section 991 requires that earnings and profits from foreign investment be reported with a breakdown as to the source of the income (i.e.—from each country) for the year in which profits were earned; and that reported earnings and profits follow generally the rules now applied to corporations within the U.S., with adjustments for prior year's deficits, and exemptions for reporting of income where foreign legal restrictions make such reporting unrealistic or U.S. laws make such reporting unfair.

Section 992 defines the U.S. corporation as one with 10% or more of the foreign company's stock and defines "control" as ownership of more than 50% of the stock. It defines the foreign corporation with provisions for assuring that indirect control shall be included.

Section 993 establishes the mechanism for determining what is considered stock ownership, either direct or indirect.

Section 994 provides against double taxation by exempting income that has already been reported for taxes in the U.S. or abroad through a chain of relationships which would be taxed anyway. Proof is required for this exemption, so that information on relationships will be available.

Section 995 makes provision so that the U.S. stock has a taxable value related to the new provisions. The basis or the taxable value of the corporate stock will be adjusted by whatever amount is included or excluded in the gross income of the U.S. corporation. This assures that U.S. income abroad does not escape proper capital gains or other revenue collection. The adjustment in the "basis" may be upwards for inclusions or downward for exclusions.

Section 996. The Secretary of the Treasury shall issue regulations to require records and accounts to be maintained to enable the provisions to be enforced.

Section 3 repeals the tax credit now given U.S. firms abroad for payment of foreign income taxes. The credit is also ended for the taxes U.S. firms now pay on royalties received by the corporations for the use of patents outside the U.S. Thus the repeal of the foreign tax credit discourages both the foreign investment and the transfer of technology.

Section 4. U.S. firms are required to apply conservative depreciation rules in estimating their tax write-offs for foreign operations. This ends practices that encourage foreign investment by allowing firms to use unrealistic measurements of foreign costs of property, machinery, etc., in estimating depreciation of that machinery.

Section 5 ends tax-free treatment for U.S. firms' incomes from licensing and transferring patents to foreign corporations. This would discourage the export of technology by taxing income from such transfer.

Section 6 would end another unfair encouragement to foreign corporate operations by eliminating the tax advantages for U.S. business to expand abroad by giving special tax exemptions to their personnel who spend 17 out of 18 months overseas working for a foreign branch or other foreign subsidiary of a U..S firm.

TITLE II—ESTABLISHMENT OF THE FOREIGN TRADE AND INVESTMENT COMMISSION

A three man independent Commission is created to regulate U.S. foreign trade. The new agency, which would replace the Tariff Commission and certain elements of the Treasury, Commerce and Labor Departments, would have much more power to regulate imports than any of these agenices have under existing legislation.

The number of Commissioners is set at three; outdated language is removed; political balance is maintained and public, labor and industrial interests are to be represented.

The terms of the commissioners will be six years. One term will expire every other year.

TITLE III—QUANTITATIVE RESTRAINTS ON IMPORTS

In general quotas would be set on all imports, except (a) where there is a voluntary government to government agreement, or (b) where quotas are already imposed pursuant to existing law, or (c) where failure to import the goods would cause long-term disruption of U.S. markets (e.g. coffee, tea, bananas and other goods not produced in the United States), or (d) where the competing domestic industry has consistently failed to modernize its production facilities.

All other categories of goods would be subject to quotas set by the United States Foreign Trade and Investment Commission under guidelines established in the bill. For the first year (1972) the quotas would be equal to average annual imports during the period 1965–69. In succeeding years the quota would be increased or decreased in order to maintain the ratio between imports and domestic production which existed during the period 1965–69 as estimated by the Commission. The Commission would also have authority to increase the quota on any items which are necessary to the production of secondary goods in the U.S. to a level which will not inhibit U.S. production of the secondary goods.

The Commission is authorized to estimate the average annual imports, if necessary.

Imports in 1972 are limited to the annual average for 1965–69.

Changes in the import quota are mandatory as U.S. production goes up or down, so that imports of an item will always bear the same relationship to domestic production as existed in the period 1965–69. Thus, if overall imports were equal to 25% of domestic production during that period, the import quota would always be 25% of U.S. production.

Any quota for components or ingredients of goods produced in the U.S. may be enlarged, if necessary, in order to facilitate the production of goods in the U.S.

Section 302. If a country refuses to become a party to a voluntary agreement which the U.S. has signed with other supplying countries, the Commission may establish an involuntary quota at a lower level for that country, thus providing greater incentive to join the voluntary agreement.

Section 303 (a). This procedure is intended to assure procedural fairness.

Section 303(b). The Commission, rather than the Secretary of Commerce, will certify to the Secretary of the Treasury the amount of goods in each category which is to be entered.

The Commission will be required to publish an annual report of its actions.

Section 303 (e). The Commission may group five and seven digit TSUS categories for purposes of establishing the "categories of goods" to which quotas will be applied. This will permit greater flexibility in the administration of the quotas, and will make it unnecessary for the Commission to set a separate quota for each of the 10,000 seven digit items or for each of the 7,000 five digit items. The groupings shall not be made in such a way to adversely affect U.S. production of the items or components.

Section 303 (f). The Commission will be directed to make estimates of domestic production of the goods which are like or directly competitive with the imported goods in each of the quota categories it sets up. Since the quota categories are initially based

on the TSUS, and since statistics on domestic production are collected on a different basis, it is almost certain that there will never be figures for domestic production which will exactly match the quota categories. Accordingly, in order to bridge this gap, and still keep imports tied to the level of domestic production, the Commission is given authority to estimate domestic production.

TITLE IV

In order to modernize the Antidumping Act, shorten the time required to process a complaint, and place the administration of the Act in one agency, it is necessary to make substantial changes in the law.

In general, the new Antidumping Act would make the following changes from existing law:

(a) one agency would make both the less-than-fair-value and injury determinations;

(b) the agency would be required to complete the entire proceeding within four months of the filing of a complaint;

(c) the agency proceeding would be on the record and subject to the Administrative Procedure Act;

(d) either party would be entitled to appeal to the courts from the agency decision.

Specific statutory changes are:

(1) Complaints are to be filed with the new Commission rather than the Treasury Department.

(2) New language makes clear that groups of workers may file complaints.

(3) Entire Antidumping proceeding must be completed in four months. Under existing law, the Tariff Commission is limited to three months for the injury determination but Treasury can take as long as it likes for the less-than-fair-value determination. Thus, under existing law, the total proceeding has sometimes taken more than two years.

(4) Actions of the Commission are made subject to the Administrative Procedure Act, thereby encouraging procedural fairness.

(5) Actions of the Commission are made subject to judicial review.

Sec. 402. This amendment would change the procedures under the Countervailing Duty Act to insure greater enforcement. Under the proposed Amendment, complaints would be made to the Commission rather than the Treasury Department, proceedings would be conducted under the Administrative Procedure Act, the Commission would be required to complete its action within four months (rather than no time limit under the existing law), and either party could appeal the Commission's decision to the Courts.

Specific changes are:

(1) Complaints are to be filed with the new Commission rather than the Treasury.

(2) Commission proceedings are made subject to the APA.

(3) A four month time limit is imposed.

(4) Either party may seek judicial review.

TITLE V

The existing Escape Clause—statute has been revised. While the establishment of quantitative restraints severely reduces the likelihood of escape clause action, there still remains the possibility of instances of serious injury.

In general the proposed amendments would transfer responsibility for administration of the Escape Clause from the Tariff Commission and the President to the U.S. Foreign Trade and Investment Commission. The Commission would investigate complaints by representatives of the domestic industries, including unions.

If the Commission determined that an industry has been seriously injured or is threatened with serious injury, it would determine what level of quota is required to remedy the injury and would put that quota into effect. The Commission's proceedings would be conducted in accordance with the Administrative Procedure Act and would be subject to judicial review upon petition by either party.

A specific definition of industry is provided. Specific statutory changes are:

(1) The new Foreign Trade and Investment Commission, rather than the Tariff Commission, would receive complaints and conduct investigations.

(2) The increased imports complained of need not be the result of trade agreement concessions.

(3) The statute could be invoked if imports are only relatively increasing. Thus, if imports are increasing their share of a declining market, it would be enough to invoke the Act.

(4) The increased imports need only "contribute substantially" to causing or threatening to cause serious injury. In the current statute increased imports must be the major factor in causing or threatening to cause the serious injury.

(5) The amendments make clear that the Commission is to consider loss of fringe benefits and stagnant wages as an element of serious injury to an industry.

(6) Under present law, if the Tariff Commission finds that an industry or firm has been seriously injured as a result of concession generated increased imports, it must find the amount of duty or quota which would be necessary to remedy the injury. Under the proposed amendment the new Commission could only impose quotas.

(7) Under existing law, the Tariff Commission merely sends its report to the President who decides whether or not to impose the import restrictions. Under the proposed amendment the Commission would have the power to impose the restrictions itself.

(8) Commission proceedings are made subject to the Administrative Procedure Act, and to judicial review.

(9) Since the new Commission will have power to impose quotas (and in appropriate cases will be required to do it), this option is removed from the President's powers. Under the amendment the President would only decide whether to grant adjustment assistance to the workers and firms in the industry.

TITLE VI

Existing foreign investment controls are based on authority granted to the President in the Trading With the Enemy Act to, inter alia, "prohibit any transactions in foreign exchange . . ." by banks during wars and other national emergencies (12 USC 95a). President Truman declared a state of national emergency in 1950 (Proc. 2914, December 16, 1950), which is deemed to continue to the present time, and provides the basis for present controls instituted in 1968 (Ex. O. 11387) for balance of payments reasons.

Section 601. The proposed statute is entirely new. It would create a new authority to regulate trans-national capital transactions whenever the President determined that employment in the U.S. would be decreased by the transaction. It would not depend upon the existence of a war or other national emergency. Violations of the Act or regulations issued under it would be punished by criminal penalties.

The basic concept is not new. The same concept that is applied here to employment already exists in presidential authority for balance of payments reasons.

Section 602. This section is also entirely new. It authorizes the President to prohibit any holder of a U.S. patent from producing the patented product abroad or from licensing someone else to produce it abroad. The penalty for violating the statute or regulations issued under it is that the patent becomes unenforceable in the U.S. Courts, the traditional remedy for misuse of a patent.

The effect of the Act would be to present a U.S. patentee with some very difficult choices if he wanted to produce his product abroad. Thus, if he held U.S. and Japanese patents on the same product, and he wanted to license someone to produce it in Japan, he could be ordered not to issue the license, primarily because it would not be in the best interests of the U.S., its citizens or its economic well-being. If he issued it anyway for his own profit, his patent could be declared unenforceable in the United States. This would permit other producers to make and sell the product in the United States without paying royalties. The effect is to protect U.S. Jobs and U.S. technology where it is felt to be in the best interests of the nation as opposed to a multinational corporation, for example.

TITLE VII

Title VII contains amendments to existing law and new material providing for the collection and publication of various types of foreign trade data. In addition, a new section requires that products containing foreign-made components be so labelled, and requires that advertising of such products also disclose that they contain imported components.

Specific statutory changes are:

(1) Future Exim Bank reports will be required to contain information from which a judgment can be made as to the effect its operations are having on U.S. exports, imports and employment.

(2) Future AID reports will contain a statement on the extent to which foreign aid financed projects are exporting their output to the U.S.

(3) The Bureau of Labor Statistics is directed to collect data on the conditions of employment of workers employed abroad by the U.S. Government and U.S. corporations.

(4) Goods containing foreign-made components must be so labelled.

(5) Advertising for goods containing foreign-made components must state that they contain foreign-made components, and list the countries from which the components came.

Section 703 repeals the provisions of the tariff code under which entire U.S. industries have moved assembly operations to Mexico, Taiwan, Hong Kong and elsewhere to utilize cheap labor. Presently companies can ship assembled units into the U.S. as a "made in U.S.A." items and pay only the duty for the "value added" by the cheap, non-U.S. labor.

By Mr. HUMPHREY:

S. 2593. A bill to establish a comprehensive national program of child nutrition and nutrition education. Referred to the Committee on Agriculture and Forestry.

THE UNIVERSAL NUTRITION AND NUTRITION EDUCATION ACT OF 1971

Mr. HUMPHREY. Mr. President, I am introducing today a bill to establish a truly comprehensive national program of child nutrition and nutrition education. I have entitled my bill the "Universal Child Nutrition and Nutrition Education Act of 1971."

This bill is somewhat similar to that introduced by Congresman CARL PERKINS, Democrat, of Kentucky, earlier this year. It is the product of many months of work by the American School Food Service Association and others who are dedicated to the goal of providing an adequate level of nutrition and nutrition education for all the Nation's children.

I believe that this measure eliminates the incredible patchwork of limiting legislation, administrative regulations, and bureaucratic redtape that typify our

present child feeding programs. These vital programs must not fall short—as they do today—of our desire to meet the nutritional needs of its children, regardless of their race, religion, residence, or income level.

My bill establishes a program which will be of great significance to the health and well-being of all our Nation's children. I believe it offers a sound and practical solution to the serious problem of poor diets and malnutrition that exists today among our Nation's children—rich and poor.

The three basic objectives of the bill are:

First, to provide all children with adequate nutrition, free of charge, or on the same basis as most other school system activities are now provided. Under this program, no child would be singled out or identified among his classmates as to his parents' income status in order to receive a school lunch or to participate in the child feeding programs covered by this bill.

Second, to provide for a nutrition education program to be conducted through State departments of education, to teach all children the principles and value of good nutrition. Evidence and surveys conducted by health and nutrition experts from throughout the country clearly indicate that ignorance is the basic cause of undernutrition and poor diets. Level of income itself does not guarantee an adequate level of nutrition.

Third, to strengthen and expand the administration of child feeding programs by State and local governments. As anyone who is familiar with this subject knows, our child feeding programs have been greatly expanded in recent years, with accompanying cumbersome administration and financial strain being placed upon State and local governments. The combination of these factors alone are today making it almost impossible for State and local governments to carry out the mandate of Congress that all needy children shall be provided with free or reduced school lunches. The present requirements of establishing minimum and maximum reimbursement rates for school lunches for the needy, the questions of transferability of funds from one fund to another, the use of section 32 and OEO moneys to help finance such programs and the increasing financial requirements which are being placed upon State and local government are all adding up to what could result in a complete breakdown of the child feeding programs that many of us have worked so hard to get established in this Nation.

Although my bill might be considered by some as a major departure from present and past legislative concepts and policies for child feeding programs, I am convinced that the Congress must move toward the adoption of such a program if it is to meet its obligations to provide adequate nutrition and nutrition education for all our Nation's children. The legislative efforts of Senators ELLENDER, TALMADGE, MCGOVERN, and other members of the Senate Committee on Agriculture and Forestry have contributed significantly to making this Nation aware of the needs connected with our child feeding programs. Thanks to the efforts of these men and others, child nutrition is now high on the Nation's list of priorities. However, their efforts have increasingly been frustrated by regulations issued by the Department of Agriculture which not only flaunt the intent and will of Congress, but violate its child feeding laws. I think that my bill will put an end to this bureaucratic usurpage of congressional mandates regarding these programs.

In that my bill would provide free lunches and meals to children regardless of the income status of their parents, there may be some people who will object to its enactment. Let me address myself to those concerns. I have already mentioned that health and nutrition experts from throughout this country have concluded, based upon scientific studies and surveys, that income alone is no guarantee of good child nutrition. Children from well-to-do homes often suffer from as much malnutrition as do children from low-income families. Furthermore, the importance of good nutrition can be seen on the impact it has on the ability of students to learn to maintain better health, to reduce absenteeism, and lower dropout rates.

As an example of this, Mr. B. P. Taylor, superintendent of the San Diego, Tex., Independent School District, in testimony before the Senate Committee on Agriculure and Forestry during hearings called by Senator TALMADGE to review the the adverse impact that proposed USDA school lunch regulations would have on the program, said that—

> The food program is an important part of our educational system. It is not enough to try to feed and educate the needy child; we must feed the hungry child and educate him . . . we strongly believe this (school lunch funding) is an investment in hungry children. We think it has in fact kept them in school and our records will so verify. It has not only kept them in school for an extra year. It has kept them in school until graduation time. . . . Our drop-out problem is almost nil in our school district and I think the food program has been a big contributing factor.

In a subsequent exchange between Senator CHILES and Mr. Taylor, the committee was told that the dropout rate in the San Diego School District had dropped from over 300 per year to less than 16 and Mr. Taylor said he attributed that directly to the availability of his free lunch program. Mr. Taylor also reported 6 years ago he had 450 children being pulled out of school by their migrant worker parents to accompany them in their pursuit of employment. Today, according to Mr. Taylor, that number has dropped to below 100. Why? Because the parents of these children want them to have the advantages of a decent diet, which they often cannot provide with their meager incomes. And, while they may principally be leaving them behind in school for that purpose, they know their children also will be receiving an education, due again in large part to the availability of an adequate diet which increases their alertness and physical ability to learn.

Recognition of the relationship between good nutrition and a child's ability to learn, and his capacity to develop both his mental and physical abilities has resulted in a number of rather spectacular changes in the child nutrition programs. Since 1966 we have seen the passage of the Child Nutrition Act, which established the school breakfast program and provided funds to help schools to buy equipment to start lunch programs. Other legislation was enacted to extend the lunch program to include child care centers and summer recreation programs. In addition, special legislation was passed in the spring of 1970 to provide emergency funding for the lunch program, and most recently Public Law 91–248 was enacted bringing major changes in the direction and impact of our child nutrition programs.

This progress has come about because the Congress has taken the leadership in initiating and approving measures to improve the health of our children through the expansion of the child nutrition programs. In the few short years since 1968, the number of needy children receiving lunches has risen sharply from less than 3 million to nearly 7.5 million children. Some 6,000 schools have come into the national school lunch program for the first time and are now offering nutritious lunches to all children in attendance. The school breakfast program has more than doubled in the past year and is now reaching a million children.

But these are simply major steps in the right direction because after 25 years of operation, only half of the Nation's children are now participating in the lunch program. I am convinced therefore, that we must now move in the direction of providing school lunches to all children free of charge on the same basis as all other school activities.

As a practical matter, local school systems have the responsibility for the child from the moment he enters the school door until he returns home. All of his physical needs are provided for except for food. Free textbooks are provided; physical education is provided free; free medical service is provided a child if he becomes sick; and, free transportation is provided if needed to get him to and from school.

Why, therefore, should we continue to consider the need for food at school as different from these other needs of children?

Let us also not lose sight of the fact that nearly all families having children in school or participating in these programs, pay taxes. The taxes paid by American families to their local, State and Federal governments are for services they want their governments to provide. While Americans have made it very clear through their representatives in Government, that they want this Nation to be fully responsive to the rights of the needy and less fortunate—especially regarding such basic needs as food, education, housing, and health care—they also expect certain services and benefits to be provided to all citizens, regardless of income level.

The principle of providing "universal" free education and other child services at

school, regardless of income, race, creed, color or religion has long been established as a national commitment. Surely it is time to make a similar commitment to our Nation's children regarding something even more basic and essential; namely, food. We should not let dollars and cents stand in the way of sharing the abundance of food we produce in this country with out children.

The increase in Federal and State investment in child feeding programs which would be required by my bill would be repaid many fold by the benefits it would provide and the contributions it would make toward the improved overall development of our young. Healthy, well educated children are more likely to become healthy, responsible adults. However, without the assurance of adequate nutrition and nutrition education for our Nation's children, we can hardly expect these goals to be achieved.

Mr. President, I suggest that many of our Nation's children are not being reached by this program today, because the lack of financial resources and the administrative requirements of the program are such that many local school districts and students are discouraged from involvement or expansion of the program. As a result of current USDA regulations and the administration's desire to limit the amount of Federal money going into these programs, many school districts throughout the country are today faced with the likely prospect of having to reduce and eliminate their existing child feeding programs. States and local school districts have simply reached the limit of what they can financially contribute to these programs. Some have even taken money from their educational and teacher budgets to keep them operating at current levels.

The current financial crisis facing these programs at the State and local level today was clearly illustrated by Mr. John Perryman, executive director of the American School Food Service Association, when he appeared before the Senate Committee on Agriculture and Forestry during its hearings on the school lunch program.

Commenting on the anticipated $150 to $180 million loss to school districts as a result of the proposed USDA regulations affecting the operation and funding of the national school lunch program, Mr. Perryman said:

> Now, if we take the most conservative figure of $150 million, and if we could provide two meals for a dollar, which we cannot quite do, on the national average, which is 52.56 cents per meal, but if we could provide two meals for a dollar, then we are talking about 300 million meals, 300 million lunches taken out of the school lunch program during the current year, and these meals are taken from the poorest children. And this means 300 million times that a child will be in a school lunch room and see other children eat and not have a meal, or 300 million times that he will go to sleep at his desk, or 300 million times that he will not come to school at all, to the detriment of our $40 billion a year investment in education, and to the tragic detriment of the child himself.

Other shortcomings of the school lunch program include the identification and singling out of needy children for participation in the program. Such a requirement is degrading to both the child and his parents, regardless of whatever clever system might be devised to minimize others learning who is participating on a free or reduced basis. In addition, what about those children whose family incomes are just above the maximum income line which determines eligibility. They often remain out of the program, because the cost of lunches continues to go up beyond their family income. And then there is the family who can afford to pay, but whose child takes the money for his lunch and spends it for something else, usually without the parents knowledge. Add these factors to the others mentioned earlier and I believe we have a compelling case for the enactment of my bill to establish a comprehensive national free child feeding program in this country.

Mr. President, the President of the United States has defaulted on his commitment to feed all those who are hungry in America, but Congress has not and will not. Now I hope Congress will take the next important step, necessary, to insure that an adequate nutritional diet is provided to all our Nation's children, a right to which they are entitled as Americans.

I invite my colleagues in the Senate to join me in sponsoring this legislation if they wish to see an end to child malnutrition in this Nation and an abolishment of all the "wonderment" as to who is going to finance it—and at what level—and by whose rules. Let us settle these matters once and for all. Let us stop piecemealing this effort and establish a permanent, fully funded, and comprehensive Federal child feeding program in this Nation.

By Mr. McCLELLAN (by request):

S. 2595. A bill to amend the act entitled "An act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of international conventions, and for other purposes," approved July 5, 1946, as amended. Referred to the Committee on the Judiciary.

Mr. McCLELLAN. Mr. President, as chairman of the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, I introduce, by request of the Department of Commerce, a bill to amend the act entitled "An act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of international conventions, and for other purposes," approved July 5, 1946, as amended.

The Trademark Act, as amended, requires that the prospective registrant of a trademark make actual use of the mark in commerce prior to applying for registration of the mark. It is contended that the inability of a business firm to apply for registration of a mark prior to actual use represents a considerable hardship and occasionally results in the loss of substantial sums of money devoted to sales and merchandising campaigns. The proposed legislation would permit potential users of marks to apply for registration on the basis of their intent to use a mark rather than its actual use. The date of application would be considered as equivalent to actual use under present law insofar as establishing rights relative to other actual or potential users of the mark. No actual registration, however, may occur until the mark has been used in commerce, nor can there be an assignment of the application prior to the use except in special circumstances.

Bills on this subject have been introduced in most recent Congresses. The bill which I am introducing today is identical to S. 3110 of the 91st Congress, with the exception of the fee schedule specified in section 7.

By Mr. BROOKE (for himself, Mr. HART, Mr. HARTKE, Mr. HATFIELD, Mr. HUMPHREY, and Mr. MONTOYA):

S. 2596. A bill to prohibit the imposition of inequitable residency requirements as a condition of voting for Senator, Representative, or Delegate. Referred to the Committee on Rules and Administration.

Mr. BROOKE. Mr. President, as many as 40 percent of all the Americans who are eligible to cast a ballot in Federal elections do not vote. Congress has, for too long, ignored this shocking statistic.

The reasons for this massive absenteeism at the polls include illness, infirmity, absence from home on election day, and apathy.

But the principal reason why people do not vote is that the law prohibits them from voting. Authoritative studies, including those conducted by the Census Bureau and the Gallup poll, have shown that more than 5 million Americans were unable to vote in 1968, because of restrictive residency requirements.

We live in an increasingly mobile society where as many as 20 percent of all citizens change their residence each year. A 1-year—even a 6-month—residency requirement creates and perpetuates a roadblock to citizen participation in Federal elections which is unnecessary in these days of instant communication.

The problem is compounded by adoption of the 26th amendment which gives full voting rights to 10 million 18-, 19-, and 20-year-olds.

Mr. President, I believe that Congress should act this year to remove the outmoded and unfair registration barriers which exist in so many of our States. Our goal should be nothing less than a 100-percent turnout in the presidential and congressional elections of 1972.

Even before the ratification of the 26th amendment, it was clear that the problem of where students who are living away from home should register and vote would raise complex legal and practical problems throughout the Nation.

In the 3 months since the amendment became law, attorneys general in several States have issued advisory opinions, and local election officials have promulgated new rules to meet the myriad problems which have arisen when undergraduate students seek to register to vote in college and university towns and cities

across the country. The supreme courts of Michigan and California, in landmark decisions, have ruled unconstitutional State laws which treat students differently than other potential voters.

In my judgment, the Michigan and California decisions will have a salutary effect—over the long haul—insuring equality and uniformity of treatment as prescribed by the Federal and State constitutions.

But in the interim we must face up to the fact that there is—and there will be—confusion, inconsistency and, yes, injustice as millions of eligible voters seek to add their names to the voting rolls.

Unless the Congress takes affirmative action to clear the way for full voter participation in 1972, we run the risk of massive voter disenfranchisement.

Our authority to act is clear. In what I am sure historians will record as the historic "breakthrough" in eliminating onerous State and local residency requirements, the Senate under Senator BARRY GOLDWATER'S leadership added a two-pronged amendment to the 1970 Voting Rights Act which, first, cut the residency requirement in every State to 30 days insofar as voting in presidential elections is concerned and, second, made it mandatory for the States to permit voting by absentee ballot for the Presidency. This reform, which I was pleased to cosponsor, has since been upheld by the Supreme Court.

On December 21, 1970, the late Mr. Justice Black, writing for the majority of the U.S. Supreme Court in *Oregon* v. *Mitchell*, 400 U.S. 118, stated the law with his usual clarity:

> Congress unquestionably has power under the Constitution to regulate Federal elections. The Framers of our Constitution were vitally concerned with setting up a national government that could survive. Essential to the survival and growth of our national government is its powers to fill its elective offices and to insure that the officials who fill those offices are as responsive to the will of the people whom they represent.

It is time, Mr. President, to extend that principle and practice to all Federal elections.

The bill which I introduce today would do exactly that. It addresses the eligibility, residency, and full voter participation issues which threaten to keep millions of Americans from the voting booth in next year's Federal election.

The bill has three provisions:

First, it permits every citizen to vote in any congressional primary or general election provided he has resided for at least 30 days within the State or congressional district in which the contest is being waged.

In addition, the bill gives each citizen the right to vote by absentee ballot in all primaries and general elections for Federal offices, assuming that he has met the residency requirements of the State and political subdivision in which the election is being held.

Finally, the bill establishes three criteria for determining that often ambiguous status—residency:

If the citizen has declared that the voting district in which he seeks to register is his residence for voting purposes, if he also declares that he is not registered to vote elsewhere, and if he has, in fact, resided within that voting district for at least 30 days preceding the primary or election, and if he meets the other State requirements, then he is an eligible voter and he must be permitted to register.

Unfortunately there are still States which do not permit voting by absentee ballot in some elections. I am sorry to say that my State of Massachusetts is one of those. In our mobile society of 1971, this is an abridgement of fundamental citizenship rights.

Primary elections in many States and in more congressional districts are decisive. When the sick, the infirm, students away at school, traveling businessmen, and vacationers are denied the opportunity to vote in these primaries, they are, in fact, disenfranchised.

The argument for uniformity and clarity in the registration and residency law was well-stated in 1965 by the late Mr. Justice Black, for a unanimous Supreme Court, in *Louisiana* v. *United States*, 380 U.S. 145, 153:

> The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws. . . . which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar.

Attorney General John Mitchell, in discussing the legal effects of the ratification of the 26th amendment and the respective roles of the Federal and State governments in protecting the rights of all voters, including those newly enfranchised, has said that—

> If Congress does wish to pass some enforcing law, we would hope that it would not discriminate in favor of or against students or any other voting group.

I strongly believe legislation is needed and that the bill which I am filing today meets the Attorney General's test. This bill has been drafted to conform with the landmark Supreme Court decision in Oregon against Mitchell insofar as it relates to the responsibility of the Federal Government vis-a-vis the State governments in regulating the electoral process.

This legislation is a supplement to, not a substitute for, several bills which have already been introduced, and are designed to facilitate the registration process by establishing new procedures through such departments as the Bureau of the Census, the Internal Revenue Service, or through active solicitation by the Federal Government.

As legislators, those of us who serve in the Congress have the responsibility of anticipating problems as well as attempting to resolve those which already exist. I am convinced that if Congress does not act affirmatively before the 1972 election in the areas covered by this bill, there will be confusion on a massive scale, and the election may be thrown into question.

Enactment of this bill would be a giant step toward solving past problems as well as avoiding future controversy.

I urge that prompt consideration be given to this proposal by the Senate Judiciary Committee, so that it can be acted upon prior to the forthcoming 1972 Federal elections.

Mr. President, I ask unanimous consent to place the following items in the RECORD: A copy of the bill, the editorial "College Students as Voters" which appeared in the Washington Post on September 18, 1971, and the Supreme Court decisions in Michigan and California which treat the subject of student registration and voting.

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

S. 2596

A bill to prohibit the imposition of inequitable residency requirements as a condition of voting for Senator, Representative, or Delegate

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Voting Rights Act of 1965 is amended by—

(1) amending the section caption of section 202 to read as follows:

"RESIDENCE REQIUREMENTS FOR VOTING IN PRESIDENTIAL ELECTIONS";

(2) striking out section 202(h) and inserting in lieu thereof the following:

"(h) As used in this section, the term—

"(1) 'election' means a primary or general election, including, but not limited to, a primary election held for the expression of a preference for the nomination of persons for election to the office of President, and an election held for the selection of delegates to a national nominating convention or to a caucus held for the selection of such delegates; and

"(2) 'State' means each of the United States and the District of Columbia."; and

(3) inserting after section 202 the following new sections:

"RESIDENCE REQUIREMENTS FOR VOTING IN CONGRESSIONAL ELECTIONS

"SEC. 203. (a)(1) No citizen of the United States who is otherwise qualified to vote in any Congressional election shall be denied the right to vote in such election because of the failure of such citizen to comply with any durational residency requirement of the State or political subdivision in which the election is held if he has registered to vote in such election and has resided in such State or political subdivision for the thirty days preceding the date of such election.

"(2) Each State shall provide by law for the registration or other means of qualification of any duly qualified resident of such State who applies, not later than thirty days preceding the date of a Congressional election, for registration or qualification to vote in such election.

"(b)(1) No citizen of the United States who is otherwise qualified to vote in any Congressional election shall be denied the right to vote in such election because he will not be physically present at the time of the election in the State or political subdivision in which the election is held if such citizen has complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.

"(2) Each State shall provide for the casting of an absentee ballot for any such election by any duly qualified resident of such State who may be absent from his election district on the date of such election, and who has applied for an absentee ballot not later than seven days prior to such date and who has returned such ballot to the appropriate election official of such State not later than the time of closing of the polls in such district on the day of the election.

"(c) Nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed in this section.

"(d) As used in this section, the term—

"(1) 'Congressional election' means a primary election held for the selection of a candidate for nomination for election as Senator, Representative, or Delegate to the Congress, or a general or special election held for the election of a Senator, Representative, or Delegate to the Congress;

"(2) 'State' means each of the United States and the District of Columbia.

"DETERMINATION OF RESIDENCY

"SEC. 204. (a) No citizen who is otherwise qualified to vote in any Congressional election or in any Presidential election shall be denied the right to vote in such election on the grounds that he is not a resident of the State, Congressional district, or political subdivision in which such election is held if he declares such State, Congressional district, or political subdivision to be his residence for voting purposes, is not registered to vote in any other State, Congressional district, or political subdivision, and has resided in the State, Congressional district, or political subdivision in which he seeks to vote for the 30 days preceding the date of such election.

"(b) As used in this section, the term—

"(1) 'Congressional election' means a primary election held for the selection of a candidate for nomination for election as Senator, Representative, or Delegate to the Congress, or a general or special election held for the election of a Senator, Representative, or Delegate to the Congress;

"(2) 'Presidential election' means a primary or general election held for the nomination of a candidate for election as President, or for the election of a candidate as President, including, but not limited to, a primary election held for the expression of a preference for the nomination of persons for election to the office of President, and an election held for the selection of delegates to a national nominating convention or to a caucus held for the selection of such delegates; and

"(3) 'State' means each of the United States and the District of Columbia."

SEC. 2. (a) Section 203 of such Act is redesignated as section 205, section 204 of such Act is redesignated as section 206, and section 205 of such Act is redesignated as section 207.

(b) Section 205 of such Act, as redesignated by subsection (a) of this section, is amended by inserting after "section 202" a comma and the following: "203, or section 204".

(c) Section 206 of such Act, as redesignated by subsection (a) of this section, is amended by striking out "section 201 or 202" and inserting in lieu thereof "section 201, 202, 203, or 204".

[JUNE 29, 1971, No. 52953]

STATE OF MICHIGAN SUPREME COURT

Sally Wilkins, Jeanne D'Haem, Timothy A. Schultz, Jacob Eichenbaum, Carol B. Shalita, Neill H. Hollenshead, Kenneth W. Jendryka, and Kathleen McDonnell Jones, Plaintiffs-Appellants, v. John P. Bentley, Clerk of the City of Ann Arbor, Michigan, Defendant-Appellee.

Before the entire bench.

Swainson, J.:

Eight University of Michigan students were, upon timely application therefor, refused registration for the purpose of voting, by the defendant clerk. By this petition for writ of mandamus, they seek the right to register and vote in Ann Arbor. One plaintiff, Carol B. Shalita, was dropped prior to trial. The cause was tried on June 11 and 12, 1968, on the amended pleadings and the pretrial statement.

The opinion of the trial court was rendered on August 23, 1968, and judgment was entered on September 10, 1968. By consent of the defendant, plaintiffs Schultz and Jones were permitted to register and vote in Ann Arbor. By judgment of the court, plaintiffs Eichenbaum and Hollenshead were awarded the right to register and vote in Ann Arbor. Plaintiffs Wilkins, Jendryka and D'Haem were denied the right to register and vote in Ann Arbor.

The parties stipulated that the plaintiffs Wilkins, Jendryka and D'Haem are citizens of the United States and that at the time they had applied for voter registration were over the age of 21 years and had resided in the State of Michigan for more than six months. Each of them maintained an apartment in Ann Arbor and had habitually slept there. Each of them commonly kept his personal effects in his apartment and his regular place of lodging was in Ann Arbor. It is agreed that the trial court denied the plaintiffs-appellants the right to register and vote in Ann Arbor under the provisions of MCLA § 168.11(b). The Court of Appeals affirmed on the grounds that said subsection (b) aids in preserving the purity of elections and guards against abuses of the elective franchise by minimizing the possibility of a person voting twice in the same election. 24 Mich App 422, 427. We granted leave to appeal. 384 Mich 782.

MCLA § 168.11 provides as follows:

"(a) The term 'residence', as used in this act, for registration and voting purposes shall be construed to mean that place at which a person habitually sleeps, keeps his or her personal effects and has a regular place of lodging. Should a person have more than one residence, or should a wife have a residence separate from that of the husband, that place at which such person resides the greater part of the time shall be his or her official residence for the purposes of this act. *This section shall not be construed to affect existing judicial interpretation of the term residence.* (Emphasis added.)

"(b) *No elector shall be deemed to have gained or lost a residence* by reason of his being employed in the service of the United States or of this state, nor while engaged in the navigation of the waters of this state or of the United States or of the high seas, nor *while a student at any institution of learning,* nor while kept at any almshouse or other asylum at public expense, nor while confined in any public prison. Honorably discharged members of the armed forces of the United States or of this state and who reside in the veterans' facility established by this state may acquire a residence where the facility is located. (Emphasis added.)

"(c) No member of the armed forces of the United States shall be deemed a resident of this state in consequence of being stationed in any military or naval place within the state."

The part of subsection (b), dealing with students, has been defined by our Court to mean that a student must overcome a rebuttable presumption that he is not a resident in the locale of the institution of learning. *Wolcott* v. *Holcomb* (1893), 97 Mich. 361; *People* v. *Osborn* (1912), 170 Mich 143; *Attorney General* v. *Miller* (1934), 266 Mich 127. Plaintiffs contend that this statute violates the due process and equal protection clauses of the Michigan Constitution [1] and the United States Constitution.[2] We turn first to plaintiffs' contentions under the due process clause.

I

We deal here with the right to vote, labeled by the U.S. Supreme Court almost a century ago "as a fundamental political right, because preservative of all rights." *Yick Wo* v. *Hopkins* (1886), 118 US 356, 370 (6 S Ct 1064, 30 L Ed 220). The courts have closely scrutinized any law that interferes with fundamental rights to insure that they are not unduly vague or give local officials unfettered discretion.[3] In cases involving voter registration, the U.S. Supreme Court has struck down State laws which gave unfettered discretion to local officials. As Mr. Justice Black stated for a unanimous court in *Louisiana* v. *United States* (1965), 380 US 145, 153 (85 S Ct 817, 13 L Ed 2d 709):

"The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar." [4]

In a recent article concerning student voting, W. P. Bullard and J. Rice, "Restrictions on Student Voting: An Unconstitutional Anachronism," 4 Journal of Law Reform 215 (1970), the authors point out by analogy, that students face many of the same problems as found by others when faced with voter qualification tests:

"Although the voter qualification tests involved were used to disfranchise blacks, thus bringing into play the fifteenth as well as the fourteenth amendment, the inherent vagueness of the interpretation test and the imprecise criteria used by the registrars presented prospective black voters with a dilemma analogous to that faced today by students. Although students must demonstrate greater attachment to the university locale than must most other registrants, the quantum of required attachment is quite unclear." [5]

The authors point out that while the law defining voting residence for other citizens under MCLA § 168.11(a) (Stat. Ann 1971 Cum Supp § 6.1011[a]), is clear and unequivocal, the effect of the law, as applied to students, under subsection (b) varies from city to city and from local clerk to local clerk.

"Therefore, in Michigan, as well as in other states, the standards which students must meet in order to vote in the locality in which their college is located are extremely vague. In Michigan, the guidelines are so vague as to be tantamount to no standards; thus each registration clerk determines himself which factors will overcome the presumption against student registrability in his city." [6]

The record in this case amply supports this assertion. The Ann Arbor city attorney conceded in oral argument before this Court that while Ann Arbor uses an elaborate questionnaire before allowing students to register,[7] the city clerk of Detroit (where Wayne State University and several colleges are located) does not ask any special questions of student registrants.

At the trial, the plaintiffs were asked questions concerning bank accounts; where they obtained their support; whether they owned or leased property, and where they spent their vacations.[8] However, these questions concerning wealth,[9] property ownership,[10] and travel,[11] if used as criteria to establish residence for voting purposes are constitutionally impermissible.

We hold that MCLA § 168.11(b), insofar as it applies to students, does violate the due process clause of the Fourteenth Amendment of the U.S. Constitution. We further hold that said provision of MCLA § 168.11(b) violates art 1, § 17, of the 1963 Mich Const. Subsection (b), as it applies to students, is overly broad and grants a constitutionally prohibited discretion to local clerks in Michigan. The ability to exercise the precious right to vote cannot depend on whether a student attends school in a large city or a smaller town. *Reynolds* v. *Sims* (1964), 377 US 533 (84 S Ct 1362, 12 L Ed 2d 506).

However, if this were the only infirmity of the statute, we could correct this defect by issuing guidelines consistent with the Constitution. We, therefore, turn to plaintiffs' claim that subsection (b) violates the equal protection clauses of the U.S. and Michigan Constitutions.

II

Traditionally, statutes have been upheld as constitutional under the equal protection clause if they met the following test:

Footnotes at end of article.

"1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but it is essentially arbitrary." *Naudius* v. *Lahr* (1931), 253 Mich 216, 222-223.

However, a different test has been used in two separate types of cases. First, if the asserted classification was on the basis of race or other disfavored classification, the state has to meet "the very heavy burden of justification * * *." *Loving* v. *Virginia* (1967), 388 US 1, 9 (87 S Ct 1817 18 L Ed 2d 1010), and (p 11):

"At the very least the Equal Protection Clause demands that racial classification, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny,' *Korematsu* v. *United States*, 323 US 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate."

The second group of cases requiring the higher standard involved the assertion of a fundamental constitutional right.

"But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling governmental interest*, is unconstitutional." (Emphasis added.) *Shapiro* v. *Thompson* (1969), 394 US 618, 634 (89 S. Ct 1322, 22 L Ed 2d 600).

It can be stated without exaggeration that the right to vote is one of the most precious, if not the most precious, of all our constitutional rights. The U.S. Supreme Court has stated concerning the right to vote:

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Wesberry* v. *Sanders* (1964), 376 US 1, 17–18 (84 S Ct 526, 11 L Ed 2d 481).

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds* v. *Sims*, *supra* at p 555.

The U.S. Supreme Court has applied the compelling interest test in recent cases involving the right to vote. Chief Justice Warren in *Kramer* v. *Union Free School District* (1969), 395 US 621 627 (89 S Ct 1886, 23 L Ed 2d 583), stated:

"Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are *necessary to a compelling interest.*" (Emphasis added.)

The compelling interest test has been applied with one exception [12] to all of the recent voting cases, including *Oregon* v. *Mitchell* (1970), 400 US 112 (91 S Ct 260, 27 L Ed 2d 272).

Thus, in determining whether MCLA § 168.11(b), as it applies to students, violates the Equal Protection Clause, we must apply the compelling State interest test. If the State is unable to demonstrate a compelling interest, that part of the statute must fall.

III

Although there is no case directly on point, the U.S. Supreme Court has dealt with the denial of the right to vote to various groups of people on several occasions in the past few years.

Carrington v. *Rash* (1965), 380 US 89 (85 S Ct 775, 13 L Ed 2d 675), involved a provision of the Texas Constitution which prevented servicemen from voting in state elections as long as they remained in the service. The court struck down the law as a denial of the Equal Protection Clause.

In *Kramer* v. *Union Free School District* (1969), supra, the Supreme Court invalidated under the Equal Protection Clause a New York law [13] which provided that only people who owned or leased property or parents with children in schools could vote in certain school district elections.

In *Cipriano* v. *Houma* (1969), 395 US 701 (89 S Ct 1897, 23 L Ed 2d 647), a Louisiana law which only allowed property taxpayers to vote on revenue bonds issued by a municipal utility system was declared unconstitutional. Likewise, an Arizona law permitting only real property taxpayers to vote at an election on the issuance of general obligation bonds for various municipal improvements was overturned in *Phoenix* v. *Kolodziejski* (1970), 399 US 204 (90 S Ct 1990, 26 L Ed 2d 523).

In *Evans* v. *Cornman* (1970), 393 US 419 (90 S Ct 1752, 26 L Ed 2d 370), the Court held that residents of the National Institutes of Health which is a Federal enclave in the State of Maryland must be allowed to vote in Maryland's elections.

Defendant contends that all of these cases are distinguishable because they involve an absolute denial of the right to vote whereas MCLA § 168.11(b), as it affects students, involves merely a rebuttable presumption against gaining residence.

This, however, is demonstrably not in fact true. Despite the treatment by the U.S. Supreme Court of *Carrington* as a case involving the denial of the absolute right to vote, it only involved denial of the right to vote in Texas.[14] All states allow servicemen to vote by absentee ballot. In contrast, because of the various civilian absentee voters' laws many students would be unable to register and vote anywhere. Several states make no provisions for absentee ballots,[15] and many others have extremely complicated provisions which discourage instead of encourage voting. Moreover with the exception of *Evans* v. *Cornman*, *supra*, the other cases heretofore cited also involved rebuttable presumptions. The voters could overcome the presumptions if they owned property or had children in *Kramer*, or if they paid property taxes in *Cipriano* and *Kolodziejski*. Their task in overcoming the presumption was no more difficult than that faced by many students under the provisions of MCLA § 168.11(b). If those voters were denied the right to vote in special elections, they still could vote for every office from president to local officials. Some students, however, cannot. Because of the interaction of the provisions of MCLA § 168.11(b) and the provisions of various state absentee-voter laws, the elective franchise is withheld from students. The ideal of one man-one vote dissolves into the harsh reality of one man but no vote.

Moreover, it is not mandatory that these plaintiffs demonstrate an absolute denial of the right to vote in order to require the State to show a compelling interest. Plaintiffs need only show that a burden has been placed on this precious right in order to avail themselves of the Equal Protection Clause. As Justice Frankfurter stated in *Lane* v. *Wilson* (1939), 307 US 268, 275 (59 S Ct 872, 83 L Ed 1281):

"The Amendment (Fifteenth) nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race."

The Equal Protection Clause likewise guards against subtle restraints on the right to vote, as well as outright denial. The U.S. Supreme Court in recent voting cases has been concerned about the more devious burdens that have been imposed on this most basic of all constitutional rights. In *Williams* v. *Rhodes* (1968), 393 US 23, 30–31 (89 S Ct 5, 21 L Ed 2d 24), the Court stated:

"But we have also held many times that *'invidious'* distinctions cannot be enacted without a violation of the Equal Protection Clause. * * * In the present situation the state laws place *burdens* on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. * * * So, also, the right to vote is heavily *burdened* if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot. In determining whether the State has power to place such unequal *burdens* on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that 'only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.'" (Emphasis added.)

Thus, the fact that a burden is placed on the right to vote because of the rebuttal presumption contained in MCLA § 168.11(b), as applied to students, is sufficient to require the State to demonstrate a compelling interest.

IV

There are several interests that the State has asserted in cases of this type. The Court of Appeals held that MCLA § 168.11(b) aids in preserving the purity of elections by insuring that students will not vote twice. 24 Mich. App 427. However, the Court of Appeals did not analyze this problem under the compelling interest test. While it may be true that the provisions of subsection (b), as applied to students, does to some minor extent aid in this purpose, that is not sufficient to justify its constitutionality. As the U.S. Supreme Court stated in *United Mine Workers* v. *Illinois Bar Assn.* (1967), 389 US 217, 222 (88 S Ct 353, 19 L Ed 2d 426):

"We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil. *Schneider* v. *State*, 308 US 147 (1939); *Cantwell* v. *Connecticut*, 310 US 296 (1940)."

The Supreme Court in *Carrington* held that the prevention of transients from voting could not justify the Texas law. Moreover, our legislature has provided numerous sanctions which insure the sanctity and

Footnotes at end of article.

purity of elections. Some of the significant provisions include MCLA §§ 168.493, 168.495, and 168.499, which provide that a registrant's affidavit of qualification is enforced by misdemeanor sanctions if the registrant does not answer honestly; MCLA § 168.505 which provides that registration officers shall ascertain if the registrant is already registered in another township, etc.; MCLA § 168.508 which allows the clerk to transfer the registration of an elector upon the receipt of reliable information; MCLA § 168.510 which provides that clerks are notified monthly of persons over 21 who have died in the county; MCLA § 168.513 which provides that upon information that the elector has moved from the municipality the clerk may, after notice and time elapsed, cancel the registration, and MCLA § 168.515 which authorizes clerks to make a house to house canvass or "other means" to check correctness of registration cards. Finally, every voter before being given a ballot must execute an application showing his signature and address which is compared to the registration card "and if the same do not correspond the vote of such person shall be challenged." MCLA § 168.523.

Therefore, in view of this complete set of safeguards to insure the purity of the election process, we hold that MCLA § 168.11(b), insofar as it applies to students, is not necessary to insure the prevention of voting fraud.

The second asserted State interest is that of promoting a concerned and interested electorate. This same interest was asserted unsuccessfully in *Kramer, Cipriano, Evans* and *Kolodziejski*. The provisions of MCLA § 168.11(b), in regard to students, like § 2012 of the New York laws in *Kramer*, are not sufficiently drawn to insure that only voters who are primarily interested are allowed to vote. As Chief Justice Warren stated in *Kramer*:

"In other words, the classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal. Section 2012 does not meet the exacting standard of precision we require of statutes which selectively distribute the franchise. The classification in § 2012 permits inclusion of many persons who have, at best, a remote and indirect interest in school affairs and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions." (p. 632)

Clearly, MCLA § 168.11(a) (the general voter registration statute) will allow many disinterested persons, by any criteria, to vote, while MCLA § 168.11(b), as applied to students, disenfranchises many interested and concerned citizens.

In *Evans, supra*, the court discussed at length the interests and concerns of the National Institutes of Health residents (p 424):

"Appellants do not deny that there are numerous and vital ways in which NIH residents are affected by electoral decisions. Thus, if elected representatives enact new state criminal laws or sanctions or make changes in those presently in effect, the changes apply equally to persons on NIH grounds * * *. Further, appellees are as concerned with state spending and taxing decisions as other Maryland residents, for Congress has permitted the States to levy and collect their income, gasoline, sales, and use taxes—the major sources of state revenues—on federal enclaves. See 4 U.S.C. §§ 104–110. State unemployment laws and and workmen's compensation laws likewise apply to persons who live and work in federal areas. See 26 U.S.C. §3305(d); 40 U.S.C. § 90. Appellees are required to register their automobiles in Maryland and obtain driver's permits and license plates from the state; they are subject to the process and jurisdiction of state courts; they themselves can resort to those courts in divorce and child adoption proceedings; and they send their children to Maryland public schools."

In *Phoenix* v. *Kolodziejski*, the court considered the relationship of property owners and those who rent property (like some of the appellants), and stated at p 210:

"Property taxes may be paid initially by property owners, but a significant part of the ultimate burden of each year's tax on rental property will very likely be borne by the tenant rather than the landlord since, as the parties also stipulated in this case, the landlord will treat the property tax as a business expense and normally will be able to pass all or a large part of this cost on to the tenants in the form of higher rent."

Turning to the facts of this case, we see that students have just as many connections with the community as those found by the Supreme Court in *Evans* and *Kolodziejski*. Students, like the National Institutes of Health residents, are included in the census determination of the state's congressional apportionment.[16] Students of course, are subject to the state's laws and regulations. Jury lists are chosen from lists of registered voters.[17] Thus, by denying students the right to register and vote, they are also denied participation in the time-honored Anglo-Saxon tradition of trial by a jury of their peers.[18] Students pay State income tax, city income tax (if any), gasoline, sales and use taxes. Michigan law provides a rebate on one-eighth of the sales tax revenue to counties and cities on a per capita basis[19] and a rebate of 20% of gasoline tax revenue on a combined population-highway mileage basis.[20] Clearly, without the students who are counted as residents for these purposes, the cities and counties would lose part of these rebates. As the U.S. Supreme Court has recognized,[21] property taxes are ultimately paid by renters such as some of the appellants. In addition, Michigan explicitly recognizes this fact by allowing all renters a 17% exemption on rent paid in lieu of the exemption that property owners receive for payment of property taxes.[22] Students with children can and do enroll them in the public school system, and, therefore, have more than a passing interest in the educational standards of the community.

The Federal government grants deductions on the Federal tax for state and local taxes in lieu of itemized deductions. These deductions vary from state to state.[23] Hence, if a student whose parents are from New York, goes to the University of Michigan and lives in Ann Arbor, he would take a deduction based on Michigan and not New York taxes. Thus, he is implicitly recognized as a Michigan resident for Federal tax purposes. The Federal government further provides community health service grants to the states based on population (which includes students).[24]

This list is not exhaustive but merely shows some of the numerous interrelationships between students, their local communities, and the State of Michigan. Moreover, there are other groups more transient than students who are not required to meet the provisions of subsection (b) as are students. According to the 1960 census, the largest group of transients were operative and kindred workers with craftsmen and foremen second, and professionals (including students) third.[25]

Thus, we hold that students cannot be denied the right to vote under the provisions of MCLA § 168.11(b) because of the State's interest promoting an informed and concerned electorate. There is every reason to believe they might be even better informed on current issues than other citizens.

V

Courts do not exist in a vacuum. They may take cognizance of facts and events surrounding the passage and purpose of legislation. *Traverse City School District* v. *Attorney General* (1971), 384 Mich 390, 405. As Mr. Justice Field stated in *Ho Ah Kow* v. *Nunan* (1879, USCC), 12 Fed Cases 252, 255:

"Besides, we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness and forbidden to know as judges what we see as men."

We thus may take judicial notice of extrajudicial material in recognizing other State interests. An article[26] in *The Wall Street Journal* of April 15, 1971, discusses the issue raised in this and similar cases around the country. A purported fear of the states involved is that the students would have a significant political impact if they were granted the elective franchise. The article quoted an Illinois State Representative as summing up the feelings of many citizens thusly: "'For goodness sakes, we could have these transients actually controlling the elections, voting city councils and mayors in or out of office.'" This fear of student voters overwhelming the townspeople at the polls was underlying the decision of our Court in *Wolcott* v. *Holcomb* (1893), 97 Mich 361, 367–368. However, what was constitutional in 1893 is not necessarily constitutionally acceptable today. As the U.S. Supreme Court stated in *Harper* v. *Virginia Board of Elections* (1966), 383 US 663, 669 (86 S Ct 1079, 16 L Ed 2d 169):

"Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights."

The court went on to point out that the segregation upheld in *Plessy* v. *Ferguson* (1896), 163 US 537 (16 S Ct 1138, 41 L Ed 256), was overruled a half century later. Likewise, the restrictions on the franchise accepted in the mid-nineteenth century are not necessarily to be tolerated today. Under the Michigan Constitution of 1835, only 21-year old white male citizens could vote.[27] The Constitution of 1850, by amendment, removed the restriction of race[28] and by an amendment to the 1909 Constitution, the restrictions based on sex were removed. Recently, Congress by statute,[30] and more recently by the adoption of constitutional amendment,[31] the voting age in all elections has been lowered to 18 years.

deTocqueville over a century ago stated:

"There is no more invariable rule in the history of society: The further electoral rights are extended, the greater is the need for extending them: for after each concession the strength of democracy increases, and its demands increase with its strength."[32]

We agree that it is no longer constitutionally permissible to exclude students from the franchise because of the fear of the way they may vote.

"'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. '[T]he exercise of rights so vital to the maintenance of democratic institutions,' (*Schneider* v. *State*, 308 US 147, 161) cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents." *Carrington* v. *Rash, supra*, at p 94.

Fears have been expressed in the past when new groups have been granted the franchise, and these fears have proven to be largely unfounded. The fear that students will vote radically different from the bulk of the electorate is problematical at this point.[33] However, as the U.S. Supreme Court stated in *Williams* v. *Rhodes* (1968), 393 US 23, 32 (89 S Ct 5, 21 L Ed 2d 24): "Competition in ideas and governmental policies is at the core of our electoral process * * *." The right to vote means the right to vote for the candidate of

one's choice regardless of ideology. As Justice Jackson stated in another case concerning the right of dissent:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in *politics*, nationalism, religion, or other *matters of opinion*." (Emphasis added.) *West Virginia Board of Education* v. *Barnette* (1943), 319 US 624, 642 (63 S Ct 1178, 87 L Ed 1628).

The right to vote has been considered to be the most vital of our constitutional rights. The cry of the American revolution of "no taxation without representation" articulated the desire of the colonists to have a voice in selecting the officials who made the decisions affecting their daily lives. At the present time, these students in many instances are being taxed without being represented. Therefore, we hold the MCLA § 168.11(b), as it applies to students, is unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. We further hold that the provisions of MCLA § 168.11(b) applying to students are unconstitutional as a violation of art. 1, § 2, of the Michigan Constitution of 1963.

In the future, students must be treated the same as all other registrants. No special questions, forms, identification, etc., may be required of students.

Article 1, § 1, of the Michigan Constitution of 1963 states that, "All political power is inherent in the people." This power resides in all of the people, student and nonstudent, alike.

The judgment is reversed and the cause is remanded to the circuit court for further proceedings consistent with this opinion.

THOMAS M. KAVANAUGH,
THOMAS GATES KAVANAUGH,

FOOTNOTES

[1] Mich Const 1963, art 1, § 2, provides: "No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation."

Mich Const 1963, art. 1, § 17, provides "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed."

[2] U.S. Const, 14th Amend, § 1, provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unitd States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[3] See, e.g., *Kunz* v. *New York* (1951), 340 US 290 (71 S. Ct 312, 95 L Ed 280).

[4] See, also, *Schnell* v. *Davis* (1949), 336 US 933 (69 S Ct 750, 93 L Ed 1093), affirming 81 F Supp 872.

[5] Bullard & Rice, *supra*, at p. 221.

[6] Bullard & Rice, *supra*, at p. 220.

[7] For a comparison of some of the questionnaires used by city clerks for student registration, see Appendix, 4 Journal of Law Reform, pp 239–243.

[8] 4 Journal of Law Reform, pp 239–240.

[9] In *Harper* v. *Virginia Board of Elections* (1966), 383 US 663 (86 S Ct 1079, 16 L Ed 2d 169), the court struck down a poll tax as a classification based on wealth. Questions concerning bank accounts, support, etc., are similarly classifications based on wealth.

[10] See, also, *Kramer* v. *Union Free School District* (1969), 395 US 621 (89 S Ct 1886, 23 L Ed 2d 583); *Cipriano* v. *Houma* (1969), 395 US 701 (89 S Ct 1897, 23 L Ed 2d 647). These cases held that states cannot deny the right to vote to nonproperty owners.

[11] In *Shapiro* v. *Thompson* (1969), 394 US 618 (89 S Ct 1322, 22 L Ed 2d 600), the court struck down residency requirements for welfare recipients on the ground that they interfered with the right to travel, a fundamental constitutional right. Similarly, it is unconstitutional to deny the right to vote to students who exercise their right to travel and leave Ann Arbor for the summer.

[12] *McDonald* v. *Bd. of Comm.* (1969), 394 US 802 (89 S Ct 1404, 22 L Ed 2d 739).

[13] New York Education Law, § 2012 (Supp 1968).

[14] Bullard & Rice, *supra*, at p 232, fn 97.

[15] C. Smith, *Voting & Election Laws* (1960), pp 89–99.

[16] 398 US at 421 (90 S Ct at 1754, 26 L Ed 2d at 374).

[17] MCLA § 600.1310 et seq.

[18] *Glasser* v. *United States* (1942), 315 US 60 (62 S Ct 457, 86 L Ed 2d 680).

[19] MCLA § 205.75.

[20] MCLA §§ 247.660, 247.663.

[21] 399 US at 210 (90 S Ct 1994, 26 L Ed 2d 528). For a discussion of the problems of attempting to discern the long range effect of property taxes on property values, see 399 US at 211 and C. Shoup, Public Finance, 385–390 (1969).

[22] MCLA § 206.528(2) and Bullard & Rice, *supra*, at p 233.

[23] 1970 Federal income tax form; 1970 Optional State sales tax table.

[24] 42 USCA § 246(a)(3)(A). "The Student Vote," New Republic, 11 (Sept 19, 1970).

[25] J. Schmidhauser, "Residency Requirements for Voting and The Tensions of a Mobile Society." 61 MLR 823, 830, fn 10.

[26] A. Otten, "Should Collegians Vote at Home or at School?" *The Wall Street Journal*, April 15, 1971, (p 1).

[27] Constitution of 1835, art 2, § 1.

[28] Constitution of 1850, art 7, § 1.

[29] Constitution of 1908, art 3, § 1.

[30] Voting Rights Act amendment of 1970, 42 USCA 1973aa–73bb.

[31] On June 30, 1971, the State of Ohio became the 38th State to approve the amendment. The amendment became law upon the ratification of three-fourths of the States. U.S. Constitution, art 5.

[32] A. deTocqueville, 1 Democracy in America 57 (knopf. ed. 1956).

[33] Bullard & Rice, supra, at 236: "A recent American Council on Education survey of college freshmen showing that 44% considered themselves liberal and 20% moderate conservative demonstrates that students would not vote as a solid unit. New York Times, Dec. 22, 1970, at 16, col. 4."

[June 29, 1971, No. 52953]

STATE OF MICHIGAN SUPREME COURT

Sally Wilkins, Jeanne D'Haem, Timothy A. Schultz, Jacob Eichenbaum, Carol B. Shalita, Neill H. Hollenshead, Kenneth W. Jendryka, and Kathleen McDonnell Jones, Plaintiffs-Appellants, v. John P. Bentley, Clerk of the City of Ann Arbor, Michigan, Defendant-Appellee.

Before the entire bench.

Brennan, J. (Concurring):

I agree with the result reached by my Brother Swainson, but would base my opinion on statutory construction rather than constitutional grounds.

The rule is that if a statute can be construed so as to avoid constitutional invalidity, the constitutionally valid construction is to be preferred.

Const 1850, art 7, § 5, which contained a provision similar to MCLA § 168.11(b) (Stat Ann 1971 Cum Supp § 6.1011[b]), was the subject of divided opinions in this Court in *Wolcott* v. *Holcomb* (1893), 97 Mich 361.

The dissenting opinion by Chief Justice Hooker, concurred in by Justice Long concluded that the provision simply meant that a student was not to be deemed to have lost his residence *automatically* by reason of being a student. In short, Hooker and Long believed that the proviso gave the student an option, his intention in the matter being controlling. He said it this way:

"The true construction of this section should be just what its language imports, i.e., that being kept in an alms-house, or attendance at college, or employment in the service of the United States, or the navigation of the lakes or high seas, does not work a change of residence against the intention or desire of the individual." *Wolcott* v. *Holcomb, supra*, p. 371.

That construction of the act was wise, reasonable, just and proper. It should have been the majority opinion in 1893. It should be today.

If a student in residence is given the "Hooker option," all the senseless folderol of voter registration in some of our college towns would be dispensed with.

Hooker's words, written in dissent almost 80 years ago, need no gilding, but bear resonant repetition.

"the only reasons given for the construction contended for are that these classes are undesirable voters at the place of the asylum; that they pay no taxes, do no work for the benefit of the municipality, and have no interest in local affairs. The same may be said of many persons in all localities, and was probably as true of these before their admission as after. It is as true of those admitted from the locality of the asylum, who may vote under this section, as of those who come from a distance, who may not vote under this construction. It never has been a requisite to electoral rights that the citizen should pay taxes, do work for the benefit of the municipality, or evince interest in municipal affairs; nor does the right depend upon a wise or even honest exercise of the privilege of the ballot. Doubtless there are many whose votes could be dispensed with to the profit of their respective municipalities and the State as well, but the electoral franchise is based upon broader principles. There is no man so poor or low that he is not richer and manlier for his political equality, and the ballot is essential to the protection of the rights of all classes. Immediately a class or race is disfranchised, its members are deprived of an equal chance with their fellows. This proposition is so important a part of the foundation of our institutions that it should not be eliminated or weakened by any unnecessary construction of a constitution based upon civil liberty and political equality." *Wolcott* v. *Holcomb, supra*, pp. 370, 371.

I concur in reversal.

THOMAS E. BRENNAN,

[June 29, 1971, No. 52952]

Sally Wilkins, Jeanne D'Haem, Timothy A. Schultz, Jacob Eichenbaum, Carol B. Shalita, Neill H. Hollenshead, Kenneth W. Jendryka, and Kathleen McDonnell Jones, Plaintiffs-Appellants, v. John P. Bentley, Clerk of the City of Ann Arbor, Michigan, Defendant-Appellee.

Before the entire bench.

Williams, J. (Concurring with Brennan, J.):

I concur with my Brother Brennan. However, I agree with my Brother Swainson's constitutional analysis.

———— ————.

[June 29, 1971, No. 52,953]

STATE OF MICHIGAN SUPREME COURT

Sally Wilkins, Jeanne D'Haem, Timothy A. Schultz, Jacob Eichenbaum, Carol B. Shalita, Neill H. Hollenshead, Kenneth W. Jendryka, and Kathleen McDonnell Jones, Plaintiffs-Appellants, vs. John P. Bentley, Clerk of the City of Ann Arbor, Michigan, Defendant-Appellee.

Before the entire bench.

Adams, J.:

I concur in reversal. There is no rational basis for treating students differently from other citizens in their exercise of the fundamental right to vote. The Michigan statute defining voting residence for all citizens provides that: "Should a person have more than 1 residence, * * * that place at which such person resides the greater part of the time shall be his or her official residence * * * ." MCLA § 168.11(a); Stat Ann 1971 Cum Supp § 6.1011(a).

For voting purposes, there is no rational basis for distinguishing between students who reside at a given locality for nine months of the year and non-students who reside in the same locality for nine months of the year. Requiring additional qualifications to vote which affect different groups unequally, whether by income, occupation, or employer, is a denial of equal protection. *Harper* v. *Virginia Board of Elections* (1966), 383 US 663 (86 S Ct 1079, 16 L Ed 2d 169); *Carington* v. *Rash* (1965), 380 US 89 (85 S Ct 775, 13 L Ed 2d 675); *Evans V. Cornman* (1970), 388 US 419 (90 S Ct 1752, 26 L Ed 370). Special treatment of students is an arbitrary and invidious discrimination against them in violation of art 1, § 2, Michigan Constitution, and amend XIV, United States Constitution. *Fox* v. *Employment Security Commission* (1967), 379 Mich 579.

PAUL L. ADAMS.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, IN BANK

Colette Jolicoeur et al., Petitioners, v. Emmery Mihaly et al., Respondents. S.F. 22826.

James Tabilio et al., Petitioners, v. Emmery Mihaly et al., Respondents. S.F. 22827.

Mark Steven Randell et al., Petitioners, v. James S. Allison, Registrar of Voters of the County of Los Angeles, Respondent. L.A. 29906.

In these proceedings we are called upon to determine whether the newly enfranchised young people of this state residing apart from their parents shall be treated like other voters for purposes of acquiring a voting residence or, on the contrary, shall be presumed to reside with their parents. We conclude that for state officials to treat minor citizens differently from adults for any purpose related to voting would violate the Twenty-Sixth Amendment to the United States Constitution. We also conclude that strong state policies require that voters participate in elections where they reside and, in accordance with California law permitting a minor to be emancipated for residential or other purposes, that California law requires that minors of 18 years of age or older be treated as emancipated and hence as adults for voting purposes in light of the Twenty-Sixth Amendment.

Petitioners are nine individual unmarried minors and two organizations. The nine individuals sought to register to vote in the jurisdiction they claim to be their actual permanent residence. Registrars of voters in the City and County of San Francisco, Alameda County, Santa Barbara County, San Diego County, and Los Angeles County refused to register the individual petitioners because they did not register at their parents' address, pursuant to the California Attorney General's opinion of February 17, 1971 (Opn. No. 70/213, 54 Adv. Ops. Cal. Atty. Gen. 7, 12), in which he concluded that "for voting purposes the residence of an unmarried minor [whether student or not] . . . will normally be his parents' home" regardless of where the minor's present or intended future habitation might be.

In reliance upon this opinion, respondent Mihaly told petitioner McConville, whose parents live in Argentina, that he could not vote in local elections at all unless he became a *married* minor. Petitioners Pang and Fruchtendler were told that they would have to register to vote in Hawaii and Arizona, respectively. The six other individual petitioners were told to register in other California jurisdictions up to 700 miles away from their claimed permanent residences. Petitioners Jolicoeur and King, who are fully self-supporting and work full-time, were told that these facts were irrelevant to their capacity to establish a legal residence for voting purposes. Petitioner Randell, who has *never* lived at his parents' current domicile, and is not familiar with any political issues pertinent to that area, was told that he must vote there and not where he lives.

Petitioners invoked the original jurisdiction of this court,[1] seeking writs of mandate directed to the respondent registrars ordering respondents to register petitioners according to the same procedures and qualifications that are followed with respect to adult registrants, pursuant to Elections Code, sections 14280–14292.[2]

The Twenty-Sixth Amendment: On June 22, 1970, President Nixon signed into law the Voting Rights Act of 1970 (P.L. 91–285, 84 Stat. 314), title III of which purported to lower the voting age to 18 for all federal, State, and local elections. After the United States Supreme Court held unconstitutional that part of title III which applied to nonfederal elections (Oregon v. Mitchell (1970) 400 U.S. 112, 118), Congress passed Senate Joint Resolution 7 on March 23, 1971, submitting a proposed constitutional amendment to the states for ratification, pursuant to article 5 of the federal Constitution. On June 30, 1971, Ohio became the 38th state to ratify the Twenty-Sixth Amendment to the United States Constitution, and it became law.

Section 1 of the Twenty-Sixth Amendment provides: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied *or abridged* by the United States or by any State on account of age." (Emphasis added.)

The Twenty-Sixth Amendment prohibits abridging the right to vote on account of age. The word "abridge" means diminish, curtail, deprive, cut off, reduce (Webster's New Internat. Dictionary (3d ed. 1961) p. 6; Schermerhorn v. Local 1625 of Retail Clerks Int. Assn. (Fla. 1962) 141 So. 2d 269, 276; Piegts v. Amalgamated Meat Cutters, etc. (1955) 228 La. 131, 139, 81 So. 2d 835, 838; Gray v. Johnson (S.D. Miss 1964) 234 F. Supp. 743, 746). *Gray* is significant for its interpretation of similar language in the Twenty-Fourth Amendment, which forbids denial or abridgment of the right to vote on account of failure to pay a poll tax. The court in *Gray* held unconstitutional as abridging the right to vote a Mississippi statute which compelled persons exempted from the poll tax by the Twenty-Fourth Amendment to secure special receipts within a limited period of time. The burden put on exempted voters to obtain the special receipts was held to circumscribe, impair, and impede the right to vote.

Compelling young people who live apart from their parents to travel to their parents' district to register and vote or else to register and vote as absentees burdens their right to vote no less than the State of Mississippi burdened its poor people in *Gray*. Such young people would be isolated from local political activity, with a concomitant reduction in their political influence and information. The burden placed on youth would be different than that placed on other absentee voters. The youth, unlike other absentee voters, claims his current residence as his domicile but would be disqualified solely "on account of age."

Sophisticated legal arguments regarding a minor's presumed residence cannot blind us to the real burden placed on the right to vote and associated rights of political expression by requiring minor voters residing apart from their parents to vote in their parents' district. The Twenty-Sixth Amendment, like the Twenty-Fourth, Nineteenth, and Fifteenth before it, "nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise . . . although the abstract right to vote may remain unrestricted . . ." (Lane v. Wilson (1939) 307 U.S. 268, 275.)

An unmarried minor must be subject to the same requirements in proving the location of his domicile as is any other voter. Fears of the way minors may vote or of their impermanency in the community may not be used to justify special presumptions—conclusive or otherwise—that they are not bona fide residents of the community in which they live.

In Carrington v. Rash (1965) 380 U.S. 89, the United States Supreme Court was faced with a quite similar problem. There a Texas statute prevented persons entering the state as soldiers from acquiring a voting residence in the state while soldiers. The state claimed that military personnel might not make responsible use of the ballot, might vote in a bloc if under the dominating influence of a commanding officer, and, as transients without a stake in the future of the area, might vote against needed bond issues and property taxes. The court's answer was clear: Texas might restrict the franchise to bona fide residents, but it could not conclusively presume soldiers to be transients. To the state's claim that soldiers could "take over" a small town near the base, the court responded firmly: " 'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." (*Id.*, at p. 94.) *Carrington* obviously applies to minors as well as to soldiers.

Were there any doubt that the Twenty-Sixth Amendment is intended to compel adult treatment of minors for voting purposes, reference to the legislative history of the amendment would dispel it. It is clear from that history, which is entitled to "an important place in ascertaining the legislative intent" (Freedland v. Greco (1955) 45 Cal. 2d 462, 467; cf. Bourland v. Hildreth (1864) 26 Cal. 161, 180; Keeler v. Superior Court (1970) 2 Cal. 3d 619, 624), that Congress believed both that minor voters are entitled to be treated as adults for voting purposes and that voting in the youth's actual place of residence is essential to accomplishing a primary congressional goal of channelling youthful idealism through the political process.

The legislative history of title III of the Voting Rights Act of 1970 and the Twenty-Sixth Amendment reveals a rare consensus of concerns and objectives among Senators and Representatives who engaged in debate. Congressmen stressed three consistent themes: first, that today's youth is better informed and more mature than any other generation in the nation's history.[3] Second, Congress was influenced by the fact that over half the deaths in Vietnam have been of men in the 18–20 age group.[4] Third, and perhaps of paramount immediate importance, Congressmen

Footnotes at end of article.

uniformly expressed distress at the alienation felt by some youths, and expressed hope that youth's idealism could be channelled within the political system.[5]

It would be impossible here to analyze fully the extensive hearings and debates held on whether to extend the vote to 18-year-olds.[6] One of the best and most concise guides to congressional intent is the Senate Report accompanying Senate Joint Resolution 7 (later enacted as the Twenty-Sixth Amendment), a report adopted by both houses of Congress by more than a two-thirds majority. (S. Rep. 92–26, 1971 U.S. Code Cong. & Admin. News 362.) "Reports of commissions which have proposed statutes that are subsequently adopted are entitled to substantial weight in construing the statutes. [Citations.]" (Van Arsdale v. Hollinger (1968) 68 Cal. 2d 245, 249.) That report makes the following "Case for 18-Year-Old Voting."

"First, these younger citizens are fully mature enough to vote. There is no magic to the age of 21. The 21 year age of maturity is derived only from historical accident. In the eleventh century 21 was the age at which most males were physically capable of carrying armor. But the physical ability to carry armor in the eleventh century clearly has no relation to the intellectual and emotional qualifications to vote in twentieth century America. . . . [¶] . . . Today more than half of the 18- to 21-year-olds are receiving some type of higher education. Today nearly 80 percent of these young people are high school graduates. It is interesting to compare these recent statistics with some from 1920, when less than 10 percent went on to college and less than 20 percent of our youngsters actually graduated from high school. [¶] Second, our 18-year-old citizens have earned the right to vote because they bear all or most of an adult citizen's responsibilities. . . . [¶] Third, these younger voters should be given the right to full participation in our political system because they will contribute a great deal to our society. Although some of the student unrest of recent years has led to deplorable violence and intolerance, much of this unrest reflects the interest and concern of today's youth over the important issues of our day. . . . [¶] The Committee believes that we must channel these energies into our political system and give young people the real opportunity to influence our society in a peaceful and constructive manner. . . . [¶] 'The anachronistic voting-age limitation tends to alienate them from systematic political processes and to drive them into a search for an alternative, sometimes violent, means to express their frustrations over the gap between the nation's ideals and actions. Lowering the voting age will provide them with a direct, constructive and democratic channel for making their views felt and for giving them a responsibile stake in the future of the nation.' [¶] Thus the Committee is convinced that the time has come to extend the vote to 18-year-olds in all elections: . . ." (1971 U.S. Code Cong. & Admin. News at pp. 365–367.)

The committee did not ignore the importance of local elections, which are most affected by denying minors the right to establish a domicile of choice for voting purposes: "If the energy and idealism of the young are needed in elective politics, they are needed no less at the State and local level. [¶] Moreover, *many of the problems that most concern younger citizens are largely matters of local and State policy: the quality of education at all levels; the state of the environment; planning and community development. In these areas, participation of the young in local and State elections is particularly appropriate and necessary, and their point of view especially valuable in devising responsible programs.*" (1971 U.S. Code Cong. & Admin. News at p. 372; italics added.)

Footnotes at end of article.

Finally, the report notes the confusion and delay that would be caused by a dual-age voting system. Hearings held in the Senate after the court's decision in Oregon v. Mitchell, *supra*, 400 U.S. 112, made clear what steps individual states might take to solve some of these administrative problems. Senate Report 92–26 recommends adoption of the Twenty-Sixth Amendment as one way of precluding individual states from embarking on several programs of which the Judiciary Committee strongly disapproved. Significantly, programs which would force youths to vote by absentee ballot or otherwise single them out came in for severe condemnation: *"A few States are at least considering the possibility of . . . requiring them to vote either in centralized locations or by absentee ballot. But this type of alternative has fostered criticism on several grounds. At least one voting official has criticized this type of segregation of the younger voters because it would give them less of a sense of participation in the election system, and they should not be removed from the heart of the process.* [¶] *Moreover, forcing younger voters to undertake special burdens—obtaining absentee ballots, or traveling to one centralized location in each city, for example—in order to exercise their right to vote might well serve to dissuade them from participating in the election. This result, and the election procedures that create it, are at least inconsistent with the purpose of the Voting Rights Act, which sought to encourage greater political participation on the part of the young; such segregation might even amount to a denial of their 14th Amendment right to equal protection of the laws in the exercise of the franchise.*" (1971 U.S. Code Cong. & Admin. News at pp. 374–375; italics added.)

It is clear that respondents have abridged petitioners' right to vote in precisely one of the ways that Congress sought to avoid—by singling minor voters out for special treatment and effectively making many of them vote by absentee ballot. The Senate Report indicates that Congress not only disapproved of such treatment, but feared that it would give youth "less of a sense of participation in the election system" and "might well serve to dissuade them from participating in the election," a result inconsistent with the goal of encouraging "greater political participation on the part of the young."

Respondents' policy would clearly frustrate youthful willingness to accomplish change at the local level through the political system. Whether a youth lives in Quincy, Berkeley, or Orange County, he will not be brought into the bosom of the political system by being told that he may not have a voice in the community in which he lives, but must instead vote wherever his parents live or may move to. Surely as well, such a system would give any group of voters less incentive "in devising responsible programs" in the town in which they live. Only the most dedicated partisan would travel from Oakland to San Diego (or Tucson) in order to exercise effectively his first Amendment rights of political association and expression.

America's youth entreated, pleaded for, demanded a voice in the governance of this nation. On campuses by the hundreds, at Lincoln's monument by the hundreds of thousands, they voiced their frustration at their electoral impotence and their love of a country which they believed to be abandoning its ideals. Many more worked quietly and effectively within a system that gave them scant recognition. And in the land of Vietnam they lie as proof that death accords youth no protected status. Their struggle for recognition divided a nation against itself. Congress and more than three-fourths of the states have now determined in their wisdom that youth "shall have a new birth of freedom"—the franchise. Rights won at the cost of so much individual and societal suffering may not and shall not be curtailed on the basis of hoary fictions that these men and women are children tied to residential apron strings. Respondents' refusal to treat petitioners as adults for voting purposes violates the letter and spirit of the Twenty-Sixth Amendment.

California Law: California law also compels respondents to treat citizens of 18 years of age or older as adults for all purposes related to voting.

Petitioners sought to register at addresses they claim to be their residences for voting purposes. If petitioners *are* residents of the districts they claim, the integrity of our state's political system demands that they be allowed to vote in those areas. This is true for two reasons.

First, basic democratic principles require that citizens be able to participate in making decisions that intimately affect their lives. Forcing resident of one locality to vote in the elections of another locality denies to those voters the right to help determine the resolution of issues which vitally affect them, and eventually alienates them from the political process.

Decisions of this court (e.g., Castro v. State of California (1970) 2 Cal. 3d 223, 235–241) and the United States Supreme Court have made it clear that *all* bona fide residents substantially affected by the outcome of an election and capable of voting intelligently and responsibly in it should be allowed to vote. As stated in Kramer v. Union School District (1969) 395 U.S. 621, 626–627, "Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the government affairs which substantially affect their lives." (Fn. omitted.)

The rules announced by respondents not only would deny to some residents the right to vote where they live, but could also serve to give an unmarried minor a series of voting residences which he has never seen. The 18-year-old who lives and works in San Francisco for the three years he is a voting minor might well wind up voting in turn for the Mayor of Seattle, the Governor of Maine, and school bonds in Oshkosh, Wisconsin, only to be disenfranchised completely on the local level when his parents move permanently to Paris.

It may be objected that to allow unmarried minors to establish a domicile where they live may swell the rolls of college town electorates. It is contended that college students may "take over" a town by all voting the same way, that they are not "truly" residents in that many of them will move to other areas after they leave school, and that local governments have a legitimate interest in excluding such persons from the local polity.[7]

In many states special rules are applied in determining the voting residence of students. (Singer, *Student Power at the Polls* (1970) 31 Ohio St.L.J. 703, 721–723.) The underlying rationale of these various tests is that students are apt to be transient inhabitants of the community, little concerned about long-term policies and problems, and often may not pay local property taxes. (But see Note, *Restrictions on Student Voting: An Unconstitutional Anacronism?* (1970) 4 U.Mich.J.Law Reform 215.) The possible transiency, penury, or ignorance of students did not, however, impress the California Legislature, which has expressly provided that the law "shall not be construed to prevent a student at an institution of learning from qualifying as an elector in the locality where he resides while attending that institution, when in fact the student has abandoned his former residence." (Elec. Code, § 14283.) Student status is therefore a neutral fact in determining residence for voting purposes.

The Legislature has thus determined that differential treatment of students for voting purposes may not be condoned as a legitimate

governmental policy. No reason appears for construing differential treatment of minors in a more favorable light.

The second major evil accomplished by allowing or forcing voters to vote in districts not their own is that voters of other districts have inflicted upon them a voter with no stake or interest in the outcome of the election. The extent of the evil is not only that residents of California would be asked to decide issues in Arizona or Hawaii. Small towns in California would be especially affected by such a rule, since the number of young people from the town who have left for other areas may be substantial in comparison to the town's total population. Allowing unmarried minors who reside elsewhere to vote may effectively turn a small town over to the control of unconcerned outsiders. Over a century ago we recognized the wisdom of requiring voters to be residents of the jurisdiction: "[C]itizens . . . should not deal with public questions through the ballot box until they at least [have] the benefit of an opportunity to learn the public wants, of concerting measures the best calculated to provide for them, and of selecting proper men to carry those measures into effect; . . ." (Bourland v. Hildreth, *supra*, 26 Cal. 161, 179.) Allowing minors to vote at fictional residences would compromise the integrity of the political process.

In addition to these fundamental policies requiring that a person vote where he actually resides and not be compelled to vote at a fictional residence, there are further legislative policies which require that a minor residing apart from his parents be permitted to vote at his residence.

Although our statutes provide for absentee registration as well as absentee voting (Elec. Code, § 213), it is likely that individuals forced to vote in elections they care and know little about will be inclined not to register or vote at all. While the rational man might register in one county as well as another for purposes of a presidential primary, why should he register or vote in any local election when he knows nothing of the issues or candidates? Forcing voters to register at fictional residences would therefore frustrate the legislative intent "to promote and encourage voter registrations . . . to the end that registration may be maintained at a high level." (Elec. Code, § 201.)

The provisions of the Elections Code governing determination of residence for voting purposes also reflect the state policy of recognizing an actual rather than a fictional residence.

Section 14282 provides the general standard for determining an individual's domicile for voting purposes. It provides: "The residence of a person is that place in which his habitation is fixed and to which, whenever he is absent, he has the intention of returning." [8]

The registrar obviously has the power not to register someone who is not a resident of the jurisdiction. But California law gives great weight to the voter's representation of where his domicile is. If a voter is challenged at the polls on the ground that he has not been a resident of the state, county, or precinct for a sufficient time, the precinct board may ask the voter only four questions. If the voter answers them with a "yes" or "no" which indicates he is a resident of the jurisdiction, the board must take his word for it and must allow him to vote. (Elec. Code, §§ 14243–14244.5.) Moreover, *"Any doubt in the interpretation of the law shall be resolved in favor of the challenged voter."* (Elec. Code, § 14255; italics added.)

Section 14282 would normally govern the determination of petitioners' domiciles for voting purposes. Any presumption that a given class of persons are not residents of the place they live would contravene the spirit and text of the Elections Code. (Elec. Code, §§ 14255, 14282; see also §§ 14283, and 14290, allowing soldiers, students, inmates of institutions, and wives living apart from their husbands to acquire domiciles in the place they live.)

Respondent apparently do apply section 14282 in determining the residence of a married minor (who may be considered an adult for some purposes, but would still be a minor under state law for voting purposes; see Civ. Code, § 25). They appear to refuse as a matter of policy, however, to accept affidavits of residence from unmarried minors, unless the residence claimed is that of the parents. Even considering state law alone, this policy may be sustained, in light of the Elections Code, and the strong state policies discussed above, only if unmarried minors are generally incapable of having a domicile of their own. Subject to some unspecified objections, the Attorney General so believed (54 Adv. Ops. Cal. Atty. Gen., *supra*, at pp. 11–12), relying on Government Code, section 244, subdivisions (d) and (f), which provide that an unmarried minor's residence is that of his parents, and cannot be changed by his own act alone.[9]

The Attorney General has misapplied section 244 by failing to view it in light of other pertinent statutes and decisions governing parent-child relations. Specifically, under California law a minor may be emancipated partially or completely by his parents or by operation of law. It is possible that a minor of 18 years of age or older, living apart from his parents, will be emancipated for all purposes; it is substantially probable that he will be emancipated for purposes of residence; and the minor is necessarily emancipated for all purposes related to voting when he is given the vote in his own right, without regard to the consent of his parent or guardian. In light of this California law regarding the emancipation of minors, we conclude that minors over 18 years of age must be treated as adults for voting purposes, and the location of their domiciles may not be questioned on account of their age.

Although section 244 is couched in absolute terms, it has not been so applied. Our courts have long held, for example, that the minor's residence does not follow that of the parent when the parent has abandoned him. (In re Vance (1891) 92 Cal. 195, 198; In re Hawkins (1920) 183 Cal. 568, 575; Guardianship of Brazeal (1953) 117 Cal. App. 2d 59, 61; see also Harlan v. Industrial Acc. Com. (1924) 194 Cal. 352, 359–360.) Similarly, although section 244, subdivision (e) baldly states that "[t]he residence of the husband is the residence of the wife," the section has not been applied where the wife obviously maintained a separate domicile from that of her husband, to whom she was apparently happily married. (Lowe v. Ruhlman (1945) 67 Cal. App. 2d 828, 833.)

Section 244's proviso that an unmarried minor's residence is that of his parents and cannot be changed by his own act must be construed in light of other statutes governing parent-child relations. In particular, Civil Code, section 211 provides in pertinent part: "The parent . . . may relinquish to the child the right of controlling him. . . ." Such relinquishment constitutes emancipation of the minor, and may be express or implied, complete or partial, conditional or absolute. (Perkins v. Robertson (1956) 140 Cal. App. 2d 536, 540; 67 C.J.S., Parent and Child, § 86.) The emancipated child "is in all respects his own man." (Lachman v. Wood (1864) 25 Cal. 147, 151.) To the extent he is emancipated he becomes *sui juris*, with the same independence as though he had attained majority. (67 C.J.S., Parent and Child, § 87; see, e.g., Wadoz v. United Nat. Indemnity Co. (1957) 274 Wis. 383, 80 N.W. 2d 262, 265.) After consenting to the emancipation of a child old enough to work and care for himself, the parent has no right to custody or control. (Ex Parte Clark (1891) 87 Cal. 638, 642.) "A parent not entitled to the custody of a child has no right to control his residence." (Harlan v. Industrial Acc. Com., *supra*, 194 Cal. 352, 359–360; cf. Civ. Code, § 213.)[10]

Nor must a child be fully emancipated in order to acquire a domicile of choice. California law recognizes that emancipation for specific purposes is effective. (Martinez v. Southern Pacific Co. (1955) 45 Cal.2d 244, 253 [emancipation implied by circumstances]; Slater v. California State Auto. Assn. (1962) 200 Cal.App.2d 375 [partial emancipation implied] Perkins v. Robertson, *supra*, 140 Cal.App.2d 536 [partial emancipation implied]; Argonaut Ins. Exchange v. Kates (1955) 137 Cal.App.2d 158 [partial emancipation implied]. As stated in Cole v. Superior Court (1915) 28 Cal.App. 1, 6, " 'the county of the husband's residence is [that] of the minor children, unless he has consented to their acquiring residence elsewhere, or has voluntarily relinquished his parental authority over them. . . .' "

Whether the minor has been emancipated for residential purposes is ordinarily a question of fact. (Martinez v. Southern Pacific Co., *supra*, 45 Cal.2d 244, 253.) Establishment of a separate abode is evidence of emancipation. (Spurgeon v. Mission State Bank, *supra*, 151 F.2d 702; Rounds Bros. v. McDaniel (1909) 133 Ky. 669, 118 S.W. 956; Ream v. Watkins (1858) 27 Mo. 516; see generally Annot., 165 A.L.R. 723, 740–742.)[11] In addition, it is common sense to believe that a good many minors over the age of 18 living apart from their parents *are* emancipated for these purposes. Eighteen is the age when most minors graduate from and leave school, when many get full time jobs and become self-supporting, when the state ceases to limit the number of hours they may work (Lab. Code, § 1172), when they may smoke cigarettes (Pen. Code, § 308), and when criminal proceedings begin to be brought in adult rather than juvenile courts. (Welf. & Inst. Code, § 604; Boches & Goldfarb, Cal. Juvenile Court Practice (Cont. Ed.Bar 1968) 35.) It is an age when males register for the draft and females may get married without the consent of either parent. (Civ. Code, § 4101.) A minor 18 to 21 years old who lives apart from his parents will usually consider his house to be home.

Not only is there a substantial likelihood that a minor over the age of 18 living apart from his parents has been emancipated for all purposes or at least for purposes of residence; it is also clear that when the minor is given the right to vote he is emancipated for all purposes relating to voting. Obviously, in giving the minor the right to vote, it was never contemplated that the parent or guardian should be able to control whether or not the minor should be permitted to vote or how he should exercise the franchise. It was necessarily the intention to accept him as a responsible member of the community, capable of participating in its political affairs, directing its policies, and choosing its leaders. For these purposes, he must be free entirely of parental control, and unless he is, the right to vote granted to him would be meaningless.[12]

The fundamental importance of the franchise, as both a symbol and a vital tool of our democracy, requires that every effort be made to apply uniform standards and procedures to all qualified voters equally. (Cf. 42 U.S.C. § 1971 (a)(2)(A).) In this case the strong likelihood that substantial numbers of voting minors living apart from their parents are emancipated for residential purposes, coupled with the necessity that minors given the vote be treated as emancipated for all purposes related to voting, persuades us that a minor 18 years of age or older must be treated as an adult for voting purposes, and that the location of his domicile may

Footnotes at end of article.

not be questioned on account of age or occupational status.

We hold today that both the Twenty-Sixth Amendment to the United States Constitution and California law require respondent registrars to treat all citizens 18 years of age or older alike for all purposes related to voting. We do not imply that registrars may not question a citizen of any age as to his true domicile. However, the middle-aged person who obtains a job and moves to San Francisco from San Diego, and the youth who moves from his family home in Grass Valley to Turlock to attend college must be treated equally. Whether either of them acquires a new domicile or retains the old one is governed by sections 14280–14292 of the Elections Code. We hold only that registrars may not specially question the validity of an affiant's claim of domicile on account of his age or occupational status.

Let the peremptory writ of mandate issue directing respondent voting registrars to determine each individual petitioner's residence for voting purposes strictly in accordance with Elections Code, sections 14280–14292, and by the same standards, tests, and procedures as are applied to persons 21 years of age or older.

PETERS, J.

We concur:

TOBRINER, J.
MOSK, J.
SULLIVAN, J.

FOOTNOTES

[1] Petitioners could have sued to enforce their rights pursuant to Elections Code, section 350. Instead petitioners ask us to exercise our original jurisdiction (Cal. Const., art. VI, § 10; Rules of Court, rule 56(a)). We exercise such jurisdiction only in cases in which "the issues presented are of great public importance and must be resolved promptly." (County of Sacramento v. Hickman (1967) 66 Cal. 2d 841, 845.) Cases affecting the right to vote and the method of conducting elections are obviously of great public importance. Moreover, the necessity of adjudicating the controversy before the election renders it moot usually warrants our bypassing normal procedures of trial and appeal. Thus we have exercised our original jurisdiction where electors sought to qualify an initiative for the ballot (Perry v. Jordan (1949) 34 Cal. 2d 87, 90–91; Farley 1. Healey (1967) 67 Cal. 2d 325, 326–327), where a proposed local election would have violated the city charter (Miller v. Greiner (1964) 60 Cal. 2d 827, 830), and where an individual sought certification by the city clerk as a candidate for office. (Camara v. Mellon (1971) 4 Cal. 3d 714.)

No less speedy resolution of the issues presented by petitioners would be adequate here. The last day for registration for the November 2, 1971, election is September 9, 1971. The last day for registration for the June 6, 1972 election is April 13, 1972. It is highly unlikely that petitioners could secure a superior court decision and complete the inevitable appeals by either side from that decision in time to register for these elections.

[2] The remedy invoked—mandate—is appropriate. (Code Civ. Proc., §§ 1085–1086.) Voting registrars are public officers with the ministerial duty of permitting qualified voters to register. Mandamus is clearly the proper remedy for compelling an officer to conduct an election according to law. (Miller v. Greiner, *supra*, 60 Cal. 2d 827, 830; Partridge v. Devoto (1905) 148 Cal. 167; see also Zellenga 1. Nelson (1971) 4 Cal. 3d 716; cf. Keane v. Mihaly (1970) 11 Cal. App. 3d 1037.) Mandamus is also appropriate for challenging the constitutionality of validity of statutes or official acts. (Metropolitan Water Dist. of Southern California v. Marquardt (1963) 59 Cal. 2d 176, 28 Cal. Rptr. 724, 729; Zellenga v. Nelson, *supra*, 4 Cal. 3d 716; San Francisco Unified School Dist. v. Johnson (1971) 3 Cal. 3d 937.)

[3] See, e.g., Hearings before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, 91st Cong., 2d Sess., at p. 130 (President Nixon); Cong. Rec., vol. 116, pt. 5, p. 6434, remarks of Sen. Goldwater; Cong. Rec., vol. 116, pt. 5, pp. 6434, 3392, and vol. 116, pt. 15, pp. 20180, 20187, remarks of various Congressmen re educational attainment of youth.

[4] See, e.g., Cong. Rec., vol. 116, pt. 5, p. 6111 (Sen. Kennedy), p. 6433 (Sen. Cook), vol. 116, pt. 15, p. 20171 (Rep. Stokes), p. 20173 (Rep. McCloskey, Jr.).

[5] See, e.g., Cong. Rec., vol. 116, pt. 15, p. 20175 (Rep. Ottinger), and p. 20163 (Rep. Anderson).

[6] See generally, Note, *Legislative History of Title III of the Voting Rights Act of 1970* (1970) 8 Harv.J.Legis. 123.

[7] The fear of a deluge is more theoretical than real. In Berkeley, for example, some 51,464 votes were cast in the recent municipal election. (Oakland Tribune, April 7, 1971.) Of 27,000 students at the University of California, no more than 9,000 (freshmen through juniors) are likely to be in the 18–20 age group. If typical registration percentages adhere, no more than 5,000–6,000 of these minors would register to vote. Even if every single one of these minors registered in Berkeley, which is highly unlikely, and even if every one then voted (which is more unlikely), the *vote* total would be increased no more than 10 percent, and the rolls an even lesser percentage. Nor, among this highly educated group, is it very probable that all 5,000 minors would vote the same way on any issue.

[8] Sections 14280–14292, and the preceding sections 14240–14255, concern challenges to any voter at the polls by the precinct board appointed by the board of supervisors. Since challenges are based only on failure to possess qualifications set forth in the affidavit of registration, e.g., residence in the jurisdiction, it is clear that these same standards for determining residence apply as well to the registrar of voters.

[9] Government Code, section 244, subdivision (d) provides: "The residence of the father during his life, and after his death the residence of the mother, while she remains unmarried, is the residence of the unmarried minor child, provided that when the parents are separated, the residence of the parent with whom an unmarried minor child maintains his place of abode is the residence of such unmarried minor child." Subdivision (f) further provides: "The residence of an unmarried minor who has a parent living cannot be changed by his own act."

[10] The great preponderance of authority from other jurisdictions similarly holds that an emancipated minor, being *sui juris*, may acquire his own domicile. (See, e.g., Bonneau v. Russell (1952) 117 Vt. 134, 85 A. 2d 569, 570; Cohen v. Delaware, Lack & Western R.R. Co. (1934) 150 Misc. 450, 269 N.Y.S. 667, 673–675; Bjornquist v. Boston & A.R. Co. (1st Cir. 1918) 250 F. 929, 932–933; Spurgeon v. Mission State Bank (8th Cir. 1945) 151 F.2d 702, 705, cert. den. (1946) 327 U.S. 782; Appelt v. Whitty (7th Cir. 1961) 286 F.2d 135, 137; 28 C.J.S., Domicile, § 12, p. 21; Rest., Conflict of Laws, § 31; Rest. 2d, Conflict of Laws, § 22.) As provided in Restatement Second of Conflict of Laws, section 22, comment f: "A parent has no power to control the domicile of an emancipated child. . . ."

[11] In Rounds Bros. v. McDaniel, *supra*, 133 Ky. 669, 118 S.W. 956, in particular, the child left home *without* express parental consent. The court held that the parent's failure to object constituted an implied emancipation, which would become irrevocable if the parent's inaction continued. Similarly, even where the father gave the child money with which to leave, but thereafter exercised no control over the minor's activities, and the minor lived in another state, an emancipation had occurred. (Johnson v. Gibson (N.Y.C.P. 1855) 4 E. D. Smith's Rep. 231.) (Cf. Grant v. Segawa (1941) 44 Cal. App. 2d Supp. 945, 949.)

[12] Since the minor is emancipated for all purposes relating to voting, we have concluded that petitioners may sue in their own right, and that it would be improper for us to appoint a guardian ad litem pursuant to Code of Civil Procedure, sections 372–373, and Civil Code, section 42.

CONCURRING OPINION BY WRIGHT, C. J.

Randell et al. v. *Allison*, L.A. 29906.
Jolicoeur et al. v. *Mihaly* et al., S.F. 22826.
Tabilio et al. v. *Mihaly* et al., S.F. 22827.

I concur in the majority opinion insofar as it is concluded therein that the places of residence of minor citizens of voting age are to be fixed in a like manner with the places of residence of adults, for purposes of determining the jurisdiction in which they are to vote. This result is *compelled* by clear language of the Twenty-Sixth Amendment which provides in pertinent part that the "right of citizens of the United States . . . to vote shall not be . . . abridged . . . by any State on account of age."[1]

It cannot be disputed that state-imposed restrictions which compel a minor of voting age to vote, if at all, only in the jurisdiction where his parents reside whatever his legitimate reasons for living apart from them, necessarily diminishes, curtails, reduces and accordingly abridges his right to vote *only on account of his minority*. The minor would thus be incapable of voting in the jurisdiction where he permanently and legally resides, while the adult is free not only to vote in such jurisdiction but to change the place where he votes when he changes his residence. No basis for justifying such an abridgment or discrimination on the right to vote, other than the minor's age or distinctions dependent thereon, has been suggested in the instant case. As the Twenty-Sixth Amendment expressly prohibits the described state conduct, we need not inquire further and to do so only emphasizes matters which should be of no concern to us.

There is no stronger statement of governing policy considerations in any particular circumstance than an express declaration embodied in our federal Constitution. Where, as here, such a declaration is manifestly dispositive of the single issue no good purpose is served by a concurrent examination of state or federal policies, or legislative histories, in an attempt to ascertain that the supreme law of the land must be adhered to because lesser policy considerations likewise require the same result.

Petitioners are entitled to their peremptory writ because the Constitution directs it, and we need and should not seek otherwise to justify such constitutional direction.

WRIGHT, C. J.

We concur:

MCCOMB, J.
BURKE, J.

[From the Washington Post, Sept. 18, 1971]

COLLEGE STUDENTS AS VOTERS

There appears to be a healthy and altogether welcome trend among the states to let qualified college students vote, if they want to, in the college communities where they live for the greater part of the year. Sixteen states and the District of Columbia have now moved in this direction. This trend runs counter to a widespread opposition manifested by state and local voting officials who prefer to require the young college voters to cast their ballots in the communities where their parents reside. The opposition remains

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[1] The majority correctly and, for purposes of the decision herein, conclusively holds that the "Twenty-Sixth Amendment prohibits abridging the right to vote on account of age. The word 'abridge' means diminish, curtail, deprive, cut off, reduce. [Citations.]"

formidable. It is, we think, inconsonant with the spirit and purpose of the 26th Amendment, which extended the right to vote to American citizens 18 to 21 years of age.

Generally speaking residence is a matter of an individual's choice. He is domiciled in the place he considers home. He lives, in short, where he thinks he lives; and ordinarily that is where he votes if he is entitled to vote. The aim of the 26th Amendment was to treat citizens 18 to 21 years of age as adults, at least so far as voting is concerned. Many, probably most, of them will want to vote where they grew up and where their families live. A Gallup Poll taken in mid-July disclosed that only 29 per cent of persons 18-to-20 years old thought that college students should vote in the community where they attend college, while 65 per cent thought they should vote in the community where they came from. We can see no real justification, however, for treating them differently from other adults. They ought to be free to vote where their interest lies and where it is most convenient for them to vote.

In the 1970 Census, according to a study prepared by Common Cause, students were counted at the address where they were actually living on April 1—that is, at the address where they lived while attending school. And of course their residence at that address figured in the community's claims for representation in state and national legislatures and in formulas for allocation of federal funds to cities and states. Most of them, moreover, paid property taxes, directly or indirectly, in these college communities. Only about one-fourth of college students live in college-owned housing. The rest live with relatives or own or rent their own living quarters. A larger number than in the past are now married and living altogether independently of the families in which they grew up.

These facts afford a rebuttal, in part, to the contention that college students do not have the welfare of the college community at heart—that they might, for one example, raise taxes irresponsibly because they will not themselves be obliged to pay them. The argument cuts two ways, in any case. It may be said with equal force that young men and women cannot vote responsibly in a community from which they are absent during the greater part of the year and to which they may choose never to return. A small town might be markedly affected by the votes of young people who have left it to reside elsewhere for study or work, if their desire to vote where they are actually living is denied.

It is unfortunate that Attorney General John Mtichell told the nation's secretaries of state in a speech recently that the Justice Department would assume no role in shaping state residency laws as applied to newly enfranchised voters under 21. He is undoubtedly right in saying that Congress ought not to adopt legislation that would "require that students, or any other group of 18-to-20-year-olds, receive some special legislative dispensation or be the victim of some special disability." But if he can give this much guidance to Congress, it would be by no means amiss, we think, if he were to advise state election officials that their aim ought to be to treat 18-20-year-olds like any other adults and facilitate voting among them in conformity with the spirit of the 26th Amendment.

A unanimous opinion by the Supreme Court of California, overturning an opinion of California's Attorney General that unmarried, newly enfranchised 19-20-year-olds must register where their parents reside, stated the case with exceptional eloquence: "America's youth entreated, pleaded for, demanded a voice in the governance of this nation. On campuses by the hundreds, at Lincoln's Monument by the hundreds of thousands, they voiced their frustration at their electoral impotence and their love of a country which they believed to be abandoning its ideals. Many more worked quietly and effectively within a system that gave them scant recognition. And in the land of Vietnam they lie as proof that death accords youth no protected status. Their struggle for recognition divided a nation against itself. Congress and more than three-fourths of the states have now determined in their wisdom that youth 'shall have a new birth of freedom'—the franchise. Rights won at the cost of so much individual and societal suffering may not and shall not be curtailed on the basis of hoary fictions that these men and women are children tied to residential apron strings. Respondents' refusal to treat petitioners as adults for voting purposes violates the letter and spirit of the Twenty-sixth Amendment.

By Mr. MAGNUSON (for himself, Mr. COTTON, Mr. ERVIN, Mr. METCALF, and Mr. SPONG):

S. 2599. A bill to provide for the application of the prohibitions contained in the Sherman Act to the business of organized professional baseball. Referred to the Committee on the Judiciary.

Mr. MAGNUSON. Mr. President, I introduce for myself and Senators COTTON, ERVIN, METCALF, and SPONG a bill to remove the antitrust exemption that baseball presently enjoys because of the decision of the Supreme Court in *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball.* (295 U.S. 200).

The reason for introduction of this measure results from a desire to accomplish two things: To compel baseball to operate subject to the antitrust laws, and to remove the judicially imposed advantage that baseball presently has over similar team sports—football, basketball, and hockey—which are not now exempt from the antitrust laws.

Recent decisions by the American League involving the transfer of the Washington Senators and the Seattle Pilots requires Congress to review the reasons for baseball's favored sport status. Last year, after the Seattle Pilots were transferred to Milwaukee, I introduced an identical measure. Because the bill was introduced late in the 91st Congress, hearings were not held. I believe that the recent transfer of the Washington Senators again raises the need for Congress to consider this question.

It is apparent that the nature of baseball has changed dramatically in the many years since organized baseball received antitrust exemption. It is our feeling that all aspects of baseball—including radio and television contracts, concessions, player-management relations, and all other relevant factors—should be reviewed in order to determine the wisdom of continuing to exempt baseball from antitrust laws.

In order for Senators to clearly focus on the issues raised by this bill, I will refer briefly to the past judicial and legislative history out of which baseball has maintained its favored position.

THE COURTS

In 1922, the Supreme Court ruled that organized baseball was not subject to the antitrust laws. *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs* (259 U.S. 200). The Court found that the "business" of baseball was not "trade or commerce in the commonly accepted use of those words." In baseball, the Court reasoned, the interstate aspects were only incidental. Justice Holmes, writing for the Court, said—

> Personal effort, not related to production, is not a subject of commerce.

The Court was later to change this concept of interstate commerce, but not as applied to baseball.

In the Federal baseball case, the Court had under review a decision of a court of appeals overruling a judgment of the trial court which awarded treble damages amounting to $240,000 to the plaintiff (269 Fed. 681 (D.C. Cir., 1920)).

The complaint alleged that the provisions in the contracts of the players with the member teams of the leagues in organized baseball forbade them to contract with another club and prevented the Baltimore enterprise from acquiring their services. This contract provision is called the reserve clause. The court of appeals discussed the purpose of the reserve clause and its effects upon the plaintiff. It found that the reserve clause was necessary to preserve competition among the teams on the playing field and that the defendants had done no more than that in this case. The Court concluded that the interstate movement of the Baltimore club had not been affected by the use of the reserve clause and that any effect it might have had was incidental.

Some 30 years later, the Supreme Court upheld its ruling in Federal when deciding *Toolson* v. *New York Yankees, Inc.* (346 U.S. 356 (1953)). In reaffirming its decision, the Court stated:

> Congress has had the—Federal baseball—ruling under consideration but has not seen fit to bring such business under these—antitrust—laws by legislation.

The Court continued:

> Without reexamination of the underlying issues, the judgments below are affirmed on the basis of Federal Baseball—so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the Federal antitrust laws.

In 1957, the Supreme Court was to limit the scope of its decisions in Federal Baseball and Toolson. In deciding *Radovich* v. *National Football League* (352 U.S. 445), the Court ruled that professional football was subject to antitrust laws.

In the previous year, the U.S. Court of Appeals in deciding Radovich had distinguished the Supreme Court's decision in *Toolson* and *International Boxing* and found that professional football was a team sport and, therefore, would be exempt from the antitrust laws while boxing, an individual sport, was not comparable (231 F. 2d 620 (oth. Cir. 1956)).

The Supreme Court stated that it was limiting the rule established in *Federal Baseball* and *Toolson* to organized baseball and that—as long as the Congress continues to acquiesce we should adhere to—but not extend—the interpretation of the act made in those cases.

The Court, realizing that its decision might result in discriminations between sports that operated substantially the

same as baseball, specifically stated that the solution to the problem rested with the Congress:

If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But *Federal Baseball* held the business of baseball outside the scope of the act. No other business claiming the coverage of those cases has such an adjudication. We therefore, conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not be court decisions. Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is, therefore, more likely to protect the industry and the public alike. The whole scope of congressional action would be known long in advance and effective dates for the legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action. Of course, the doctrine of *Toolson and Federal Baseball* must yield to any congressional action and continues only at its sufferance.

Thus the Court firmly rejected the suggestion that it extend the baseball decisions to other sports. Instead, the Court made it clear that any exemption for the organized professional team sports of football, basketball, and hockey must come from the Congress.

THE CONGRESS

The Congress has shown awareness of the problems created by the various decisions of the Supreme Court affecting organized professional sports and has given consideration to their antitrust aspects for 14 years. In that time a large number of bills have been introduced dealing with the status of professional team sports under the antitrust laws. Some of these bills sought to remedy the anomaly under which baseball was held to be outside the antitrust laws while other professional sports were declared within those laws.

In almost every session since 1951, bills have been introduced dealing with professional sports. The courts have clearly deferred to the Congress to resolve the issue—if it wishes.

As of this date, numerous hearings have been held, reports have been written and witnesses have testified, but Congress has never resolved the key issue: should baseball be given a favored status over all other professional sports. We believe the answer should clearly be: No.

By Mr. WILLIAMS:

S. 2600. A bill to authorize the involuntary recall of the Coast Guard Ready Reserve to duty in time of natural disaster. Referred to the Committee on Commerce.

AN EMERGENCY ROLE FOR THE READY COAST GUARD RESERVE

Mr. WILLIAMS. Mr. President, in the last Congress, I had the honor of sponsoring legislation which prevented a dramatic cutback in the strength of the Coast Guard Ready Reserve.

That legislation, an amendment to the Military Procurement Authorization bill, received widespread support in this House and subsequently was retained as part of the bill when it was signed into law.

A major reason I advanced for maintaining the Coast Guard Ready Reserve at approximately its existing strength was because of the vital mission that agency can perform in our war against pollution and environmental problems.

Today, I am pleased to offer a bill, S. 2600, which greatly would facilitate the use of our Coast Guard Ready Reserve for those duties.

Under this legislation, the President would be authorized to declare a "domestic emergency" in the event of a natural or man-made water-related disaster involving such problems as water pollution, storms, hurricanes, earthquakes, tidal waves, fires, explosions or other matters involving imminent danger to life and property.

Once the President has made such a declaration, the Secretary of Transportation could then activate Coast Guard Ready Reserve units.

In order to prevent any serious disruptions of a reservist's civilian life of hardships in the area of his employment, the bill places a limit of 30 days on the time a reservist can be activated in any 1 year. However, it would seem that any callups probably would be for a briefer duration.

Mr. President, the information I have been able to obtain indicates that the Coast Guard Ready Reservist is eager to perform this mission. These are areas in which they are trained and most certainly they are capable of fulfilling this mission.

Just recently volunteers from the Coast Guard Ready Reserve rendered expert service in the aftermath of an oil spill in Bayonne, N.J. And, this is not an isolated incident.

We are all aware of the magnificent service which the Coast Guard has performed in times of natural and ecological disasters.

This has been recognized in many ways.

Under the Water Quality Improvement Act of 1970, the Secretary of Transportation was given jurisdiction for pollution prevention and control in navigable waterways and coast areas. The Secretary has delegated actual operational functioning for his areas to the Coast Guard.

As coastguardsmen pass into the Active Reserve, they provide our Nation with a highly trained manpower pool to deal with situations which create grave threats to our environment, our property, and even our lives.

Mr. President, I would like to add that the Coast Guard itself has a proposal similar to that contained in this legislation. That proposal currently is being studied by the administration.

I would hope that that proposal would be made public by the administration so that information would be available to help in our consideration of this measure.

Mr. President, to give some idea of the scope of Coast Guard activities, I ask unanimous consent to have printed in the RECORD at this point in my remarks a summary of the Coast Guard's pollution and surveillance functions.

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

COAST GUARD POLLUTION CONTROL FUNCTIONS

The Coast Guard has been concerned with and involved to some degree with pollution control efforts for many years. Under our general maritime law enforcement functions, we are responsible for the enforcement of various Federal laws on the high seas and in U.S. waters. These Federal laws include specific anti-pollution statutes such as the Refuse Act of 1899, the Oil Pollution Act of 1961, and the Water Quality Improvement Act of 1970 (PL 91-224). All of these involve activities of the Coast Guard. However, it was not until 1968 that a project was undertaken to assemble the various elements into one program. The first step was the creation in January 1969 of a separate Maritime Pollution Control Branch. A new program was established and elements of other programs were incorporated into it. The new program, based on existing legislation and interagency agreement, has been developed anticipating the enactment of additional pending legislation, which became reality with the signing of PL 91-224.

The Coast Guard's preventive activities include: regulatory measures aimed at prevention of spills from vessels, development and utilization of equipment to prevent spills from grounded and otherwise damaged tankers, prevention of pollution by shore facilities, formulation and enforcement of vessel sewage regulations, public education and international cooperation. We also have plans for offshore terminal regulations and are interested in vessel air pollution and the disposal of waste on the high seas. In addition, major Coast Guard programs, including Aids to Navigation, Bridge Administration, Commercial Vessel Safety, Port Safety, and Boating Safety, while primarily safety-oriented, obviously result in pollution prevention through the reduction of maritime casualties.

Coast Guard detection and response activities include: detection and surveillance of pollutant spills, investigation of pollution incidents, development and utilization of more efficient and effective cleanup methods. The National Oil and Hazardous Materials Contingency Plan is implemented by the National Response Center, pollution strike forces and administration of the Revolving Fund.

In a major effort to gain a more thorough understanding of the actual dangers presented by various pollutants, the Coast Guard carries on various pollution base line monitoring programs and also incorporates pollution research and monitoring into the Oceanographic, Ocean Station and Polar Scientific Operations programs.

The Coast Guard has traditionally emphasized cooperation with other government agencies in the national interest. This has been especially important in the pollution control field and will continue with the added thrust of the anticipated creation of EPA and NOAA. We are also aware of the Navy's willingness to provide resources for assisting in the national maritime environmental protection effort, and we are interested in arranging a cooperative allocation of responsibilities with them so as to make efficient use of all available resources.

EXAMPLES OF COAST GUARD MISSIONS WHICH ARE PRESENTLY UNDERGOING EXPANSION

1. Oceanography—Federal agencies (including DOD) as well as the business and academic communities are generating an ever-increasing demand for information concerning the physical characteristics and behavior of the oceans. Many Coast Guard vessels now assist in gathering oceanographic data in addition to performing other duties. Three Coast Guard cutters are now assigned

the primary duty of conducting oceanographic surveys.

2. Aids to Navigation—Increased commercial and recreational traffic in our harbors and waterways is resulting in increased demand for facilities to aid in conducting the mariner safely to his destination. New methods of radar monitoring, harbor traffic control and obstruction marking are being evaluated with a view to reducing navigational hazards.

3. SAR—The Search and Rescue workload, particularly in connection with recreational boating, grows heavier from year to year. Education and enforcement activities must grow apace. Presently developing approaches in this area are grant in aid programs to state governments to bolster state boating safety programs, the development and establishment at the Federal level of minimum safety standards for boats and related equipment, and the implementation of pilot programs to precisely measure the effect of Coast Guard efforts in boating safety, so that resources may be allocated to cost-beneficial programs.

4. Marina Environmental Protection Activities—The Water Quality Improvement Act of 1970 (PL 91-224) expands the Coast Guard's regulatory authority in the prevention of marine pollution through the discharge of oil into the navigable waters of the U.S. or the waters of the contiguous zone. It directed the formulation of a contingency plan to provide for the establishment of a strike force and a system of surveillance and notice which was published by the President in June 1970. The plan specifies that the strike force shall be furnished by the Coast Guard. In Executive Order 11548 the President delegated the following authority and responsibilities to SECTRANS, who is in turn expected to redelegate them to the Coast Guard:

(a) Regulatory authority to prevent discharges of oil from vessels or transportation-related on shore or offshore facilities.

(b) Regulatory authority governing inspection of oil carrying cargo vessels.

(c) Administration of the revolving fund established to pay for government clean-up of spills of oil or other hazardous materials.

(d) Enforcement authority in the boarding and inspection of vessels and facilities for which we have regulatory responsibility.

(e) Authority to clean up spills in the coastal area which are not properly cleaned up by the spillers.

(f) Direction of efforts to remove a substantial threat of oil spillage in coastal area including destruction of a vessel if necessary.

It is in this mission area, as well as in the occurence of natural disasters such as hurricanes and floods, that peacetime employment of the Coast Guard Selected Reserve appears most useful. Episodes of this nature would be typified by a short term requirement for manpower in excess of that normally available to the active duty Coast Guard in a specific area. Moreover, the additional manpower required must be trained in Coast Guard operating methods and must be available on short notice. The Selected Reserve in many cases would be the sole source of additional manpower meeting these criteria:

(a) Location—The Selected Reserve is an organized force already located at or near all major port/port complex sites and, therefore, ideally situated to provide support under the direction of cognizant active duty commands.

(b) Training—Port security units contain, in addition to port security/port safety skills, personnel trained in fire fighting, damage control, pump operations, boat operations, communications and law enforcement. With specific respect to oil pollution, the port security training curriculum presently used includes knowledge of Federal statutes, investigative procedures, collection of evidence, sampling and the reporting of violations.

(c) Availability—the Selected Reserve constitutes the Coast Guard's early response Reserve force for military mobilization. This quick response capability would be equally important to and available for domestic emergency.

By Mr. TOWER:

S.J. Res. 160. Joint resolution amending the provision of law which denied Federal disaster assistance to properties which could have been covered by flood insurance but were not. Referred to the Committee on Banking, Housing and Urban Affairs.

Mr. TOWER. Mr. President, recent seasonal tropical storms have left in their wake considerable property damage along the Texas coast. Destruction caused by the hurricane force winds notwithstanding, the most serious threat to property has stemmed from the torrents of rain which have fallen upon lands well past their absorption levels. Rising waters from the hours of continuous rainfall coupled with high tides have invaded coastal homes and business establishments, remained for several days, and then receded leaving behind flood damage calculated in the millions of dollars in addition to incalculable personal grief and sorrow.

Prior to enactment of the National Flood Insurance Act of 1968, there was no insurance coverage available to those who sought it. The private property insurance industry had concluded that it could not provide flood insurance on an economically feasible basis—at least during the early years of such a program—without Government assistance. Congress, therefore, recognizing the pressing need for flood insurance, enacted the National Flood Insurance Act of 1968, embodied within the Housing and Urban Development Act of 1968 as title XIII.

The flood insurance program under the 1968 act enables property owners to buy insurance against losses resulting from physical damage to or loss of real or personal property arising from floods occurring in the United States. The program is carried out in cooperation with private property insurance companies and through existing agents, brokers, and adjusting organizations.

Mr. President, this program of flood insurance performs an important function in that it permits individuals to purchase policies at premium levels which they can afford. However, there is a provision in the act relative to the purchase of the policies which causes me concern. It is provided in the statute that individuals and small businesses in an area eligible for flood insurance are precluded from receiving specified types of Federal disaster assistance, after the insurance has been available in their area for 1 year, to the extent that their losses would be covered by insurance. On the surface, this is a reasonable provision, preventing duplication of benefits for property loss covered under flood insurance policies. However, upon further examination a possible inequity becomes apparent.

Congress, in enacting the legislation, intended that there be a "reasonable" lapse of time from the date insurance became available in the particular area until the penalty provision preventing duplication of benefits should take effect. One need but examine the reports from the Department of Housing and Urban Development to see that very few have availed themselves of the opportunity to purchase flood insurance. In view of the need for insurance and the risk avoided by purchase of the policies, it becomes apparent that the program has not been adequately publicized at the local level. Due to the inadequate publicity, the statutory 1-year provision has not, in many instances, been a reasonable time period. Administration of the penalty provision at the present time would thus be most inequitable.

Mr. President, the joint resolution I introduce today would amend the provision of law which denies Federal disaster assistance to properties which could have been covered by flood insurance but were not. This resolution would postpone the applicability of the penalty provision until December 31, 1973.

The additional time made possible by adoption of this resolution will enable the Department of Housing and Urban Development in cooperation with local officials and insurers to better advertise the availability of flood insurance for those thousands who inhabit the flood-prone areas of our Nation. I feel that other provisions of the act require close examination, especially those which require implementation of local land use controls by December 31, 1971. Currently my staff is engaged in a series of discussions with locally elected officials representing cities and towns situated along the Texas coastal plain relative to the effect of implementation of such controls. Additional legislation might well follow from these discussions; however, in the interim, I surge the adoption of this resolution introduced today in order that many of the immediate inequities might be corrected and future inequities might be avoided.

Mr. President, I ask unanimous consent that the text of this resolution be printed at this point in the RECORD.

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

S. J. RES. 160

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of subsection 1314(a)(2) of the National Flood Insurance Act of 1968 shall not apply with respect to any loss, destruction, or damage of real or personal property that occurs on or before December 31, 1973.

By Mr. FONG (for himself, Mr. BAKER, Mr. BIBLE, Mr. HOLLINGS, Mr. HUMPHREY, Mr. METCALF, Mr. MUSKIE, and Mr. PROXMIRE):

S.J. Res. 161. Joint resolution proposing an amendment to the Constitution of the United States with respect to the eligibility of naturalized citizens to hold the office of President. Referred to the Committee on the Judiciary.

Mr. FONG. Mr. President, for long years, I have been in the forefront of the fight to treat all persons equally and

fairly, especially all citizens of these United States.

Accordingly, I propose an amendment to the Constitution to permit not only natural born, but naturalized citizens, to be eligible for the Office of President of the United States.

The Supreme Court, in *Schneider* v. *Rusk*, 377 U.S. 163 (1964), holding invalid a statute which provided for loss of citizenship by a naturalized American who resided for 3 years in the country of his birth or former nationality, said:

> This statute proceeds on the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born. This is an assumption that is impossible for us to make. Moreover, while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process. . . . A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship.

The Supreme Court in *Rogus* v. *Bellei*, U.S. ——, decided April 5, 1971, cited Schneider against Rusk with approval and quoted therefrom to the effect that "the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive." (P. 19 of Slip Opinion, quoting 377 U.S., at 165.)

The Court, in the Bellei case, quoted the first sentence of the 14th amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

Much was made of the "14th amendment-first-sentence citizen" by Mr. Justice Blackmum in the Opinion of the Court in that case.

Yet the Constitution itself differentiates between the native born and the naturalized citizens.

Article II, section 1, clause 4 of the Constitution reads:

> No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President. . . .

Thus, naturalized citizens, being barred from the Office of President and by inference from the Office of Vice President, are declared to be less than natural or native born citizens—they are denied the privilege of serving their adopted country in the highest office it holds open to native born citizens.

Naturalized citizens are truly denied first-class citizenship.

Or, as Mr. Justice Blackmun calls them, "14th amendment-first-sentence citizens" are being denied "the rights of citizenship of the native born" which "are—deemed—of the same dignity and are coextensive" with the rights of naturalized citizens. (See *Schneider* v. *Rusk*, 377 U.S., at 165).

These naturalized citizens, like every citizen of the United States, are entitled to all the rights and privileges of citizenship afforded the native born.

This amendment to the Constitution would remove this disability from naturalized citizens. Naturalized citizens would be eligible for the Office of President.

Both the native born and the naturalized citizens of this country, I submit, are the poorer for thus being deprived of the opportunity to vote for the one person—be he native born or naturalized—whom they deem to be the best qualified person in the United States for that most exalted of offices—the Presidency of the United States of America.

Not only the native born and the naturalized citizens of the United States, but our Nation and the world may well be harmed by the disqualification of such naturalized citizens for the Office of President. The best qualified person may now be deemed a second-class citizen because of his being a naturalized citizen rather than a native-born citizen—and the United States and the world is deprived of his leadership.

All citizens should be given their fullest choice in the selection of the President—especially in these troubled times, it is essential that the best person be eligible for and elected to the Office of President.

No such artificial barrier as second-class, naturalized status, should prevent his being able to serve his country of adoption if he should be the choice of a majority of the citizens of these United States, his country of adoption.

I ask unanimous consent that the text of the joint resolution be printed in the RECORD at this point.

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

S.J. RES. 161

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of the several States within 7 years after its submission to the States for ratification:

"ARTICLE —

"Notwithstanding the provision of clause 4 of section 1 of article II of the Constitution, a person who is a naturalized citizen of the United States shall be eligible to hold the office of President if he is otherwise eligible under such clause to hold such office."

By Mr. BENTSEN:

S.J. Res. 162. Joint resolution to amend the Disaster Relief Act of 1970 to authorize disaster loans with respect to certain losses arising as the result of recent natural disasters, and for other purposes. Referred to the Committee on Public Works.

Mr. BENTSEN. Mr. President, I am introducing legislation today to extend flood insurance and disaster relief to the residents of Texas communities damaged by hurricanes in recent years.

Many of my fellow Texans are ineligible for such assistance because of a failure to register for Federal flood insurance during a 1-year period allocated under previous legislation. I believe there were numerous reasons for this lack of registration, but mainly because of the failure to allow for sufficient notice by the Federal Government.

This proposed legislation would amend the present flood insurance program of 1968 and Disaster Relief Act to offer financial aid to those not currently covered by either of these Federal programs. It would assist those individuals with a financial burden incurred in reconstruction of homes and small businesses.

The legislation would extend the sign-up period for 1 more year and make available Small Business Administration loans under the provisions of the flood insurance program.

I am confident that this legislation will give to the people of Texas and other States ravaged by the hurricanes the initial boost to rebuild for the future.

ADDITIONAL COSPONSORS OF BILLS AND JOINT RESOLUTIONS

S. 555

At the request of Mr. KENNEDY, the Senator from Texas (Mr. BENTSEN) was added as a cosponsor of S. 555, to authorize the establishment of an older worker community service program.

S. 1124

At the request of Mr. WILLIAMS, the Senator from Texas (Mr. BENTSEN) was added as a cosponsor of S. 1124, to amend the Older Americans Act of 1965 to authorize a special emphasis on the transportation research and demonstration project program.

S. 1585

At the request of Mr. PERCY, the Senator from Indiana (Mr. BAYH) was added as a cosponsor of S. 1585, to amend title XVIII of the Social Security Act to provide for the coverage, under part A of such title, of certain drugs which are prescribed and furnished, whenever possible, by generic name.

S. 1597

At the request of Mr. HARTKE, the Senator from Minnesota (Mr. HUMPHREY) was added as a cosponsor of S. 1597, a bill to amend title 38, United States Code, so as to provide that increases in social security benefits, railroad retirement benefits, and cost-of-living adjustments of civil service retirement annuities shall be disregarded under certain circumstances in determining eligibility for or the amount of dependency and indemnity compensation for dependent parents of veterans and non-service-connected pension for veterans and widows.

S. 2161

At the request of Mr. HARTKE, the Senator from Minnesota (Mr. HUMPHREY), and the Senator from Oklahoma (Mr. HARRIS) were added as cosponsors of S. 2161, to amend chapters 31, 34 and 35 of title 38, United States Code, to increase the vocational rehabilitation subsistence allowances, the educational assistance allowances, and the special training allowances paid to eligible veterans and persons under such chapters.

S. 2360

At the request of Mr. WILLIAMS, the Senator from Nevada (Mr. CANNON) and the Senator from Rhode Island (Mr. PELL) were added as cosponsors of S.

2360, the Automobile Driver Education Act.

S. 2412

At the request of Mr. ALLOTT, the Senators from Maryland (Mr. MATHIAS and Mr. BEALL) were added as cosponsors of S. 2412, to amend the Urban Mass Transportation Act of 1964 to waive in certain cases the requirement that assistance provided under that act must be in furtherance of a program for a unified officially coordinated urban transportation system.

S. 2427

At the request of Mr. WILLIAMS, the Senator from Utah (Mr. Moss) was added as a cosponsor of S. 2427, the National Community Antenna Television Act of 1971.

S. 2482

At the request of Mr. KENNEDY, the Senator from Wyoming (Mr. McGEE) was added as a cosponsor of S. 2482, the Indian Education Act.

S. 2497

At the request of Mr. WILLIAMS, the Senator from Indiana (Mr. BAYH), the Senator from Idaho (Mr. CHURCH), the Senator from California (Mr. CRANSTON), the Senator from Oklahoma (Mr. HARRIS), the Senator from Minnesota (Mr. HUMPHREY), the Senator from South Dakota (Mr. McGOVERN), the Senator from Montana (Mr. METCALF), the Senator from Minnesota (Mr. MONDALE), the Senator from Maine (Mr. MUSKIE), the Senator from Wisconsin (Mr. NELSON), and the Senator from Rhode Island (Mr. PELL) were added as cosponsors of S. 2497, the Vietnam Children's Care Agency Act.

S. 2509

At the request of Mr. SCOTT, the Senator from Texas (Mr. TOWER) was added as a cosponsor of S. 2509, to incorporate Pop Warner Little Scholars, Inc.

S. 2569

At the request of Mr. WILLIAMS, the Senator from Connecticut (Mr. RIBICOFF) was added as a cosponsor of S. 2569, to permit the broadcasting of information on State-run lottery programs via television or radio.

SENATE JOINT RESOLUTION 79

At the request of Mr. HARTKE, the Senator from Illinois (Mr. STEVENSON), the Senator from Maryland (Mr. BEALL), and the Senator from New Mexico (Mr. MONTOYA) were added as cosponsors of Senate Joint Resolution 79, proposing an amendment to the Constitution of the United States relative to equal rights for men and women.

SENATE JOINT RESOLUTION 157

At the request of Mr. TALMADGE, the Senator from Minnesota (Mr. MONDALE) and the Senator from North Carolina (Mr. JORDAN) were added as cosponsors of Senate Joint Resolution 157, to assure that every schoolchild will receive a free or reduced price lunch as required by section 9 of the National School Lunch Act.

SENATE JOINT RESOLUTION 158

At the request of Mr. WEICKER, the Senator from Wyoming (Mr. HANSEN), the Senator from Oklahoma (Mr. HARRIS), the Senator from Kansas (Mr. PEARSON), and the Senator from Michigan (Mr. GRIFFIN) were added as cosponsors of Senate Joint Resolution 158, to declare May 6, 1972, "Clean Up America Day."

AMENDMENT OF FEDERAL WATER POLLUTION CONTROL ACT—AMENDMENT

AMENDMENT NO. 442

(Ordered to be printed and referred to the Committee on Public Works.)

Mr. NELSON submitted an amendment, intended to be proposed by him, to the bill (S. 523) to amend the Federal Water Pollution Control Act, as amended.

MILITARY PROCUREMENT AUTHORIZATIONS, 1972—AMENDMENTS

AMENDMENT NO. 443

(Ordered to be printed and to lie on the table.)

Mr. HUGHES submitted amendments, intended to be proposed by him, to the bill (H.R. 8687) to authorize appropriations during the fiscal year 1972 for procurement of aircraft, missiles, naval vessels, tracked combat vehicles, torpedoes, and other weapons, and research, development, test, and evaluation for the Armed Forces, and to prescribe the authorized personnel strength of the Selected Reserve of each Reserve component of the Armed Forces, and for other purposes.

AMENDMENT NO. 444

(Ordered to be printed and to lie on the table.)

Mr. SAXBE (for himself and Mr. HUGHES) submitted an amendment, intended to be proposed by them, jointly, to House bill 8687, supra.

AMENDMENT NO. 445

(Order to be printed and to lie on the table.)

Mr. EAGLETON (for himself, Mr. ANDERSON, Mr. BAYH, Mr. CASE, Mr. CHURCH, Mr. CRANSTON, Mr. FULBRIGHT, Mr. GRAVEL, Mr. HARRIS, Mr. HART, Mr. HARTKE, Mr. HATFIELD, Mr. JAVITS, Mr. KENNEDY, Mr. MANSFIELD, Mr. McGOVERN, Mr. MONDALE, Mr. PROXMIRE, Mr. STEVENSON, Mr. TUNNEY, and Mr. WILLIAMS) submitted an amendment, intended to be proposed by them, jointly, to House bill 8687, supra.

ADDITIONAL COSPONSORS OF AMENDMENTS

AMENDMENT NO. 425

At the request of Mr. NELSON, the Senator from Indiana (Mr. BAYH), the Senator from South Dakota (Mr. McGOVERN), the Senator from Michigan (Mr. HART), the Senator from Alaska (Mr. GRAVEL), the Senator from Oregon (Mr. PACKWOOD), the Senator from New Jersey (Mr. CASE), and the Senator from Minnesota (Mr. HUMPHREY) were added as cosponsors of amendment No. 425, to H.R. 8687, the military procurement authorizations bill, 1972.

AMENDMENT NO. 430

At the request of Mr. ALLOTT, the Senator from Arizona (Mr. GOLDWATER), the Senator from Washington (Mr. MAGNUSON), and the Senator from Nebraska (Mr. HRUSKA) were added as cosponsors of Amendment No. 430, to H.R. 8687, the military procurement authorizations bill, 1972.

ANNOUNCEMENT OF HEARINGS ON INDIAN LEGISLATION

Mr. BURDICK. Mr. President, I want to announce to the Senate, the Indian people, and other interested individuals, hearings on several Indian bills before the Subcommittee on Indian Affairs will be held during the month of October.

On October 7, 1971, the subcommittee will consider S. 1104, to provide for the disposition of funds arising from judgments in favor of the Confederated Tribes of the Colville Reservation; S. 2339, to provide for the disposition of judgment funds to the public of Laguna; and S. 2095, to provide for the disposition of funds to pay a judgment in favor of the Yankton Sioux Tribe.

On October 15, 1971, the subcommittee will consider S. 1101, to authorize the purchase, sale, and exchange of certain lands on the Kalispell Indian Reservation; S. 345, to authorize the sale and exchange of certain lands on the Coeur d'Alene Indian Reservation; S. 925, to declare that certain public lands are held in trust by the United States for the Summit Lake Paiute Tribe; S. 1115, to declare that certain federally owned lands are held by the United States in trust for the Paiute-Shoshone Tribe of the Fallon Reservation and Fallon Colony, Nev.; and S. 1218, to declare that certain federally owned lands in the State of Nevada are held by the United States in trust for Reno-Sparks Indian Colony.

On October 21, 1971, the subcommittee will consider S. 2408, to extend the life of the Indian Claims Commission.

On October 26, 1971, the subcommittee will consider S. 2250, to authorize grants for the Navajo Community College.

It is anticipated that Indian tribal and administraton officials will be the principal witnesses at the announced hearings.

All of the aforementioned will be open public hearings and each will commence at 10 a.m. on the dates indicated in room 3110, New Senate Office Building.

HEARINGS SCHEDULED ON EXECUTIVE ORDER WHICH EXPANDED THE POWERS OF THE SUBVERSIVE ACTIVITIES CONTROL BOARD

Mr. ERVIN. Mr. President, on October 5 and October 7, 1971, the Subcommittee on Separation of Powers, of which I am chairman, will conduct hearings on the President's Executive Order 11605, of July 2, 1971, relating to security requirements for Government employment.

Executive Order 11605 purports to give the Subversive Activities Control Board authority, upon petition of the Attorney General, to hold hearings to determine whether any organization or group is totalitarian, fascist, Communist, or subversive, or has the policy of "unlawfully advocating the commission of acts of force or violence * * *" or which "seeks to

overthrow the Government of the United States or any State or subdivision thereof by unlawful means."

It appears to me to be manifest that the real objective of the order is to empower the SACB to brand, as it sees fit, any organization, or group, as intellectually or politically dangerous to the established order. However, Mr. President, it is not the purpose of these hearings to investigate or discuss subversive activities, but, on the contrary, to consider whether the issuing of this Executive order was within the constitutional power of the President or whether it was, as I believe, an act of "legislating" on the part of the President. In my view, this Executive order is another in a long line of attempts on the part of the Executive to usurp duties which are reserved by the Constitution to the Congress.

These hearings will also consider my bill, S. 2466, which would prohibit the SACB from carrying out the duties purportedly given it by the President's Executive Order 11605, and Senate Resolution 163, which would express the sense of the Senate that the Executive order is "an attempt to usurp the legislative powers conferred on Congress by the Constitution."

Attorney General John N. Mitchell and SACB Chairman John W. Mahan have been invited to testify. Three of the subcommittee's consultants, Profs. Philip B. Kurland of the University of Chicago Law School, Ralph K. Winter, Jr., of Yale Law School, and Arthur S. Miller of the George Washington University National Law Center, will testify as well as question witnesses.

The hearings will be held in room 2228, New Senate Office Building, on October 5 and October 7, 1971, and will begin at 10 o'clock each day.

I invite all Senators and other interested persons to participate in this inquiry. The subcommittee's offices are in room 1418 New Senate Office Building, Washington, D.C., telephone 225–4434.

ADDITIONAL STATEMENTS

DEREGULATION OF RAILROAD RATES

Mr. TAFT. Mr. President, on March 3, I introduced S. 1092, the Modern Railway Transportation Act. One of the significant provisions of this measure involves the deregulation of railroad rates. In subsequently testifying before the Surface Transportation Subcomittee I pointed out the ICC was created in large part to prevent arbitrary and discriminatory rail rates. I stated, however, that the ICC has sometimes done exactly the opposite. Rates vary not only as to the commodity shipped but as to the direction in which the freight moves.

To ship synthetic rubber, for example, from Louisville, Ky., to New York for export, 834 miles, the rate in 1970 was 95 cents per hundredweight. But the rate for that same commodity from Louisville to Toledo, a distance of only 298 miles, was $1.18. In my judgment, a rate system under which it costs more to ship rubber 298 miles than 834 miles is arbitrary, discriminatory, and ill-conceived.

On March 5, 1971, Mr. Herbert O. Whitten, a transportation consultant for the Department of Transportation, wrote to me and estimated that—

> There are in existence 43 trillion railroad rates on file at the ICC . . . He wrote that he has personally measured the tariffs on file in the ICC tariff room and counted 4,300 feet of tariffs—without an index to the rates covered! This is equal to a stack 7½ to 8 times as tall as the Washington Monument and 3½ times as tall as the Empire State Building with its TV antenna!

On January 28, 1971, the Honorable Richard McLaren, Assistant Attorney General, Antitrust Division, stated:

> Under ICC rate-making proceedings, rates generally are allowed to rise to the level of the highest cost carrier in the market. For the most part, only inefficiency is rewarded in this protective atmosphere, and in the long run the nation's resources are seriously misallocated.

He concluded by stating:

> Of one thing I am sure, competition as a regulator has a far better track record than the administrative agencies.

I have maintained that railroad rate regulation has resulted in higher costs for shippers and customers. When rates are set by regional cartels, with the blessing of the ICC, it is the American consumer who has to pick up the tab.

My position on this has naturally raised questions on the part of some Senators who ask if deregulation would not simply allow the railroads to raise their rates even higher. In my own mind I believe that free and open price competition between railroads is the best protection for the consumers and shippers of this country. This view has now been confirmed by a recent study undertaken for the Brookings Institution by Prof. Thomas Gale Moore, of Michigan State University. The study will be presented to the Brookings Institution during the latter part of October and is currently in draft form.

Because this study has been alluded to in several articles published in the Washington Post, I believe that it should now be brought to the attention of the Senate.

While I may not concur in all of the positions reached by Professor Moore, I do concur in his basic conclusion:

> While not all of the costs have been identified and the figures are, at best, orders of magnitude, they do indicate that ICC regulation costs the economy billions of dollars. In 1968, with national income generated in transportation just over $27 billion, about one-fourth of that may be due to regulation. As a conclusion, therefore, it seems urgent that steps be taken to eliminating or reducing significantly regulation of surface-freight transportation.

I ask unanimous consent that the draft of Professor Moore's study, entitled "The Feasibility of Deregulating Surface Freight Transportation," be printed at this point in the RECORD.

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

THE FEASIBILITY OF DEREGULATING SURFACE FREIGHT TRANSPORTATION

(By Thomas Gale Moore)

A large and growing body of literature has criticized the Interstate Commerce Commission and its regulation of surface freight transportation.[1] Study after study has pointed out the inefficiencies generated by the regulatory process, the effect of value of service rate making, and the effect of the controls on entry, investment and disinvestment. Much of this literature, however, has been qualitative rather than quantitative. Only Ann Friedlaender [1] [7] has attempted to quantify part of the cost of regulation on the economy. While most studies have indicated or suggested policy alternatives that would improve, in the author's opinion, the allocation of resources the analysis has tended to focus on existing problems rather than the alternatives. The objective of this paper, therefore, is two-fold. First to estimate the order of magnitude of the cost on the economy of regulation. Second, to consider a few major proposals for reducing or eliminating regulation and consider the costs of these alternatives and compare them with the present system.

EXISTING COSTS OF REGULATION

We can identify several kinds of losses that stem from regulation. First, regulation may increase costs within a particular mode. For example, regulation of trucking limits the ability of regulated trucks to secure backhauls; moreover, the legal restrictions on private and agricultural motor carriers force their trucks to travel empty a considerable portion of the time as well. Therefore, costs of motor carriers are increased above what is necessary to carry present loads. In the railroad industry, prohibitions on abandonment of uneconomic services also have inflated costs. For water carriers, the prohibition on mixing non-regulated with regulated tows or more than three non-regulated tows have also led to higher costs.

In other words, regulation has raised the cost of providing a given amount of service. This type of cost to the economy, Liebenstein [11] found tended to be more substantial than the traditional welfare triangle.

A second cost to the economy from regulation stems from any shifting of traffic from low cost modes to high cost modes. For example, if rail rates are raised relative to truck rates then some traffic which would be more economically carried by rail will be moved by truck. Potentially, regulation could shift traffic among all the modes: rail to water, rail to truck, truck to or from water, surface to air or vice versa, and all other modes to or from pipelines.

A third major cost of regulation stems from pricing above marginal costs—the traditional welfare triangle [6]. This is the allocative cost from the nonshipment of goods due to higher prices.

A fourth loss from regulation stems from distortions in other sectors due to locational and product price discrimination. Only Friedlaender [7] has ever attempted to quantify this loss. If for example, the rate for shipping scrap iron is higher relative to cost than the rate for shipping iron ores, then there will be less recycling of scrap iron than there would be if rates were based strictly on costs. As a consequence, more iron ore will be used by the economy and less scrap. Other distortions result from the general tendency to price the shipment of manufactured goods relatively high compared to cost while raw materials rates tend to be low compared to cost. This leads manufacturers in locating plants near their major customers rather than near the source of raw materials. Besides obviously misallocating resources, it leads to congestion in urban areas with severe external costs.

A fifth loss and possibly the largest, is the dynamic losses that stem from a reduction in incentives to innovate due to the regulatory process. If regulatory inertia and pricing umbrellas inhibit innovation, this can

[1] See [1], [2], [3], [4], [7], [8], [9], [10], [26], [28], [29], [34], [37], [38].

lead to higher costs and a less progressive industry than would exist in the absence of regulation. MacAvoy and Sloss [8], Gellman [29], and others [9] have argued that in fact regulation has held up major innovations, especially in railroading.

This paper will not attempt to estimate the losses stemming from distortions in other sectors or the dynamic losses from the introduction of innovations being held up by regulation. There does not seem to be sufficient data or information available to measure either of these distortions though Ann Friedlaender has made a start on estimating the distortion loss and MacAvoy and Sloss have given a good description of the dynamic losses that result from innovations. They estimated that the loss from simply not introducing unit coal trains was about $9 million each year that the innovations were held up [8, p. 61].

COSTS FROM INEFFICIENT PROVISION OF SERVICES

As Liebenstein has pointed out costs of producing a product or service in a noncompetitive situation may vastly exceed the lowest possible cost. Such costs are dead losses to the economy no matter what other misallocations exist. Clearly if a service can be provided with a smaller use of resources it will be desirable to do so. Any saving in resources can generate additional goods and hence a rise in real income. In other words, second best considerations do not hold [16]. As Mishan [17] has pointed out, it is always desirable to eliminate imperfections that lead to a smaller output.

Motor common carriers

Regulation has forced inefficient practices on common carrier trucking as has been pointed out by Nelson [10]. A 1941 study conducted by The Board of Investigation and Research [13] indicated that the certificate of convenience and necessity that carriers must always have indicate the routes or territories over which such operations may be conducted, the points to and from which the carrier may render its service, the commodities or classes of commodities which may be moved, and the extent to which the authorized movement is tied to specific highways routes and gateways.

Commodity restrictions have often been very narrowly defined. The Board of Investigation and Research Study indicated that 62% of the truckers have been limited to special commodities and 40% of those limited had been limited to one commodity or commodity class. Eighty percent had been restricted to six or less [13, pp. 20–32]. It should be obvious that such limitations impose major costs on common carrier trucking firms. In particular these restrictions make the filling of backhauls more difficult and thereby leading to the underutilizing of trucks.

About 70 percent of the regular route common carriers possessed less than full authority to serve intermediate points on their routes, while approximately ⅓th had no authority to serve any intermediate point [13, p. 77]. Irregular route carriers were generally limited to radial service, which meant that their traffic had to be picked up and delivered to one or more specific points within a geographic region. Many such carriers had to operate through points that they could not legally serve; that is, they could not legally pick up and deliver goods within those areas. Regular route common carriers often had to follow circuitous routes and specific highways. The Board of Investigation and Research Study also found that a third of the inter-city truckers had return limitations with almost 10 percent having no authority to transport traffic on their return trip [13, p. 126].

Clearly these restrictions on the operating authority of motor carriers are very costly to the economy. In reporting on these restrictions, James C. Nelson concluded that "it is probably that a roughly comparable pattern is in existence today" [10, p. 393]. The Interstate Commerce Commission acknowledged to a Senate Small Business Committee in 1955 that the same type of restrictions were still in operation. There is no reason to believe that they have been diminished or abolished since.

Moreover, the ICC requires that merged companies follow the previously authorized routes of each company when shorter routes may be feasible. Thus to ship from the territory of one firm to that of the other, the trucks must go through the point or points where the territories overlap.

Adding to the cost of regulation is the tendency of motor carriers to practice nonprice competition mainly by increasing their capacity. Price competition is virtually impossible due to ICC regulation. Increased capacity permits a trucking firm to offer faster and more convenient service and therefore provides it with a competitive edge over other firms. This leads to excess capacity, lower load factors and more waste. However, such increases in service may not be net losses to the economy; there may be some gain to the consumer in better service.

In the middle 1950s, a series of court decisions led to the deregulation of trucking of fresh dressed poultry (1965) and frozen poultry (1966). A 1966 court decision held that frozen fruit and vegetables were exempt commodities under the ICC act. The impact of deregulation on rates and services was studied by the U.S. Department of Agriculture [14], [15]. The years 1952 and 1955 (under regulation) were compared with the fiscal year 1975 for fresh and frozen poultry. To measure the impact of deregulation on frozen fruits and vegetables, the Department compared 1955 to 1957.

The results of these studies indicated that rates fell and services improved. The rates on fresh poultry fell from 12 to 53 percent for different markets while the rates for frozen poultry declined 16 to 59 percent. The average rate reduction on fresh poultry was 33 percent and for frozen poultry 36 percent [14, pp. 65–66]. In addition stop-off charges were reduced or eliminated and the number of stops permitted was increased. For frozen fruits and vegetables the weighted average decline in rates was 19 percent while rail rates on the same products increased 6 to 14 percent [15, pp. 1–3]. Again stop-off charges were reduced substantially and the number permitted increased.

In collecting the data on rates, shippers were asked the advantages and disadvantages of regulated vs. unregulated carriage. While not proof that service was better under unregulated trucking, it is indicative that poultry shippers listed only 20 advantages of regulated carriage but 32 disadvantages while they found 82 advantages of unregulated and 54 disadvantages [14, pp. 47–53].

Since regulation has not improved service in the eyes of shippers, any increase in costs due to regulation can be considered a net loss. There is no reason to believe that the commodities deregulated by court decisions were atypical and that we cannot treat these commodities as a random sample of all commodities shipped by truck. Like Friedlaender [1, p. 74], we will, therefore, assume that rates would fall 20 percent generally if regulation of trucking were eliminated.

In 1968, total truck revenues of class I and class II common carriers were $9.6 billion [18 (1970), p. 141] [19, Table 37]. A fall of 20 percent in rates would reduce revenue, on the same volume, $1.92 billion. At this lower level of revenue, the industry would presumably cover its costs including a normal profit. Thus this decline in revenue must reduce monopoly profits and/or costs by a total of $1.92 billion. Any reduction in costs would be a real gain to the economy while a reduction in monopoly profits is simply an income transfer.

There are several ways to estimate what proportion of the reduction would be cost savings and what proportion would come from monopoly profits. In 1968, the value of tangible property less reserves for amortization of class I and II motor carriers certificates was $218 million [19, Table 2]. When a motor carrier purchases a certificate the cost goes into this account. Carriers at their discretion, however, can amortize this investment over a five year period. Figures from class I common carriers (general freight, intercity) suggest that about twenty percent has been set aside as reserves. Thus the gross value of these certificates would be $262 million. However this figure is clearly an underestimate since some of these certificates were purchased long ago or even may never have been sold.

If all trucking firms were continuously being bought and sold or if bookkeeping practices were not conservative but truly reflected the value of the firms' certificates, this number would equal the present value of the monopoly gains due to regulation. There is no doubt that it is an underestimate—how much of an underestimate, we don't know.

If investors in this industry must earn 10% before taxes, annual monopoly profits due to regulation would be $26.2 million. Even if investors demanded a higher rate of return before taxes of, say, 20% the annual amount is still fairly negligible. Subtracting this number from $1.92 billion would indicate the amount costs would fall with deregulation. In other words, the increase in cost due to regulation might be as much as $1.89 billion dollars; this is our upper estimate.

Another way to estimate the amount costs are inflated is to look at net profits in 1968. Some of these profits are in fact return on equity capital and therefore not true monopoly profits. Total assets of class I and II common carriers were $2.7 billion in 1968 [18 (1970, p. 142] [19, Table 37]. If the industry must earn 10% before taxes and it is entirely equity financed it would need $270 million a year to pay for its investment. Since net operating income was $499 million, $229 million would be left as the amount of monopoly profits. Subtracting $229 million from $1920 million indicates that cost might be inflated by $1.69 billion. If all of the $499 million were monopoly profits and there was no return due on investment then the minimum estimate of the increase in cost due to regulation would be 1.4 billion dollars.

Private trucking

Regulation imposes large costs on private trucking and unregulated farm trucking. Private trucking is in general prohibited from soliciting on a commercial basis traffic. Since few companies are in a position to utilize their trucks full both ways and since the normal flow of goods for a company would only be in one direction, backhauls will normally have to be empty. Similarly, farm trucking often brings goods from agricultural areas to consumer areas but there is little exempt agricultural goods flowing in the opposite direction. In other words regulation imposes considerable amount of empty backhauls on private and unregulated trucking, in addition to the costs estimated above for common carrier trucking.

In the absence of regulation private trucking should be able to secure the same proportion of backhauls—at least for long hauls—as common carrier trucking does now. Since regulation also imposes empty backhauls on regulated trucking, private trucking could probably do better in the absence of any regulation. A study done by the Department of Transportation gives the percent of empty backhauls by type of truck and by type of carrier, e.g., ICC regulated, private, etc. [20].

For short hauls, soliciting backhaul traffic would be unprofitable and therefore, only long haul private trucking can reasonably expect to seek and gain backhaul traffic in an unregulated market. Since most local traffic uses single unit trucks, while tractor-trailer combinations predominate in the long haul market our data are confined to the latter types of rigs. Table I sets forth the percent of trucks empty by type of vehicle and for private and ICC regulated. It also indicates the percent of truck miles that could be saved if private trucking achieved the same level of utilization as ICC regulated vehicles.

TABLE 1.—PERCENT OF EMPTY TRACTOR-TRAILER TRUCKS

	Private	ICC regulated	Percent capacity saved
Platform	40.9	35.9	7.8
Open-top vans	35.7	20.5	19.1
Vans	31.4	19.0	15.3
Insulated	30.5	21.1	11.9

Source: [20, table 1].

All sectors of the economy do not have equal opportunities to solicit backhauls. While manufacturing, trade, agriculture and forestry would be most able to take advantage of opportunities to compete for backhauls traffic, such sectors as contract construction and services probably would not be able to solicit backhauls as easily. Many types of trucks are so specialized that they can only haul particular goods which makes it difficult to secure backhauls. Consequently the analysis has been confined to the four types of generally used trucks: platform, open-top vans, vans, and insulated, non-refrigerated trucks.

The Census gives the number of truck miles for each of these types of trucks by sector of the economy, e.g., agriculture, manufacturing, wholesale and retail trade, and forestry [21, Table 27]. Table 1 indicates the percent of miles that would be saved with these types of trucks if each sector could secure the same rate of empty backhauls as ICC regulated common carriers. A rather old study done by the Highway Research Board of line haul trucking costs presents charts indicating how cost per vehicle mile varies with load; on this basis it appears that conservatively it costs $0.40 per vehicle mile to move a large truck [22, figures 18, 19, and 20]. With these data the additional miles that could be carried given the existing trucks could be computed and alternatively the additional savings in truck miles to carry the same shipments could be estimated.

It could be argued that trucks owned by forestry operators would be operating in areas where securing backhauls would be difficult. If such trucks are excluded then private trucking in manufacturing, trade, and agriculture could carry the same loads with a reduction of 390 million vehicle miles if they could achieve the same performance as ICC regulated. This amounts to about $150 million savings. Alternatively, if forestry trucks could do as well, the saving would be about 420 million vehicle miles or about $170 million. However, if all industry could achieve the average performance of ICC regulated trucks, the saving in vehicle miles would be about 2400 million and the dollar saving just under one billion.

Railroads

Waste due to regulation of railroads are obviously substantial. They are deterred from abandoning unprofitable routes and services. While the rental rates on freight cars appear to be so low as to provide an inadequate incentive for railroads to purchase freight cars, it does provide an incentive to hoard cars in order to provide better service to their customers. Regulation, MacAvoy, Sloss [18], Gellman [29] and others have pointed out, has deterred innovations in the railroad industry with the result that costs are higher than they would be without regulation. Passenger losses clearly have added to the costs of railroads. In general these costs are substantial, but quantifying them is difficult.

Ann Friedlaender, in a recent paper [7], has attempted to quantify these losses due to the excess capacity brought about from regulation of the railroad industry. She estimated a long run cost function based on cross-sectional data and a short run cost function based on time series data, and from these two cost functions she has computed a cost elasticity in the long run and a cost elasticity in the short run. She shows that:

$$E/E^* = \frac{dc/dx}{dc^*/dx} \cdot \frac{c^*}{c}$$

where E is the cost elasticity, c is total cost, x is output and the starred variables are long run. Then

$$c^*/c = (E/E^*)\,(mc^*/mc)$$

To make this expression operational, Mrs. Friedlaender assumes that marginal cost in the long run equals short run marginal cost and therefore concludes that the ratio of the elasticity must equal the ratio of the costs. However, it would be incorrect to assume that short and long run marginal costs are equal. If there is excess capacity, which is what she is trying to estimate, then marginal cost in the short run will be below marginal cost in the long run. Consequently her estimation technique appears to be incorrect. It should be noted, however, that using this technique she estimates the loss from excess capacity in 1969 to be roughly $2.4 billion.

I have used a somewhat different technique. Since the approach sketched below cannot be considered very definitive or exact, its main usefulness is to estimate the order of magnitude of the costs. Basically, I have attempted to estimate how much rail rates would fall on average in the absence of regulation. This decline in rates would produce a comparable fall in revenue for the same traffic, part of which would reflect lower costs and part less monopoly rents. To estimate how much rail rates would fall, it is necessary to predict the distribution of traffic in the absence of regulation. The assumption made is that railroads would secure the same volume of traffic, but to the extent they received more, rail rates would have had to decline further than predicted with a larger loss in revenue and hence higher cost savings.

There is a general belief that in the absence of regulation, rails would succeed in capturing additional traffic from trucks (1) (2). Friedlaender and Mayer et al. have argued that rail costs are considerably below truck costs for shipments greater than 200 miles and consequently much of the truck traffic that goes over 200 miles would move to rails in the absence of regulation.

This proposition seems questionable. First, the major competitive moves in recent years by railroads have been attempts to divert traffic from water carriers to rails rather than from trucks to rails. For example, in the years 1966 to 1970, the ICC decided and reported on in their annual report, 11 intermode cases (18, 1966–1970). Eight of these were attempts by railroads to attract traffic from water carriers. Only one was clearly an attempt by railroads to attract traffic from motor carriers while one was an attempt by trucks to attract rail traffic. The final case involved an REA attempt to attract pure truck traffic.

Second, it is widely recognized that regulatory commissions usually develop tendencies to protect the industries that they regulate from competition. Since the Interstate Commerce Commission up to 1955 was primarily concerned with the regulation of railroads, to the extent that the Commission was "captured" it would have been by railroad interests. Prior to the regulation of motor carriers, it was rail companies that were most vocal in urging their control. It seems likely, therefore, that the ICC would have continued since 1935 to protect the interest of the railroads. While regulation would have made the ICC concerned with trucking interests, the Commission would not have willingly sacrificed railroads. Without evidence to the contrary, the most reasonable expectation would appear to be that the ICC would attempt to balance the traffic so that rails and trucks would continue to secure the same share as they would have gotten absent regulation. But, in order to protect and increase profits both truck and rail rates would be pushed higher with the effect of diverting traffic to basically regulated water carriers. Hence a conservative conclusion is that absent regulation, railroads would carry at least the same total amount of traffic as they do under ICC jurisdiction. More likely railroads would actually increase the amount of traffic carried somewhat, perhaps even increasing their share.

There have been several studies of the demand for transportation by sector (23) (24). Most of these studies have serious imperfections. Because of better data, the best study is probably that of Alexander L. Morton of the Department of Economics, Harvard University, who estimated the demand for rail transportation and the demand for truck transportation. Mr. Morton was not very successful in achieving meaningful estimates of the cross elasticity of demand between rail and truck for the rail estimating equation. His truck demand equation is given below in equation (1):

(1) $\log TK\ Vol = -1.841 \log TK\ Rate$
$(.343)$
$+ .932 \log RR\ Rate$
$(.126)$
$+ 2.323 \log GNP$
$(.151)$

We know from economic theory that there is a relationship between the cross elasticity of demand for two related services. The market cross elasticity of substitution between good one and two, n_{12}, can be written:

$$\eta_{12} = \eta_{12}^{s} - \eta_1^{I} P_1 Q_1 / I$$

where

η_{12}^{s}

is the pure elasticity of substitution,

η_1^{I}

is the income elasticity of demand for good 1,

$P_1 Q_1$

is total expenditure on good one, and I is total income. Now the pure cross elasticity of substitution between good one and two is related to the pure cross elasticity between good two and one by the following expression:

$$P_1 Q_1\, \eta_{12}^{s} = P_2 Q_2\, \eta_{21}^{s}$$

Consequently the market cross elasticity for one and two can be expressed as a function of the market elasticity between two and one as follows:

$$P_1 Q_1\, \eta_{12} = P_2 Q_2 \eta_{21} + {}_2{}^{I}(P_2 Q_2)^2/I - {}_1{}^{I}(P_1 Q_1)^2/I$$

Now total freight revenue for common carrier trucking and for railroads are both approximately equal to $10 billion. Assuming as a first approximation they both equal $10 billion, we have the following relationship:

$$\eta_{12} = \eta_{21} + (\$10 \text{ billion/GNP}) \cdot \eta_1{}' - (\$10 \text{ billion/GNP}) \cdot \eta_2{}'$$

Since GNP in 1968 was $865.7 billion, the ratio 10/865.7 is very small and as a first approximation we can say

$$\eta_{12} \simeq \eta_{21}$$

Therefore, since we have a good estimate of the elasticity of substitution between trucks and rails of .93 we assume that the rail to truck elasticity is roughly the same—about 1. Using Morton's data and fixing the cross elasticity of demand at one, the demand for rail transportation was re-estimated. The results are presented in equation (2).

$$\text{(2) } \log \text{RR Vol} = \underset{(0.356)}{2.228} - \underset{(0.200)}{0.915} \log \text{RR Rate} + 1.0 \log \text{TK Rate} - \underset{(0.089)}{0.097} \log \text{GNP}$$

Under this new formulation the price elasticity of demand for rail rises to −0.915 and is not significantly different from −1. Consequently, we can conclude from the evidence, that a 20 percent decline in truck prices would necessitate an approximate 20 percent decline in rail prices to maintain volume.

Freight revenues in 1968 were approximately $10 billion for class I railroads. With a 20 percent fall in rates and the same volume of traffic, total rail revenue would decline to $8 billion. In order for the railroads to maintain the same profits as earned in 1968, which was not excessive by any manner of means, costs would have had to fall by $2 billion.

It is possible that much of the value of the assets of railroads are capitalized monopoly rents, although it does not seem probable since published profit rates have been very low compared to other areas for years and any monopoly rents would likely be small. Assuming, however, that half of the asset value of $27.7 billion reflects the capitalized value of monopoly rents railroads would have had to earn 2.44 percent on $13.8 billion to achieve the same rate of return as in 1968. Thus deducting these capital costs of $337 million from the $8 billion revenue would imply costs of $7.663 billion. Actual costs in 1968 figured on the same basis, were $9.332. The difference between the two is $1.7 billion; that is, costs would have had to fall by roughly $1.7 billion to allow railroads the same rate of return. As the high estimate of the amount costs might fall without regulation, we will accept Friedlander's estimate for 1969 of $2.4 billion of excess cost due to excess capacity.

WATER CARRIERS

The ICC proscribes towing regulated traffic and unregulated traffic in the same tow; towing more than three types of unregulated commodities by the same barge makes the shipment subject to regulation. Prior to 1967, a common practice was for non-regulated water carriers to put together barges of unregulated commodities. These tows were then subcontracted to a regulated carrier, under a regulated tow rate, to be hauled down stream. This practice provided a means of getting around the mixing rules. In 1967 the Supreme Court upheld an ICC ruling that this practice of mixing regulated and non-regulated barges in the same tow was illegal.

Karl Ruppenthal [26] estimated the impact of this new rule on costs in barge transportation. He studied five large carriers, and by simulation, computed the costs if they operated under the ICC edict. He made two estimates of the effect on cost per ton mile of this ruling. One estimate was based on the assumption that an economic tow can be put together with as few as seven barges; the other assumed eleven barges were needed. For the seven barge cutoff, he found that the cost per ton mile would have been 3.02 mills, whereas the actual cost in 1967 had been 2.3 mills. With an eleven barge cutoff, the cost per ton mile rose to 3.34 mills [26, p. 43]. Thus the long-run impact of this ruling is to add between $207 million to $287 million to freight costs. This underestimates the loss from regulation since prior to 1967 the practice followed was presumably not the lowest cost way to move commodities by water, but was made necessary by the ICC regulations and prohibitions on direct mixing.

PIPELINES

Unfortunately, there is no data that permits us to estimate the losses due to regulation of pipelines. Clearly, regulation induces the pipeline companies to maintain older pipes since they go into the rate base and permit larger earnings. However, the extent to which capacity is thereby inflated, leading to higher costs, is uncertain.

All of these losses are summarized in Table 2. As can be seen, the sheer waste involved in moving existing shipments by existing carriers is monumental. Of national income generated in rail, truck, and water transportation between 10 and 20 percent is unnecessary to provide the services. These are losses to the economy clearly. We cannot argue on second best considerations that these shouldn't be counted, because they involve using additional resources to provide the same service, not a shift of services from one class to another class.

These additional costs would not be pure waste if they reflected improved service. On the other hand, if regulation led to worse service, our figures are underestimating loss from regulation. As mentioned above, deregulation of trucking appeared to improve service. Clearly the effect of regulation on private trucking and on water carriers was not to improve service. It is possible that regulation improved rail service, but any improvement seems likely to be small. Since incentives are dulled for innovation, since incentives are low to purchase new freight cars, and since excess capacity in terms of branch lines must be carried that serve few, the improvement in service from regulation is probably negligible and may be actually offset by declines in service due to lack of competitive vigor of the industry.

LOSSES FROM SHIFTING OF TRAFFIC

Discussed above were the impact of regulation on the allocation of traffic between trucks and rails, and that it did not seem likely regulation had led to much of a shift from trucks to rails, though other studies have indicated otherwise. Meyer, Peck, et al. and Friedlaender [01] [02] have all concluded that substantial traffic travels by truck long distances that ought to travel by rail. The Charles River Associates did a study for the Department of Transportation that attempted to quantify the difference in costs including costs to the shippers and came to the conclusion that approximately 26 percent of the truck traffic—about 100 billion ton miles—would move by rails in the absence of regulation [27].

Friedlaender made estimates of the marginal cost of shipping per ton mile by rail and truck [01, Table 3.5, p. 51]. Except for higher valued commodities, marginal cost for shipping over 500 miles is at least one cent cheaper per ton mile by rail than by truck. Applying the one cent saving, we find a resource saving of $1 billion by shifting modes. Meyer et al., on the other hand, finds the differential for over 200 miles amounts to about two cents per ton mile, or a resource cost saving of approximately $2 billion [02, Table 39, p. 190].

Merton J. Peck estimated that rails could attract no more than 10 percent of truck revenue under deregulation [28]. He argued that shipment of bulk and agricultural commodities provide about 24 percent of regulated motor carriers' revenue and he guessed that rails could attract no more than half of that or about 10 percent. Since rates per ton mile on bulk commodities tend to be lower than average, his data would suggest that something over 10 percent of total common carrier ton miles would shift. Thus about 16 billion ton miles would be attracted to rails for a net saving of $160 million to $320 million.

In addition, traffic would be attracted from private and from unregulated agricultural commodity carriers. According to 1967 *Census of Transportation*, 29.2 billion ton-miles were moved by private truck [30, Table D]. Professor Peck claims that 5 percent or about 1.5 billion ton miles would shift. The saving on this reallocation would then be between $15 million and $30 million. He also claims that 25 percent of the agricultural commodity carriers revenues would shift. If we assume that the ratio of average revenue (1957–59) to ton-miles in 1968 is the same for ICC regulated trucking and for agricultural commodity carriers, then on the basis of Peck's data we can estimate that 28.4 billion tons would shift to rails for a saving in resources of $284 million to $568 million. Thus Peck's analysis suggests that the saving from a shift in traffic would range from $450 million to $900 million.

Table 2 presents our law, medium, and high estimates on the cost to the economy of regulation induced shift of traffic from rail to trucks. The low estimate is based on the hypothesis that there is no shift; no doubt there is some diversion even if the net shift in ton miles were zero, therefore this is an underestimate. The medium and high figures are based on Peck's estimates and the difference between the medium and high figure depend on whether the saving per ton mile is 1¢ or 2¢. If the Charles River Associates figure of 26 percent were correct the cost to the economy from the diversion in traffic might be as high as $2 billion.

Unfortunately, we're not able to measure the traffic shifted from rails to water carriers due to regulation, though undoubtedly some shift has occurred. Moreover, some traffic has no doubt shifted to pipelines from rails, since regulation has held rail rates up. Other traffic has shifted to nonregulated private trucking and possibly to air. However, the net impact of these shifts cannot be measured.

STATIC WELFARE LOSS

The last cost item necessary to estimate is the deadweight loss from noncompetitive pricing that results in the nonshipment of some commodities.

TABLE 2.—ESTIMATES OF THE ECONOMIC LOSS FROM ICC REGULATION

[In millions of dollars]

Type of loss	Low	Median	High
Inefficient use of:			
Common carrier trucks	$1,400	$1,690	$1,890
Private trucks	100	200	1,000
Rails	1,700	2,000	2,400
Water carriers	200	300	300+
Pipe lines	NE	NE	NE
Subtotal	3,400	4,190	5,590
Loss from traffic carried by:			
Trucks instead of rails	0	450	900
Water carriers instead of rails	NE	NE	NE
Pipelines instead of other modes	NE	NE	NE
Loss from traffic not carried	175	175	400
Total estimated	3,575	4,815	6,890

NE=Not estimated.

Source: Estimated by author.

Friedlaender estimated this loss at $300 to $400 million annually. Using Morton's demand equation as re-estimated by this au-

thor, a new estimate was made. Assume, as above, that rail rates would fall sufficiently to maintain rail traffic in the absence of regulation. In other words, rail prices would fall 20 percent as truck rates fell 20 percent. The net impact of these reductions in rates is to increase truck traffic by 18 percent. Since total truck revenues, class I and class II were $9.6 billion the total change in traffic revenue would be approximately $1.7 billion and the total welfare loss would be $175 million. This estimate is conservative since it does not allow for any increase in shipments by rail.

TOTAL LOSSES FROM REGULATION

Low, medium, and high estimates of the total losses from regulation are listed in Table 2. We have included Friedlaender's estimates as our high figures for the inefficient use of rails and for the loss from traffic not carried. For the low estimate of the loss from diversion of traffic from rails to truck we have put zero since it is plausible that there has been no substantial diversion. These estimates, as indicated above, tend to be conservative. Since these figures range from a low of $3.5 billion to almost $7 billion, and since a number of important costs are not estimated, it is possible, maybe even likely that the loss from ICC regulation is as high as $10 billion; it seems unlikely that it would be lower than $4 billion per year. Or, expressing it another way, as much as one-third of the income generated in surface freight transportation could be pure waste.

It must be recognized that all the estimates here are very crude. They are aimed at presenting the order of magnitude. However, it seems certain that the cost of the economy of ICC regulation exceeds $3 billion and is unlikely to be much over $10 billion. We know the range in which it lies, and it is expensive. In addition to these costs should be added the losses due to a slower rate of innovation and the losses elsewhere in the economy due to the misallocation in transportation. Friedlaender estimated these at only $12 to $41 million [07, p. 227].

It should recognized, however, that alternatives to regulation are also not costless. We cannot necessarily achieve the truly competitive solution in the transportation industry. While certain segments in the industry do appear to be characterized by purely competitive conditions, other segments such as pipelines, certain rail transportation, seem to have market structures more representative of monopoly or obligopoly than of a purely competitive market. Consequently, a perfect solution, i.e., Pareto optimum solution, is not necessarily feasible.

POLICY ALTERNATIVES

There are an infinite number of possible policy alternatives. Regulation could be changed in a wide variety of ways: more power could be given to the Interstate Commerce Commission; the Commission could be merged with other regulatory agencies such as the CAB and the Federal Maritime Commission; regulation could be relaxed; it could be abolished. Except for total deregulation, there are almost an infinite variety of possible alternatives within each category.

The evidence suggested to date, however, both in this paper and in other studies indicate that the regulatory process is primarily responsible for the wastes indicated above; the remedy for the evils, therefore, would be less regulation. It is, of course, conceivable that if the ICC were given complete dictatorial authority over the transportation industries, it could achieve any possible allocation of resources including the perfectly efficient solution. However, given the sorry record of the ICC, given the imperfections of commission regulation generally, given the imperfections of bureaucratic decision making, given the paucity of information and data to decision makers, it is almost inconceivable that even dictatorial powers would lead to a Pareto optimum solution, or even a reasonable second best.

It also does not seem likely that dictatorial powers for the ICC would improve matters; rather many of the costs of regulation are the direct result and the intended result of ICC regulation. The ICC intends to increase empty backhauls of private and agriculture trucking. It encourages the reduction of competition between and within modes. It requires the obvious wastes that stem from the limitations on trucking certificates; it has the power now to eliminate the worst wastes. Since the ICC does not change these practices, it seems unlikely that a newly constituted, more powerful ICC could make the changes.

It is of course conceivable that with new congressional direction some desirable changes might be made, but any important changes would be such as to permit market forces to play a larger role in allocating resources; in other words, to move toward regulation. The alternatives, therefore, that will be considered in the remainder of this paper are concerned with less regulation. Such alternatives can range from trivial modifications of ICC regulations to major changes such as abolishing the ICC entirely and moving to a completely free market.

PARTIAL DEREGULATION

There are a large number of partial deregulation policies that might be followed. We will concentrate on some of the main alternatives such as removing regulation of minimum rates, repealing the Reed-Bulwinkle Act, and deregulating trucking.

Removing minimum rate regulations

One of the most common suggestions for modifying of transportation is to remove minimum rate regulation. In 1962 President Kennedy, for example, a special message to Congress recommended "Extending to all . . . carriers the exemption from approval or presentation of minimum rates . . ." on bulk and agricultural commodities (54). It is often argued that maximum rate regulation is necessary to prevent the railroads from exploiting their monopoly power, whereas minimum rate regulations clearly prevent railroads and trucking firms from reducing their rates. While this appears to be plausible, minimum rate regulation is inseparable from maximum rate regulation. The courts have held and the law usually requires regulatory commissions to permit regulated firms to earn a fair return on their investment. In fact, it is economically necessary that firms earn at least the cost of capital if firms are to remain in business.

In the absence of minimum rate regulation, it would be conceivable and even likely, that at times some rates might be reduced below cost in certain markets with the result that the firms' earnings fell below the minimum. The regulatory commission would then have to permit higher rates in other markets. As has been shown by Averch and Johnson [31], such policies in fact are not only feasible, but could in fact be profitable. Thus, if there is to be meaningful maximum rate regulation, there has to be some control of minimum rates to insure that the railroads or the monopoly carrier does not reduce rates in competitive markets, leading to reduced profits which "justify" and require higher rates in the monopoly markets.

It would probably be better to abolish all controls over rates than to simply abolish control over minimum rates. With no control over rates there would not be an incentive to underprice competitive services to achieve higher rates on the monopoly service.

Repeal the Reed-Bulwinkle Act

The Reed-Bulwinkle Act authorizes the Interstate Commerce Commission to approve rate agreements made through rate bureaus by competing carriers. While such rate-making results in blatant cartel behavior, repeal of the Reed-Bulwinkle Act would not improve the situation greatly. The Commission has traditionally been interested in reducing or eliminating rate competition between and among carriers in transportation. It has used its powers to deter or prevent rate reductions especially if competing carriers would suffer; it has used its power to restrict and to limit entry of competing carriers; it has attempted to use its powers to increase the profitability of the firms in the industry.

Repeal of the Bulwinkle Act would make it a little more difficult for the Interstate Commerce Commission to restrict rate competition but it still would have the power to suspend rates that are considered too low. In other words, the Commission would still be able to prevent rate cutting and to insure uniformity of rates even in the absence of the Reed-Bulwinkle Act, since the Act just facilitates its efforts in these areas.

Moreover, repeal of the Reed-Bulwinkle Act would still leave truckers with empty backhauls, restricted certificates of convenience and necessity, and excess capacity and would thus not reduce the major losses found above. At most repeal of the Reed-Bulwinkle Act might be slightly helpful.

Deregulate trucking

A more extensive policy proposal is to deregulate the trucking industry. It has been widely agreed that the trucking industry could perform very well, that is in a socially efficient manner, in the absence of regulation. Entry costs without regulation would be minimal: a used truck, a driver's license, and a rented terminal-office is all that would be necessary. The number of trucking firms would be substantial. Meyer, et al. concluded that "so-called economies of scale would appear to be equally available to small and large firms" [02, p. 9]. Since the service offered is homogeneous, all of the necessary conditions or a highly competitive industry exist.

We don't have to depend, however, simply on theory to suggest that the trucking industry could perform well in the absence of regulation. It has been tried and works well.

The trucking industry was deregulated in Australia in 1954 and 1955 [33]. One study reported that the industry was entirely free of the "instability" and "destructive and wasteful competition" so frequently forecast as the probable outcome of an unregulated trucking industry.

Our neighbor to the north, Canada, has relied primarily on province regulation of trucking. Such regulation has ranged from virtually no regulation in some provinces to fairly strict regulation in others. The best evidence suggests that the trucking industry has had lower rates, about 0.87 cents per ton mile less, in the unregulated provinces than in the regulated ones [34, p. 347].

In the United States, there is clear evidence in the agricultural exemption that unregulated trucking can perform well. The principal shippers by unregulated agricultural trucking, farmers, have consistently and strongly, opposed bringing farm trucking under Interstate Commerce Commission regulation. Their objection is clearly based on a supposition that regulation would increase their costs and/or lead to worse service.

Department of Agriculture reports have indicated that unregulated rates generally reflect costs and that there had been ample capital investment to provide a growing capacity and to provide more efficient equipment [35]. The best proof of the viability of unregulated haulage is, of course, the beneficial results that stemmed from the court decisions reregulating poultry and frozen fruits and vegetables. Moreover, after Congress reimposed controls on frozen fruits and vegetables in 1958, a Department of

Agriculture survey indicated that increases in rates predominated and many shippers reported declines in service [36].

Thus deregulating trucking is a feasible alternative. Nevertheless, it is conceivable that deregulation of trucking could make resource allocation worse. Freight that could be moved by rail at cheaper rates might be shipped by truck since motor carrier rates could be expected to decline relative to rail rates. Consequently, deregulation of trucking by itself might lead to new misallocations of resources and to new costs on the economy.

Offsetting this loss would be rationalization of the trucking industry. Deregulation of trucking would eliminate the inefficiencies identified above as costing between $1.5 billion to $2.9 billion. Trucks would no longer be confined to carrying only specific commodities between specific points along specific routes; backhauls could be filled if traffic could be secured; and all of the inefficiencies imposed by the ICC on the trucking industry would evaporate.

An estimate of the amount of traffic to be diverted from rail to truck can be computed from equation (2). Assuming that truck prices fell an average of 20% and rail rates remained constant, the demand equation indicates that 20% of the 756.8 billion ton miles of commodities shipped by rail in 1968 would shift from rails to trucks [18, (1970), p. 78]. Thus, approximately 150 billion ton miles would shift from rail to trucks.

In 1967, the average freight revenue for intercity ton-miles was $.06645 [19, Table 16]. If prices decline 20% we will assume that average revenue would decline 20%. Presumably at the original rates some shippers were indifferent between shipping by truck and rail. At the 20% lower rate some others would be indifferent and those that were indifferent at the higher rate would now be shipping by truck. If we assume that the distribution of shippers who would shift from rail to truck is linear over the 20% decline in rates, then half of the reduction in price would be equal to the average cost to the economy of shipping by truck rather than by rail. The average added cost to the economy would therefore be $.006645 per ton mile. For 150 billion ton miles this amounts to roughly $1 billion.

As noted above, the cost of the regulation of trucking in terms of higher costs of operation was at a minimum $1.5 billion; consequently there would be a net gain from deregulating trucking alone. Moreover, it seems unlikely that rail rates would not come down if truck rates fell. The ICC would no doubt permit rails to reduce their rates in the face of a competitive trucking industry in order for them to maintain their traffic. If rails were not permitted to reduce rates then they would suffer a 20% loss of business. Given their large fixed costs and their weak profit position, a 20% loss in business would make most railroads look like the Penn Central. Thus the ICC would have to let railroads cut rates. Consequently, the net effect of reregulation of trucking would be positive and any loss due to shift or traffic would likely be small.

TOTAL DEREGULATION

Total deregulation of all surface freight transportation has been discussed. As the previous section indicated total deregulation of trucking is probably desirable since motor carriers would appear to have all the main characteristics of a highly competitive industry. Only 7.3 percent of the ton-miles that travel by water carriers are regulated [18, p. 78]. Therefore deregulation of water carriers would present few problems, especially since water transportation would also appear to have the characteristics of a workable, competitive industry. Freight forwarders are also regulated by the ICC but entry standards, at least until recently, have been lenient. In Canada, freight forwarders are unregulated and the industry behaves efficiently. Therefore, there would seem to be no bar to reregulate freight forwarders.

Pipelines, on the other hand, have the characteristics of a natural monopoly. The pipeline industry does not seem to have any real potential for competition. However, some inter-regional and intermodal competition does exist. The regulation, however, of oil pipelines is a separable problem. They could be continued under ICC jurisdiction, transferred to Federal Power Commission jurisdiction, or deregulated.

When railroads were made subject to Federal control, it was claimed that at least in some areas, they had a natural monopoly. In addition, it was claimed that railroads had excess capacity and were subject to large economies of scale; competitive behavior was, therefore, unstable. Historical research on railroad regulation has indicated that the railroads themselves supported regulation in an effort to stabilize cartel price fixing agreements [37] [38]. There seems to be no strong evidence or in fact any evidence that there were any substantial economies of scale beyond those already exploited by the large railroads in the 19th century.

Certainly any monopoly power of railroads today is considerably less than it was in the 19th century. Before 1920, the major monopoly power of the railroads lay in their exclusive control over short haul shipments, but in the short haul market today, the truck is a viable alternative. For only bulk, low-cost commodities shipped long distances do the rails have a predominant position.

Even for these commodities, where there is water transportation, the rails have little power. It was in shipping bulk commodities long distances prior to the turn of the century, that railroads competed most vigorously. Then, as well as now, railroads shipping bulk commodities long distances compete not only with other railroads, operating over the same route but with roads operating elsewhere. Wheat, for example, shipped from one region to a particular consuming center competes with wheat shipped from other regions by other railroads to the same center. When wheat or bulk commodities are also exported, then railroads must compete with roads shipping bulk commodities from different regions to different ports.

Table 3 sets out the market structure in railroad freight transportation from region to region. As can be seen, from most regions to most other regions there are three or more railroads competing. In some major pairs of producing and marketing areas such as the midwest and the south, ten to twelve railroads compete. There are a few areas, such as from the North Mountain states—Idaho, Wyoming, Montana—south to Utah, Colorado and Nevada, where there are only two railroads in direct competition and where there is no water transportation available. However, there is very little that moves between those areas. Most commodities that are either mined or grown in those areas are either shipped west or east to consuming areas. Table 3 indicates that while the railroad industry by itself can certainly not be characterized as purely competitive, it is probably in general no more concentrated than a number of manufacturing industries. With the availability of water competition in a number of markets and with ubiquitous trucks, an unregulated railroad industry would appear to be workably competitive.

TABLE 3.—MARKET STRUCTURE IN SURFACE FREIGHT TRANSPORTATION

From region	To region	Number of railroads	Availability of water transportation
New England	New York, New Jersey, Pennsylvania.	3	Yes.
New York, New Jersey, Pennsylvania	South	3	Yes.
	West	4	Some.
Mid-Atlantic (Virginia, Maryland, Delaware, and West Virginia).	North	3	Yes.
	South	3	Yes.
	West	5	No.
	Southwest	6	No.
South Atlantic (South Carolina, Georgia, Florida).	North	3	Yes.
	West	5	Yes.
	Southeast	5	No.
Midwest (Michigan, Ohio, Indiana, Illinois, Wisconsin).	Northeast	4	Some.
	South	10	Yes.
	Northwest	7	Some.
	Southwest	12	Do.
East South Central (Kentucky, Tennessee, Alabama, Mississippi).	North	10	Yes.
	South	5	Yes.
	East	6	No.
	Southeast	5	No.
	Southwest	6	Yes.
North Central (N. Dakota, South Dakota, Minnesota).	Northwest	8	Some.
	East	7	Do.
	South	4	Do.
	West	5	No.
Mid Central (Nebraska, Iowa, Missouri, Kansas).	North	4	Yes.
	East	12	No.
	South	6	Yes.
	West	6	No.
	Southeast	8	No.
	Northwest	3	No.
West South Central (Oklahoma, Arkansas, Louisiana, Texas).	North	6	Yes.
	West	4	No.
	East	6	Yes.
North Mountain (Idaho, Wyoming, Montana).	Northeast	5	No.
	South	2	No.
	West	3	No.
	Southeast (Nebraska)	3	No.
South Mountain (Nevada, Utah, Colorado, Arizona, New Mexico).	North	2	No.
	Southeast	4	No.
	Northeast	6	No.
	West	4	No.
	Northwest	1	No.
Oregon and Washington	East	3	No.
	South	1	Yes.
	South, East	1	No.
California	North	1	Yes.
	East	4	No.

Source: Moody's Transportation Manuel and [47, p. 716].

Potential problems

The literature on transportation has often claimed that deregulation, especially of railroads, would cause severe problems. It is feared that deregulation would lead to predatory pricing, price discrimination, and unstable competition.

Predatory Pricing Railroads might practice predatory pricing between themselves or against other modes. There is no real need to fear predatory pricing by railroads against trucks or barges. Entry is easy and not expensive. Consider the following example. Assume that if a railroad is pricing at marginal cost, trucks and/or barges can compete. Now, if the railroad tries to eliminate truck competition or barge competition by cutting prices below railroad costs, it will make losses. Suppose it succeeds in eliminating the competition, then as soon as its price returns to an economic level, truck and/or barge competition would reappear. There would be no way for a railroad to secure any kind of permanent or even temporary monopoly throughout predatory pricing. Consequently, predatory pricing would be a lost cause. On the other hand, if a railroad has a cost advantage, pricing below truck and barge costs would not be a predatory practice.

A more troublesome aspect of predatory pricing would be between railroads. Such a practice would be potentially more profitable and probably more difficult to detect than predatory pricing against other modes. Unlike the barge industry or the truck industry, new entry is virtually barred in the railroad industry. Without the power of eminent domain, it is inconceivable that a new company would be able to put together the right of way for new tracks. Unless the cause for a new entrant was overwhelming, it is unlikely that either the states or the Federal Government would grant such power to a potential new entrant. With entry effectively barred and unless there are substantial diseconomies of scale, the value of competing railroads would be greatest if combined into one road. Combined, the railroads could operate as a monopoly without the fear of new entry. Separately, they would have to compete with each other and there is a tendency even in the most well ordered cartel to cheat and to spend additional resources on nonprice competition.

On the other hand, if demand is contracting in the railroad industry, which in a relative sense it appears to be, then it may become uneconomic to have two railroads vying for the same traffic. Absent regulation and absent strong collusion, the railroads would have a tendency to compete down to short-run marginal costs which, under the circumstances, would be less than long run marginal costs. Thus, during contraction, losses would develop and continue until one railroad buys out the other.

How is this situation going to be distinguished from the situation where a railroad is in fact deliberately practicing predatory pricing? No railroad will admit that it is practicing predatory pricing and will simply claim that its lower prices are economic and also designed to attract traffic and gain a larger share of the market. If public policy permits the merger of failing railroads, then predatory pricing will be rewarded by merger and monopoly. On the other hand, if public policy bans horizontal acquisition, redundant capacity will be maintained long after it is economic in a market and existing firms will continue to suffer losses. In other words, it will become incumbent upon policymakers to determine when losses stem from inadequate traffic for the existing roads and when they stem from predatory pricing.

The question of the viability of competition in this industry, therefore, hinges on the extent of substantial economies of scale in railroading. There have been a number of studies on this subject using a variety of techniques. Professor Klein in his textbook reports on a study of railroad production functions; he found modest but statistically significant economies of scale in railroading based on 1936 data [39, pp. 226–236]. Professor Borts estimated cost as a function of output by size of railroad and by region of country [40] [41] [42]. He found no appreciable economies of scale and in fact no economies of scale for the larger railroads. He concluded that "increasing costs apparently prevailed in the East" [42 p.]. Griliches also estimated costs functions and concluded that if there are some decreasing costs, they are not prevalent in the East or among the bigger railroads" [43, p. 30]. Friedlaender simply fitted a Cobb-Douglas production function to cross section data on thirty-three railroads and found that the sum of the coefficients was equal to .97 [07, p. 233]. While all of these studies can be criticized, only the study based on pre-World War II data found economies of scale, at least for the larger railroads.

This paper presents some additional evidence tending to confirm the absence of scale economies among larger railroads in recent years. The basic model assumes a Cobb-Douglas production function for freight and a separate Cobb-Douglas production function for passenger services. Some of the factors in the freight production function also appear in the one for passenger services and some factors are specialized to moving freight or passengers. This model also assumes that the regulatory commission, the ICC that is, establishes the rates and hence the output and that the price of inputs is given to the railroads. Consequently, the model specifies that input prices. This model can be written as railroads minimize cost given output and follows:

$$F = aK_f^{\alpha_1}K_o^{\alpha_2}L_f^{\alpha_3}L_o^{\alpha_4} \tag{3}$$

$$P = bK_P^{\beta_1}K_o^{\beta_2}L_P^{\beta_3}L_o^{\beta_4} \tag{4}$$

where F is the quantity of freight shipped, P is the number of passenger-miles moved, K_f is the freight-specific capital, V_o is capital used jointly in moving freight or passengers, L_f is freight-specific labor, L_o is labor used jointly, K_P is passenger-specific capital, and L_P is passenger-specific freight. The coefficients a, b, α_1-α_4, and β_1-β_4 are constants. The railroads cost function, c, can be written as:

$$C = r_fK_f + r_oK_o + r_PK_P + w_fL_f + w_oL_o + w_PL_P \tag{5}$$

The railroads, however, will not know actual freight traffic and actual passenger traffic until after the fact. Therefore the railroad tries to minimize cost given expected freight and expected passengers. That expected freight can be written as equation (6) and expected passengers as equation (7). Then actual freight equals expected freight times the random variable e^v and actual passengers will equal expected passengers times a random variable, e^w.

$$F = \bar{F}e^v = aK_f^{\alpha_1}K_o^{\alpha_2}L_f^{\alpha_3}L_o^{\alpha_4}e^v \tag{6}$$

$$P = \bar{P}e^w = bK_P^{\beta_1}K_o^{\beta_2}L_P^{\beta_3}L_o^{\beta_4}e^w \tag{7}$$

where F=EF and P=EP.

Assume Ev=O and Ew=O with constant variances of δ_v^2 and o_w^2. The railroad therefore attempts to minimize (5) subject to satisfying equations (6) and (7). The necessary conditions for this maximum are given in equations (8) through (15).

$$r_f - \lambda_1\alpha_1(F/K_f)e^v = 0 \tag{8}$$

$$r_P - \lambda_2\beta_1(P/K_P)e^w = 0 \tag{9}$$

$$r_o - \lambda_1\alpha_2(F/K_o)e^v - \lambda_2\beta_2(P/K_o)e^w = 0 \tag{10}$$

$$w_f - \lambda_1\alpha_3(F/L_f)e^v = 0 \tag{11}$$

$$w_P - \lambda_2\beta_3(P/L_p)e^w = 0 \tag{12}$$

$$w_o - \lambda_1\alpha_1(F/L_o)e^v - \lambda_2\beta_4(P/L_o)e^w = 0 \tag{13}$$

$$\bar{F} - aK_f^{\alpha_1}K_o^{\alpha_2}L_f^{\alpha_3}L_o^{\alpha_4}e^v = 0 \tag{14}$$

$$\bar{P} - bK_P^{\beta_1}K_o^{\beta_2}L_P^{\beta_3}L_o^{\beta_4}e^w = 0 \tag{15}$$

The pure exogenous variables in this model are F, P, and the input prices r_f, r_o, r_P, w_f, w_o, w_P. However, some of the inputs are determined solely by the production function they are embedded in, and some are jointly determined. The jointly determined variables, as can be seen by equations (10) and (13), are L_o and K_o. All the other variables are determined by the purely exogenous variables in their own production function.

For solving our simultaneous equation system, therefore, we have two endogenous variables, K_o and L_o, two completely exogenous variables, F and P, and four variables which are determined within each production function separately, and therefore not interdependent. A two stage least square model was run, therefore, to estimate the coefficients of K_o and L_o. The data used were as follows: F was net ton-miles of freight (revenue and nonrevenue) in 1968, K_f was freight-car-miles, K_o locomotive-unit-miles, L_f freight-specific labor, L_o all other labor, P passenger-miles, K_P passenger-car-miles, L_P passenger-specific labor [44]. The sample includes data for the 18 largest railroads in 1968 excluding the Penn Central.[1]

Our objective is to measure the extent of economies of scale in freight transportation. For this a Cobb-Douglas production function is particularly useful device in that the sum of the coefficients measure the degree of homogeneity of the production function and therefore the degree of economies of scale, if any.

A major problem with estimating our coefficients in that there is considerable intercorrelation among the variables. Simple correlation coefficients between the variables are normally above .9. Thus the standard deviations of the regression coefficients are increased and the reliability of the estimates of the coefficients are diminished. For example, a simple, naive approach would be to regress net freight ton-miles, revenue and nonrevenue, on capital and labor. Model 1 in Table 4 presents the results. The sum of the coefficients is 1.018 and is not statistically significant from one. The coefficient for labor, however, is small and not significantly different from zero. If railroads are paying labor the value of their marginal product then they should be receiving according to Model 1, 8 percent of the total receipts of railroads. They receive considerably more. So the size of the individual coefficients do not appear to be particularly reliable. The simple correlation between freight-car miles and all labor is .94. Note, however, that the coefficients do sum to approximately one.

Model 2 takes account of the simultaneous equation problem in determining all labor. As can be seen, the results are not greatly different from Model 1. The sum of the coefficients still is close to one.

A useful method for avoiding multicol-

[1] The Penn Central was excluded because the data had been stolen from the ICC. However, since it was so much larger than the other railroads, it might have unduly biased the results in any case and probably would have been excluded in any case.

linearity is to secure independent estimates of the value of some of the coefficients. Our model hypothesized that rates were set by the regulatory commission and input prices fixed to the railroad. Rewriting equation (8) we have:

$$r_f \cdot K$$
$$r_f \cdot K_f = \alpha_1 \lambda_1 F e^v$$
$$\text{or } \frac{r_f \cdot K_f}{\lambda_1 F} = \alpha_1 e^v$$
$$\text{where } E\alpha_1 e^v = \alpha_1$$

The Lagrange multiplier, λ_1, is the marginal revenue from additional shipments. Given our assumptions, this equals price and so we can write that:

$$(8)' \qquad E\frac{r_f \cdot K_f}{TR_f} = \alpha_1$$

In other words, the expected value of the ratio of the expenditure on freight-specific capital (or labor) to total freight revenue equals the coefficient.

From ICC records the expenditure in 1968 on freight specific labor was collected for the eighteen railroads. The ratio of this to total freight revenue computed and the result averaged. The average ratio was 0.081 with a standard error of 0.008; this value was then assumed for α_2, the coefficient for freight-specific labor.

The cost of freight-specific capital is the average rental rate per mile on freight cars in 1968. The Association of American Railroads (AAR) furnished the author the average daily freight car rental rate in 1968 ($3.271). This was converted to the rate per mile on the basis of the average miles per day per freight car [44, Tables 162 & 163]. The average rental rate per mile ($0.0531) is then r_f. Total expenditure on freight cars was taken to be $0.0531 times the number of freight car miles. Dividing this by freight revenue and averaging over all roads produces the expected value of α_1, .1758.

TABLE 4.—ESTIMATES OF RAILROAD PRODUCTION FUNCTIONS

Model number	Variables					Sum of coef.	R^2	F
	K_f	L_{tot}	L_f	K_o	L_o			
1. O.L.S.	0.936	0.082				1.018	0.965	207.9
	(0.141)	(0.160)				(0.212)		
2. 2 St. L.S.	0.904	0.121				1.025	.965	208.9
	(0.179)	(0.203)				(0.272)		
3. O.L.S.	0.932		[1] 0.081			1.013	.961	199.2
	(0.050)		[1] (0.008)			(0.051)		
4. 2 St. L.S.	[1] 0.176		[1] 0.081	0.700		0.957	.895	45.3
	[1] (0.061)		[1] (0.008)	(0.082)		(0.103)		
5. 2 St. L.S.	[1] 0.176		[1] 0.081	0.172	0.678	1.107	.941	59.8
	[1] (0.061)		[1] (0.008)	(0.167)	(0.198)	(0.264)		

[1] Computed independently of the regression.

Table 4 presents the results. Models numbers 1 and 3 ignore the simultaneous equation problem and simply estimate the freight production function directly. However, for equation 3, a_2 was predetermined before estimating the other coefficients. For models 2, 4 and 5 two stage squares were used to get unbiased estimates of the coefficients for L_{tot}, K_o, and L_o. In models 4 and 5, the predetermined values of a_1 and a_2 were substituted in the equation before estimating the other coefficients.

The results of these estimating techniques are summarized in the third column from the right entitled Sum of the Coefficients. As can be seen, all of the sums of the coefficients are roughly 1. None are significantly different from 1. All of the coefficients except one are slightly above 1, suggesting if anything that there are mild economies of scale.

Given the small size of the sample, the fact that data from only one year were used, the possibility of misspecification of the model, not too much confidence should be put in the absolute value of specific coefficients, but the sum of the coefficients is a more robust statistic and so these results help confirm the findings of other studies that economies of scale for large railroads are negligible. It would appear, therefore, that the viability of competition is not a problem.

Discrimination—Prior to the formation of the ICC, a major complaint was that the railroads practiced price discrimination. Some shippers received low rates; others were charged much higher rates. Some geographic areas received lower rates for shipping the same commodities the same distance or longer distances than other areas. The fear of railroad price discrimination lingers on, and past efforts to reduce regulation have founded on the fear that the roads would discriminate among and between areas and customers.

In a highly competitive market, there is no opportunity for discrimination. A firm that charged one customer more than another customer will find that their competitors will steal away their high-priced customers. Even in highly competitive markets, however, prices can fluctuate considerably due to the time of day and time of year. For example, in resort areas during peak demand periods, prices usually are considerably higher than during off-peak periods when they approach short-run marginal costs. Peak-load pricing, that is, pricing that varies with demand is not price discrimination. It leads to an efficient utilization of resources.

At least part of the alleged price discrimination of railroads probably results from a confusion between peak pricing and true price discrimination. The demand for transportation shifts seasonally. Often the demand is largely one-way. Thus, during the 19th century, commodities tended to flow from the Middle West to the East coast and little product returned, with the result that rates were often low on West-bound traffic and considerably higher on East-bound traffic. True price discrimination is charging a different price relative to short-run marginal costs for different customers or classes of customers. Such price discrimination cannot exist in competitive markets.

There should be no fear of price discrimination in motor carrier transportation. Competition would be vigorous; any firms attempting to price higher to one class of customers than another would simply lose their high priced business to more eager trucking firms. On the other side of the coin, large shippers are not in a position to force prices down below marginal costs, which is where rates would tend to settle in the absence of regulation. Since in a highly competitive market a trucking firm can get as much business as it wants at the going rates, no firm would carry products for less than marginal cost.

For similar reasons, water carriers would not practice price discrimination. They, too, are basicly a competitive industry where price would mainly reflect marginal cost; shippers would not be in a position to force prices below that. Nor would any carrier be in a position to charge more.

On the other hand, railroads may have power to discriminate. In some markets, railroads may have some monopoly power, giving them the power to charge some customers more than others. In addition, where railroads established rates above marginal cost, large shippers might be in a position to secure special low rates. Such has apparently occurred in the past; it is generally alleged that Standard Oil used to receive especially low rates from railroads. There is no reason to believe that an unregulated railroad would not be subject to similar pressure today with large shippers threatening to ship by competing roads if rate concessions are not made. Large shippers, however, could not force prices below short-run marginal cost and in the long run, all they could do would be to simply absorb the rent of railroad operations.

In other markets, railroads might have the power to charge higher rates to special classes of shippers. For example, farmers in isolated areas facing only one railroad might be charged considerably higher rates than similar shippers in areas serviced by several railroads. Since railroads would not want to charge so high a price as to drive shippers out of business, their monopoly power is limited. In general, even in those areas where they ostensibly have a monopoly, railroads are subject to competition. Normally, a railroad cannot affect the market price for a good, with the result that it cannot charge more than the difference between the market price and the opportunity cost of producing the product. In particular, the most railroads can do is to absorb the rents involved in locational decisions of shippers. That is, shippers who are located near markets or in particularly fertile areas can be charged more without forcing them out of business than can shippers in more marginal situations.

As these examples suggest, the primary problem is not with manufacturing, which can be done almost anywhere, but with the shipment of agriculture and raw materials. Farmers often reap large rents from their locational advantage. Nearness to market, fertility of the soil, and climate all provide rents to land owners. Much of these rents could be absorbed by monopolistic railroads, but from an efficiency point of view, this has little long-run allocative effect. Nevertheless, higher rates to such farmers make them poorer, a result which is likely to be politically unpalatable to the Government.

As was pointed out above, railroads no longer have monopoly power in the short haul market because trucks can compete well on a price and service basis for all but a few bulk commodities. Inasmuch as goods shipped from a region must compete with goods shipped from elsewhere, the monopoly power of railroads is limited in the long haul market as well. Consequently, there are few if any products shipped between any markets for which railroads would have much monopoly power.

In the absence of regulation, railroads would raise prices on those products where they had unexploited monopoly power and lower them on others. If railroads are fully exploiting their monopoly power at the moment, there will be no change in discrimination with the elimination of regulation. There is some evidence that suggests that railroads are already changing what the market can bear. Friedlaender has shown that in those areas where the railroads have no water competition, rates to ship the identical commodities for approximately the same distances tend to be higher than where water competition exists [1, Table 3.8]. This suggests that railroads are at least in part exploiting their monopoly power.

If the railroads are not exploiting their monopoly power now, it is surprising. Earnings of the railroad industry have been very poor for years and the Interstate Commerce Commission has been concerned. Given this concern, it seems probable that any railroad filing higher rates for a particular commodity would not find the ICC sustaining shipper objections. In May of 1967, most railroads in the country petitioned for the first general rate increase in six years [18, 1967, pp. 17 and 19]. Even though the railroad industry had for the fifth straight year "exhibited considerable improvement in most respects during 1966," the ICC granted the rate increase promptly [18, 1967, p. 57]. It does not appear difficult, therefore, for the railroad industry to secure rate increases. Individual rate changes for a particular commodity are usually even easier to secure. For example, of the 45,160 tariffs received from railroads by the ICC during fiscal 1967, only 158 were rejected [18, 1967, p. 112].

Deregulation might, therefore, lead to no or very few upward changes in rates, but there likely would be considerable reductions in many areas.

On the other hand, if any products are being carried at below cost, these rates would clearly rise. (Why didn't the railroads raise them before this?) Friedlaender and Meyer, et al., have pointed out a number of commodities are carried at below the ICC measured out-of-pocket costs [1][2]. On first glance, this suggests that some rates are being carried at less than cost. However, such an assumption is certainly not warrented on the basis of the data.

The ICC measure of out-of-pocket cost has little relationship to true marginal cost. The ICC says that out-of-pocket costs "include 80 percent of freight operating expenses, rents and taxes (excluding Federal income taxes) plus a return of 4 percent after Federal income taxes on 50 percent of the road property and 100 percent of the equipment used in freight service," [45, p. 4]. Since this sum has nothing to do with true marginal cost, no estimate can be made as to whether true marginal costs would be higher or lower than out-of-pocket costs. It is not even clear that relative out-of-pocket costs is an index of true marginal cost.

Price discrimination could basically take one of three forms in transportation: between commodities, between shippers, and between geographic regions. Even under ICC regulation price discrimination is quite prevalent. If out-of-pocket costs as measured by the ICC are at least an index of relative marginal costs, then the relationship of rates to cost differ widely from commodity to commodity. Table 5 shows the contribution to revenue Class 1 railroads by selected commodities relative to out-of-pocket costs for a number of large commodity classes for the year 1966. As can be seen, the contribution varies from 3.65 for ordinances and accessories to 0.97 for crude oil, an almost four-fold difference.

TABLE 5.—CONTRIBUTION TO CLASS I RAILROAD BURDEN BY SELECTED COMMODITY GROUPS, AND RATIO OF REVENUE TO OUT-OF-POCKET COST FOR THE YEAR 1966

Code		Revenue	O.P. cost	Contribution to burden	Ratio revenue to O.P. cost
01	Farm products	$870,821,800	$700,674,624	$170,147,176	1.24283
08	Forest products	13,114,400	6,038,916	7,075,484	2.17165
09	Fresh fish	2,588,300	2,474,548	113,752	1.04597
10	Metallic ores [1]	278,084,900	308,262,315	30,177,415	0.90210
11	Coal [1]	972,297,800	961,129,793	11,168,007	1.01162
13	Crude oil	4,938,200	5,113,708	175,508	0.96568
14	Nonmetallic ores	305,510,400	301,639,799	387,061	1.01283
19	Ordnance and access	45,698,200	12,516,478	33,181,722	3.65104
20	Food and kindred products	948,064,000	868,525,346	79,540,654	1.09158
21	Tobacco products	13,937,200	7,632 596	6,304,604	1.82601
22	Basic textiles	29,607,800	16,809,434	12,798,366	1.76138
24	Lumber and wood	633,965,700	609,732,821	24,232,879	1.03974
25	Furniture and fixtures	72,636,500	55,047,992	17,609,408	1.31990
26	Pulp, paper and allied products	486,455,100	308,663,441	177,791,659	1.57600
27	Printed matter	20,279,000	13,933,809	6,345,191	1.45538
28	Chemicals and allied products	$762,015,200	$488,608,786	$273,406,414	1.55956
29	Petroleum and coal products	192,218,300	181,133,643	11,104,657	1.06120
30	Rubber	65,527,000	41,894,348	23,632,652	1.56410
31	Leather	1,585,200	1,199,370	385,830	1.32169
32	Stone, clay, and glass products	432,024,900	308,953,776	123,071,124	1.39835
33	Primary metal products	680,784,800	432,482,745	248,302,055	1.57413
34	Fabricated metal products	185,819,700	122,995,148	62,824,558	1.51079
35	Machinery (except electrical)	133,494,600	68,655,526	64,839,074	1.94441
36	Electric machinery	120,572,300	78,764,759	41,807,541	1.53079
37	Transport equipment	587,414,900	284,657,424	302,757,476	2.06358
40	Waste and scrap	184,220,700	122,119,193	62,101,507	1.50853
50	Total carload traffic [2]	8,364,986,900	6,461,590,894	1,903,396,006	1.29457

[1] Computed in accordance with Railform A, not by method used by ICC in burden studies, thus grossly overstated cost because does not account for unit trains lower cost per unit.
[2] Computed from TD-1 information not column totals.

Source: Computed by the U.S. Department of Agriculture from the 1966 1 percent weighbill data and Railform A and furnished the author at his request. Loss and damage payments for commodity groups for year 1965.

In the absence of regulation, as rates move towards costs because of competitive pressures, such discrimination would be reduced. Where trucks would be fully competitive, rates would approximate at least trucking costs. While discrimination between commodities would be reduced by reregulating transportation, there is little political gain in doing so and there may be little allocative gain as well. To the extent that discrimination is between non-competitive groups of commodities, the allocative effect would be small and might amount to no more than the $12 million to $41 million estimated by Professor Friedlander [07, p. 227].

A second form of discrimination is between shippers. Personal discrimination is specifically banned by Part I, Sec. 2 and 3 of the Interstate Commerce Commission Act. Total deregulation would presumably permit railroads to discriminate legally between shippers, though some extension of the Robinson-Patman Act could ban such practices.

Personal discrimination arises when different elasticities of demand for shipping by a particular carrier; while not true discrimination, different rates may be charged different shippers when marginal costs differ. The latter "discrimination" may occur simply because at one time the railroad has excess capacity while at another time it is operating close to capacity or it may occur due to the size of the shipments. The latter type of "discrimination" is not economic price discrimination and is desirable from an allocative point of view. In a competitive market, such "discrimination" may be common.

A greater problem is true personal discrimination that is based on shipper needs and alternatives. Where the shipper has good alternatives rates will be lower; where the shipper is largely restricted to a single carrier, a railroad can extract a monopoly profit. However, the railroad would not desire to put the shipper out of business and hence would be limited in its long-run ability to exploit captive shippers.

Personal discrimination may also arise as conditions change. In the face of excess capacity, railroads may offer reduced rates to receive a particular load. Such practices are common in other sectors of the economy and largely reflect the workings of a market place economy.

In the past, lower rates were often offered to secure big shipments and the little shipper was discriminated against. Today, trucks are much more efficient at carrying small loads than large loads with the result that the small shipment market is highly competitive. Large shippers, however, are not in danger of being exploited, since they can always divide shipments into smaller lots. Consequently, discrimination between shippers would seem to be no larger a problem in an unregulated transportation market than in manufacturing.

Geographical discrimination has several dimensions. It may involve charging more or relatively more over part of a route than for the whole route; it may involve discriminating between shipping regions or points of destination.

The short-haul provision of the Interstate Commerce Commission (Part I, Sec. 4) was designed to deal with the first dimension by prohibiting the charging of more for short hauls than for long hauls. As has been pointed out repeatedly above, trucks are a more viable alternative for short haul than for long haul and therefore rails are no longer in a position to charge significantly more for a short distance than for a long one.

Geographical discrimination between areas has been common in the past and continues to be so. Where there is good water transportation, rates have been forced lower than where good water transportation does not exist.[1]

Moreover, railroads have tended to soak up the geographical advantage of competing areas by having higher rates to the most advantaged region [47, pp. 490–511]. For example, rail rates relative to out-of-pocket costs (1961) for oranges and grapefruit are higher for shipments from Florida to the East coast region than from California to the East [46]. This differential has permitted

[1] See [1, pp. 61–63].

California citrus fruits to compete on a price basis. The affect of this discrimination is to reduce the earnings of Florida growers and transfer some of the rents they would have received from being close to major consuming markets to eastern railroads. This pattern of geographic discrimination, that is charging higher rates to those closest to consuming markets, is common among primary products.

Export freight rates to Boston and Baltimore are identical from originating points like Pittsburgh, Cleveland, and Buffalo even though the distance to the two ports is substantially different. Unless competition were sufficiently vigorous to drive rates down to costs, such discrimination would tend to continue in the absence of regulation. Railroads on the longest routes would be willing to drop rates to marginal costs in order to preserve or secure part of the export market. Unless rails servicing the nearer ports drop their rates to the point that other roads could not compete, some such discrimination would be inevitable.

Reregulation would lead to changes in prices and to new claims of discrimination. Commodity discrimination would no doubt be reduced; true personal discrimination would probably occur more frequently than with regulation; and geographic discrimination would probably not arise more frequently than with regulation and very likely would diminish as competitive pressures forced more rates towards costs.

In any case, some change in price structure can be expected with the elimination of regulation, and any change in price structure will impose costs on shippers. While some shippers will gain, others will lose. Even if all changes were downwards, those that received the smallest decreases or no decreases would feel worse off if their competitors were granted greater reductions.

Many of the costs imposed on shippers will be only transistory in that over time actions will be possible that will mitigate or avoid the effects of the changes. For example, rates on manufactured goods tend to be high relative to raw material rates. If, as might be expected, deregulation reduced rates for manufactured goods, firms would find their plants were located too close to major consuming markets and not close enough to raw material supplies for minimum cost operation. It would take time and would be costly for plants and labor to be relocated and for minimum cost operation.

In addition, some factories are located in areas served by uneconomic railroad branch lines, and would have to adjust to using truck services or moving the plant if railroads were free to abandon unprofitable service. Major shipping ports might find changes in their relative competitive position due to freight rate adjustments that more accurately reflected costs, although it seems probable that the effect on the competitive position of ports is likely to be much smaller than the impact of containerization which is concentrating shipping in a handful of ports.

While all of these results from deregulation are in the long-run interest of a more efficient use of resources, there is no doubt that all change is costly, and the transition from regulation to an unregulated status should be very carefully planned. The purpose of this paper, however, is not to focus on transitional costs, but on the desired public policy towards surface freight transportation.

JOINT OWNERSHIP OF SEVERAL TRANSPORTATION MODES

Deregulation of transportation would simply bring to the fore several antitrust policy issues. It would face the Justice Department with the problem of mergers between competing railroads—this problem was discussed above.

It would also force the antitrust authorities to develop a policy on vertical integration that would lead to transportation companies. The problem is simply that railroads have for years chafted at restrictions on their rights to enter other forms of transportation. They have claimed that by owning several modes they could combine their services to offer savings to shippers and better transportation. On the other hand, other modes have feared their entry and the Antitrust Division of the Department of Justice has viewed such integration as likely to lead to a reduction in competition.[1]

Any benefits that would come from common ownership would probably be small. If markets worked costlessly there could be no gains since if joint services would offer cost savings, independent companies would make arrangements to offer the joint services. The only problem would be to divide up the joint profits. Many of the reasons why markets would not operate costlessly and common ownership (vertical integration) may have savings, were set out in a recent article by Oliver Williamson [52]. As he pointed out, uncertainty as to future conditions may make long-term contracts difficult and continuous renegotiation of arrangements can be expensive. If expensive equipment is needed to facilitate intermodal transfers, common ownership may be the only practical market organization.

A major objection to vertical integration and specifically to intermodal ownership is that non-integrated firms may be excluded from the market and competition will "consequently" be diminished. If transportation were deregulated and railroads were free to enter the trucking and water carrier business, then it is claimed that independent truckers and barge owners would be excluded from joint traffic and many as a consequence would drop out of business.

Given the ease of entry (in the absence of regulation) into trucking and water carriage, railroads would never be able to threaten the competitive viability of either. Even if railroads attempted to monopolize a market by reducing rates below costs, all they could do would be to suffer losses themselves. As soon as rates were raised to remunerative levels, new competitors would appear.

On the joint rail/truck or rail/barge shipments the railroads could conceivably monopolize the carriage to their own subsidiaries. Would they do so and if they did so would it be harmful? Consider Diagram I where a railroad has a monopoly between points A and B and faces independent competitive trucking firms. Let marginal cost of carrying say a piggyback trailer from A to B be $20. On Diagram I (not printed in the RECORD) are indicated points C, C', C'' and D, D', D'' with the marginal cost of shipping from these points to other points, and also to the rail heads A and B (loading costs are neglected). Now a shipment from C to D entirely by truck has a marginal cost of $100 while to go piggyback by rail costs $30. A monopoly railroad could charge anything up to $90 for the carriage from A to B and secure the business. A shipment, however, from C' to D' would have an all truck marginal cost of $50 and the railroad to secure that business could charge no more than $40 for the A to B trip. If the railroad reduces its rates to say $39 to secure the C' to D' traffic it would forgo about $50 per trip on the C to D traffic. The judgment on whether to do so would depend on the relative traffic between the areas. The railroad could also compete for the C'' to D'' traffic since it has a $1 marginal cost advantage but it probably would not because it would have to forgo so much monopoly profits on other trips. In other words, the railroad not being able to perfectly price discriminate would forgo some traffic for which it is the low cost carrier.

The railroad, however, if it owned its own trucks and carried only its own trailers could price at $89 from C to D, $49 from C' to D' and $30 from C'' to D'' and secure all the business. This would be foreclosure but from an allocative point of view it would be preferable to the situation where it could only establish a single monopoly rate between A and D. This foreclosure would allow the railroad to perfectly price discriminate and capture all of the traffic for which the joint truck/rail/truck shipment is the low cost alternative.

Consequently we can conclude that railroads, particularly those in a monopoly situation, might try to foreclose the market but that at least from an allocative point of view such a step could improve the allocation of resources. Of course to the extent that it permitted higher rates to some markets it would reduce shipments which would produce allocative losses. These losses would probably be smaller, unless demand was very elastic than the misallocation stemming from a single monopoly rate.

On theoretical grounds, therefore, there would seem to be no objection to permitting railroads to own other modes. It probably would improve the allocation of resources.

Some idea of the outcome of a more permissive stance towards intermodal ownership can be secured by examining the Canadian system. The Canadians have permitted railroads to own other modes and as a consequence Canadian Pacific and Canadian National each operates a large railroad system, one of Canada's largest trucking firms, an international airline, and a major steamship line. No instance of foreclosure or attempts to monopolize have occurred.[1] Confirming the absence of attempts to monopolize is evidence from one of the major railroads indicating that less than 10 percent of that portion of piggyback service which could be monopolized by a company's own trucks (Plan I and II) is actual trailers owned by subsidiaries.[2] Moreover railroad ownership of trucking consists of less than 10 percent of the whole industry [53, p. 179].

While these observations do not appear to be consistent with the model presented above, the latter dealt with the situation where one railroad has a monopoly. In Canada, it would appear that neither road is in a position to monopolize; hence there is little gain from one railroad attempting to price discriminate by restricting traffic to its own trucks.

Some of the advantages of intermodal ownership may be indicated by the earlier large-scale introduction of piggyback service in Canada and that the first integrated multimodal shipments on the continent was established in 1947 on the White-Pass and Yukon route using truck bodies carried on truck, water carrier, and rail.

Consequently, while the advantages of unified ownership have probably been exaggerated, the drawbacks have too. It would seem on net that the gains would outweigh any losses and at least if regulation were relaxed on entry and rates, it should also be relaxed on multimodal ownership.

MODIFIED DEREGULATION

From an allocating point of view, it is probably true that complete deregulation is a desirable step; certainly it would be a vast improvement over the existing situation. Much of the waste, engendered by ICC regulation would clearly disappear. On the other hand, deregulation might lead rates on certain non-competitive routes to be raised, and, on the downward side, predatory pricing between railroads might occur. It is generally believed that railroads have considerable excess capacity [7] [48]. Such excess capacity might tempt railroads into pricing at short-run marginal cost considerably below long-run marginal cost with the result that rates would be quite unstable until the excess ca-

[1] See [53,] p. 179.

[2] Confidential data furnished the author.

pacity was eliminated. While from an efficiency point of view, pricing at short-run marginal cost and the elimination of excess capacity, thereby, is desirable, it would be costly to the railroads and possibly to other forms of transportation and at a minimum would engender considerable political opposition.

While the need for change of the current regulatory system should be obvious to all and the desirability of moving towards less regulation obvious to everyone except those with vested interest in the existing system, complete abolision of regulation at the moment, no matter how desirable on efficiency grounds, remains unlikely to pass Congress. The political process tends to work carefully to preserve existing income distributions and vested rights. The people who would be hurt by abolishment of regulation are vocal and knowledgeable. The people who would gain from deregulation are less knowledgeable, are less vocal, and are more widely diffuse. Therefore, the political process will listen carefully to those who will be hurt.

Moreover, from an economic welfare point of view, it is not obvious that the political process is wrong. A dollar lost by one person cannot be equated with a dollar gain for someone else. A large number of individuals—truckers, barge line operators, etc.—would lose from deregulation. While their loss would be in absolute terms less than the dollar gain to shippers and consumers, an ethical judgment as to the desirability of the resulting income distribution is necessary before deregulation can be prescribed. Certain inefficiencies, however, are clearly so costly to the economy that they could be considered a net gain unless the resulting income distribution was horrendous. The increased cost of operations of trucks, railroads, and barge lines that stem from regulation are clearly in that category. Moreover, the impact of deregulation on income distribution is ambiguous for the economy as a whole. Consumers which include poor people would gain; truckers and barge line operators and some of their labor would lose at least in the short run.

This paper has identified three potential problems with deregulation: higher rates in any monopolized markets, increased price discrimination—especially between shippers, and predatory pricing. While none of these may occur, they are widely feared which explains why deregulation is so difficult to achieve politically.

Can we provide a legal framework that would produce most of the gains from deregulation but reduce the likelihood of monopolized markets, personal price discrimination, and predatory pricing? It must be recognized that any policy designed to deal with these dangers will impose costs which may be higher than the gains.

A possible means of providing a competitive environment for transportation and yet preventing some of the excesses that might result from complete reregulation would be patterning the system after the Canadian transportation regulatory legislation. To prevent predatory pricing, Canada prohibits pricing at less than variable cost of the movement; the method of determining variable cost is defined in the act. The Canadian legislation also allows the setting of maximum rates where a shipper ". . . has no alternative, effective and competitive carrier or carriers other than a rail carrier or carriers. . . ." In that case, a shipper can apply to the regulatory commission for a rate not higher than 250 percent of the variable cost of the movement. A shipper whose rate is so fixed must utilize it for all his relevant goods or pay damages.

One of the virtues of the Canadian legislation is that it limits maximum rate regulation to monopoly situations. Since the Canadian legislation was enacted in 1967, there have been only two complaints under the Captive Shipper Clause. The cases which involved a paper manufacturer and a wood pulp manufacturer are both pending before the regulatory commission. No minimum rate protests have been upheld to date.

The Canadian legislation requires the filing and publishing of all rates with a 30 days notice for increases and prohibits all rebates. Such publishing of rates limits the potential for personal price discrimination but at the same time makes implicit collusion easier between railroads.

A major problem with following the Canadian pattern is the difficulty of measuring costs. Clearly, one of the most important steps that could be taken to improve the allocation of resources in transportation besides reducing or eliminating regulation is to provide a meaningful ongoing cost analysis of transportation. A careful effort should be made to measure long-run and short run costs for a wide variety of product classifications and these figures should thereafter be computed regularly. With such data at hand it will be feasible to prove when a railroad was predatory pricing and when it was simply responding to the forces of the market place.

The Canadian system seems to work well and permits the railroads considerable discretion concerning their prices yet limits them from either predatory pricing or excessive monopoly pricing. U.S. legislation along the same line could reduce the political costs of deregulating transportation while still permitting genuine competition between modes and within modes in the transportation industry.

CONCLUSION

Only a hardened free-market advocate would claim that deregulating transportation does not present some problems. These would be some residual monopoly situations where railroads might price significantly above costs, some potential for personal price discrimination, and some situations which might lead to predatory pricing between railroads. However, monopoly situations would be rare and of no greater consequence than such situations in manufacturing. Nor is price discrimination likely to lead to greater problems in transportation than in other sectors of the economy. The railroad industry is certainly not much more concentrated than such industries as aluminum, copper, and automobiles. Yet oligopolistic competition is generally felt to be the only viable alternative in these industries. Thus it would seem feasible to deregulate entirely.

As suggested in the preceding section, however, some minimal regulation may be politically desirable and in fact could be justified on economic grounds for those fearful that railroad monopoly powers are greater than they would appear on the surface and that the problem of predatory pricing is more considerable than would be suggested by the above analysis.

Certainly the evidence seems to strongly support the proposition that there are no substantial economies of scale in any of the major modes of transportation, with the possible exception of pipelines, and that again with the possible exception of pipelines, a viable substantially unregulated industry could be a major improvement over the existing situation. An investigation of the cost of regulation in this industry suggests that they are in fact not only substantial, but monumental. While not all of the costs have been identified and the figures are at best orders of magnitude, they do indicate that ICC regulation costs the economy billions of dollars. In 1968, with national income generated in transportation just over $27 billion, about one-fourth of that may be due to regulation. As a conclusion, therefore, it seems urgent that steps be taken to eliminating or reducing significantly regulation of surface-freight transportation.

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Mr. TAFT. Mr. President, I am very much pleased that the Nixon administration is moving in the direction of deregulation with regard to surface transportation rates. The action which the administration is taking in this area was recently described in an article written by Robert T. Samuelson and published in the Washington Post. I ask unanimous consent that it be printed in the RECORD.

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

OVERHAUL OF ICC READIED—TRANSPORTATION REGULATION WOULD BE CUT

(By Robert T. Samuelson)

The Nixon administration is preparing to ask Congress for a fundamental overhaul of federal regulation of the trucking, railroad and barge industries.

The administration's proposal would significantly relax regulation in an attempt to stimulate more competition among trucks, railroads and barges and, thereby, force freight rates down.

Although the reform has been discussed since early this year, the White House is now apparently nearly ready to submit its legislation. A draft of the bill, obtained yesterday, indicates that the administration will urge congress to:

Eliminate "rate bureaus" as a vehicle by which truckers, railroads or barge firms can get together and agree on common national (or regional) freight rates for their industries. These rate agreements, now immune from anti-trust prosecution, can be approved, rejected or modified by the Interstate Commerce Commission.

Reduce the ICC's control over the number of truck lines that can haul freight over a specific route.

Relax the ICC's control of rates. Although the commission would still be able to reject carrier rate proposals, it could do so only if freight rates met one of two conditions: they failed to cover the carrier's costs on the low side; or, on the high side, they represented more than a 50 per cent margin of profit.

Economists have long argued that tight federal regulation has stifled competition in the transportation industry, resulting in higher freight rates. With the complete elimination of federal regulation—something the Nixon administration is not proposing—freight rates would drop about 20 per cent and shippers would save from $3 to $5 billion annually, according to one recent economic study done for the Brookings Institution.

Spokesmen for railroads and truckers have disputed such predictions, and strong opposition from transportation interests—particularly the truckers—is expected to the administration's proposal.

The railroads, truckers and barge lines have already submitted a substitute bill which would make up to $5 billion in federally guaranteed loans available to the surface transportation industry, but would not tamper with the wide power of rate-making bureaus.

The two bills are expected to become the center of a prolonged and bitter lobbying contest.

"I can't believe that it (the administration's proposal) will be enacted," one source said yesterday, predicting that shippers ultimately would join opposition to the bill.

Shipping interests have generally favored more competition among freight carriers, but the administration's legislation would limit the ICC's ability to hold back rate increases. During an inflationary era—when railroads and truckers have repeatedly clamored for higher rates—that change might leave shippers cold, this source said.

The administration's proposal would also weaken states' powers to control freight rates on shipments within their own states. Under the bill, carriers could request states to approve new rates once the ICC had accepted the rates. Under these circumstances, the states would have only four months to act (they have an indefinite period now) and carriers could appeal an unfavorable decision to the ICC.

SENATOR JOHN SHERMAN COOPER, OF KENTUCKY

Mr. SAXBE. Mr. President, in today's Washington Post, columnist Marquis Childs has written a perceptive piece centering on the distinguished senior Senator from Kentucky (Mr. COOPER). Mr. Childs notes that, among other things, Senator COOPER's record is in many respects unique in its scope and in the independence it reflects.

Mr. President, I could not agree more. I have followed Senator COOPER's lead more often on matters affecting this body than any other Senator. I believe strongly in his sincerity and ability. My respect for the senior Senator from Kentucky is perhaps heightened because, in many ways, our backgrounds are not dissimilar.

I ask unanimous consent that Mr. Childs' tribute to this remarkable Senator be printed in the RECORD.

Mr. MATHIAS. Mr. President, it is the unanimous judgment of the Senate that the senior Senator from Kentucky, JOHN SHERMAN COOPER, is one of the finest men ever to serve here. Someone once applied to Senator COOPER the lines from Shakespeare "This was the noblest Roman of them all," and instead of being met with the derision that would have greeted such a description of most of us, it stuck. It was accepted, because it fit and everyone of us feels better that such a man serves here. His interest in a cause gives it both weight and dignity, and his support may not insure victory, but it guarantees serious consideration and thoughtful discussion.

It is good to know that these sentiments are shared by those outside the Senate. The most recent evidence of this is the column by Marquis Childs entitled "Senator Cooper—Son of Somerset" published in today's Washington Post. I join the Senator from Ohio (Mr.

SAXBE) in asking unanimous consent that the article be printed in the RECORD.

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

SENATOR COOPER—SON OF SOMERSET

(By Marquis Childs)

The recent bombing of North Vietnam, most massive in three years, is a manifestation of America's continuing involvement in a war deeply dividing the nation. On no one does this weigh more heavily than on the senior senator from Kentucky, a Republican, John Sherman Cooper.

Cooper's opposition to the bombing goes back to 1964. While voting for the Gulf of Tonkin resolution in August of that year, he said on the Senate floor that to be granted such broad powers the President was obligated immediately to search for ways to negotiate an end to the fighting and perhaps even to refer the question to the Geneva powers.

The following year and again in 1966 he drove hard for a stop to the bombing of the North. The weight of his influence had not a little to do with Lyndon Johnson's decision to negotiate and halt bombing in the North. The thousands of tons of bombs rained down north of the DMZ a few days ago is a grim commentary on the power that persists once the guns start firing.

In his opposition to the war and in every field Cooper's record is in many respects unique in its scope and in the independence it reflects. After his re-election in 1966 he said he would not seek another term and he repeated this several times.

Usually when an elected officeholder makes such an announcement the scramble to succeed him becomes a stampede. Petitioners from Kentucky, and among them are Democrats as well as Republicans, urge him to run again next year. They agree he could win with virtually no campaign.

Some of Cooper's close allies in the Senate despair over the way the power of the executive overshadows the Congress, and they point to the resumption of heavy bombing as proof. Cooper disagrees. It may be his Kentucky heritage of grit, but he does not give up for all his bruising encounters with power.

During the congressional recess he flew to Helsinki to get a reading on the Strategic Arms Limitation Talks (SALT). After lengthy conferences with the American delegation he brought back the word, now on the front pages, that an agreement limiting defensive weapons is likely before the end of the year. Cooper joined Sen. Philip A. Hart (D.-Mich.) to knock out funds for the anti-ballistic missile in the defense budget of 1969. They lost by a single vote. A second attempt the following year was defeated by 52 to 47. The Senator's present intention in light of a probable agreement is not to challenge the funds for ABM this year.

In 1958, in partnership with John F. Kennedy, then a Senator from Massachusetts, Cooper initiated the consortium of a half-dozen nations supplying aid to India and Pakistan. It worked well until the rivalry between Moscow and Peking accentuated the enmity between the states that share the subcontinent. Cooper was ambassador to India in 1955 and '56, between his service in the Senate for two short terms and his election in '57 to a full term.

At times, voting for civil rights measures, he runs afoul of his comparatively conservative constituency. His was one of three votes against the measure giving the Attorney General greatly broadened powers to wire-tap. Addressing the Louisville Chamber of Commerce a little later on pollution, as he finished a voice from the back of the hall boomed out:

"We want to know why you voted for crime the other day."

The senator, who has served longer in the Senate than Henry Clay, longer than any Kentuckian except Alben Barkley, can tell that kind of anecdote with the dry humor that is out of his roots in his home town of Somerset. When he goes back home, people line up to talk to him not just about politics but about their personal problems. For all his years in Washington, New Delhi and in New York at the United Nations, he is still the man from Somerset.

The other day Cooper had his 70th birthday. His knowledge and experience gave him a remarkable perspective on the political scene both at home and abroad. If he goes through with his intention of retiring, is this experience to be lost? The young today would reject anyone over the age of 25, or maybe 30. That loud, arbitrary cutoff denies the wisdom of men such as Cooper who have come through the struggle of our times bloody but unbowed.

TRIBUTE TO J. EDGAR HOOVER

Mr. ELLENDER. Mr. President, the Young Men's Business Club of Greater New Orleans is one of that city's most active and most civic minded organizations.

It is at the request of this group that I ask unanimous consent that the following YMBC resolution be printed in the RECORD.

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

RESOLUTION

Whereas, J. Edgar Hoover has completed 47 years of continuous and dedicated service to the United States of America, and

Whereas, J. Edgar Hoover, through hard work, sincere application and self-sacrifice, has risen to the leadership of the Federal Bureau of Investigation; and

Whereas, under his leadership the Federal Bureau of Investigation has become recognized as the most effective and reputable law enforcement agency in the world;

Now, therefore, be it Resolved that the Young Men's Business Club of Greater New Orleans, Inc., place its name on the public records as congratulating J. Edgar Hoover for his 47 years of devotion to effective and vigorous law enforcement and to the Federal Bureau of Investigation, which, under his leadership, has done more to protect our country from crime and subversion than we can ever fully appreciate or comprehend.

Be it further resolved that copies of this resolution be forwarded to J. Edgar Hoover, the Federal Bureau of Investigation, to all news media, to Louisiana Congressional Delegation with a request that it be entered into the Congressional Record.

PROBLEMS OF FRAUD IN WELFARE

Mr. TOWER. Mr. President, I was heartened by recent reports of Vice President AGNEW's comments at the National Governors' Conference concerning the administration's welfare reform bill.

The Senator from Louisiana (Mr. LONG), chairman of the Committee on Finance, reported to the Governors in very strong terms that H.R. 1 will not solve the problems of fraud or put welfare recipients back to work and indicated that the Finance Committee was far from satisfied with it.

Responding to Senator LONG, the Vice President reportedly commented:

There's a very distinct possibility . . . that we might find the middle ground.

Signaling an administration willingness to compromise on the measure.

I certainly hope this is the case. The views set forth by the President in his Labor Day speech and again in his recent message to the joint session of Congress, spelling out concerns over the welfare problem which would not be rectified by H.R. 1 and his announcement of his desire to postpone the effective date of the measure as part of his new economic program, presaged such second thoughts.

Chairman LONG has proposed subsidies by low-wage workers and tax deductions for families who hire domestics at wages above the welfare level as part of an alternative program. Senator CURTIS, a member of the committee, joined by myself and Senator FANNIN, has proposed a plan for returning control of the welfare program to the States and localities, with Federal revenue-sharing grants to assist in financing the programs as an alternative to federalizing welfare.

If the Finance Committee is given ample opportunity to study these two alternatives and the administration is indeed willing to compromise in the interest of obtaining the best possible reform, I believe we may yet be able to find a solution to this desperate crisis which will deal adequately and justly with both the needy of our Nation and the American taxpayer. Equally as important, we may be able to resolve the problem in a way that strengthens our free-enterprise federal system of government rather than taking another step down the road to socialism.

I commend Vice President AGNEW for opening the door and pray that it reflects the feeling of the administration.

Mr. President, I ask unanimous consent that the Washington Post article quoting the Vice President be printed in the RECORD.

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

[From the Washington Post, Sept. 14, 1971]

AGNEW TO DEMOCRATS: BACK NIXON PROGRAM

(By David S. Broder)

SAN JUAN.—Vice President Agnew today challenged the Democratic Party's governors to "put away partisan jockeying" and support President Nixon's economic policies. They replied by blaming him for the "worst economic crisis in a generation" and demanding that he be more "even-handed" in Phase 2 of the control program than in the current wage-price freeze.

The economic argument dominated a full day of private and public discussions among administration officials, congressional leaders and state executives here for the 63d annual National Governor's Conference.

Among the main developments:

Long-time advocates of revenue-sharing here were cheered by reports that House Ways and Means Committee Chairman Wilbur Mills (D-Ark.) might approve a version of that plan—not called by that name—which would put $5 billion a year in state and local treasuries.

Agnew signaled an administration willingness to compromise with Senate Finance Committee Chairman Russell B. Long (D-La.), who laid down a major attack on the Nixon welfare reform bill in a speech to the governors this morning.

Representatives of the administration lobbied behind the scenes to keep the Democrats, who took over majority control of the conference in last year's elections, from scuttling its support of Mr. Nixon's two key programs, revenue-sharing and welfare reform.

And Gov. George C. Wallace of Alabama served notice he will try to bring the controversial busing question before the conference at its final session on Wednesday.

The economic argument began when Agnew, in a major address to the morning session, defended the Nixon proposals as a "balanced program," fair to business, labor and consumers, and pleaded with the Democrats not to break the pattern of general cooperation he said had characterized the first month of the wage-price freeze.

His reply came eight hours later, when the Democratic caucus approved a statement blaming the President for taking a pro-business approach to solving an economic problem which they said has caused "widespread suffering and deprivation."

Maryland Gov. Marvin Mandel, who was elected as new chairman of the caucus, denied the statement was "a slap to anyone."

The Democrats plan to bring their resolution before the full conference on Wednesday, but with only 29 votes, they appear to be at least nine votes short of the three-fourths majority needed to suspend the rules and bring up a resolution not submitted 30 days in advance.

What some governors hailed as a breakthrough in the long fight for revenue-sharing was a staff proposal, drawn up by Mills' aides, for a two-part package of new federal aid to states, counties and cities.

As circulated here, one part would provide $3.5 billion a year to cities and counties for the next three to five years, for use at their discretion in certain broad areas of public need, excluding education.

The second part would be a permanent appropriation to the states, starting at $1.5 billion a year and possibly increasing as federal revenues increase, for any use they decide.

Governors who had been briefed on the plan said they had been told Mills indicated it might pass the Ways and Means Committee as early as next month.

Others, who recalled similar optimistic reports from Washington at previous governors' conferences, said they were skeptical that all the necessary agreements had been secured.

Representatives of the U.S. Conference of Mayors here, for example, said their organization had no accepted a provision that would reportedly permit a state to preempt 20 per cent of the local funds for a coordinated attack on regional problems.

The companion measure on the Nixon domestic program, welfare reform, was also the subject of a tug-of-war today. The Governors' Conference in the past has endorsed a phased federal takeover of all welfare costs and most of its members have supported the Nixon plan as a step in that direction.

But Long, whose Finance Committee holds the immediate fate of the house-passed measure in its hands, told the governors in strong terms today that the Nixon plan would not solve the problem of fraud or put welfare clients back to work, as most of them would like done.

His attack appeared to strengthen a wave of second thoughts about the Nixon plan, involving governors of both parties.

Long advocated his own alternative to the President's proposals—involving a range of subsidies to people who take low-wage jobs and quit the welfare rolls. Long also favors tax deductions for families who hire domestics at high enough wages to bring them above the welfare cutoff.

Comments from the governors after the speech indicated many of the conservatives shared his approach, but Massachusetts Gov. Francis W. Sargent (R) urged his colleagues to stay behind the Nixon plan, or to seek to increase its benefits, in hopes "we can get the states out of the welfare business."

Agnew, who followed Long to the podium at today's meeting, took a conciliatory line toward the Finance Committee chairman.

"There's a very distinct possibility, Senator," he said, "that we might find the middle ground." Agnew said that under any program of welfare, the administrators would have to confront the "public attitudinal problems which prevent the investigation of fraud . . . and be very courageous to take the steps to protect the taxpayers from abuses."

Then the Vice President made his plea to the governors—obviously aimed mainly at the new Democratic majority—that they not let "blind negativism" dominate their response to Mr. Nixon's new economic policy.

Praising labor, business and all elements of the public for "cooperating with the President" in the start of the 90-day wage-price freeze, Agnew sought to rebut three major arguments that Democratic economists and politicians have raised against the Nixon package.

The argument that an investment tax credit is not needed when American industry is operating at 73 per cent of capacity ignores the fact that "the unused capacity . . . for the most part is old, outmoded and inefficient," Agnew said.

In contradiction to those who claim the President's package gives more benefits to business than consumers, Agnew described it as "a balanced tax package" which "reduces taxes paid by individuals by $3.3 billion, and offers a tax credit of $2.7 billion to industry . . . and relieves consumers from some $2 billion in excise taxes."

"I do not see how, under any circumstances, the 'trickle down' appellation applies," Agnew said.

Finally, rejecting the suggestion that profits should be frozen along with wages and prices, Agnew asserted that "rising corporate profits are good for the average man and are needed more than ever by the poor."

By contrast, the Democratic resolution said the Phase 2 controls should assure that "whatever restraints on wages or other forms of personal income are balanced with commensurate restraints on profits, dividends, and interest rates." Ohio Gov. John J. Gilligan, the head of the drafting committee, said those "could include an excess profits tax," but did not necessarily require one.

OTHER REQUESTS

In other specifics, the Democrats called on the President or Congress to:

Grant a 7 per cent investment tax credit for new investment but cancel the liberalized depreciation allowances approved by the Treasury earlier this year. The President recommended a 10 percent tax credit on top of the faster writeoff.

Pass the welfare reform and revenue-sharing bills without further delay.

Make a special grant of $3.5 billion to states and cities to replace what they said were revenue losses attributable to last year's recession.

And release some $12 billion of appropriated funds the President has impounded, to accelerate construction of roads, housing and health facilities.

GENERAL MOTORS CHANGES DIRECTION

Mr. NELSON. Mr. President, the automotive world is buzzing this month over reports that the industry's and the planet's largest corporation, General Motors, is undergoing an historic reversal of management policy and corporate organization. The reports are to the effect that GM is changing from an organization and policy of coordinated decentralization to a policy and organization of total centralization.

General Motors has not confirmed these reports, in so many words; but the indications are strong that they are substantially correct. Automotive News, the distinguished independent newspaper of the industry, last week and again this week has published lengthy articles, to which many of its most expert and experienced reporters and editors contributed.

Because General Motors is so immense, anything it does is significant and deserving of careful scrutiny by the Senate. For that reason, I ask unanimous consent to have printed in the RECORD the following documents:

First. General Motors press release dated September 14, 1971.

Second. Article from the Wall Street Journal of September 15, 1971, headed "GM Chevrolet Division To Give Up Last Three Car-Making Facilities."

Third. Article from Automotive News of September 20, 1971, headed "GM Moves To Centralize All Operations."

Fourth. Article from Automotive News of September 20, 1971, headed "Whether in 1968 or 1971, GM Calls It 'Flexibility'."

Fifth. Article from the New York Times of September 22, 1971, page 65, headed "GM Reported To Centralize To Avert Antitrust Moves."

Sixth. A statement by myself, prepared at the request of Automotive News, captioned "Statement by Senator GAYLORD NELSON on reported plans of General Motors Corp. to centralize its operations.

Seventh. Article from Automotive News of September 27, 1971, headed "GM Move To Centralize Faces Senate Scrutiny."

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

GENERAL MOTORS CORP. NEWS RELEASE
SEPT. 14, 1971

DETROIT.—Effective October 1, the GM Assembly Division will assume the administration of three assembly facilities currently operated by the Fisher Body and Chevrolet Motor divisions, it was announced today by James M. Roche, General Motors chairman.

This will bring to 18 the number of assembly plants under GMAD administration.

The three affected Fisher-Chevrolet facilities are the Willow Run plant at Ypsilanti, Mich., and the Lordstown, Ohio, and St. Louis, Mo., plants.

Mr. Roche said that the realignment of assembly plant management responsibility will permit greater flexibility in processing body and chassis operations.

The Willow Run plant assembles the Chevrolet Nova and Pontiac Ventura. The Chevrolet Vega is assembled at Lordstown, and standard size Chevrolets and Chevrolet Corvettes are assembled at St. Louis. Chevrolet and GMC vans are also assembled at Lordstown, and trucks for both divisions are assembled at St. Louis.

Joseph E. Godfrey, GM vice president and general manager of GMAD, announced the following management changes in connection with the realignment:

William S. Lemmer, manager GMAD-Fremont, Calif., to regional plant manager responsible for the operations of six GMAD plants. His headquarters will be at the GMAD Central Office, Warren, Mich.

Clifford J. Vaughan, manager Chevrolet-St. Louis, Mo., to manager GMAD-Fremont, Calif.

Patrick J. Coletta, manager GMAD-Leeds, Kansas City, Mo., to manager GMAD-St. Louis, Mo.

Darrel W. Kegerreis, production manager GMAD-Linden, N. J., to manager GMAD-Leeds, Kansas City, Mo.

Alvin B. Anderson, manager GMAD-Van Nuys, Calif., to manager GMAD-Lordstown, Ohio.

J. Charles Abernethy, production manager GMAD-Van Nuys, Calif., to manager GMAD-Van Nuys.

Orm F. Perkins, manager Fisher Body-Lordstown, Ohio, to manager GMAD-Willow Run.

Louis J. Biskach, manager Chevrolet-Lordstown, Ohio, to assistant to the manager GMAD-Lordstown.

William M. Steiner, manager Chevrolet-Willow Run, to production manager-trucks GMAD-Lordstown, Ohio.

John R. Gibbs, acting plant manager Fisher Body-Willow Run, to production manager GMAD-Linden, N.J.

William F. Harden, Jr., executive engineer General Motors Overseas Operations Division, Detroit, to production manager GMAD-Van Nuys, Calif.

Frank D. Faga, manager Fisher Body-St. Louis, Mo., to production manager GMAD-Lakewood, Ga.

John F. Patete, production manager GMAD-Lakewood, Ga., to production manager GMAD-St. Louis, Mo.

Charles W. Coffey, general superintendent GMAD-Janesville, Wis., to production manager-passenger cars GMAD-Lordstown, Ohio.

Clyde K. Oran, divisional director of quality control, Warren, Mich., to production manager, GMAD-Willow Run.

[From Wall Street Journal, Sept. 15, 1971]

GM Chevrolet Division To Give Up Last Three Carmaking Facilities

ASSEMBLY DIVISION TO GET PLANTS, OBSERVERS CITE COST SAVINGS, POSSIBLE HEDGE AGAINST SPLITUP

Detroit.—The huge Chevrolet division of General Motors Corp. will give up the last of its car-assembling operations Oct. 1, the company said.

In a brief announcement, GM said Chevrolet's last three car-assembly plants will be turned over to the General Motors assembly division on that date, leaving Chevrolet without an individual auto-assembly plant among its network of facilities. At one time, GM's divisions operated much like separate companies, each designing, building and selling its own cars.

The latest move, however, means that 18 of GM's 22 car-assembly plants will be operated by the assembly division. Only the "home" plants of Buick, Oldsmobile, Pontiac, and Cadillac will be operated by the car divisions. Similarly, the assembly division will operate all of GM's truck plants, except for the "home" truck plants of GMC truck division and Chevrolet truck.

Industry observers long have seen the moves to consolidate GM's car production under the assembly division as having two main purposes. First, by centralizing car building under it, the auto giant eliminates duplicate staffs and concentrates buying power, resulting in cost savings, while also giving GM flexibility to swing its production to various sized cars as demand changes.

Also important, in the view of some industry observers, is that by stripping Chevrolet of its assembly function. GM makes the big division less of a complete unit in itself. This could make it much more difficult for some future antitrust action to separate Chevrolet from GM, a plan that has been favored by some antitrust advocates over the years.

Although still GM's biggest division, Chevrolet has slipped in recent years, from generating 51.1% of GM sales in 1962 to 47% in 1969, GM's last full nonstrike year.

Although Chevrolet won't any longer assemble cars, it still will operate 23 facilities around the nation to manufacture engines, gears, bumpers and other car components. It also will retain full responsibility for the design, engineering and marketing of its cars.

The assembly plants to be transferred to the assembly division are the Willow Run plant, at Ypsilanti, Mich., the St. Louis, Mo., plant, and the newest GM assembly plant, the heavily automated Vega factory at Lordstown, Ohio.

GM said three Fisher Body plants, formerly run by the Fisher Body division at the locations of the Chevrolet plants, also will be transferred to the asembly division. Fisher Body, which produces car bodies in factories generally nearby to assembly plants, will operate its own plants only at the sites of the four remaining divisional "home" plants, a GM spokesman said.

[From Automotive News, Sept. 20, 1971]

GM Moves To Centralize All Operations

CONTRIBUTORS

Contributors to this report on General Motors included Hugh Quinn, John K. Teahen, Richard A. Wright, Helen Kahn, John E. Walsh, Robert M. Lienert and Robert M. Finlay

The most sweeping changes in General Motors history are putting a new face on the auto giant.

The corporation is moving on a deliberate course toward a strong centralization of operations that eventually will reduce and five passenger-car divisions largely to marketing arms.

It's taken GM more than 50 years of long hours and hard work to get where it is today, following the management precepts laid down by the late Alfred P. Sloan Jr., longtime GM boss and chief advocate of the company's celebrated modus operandi of "coordinated decentralization."

GM has long been the classic textbook example of a decentralized corporate structure.

Now the giant corporation definitely is swinging away from Sloan's original thesis to an operating plan that bears striking resemblance to those of GM's competitors, Chrysler Corp. and Ford Motor Co.

Carried through, the centralization will find GM operating with a single engine division, for example, supplying engines for all car lines; a single assembly division building the cars and supplying the finished product to the sales divisions.

Consolidation of other operations, now spread among various divisions, could result in single divisions for forgings, chasis, transmissions, suspension and so on.

But centralization involves more than just consolidation of certain manufacturing or assembly operations. GM, long a favorite target of would-be trustbusters and, lately, consumer advocates, who feel the company is too big, would become a hard nut to crack.

To date, 18 antitrust actions have been brought against GM. Eight were criminal indictments, resulting in six nolo contendere pleas and two judgments. Ten were civil complaints resulting in two decisions against GM, five consent decrees and three dismissals.

Under the Sloan system, each GM division was an autonomous profit center, and the general manager of each division was responsible for building his own organization, coordinating its efforts and planning its progress.

Passenger-car divisions had responsibility for product planning, engineering, manufacturing, assembly and marketing. Divisions were charged with showing a proper return of capital investment, just as a corporation would be outside the protective GM fold.

Chevrolet, the largest single producer of vehicles in the world, and the largest unit within GM, thus was a separate entity, all to itself, that might neatly be split off and enrolled as a dues-paying member of the Automobile Manufacturers Assn.

But no longer.

As of Oct. 1, Chevrolet will be out of the car-building business altogether, and some insiders believe that the next step will be to take away the home assembly plants of the other vehicle divisions—maybe within six months.

In the Oct. 1 move, announced last week, GM will take away Chevrolet's last three remaining car assembly plants. They will be reassigned, along with the adjacent Fisher Body facilities, to the fast-growing General Motors Assembly Division, which is headed by Joseph Godfrey, 56, a corporate vice-president.

The plants involved are at Lordstown, O.; Willow Run, Mich., and St. Louis.

The Lordstown case is interesting. In stripping Chevrolet of six plants in 1968, GM implied that the blow was softened by the fact that Chevrolet was given the responsibility for engineering, producing and distributing GM's new small car (Vega), which had been announced a few weeks before.

The production responsibility was short-lived. Vega is built only at Lordstown, and Lordstown is no longer a Chevrolet plant.

Only six weeks ago, Chevrolet lost its Norwood (O.) plant to GMAD. All that remains of the former Chevrolet assembly network is the plant at Flint, which builds trucks for Chevy and GMC Truck & Coach.

This means that Chevrolet no longer exists as a unified producer and marketer of passenger cars. Chevrolet now must buy its automobiles from a supplier, GMAD. And GMAD, on the other hand, could not operate on its own, since it has no retail sales outlets, or, for that matter, no internal wholesale organization.

GM President Edward N. Cole, the man who has skippered the corporation's course toward centralization, reportedly told a Greenbier conclave of top GM executives, some 10 years ago, that he would like to centralize operations to make it tougher for the Justice Department to break up the corporation.

Since then, the channel markers for this course have appeared, sometimes clearly, at other times shrouded in fog.

THE GM PHILOSOPHY

In October, 1968, GM submitted a statement to two subcommittees of the Senate Select Committee on Small Business, in which the corporation (how did GM wind up in a Small Business hearing?) said that "General Motors is an operating company, a single-business enterprise, not a holding company or a collection of independent operating units. The car divisions are not equivalent to independent companies and could not function on their own."

At the time of that Washington testimony, GMAD was gaining strength, and the course was beginning to appear more clearly on the charts.

By 1964, GM had integrated its intermediate car lines to a point of high interchangeability of parts. The full-size car lines reached that level with 1971 models.

The 1968 Small Business statement put forth GM's new philosophy of economies through centralization: "Higher volume production may justify expenditures on capital equipment which at least pay for themselves as the volume potential increases.

"Illustrative of this," the statement continued, "are the high-speed presses which, with a single set of dies, produce inner door panels for all General Motors regular size cars."

The statement cited another example: "Except for Cadillac Division, assembly operations by each car division of General Motors are integrated in part with some other division . . . Each division depends on development efforts and production carried on in

other divisions and on central staff activities, coordination and management."

Since then, even Cadillac's operations have been interwoven with those of other divisions. The GMAD plant at Linden, N.J., now assembles Cadillacs, and the Cadillac Eldorado has the same drive train as Oldsmobile Toronado and the same body shell as Toronado and Buick Riviera.

In other words, where would a trust-buster draw the line?

The only plants operating outside the GMAD wing after Oct. 1, when the three Chevrolet plants officially move, will be the home plants of Buick, Cadillac, Oldsmobile, Pontiac and GMC Truck & Coach divisions and the Chevrolet truck plant in Flint.

As of today, GMAD operates 18 of the corporation's 24 assembly plants. The Pontiac, Oldsmobile, Buick and Cadillac home plants build only their own lines, but the GMC home plant assembles Chevrolet trucks as well as its own.

NEXT TO GO

If, as expected, all vehicle divisions lose their home assembly plants, it follows that their responsibilities in engineering, product planning, and component manufacturing also would be stripped away and reassigned to other GM units.

This already is happening. Engineering for front end sheet metal, now done individually by each passenger-car division, is being taken over by Fisher Body Division in the near future.

Product planning also has been transferred to a corporate staff activity at the GM Tech Center.

Chevrolet's Warren (Mich.) plant is tooling up to produce all the front control arms for all GM divisions, just as all disk brakes now are made in Flint. These operations, while now part of individual divisions, could easily become consolidated in some corporate manufacturing division.

The possibility of a single engine division looms as GM trims away the array of engines produced by the various divisions. Within a few years, GM will have only two V–8 engines (350 and 500 cubic inches), one six-cylinder engine and the four-cylinder powerplant now used in the Vega.

Integration of the corporation's truck operations already has been accomplished at all but the sales and engineering levels. Although GM persistently denies reports that it plans to merge the two truck divisions, the merger has taken place in product line and in production.

All medium, medium-heavy and heavy-duty trucks, carrying both Chevrolet and GMC nameplates, are assembled at the GMC plant in Pontiac. The Chevrolet plant in Flint—the last remaining Chevrolet assembly point—turns out pickups, the Blazer (Chevrolet) and Jimmy (GMC) utility vehicles and and Chevy and GMC suburban models.

Light-duty trucks for both divisions are produced at GMAD facilities across the country. The Chevrolet El Camino and GMC Sprint luxury pickups are assembled on Chevelle lines in the GMAD-Leeds plant in Kansas City, Mo.

Specifications for all comparable Chevrolet and GMC trucks are identical, although different options are available.

This melding of product identity of various GM divisions has contributed to the internal pressures for centralization. The Willow Run plant, which started out in the GM organization as the original Corvair plant, was converted by Chevrolet to Nova production.

But as the Nova body shell and components were made available to Pontiac Division for the Ventura II, the plant lost its Chevrolet identity. The same happened with the Chevrolet Camaro operation at Norwood, O., when the Pontiac Firebird was put into production.

MOVES UNDER PRESSURE

There is little doubt that GM's centralization course has been charted under pressure—pressure from Washington, pressure from rising costs of material and labor, pressure from the ecology and consumerism movements, pressure from the rigid engineering and quality standards laid down by safety and emission regulations, pressure from an everchanging marketplace. And, certainly, pressure from Ed Cole.

Cole's initial centralization plan might well have been prompted by a desire to forestall intervention by government trust-busters. The simplest, and most-heard plan, always has been to split off Chevrolet.

Cole might have stymied that possibility by taking away Chevrolet's assembly function.

The next step—a step already under way—is to peel off the division's manufacturing, which now encompasses everything from nodular iron castings to forging to metal stamping and fabricating. The division builds engines, axles, transmissions, in fact, just about everything except the car themselves.

But several of the Chevrolet manufacturing plants already are producing for the entire GM output, making them ripe for reassignment to a central operation, outside of Chevrolet.

Removing the engineering, product planning, manufacturing and assembly functions from the GM divisions will put the divisions on a par with the Ford and Chrysler sales divisions, making the GM divisional general managers, in effect, sales managers.

The top men at the two Chrysler vehicle divisions, in fact, carry the title of general sales manager, without the vice-presidential status.

Perhaps Chevrolet General Manager John Z. DeLorean was looking down the road when he said recently that he would like to get out of GM within a few years to devote himself to activities of a more productive nature.

Chevrolet Division employment now totals only about 96,000 persons, including some 86,000 in the plants. The Oct. transfer cost the division 14,300 employes.

CUTTING THE PIE

An insider at Ford says that Ford has been fearful, over the years, of any attempt to split off Chevrolet from the GM corporate family.

Not only would such an excision make Ford Motor No. 3, in the domestic rankings, it would mean that the new Chevrolet and the stripped-down GM would fight harder and, between them, corner perhaps 70 percent of the market, leaving a smaller slice of the pie for Ford and the other makers.

Both Ford and Chrysler had decentralized operations several years ago, and both companies found it necessary to integrate their production facilities.

Currently, Ford's North American Automotive Operations, under Executive Vice-President William D. Innes, reports directly to Ford President Lee A. Iacocca.

The product development group combines all car engineering, planning and research.

The manufacturing group includes an Engine and Foundry Division, General Parts Division and Transmission and Chassis Division as part of the Power Train Operations; and a Metal Stamping Division, Body Engineering Office, Automotive Assembly Division and Industrial and Chemical Products Division as part of Body and Assembly operations.

Ford sales channel through a wholly owned subsidiary, Ford Marketing Corp. The three domestic sales divisions—Ford, Lincoln-Mercury and Autolite-Ford Parts—are divisions of the marketing corporation, and not the parent Ford Motor Co.

None of the Ford sales divisions have responsibility for product planning, engineering, manufacturing, testing or assembly.

At Chrysler, U.S. Automotive Manufacturing and U.S. Automotive Sales are under separate group vice-presidents.

The sales divisions—Dodge Car & Truck and Chrysler-Plymouth report through Robert B. McCurry, U.S. automotive sales and service vice-president.

Under McCurry, such operations as field service, public relations, and sales promotion have been centralized, leaving the divisions with nothing more than sales and advertising functions. And, as McCurry has said in the past, he is the ad manager for the corporation anyway.

Chrysler provides its sales division with products from a single stamping division, a single assembly division and three centralized manufacturing divisions.

THE FIRST STEPS

The purist might scoff and say that centralization has been going on for several decades at GM—ever since the '30s when the corporation began building Buicks, Oldsmobiles and Pontiacs in plants at Linden, N. J., and South Gate, Calif.

The thesis bears examining. That long-ago program was spawned more by necessity than by any idea of centralization.

Buick, Oldsmobile and Pontiac needed outlying locations in order to speed deliveries to dealers and customers, but individual plants for the three divisions were not feasible because of low volume.

The same reasoning can be applied to the formation of the Buick-Oldsmobile-Pontiac Assembly Division in 1945. It consisted of the Linden and South Gate plants plus installations in Atlanta; Arlington, Tex.; Kansas City, Kans., and Wilmington, Del.

Many observers believe that a big step toward real centralization occurred in November, 1961, when Cole was promoted to group vice-president in charge of the car and truck divisions. Cole was elected to the GM board of directors at that time.

A major change was announced at the GM shareholders' meeting in May, 1963: President John F. Gordon disclosed that, starting with '64 model production, Chevrolets would be built in some B-O-P Assembly Division plants and that B-O-P models would be built in some Chevrolets plants.

At that time, there were seven B-O-P plants—the six mentioned above plus the brand new Fremont plant in the San Francisco Bay area. Chevrolet was then operating 12 assembly plants.

In 1965, the name of B-O-P Assembly Division was changed to General Motors Assembly Division. It was a logical step in view of the fact that those plants were also making Chevrolets.

GMAD was destined to become a mighty important name.

In November, 1968, GM announced a decision that had centralization written all over it. It was a many-sided action involving GMAD, Chevrolet, Fisher Body and Ternstedt. (Remember Ternstedt?)

By that time, Cole was president of General Motors.

Highlights of that 1968 shakeup were:

Six assembly plants were taken away from Chevrolet and given to GMAD.

GMAD almost doubled in size, growing from eight to 14 assembly plants. (It earlier had picked up Framingham, Mass., from Chevrolet.)

For the first time, the assembly unit was headed by a corporate vice-president. Formerly, the general manager of GMAD and its predecessor (B-O-P Assembly) had not been a GM vice-president.

Fisher Body lost its role in the six Chevy plants that went to GMAD. (Fisher Body produces stampings and components for bodies of all GM cars, but GMAD assembles the bodies used at GMAD plants.)

But Fisher Body made out pretty well. It acquired Ternstedt Division and its seven plants which make body hardware, parts and accessories.

Ternstedt had been GM's fourth largest domestic division, and all of a sudden it didn't exist any more. The three biggest domestic units, before and after the 1968 changes, were Chevrolet, Fisher Body and GMAD.

The Chevrolet-Fisher Body plants that went to GMAD in 1968 were in Atlanta; Baltimore; Janesville, Wis.; Kansas City, Mo.; Los Angeles, and Tarrytown, N.Y.

The centralization at GM hasn't been confined to the assembly plants. There has been consolidation at the divisional level, too.

Eight years ago, GM had 31 U.S. manufacturing divisions, including its non-automotive operations. Today there are 27.

Ternstedt no longer exists as a separate division. New Departure and Hyatt Bearings have been combined; so have Delco Products and Delco Appliance; ditto for Detroit Diesel and Allison.

A number of other divisions have new names but continue to operate as they did before.

WHETHER IN 1968 OR 1971, GM CALLS IT "FLEXIBILITY"

DETROIT.—When General Motors transferred six Chevrolet-Fisher assembly operations to the GM Assembly Division in November, 1968, Chairman James M. Roche was quoted in the news release as saying that "the realignment of assembly plant management responsibilities will permit greater flexibility in processing body and chassis operations.

"This is especially important," he continued, "in view of the expanding number of passenger car models to serve individual customer preferences." At the time GM carried 145 models, down 11 from the previous model year.

When GM announced the transfer of three more Chevrolet-Fisher facilities last week, Mr. Roche was quoted as saying that "the realignment of assembly plant management responsibility will permit greater flexibility in processing body and chassis operations."

No mention was made, however, of the "expanding number of passenger car models."

GM, in fact, dropped nine models from its lineup going into the 1972 model year, with 125 available. Since 1968, however, GM has achieved even greater standardization of components, making integration of manufacturing and assembly more of an economic and operational practicality.

[From the New York Times, Sept. 22, 1971]

GM REPORTED TO CENTRALIZE TO AVERT ANTI-TRUST MOVES

(By Jerry M. Flint)

DETROIT, Sept. 21—The centralization of the General Motors Corporation is tied at least in part to an effort to make the company more difficult to break up in antitrust actions, according to Automotive News, a trade publication.

There is no question that the centralizing of General Motors is under way and is being pushed by its president, Edward N. Cole.

The change in management direction is particularly noteworthy because the auto maker grew to be the largest manufacturer in the world under a system of decentralized operating divisions, and the management theories were created by Alfred P. Sloan Jr., who led G.M. as president or chairman from 1923 to 1956.

MARKET GROWTH CITED

Mr. Cole's own explanation for the drive to centralize G.M. operations has been tied to the growth of the market, the proliferation of vehicle types, the pressure for safety and pollution controls that need central direction and increasing costs.

The heart of G.M. operations is its car divisions. At one time these five divisions controlled the design, manufacture and sales of their vehicles, within guidelines set by the General Motors organization. Now, said Automotive News in an article in its Sept. 20 issue, these divisions appear to be turning into mere sales organizations.

For years G.M.'s competitors, the Ford Motor Company and the Chrysler Corporation, tried to imitate the G.M. divisional pattern, but both gave up finally setting up product-design, engineering and manufacturing units distinct from the car divisions, which became sales and service organizations. Now General Motors appears to be creating an organization more like its competitors.

Mr. Sloan, in his book, "My Years With General Motors," called the G.M. organization "a happy medium in industrial organization between the extremes of pure centralization and pure decentralization."

The General Motors Corporation had no comment on the Automotive News story or on questions about the centralizing process within the concern.

The article noted that the Chevrolet division of G.M. as of Oct. 1 would be out of the car-building business, turning its last car assembly plants over to the G.M. assembly division. This will give the assembly plants over to the G.M. assembly division. This will give the assembly division control of 18 of 24 G.M. assembly plants, and more are expected to follow.

Automotive News noted that some engineering and planning responsibilities, too, are being taken from individual divisions. Front-end sheetmetal, for example, now done by each division for its own vehicles, is to be taken over by the Fisher body division soon. Product planning is to be switched to the corporate staff at the General Motor Technical Center outside Detroit. The variety of engines is to be reduced so that "within a few years G.M. will have only two V-8 engines (350 and 500 cubic inches), one six-cylinder engine and the four-cylinder power plant now used in the Vega," the magazine said.

SPEECH IS CITED

In putting at least part of the reason for this change to an effort to stymie antitrust, Automotive News said that Mr. Cole "reportedly told a conclave of G.M. executives, some 10 years ago, that he would like to centralize operations to make it tougher for the Justice Department to break up the corporation," although the Government has never attempted to break up General Motors.

Mr. Sloan in his book said, "General Motors' long-term survival depends upon its being operated in both the spirit and the substance of decentralization."

STATEMENT BY SENATOR GAYLORD NELSON ON REPORTED PLANS OF GENERAL MOTORS CORPORATION TO CENTRALIZE ITS OPERATIONS

General Motors is apparently becoming more and more uncomfortable about the facts of life—its own life.

One fact is that, despite GM's frequent, forceful assertion that it is a single-line company, it is really a giant, multinational conglomerate. In its 19th annual report (1969), the Senate Small Business Committee made this observation:

While GM is most important as the maker of over half of the Nation's passenger autos, it is also the leading producer of trucks, buses, and locomotives—and automobile cigarette lighters. It makes at least 167 separate products other than cars. It is the 10th largest defense prime contractor.

Another fact is that GM is a larger power, in terms of money handled, than any but 22 sovereign nations of the world. It is a little smaller than Switzerland, but larger than Pakistan.

A third fact is that GM, despite these staggering statistics, has always acted and is still acting and obviously wants to go on acting as if the way it runs its business is no one's business but its own. It acts as if it ought to have the same rights of privacy as the family plumber or the corner grocer; but it knows that that belief, which it has held and cherished for so long, is under attack. There are increasing numbers here on Capitol Hill, for one place, who do not believe that the rules for moving around in traffic that are appropriate for a few kids on skates in a roller rink are also appropriate for a locomotive, an ocean liner or a Boeing 747, in the various "rinks" in which they move around.

But GM has always acted as if it had the right to pilot its leviathan through the business seas by the same rules as a 10-foot sailboat, insofar as letting out any meaningful information about itself is concerned.

The article in *Automotive News*—and it is a very good article—suggests that GM's management is fearful of the gathering clouds of opinion favoring divestiture of part of its empire, and that fear may be the main reason behind the present moves. I would share that suspicion, and add another. I think that the top management is also fearful of the gathering clouds of opinion, both on Capitol Hill and on Wall Street, that GM ought to begin to tell the world quite a bit more about how it makes all the money it makes.

Now, the issue of disclosure is not unrelated to the issue of divestiture, but it is a separate issue, one that you can believe in even if you don't believe in divestiture.

Back in 1968, my Senate Small Business Subcommittee on Monopoly and Senator Wayne Morse's Subcommittee on Retailing asked GM to give us some fairly broad-gauge information on costs and profits, by product lines and divisions.

We did not subpoena the information, we merely asked for it politely. GM politely declined. GM did not then and does not now think the public has a right to know how the Automotive Group is doing, separately, much less the Chevrolet Division. So far, public policy has been to let them get away with that arrogant attitude. But I think that GM thinks that public policy is going to change on that, and fairly soon. And so one reason for these shifts—perhaps a minor reason but still a reason—will be to make divisional reporting, when it comes, as confusing as possible and as little useful to competition as possible. The operating results of the General Motors Assembly Division, management may feel, will tell less that is meaningful and helpful, if they ever have to publish divisional results, than would the results of the Chevrolet Division as previously constituted, when it was really a separate complete auto company within a company.

If General Motors believes that there is going to be increasing pressure for less corporate secrecy and more corporate information disclosure, they are right. The Subcommittee on Monopoly will be starting hearings on corporate secrecy on November 9, and my hope is that those hearings will have an effect on public policy.

Eventually, I suspect and I certainly hope, we are going to have segmental financial reporting from the giant corporations of this country on the basis of standard industrial classifications, the SIC codes. That will be better than reporting on divisions or groups or any other arbitrary, changeable basis. The subcommittee's next series of hearings will ask economists and industrialists, union leaders and consumer advocates, auto makers and auto dealers to come in and tell why this country should or should not move out of the present era of giant corporation secrecy and into an era that we might call "the open society," an era when the giant, conglomerate corporations will have to live with the idea of "open profits openly arrived at."

I hope that GM is only changing its organizational structure for greater efficiency and cost savings. If so, more power to them. But to the extent that their purpose is to preserve and entrench their historic policies of secrecy, I predict that they will not succeed.

[From Automotive News, Sept. 27, 1971]

SECRECY HEARING, NOV. 9—GM MOVE TO CENTRALIZE FACES SENATE SCRUTINY

WASHINGTON.—The movements toward centralization at General Motors reported in the Sept. 20 issue of AUTOMOTIVE NEWS are expected to come under the scrutiny of Congress here later in the year.

Senator Gaylord Nelson, Wisconsin Democrat, said:

"If General Motors believes that there is going to be increasing pressure for less corporate secrecy and more corporate information disclosure, it is right."

Senator Nelson chairs the Senate Small Business subcommittee, which held extensive hearings on competition in the auto industry.

The committee is planning hearings on corporate secrecy to start Nov. 9.

Senator Philip A. Hart, Michigan Democratic and chairman of the Senate Antitrust subcommittee, has announced his intention to introduce legislation on economic concentration.

With reference to the AUTOMOTIVE NEWS article, Ralph Nader, who has been a gadfly to GM, commented:

"There was once a time that General Motors justified its oligopolistic dominance over the auto industry by pointing proudly to its separate manufacturing divisions; since they tenaciously competed, the firm claimed, no breakup was necessary.

"Now that GM has mooted that justification, a new reason arises from the ashes of the old: Not that a breakup is not necessary, but that it is impossible. Why? Because centralization supposedly presents the government with an unsolvable Solomon-like riddle—how to divide one in half."

Nader suggested that the government should invest the requisite manpower into an antitrust suit to break up GM, which, he said, is six to 16 times larger than the economies of scale require, "according to corroborating economic studies cited in The Closed Enterprise System (Pages 464–5)."

If a breakup can't be done under present law, new legislation should be found, Nader said.

Nelson asserted that GM is a "larger power, in terms of money handled, than any but 22 sovereign nations of the world—a little smaller than Switzerland but larger than Pakistan."

Nelson believes that giant business does not have the same "rights of privacy as the family plumber or the corner grocer."

The senator pointed out that the issue of disclosure is not unrelated to the issue of divestiture, but those who cannot believe in divestiture can believe in disclosure.

It was in 1968 that two Senate Small Business subcommittees asked GM "politely" for some fairly broad-gauge information on costs and profits, by product line and divisions and GM "politely" declined.

Nelson explained:

"GM did not then and does not now think the public has a right to know how the Automotive Group is doing, separately, much less the Chevrolet Division. So far, public policy has been to let them get away with that arrogant attitude.

"But I think that GM thinks that public policy is going to change on that, and fairly soon. And so one reason for these shifts—perhaps a minor reason but still a reason—will be to make divisional reporting, when it comes, as confusing as possible and as little useful to competition as possible.

"The operating results of the GM Assembly Division, management may feel, will tell less that is meaningful and helpful if they ever have to publish divisional results, than would the results of the Chevrolet Division as previously constituted, when it was really a separate complete auto company within a company."

During the November hearings, Nelson hopes to hear from union leaders, consumer advocates, auto makers and dealers to explain why the country should not move out of the "present era of giant corporation secrecy and into an era that we might call 'the open society,' an era when the giant, conglomerate corporations will have to live with the idea of 'open profits openly arrived at.'"

Nelson concluded: "I hope GM is only changing its organizational structure for greater efficiency and cost savings. If so, more power to them. But to the extent that their purpose is to preserve and entrench their historic policies of secrecy, I predict that they will not succeed."

Senator Hart considers restructuring industries as no more radical than a wage-price freeze and his intention has always been to promote competition through vigorous antitrust enforcement.

One of Hart's strongest beliefs—expressed on Aug. 7, 1971, at a Conference on Non-Technical Barriers to Innovation—is that bigness does not necessarily mean technological progress. He suggested that "bigness not only tends to detract from inventiveness, but also tends to stifle the inventiveness it encounters" and added:

"We need ways to restrict the growing surge toward concentration, ways to free up entry into markets for new competitors and ways to break up existing concentration."

REGULATION OF AIRLINE FARES

Mr. TOWER. Mr. President, the Wall Street Journal of September 20 contains a most interesting editorial on the problem of quasi-judicial agencies regulating fares. The article entitled "Room To Maneuver," concerns the Civil Aeronautics Board and airline fares, but could have easily been about a number of other regulatory bodies. As a part of my continuing concern with this matter, I ask unanimous consent that the article be printed in the RECORD.

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

[From the Wall Street Journal, Sept. 20, 1971]

ROOM TO MANEUVER

A few years ago, American Airlines President George A. Spater proposed in a speech to the Aero Club in Washington that the Civil Aeronautics Board give each airline the right to freely raise and lower fares within certain prescribed limits.

The troubles the airlines have undergone since Mr. Spater made his 1968 speech suggest that his idea was worth more serious consideration than it got from the CAB. It still is.

What Mr. Spater was saying was that there are enough airlines and enough planes to provide competition on nearly all the major routes in the country. So why not let the airlines compete?

The freedom to move rates would enable lines to test alterations in their fare structures that might help them fill up planes that are not profitably occupied, doing so quickly and unilaterally to meet changing conditions and needs. The financial fortunes of the carriers would then depend much more heavily upon their own ingenuity and agility in meeting the needs of the public. Under the present CAB-dictated rate structure, such fortunes depend more than anything else upon what kind of route structure the carriers have been dealt by the government.

The last few years have shown again that there are cycles of over-capacity in the airline industry during which it is vitally important to try to attract more business. Most major airlines are well along in converting to a new generation of aircraft, represented mainly so far by the Boeing 747.

The 747 has been found to be well over 15% more efficient in costs per passenger mile than the old generation of 707s, 720s, DC–8s and 880s. All that the airlines need to cash in on this very substantial technological gain is more business, both cargo and passenger. A passenger-carrying 747 can carry nearly as much in its cargo hold as a 707 hauling nothing but cargo, but some lines are getting only about a 15% load in the 747 cargo space on average.

Relatively small gains in either cargo or passenger load factors, or both, for the 747s could make a big difference in the financial status of the airlines. Usually the best way to get more business is to cut prices or at least to use discount prices to promote those parts of the business that are slack.

Under the present rigid CAB-controlled rate structure a technically advanced and highly efficient form of transportation is being underutilized. This is not only an economic waste but it also lowers the incentive for further technological advancement that could easily be within reach. The big Lockheed C–5, a military cargo plane, for example, while much maligned because of cost overruns, has great possibilities in commercial freight transportation that may go untapped because of too-restrained development of the air-freight market.

Another advantage of permitting more flexibility would be the demonstration that competition isn't such a terrible idea even in the transportation industry. Government regulators have insisted that transportation would be chaotic without their wisdom for so long that some people in the transportation industry may have come to believe them. They might benefit from substantial experience in the subject.

And if the airlines prove that they can handle the problems of pricing without government help, who is to say that the remainder of the transportation industry couldn't do the same thing? Once that point is proved there might well be some progress toward a complete deregulation of transportation, which is chained by regulations and red tape that ceased to have any reason for existence many years ago.

For the moment, however, we would settle for seeing the airlines get greater room to maneuver out of the difficulties that beset them. Flying on automatic pilot may be all right in sunny weather but when there are storms, planes should be in the hands of their pilots.

THE FREEZE AND BEYOND

Mr. SAXBE. Mr. President, some months ago, George P. Shultz, Director of the Office of Management and Budget, presented a little-noticed talk in Chicago. However, his speech caught the interest of a number of economists. Many of them criticized it, but some praised the speech as an excellent description of the economic policies followed by the Nixon administration. At that time, the thrust of the speech and of the administration's money policies was to slow inflation without severe economic decline by the use of moderate fiscal restraint, moderate monetary restraint, and a liberal dose of psychological persuasion.

I was one of many Senators who criticized this policy which stressed moderation rather than the establishment of a commission or some entity on wages and prices as well as action in increasing the productivity of the American economy.

Traditionally, inflationary forces have been offset by a reduction in Government spending and the moderation and stabilization of our economic forces. While our economy should not be fine tuned with a sledge hammer, I feel that with inflation almost out of control and during a very expensive war some more structured economic guidelines must be given priority.

Considering the complexity of the international monetary crisis, the Vietnam war, and our domestic unemployment problem, I applaud and welcome the President's 90-day freeze. It is my feeling that his new game plan aggressively combats these problems. Our trade enigma has been of growing concern. Economic recovery under the original Nixon plan might have worked out if our trade position and threatened balance-of-payments deficit had not been such a negative force on the economy. The positive action of the President is an affirmative step toward creating jobs, combating inflation, and dealing directly with the balance-of-payments problem as well as improving our international monetary policies.

More important, the President's new policy serves to stimulate confidence in the consumer as well as the worker. It encourages the consumer to spend rather than save, which spurs the business cycle of additional capital investment, new plant construction, and additional jobs.

We must have this additional investment to accomplish one extremely important element of any successful program. That element is productivity. It is unique in that it is the force that can lead an economic system out of a depression or stem runaway inflation. Increased productivity produces a higher rate of employment, more incomes, and increased demand. At the other end of the spectrum, in an inflationary economy, effective demand is greater than output and productivity must increase, supplying this ballooning demand and stabilizing prices.

I strongly feel that increased productivity can be obtained in this country by replacement of wornout machinery and equipment, if the President's tax package containing an investment tax credit is passed by Congress. Old equipment not only allows us to consume more than we produce, but is a severe disadvantage in the highly competitive international market. In short, we have been suffering from a recession-inflation economy. It is my feeling that productivity is the key to reviving our industrial leadership, allowing us to build new factories and to produce good products.

The President's policy is a first step to increasing productivity. I must emphasize here that the program is a freeze, not a set of controls. And, being a freeze for the period of 90 days, some inequities will exist. The freeze admits inequities but provides for adjustment over a long period of time. The President's freeze puts a lid on our economic system, slowing its momentum until we can instill consumer confidence in our products and production, thereby increasing our productivity, taking us out of the present recession—inflation economy and restoring our competitive position in the international marketplace.

On August 4, prior to the freeze, several other Senators and I urged the President to take more aggressive steps to combat our economic crisis, at that time we introduced two bills, S. 2413 and S. 2414.

The first establishes a National Commission on Wages and Prices specifically giving the President the power to set requirements as to Federal procurement, guarantees, loans, and grants to encourage compliance with the Commission's guidelines. The Committee on Banking, Housing, and Urban Affairs has scheduled hearings on the bill October 4 through October 8. I sincerely hope the legislation can play an important part in making phase II of the President's program a success.

In regard to increased productivity, I certainly agree with the administration. We must increase our output per worker per hour. Any phase II wage increases should be based on productivity. To accomplish this purpose, my fellow cosponsors and I feel that this measure would make an important contribution to increased productivity by encouraging more efficient practices, stressing maximum usage of technical and managerial talent and influencing wage and price changes. The legislation establishes a National Productivity Council coordinating with regional and local councils to revitalize the production base of our economy.

On September 16, the President outlined some firm restraints moving his game plan from a freeze to a more controlled economy allowing for more equitable adjustment for post-freeze complaints. It is clear that phase II will contain not only long-range controls, but standards for increases in wages, prices, and rents. Further, wage boosts will be tied to productivity.

I urge the administration to consider S. 2413 and S. 2414 as vehicles to effectively work out post-freeze differences among management, labor, and the individual taxpayer. A freeze of short duration can be administered on a no-exception basis, but to put teeth in future jawboning a rational more flexible approach must prevail during a longer period of controls. I am convinced, as are the other cosponsors of S. 2413 and S. 2414, that these bills provide an excellent start in the right direction. I sincerely hope that the Senate and the administration agree.

SUMMARY OF THE JOINT ECONOMIC COMMITTEE TESTIMONY ON ADMINISTRATION'S NEW ECONOMIC POLICY

Mr. PROXMIRE. Mr. President, the Joint Economic Committee has just concluded 15 days of hearings on the administration's new economic program. The testimony of the witnesses who appeared before the committee will be valuable to the Congress in considering legislation for phase II of the new economic program and in studying the long-run alternatives to fiscal, monetary and income policies. On September 8, 1971, I inserted in the RECORD the texts and summaries of statements from the first 7 days of hearings. The staff of the Joint Economic Committee has now prepared summaries of the testimony given the committee since September 8.

Mr. President, I ask unanimous consent that the staff summaries of the witnesses' prepared statements be printed in the RECORD.

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

MILTON FRIEDMAN AND PAUL SAMUELSON

Professor Milton Friedman, Professor of Economics, University of Chicago, and Professor Paul Samuelson, Professor of Economics, Massachusetts Institute of Technology, generally agreed on the steps taken by the Administration on the international front, particularly with respect to the closing of the gold window and allowing the dollar to float.

Friedman was against any action by the United States to raise the price of gold. Samuelson would have no objection to the U.S. making a token change in the gold price if this were politically necessary to achieve the desired goal of quickly eliminating the 10 percent import surcharge and other protectonist devices. Both Friedman and Samuelson warned of the grave danger in continuing the surcharge for any extended period of time.

With respect to the new domestic program, Friedman and Samuelson differed sharply. Friedman felt the wage-price freeze was a mistake, that the economy was progressing satisfactorily and further stimulation by fiscal or monetary policies would only pile up inflationary forces which would be activated when the economy was once more decontrolled. He also applauded the President's cutback of Federal expenditures and receipts.

Samuelson held that the freeze was necessary, was working fairly well, and that it should be followed by an incomes policy with teeth in it. He recognized some stimulative impact from the President's fiscal program, but held that the "mix" of spending and tax cuts represented a distortion of the nation's priorities, with the tax cuts heavily oriented toward higher incomes, and the expenditure reductions reflecting postponement of needed aid to the poor and to localities in need of greater resources.

Samuelson noted that he had reviewed incomes policies in other countries and that on the basis of this study, he was convinced an incomes policy could be helpful for the U.S. He believed, moreover, that the authority to institute an incomes policy should be available at all times, even though it need not be invoked permanently.

ALLEN FERGUSON

Dr. Allen Ferguson is an economic consultant who has extensive experience with the Federal Government. He served as an economist with the Office of Price Stabilization during the Korean War.

According to Dr. Ferguson the Administration's economic program is deficient in several respects. It does nothing to reduce concentration and monopolistic power. In fact it reduces competition through the import surcharge and the DISC proposal. The NEP uses a "trickle-down" approach with most stimulation directed at business, while the low income worker is ignored—no positive manpower program is proposed and welfare reform is postponed. The sectors of the economy most in need of assistance are bypassed by the NEP: the poor, the minorities, the cities and the depressed rural areas.

An alternative policy is proposed by Dr. Ferguson:

Prices and Wages.—Following the freeze wage-price standards should be announced which would be largely voluntary. However, the power of enforcement should be applied to large corporations and unions which are able to administer prices. The import surcharge and DISC should be rejected. The power of regulatory agencies to set prices should be suspended and government regulatory agencies should be reformed and eventually eliminated. The Antitrust Division of the Justice Department and the FTC should be strengthened through Congressional action.

Fiscal Stimulation.—With respect to business incentives, the investment tax credit should apply only to small firms and Congress should consider substitution of an undistributed profits tax for the corporate income tax. The emphasis of Phase II should be on the consumer and low income groups. Accordingly, welfare reform should be expedited, unemployment compensation programs should be expanded and individual income taxes, especially for low income groups, should be reduced.

ARNOLD A. SALTZMAN

Arnold A. Saltzman is president of the Seagrave Corporation in New York and served with the Office of Price Administration during World War II and the Office of Price Stabilization during the Korean War. Mr. Saltzman emphasized in his testimony that the economic crisis we are facing affords the opportunity to attack not only long-run economic problems but social and political issues as well.

With respect to the 90-day wage-price freeze, Mr. Saltzman argued that the freeze regulations perpetuate inequities, do not regulate interest rates or certain other commodities, encourage inefficiency and pose serious enforcement problems. The controls cannot be eliminated after 90 days, however, since to do so would create greater problems than existed on August 15.

The Phase II Policy proposed by Mr. Saltzman includes creation of an Economic Development Board which would have regulatory powers to correct imbalances in the economy. The board, appointed by the President, would also have an economic planning function. It would be able to affect prices, wages, interest rates, rents and resource allocations to achieve the broad objectives legislated by the Congress. The board would be assisted by an Advisory Council made up of representatives of labor, business, agriculture, and consumer groups.

JAMES TOBIN

James Tobin is a professor of Economics, Yale University.

Tobin emphasized that the United States and other major countries should take their time at arriving at new international monetary arrangements. He asserted the present floating system is perfectly viable and there is no urgency. The 10 percent import surcharge, according to Tobin may be useful as a bargaining tool in negotiations, but the United States should resist any demand to increase the dollar value of gold.

In Tobin's view, the chief problem in the domestic economy is stagnation. He urged that the tax changes recommended by the President should be modified to avoid any permanent revenue loss. He suggested that the auto excise tax be suspended for only one year instead of repealing it, and that the investment tax credit should be limited to a 7 percent rate for only one year also. The accelerated depreciation range should be abolished, and the investment tax credit should be limited to net rather than gross investment. Tobin believed it would be a mistake to postpone welfare reform or revenue sharing. In designing incomes price policies, he suggested that in any sector with high unemployment, no wage increase should be permitted regardless of the productivity guideposts. He hoped that under current circumstances, labor and management would give wage-price guidelines far more complete support than they did in the early '60s.

ARTHUR J. GOLDBERG

Past general counsel for several national labor unions, Secretary of Labor under President Kennedy, associate justice of Supreme Court, and U.S. Ambassador to the United Nations.

Ambassador Goldberg's first point of emphasis was on price and wage policies, where he argued that comprehensive rather than selective controls were necessary, that labor and management should participate in the agreed upon income stabilization program, and that policy should be embodied in a tripartite board. He also argued that profits should be controlled, and that the standard for policy should be stabilization of prices at levels that do not exceed the present ones, subject to equity adjustments, and wage increases should be linked with productivity growth.

In the international field, he argued that we should frankly acknowledge that the dollar is being devalued and move rapidly toward realigning international currencies so that the import surcharge can be removed.

With respect to the domestic tax proposals of the President's economic policy, Goldberg urged Congress to revise the proposal in the interests of fairness. He went on to say that if we are to move towards full employment we must make sure that tax relief is granted to workers and consumers as well as business. Finally, he said that this was the least appropriate time to delay much needed welfare reforms and financial assistance to our cities and states.

ARTHUR S. MILLER

Professor of law at George Washington University Law Center and expert in constitutional law.

Professor Miller presented a legal analysis of the President's NEP, concluding that it is invalid constitutionally and indefensible on the grounds of good public policy.

First, he argued that there is no doubt that the 10 percent surcharge on imports violates the General Agreement on Tariffs and Trade (GATT). Moreover, it represents a return to fortress America policies.

Second, he argued that the Economic Stabilization Act of 1970 was constitutionally invalid because it gives the President power to do virtually anything—the statute does not have standards that narrow the delegated power within reasonable boundaries. He also argued that this unregulated power cannot be justified by invoking war powers.

Finally, he argued that some specific interpretations of the Cost of Living Council were questionable and probably invalid. He focused on the abrogation of private contracts entered into prior to August 14th as an example.

He concluded in the note that Congress should play a more active role in setting legal guidelines to establish some sort of economic stabilization board.

SAMUEL LUBELL

Mr. Lubell is a noted public opinion analyst and author of the current book The Hidden Crisis in American Politics.

Mr. Lubell reported that his extensive interviews across the country indicated that the magnitude of the credibility gap has widened, that disenchantment with what government was doing had increased, and that these factors have great bearing on the success of the President's new economic program. He made the following recommendations for dealing with this fundamental malaise:

1. That any price and wage control program that follows the current freeze be established by law, with clearly stated principles and complete visibility. The operations should be conducted with the equivalent of a gold fish bowl, with tape recorders and telescopic photo lenses.

2. That tax incentives designed to stimulate industrial investment be supplemented by priority preferences for specific sectors of the economy, suffering from investment neglect, or where distortions of supply and demand cause price increases in excess of the general price level.

3. That some part of any proposed tax incentives be skimmed off for an accelerated anti-pollution effort, tied to the creation of an improve your country work program for the nation's youth.

4. That a new post be created—that of director of economic entry—charged with a double responsibility:

a. to coordinate all efforts to facilitate the employment of Vietnam veterans and young workers coming of age, as well as older workers who may be displaced;

b. To study all governmental policies and private economic practices, including the effects of wage-price negotiations, to judge and report publicly whether opportunities for entry into the economy are being reduced and how that is being checked.

5. That the relationship of strategic-defense policy to domestic economic policy be brought under constant, vigilant analysis by a revitalized Office of Emergency Planning, with new vigor and direction.

6. That the Administration arrange for the prompt publication of all papers of the National Security Council and other agencies that will give the public a full and clear picture of how the economic decisions relating to the war and our domestic economy were made.

LLOYD ULMAN

Director of the Institute of Industrial Relations at the University of California, Berkeley, and co-author of the authoritative book, "Wage Restraint: A Study of Incomes Policies in Western Europe."

Drawing upon his familiarity with incomes policies used in various European countries, Dr. Ulman made the following observations:

Incomes policy has been most successful as a short-run measure.

Only national emergencies have provided sufficient incentive for compliance. The avoidance of unemployment has been insufficient; the prospect of a faster rate of growth in real income has been insufficient; the prospect of redistributing income in favor of poorer groups has been insufficient.

Wage-price freezes are frequently marked by a drift of wages at the lower levels. The longer they run, the more probably it becomes that there will be an explosion.

There are certain advantages our system has over European ones. We have long-run, fixed-term collective bargaining agreements, and in our system the drift of wages over negotiated levels is minimized.

Short-run effectiveness of wage-price policies require two things:

1. active union cooperation
2. statutory legal enforcement authority

Union cooperation is dependent upon:

1. some protection in cost of living increases;
2. maintenance of equitable wage relationships;
3. special treatment for the lower end of the income distribution;
4. parity of treatment vis-a-vis non-wage incomes.

In order to succeed, an incomes policy must assure workers that they will receive a higher rate of increases in real wages with a lower rate of increase in non-wages than they would had in the absence of such a policy.

Although Dr. Ulman was pessimistic about

past attempts at incomes policies, he believes that if they are sufficiently sophisticated, intelligent and thought fully carried out, they can be more successful in the future.

DAVID GINSBURG

David Ginsburg has had extensive experience with the problems inherent in wage-price control systems. He was General Council of the Office of Price Administration in World War II. As Executive Director on President Johnson's National Advisory Committee on Civil Disorders, he is also well aware of the dangers to society when society fails to develop programs of a fair, equitable and progressive nature. Ginsburg did not question the validity of the President's wage-price freeze action. Nevertheless, Ginsburg did think that, as a matter of public policy, the breath of the provisions is unwise and refuted assumptions that we are now moving into a very temporary system of controls.

The problems that we are facing today arise because of rigidities in the system. We, therefore, need price and wage stabilization because of those rigidities and because of the failure of competition in our system.

Mr. Ginsburg strongly supported the establishment of an Economic Stabilization Board with a Wage Stabilization Board and a Price Stabilization operating directly below it. It is essential to separate wage and price stabilization efforts. This is partly because the functions are different and it is partly to minimize the risk of that traditional partnership between labor and business which almost invariably operates to the detriment of the purchaser or consumer.

The Economic Stabilization Board, as seen by Ginsburg, should be the sole repository of legal power. Acting on appeals from the recommendations of the Price Stabilization Board and the Wage Stabilization Board there would be no appeals to or action by the President.

Final actions of the Economic Stabilization Board should be subject to enforcement by injunctions.

HAROLD R. SIMS

Harold R. Sims, Acting Executive Director of the National Urban League, provided useful information on the President's New Economic Policy as it relates to the members of minority groups and the poor.

Mr. Sims expressed grave concern over the crisis of unemployment in our cities and cited the President's action as hopeful in trying to avert economic calamity. He nevertheless warned that there is still some pessimism present that the action is too little and too late.

Tax cuts are of no value to those who are unemployed. We are not in a demand-pull inflation. The consumer is the key to recovery. We must now quickly grasp the opportunity to turn sagging employment and demand into a huge reservoir of services we so desperately need in schools, hospitals, clinics, forest, and in prisons and our outdated correctional system.

Welfare reforms and revenue sharing programs are also desperately needed to realign our national priorities. "Things" are being placed before "people" and this is intolerable.

Mr. Sims felt that the President's plan does little to help the blacks and the poor. Poorly paid workers are being told they must continue to exist on inadequate salaries for at least the next 90 days.

The President's program is well-intentioned but it falls far short of answering the needs of those farthest down the economic ladder. After the 90 days, the Nation should be looking forward to an American Domestic Marshall Plan, for nothing less can bring full employment and prosperity to all.

LEONARD WOODCOCK

President of United Automobile, Aerospace and Agricultural Implement Workers of America, UAW.

Mr. Woodcock was highly critical of the New Economic Policy saying that in itself it is a confession of the failure of the Administration's previous policy and the new policy is equally misguided.

Mr. Woodcock addressed his remarks to three major areas.

Taxes and Unemployment: The current level of unemployment is completely unacceptable. Tax cuts for low and middle income consumers would quickly provide jobs and close the gap between actual and potential GNP. The investment tax credit is a windfall for business, it will not stimulate investment beyond levels which would otherwise have been reached, and its contribution to employment will at best be marginal. Similarly ADR and the DISC proposal are tax "giveaways." In lieu of these, Mr. Woodcock submitted his own list of proposed changes.

Balance of Payments: The UAW supports the suspension of gold convertibility and the temporary import surcharge. To promote price competition with imports, Mr. Woodcock submitted a formula for a "Competition Promotion Tax."

Wage-Price Stabilization: There are inequities in the current freeze which must be adjusted as soon as the 90-day period ends. Following the freeze, the UAW supports a Price-Wage Review Board as set forth in HR–10592. A price and wage stabilization program will be acceptable to organized labor only if it is "voluntary and tripartite and applies equitably to all forms of income." To assure equity between wage and non-wage incomes, Mr. Woodcock proposed an Income Equalization Tax.

ROBERT V. ROOSA

Mr. Robert V. Roosa is a partner in Brown Brothers Harriman & Company. He served as Under Secretary of the Treasury for Monetary Affairs from 1961 to 1964.

With respect to incomes policy, Mr. Roosa favors creation of a tripartite board which would issue guidelines on acceptable wage and price increases. The board should have enforcement powers as long as inflationary pressures remain strong. The board should not act, however, until a full review of the proposed price or wage increase has been conducted. Mr. Roosa indicated support of the Okun plan that would allow wages to increase by the amount of increase in productivity plus one-half the cost-of-living increase of the previous year.

On the investment tax credit, Mr. Roosa favors reinstatement of the credit, but at a flat rate. It should help to preserve American competition with our trading partners.

The international policies recommended by Mr. Roosa are:

Prompt elimination of the import surcharge. While it was valuable in dramatizing international economic problems, it will become a destructive element if retained beyond 5 or 6 months.

Gold convertibility should not be restored. While Mr. Roosa would be willing to consider a change in the price of gold if convertibility is not restored, he wants to de-emphasize the role of gold in the international monetary system.

The exchange rates should be expressed in terms of SDR's and the SDR's would be defined, for nominal purposes only, in terms of gold. If any change is to be made in the SDR price, it should be a joint decision of all IMF members and not a unilateral action of the U.S.

SENATOR PHILIP A. HART

Senator Philip A. Hart testified in his capacity as Chairman of the Senate Subcommittee on Antitrust and Monopoly.

Senator Hart said that new legislation is needed to control the monopoly power of large corporations if we are to restore price stability to the American economy. The wage-price freeze represents a radical departure from our past economic policies, and while it won't be retained permanently, the freeze signals a movement towards some permanent government power over private transactions.

The experience of the past 2 years has proved that fiscal and monetary policies are undermined by the pricing decisions of firms that actually control the market. The longer run solution to the inflationary spiral we are in lies in more effective application of antitrust measures. While the Sherman and Clayton Antitrust Acts are perfectly adequate tools, most Administrations have been reluctant to use them. Enforcement of antitrust laws is such a politically sensitive issue that a new Congressional mandate is needed.

Senator Hart suggested three possible alternatives to present authority:

A corporate licensing system that could deny permits to firms with undue economic power and monopolistic position.

A new enforcement commission with broad powers to break up existing concentration.

Addition of more stringent guidelines to old antitrust laws.

LAWRENCE R. KLEIN

Benjamin Franklin Professor of Economics University of Pennsylvania; Chairman of the Board of Trustees of Wharton Econometric Forecasting Associates; author of An Econometric Model of the United States, 1929–1952 and The Wharton Econometric Forecasting Model.

Dr. Klein's testimony summarized the results of a study of the possible effect of applying guidelines to profits as well as to wages. This study is described in greater detail in an article by Dr. Klein and Dr. Vijaya Duggal in the Wharton Quarterly, Summer, 1971.

The following assumptions were introduced into the Wharton simulation model of the U.S. economy: 1) Wages increase no faster than average productivity growth; 2) taxes on corporate profits are adjusted so that after tax profit per unit of capital also increases no faster than average productivity growth; 3) Any extra taxes collected in order to control profits are respent by the government so as to avoid any unwanted restraint on economic activity. The long range Wharton forecast based on these assumptions suggests that such a policy would substantially hasten a return to full employment with reasonable price stability. The model projects a reduction of unemployment to 3.5 percent by mid 1973, with the rate of inflation reduced to about 2 percent. Dr. Klein's statement did not address itself to how such a profits tax could be administered in practice or how the necessary variations in Federal spending to counteract variable tax receipts would be achieved.

Dr. Klein estimates that within a period of about five years price will have stabilized sufficiently that the profit tax will no longer be needed. Profits would stay within the guidelines without any formal policy of restraint. Thus he regards the profits tax proposal as a transitional rather than a permanent policy.

LAWRENCE B. KRAUSE

Senior Fellow, Brookings Institution, Senior Staff Economist, Council of Economic Advisers, 1967–1969. Author, Sequel to Bretton Woods: A Proposal to Reform the World Monetary System, Brookings, 1971.

Dr. Krause's testimony was addressed primarily to the international aspects of economic policy. He expressed the belief that a reasonably satisfactory exchange rate realinement could be negotiated fairly quickly and that the import surcharge should be abolished as soon as this was achieved. Fundamental reform of the international monetary system, which will take longer to achieve, could then be taken up in a better atmosphere.

Dr. Krause recommended that under a reformed international monetary system, the United States would not be obligated to convert dollars into gold, but would define the value of the dollar in terms of special drawing rights. Dr. Krause would prefer a system in which the par values of all currencies would be defined in terms of SDRs and in which official gold holdings would be replaced by SDRs. The system would also provide for wider margins around the par values of currencies and for a strengthened role for the International Monetary Fund. Existing stocks of monetary gold could be turned over to the IMF (in exchange for SDRs) and gradually sold by the IMF or the World Bank on the private market, with any profits being used for World Bank programs of aid to less developed countries.

HENRY C. WALLICH

Seymour H. Knox, Professor of Economics, Yale University, Member, Council of Economic Advisers 1959–1960. Consultant to the Dept. of the Treasury.

Dr. Wallich made the following suggestions with respect to international economic policy: the import surcharge, while it clearly should be temporary, should be retained long enough to obtain adequate new exchange rates; a new international monetary system should provide for wider bands and limited floats; short term capital flows might be reduced by requiring large multinational corporations to stabilize their overall foreign exchange positions; and only the U.S. "basic deficit" should have to be settled in reserve assets, with any additional deficit arising from short-term capital flows being settled in dollars.

With respect to price and wage stabilization, Dr. Wallich advocated a surtax on corporations which grant wage increases in excess of a wage guideline. Such a policy, he believes, would allow market forces to work in favor of wage and price restraint. With regard to profits, Dr. Wallich opposed any type of excess profits tax but suggested that, if such a tax were imposed, it should be based on aggregate profits as a percent of gross national product rather than on any attempt to judge the appropriate level of profits for individual firms.

Dr. Wallich supported the fiscal aspects of the Administration's new program both as providing the right amount of stimulus and the proper emphasis on investment. He argued that the tax system requires a permanent restructuring designed to give greater inducement to investment and that the investment tax credit will fill this need.

W. P. GULLANDER

W. P. Gullander, President of the National Association of Manufacturers, presented to the Committee his views as one of the leading industrialists of the Nation. Mr. Gullander has been president for the NAM for almost a decade. Prior to that, he held top-level positions at General Dynamics Corporation, Weyerhauser Company, and General Electric.

Mr. Gullander expressed the Association's contention that authority to control wages and prices should be vested in the Cost of Living Council rather than in a tripartite board. This position is based on the principle that governmental authority should be exercised by government officials. The members of the board, whoever they may be, should be instructed to act as representatives of the whole nation, rather than defenders of the narrow interest of some segment.

The NAM president pointed out that the price-wage freeze should be only temporary because the entire price- and wage-setting process is incompatible with a free enterprise economy.

Emphasizing the need for an easing of the tax burden on business, he urged the Congress to enact the investment credit as soon as possible. He could not think of any measures which would more directly assure long-term growth of output and employment and the improvement of productivity.

Mr. Gullander refuted parallelisms being drawn that since wages are being controlled, equity demands that there be some form of control on profits. He said that the correct parallelism is between wage controls and price controls. A productivity guidepost for wages, combined with a cost pass-through system for establishing price ceilings, seemed to insure balance and equity. An excess profits tax destroys the incentive for curbing costs and penalizes business expansion.

FOR A NATIONAL MOBILIZATION TO ATTACK DRUG ABUSE

Mr. HARTKE. Mr. President, several national opinion polls have confirmed that the American people consider drug abuse to be one of the three major problems facing our society. The principal force behind this concern is the fear of crime caused by addicts seeking money to maintain their habits and the lack of understanding of the different life styles followed by younger and older generations.

The major thrust of society's response to drug abuse has been to incarcerate the abusers. By putting them out of sight, we have sought to keep them from offending our sensibilities. Tragically, the harm caused to both society and to the individuals involved far outweighs any benefits of this approach. Disrespect for the law has been only one by-product. Our prisons themselves have become promoters of drug abuse, turning loose on society even more drug abusers.

We must make a serious commitment to fight drug abuse, but that commitment must be positive. It must emphasize education, treatment and rehabilitation, rather than incarceration and imprisonment. Recently, an article written by Jerry Finkelstein, chairman of the New York City Democratic Committee and publisher of the New York Law Journal, appeared in the New York Times. Mr. President, I ask unanimous consent that the article be printed in the RECORD.

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

UNHOOKING ADDICTS

(By Jerry Finkelstein)

An astronaut, back from the moon, displays symptoms of an unknown disease. The disease spreads, killing many and permanently disabling most of those who contract it. What comes next?

Any science fiction fan knows that the President declares a national emergency and appoints a czar with plenary powers to meet the threat.

Men, money and materials would be coopted.

Red tape would dissolve.

All who could conceivably contribute to solving the problems would do so, willy-nilly.

The Manhattan Project, the New Deal and the space program would be dwarfed by comparison. And the finest minds, backed by the resources and power of our country, would solve the problems. The threat would be overcome.

That is fantasy. But is reality better? We have our own mutating Andromeda Strain in the opiates, barbiturates, amphetamines and hallucinogens. Cocaine has re-emerged and laboratories are inventing synthetics and derivatives faster than they can be outlawed. Instead of infection we have addiction.

Our present Andromeda Strain did not come from the moon or outer space. It comes from the poppy fields of Turkey via the laboratories of Marseilles, the hemp fields of Mexico, the chemical laboratories of great universities and from dozens of other sources. It is spread by human rats and lice rather than more primitive vectors. It does not kill quickly and cleanly nor disable neatly and tidily. It also degrades.

It is unnecessary to dwell on the scope of the drug crisis. Anyone who needs to be convinced that there is a drug epidemic must be a newly trained translator in Peking.

What do we actually have to meet the drug crisis? Piecemeal programs and minuscule financing. Temporizing statements and dangerous panaceas.

The lack of basic research is frightening. We know more about moon rocks than marijuana. Is it dangerous or not? Should we legalize it or class it with the hard drugs? Ironically, the only answer given as to why marijuana and other hallucinogens should not be legalized comes not from science but from history. Only two societies tolerated the widespread use of hallucinogens: the Arab, which then managed to turn the most fertile part of its world into a desert; and peyote-chewing tribes, whose noblest hour came as their hearts were ripped out as human sacrifices to foreign gods.

As to hard drugs, a current palliative is methadone, which, like heroin, is a derivative of opium. Even as a palliative, this is inadequate; and we must heed the nagging memory that the original use of heroin, as the authority Hindesmith notes, was "as a non-habit-forming substitute for opium or morphine or as a cure for drug addiction."

What is urgently needed is a strongly financed, well-coordinated mobilization of the nation's resources to develop a comprehensive program to put an end to this national disaster and disgrace.

The United States has attacked many difficult problems and found solutions through massive injections of money and talent. Drug abuse should be approached in the same manner.

Why haven't the obvious steps been taken?

Cost should be no consideration. The Manhattan Project produced the atomic bomb—and radioactive isotopes are a mainstay of modern medicine.

The space program put men on the moon—and whole industries produce undreamt of products (including advanced prosthetics) as a result.

Can one conceive of the potential by-products of the war on addiction? Wholly apart from the heartbreak tragedies prevented, the crime and corruption uprooted, and the malaise of fear eliminated, we can predict priceless discoveries in biochemistry, psychology and many other fields.

Who would oppose any remotely reasonable steps taken?

Industrialists with billions lost annually from lowered productivity, absenteeism and theft?

Unions with their members fearful for their children?

Farmers with the infection now spreading to the most remote communities?

Churches?

Blacks?

Judges and lawyers?

Physicians?

Shopkeepers?

Liberals?

Conservatives?

Only organized crime would oppose a war on addiction.

How old are your daughters and granddaughters? I have two granddaughters and hope for more, I would revere any man who could wipe out addiction—and so would you.

Polio crippled, but it did not debase. Cancer kills, but it does not degrade.

We honored Drs. Salk and Sabin for conquering polio. A greater mantle awaits the conqueror of cancer.

Why has no one made a name for himself as Mr. Anti-Addiction? Is it because the job of making any serious impact is too great for anyone but the President of the United States?

The President has a unique opportunity. Already, with the freeze, he has established that he has the capacity for taking drastic action, together with the ability to accept ideas from others regardless of party. I pray that he will use his great powers against the common enemy of mankind and start to vanquish drug addiction now. We can't wait.

Jerry Finkelstein is chairman of the New York City Democratic Party, and publisher of The New York Law Journal.

WHY THE IMPORT SURCHARGE IS NECESSARY

Mr. FANNIN. Mr. President, we are being told repeatedly that a continuation of the 10-percent import surcharge will bring dire consequences for the United States.

It is my belief that this surcharge must be maintained until we obtain the objectives outlined by the administration—reform of the international monetary system, an end to unfair trade practices and barriers, and a more equitable system of sharing the cost of free world defense.

The danger lies not in imposing or in maintaining the import surcharge, but in yielding before we have obtained the necessary reforms.

President Nixon proclaimed this surcharge on the recommendation of the Commission on International Trade and Investment Policy. This Commission, established on May 21, 1970, has examined the principal problems in the field of U.S. foreign trade and investment and was requested to produce recommendations designed to meet the challenges of the changing world economy.

The Commission stated that there was an urgent need for action and that first priority should be given to correcting certain of our immediate problems by the imposition of a uniform import tax.

Treasury Secretary Connally has repeatedly stated that the surcharge is necessary and will remain until our trading partners remove their trade barriers. I agree with this.

Mr. President, it is easy to see how the public can be misled by opponents of the surcharge. Consider the statements attributed to Hendrik Houthakker, a former member of the Council of Economic Advisers. He declared that the administration is being "entirely unrealistic" in its use of the 10-percent surcharge as an international bargaining weapon. Earlier Mr. Houthakker testified before the Subcommittee on International Trade of the Committee on Finance:

> The point I want to make is that imports not infrequently are blamed for developments of purely domestic origin.
>
> In fact there are relatively few important sectors of the economy where imports constitute a large enough percentage of supply to affect employment and profits to a serious extent. The notion that we are being flooded with imports will not bear examination. In 1967, the last year for which comprehensive data are available, there were only 25 four-digit manufacturing industries (out of a total of about 400) where imports accounted for 20 percent or more of total shipments; these 25 industries represented only 25 percent of the value of domestic shipments in all manufacturing. There is no reason to think that these figures will be very different for more recent years.
>
> Even though the impact of imports is frequently exaggerated, it remains true that the burden of adjustment may be too heavy for any particular industry to bear. This is why adjustment assistance may be necessary.

The testimony of Mr. Houthakker is directly contrary to the President's Commission on International Trade and Investment Policy and other witnesses before the Subcommittee on International Trade.

Mr. Houthakker appears to be telling us first, we really do not have a problem and, second, if we do, we can offer workers displaced by imports a form of unemployment compensation called "adjustment assistance." It is merely another form of temporary public welfare.

Fortunately, this country has finally recognized that we are in deep trouble in international trade—trouble far more severe and important to the Nation than the public had been led to believe. The traditional U.S. surplus on merchandise trade, relied upon to offset deficits on other accounts, has disappeared since its peak in 1964. Since that time the growth of U.S. imports has well outstripped the growth of exports and has led to a total deficit of $14 billion from 1966 through 1970.

The report submitted to the President by the Commission on International Trade and Investment Policy recommended a surcharge and the President has taken an obvious and much needed step to reverse our critical trade problem.

Mr. President, let us briefly explore some of the important factors which have had significant detrimental effects on merchandise trade.

First, the combination of the value-added tax and the related adjustment of border taxes imposed by the European Economic Community on imports. This system of taxation on imports allows the EEC to subsidize their exports by providing a tax rebate. For instance France has a border tax of up to 33 percent on most industrial products. The EEC appears to be moving to a uniform rate of 15-percent tax on imports and an equal rebate on exports. How does that compare with a mere 10-percent import surcharge?

Second, the variable import levies imposed by the EEC on agricultural imports. This system under which duties are assessed on food imports to bring prices up to the relatively high EEC level is equivalent to a tariff of 35 percent. This is higher than the agricultural tariff of any other industrial country. The variable levy also enables the EEC to subsidize their exports to third countries in competition with the United States. How does this compare with a mere 10-percent import surcharge?

Third, the closed Japanese market. Japan has one of the most highly protected markets in the world. With a closed domestic market insulated against foreign competition, domestic prices can be easily fixed at a high figure. Japan charges its own people more money for domestically consumed manufactured products than they charge for the same products shipped here, thus subsidizing their exports to penetrate and take over American markets. Now let us consider tariffs on two products that have been flooding this market—autos and television sets.

The Japanese can put a Toyota in the United States for $50 in duty while it costs us $450 to put a comparably priced car in Japan. From 1968 to 1972 the U.S. tariffs on imported television sets were to be reduced from 10 to 15 percent. During the same period the Japanese duty on imported sets was to be reduced from 24 to 11 percent. The Japanese later announced that tariff rates were to be cut to 7.5 percent. While this sounds encouraging, the fact remains that we cannot sell one TV set or auto in Japan. Hence, 7.5 percent of nothing is really no better than 24 percent of nothing. The tariff disparity of $450 to $50 for autos is considerable, yet this figure is meaningless when we consider that the Japanese have almost insurmountable barriers for American cars. How does this compare with a mere 10-percent import surcharge?

Fourth, in the area of export subsidies and incentives, our trading partners provide a whole host of subsidies such as direct export subsidies, rebates of taxes by virtue of exportations, preferred tax treatment, currency manipulations in favor of exports, export financing and insurance, and price supports.

These subsidies are verified when we compare the excess of domestic prices over export prices. Fred J. Borch, chairman of the board of General Electric Co., presented a table to the Subcommittee on International Trade showing how the governments of our trading partners help exporting industries at the expense of domestic consumers.

EXCESS OF DOMESTIC PRICE INDEXES OVER EXPORT PRICE INDEXES

(Expressed in percent)

	G. 1960	H. 1964	I. 1970
Japan	−20	+3	+33
Italy	−19	+5	+16
United Kingdom	−4	+1	+21
France	−10	−1	+18
Germany	−2	+2	+5
Canada	−7	+1	+2
United States	−3	0	+4

How does this compare with a mere 10-percent import surcharge?

Fifth, one of the least understood and underpublicized elements in foreign trade is the EEC discrimination toward Japan. The dominant purpose of the early U.S. negotiations was to open the markets of the EEC for the products of Japan.

In a display of goodwill the United States opened wider its markets for the products of Europe through tariff concessions in exchange for commitments by European countries to confer trade concessions upon Japan. While the liberalization of our import trade from Europe and Japan proved to be permanent, the intended concessions from Europe to Japan proved to be highly transitory. European nations reserved the

right to impose quotas on imports from Japan to safeguard European industry and balance of payments. This reservation under article XXXV of the General Agreements on Tariffs and Trade has been systematically used by European nations to hold Japanese imports at bay, preventing the degree of inundation of European markets which has become commonplace in the United States. Thus, since most European countries now bar many categories of Japanese goods, that country resorts to exporting those goods on the relatively accessible market of the United States. As a result, the United States absorbs 30 percent of all Japanese exports whereas the EEC with double our population permits only 5 percent of Japanese exports to enter their market. Compare this action with the criticism leveled at this country by the EEC for the imposition of the 10-percent import surcharge.

Mr. President, for the first time in years this country has a lever to encourage our trading partners to eliminate the above inequities and unfair trade practices. Today our trading partners can stand on their competitive feet. It is in the U.S. interest to be more vigorous in insisting on trade reciprocity and negotiating a reduction in tariff and nontariff barriers. The 10-percent surcharge is the opening wedge to bring about such action.

INSURED EMERGENCY LOANS

Mr. TOWER. Mr. President, I am pleased to cosponsor with Senator EASTLAND and Senators STENNIS, ALLEN, DOLE, BELLMON, and LONG Senate bill 2559, to amend the Consolidated Farmers Home Administration Act of 1961 to authorize insured emergency loans.

The bill would authorize the Secretary of Agriculture to use the agricultural credit insurance fund to make Farmers Home Administration emergency loans and sell them as insured loans. The purpose of the bill is to assure adequate financing through FHA to farmers and ranchers suffering from crop failures as a result of a natural disaster. In the past, and under present law, emergency loans are financed by apportionments from the emergency credit revolving fund. When the amount of cash in the fund is not sufficient to meet unforeseeable demands arising from natural disasters declared by the Secretary or major disasters declared by the President, a supplemental appropriation act becomes necessary in order to provide assistance for the disaster victims. This bill would not only make it possible to shift the source of funding of the program from the public to the private sector but would also make available a more flexible method of funding which would be more appropriate to the sudden and unpredictable needs caused by disaster.

This past year has created a severe strain not only on the farmers and ranchers of this Nation but has required the President to request additional funds be made available to assure the survival of agriculture in many States.

The drought and flooding conditions in the southern coastal States are evidence of the perils faced by our farmers and ranchers. Should a delay in funding the emergency programs for disaster relief cause a delay in feeding livestock or planting crops, then our farmers could face missing an entire "crop year" effecting a serious economic problem. This bill will also enable the FHA to reconstitute farmers' obligations over a period that will enable them to overcome their disaster.

MORRIS KAPLAN

Mr. MOSS. Mr. President, Morris Kaplan, technical director of Consumers Union and a supporter of progressive consumer legislation died on September 15, 1971, at his home in New Rochelle, N.Y. For 25 years, Mr. Kaplan served as the technical director of CU taking on the task of directing the extensive testing program and insuring the accuracy and competence for which we look to Consumer's Union for guidance.

Mr. Kaplan was an outspoken champion of product safety legislation. We knew him well for the strength of his support for the Toy Safety Act and flammable fabrics legislation. Just last November, Mr. Kaplan demonstrated hazardous toys which were still on the market due to lax enforcement of the toy safety law. A lawsuit brought by Consumer's Union can be credited with bringing about increased vigilance on the part of the administrators of the toy safety legislation.

The public has suffered a great loss with the death of Mr. Kaplan. His enthusiasm, talent, and intuition made him a hero for the consumer. To his family I extend my sincere and deeply felt condolences.

GENOCIDE: PROWESS AND INGENUITY

Mr. PROXMIRE. Mr. President, war crimes are not new to man's experience. Indeed, it could be said that war itself is the ultimate war crime.

But what can be done? For ages men have tried to find a way to settle their differences without recourse to violence. but apparently no permanent solution has yet been found.

Meanwhile, as we continue to look, our latest advances in technological prowess combine with our natural ingenuity to give man the awesome power to terrorize, mutilate, and kill other men—on a scale vaster than his forebears had ever imagined.

Similarly, the crime of genocide has occurred in the past from time to time, and has been dutifully condemned afterward. As man has become more proficient in the art of war, the capacity of nations to commit genocidal acts has also become greater. Massacres which would have seemed deeply repugnant in more tranquil times now can be dwarfed by crimes of even greater immensity.

Genocide is inherently a crime of immense proportions—not one murder or two murders, but indiscriminate mass murder aimed against an entire ethnic, religious, or national group.

Perhaps we cannot abolish war at this time. But we can take steps which would constrain nations from genocide. We can establish genocide as a crime and create procedures for trying and punishing violators.

That is what the Genocide Convention does.

And that is why the Senate should ratify the Genocide Convention soon.

LOS ANGELES EMERGENCY COMMAND AND CONTROL SYSTEM

Mr. CRANSTON. Mr. President, the International Association of Chiefs of Police is holding its annual conference in Los Angeles this week. Mr. Jerris Leonard, the Administrator of the Law Enforcement Assistance Administration, will attend the conference and speak to its second general session today. During his stay in Los Angeles, Mr. Leonard will also receive a demonstration of the proposed Los Angeles emergency command and control system.

I took the opportunity to write to Mr. Leonard and urge immediate LEAA approval of Los Angeles' request for Federal funds for implementation of this vital program. I ask unanimous consent that the letter be printed in the RECORD.

To the remarks therein, I would like to add the following comments. I believe that the Los Angeles command and control system is an excellent example of the way in which military and aerospace technology can be applied to critical domestic problems. It was developed by one of the Nation's leading aerospace companies. During its implementation, unemployed engineers and scientists can be put back to work.

We should follow this first effort with other Federal spending which will encourage private industry to explore other ways to solve our problems here at home. If we abandon the tragic war in Vietnam and unnecessary expenditures of strategic armaments, we will have the money we need for more police systems like the one in Los Angeles, mass transit for our cities, and health care for our people, young and old.

But we will not solve our domestic problems if we continue to fund our programs in a piecemeal fashion. As long as each of the 50 States is forced to do its own research on police or other needed programs, we will be faced with duplication and our progress will be minimal. Instead, we must have Federal backing for pilot projects like the command and control system in Los Angeles. These will provide examples for other jurisdictions. In addition, we must develop central procurement systems that will reduce costs and at the same time allow quicker and more efficient implementation of vital domestic programs.

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

U.S. SENATE,
Washington, D.C., September 24, 1971.

MR. JERRIS LEONARD,
Administrator, Law Enforcement Assistance Administration, Attorney General Office, Washington, D.C.

Re LEAA Grant Application P71-209

DEAR MR. LEONARD: Recently, at a hearing of my subcommittee on Production and Stabilization, I had the opportunity to receive testimony regarding the proposed Los

Angeles Emergency Command Control Communications System. To implement the system, the City has applied for a four year grant of $43,929,868 under the Law Enforcement Assistance Administration (LEAA), to be matched by $14,643,289 in City funds. Its first year request is $4,501,721.

I was tremendously impressed with this project and believe it will greatly improve law enforcement in the future. It is truly a space age communications system for today's police departments.

I am informed that you will soon receive a demonstration of this project. It is for this reason I am writing you now to urge approval and full funding of this vital program.

The project will be a national investment in improved law enforcement which almost certainly will pay dividends in more efficient police work and crime reduction in every state.

Police dispatch time will be reduced by 60%. Thus, more criminals will be apprehended faster. Costs will be lower. Officers' lives will be saved and citizens will be better protected. Police morale will be improved. And during civil disturbances or natural disasters such as floods or fires thousands of lives could be saved. (During the recent San Fernando Valley earthquake, for example, tens of thousands of residents had to be evacuated on an emergency basis. Police communications systems were already overloaded. If the proposed high-speed computerized communications system had been in existence, police calls could have been handled much faster and more efficiently.)

Los Angeles Police Chief Edward M. Davis had informed me that the system, when fully operational, will save the City $77 million over a ten-year period. This is in addition to less tangible benefits such as improved crime control, faster reaction to emergencies and police safety.

The savings will continue after the ten year period. Chief Davis estimates that the present manual communications system, utilizing standard two-way voice radio apparatus, will cost Los Angeles about $12 million a year to operate. The proposed computer system will cost only $5 million to operate.

Los Angeles has a huge geographical sprawl (463 square miles) and unique police communications problems. It is thus an ideal testing ground for development of new and needed communications systems.

In addition to geographic problems, Los Angeles has fewer policemen in ratio to population than heavier populated eastern cities. Its ratio is about two and a half policemen per thousand population versus four policemen per thousand in many large cities in the east.

Development of this system in Los Angeles obviously could lead to better utilization of police all over the nation.

Small as well as large cities could benefit from this system. There is no reason why entire counties should not be linked by central dispatch-communications centers. Fire departments could be included in these systems, providing dual advantages of savings and better civilian protection.

Last year I asked in a letter to police chiefs, sheriffs, and law enforcement officials all over my state to comment on their needs. The consistent response was the need to improved communications. I believe that the same needs exist in cities all over the country.

Once the first system is implemented in Los Angeles, it will be easier and cheaper to design and build similar systems in other cities. Thus the first steps taken in Los Angeles will mean better law enforcement in other parts of the nation.

The State of California has begun to develop its own statewide computerized communications system which already is proving highly successful. Local links to the state system will provide even greater law enforcement efficiency when cities and counties develop such systems.

But no city, hard-pressed as all of them are for funds to meet day-to-day operations, can invest many millions in new police communications network even though it can be shown that such an investment will eventually result in actual savings. For the fact is: this large amount of money simply is not there and there is no way to get it.

That is why it is so essential for the federal government to finance projects such as the Los Angeles Emergency Control Command Control Communications System.

I urge you and your staff to give this project your closest study.

I think you will agree with me that Los Angeles, after having looked at several different designs and performing cost tradeoff studies, selected this because it was the most effective and efficient. I strongly believe that the federal government must assist local governments through this form of revenue sharing, and I will support your efforts in providing our citizens better police protection and law enforcement. The Los Angeles proposal is a vital step in that direction.

Sincerely,

ALAN CRANSTON.

RESPONSIBILITY OF UNION LEADERS

Mr. FANNIN. Mr. President, recently my colleague from Arizona (Mr. GOLDWATER) addressed a meeting of the National Retail Merchants Association here in Washington.

In the speech, it was suggested that union leaders get in step with rank and file workers in supporting the wage-price freeze.

It also was proposed that unions accept the responsibility that they rightfully should have of helping improve the quality of workmanship in American products. There was a time when unions, or guilds as they were known in the old days, were interested in pride of workmanship. Anyone who was not qualified to do a job was drummed out of the corps. Now the only thing the unions seem to think about is how much money they can wring out of employers—and thus the public—in their next contract.

Mr. President, I ask unanimous consent to have printed in the RECORD excerpts of remarks made by Senator GOLDWATER on September 14, 1971.

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

EXCERPTS OF REMARKS BY SENATOR BARRY GOLDWATER, OF ARIZONA, BEFORE THE NATIONAL RETAIL MERCHANTS ASSOCIATION, WASHINGTON, D.C.

WHAT ABOUT A FREEZE ON POOR WORKMANSHIP?

Mr. Chairman and honored guests, needless to say, I am delighted to be here today as I always am when it comes to the retail merchants. As most of you know, my interest stems, not from politics, but from a long and enjoyable experience as a retail merchant in my home State of Arizona. I know about your organization, and I know of your deep interest in the things that are going on in the nation's capital today which have such a direct bearing on your businesses and upon the welfare of your customers.

It is not my intention here today to attempt to play economist and to give you a long dissertation on my views about our nation's economic and monetary and financial problems.

Let it be sufficient to say that I am well versed in how the situation came about. For I was an eye witness to much of the extravagance and waste and irreponsibility which piled one Federal deficit on top of another during the Kennedy and Johnson years. I was one of those who raised my feeble voice in the cause of sound government financial policies and in warning about the run-away inflation which would follow the continual deficit financing by the Federal Government.

I am sure you realize that I am perhaps one of the last people on Capitol Hill who could be expected to sanction wage and price controls of any kind. But I recognize that the program outlined by President Nixon to correct long years of irresponsible economics in government was forced upon him by the weight of circumstances. I do not believe that the President of the United States had any choice. I believe the course he took was made inevitable by the inattention to sound financial policy which has characterized the Federal Government through much of the last 30 years.

It was time for drastic action. I can only say that the people of the United States are fortunate that when this time of decision was reached, they had in the White House a President who was unafraid to take the steps that were indicated, regardless of the consequences to his own political future or that of his political party.

Now today we find a nation which is overwhelming in its support of its President in a time of true national emergency. Cooperation has been given or pledged by most important individuals and groups throughout the length and breadth of the country.

But there are notable exceptions. For example, we find union leaders like AFL–CIO President, George Meany, and Longshoremen's Boss Harry Bridges doing their best to make the President's job more difficult.

At a time when an overwhelming number of the American people and an overwhelming number of rank and file labor union members are supporting the Administration and doing their best to cooperate, the union leaders who over the past years have played an important role in creating the mess are withholding offers of help. Indeed, we find Mr. Meany placing conditions on his organization's support. He has actually presented what can only be called a list of demands, including limitations on corporate dividends and profits, flexible wage guidelines, and a tripartite wage stabilization board with representation from labor, business, and the public.

When I read in the newspapers about Mr. Meany's arrogance and his demands, I am reminded of the time when John L. Lewis threatened to limit the United Mine Workers' support of the Roosevelt Administration in World War II unless his demands were met.

Now I'd like to make a suggestion to Mr. Meany. In fact, I'd like to make several suggestions to Mr. Meany. I should like to begin by suggesting that Mr. Meany join the majority of responsible American citizens in supporting his Government in a program aimed at helping all Americans, including union members and their leaders. I should like to remind Mr. Meany of the great strides his unions have made and how much the exorbitant wage demands by some unions contributed to the cost-price spiral.

Then I should like to ask Mr. Meany—while he is so busy making demands of the Federal Government and of the corporations and of the people—if he can't contribute something of his own. I should like to ask Mr. Meany whether he believes it might be possible to get some old-time pride in craftsmanship from the workers whom we pay so dearly. I wonder if it wouldn't be proper to ask Mr. Meany if he has done anything lately to bring about a situation where the American homeowner can get some fair workmanship and speed from the plumber he calls to fix a leaky faucet. I wonder if we couldn't in-

quire of Mr. Meany whether he sees any time in the future when a homeowner can hire a carpenter and get a decent job of work done for the exorbitant price he has to pay. I wonder if Mr. Meany's influence couldn't get the American people better mechanical work for repairs on their automobiles. I wonder if the union leaders who are showing such an arrogant, demanding face to a President struggling with a problem they helped to create might help improve the quality of American workmanship.

Ladies and gentlemen, I mean what I say. I no longer take the pride that my father and my uncle and my grandfather took in the quality of Yankee workmanship. I am not puzzled that we are encountering more and more competition from abroad. Let me say it like it is—foreign producers are making better products than their competitors in this country. And that goes all the way up and down the line. Better steel is made abroad. Better and cheaper automobiles are made abroad. Better radios, televisions, recorders, and other electronic items are made abroad.

It's about time that we ask for better work, especially from the workers in our highly unionized industries and crafts. And who better is there to ask than the men who beat their chests and proclaim so loudly that they speak for the American workingmen and that they have the welfare of all American workers at heart.

It is time for cooperation from everyone—not just a few. The retail merchants in this country are cooperating by adhering to the President's price-wage freeze. The blue collar workers are cooperating by acquiescing to the freeze on wages. Almost everyone in the country is cooperating with the exception of Mr. Meany and that special category of union leader who has so long felt he was above the rest of us. You will remember that the President in announcing his new economic policy asked the union leaders to cooperate by ending strikes that were then in progress for the duration of the freeze and in postponing any new work stoppages that might be coming up before the middle of November. The answer was a resounding "No." Mr. Bridges wasn't about to end his longshoremen strike on the west coast and other unions made it clear that they would not delay any strike action merely because the President of the United States had asked for it.

SENATOR WINSTON L. PROUTY

Mr. TOWER. Mr. President, I share the deep sense of loss that nearly everyone in this body feels upon the passing of our beloved friend, Win Prouty. There have already been quite a few who have chronicled his many achievements both in and out of the Congress. I wish to address myself to Win personally, which is the way I know him best. When I remember Win Prouty I think of his modesty, a modesty that cloaked a deep understanding of our political system, a modesty that helped develop his compassion for the elderly, the young, and the disadvantaged. I think also of his hard work and prodigious efforts. These Yankee virtues earned for Win the respect of all those who worked with him, both those who agreed with as well as those who disagreed with him. His quiet manner made possible a fine examination of problems that would not have been possible in a more heated situation.

Mr. President, Win Prouty was a friend of mine, and I shall miss him very much. He was, to me, the personification of the New England character which has added so much to the American heritage that we all cherish. He was living proof that hard work can and does bring success; that from a failure can come dynamic achievement; that we do not need to speak loudly in order to be heard. His dedication to ideals and principles that were of the highest order brought his proposals instant respect. When he spoke to us in his mild manner, everyone listened. When he admonished us, all would stop and review our positions. Now that he is gone from us, a stillness in the wind has vanished from this body, a reflective voice is no longer with us, a prudent evaluator of ideas and ideals will be missed.

Winston L. Prouty, rest in peace. Your example shall remain with us as a lasting memorial of the best of our Republic.

MILITARY RECRUITMENT—CREDIBILITY GAP WIDENS AS ARMY REFUSES TO ENLIST EXPERIENCED VETERANS WHILE CLAIMING MANPOWER SHORTAGE

Mr. PROXMIRE. Mr. President, in the days between July 1 and September 21—the period when the draft law was in limbo—Congress was subject to a series of dire warnings by administration officials, supporters of the draft in the Senate, and its friends, and allies elsewhere.

We were told that passage of the draft was essential for our national security. Warnings were given that we were falling far behind in voluntary recruitment. One Senator told us we were falling short by 6,000 recruitments a month. It was said that nine or 11 divisions outside Vietnam were unfit to fight due, in part at least, to the ending of the draft.

The Secretary of Defense sent each Senator a letter signed by the Joint Chiefs of Staff telling us that the failure to extend the draft was threatening the security of the Nation. We were told that the consequences of foregoing huge draft levies were to imperil not only the Army, but the Reserve and Guard units and, indeed, the defense of the free world itself.

PROPAGANDA OVERKILL

It now turns out that all of this was just another example of propaganda overkill—the reason the American people have lost faith in their institutions and why there is such a credibility gap in the Government, especially the Pentagon.

Now we learn that at the very time the official spokesmen of the Pentagon were shouting "wolf," the Army was actually turning away veterans who wanted to enlist.

The Army's recruiting command at Fort Monroe was sending instructions to its recruiters through the Army establishment that—

There is no present need for the enlistment of prior service personnel.

Why, if the Army needs 20,000 men a month and was only recruiting 14,000 a month, were they turning away men with experience? In fact, due to their previous training, it would be far less costly to recruit men of experience than raw, untrained, men.

With the huge increase in pay voted by Congress which is shortly in the offing, many of these men could sign up even at lower grades than they left the military and still be way ahead in terms of pay and allowances.

CRISIS CONTRIVED

As numerous Senators pointed out on the floor of the Senate during the debate, much of the manpower crisis was contrived. As the Gates Commission report clearly indicated, with the institution of modern recruiting methods, better use of manpower, and reforms in the Army itself, the job of recruiting an all-volunteer Army should be a relatively easy job. In fact, what the Gates Commission said could be in effect by July 1, 1971, the Army has already postponed for 2 years.

But now we know that potential enlistees were actually turned away. This situation borders on the scandalous. It is yet another indication of the gap between what the Pentagon tells us and the truth.

I ask unanimous consent that an Associated Press article, published in the Washington Star of Saturday, September 25, 1971, be printed in the RECORD.

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

MANPOWER CRISIS?—ARMY REJECTING RETURNEES AS LAIRD PUSHES DRAFT

While Secretary of Defense Melvin R. Laird was warning Congress of a serious military manpower crisis unless the draft was renewed, the Army was telling its recruiters to turn away veterans wanting to re-enlist.

"Current re-enlistments of individuals on active duty are sufficient to maintain the career-content of the Army under its reduced structure. Thus, there is no present need for the enlistment of prior service personnel from the civilian community."

These were the instructions in a Sept. 14 letter from Maj. Gen. A. H. Smith of the Army's personnel office to the recruiting command at Ft. Monroe Va. The orders then were passed on to recruiting offices across the country.

Four days earlier Laird wrote Senate Armed Services Committee Chairman John C. Stennis, D-Miss., urging immediate passage of the draft bill "in the interest of national security."

Laird said the readiness of the Army would be affected beginning in January by a shortage of trained men who could be assigned to units.

LAIRD'S LETTER

The bill renewing the draft for two years, was approved by the Senate Tuesday and is awaiting President Nixon's signature.

"There may be some seeming inconsistencies," Pentagon spokesman Daniel Z. Henkin conceded yesterday, "as manpower needs of the Army and the other services are realigned in light of continuing withdrawals from Vietnam and manpower reductions directed by Congress."

He added, "As we've said we need the draft to bring in new men and we also need to take actions to improve the over-all caliber of the armed forces while at the same time they are being reduced by more than a million men."

The Army is budgeted to shrink to 892,000 men by June, down from its 1968 Vietnam war peak of 1.5 million.

HIGH UNEMPLOYMENT

Henkin said Laird, who has been pushing the administration's effort to find jobs for returning Vietnam veterans, was unaware of the recruiting order. There are currently 310,000 Vietnam-era vetreans between the

ages of 20 to 29 unemployed, according to the Labor Department. As a group they have the second highest rate of unemployment, 8.2 percent compared to the national rate of about 6 percent.

Gen. Smith's Sept. 14 order applies only to veterans wanting to come back into the service and not to young men signing up for the first time. The Army figures it will need 20,000 new men a month if it is to end reliance on the draft and become an all volunteer force by mid-1973.

But it would seem the Army would prefer taking veterans since they are already trained and the expense of training new men could thus be saved. This would be in keeping with arguments favoring an all-volunteer force which, proponents contend, would reduce personnel turnover by keeping men in service longer and thereby cut training costs.

"We still need people, there's no question about that," an Army spokesman said. "But we need enlistees for the combat arms. Otherwise we'll be top heavy with sergeants and no privates."

TOO MANY SERGEANTS

Veterans coming back into the service—20,000 did last year—would retain their old rank. A man with two or three years prior service would in most cases be a sergeant E–4 or E–5.

There are two exceptions to the order barring veterans. The Army will take back men trained in any of 18 critical job skills. Mostly in electronics, and those holding either of the three highest combat awards—the Silver Star, Distinguished Service Cross or Medal of Honor.

SENATOR WINSTON L. PROUTY

Mr. BENNETT. Mr. President, I wish to add my condolences to those already expressed by this body on the passing of our esteemed colleague, Senator Winston Prouty.

Senator Prouty came to the Senate in 1958, a member of my own party, yet adhered to no strict philosophy except that dictated by the strength of his own ideals. Senator Prouty exemplified the virtues of moderation, reason and consideration which are the hallmark of a statesman and a gentleman.

Senator Prouty's public career was quietly and efficiently distinguished. He participated in government at every level, from mayor of Newport, Vt., as a member and speaker of the Vermont House of Representatives, and finally, as a dedicated public servant in the House and here in the Senate.

Senator Prouty left his solid imprint on much of the legislation passed by this body. Few bills have been passed in the fields of education, social security, health care, labor, welfare, or commerce which have not included substantive contributions by this quiet, effective, hard-working legislator.

I was not privileged to serve on the same committees as our late colleague, but I do know he had a reputation for accuracy, efficiency, effectiveness and courage in his dealings here in the Senate.

Senator Prouty does not leave behind the legacy of an ambitious man, and I am sure he would not care to. His legacy is one of concern, compassion and effort in behalf of the principles and people he believed in.

And so, Mr. President, I join in reverencing the memory of our late colleague, and together with Mrs. Bennett, extend sincere sympathy and condolences to Mrs. Prouty and the Prouty family.

SENATOR HUMPHREY'S REMARKS TO CALIFORNIA LEAGUE OF CITIES

Mr. HUMPHREY. Mr. President, on September 27, 1971, I had the honor of addressing the annual conference of the California League of Cities. This year's meeting was held in San Francisco, and it featured panels and study seminars on transportation problems, social policy, and intergovernmental relations.

The California League of Cities is composed of municipalities of all sizes. However, no matter what the population, all the cities are faced with two crucial problems: providing quality basic services, and paying for quality basic services.

These are two themes I stressed in my remarks. I outlined financing strategy to assist "street level government" in the day in and day out task of providing services. Such a program must consider the need for both long term credit and immediate fiscal aid.

Mr. President, I ask unanimous consent that the text of my remarks be printed in the RECORD.

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

REMARKS BY SENATOR HUBERT H. HUMPHREY

For many years, a popular television program began its evening broadcast with the words. "This is the City."

And for many years, Americans thought they knew what a city was . . . tall buildings . . . concrete . . . cars . . . trolleys . . . baseball games . . . and people, doing all kinds of things and going places.

But, this is not the city, the tall buildings are there, of course. And there are plenty of cars.

But in all too many instances, the spirit has gone out of our cities. And no matter how hard we try, we cannot seem to replace it.

This is our national tragedy.

We thought at one time that suburbia was an answer.

We were wrong. Look at Suburbia, with its miles of neon lights, traffic lights, and rings of highways. And, the suburbanite realizes all too clearly that the problems he thought he left in the city are fast catching up with him.

We thought at one time that the answer to ghettoization—with its poverty, racism, violence, and alienation—was massive social programs.

We know now that this is only part of the answer.

The ghetto dweller found out that when he worked through normal channels to obtain the benefits of new programs, seldom did anyone pay attention. If he led a protest though, he got action—but at a severe and often devastating price.

And, in our haste to solve the urban problems, those Americans living in rural areas truly become the people left behind.

In all that we have done, in all the social programs we have passed—there is one missing element:

There has been no looking ahead. There has been no attempt to get ahead of our problems.

Government and community leaders know that within 25 years, there will be an extra 100 million Americans.

This is as much a fact of the future as the decay and deterioration of cities and rural countryside is of the present.

Perhaps it is time to face up to the facts of American life. Time to ask hard questions:

What kind of life do we want? How can we achieve a better balance of growth? How can we design a national growth policy that will encourage better distribution of resources and population.

Let me answer this way:

We can and must design a National Growth Policy.

We can do what we must—we have no other choice but to fail.

We are a wealthy country—with resources and talent.

But, we are also confused. We know that affluence does not necessarily bring happiness, that leisure can mean boredom, and that we are in danger of becoming frozen in our own indifference.

We share an anger at things we cannot understand. And, we sense that many of our programs are often wasteful, stupid, and irrational.

We prescribe rules from the top-down—We tell cities how to manage their programs. And, in the process we prevent them from utilizing the full strength of local styles and initiatives. Our mayors end up playing second, third, and fourth fiddle to Federal bureaucrats.

I think this is wrong.

We are fighting a war in Laos, Cambodia, and in Viet Nam—a war that saps our energy and our will.

Surely we have learned our lesson—it is time to end this war.

This war has consumed our spirit and voided our moral strength. It has depleted our resources. And, it has diverted us from the ever-mounting tough problems here at home.

But, we have learned something from this war: We know that if there is something you want to do—then you will find the money.

I am willing to win the only war we ought to be fighting—the war against want, disease, ignorance, poverty, slums, and underdevelopment.

In plain and simple language, are we willing to mobilize Americans in a battle for a better life for our people?

We have been too slow, and it has taken too long to set our own house in order.

We have allowed local government to become a holding operation—a custodian of dreams rather than a cutting edge of social progress.

And, in the process, a nation-wide crisis of confidence in government has resulted.

I think this is sad.

For too long, we have spent more money on creating problems than we have on solving them.

And, in the process, we have become a nation that is privately wealthy, but publicly poor.

I believe this is wrong.

But, what are we going to do about it?

The 70's must be a Decade of Dynamic Domestic Development.

It must be a time when we focus our resources on the central figure of American life—the people.

It must be a time when we assist "Street Level Government"—the government closest to people—in the day-in and day-out task of providing services.

It must be a time when governments stop over-promising and under-performing.

It must be a time when people can call City Hall and have their sidewalks fixed, their apartments inspected, snow removed, dependable electricity, enough heat and garbage collected.

And so when we ask what are we going to do about it, our answer must be:

We are going to have a program for our communities that does not short-change residents on services their tax dollars ought to buy.

And, we are going to have a realignment of federal dollars that returns money to the local communities where government and people are one and the some.

But, to even make a start, the United States must have a sound economy.

If there is one thing that is clear from all the recent debates over the economy, it is this: Our citizens are telling us that there must be more purpose to our economy than just buying, selling, or making profits.

They are also telling us with a loud and clear voice: We can not tolerate a policy that condones a nation-wide rate of over 6 percent unemployment. And, Californians are echoing the same words: They cannot tolerate a policy that condones a state unemployment rate of over 7 percent.

We must have an economy of job creation—not job destruction.

Jobs mean food on the table, clothing, and dignity. Jobs mean that families stay together.

And, to our cities, jobs mean vitality—an enhanced ability to pay for basic services.

And, we also need an economy without runaway inflation. Inflation robs us all. It hits cities particularly hard.

Inflation has accounted for over 40 percent of the total increase in local government outlays—only 25 percent was due to increased services.

An incalculable amount of damage to financial planning is done by inflation on one hand and recession on the other. Changes in the cost of providing government services increases 2 percent for each 1 percent rise in the general price level.

The consequences of this are apparent: inflation increases the cost of government faster so that revenues cannot keep up the pace. This means new taxes—or as usual, increased taxes.

But that is not all. By the end of this year, our current economic recession will have cost state and local governments over 7 billion dollars in lost revenues. It will cost the Federal Government over $35 billion, and it will cost all of us over $200 billion.

There has been a lot of talk about the economy lately. And, many of us have ideas different from those proposed by the President.

Right now, however, what is most important to local governments are the policies that will prevail after the 90 day freeze.

As far as local governments are concerned, the policies of Phase Two must clearly recognize that the financing of local government differs significantly from private industry. And, state and local government must be consulted prior to any announcement of Phase Two policies and on a continuing basis thereafter.

FISCAL PROGRAMS

A sound, healthy economy will provide the foundation for fiscal programs that can pay for basic services.

We need a financing strategy that goes to the heart of the urban crisis—our cities are overburdened by debt. They lack an expanding tax base, and they cannot pay for fundamental services.

I want to outline to you such strategy.

In May of this year, I introduced the National Domestic Development Bank Act of 1971.

The objective of my bill is to provide an alternative source of funds for new school, medical, and hospital centers, day-care centers, parks, waste disposal plants, playgrounds, and more.

Under this plan, cities and communities borrow money for facilities at rates comparable to municipal bonds.

All lending activities will be regionalized, and the bank will emphasize decision making at the local level where the problems are known first-hand.

The National Domestic Development Bank will provide an orderly, continuous source of capital funds and long-term credit for our financially strapped communities.

And, I want to emphasize the importance of long-term credit.

We simply must have a credit and financing structure that will eliminate the present stop-start method of public finance that has resulted in a string of broken promises to our communities and increased costs.

The National Domestic Development Bank emphasizes community planning—planning that results in a decision to implement a project—not a decision to have another study.

It emphasizes multi-year financing—so that projects do not get half finished.

My proposal for a National Domestic Development Bank has been tested and found workable. It can do for American cities and local governments what the World Bank has been doing for other countries of this globe.

I say that if we can make long-term and generous loans to Rio de Janeiro and India, then we can make long-term and generous loans to American cities, villages, and towns.

The National Domestic Development Bank can help those large cities and counties, but what about rural areas?

We simply must turn some attention to rural America. It is from rural America that we have 30 million people migrating to the cities—depleting the city services, causing additional problems of poverty, and joblessness, and welfare.

It is with this in mind that I introduced companion legislation to the National Domestic Development Bank. This is a supplementary program for counties, and towns under 35,000 population. It is designed to supply them with a credit mechanism for building new learning centers, revitalizing community property, and spurring job development in the rural heartland.

Long-term credit—for both urban and rural America—can take the pressure off the indebtedness of cities, but it does not solve the problem of immediate basic services.

It does not tell the citizens watching two men walk on the moon why his services are so poor, why he has trouble getting to work, and why he is afraid to take an evening walk.

If we are going to have quality community services—then we have to change our regressive state tax structures and assure adequate dollar return from the federal government.

How equitable are our taxes?

Right now, the top ten percent of the income population in the United States receives 30 percent of the total income but pays only 9.8 percent of the total taxes.

On the other hand, the middle and moderate income groups receive only 11 percent of the income but pay 25 percent of the taxes. And, the lowest tenth of the population receive one percent of the national income, but pay about four percent of the taxes.

The tax structures in short, are out of joint.

Look at your own communities. Better than $6 billion is collected in California by the property tax—this is 35 to 40 percent of total local government revenue.

But, who gets hit the hardest from the property tax? It is the moderate income, the middle income, and the low income tax payer.

Public officials at all levels of government have an obligation to seek out ways to make taxing fair and reduce the crushing burden of property taxes.

The federal government can make a start by returning to local communities nothing less than $5 billion a year—money that belongs in the local community but is siphoned off by the national government.

Call it what you want—revenue assistance, revenue sharing, bloc grants, grants-in-aids—who cares what the title is. The important thing is where the money is.

And, I think we need it right now.

I am opposed to the President's delay of federal aid to our cities and states.

I also believe we can make urgently needed changes in our transportation program. If it is sound policy for the Federal government to pay 90 percent of the cost of an interstate highway system, then it is equally sound policy for the federal government to pay for the streets that lead off and feed into that system.

I am in favor of opening up the highway trust fund to full city participation—for street repair, for mass transit facilities, for construction, for maintenance, and for improving the transportation from the country to the city.

Finally, I believe we must reform the welfare system.

In California, cities are hit only indirectly by welfare costs. The counties have to pay the bills, but the city residents are still taxed for it. And, welfare costs are a drain on potential resources that the communities could use to pay for basic services.

Welfare reform has three purposes. First, to help those who really need help. Second, to retain and employ those who are capable of work. And, third, to alleviate the tax burden on county and city taxpayers.

All three are vital. That is why I am for welfare reform.

And, I regret the President's request to delay it for a year.

Our cause is urgent.

A report issued last week by the National Urban Coalition reported that "those who wield the power in America were not willing to take the drastic action necessary to make American cities liveable again."

And, it pointed once more to the frustration shared by "people of all ages and races, and incomes" over the way programs "disrupt and demean peoples' lives."

I ask you today to give of ourselves, to do what must be done to build liveable cities and develop rural America.

I ask you today to concentrate your energies on the services that make cities work.

I ask you today to leave this luncheon with a common goal:

We will succeed in dispelling frustration.

We will succeed in building liveable cities.

We will succeed in building a better rural America.

And, the anxiety of the past shall not crush out the promises of American life.

PRAISE FOR PRESIDENT NIXON'S PROPOSED TRIP TO MAINLAND CHINA

Mr. BROOKE. Mr. President, an editorial published in the Anchor, a publication of the Roman Catholic Archdiocese of Fall River, Mass., praising President Nixon's decision to visit Mainland China, has recently come to my attention.

I believe the words of two Popes, regarding efforts to break the logjams of history and to move toward peace and brotherhood, are eminently relevant to this situation.

I ask unanimous consent that the text of the editorial, entitled "A Pattern Changed," be printed in the RECORD.

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

A PATTERN CHANGED

The late Pope John often pointed out that when one is confronted with a tangled and complex problem there are several ways of attacking it. One way is to try to solve the problem by using all the resources of reason and discussion and prayer.

Another way, the Pope would indicate, is to change the pattern of the problem itself. Someone, he would say, must step in like a lumberman in the midst of a log jam on a Canadian river and pry out a key log, thus altering and, hopefully, changing the pattern to a degree that the problem would become more amenable to solution.

This seems to be the role that President Nixon has chosen in his decision to visit Red China.

Pope Paul hailed this action on Sunday as he spoke of "something big and new that is taking place which can change the face of the world."

It is to be hoped that this will happen.

But, at any rate, the pattern seemed to have changed.

And this change gives new optimism to hopes for world peace and brotherhood.

FBI SURVEILLANCE OF SENATOR GRAVEL'S ANCHORAGE OFFICE

Mr. GRAVEL. Mr. President, on Friday, September 24, 1971, I was informed by my official representative in Anchorage that agents of the Federal Bureau of Investigation either entered my local office or had someone enter my office for them.

I was further informed that certain office papers were removed and are now in the possession of the FBI.

Over the weekend serious confusion arose as to exactly what occurred at my Anchorage office. At this point all that is clear is that the FBI maintained surveillance of my office on Friday, September 24, and by the end of the day the FBI had possession of some of my office papers.

It is imperative that the confusion which has occurred be clarified and that the exact facts be ascertained. I am therefore considering seeking a Senate investigation of this incident through an appropriate Senate committee. My decision will be made shortly after I have had an appropriate opportunity to examine the sworn statements of those who were present in my office on the day in question.

KATHERINE "MOM" GREEN TO BE PULASKI DAY GRAND MARSHAL

Mr. WILLIAMS. Mr. President, the 35th Annual Pulaski Day Parade will be held on October 3d in New York City. This occasion has always been a proud and memorable event as it so fittingly honors the Polish nobleman and American Revolutionary soldier, Count Casimir Pulaski. It is appropriate that this parade reminds all Americans of the contributions made by Polish immigrants and their descendants to our American way of life.

But this year's parade will be especially significant. Not only is this the first time in the history of this special celebration that a woman has been choosen to be grand marshall of the parade, but the selection could not have been finer. Mrs. Katherine Green, of Elizabeth, N.J., better known as "Mom" Green to all who know and admire her, will hold the honored position of leading the Polish-American marchers up Fifth Avenue.

Ever since her arrival to this country from Poland in 1911, "Mom" Green has been remarkably active not only in Polish activities but in other civic organizations and functions as well. Her deep dedication to Polonia and her continuous efforts to aid those in need have gained her overwhelming respect and admiration.

In 1966, the Polish Merchants and Professional Association of Elizabeth, N.J., honored "Mom" Green with a testimonial dinner. This, again, was the first time such distinction had gone to a woman. And, following her selection as grand marshal, the City Council of Elizabeth demonstrated its appreciation of "Mom" Green's contributions with a fitting resolution. I ask unanimous consent that the city council resolution be printed in the RECORD.

Mr. President, in honoring the Pulaski Day Parade, I wish to express great appreciation to all Polish Americans and their contributions to this country, and extend special and personal congratulations and best wishes to New Jersey's "Mom" Green.

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

RESOLUTION

By city council as a whole:

Whereas, City Council of the City of Elizabeth has learned of the selection of Mrs. Katherine Green, an Elizabeth businesswoman, as Grand Marshall of the Thirty-Fifth Annual Pulaski Day Parade in New York City on October 3, 1971; and

Whereas, Mrs. Green is the first woman to be so honored; and

Whereas, Mrs. Green has brought fame and honors to the City of Elizabeth; now, therefore, be it

Resolved that City Council of the City of Elizabeth hereby congratulates Mrs. Green on behalf of itself and all the citizens of Elizabeth and expresses its pride in her achievements; and be it

Further resolved that a certified copy of this resolution be forwarded to Mrs. Green and that this resolution be spread in full upon the minutes of City Council.

MIDAIR COLLISION PROBLEM

Mr. MOSS. Mr. President, since introducing my bill, S. 2264, dealing with the midair collision problem, there have been several significant developments in the area that I should like to bring to the attention of my colleagues in the Senate. S. 2264 would require all aircraft to be equipped with a collision avoidance system or proximity warning indication by January 1, 1973.

A time-frequency collision avoidance system now exists, jointly fostered by the Air Transport Association, Bendix, McDonnell Douglas and the team of Sierra Research/Wilcox Electric. These firms have collectively invested some ten million dollars in developing and successfully flight-testing airline and business aircraft anticollision hardware. The FAA is now conducting simulation tests to determine the effect of the CAS and its vertical escape maneuver on air traffic control procedures. The FAA also expects soon to request bids for the development of a ground station that can be used to synchronize precisely air borne equipment of the time-frequency type.

To be effective, the time-frequency system requires both aircraft involved in a midair collision threat to be outfitted with compatible equipment before either can be protected. Because many midair collisions have involved smaller aircraft, there is a great need to develop simple, low cost versions of a CAS suitable for general aviation.

McDonnell Douglas now has announced a Micro-CAS. This small general aviation version of the airline-sponsored time-frequency device is expected to sell for approximately $2,500 based on a production run of 1,000 units. Sierra Research Corp., also is currently working toward a time-frequency compatible system for general aviation whose design objective calls for a selling price of only $1,500.

In hearings scheduled for November 2 and 3, before the Senate Aviation Subcommittee, I am hopeful that we can be apprised further as to the status of anticollision avoidance systems so that Congress can take positive steps to protect the lives of America's air passengers.

A recent article by Philip J. Klass, published in Aviation Week & Space Technology, August 16, 1971, reviews the present status of anticollision avoidance systems. I recommend this informative article to the Senate and ask unanimous consent that it be printed in the RECORD.

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

ANTI-COLLISION COST MAY BE $250 MILLION

(By Philip J. Klass)

Washington.—Growing concern over the mid-air collision problem is prompting congressional action, including a bill recently introduced in the Senate which would require all aircraft to be equipped with a collision avoidance system or proximity warning indicator by Jan. 1, 1973. A mandatory requirement would cost the U.S. airlines at least $250 million, based on dual equipment installations.

The bill, S–2264, was introduced by Sen. Frank E. Moss (D.-Utah), a member of the Senate aviation subcommittee, headed by Sen. Howard Cannon (D.–Nev.), which will hold hearings on the bill when Congress reconvenes next month.

All aircraft over 12,500 lb. would be required to install collision avoidance systems (CAS), while smaller aircraft would need less costly proximity warning indicators.

Recent hearings by the House Government activities subcommittee to appraise the status of anti-collision systems, provided the grounds for "cautious optimism," according to its chairman, Rep. Jack Brooks (D.-Tex.). But he cautioned that controversy over competing concepts could delay implementation and he warned that "time is critical."

In a concluding statement following the one-day hearings, Rep. Brooks called on the Federal Aviation Administration to select the best of the competing systems, indicating that Congress should not attempt to resolve the complex technical issues.

FLIGHT TESTS

The airline-sponsored time-frequency CAS, which has undergone extensive flight testing and computer simulation, has a significant lead over much of its competition in terms of demonstrated capability and early availability. The basic concept was reduced to operational hardware by McDonnell Douglas in the mid-1960s and has been in operational use since then for flight tests of the company's F–4 aircraft (AW&ST Apr. 25, 1966, p. 52.) Extensive flight tests of airline and business aircraft type hardware were conducted in 1968–69 using both jet and piston-engine aircraft.

The FAA is now conducting simulation tests at its Atlantic City facility to determine the effect of the CAS and its vertical escape maneuver on air traffic control procedures. Tests so far have demonstrated that the only potential problem might be in terminal areas which employ two parallel runways. However, results to date indicate that this probability can be resolved, FAA's Robert Buck told the subcommittee.

By the end of the current year, FAA Deputy Administrator Kenneth M. Smith said, the agency expects to "have the answers to enough questions to be able to recommend changes to the CAS or to the ATC system, or to both, which will allow safe utilization of an airborne collision avoidance system in conjunction with ATC."

Within a month, the FAA expects to request industry bids for the development of a ground station that can be used to synchronize precisely each airborne equipment of the time-frequency type, Buck said.

Sierra Research Corp, under FAA sponsorship, is studying the possibility of modifying existing distance measuring equipment (DME) stations so they could also provide the synchronization service. If this proves feasible, FAA will then determine what percentage of the operational synchronization stations will be the modified-DME type.

One indication of the FAA's increased efforts in the field of anticollision systems is that the agency has budgeted a total of $3.6 million for Fiscal 1972, compared to a total of $4.5 million that the agency has spent for this purpose over the past 15 years.

The time-frequency CAS is a joint airline/avionics development, fostered by the Air Transport Assn. Bendix, McDonnell Douglas and the team of Sierra/Wilcox Electric have collectively invested approximately $10 million in developing and testing flight hardware, in anticipation of a large potential airline and business aircraft market.

But, with the exception of Piedmont Airlines, which recently ordered the McDonnell Douglas CAS for its fleet of 12 Boeing 737s, the carriers have been slow to commit themselves, largely because of their current economic conditions. United Air Lines recently announced plans to install two McDonnell Douglas units on a Boeing 727 to conduct tests needed to obtain a supplemental type certification.

Airline CAS of the time-frequency type is expected to cost approximately $50,000. One reason for its moderately high cost is that each airline unit is designed to provide time synchronization automatically to general aviation aircraft with less complex equipment if the latter are out of range of a ground synchronization station.

Despite this, the time-frequency system is handcapped in being unable to offer an extremely low-cost version for the smallest general aviation aircraft. Because the time-frequency system, like its principal competitors, is a cooperative type, both aircraft involved in a mid-air collision threat must be outfitted with compatible equipments before either can be protected.

Since many mid-air collisions with airliners have involved smaller aircraft, the ATA has recognized the need to develop simple, lower-cost versions suitable for general aviation. Within two days after the House hearings, a Continental Airlines Boeing 707 collided with a Cessna 150 near Los Angeles but there were no fatalities.

PRICE TAG

When McDonnell Douglas launched the development of a smaller general aviation version a year ago, it was expected to sell for approximately $4,000. Now, having built a working model, which is expected to begin flight tests this fall, the company says its "Micro-CAS" can be sold for approximately $2,500. The figure is based on a production run of 1,000 units, the subcommittee was told by Anatole Browde, a vice president of McDonnell Douglas Electronics Co.

NASA's Langley Research Center is sponsoring a study with Sierra Research Corp. which is aimed at achieving a still lower-cost general aviation version. The target price is $1,500.

Spokesmen for Honeywell and RCA, which are working on basically similar types of anti-collision systems that do not employ the time-frequency principle, recommended against its choice as a national standard. Both companies favor systems in which each aircraft interrogates every other within communications range, instead of using one-way communications in which each aircraft transmits in its exclusive time slot and all others listen, the technique used in the ATA system.

The principal advantage claimed for this two-way communications type CAS is that it is less complex than time-frequency and would permit simple, extremely low-cost units for small aircraft. Also, the Honeywell/RCA approach does not require ground synchronization stations. A potential problem is mutual interference in high density areas because of the large number of interrogations and replies from every pair of aircraft within communications range.

Honeywell's proposed collision avoidance system is an outgrowth of a proximity warning indicator (PWI) which the company developed for the Army Aviation Center at Ft. Rucker, Ala. Honeywell has built 285 of these PWIs for use on helicopters and small fixed-wing Army aircraft during instrument training exercises (AW&ST Aug 4, 1969, p. 109).

These units have now accumulated more than 250,000 hr. of flight use in high traffic density situations at Ft. Rucker, Honeywell's Robert J. Follen told the subcommittee. He added that "not a single false alarm or other adverse effects of any kind from multiple aircraft has been reported."

However, for the Army application, the equipment is designed to listen for replies to its own interrogation for only 1–3 microseconds, corresponding to aircraft within a 1,000–3,000 ft. radius. This by itself greatly reduces the potential interference problem from aircraft at greater distances. For a civil system, Follen said, the radius of sensitivity would need to be increased to 12 mi.

For subsonic jet transports, many observers believe that the radius of communications needs to be 20 mi. or more. Honeywell's own computer simulation analyses indicate that its system can operate without objectionable interference in terminal area traffic densities projected for 1995 (AW&ST Feb. 15, p. 46).

Honeywell has built several expanded versions of the original PWI which enhance its capability. One of these, now under evaluation by the Army, employs the same "tau" criteria used in the ATA system (separation distance divided by closure rate) to determine whether a collision threat exists. This serves to filter out targets which are not a threat so that the pilot is alerted only to other aircraft which might pose a hazard.

Honeywell calls this a collision warning system since it does not automatically determine the required evasive maneuver. However, Honeywell is confident that it can take the next step and expand the equipment into a full-fledged CAS.

Based on Honeywell's experience in producing flight hardware for the Army, the company has projected the following prices for different members of its anticollision equipment family:

Presence indicator, a simple beacon which would alert only other, more fully equipped aircraft: $350, based on a production quantity of 10,000 units.

Proximity warning indicator: $650, based on quantity of 10,000.

Collision warning system: $1,500, based on quantity of 5,000.

Full collision avoidance system: $4,500 based on quantity of 5,000.

RCA began work on its anti-collision concept, called Secant, in 1967, but has not yet constructed a complete system. This past July, RCA conducted its first flight tests in California using several of the basic interrogator/transponder elements and a signal correlation unit which would form the heart of the system. This correlator, plus the use of 24 different transmission frequencies, is expected to eliminate the interference problem, according to the company's analysis.

This same equipment, built at RCA expense, will soon be flight tested by the Naval Air Development Center, Johnsville, Pa. The FAA will monitor the test program, as it is also doing for the Army tests of the latest Honeywell design. During the NADC tests, as with the earlier RCA tests, a company-built simulator will be employed to create a high traffic density environment.

RCA proposes a family of Secant anti-collision equipments, ranging from a simple presence indicator beacon to a fully automatic CAS. RCA's current price estimates, based on a production run of 50,000 units, are somewhat higher than the Honeywell figures for the simpler units and considerably higher for the more complex. However, the RCA figure for a full CAS is somewhat lower than the present time-frequency prices.

Honeywell's Ronald E. Erickson recommended that the government should establish its requirements for an anti-collision system and that a "competitive industry development program should be immediately started to develop, evaluate and adopt the system which best meets the guidelines in the most cost-effective manner."

ATA's senior vice president, Clifton F. von Kann, cautioned against delaying implementation of the existing time-frequency system in the expectation of getting "a better one" several years hence.

Van Kann emphasized that experience shows that it takes 5–7 years after a decision is made to deploy new equipment before a large majority of airspace users can outfit their aircraft.

Commenting on the Jan. 1, 1973, deadline in the Moss bill for mandatory use of anti-collision systems, McDonnell Douglas' Browde recommended a more gradual timetable. Browde said that his company can deliver production equipments 16 months after receipt of orders.

SCHOOL LUNCH PROGRAM FALTERS

Mr. HOLLINGS. Mr. President, in May of 1969, the President of the United States declared that:

The moment is at hand to put an end to hunger in America itself for all time.

The White House also promised in December 1969, that by Thanksgiving of 1970 every needy schoolchild would be receiving a free or reduced-price school lunch. Well, the Thanksgiving of 1970 has come and gone. And the events of the last few weeks have made a sad mockery of those promises. Even so notable an authority as Dr. Jean Mayer of Harvard, the man President Nixon named to head his White House Conference on Food, Nutrition, and Health, has accused the President of a "lack of leadership" which has "made a mockery" of these very promises to wipe out hunger. Not only does hunger persist in this Nation, but we now have chaos in our American school lunch program—the very program Mr. Nixon himself promised would reach every needy child. After

all, the President did not promise that lunches would be provided only to a certain number of poor children. He did not promise lunch only to those children attending schools with adequate lunchroom facilities. He promised that every needy schoolchild would be served with a free or reduced-cost lunch. And now, with the start of school in 1971, the U.S. Department of Agriculture has issued school lunch regulations which make President Nixon's promises of 2 years ago even more of a sham. We know that more than 9 million schoolchildren would have been served a free or low-cost school lunch this year until the new rules were written. Now school lunch officials from throughout the Nation say they will be lucky to feed 6.6 million, about what they reached last year.

The situation is even more drastic in my own State of South Carolina. One of the things we are proud of is our school lunch program. We may be behind in many things, but in the efficiency and operation of this program, we lead the Nation. We are able to do this because of a capable, dependable and dedicated school lunch supervisor, Miss Kathleen Gaston. I am sad to report that Miss Gaston's hope of feeding nearly 300,000 needy children this school year now seems to be lost. Through the cooperation of school officials on all levels, plans had been carefully laid once again to lead the Nation in the percentage of eligible children reached by this program. Miss Gaston now says these plans will have to be laid aside. And why? It is because the Department of Agriculture, with the apparent approval of President Nixon, has played a cruel trick upon the children of South Carolina. We now know that under these new regulations, our State stands to be cut by nearly $10 million in the 1971–72 school year. I say that it is about time that there be a showdown between Congress and President Nixon on the issue of feeding hungry children. The Congress has issued a legislative mandate that these children be fed and has authorized the Department of Agriculture to expend special funds to meet this need.

I will join in a bipartisan movement in the Senate to seek approval of a joint resolution which will force the USDA and President Nixon to live up to these promises. This country can no longer afford the leadership which mouths political platitudes about feeding hungry children, then cuts back the money in the name of fiscal responsibility.

THE APOLLO 15 ACHIEVEMENTS

Mr. ANDERSON. Mr. President, Apollo 15, the fourth successful lunar landing mission, was the most rewarding to date from a scientific standpoint. This success was due in part to the experience gained from the earlier missions resulting in equipment innovations which permitted the astronauts longer lunar stay time and provided them with the mobility to traverse large areas of the lunar surface. The success was also attributable to superb preparations by the astronauts, their dedication to the scientific aspects of the mission and the fine integration of scientific and engineering efforts to achieve the greatest possible return from the Apollo 15 undertaking.

Mr. President, Dr. Fletcher, the Administrator of NASA, has sent me a summary of the Apollo 15 achievements in science and a number of statements from members of the scientific community giving their assessments of the Apollo 15 mission. I ask unanimous consent that Dr. Fletcher's letter along with the summary, statements, and other material be printed at this point in the RECORD.

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

NATIONAL AERONAUTICS
AND SPACE ADMINISTRATION,
Washington, D.C., September 20, 1971.

Honorable CLINTON P. ANDERSON, *Chairman, Committee on Aeronautical and Space Sciences, United States Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Apollo 15 was a very successful mission and has demonstrated man's ability to modify experiments in space and to use his ingenuity and creativity to its maximum.

The findings of Apollo 15 have apparently dazzled the minds of some of the most dedicated scientists.

Attached for your interest is a paper entitled, "Science on Apollo 15", and a sampling of thirteen statements from some of the scientists involved in this flight.

It is difficult to describe in a few pages the true significance of these scientific findings, however, I hope this gives you some feel for the scientific accomplishments of Apollo 15.

Sincerely yours,

H. DALE GRUBB,
Assistant Administrator for Legislative Affairs.

SCIENCE ON APOLLO 15

The moon, the only body in our solar system other than the earth which man himself can now explore, has long held the promise of revealing exciting, scientific discoveries. Man's seventh flight to the moon and fourth landing has been called a great scientific achievement. The first manned lunar landing, and each subsequent mission have added greatly to our store of new knowledge. Apollo 15 is expected to surpass by far any of the previous missions when the final analyses of all the data are carried out, because it had an expanded payload capability and because it was the first mission involving coordinated surface and orbital experiments.

The Apollo 15 mission has demonstrated, more than any previous manned flight, the value of man in space. The explicit and keen observations of the astronauts, combined with the analysis of material returned from the moon, have already led to new scientific discoveries. In addition to their roles as explorers, the crew diagnosed and corrected equipment malfunctions which permitted the successful completion of several important objectives that would have been lost had man not been present.

Exploration of the Hadley/Apennine landing site by the crew of Apollo 15 accomplished all of the primary mission objectives. The four geological targets of highest priority were reached. The lowest priority target, exploration of the North Complex, was omitted because of lack of time. Deployment of the geophysical station (ALSEP) was completely successful, and all experiments are operating as planned. A final high-priority objective, the return of a deep core sample, was also attained.

Some of the significant scientific aspects of the Apollo 15 mission are already evident, although it may well be several years before sufficient analysis and data correlation are in hand to appreciate fully the magnitude of this accomplishment. Several examples follow. The Apennine Mountains are now known to be layered, thus indicating that the history of the moon, prior to the formation of the Imbrium Basin some four billion years ago, was complex but evolving along processes similar to those already observed on the earth and moon. It is this early history in the evolution of a planet that has intrigued scientists, primarily because the comparable early history of the earth has been obliterated by later processes and cannot now be studied. A detailed understanding of the moon will thus lead to a better understanding about the earth, its origin and evolution, and perhaps even its mineral resources. The white crystalline rock described by Scott, may well be a piece of the early lunar crust which has never been conclusively identified among the samples returned from previous missions. This rock may prove to be the missing chemical link in understanding the early evolution of the moon. (Because of the importance of collecting this material, Apollos 16 and 17, among the many other scientific objectives to be accomplished, will continue the search, and hopefully will unravel the complex history of the moon through the study of the lunar highlands.) Another significant find was the bedrock collected at Hadley Rille. Samples of this bedrock will indicate the processes of formation of the Mare and, hopefully, the Rille itself. Finally, the deep core sample will allow us to study, layer by layer, a long period in the moon's past, from the present back perhaps a billion years in the moon's history.

Data now being telemetered from the ALSEP experiments left on the moon's surface are already disclosing new information about the moon's deep interior. Seismic events were recorded for the first time simultaneously on three instruments during the moon's recent perigee. The centers of these events are now being precisely located. Data from the second magnetometer, in conjunction with orbital magnetometer readings from the subsatellite, will now allow us to interpret the structure and thermal regime of the moon to its very core. Both of these interpretations, supported by data from the first heat flow experiment, will give us a firm starting point from which valid comparisons of the earth and moon can be made. A three station laser ranging retroreflector network has also been established. Precise measurements between the earth and these stations on the moon over many years will give us a better understanding of the interior structure of both bodies and eventually allow us to measure movements in the earth's crust.

A major factor in the Apollo Program's increase in capability for scientific exploration was the addition in Apollo 15 of the orbital science payload. This global survey technique adds a new dimension to the Apollo Program. From the data acquired, the moon's magnetic and gravity fields will be plotted, and physical and chemical maps will be compiled and correlated with large portions of the surface photographed.

The orbital geochemical sensors have demonstrated that we now have the capability to extrapolate our knowledge, obtained at the landing sites, to other areas of the moon, including the farside. The preliminary orbital data have already shown that Mare material is low in aluminum and high in magnesium relative to the Highlands. Radioactivity profiles obtained from orbit show relatively high levels over Imbrium. This is compatible with earlier geologic studies suggesting that the Fra Mauro material is ejecta from the Imbrium impact. Correlation of the orbital data

with sample studies will lead to the understanding of the processes and events which have modified the moon. Orbital data have shown that in addition to distinct relationships between topography and chemical composition, there is a relationship between chemical composition and gravity profile as well.

In summary, Apollo 15 has established that a comprehensive scientific endeavor, including disciplines from both orbital and surface science, can materially add to the understanding of the history and composition of the moon. The crew was superbly trained and highly skilled and was thus able to focus on the important and on the unexpected—to help develop a new level of the understanding about our sister planet. The observed layering and organization of the lunar material in the Apennine Mountains and the Hadley Rille, together with the information from the third scientific station emplaced on the moon, as well as detailed measurements from lunar orbit, have already added many pieces to the puzzle about the origin of the moon, the earth, the solar system, and the universe.

APOLLO 15 SCIENTIFIC ACHIEVEMENTS

ACHIEVEMENTS

Total distance traversed, 27.9 Km.
Total sample return, ~80 kg.
Total EVA manhours, 37 hours.
First three-station lunar network of geophysical instruments: Passive Seismometer, Laser Ranging Retroreflector, Suprathermal Ion Detector.
First two-station lunar network of geophysical instruments: Lunar Surface Magnetometer, Cold Cathode Ionization Gauge, Solar Wind Spectrometer.
Solar Wind Composition Experiment exposure time doubled.
Deep core from lunar surface (~225 cm.)
Layering of Apennine Mountains photographed and described.
Bedrock samples collected for first time.
First major science station in lunar orbit.
First comprehensive study of lunar chemical composition from lunar orbit.
First comprehensive study of lunar atmosphere from lunar orbit.
Orbital location of local lunar magnetic anomalies associated with craters.
Confirmation of chemical difference between Mare and Highlands.
High quality mapping photography.
Correlation of Laser altimetry with spacecraft doppler tracking measured the offset between Center of Mass and Center of Figure of moon.
Unique studies of galactic X-Ray Sources.

SURFACE EXPERIMENTS

Passive Seismic Experiment.
Heat Flow Experiment
Lunar Surface Magnetometer.
Suprathermal Ion Detector Experiment.
Solar Wind Composition.
Cold Cathode Gauge Experiment.
Laser Ranging Retroreflector.
Solar Wind Composition.
Lunar Geology Investigation.
Soil Mechanics Experiment.
Lunar Dust Detector.

ORBITAL EXPERIMENTS

Gamma-Ray Spectrometer.
X-Ray Spectrometer.
Alpha-Particle Spectrometer.
S-Band Transponder (CSM & LM).
Mass Spectrometer.
Bistatic Radar.
Subsatellite: Particle Measurement, Magnetometer, S-Band Transponder.
CM Window Meteoroid.
UV Photo Earth and Moon.
Gegenschein.

ORBITAL FACILITIES

61 cm. Panoramic Camera.
7.6 cm. Mapping Camera.
Laser Astimeter.

DR. LEON SILVER, PROFESSOR, CALIFORNIA INSTITUTE OF TECHNOLOGY, CO-INVESTIGATOR, LUNAR SURFACE GEOLOGY EXPERIMENT, MEMBER, PRELIMINARY EXAMINATION TEAM

Apollo 15 has yielded the most comprehensive sampling observations and photography of any lunar mission today. These should provide the basis for developing a more accurate understanding and should extend the effective known time span of the history of the moon. They should also extend our understanding of the physical nature of the moon to significant depths, perhaps to 10 km or more. We have probably moved a major step closer to understanding the evolution of the sister planetary body. The new clues to the chemical evolution of the moon can mean a closer understanding of how important chemical elements useful to man were concentrated on our own planet. Equally important, the deep core of the soil and the other cores and soil samples are the best record we have of the activities of our sun for the past several billion years. We share the effects of variations in solar activities with the moon and this record will provide knowledge vital to the well being of man who is so dependent on the activities of the sun.

DR. RICHARD H. JAHNS, DEAN, DEPARTMENT OF EARTH SCIENCES, STANFORD UNIVERSITY, PRESIDENT, GEOLOGICAL SOCIETY OF AMERICA

Beyond the more obvious elements of spectacular success, the Apollo 15 mission deserves special recognition in the context of scientific accomplishment. The return of records, materials, and descriptive information from a site of great geologic density was remarkable in scope and quality; it was an impressive "delivery of the goods" relative to scientific justification of the lunar exploration program.

More than this, Apollo 15 firmly demonstrated the wisdom of a *manned* lunar program. The astronauts handled an astonishingly large number of complex tasks, including some for which direct human input was uniquely required. Their presence on the scene yielded the best description and documentation of lunar features yet obtained, and it made possible some useful changes in procedure as responses to unexpected conditions. It is difficult to conceive of a comparable unmanned mission that would have been more than a pallid substitute in terms of results obtained.

The combination of a carefully selected site, exceptionally able and well trained astronauts, top quality equipment, and coordinated planning and back-up efforts paid off handsomely for science, and from Apollo 15 we should learn a great deal about lunar materials, features, and history. From it we may also learn something about the early history of the earth, which it is felt has been little more than conjecture.

DR. ROBERT M. WALKER, MCDONNELL PROFESSOR OF PHYSICS, WASHINGTON UNIVERSITY, PRINCIPAL INVESTIGATOR, LUNAR SAMPLE PROGRAM

The Apollo 15 mission was clearly a milestone in human achievement. Perhaps most astonishing was the evident advance in scientific accomplishment over earlier missions. So many things were so much better that it is hard to single out any one improvement. The Lunar Rover made it possible to sample many important formations. The deep drill represents a quantum jump in our ability to understand the evolution of the lunar surface. The orbital experiment will make it possible to tie our ground observations to the moon as a whole.

The crew was simply great. The evident understanding of the scientific objectives speaks highly of their intelligence, their dedication, and, equally important, their excellent training. With this mission, scientific exploration of the moon matured. All involved have my heartfelt congratulations and my deepest thanks.

DR. LARRY A. HASKIN, PROFESSOR OF CHEMISTRY, UNIVERSITY OF WISCONSIN, VICE CHAIRMAN, LUNAR SAMPLE ANALYSIS PLANNING TEAM, PRINCIPAL INVESTIGATOR, LUNAR SAMPLE PROGRAM

The Astronauts were very efficient and conservative in their efforts, which clearly reflects not merely the special interest of Scott and Irwin in the scientific aspects of their mission but also shifts in emphasis in Astronaut training. It was important to have Astronauts who understood the essence of the scientific needs of the mission to the point that they could make good decisions themselves while on the surface; it was also important that a group of groundbased scientists representing a range of disciplines could still influence their sampling activities. . . .

The opportunity for our representatives in Houston to be consulted during the surface activities about the suitability of or necessity at a given site for the collection of comprehensive samples was very important. . . . I have always been impressed that NASA could coordinate vastly complex hardware and so many people in order to get men to the moon and back. Now I am thanking you and your organization at MSC for also successfully coordinating our scientific needs deeply enough into mission planning to bring them to fruition on the lunar surface.

DR. G. J. WASSERBURG, PROFESSOR OF GEOLOGY AND GEOPHYSICS, CALIFORNIA INSTITUTE OF TECHNOLOGY; PRINCIPAL INVESTIGATOR, LUNAR SAMPLE PROGRAM; MEMBER, NATIONAL ACADEMY OF SCIENCES AND NATIONAL RESEARCH COUNCIL; MEMBER, THE U.S. NATIONAL COMMITTEE FOR GEOCHEMISTRY

Apollo 15 has initiated an advanced series of lunar missions with extraordinary success. This mission represents a quantum jump to a new state in lunar exploration. The skill and dedication of the astronauts in carrying out this endeavor in exploration and science is coupled with a major increase in mobility and versatility which will yield much more fruit in future lunar missions.

DR. JAMES R. ARNOLD, PROFESSOR OF CHEMISTRY, UNIVERSITY OF CALIFORNIA, SAN DIEGO; PRINCIPAL INVESTIGATOR, APOLLO GAMMA RAY SPECTROMETER, NATIONAL ACADEMY OF SCIENCE

The orbiting geochemical package on Apollo 15 represents the achievement of a dream of many years: mapping the chemical composition of a broad and representative part of the lunar surface. This was accomplished with a group of sensors (Gamma Ray, X-Ray, and Alpha Particle) mounted in the Service Module, which were in use through the period of lunar orbit, and on the way home. It is remarkable that we are learning much about the chemical composition of the backside of the moon, where samples will probably not be collected for decades. It is equally remarkable that we can obtain typical, or average composition over large regions, for example a mean for Mare Crisium, rather than that of samples from a local point.

This milestone has many implications for the future of lunar and planetary research. We can look forward to accurate chemical maps over the whole moon, including the polar regions where volatiles may be concentrated, and to mapping of Mars, Mercury, and the Asteroids.

DR. ISIDORE ADLER, SENIOR SCIENTIST, THEORETICAL STUDIES BRANCH, GODDARD SPACE FLIGHT CENTER, PRINCIPAL INVESTIGATOR, APOLLO X-RAY SPECTROMETER

"I find this probably the most exciting thing that has ever happened to me scien-

tifically. Three things strike me as very significant.

1. We are getting chemical information about a large portion of the moon, far larger than one could hope to get by just going to the surface.

2. We are getting chemical and physical information about the backside of the moon which is probably inaccessible by any other means.

3. We have demonstrated very effectively, the power of this remote sensing technique and its significance to remote analysis of planetary surfaces, and perhaps its use in geochemical prospecting.

DR. GARY V. LATHAM, SENIOR RESEARCH ASSOCIATE, LAMONT-DOHERTY GEOLOGICAL OBSERVATORY, PRINCIPAL INVESTIGATOR PASSIVE SEISMIC EXPERIMENT

"With the successful installation of a geophysical station at Hadley Rille, the Apollo Program has for the first time achieved a network of stations on the lunar surface; a network that is absolutely essential for the location of natural events on the moon. The establishment of this network is perhaps the most important milestone in the geophysical exploration of the moon. The first event to be recorded on all three stations was manmade; the impact of the LM ascent stage near the Apollo 15 station. The now familiar rumble generated by this impact spread slowly outward and reached the Apollo 15 station in 28 seconds and the Apollo 12 and 14 stations, 1,100 km to the south in about seven minutes. The fact that this small source of energy was detected at such great range strongly supports the hypothesis that meteorite impacts are being detected from the entire lunar surface.

The SIVB impact from mission 15 extended the depth to which lunar structure can be determined by seismic methods to nearly 100 km. From these additional data, it now appears that a change in composition may occur at a depth of 25 km beneath the surface. If so, this would be strong evidence for the presence of a lunar crust, equivalent to the crust of the earth, and of about the same thickness.

DR. PAUL GORENSTEIN, SENIOR STAFF SCIENTIST, SPACE RESEARCH DIVISION, AMERICAN SCIENCE AND ENGINEERING, PRINCIPAL INVESTIGATOR, APOLLO ALPHA PARTICLE SPECTROMETER

Apollo 15 presented our first opportunity for an extensive study of the chemistry of the lunar surface. We have surveyed an area amounting to over 1,000,000 square miles with the Gamma-ray, X-ray, and Alpha Particle Spectrometers from the orbiting Command and Service Modules. We have successfully mapped the chemical composition of a substantial portion of the surface including regions on the farside of the moon. In particular, we have obtained the first compositional data on the backside. Significant differences in chemical composition between Maria and highland regions have been observed.

Within the regions surveyed by Apollo 15, we will be able to locate possible areas of unusual chemical composition, high radioactivity concentration, or sites of outgassing phenomena.

During the trans-earth coast, the X-ray spectrometer observed previously discovered X-ray objects deep in our galaxy. The X-ray emissions from these objects do not penetrate our atmosphere, so are observable only from space. By pointing the instrument at several of these objects for periods of up to one hour, we obtained the longest coverage to date. Ground based optical and radio observatories in the Soviet Union and Europe participated in simultaneous observation with Apollo 15 of two objects whose time varying light and radio emissions are detectable at the earth. Hence, we succeeded in obtaining unique and important data in the area of galactic X-ray astronomy. We have the data necessary for assessing the potential of the moon and near-lunar environment as a base for X-ray astronomy.

MR. WILLIAM L. SJOGREN, MEMBER, TECHNICAL STAFF, TRACKING AND ORBIT DETERMINATION SECTION, JET PROPULSION LABORATORY, PRINCIPAL INVESTIGATOR, APOLLO S-BAND TRANSPONDER GRAVITY EXPERIMENT

The data from Apollo 15 science will no doubt be continually bearing fruit for the next several years. The simultaneous, concentrated effort of so many disciplines will provide a unified understanding of the moon. This understanding is basic, for man must eventually leave this earth and inhabit other planets and solar systems. Man will not die like his mindless animal ancestors from eon to eon, for his search for truth and knowledge will certainly continue his existence.

Preliminary results from Apollo 15 science has been very illuminating. Gravity, seismic, chemical, thermal, and magnetic data are tying together beautifully. Some first far-side data, other than photography, are now available. Correlation between these results will provide definite theoretical models of the moon. We can then appreciate what can and cannot be done with the moon to further our understanding of the other planets and of the earth itself.

DR. JOHANNES GEISS, DIRECTOR, PHYSIKALISCHES INSTITUT, UNIVERSITY OF BERNE, PRINCIPAL INVESTIGATOR, SOLAR WIND COMPOSITION EXPERIMENT

Congratulations to NASA for a mission of great scientific significance. The rocks collected with expertise by the Apollo 15 astronauts should reveal the sequence of events which formed Mare Imbrium and the Apennine Mountains during the early history of the moon. The record of the first billion years of the earth's history was essentially destroyed by its own geological activity. Investigations on the Hadley rocks together with geologic-geophysical observations should enable us for the first time to draw firm conclusions about this early epoch in the history of the solar system, and about the process of formation of planetary bodies. Apollo 15 has demonstrated the essential role man plays in the exploration and scientific investigation of the very complex solid bodies in the solar system.

Our Solar Wind Composition Experiment has collected solar matter over a period twice as long as in earlier Apollo missions. Consequently, we expect to obtain precise data on abundances in the sun of rare isotopes such as Neon–21 and Argon–38. By comparing isotopic and elemental abundance results from different missions we study acceleration and fractionation processes in the solar atmosphere. Presently we interpret the observed difference between the helium isotope abundances of meteoritic and solar matter as due to nuclear processes inside the sun. The difference between the neon isotopic composition in the sun and in the earth's atmosphere is due to gas losses from the latter. Since the Solar Wind is one of the principal sources of gas in the lunar atmosphere, our experiment establishes the rates of input to the lunar surface of gases which are found in the atmosphere of the moon.

I wish to thank you for the cooperation NASA has generously extended to our institute.

MR. FREDERICK J. DOYLE, RESEARCH SCIENTIST, MAPPING DIVISION, U.S. GEOLOGICAL SURVEY, TOPOGRAPHIC DIVISION, CHAIRMAN, APOLLO ORBITAL SCIENCE PHOTOGRAPHIC TEAM, PAST PRESIDENT, AMERICAN SOCIETY OF PHOTOGRAMMETRY

The orbital cameras flown on Apollo 15 are part of an integrated system which includes the cameras themselves, the spacecraft tracking, the Laser Altimeter, and the ground data reduction equipment and techniques. Simply in terms of information gathering ability, the Panoramic Camera is equivalent to sixty Lunar Orbiters, and the Mapping Camera to fifteen more Lunar Orbiters. The combination of Mapping Camera, Stellar Camera, Laser Altimeter, and tracking data will permit the precise location of any point on the moon's surface recorded by the cameras.

In addition to providing a cartographic base for location of the data recorded by the other Apollo orbital sensors, this information will permit inferences to be drawn regarding the departure of the moon's shape from spherical, the separation of the center of mass from the center of figure and the correlation of topographic features with gravity anomalies. These facts have geophysical implications regarding a hot or cold genesis for the moon, and the extent to which tectonic forces may still be operating.

DR. JOHN H. HOFFMAN, ASSOCIATE PROFESSOR, DIVISION OF ATMOSPHERIC AND SPACE SCIENCES, UNIVERSITY OF TEXAS AT DALLAS, PRINCIPAL INVESTIGATOR, APOLLO LUNAR ORBITAL MASS SPECTROMETER

Apollo 15 has given us an opportunity to observe the lunar atmosphere for the first time with an instrument designed to determine the composition and abundance of the gases associated with the moon. Preliminary results show an unexpectedly large population of gas molecules at lunar orbit altitudes. Many kinds of gases, from water vapor and carbon dioxide to many hydrocarbon molecules are observed.

In addition, the data covers a significant fraction of the moon's surface, and gives us an opportunity to search for volcanic type events that release gases into the atmosphere. One such event may already have been observed on the backside.

The Apollo 15 flight, with its abundant scientific return will certainly provide a much deeper understanding of the solar system, and hopefully is the beginning of a detailed scientific investigation of the moon.

SMOKING AND NONSMOKING SECTIONS FOR COMMERCIAL AIR CARRIERS

Mr. BENNETT. Mr. President, today I have written Mr. John Shaffer, Administrator of the Federal Aviation Administration, requesting that his agency step up its feasibility study of issuing mandatory regulations that would require commercial air carriers to provide smoking and nonsmoking sections for their passengers.

I recognize this has been done by a number of airlines on a voluntary basis, and I commend them for their efforts; however, because these are voluntary efforts, there is virtually no enforcement of the nonsmoking regulations. This has led to an increasing number of complaints from passengers who have specified that they wished to be seated in the nonsmoking section of the airplane only to find themselves seated beside someone who smokes. To someone who smokes this may seem a minor problem, but to those of us who do not, it can often mean several hours of irritation and discomfort. The unhappy aspect of this problem is that it could be resolved with a minimum amount of effort on the part of the airlines and at virtually no expense.

Mandatory regulations issued by the FAA would make it possible for a passenger who either by personal choice or

because of health reasons could be assured of making the flight relatively free from the irritation of tobacco smoke. With the increasing capacities of the commercial airliners, it is becoming increasingly important that attention be given to the needs of both the smoker and the nonsmoker.

Another fact which has come to my attention in the study of this problem that has given added urgency to seeing these regulations implemented is the increase in tobacco consumption by the American people during the first 6 months of this year. Statistics recently released by the American Cancer Society and the Department of Agriculture show that Americans are smoking more than during the same period of time last year. For the first time in 5 years there has been an increase in the total consumption of tobacco. This comes as a surprise to many of us, particularly in light of the fact that there is increasing evidence that cancer, heart disease, and other respiratory ailments are directly related to smoking.

This increase has occurred despite the fact that all the cigarette advertisements were removed from radio and television on the first of January of this year. While the increase is small, only four cigarettes per person, the major reason for concern is that this may indicate a trend toward increased smoking. Hopefully, this will not be the case.

At this point I want to pause to make one thing clear. It is a personal decision whether one smokes or not—I would not want to do anything to interfere with this decision. However, I do believe that when smoking becomes an imposition or infringement upon the health and comfort of another individual, there is need for regulation.

It may also be of interest to note that there have been a number of campaigns started that would restrict smoking to certain cars on passenger trains, to limit it in waiting rooms of hospitals, bus stations, railroad terminals, and other public areas.

I sincerely hope that with the combined efforts of all concerned about the problems related to the mixing of smokers and nonsmokers in public places, we will be able to assist the FAA in prompt adoption of mandatory seating regulations and other reasonable solutions to problems of conflict in public areas.

REDUCING DEATH

Mr. MOSS. Mr. President, cigarette smoking continues to be a plague on our people. The merchants of death, exploiting both the genius of Madison Avenue and the inventiveness of new product managers have continued to bombard the American people with wanton invitations to ravish their health.

But we are faced with soaring costs of hospitalization and overflow crowding in our extended care facilities; there are not enough funds available to provide for the intensive care needed by the emphysema, cancer, and heart disease patients; and millions and millions of dollars are being paid from our social security funds to aid relatively young and otherwise productive people who are unable to use their skills due to disabling respiratory or heart conditions.

The best medicine for these problems is, of course, preventive medicine. Prevention cuts down on costs, it cuts down on agony, and it cuts down on disability. As we are all aware, the most significant and demonstrable form of prevention of lung cancer, oral cancer, heart disease and emphysema is abstinence from smoking. Just think of the hundreds of thousands of lives extended and the years of productivity conserved if people did not smoke.

After a long and spirited battle with tobacco interests, the Government has exerted its sovereign power to protect the health and welfare of its citizens through elimination of cigarette advertising in the broadcast media. And this legislation, which might be termed a triumph over greed and political power has succeeded in cutting the purse strings on a multimillion-dollar expense account and put an end to one of the most subtle and insidious influences ever to attack the thoughts of our young people.

What has been the effect of our ban on broadcast cigarette advertising? For one thing, children are no longer exposed to the allure of handsome men and elegant women filling their lungs with death-dealing smoke. Adults who are desperately trying to quit, no longer have their resolve shaken by the sight of men and women seductively indulging in self-pollution. We have had and will continue to have antismoking television announcements to remind those who continue in their folly. And in payment for decades of broadcast advertising of cigarettes, I believe that the broadcasters have a moral if not legal obligation to air anti-cigarette commercials until the residual effects of billions of dollars of cigarette advertising has been dissipated.

Unfortunately, members of the cigarette industry, despite their acceptance of the public verdict that the promotion of cigarettes on brodacast media is not in the public interest, show no signs of slackening their quest for new consumers through every conceivable promotional and marketing technique they can conjure up.

So where does Government go from here? It must change the economic and social benefits accruing to the tobacco economy. We must develop methods to deter the growing, processing consumption of the product. In the United States, a considerable portion of the economy of several States depends on tobacco for complete economic solvency. This must change. Even though tobacco history in the United States almost parallels the development of the Nation itself, this type of consideration must be overlooked.

We must prepare a long-range plan to eliminate tobacco as a staple commodity. The deceptive promotional tactics for the product must cease, the tar and nicotine content of the product must be reduced, and although those who depend on tobacco for their livelihood will be most disturbed, we must terminate their dependence on tobacco.

I have repeatedly tried to have legislation supporting this effort seriously considered by the Agriculture Committee, but without success. I have brought the problem directly to the floor through amendments to the Agriculture appropriations legislation which would strike out all subsidization for tobacco, but without success. Senator BROOKE has again introduced legislation modeled along the lines of my termination program, although more gradual, and I have joined with him in cosponsorship of that measure. But in all candor, I doubt if we will be successful in getting the Agriculture Committee to consider the legislation. So once again we are faced with the dilemma of the tobacco problem with little hope of overcoming the seemingly modest suggestion to discuss it in an intelligent fashion.

There are several areas and ways in which we can approach the subject. Some have been embodied in legislation which I have already proposed, other concepts will be in additional forthcoming legislation. But let us also look to voluntary efforts. In Canada, the cigarette industry has volunteered to limit tar and nicotine content to 22 milligrams and 1.6 milligrams per cigarette. Five brands of cigarettes exceed these levels and the manufacturers have stated that they will reformulate and decrease the levels.

Obviously this is a practical method of handling one aspect of the cigarette problem. My bill, S. 1454, would in effect bring about the same policy in the United States. Hopefully we will be able to hold hearings early in 1972 on S. 1454, and see a continued reduction in the tar and nicotine content of domestic cigarettes which fortunately has already been noted in some cigarettes on the market today.

Mr. President, I ask unanimous consent that an article concerning the Canadian cigarette situation published in the Wall Street Journal of September 22, 1971, to be printed in the RECORD.

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

CANADA'S TOBACCO INDUSTRY AGREES TO END CIGARETTE ADS ON RADIO AND TV NEXT JAN. 1

OTTAWA.—The Canadian tobacco industry, hoping to stall legislation action on a bill that would ban all cigaret advertising, says it will voluntarily end advertising on radio and television next Jan. 1. However, it will continue to buy advertising space in other media.

The bill calls for the all-media ban to go into effect next Jan. 1. But Health Minister John Munro has hinted that the government might be willing to delay the start-up date pending further talks with the tobacco and advertising industries.

The tobacco industry, represented by the Canadian Tobacco Manufacturers Council, also said it agreed to limit tar and nicotine content per cigaret to 22 milligrams and 1.6 milligrams respectively. Five brands surpass these levels, the council said.

They are Buckingham king-size plain end, Pall Mall king-size plain end, and Chesterfield king-size plain end, all made by Imperial Tobacco Products Co., a division of Imasco, Ltd.; St. Moritz premium-filter menthol, made by Rothmans of Pall Mall Canada Ltd., and Mannic king-size filter, made by Bastos Ltd., a small Quebec concern that isn't a member of the association.

Imperial makes Pall Mall cigarets in Canada under license with American Brands Inc.

and Chesterfields under license with the Liggett & Myers division of Loews Corp.

Imperial said it will reduce the tar and nicotine content of the three brands to at least the council's ceiling. Paul Pare, council president, also is president of Imperial.

But Bastos, which isn't a member of the council, said it may cut down the tar and nicotine in its Mannic cigarets but added that it's reluctant "to change anything unless the government pushes us."

The council said also that, effective next April 1, all cigaret packages will carry the admonition: "Warning: Excessive smoking may be hazardous to your health." The government bill calls for the warning to read: "Danger to health increases with amount smoked, avoid inhaling."

In 1969, the latest year for which figures were available, Canadian cigaret manufacturers spent a total of $25 million on all types of advertising. Some $7 million of this was spent on broadcast advertising.

According to the council, more was spent on such advertising last year and outlays increased again in 1971.

The council said it wants the cigaret-advertising ban confined to broadcasting "in line with the voluntary action taken in the United Kingdom and the legislative action in the U.S."

"We have no reason to believe the government has changed its mind" about the total advertising ban, Mr. Pare said. "Hopefully the revised advertising code will aid deferment of the bill. But that's a hope more than an expectation," he added.

The council said cigaret advertising won't imply smoking "promotes physical health," or "is essential to romance, prominence, success of personal advancement." All models in ads must be at least 25 years old, the council added.

TRIBUTE TO JUSTICE HUGO L. BLACK

Mr. WILLIAMS. Mr. President, like other Senators, I was disappointed when I learned of Justice Hugo L. Black's retirement from the Supreme Court on September 17, and very deeply saddened when I learned of his death Saturday.

Hugo Black's term, which began on August 19, 1937, and ended on September 25, 1971, was one of the longest in the history of our Nation's Highest court. Only two men—John Marshall and Stephen J. Field—served longer. I am confident that Justice Black's influence on both the Supreme Court and the Nation at large shall live on and remain a fitting monument to his life and philosophy. One cannot help but be awed at the thought that during his censure, Justice Black was associated with one-fourth of the Justices who have sat on the Court, and with one-third of the Chief Justices who ever served.

It might be considered trite to say that Hugo Black rose to great heights from a humble beginning, but that is precisely the case. He was born the son of a farmer and small storeowner in rural Alabama, and became one of the most respected and influential men in our country, and perhaps the world.

Justice Black was one of the principal architects in shaping the Supreme Court we have known since the 1950's. It was during this time that the guarantees of due process of law extended defendants in Federal courts, were extended to cover criminal defendants in other courts as well. This was accomplished through interpretation of the 14th amendment, which Justice Black had long argued was designed to make the Bill of Rights as binding upon the States as it is upon the Federal Government.

While Justice Black never persuaded the majority of his colleagues on the Court to fully accept this view of the 14th amendment, the Court did come to accept it to a large degree. Over the years the Court used the 14th amendment to invoke, one by one, the liberties guaranteed by the first, fourth, fifth, sixth, and eighth amendments, to protect individuals from actions of State and local governments.

The ideals of equality and democracy were certainly at the core of what Justice Black preached and practiced. He tended to trust Americans to handle their rights and responsibilities as citizens, and he viewed the first amendment as preeminent. Justice Black called this amendment—

> the heart of our Constitution, our Bill of Rights, and our Nation.

He saw in this freedom of speech and assemblage the ultimate means by which controversies inherent in a democracy could be settled peacefully under the rule of law.

The character and quality of Justice Black's work is rich ground for a lengthy discourse. However, it is undoubtedly true that brevity is in order at this time. Let me just say that there is now a great void in our National Government, a void which will not be easily filled.

MAGRUDER CORRIDOR

Mr. NELSON. Mr. President, Senator CHURCH of Idaho and Senator METCALF of Montana have recently introduced a bill to establish an Upper Selway Wilderness Area in the section of Idaho adjoining Montana known as the Magruder Corridor. The bill, S. 2390, would place 205,000 acres of timbered mountain land in wilderness status and would prevent the pollution of the Upper Selway River, a unit of our Wild River System, and the loss of the anadromous fish that spawn there.

Senators CHURCH and METCALF emphasize that the measure that they propose is needed to connect two major wilderness areas, the Selway-Bitterroot Wilderness Area on the north and the Salmon Breaks Primitive Area to the south. If the Magruder Corridor is maintained in wilderness condition, this large block of wilderness area will be maintained in much the condition as it was when Lewis and Clark crossed the Continental Divide in 1805.

Senators CHURCH and METCALF are to be complimented on their deep interest in this conservation measure and deserve the support of their colleagues.

I ask that an editorial by Mr. Bill Hall appearing in the Lewiston Tribune be printed in the RECORD for the information of my colleagues.

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

CORRIDOR BETWEEN TOWERS

Placing the 240,000-acre Magruder Corridor in the wilderness system would have a negligible effect on the timber industry of Idaho and Montana. But logging and road construction, if permitted in the area, could have a very expensive effect on the land in question.

Sens. Frank Church, D–Idaho, and Lee Metcalf, D–Mont., have offered a bill to designate the Magruder Corridor as the Upper Selway Wilderness Area.

In this era of urban encroachment on the last remaining wilderness, unnecessary carving on the Magruder Corridor would be unthinkable by itself. But there is also the matter of the headwaters of the Selway River, a stream that is among Idaho's most extraordinary and well worth the price of a handful of sawlogs to spare it from degradation.

Church points out that the potential timber in the area is quite small. The allowable cut would be only 6.4-million board feet, most of which would be milled in Montana.

Where it is milled doesn't matter if it is actually a crucial supply to help fill the nation's needs. But whether milled in Montana or Idaho, it is, according to Church, only a four-month supply of logs for one small mill.

That is not enough to warrant tearing up a section of wilderness considered priceless by thousands of the region's residents.

Unfortunately, the more America is urbanized, the more the citizens require these islands of sanity away from civilization, these healing stations away from the traffic jam, the alarm clock, the telephone and the polluted air. Yet the more urbanized we become, the less virgin territory we retain—unless steps are taken.

Church and Metcalf are taking steps to preserve the Magruder Corridor.

The Idaho senator is a foreign policy specialist, and it is no secret that his first priority in his personal career is to serve his nation in that field. And history may well look favorably upon Church and a dozen others in the Senate who have lifted America into a more mature and seemly posture of one of the great nations of the world.

But in the years to come, Church, and a few others, may be recognized for the special vision that caused Idaho's senator to embark a decade ago—before it was fashionable—upon the task of segregating so-called civilization from the remaining American outback. His work in the field of wilderness legislation and in designating wild and scenic rivers provides the hope that our grandchildren—though they may live during the week in nervous plastic towers—will be able to get away from it all on occasion and come to terms with the raw earth from which they sprang.

Church's pioneer work in that effort means stashing away some serenity as a balm for the pressured generations to come. That may be a more fundamental contribution to peace on earth than a Foreign Relations Committee hearing.

And Magruder Corridor will serve society better as it is—for healing—than as the source of more pulp to make more paper on which to print more forms to rot more minds in the offices of those who must fill them out.—B. H. Lewiston Morning Tribune.

S. 2432, THE COURT PRACTICE APPROVAL ACT OF 1971 AND THE PROPOSED NEW FEDERAL RULES OF EVIDENCE

Mr. McCLELLAN. Mr. President, on August 5 of this year, I introduced, on behalf of myself and my distinguished colleagues, the Senator from Nebraska (Mr. HRUSKA), the Senator from North Carolina (Mr. ERVIN), the Senator from West Virginia (Mr. BYRD), the Senator from Alabama (Mr. ALLEN), the Senator from Pennsylvania (Mr. SCOTT), and the Senator from South Carolina (Mr. THURMOND), S. 2432, the Court Practice

Approval Act of 1971. This proposed legislation would modify the present delegation of power to the Supreme Court of the United States to prescribe rules of practice and procedure applicable to the Federal courts sitting in criminal and other proceedings to insure adequate participation by the Congress in the rule formulation process. In my remarks on August 5, 1971—CONGRESSIONAL RECORD, page 29894—I noted that the bill was drafted to respond to a problem brought to light by the circulation of the Revised Draft of the Proposed Rules of Evidence for the United States Courts and Magistrates. It was dissatisfaction with those proposed rules that led me to examine the avenues open to the Members of this body by which they might express their criticism and make their voice heard; and it was in the course of that endeavor that I realized that the present statutory scheme affords inadequate opportunity for this body to consider the implications of any proposals put before it by the Supreme Court.

Mr. President, during the course of our recent recess, I forwarded to the chairman of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, a detailed statement of my positions on the more salient issues presented by the proposed rules. It is my judgment now that it would be helpful if hearings would be held by the full Committee on the Judiciary, not only on the Court Practice Approval Act, but also on the merits of any rules of evidence ultimately forwarded to the Supreme Court by the Judicial Conference. As the rules are processed, and if they become less controversial, it might be possible to separate them from the Court Practice Approval Act, but at this juncture, I am still of the opinion that they should be considered together. In this connection, I wish to draw to the attention of Senators my own observations and thoughts as well as those of the U.S. Department of Justice and those of the U.S. Attorney for the District of Columbia, which were also forwarded by letter to the Standing Committee.

These letters express a concern similar to my own with the rules in their present form. I was gratified, however, to learn from a distinguished member of the standing committee, Prof. Charles Alan Wright, of the University of Texas Law School, that any seeming disregard on the part of that committee for the expressed intent of the Congress in drafting the proposed rules, at least in reference to proposed rule 609, which deals with the so-called Luck question (see *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F. 2d 763 (1965)), grew out of a good-faith misunderstanding of the intent of Congress itself. I take heart at learning, therefore, that the further development of these rules will take place with Professor Wright's good counsel and without this misunderstanding.

Nonetheless, the issues presented are momentous for the administration of criminal justice, and the debate on the merits of any such rules within the judiciary, Congress, and the Nation should be long and ample. Consequently, I express my hope that these remarks will engage the interest not only of my learned colleagues, but also of concerned citizens throughout the country.

Finally, I am informed that the rules were considered again by the Advisory Committee on Evidence over the Labor Day weekend and will be presented to the standing committee on the 30th of this month. A number of important and worthwhile changes have been made in the rules. In addition, the chairman of both the standing committee and the Evidence Committee and the reporter for the rules were kind and generous enough to meet with me here in Washington and to discuss with me many of my concerns. I recognize, of course, that what they said to me need not bind their colleagues on the standing committee, but they did express a willingness to take to the committee a number of additional modifications and clarifications that will strengthen the rules and meet many of the objections voiced here and elsewhere. The project is too important to have it aborted at this stage of its development. At the same time, we cannot afford to weaken the administration of criminal justice. I am hopeful, therefore, that an accommodation can be worked out on these matters. I know it will if the standing committee is itself as generous and considerate as its chairman and the chairman of the Evidence Committee. It is, I am told, not too late to convey comments to the standing committee and that copies of the last published draft of the rules may be obtained from and comments may be forwarded to Mr. William E. Foley, the Secretary of the Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Supreme Court Building, Washington, D.C. 20544.

Mr. President, I note that the text of the proposed rules may be found at 51 F.R.D. 315 (1971), and I ask unanimous consent that the following documents be printed in the RECORD:

First, my letter of August 12, 1971, to Judge Maris;

Second, a letter from Deputy Attorney General Richard G. Kleindienst to Judge Maris accompanied by the Department of Justice's comments on the revised draft of the Proposed Rules of Evidence;

Third, a letter from Thomas A. Flannery, U.S. attorney for the District of Columbia, of August 6, 1971, to Judge Maris;

Fourth, a letter to me from Prof. Charles Alan Wright of August 13, 1971, my reply to him of September 2, 1971, and his response to me of September 13, 1971.

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

U. S. SENATE,
Washington, D.C., August 12, 1971.

HON. ALBERT B. MARIS,
Committee on Rules of Practice and Procedure, Supreme Court Building, Washington, D.C.

DEAR JUDGE MARIS: I write to express my concern that the promulgation of the proposed Federal Rules of Evidence in their present form would seriously impair the administration of justice in the United States. In the main, I fully support your effort to secure for Federal courts compact, clear-cut, uniform, accessible and authoritative rules of evidence. But I must deprecate any effort which would go beyond such a codification, radically alter present law and further debilitate an already weak Federal system of criminal justice.

My comments here represent my initial opinions on the Rules as now drafted. With full public hearings, in which the drafters of the Rules could be heard and the criticism and suggestions of others solicited, I recognize that I might be persuaded that other positions on these various issues ought to be adopted. Nevertheless, I thought it perhaps wise to share with you my thoughts at this stage in your reconsideration of the proposed Rules.

RULE 103

Subdivision (a) of Rule 103 provides that error may not be predicated upon a ruling admitting or excluding evidence "unless a substantial right" of a party was affected.

I would assume that this Rule does little more than codify the harmless error rule. See, e.g., *Chapman* v. *California*, 386 U.S. 18 (1967). It would be helpful, however, if language were added regulating the notion of "substantial right" to the probable affect of the error on the verdict or finding. Such a provision is found in the *Model Code of Evidence* §§ 6(b) and 7(b). To the degree that rules of evidence seek to implement policies other than those immediately associated with the just determination of judicial disputes, it will always be possible to envision that a "substantial right" (e.g., the invasion of privacy associated with the use of the product of an unlawful wiretap) may have been violated, even though it had no impact on the final outcome of the proceeding. In such cases, a retrial would be a needless expenditure of public resources and further contribute to the massive problem of delay in our courts.

RULE 104

Subdivision (d) of Rule 104 limits the use that may be made of testimony of an accused given during a preliminary hearing on admissibility to "impeachment of clearly contradictory testimony by him at trial."

This provision appears to be an unwarranted extension of *Simmons* v. *United States*, 390 U.S. 377 (1968) and a narrowing of *Walder* v. *United States*, 347 U.S. 62 (1954). *Simmons* held that the testimony of an accused, establishing ownership of a suitcase, given on a motion to suppress, may not be used to establish guilt in the Government's case in chief; it says nothing about its use to establish guilt by rebuttal testimony after the defendant has put in an inconsistent defense (e.g., to rebut alibi witnesses not including the accused himself). *Walder* held that evidence obtained contrary to the Fourth Amendment may be used to unmask by rebuttal testimony affirmative perjury on collateral issues by an accused who testifies in his own behalf. Following and extending *Walder*, *Harris* v. *New York*, 401 U.S. 222 (1971), held that evidence obtained contrary to the Fifth Amendment may be used to unmask by impeachment on cross-examination perjury by an accused who testifies in his own behalf. Neither *Walder* nor *Harris* limits the use of such evidence to "clearly contradictory" testimony. I would suggest, therefore, that, in the absence of some compelling showing of need, "clearly contradictory" be changed to "inconsistent" and provision be made for the use of the evidence in cross-examination or rebuttal. If the purpose of a criminal trial "is to seek out and determine the truth or falsity of the charges brought against the defendant," *Lopez* v. *United States*, 373 U.S. 427, 440 (1963), the

needless suppression of impeaching or rebuttal testimony ought to be avoided.

RULE 303

Rule 303 deals with the effect of presumptions in criminal cases. As you may be aware, proposed Rule 303 differs in its treatment of presumptions from Section 103(4) of the proposed Federal Criminal Code of the National Commission on Reform of Federal Criminal Laws, the Brown Commission. I would urge on you acceptance of the Brown Commission's draft, with one reservation to preserve current law while Congress is considering the issue.

In my judgment, Section 103(4) is superior to the draft of Rule 303 principally because it requires the court to instruct the jury that the "law regards the facts giving rise to the presumption as strong evidence of the fact presumed." Especially where statutory presumptions are at issue, any other course of action would deprive the jury of the special insight of experience that legally underpins the presumption itself.

For present purposes, however, I would recommend that the alternative formulation of the last clause of subsection (4)(a) be substituted for the black letter text of the Brown Commission's recommendation. See *Final Report of Commission, Comment* p. 159–60. This would be consistent with present law. See *Curley* v. *United States,* 160 F.2d 229 (D.C. Cir.), *cert. denied,* 331 U.S. 837 (1947). Since Congress will face this issue as it processes the recommendations of the Brown Commission, it would be preferable to avoid making a change in present law that might be itself so soon reversed. Every effort should be made to coordinate the consideration of parallel or identical areas of the law by those entrusted with parallel or overlapping responsibilities, and needless confusion by several changes in basic concepts in an already difficult area of the law ought to be avoided if at all practicable.

RULE 403

Rule 403 codifies the familiar principle that evidence, even though relevant, may be excluded if its probative value is substantially outweighed by such dangers as unfair prejudice, confusion of issues, delay, etc. Rule 403 also draws a distinction between those situations thought to require mandatory rather than discretionary exclusion.

In my judgment, this distinction is without foundation either in prior case law or in reason, and I would recommend to you that the Rule be redrafted along the liens of *Model Code of Evidence* § 303, where the discretionary character of the judgment to exclude is made explicit. See generally *McCormick* § 152 pp. 319–21.

I recognize, of course, that a distinction may be validly drawn between general applications of the principle and the situation where delay is the point at issue. My quarrel is not with this distinction, which the Advisory Committee note indicates at p. 31, is at the bottom of the division of Rule 403 into two parts. My difficulty lies with the failure of Subdivision (a) to see the ultimate issue in terms that emphasize the sound discretion of the trial judge and to uphold his ruling on appeal, absent abuse of discretion, in what will always be a balancing situation. I see no reason to purport to draw a hard and fast line that no one will be able to trace in practice. The adoption of the present draft would only provide criminal defendants with another standard ground for appeal and lead to more needless reversals and retrials in criminal cases.

RULE 404

Rule 404 deals with the inadmissibility of evidence of character or a trait of character to show conduct on a particular occasion. Subdivision (a)(2) makes possible, however, the use of evidence of the character of a victim of crime in instances where the accused first puts it in issue.

In my judgment, this exception is not broad enough as it is presently drafted. The cases are not without conflict, but it seems to me altogether reasonable, in at least homicide prosecutions, to permit the Government to rebut evidence of self-defense with proof of the man's character for peace and good order, even though the accused has not put the dead man's character directly in issue. Both *McCormick* § 160 p. 339–40 and 3 *Wigmore* § 63 n. 2 support this view, and I urge your acceptance of it.

Too little is said now in behalf of the victims of crime. When the dead man cannot speak in his own behalf, his good name in the community ought to speak for him, when either his character or his conduct is attacked by the accused.

RULE 410

Rule 410 reflects the familiar principle that pleas of guilty or otherwise, later validly withdrawn, cannot be subsequently used.

Two unwarranted changes, however, were introduced in Rule 410 from the March 1969 draft to the March 1971 version. The March 1969 draft limited the principle of unavailability to proceeding in which the person who made the plea was himself involved. The March 1971 version apparently broadens the Rule by omitting these words of limitation.

When it is not being used against the person who made it, it is difficult for me to perceive what policy is served by an unwillingness to use, for example, a voluntary plea of guilty and its accompanying *McCarthy* (394 U.S. 459 (1969) statements acknowledging guilt merely because the plea was later validly withdrawn. Proposed Rule 804(b)(4), criticized below would make admissible statements against interest under certain conditions. Would Rule 410 so qualify proposed Rule 804(b)(4) that the plea and public confession of A could not be used by B to exculpate himself, where A's plea was validly withdrawn and he died before he could be re-tried?

It makes sense to give meaning to the ability to withdraw a plea by prohibiting its subsequent use in such a fashion that would undermine the withdrawal itself. This is, of course, the thrust of the dictum of the Supreme Court in *Kercheval* v. *United States,* 274 U.S. 220 (1927) (withdrawn plea to be excluded in subsequent trial). But that salutary and necessary policy is distorted by the March 1971 drafts apparent willingness to write a rule that would suppress the truth. I suggest, therefore, the adoption of suitable language that would return the Rule to its original scope.

The March 1971 version would also expand the March 1969 draft by extending the dictum of *Kercheval* on pleas to *McCarthy* statements made by the accused to the court when it takes a plea under Rule 11 Fed. Rules of Cri. Proc. I deprecate the suppression of voluntary statements by courts charged with finding truth, but I recognize the force of the logic that would extend the scope of *Kercheval* to meet the new rituals of plea-taking that require factual inquiries by the court to guarantee the voluntary character of the pleas. Nevertheless, I suggest that a rule of simple exclusion goes too far. As I noted above in connection with Rule 104, there are instances involving impeachment or rebuttal testimony where truth should outweigh the desire to make meaningful the judgment that a plea ought to be able to be withdrawn effectively. Consequently, I suggest that suitable language be added to the Rule itself or that the commentary at least reflects that the scope of the exclusion is not without limitation.

RULE 502

Rule 502 creates a Federal privilege to refuse to disclose and to prevent the disclosure of reports required by Federal or State law to be filed by persons, associations or corporations, where such is provided in the Federal or State statute requiring the report to be filed.

I am somewhat troubled by the apparent scope of this new privilege. It apparently has no counterpart in the Model Code of Evidence. The cases cited in the Advisory Committee's Note, moreover, are not particularly enlightening. To uphold values found in the privilege against self-incrimination, it may be necessary to accord protection against disclosure of information required to be filed by an individual, but why extend the privilege to an association or a corporation? Neither comes with the protection of the privilege against self-incrimination. *Wilson* v. *United States,* 221 U.S. 361 (1911) (corporations); *United States* v. *White,* 322 U.S. 694 (1944) (unions). Where Federal law is at issue, Rule 501, of course, controls. Information privileged by Federal statute ought to be accorded appropriate status under the rules. But why should the rules incorporate wholesale State law? If the litigation were between private parties or civil in character, I might readily agree that due deference to policies grounded in Federalism ought to control. See *Wright, Federal Courts* § 93 p. 415. But the administration of Federal criminal justice has never been thought to be generally subject to State privileges. See *Funk* v. *United States,* 290 U.S. 371 (1933); *Wolfle* v. *United States,* 291 U.S. 7 (1934); *Rule 26 Fed. Rules of Crim. Proc.* Why should a required reports exception be carved out of this salutary general principle? I am not willing to suggest that in particular instances the courts ought not recognize such a privilege, but this should take place on a case by case basis; I would be reluctant to support a wholesale adoption of State law in this area without knowing quite what it was that was being adopted. *McCormick* § 149 pp. 311–12, for example, suggests that "in legislative halls when bills requiring such reports are proposed, the need for encouraging frank and full reports looms large to the proponents, but the judges and lawyers who would urge the need for truth in litigation are not alerted to oppose the privilege. The need might not be all that it appears to be. Consequently. I suggest that Rule 502 be deleted; it seems, in short, to hold out promise of more unforeseen difficulty than needed benefit.

Finally, in reference to the wording of the last sentence of Rule 502, I call your attention to the comparable and preferable language of 18 U.S.C. § 6002: "for perjury, giving a false statement, or otherwise failing to comply" with the statute.

RULE 504

Rule 504 adopts, subject to certain exceptions, in general Federal jurisprudence, not a doctor-patient, but a psychotherapist-patient privilege.

I am troubled by the omission in the Rules of any recognition of the general doctor-patient privilege. Although I recognize that the weight of scholarly opinion argues against its adoption, its support in the community is attested to by its inclusion in the *Model Code of Evidence* §§ 220–23 over the objections of the Reporter and Chief Consultant and its acceptance in a majority of states.

Nevertheless, because of my general opposition to any rule of evidence that suppresses the truth, I am willing, at least at this juncture, to see the rule written in its present draft form. It ought to be pointed out, however, that the shift in language from the March 1969 draft to the March 1971 version redefining "psychotherapist" from a doctor "who devotes a substantial portion of his time" to one "who devotes all *or a part of his time*" to psychotherapy virtually undermines your professed policy of not writing a general privilege. All doctors face and must treat in some fashion those whose illnesses are more psychosomatic than organic. If you are going to adopt the rule that you argue

for, I would suggest, therefore, that you return to the language of the March 1969 draft.

RULE 505

Rule 505 recognizes in Federal criminal jurisprudence a limited privilege of a person to prevent his spouse from testifying against him.

Several aspects of this rule trouble me. The failure to write a rule protecting confidential communications seems a sharp break with tradition, but if a broad enough privilege against testimony is written, the same ground will be covered, at least in criminal cases, and the failure may not be crucial. But I am concerned that neither the text of the Rule nor the Advisory Committee Note offers any definition of "spouse." Compare *Model Code of Evidence* § 214(a). The matter could be handled either on the face of the Rule or in the comment, but it ought to be made unequivocal that the Rule is inapplicable where the marriage is a sham, *Lutwak* v. *United States*, 344 U.S. 604 (1953) or is at an end, through divorce or separation. See, e.g., *Barsky* v. *United States*, 339 F. 2d 980 (9th Cir. 1964).

If the rationale of the rule is the desire to achieve "the prevention of marital dissension and the repugnancy of requiring a person to condemn or be condemned by his spouse," Advisory Committee Note at p. 56, I find it strange, moreover, that Subdivision (c)(2) excludes events occurring prior to the marriage. Would not such testimony equally promote dissension and give rise to repugnancy? I would suggest, therefore, that this limitation be omitted to maintain consistency with your professed policy.

At the same time, I suggest that the testifying spouse be made the holder of the privilege. I recognize that *Hawkins* v. *United States*, 358 U.S. 74 (1958) may be cited for the contrary position, but if the rationale is the prevention of dissension, the goal is already beyond attainment where the spouse is willing to cooperate. To shut the mouth of a spouse willing to testify on the motion of the other is not to prevent or to heal a marriage break-up—that has already occurred—but to suppress the truth with no countervailing social gain. See *McCormick* § 66 p. 145. I note, too, that this is already the position that has been adopted by the Congress for the District of Columbia in 14 D.C. Code 306(a)(1964).

Finally, I would suggest a return to the original language of Subdivision (a) of the March 1969 draft, which writes the privilege in terms of "testifying against". No issue is presented of marital dissension or repugnancy where the spouse as such does not testify. The use of testimony taken from another proceeding, where the privilege did not obtain, ought to be permitted. In theory or practice, it differs little from well recognized exceptions to the doctrine of privileged communications, where the privilege is not to suppress the truth of a communication, but merely to prevent the testimony of the spouse from being compelled. See, e.g., *Dickerson* v. *United States*, 65 F.2d 824 (1st Cir. 1933) (trial of husband for murder of wife; letter of wife found by third person among her effects held admissible). Problems may be presented by testimony in grand juries, but there is an ample number of precedents in related areas to make practical the drawing of the necessary distinctions to protect a person from having to testify there against his spouse. See, e.g., *People* v. *Tomasello*, 21 N.Y. 2d 143, 234 N.E. 2d 190 (1967) (prospective defendant called before grand jury); see generally Birzon and Gerard, "The Prospective Defendant Rule and the Privilege against Self-Incrimination in New York," 15 *Buff. L. Rev.* 595 (1966).

Finally, I suggest that "or other similar statute" be added to Subdivision (c)(3). There are a number of statutes comparable to either 8 U.S.C. § 1328 and 18 U.S.C. §§ 242–24 in that they deal with prostitution or vice that might be logically added. See e.g., 18 U.S.C. § 1952. Coverage can be obtained over them by general language without fear that another one is overlooked by inadvertance.

RULE 506

Rule 506 recognizes a privilege for confidential communications made to a clergyman.

Few can quarrel with the motivation that leads to the adoption in Federal law of this privilege. Indeed, it may be a necessary implication of the First Amendment itself. Compare *United States* v. *Caldwell*, 8 Crim. L. Reptr. 2124 (9th Cir. 1970), *cert. granted*, 9 Crim. L. Reptr. 4028 (5–5–71). Nevertheless, I am troubled by the possible implications of extending it beyond its roots in the discipline or accustomed practice of a religious community. Compare the formulation of the privilege found in *Model Code of Evidence* § 219. I recognize, of course, that the role of a clergyman extends beyond the custom of confession. As the Advisory Committee Note indicates at p. 58, many "clergymen now receive training in marriage counseling and the handling of personality problems." But so do marriage counselors and social workers. If we are protecting confidential communications in these areas, why should the rule be limited to spiritual advisors? I am not willing at the present time to write a rule quite so broad. No defensible rationale for distinguishing between those who wear the cloth and those who do not in these sensitive areas suggests itself to me. Consequently, I would suggest that Rule 506 be given a much more narrow and defensible scope, along the lines of the *Model Code of Evidence* § 219.

On the other hand, should you go forward with the text of the present rule, I would seriously urge on you the need to recognize, at least in those areas beyond "penitential communications," see *Model Code of Evidence* § 219(1)(c), some sort of countervailing weight. As Rule 506 is now drafted, it is an absolute. Yet exceptions are recognized in Rule 504 to the psychotherapist-patient privilege and in Rule 503 to the lawyer-client privilege. At least where communications, not penitential in character, concern a mental illness and there is a need for hospitalization, see Rule 504(d)(1), or are in furtherance of crime or fraud, see Rule 503(d)(1), I can see no justification for writing the Rule in its present unlimited form.

It is fashionable in some quarters today, for example, for clergymen to protest real and imagined defects in our society, not through constitutionally protected speech or assembly, but through criminal conduct, sometimes dangerous not only to property but also to life and limb. I see no reason why the law should offer them a shield behind which they can seek to overturn unlawfully our traditional institutions free of legal responsibility. I urge on you, therefore, the need to reconsider the unwarranted scope of the present draft.

RULE 509

Rule 509 recognizes a Governmental privilege in military and state secrets.

As presently drafted, this Rule raises a number of serious issues in my mind, although I am not prepared, at this juncture, to venture an opinion on how I would approach these matters should they come before the Congress. As you may be aware, these issues are now the subject of extensive hearings before the Subcommittee on Separation of Powers in the Senate. Nevertheless, I should like to share with you some of my deep concerns.

As originally proposed in March 1969, the rule closely followed *United States* v. *Reynolds*, 345 U.S. 1 (1953), where the Government's right to withhold military information in a tort suit against it was upheld. The test under the March 1969 Rule was a "showing of substantial danger that the evidence will disclose a secret of state." "Secret of state" was defined in terms paralleling the *Model Code of Evidence* § 227(1). The March 1971 version, however, omitted this definition and subtly shifted the test; it would now require a showing of reasonable likelihood of danger that disclosure of the evidence would be detrimental or injurious of the national defense or international relations of the United States." The showing may be heard in chambers, but "all counsel are entitled to inspect the claim and showing and to be heard thereon."

I am concerned that you have withheld what you purported to recognize by setting up an unrealistic procedure for testing the claim. The Supreme Court itself in the *Reynolds* case reasoned that the procedure adopted to determine the validity of a claim must not "force the disclosure of the very thing that privilege was designed to protect." 345 U.S. at 8. I strongly urge you to return to the approach of the March 1969 draft and provide for an *in camera* procedure for testing the claim.

The Subcommittee on Criminal Laws and Procedures held extensive hearings and made an exhaustive study of the unhappy experience of the litigation surrounding the disclosure rule announced by the Supreme Court in *Alderman* v. *United States*, 394 U.S. 165 (1969) in the area of electronic surveillance. See generally my discussion in "Organized Crime Control Act (S. 30) or Its Critics: Which Threatens Civil Liberties," 46 *Notre Dame Lawyer* 57, 108–33 (1970). Our hearings and studies showed that "protective measures" are an illusion, and disclosure to counsel too often means disclosure to accused and the newspapers. It would be most unwise to go down that road again.

It is appropriate at this point to raise a related problem. The proposed rules do not contain an explicit rule parallel to *Model Code of Evidence* §228, which deals with official information not open to public disclosure. The Advisory Committee Note to Rule 509 at pp. 63–64 indicates that this omission was intentional. It may well be, however, that Rule 501, in fact, covers this situation, when it states except as "provided by Act of Congress" before it specifies that only those privileges set out in the Rules are recognized. As the Advisory Committee Note indicates, Congress has authorized heads of executive departments to control the information that they possess, and the courts have consistently upheld the validity of regulations dealing with disclosure against challenge in the context of the issuance of judicial subpoenae, see, e.g., *United States* v. *Ragen*, 340 U.S. 462 (1951), although the right to control that information is, of course, now limited under the Freedom of Information Act, 5 U.S.C. § 552.

I cannot say that I am enamored of an "official information" privilege in all its possible ramifications and in light of its many abuses, but it is too deeply imbedded in our history to dismiss it as merely a problem in relevancy, as the Advisory Committee Note does at p. 64. It deserves a more discriminating treatment.

On the other hand, I see no reason to accord "official information" a status equal to that of "state secrets." If an official information privilege is to be recognized—and I think that it should receive a more detailed treatment than the present Rule accords it—the Rules should meet the issue head-on and provide suitable definitions and procedures for its claim and determination. See *McCormick* §§ 145–47. Consequently, I urge on you the careful reconsideration of Rule 501 and its parallel problems.

RULE 510

Rule 510 recognizes the traditional informant's privilege.

The present version of Rule 510, however, raises a number of troublesome questions. Would "law enforcement" officer include a member of a legislative committee or its staff investigating conduct that may constitute a violation of Federal or State law for the purpose of developing legislation? My experience with the Permanent Subcommittee on Investigations leads me to suggest that any lack of clarity here ought to be resolved in favor of recognizing this dimension of the privilege.

Similarly, how narrowly would "information purporting to reveal a violation of law" be read? Many times informants provide information of a general intelligence character that cannot immediately be tied into a violation of a specific law. This is particularly true in subversive and organized crime investigations. Information also often leads not to a violation of law, but to the location of a fugitive. I trust that these situations would be protected by the privilege.

I recognize, of course, if the Government calls the informant, the accused ought to be able to elicit from him on cross-examination testimony as to his identity and background. See, e.g., *Alford* v. *United States*, 282 U.S. 687 (1931). On the other hand, when the accused calls a person as his witness, inquiry into such matters should be more restricted. See, e.g., *Beasley* v. *United States*, 218 F. 2d 366, 368 (D.C. Cir. 195 4), *cert. denied*, 349 U.S. 907 (1955). This distinction, in my judgment, is not given sufficient recognition in the language of Subdivision (c)(1). I suggest, therefore, the addition of an appropriate qualifying phrase.

As proposed in the March 1969 draft, Rule 510 basically codified the law as announced in *Roviaro* v. *United States*, 353 U.S. 53, 59 (1957). To obtain the informant's identity, the Rule provided that it was necessary to show that his identity was necessary "to a fair determination of guilt or innocence." The March 1971 version, however, introduced a subtle difference. Now the test is to be a "fair determination of a material issue." This is explained in the Advisory Committee Note at 66 as a change made necessary to adopt the rule to civil proceedings. Nevertheless, as so stated, despite the language to the contrary in the Advisory Committee Note at p. 66, it might well be read to set aside the Supreme Court's decision in *McCray* v. *Illinois*, 386 U.S. 300 (1967), where the Court upheld a refusal to disclose an informant's identity, where his testimony bore not on guilt or innocence, but on the propriety of an arrest without a warrant. I suggest, therefore, a return to the original language of the 1969 draft, duly qualified to apply to criminal proceedings, along with the addition of the new language, duly qualified as applicable only to civil proceedings.

It seems to me to be advisable, moreover, to adapt the *in camera* procedure of Subdivision (3) to the issues posed by Subdivision (2). The court ought to have available to it some mechanism whereby it can determine of what value the informant's testimony or identity would be on the issue of "guilt or innocence" or to a "fair determination of a material" issue. In addition, I wonder if dismissal should be the automatic remedy. Might it not be just as proper to strike one or more counts or to sever one or more defendants? The remedy you propose seems to me to be altogether too inflexible in the criminal context.

Finally, I am not sure that I understand the provision of Subdivision (3) that permits *all* counsel to be present at every stage that *any* counsel is permitted. I can envision situations where in the process of an *in camera* showing it would be necessary to have counsel for the Government present, but the procedure would be self-defeating if counsel for the accused was present. My remarks above in reference to Rule 509 need not be repeated fully here. My point is simply that too often today so-called "movement" lawyers draw no distinction between themselves and those they represent, and in organized crime prosecutions, even though a prominent lawyer will be retained, the ubiquitous "house counsel" will be present to handle special chores. The failure to recognize these realities of trial practice is most unwise.

At the same time, I see no reason to require all defense counsel to be present in all situations. Where the issue concerns only one of several defendants, why should it be necessary to run unnecessary risks by having all counsel present? In short, I would hope that on further reflection you could be lead to modify and to clarify these provisions, so that the procedure you adopt does not undermine the privilege you recognize.

RULE 606

Rule 606 deals with the competency of jurors as witnesses, either in the trial itself or to inquire into the validity of an indictment or verdict.

I have no objection to permitting jurors to testify that improper information came to their attention. This may be necessary to protect verdicts from improper influence, especially by the news media. This rule has deep roots in Federal practice. *Mattox* v. *United States*, 146 U.S. 140 (1892). But as I read the present draft of Rule 606, it would go further and permit the impeachment of verdicts by inquiry into, not the mental processes themselves, but what happened in terms of conduct in the jury room.

The mischief in this Rule ought to be plain for all to see. Judges need not explain their verdicts beyond the judgment and the opinion. Were it possible to overturn a decision because, in fact, it was not based on precedent, but bias, and this was an issue that could be litigated, it would indeed be brought before the courts. Present law, as I read it, wisely prohibits this sort of inquiry before it starts with jurors as it is unthinkable with judges. *Hyde* v. *United States*, 225 U.S. 347 (1912) (compromise verdict). *McDonald* v. *Pless*, 238 U.S. 264 (1915) (affidavit as to quotient verdict excluded). I do not believe it would be possible to conduct trials, particularly criminal prosecutions, as we know them today, if every verdict were followed by a post-trial hearing into the conduct of the juror's deliberations.

Should my views on this question not obtain, I would at least urge, for the sake of finality, that consideration be given to permitting testimony to support a verdict, when inquiry is made into conduct within the jury room. See *McCormick* § 68 n. 16 p. 149. Better no testimony at all, but if testimony is to come in, a principle of harmless error in fact ought to be recognized. I urge that you recognize that trials are human processes and that perfect trials, using lay jurors as the Sixth Amendment rightly commands, are an illusionary goal.

RULE 608

Rule 608 deals with the admissibility of evidence of character and the use of specific instances of conduct to attack the credibility of a witness, including the accused.

I question the departure from the traditional practice of not permitting an accused to buttress his character for veracity before it is attacked by the prosecution. See *McCormick* § 158 p. 334 n. 7. The question, however, is not of large moment. Of more concern to me is the apparent shift away from the sort of full and effective cross-examination envisioned by the Supreme Court in *Michaelson* v. *United States*, 335 U.S. 469 (1949) by the substitution of the phrase "clearly probative . . . and not remote in time" in Subdivision (b), in the March 1971 version for the term "relevant" in the March 1969 draft. Granted that abuse is possible, I would trust to the common sense, fairness and discretion of the trial judge under a general concept of "relevancy" before introducing unnecessary second guessing on an appeal on issues such as "clearness" and "remoteness." I urge, therefore, a return to the original language of the March 1969 draft; the present draft bespeaks too much of a lack of trust in trial judges.

RULE 609

Rule 609 deals with impeachment by evidence of conviction of crime.

I note that the March 1971 version rejects the position of the March 1969 draft and adopts the rule of *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F. 2d 763 (1965).

I find it somewhat difficult to understand that less than eight months after the Congress, after full hearings and debate, specifically rejected *Luck* in the District of Columbia Court Reform and Criminal Procedure Act of 1970, P.L. 91–351 § 133 that it would now be suggested that it ought to be adopted for the entire Federal system.

Putting aside for a moment the intrinsic merits of the issue, I would suggest that this Rule be rewritten in terms of the March 1969 draft. If the 1970 Crime Act is to be overturned, I suggest that this is a question for the Congress to decide.

RULE 611

Rule 611 deals with the mode and order of the presentation of evidence, including the scope of cross-examination and the use of leading questions.

It may be debated that the shift from the traditional rule in Federal courts limiting the scope of cross-examination embodied in the March 1969 draft to the wide-open rule of the March 1971 version is a wise choice. But when it is coupled with the striking of "shall" in Subdivision (a) and the insertion of the weaker "may" in Subdivision (a)'s directive to the trial judge to control his own court room, I am convinced that it is unwise. At the very least, I would suggest that the Rule, not only give recognition to power of the judge to order the presentation of evidence, but also place upon him the unequivocal duty to see that it is done to avoid confusion and bring out the truth. Once again I am constrained to comment that your draft bespeaks of a lack of trust in trial judges.

RULE 612

Rule 612 deals with the production of writing used to refresh a witness' memory.

In the main, the rule is unobjectionable. I am troubled, however, about one of its features—that relating to documents examined *before*, rather than *at* trial—and its relation to the scope of cross-examination proposed in Rule 611, noted above.

As I understand it today, the controlling teaching in Federal courts is that of *Goldman* v. *United States*, 316 U.S. 129, 132 (1942), which does not permit the production of documents not used *during* the trial. The language of Rule 612, obviously, would set aside this practice. Coupled with the wide-open cross-examination of Rule 611, I do not see any meaningful limitation of the extent to which documents might be produced, or at least enterprising defense counsel might not call for. (The right to call for documents is not limited to the scope of the direct examination, but is phrased in terms of the "testimony of the witness.") Particularly in those cases touching national security information, where the witness may have refreshed his recollection so that his testimony in the trial would not reveal information that is classified and unrelated to the trial, I can foresee that this rule would introduce far too many tangential issues and raise endless matters for endless appeals and retrials; it would contribute so little to fair and effective cross-examination that I must question its wisdom.

All of this may be pointed out without noting that the Rule, as now written, flies directly against the policy of 18 U.S.C. § 3500,

which sharply restricts not only pre-trial discovery, but also sharply limits the production of documents at trial. In this connection, I note that the Congress has most recently reaffirmed the policy of restricted discovery of Government documents and extended the scope of 18 U.S.C. § 3500 to cover grand jury testimony. P.L. 91–452 § 102.

I strongly urge, therefore, that the Rule be redrafted in line with both the teaching of *Goldman* and the policy of 18 U.S.C. § 3500.

Article VII: Opinion rules

Article VII of the Rules deals with opinion testimony, either by laymen or by experts.

In the main, it promises to increase the knowledge that will be available to the triers of fact. Consequently, it may be expected to enhance the system of justice.

In my judgment, however, it would also be helpful if the Rules contained provisions like those found in *Model Code of Evidence* §§ 404–08, dealing with notice and examination of expert testimony before it is given. In civil proceedings, there is, of course, now ample means for obtaining pre-trial discovery either for the Government or the accused. Given the special considerations there applicable, this may well serve the course of justice. However that may be, I see little justification for fear of the consequences of pre-trial notice and discovery by either side where the testimony is expert in charter, and no valid objection under the Fifth Amendment on the part of the accused. See *Jones* v. *Superior Court*, 58 Cal. 2d 56, 22 Cal. Rptr. 879, 372 P.2d 919 (1962) (medical testimony of accused in rape prosecution purporting to show impotency held discoverable). Given the increased latitude accorded expert testimony under the proposed Rules, there is all the more reason to guarantee that such testimony will be subject to the most searching cross-examination. The cause of truth will not be served if the result of the Rules is simply to turn over to the experts the trial of various issues. I urge you, therefore, to give careful consideration to these provisions of the Model Code.

Hearsay: Article VIII

Rule 801 contains definitions applicable in Article VIII, which deals with the hearsay rule and its various exceptions.

I am not sure of the significance of the omission from the March 1971 version of Subdivision 801(c)(2)(iv), dealing with transcripts of testimony, which was contained in the March 1969 draft. I assume that its coverage was duplicative of Subdivisions 801(c)(i) (inconsistent statements) and (ii) (consistent statement offered for rebuttal). To that degree, it was, of course, surplusage. The only area not covered by (i) and (ii) would be consistent statements not offered for rebuttal purposes. Consequently, the effect of (iv)'s omission was to place back within the definition of hearsay such statements.

This seems to be a reasonable modification of the March 1969 draft, which was perhaps too expansive in this regard. However, if the significance of the omission was to disapprove of the reasoning or result of *United States* v. *DeSisto*, 329 F.2d 929 (2nd Cir. 1964), *cert. denied*, 377 U.S. 979 (1965), cited in the Advisory Committee Note at p. 167, I would strongly urge that the language of the original text be restored. *DeSisto* contains, in my judgment, a highly persuasive analysis of the hearsay rule and should be followed in your efforts to make sense out of the law in this area.

Co-Conspirator Declaration Rule

I regret that you did not take the opportunity of the formulation of comprehensive rules of evidence to re-examine the present law dealing with the admission of the declaration of co-conspirators. Subdivision 801(d)(v), as the Advisory Committee Note indicates at p. 104, follows uncritically the "accepted pattern." Here I would urge on you a re-examination of the law in this area. Consequently, I take the liberty of commenting more expansively on my understanding on the development of the hearsay rule and its various exceptions. What I suggest, however, is that the present requirement of "furtherance" be omitted and that two new ones be added: (1) a requirement of the presence of an independent circumstantial guarantee of trustworthiness, and (2) a requirement of relevancy to the character or the execution of the conspiracy itself.

My suggestion must first be placed in historical context. With the development of the witnesses in the common law trial of the 1600's, there developed a series of rules, as I am sure you are aware, each seeking to establish the truth of testimony. The witness must, as Chief Justice Vaughn put it in *Bushel's Trial* (1670) 6 How. St. Tr. 999, 1003, speak to "what hath fallen under his senses." The law then rightly wanted no part of second-hand information. Closely allied to this principle was the rule that demanded confrontation-cross-examination. Too many knew of the injustice done in *Raleigh's Trial* (1603), 2 How. St. Tr. 16, when Chief Justice Popham refused to produce Lord Cobham, the accuser. No precise date or ruling stands out as decisive, but the rule seems to have become fixed between 1675 and 1690.

This rule against hearsay, however, was not without exceptions. Sworn depositions could be used, as Raleigh himself conceded, "where the accuser is not to be had conveniently" (1603) 2 Hos. St. Tr. 16, 18. Nevertheless, with firm establishment of the exclusion of extrajudicial unsworn statements, the anomaly of the sworn statement stood out, and in *Fenwick's Trial* (1696), 13 How. St. Tr. 537, 618, the principle if not the rule carried the day, for it soon became "a fundamental rule (of) law that no evidence shall be given against a man, but in the presence of the prisoner, because he may cross-examine him who gives such evidence."

Today, of course, this common law rule is reflected in our Sixth Amendment, which guarantees "the accused the right to be confronted with the witness against him." Nevertheless, as 5 *Wigmore* § 1397 p. 130–31 put it:

> . . . this right of cross-examination thus secured was *not a right devoid of exceptions*. The right to subject opposing testimony to cross-examination is the right to have the hearsay rule enforced; for the hearsay rule is the rule requiring cross-examination. . . . Now the hearsay rule is not a rule without exceptions; there never was a time when it was without exceptions. There were a number of well-established ones at the time of the earliest constitutions, and *others might be expected to be developed in the future*. The rule had always involved the idea of exceptions, and the constitution makers indorsed the general principle merely as such. They did not attempt to enumerate exceptions; they merely named and described the principle sufficiently to indicate what was intended. . . . The rule sanctioned by the Constitution is the hearsay rule as to cross-examination, with all the exceptions that may legitimately be found, *developed, or created therein*. (Emphasis added)

He continued:

> The revision and extension of those exceptions is gradually progressing, and it is well to appreciate fully that there is in progress nothing inconsistent with constitutional sanctions. So bold are nowadays the attempts to wrest the Constitution in aid of crime, and so complaisant some courts in listening to fantastic and unfounded objections to evidence, that the permissibility of such changes should not be left in the slightest doubt. *Id.* at 135.

A large number of "exceptions" to the hearsay rule have thus evolved, permitting the admission of many extrajudicial declarations despite their inclusion within the term "hearsay." The number may be put at "ten to twenty," depending on the system of "classification." *McCormick* § 300 p. 626. Two examples are declarations against interest, see, e.g., *People* v. *Spriggs*, 60 Cal. 2d 868, 36 Cal. Rptr. 841, 389 P. 2d 377 (1964), and dying declarations, see e.g., *Mattox* v. *United States*, 156 U.S. 237 243 (1895) (dictum). Thus, for as long as there has been a hearsay rule, the boundaries of the "hearsay" definition and its "exceptions" have resulted in the admissibility of extrajudicial declarations in many situations where an oath, the presence of the trier of fact, or an opportunity to cross-examine was absent—and in some situations, such as dying declarations and declarations against interest, where *all three* factors were absent. Further, these rules have been held not to infringe the constitutional right of confrontation, on the ground that it embraces limitations and exceptions just as does the hearsay rule itself. See, e.g., *Douglas* v. *Alabama*, 380 U.S. 415, 418 (1965) (dictum); *Pointer* v. *Texas*, 380 U.S. 400, 407 (1965); *Kirby* v. *United States*, 174 U.S. 47, 61 (1899); *Mattox* v. *United States*, 156 U.S. 237 (1895).

Still more important is the fluidity of the hearsay and confrontation rules' contours and exceptions. Created by the courts through the process of common law adjudication, they have remained subject to judicial expansion, contraction, and restatement as learning and experience have advanced. Congress itself has amended the hearsay rule and exceptions, see, e.g., 28 U.S.C. §1733 (government records), and the rule-making process, too, has been involved. See, e.g., Fed. R. Crim. P. 27 (government records). Such expansion of admissibility is, in short, not inconsistent with the limitations of the Constitution. As Mr. Justice Cardozo wrote for the Supreme Court in *Snyder* v. *Massachusetts*, 291 U.S. 97, 107 (1934), "the exceptions [to the right of confrontation] are not even static, but may be enlarged from time to time if there is no material departure from the reason of the general rule." I propose one such expansion.

In the area of organized crime, the existence of a conspiratorial relationship is usually shown either by circumstantial evidence, by the testimony of a co-conspirator who has turned state's evidence, or by evidence of the out-of-court declarations or acts of a co-conspirator and of the accused himself.

Today, the co-conspirator declaration rule is unually framed in these terms: Any declaration by one co-conspirator, voiced in furtherance of the conspiracy and during its pendency, is admissible against each co-conspirator, subject to the laying of an independent foundation of the existence of the conspiracy and the accused's participation in it. "Development in the Law—Conspiracy," 72 *Harv. L. Rev.* 920, 983–84 (1959).

It is my suggestion that this existing hearsay exception be enlarged by substituting for the present requirement that the declaration be in "furtherance" of the conspiracy requirements that there be facts or circumstances from which the "trustworthiness" of the declaration may be inferred and that the declaration relate to the character or the execution of the conspiracy.

The Subcommittee on Criminal Laws and Procedures had such a proposal under consideration as part of S. 30, the "Organized Crime Control Act of 1970," now P.L. 91–452. Hearings were held on the proposal, and it received the endorsement of a number of witnesses. See generally *Measures Relating to Organized Crime*, Hearings before the Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, United States Senate, 91st Cong. 1st Sess. (1969). It was not processed by the Subcommittee as part of the final bill largely out of a feeling that piece-meal reform was unwise and that this and related endeavours might well await your work.

In support of the suggestion, I should like

to draw your attention to the testimony in the hearings on the proposal of the Department of Justice and Professor Henry Ruth, then with the University of Pennsylvania Law School, now head of the Criminal Justice Coordinating Council in New York City. The Department fully supported the change and stated the need and justification for it in these terms:

The "co-conspirator's hearsay exception" is a firmly established exception to the general rule against the use of hearsay to establish criminal liability. *Krulewitch* v. *United States*, 336 U.S. 440, 443 (1949). The exception has come to rest in American jurisprudence on agency principles as articulated by Mr. Justice Story in *United States* v. *Gooding*, 25 U.S. (12 Wheat.) 460, 469 (1827), and the exception remains as yet unquestioned by the Supreme Court. See *Bruton* v. *United States*, 391 U.S. 123, 128 n. 3 (1968).

The rationale behind this proposed change apparently is that the "furtherance" requirement of this exception is of somewhat ill-defined meaning, but apparently an outgrowth of the agency rationale which is sometimes stated in terms of *res gestae* language, but which many other courts interpret so broadly as to apply to anything that relates to the conspiracy. Since this reduces the requirement to relevancy, and since all evidence must be relevant, it is reasoned that the "furtherance" requirement is thus eliminated in substance if not in form. This being so, it is felt that something more, namely, the element of trustworthiness should be required.

The logic of this argument is quite compelling, and the substitution of the element of trustworthiness of relevant evidence for the furtherance requirement would appear to be not only more realistic in terms of current judicial interpretation but also more consistent with the policy behind this exception to the general rule of exclusion of hearsay evidence.

Criminal law conspiracy principles have been most effective in organized crime prosecutions, and there can be no doubt that the "co-conspirator's hearsay exception" has been a vital factor in their success. The continued vitality of this co-conspirator rule is absolutely essential in conspiracy prosecutions of all types. Since the agency rationale which currently supports this exception is subject to increasing criticism by the courts and by the authorities in the field, it would seem only prudent to move away from this rationale toward a more realistic basis for the exception, that is from agency to trustworthiness.

The movement to eliminate the furtherance requirement began with Professor Morgan's examination of the soundness of the vicarious liability rationale in an article in 42 Harvard Law 461 (1929). As a result of Professor Morgan's article the furtherance requirement was eliminated both in the *Uniform Rules of Evidence*, 63(9), and in the *Model Code of Evidence*, Rule 508(b). It has also been approved by Professor McCormick, *Evidence*, Section 244 (1964).

The ambiguity of the furtherance requirement has caused considerable difficulty in the admission of testimony in conspiracy prosecutions, and more often than not a narrow construction of the term results in the exclusion of the Government's evidence. Few opportunities for appellate review of the principle have been occasioned since the Government has no right of appeal.

On the other hand, a conflict among the Circuit Courts exists in the cases of *United States* v. *Birnbaum*, 337 F.2d 490 (C.A. 2, 1964), where Judge Lumbard applies a strict agency construction to the furtherance requirement, and in *International Indemnity Company* v. *Lehman*, 28 F.2d 1 (C.A. 7, 1928), *cert. denied*, 278 U.S. 648, which is classically cited for the virtual abandonment of the furtherance requirement in favor of the test of relevancy.

In view of these authorities, then, and in view of the apparent reality that many courts have discarded the furtherance requirement in favor of relevancy, it would seem that this is an appropriate time to codify this principle. Perhaps an even more cogent reason for discarding the furtherance requirement which is based on agency and shifting the basis of the exception to trustworthiness, however, is the portent in several recent Supreme Court decisions, *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Douglas* v. *Alabama*, 380 U.S. (415 (1965); *Barber* v. *Page*, 390 U.S. 719 (1968); and *Bruton* v. *United States*, 391 U.S. 123 (1968), that the Supreme Court may be moving towards re-examination of the present theory sustaining the admissibility of co-conspirator's statements based on agency principles. These cases, while dealing with co-conspirator's statements sought to be admitted after the termination of the conspiracy, indicate that the right to confrontation under the Sixth Amendment still permits some traditional hearsay exceptions, based upon necessity and trustworthiness. In view of these decisions, therefore, it would seem that this would be a prudent time to enact this provision. Hearings at 374–75)

Professor Ruth stated:

Existing law as to co-conspirator statements is founded upon the common law and in effect is a substantive extension of the agency doctrine that each conspirator is responsible for the acts of other conspirators in furtherance of the conspiracy. The theory rests upon a vicarious admission philosophy that each conspirator is an agent for the others and those others thereby adopt whatever each conspirator does and says in furtherance of one plan. Wigmore supports this theory against strong opposition from Morgan. See Wigmore, secs. 1079–1080a (3d ed. 1940). The furtherance principle was also retained in the California and New Jersey evidence codes adopted in 1965 and 1967 respectively.

On the other hand, the Model Code of Evidence and the Uniform Rules of Evidence omit the furtherance requirement in their practically identical Rules 508(b) and 63(9)(b) respectively. The Model Code provides:

"* * *

"(b) the party and the declarant were participants in a plan to commit a crime or civil wrong and the hearsay declaration was relevant to the plan or its subject matter and was made while the plan was in existence and before its execution was complete. * * *"

Four recent United States Supreme Court cases have re-examined hearsay exceptions insofar as admissibility at trial may conflict with the Sixth Amendment right to confrontation of witnesses at trial, a provision now applicable to the states. See *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Douglas* v. *Alabama*, 380 U.S. 415 (1965); *Barber* v. *Page*, 390 U.S. 719 (1968); and *Bruton* v. *United States*, 391 U.S. 123 (1968). In addition, the Court has just granted certiorari in *Evans* v. *Dutton*, 400 F. 2d 826 (5th Cir. 1968). Each of the cases involve co-conspirator statements, but in each the statement sought to be admitted was made following the termination of the conspiracy. Thus, there is only a portent that the Supreme Court may be moving towards re-examination of admissibility of co-conspirator statements as vicarious admissions. The above cases do reveal applicable principles: (1) the confrontation doctrine is at the heart of a fair trial; (2) confrontation does not mean merely the right to cross-examine at some point of time; it includes a right of confrontation at trial where the jury can see the witness' demeanor; (3) the Sixth Amendment still permits some traditional hearsay exceptions, based upon necessity and trustworthiness; but a witness' unavailability at trial must be based upon cogent reasons and other indicia of strong reliability must be present.

Rejection of the furtherance requirement makes much sense to me. That requirement is necessary if one retains the vicarious admission theory. But that theory is quite strained in that authority to act for another does not necessarily imply authority to speak for another in those circumstances where such speaking is not in effect conduct in furtherance of the conspiracy. Reliability of the declarant seems really to be based upon a finding that a conspirator's statement is against his interest, whether that interest be penal, social or economic. And Title VII, in requiring the declaration to relate to the existence or execution of the conspiracy during the declarant's participation in it, moves towards this reliability. The further requirement of facts and circumstances implying trustworthiness builds upon the need for reliability. (Hearings pp. 337–38)

In addition, I note that the American Bar Association approved the elimination of the furtherance requirement when it approved the Uniform Rules of Evidence in 1953. See 30 *A.B.A.J.* 1029 (1953). Finally, the statutes of four states codify the rule omitting this requirement. See *Ga. Code Ann.* § 38–306; *Kan. Stat. Ann.* § 60–460(1); *Mont. Rev. Code Ann.* § 93–401–27(6); *Ore. Rev. Stat.* § 41, 910(6).

My suggestion could be implemented by substituting the following language for Rule 801(d)(2)(v):

"A statement by a co-conspirator of a party during the course of the conspiracy, relating to the character or the execution of the conspiracy, and there were facts and circumstances from which its trusthworthiness may be inferred."

The requirement of "relating," of course, speaks pretty much for itself. What I envision for the element of "trustworthiness" is not terribly different from the criterion now generally applicable in other hearsay exceptions. Corroboration by independent evidence would make it trustworthy. See e.g., *Smith* v. *United States*, 348 U.S. 147, 155 n. 3 (1954). It might have been voiced in circumstances making it especially credible. See, e.g., *Holt* v. *United States*, 94 F.2d 90 (10th Cir. 1937) (deathbed confession excluded as not in furtherance). Normally, however, that the statement was against the penal interest of the declarant himself ought to suffice. See *Model Code of Evidence* § 508, Comment p. 251. ("These statements are likely to be true [since they] . . . are usually made with a realization that they are against the declarant's interest.")

I have framed this suggestion as an amendment to Subdivision 801(d)(2)(v). And it could be rationalized there. However, it would seem far more logical to put it following Subdivision 804(d) where the requirement of "unavailability" would be fully applicable to it as an independent exception to the hearsay rule not founded on the doctrine of vicarious admission. See Testimony of Professor Ruth, *Hearings* at p. 338.

Statement against interest

In the main, I support the introduction into Federal law of the concept of declarations against not only material, but also penal interests. But I am seriously troubled with the scope of the Rule as it is now written.

Initially, it seems to me that the Rule ought to have some requirement of directness and immediateness. See *McCormick* § 253 p. 546. The rationale of the Rule is that such statements are trustworthy because people do not normally speak against themselves. This rationale is supportable to the degree that statement is directly and immediately against the declarant's interest, and conversely, unsupportable to the degree that the statement is merely indirectly or only re-

motely against a declarant's interest. We would be guaranteeing the trustworthiness of the evidence we admit if these thoughts were added to the rule.

Second, there ought to be some requirement that the fact asserted by the declarant be within the scope of his personal knowledge. See *McCormick* § 253, p. 546. The Supreme Court has been careful to accept hearsay in the context of showing of probable cause for search and seizure only where the declarant can reasonably be said to have had personal knowledge of that about which he speaks. See, e.g., *Spinelli* v. *United States*, 393 U.S. 410 (1969). We should do no less here.

Third, I believe that the rule goes too far when it accepts declarations against penal interest at their face value. I suggest that such declarations be admitted only when they are in such a form that they would qualify to convict the declarant himself. As you have phrased the Rule now, it will only apply to admit exculpatory evidence. It will not serve to admit incriminating evidence. (I will treat this aspect of the rule below.) On the assumption that this limitation is to remain, I think it unwise not to look more carefully at what you are proposing.

Holmes in his classic dissent in *Donnelly* v. *United States*, 228 U.S. 243, 277 (1913) did not argue for the admission of such declaration *simpliciter*. He suggested that Joe Dick's confession of murder should be admitted to exculpate Donnelly when it was "coupled with circumstances pointing to its truth." He added, too, that there should be "no ground for connecting Donnelly with Dick."

I would apply a rule of corroboration to such declarations as strong as the rule we now apply to confessions where introduced for the purpose of conviction. See *Smith* v. *United States*, 348 U.S. 84 (1954). In each case, we are proving by the declarant's statement that he committed a crime. All of the reasons which lead us to demand that confessions be trustworthy when we seek to convict by their use apply when an accused seeks, in effect, to convict another by such a confession in order that he himself may go free.

Next, because of the special danger associated with jail-house testimony used to exculpate, I would provide that the prosecution have the right to obtain from the court an instruction to the jury that where the declarant himself had been involved in the past in criminal offenses that his statement should be received and credited only with the utmost care because of the special danger of perjury and the virtually universal experience of the untrustworthiness of such declarations.

Lastly, I would omit entirely the last sentence of Subdivision 804(b)(1). On its face it does not state the law. *Nelson* v. *O'Neill*, 9 Crim. L. Reptr. 3184 (6-1-71) held that the use of a confession of a co-conspirator implicating the other defendant did not contravene the Sixth Amendment where the co-conspirator took the stand to testify, but disavowed the confession. When the principle of a declaration against interest is introduced, a witness should be, I suggest, considered "unavailable" if his present testimony is inconsistent with his prior confession, see *United States* v. *DeSisto*, 329 F.2d 929 (2nd Cir. 1964), *cert. denied*, 377 U.S. 979 (1965), and such a declaration against interest should then be fully admissible against a fellow accused, at least where the declarant himself was available for cross-examination. Consequently, I would suggest that, consistent with your decision not to write the Rules in terms of their constitutional implications, this last clause be omitted and that the question of what use, if any, declarations against interests should have in criminal proceedings as evidence against an accused be left up to the Supreme Court for constitutional resolution.

I regret that the pressure of the hearings now being held by the Permanent Subcommittee on Investigations into organized crime and other committee work prevented me from preparing and forwarding these comments to you earlier. I followed with interest the issuance of March 1969 draft of the rules; it was received in the Subcommittee on Criminal Laws and Procedures on April 15, 1969. My attention was not drawn to the March 1971 draft, however, until the first part of July; apparently no copy of the revised draft was sent to either my office or to the Subcommittee. In this connection, it would be appreciated if you could arrange to forward to me periodically the results of your deliberations as these Rules continue to be considered.

In conclusion, I would be remiss if I did not repeat that although the bulk of these comments are critical, I fully support your effort and feel that the Rules, as a whole, promise to aid the accurate and just resolution of controversy in our Federal judicial system.

ADDENDUM

You may find it useful to know that these comments were prepared without the benefit of the views of the Department of Justice forwarded to you on August 9, 1971, and I submit them to you without revision in light of the Department's comments. I have, however, now examined the Deputy Attorney General's letter and its attachment. While I cannot say that I concur in or support each of the Department's criticisms, I urge you to give them most careful attention. My own feeling of uneasiness when I first reviewed the revised draft of March 1971 has been reenforced and underscored by many of the Department's comments. It would be most unfortunate if the rules were forwarded to the Congress in a form with which the Department of Justice found itself in such substantial disagreement.

With kindest regards, I am

Sincerely yours,

JOHN L. MCCLELLAN.

OFFICE OF THE DEPUTY
ATTORNEY GENERAL,
Washington, D.C., August 9, 1971.

Hon. ALBERT B. MARIS,
Chairman, Committee on Rules of Practice and Procedure, Supreme Court Building, Washington, D.C.

DEAR JUDGE MARIS: Attached are the Department's comments on the Revised Draft of the Proposed Rules of Evidence for the United States Courts and Magistrates. These comments detail the Department's serious reservations concerning certain of the rules contained in the Revised Draft.

As you know, a Committee appointed by the Attorney General submitted comments to the Preliminary Draft. The Revised Draft indicates that many of the Departmental Committee's recommendations were rejected by the Advisory Committee. Moreover, the Revised Draft contains many important provisions which were not included in the Preliminary Draft and upon which the Department had no opportunity to comment. In these circumstances, we deem it imperative to place the Department's views before the Advisory Committee.

Several of the problems detailed in the attached report are of such overriding importance that they should be stated at the very outset.

1. Rule 509 Military and State Secrets.

This rule fails to recognize that the Government has a privilege not to disclose official information if such disclosure would be contrary to the public interest. See *Davis* v. *Braswell Motor Freight Lines*, 363 F.2d 600 (5th Cir. 1966); *Kaiser Aluminum & Chemical Corp.* v. *United States*, 141 Ct. Cl. 38, 157 F. Supp. 939 (1958).

By requiring that the Government must substantiate its claim of state secrets privilege by showing the likelihood of a danger that disclosure will result in detriment or injury to the national defense or international relations, the Rule fails to reflect the present state of the law as enunciated in *United States* v. *Reynolds*, 345 U.S. 1 (1953). A Governmental showing of a reasonable possibility that military or state secrets are involved would be consistent with *Reynolds*. Instead, the Revised Rule raises the possibility that in order to sustain its claim, the Government may be required to disclose the very information claimed as privileged.

The Revised Rule is also deficient in that it fails to authorize a procedure whereby the Government can make an *in camera* submission of information to the trial judge to enable him to make an informed judgment as to whether or not the claim should be sustained.

2. Rule 510 Identity of Informer.

Rule 510(a) limits the Government's identity of informer privilege to the identity of persons furnishing "information purporting to reveal a violation of law." Because informers provide intelligence information on a continuing basis, their value extends far beyond providing information purporting to reveal a violation of law. The privilege should be extended accordingly.

Under Proposed Rule 510(c)(1), the Government's privilege would be lost even if the informer was called as a witness by the defendant, thereby motivating a defendant to call witnesses primarily to ascertain those who may have been government informers.

In an attempt to accommodate the Rule to civil cases, the drafters, in subsection (c)(2) changed the test of dismissal for failure to reveal an informant's identity from the Preliminary Draft's "the issue of guilt or innocence" to a "material issue in the case." Yet, this accommodation requires a departure from the test outlined in *Roviaro* v. *United States*, 353 U.S. 53 (1957).

Subsection (c)(2) is also defective in that it fails to provide an adequate procedure for handling defense requests to learn the identity of informers. There is no reason why the Government cannot submit to the trial judge *in camera* the information needed to determine whether fairness requires that the Government be ordered to reveal the identity of the informer.

Subsection (c)(3) of the Rule, concerning the legality of evidence obtained on the basis of information received from an informer, narrows the test to one of the reliability of the informer. The correct test is one of credibility or reliability. *Aguilar* v. *Texas*, 378 U.S. 108, 114 (1964); *United States* v. *Harris*, 91 S. Ct. 2075 (1971).

3. Rule 609 Impeachment by Evidence of Conviction of a Crime.

By giving the trial judge discretion to permit defendants in criminal cases to testify without being impeached with prior convictions, the revised draft adopts the rule derived from *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F. 2d 763 (1965). The *Luck* rule is not only inconsistent with the law in almost 90 percent of the states, but was overturned by the Congress in the District of Columbia, the only federal jurisdiction in which it existed. See District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 133. In rejecting the *Luck* rule, the Congress found persuasive the fact that it had proved completely unworkable in the District of Columbia, as evidenced by the fact that the Bar Association of the District of Columbia in a 1970 membership-wide referendum supported the elimination of the rule.

4. The other rules commented upon raise, in total impact, significant problems in the fair and orderly procedures at trial and at pretrial hearings. In our view their adoption, without significant amendment, would impede the effective administration of justice.

We trust that our comments will prove helpful to the Committee.

Sincerely,

RICHARD G. KLEINDIENST,
Deputy Attorney General.

DEPARTMENT OF JUSTICE ANALYSIS AND RECOMMENDATIONS REGARDING REVISED DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE U.S. COURTS AND MAGISTRATES

ARTICLE I. GENERAL PROVISIONS

Rules 101—Scope—Amendments to the rules of civil and criminal procedure

The Advisory Draft repealed all of Rule 43, F.R. Civ. P., except the first sentence: "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules" [*i.e.*, the Federal Rules of Civil Procedure].

Problem: There may be instances where the proposed Federal Rules of Evidence would allow testimony to be taken in written form or other than in open court. Under Rule 509 (b), [Military and State Secrets], for example, the "judge may take any protective measure which the interests of the government and the furtherance of justice may require." It should be made clear that, in devising protective measures, the judge is not restricted by Rule 43.

Recommendation: We suggest that Rule 43 should be revised to read:

"In all trials the testimony of witnesses shall be taken orally in open court unless otherwise provided by these rules *or the Federal Rules of Evidence.*" [italicized portions added]

To avoid similar lack of clarity we recommend that Rule 26, F.R. Cr. P., be amended to read:

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress, or by these rules, *or by the Federal Rules of Evidence.*" [italicized portions added]

Rule 104—Preliminary questions

Subdivision (c)—Hearing of Jury. This subdivision makes mandatory that hearings on the admissibility of confessions be conducted out of the presence of the jury. This provision is not objectionable *per se*. The subdivision provides further, however, that, "[*h*]earings on other preliminary matters shall be so conducted when the interests of justice require, *or, when an accused is a witness, if he so requests*" (emphasis added). The italicized material was added by the Advisory Committee:

Problem: Hearings out of the presence of the jury are both time consuming and cumbersome. In many instances evidence given during such hearings must be repeated before the jury, and much preliminary evidence may be heard by the jury without adverse effect. Considering these factors, we do not believe it advisable to give a defendant an unqualified right to testify out of the presence of the jury. We think such a rigid rule is particularly unwise since the consequences of failing to accord such an unqualified right to the defendant are not certain. For example, will this be "plain error" which produces a reversal? Must the defendant in every instance when a preliminary matter arises during the course of a trial expressly waive this right to testify out of the presence of the jury? Cf. *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); compare *United States* v. *Brown*, 428 F. 2d 1100 (D.C. Cir. 1970). These are but a few of the difficult and unsettled questions the proposed rule generates. In this setting we believe it would be a mistake to adopt a blanket rule depriving trial judges of their authority over the conduct of trials in this area. Whether to hold a hearing out of the presence of the jury depends on the posture of the evidence in each particular case. The determination to hold such a hearing is best left to the discretion of the judge.

Recommendation: We suggest the readoption of subdivision (c), as contained in the Preliminary Draft.

Subdivision (d)—Testimony by Accused. The first sentence provides: "The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case."

Problem: The proposed rule may unduly subject the accused to cross-examination concerning the issue about which he testifies without the traditional limitation that the cross-examination must pertain to matters reasonably related to the subject matter of the direct testimony. See *Brown* v. *Walker*, 161 U.S. 591, 597–598 (1896); *Fitzpatrick* v. *United States*, 178 U.S. 304, 314–316 (1900); *Brown* v. *United States*, 356 U.S. 148 (1958). A motion may be made to suppress evidence recovered from two different seizures. Under the proposed rule, were a defendant to testify on direct as to one of the seizures, he might be subject to cross-examination on both since they relate to the "issue" of an illegal seizure.

On the other hand, the proposed rule could be construed to prohibit cross-examination on other issues in the case even if they were covered by the accused in his direct examination. For example, an accused testifying in support of a motion to suppress illegally seized evidence might refer on direct to matters which relate to the other issues in the case, such as a proposed alibi defense. A literal reading of the first sentence of Revised Rule 104(d) could preclude cross-examination on this aspect of the accused's testimony. At the very least it will invite litigation on the meaning and scope of this revised rule. Such litigation would be avoided by adoption of the traditional standard for cross-examination.

Recommendation: We suggest that the first sentence of subdivision (d) be amended to read as follows:

"The accused does not, by testifying upon a preliminary matter outside the presence of the jury, subject himself to cross-examination on matters not reasonably related to the subject matter of his direct examination."

It is also recommended that the second sentence of Rule 104(d) be entirely deleted. That sentence provides:

"Testimony given by him [an accused] at a hearing in which he is asserting a constitutional right, or any right to have evidence suppressed or excluded, is not admissible against him as substantive evidence but may be used for impeachment if clearly contradictory of testimony given by him at trial."

As the Advisory Committee's Note points out, "[t]he inadmissibility of the testimony of the accused is based on *Simmons* v. *United States*, 390 U.S. 377 (1968)." *Simmons* held that because of potential infringement of the Fifth Amendment privilege against self-incrimination the testimony of a defendant in support of a motion to suppress evidence on Fourth Amendment grounds "may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." 390 U.S. at 394.

Subsequent to the release of the Revised Draft in March, 1971, the Supreme Court decided *McGautha* v. *California*, 91 S. Ct. 1454 (1971). In that case, the Court rejected the argument that a unitary trial in which a jury decided both guilt and punishment at the same time, violated the privilege against self-incrimination of a defendant who wished to testify as to punishment but not as to guilt. The Court made these comments about *Simmons*:

"The insubstantiality of the purely Fifth Amendment interests involved in *Simmons* was illustrated last Term by the trilogy of cases involving guilty pleas. *Brady* v. *United States*, 397 U.S. 742 (1970); *McMann* v. *Richardson*, 397 U.S. 759 (1970); *Parker* v. *North Carolina*, 397 U.S. 790 (1970). While in *Simmons* we relieved the defendant of his 'waiver' of Fifth Amendment rights made in order to obtain a benefit to which he was ultimately found not constitutionally entitled, in the trilogy we held the defendants bound by 'waivers' of rights under the Fifth, Sixth, and Fourteenth Amendments made in order to avoid burdens which, it was ultimately determined, could not constitutionally have been imposed. In terms solely of Fifth Amendment policies, it is apparent that *Simmons* had a far weaker claim to be relieved of his ill-advised 'waiver' than did the defendants in the guilty-plea trilogy. While we have no occasion to question the soundness of the result in *Simmons* and do not do so, to the extent that its rationale was based on a 'tension' between constitutional rights and the policies behind them the validity of that reasoning must now be regarded as open to question, and it certainly cannot be given the broad thrust which is attributed to it by Crampton [the defendant] in the present case (91 S. Ct. at 1469)."

The *McGautha* decision thus makes evident that the constitutional law with respect to the use of testimony specified in the second sentence of proposed Rule 104(d) is in a state of uncertainty and change may be imminent. This uncertainty in governing constitutional doctrine and the strong policy arguments for and against admissibility evident in the majority and dissenting opinions in both *McGautha* and *Simmons*, strongly militates against any statutory codification at this time.

The difficulty of drafting an appropriate rule in light of *McGautha* also merits consideration. Although *Simmons* is now limited to its result, proposed Rule 104 depends on its questioned rationale to exclude testimony given by an accused to protect noconstitutional as well as constitutional rights—an exclusion, we would emphasize, that is not covered by the *Simmons* rationale. The rule also precludes use of the testimony "as substantive evidence"; but it is doubtful that it as ever intended, even under the *Simmons* rationale, to exclude "as substantive evidence" prior testimony in prosecutions for perjury and false declarations. See *Harris* v. *New York*, 401 U.S. 222 (1971). Another question which would require resolution is whether the testimony can be used as impeachment only if "clearly contradictory" of trial testimony or, as is the traditional test for impeachment, one recommended in the Advisory Committee's Note to the Preliminary Draft, if inconsistent with the trial testimony.

Recommendation: We suggest that it would be inappropriate to adopt any evidentiary rule in this constitutional area and propose that Rule 104(d) be deleted. Of course, its deletion should not be construed as disapproval of that part of the proposal which recognizes the accepted case law approval of the use of prior testimony as impeachment. See *Walder* v. *United States*, 347 U.S. 62 (1954); *Harris* v. *New York*, *supra*.

Rule 107—Remainder of or related writings or recorded statements

Proposed Rule 107 authorizes an adverse party to require a party, who has introduced a writing or recorded statement or part thereof, to introduce "any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." As the Advisory Committee's Notes observe, the purpose of this rule is to codify the "rule of completeness" so as to prevent the trier of fact from being mislead by introducing a part of a writing "out of its context." McCormick, *Law of Evidence*, § 56 (1954) [hereinafter cited as McCormick].

Problem: The language of proposed Rule 107 could, be utilized to usurp the function

of cross-examination by permitting one party to disrupt the orderly presentation of evidence by the other by moving into evidence, under a claim of fairness, other documents which properly should be admitted only in its own case. This may well have a generally disruptive effect in orderly presentation particularly in complicated fraud and antitrust cases which involve a great number of documents. The upshot is that instead of preventing the jury from being misled—the aim of the Revised Draft Rule—the rule may have the opposite effect: *i.e.*, the disorderly and illogical presentation of evidence with consequent disruption and confusion.

Recommendation: In our view, the rule should be confined to requiring the offering party to place into evidence only whatever part of the same document "relates to the same subject matter." *See* McCormick, 132. The proposed test of fairness is vague and fails to provide the necessary guidance. Should the rare situation arise in which a jury is apt to be misled by a party offering into evidence one writing inextricably intertwined to another—such as a letter and a response—the judge is empowered to eliminate the confusion by his general control "over the mode and order of presenting . . . evidence" under proposed Rule 611(a).

We therefore suggest that proposed Rule 107 be amended to read as follows:

Rule 107. Remainder of Writing and Recorded Statement

When a part of a writing or recorded statement is introduced by a party, an adverse party may require him at that time to introduce any other part of the same writing or recorded statement which relates to the same subject matter.

ARTICLE III. PRESUMPTIONS

Rule 303—presumption in criminal cases

Since the Advisory Committee had originally drafted the rule concerning presumptions in criminal cases, the National Commission on Reform of Federal Criminal Laws submitted to the President and to the Congress its Final Report containing among its recommendations for a new federal criminal code, provisions dealing with presumptions and *prima facie* evidence. Those provisions appear in Section 103(4) and 103(5) and are explained at pages 5 and 6 of the Final Report and at pages 19 through 32 of the Commission's published Working Papers.

Problem: We believe that the National Commission's formulation has much to commend it: (1) it is framed to encourage judges to submit rational presumptions to juries in all cases where warranted by the state of the evidence; (2) it emphasizes the nature of the rational connection to the jury and clarifies the consideration to be given the presumption by the jury by providing that the jury shall be instructed that "the law regards the facts giving rise to the presumption as strong evidence of the fact presumed"; and (3) it treats the general subject with maximum clarity.

We therefore strongly commend to the attention of the Advisory Committee the National Commission's provision on presumptions, together with its alternative formulation of the last clause in subsection (4)(a).

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 403—Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time

Rule 403(a) requires the mandatory exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues, or of misleading the jury.

Problem: We are opposed to an absolute standard of inadmissibility which would appear to require reversal on appeal whenever an appellate court disagreed with the trial court's exercise of discretion. It is generally recognized that this matter is best left to the discretion of the trial judge. See McCormick, p. 320 and authorities there cited. As McCormick observes at p. 320:

"Relevant evidence, then, is evidence that in some degree advances the inquiry, and thus has probative value *and is prima facie admissible* . . . This balancing of intangibles—probative values against probative dangers—is so much a matter where wise judges in particular situations may differ that *a leeway of discretion is generally recognized.*" (Emphasis added.)

The difficulty posed by the standard of mandatory inadmissibility is particularly compounded by its possible impact on the other Rules providing for the admissibility of evidence.

We also observe that Rule 403 has an additional defect in that it is divided into two parts. This division provides no guidance in the situation where a trial judge would find that neither the dangers enumerated in Rule 403(a) or (b) by themselves substantially outweigh the probative value of proferred evidence but taken together they do.

Recommendation: We suggest that Rule 403 be redrafted to eliminate the requirement of mandatory exclusion.

Rule 404—character, evidence not admissible to prove conduct; exception; other crimes

Subdivision (a) (2)—Character of Victim. The subdivision authorizes admission of evidence of a *pertinent* trait of character of the victim of the crime offered by an accused or by the prosecution in rebuttal.

Problem. Except by the word "pertinent" neither the Rule nor the Advisory Committee's Note distinguishes between those situations in which character evidence of the victim of a crime is admissible only if known by the accused and when it need not be known by the accused. See 1 Wigmore, *Evidence* (3d Ed 1940) [hereinafter cited as Wigmore] § 63; McCormick, § 160. For example, there are two generally recognizable purposes for which evidence of the character of a victim in a homicide case may be adduced. Such evidence may be introduced by the accused to buttress a claim of self-defense and to establish that the victim was the first aggressor. The second use of the reputation of the deceased for violence is to show a defendant's reasonable apprehension of immediate danger. For the latter purpose, such evidence is admissible only if the reputation of the deceased for violence was in fact known to the accused. By failing to take this distinction into account, the Rule may be construed as eliminating it. The possibility should be avoided by providing the necessary explanation in the Advisory Committee's Note.

Further, a number of leading commentators hold the view that in homicide cases where the accused relies on self-defense, the prosecution should be allowed in rebuttal to introduce testimony of the deceased's good reputation for peacefulness even if the defendant does not first introduce character evidence adverse to the deceased. McCormick, § 160 states in pertinent part:

"Wigmore and a growing group of courts have favored the view that whenever the accused claims self-defense and offers evidence that the deceased was the first aggressor, the state in rebuttal may produce evidence of the peaceful reputation of the deceased. To the present writer, this seems the wiser solution."

Recommendation: We suggest that full paragraph 3 of the Advisory Committee's Note, on page 33, of the Revised Draft, be expanded by the insertion of the following sentence after the citations to the first sentence: "With respect to the character of the victim, the limitation to pertinent traits of character, is intended, *inter alia*, to preserve the distinction between those situations in which the victim's character trait is admissible only if known to the accused and those in which the traits need not be known to the accused. 1 Wigmore, § 63; McCommick § 160.

The subdivision itself should be reformulated as follows:

"Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the deceased was the first aggressor."

Subdivision (b). It provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. This is a correct statement of the law. 1 Wigmore, § 216; McCormick, § 157. Rule 404(b) also provides that such evidence such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The Advisory Committee's Note emphasizes the "may" aspect of admissibility.

Problem: We are seriously disturbed by the modifier "may" since the general rule is that if relevant, such evidence *is* admissible and the normal "rule of exclusion is simply inapplicable." McCormick, 327. "[F]acts consisting of past misconduct, whether criminal or not, and being offered to show design, motive, intent, knowledge, or the like, . . . are admitted, then, whenever they are relevant otherwise than to character." 1 Wigmore § 216. Only if the probative value of these facts is substantially outweighed by the danger of unfair prejudice, are they properly excludable. Rule 404(b), accordingly, should be amended to reflect this rule of admissibility rather than the purely discretionary "may" which fails to provide appropriate guidance. Rule 404(b) should also be amended to make it more clear than it does now that the list of purposes it enumerates for which evidence of other crimes is admissible is not exhaustive.

Recommendation: The second sentence of Rule 404(b) should therefore be redrafted to read as follows:

"It is, however, admissible for other purposes, including but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, unless the probative value of this evidence is substantially outweighed by the danger of unfair prejudice."

Rule 405—Methods of proving character

Rule 405(a) provides that where admissible, evidence of character or a trait of character may be proved by opinion testimony as well as by reputation.

Problem: Authorization to use opinion testimony, though recommended by some text-writers, is contrary to present law and practice, which limits such evidence to reputation. *See* McCormick, pp. 334–35:

The reasons for the almost universal disfavor with which courts regard opinion testimony, were persuasively stated by the New York Court of Appeals in the leading case of *People* v. *Van Gaasbeck*, 189 N.Y. 408, 418, 82 N.E. 718, 721 (1907):

"If a witness is to be permitted to testify to the character of an accused person, basing his testimony solely on his own knowledge and observation, he cannot logically be prohibited from stating the particular incidents affecting the defendant, and the particular actions of the defendant which have led him to his favorable conclusion. In most instances it would be utterly impossible for the prosecution to ascertain whether occurrences narrated by the witness as constituting the foundation of his conclusion were or were not true. They might be utterly false, and yet incapable of disproof at the time of trial. Furthermore, even if evidence were accessible to controvert the specific statements of the witness in this respect, its

admission would lead to the introduction into the case of innumerable collateral issues which could not be tried out without introducing the utmost complication and confustion into the trial, tending to distract the minds of the jurymen and before the chief issue in litigation."

Opinion testimony is objectionable for other reasons. Unlike reputation-evidence, which can be established by a limited number of witnesses and therefore is subject to control by the court, opinion testimony would be difficult to limit since it is the individual opinion which is relevant. As the Advisory Committee's Note makes clear, if a person is charged with a crime such as theft, the proposed opinion testimony rule would permit the accused's employer or a psychiatrist to give his opinion that the accused is an honest man. Such evidence of good character *by itself* "may be" sufficient to raise a reasonable doubt as to guilt and the jury is to be so instructed. *Michelson* v. *United States,* 335 U.S. 469 (1948). Moreover under present practice, the "may be" of *Michelson* has become the general practice with a jury being routinely so instructed once any evidence of good character is admitted. To permit acquittal on this ground—an employer's or psychiatrist's personal opinion as to honest—is in our view, an unwise rule of law.

Recommendation: We suggest that the authorization in Rule 405(a) to use opinion testimony to prove character or a trait of character should be eliminated. This can be accomplished by inserting a period in the first sentence of Rule 405(a) after the word "reputation" and deleting the rest of the sentence.

Rule 410—Offer to plead guilty; nolo contendere; withdrawn plea of guilty

The second sentence of Rule 410 excludes from evidence any statement made in connection with withdrawn pleas of guilty or *nolo contendere*. This second sentence was not included in the Preliminary Draft of March, 1969, but was added, without comment or explanation, in the Revised Draft.

Problem: Though it has been persuasively argued that withdrawn pleas of guilty should be admitted into evidence when freely and understandingly made (McCormick, § 242 and cases cited therein), the weight of authority, relying principally on the language in *Kercheval* v. *United States,* 274 U.S. 20 (1927) as opposed to its particular facts, precludes admissibility of such pleas.

Neither *Kercheval* nor other decisions or authorities cited in the Advisory Committee's Note support the exclusion of statements made in connection with pleas of guilty or *nolo contendere*. If a statement obtained in violation of *Miranda* but otherwise voluntary and reliable can be used as impeachment (*Harris* v. *New York,* 401 U.S. 222 (1971)), a voluntary statement made in open court, while represented by counsel, should also be admissible. Whatever the reasons for excluding the fact of a withdrawn plea, they should not apply to statements of an accused made freely and vountarily in open court.

Recommendation: We suggest deletion of the second sentence of Rule 410.

ARTICLE V. PRIVILEGES

Rule 503—Lawyer-client privilege

Problem: The rule is drafted to allow for the making of a confidential communication by a client to a "representative of the lawyer", but "representative of the lawyer" is defined less precisely than is necessary.

Recommendation: We suggest that paragraph (a)(4) be redrafted, as follows:

"(4) A representative of the lawyer is one employed to assist the lawyer in the rendition of professional legal services, *but does not include a person employed to testify as a witness whether or not that person actually testifies as a witness.*"

Although a similar disclaimer is contained in the Advisory Committee's Note (p 49), we think that such an important exception should more properly be made a part of the definition itself.

Problem: The revised rule further requires tightening in its definition of "confidential" communication. A man conversing with an attorney and knowing of the presence within earshot of "a casual disinterested third person" should not be heard to suggest that the conversation was confidential. § 95.

Recommendation: In order to define "confidential" communication more clearly and completely, and to facilitate resolution of disputes concerning the issue, paragraph (a)(5) should be modified as follows:

"(5) A communication is "confidential" *if made under circumstances reasonably justifying an expectation of pirvacy* and not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."

A similar insertion should be made in the definitions of confidential communication in Rules 504 and 506.

Rule 504—Psychotherapist-patient privilege

The revised draft changes the definition in the original draft of "psychotherapist" (subsection (a)(2)), so that the term is no longer limited to the physician who devotes a "substantial" part of his time to the practice of psychiatry but includes a physician spending *any* time practicing psychiatry.

Problem: It is our view that the privilege should not extend to a physician practicing psychiatry only on an intermittent basis; it should be limited to the physician who devotes a substantial part of his professional service to the specialized practice of psychiatry. Our objection is based upon the consideration that all physicians as a practical matter do, in the course of treatment, give advice which may be labelled "psychiatric". Hence, the net result of the revised version of the rule would be the creation of a general physician-patient privilege which, as the Committee correctly notes, is not recognized in federal law or recommended in the authorities. On the other hand, the test of substantiality will allow courts a desirable latitude in applying the privilege and distinguishing between the regular practitioner and others.

Recommendation: We suggest that Rule 504(a)(2) be worded as in the Preliminary Draft.

Rule 505—Husband-wife privilege

The approach taken in the draft is essentially to make a spouse incompetent as a witness in a criminal case at the option of the defendant. This approach does not withstand analysis.

Problem: The principal reason that has been advanced for a husband-wife testimonial privilege is the overriding importance of preserving marital unity. It is patent however, that if a spouse is willing to testify for the Government in a crminal case, there is no marital harmony to preserve. And to recognize a privilege even when a spouse is willing to testify is to pay a price in competent evidence for no redeeming purpose.

"The privilege has sometimes been defended, after the manner in which we find reasons for inherited customs generally, as protecting family harmony. But family harmony is nearly always past saving when the spouse is willing to aid the prosecution. The privilege, in truth, is an archaic survival of a mystical religious dogma and of a way of thinking about the marital relation, which are today outmoded." McCormack, p. 145

The logical conclusion is that the privilege should lie with the spouse who is called to testify in the prosecution of the companion spouse. The decision in *Hawkins* v. *United States,* 358 U.S. 74 (1958), does not prevent adoption of such a rule. Indeed the rule we advocate is the rule Congress chose to adopt for the District of Columbia. 14 D.C. Code 306(a) (1964).

Recommendation: We suggest that Subsections (a) and (b) of Rule 505 be amended to read as follows:

"(a) *General Rule of Privilege.* A person has a privilege to refuse to testify against his spouse in a criminal proceeding.

"(b) *Who May Claim the Privilege.* The privilege may be claimed only by the person who is sought to be compelled to testify against his spouse."

Subsection (c) should be retained.

Rule 509—Military and State secrets

Section 509—This rule is drafted to recognize the evidentiary privilege concerning military and state secrets and to provide standards and procedures for its invocation.

Problem: In addition to our objections to the standards and procedures set forth relating to military and state secrets, a major problem raised by the proposed Section is that, while it in general recognizes the existing law concerning the governmental privilege as to military and diplomatic secrets, it rejects any recognition of the well established privileges against disclosing other information in the control of the Executive. In view of the provisions of Section 501 that there is no privilege unless it is recognized by the rules themselves, the Constitution, or by Statute, the lack of recognition of any such privileges effectively negates them. As previously urged, we believe that the rules should recognize that there is also a governmental privilege against disclosing official information if such disclosure will be contrary to the public interest. The rule should be broad enough to encompass a variety of recognized privileges of the Government, such as the privileges to refuse to disclose investigative reports and internal memoranda containing policy recommendations. As noted in *Capital Vending Co., Inc.* v. *Baker,* 35 F.R.D. 510 (D. D.C. 1964):

"The government has certain privileges in reference to disclosure or refusal to disclose certain documents that are not accorded to private individuals. For example, such a privilege exists specifically as to matters involving national defense or foreign relations with other governments. So, too, the Court is of the opinion that such a privilege exists with respect to documents that the government is using in connection with an investigation of possible violations of criminal laws."

See also *Kaiser Aluminum & Chemical Corp.* v. *United States,* 141 Ct. Cl. 38, 157 F. Supp. 939 (1958) (privilege not to disclose internal memoranda containing policy recommendations); *Davis* v. *Braswell Motor Freight Lines, Inc.,* 363 F. 2d 600 (5th Cir. (1968)).

We recognize, of course, that a basic principle of our democratic form of government is that most information in the control of the Executive Branch should be readily and fully available to the public generally and to individual litigants. At the same time, however, it is necessary to protect equally important rights. Paramount among these is national security, as recognized by the proposed rule. However, it is also important to protect individuals' rights of privacy with respect to information in Government files and to prevent, in the public interest, interference with the efficient operations of Government programs.

A. Official Information

The existence of a governmental privilege with respect to internal policy memoranda is based, of course, on the need to encourage candor in exchanges of views within the Executive branch. Government officials will tend to hedge or blur the substance of their

opinions if they know that their opinions may be subject to subsequent disclosure in court. The rationale is set forth in the House Committee Report on the Freedom of Information Act (H. Rep. 1497, 89th Cong. 2d Sess. p. 10) and in the case law, and need not be elaborated further here. It is sufficient to note that a privilege not to disclose such matters is well-established in existing case law. See, *e.g., Freeman* v. *Seligson,* 405 F. 2d 1326, 1339 (D.C. Cir. 1968) and cases cited therein.

The Advisory Committee's Note expresses the view that the concept of relevancy will afford the government adequate protection from disclosure in this area. This seems doubtful. Under proposed Rule 401, evidence that has any rational relationship to a fact in issue is "relevant," the broadest possible standard. That the standards of relevance and the scope of the privilege as heretofore recognized by the courts are not co-exclusive is demonstrated by *Freeman* v. *Seligson, supra.* There the court held that certain documents must be produced under the relevancy standard of Rule 26(b) of the Federal Rules of Civil Procedure, subject to a showing that they were nevertheless privileged as "advisory opinions and recommendations submitted for consideration in the performance of decision- and policy-making functions." 405 F. 2d at 1339.

Equally compelling considerations dictate the need for a governmental privilege with respect to law enforcement investigative reports. Disclosure of such reports could seriously prejudice law enforcement by allowing a prospective defendant to know how much or how little information the government had about him. And, as Attorney General Jackson pointed out, in invoking Executive privilege with respect to a request from Congress for certain Federal Bureau of Investigation reports, disclosure "might also be the grossest kind of injustice to innocent individuals," since the reports included "leads and suspicions, and sometimes even the statements of malicious or misinformed people. Even though later and more complete reports exonerate the individuals, the use of particular or selected reports might constitute the grossest injustice, and we all know that the correction never catches up with an accusation." 40 Op. A. G. 45 (1941).

To be sure, as the Advisory Committee's Note points out, "the restrictions imposed on discovery, particularly in criminal cases," afford the government some protection from disclosure of law enforcement investigative reports. Under Rule 16(b) of the Federal Rules of Criminal Procedure and judicial constructions of the Jencks Act (*e.g., Palermo* v. *United States,* 360 U.S. 343 (1959)) defendants in criminal cases are not generally entitled to disclosure of investigative reports, except as to Jencks Act statements. However, these limitations on discovery do not apply to civil cases. As *Freeman* v. *Seligson, supra* at 1340, demonstrates, recognition of a privilege for relevant investigative reports appears to be the only way to prevent their disclosure in civil cases, says for application of the constitutional doctrine of Executive privilege.

While much of the information in the hands of the government which would fall into the third category of our proposal may be already protected by the Constitution, by statute, or by the criminal or civil rules, in many cases, the information has been protected by agency regulations rather than statute or by agency practice, or the need to protect information has been given recognition by the case law. Again, situations may arise which have not been anticipated by statute, rule, or regulation, but in which disclosure would have adverse effects upon both public and private interests. In these latter situations, there is a need to balance the competing interests—those of the litigant against those of the public generally and of the Government. These situations are best controlled not by detailed rules governing specific situations but by providing a standard within which such balancing may be made.

Thus, we would suggest that the proposed rule be redrafted to recognize except, with respect to intergovernmental advice, opinions, recommendations or investigatory files where policy considerations require a treatment in accordance with *United States* v. *Reynolds,* 345 U.S. 1 (1953), that the Government has a privilege not to disclose official information, if considering all the circumstances, discosure would be contrary to the public interest. Such a standard would give the courts broad discretion to weigh the public interest in nondisclosure of particular government information against the need of the particular litigant for that information. See, *Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments,* 3 Vand. Law Rev. 73 (1949).

While our primary concerns are investigative reports and internal memoranda containing policy recommendations, the term "official information" should be broadly construed to include all the information under the control of a department or agency, except information as is available to the public under the Freedom of Information Act. In view of the fact that the judge will have discretion to order disclosure of such information, a broad definition of "official information" seems entirely reasonable.

B. Secrets of State

We agree, of course, that, as to Secrets of State, the government's privilege should remain absolute. Subdivision (a) of the revised draft of Rule 509 provides that the governmental privilege becomes operative "upon a showing of reasonable likelihood of danger that disclosure of the evidence will be detrimental or injurious to the national defense or the international relations of the United States." This differs from the preliminary draft which required a showing of "substantial danger that the evidence will disclose a secret of state."

The revised draft does not accurately reflect the present state of the law with respect to this privilege, as enunciated by the Supreme Court in *United States* v. *Reynolds,* 345 U.S. 1 (1953). In *Reynolds,* the Court held that a formal claim of privilege by the Secretary of the Air Force was sufficient to cut off further demands for the disclosure of certain documents, when it was made "under circumstances indicating a reasonable possibility that military secrets are involved." (345 U.S. at 11).

Two major concerns were expressed in the Court's opinion. The first concern was that allowing a bare unsubstantiated claim of privilege to become conclusive would constitute an abdication of judicial responsibility for the rights of individual litigants and would open wide the door for potential abuses of the privilege thus granted. Accordingly, the Court left open some area for appropriate judicial review of such claims of privilege, indicating that courts should balance the litigant's actual need for the information sought against the strength of the government's showing that disclosure might reveal military secrets. The Court articulated this standard of review, and underscored its limited extent, in the following passage:

"In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. When there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but *even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. A fortiori,* where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail. (345 U.S. at 11). (Emphasis added); *Totten* v. *United States,* 92 U.S. 105 (1875).

The Court's other concern was that if the Government were required fully to substantiate the claim of privilege to a court's satisfaction in every case, the result could very well be the disclosure of the privileged information in the course of validating the claim of privilege. ("The Court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect." 345 U.S. at 8). Analogizing to similar problems raised by claims of the privilege against self-incrimination, cf. *Hoffman* v. *United States,* 341 U.S. 479 (1951), the Court reiterated its conclusion that judicial inquiry should be limited to the question of whether the privilege was claimed under circumstances indicating a reasonable possibility that state or military secrets were involved.

The revised subdivision appears to go contrary to the concerns expressed in *Reynolds* by requiring that the Government substantiate its claim of privilege by showing, not a reasonable possibility that military or state secrets are involved, which would be consistent with *Reynolds,* but the likelihood of a danger that disclosure will result in detriment or injury to the national defense or international relations. Thus, the present formulation of the rule raised the possibility that the Government may be required to disclose the very information claimed as privileged, or other sensitive information, in order to sustain its claim. This is precisely the situation which the Supreme Court wisely sought to avoid in *Reynolds.*

The Advisory Committee's Note purports to recognize the problem created by "the infringement upon security which would attend a requirement of complete disclosure to the judge, even though it be in camera." However, as presently drafted, the Rule may contemplate many situations where such infringement will occur, and unnecessarily. In summary, the present formulation of the privilege may very well require the government, in many situations, to disclose the information which it seeks to protect in the course of sustaining the claim of privilege.

Therefore, we proposed that the subsection be redrafted, insofar as military and state secrets are concerned, to include a definition of "Secret of State," and that the general rule of the privilege be redrafted to provide that "The government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood that the evidence will disclose a secret of State."

We would suggest that the definition of secret of State utilize the phrase "relating to the national defense" since that phrase is used in 18 U.S.C. § 793. This would serve to emphasize that this phrase in the rule is to be construed as it had been in the statute, as a "generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness," *Gorin* v. *United States,* 312 U.S. 19, 28 (1941).

We further point out that while the comments correctly recognize that the showing required should be limited so as not to "jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone in chambers," *Reynolds* v. *United States,* 345 U.S. 1, 10, the comments fail to consider the weight that should be given to the fact that an item has been classified by the head of a department as affecting national security pursuant to Executive Order 10501. We, therefore, suggest that the following paragraph be added to the comments on subdivision (b) of our suggested draft:

"Since, by its terms, Executive Order 10501 imposes an obligation on department and agency heads to classify information pursu-

ant to that order as affecting the national security, the fact that the information for which the privilege is sought has been so classified pursuant to Executive Order 10501 must unless such classification is clearly arbitrary and capricious be given conclusive weight in determining that it involved "state secrets." Any other procedure would result in substituting the judgment of the courts for the Executive judgment as to the classification of information, a result that would involve courts, in passing judgment on matters 'remote from the experience and competence of the judiciary' and would raise serious questions of the separation of powers doctrine. *Green* v. *McElroy*, 254 F.2d 944 (D.C. Cir. 1958) at 954, *reversed on other grounds*, 360 U.S. 474 (1959), *cf. Bailey* v. *Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *affirmed by an equally divided court*, 341 U.S. 918 (1951); see *Van Knorr* v. *Miles*, 60 F. Supp. 962 (D. Mass. 1945). See also *Ogden* v. *United States*, 303 F.2d 724 (9th Cir. 1962), *cert. denied*, 376 U.S. 973; *Shoultz* v. *Laird*, 413 F.2d 868, *cert. denied*, 396 U.S. 962 (1969); *Epstein* v. *Resor*, 421 F.2d 930 (9th Cir. 1970), *cert. denied*, 398 U.S. 965 (1970), and *United States* v. *Reynolds*, 345 U.S. 1, all recognizing the power of the Executive with respect to the control of classified information."

While under this formulation, the judicial inquiry would be extremely limited, *cf. Epstein* v. *Resor*, *supra*, this is, as noted, consistent with constitutional concepts and with the judicial decisions in this area. Moreover, we would note that the sustaining of the privilege is followed by further judicial orders "which the interest of justice require," Subsection (d) of the proposed rule.

C. Procedures

Both the proposed draft and our recommended redraft provide that a claim of privilege must be made by the head of the department or agency. Such a procedure is appropriate where the privilege claimed is the absolute privilege to refuse to disclose secrets of state. We believe, however, that the attorney for the Government should be permitted to assert a claim of privilege as to "official information." Since such a claim is not absolute but depends upon the judge's determination that disclosure "would be contrary to the public interest," there seems little reason to require the head of the department or agency to assert the claim. Moreover, the department or agency will often have regulations governing the disclosure of information which the judge can use as a guide to the official agency position on disclosure, and the judge also has the inherent power to request an expression of the views of the head of the agency, if he has any doubt as to the propriety of the claim of privilege. Our recommended redraft provides for the two different procedures.

An additional problem arises from the fact that the proposed draft fails to provide a method for the government to make an *in camera* submission of information to the judge which would enable him to make an informed judgment as to whether or not the claim of privilege should be sustained. Yet, in some instances the value of the privilege would be lost if the government were required to make its showing in open court or to counsel. There seems little reason not to allow an *in camera* submission to be made in connection with a claim of privilege under this Rule, when such a procedure is allowed in testing a claim of privilege under proposed Rules 508 and 510 (c)(3). See Rule 16(e) of the Federal Rules of Criminal Procedure. Allowing such a procedure would provide the court with information necessary to a proper determination of a claim of the privilege which might not otherwise be available.

Finally, the comments to this rule include the following statements about Executive privilege:

"To the extent that executive privilege embodies a constitutional concept, it is beyond the proper scope of these rules. In any event, the level at which it operates is sufficiently lofty to allow the ordinary business of the courts to be handled without hindrance from problems engendered by it. The problem area is the departments and agencies."

We recommend that the second and third sentences be stricken. The import of the second sentence is unclear, since a claim of Executive privilege based upon the constitutional doctrine of separation of powers may be invoked with respect to requests for information from the courts as well as from Congress. It therefore seems inappropriate to speculate about the effect of the privilege on judicial proceedings. The third sentence suggests that the privilege only applies to information or documents in the possession of the President or his immediate staff. Such a suggestion would be incorrect. Historically, the constitutional doctrine of Executive privilege has been invoked in appropriate cases with respect to information and documents in the custody of the Executive departments and agencies. *See, e.g.*, 40 Op. A.G. 45 (1941), involving Attorney General Jackson's claim of Executive privilege with respect to certain Federal Bureau of Investigation reports.

Recommendation: To effect the above recommendations, and in addition to the amendments to the comments already set forth, we strongly urge that Rule 509 be redrafted:

Rule 509

Secrets of State, Intragovernmental Memoranda, Investigate Reports, and Other Official Information

A. Definitions

1. Secret of State. A "secret of state" is information not open or theretofore officially disclosed to the public relating to the national defense or the international relations of the United States.

2. Official Information. "Official information" is: (1) intragovernmental advice, opinions or recommendations submitted for consideration in the performance of decisional or policy making functions or (2) investigatory files compiled for law enforcement purposes or (3) information within the custody or control of a governmental department or agency whether initiated within the department or agency or acquired by it in its exercise of its official responsibilities and not otherwise available to the public pursuant to 5 U.S.C. 552.

B. General Rule of Privilege

The Government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that disclosure of the evidence will disclose a secret of State, intragovernmental advice, opinions, recommendations or investigatory files or, in the case of other information, upon a showing that, considering all the circumstances, the disclosure would be contrary to public interest.

C. Procedures

The privilege for secrets of state may be claimed only by the chief officer of the Government agency or department administering the subject matter which the secret information sought concerns, but the privilege for official information may be asserted by any attorney representing the Government. The required showing may be made in whole or in part in the form of a written statement. The judge may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and to be heard thereon, except that, in the case of "secrets of State," the court, upon motion of the Government, may permit the Government to make such required showing in the above form *in camera*. If the court sustains the privilege upon an *in camera* showing, the entire text of the Government's statements shall be sealed and preserved in the court's records in the event of appeal. In the case of privilege claimed for "official information" the court may require *in camera* examination of the information itself. The judge may take any protective measure which the interests of the Government and the furtherance of justice may require.

D. Notice to Government

If the circumstances of the case indicate a substantial possibility that a claim of privilege would be appropriate but has not been made because of oversight or lack of knowledge, the judge shall give or cause notice to be given to the officer entitled to claim the privilege and shall stay further proceedings a reasonable time to afford opportunity to assert a claim of privilege.

E. Effect of Sustaining Claim

If a claim of privilege is sustained in a proceeding to which the government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interest of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action.

Rule 510—Identity of informer

This rule involves considerations of paramount importance to the Government.

Recognition of a Governmental privilege not to divulge the identity of informers necessarily carries with it recognition that informers play a major role in effective law enforcement. The exposure of informants will normally preclude their effectiveness in providing essential information which in many instances is not otherwise obtainable. Consequently, it is necessary to assure that the identities of informants are not revealed except where the countervailing considerations are extremely important. It must also be kept in mind in this connection that loss to the Government of a source of information is only a part of the problem and not the most important part. The privilege involves a matter directly involving human lives. Nor are we overstating this consideration. As noted in the testimony of former Attorney General Katzenbach, between 1961 and 1965 twenty-five of the government's informers in the organized crime field alone were murdered. (Testimony at *Hearings Before the Senate Subcommittee on Administrative Practice and Procedure of the Committee of the Judiciary on Invasions of Privacy*, 89th Cong., 1st Sess., pt. 3, p. 1158 (1965).) Since 1965 these incidents have persisted and present a real and continuing problem. Under these circumstances, we deem it essential to urge adoption of the protections that were lacking in the Preliminary Draft and are absent in the Revised Rule.

Problem: If subsection (a) of Revised Rule 510 were adopted, it is no overstatement that the consequences for the Government and to the public could be disastrous. Under the proposed Rule the privilege covers only persons furnishing "information purporting to reveal a violation of law." This limitation excludes a great number of very valuable informers. Many informers provide intelligence information on a continuing basis, especially in organized crime investigations. Their value goes far beyond providing information purporting to reveal a violation of the law. See, e.g., *United States* v. *Russ*, 362 F. 2d 843 (2d Cir., 1966), *cert. den.* 385 U.S. 923 (1966); *United States* v. *Coke*, 339 F. 2d 183 (2d Cir., 1964); *Schuster* v. *New York*, 5 N.Y. 2d 75; 154 N.E. 2d 534 (1958). Informers often assist in location and apprehension of wanted persons and in the utilization of other informers and undercover investigators.

Recommendation: Rule 510(a) is much too

restrictive, and should be amended to read as follows:

"(a) *Rule of Privilege.* The Government of a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished to a law enforcement officer information *relating to or assisting in an investigation of a possible violation of law.*"

Problem: Under proposed Rule 510(c)(1), the privilege would be lost if the informer appears as a witness even if called by the defendant. In our view the privilege should be lost only if the informer is called *by the Government.* When an informer testifies for the government, there is little or no added danger involved in revealing his role as an informer; no similar situation arises when a defendant calls as a witness a person who, unknown to the defendant, has been acting as an informer. As the proposal stands, a defendant might be motivated to call witnesses primarily to ascertain those who may have been government informers.

Recommendation: Its is important to the interests of the Government, while of no detriment to the legitimate interests of defendants, to change Rule 510(c)(1) as follows:

"No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness *for the Government.*"

Problem: Subsection (c)(2) provides for dismissal of criminal proceedings when the Government elects to protect the identity of the informer and his testimony is necessary for a fair determination of the vital issues in the case. But the Rule, as drafted, does not provide adequate procedure for courts to use to meet such problems.

For example, a narcotics agent may testify that a certain person (an informer) introduced him to the defendant in a bar and that he and the defendant went to a table, alone, and discussed a narcotics deal. The defendant might admit to speaking alone with the agent in the bar but deny talking about narcotics. In such case, the Government should not be forced to reveal the informer's identity and role when the Government submitted information satisfying the court that the informant had not overheard the disputed conversation.

To assure that the Government will not improperly be required to elect, courts must make a careful inquiry into the facts to ascertain whether a fair trial can be had with the informer's identity kept secret. In short, dismissal should not automatically follow when the Government invokes the informer's privilege, nor should it be based on mere speculation or on an inadequate determination of whether disclosure is necessary. See *Lannom* v. *United States,* 381 F.2d 858, 861 (9th Cir. 1967), *cert. denied,* 389 U.S. 1041 (1968); *Miller* v. *United States,* 273 F.2d 279, 281 (5th Cir. 1959), *cert. denied,* 362 U.S. 928 (1960). A proper procedure for handling defense requests to learn the identity of informers is a vital part of a rule acknowledging the Government's privilege about an informer's identity.

Recommendation: We believe that Rule 510(c)(2) must contain an *in camera* procedure similar to that provided for in (c)(3) so that the Government can submit to the judge alone the information he needs in deciding whether fairness requires that the Government be ordered to reveal the informer. Such a procedure appears in the draft suggested below.

Problem: The original draft of Rule 510(c)(2), without mentioning civil cases, dealt with the consequences in criminal cases of the Government's electing not to divulge an informer's identity when his testimony would be necessary for a fair determination of "the issue of guilt or innocence." To deal with the problem in civil cases, the revised draft added a sentence to (c)(2) and changed the test from "the issue of guilt or innocence" to a "material issue in the case." Such an accommodation of terms—so as conveniently to embrace civil cases—involves a departure from the test enunciated in *Roviaro* v. *United States,* 353 U.S. 53 (1957), which test was quoted in the original Advisory Committee's Note.

Recommendation: The test for criminal cases should be expressed in terms of "the issue of guilt or innocence," and, comparably for civil cases, in terms of the "ultimate issues." Our suggested draft below incorporates these changes.

Problem: In a prosecution of several defendants, the informer's testimony could be necessary in determining the guilt or innocence of one or more but not necessarily all of the defendants. In such a case, dismissal should, of course, be considered only as to defendants as to whom the informer's testimony is necessary. This point could be clarified in redrafting the Rule to provide for the *in camera* inspection.

Recommendation: For the above reasons, we suggest that subsection (c)(2) be revised as follows:

"*Testimony on Guilt or Innocence (Criminal Cases) or on Ultimate Issue (Civil Cases).* If the Government invokes the privilege and the circumstances indicate that the informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of an ultimate issue in a civil case, the judge shall give the Government an opportunity to submit to the court *in camera* a written statement, preferably in the form of affidavits, containing any facts which may be relevant to the determination of whether the informer can, in fact, supply such testimony. If, after the Government has been afforded the opportunity to present such a statement, the judge finds that there is a reasonable probability that the informer can give testimony necessary to a fair determination of such issue and the Government elects not to disclose the identity of the informer, the judge in a criminal case on motion of the defendant shall dismiss the proceedings against him and the judge may do so on his own motion, and the judge in a civil case shall make such order as may be just. Written statements submitted for *in camera* inspection shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents thereof shall not otherwise be revealed without the consent of the government. All counsel shall be permitted to be present at any stage at which any counsel is permitted to be present."

Problem: Subsection (c)(3) of the Rule, which concerns the legality of evidence obtained on the basis of information received from an informer, makes the test one of the *reliability* of the informer. This is too narrow; the correct test is one of credibility or reliability. *Aguilar* v. *Texas,* 378 U.S. 108, 114 (1964); *United States* v. *Harris,* 91 S. Ct. 2075 (1971).

Problem: While we have no disagreement with the general concept of Rule 510(c)(3), since we understand the rule not to detract from the principle announced in *McCray* v. *Illinois,* 386 U.S. 300 (1967), but rather to afford an opportunity for the disclosure of additional information if the Government so chooses, the subsection seems far from a complete statement of the appropriate procedure. It would require disclosure of an informer's identity when the identity, as such, would not necessarily be meaningful. It is important both from the standpoint of the public and the Government that the rule on an informer's privilege be clear.

Recommendation: For the reasons given in the two preceding paragraphs, Rule 510(c)(3) should be redrafted to read:

"*Legality of obtaining evidence.* If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, he shall give the Government an opportunity to submit to the court *in camera* a written statement, preferably in the form of affidavits, containing any facts relevant to the question of the reliability or credibility of the informer. The judge may then make any order that justice requires. Written statements submitted for *in camera* inspection shall be sealed and preserved to be made available to the appellate court in the vent of an appeal, and their contents shall not otherwise be revealed without the consent of the government. All counsel shall be permitted to be present at any stage at which any counsel is permitted to be present."

Rule 511. Waiver of privilege by voluntary disclosure

Problem. The proposed rule would necessitate the finding of waiver every time the holder of a privilege is shown to have voluntarily disclosed a significant part of the privliged matter, except when such disclosure is made during communications that are also privileged.

The exception is too narrow. Courts should not be required to find that waiver automatically follows from voluntary disclosure of privileged matter. The proper test should grant the judge flexibility to assess all the circumstances surrounding the disclosure; in that way he can evaluate the primary issue whether disclosure is compatible with the existence of the privilege. See *United States* v. *Woodall,* 438 F. 2d 1317, 1324–1326 (5th Cir. 1971) (and authorities cited therein). It seems, *e.g.,* that cooperation between Federal and State investigators involving a disclosure of informers should not work a forfeiture of the government's privilege regarding informers (Rule 510 was revised specifically to cover the situation), so that the question of waiver goes clearly beyond the fact of voluntary disclosure.

We note also that the proposed rule does not clearly permit the interpretation, in accordance with the authorities and the presumed intent of the Advisory Committee, that the privilege may not be used as a sword but only as a shield, and hence may be waived by the holder of the privileged communication. See *United States* v. *Woodall, supra,* at n. 3, citing Wigmore, McCormick, the American Law Institute Mode Code of Evidence, and the Model Code of Evidence drafted by the National Conference of Commissioners on Uniform State Laws. This difficulty would be resolved by the formulation suggested below.

Recommendation: We recommend that rule 511 be redrafted as follows:

"A person upon whom these rules confer a privilege against disclosure of a confidential matter waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclose any significant part of the matter *under such circumstances that it would be inappropriate to allow the claim of privilege.*"

The specific exception written into the draft for voluntary disclosures which are themselves confidential communications would be unnecessary under, and is therefore omitted from this formulation.

ARTICLE VI. WITNESSES

Rule 606—Competency of Jurors as Witnesses

Subdivision (b)—Inquiry Into Validity of Verdict or Indictment. The subdivision, by making a juror incompetent to testify concerning "the effect of anything upon his or any other juror's mind or emotions", suggests that a juror is competent to testify concerning all transactions during the jury deliberations.

Problem: The subdivision is a manifest departure from existing law concerning the extent to which jurors may impeach their verdict. The Supreme Court has drawn a distinction which permits a juror to testify that improper information came to the attention of the jury, *Mattox* v. *United States*, 146 U.S. 140 (1892), but precludes a juror from testifying about all other matters in the process by which the jury reached its verdict. *McDonald* v. *Pless*, 238 U.S. 264 (1915).

The Supreme Court summarized the rules concerning a juror's right to impeach his verdict in *Stein* v. *New York*, 346 U.S. 156, 178 (1953).

"Nor have the courts favored any public or private post-trial inquisition of jurors as to how they reasoned, lest it operate to intimidate, beset and harass them. This Court will not accept their own disclosure of forbidden quotient verdicts in damage cases. *McDonald* v. *Pless*, 238 U.S. 264. Nor of compromise in a criminal case whereby some jurors exchanged their convictions one issue in return for concession by other jurors on another issue. *Hyde* v. *United States*, 225 U.S. 347. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference." *McDonald* v. *Pless*, *supra*, at 267–268.

We disagree with the comment in the Advisory Committee's Note, that there is a trend toward allowing jurors to testify about everything but their own mental process. Recent federal decisions show continued adherence to the rule that jurors cannot testify about irregularities in their deliberations. *Holden* v. *Porter*, 405 F.2d 878 (10th Cir. 1969); *United States* v. *Chereton*, 309 F.2d 197 (6th Cir. 1962); *Farmer's Cooperative Elevator Ass'n* v. *Strand*, 382 F.2d 224, 230 (8th Cir. 1967) *cert. denied*, 389 U.S. 1014 (1967); *United States* v. *Crosby*, 294 F.2d 928, 949 (2d Cir. 1961).

Strong policy considerations continue to support the rule that jurors should not be permitted to testify about what occurred during the course of their deliberations. Recent experience has shown that the danger of harassment of jurors by unsuccessful litigants warrants a rule which imposes strict limitations on the instances in which jurors may be questioned about their verdict. *See Miller* v. *United States*, 403 F.2d 77 (2d Cir. 1968) *modified on other grounds*, 411 F.2d 825 (2d Cir. 1969); *United States* v. *Driscoll*, 276 F. Supp. 333 (S.D.N.Y. 1967).

Recommendation: We suggest that Subdivision (b) should be redrafted to provide as follows:

"(b) Inquiry into Validity of Verdict or Indictment. Upon inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter of statement occurring during the course of the jury's deliberations or to the effect of any thing upon his or any other juror's mind of emotions as influencing him to assent or dissent from the verdict or indictment or concerning his mental process in connection therewith, except that a juror may testify on the question of whether or not extraneous prejudicial information was improperly brought to the jury's attention during the course of its deliberations. Nor may a juror's affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received."

Rule 608—Evidence of character and conduct of witness

Subdivision (a)—Opinion and Reputation Evidence of Character. This rule deals with the use of testimony relating to the character trait of truth and veracity on the issue of the creditibility of a witness. This use of character testimony is distinct from the use of similar character evidence adduced to establish a defense or to negate an element of a crime, treated in Rule 405. Subdivision (a) departs from existing law in that it permits character testimony in the form of an opinion and in that it permits a testifying accused to buttress his credibility through character witnesses, without the necessity of a prosecutorial attack on his credibility.

Problem: We disagree with both aspects of the rule which, in our view, depart from the prevailing case law. The courts have consistently rejected proof of character by means of opinion. *See* McCormick, § 44, n. 3. The reason for this almost universal disfavor is that "[r]eputation evidence, though muted and colorless, is thought to have the advantage of avoiding distracting side-issues as to particular acts and incidents in the past life of the accused." McCormick, p. 334. In this connection, we refer to our comments with respect to Rule 405.

Recognizing the "enormous needless consumption of time which a contrary practice would entail," the Preliminary Draft specified that character evidence in support of a witness' credibility is admissible only after his credibility has been attacked. This view is amply supported by the case law and we urge readoption of that approach. Cf. *Mellon* v. *United States*, 170 F. 2d 383 (5th Cir., 1948); *United States* v. *Tomaiolo*, 249 F. 2d 683, 689 (2d Cir., 1957); McCormick § 49, p. 105, § 158, p. 334 n. 7; 4 Wigmore § 1124.

No precedent or reason justifies an exception when the accused testifies. This exception raises the specter of a long line of "oath-helpers," which the Committee itself commented on unfavorably on page 91, in its comments to Rule 704. Concerning this proposed exception, the comment to the Revised Draft notes on p. 75:

"The exception with respect to the accused who testifies is based upon the assumption that the mere circumstance of being the accused is an attack on character. It is consistent with the admissibility of evidence of good character under Rule 404 (a) (1)."

The mere fact that subdivision (a) (2) is "consistent with the admissibility of evidence of good character under Rule 404(a) (1)" lends no support to the proposal. It is one thing to allow a defendant to introduce character evidence in order to negate an element of the offense with which he is charged, as is the case under Rule 404(a) (1). It is quite another thing to allow a defendant to buttress his credibility as a witness if there has been no attack on his credibility, as is the case under the subdivision.

Recommendation: We suggest that the subdivision be redrafted as follows:

"*Reputation Evidence of Character.* The credibility of any witness including the defendant if he chooses to testify, may be attacked or supported by evidence in the form of reputation, subject to these limitations: The evidence may refer only to character for truthfulness or untruthfulness, and that evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise."

Subdivision 608(b)—Specific Instances of Conduct. This subdivision relates to specific instances of conduct introduced for the purpose of attacking or supporting credibility of a witness. Except to the extent cross-examination is limited to inquiries concerning specific instances which are "clearly probative of truthfulness or untruthfulness," it restates the common law. The words "clearly probative of truthfulness or untruthfulness and not remote in time" appear for the first time in the Revised Draft.

Problem: We disagree with the Rule's limitation upon the range of cross-examination. In support of this provision, the Standing Committee noted: "Effective cross-examination demands that some allowance be made for going into matters of this kind, but the possibilities of abuse are substantial. Consequently, safeguards are erected in the form of specific requirements that the instances inquired into be clearly probative of truthfulness or its opposite and not remote in time." There is no precedent which supports the limitation suggested. The long-accepted test is whether the matter is *relevant to truthfulness.* McCormick § 42, p. 87; And this was the test contained in the Preliminary Draft of the Rule and we strongly urge its adoption.

By limiting the scope of cross-examination the proposed Rule would provide too free an opportunity to parade false or biased character witnesses. The substantial possibility of abuse under the accepted test of cross-examination, which the comment to the Revised Draft conjectures, is less significant that there assumed. McCormick, for instance, noted that reversals on this ground are exceedingly rare. McCormick § 158, p. 336, n. 19. The possibility of abuse is best guarded against by the now common practice of trial judges requiring cross-examiners to give their professional assurance that they have reasonable grounds to believe that such specific instances of misconduct here occurred; *United States* v. *Beno*, 324 F. 2d 582, 588 (2d Cir. 1963), *cert. denied*, 379 U.S. 880 (1964); *United States* v. *Giddins*, 273 F. 2d 843, 845 (2d Cir.), *cert. denied*, 362 U.S. 971 (1960); *Malatkofski* v. *United States*, 179 F. 2d 905, 913 (1st Cir. 1950); by the rule that inquiry concerning specific instances of misconduct made in bad faith may be the basis for reversal of a conviction; and by the inherent limitation of the common law that "[i]f the witness denies the alleged misconduct, the examiner 'must take his answer,' not in the sense that he may not further cross-examine to extort an admission but in the sense that he may not call other witnesses to prove the discrediting acts." McCormick § 42, p. 89.

Further, the suggestion that the instances of misconduct must not be "remote in time," see *Shailer* v. *Bullock*, 78 Conn. 65, 61 A. 65 (1905), is best served by leaving the matter to the discretionary control of the trial judge. *Simon* v. *United States*, 123 F. 2d 80 (4th Cir., 1941). *Michelson* v. *United States*, 335 U.S. 469 (1949), while it did not deal solely with evidence of character which affected credibility, discussed the remoteness issue. There the court sustained an inquiry on cross-examination concerning an arrest of the defendant twenty-seven years prior to trial. If a character witness stresses his long acquaintance with the reputation for truth and veracity of the person whose credibility he buttresses, permissible inquiry should be equally extended in time. This discretionary authority of the judge is best indicated by an appropriate cross-reference to Rule 403, as was done in the Preliminary Draft.

Recommendation: We suggest adoption of the subdivision as contained in the Preliminary Draft.

Rule 609—Impeachment by evidence of conviction of crime

Subdivision (a)—General Rule. The revised draft adopts the rule derived from *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F. 2d 763 (1965). The proposed rule reads:

"(a) *General Rule.* For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime, except on a plea of nolo contendere, is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law which he was convicted, or (2) involved dishonesty or false statement regardless of the punishment, *unless (3), in either case, the judge determines that the probative value of the evidence of the crime*

is substantially outweiged by the danger of unfair prejudice." (Emphasis added).

The third clause was not contained in the Preliminary Draft.

The revised rule gives the trial judge discretion to permit defendants in criminal cases to testify without being impeached with prior convictions.

Problem: During the 91st Congress (1969–1970), both the Senate and the House of Representatives made a careful and thorough review of the operation of the *Luck* rule in the District of Columbia. Several proposals to modify and eliminate the rule were submitted to the Congress. Full hearings were conducted by both the Senate and House Committees on the District of Columbia. After consideration and debate, Congress expressly rejected the *Luck* rule. See District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91–358, § 133 (July 29, 1970).[1]

In reaching its decision to reject the *Luck* rule, Congress found the following reasons persuasive:

(1) The Department of Justice on July 11, 1969 submitted to Congress legislation to overrule the *Luck* case. The Department's major criticisms of the *Luck* rule were set forth by a Department spokesman. *Crime in the National Capital, Part 4, Hearings before the Senate Committee on the District of Columbia,* 91st Cong., 1st Sess., 1396–97 (1969):

"The obvious reason for permitting impeachment of witnesses by proof of conviction of crimes is to enhance the truth-seeking process of a trial. To arrive at the truth, the fact-finder, be it judge or jury, must assess the credibility of witnesses. It is difficult to conceive of evidence more probative on the issue of a witness' credibility than proof of conviction of a crime which reflects on honesty and veracity or which demonstrates a willingness to engage in conduct which entails substantial injury to and disregard of the rights of other persons or to the public. Preventing impeachment of a criminal defendant eliminates from the fact-finders consideration this highly probative evidence.

* * * * *

"In actual practice, the *Luck* doctrine . . . has proved totally unworkable, principally because no meaningful criteria exist to guide the trial court's exercise of discretion . . . Since no meaningful criteria do or can exist, appeal is encouraged."

(2) The Bar Association of the District of Columbia supported elimination of the *Luck* rule in the District of Columbia.

(3) The *Luck* rule is inconsistent with the law in almost 90 percent of the States.

Recommendation: In light of the fact that Congress specifically rejected the *Luck* rule, after finding the objections to it well-founded, it is recommended that the Committee on Rules of Practice and Procedure not incorporate the *Luck* rule into Rule 609. In lieu thereof, it is recommended that the Committee adopt the rule of impeachment enacted by the Congress of the United States in July, 1970, as part of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91–358, § 133 (July 29, 1970).[2]

[1] A Conference version was reported to the Congress. H. Rep. No. 1303, 91st Cong., 2d Sess. (1970). The Conference Report contained an identical impeachment by prior conviction provision to that passed by the House of Representatives on March 19, 1970. The Conference Report passed the House of Representatives on July 15, 1970 by a vote of 332 to 64 and passed the Senate on July 23, 1970 by a vote of 54–33. 116 Cong. Rec. H6743–44, 91st Cong., 2d Sess. (daily ed. July 15, 1970); 116 Cong. Rec. S12029, 91st Cong., 2d Sess. (daily ed. July 23, 1970).

[2] The complete text of the new District of Columbia law on impeachment by evidence of conviction of crime is included in the Appendix. Our view requesting adoption of 14 D.C. Code 305, in lieu of subdivision (a), obviates the necessity for further comment with respect to subdivisions (c), (d) and (e) except for noting that 14 D.C. Code 305(b)(2)(A), the provision corresponding to subdivision (c), differs from that provision for the sake of consistency with 14 D.C. Code 305(b)(2)(B). An equivalent of subdivision (d) is omitted by implication in 14 D.C. Code 305, in line with the general policy against public disclosure of juvenile adjudications. Subdivision (e) is substantially incorporated in 14 D.C. Code 305(d). Concerning subdivision (b), we note that 14 D.C. Code 305(b)(2)(B), the equivalent provision, is more consistent with the Preliminary Draft and the rejection by *United States* v. *Simpson,* D.C. Cir. No. 23, 269 (November 17, 1970), of attempts such as in *United States* v. *McCord,* 420 F.2d 255 (D.C. Cir. 1969), to begin the measurement of the remoteness of a prior conviction as closely to the time of the judgment as possible. It is our opinion that 14 D.C. Code 305(b)(2)(B) is superior to both the Revised and the Preliminary Draft of subdivision (b) in that it takes into account the principle that recent misconduct revives incidents of prior misconduct. Cf. *Michelson* v. *United States,* 335 U.S. 469, 484 (1948).

APPENDIX

§ 14–305. Competency of witnesses; impeachment by evidence of conviction of crime.

(a) No person is incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of a criminal offense.

(b)(1) Except as provided in paragraph (2), for the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a criminal offense shall be admitted if offered, either upon the cross-examination of the witness or by evidence aliunde, but only if the criminal offense (A) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (B) involved dishonesty or false statement (regardless of punishment). A party establishing conviction by means of cross-examination shall not be bound by the witness' answers as to matter relating to the conviction.

(2)(A) Evidence of a conviction of a witness is inadmissible under this section if—

(i) the conviction has been the subject of a pardon, annulment, or other equivalent procedure granted or issued on the basis of innocence, or

(ii) the conviction has been the subject of a certificate of rehabilitation or its equivalent and such witness has not been convicted of a subsequent criminal offense.

(B) In addition, no evidence of any conviction of a witness is admissible under this section if a period of more than ten years has elapsed since the later of (i) the date of the release of the witness from confinement imposed for his most recent conviction of any criminal offense, or (ii) the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction of any criminal offense.

(c) For purposes of this section, to prove conviction of crime it is not necessary to produce the whole record of the proceedings containing the conviction, but the certificate, under seal, of the clerk of the court wherein the proceedings were had, stating the fact of the conviction and for what cause, shall be sufficient.

(d) The pendency of an appeal from a conviction does not render evidence of that conviction inadmissible under this section. Evidence of the pendency of such an appeal is admissible.

Rule 611—Mode and order or interrogation and presentation

Subdivision (b)—Scope of Cross-Examination. This subdivision adopts a substantial change from the Preliminary Draft by making a witness subject to a cross-examination on *any matter relevant to any issue in the case, including credibility.* The Preliminary Draft had rejected this approach in the interest of the orderly presentation of evidence and restricted the use of cross-examination to the subject matter of direct examination and matters affecting credibility. Inquiry into additional matters, if permitted at all by the judge, was limited to the use of non-leading questions.

In support of the change, the Committee cites McCormick. A close inspection of the text of § 27 of McCormick's treatise, however, reveals the McCormick's discussion did not concern itself with the use of leading questions, but rather concerned itself with the scope of the inquiry on cross-examination.

Problem: The text of the Preliminary Draft, as well as the Revised Draft, indicates a desire not to restrict the cross-examiner entirely in his inquiry to the scope of the direct examination. In our judgment, the Preliminary Draft indicated a greater sensitivity to abuses implicit of McCormick's "wide open" rule. These abuses pertain to the use of leading questions, and the confusion which may result from a procedure permitting an opposing party to go into matters not necessary for the presentation of the case of the party proponent. Moreover, it is unfair to permit a party to adduce through leading questions evidence which properly belongs into the presentation of its own case. This unfairness is particularly manifest in situations where the witness is unfriendly to the party which called the witness and biased in favor of the cross-examining party. The Preliminary Draft recognized that a practice of limited cross-examination promotes orderly presentation of the case. This avoids confusion of juries and lawyers. The Preliminary Draft better served the doctrine that considerations of clarity in the presentation of evidence may outweigh even considerations of economy in the use of trial time.

Recommendation: We suggest adoption of the version of subdivision (b) contained in the Preliminary Draft.

Rule 612—Writing used to refresh memory

Rule 612 provides that an adverse party is entitled to have produced not only any document used by a witness to refresh his memory on the witness stand, but also any other document used prior to trial for the purpose of refreshing the witness' memory.

Problem: The Advisory Committee recognizes that the rule is a sharp departure from present practice which limits the right of inspection to documents which the witness uses to refresh his memory during the course of his testimony at the trial. We strongly oppose the extension of the inspection right advocated in the rule.

Under the discovery rules in Federal courts, discoverable material is ordinarily obtained by counsel prior to trial. The proposed rule would appear to compel production of material that would not otherwise be discoverable, unless the attorney preparing the witness had taken pains to assure that only material already available to opposing counsel was used in refreshing a witness' recollection. Such a rule would place a great burden on the government in many cases where, in preparing a government employee to testify, counsel might want to bring to the witness' attention classified reports or other privileged documents which would ordinarily not be discoverable by opposing counsel.

In addition, the proposed rule would create a severe practical problem. In the course of preparation for trial, especially in complex cases, privileged documents, such as internal

memoranda containing recommendations and the like, may have been used to refresh a witness' recollection. Obviously, these documents should not be made available to a defendant. Further, cross-examination of witnesses may deteriorate into lengthy fishing expenditions on the part of counsel seeking to inquire what pieces of paper a witness has seen during the course of preparation for his testimony. Insofar as documents used to refresh a witness' recollection prior to trial may be statements of other potential Government witnesses the rule is a radical departure from the Jencks Act, 18 U.S.C. 3500.

We believe that the present discovery rules contained in the Federal Rules of Criminal Procedure, in conjunction with the Jencks Act and the prevailing rule granting access to documents used by a witness during his testimony to refresh his recollection, sufficiently protect any legitimate interest which a defendant may have. We agree with the rule formulated by the Supreme Court in *Goldman* v. *United States*, 316 U.S. 129, 132 (1942):

"We think it the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them."

Recommendation: We suggest deletion of the words "either before or" from the text of the proposed rule.

ARTICLE VIII—HEARSAY

Rule 801—Definitions

Subdivision (d)(1)(iii) excludes from a definition of hearsay evidence of statements of a declarant in identifying a person which are made *"soon* after perceiving him." The commentary to this provision makes clear that the rule applies to corroborating testimony concerning a complaining witness' statements made at lineups or other identification procedures. Such testimony may consist of either prior consistent statements or hearsay, in the classic sense. Insofar as the proposed rule provides for admissibility, it is consistent with the decision of the Supreme Court in *Gilbert* v. *California*, 388 U.S. 263 (1967).

Problem: The qualification that the statement of identification must have been given "soon" after the declarant perceived the person whom he identifies, injects into the suggested rule a possible limitation upon which no court has passed. We understand the rule to mean that the identification must take place soon after the offense. There has been no decision requiring that lineups be held within a particular period of time after the commission of the offense.

Practical considerations militate against such a restrictive approach. The offender may not be apprehended or otherwise be subject to a lineup until a considerable time after the offense. The victim may be hospitalized as a result of an attack upon him and may not be able to attend a lineup until a considerable period after the event. Even if the proposed rule is read as implying that the statement of identification must have been made "soon" after commencement of the identification procedure, we regard it as unduly restrictive. Through fear of retribution, a complaining witness may not make a statement of identification until shortly before he actually testifies at trial, a considerable period of time after the identification procedure, as for instance in *United States* v. *Hinkle*, D.C. Cir. No. 24, 273 (July 19, 1971). Yet, even such a statement has some probative value in corroborating the in-court identification.

Recommendation: We suggest deletion of the word "soon" from the rule.

Rule 804—Hearsay exceptions: Declarant unavailable

Subdivision (b)(4)—Statement Against Interest: This rule extends admissibility to statements against penal or social interest.

The 1971 draft has improved the 1969 draft by substituting the word "disgrace" for the words "social disapproval".

Problem: However, the change does not eliminate the serious problems relating to admissibility of statements against penal or social interest. Our basic objection to statements against social or penal interest is that the standard is so vague as to be unworkable.

As the Advisory Committee note recognizes, it has long been established that at common law statements against penal interest are not an exception to the hearsay rule. In *Donnelly* v. *United States*, 228 U.S. 243 at 273 (1912), the Supreme Court said:

"Hearsay evidence, with a few well recognized exceptions, is excluded by courts that adhere to the principles of the common law. The chief grounds of its exclusion are, that the reported declaration (if in fact made) is made without the sanction of an oath, with no responsibility on the part of the declarant for error or falsification, without opportunity for the court, jury, or parties to observe the demeanor and temperament of the witness, and to search his motives and test his accuracy and veracity by cross-examination, these being most important safeguards of the truth, where a witness testifies in person, and as of his own knowledge; and, moreover, he who swears in court to the extra-judicial declaration does so (especially where the alleged declarant is dead) free from the embarrassment of present contradiction and with little or no danger of successful prosecution for perjury. It is commonly recognized that this double relaxation of the ordinary safeguards must very greatly multiply the probabilities of error, and that hearsay evidence is an unsafe reliance in a court of justice."

Illustrative of the problems is *United States* v. *Dovico*, 380 F. 2d 325 (2d Cir. 1967), *cert. denied* 389 U.S. 944, in which the Court stated:

"Judge Sugarman recognized that the statements would not be admissible as against penal interest, but felt that they would be against social interest. Judge Cooper, on the showing made on the second trial, held the statements not admissible as against social interest. With this ruling we agree.

"The only evidence of any effect on his standing in the prison community was Plattner's opinion, which Judge Cooper did not credit, and properly so, for in addition to Plattner's unreliability as a witness, it was quite plain that after Gangi's alleged statement, those alleged to have heard it, including Plattner, in the prison vernacular 'stood with' (accepted) Gangi in spite of it." [380 F. 2d at 327–328].

Accord, Scolari v. *United States*, 406 F.2d 563 (9th Cir. 1969), *cert. denied* 395 U.S. 981, in which an appellant was convicted of driving a car across the border with drugs concealed in the tires. The Court described the situation as follows:

"Scolari's defense was that he did not know that the drugs were there. At the trial he sought to testify that Judi Taylor told him that she put the items in the tire and that he was not a party to it. The evidence was excluded.

"Scolari urges that the testimony should have been allowed as an exception to the hearsay rule, on the ground that Taylor's declarations were against her penal interest. The weight of authority is against him." [406 F.2d at 563].

Unworkable vagueness is compounded by the provision that statements against interest are admissible only when they are so far against the declarant's interests that "a reasonable man in his position would not have made the statement unless he believed it to be true." This injects an issue as to whether the determination should be made on an objective or subjective basis. We believe that the question should be left to the discretion of the courts.

The Advisory Committee comment with respect to Rule 804(b)(4) recognizes that the common law rule is not a bar in every case saying:

"The common law required that the interest declared against be pecuniary or proprietary but within this limitation demonstrated striking ingenuity in discovering an against-interest aspect. *Higham* v. *Ridgway*, 10 East 109, 103 Eng. Rep. 717 (K.B. 1808); *Reg.* v. *Overseers* of *Birmingham*, 1 B. & S. 763, 121 Eng. Rep. 897 (Q.B. 1861); McCormick, § 256, p. 551, nn. 2 and 3." [1971 draft, p. 130]

Recommendation: We suggest that the provisions relating to penal and social interest should be deleted. This would not mean that all such statements would have to be excluded as the comment to the proposed rule recognizes.

Also, the final sentence should be deleted. This sentence apparently is designed to deal with problems created by the decision in *Bruton* v. *United States*, 391 U.S. 123 (1968). Construed as a constitutionally required exception, the final sentence is too restrictive. The Supreme Court has recently decided that there is no Sixth Amendment violation where the codefendant declarant testifies as a witness and is subject to cross-examination. *Nelson* v. *O'Neil*, 91 S. Ct. 1723 (1971). *See also United States* v. *Boone*, 401 F. 2d 659, 663 (3d. Cir. 1968), certioraria denied *sub. nom. Jackson* v. *United States*, 394 U.S. 933 (1969). The problem should be left entirely to the courts.

We suggest that Rule 804(b)(4) should be redrafted as follows:

"(4) *Statement against Interest.* A statement which was at the time of its making contrary to the declarant's pecuniary or proprietary interest."

U.S. DEPARTMENT OF JUSTICE,
Washington, D.C., August 6, 1971.

Hon. ALBERT B. MARIS,
Chairman, Committee on Rules of Practice and Procedure Judicial Conference of the United States Supreme Court Building, Washington, D.C.

DEAR JUDGE MARIS: I am writing to register my objections to a number of the Proposed Rules of Evidence for the United States Courts and Magistrates contained in the Revised Draft released in March of this year. My objections are based not only on my experience as United States Attorney for the District of Columbia, but also on my experience for many years as an Assistant United States Attorney and a trial attorney in private practice.

I have been advised that the Department of Justice is preparing a more comprehensive report setting forth the most serious objections it has to the proposed rules. My failure to comment on all the rules discussed by the Department should not be construed, however, as indicating any disagreement on my part with its objections.

I shall discuss those rules to which I object as they appear in sequence in the Revised Draft.

1. PROPOSED RULE 104(d). PRELIMINARY QUESTIONS

The second sentence of Rule 104(d) provides:

Testimony given by him [an accused] at a hearing in which he is asserting any constitutional right, or any right to have evidence suppressed or excluded, is not admissible against him as substantive evidence but may be used for impeachment if clearly contradictory of testimony given by him at the trial.

I recommend that this sentence be deleted. This rule excludes as substantive evidence testimony given by an accused in open court

while represented by counsel. Such an exclusion is clearly inconsistent with the function of a trial as a truth-seeking process.

The Advisory Committee's Note to this rule indicates that this exclusion is based on *Simmons* v. *United States*, 390 U.S. 377 (1968). In my view, however, the proposed rule goes far beyond *Simmons*. First, it extends the *Simmons* exclusion to testimony to assert *non*constitutional rights whereas *Simmons* involved only constitutional rights. Second, although the formulation of the rule in the Preliminary Draft of March, 1969, excluded such testimony only "on the issue of guilt at the trial,"—the language of *Simmons*—the Revised Draft extends the exclusion to us "as substantive evidence." This would apparently prohibit the use of such evidence in prosecutions for perjury and other similar offenses, a clearly objectionable result. Third, the proposed rule limits the use of the testimony as impeachment only if it is "clearly contradictory" of the accused's testimony at trial. I am aware of no rule which limits impeachment by use of prior statements or testimony to material that is "clearly contradictory." The standard test is whether or not the prior statement or testimony is inconsistent. *E.g.*, McCormick, *Law of Evidence*, § 34. I see no reason to depart from this standard test.

The above paragraph contains my objections to the rule as presently drafted. I also wish to bring to your attention a more fundamental objection, an objection which warrants deletion of the rule in its entirety. In May of this year, in *McGautha* v. *California*, the Supreme Court questioned the validity of the rationale of the *Simmons* case—that is, the concept that a "tension" between constitutional rights may justify on Fifth Amendment grounds exclusion of an accused's testimony to assert a constitutional right. Since this rationale, basic to the proposed rule, is now considered by the Supreme Court as open to question as a matter of constitutional law, it is, in my view, an inopportune time to try to codify the *Simmons* rationale. I therefore recommend deletion of the second sentence.

2. RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS, OTHER CRIMES

Rule 404(b) provides that while evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show that he acted in conformity therewith, it "may" be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The use of the word "may" indicates that the admissibility of such evidence is purely discretionary with the court and no guidance is provided to trial judges for the exercise of their discretion. As both 1 Wigmore, *Evidence*, § 216, and McCormick, § 157, make clear, however, if relevant to proof of motive, intent, knowledge, etc., evidence of other crimes *is admissible*. The only limitation placed upon the admissibility is that the person against whom the evidence is introduced is entitled to an instruction explaining the limited purpose for which the evidence is admitted.

A rule which makes evidence admissible only in the discretion of the court, with no guidelines for the exercise of discretion, can be expected to operate in such a way as to deprive a party to litigation of evidence which is highly probative of such critical issues as motive, intent, knowledge, etc. This is particularly so because judges, for obvious reasons wishing to avoid appellate reversal, will understandably be inclined to exercise their discretion to exclude the evidence, particularly in criminal cases in which the Government has no right of appeal. I recommend that the second sentence of proposed Rule 404(b) be redrafted to read as follows:

It [proof of other crimes, wrongs, or acts] is admissible, however, if relevant to prove such matters as motive, opportunity, intent, preparations, plan, knowledge, identity, or absence of mistake or accident.

There is no need to add the right to a limiting instruction since that is provided for in Rule 106.

3. RULE 405. METHODS OF PROVING CHARACTER

Proposed Rule 405(a) and also Rule 608(a) permit proof of character, where relevant, to be by personal opinion in addition to reputation. Use of personal opinion to prove character is not permitted in the federal courts. *Michelson* v. *United States*, 355 U.S. 469 (1948). As McCormick observes (p. 334–35):

Reputation evidence, though muted and colorless, is thought to have the advantage of avoiding side-issues as to particular acts and incidents in the past life of the accused.

Opinion testimony, however, would inevitably lead to the introduction into a case of collateral issues which can only result in confusion and distraction of the jury from the main issues in dispute. Moreover, particularly as to moral traits of character, individual opinion is easily fabricated and difficult to cross-examine.

It can be persuasively argued that proof of character is both uncertain and distracting and, consequently, should not be allowed at all. If, however, character evidence is to be permitted, I oppose expanding the methods of proof and departing from the procedure set forth by the Supreme Court in *Michelson*.

4. RULE 505. HUSBAND-WIFE PRIVILEGE

Rule 505 authorizes a person to prevent his spouse from testifying against him in a criminal proceeding even if that spouse is willing to testify. I agree with the following comment about this privilege by McCormick (p. 145):

The privilege has sometimes been defended, after the manner in which we find reasons for inherited customs generally, as protecting family harmony. But family harmony is nearly always past saving when the spouse is willing to aid the prosecution. The privilege, in truth, is an archaic survival of a mystical religious dogma and of a way of thinking about the marital relation, which are today outmoded.

Congress has previously provided by statute that in the District of Columbia a person has a privilege to refuse to testify against his spouse but that spouse cannot claim the privilege; only the spouse called to testify can. D.C. Code, § 14–306(a). This rule has operated fairly and effectively in the District of Columbia for over fifty years. I agree with this resolution by the Congress and recommend its adoption as the rule for the federal courts.

5. RULE 510. IDENTITY OF INFORMER

With the widespread growth of organized crime, the need for law enforcement authorities to have access to inside information and to preserve these sources of information makes it more imperative than ever that the law provide adequate procedures for protecting the identity of these sources. Disclosure of identity should be required, particularly in criminal cases, only when the strong public interest in the flow of information is substantially outweighed by the right of an accused to present his defense as to guilt or innocence.

While the case law as developed by the Supreme Court and the federal courts of appeal provides adequate safeguards for protecting the identity of informers, proposed Rule 510, in my view, would place some of these safeguards in jeopardy.

A. Rule 510(a) extends the informers' privilege only to informers who furnish information purporting to reveal a violation of law. There are other informers, however, who provide information concerning organized crime which does not specifically relate to a crime or violation of law. The information may relate to investigation involving a suspected violation of law. Such an informant's identity should not be disclosed. Section 510(a) should be redrafted, accordingly, to extend the privilege to informers who provide this kind of information.

B. Furthermore, proposed Section 510(c)(2) provides that if "circumstances indicate a reasonable probability that the informer can give testimony or information necessary to a fair determination of a material issue in the case," the informer's identity must be revealed upon pain of dismissal of criminal proceedings. The language used in *Roviaro* v. *United States*, 353 U.S. 53, 60–1 (1953) pertaining to disclosure of an informant's identity in criminal cases is whether disclosure "is relevant and helpful to the defense of an accused." This has been consistently construed by the federal appellate courts to limit disclosure to those situations, relating only to guilt or innocence of an accused, in which the informant has been an actual participant in or a witness to the offense charged, the factual situation in *Roviaro*. See *e.g.*, *Rocha* v. *United States*, 401 F. 2d 529 (5th Cir. 1968), *cert. denied*, 393 U.S. 1103 (1969); *Churder* v. *United States*, 387 F. 2d 825, 831–32 (8th Cir. 1968); *Lannom* v. *United States*, 381 F. 2d 858, 861–2 (9th Cir. 1967), *cert. denied*, 389 U.S. 1041 (1968); *Garcia* v. *United States*, 373 F. 2d 806, 808 (10th Cir. 1967); *United States* v. *Pitt*, 382 F. 2d 322 (4th Cir. 1967).

The proposed rule, in covering both civil and criminal cases, is too broad. In line with the above-cited cases. I therefore recommend that as to criminal cases disclosure be required only when relevant and helpful to the defense as to guilt or innocence, that is, when the informant is an actual participant in or a witness to the offense charged.

Section 510(c)(2) also fails to set forth an adequate procedure by which a trial judge can determine whether the test requiring disclosure has been met. A procedure must be set forth by which the judge can determine whether there is a reasonable probability that the informer can give the necessary testimony. This should be by an *in camera* proceeding in which the information is submitted to the court in written form. No counsel should be present unless all counsel are present. Moreover, disclosure must be based on facts, not speculation. *Lannom* v. *United States*, *supra*, at 861. As the Court of Appeals for the Fifth Circuit observed in *Miller* v. *United States*, 273 F. 2d 279, 281 (5th Cir. 1959), *cert. denied*, 362 U.S. 928 (1960):

If the informer's relation to the acts leading directly to or constituting the crime may be assumed from a fertile imagination of counsel, the Government in practically every case would have to prove affirmatively that the informant had not done any such likely acts. Having done that, all would be revealed and the informer privilege, deemed essential for the public interest, for all practical purposes would be no more. 273 F. 2d at 281.

Finally, the proposed rule is subject to the interpretation that if the Government refuses to disclose an informant's identity in a multiple-defendant case, the proceedings are to be dismissed as to all defendants even if the anticipated testimony of the informant is not necessary to the defense of all the defendants. The rule should be redrafted to avoid this result.

C. Rule 510(c)(3) sets forth those circumstances in which an informer's identity must be revealed when the issue is not guilt or innocence, but the legality of the means by which evidence was obtained. The cases I have cited above indicate that disclosure is *not* required when an informer's information relates only to establishing probable cause, a holding consistent with prior decisions of the Supreme Court. *Rugendorf* v. *United States*, 376 U.S. 528 (1964); *McCray* v. *Illinois*, 386

U.S. 300 (1967). As the Supreme Court observed in *McCray*, 386 U.S. at 309 at 311–12:

What *Roviaro* thus makes clear is that this Court was unwilling to impose any absolute rule requiring disclosure of an informer's identity even in formulating evidentiary rules for federal criminal trials. Much less has the court ever approached the formulation of a federal evidentiary rule of compulsory disclosure where the issue is the preliminary one of probable cause, and guilt or innocence is not at stake. . . .

In sum, the court in the exercise of its power to formulate evidentiary rules for federal criminal cases has consistently declined to hold that an informer's identity need always be disclosed in a federal criminal trial, let alone in a preliminary hearing to determine probable cause for an arrest or search.

I therefore question the desirability of any rule permitting disclosure of an informer's identity when his information is unrelated to guilt or innocence. This is particularly so when the challenged evidence was obtained pursuant to a warrant.

If there is to be such a rule, I have the following comments. Under the proposed rule, if the Court is not satisfied as to the reliability of an informer whose information is used to establish probable cause, he may require disclosure of the informer's identity. The rule states only that disclosure "may" be *in camera*. I recommend that disclosure, if required, should *only* be *in camera*, with additional information establishing reliability or credibility provided in writing. The purpose is to satisfy the judge. When disclosure is unrelated to guilt or innocence, there is no justification for disclosure of identity to an accused.

This section as drafted also appears to permit the court to require disclosure without an alternative to the Government to decline and face dismissal. The availability of this alternative should be made clear, as it is in the preceding section.

Finally, Rule 510(c) (3) should be amended to make clear that information from an informer to establish probable cause is sufficient if the informer is reliable *or* credible. *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *McCray* v. *Illinois*, *supra* at 311; *United States* v. *Harris*, ——— U.S. ———, decided June 28, 1971.

6. RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

Although proposed Rule 608(a) makes inadmissible evidence of the truthful character of a witness unless the character of the witness for truthfulness has been attacked, it provides an exception with respect to an accused in a criminal case who testifies in his own behalf. To my knowledge, this exception is without precedent. It was not included in the Preliminary Draft of March, 1969.

The only explanation provided for this addition is that merely being the accused in a criminal case "is an attack on character." I respectfully disagree with this explanation. A mere indictment is simply not an attack on the truthfulness of the accused as a witness. It may constitute an attack as to a particular character trait based on the nature of the offense charged, i.e., peacefulness in a charge of homicide, honesty in a charge of fraud. And in those situations, the defendant may, of course, defend with character evidence under Rule 405. But, except for a charge such as perjury, an indictment is unrelated to the accused's truthfulness.

I see no justification, therefore, for departing from the accepted rule that until the truthfulness of a witness is attacked, evidence of truthful character is inadmissible.

For the same reasons set forth in my comments on proposed Rule 405, I consider it unwise to depart from the federal practice of limiting proof of character to reputation. I oppose use of opinion testimony, particularly to establish a moral trait such as truthfulness.

7. RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

Rule 609(a) provides that a court may prohibit impeachment of a witness by proof of conviction of a crime if it finds that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. As the Advisory Committee's Note makes clear, this "provision finds its genesis in *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965)" a case which has given rise to a rule known as the *Luck* rule.

The operation of the *Luck* rule in the District of Columbia—the only District in which it has been in full force and effect for a substantial period of time—was intensively studied by the Congress in 1969 and 1970. Both the Senate District Committee and the House District Committee independently concluded that the *Luck* rule should be abolished. The recommendations of each of these committees that a judge should not have discretion to limit or exclude impeachment by proof of prior convictions was not challenged on the floor of either House of Congress and became law on July 29, 1970, and effective February 1, 1971. Public Law 91–358, Sec. 133.

Proposed Rule 609(a), therefore, is wholly inconsistent with recent legislation of the Congress which was enacted for the specific reason of overturning a decision which the rule attempts to reinstate. The proposed rule included in the Revised Draft is also wholly inconsistent with the conclusion arrived at by the Advisory Committee in the Preliminary Draft. As the Note to the Preliminary Draft makes clear, the Advisory Committee thoroughly considered and specifically declined to follow the *Luck* rule. It is also, in my view, highly significant, that the Bar Association of the District of Columbia, in a referendum participated in by nearly 1,400 lawyers, in February, 1970, voted to overrule the *Luck* decision. The Department of Justice recommended abolition of the *Luck* rule and I testified in favor of eliminating it before the Senate District Committee.

Since it became law in the District of Columbia, my office has found the rule to be wholly impractical and unworkable. This is so despite the attempt in *Gordon* v. *United States*, 383 F. 2d 936 (1967) two years after *Luck*, of then Circuit Judge Burger to set some guidelines for the exercise of the discretion given trial judges by the *Luck* rule and thereby bring some order out of the confusion that existed. Not only do judges vary tremendously in their application of *Luck*, but also the hearings required by *Luck* are time-consuming and increase the excessive congestion of the Courts. Furthermore, because the judges are aware of the close scrutiny their exercise of discretion receives on appeal when ever they permit impeachment, they tend to avoid the problem by excluding impeachment altogether. This result, as observed by the Advisory Committee in its Note to the Preliminary Draft, "enables an accused to appear as a person whose character entitles him to credence, when the fact is to the contrary." The *Luck* rule, as I testified before the Senate District Committee, impedes the pursuit of truth.

As was noted in the Report of the House District Committee, the rule is so unworkable that even appellate judges cannot agree among themselves. A rule which in five years has resulted in over thirty written appellate opinions, a significant number of them being split decisions, hardly merits the label of a rule.

For these reasons I recommend that with respect to impeachment by proof of prior convictions, the committee adopt the legislation enacted by the Congress in 1970 in the Court Reform and Criminal Procedure Act for the District of Columbia now found in D.C. Code, § 14–305 (Supp. IV, 1971).

8. RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

Proposed Rule 611(b) departs from the rule in the Federal courts and the majority of the states which limits the scope of cross-examination of a witness to matters reasonably related to those testified to on direct examination. McCormick, *Law of Evidence*, § 21. The proposed rule is also inconsistent with the proposal contained in the Preliminary Draft which limits cross-examination "to the subject matter of the direct examination and matters affecting the credibility of the witness."

The Preliminary Draft proposal and the Federal Rule permit an orderly, logical presentation of evidence, first by the plaintiff or prosecution, then by the defendant. There are many situations, particularly with the expansion of immunity provisions (Title II of the Organized Crime Control Act of 1970, Public Law 91–452) in which a hostile witness is called to the stand by the prosecution for a limited purpose. Despite his limited direct testimony, the proposed rule would permit him to be cross-examined by leading questions wholly unrelated to his direct examination or his credibility. This is not only unfair to the party calling him but is also disruptive of an orderly presentation of a case. For its permits an astute opposing counsel to interrupt a party's presentation of its case and thereby confuse and distract the jury.

The only limitations on the operation of this rule is the phrase in 611(b) which permits a judge "[I]n the interests of justice" to limit cross-examination and the word in 611(c) "Ordinarily", which is intended to limit the right to ask leading questions on cross-examination. These limitations are, in my view, wholly inadequate to avoid the dangers I have specified in the preceding paragraph. The Advisory Note indicates that the existing rule creates excessive bickering in the courtroom as to what is the scope of the direct. With all respect, this has not been my experience based on many years trial experience in the courtroom. I believe far more harm will be done to the orderly presentation of evidence in both civil and criminal trials and the manner in which testimony is elicited by the proposed rule with its virtual unlimited right of cross-examination.

If there is a compelling need for a witness called for a limited purpose to complete his testimony in one trip to the witness stand, the judge can allow him to be examined as if on direct by opposing counsel, even though this interrupts the presentation of its case by the party calling him. The Preliminary Draft proposal authorizes it. I recommend that the Preliminary Draft Rule be retained and that proposed Rule 611 be modified accordingly.

9. This concludes my presentation of objections to particular rules of the proposed rules of evidence. Though an appropriate ruling on the admissability of evidence depends on the facts and circumstances of the particular case, I support the attempt to codify rules of evidence in order to promote uniformity and certainty in the administration of justice in the courts. Nevertheless, the objections, I have to the proposed rules, when considered together, are so substantial, that I feel obliged to observe that unless changed I am unable to support adoption of these rules.

Thanking you in advance for the consideration you have given my comments, with best regards,

Sincerely yours,

THOMAS A. FLANNERY,
U.S. Attorney.

THE UNIVERSITY OF TEXAS AT AUSTIN,
Austin, Tex., August 13, 1971.

Hon. JOHN L. MCCLELLAN,
U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: My attention

has been called to your remarks in the Senate on August 5th in connection with the introduction of S. 2432. I was interested in your speech because I am, and have been for more than seven years, a member of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, to which you made reference on that occasion.

I was hospitalized for a considerable time last fall after a knee operation. As a result, I did not attend either of the meetings of the Standing Committee at which the proposed Rules of Evidence were considered. I took no part, as is reflected in the report of the Standing Committee to the Judicial Conference, in any of the actions of the Standing Committee with regard to the Evidence Rules.

Though I took no part in all of this, I am concerned by your suggestion that in Rule 609, embodying a form of the *Luck* rule, the Standing Committee took a position that "Congress had recently specifically disapproved." In all of the years that I have been associated with federal rulemaking, there has been the utmost deference by the various committees to the will of Congress and I do not know of any instance in which a rule has been proposed that would be contrary to a recent expression of the view of Congress.

I do not understand Rule 609 to be an exception to this. The Conference Report accompanying S. 2601, the bill that became the District of Columbia Court Reform and Criminal Procedure Act of 1970, said:

The language of the House amendment and the conference substitute is similar to the rule on impeachment recommended by the Advisory Committee on Rules of Evidence to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. Should the Supreme Court of the United States subsequently promulgate as part of prescribed rules of evidence for all Federal courts a different rule of impeachment, the conferees suggest the appropriateness of Congress reconsidering the rule adopted in the conference substitute.

If I had been able to participate in the deliberations of the Standing Committee on the Evidence Rules, I would have read this language from the Conference Report as meaning that Congress was incorporating what the rulemakers were then proposing but that it recognized that the end result of the rulemaking process might be something quite different. On this reading, I would have thought that the Standing Committee, the Judicial Conference, and the Supreme Court were free to devise what they considered to be the best possible rule and were not limited by the provision adopted for the District of Columbia.

As you quite properly say in your remarks, "reasonable men can differ over the merits of the Luck rule." I know of no difference, however, on the proposition that the rulemakers should carefully heed the expressed will of Congress. I write you only to emphasize that my colleagues who made these changes in proposed Rule 609 could reasonably believe that they were not disregarding Congress in doing so.

Sincerely yours,

CHARLES ALAN WRIGHT,
McCormick Professor of Law.

SEPTEMBER 2, 1971.

Prof. CHARLES ALAN WRIGHT,
The University of Texas at Austin School of Law, Austin, Tex.

DEAR PROFESSOR WRIGHT: I did not see your kind note of August 13th until my return from Arkansas after the summer recess. It is for this reason that my reply to you has been so long delayed.

The language from H.R. No. 91–1303, 91st Cong., 2d Sess. 231 (1970), quoted in your letter, was not understood by the Congress to have the meaning you suggest, and, it is my understanding, your reading of it does not, in fact, reflect the intent of the conferees.

Both the Senate and the House passed bills in the 91st Congress that set aside the so-called *Luck* rule (121 U.S. App. D.C. 151, 348 F2d 763 (1965) which gave trial judges discretion, in the interest of avoiding undue prejudice, to permit criminal defendants to testify without impeachment by prior convictions. The Senate measure was passed by unanimous consent in December and consolidated in a more general bill in March (Cong. Rec., vol. 115, pt. 28, pp. 37183–37196; vol. 116, pt. 7, pp. 8913–8975). Although it set aside the so-called *Luck* rule, it did contain language limiting the character of the convictions that could be used for impeachment to those relevant to honesty or veracity. In contrast, the House measure allowed a broader approach; it was passed in March (Cong. Rec., vol. 116, pt. 6, pp. 8086–8221). Nevertheless, the record shows that during the debate Congressman Dennis of Indiana proposed that the House measure be limited in a fashion similar to the Senate measure, although he noted that his "amendment in nowise . . . [tried] to retain the *Luck* doctrine." (Cong. Rec., vol. 116, pt. 6, pp. 8151–8157.) The Dennis amendment, however, was defeated two to one. (Id at p. 8157). The *Luck* rule was not, therefore, the impeachment issue that divided the House and Senate. Division existed on the issue of relevancy not undue prejudice. This can be seen most clearly in the statement of Managers on the Part of the Senate, 91st Cong. 2d Sess. 24–25 (1970), which noted:

Both versions of the bill on impeachment of a witness (notably the defendant) by evidence of prior convictions sought to curtail the case law authority for a trial court in its discretion to exclude evidence of conviction whenever the prejudicial effect of the evidence "far outweights" its probative value as to credibility. See *Luck* v. *United States*, 348 F. 2d 736 (D.C. Cir. 1965). The Senate version would have codified the District of Columbia case law requirement that such conviction reflect upon the honesty or veracity of the witness; but the conferees receded to the House position which allows impeachment by proof of any felony conviction or any misdemeanor involving dishonesty or false statement. The House version—which is the rule in most states and which is supported by a draft of the Advisory Committee on Rules of Evidence to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States—is premised upon the conclusion that a felony conviction is "[a] demonstrated instance of willingness to engage in conduct in disregard of accepted patterns [which] is translatable into willingness to give false testimony."

The recession by the Senate conferees was explicitly conditioned, however, upon a conference agreement to reconsider the rule on impeachment if the Advisory Committee's draft is substantially modified in the Federal rule adopted and promulgated by the Supreme Court. It would be clearly antithetical to have one rule for the District's local courts and a different rule for the Federal courts. The Senate conferees would indeed urge the appropriate judiciary subcommittees to reconsider this provision when the new Federal Rules of Evidence are adopted and become subject to congressional disapproval.

Consequently, you are mistaken, I suggest, if you feel that anything in the legislative history of P.L. No. 91–358 manifests a willingness on the part of the Congress to return to the *Luck* rule, and it is most unfortunate if a possible ambiguity in the House Statement contributed to the Committee's adoption of the *Luck* rule.

I was most disturbed to learn that you did not attend either of the meetings in which the proposed rules were considered and I had not realized that you took no part in the actions of the Standing Committee until you drew this to my attention in your letter. I am constrained to observe now, however, that my confidence in the March 1971 draft has been further undermined. I have long been aware of your admirable work in the area of Federal procedure and it was in no small part in reliance on the sound judgment and expertise of men such as yourself that I have been willing up until now to accept certain of the more radical changes proposed in the present draft of the rules.

With all the best, I am

Sincerely yours,

JOHN L. MCCLELLAN,
U.S. Senator.

THE UNIVERSITY OF TEXAS
AT AUSTIN,
SCHOOL OF LAW,
Austin, Tex., September 13, 1971.

Hon. JOHN L. MCCLELLAN,
U.S. Senate,
Washington, D.C.

DEAR SENATOR MCCLELLAN: I am extremely grateful to you for your very helpful letter of September 2nd discussing the legislative history of that portion of P.L. 91–358 that deals with impeachment of witnesses by the use of prior convictions. I quite agree with you that the full history as you developed it and the statement of the Managers on the part of the Senate, which you quoted, do shed a different light than I had drawn from the statement of the House Manager. I do not now recall how I came to see the statement of the House Manager or why I saw it and not that of the Senate Manager. I had thought that perhaps I had relied for the legislative history on United States Code Congressional and Administrative News. I have it in my office and do frequently look only to it unless I am preparing a brief or an article for which the full legislative history is of importance. Quite often it will print only a report from one house and not the other. I looked this morning to see if that could explain my mistake but so far as I can find it never printed any legislative history on P.L. 91–358.

I appreciate very much the comments in the final paragraph of your letter. I am glad to say that I have now recovered completely from my knee operation and I will be present when the Standing Committee meets September 30th and October 1st. Do consider the evidence rules in the light of comments on the revised draft. I am sure that your concern will be given great weight by the Committee. I know that they will by me.

I have never had the pleasure of meeting you but I did get to watch you in action two years ago when I attended the hearings before the Judiciary Committee for three days hoping unsuccessfully to testify in support of Judge Haynsworth.

Sincerely,

CHARLES ALAN WRIGHT.

OBSERVATIONS ON U.S. DEFENSE SITUATION

Mr. GOLDWATER. Mr. President, as the Soviet Union pushes ahead on its massive program of military buildup, important new questions are being raised throughout the country on subjects such as the proper level of U.S. defense spending, the nature and disposition of our strategic forces as well as the whole subject of military bases.

Underscoring the importance of these considerations is the security of the United States of America and the security of our allies in the years directly ahead. It is important to understand that in all defense discussions this is the

paramount consideration—it overshadows everything else. It renders academic arguments about spending priorities and about domestic problems such as education, health, housing, and welfare.

Because of this, I should like to draw the Senate's attention to some very timely and profound observations on our defense situation voiced recently by Gen. John D. Ryan, Chief of Staff, U.S. Air Force. I ask unanimous consent that General Ryan's speech of September 22, 1971, before the Air Force Association, be printed in the RECORD.

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

REMARKS BY GEN. JOHN D. RYAN, CHIEF OF STAFF, U.S. AIR FORCE ASSOCIATION, SEPTEMBER 22, 1971

I always enjoy these Air Force Association luncheons because they give me the opportunity to exchange thoughts with many of the people who help the Air Force do its job.

I have especially looked forward to this 1971 convention. As the Air Force Association Silver Anniversary Year draws to a close, the Air Force itself begins its 25th year of existence as a co-equal with its sister services. We have both come a long way.

Over the past quarter century, the Air Force Association has measured up to the tasks it set out to accomplish. Its support of aerospace power has been effective and unflagging. I know I speak for all in the United States Air Force when I express appreciation for everything the Air Force Association has done, and is doing, for us.

During these past twenty-five years, in the process of accurately portraying aerospace capabilities and doctrine, the Air Force Association has consistently shown a comprehensive understanding and awareness of the overall defense needs and problems of the United States.

If ever such an awareness were needed in this country, it is now. As the world has grown more complex, as America in general and the American military in particular have been indelibly marked by the war in Southeast Asia, and as we have begun to put together the forces and plans needed to support a strategy of Realistic Deterrence, there have arisen many differing points of view about what *is* happening now and what actions we can and should take.

One point of view sees this as a time when the United States is completely withdrawing from the world; another views the U.S. as solidly encamped around the world like Roman Legions.

One view hold that the strategic forces of both the United States and the Soviet Union are already capable of so much destruction that there is no point in spending any more money in this area; another suggests that we can maintain a strategic deterrent with fewer than our three current strategic forces.

Finally, because of pressing internal needs, one view sees current military spending as outrageously high in relation to domestic spending; another because of inflation, observes that current military budgets are low in relation to past defense spending.

There is always a potential hazard when views are presented without relationship to the total problem. These views are especially dangerous, in my judgment, because they are often put forth as guides to national security with such sincerity and good intentions that they gain a credibility which they may not deserve.

I have zeroed in on defense spending, strategic forces, and military basing for good reasons. First, there currently seems to be more discussion and more confusion about these areas than about any other.

Second, American security and the security of our allies directly depends on what happens in these areas.

Most of you are well-informed about defense and military matters in this country. You have got to be to do your job. As a result, you spend a good part of your time reading defense related articles and reports. And you are subjected to quite a few speeches on the topic. Many of you retaliate by making a few speeches yourselves.

How often in the past few years have you heard someone say that current defense spending is such and such a percent of the total federal budget; that we are now spending so many more (or less) billion dollars on defense than on domestic programs?

Or: Because of inflation, the dollars in this year's DoD budget are, in terms of buying power, lower than any budget since FY 62 or 54 or whenever?

There is nothing inaccurate about such statements. They are legitimate ways of describing defense spending. But that is the point. They are *descriptions of* this country's defense budget, not *prescriptions for* what we spend on defense.

There is no sacrosanct relation that defense spending must keep from year to year with previous budgets or with domestic spending. The long pole in the defense tent is our potential adversaries capabilities.

People must understand that the requests for funds first submitted by each of the services and then combined into the overall defense budget are based on the threat coupled with our defense policies for defending against the threat. Right now that threat is greater than any ever faced by the United States.

Our defense spending should be based on what we need to deter potential aggressor capabilities from being used against us or to overcome them if they are.

Granted, as a result of SALT or for some other reasons, the threat could be reduced and there could be a cutback in potential enemy forces. If so, we could make the necessary adjustments.

And, if such a situation does occur, the request for military spending will be determined, as it is now, by what we need to counter the threat to this country. Very likely in the near and long term future the number one priority for the American military will continue to be the deterrence of strategic nuclear war.

Under the present circumstances, with increasing costs and other inflationary trends and numerous domestic programs crying for support, many in the nation are in a mood to listen to anyone who has a proposal to reduce defense spending. One proposal often heard is that we don't need land-based missiles, sea-based missiles, and manned bombers. Since the issue concerns nothing less than our future national security, let's be somewhat discriminating before we take our savings—if any—and run.

The United States fundamental philosophy and strategy is to deter war. Our forces and policies are designed to keep war from happening by making the cost of war to an aggressor greater than his possible gains. The deterring effect of our forces must work regardless of the number of uncertainties which might exist in a crisis. Some examples of the uncertainties we face in structuring our strategic forces are:

The future capabilities of hostile nations and their intentions;

The ways a war could begin;

The performance of our weapons in combat; and

The tasks we may be asked to perform.

Because of these and other uncertainties, the United States relies on a mixed force of manned bombers, land and sea-based missiles known as the strategic Triad.

Each system has unique strong points which provide mutual support against either technological or military surprise. Technologically, the survival of bombers and the alert submarine force is insensitive to missile CEPs; therefore, bombers and the alert submarine force provide assurance against a crippling first-strike against our land-based missiles in case of a breakthrough in missile CEPs.

Bombers and land-based missiles being insensitive to antisubmarine warfare provide assurance against a breakthrough in anti-submarine warfare. Bomber survival however *is* dependent on adequate time between warning of an incoming missile and safe escape from its airfield. Thus, sea-based missiles and land-based missiles provide assurance against a breakthrough in negating our warning system.

Militarily—the Triad compounds and complicates enemy offensive and defensive problems and provides enough flexibility to respond to nuclear war or provocation below a general nuclear exchange. Offensively, an aggressor's attempt to destroy all elements of the Triad at the same time would fail because even the best possible attack would provide considerable warning to at least two elements and allow a substantial force to retaliate.

Defensively—a mix of bombers and missiles tasks enemy defenses to defend against both. Thus, a mix of forces on our part makes an enemy spend considerably more to get a certain level of defense. To put it another way, for a given enemy expenditure on defense, the U.S. does not need as many forces to do the job as we would if our forces were either all bombers or all missiles.

Because of the global nature of our economic and political interests, the deterrence requirement is not so narrow that a U.S. homeland defense strategy alone is sufficient. Deterrence of attacks on our allies, as well as on U.S. deployed strategic and general purpose forces, requires appropriate and credible responses. Within the Triad, any prospective aggressor will see that our forces include both protection against surprise attack and a capability to fight at many levels of war. For the foreseeable future, the Triad will provide the U.S. with a credible strategic deterrent, provided we maintain the viability of each leg.

In a period of near strategic parity and accelerated technological momentum on the part of the Soviets, the virtues of the Triad become even more important. It is the synergistic effect of all three elements of the Triad which adds assurance against the kinds of uncertainties we face in structuring our strategic forces. Assurance after all is really the same of the strategic game, now more than ever before.

As part of our determination to deter conflict at lower levels, or if such conflict does occur, to insure it does not escalate to strategic nuclear war, the United States currently stations air, ground and naval units at bases around the world.

Wherever it is in our national interest to deter war—whether accomplished by land, sea, or air forces—there will be a requirement for a system of main operating bases outside the CONUS. Any limitations of this requirement affect all our military forces. Naturally, my direct concern is with air bases.

I know some people suggest that political constraints during a crisis will not allow the Air Force to use bases in an increasing number of nations. Again this challenge must be considered in light of the total picture.

The technical argument is that base rights will not be granted. But it must be obvious that any nation desiring the assistance of the United States will make bases available.

Our overseas bases fall into two categories: Those with forces present 24 hours a day, every day of the year and those which serve as a resupply and staging location to allow

the units it supports to operate elsewhere. Our allies who daily face potential aggression from large, neighboring forces, such as in Europe or Korea, are especially sensitive to this difference. Consequently, in some areas of the world, where our interest is vital, in-place forces are required as tangible evidence of the depth of our commitment.

I want to point out that this strategy has worked. When in the face of serious external aggression to our allies we have made firm commitments and have underwritten these commitments by garrisoning ground and air units in the sovereignty of our ally, there has been no aggression. NATO and post-1953 Korea are cases in point.

In other areas the assurance of our assistance is enough to deter aggression and we rely on our world-wide mobility capability as proof that we can, in fact, provide assistance quickly when necessary.

The Air Force is enhancing its world-wide employment capability. For example, we have demonstrated our bare base capability and can adapt it to a wide range of circumstances.

Ultimately, the location of our forces is determined by the location, type, and magnitude of the threat we must counter to successfully deter war.

I've talked about defense spending, strategic force mix and military basing and I keep ending up on the same note: the threat. Typical military thinking, you say. You bet it is.

Determination of how much we request, what kinds of forces we need, and where those forces are located has got to be based on the threat. This will remain as fundamental to our defense planning in the future as it has been in the past.

I have welcomed the opportunity to share my thoughts with you and look forward to visiting with many of you during the remainder of the conference.

LABOR CONDITIONS IN THE RESTAURANT INDUSTRY

Mr. WILLIAMS. Mr. President, the Subcommittee on Labor has been holding hearings on S. 1861 and S. 2259, the Fair Labor Standards Amendments of 1971. These hearings, which have been extensive, have included discussions and testimony of S. 1861 on the restaurant industry, particularly the provisions of S. 1861, which would eliminate the tip credit, the exemption from coverage of retail and services establishments that gross under $250,000 annually, and the overtime exemption currently applicable to hotel and restaurant employees.

As chairman of the Subcommittee on Labor, I have received from the Hotel & Restaurant Employees & Bartenders International Union, a resolution on this subject, passed at their recent convention.

I ask unanimous consent that the resolution be printed in the RECORD.

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

FAIR LABOR STANDARDS ACT

Whereas, America's working poor need decent jobs with good wages, and deserve a living wage rather than government welfare payments, and are entitled to an adequate income to support themselves and their families, and

Whereas, the Fair Labor Standards Act recognized this right from its inception but has unfairly discriminated against the workers in the Hotel and Restaurant Industries by excluding them from receiving premium pay for overtime work, and, futher, by eroding the meager minimum wage paid with unwarranted deductions and deviations from that wage, and

Whereas, these deductions exist mainly for the convenience of the employers in this billion dollar industry, and meals and lodging are provided in order that workers may be available and present to serve customers as required, and has no bearing on the wage workers are entitled to receive under law, and

Whereas, an "allowance" for tips is grossly unfair and discriminatory, since tips vary greatly from establishment to establishment and vary according to time factors. Tips should not be a reason why employers should be permitted to pay sub-standard wages, and

Whereas, an allowance for such meals as a deduction from the minimum wage is grossly discriminatory and such meals are not even considered income for Federal income tax purposes, therefore, be it

Resolved, that the Hotel and Restaurant Employees and Bartenders International Union in convention assembled urge the Congress of the United States to delete all provisions that permit employers to discriminate against hotel and restaurant employees, and be it further

Resolved, that we urge the Congress to amend the law to insure that all workers be guaranteed the prevailing minimum wage, and be it finally

Resolved, that copies of this resolution be transmitted to the majority leaders of the Senate and House of Representatives, the Secretary of Labor, the Senate Committee on Labor and Public Welfare, the House Education and Labor Committee, the AFL–CIO, and to the press and all media.

SICKLE CELL ANEMIA

Mr. KENNEDY. Mr. President, sickle cell anemia and its unannounced attacks of painful crises is estimated to seriously affect 100,000 black Americans. All told, 2 million black people in this country are believed to be "carriers" of the sickle cell trait. But, shamefully, like most other things that only affect blacks, little has been done to change or improve life for sickle cell sufferers.

However, it now appears that due to the inspiration provided by researches like Howard University's Dr. Roland B. Scott and Dr. Angela Ferguson, long sought after help may soon be delivered to produce well deserved treatment, research, and education programs in the battle against sickled blood.

Later this week, I intend to join with the Senator from California (Mr. TUNNEY), the Senator from New Jersey (Mr. WILLIAMS), and the Senator from Massachusetts (Mr. BROOKE) to introduce legislation authorizing $25 million each year for 3 years to support sickle cell assistance projects. The proposed legislation will provide Federal grants for hospitals, medical centers, and local health departments to establish sickle cell programs. It also encourages the development of assistance programs in Federal health agencies like the Veterans' Administration, the Public Health Service, and the Armed Forces, to include sickle cell detection and treatment procedures in their ongoing programs.

Black physicians and their patients have been struggling with the pain and exasperation of inadequate treatment facilities for sickle cell anemia for decades. Their efforts in terms of public education and awareness programs, have been most recently aided by the formation of parent groups that have emerged to offer comfort to other bewildered families of sickle cell victims.

At the same time, the black press has joined the campaign against the dread effects of sickling. Ebony magazine offers in its October 1971, issue a comprehensive description of the sickle cell anemia problem. Physicians, parents, students, volunteers, and prominent athletic stars are mentioned by Ebony as the principal workers in the fight against this crippling killer.

I believe the presentation made by Ebony magazine warrants the attention of this Senate, because it clearly sets forth the demanding challenge of combating a health crisis that has for too long suffered neglect and indifference because it dos not affect America's majority population.

Mr. President, I ask unanimous consent to have printed in the RECORD an article entitled "Counterattack on a Killer," published in the October 1971 issue of Ebony magazine, and an editorial entitled "Finally the Blacks Are Facing the Facts."

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

COUNTERATTACK ON A KILLER: BLACKS FIGHT TO END TRAGIC TOLL OF SICKLE CELL ANEMIA

Go to any hospital frequented by blacks and you will see them there. But it will be hard, if not impossible, for you to distinguish the sickle cell anemia patients from others. Some will be skinny, with drawn faces and yellow eyes. Others will be fat. (Some will wear the bandages from recent surgery on damaged bones or internal organs. Others will seem completely healthy except perhaps for a look of fear or resignation in their eyes. Because sickle cell anemia usually kills early, most patients you see will be children or young adults.

The one thing they will all have in common is the memory of excruciating pain. Those who are in the hospital are there usually because they have undergone a recent "crisis"—many of the red cells in their blood have changed in shape from fat doughnuts to elongated sickles which have clumped together to cut off blood circulation in knees, ankles, shoulders, stomach, brain or other areas. The patients' bodies have become cramped and contorted with pain until, mercifully, they have perhaps lost consciousness.

The genetic abnormality that causes sickling (it occurs mainly in black people, and far less frequently in Italians, Greeks and other peoples living around the Mediterranean Sea) may at one time have been beneficial. Sickled cells resist malaria, and persons who had them may have had a better chance for survival during malaria epidemics that have ravaged African populations. But today, its possible usefulness gone, sickle cell anemia remains a torturer and killer of blacks, a dread disease against which America's black communities are mounting a counteroffensive.

Sixty years have passed since sickle cell anemia was first identified and diagnosed, but it is only in the recent past that much headway has been made in controlling it. Much of the research done to combat the disease has been performed by black doctors in scraps of time stolen from their overburdened practices.

Though it had long been known that sickling occurred in blood cells that contain less than normal oxygen, it was not until 1945 that a young black Air Force lieutenant at Tuskegee Air Force Base, Dr. Allison B. Hen-

derson, did the first studies of the effect of high altitude on black pilots. He showed then that apparently healthy young black men who had sickled cells in their blood might experience blurred vision and confusion under certain conditions. These men had sickle cell "trait"—that is, each had received from one of his parents a gene that caused some of his blood to sickle. Black doctors have urged for a long time that black armed service recruits be given tests for sickling along with the other tests that are administered when they enter. The need for this was emphasized strongly last year when four 21-year-old Army recruits lost consciousness during strenuous basic training at 4,000 feet altitude, and later died. All four were found to have a great deal of sickling in their blood.

"About one in every 10 American blacks carries the trait," says Dr. Roland B. Scott, a Howard University professor who has researched the disease more than 20 years. "Most of these carriers have very little sickling in their blood and have no trouble from it all during their lives. But if two trait carriers marry and have children, they can expect one out of four of their children to have the severe disease which we call sickle cell anemia."

At present, there is no cure for sickle cell anemia. Treatment consists mainly in cradle-to-grave care to avoid crises, and in relieving the pain and damage from crises when they occur. No drug has yet been proven to control the disease permanently without producing ill side effects. Some doctors say the only way to eradicate the disease is to "starve" it of victims—that is, make sure no more children are born who carry the trait. "We don't tell people with the trait not to marry and have children," says Dr. Peggy Alsup, who treates patients at Sydenham Hospital's sickle cell anemia clinic in Harlem. "But we want them to know beforehand what the chances are of their children having the disease, and what it will mean for their lives."

FINALLY, BLACKS ARE FACING THE FACTS

When Nathaniel Murray was born in 1917, few doctors had heard of sickle cell anemia—and fewer cared. One doctor near Perry, Fla., where Murray's family lived, advised Murray's mother to let the underweight, pain-racked child die because, said the doctor, "his bones are soft. He won't live long anyway."

For Murray those early years were the beginning of a life of chronic pain accentuated at times by excruciating agonies. Sometimes his stomach would swell until he thought it would burst. "The doctors thought I had gas," he says. "They told me to walk around swinging my arms. Sometimes I would walk so much that I would get tired and be walking in my sleep almost. I learned to dull the pain a little by putting two pillows on the bed and lying on them for hours, just staring." It was not until he was 21 and his family had moved to Pittsburgh that an exploratory operation showed that his spleen had burst, a common result of sickle cell anemia.

To the loneliness of his teen years, during which he had been unable to play with his healthy sisters and schoolmates, was added the frustration of an adult life in which he was "determined to stay off welfare" but failed in job after job because of sheer inability to stand the physical demands. "Nobody could tell me what to do to avoid getting sick. And it was almost impossible to make enough money even to take care of the medical expenses," he says. "I know how hard life can be for people with this disease. That's what inspired me to try to start this society."

Last year, with the help of community groups and doctors, Murray organized the Sickle Cell Society, Inc., in Pittsburgh. Struggling on a budget composed of small grants and contributions, its members (most of whom are sickle cell anemia victims) operate a round-the-clock service for victims and their families. They seek out sources of low cost medical supplies and appliances, counsel parents on problems they and their children can expect to face, present educational programs to convince people to have themselves tested for the trait and disease, and round up blood donors.

The Pittsburgh group is one of many that have sprung up in recent years in cities with large black communities. One of the largest, the Foundation for Research and Education in Sickle Cell Disease, based in New York City, was instrumental in setting up in a city hospital the first of five centers devoted exclusively to treatment of sickle cell anemia. The Foundation has given free blood tests to thousands of children in Head Start centers, and to passersby on ghetto streets. Its executive director, Dick Campbell, acknowledges that efforts so far are small compared to the great need. "But," he says, "at least blacks are realizing we have to fight this thing out ourselves."

Some aid may come through the efforts of Pittsburgh Pirates' home run hitter Willie Stargell who is organizing black athletes into a foundation to raise money to fight sickle cell anemia. The funds they raise will be channeled into research.

THE HIGH COURT: A TIME OF WEAKNESS

Mr. ERVIN. Mr. President, the Washington Post on Sunday, September 26, 1971, published an article entitled "The High Court: A Time of Weakness," written by Philip B. Kurland, professor of law and editor of the Supreme Court Review of the University of Chicago. In his article, Professor Kurland depicts with eloquence the characteristics of those Supreme Court Justices who acquire the status of greatness.

Incidentally, I cannot refrain from stating my conviction that Philip Kurland possesses the qualifications described by him through quotations from Judge Learned Hand and Justice Felix Frankfurter, and that he would go down in history as an outstanding Supreme Court Justice if any President possesses the wisdom to nominate him for such a post.

I ask unanimous consent that Professor Kurland's article be printed in the RECORD.

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

THE HIGH COURT: A TIME OF WEAKNESS

(By Philip B. Kurland)

"And so the great man is gone." This was Justice Brandeis' response to the news of the death of Oliver Wendell Holmes. "And so the great men are gone." This must be the response to the news that both Justice Black and Justice Harlan have departed the court. For it was these two justices who, in recent years, assumed the mantles of intellectual leaders of the court. And, even in the Age of Aquarius, intellect is the stuff of which Supreme Court justices are made.

That the resignations of two justices whose judgments were so often in conflict should deprive the court of the same quality will seem strange only to those who measure votes and not reasons, who are concerned with ends but not means. For Black and Harlan, as for their great predecessors, the obligation of a high court judge was to resolve the issues brought to them only after recognizing and dealing with the complexities of the problems and not by ignoring them.

No matter who their replacements might be, the Supreme Court is likely to be a sadly debilitated institution for some time to come. For history has made it clear that great justices are made, not born; that experience on the Supreme Court is itself a necessary though not a sufficient condition for judicial eminence; that it takes time for any new appointee, however vast his prior judicial experience, to meet the extraordinary challenges that inhere in the job. No less accomplished justices than Charles Evans Hughes and Robert H. Jackson have given personal testimony that they felt inadequate to their task during their periods of apprenticeship.

The court, then, would seem to be moving into a condition unfortunately similar to that which resulted when the Roosevelt Court under Stone was transmuted into the Truman Court under Vinson. Indeed, conditions are worse. For during the Truman period the court had the strengths of Hugo Black and Felix Frankfurter and Robert Jackson. There is none left on the present court to carry the same traditions of greatness. Unless Justices Stewart and White, both of whom have the potential, emerge from the shadows to lead the court in justifying its conclusions by adequate reasons, the court may disintegrate into a purely political body whose decisions are merely euphemistic expressions of partisan preferences.

It has been said, and it is true, that justices often have a way of growing into their jobs. Justice Black was himself an example of that phenomenon. Unfortunately, this is not the usual pattern. For the most part, mediocrities appointed to the Supreme Court have remained mediocrities. To appoint a small man, with the hope—it certainly cannot be an expectation—that he will gain stature, is a far greater risk than the appointment of a man of talents who, admittedly, might squander them as some justices have done.

Judge Learned Hand once spoke of the appropriate qualifications of a great jurist. He said: "I venture to believe that it is as important to have a judge, called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have specifically been written on the subject. For such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined." Such a judge as Hand prescribed was John Marshall Harlan.

Felix Frankfurter, too, spoke many times to the question of what makes the great jurist. On one occasion he said: "Human society keeps changing. Needs emerge, first vaguely felt and unexpressed, imperceptibly gathering strength, steadily becoming more and more exigent, generating a force which, if left unheeded and denied response so as to satisfy the impulse behind it at least in part, many burst forth with an intensity that exacts more than reasonable satisfaction. Law as the response to those needs is not merely a system of logical deductions, though considerations of logic are far from irrelevant. Law presupposes sociological wisdom as well as logical unfolding . . . A judge whose preoccupation is with such matters should be compounded of the faculties that are demanded of the historian and the phi-

losopher and the prophet. The last demand upon him—to make some forecast of the consequences of his action—is perhaps the heaviest. To pierce the curtain of the future, to give shape and visage to mysteries still in the womb of time is the gift of imagination . . . These judges, you will infer, must have something of the creative artist in them; they must have antennae registering feeling and judgment beyond the logical, let alone quantitative, proof." Such a judge as Frankfurter prescribed was Hugo Lafayette Black.

Both the statements of Hand and Frankfurter and the judicial careers of Black and Harlan attest that to talk of "strict constructionists" is to use a meaningless phrase to cover some different criterion. The grand provisions of the Constitution—whether they be "due process of law," "equal protection of the laws," or "privileges and immunities of citizenship," whether they are "cruel and unusual punishment," "abridging the freedom of speech, or of the press," or "the right to a speedy and public trial"—are not susceptible to dictionary definition. These and many others are concepts that have to be adapted to each new development in a swiftly changing society. It is their connotations for today, not their denotations of yesterday, that must guide the Supreme Court to its decisions. Anyone who asserts that there can be "strict construction" of the Constitution is only displaying naivete about the Constitution and the role of the court as its expositor.

For some, "strict constructionist" means one who wishes to return to the rulings of an earlier era. For some, "strict constructionist" means one who readily jumps from the premise that courts cannot by themselves bring about social change to the conclusion that courts have no role at all to play in bringing about social change. For some, "strict constructionist" means only one who rejects the concept that the Constitution is a totally plastic document to be fitted to the whims of the justice appointed to interpret it. In short, there is no "strict construction" of the phrase "strict construction."

What ought to be recognized is that, in a day when more and more power over the lives and fortunes of every American is more and more concentrated in the national government—indeed, in the executive branch of the national government—the vital role of the court is to protect the individual against the incursions of the Leviathan. The court may well be the last bulwark of freedom as well as the schoolmaster of the nation. It would behoove a President of the United States to make his judicial appointments with cognizance of the important and difficult job that he is filling. It would behoove a President to rise above himself and not use the appointments for the satisfaction of partisan political objectives.

Alas, it has been too seldom true in the past, and it is not likely to be true in the immediate future, that quality will be the only measure of the men chosen for the high court. It matters little whether the new justices will vote the way their predecessors did. It matters much that they will perform their task in a way that will preserve the majesty of the law, for "law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised."

And so, as clerics who were divines before they became politicians used to say: "Let us pray."

POLLUTION CONTROL LOANS

Mr. NELSON. Mr. President, today I am introducing an amendment authorizing long-term low-interest Federal loans from the Environmental Protection Agency to small business firms that would suffer serious adverse economic effects in meeting water pollution control standards. The proposal would amend S. 523, a bill to amend the Federal Water Pollution Control Act. S. 523 is now being considered by the Senate Public Works Committee.

The primary aim of this amendment is to enable small firms which could otherwise continue to compete in the marketplace to meet pollution control standards without being placed in financial jeopardy.

The proposal is based on the conviction that we need not sacrifice either environmental standards or otherwise healthy business ventures in order to achieve clean water.

This measure would restrict the loans to small businesses as defined under the Small Business Act. It is already evident that the greatest impact of water pollution control spending will be on the small independent firm without readily available capital resources.

The amendment is based on a similar proposal I introduced in 1966 as one of a comprehensive package of pollution control bills. It authorizes an $800 million loan program and allows up to 20 years for repayment of the loan. The only interest on the loans—which could be up to 100 percent of the cost of the firm's construction of a needed pollution control facility on $2 million—would be that necessary to cover the loan's cost to the U.S. Treasury.

The measure proposes that the loan program be administered by the Environmental Protection Agency, based on the EPA's responsibility among other things for the Federal water quality program.

Strict safeguards are provided in the measure to assure that the loans can be made only according to the program's purpose and will be effective: First, facilities to be financed by the loans would have to be certified as necessary to meet State and Federal pollution control requirements. Second, the applicant would be required to show that without a loan, he could not meet pollution control standards and continue to operate, and that with the loan, he actually could.

Furthermore, an applicant would have to fully disclose the economic and environmental information deemed necessary by the EPA Administrator for deciding whether to grant the loan.

Also, while this measure provides a loan program for water quality projects, because it is proposed as an amendment to the water quality bill which amends the Federal Water Pollution Control Act, the same approach would also be appropriate for air quality projects required of small businesses and I will introduce a similar bill to the Federal air quality laws to provide this loan program.

Although current Federal studies will provide more data, the evidence is already strong that any economic adversity that may result from environmental controls will hit hardest at the small firm and its community and its workers, an element already being squeezed out in the cold in our economy by the persistent American drive for bigness at any price.

For instance, in a 1970 study of the economic impact of air pollution controls on the 1,376 foundries in the gray iron industry, the National Air Pollution Control Administration learned that the larger the size of the firm, the smaller the annual cost of pollution controls as a percent of profits before taxes.

In the gray iron industry, the study found the annual cost of pollution controls to be 59 percent of profits before taxes for the small firms—with a value of casting shipments under $0.5 million per year—to 11 percent for relatively large firms—value of more than $10 million in shipments.

In short, the NAPCA study concluded that pollution controls would weigh more heavily on small firms in this industry than on the large ones.

Current trends would only increase this disadvantage, they added:

> It would appear that the growth of larger foundries, the relative increase in casting prices, the relative decrease in raw materials prices, and the increasing profit and capital shares of the industry will allow larger firms to distribute the burden of air pollution control more widely.

Pollution controls are critically necessary. The alternative to an effective pollution control program is a massive environmental disaster. What must be recognized is that many otherwise viable small businesses cannot afford the immediate cost of the capital investment necessary to meet the pollution control standards, but could in fact manage the pollution control costs if given the benefit of low-cost, long-term loans. The concept is not new. Perhaps the best example of a remarkably successful low-interest, long-term loan effort is the Rural Electrification Administration.

When the otherwise healthy small independent firm is forced to close, the tax base of the community is further weakened, and workers and their families are often forced back into already congested metropolitan areas, contributing to a spiraling demand for services from already strained urban resources. Far too frequently, the result is not only a tragic waste of human resources, but a further strike against our ability to ever restore the quality of our now-chaotic environment.

Already, this country is confronted with the massive consequences of the growing cult of giantism in farming, in industry, in highway programs, in our cities, in almost every facet of our consumer society. Pursued in the name of profit and a supposed computerlike efficiency, the cult of bigness may well become mired down in its own weight, smothering the competition, the diversity, the individual participation that are fundamental aims of the quality of life for which this country has always worked.

The alternative to such incentives as extending pollution control loans would be waiving strict environmental standards where economic hardship could be shown. But the approach of giving variances to pollution controls based on economic grounds has long ago shown itself to be a risky course: All too often, the variances become a tool used by powerful political interests to obtain so many exemptions for pollution control standards and timetables on the flimsiest of

pretenses that they become meaningless. In short, with variances, exceptions to pollution cleanup can become the rule, meaning further tragic delay in stopping the destruction of our environment.

In addition to the industrial pollution control loans proposed in this measure, we must also greatly increase Federal funding for the upgrading or construction of municipal waste treatment plants. Effective treatment at this key source is one of the major hurdles to our national clean water goal, and yet, with cities and States already staggering under gigantic demands for all services, efficient waste treatment could be more decades away without much greater Federal support. Recently, I reintroduced my proposal of 5 years ago to put the Federal funding of this vital part of the water quality effort on the same 90–10 basis as our Interstate Highway System. In addition to fulfilling the national commitment to water quality, this step could be as effective as any other method that could be devised to implement the tax sharing concept now being so widely discussed.

In regard to the 90–10 proposal, it is encouraging to note that the Senate Air and Water Pollution Subcommittee's water quality legislation would increase the Federal share to 75 percent, if States contribute 15 percent, totaling 90 percent Federal-State aid, certainly a big step in the right direction.

Also, incentives to recycle wastes in the most effective manner ought to be a part of any overall attack on the water pollution problem, and in this regard, it is heartening to see that in the water quality bill reported by the Air and Water Pollution Subcommittee, waste treatment management plans required by the act shall have "as a first priority, recycling of pollutants and the reclamation of water." It is important that this priority be reflected in the program of Federal grants in aids for municipal waste treatment systems and in the user charge system required under the bill.

To conclude, no one tool will get clean water in this country. The task is too complicated and too enormous for that. We must set effective standards and obtain compliance through efficient enforcement. The immense financial and technological resources to get the cleanup job done must be stimulated by a program of incentives to industry and direct financial aid to municipalities.

Among these incentives is the loan program I am proposing today, extending Federal aid to those small businesses who would be crushed economically in meeting pollution control requirements but who could make it otherwise. An important benefit of the proposal should be aiding in reconciling any potential point of conflict that might occur between the goal of a decent environment and the goal of a diversity in American life based on the opportunity for small business and small communities to endure and be vigorously competitive.

Mr. President, I will conclude with an analysis of this proposal. I ask unanimous consent that the text of the amendment be printed at the end of these remarks.

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

ANALYSIS OF AMENDMENT PROVIDING FEDERAL WATER POLLUTION CONTROL LOANS TO SMALL BUSINESSES

Amendment, introduced to S. 523, would add a new section (28) to the Federal Water Pollution Control Act.

SEC. 28(a) Authorizes the Administrator of the Environmental Protection Agency to make loans to small business concerns for the construction of water pollution control facilities (including reconstruction, installation, or acquisition), or for changes in manufacturing facilities which would substantially reduce water pollution.

SEC. 28(b) Establishes the conditions, which include:

(1) The applicant submitting such information as may be required by the EPA Administrator to determine whether to grant the loan;

(2) Granting loans only for construction or changes certified by the State water pollution control agency and determined by the EPA Administrator as being necessary to conform with state and Federal water quality programs;

(3) Granting loans only if the Administrator determines that the applicant (A) would not be able to continue operations in conformance with state and Federal water pollution programs without the loan, and (B) that with the loan, the applicant would be able to continue operations in conformance with the programs, and (C) that the applicant would be able to repay the loan;

(4) Authorizing the loans to be made for a period not exceeding 20 years;

(5) Authorizing the loans to be made in an amount up to 100 percent of the cost of the water pollution control construction or changes on $2 million;

(6) Limiting the interest to that needed to cover the cost of the loans to the Federal Treasury;

(7) Authorizing additional conditions and requirements as the Administrator may require to properly carry out his functions pursuant to the Act.

SEC. 28(c) Provides definitions for the terms used in the amendment.

SEC. 28(d) Authorizes a loan program totalling $800 million.

THE DAY OF ATONEMENT

Mr. WILLIAMS. Mr. President, at sundown today, Jews throughout the world begin the observance of their holiest day, Yom Kippur, the day of atonement. It is a day dedicated to being at one with God. This year, even more so than in the past, upper most in the minds of our Jewish citizens, are two grave matters that must concern us all; the still unresolved Middle East crisis and the tragic plight of Soviet Jewry.

I know that my colleagues share with me a very deep concern. I will not burden them at this time with a recitation of the historical and moral imperatives in both these matters. Suffice it to say that on this holy day, I join with all the members of our Jewish communities throughout this Nation and throughout the world in praying for peace in the Holy Land and freedom for the Jews of Russia. At the same time, I believe it vital that our prayers be coupled with a renewed commitment by Jews and non-Jews alike to do all that is necessary, each as best he can, to achieve these two great goals.

PRISONERS OF THE INDOCHINA WAR

Mr. KENNEDY. Mr. President, this morning I had the privilege of visiting the Massachusetts delegation attending the national convention of the League of Families of Prisoners of War and Missing in Action now in session in Washington.

Many other Members of Congress have, I know, attended sessions of the league's convention. We have all been moved by the courage and spirit shown by these wives and mothers and fathers of American men captured or missing in Indochina. And we all certainly share in their frustration over the lack of progress that has been made in obtaining more humane treatment for, and the release of, all our men. Yet, despite frustrations and disappointments, these wives and parents continue their activities on behalf of their loved ones and set an example for all of us.

I found, Mr. President, that many of the league members I spoke with share the view of a growing number of Americans, that if we are to make any real progress in solving the prisoner-of-war problem—if we are to bring relief to our men held captive for so many years—it is incumbent upon our Government to negotiate an end to our participation in the war that imprisons us all.

For each day brings more tragedy as the list of Americans missing in action, and presumed captured, continues to grow. Just this year, dozens of new names were added to the list of young Ameriman men lost or captured in Indochina. As I have said before, the hard reality is that as long as this tragic war in Indochina continues, more Americans will become prisoners of war or missing in action.

Mr. President, none of us here—none of the members of the families—know all the answers. But we do know that the only way for us—and for them—to secure the return of our men is for our Government to begin to talk and to negotiate seriously with the other side in Paris.

I believe it is the responsibility of this Congress to assist in this process. That is why, Mr. President, I am in favor of the Mansfield amendment—of setting a date certain for our withdrawal from Indochina in order to set the stage for the difficult negotiations that will be necessary for the ultimate safety and return of all prisoners of war.

This view was expressed to me by the wife of the first resident of my State to be captured in the Indochina war—Mrs. Louise M. Mulligan, the wife of Capt. James A. Mulligan, Jr., USN, captured in North Vietnam since March 20, 1966. I attended a small press conference this morning where she formally expressed her support of the Mansfield amendment. I invite the attention of Senators to her very strong and very passionate statement and ask unanimous consent that it be printed in the RECORD.

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

FOR WHOM IS THIS WAR ENDING, MAY I ASK?

(By Louise M. Mulligan, wife of Capt. James A. Mulligan, Jr. USN, P.O.W. in North Vietnam since March 20, 1966)

There is no question that the war is winding down, or fading away is another terminology used. I hope the American people and our Congress realizes that although we are being bombarded with these encouraging phrases many families in this country are still receiving notices beginning: "We are sorry to inform you that your son was killed in action." For that man the war has truly ended. Talk to an army nurse serving in Da Nang and ask her about the number of casualties. You will find their work load is as heavy as ever. Look into the eyes of a young 20 year old son, who was 15 when his father left to go to war, and has been a prisoner of war for over five and one half years. Try to convince him the war is ending. This seems to be the war for the chosen few, is the end also going to be for the chosen few? Are more American lives to be expended for one man's dream of a generation of peace? You do not ask others to give of their lives to attain your ideals, especially when you are attempting to prove it in an area that has proved hopeless for generations.

The simple truth is that we must negotiate. When you don't win a conflict you negotiate for the best terms available. This is something new to this country. Have all our male leaders become so completely immasculated that they are going to continue to sacrifice the lives of our young Americans and label our POW's as expendable, rather than admit we did the best we could, but we did not win?

On March 6, 1970 several family members appeared before the Committee on Armed Services, telling our stories, begging, pleading with them to help our men. Congressman Rivers, at that time, assigned the problem to Congressman Zablocki's sub-committee for a solution. Would you believe a year and a half later Mr. Zablocki is still listening to testimony advising him that the treatment accorded the POW's is inhumane! How much longer is this charade of "concern" to continue?

Our men, for the most part, are career military men. But, nowhere in their oath, upon entering into the service of their country, does it state they will be willing to commit suicide nor be labeled as expendable. Their Commander-in-Chief has stated: "There will be no military victory." He then starts withdrawing troops without prior commitment to our men languishing in prisoner of war camps or the hundreds listed in a state of limbo, missing in action. (Try to explain that term to a three year old who has never seen her daddy.) Our President can withdraw all his combat troops, but what of the POW's and MIA's. His answer to that was a residual force until all prisoners are released. When this backfired, he was forced to admit that the administration would not abandon the South Vietnamese for "only" 339 men. Have you noticed how they change the figure from 1600, which is the total number of POW's and MIA's in Southeast Asia as listed by our Department of Defense, to 339, the number of prisoners listed by the North Vietnamese government, when it serves their purpose?

The cruelest hoax played on the families by this administration was in convincing them that if they created enough embarrassment to the North Vietnamese government they would release our men. All the publicity has helped some of the men certainly, but only the men held in the North. Mail increased for awhile, (no substantial mail has been received since March), more packages have been permitted for a year now and I am convinced treatment has improved—but the cruel fact is: are we any closer to their release?

The administration would like us to believe something is imminent. In fact, Dr. Kissinger has been intimating this at private meetings with the families since last February. Hence, many have been lulled into a state of unquestioning trust.

There are three elements that must share the burden of guilt for this conflict. First, the military leaders who allowed their men to be committed to a conflict they were not permitted to win. Second, the Congresses who have convened and recessed during the far too many years of this conflict and have abdicated their right to control this holocaust. Third, the administrations that have perpetuated this conflict.

It behooves this nation to raise a mercenary army if they are to commit their military men to political conflicts they are not permitted to win.

Indeed, cryptic comments by our President are not enough. The American people who are still sacrificing their sons and the POW/MIA families have a right to know if our men are to continue to sacrifice their lives to shore up a corrupt South Vietnamese government who is more concerned with its political future than the future of its people or country. Who among us dare betray his people in such a sacrificial manner?

QUORUM CALL

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

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

The second assistant legislative clerk proceeded to call the roll.

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

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

CONCLUSION OF MORNING BUSINESS

Mr. MANSFIELD. Mr. President, is there further morning business?

The PRESIDENT pro tempore. Is there further morning business? If not, morning business is closed.

MILITARY PROCUREMENT AUTHORIZATIONS, 1972

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of the unfinished business.

The PRESIDENT pro tempore. The bill will be stated by title for the information of the Senate.

The legislative clerk read as follows:

A bill (H.R. 8687) to authorize appropriations during the fiscal year 1972 for procurement of aircraft, missiles, naval vessels, tracked combat vehicles, torpedoes, and other weapons, and research, development, test, and evaluation for the Armed Forces, and to prescribe the authorized personnel strength of the Selected Reserve of each Reserve component of the Armed Forces, and for other purposes.

The PRESIDENT pro tempore. Is there objection to the present consideration of the bill?

There being no objection, the Senate proceeded to consider the bill.

Mr. MANSFIELD. Mr. President, it is my understanding that the distinguished Senator from Wisconsin (Mr. NELSON) is prepared to call up an amendment, but pending that and the arrival of the manager of the bill, the distinguished Senator from Mississippi, I suggest the absence of a quorum.

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

The legislative clerk proceeded to call the roll.

Mr. BYRD of West Virginia. 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.

UNANIMOUS-CONSENT AGREEMENT

Mr. BYRD of West Virginia. Mr. President, at the direction of the majority leader, I have discussed certain amendments to the pending military procurement bill with the authors of those amendments and the distinguished manager of the bill, as well as with the minority leadership. I, therefore, propose the following unanimous-consent agreement with respect to a time limitation on those amendments, with the understanding that as of this moment there is no agreement as to when all of the amendments will be called up. That will be discussed later.

Mr. President, with respect to the amendment which will be called up by the Senator from Wisconsin (Mr. NELSON), and which will be called up immediately, dealing with a 5-year Department of Defense study, I ask unanimous consent that there be a time limitation of 2 hours, to be equally divided between the distinguished author of the amendment, the Senator from Wisconsin (Mr. NELSON), and the distinguished manager of the bill, the Senator from Mississippi (Mr. STENNIS), and that time on any amendment thereto be limited to 30 minutes, to be equally divided between the mover of the amendment in the second degree and the distinguished manager of the bill (Mr. STENNIS).

The ACTING PRESIDENT pro tempore. Is there objection?

Mr. STENNIS. Mr. President, reserving the right to object——

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

Mr. STENNIS. Mr. President, first, I want to inquire of the Senator when he contemplates that the amendment will be called up.

Mr. BYRD of West Virginia. Immediately or within the next 5 minutes.

Mr. STENNIS. Very well. The time request is for 1 hour to a side?

Mr. BYRD of West Virginia. Yes.

Mr. STENNIS. And that is the so-called 5-year plan?

Mr. BYRD of West Virginia. Yes, it is.

Mr. STENNIS. Very well.

Mr. BYRD of West Virginia. I thank the distinguished Senator.

The ACTING PRESIDENT pro tempore. Is there objection to the request?

Mr. GRIFFIN. Mr. President, reserving the right to object, I wonder if I may inquire when the vote will be expected. It would be about 1:30 p.m. today. Is that right? That would be a very inconvenient time for Senators on this side of the aisle in view of the scheduled policy luncheon.

Mr. BYRD of West Virginia. If all time is taken on the amendment, there being

a 2-hour limitation, the vote would occur at about 1:30 p.m. today.

Mr. GRIFFIN. I am going to object on behalf of the Senator from Colorado (Mr. ALLOTT). I almost have to do that. If other Senators were ready with amendments and if this objection were going to hold up proceedings of the Senate in any way, it would be different. But, as the distinguished assistant majority leader knows, this is a regularly scheduled meeting of all Republican Senators; and I wonder if he could not accommodate that.

Mr. STENNIS. There is another one today, I understand.

Mr. GRIFFIN. Could the vote be at 2 p.m. today? Would that be unreasonable?

Mr. STENNIS. Mr. President, reserving the right to object—and I shall not object—if we are going to vote at 2 p.m. we might as well let the debate conclude at 2 p.m., or take a recess, if need be.

However, I want to say something before we get to the vote about having to wait around and beg people to come in with amendments. I say that with all deference to Senators, and without reference to any individual Senator. This entire legislative process is held up until this bill is passed. We have amendments here and they are important amendments and we should not have to wait around for Senators to call up amendments.

Mr. GRIFFIN. Mr. President, I want to associate myself with the statement of the Senator from Mississippi. In the past when we have run into this kind of situation Senators have been reminded that some other Senator could call up his amendment if he saw fit to do so. Whether we proceed in that way remains to be seen. I think Senators who have amendments should be prepared to call them up.

Mr. STENNIS. Mr. President, will the Senator yield further?

Mr. BYRD of West Virginia. I yield.

Mr. STENNIS. I am willing to agree to several time limitations, if the Senator makes more requests, but I am not willing now to agree to certain days for those amendments to come up; that is, to skip over 2 or 3 days where we would have nothing to do. I am going to insist as far as I can that we have continuity here; and if we are not going to take them up, just recess for a day or so until someone is willing to call up amendments. Even after I agree on time, any time we are not doing anything I want to be able to talk about amendments.

The ACTING PRESIDENT pro tempore. Time would be controlled only after an amendment is called up.

Mr. BYRD of West Virginia. I thank the distinguished Senator and also the distinguished assistant Republican leader. I revise my request accordingly.

Mr. President, I ask unanimous consent that the vote on the amendment to be called up by the distinguished Senator from Wisconsin (Mr. NELSON), the amendment dealing with the 5-year Department of Defense study, occur today at 2 p.m., and that the time between now and 2 p.m. be equally divided between the mover of the amendment and the manager of the bill.

The ACTING PRESIDENT pro tempore. Is there objection? The Chair hears none, and it is so ordered.

What about amendments to the amendment?

Mr. BYRD of West Virginia. It is my understanding I had already made that request. I should have repeated it. I do so now.

I ask that the time on any amendment to the amendment be equally divided between the mover of the amendment in the second degree and the distinguished manager of the bill, and limited to 30 minutes.

The ACTING PRESIDENT pro tempore. And all votes to take place at 2 p.m.?

Mr. BYRD of West Virginia. Not necessarily.

The ACTING PRESIDENT pro tempore. Will all votes on amendments to the amendment take place at 2 p.m.?

Mr. BYRD of West Virginia. The vote on the amendment in the first degree will occur at 2 p.m. today.

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

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that time not begin running on the Nelson amendment until it is called up by the Senator from Wisconsin (Mr. NELSON).

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

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that upon disposition of that amendment, the amendment by the able Senator from Ohio (Mr. SAXBE) then be made the pending question. That amendment deals with the carrier aircraft. I ask unanimous consent that time on that amendment be limited to 2 hours, to be equally divided between the mover of the amendment (Mr. SAXBE) and the manager of the bill (Mr. STENNIS), with time on any amendment limited to 30 minutes, the time to be divided equally between the mover of the amendment in the second degree and the distinguished manager of the bill.

Mr. SAXBE. Mr. President, reserving the right to object, I have no objection to the time limit. As to being called up immediately after the vote at 2 o'clock, I would like to leave that pending until after the forthcoming meeting to be held at 12:15 today. Let us agree on the time, but leave out when it is to be called up.

Mr. BYRD of West Virginia. I thank the distinguished Senator.

Mr. STENNIS. Mr. President, reserving the right to object, I want to make the same suggestion. I think the Senator has hit the nail on the head. That would be my suggestion on the other requests of the Senator from West Virginia. I will agree to the time limitation, but would not agree to leapfrogging over certain ones or jumping a day or two.

Mr. BYRD of West Virginia. Mr. President, may I say that I inadvertently included the time at which this amendment would be scheduled. The Senator from Ohio had asked that it not be scheduled for a particular time. So I remove that provision from my request.

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

Mr. BYRD of West Virginia. Now I ask unanimous consent, Mr. President, that with respect to the amendment by the Senator from Missouri (Mr. EAGLETON), regarding the Main Battle Tank, the time on that amendment be limited to 2 hours, to be equally divided between the mover of the amendment (Mr. EAGLETON) and the manager of the bill (Mr. STENNIS), and with the same provision as with the Saxbe amendment with respect to amendments in the second degree.

Mr. STENNIS. Thirty minutes on amendments to the amendment, to be equally divided?

Mr. BYRD of West Virginia. Yes.

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

Mr. BYRD of West Virginia. Finally, Mr. President, I ask unanimous consent that with respect to the amendment to be offered by the Senator from Wisconsin (Mr. NELSON), the so-called Sanguine amendment, time on that amendment be limited to 2 hours, to be equally divided between the mover of the amendment (Mr. NELSON) and the manager of the bill (Mr. STENNIS), and that time on any amendments thereto be limited to 30 minutes, to be equally divided between the mover of the amendment in the second degree and the manager of the bill.

The ACTING PRESIDENT pro tempore. Is there objection?

Mr. NELSON. Mr. President, does the Senator wish to set a time for voting on that, or is that objected to?

Mr. STENNIS. Mr. President, at this time I would like to object, until we can get all these matters before us.

Mr. MANSFIELD. Mr. President, if the Senator will yield, these are the only two amendments as of now on which we are able to achieve a unanimous-consent agreement. It is my understanding that the distinguished Senator from Wisconsin (Mr. NELSON) is prepared to call his amendment up at the conclusion of the morning business and the morning hour tomorrow. So would the Senator give consideration to nailing this down?

Mr. STENNIS. Mr. President, I would rather reserve the right to object. I shall try, but I have not seen the amendment yet.

Mr. NELSON. Mr. President, let me raise this point. I am willing to accommodate any Senator here. I am calling this amendment up right now because there is no other amendment pending. I would rather call up the Sanguine amendment in the next 2 or 3 days, but if I am to call it up, I want to notify other Senators that the amendment is pending. That is what I would like to do, whether it is tomorrow or the next day. I am agreeable to any day. It is a very simple amendment and I would prefer to call it up in 2 or 3 days at my convenience rather than call it up at the convenience of the Senate.

The ACTING PRESIDENT pro tempore. Is there objection?

Mr. STENNIS. Mr. President, reserving

the right to object, if the Senator would state the difference between Sanguine I and Sanguine II, perhaps we could get at it that way.

Mr. NELSON. Yes. This amendment simply removes $2 million from the appropriation for Sanguine. It is the $2 million that the Navy requested to begin the exploration of a deep underground system. As the Senator knows, the Navy, 15 or 18 days ago, decided to back up from the request for that appropriation to bore holes a mile deep into the ground to explore the possibility of an underground system and asked that the money approved by the House and Senate be transferred and added on top of the research and development for the oncoming Sanguine project. I simply ask to take the $2 million out of the budget entirely.

Mr. STENNIS. That requires some study. I think after the conference which is to start in about 30 minutes we may be able to tell. I would like to see all of these together before I decide.

Can the Senator be ready this afternoon?

Mr. NELSON. No. I need to get a memorandum around to Senators. I would rather call it up Thursday.

Mr. STENNIS. How much time is there on the Sanguine amendment?

Mr. BYRD of West Virginia. Two hours, to be equally divided.

Mr. STENNIS. Very well. We can agree to take it up first thing in the morning.

The ACTING PRESIDENT pro tempore. Is there objection?

Mr. NELSON. Mr. President, is this after the morning hour?

Mr. STENNIS. Yes.

The ACTING PRESIDENT pro tempore. Does the Senator amend his unanimous consent request to include the result of this colloquy?

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that, upon the conclusion of the period for the transaction of routine morning business on tomorrow, the Chair lay before the Senate the unfinished business and that the pending question at that time be the so-called Sanguine amendment by the distinguished Senator from Wisconsin (Mr. NELSON).

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

Mr. MANSFIELD. What about the 2 hours?

Mr. BYRD of West Virginia. We already have that.

The ACTING PRESIDENT pro tempore. There are 2 hours on the amendment and 30 minutes on any amendment to the amendment, and it will be taken up tomorrow right after the routine morning business is completed.

The ACTING PRESIDENT pro tempore. The Chair is not quite clear about the first unanimous consent request. Under the current request, can that vote come before 2 o'clock on that amendment or amendments thereto?

Mr. BYRD of West Virginia. Mr. President, under the understanding that I have as the one who promulgated the request, votes could be had on amendments to the amendment prior to 2 o'clock.

The ACTING PRESIDENT pro tempore. Can be had?

Mr. BYRD of West Virginia. Yes, but the vote on the amendment in the first degree will be at 2 p.m. today.

The ACTING PRESIDENT pro tempore. The Chair thanks the Senator.

Mr. BYRD of West Virginia. I thank the Chair.

AMENDMENT NO. 441

Mr. NELSON. Mr. President, I send an amendment to the desk. This amendment is the one on which we have a unanimous consent agreement to take up tomorrow after the morning business.

The ACTING PRESIDENT pro tempore. The amendment will be received and printed and will lie on the table.

ORDER OF BUSINESS

Mr. NELSON. Mr. President, I send to the desk for appropriate reference a bill to amend the Federal Water Pollution Control Act to provide for long-term low interest Federal loans from the Environmental Protection Agency to small business firms that would suffer serious adverse economic effects in meeting water pollution control standards.

I ask unanimous consent that a statement accompanying the bill be printed in full in the RECORD.

The ACTING PRESIDENT pro tempore. Is there objection?

Mr. BYRD of West Virginia. Mr. President, reserving the right to object—and I shall not object—the Senator has been very patient and cooperative and congenial in all of our understandings with respect to unanimous-consent requests governing amendments to the pending unfinished business, so I shall not object to the conduct of morning business in this instance, even though the Pastore rule has not yet fully expired.

The ACTING PRESIDENT pro tempore. Without objection——

Mr. NELSON. I object. I do not like to see the rule violated, and it was a lapse on my part. I will submit this material later at the appropriate time. I am one of those who insists that the rules on germane business be complied with, and I am glad that the distinguished Senator reminded me.

Mr. BYRD of West Virginia. I thank the distinguished Senator.

MILITARY PROCUREMENT AUTHORIZATIONS, 1972

The Senate continued with the consideration of the bill (H.R. 8687) to authorize appropriations during the fiscal year 1972 for procurement of aircraft, missiles, naval vessels, tracked combat vehicles, torpedoes, and other weapons, and research, development, test, and evaluation for the Armed Forces, and to prescribe the authorized personnel strength of the Selected Reserve of each Reserve component of the Armed Forces, and for other purposes.

AMENDMENT NO. 425

Mr. NELSON. Mr. President, I call up my amendment No. 425.

The ACTING PRESIDENT pro tempore. The amendment will be stated.

The legislative clerk read as follows:

At the end of the bill add a new section as follows:

SEC. 505. (a) The Committees on Armed Services of the Senate and the House of Representatives, acting separately or jointly, or both, or any duly authorized subcommittees thereof, shall conduct full and complete studies of the budget for the Department of Defense for the five fiscal years following the fiscal year in which this section is enacted. In carrying out such studies the committees shall consider, among other things—

(1) the projected amounts for such budget for such years under current strategies and foreign policies of the United States and under present world conditions;

(2) how the projected amounts for such budget for such years might be affected by changing world conditions or by the adoption of new or different strategies and policies by the United States; and

(3) the so-called five-year defense program of the Department of Defense, access to which the committees shall request.

(b) The committees shall report to their respective Houses the results of such studies together with such recommendations as they deem appropriate, including—

(1) levels of spending for defense purposes for the five-year period referred to in subsection (a) of this section; and

(2) ways in which the Congress might improve its ability to make sound decisions on future defense spending levels and ways of effectively implementing those decisions.

Such reports shall be included as a part of the reports made by such committees to their respective Houses on the military procurement authorization bill for the fiscal year beginning July 1, 1972, except that either committee may file its report at any time prior to the filing of the report on such military procurement authorization bill if it elects.

The ACTING PRESIDENT pro tempore. Who yields time?

Mr. NELSON. Mr. President, I yield myself 15 minutes.

The ACTING PRESIDENT pro tempore. The Senator from Wisconsin is recognized for 15 minutes.

FIVE-YEAR DEFENSE BUDGET STUDY

Mr. NELSON. Mr. President, we are looking at the wrong defense budget.

We are looking at the defense budget for fiscal year 1972, when we should be looking at fiscal 1973 and beyond.

As my remarks will show in detail, time has already robbed the Congress of much of its flexibility to make major decisions on the level of defense spending in fiscal 1972. It is now, in September, already too late to make any but marginal changes of a few billion dollars in the fiscal 1972 defense budget. Before we have finished with the two basic defense bills—procurement authorization and appropriations—this year, we will have lost even more of our flexibility in making major decisions.

Meanwhile, the administration is already far along in planning the fiscal 1973 defense budget, and it has been making the basic decisions on that budget without any significant congressional guidance. By the time the fiscal 1973 budget reaches us for consideration we will again have lost much of our ability to change it.

The central point of my remarks today is that, in order to effectively make decisions on the level of defense spending, Congress must look ahead, plan ahead, and perhaps even legislate ahead.

The ability of Congress to work ahead in this fashion will not be developed overnight. I am proposing today one step—a beginning—in this direction.

It is an amendment to the military procurement authorization bill by which Congress would instruct the Armed Services Committees of the House and Senate to:

Conduct studies on the 5-year outlook for the U.S. defense budget, something they have not done at all extensively to date.

Review the administration's own planning of the defense program and budget for the next 5 years.

Recommend levels of defense spending for the next 5 years.

Recommend ways in which Congress might further improve its ability to make fundamental decisions as to defense spending levels in the future.

Report these findings and recommendations as part of or prior to the next regular reports of the committees roughly a year from now.

CONGRESS IS LATE

As the following table shows, the regular defense appropriations bills generally are passed by Congress about half way through the fiscal year to which they apply:

	Fiscal year—			
	1965	1969	1970	1971
Authorization Act	June 5, 1967	Sept. 20, 1968	Nov. 19, 1969	Oct. 7, 1970
Regular Appropriation Act	Sept. 29, 1967	Oct. 17, 1968	Dec. 29, 1969	Jan. 11, 1971
Last Major Supplemental Appropriation	July 9, 1968	July 22, 1969	July 6, 1970	May 25, 1971

Midway in the fiscal year is very late to try to make substantial changes in a budget. Defense Department Comptroller Robert C. Moot discussed this in recent testimony before the Joint Committee on Congressional Operations:

By that time, the Department has been operating for six months based on the continuing resolutions. Plans and work schedules are in being, covering at least the next several months—this involves deployments, combat operations, training rates, rebuild and transportation schedules, manpower programs, ship and aircraft operations, and so forth. At the same time, contractors are at work producing goods and services for defense. Industry manpower is engaged, parts orders and subcontracts have been let, and work is proceeding. Large parts of the Defense program are not subject to orderly change if decisions are delayed until the middle of the fiscal year.

Even the very beginning of the fiscal year may be too late, for practical purposes, to make major changes in defense spending for that year. Late last June Senators PROXMIRE, and MATHIAS sought unsuccessfully to place a $68 billion ceiling on defense outlays for fiscal 1972—a $7 billion cut from the administration's budget, or 9 percent. The Proxmire-Mathias amendment was placed on the continuing resolution, at the start of the fiscal year, precisely to avoid the argument that such large changes could not be made late in the year. However, one of the main arguments raised against the amendment on the Senate floor was that even at that early date in the fiscal year, cuts of that magnitude would be highly disruptive. Manpower would have to be reduced by layoffs rather than attrition. Contracts would have to be terminated with penalty payments and bases abruptly closed—all resulting in much inefficiency. The amendment was defeated 24 to 63. The incident seems to suggest that even at the beginning of the fiscal year Congress has lost much of its flexibility of decision.

Now, in September Congress can make marginal changes—for example cuts of $2 or $3 billion—in the fiscal 1972 defense budget, which no doubt have already been taken into account in Pentagon planning. But we have already lost our chance to realistically consider more major changes.

PENTAGON PLANS AHEAD

While Congress is looking at the fiscal 1972 defense budget, the administration is already far along in planning the fiscal 1973 budget, and is doing so without any guidance from Congress.

The administration's annual defense budget planning process consists of 27 steps. It begins in January with a 5-year defense program inherited from the previous cycle. It ends with the formulation of a new 5-year plan and its translation, just before Christmas, into a budget for the ensuing fiscal year. For the fiscal 1973 budget, this process began in January 1971. By the end of August 1971, 17 of the 27 steps had been completed. Included in the 17 completed steps were an analysis of strategic issues by the Secretary of Defense fiscal guidance by the Secretary of Defense indicating how much money could be spent in 1973 and following years; an outline of forces by the Joint Chiefs within these constraints; program objective memorandums from each of the services detailing changes in their force levels, support, and activities under these policies; and, most recently, program decisions by the Secretary of Defense which will lead to updating of the 5-year defense program to cover fiscal 1973–77. This will be followed by review by the Office of Management and Budget and presentation of the fiscal 1973 budget to Congress early in calendar 1972. This process actually looks even farther ahead than 1977. Step No. 13, completed at the beginning of July, consisted of a strategy paper by the Joint Chiefs dealing with a defense program from fiscal 1974 to 1981.

Mr. President, I ask unanimous consent to have printed in the RECORD at the conclusion of my remarks a list furnished by the Department of Defense outlining these 27 steps as they were conceived at the beginning of the budget cycle.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered. (See exhibit 1.)

Mr. NELSON. With some minor changes, this list has been followed very closely through step 17 at the end of August. The actual completion dates of each step have been close to the planned action dates shown on the list.

This process takes place with no formal participation by Congress. The documents involved are regarded as internal papers of the administration and are not furnished to congressional committees dealing with defense. Nor do these committees appear to have sought them. Some information from the document is reflected in testimony to these committees by administration witnesses in closed session.

The most basic of these documents in terms of looking ahead is the annually updated 5-year defense program. So far as I have been able to determine, this has not been furnished to congressional committees even on a secret basis. The 5-year program included money totals for the Defense Department for each of the 5 years. These figures have not been included in the Secretary of Defense's annual report to Congress even in its classified information form. The Senate Armed Services Committee has received classified information from the 5-year program but not the document itself.

REORGANIZATION ACT

The Legislative Reorganization Act of 1970 requires legislative committees to estimate the 5-year costs of legislation they enact. To comply with this provision, Chairman F. EDWARD HÉBERT of the House Armed Services Committee wrote Secretary Laird last May asking for 5-year projections. Mr. Laird replied by citing the difficulty of making such projections:

As you know, any projection of Defense financial resuirements beyond the budget year is extremely tentative at best. Such programs as may be proposed by Defense components have not been approved by the President nor have they been subjected to the thorough review and analysis by my staff to assure that they represent firm requirements supportable within the dollar levels that might be expected to be available to the Department of Defense in future years.

Mr. Laird went on to say:

. . . I can also provide the general estimate that to support the 5-year forces contained in my Defense report on the fiscal year procurement and RDT&E in the range of $22–23 billion (in fiscal year 1972 dollars) would be required for each of the next 5 years.

The estimate covers only procurement and research and development—about a third of the defense budget—because those are the only major items covered in the authorization bill. The Legislative Reorganization Act exempts appropriations committees from making 5-year estimates. This exchange—and a similar exchange between Mr. Laird and the Senate Armed Services Committee—appear to be the closest Congress has come yet to estimating defense costs over the next 5 years.

TRADITION

Behind all this is a long tradition that the administration does not divulge budget figures until they are formally presented to Congress. The Office of Management and Budget has a governmentwide policy against such disclosures. Some believe this is the way it should be in a government of divided powers—that the executive should recommend, Congress approve, and that Congress has no business intervening in an administration recommendation before it is made. On the other hand, it can be argued that the need for Congress to look ahead requires some change in this tradition. Congress is in a serious box if, when the administration makes its recommendations, Congress has already lost much of its flexibility to entertain a range of possible decisions.

SECRECY

There is obviously a substantial question of military secrecy. No doubt a detailed breakdown of 5-year costs by program and element would tell other countries a lot about U.S. military forces and strategy in the future. But this should not stop committees from dealing with future costs in closed session. Also, it may be that a general discussion of overall 5-year defense costs could take place in public without loss of national security. If the projected budgets were budgets of restraint, it might be beneficial to disclose the general levels to the Soviet Union in hopes that it would follow equal restraint.

NEED FOR INFORMATION

Congress should have more information on the Defense Department's 5-year planning. More specifically:

The 5-year defense program budget totals for each year in actual and constant dollars.

The 5-year totals broken down by program, such as strategic forces, general purposes, intelligence and communications, airlift-sealift, and so forth.

In order for the budget totals to be meaningful, there should be an explanation of how they are arrived at. For example, one possible way is to assume a more or less arbitrary budget level. Another is to project actual programs and compute their future costs.

Five year projections of the defense budget as a percent of national product.

Five year projections of defense budget as percent of Federal budget.

The fiscal guidance being used in planning the fiscal year 1973 budget and beyond.

General budgetary policies being followed by the Defense Department. In general will the defense program in real terms be allowed to grow? Will the baseline grow or decline in constant dollars? Will any of the Vietnam saving, in terms of constant dollars, be transferred to the baseline?

Probably most of this information could be made public. It is possible that some should be given to Congress in classified form.

AMENDMENT

In addition, passage of this amendment would provide the impetus to start Congress in the direction of advance planning of defense budgets.

Studying the 5 year prospects of the defense budget will bring the Armed Services Committees into a kind of advance planning which now only the administration is doing. It will be a healthy thing to have these committees review the administration's own planning. The committees do not have to come up with complete, detailed 5-year defense programs all by themselves, but are only asked to make rather general recommendations as to the level of defense spending. They would have great latitude as to the nature of their recommendations.

The committees are also asked to consider how Congress may best deal with these problems in the future. Someday Congress may wish to legislate levels of defense spending or set defense policies years ahead, in addition to annually appropriating funds. Someday Congress may wish to adopt its own 5-year defense program, and then update it each year. It may wish to make more use of multiyear authorizations, or set limits on expenditures, or on total obligational authority—TOA. But just how we should go about it, is something that needs much more study.

It is sometimes said that, in order to really tackle basic defense issues, Congress would have to build itself a vast establishment of planners and systems analysts like the administration has. In my opinion this is an exaggeration. The basic thing Congress needs is to address the real questions, which involves looking ahead. If it looks at these questions, it will find it already has within its own establishment vast resources to find the answers.

I yield the floor.

PROGRAM/BUDGET REVIEW SCHEDULE, CALENDAR YEAR 1971

Item and action	Agency	Action date
1. Update 5-year defense program (FYDP)	C	Jan. 15, 1971.
2. Submit joint research and development objectives document (JRDOD).	J	Do.
3. Submit volume II, JSOP (fiscal year 1973–80), analysis and force tabulations.[1]	J	Jan. 18, 1971.
4. Issue tentative fiscal and force capability guidance (under study).	O	Feb. 5, 1971.
5. Submit comments on tentative fiscal guidance and provide force capability estimates.	J	Feb. 26, 1971.
6. Issue strategy guidance memorandum	O	Mar. 1, 1971.
7. Submit comments on tentative fiscal guidance and provide force capability estimates.	C	Mar. 8, 1971.
8. Submit DOD analysis of strategies, capabilities, and costs to DPRC/MSC.	OJ	Mar. 26, 1971.
9. Issue fiscal and capabilities guidance (FCG) to include selected requirements for analysis.	O	Apr. 19, 1971.
10. Submit joint force memorandum (JFM)	J	June 14, 1971.
11. Issue budget guidance for preparation of fiscal year 1973 budget estimates.	O	June 15, 1971.
12. Submit program objectives memorandum (POM) including machine-readable proposed program in FYDP format.[2]	C	June 28, 1971.
13. Submit volume I, JSOP (fiscal year 1974–81) strategic guidance (calendar year 1972 cycle).	J	July 1, 1971.
14. Submit final selected analysis	JC	July 14, 1971.
15. Start issue of Secretary of Defense tentative decisions	O	Aug. 1, 1971.
16. Provide comments on tentative decisions	JC	Aug. 1–27, 1971.
17. Issue program decision memorandum (PDM)	O	Aug. 31, 1971.
18. Update 5-year defense program (FYDP) responding to PDMs	C	Sept. 10, 1971.
19. Submit memorandum to NSC and OMB summarizing forces and capabilities used as a planning base for the fiscal year 1973 budget.	O	Sept. 20, 1971.
20. Submit annual budget estimates and back-up information	C	Sept. 30, 1971.
21. Start budget hearings	O	Oct. 5, 1971.
22. Start issue of program budget decisions (PBDS)	O	Nov. 1, 1971.
23. Provide comments (reclamas) on program budget decisions	C	Nov. 10, 1971 to Dec. 1, 1971.
24. Issue revised PBDs based on reclama comments	O	Nov. 16, 1971 to Dec. 15, 1971.
25. Conduct joint meeting with JCS and service secretaries to discuss major unresolved budget issues.	O	Dec. 6, 1971.
26. Issue revised PBDs based on budget issue review	O	Dec. 13, 1971.
27. Submit volume II, JSOP (fiscal year 1974–81) analysis and force tabulations.	J	Dec. 23, 1971.

[1] Also includes previous volume III, "Free World Forces."
[2] Technical details will be prescribed by ASD (SA).

Legend: O=Sec. Def.; C=Military departments and defense agencies; J=JCS; JC=JCS military departments, defense agencies.

The ACTING PRESIDENT pro tempore. Who yields time?

QUORUM CALL

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

The ACTING PRESIDENT pro tempore. How does the Senator want the time allocated?

Mr. NELSON. Equally.

The ACTING PRESIDENT pro tempore. Without objection, there will be a quorum call, with the time equally divided.

The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

PRIVILEGE OF THE FLOOR

Mr. NELSON. Mr. President, I ask unanimous consent that two members of my staff, Charles N. Conconi and David E. Osterhout, be permitted access to the floor during the period of the debate over the pending amendment.

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

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

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. STENNIS. Mr. President, I ask

unanimous consent that the order for the quorum call be rescinded.

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

Mr. STENNIS. Mr. President, as always, our friend, the Senator from Wisconsin, is very diligent and very sincere. He has endeavored greatly, through his amendment, to bring about a better situation with reference to the military budget and its annual cost each year. So anything that I say about its not being applicable is no reference to him, of course.

I reiterate my confidence in him and commend him very highly for his fine work. He has always been ready to do his work.

Mr. President, I wish that some planning along this line could have practical application. However, when we plan a 5-year foreign policy in advance and put the dollar figures on it—and it is just for budgetary considerations that we appropriate for 1 year at a time—it is a very difficult and, I think, an impossible situation.

First, Mr. President, let me illustrate. The provision reads that this mandate is to conduct full and complete studies:

> Of the budget of the Department of Defense for the five fiscal years following the fiscal year in which this section is enacted. In carrying out such studies the committees shall consider, among other things—
>
> (1) the projected amounts for such budget for such years under current strategies and foreign policies of the United States and under present world conditions;
>
> (2) how the projected amounts for such budget for such years might be affected by changing world conditions or by the adoption of new or different strategies and policies by the United States; and
>
> (3) the so-called five-year defense program of the Department of Defense, access to which the committees shall request.

Mr. President, in the first place, in our system of government we change Presidents every 4 years or, at least, we have a presidential election each 4 years. There is a constitutional mandate that a President cannot serve more than 2 terms. That in itself would be a roadblock that would be insurmountable. If we project a foreign policy for 5 years beyond a certain date for a President who, under the Constitution, is going to complete his term of office next year, or 2 years from now, we could speculate on the matter, and evaluations of that kind are made by the men in office and those who are coming in office. However, as far as getting anything definite and positive that we could tie down, it would be almost impossible. It would practically be impossible.

Another situation is that certainly the foreign policy for the legislative branch is set by the legislative committee or the Foreign Relations Committees of the two Houses and then the joint action of the Congress.

If the Armed Services Committee has an outline of a foreign policy for the next 5 years, that would be a ground rule and it would be a start toward our trying to make some evaluations within the sphere of the policy. However, we would be starting on this proposition really in the wrong place.

Our committee has to pass on a budget that is seeking to implement the foreign policy of the President that is currently in office, as approved or changed by the Congress. And we have this situation. There is one budget from which money is now being expended. Let us forget that we are in this continuing resolution period. There is a budget from which money is being expended at the present time. There is also a budget for another fiscal year that is being justified before the Congress. And we are debating the matter at the same time that the Budget Bureau is preparing the budget for a third year. So, we have the budgets for 3 fiscal years running here at the same time. That within itself makes it very difficult. It is difficult for the President, the Budget Bureau, the departments, and for Congress.

I am not just talking about the Armed Services Committee. I am talking about the legislative branch. We do fairly well. We do our best. We do fairly well to keep those three budgets separate and keep something in view. If we have to try and project a 5-year plan regarding a policy that the Armed Services Committee does not directly initiate and that is not directly molded even in the legislative branch, I think, first, that it would be almost a worthless sheet of paper, and second, I am afraid that it would be highly confusing.

I have tried to protect my thinking as chairman of the committee on matters that we are going to be confronted with, and other members of the committee do the same. I know that we weigh these matters the best we can. Then we come back here after a brief recess in January and find out how much out of line we are.

I have had some thoughts on this matter. I have tried to make geometric proportions as to the cost of manpower and the cost of weapons that are mentioned in the report.

Even with a paring down and a reduction of the cost and having fewer types of weapons so that we can improve something else and have a lesser number of men in uniform—and the military personnel has gotten to be more than half of the cost involved—and even allowing for those things which would constitute a reduction in our budget, when we go to adding the pulses involved—namely, the inflation and all the increased cost of technology and avionics and all of the things that go with it—I have to confess that I think the budget figures will increase for a few years yet in spite of the reductions we are making and in spite of the war that is going to end and is ending and the astronomical increase in cost of weapons. And part of that may involve a misjudgment as to a contract, but it is mainly due to inflation and the military requirements that these weapons are called on to perform.

With all due deference to our friend, the Senator from Wisconsin, I respectfully submit that the amendment is too ambitious and this matter would be applied too impractically for our committee to be able to carry this out. If it should become law, we could make some effort. However, it is like the alternative budget that the Senator had up for consideration before the Senate the other day. In spite of the good arguments he made, that proposal was voted down by the Senate after it had heard the proposal by a vote of 58 to 26.

Mr. President, I am requested now to be in another place. I am going to conclude in just a moment.

When we are fixing our foreign policy, like it or not, we know it has to be responsive to foreign policies of other countries, and right now this military is responsive in large part to what might be the plans of Soviet Russia. We have to be frank about that. How are we going to determine the foreign policies of other countries; for instance, China, and with nuclear weapons coming in. We hope there will be better policies with more downgrading of the military and military weapons. To put it all down in black and white 5 years ahead of what our policies will be and what their policies will be in these kinds of bills is virtually impossible.

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

UNANIMOUS-CONSENT AGREEMENT

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent with respect to the amendment to be offered by the Senator from Wisconsin (Mr. PROXMIRE) dealing with the F–14, that time on that amendment begin running immediately upon the disposition of the so-called Sanguine amendment tomorrow, which will be offered by the Senator from Wisconsin (Mr. NELSON), and that time on the F–14 amendment be equally divided between the mover of the amendment (Mr. PROXMIRE) and the manager of the bill (Mr. STENNIS), with time on any amendment to that amendment limited to one-half hour, to be equally divided between the mover of the amendment in the second degree and the manager of the bill (Mr. STENNIS), and that a vote occur on the F–14 amendment tomorrow at 5 p.m.

The PRESIDING OFFICER (Mr. HART). Is there objection?

Mr. STENNIS. Mr. President, reserving the right to object, what is the provision with repect to amendments to the amendment? Is it 30 minutes to a side?

Mr. BYRD of West Virginia. No. It is 30 minutes to be equally divided. Would the Senator prefer 30 minutes to a side?

Mr. STENNIS. No.

The PRESIDING OFFICER. The Chair wishes to inquire if there is to be a time limitation on the amendment itself.

Mr. BYRD of West Virginia. Yes. Time would begin running on the disposition of the Sanguine amendment tomorrow, the vote to be at 5 p.m.

Mr. STENNIS. The inquiry of the Chair was how much time there will be on the amendment itself.

Mr. BYRD of West Virginia. The way I phrased the request, it did not provide a definite time on the amendment. It would amount to something like 2 hours or 2½ hours.

Mr. STENNIS. Reserving the right to object, so many things could happen to delay the vote on the Sanguine amendment I wonder if we should lock in

the F–14 amendment based on the Sanguine amendment.

Mr. BYRD of West Virginia. Very well. I rephrase my request in this fashion: I ask unanimous consent that there be not less than 2 hours on the F–14 amendment, to be equally divided.

Mr. STENNIS. Mr. President, reserving the right to object, what about amendments to the amendment?

Mr. BYRD of West Virginia. Time on any amendment to the amendment would be limited to 30 minutes, equally divided.

Mr. STENNIS. And that would possibly run it beyond 5 p.m.

Mr. BYRD of West Virginia. It could.

Mr. President, I rephrase my request.

Mr. President, I ask unanimous consent that tomorrow, immediately upon disposition of the so-called Sanguine amendment by Mr. NELSON, the F–14 amendment by Mr. PROXMIRE be made the pending question, and that time on that amendment be limited to 2 hours, to be equally divided between the mover of the amendment and the distinguished manager of the bill, provided further that time on any amendment thereto be limited to 30 minutes, to be divided between the mover of the amendment in the second degree and the distinguished manager of the bill.

Mr. JAVITS. Mr. President, reserving the right to object, I wish to be heard and to vote on this particular amendment and I cannot be present tomorrow for religious reasons. Does the leadership persist in its request?

Mr. BYRD of West Virginia. I made the request at the direction of the majority leader and I hope the Senator would not object.

Mr. JAVITS. I want to know if the Senator persists in it and then I will decide if I object in view of what I have just said.

Mr. BYRD of West Virginia. I am sorry the Senator puts it in that vein. I do not want to persist in anything, but I make the request.

Mr. JAVITS. I do not feel I should object but I wish to make clear that this is a very difficult time for me. I cannot be here. It is an amendment on which I wish to vote. I will do my utmost to make my views known and see if I can get a pair.

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

Mr. BYRD of West Virginia. I yield.

Mr. STENNIS. Mr. President, I appreciate the statement of the Senator from New York I am in sympathy with his position and I appreciate the position he has taken.

Mr. JAVITS. I thank the Senator.

Mr. BYRD of West Virginia. Mr. President, I will withdraw the request and make it later, if the Senator wishes to discuss it.

Mr. JAVITS. I think the facts are clear but I hope the leadership will enable me to arrange for a pair on the vote.

Mr. BYRD of West Virginia. Very well. The leadership will do all it can to accommodate the Senator from New York. I can appreciate the situation as he has explained it. Every effort will be made to secure a pair for the Senator from New York.

The PRESIDING OFFICER. Is there objection to the unanimous consent request? The Chair hears no objection, and it is so ordered.

Mr. BYRD of West Virginia. I thank the distinguished manager of the bill and the distinguished Senator from New York.

RECESS

Mr. BYRD of West Virginia. Mr. President, I move that the Senate stand in recess until 1:30 p.m. today, that the time beginning at 1:30 p.m. be equally divided between the two sides in accordance with the previous agreement, and that the vote occur at 2 p.m.

The motion was agreed to, and at 12:28 p.m. the Senate took a recess until 1:30 p.m.

The Senate reassembled on the expiration of the recess and was called to order by the Presiding Officer (Mr. CRANSTON).

Mr. President, I suggest the absence of a quorum. I ask unanimous consent that the time be charged equally against both sides.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. STENNIS. Mr. President, how much time do I have left on this amendment?

The PRESIDING OFFICER. Each side has 12 minutes.

Mr. STENNIS. Mr. President, continuing my remarks on the bill where I left off, and with emphasis again on the fine work the Senator from Wisconsin has done on this and related matters. I point out with emphasis that the proposed amendment is another attempt to force upon only the Department of Defense, as distinguished from all other Government agencies, a requirement to develop and make available to the Congress additional budget estimates for the 5 fiscal years following fiscal year 1972. This is unworkable, and at variance with the requirements of the proven, long established Budget and Accounting Act of 1921.

A similar amendment, number 429, was proposed by the distinguished Senator from South Dakota on September 23, 1971, which would have required an alternative defense budget to be submitted for fiscal year 1973. After being debated, the convincing arguments made, including those of the distinguished Chairman of the Research and Development Subcommittee, the distinguished chairman of the Committee on Appropriations, the ranking Republican member of the Armed Services Committee, the Senators from South Carolina and Arizona, the amendment was defeated by a vote of 58 to 26.

Mr. President, there are numerous reasons why this amendment should be defeated, in addition to most of those stated during the debate on amendment 429. Let me briefly mention some of the more important of these.

The proposal would constitute a major amendment to the Budget and Accounting Act of 1921, and the Legislative Reorganization Act, both of which are under the jurisdiction of other committees. If it is the will of the Congress that the President submit budget requirements projected for 5 years into the future, then the proposal should be referred to these other committees, appropriate hearings held, and necessary legislation proposed to both Houses of the Congress for debate and consideration prior to enactment. It should be treated as a Government-wide problem and not for only one department of the Government. These are the legal implications.

Now, Mr. President, what are the practical considerations? I will repeat my comments of last week. The present budget is already 18 to 24 inches high and consume up to 2,000 finely printed pages. In addition, the testimony taken this year by the committee and subcommittee filled over 5,000 closely printed pages. And this is only on a single budget year. While the size of these volumes is one impressive measure of the amount of work performed, what is even more significant is the thousands of people and literally millions of man-hours which were spent during this past year in developing, reviewing, coordinating and obtaining approval of this monumental document. To multiply this requirement by adding four more budgets, even if it were otherwise possible, would require a corresponding increase in number of people. And then the congressional committees would have neither the people nor the time to handle the mountain of material submitted within the time available for congressional action.

Mr. President, the Department of Defense is perhaps the one agency of Government which is subject to more unknown influences of national and international scope, and changes in technology than any other agency. We have observed year in and year out the numerous major changes that are made necessary in the annual defense program, after the appropriations are enacted, which involve the entire complexion of our Armed Forces. Any single major change in the budget year usually has a much greater chain reaction in later years. For example, when the Air Force B–1 bomber was proposed in the fiscal 1971 budget, it was estimated that the fiscal 1972 requirement would be $569 million. However, when the fiscal 1972 budget was submitted, the amount had been reduced to $370.3 million, a decrease of $199 million, or 35 percent. The effect of this change in future year requirements obviously also would be significant. This is not a case of poor estimates, but rather, the refinement of estimates as a weapon system progresses into development. This is a very dramatic example which may not be too typical but it demonstrates how drastically requirements can change in just 1 year.

The Congress, Mr. President, has recognized the tenuous character of the Defense program. Procedures have been

agreed upon and have been in effect for many years whereby the Congress is formally advised of major changes through established preprograming procedures. Both Houses have found this to be a satisfactory way of keeping control of changes in the Defense program; but at the same time such changes are recognized as being a fact of life.

The whole idea of preparing a 5-year Defense budget is impractical, Mr. President. In my opinion, it would be wholly unfair to impose on the President the burden of formulating budgets for 4 future fiscal years which, under the proposed amendment, would have to be based on "current strategies and foreign policies of the United States and under present world conditions." Why, world conditions today are so dynamic and fluid that even at the end of this fiscal year, it would be surprising if most of the events upon which our current budget was based came to pass. To forecast beyond that time in terms of the infinite detail required to prepare an annual budget would be utterly meaningless and wasteful.

My distinguished colleague from Wisconsin proposes, in his amendment, that the committee shall consider "how the projected amounts for such budget for such years might be affected by changing world conditions or by the adoption of new or different strategies and policies of the United States." Is my colleague really serious? I would be willing to state with little fear of contradiction that each and every Member of this 100-man body would have a different opinion of what changes will occur in world conditions during the next 5 years, let alone during each of those years. The same divergence of view could be expected on what new or different strategies and policies the United States should adopt during those future years. Does the distinguished Senator for a moment believe that there is either an easy formula or a pat science which can be used to grind this information out of a crystal ball?

Mr. President, let me depart for a moment from the proposed amendment to provide my colleagues with some insight into the deliberations of the committee. While the committee directs its review with greatest emphasis on the programs proposed for the budget years, it is highly sensitive to the significance of the amounts of money which will be required in subsequent years if the programs proposed by the Department of Defense are approved.

In the military procurement authorization bill, this attention is focused upon the major weapon systems which are proposed for development and procurement. For research and development programs, the justification material submitted in support of the authorization request includes an estimate of the additional amounts of money required beyond the budget year to complete the development of the major programs. In procurement, similar treatment is reflected in that the programs proposed for procurement in the budget year are priced out to show the total future year's costs to complete production. In addition to this, the Department of Defense, by agreement with the Congress, submits Selected Acquisition Reports—SAR—quarterly which provide a complete breakdown of all of the cost elements of the 38 major weapon systems, which is an excellent insight to the progress that these programs are making and a complete track of all changes which occur in these programs. This system will be continued.

In conclusion, Mr. President, I would assure my colleagues that the Committee on Armed Services will continue to exert its best efforts to review the programs proposed by the Department of Defense to eliminate all unnecessary requirements and to recommend the most austere defense procurement programs consistent with the requirements of our national security. The amendment proposed by my colleague from Wisconsin would serve no useful purpose in the attainment of this objective. In fact, it would jeopardize the ability of the members of this committee and their staff by impeding the highly competent manner in which they have fulfilled their responsibilities.

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

The PRESIDING OFFICER (Mr. CRANSTON). The Senator has 7 minutes remaining.

Mr. STENNIS. Mr. President, I do not think there is anything that underscores the complexity of this matter any more, of a 5-year budget proposal to be reported back by this committee, than that it requires the consideration and the measurement of a foreign policy, for instance, for 5 years hence, that has not yet been formulated by the executive branch of the Government, and an appraisal of the future foreign policy of Soviet Russia, for instance. They certainly have not made their estimates and their appraisals of their policies that far along, and if they have, they have not told us, and they will not tell us.

Let me emphasize, Mr. President, this is not by way of complaint, but this bill and this complete military budget require all these voluminous hearings and require a tremendous amount of research work by the staff members starting a year in advance. We are already working on the budget bill for next year, and this all culminates in a report that, with all due modesty on behalf of our committee, is 140 closely printed pages, which I respectfully submit is an outstanding document.

I am not just saying that. Leading members of our press representatives here in this city have brought this up many times, several of them this year and last year, about how much this report represents, and how illuminating it is, and that what it does not tell it gives them leads to.

So, Mr. President, we are talking about something that is beyond the capacity of our committees and staffs to possibly prepare and bring back in here, with any intelligence.

Mr. THURMOND. Mr. President, I rise in opposition to amendment No. 425, offered by the distinguished Senator from Wisconsin (Mr. NELSON).

This amendment would require the Armed Services Committee of the Senate and House to conduct studies of the Defense Department plans and budgets for the 5 years following the current fiscal year.

It would also require that the committees report to their respective Houses on the results of these studies along with proposals for levels of defense spending and ways Congress can improve its decisionmaking process.

Mr. President, there are several reasons why this amendment should not be favorably considered by the Senate. First, defense budgets for each of the next 5 years do not exist and would be impossible to construct.

Preparation of the fiscal year 1973 budget is nearly complete now in calendar year 1971. This process requires considerable planning in view of the fact that defense needs and resources are constantly changing. A large percent of the Pentagon employees spend months preparing this one budget. In my view it would be unrealistic to require the preparation of budgets for each of the next 5 years and submit them to Congress some 5 years ahead of schedule.

Second, this amendment would realine committee responsibilities as presently budgetary matters are under the purview of the Committees on Appropriations.

Such a major realinement of committee responsibilities should not be considered in the form of an amendment to the military procurement bill. The proper legislative procedure would be to offer this proposal as an amendment to the Budget and Accounting Act and the Legislative Reorganization Act—both of which are under the jurisdiction of other committees.

Third, the Senate Armed Services Committee considers all military requests in the context of how they affect future defense spending. For instance, in the XM–803 tank program the committee looks at the total tank program and how the money will be expended and when the equipment will be deployed on into the early 1980's.

Thus, in effect a look down the road is presently being taken by the Senate Armed Services Committee as it goes about the authorization process in defense programs. This approach takes into account the 5-year defense program which is actually a projection of manpower, weapons, and dollars.

Mr. President, in my view the Senate Armed Services Committee is operating in an effective and responsible manner. If this amendment is approved, I believe that, rather than solutions, the result would be confusion and problems. I urge the Senate to reject amendment No. 425.

Mr. TOWER. Mr. President, will the Senator yield me 1 minute?

Mr. STENNIS. Yes; I yield the Senator 3 minutes. I am glad he is in the Chamber, and I would like to hear what he has to say.

Mr. TOWER. I associate myself with the remarks of my distinguished colleague from Mississippi. We in the Armed Services Committee unfortunately are not armed with crystal balls. We cannot see thus far into the future, and determine what our requirements are going to be 5 years from now. Indeed, foreign policy changes, and sometimes

foreign policy changes very rapidly. I do not think we could accurately make these projections.

Too, very often our intelligence on Soviet weapons systems has been very much behind the achievement in certain states of the art by the Soviets. There have been times when we did not know the Soviets possessed a new and highly sophisticated weapons system until they rolled it out of the hangar and showed up at the Paris Air Show with it, or something like that. So we cannot know what Soviet technology is going to produce over a 5-year period, that might require development of certain military technical countermeasures on the part of the United States.

Therefore, anything that we would do in this line, in trying to project a 5-year budget, would be guesswork at best, and not inevitably educated guesswork. As a matter of fact, it would be uneducated guesswork. We do not know what our intelligence sources are going to tell us a year hence or 2 years hence. We do not know with certainty who will be in the White House 5 years from now. We do not know what turns American foreign policy may take. We do not know what might happen to the strategic arms limitation talks.

So I do not think this is realistic or practical. I wish it could be done. I think the amendment of the Senator from Wisconsin is well motivated, and I think I understand what he is trying to do. But I think it is just totally impractical to expect us to come up with anything like an accurate projection over a 5-year period, and, as the distinguished chairman of the committee has pointed out, the man-hours of labor that would have to go into a study of this type, I think, would be beyond the present capabilities of the Committee on Armed Services.

I therefore hope that the amendment of the Senator from Wisconsin will be rejected. I wish we could achieve what he seeks to achieve here, but I just do not think, in a practical way, that we can do it.

Mr. STENNIS. I thank the Senator very much. Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. The Senator has 2 minutes remaining.

Mr. STENNIS. Mr. President, I yield my remaining time to the Senator from New Hampshire, and if the Senator from Wisconsin could spare him a little time it would be appreciated.

Mr. McINTYRE. Mr. President, I would like to add my strongest support to my distinguished chairman in opposing the proposed amendment number 425 to the fiscal year 1972 Military Procurement Bill. That amendment, if it were ever adopted, would cause a disaster.

If I could think of one, I would use a word stronger than frustration to describe the emotion which constantly weighs so heavily on the mind of anyone who is up to his armpits in the review of the Defense budget. If the distinguished Senator from Wisconsin could find the time to participate in the review of a single year budget, I am convinced that he would not propose such an amendment.

The Defense budget is the antithesis of cause and effect. The variables in this constantly changing world are so numerous, so diverse, and so unpredictable, that it never ceases to amaze me how even a single thread can be woven through the fabric of the annual defense budget. It is a tribute indeed to the remarkable capabilities of the civilian and military leaders in the Department of Defense that the budget presented to the Congress, in its vast array of detail, is so complete a document.

The proposed amendment raises a question of legislative procedure since it would constitute a major amendment to the Budget and Accounting Act and the Legislative Reorganization Act of 1970—both of which are under the jurisdiction of other committees which I am sure would have strong views with respect to the proposal. At several points, the amendment mentions the budget for the Department of Defense for 5 years into the future. There is no such budget, nor does the amendment specify how such a budget is to come into existence. The law now requires the President to submit a budget only for the upcoming fiscal year; this requirement would not be changed by the amendment. The amendment mentions that the Armed Services Committees will request access to the 5-year defense program. Even if such a request was successful, this 5-year program would be of questionable value. I understand that it is far removed from a budget as we would ordinarily use the term, and at best is only an internal but incomplete planning document.

The amendment, in short, cuts across several major pieces of legislation and involves a major rearrangement of the assigned tasks of at least three separate committees of both Houses of the Congress. Before making such major changes in the way we do business, I believe we would want much more systematic consideration than will be possible on the floor of the Senate Chamber today.

As I understand it, the intent of the amendment would be to require the President to submit the Defense budget projections for the next 5 years, in considerable detail. This is not merely a matter of requiring the Executive to furnish information which now exists—it would require the development of such material expressly for this purpose, and it would entail a massive effort. The submissions would be meaningless unless approved by the President—indeed, I do not believe that we would accept them, nor would the Department submit them, without the President's approval. This would mean that the President would have to approve 5-year budget estimates for the Department of Defense, which he does not do today. He has not, for example, approved what figures may appear in the 5-year Defense program. The development of a budget for even 1 year is a massive, complex, and costly task. We would be multiplying the problem many times. In these projections, the Executive would have to make many assumptions in many areas. For example:

Technology;

International strategic developments;

Shifts in United States and alliance policies;

Pay rates and price levels;

Federal revenues, nondefense spending needs, and the state of the economy;

The degree of success in the development, production, and operation of key weapon systems.

All of these factors have a bearing on Defense budget levels, in total and in detail. Only one thing is certain—that is that conditions will change, and that the assumptions will have to be successively revised as we move along.

Let us take a very simple matter: rates of pay. In projecting the budget for 5 years, one obviously has to make some assumptions regarding pay raises. Let us use fiscal year 1972 Defense manpower levels to illustrate. If we assume the pay raises average 5 percent per year for the next 5 years, this would add $11 billion to the Defense payroll by 1977. If, instead we assumed 7 percent, the payroll would rise by $16 billion. That is a $5 billion difference associated with a mere 2-percent variation in pay raise assumptions.

Take another example. Federal civilian agency spending is currently running at about $160 billion per year. If it increases at 10 percent per year, for the next 5 years, it will be about $258 billion in 1977. At 12 percent per year, it would be $282 billion. There is a $24 billion difference, depending upon another 2-percent variation in the assumptions.

The PRESIDING OFFICER. The Senator's 2 minutes have expired.

Mr. McINTYRE. Will the distinguished Senator from Wisconsin yield me 2 minutes?

Mr. NELSON. I yield the Senator from New Hampshire 2 minutes.

Mr. MANSFIELD. Mr. President, will the Senator yield briefly, with no time taken out, so we can ask for the yeas and nays?

Mr. McINTYRE. I yield.

Mr. MANSFIELD. I ask for the yeas and nays.

The yeas and nays were ordered.

Mr. McINTYRE. Mr. President, a $5 billion difference for pay, and a $24 billion difference in civilian agency spending, both depend upon 2 percent variations in the assumptions used. We could illustrate the same range of uncertainty with respect to price inflation, revenues, and other variables—all of which have a definite bearing upon defense budget levels. Two percent variations in the assumptions used can easily produce variations in the tens of billions of dollars. This is in addition to uncertainty as to technology, international developments, and performance of individual weapons.

These give some indication of the range of uncertainty with which the President would have to wrestle in projecting Defense budget levels for the next 5 years. Under the cirmustances, it is simply pointless to incur the massive costs of developing such budget estimates in great detail. The executive branch has not done so for its own purposes and, I submit, it would be a pointless and costly exercise for us as well.

The point may be made that the 5-

year defense program reflects future projections, and might be used to meet the purposes of the amendment. This observation would be incorrect, for two reasons: First, the 5-year defense program is not a budget. Second, there would be serious problems in presenting this material to the Congress.

The 5-year defense program reflects, as I understand it, projections of manpower, forces, major weapons, and dollar costs. These data are obviously of great importance for planning and programing within the Department of Defense. For example, if a certain type of aircraft is to be phased out in 1973, the Department obviously should not spend money in modifying the aircraft, or in related base alteration, training, and so forth. On the other hand, many parallel actions must go on with respect to new aircraft to enter the system, say, in 1974. There are obviously many uses for this 5-year program. But it is not a budget, because:

It is stated, generally, in prices and pay rates in effect each time it is prepared—it does not reflect future anticipated pay raises, for example, which alone would add $16 billion or more to some of the later years.

The programs beyond the budget year have not been approved by the President and, indeed, some of them could be significantly changed by the military departments or the Secretary of Defense before budget requests for a given year are even submitted to the President.

A good deal of important financial information, such as data on prior-year balances, is not reflected in the 5-year program at all.

In other words, one simply cannot move from the 5-year defense program to what could be called a budget request or projection for a given year. This program is simply not a budget, and massive efforts would be required—involving everyone from the President on down—to convert it into one.

Aside from this, consider what would be involved in making the 5-year defense program available to the Congress. Defense programs are very large and very intricate. There must be some means to provide balance and coordination among very varied activities—the number of close air support aircraft, for example, as against the number of ground units and their artillery or the mix of manpower, training, logistic, installation, and other support of a given weapon. Obviously, the President cannot decide all of these items in detail, 5 years into the future, including day-by-day revisions. The Secretary of Defense must, however, provide the services with some basis upon which to plan and to operate. He does this through the 5-year defense program. This program reflects the phase out and phase in of various types of ships, aircraft, and other weapons, military units, and so forth. Such a system is essential to the operation of the Department. Consider what it would become if every item therein had to be approved by the President for submission to the Congress. If the Department submitted the program in its present form, without Presidential approval, grave questions would be posed for both the Congress and the executive. I am not sure that they would submit it, or that we would accept it, on such a basis.

Even if the program was submitted, consider the complexities. The program changes several times a year. Would we try to track all the changes? Suppose that the program shows that certain communication sites, for example, will be phased out in fiscal year 1973, while others will continue throughout the period. Would we regard this as an ironclad commitment to phase out, or to continue, the locations involved? These examples could be multiplied. What is now an internal program document, serving a vital purpose, would be radically altered in content and in usefulness if all the details were to be presented to the Congress.

In short, before we consider requiring comprehensive 5-year projections, we had better proceed very carefully in such matters as the level of detail we would require, how we would plan to handle the material, and so forth.

I am puzzled, too, as to why the Department of Defense is singled out in this amendment. If we are concerned about long-run budget problems, our attention certainly must be focused primarily elsewhere. The amendment suggests a 5-year look ahead. Let us look back 5 years for a moment. From 1967 to 1972:

Defense spending is up $8 billion.

Nondefense spending is up $67 billion.

Of course, 1967 was a war year. If we move back to prewar, we find that, from 1964 to 1972:

Defense spending is up $25 billion.

Nondefense spending is up $90 billion.

I do not see anything in these figures to suggest that defense spending trends are the key to our future budget problems.

Finally, I would express my concern with the timing involved in the proposed amendment. The Armed Services Committee would have to complete their work on the 5-year projections before, or concurrent with, their work in the annual bill. It is now the end of September and we still have a considerable way to go on the annual bill alone. Only after work on that is completed can the Congress take up the appropriation request which, for 1971, was not enacted until last January. The proposed amendment would inject the 5-year projection into the process, introducing even further delays.

I must conclude, Mr. President, that this amendment raises far more questions as to the organization of the Congress, relations between the executive and legislative branches and within the executive branch, and sweeping amendments in existing law than can possibly be handled in the brief time available for floor consideration today. Even given the time to consider all of these matters in proper perspective, I have certain doubts that the Congress in due course would adopt the proposed amendment or even any part thereof.

I am convinced, Mr. President, that the proposed amendment would obstruct the orderly process which now exists in the Senate for the consideration of annual Defense budgets. I urge my colleagues to join me in voting against the proposed amendment.

The PRESIDING OFFICER. The Senator from Wisconsin is recognized.

Mr. NELSON. Mr. President, the objection made to the amendment which would direct the Committee on Armed Services to project a 5-year defense budget is that it is very complicated.

Weapons systems competition between the major powers changes and may change abruptly. The foreign situation among the major powers may change rather abruptly. Therefore, it is not possible to project a defense budget 5 years in advance.

I submit, Mr. President, that the Defense Department does it now. They do not find it an impossible task to prepare a 5-year defense budget and then the next year project it 5 years ahead again, and the subsequent year project it 5 years ahead again, recognizing that circumstances change and they have to modify the projection each year. This is true of any budget projection, whether it be a budget projection of a State government's welfare program, whether it be a budget projection of a major city, or whether it be a 5- or 10-year projection in plans for budgeting of a corporation 5 years in advance or 10 years in advance. This is a process in which they all engage.

As to this specific proposal, I pointed out in my earlier remarks that the Department of Defense goes through 27 steps in its entire defense budget plan ning and programing. Step No. 13 of the Defense Department was completed at the beginning of July of this year, and it consisted of a strategy paper by the Joint Chiefs dealing with a defense program projected from fiscal 1974 to fiscal 1981.

I would think that one is entitled to question how it is possible that the Defense Department can project defense programs from 1974 to 1981 but, somehow or other, it is not within the competence of Congress, which has to appropriate the money, to do the same.

I simply do not think that is true. In fact, the Defense Department will not even give to the appropriate congressional committees the 5-year projections they are making for themselves. They much prefer the situation in which the budget comes to the floor of the Senate and we vote on it 2 or 3 months after the fiscal year has already begun.

The fiscal year for this procurement budget began on July 1. We will not be voting on this fiscal year's budget until perhaps mid-October, which means July, August, September, and October—3 and a half months—have expired since the beginning of the fiscal year to which this particular budget applies.

I suspect that the Defense Department people like that arrangement, because it forecloses any opportunity for real debate and it forecloses any opportunity for dealing with this budget in any flexible or meaningful way by Congress; because the argument, rightly so, is that it is too late to make any serious changes in this budget because the fiscal year is already underway and contracts are being made and commitments are made and, of course, you cannot make any

dramatic or significant cuts, because the budget is already moving. That is correct, and that is the position Congress is in on every defense budget we deal with year after year.

I should like to call attention to something I mentioned earlier this morning. The Legislative Reorganization Act of 1970 requires legislative committees to estimate 5-year costs of legislation they enact. To comply with this provision, Chairman EDWARD HÉBERT of the House Armed Services Committee wrote Secretary Laird last May, asking for 5-year projections. Mr. Laird replied by citing the difficulty of making such projections:

As you know, any projection of Defense financial requirements beyond the budget year is extremely tentative at best. Such programs as may be proposed by Defense components have not been approved by the President nor have they been subjected to the thorough review and analysis by my staff to assure that they represent firm requirements supportable within the dollar levels that might be expected to be available to the Department of Defense in future years.

Mr. Laird went on to say:

I can also provide the general estimate that to support the 5-year forces contained in my Defense report on the fiscal year 1972 Defense budget, authorizations for procurement and RDT&E in the range of $22–23 billion (in fiscal year 1972 dollars) would be required for each of the next 5 years.

As I have said, the Defense Department makes the projections. Why should not the appropriate committees of Congress make 5-year projections, recognizing, just as the Defense Department does, that changing circumstances will require modification of those projections? So that on each succeeding year, the projection is extended for 5 years hence with whatever modifications are indicated due to the changing circumstances in the past year.

Mr. President, if Congress is going to have significant impact or influence and if Congress is going to have any control over the defense budget in any significant way, it will have to be dealing with projections in the future and not be confined to dealing with a budget for a fiscal year that has already begun by the time we begin to debate that budget.

Mr. President, I ask unanimous consent to have printed in the RECORD a detailed analysis of this proposal.

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

THE FUTURE OF THE DEFENSE BUDGET

DRAFT OUTLINE

The defense budget to date

The Defense Department recently declassified Vietnam war costs for 1971 and 1972 in current and constant prices. This fills in many gaps in defense spending tables and makes it much easier to look at what has been happening to the defense budget in recent years and where it is likely to go in future.

The figures in terms of defense outlays in recent years are reproduced below:

CURRENT PRICES

	Fiscal year—					
	1964	1968	1969	1970	1971	1972
Outlays:						
Full cost, SEA		26.5	28.8	23.1	15.3	10.1
Incremental costs, SEA		20.0	21.5	17.4	12.0	7.8
Baseline force	50.8	58.0	57.1	60.5	26.5	68.2
Total outlays	50.8	78.0	78.7	77.9	74.5	76.0

CONSTANT (FISCAL YEAR 1972) PRICES

	Fiscal year—					
	1964	1968	1969	1970	1971	1972
Outlays:						
Full Costs, SEA		31.9	33.2	25.2	16.0	10.1
Incremental costs, SEA		24.3	25.1	19.1	12.5	7.8
Baseline force	75.8	75.6	71.0	69.0	67.1	68.2
Total outlays	75.8	99.9	96.1	88.1	79.6	76.0

With the help of these figures it is possible to see a number of trends:

1. **The cost of the Vietnam war is declining rapidly. The full cost of the war, measured in current (that is changing) dollars, has declined from $28.8 billion in 1969 to an estimated $10.1 billion in fiscal 1972.** The full cost includes forces and expenses now going into the war but which would still be present without the war. For example, some ammunition now being used in Vietnam would still be used in peacetime training, and some of the aircraft now flying in Vietnam would still make peacetime flights. The incremental war cost includes war expenses actually added to the budget. It is therefore the one to look at when considering how much can be saved as the war comes to an end. The incremental war cost, in current prices, has declined from $21.5 billion in 1969, to an estimated $7.8 billion in 1972—a drop of $13.7 billion.

2. But "inflation" is adding more to the defense budget than the Vietnam saving.

The figures, read vertically, show the impact of increases in pay and price scales on the defense budget. The 1964 baseline (or non-Vietnam) force cost $50.8 billion at that year's rates. At 1972 rates the same force would cost $75.8 billion. Therefore, what the Defense Department calls "inflation" added $25 billion to the baseline cost between 1964 and 1972. Between 1969 and 1972 (when the war dropped $13.7 billion) inflation added $17.4 billion to the total defense budget, according to the tables.

It is worth taking a look at just what this inflation is made of. Of the $25 billion 1964–1972 inflationary increase noted above, nearly $16 billion is related to pay and a little over $9 billion represents increased costs of purchases. The pay increases included raises voted by Congress (including those designed to move toward a volunteer armed force) and other raises tied automatically to the cost of living. The Defense Department's computation for purchase price increases is based on indices for the economy as a whole, and these in turn are influenced by defense. It is probable that some of the inefficiencies that go into procurement "cost overruns" have crept into the figure for "inflation". The extent of this needs further study.

3. The total defense budget, in current prices, has declined only slightly from the Vietnam peak. But measured in constant dollars, it has been squeezed back to close to the 1964 level (before the Vietnam Build-up) with the war still included. The baseline, or non-Vietnam, portion has grown in current prices. But in constant prices it is $7.6 billion below 1964, indicating a cut in the baseline defense program in real terms.

4. This has been accompanied by physical cuts in forces between 1964 and 1972—for example from 16⅔ to 13⅓ Army divisions; 24 to 16 attack and antisubmarine carriers; 24 to 15 carrier air wings; 119 to 105 Air Force tactical squadrons; 61 to 38 airlift squadrons; and 932 to 658 commissioned ships in the fleet.

5. At least through fiscal 1971, the Vietnam saving has not been used to build up the baseline force in real terms. But this saving has not become the kind of "peace dividend" for which some has hoped, available to increase domestic programs or to lower taxes, because it has been gobbled up by inflation on the overall defense budget.

The current price figures show that between 1969 and 1972 the incremental war cost declines $13.7 billion, but the total defense budget declines only $2.7 billion. From these figures alone it appears that $11.1 billion in Vietnam savings have been used to increase the baseline budget.

But the constant dollar figures show a decline in the war, the baseline and the total defense budget. Looking at it this way, the Defense Department argues that the Vietnam saving in real terms has been removed from the defense budget and has not been used to increase the real baseline.

While the constant dollar baseline has been declining each year through 1971, a $1.1 billion increase is shown for the first time between 1971 and 1972. To this extent, following the Defense Department's way of looking at it, a small part of the Vietnam saving is for the first time apparently going to be used to increase the baseline in real terms.

However, it is not yet known just what the true 1972 outlay figures will turn out to be.

One implication of all this is that for a number of years the Vietnam reduction has served as a cushion to offset inflation without requiring more drastic cuts in overall forces. But this cushion is now almost used up.

6. There has been a degree of change in national priorities. Between 1968 and 1972 the defense budget changes from 9.5% to 6.8% of the gross national product and from 42.5% to 32.1% of the federal budget as measured by the unified budget method.

On a federal funds basis, national defense including DOD military functions, MAP, AEC costs, Selective Service and emergency planning declined from 56.2% of the federal budget in 1964 to 43.8% in 1972. This excludes trust funds from the accounting. (p. 1168 House hearings)

Congress must look ahead

Are these the right priorities, the right percentages of national product and federal budget? Should the defense budget continue to decline in constant dollars in the years ahead? By how much? Should it stay the same or rise? These are questions to which Congress should address itself. In general there are four ways in which Congress can control defense—fixing the total budget, approving or denying individual weapons projects, setting overall force levels, and setting broad strategies and policies such as those involving U.S. commitments. To be effective, Congress must use all these approaches. If it only controls the money, then the strategic decisions are made by the administration. If it only controls weapons and forces, then the money gets out of hand. This paper concentrates on the budgetary approach, which is not to say the others are not also important.

DEPARTMENT OF DEFENSE—DEFENSE BUDGET, FEDERAL BUDGET, AND GNP FOR SELECTED YEARS

[Billions of dollars]

Fiscal years	GNP	Federal budget outlays: Net total	Federal budget outlays: Department of Defense	Federal budget outlays: Other	Federal budget outlays: Offsets [1]	DOD outlays as percent of: GNP	DOD outlays as percent of: Federal budget
1950: Lowest year since World War II [2]	$263.3	$43.1	$11.9	$31.2	NA	4.5	27.7
1953: Korea peak [2]	358.9	76.8	47.7	29.1	NA	13.3	62.1
1964: Last prewar year	612.2	118.6	50.8	70.7	−2.9	8.3	41.8
1968: SEA peak [2]	822.6	178.9	78.0	105.5	−4.6	9.5	42.5
1970: Last actual year	956.2	196.6	77.9	125.0	−6.2	8.1	38.4
1971: Current estimate	1,013.0	212.8	74.5	145.5	−7.2	7.4	33.9
1972: [3] Budget estimate	1,123.0	229.2	76.0	161.0	−7.8	6.8	32.1
Changes:							
1964 to 1972	+510.8	+110.6	[4] 25.2	+90.3	−4.9		
1968 to 1972	+300.4	+50.3	−2.0	55.5	−3.2		

[1] These amounts are undistributed intragovernmental transactions deducted from Government-wide totals. These include Government contribution for employee retirement and interest received by trust funds.

[2] In constant dollars, and as a percentage of GNP and the Federal budget.

[3] Lowest percent of GNP since 1951; lowest percent of Federal budget since 1950.

[4] 4.9 percent of the GNP growth during this period, and 21.8 percent of the increase in the Federal budget.

NOTE.—Page 1128, Hearings, House Committee on Appropriations, Department of Defense Appropriations for 1972, part 1.

To deal with the broad questions of national priorities and the defense budget. Congress must look ahead and possibly even legislate ahead. To what extent does Congress do this now?

1. When Congress acts on an annual defense appropriation, it is already too late to make anything but a marginal change in priorities for that fiscal year. As the following table shows, the regular defense appropriation bills are generally passed by Congress about half way through the fiscal year to which they apply:

	Fiscal year—1968	1969	1970	1971
Authorization Act	June 5, 1967	Sept. 20, 1968	Nov. 19, 1969	Oct. 7, 1970
Regular Appropriation Act	Sept. 29, 1967	Oct. 17, 1968	Dec. 29, 1969	Jan. 11, 1971
Last major supplemental appropriation	July 9, 1968	July 22, 1969	July 6, 1970	May 25, 1971

Source: Testimony of Robert C. Moot, Department of Defense Comptroller, before Joint Committee on Congressional Operations.

Because of the lead time in planning budgets and forces, the Defense Department has little flexibility half way through the fiscal year to make major changes in its program. Now, in August, it is rapidly becoming too late for Congress to even *consider* the basic level of the fiscal 1972 defense budget, beyond making a marginal cut of a very few billion dollars, which the Defense Department has no doubt already anticipated.

Late last June Senators Proxmire and Mathias sought unsuccessfully to place a $68 billion ceiling on defense outlays for Fiscal 1972, a $7 billion cut from the administration's budget, or 9 percent. The Proxmire-Mathias amendment was placed on the continuing resolution, at the very beginning of the fiscal year, to avoid the argument of late legislation. But one of the main arguments raised against it on the Senate floor was that, even at that date, it would be highly disruptive of long planned programs, requiring major cuts in manpower, cancellation of procurement contracts, operation and maintenance reductions and base closings. The incident seems to suggest that even on the opening day of the fiscal year Congress has already lost much of its influence over broad priorities for that year.

2. At the present time, while Congress is looking at the fiscal 1972 defense budget, the administration is already far along in planning the fiscal 1973 budget, and is doing so without any guidance from Congress.

The administration's annual defense budget planning process consists of 27 steps. It begins in January with a Five Year Defense Program inherited from the previous cycle. It ends with the formulation of a new five year plan and its translation, just before Christmas, into a budget for the ensuing fiscal year. For the fiscal 1973 budget, this process began in January, 1971. By the end of July, 1971, 14 of the 27 steps had been completed. Included in the 14 completed steps were an analysis of strategic issues by the Joint Chiefs; strategic guidance by the Secretary of Defense; fiscal guidance by the Secretary of Defense indicating how much money could be spent in 1973 and following years; an outline of forces by the Joint Chiefs within these constraints; and Program Objective Memoranda from each of the services detailing changes in their force levels, support and activities under these policies. In September, the schedule calls for program decisions by the Secretary of Defense, and the updating of the Five Year Defense Program to cover fiscal 1973–1977. Then comes review by the Office of Management and Budget and presentation of the fiscal 1973 budget to Congress early in calendar 1972. This process actually looks even farther ahead than 1977. Step number 13, completed at the beginning of July, consisted of a strategy paper by the Joint Chiefs dealing with a defense program from fiscal 1974 to 1981.

This process takes place with no formal participation by Congress. The documents involved are regarded as internal papers of the administration and are not furnished to Congressional committees dealing with defense. Nor do these committees appear to have sought them. Some information from the documents is reflected in testimony to these committees by administration witnesses in closed session.

3. The most basic of these documents in terms of looking ahead is the annually updated Five Year Defense Program. As far as this office has been able to determine, this has not been furnished to Congressional committees even on a secret basis. The five year program includes money totals for the defense department for each of the five years. These figures have not been included in the Secretary of Defense's annual report to Congress even in its classified form. The Senate Armed Services Committee has received classified information from the Five Year Program but not the document itself.

4. The Legislative Reorganization Act of 1970 requires legislative committees to estimate the 5-year costs of legislation they enact. To comply with this provision, Chairman F. Edward Hébert of the House Armed Services Committee wrote Secretary Laird last May asking for 5-year projections. Laird replied by citing the difficulty of making such projections: "As you know, any projection of Defense financial requirements beyond the budget year is extremely tentative at best. Such programs as may be proposed by Defense components have not been approved by the President nor have they been subjected to the thorough review and analysis by my staff to assure that they represent firm requirements supportable within the dollar levels that might be expected to be available to the Department of Defense in future years." Laird went on to say that ". . . I can also provide the general estimate that to support the 5-year forces contained in my Defense report on the fiscal year 1972 Defense budget, authorizations for procurement and RDT&E in the range of $22–23 billion (in fiscal year 1972 dollars) would be required for each of the next 5 years." The estimate covers only procurement and research and development—about a third of the defense budget—because those are the only major items covered in the authorization bill. The Senate Armed Services Committee had a similar exchange of correspondence with Secretary Laird. The Legislative Reorganization Act exempts appropriations committees from making five year estimates. The above appears to be the closest Congress has yet come to estimating defense costs over the next five years.

5. Behind all this is a long tradition that the administration does not divulge budget figures until they are formally presented to Congress. The Office of Management and Budget has a government-wide policy against such disclosures. Some believe this is the way it should be in a government of divided powers—that the executive should recommend, the Congress approve, and that Congress has no business intervening in an administration recommendation before it is made. On the other hand it can be argued that the need for Congress to look ahead requires some change in this tradition. Congress is in a serious box if, when the administration makes its recommendations, Congress has already lost much of its flexibility to entertain a range of possible decisions.

6. There is obviously a substantial question of military secrecy. No doubt a detailed breakdown of five-year costs by program and element would tell other countries a lot

about U.S. military forces and strategy in the future. But this should not stop committees from dealing with future costs in closed session. Also, it may be that a general discussion of overall five year defense costs could take place in public without loss of national security. If the projected budgets were budgets of restraint, it might be beneficial to disclose the general levels to the Soviet Union in hopes that it would follow equal restraint.

Where is the defense budget going?

What clues are presently available as to the future course of the defense budget under present programs and policies? There are a few:

Laird's on-the-record estimate of $22–23 billion for procurement and R&D over the next five years in constant dollars is close to the recent level.

Laird is understood also to have made an in-house estimate that the 1972 outlay level—roughly $76 billion—when carried forward in constant dollars will provide a minimum but adequate defense program for the next five years under the word situation as it now appears and under present foreign policies and strategies. Put another way, the Defense Department appears to be contemplating a defense budget which will remain the same in constant dollars over the next five years, barring changes in situation or policy. However, there has been no public statement to this effect.

Since the gross national product and federal budget are growing, this would mean the defense share of both would continue to decline, probably reaching 6% or less of the national product in a few years and probably going below 30% of the federal budget.

Brookings Institution (Setting National Priorities, the 1972 Budget) projects present Nixon doctrine defense policies as resulting in a defense budget slightly down in real terms in five years, even after withdrawal from Vietnam. But it estimated this would represent about 6 per cent of the national output, compared with slightly under 7 per cent today. It outlined higher and lower defense budget options.

The net import of Brookings' review of the entire federal budget, and all its parts, in the future is that between now and 1976 very little "fiscal dividend" or new money to meet public needs, becomes available under present policies. Brookings indicates that those who believe various public needs should take higher priority must consider increases in taxes or taking funds from other parts of the budget.

It is in this context that Congress should look at whether the projected present defense program is the right level. To do this Congress must begin looking ahead now.

Recommendations

1. As a first step, we should request the Defense Department to make available more information on its defense budget projections. More specifically:

(a) The 5-year defense program budget totals for each year in actual and constant dollars.

(b) The 5-year totals broken down by program, such as strategic forces, general purposes, intelligence and communications, airlift-sealift, etc.

(c) In order for the budget totals to be meaningful, there should be an explanation of how they are arrived at. For example, one possible way is to assume a more or less arbitrary budget level. Another is to project actual programs and compute their future costs.

(d) Five year projections of the defense budget as a percent of national product.

(e) Five year projections of defense budget as percent of federal budget.

(f) The fiscal guidance being used in planning the FY 1973 budget and beyond.

(g) General budgetary policies being followed by the Defense Department. In general will the defense program in real terms be allowed to grow? Will the baseline grow or decline in constant dollars? Will any of the Vietnam saving, in terms of constant dollars, be transferred to the baseline?

Probably most of this information could be made public. It is possible that some should be given to Congress in classified form.

2. Congress should enact legislation to require its existing committees:

(a) To make specific studies of the future of the defense budget, particularly for the next five years.

(b) To specifically review the Five Year Defense Program and the documents involved in administration planning of the defense budget for years ahead, including the strategies, assumptions, and estimates contained in them.

(c) To look at the future of defense spending in terms of the overall federal budget and national economy.

(d) To formulate their own recommendations concerning the defense budget over the next five years.

(e) To investigate possible ways in which Congress, while retaining control over annual appropriations, could also increase its influence over future defense budgets in advance, perhaps by legislating ahead. (One possibility: multi-year authorization bills, annually revised, and covering the whole defense budget, while retaining annual appropriations.)

Probably the committees involved should be the Senate and House Armed Services Committees, although others are possible. Such legislation could be an amendment to the Procurement Authorization Bill.

3. One possible further step would be for Congress to enact legislation this year which would set or express substantive policies as to the defense budget for the next five years. This could take the form of:

(a) An expression of the sense of Congress as to general policies. For example that the defense budget in real terms should not increase and if possible should decline, that the defense percent of national output should continue to decline, that the percent of federal budget should continue to decline. Figures could be included on the goals.

(b) Legislation of a 5-year defense budget ceiling on outlays or total obligational authority. This idea has some serious problems, at least at the present time. If the ceiling is set at present levels it becomes a mandate not to cut. If it is set low it would have to be an arbitrary ceiling assuming conditions in the future that cannot now be known. Such legislation ahead, however, might be more realistic after thorough committee studies on the five year defense prospects. In view of this, it is not recommended now.

Broad sense of the Congress policies as in (a) above, might however be included in the legislation in Recommendation 2.

Mr. BYRD of West Virginia. Mr. President, will the Senator yield?

Mr. NELSON. I yield.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that upon the disposition of the pending amendment, the amendment by the Senator from Ohio (Mr. SAXBE), dealing with the Harrier aircraft, be made the pending question before the Senate.

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

Who yields time?

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

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

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

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

Mr. NELSON. Mr. President, I ask unanimous consent that the following cosponsors of the pending amendment, No. 425, be added:

Senators BAYH, MCGOVERN, HART, GRAVEL, PACKWOOD, and CASE.

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

The hour of 2 o'clock having arrived, and under the previous order, the question is on agreeing to amendment 425, of the Senator from Wisconsin (Mr. NELSON).

On this question the yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. BENTSEN (after having voted in the negative). On this vote I have a pair with the distingiushed Senator from West Virginia (Mr. RANDOLPH). If he were present and voting, he would vote "yea"; if I were at liberty to vote, I would vote "nay." I withdraw my vote.

Mr. BYRD of West Virginia. I announce that the Senator from Indiana (Mr. BAYH), the Senator from Oklahoma (Mr. HARRIS), the Senator from Hawaii (Mr. INOUYE), the Senator from Washington (Mr. JACKSON), the Senator from Massachusetts (Mr. KENNEDY), the Senator from South Dakota (Mr. MCGOVERN), the Senator from Maine (Mr. MUSKIE), the Senator from West Virginia (Mr. RANDOLPH), the Senator from Alabama (Mr. SPARKMAN), and the Senator from California (Mr. TUNNEY) are necessarily absent.

On this vote, the Senator from Indiana (Mr. BAYH) is paired with the Senator from Alabama (Mr. SPARKMAN).

If present and voting, the Senator from Indiana would vote "yea" and the Senator from Alabama would vote "nay."

I further announce that, if present and voting, the Senator from Washington (Mr. JACKSON) would vote "nay."

I further announce that, if present and voting, the Senator from California (Mr. TUNNEY) would vote "yea."

Mr. GRIFFIN. I announce that the Senator from Delaware (Mr. BOGGS), the Senator from Oregon (Mr. PACKWOOD), and the Senator from Ohio (Mr. TAFT) are necessarily absent.

The Senator from Kentucky (Mr. COOPER) is absent to attend the funeral of the late Representative John C. Watts.

The Senator from Kentucky (Mr. COOK) is absent by leave of the Senate to attend the funeral of the late Representative John C. Watts.

The Senator from South Dakota (Mr. MUNDT) is absent because of illness.

The Senator from Kansas (Mr. DOLE) is detained on official business.

If present and voting, the Senator from Delaware (Mr. BOGGS), and the Senator from Ohio (Mr. TAFT) would each vote "nay."

The result was announced—yeas 28, nays 54, as follows:

[No. 233 Leg.]

YEAS—28

Anderson	Hartke	Pell
Burdick	Hatfield	Percy
Byrd, W. Va.	Hughes	Proxmire
Case	Humphrey	Ribicoff
Church	Javits	Roth
Cranston	Mansfield	Symington
Eagleton	Metcalf	Weicker
Fulbright	Mondale	Williams
Gravel	Moss	
Hart	Nelson	

NAYS—54

Aiken	Ellender	McIntyre
Allen	Ervin	Miller
Allott	Fannin	Montoya
Baker	Fong	Pastore
Beall	Gambrell	Pearson
Bellmon	Goldwater	Saxbe
Bennett	Griffin	Schweiker
Bible	Gurney	Scott
Brock	Hansen	Smith
Brooke	Hollings	Spong
Buckley	Hruska	Stafford
Byrd, Va.	Jordan, N.C.	Stennis
Cannon	Jordan, Idaho	Stevens
Chiles	Long	Stevenson
Cotton	Magnuson	Talmadge
Curtis	Mathias	Thurmond
Dominick	McClellan	Tower
Eastland	McGee	Young

PRESENT AND GIVING A LIVE PAIR, AS PREVIOUSLY RECORDED—1

Bentsen, against.

NOT VOTING—17

Bayh	Inouye	Packwood
Boggs	Jackson	Randolph
Cook	Kennedy	Sparkman
Cooper	McGovern	Taft
Dole	Mundt	Tunney
Harris	Muskie	

So Mr. NELSON'S amendment No. 425 was rejected.

Mr. TOWER. Mr. President, I move to reconsider the vote by which the amendment was rejected.

Mr. STENNIS and Mr. THURMOND. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

AMENDMENT NO. 427

The PRESIDING OFFICER (Mr. ROTH). Under the unanimous-consent agreement the Senate will now consider amendment No. 427. On this amendment there will be 2 hours, divided evenly, to be controlled by the Senator from Mississippi (Mr. STENNIS) and the Senator from Ohio (Mr. SAXBE). The amendment will be stated.

The amendment was read as follows:

On page 8, line 5, strike out "$3,256,200,000" and insert in lieu thereof "$3,232,500,000".

The PRESIDING OFFICER. Who yields time?

Mr. STENNIS. Mr. President, will the Senator yield to me on my time, because I have to leave the Chamber?

Mr. SAXBE. I yield.

Mr. STENNIS. Mr. President, I ask unanimous consent that I may yield the committee's time on this amendment to the Senator from Missouri (Mr. SYMINGTON).

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

Mr. STENNIS. Mr. President, this amendment concerns a provision which the committee wrote into the bill. I am compelled to be away from the Chamber for a part of the debate. I support the committee. The committee position was, being concerned about the technology of the Harrier, we provided that work on the engine and production would be in the United States. I understand the Senator from Ohio offered an amendment to change that.

I thank the Senator for yielding to me to make this brief statement.

PRIVILEGE OF THE FLOOR

Mr. SAXBE. Mr. President, I ask unanimous consent that my staff assistant, Michael Gertner, Senator MATHIAS' staff assistant, Sam Goldburg, and Senator PROXMIRE'S staff assistant, Ross Hamchek, be present during the debate and vote on our amendment No. 427 to H.R. 8687.

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

Mr. SAXBE. Mr. President, the Harrier is an operational vertical-short takeoff and landing—V/STOL—combat aircraft made by Hawker-Siddeley in the United Kingdom. Its single engine is manufactured by Rolls Royce. It will be used by the Marines as a close support aircraft. In this respect it is similar in mission to the AX and Cheyenne.

In a research paper prepared by Senator MATHIAS and Senator PROXMIRE and Congressman SEIBERLING it is recommended that Harrier production be discontinued after the current fiscal year, leaving 60 aircraft purchased out of the planned total run of 114. My amendment does not reach this issue. I favor the entire purchase of the recommended 114 Harrier aircraft. I only am attempting to limit the expense of domestic production which could run as high as $275 million over the cost of purchasing the plane from Great Britain.

The current bill authorizes $23.7 million for the start of domestic production. Production of the Harrier in the United States was considered by the Congress last year and rejected then. It was rejected again by the House Armed Services Committee in its deliberations on this bill. We should not initiate it now.

There have been three arguments offered in behalf of Harrier U.S. production. Let us consider these arguments in turn:

First, it has been suggested that domestic production of the Harrier would alleviate unemployment in the United States. This would be true, however, only in one small area, and it is not the purpose of the defense budget to regulate the national economy.

Second, it has been suggested that domestic production is needed to end U.S. dependence on a foreign source of supply for the Harrier. But there is no real likelihood that the British source of supply would be cut off. The Marines themselves and the Department of Defense are perfectly content with United Kingdom production of the Harrier. Moreover, it is unlikely that we could find American subcontractors for all the components which go into the plane.

Third, it has been suggested that domestic Harrier production could establish a technological base for future V/STOL development in the United States. The key to V/STOL development, however, is the engine, not the airframe. Yet at present no American company has expressed interest in domestic production of the Harrier's engine.

This is the central portion of the V/STOL development.

In addition, the Harrier was designed in the early 1960's and some of its technology dates back even further. We might get far more for our money if we concentrated on new prototype development efforts rather than Harrier production. It should be noted that a new Navy initiative in R. & D. for V/STOL propulsion for fixed-wing aircraft is already scheduled to commence in fiscal year 1972.

The main argument against production of the Harrier in the United States is the high cost likely to be incurred for the marginal benefits just cited. The Marines now estimate that the additional costs could run anywhere from $113.8 to $275 million, just for the basic airframe, depending on whether the airframe alone or the entire plane were produced in the United States. If we bought an additional 84 Harriers in the United Kingdom, their unit cost would continue to be $4.4 million. If we build only the airframe in the United States, this unit cost would rise to $5.8 million for the 84 planes. And if the entire aircraft were built here, it would rise to $7.8 million. In short, U.S. production would make the Harrier either three or four times as expensive as $2 million AX, depending on the degree of U.S. production.

Finally, of the total buy of 114 planes only 12 can be completely produced in the United States. This is a high price to pay—$275 million for 12 planes.

My interest in this stems not from a desire to do the Marine Corps out of what I consider to be a first-class airplane. I have seen this plane fly. I know its performance record. I believe it will do, in a limited way, exactly what the Marines want it to do. The payload is sacrificed tremendously when you have a short takeoff and landing airplane. In other words, one has to cut down on his fuel, on his radius of operation, on his bomb load or weapon load. Therefore, he loses a great deal of the advantage. I think the 114 planes they have intended for their present deployment is the limit of what they can use. They have no intention of increasing them, nor have they indicated any intention of increasing the 114.

Mr. President, I ask for the yeas and nays on the amendment.

The yeas and nays were ordered.

Mr SAXBE. Mr. President, there is no desire on the part of the Marines to ask for additional planes. If this were going to be a big run airplane, it would be one thing, but it is a limited-design airplane. The limit is 114.

The characteristics of the plane are based primarily on its power unit. The power unit is changed to give it its upward thrust, and then as its speed increases, it becomes more horizontal so that the ultimate speed is reached. However, it is not a supersonic plane; it is a close support airplane, an extremely expensive close support airplane.

When we are already paying $4.4 million for a limited number of airplanes, I object to raising its price to $7.8 million.

In 1968, when the Defense Department elected to go to Hawker-Siddeley Co. of England to buy this particular airplane, if a mistake was made it was made then.

In 1969 and in 1970, when the budget was considered and the money was appropriated for the acquiring of these planes, perhaps this body made a mistake. Now we are half way into this program.

The figures are as follows: We appropriated $62.7 million to acquire 12 planes in 1970. We appropriated $86 million to acquire 18 planes in 1971. We are voting in this bill, and it will not be changed, nor is there any suggestion that it be changed, $110.3 million for another 30 planes. That means that all but 54 of those planes are already under order.

If the complete tooling were to be made to transfer funds to McDonnell Douglas at St. Louis, it would mean that only 12 complete planes, and no more anticipated, would be made in the United States.

If a mistake was made in giving the contract to Hawker-Siddeley to begin with, let us not compound this mistake by now moving it when we can have the construction of 120 planes.

The $275 million is not a lot of money when compared with the total amount of the defense budget, running into billions, but I assure you, Mr. President, $275 million is a lot of taxpayer's money to move production to St. Louis. I suggest that there are other ways that can be better utilized to spend this $275 million.

Now, as to the STOL capability, it has been suggested that only through the building of it could we adequately harvest the tremendous amount of work that has been done on V/STOL. It is true that it is the only operational V/STOL airplane in the world, but it was designed in the 1960's and its technology goes back even further.

We might get far more for our money if we concentrated on new prototype development efforts rather than Harrier production. It should be noted that a new Navy initiative in R. & D. for V/STOL propulsion for fixed-wing aircraft is already scheduled to commence in fiscal year 1972.

The main argument against production of the Harrier in the United States is the high cost likely to be incurred for the marginal benefits just cited. The Marines now estimate that the additional costs could run anywhere from $113.9 to $275 million.

I realize that St. Louis, like many other areas, needs economic relief and probably employment, but I suggest that this is a poor way to do it, and if St. Louis is in that situation, we had best vote the money to be distributed and not run it through McDonnell-Douglas.

I am not going to talk about the advantages and disadvatages of this plane. I am simply saying that the plane is under contract to be made in the United Kingdom, and if we want to change it, if we want to pay more than double the cost of the plane, and still use the Rolls-Royce engine, we will do something which I would consider here today as folly.

VISIT TO THE SENATE BY A MEMBER OF THE HOUSE OF COMMONS OF GREAT BRITAIN

Mr. SYMINGTON. Mr. President, I yield to the distinguished senior Senator from Virginia for the purpose of introducing a distinguished visitor.

The PRESIDING OFFICER. The Senator from Virginia is recognized.

Mr. BYRD of Virginia. I thank my friend from Missouri.

Mr. President, I invite the attention of the Senate to the presence on the floor today of a distinguished Member of the House of Commons of Great Britain. He has been a Member of the House for 25 years. He has served in many of the important portfolios, being at one time Chancellor of the Exchequer. He is now the Treasurer of the Labor Party of Great Britain.

I introduce to the Senate the Honorable L. James Callaghan, a Member of the House of Commons.

[Applause, Senators rising.]

MILITARY PROCUREMENT AUTHORIZATIONS, 1972

The Senate continued with the consideration of the bill (H.R. 8687) to authorize appropriations during the fiscal year 1972 for procurement of aircraft, missiles, naval vessels, tracked combat vehicles, torpedoes, and other weapons, and research, development, test, and evaluation for the Armed Forces, and to prescribe the authorized personnel strength of the Selected Reserve of each Reserve component of the Armed Forces, and for other purposes.

The PRESIDING OFFICER. The Senator from Missouri.

Mr. SYMINGTON. Mr. President, last year this airplane was first unanimously approved by the Senate Armed Services Committee, later unanimously approved by the Senate Appropriations Committee; and also unanimously approved by the House Armed Services Committee. It was rejected in conference with the Senate by the House Appropriations Committee.

I mention this because it was not until recently I knew the distinguished Senator from Ohio was going to object and I note he mentioned St. Louis several times in his remarks.

As a member of the Tactical Air Power Subcommittee, of which the distinguished Senator from Nevada is the chairman, we went into this matter thoroughly, and I would say an unfortunate impression left by the Senator from Ohio in the last sentence in his printed speech. He says:

> This is a high price to pay—$275 million for 12 planes.

Mr. President, that would imply that the engines were to be made in this country, as well as the avionics. That is not part of the plan. The correct figure is $113,800,000.

WHY THE HARRIER PLANE SHOULD BE BUILT IN THE UNITED STATES

As I mentioned, the tactical Air Power Subcommittee considered the question of domestic production of the Harrier very carefully this year during their review of the fiscal year 1972 authorization request. There were several very compelling reasons for our recommendation to phase Harrier production into the United States.

The first is the need to bring the technology of this V/STOL airplane into this country. We have spent over a half billion dollars on various attempts at vertical and short takeoff and landing airplanes; and none has been operationally viable or successful.

On the other hand, the British-built Harrier has evolved into an airplane that is now in routine service use in the Royal Air Force and in our first Marine Corps squadron here in the United States.

The Harrier uses the deflected thrust principle for its vertical takeoffs and landings. This requires a unique control system with special devices for stability augmentation during hovering and low-speed flight. The Harrier engine produces a thrust greater than the weight of the airplane through a special type of turbofan and ducting arrangement developed for this application. These technology advances will be imported directly into this country by phasing the production over to the United States.

At the same time, we also will be adding jobs for our aerospace production workers. I need not dwell on the problems that the aerospace industry has from the standpoint of the vast numbers of skilled workers who have been laid off at plants all across this land. All of us are familiar with the terrible problems our once gainfully employed and producing aerospace work force now face.

Surely this jobs factor should be weighed heavily by all of us when we consider the added cost of phasing Harrier production into this country.

Another reason for domestic production capability is that we will create our own sources of supply for the Harrier in order to sustain it in operation in our own forces. This will free us from dependence on foreign sources which could very possibly have many problems that would be beyond our own direct control.

Surely it is always wise for the United States to have support capability for its own military weapons systems.

The above reasons all carried great weight during discussions of the Tactical Air Power Subcommittee and also the full Armed Services Committee—I might add that the vote in the full Armed Services Committee was 12 to 1—when we discussed this production phaseover.

The benefits were felt to far outweigh the added costs. Accordingly, the committee recommended that $23.7 million be added to the Harrier authorization this year for this purpose.

Mr. President, there is almost nothing that cannot be purchased for less money abroad.

Mr. CANNON. Mr. President, will the Senator yield at that point?

Mr. SYMINGTON. I am glad to yield to the chairman of the Tactical Air Subcommittee.

Mr. CANNON. Is it not a fact that in the President's attempt to control the economy very recently, the added import duty imposed against foreign-made goods was, because they can be produced more cheaply abroad and, therefore, were outcompeting manufacturers in this country? Is that not the basic element of the issue?

Mr. SYMINGTON. As the able Senator knows, that is only too true. Twice the Senator from Ohio brought up the word "St. Louis." Yes, these planes would be built in St. Louis. As a former purchaser

of machine tools, the center for much of that production is in Cincinnati. Engines are made in Columbus, Ohio—and we all know a lot of business comes out of Cleveland. To carry out the thinking behind this suggested amendment, why not build everything in Great Britain or Germany or Italy, where the rates are even less?

Mr. CANNON. Or Japan.

Mr. SYMINGTON. Right. Someone mentioned on television the other day that you can buy a Toyota in this country for some $2,000, but they cost $4,000 in Japan, and a Chevrolet over there costs $8,500.

Mr. President, I do not argue primarily from the standpoint of my great interest in people working in this country. We are talking about a military weapon, something to be used in time of possible war; and for the information of my colleague from Ohio, and as is well remembered by the distinguished Senator from Nevada, when the Marine Corps came and said, "We would like to take the money for Phantoms, and use it for Harriers because we think we have a better airplane for our mission," I said first, let us decide whether it was a better airplane. So I asked the Senator from Nevada to check out this assertion. He did. As a result, even though the Phantom was made in St. Louis, we voluntarily gave up that production to get the best plane for the Marine Corps, and the company bid successfully for the British Harrier rights.

I do not think the United States should rely entirely, in a new art like V/STOL, on what could happen in a foreign country. Countries that have been our allies in the past—the Soviet Union, Red China—are not considered so today. Countries the have been our enemies in the past—Germany, Japan—are not considered so today.

In addition, we would have no control over what might happen, say strikes: Should we put our entire future in the hands of a foreign country, on a weapon needed for our security. I know the distinguished Senator felt some of the people in the company in my State did not want this airplane to be built, and that that was one of the reasons he wanted to take the floor today with his amendment.

For the record, I assure him that after that came up, I found the company in question was much interested in building this plane for the figure mentioned.

Nearly every commercial airplane is a fallout from a military airplane. The 707, as but one illustration, represents the B–52 and the KC–135 tanker.

Despite the fact we are now building STOL fields all over the United States, so as to help handle problems incident to increases in air congestion, we have no STOL art of any kind in this country. That also should be considered at this time.

Therefore, Mr. President, with the premise anything can be built abroad for less money than in the United States, I hope this amendment is rejected.

Mr. SAXBE. I yield myself such time as I may require.

Mr. President, I am certainly aware that it is of great interest to have the business in St. Louis. It is of great interest that Cincinnati Milling Machine might be able to make some of these tools. It is of great interest that many of our subcontractors would be interested. But I point out that in changing this contract, the Defense Department has not been interested. They have not pushed this. No one from the Defense Department came in and said, "We would like to transfer this to St. Louis." In fact, in my consultations with the Defense Department, they say, "Look, we're not going to go in and ask for $9 million more for each plane for a dozen planes, because the die is cast. If a mistake was made, it was made in the past."

Second, we talk about the V/STOL characteristics and the fruits of this development which we could expect. Let me point out that the very guts of the V/STOL problem is the development of an engine; and by the very admission of the Senator from Missouri, who I admire very much—and who I am sure knows a great deal about this plane, as he does about many others—the engine would continue to be built by Rolls-Royce in England.

If the Defense Department had come forth and said it is in the interest of the development of V/STOL, it is for the development of economy, and it is in the interest of employment to transfer this contract to the United States, I am sure we would listen. If McDonnell Douglas had come in and said, "We can produce this plane and it is important to our future," we would listen. But, to my knowledge, no one has come before any committee of the U.S. Senate, or a subcommittee thereof, and advocated changing this contract, except the senior Senator from Missouri.

I submit that, while I am a member of the Armed Services Committee, I am anxious and willing to support every effort to build up the defense of this country. But I cannot in good conscience support what I consider to be a boondoggle. Suppose we set it at $113 million, which is the minimum. It takes $113 million and blows it on 12 airplanes. There are some 47 subcontractors of Hawker Siddeley that are producing for this plane.

I just cannot believe that if, for example, McDonnell Douglas got this contract, they would not still do business with these subcontractors, who are tooled up and are producing.

So what we would have would be the cost of an additional $9 million. This is not the total cost. This is additional, for assembling an airplane—assembling, if you please—initial construction of some airframe, by primarily taking a Rolls-Royce engine, taking the products of assembly subcontractors, and assembling them.

It is true that this administration and all of us are talking about the dollar flow, and we want to stop this. We do not want this money to go out of our country, and we want to right the balance of trade that has been discussed and has become out of focus. But I submit that at the cost of this, we would be better off to stop production, if necessary, because there is not that much uniqueness and difference in this airplane. But I do not suggest that.

We have made a deal, and we should keep the deal. As Lincoln once said:

When you get a bad deal, you hug it all the harder.

So let us keep the deal we have, but let us not really make it worse by saying that just for the few remaining planes, we can transfer this to St. Louis to help our domestic economy. I do not believe that the people of this country—as we all know, they are very questioning about where the military dollar is going today—would tolerate such a thing. I cannot help believe that the reason for the silence by the Defense Department—in fact, their statements to me that they do not want this—reflects this, because they know that they could not justify such an expenditure to the American people.

ORDER FOR TRANSACTION OF ROUTINE MORNING BUSINESS TOMORROW

Mr. BYRD of West Virginia. Mr. President, will the Senator yield

Mr. SYMINGTON. I yield.

Mr. BYRD of West Virginia. I thank the Senator.

Mr. President, after consulting with the distinguished manager of the bill and with authors of the amendments to which I will shortly refer, and with the approval of the distinguished majority leader, I ask unanimous consent that, at the conclusion of the orders for recognition of Senators on tomorrow, there be a period for the transaction of routine morning business, for not to exceed 15 minutes, with statements therein limited to 3 minutes.

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

MILITARY PROCUREMENT AUTHORIZATIONS, 1972

The Senate continued with the consideration of the bill (H.R. 8687) to authorize appropriations during the fiscal year 1972 for procurement of aircraft, missiles, naval vessels, tracked combat vehicles, torpedoes, and other weapons, and research, development, test, and evaluation for the Armed Forces, and to prescribe the authorized personnel strength of the Selected Reserve of each Reserve component of the Armed Forces, and for other purposes.

UNANIMOUS-CONSENT REQUEST

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that on tomorrow, immediately following the disposition of amendment No. 435, which will be called up by the distinguished senior Senator from Wisconsin (Mr. PROXMIRE)—the amendment dealing with the F–14—amendment No. 443, which will be called up by the Senator from Iowa (Mr. HUGHES), an amendment dealing with the ABM, then become the pending question; provided, further, that time thereon be limited to 1½ hours, the time to be equally divided between the distinguished mover of the amendment and the distinguished manager of the bill; provided, further, that time on any amendment to that amendment be limited to 30 minutes, to be equally divided and controlled by the mover of the amendment in the second

degree and the distinguished manager of the bill.

Mr. MATHIAS. Mr. President, reserving the right to object, is it the anticipation of the assistant majority leader that the ABM amendment will be voted on tomorrow?

Mr. BYRD of West Virginia. Yes. After the expiration of the time thereon.

This has been discussed with the manager of the bill, the leadership on both sides of the aisle, and the author of the amendment, Senator HUGHES.

Mr. SYMINGTON. Mr. President, reserving the right to object, the situation with respect to the ABM is not clear.

Last year, an amendment was submitted by the distinguished senior Senator from Kentucky and the distinguished Senator from Michigan. I ask this question of the able assistant majority leader:

Is there only one ABM amendment that we are considering at this time?

Mr. BYRD of West Virginia. I am glad that the distinguished senior Senator from Missouri asked that question. There are two amendments dealing with the ABM, the second one of which would be offered by the distinguished Senator from Ohio (Mr. SAXBE), who is working with the distinguished senior Senator from Kentucky (Mr. COOPER) with respect thereto. It was my intention to follow the request just made with a request for limited time on that amendment also.

Mr. SYMINGTON. Mr. President, I ask unanimous consent that the time requested by the distinguished assistant majority leader not be taken out of the time set on the amendment of the able Senator from Ohio.

Mr. MATHIAS. Further reserving the right to object, I am wondering whether the Senator could withhold that for just a few moments while we discuss the impact.

Mr. STENNIS. Reserving the right to object, may I say to the Senator that I would be disposed to meet any special situation he had, but this has been worked out now as to the two ABM amendments with the authors of amendments and with the manager of the bill and those who are concerned. I hope he can bear with it. I have to leave the floor shortly.

Mr. BYRD of West Virginia. Will the Chair indulge me without the time being charged?

The PRESIDING OFFICER. The Chair advises the Senator from West Virginia that time is not being charged.

Mr. BYRD of West Virginia. I thank the Chair.

Mr. MATHIAS. Mr. President, I have no further objection.

Mr. BYRD of West Virginia. I thank the distinguished senior Senator from Maryland.

Mr. President, I ask unanimous consent, upon disposition of amendment No. 433, which will be called up by the distinguished Senator from Iowa (Mr. HUGHES) on tomorrow, that the pending question before the Senate then be made the amendment No. 444 to be called up by the distinguished Senator from Ohio (Mr. SAXBE)—to which I alluded a moment ago—an amendment which also deals with the ABM, and that time on that amendment be limited to 2 hours, to be equally divided between the mover of the amendment (Mr. SAXBE) and the manager of the bill (Mr. STENNIS); and that time on any amendment thereto be limited to one-half hour, with the time to be equally divided between the mover of the amendment in the second degree and the distinguished manager of the bill.

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

Mr. BYRD of West Virginia. Mr. President, I further ask unanimous consent that time on the amendment No. 438 dealing with Rhodesian chrome ore—an amendment which will be called up by the distinguished Senator from Arkansas (Mr. FULBRIGHT)—and when that amendment is called up before the Senate, be limited to 2 hours, to be equally divided between the mover of the amendment and the manager of the bill.

Mr. JAVITS. Mr. President, are we going now into tomorrow, or days after tomorrow?

Mr. BYRD of West Virginia. This would be for Thursday.

Mr. JAVITS. My understanding was that we were going to consider two amendments tomorrow.

Mr. BYRD of West Virginia. It is the intention of the leadership on both sides—the majority leader is here and can speak to the matter himself. There is an amendment by the distinguished Senator from Missouri (Mr. EAGLETON) dealing with the main battle tank–70 which will be called up following the transaction of the period for the transaction of routine morning business on Thursday.

Mr. JAVITS. That is all right. I am talking about the requests the Senator is now making. Are they new for tomorrow or the days after?

Mr. MANSFIELD. Tomorrow, and Thursday and Friday, insofar as we can, so that the Senate will be on notice. We had an unfortunate experience last Friday with only 51 Senators in town. It was nip and tuck. What we are doing now is trying to give the Senate as much advance notice as we can, so that Senators will be prepared.

May I say that, at the present time, it is my intention, following the disposal of the Eagleton amendment on Thursday, to call up the amendment seeking to terminate the war in Vietnam and Southeast Asia concurrent, of course, with the release of POW's and recoverable MIA's in the meantime.

Mr. JAVITS. If the Senator will yield further, I want to explain to the distinguished majority leader the absolute impossibility of my being here tomorrow. I interpose no objection to the two unanimous-consent requests. The Senate must go on and do its business. I was merely seeking information, that was all.

Mr. SYMINGTON. Mr. President, I appreciate the explanation given the distinguished Senator from New York and respectfully remind my colleagues that I still have the floor.

[Laughter.]

Mr. MANSFIELD. Excuse me.

Mr. BYRD of West Virginia. Mr. President, my request was not completed.

The PRESIDING OFFICER. The Senator will complete his request then.

Mr. BYRD of West Virginia. I ask unanimous consent, with the indulgence of my good friend from Missouri (Mr. SYMINGTON), that time on the amendment by the distinguished Senator from Arkansas (Mr. FULBRIGHT), which will deal with the Rhodesian chrome ore question, be limited to 2 hours, with the time to be equally divided between the mover of the amendment and the manager of the bill, and that time on any amendment thereto being limited to 30 minutes, to be equally divided between the mover of the amendment in the second degree and the distinguished manager of the bill; with the understanding that the amendment be called up following the vote on the end-the-war amendment by the distinguished majority leader on Thursday.

Mr. JAVITS. Well, Mr. President, reserving the right to object, I am now informed that instead of two amendments, we are now into three; is that correct?

Mr. BYRD of West Virginia. No. Mr. President, we have already agreed to act on four amendments tomorrow.

Mr. JAVITS. Could I know what those are, please?

Mr. BYRD of West Virginia. Yes. Earlier today, the Senate agreed to consider the amendment by the distinguished Senator from Wisconsin (Mr. NELSON), the Sanguine amendment, immediately following the period for the transaction of routine morning business tomorrow. Upon disposition of that amendment, the amendment dealing with the F–14 would be called up by the distinguished Senator from Wisconsin (Mr. PROXMIRE) to be considered and disposed of.

Now, a few minutes ago, I propounded the request—which was agreed to—that the amendment by the distinguished Senator from Iowa (Mr. HUGHES), dealing with the ABM, become the pending business immediately upon disposition of the Proxmire amendment tomorrow, and that following the amendment by the Senator from Iowa (Mr. HUGHES), there be consideration of the Saxbe amendment, which also deals with the ABM.

Mr. JAVITS. So that the Senator has already obtained unanimous consent for 4 amendments on tomorrow; is that correct?

Mr. BYRD of West Virginia. Yes, Wednesday.

Mr. JAVITS. Now where are we? What day are we in now?

Mr. BYRD of West Virginia. I thought I made that clear. Now we are talking about Thursday. On Thursday, immediately following the period for the transaction of routine morning business, the Senate will proceed to the consideration of the main battle tank–70 an amendment to be called up by the Senator from Missouri (Mr. EAGLETON), with 2 hours on that amendment. Upon disposition of that amendment, the Senate will proceed to the consideration of the amendment by the distinguished majority leader on ending the war in Vietnam, on which there has yet been no time limitation agreed to, following which, if time remained on that day, the Senate would

proceed to consider the amendment by the distinguished Senator from Arkansas (Mr. FULBRIGHT) dealing with Rhodesian chrome ore.

Mr. JAVITS. So that the chrome ore amendment, which I am very anxious to vote on, will not come until after tomorrow, is that it?

I would say to the Senator that I am not a bit desirous of impeding the business of the Senate, but I must hope that the leadership will consider, in these rather rapid fire unanimous-consent requests, that the rights of Senators may very well be prejudiced. I assume that, as is usual here, clearance is taking place among those who might be interested. I did express an interest and did understand that only two amendments would be taken up tomorrow. Now I find that there are four. I regret that. I cannot make any statement about it although it may be necessary in order to protect one's rights, to begin to do just that. But I know that at the time of the period for the transaction of routine morning business, just before I left the floor, I understood there would be only two amendments for tomorrow and that we were going down to 5 o'clock in the afternoon. Now I am faced with four amendments. I wish to serve notice that certainly I will object to anything further tomorrow. It is bad enough, especially knowing the circumstances, when everyone knows I cannot be here to deal with one amendment which is very important to me. It is very embarrassing that it is coming up tomorrow.

As I said, I am not standing in the way of the Senate's business, but I would hope that a certain amount of accommodation and understanding would obtain in respect of these matters.

Mr. BYRD of West Virginia. Let the record be clear that the distinguished Senator from New York did not secure any understanding from me with respect to limiting to two the number of amendments to be disposed of tomorrow. He undoubtedly received that understanding from someone, but not from me. I do not recall the Senator from New York having asked me anything about understandings.

Mr. JAVITS. I just spoke of the normal relationships among Senators because it is very well known that I cannot be here tomorrow. That is all I said.

Mr. BYRD of West Virginia. I continue to yield.

Mr. JAVITS. I would hope that a certain amount of discretion would be exercised in how much we just happen to bring up tomorrow. When I left here we had only two. Now there are four. I still have not objected but I only wanted to address that friendly thought to my colleague, and nothing more.

Mr. STENNIS. I want to thank the Senator from New York for his indulgence.

Mr. BYRD of West Virginia. Mr. President, I do not want the record to leave the impression that I had given the Senator from New York any understanding that there would be only two amendments on tomorrow.

Mr. JAVITS. I said no such thing.

Mr. BYRD of West Virginia. I thought the Senator from New York said that he had earlier understood from someone that there would be only two amendments tomorrow.

Mr. JAVITS. I said that when I left the floor there was no further commitment for more voting tomorrow. If I have anything further to say, I will say so loud and clearly.

Mr. BYRD of West Virginia. I understand.

Mr. MANSFIELD. Mr. President, may I say to the distinguished Senator from New York that we did try to clear all points in arriving at agreements. There will be no more than announced, if we finish that much on tomorrow.

The purpose, I reiterate, was to try to avoid the situation which was created on last Friday when 49 Senators were absent, so that we could give notice ahead of time so that Members might guide themselves accordingly.

As far as the amendment to end the war is concerned, no time agreement has been reached as yet. It is hoped that a time agreement may be reached possibly some time tomorrow, and in that way we could be assured of the stability of the program announced so far by the distinguished deputy majority leader. The very purpose behind it, I will assure the Senator from New York and the Senate, was to give enough notice ahead of time as to what the schedule would be.

Mr. JAVITS. Mr. President, I thank the Senator from Montana.

The PRESIDING OFFICER. Is there objection to the unanimous-consent request of the Senator from West Virginia? The Chair hears none, and it is so ordered.

Mr. SYMINGTON. Mr. President, before yielding to my colleague from Missouri, I would reply to two points brought up by the Senator from Ohio.

First, it is true the Navy did not ask for this airplane. The Navy has never looked on it with as much favor as has the Marine Corps.

One of the reasons we have an Air Force is because of the way their requests were handled formerly by the Army. I never said the Navy unqualifiedly backed this plane. All I did say was that the late great General McCutcheon felt it was extremely important to the Marine mission. Therefore, I was glad McDonnell Douglas won the license from the British company to build the plane.

Speaking of licenses, Pratt & Whitney and General Electric are both negotiating with Rolls-Royce for the licensing of this engine, the advanced Pegasus engine.

The aerospace industry needs this work here. These two engine companies apparently feel there is a future in domestic V/STOL, or they would not be trying to obtain these licensing rights.

I would present that $113 million is about one-half of 1 percent of the military procurement budget we are talking about, and it supplies employment over here.

Mr. President, I yield to my colleague from Missouri.

Mr. EAGLETON. Mr. President, I thank my senior colleague.

Mr. President, I rise in opposition to the Saxbe amendment, No. 427, and in support of the position of the Senate Armed Services Committee, as has been so ably articulated by my senior colleague.

Considerable free-world development effort has been in support of the position of the Senate Armed Service Committee expended over the past two decades to develop a practical V/STOL aircraft. Only one, however, has progressed to successful operational status. That is the AV–8A Harrier now built by the Hawker Siddeley Aviation Limited in the United Kingdom.

Harrier is a high-speed jet aircraft with a size and performance very close to that of the A–4 airplane which is the primary close air support aircraft of the Marine Corps. This size and performance have been found to be ideally suited for Marine Corps missions.

There are several advantages of the Harrier aircraft over the A–4. Its major advantage is that the Harrier not only has the high speed and firepower of the A–4, but it can also take off and land vertically like a helicopter. This enables Harrier to operate from substantially smaller and more austere areas than can the A–4 or any other conventional aircraft.

In December 1968, U.S. Marine Corps initiated a program to procure sufficient Harriers to provide this source of firepower to each of the three Marine combat divisions.

The original program for Marine Corps acquisition of Harriers was initiated during the fiscal year 1970 budget process. The Secretary of the Navy recommended to the Congress the procurement of 12 Harrier aircraft as the initial step in equipping three Marine attack squadrons of 20 aircraft each. The Harrier buildup would commence in fiscal year 1971 and would be offset by a corresponding reduction in Marine fighter aircraft squadrons. The Marines plan to give up one fighter aircraft squadron for each Harrier squadron acquisition. The fiscal year 1970 procurement costs were offset by a reduction in the Marine procurement of approximately 15 fighter aircraft. The scope of the Harrier program for the Marine Corps includes three tactical attack squadrons, one training squadron, and pipeline aircraft, for a total of 114 Harriers to be acquired in a 5-year period.

In connection with the fiscal year 1970 submission to the Congress for 12 Harriers, the House Armed Services Committee approved the purchase of the first 12 Harriers from the United Kingdom but concluded future Harriers should be produced in the United States. As a result of this statement of intent by the Congress, the Naval Air Systems Command encouraged Hawker Siddeley and other major contractors involved in the production of Harrier and its equipment to enter into license agreements with U.S. firms to bring production of the aircraft to this country. Hawker Siddeley Aviation, the prime United Kingdom contractor for Harrier, negotiated with U.S. aerospace contractors on a competitive basis for licensing rights for U.S. production of Harrier. After long survey of key U.S. companies, the McDonnell Douglas Corp. of St. Louis was chosen for the licensing rights. Subsequently, an agreement was signed which allows McDonnell Douglas to manufacture the Harrier airframe, aircraft spares, and associated ground support equipment. A

very important part of the agreement is that McDonnell Douglas has the right to design and to manufacture new military aircraft based on Harrier technology. This clause in the licensing agreement makes Harrier a stepping stone to the future of U.S. V/STOL aircraft since the technology developed by the United Kingdom is available under this agreement in the United States.

The Senate Armed Services Committee is concerned that the Harrier V/STOL technology remains abroad.

Of the many technical approaches attempted to achieve V/STOL capability, only the deflected thrust used by the Harrier has developed to operational status. The Senate Armed Services Committee has recommended shifting production of Harrier to the United States for the last 2 years in order to acquire this technology.

Mr. President, the Senate Armed Services Committee has again recommended phasing the airframe production to this country and has unanimously recommended the addition of $23.7 million to start this production line shift, in addition to the Navy request for $102.3 million required to procure 30 Harrier aircraft in Great Britain. The total recommended for fiscal year 1972 by the Senate Armed Services Committee is $126.0 million for the Harrier program.

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

Mr. EAGLETON. I yield.

Mr. SAXBE. I do not believe that was a unanimous vote in the Committee on Armed Services.

Mr. EAGLETON. Was the vote 12 to 1?

Mr. President, I ask unanimous consent to change the word "unanimously" to "overwhelmingly."

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

Mr. EAGLETON. Mr. President, let me summarize the reasons which would support the position recommended by the Senate Armed Services Committee.

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

Mr. EAGLETON. I am pleased to yield to my senior colleague.

Mr. SYMINGTON. Last year it was unanimously recommended by the Tactical Air Subcommittee, unanimously recommended by the full Committee on Armed Services in the Senate, unanimously recommended by the Committee on Appropriations in the Senate, and unanimously recommended by the House Armed Services Committee before losing out in conference with the House Appropriations Committee—it was a relatively small amount of money to maintain jobs over here in an industry where there probably have been more reductions than in any other. For example, this year the original request of the Air Force for planes was less than in any year since 1935.

Mr. EAGLETON. I thank my colleague for that useful observation, which puts the record in proper context.

Mr. President, I wish to summarize the reasons which would support the position recommended by the Senate Armed Services Committee.

It would provide a production capability with the United States for follow-on and expanded Harrier procurement.

It would provide a V/STOL technology to the United States, thereby accelerating the U.S. aerospace industry activity in V/STOL.

It would provide an engineering capability in the United States for solving engineering and service problems which could arise.

Importantly it would provide an increase in aerospace employment—not make work employment but rather employment geared to meeting a legitimate need—in the United States during a period of readjustment within this industry.

Mr. President, for 2 years the Senate Armed Services Committee has carefully considered the question of domestic production of the Harrier aircraft. On each occasion the committee has recommended U.S. production. I urge the Senate to adopt the committee position and to oppose amendment 427.

Mr. SYMINGTON. Mr. President, I thank my able colleague for his presentation, and yield to the distinguished Senator from South Carolina.

Mr. THURMOND. Mr. President, this amendment would strike from the military procurement bill $23 million to phase over to the United States the production of the airframe of the Harrier V/STOL aircraft.

The purpose of this program is to import some sound V/STOL technology to this country because it has significant military application, and U.S. developers have been unsuccessful in this field.

The Soviets have a number of good V/STOL aircraft and thus enjoy an advantage which could eventually turn up on some battlefield in the world.

The United States is buying 114 Harriers for the Marines, who wish to employ this aircraft in a close air support role for ground forces. Under the plan to import the airframe production work to the United States, the final 12 aircraft would be produced in this country.

Also, Mr. President, there are other benefits of this arrangement. More jobs would be created in the United States, and the Nation would not be dependent on another nation for an important piece of military equipment.

Mr. President, I urge my colleagues to reject this amendment.

The PRESIDING OFFICER. Who yields time?

Mr. SAXBE. Mr. President, I yield myself such time as I may require.

One of the interesting things that has developed in this matter is the fact that most of the people involved are well aware of the fact that this is not a very practical suggestion. The Department of Defense itself refused to take a stand in favor of this. In fact, when I directly asked the Secretary of Defense if he was interested in this he said, "I am not interested in it." He said it is impractical.

When I asked the vice president of McDonnell Douglas, he said, "We can not afford to get clogged up for 12 airplanes."

I wonder if the Senator from South Carolina is aware that only 12 airplanes would be made in this country because of the progress the program already has made. So we come down to the argument of the V/STOL characteristics and the fact that we need this technology. I question whether production of the Harrier is the proper vehicle for us to get into the V/STOL operation. While it is the only operational airplane in the world with V/STOL characteristics, the technology goes back a good many years; it is engine technology, it is not airframe technology, an engine that will continue to be made by Rolls-Royce.

But the main argument against production of the Harrier is the high production cost for marginal benefits. This is the reason the Marine Corps does not suggest changing the contract. They said—

> We are perfectly satisfied. We want 114 aircraft. We are getting them the way we want them and we do not think it would be practical for us to suggest we spend a couple of hundred million dollars more just to say that the last 12 were made in this country.

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

Mr. SAXBE. I yield.

Mr. CANNON. Does the Senator know of any other case where the Marine Corps, Air Force, or Navy suggested that it would be practical?

Mr. SAXBE. Yes. I think they have on domestic and foreign production.

Mr. CANNON. I would like to know of an example, if there is one. I am not aware of one. In other words, the services just determine if they want a particular weapon system. They never get into the field of who the contractor is or where it is produced. They would not in this case, and they have not in other cases that I am aware of.

Mr. SAXBE. Can the Senator suggest any aircraft made for major production for a major military unit?

Mr. CANNON. By a foreign government?

Mr. SAXBE. Yes.

Mr. CANNON. We purchase from Canadian Government on occasion.

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

Mr. CANNON. I yield.

Mr. SYMINGTON. The only source for the Caribou is Canada. This is an extensively used airplane.

Mr. SAXBE. I do not question the Marines in the selection of this plane. I have seen it fly. It is a very capable plane. I feel the public should be advised that we are spending the equivalent of about 10,000 housing units which would provide considerable employment. We are spending the equivalent of about 10,000 housing units to transfer production of a limited number of aircraft. All they want is 114 aircraft. This is not a long-term production schedule. We are talking about 114 aircraft.

Mr. CANNON. Mr. President, will the Senator yield at that point?

Mr. SAXBE. I yield.

Mr. CANNON. I think the Senator will find that in many, many weapons systems, that decision has to be made at a later point in attempting to keep production lines open, for obvious reasons. We in our Tactical Airpower Subcommittee this year recommended in two instances keeping production lines open beyond the original projection because we foresee a need in the future for them. One was the EA–6B, in which we foresee a future need, and another was the F–111. With respect to this particular aircraft, if it

works out as the Marines anticipate it will, I would say they will be back to ask for an additional number of aircraft at the proper time. If they do and we have opened a production line and the capability here in this country, obviously we would be at an advantage as well from the standpoint of supplying spare parts and equipment that are necessary to support an aircraft unit of this type.

Mr. SAXBE. Mr. President, I assure the Senator from Nevada, who has done a substantial amount of work on military procurement, that I made every effort to talk not only to people in the Marines but in the highest levels of the Defense Department. I said—

I do not want to louse up any magnificent deal here in a long-range plane. Is there anybody over there in a position of authority who says this line should be extended? Is there anybody in the Department of Defense, anybody in the Marines, who thinks this is going to be a continued program and that we will need 200 or 300 of these planes?

The answer was "No." So all I can do is proceed on such information as I get, because I do not want to label something a "boondoggle" if it is a long-term thing that can be amortized; but when they do not come forward from the Defense Department, from McDonnell Douglas, or anywhere else and say so, it makes it hard to justify transferring it to build just 12 airplanes. We are aware of this. That is why I am saying the military-industrial complex catches enough trouble in this country from people who want to complain about it without giving them more fuel and ammunition, because I can see this thing scattered all over the newspapers of the country. They are going to say, for some reason the Congress of the United States elected to blow $120 million, or perhaps $200 million, on transferring a contract to a person who did not even want it very badly. That is what I am trying to call to the Senate's attention.

Now I want to talk on the V/STOL matter, and then I want to turn this over for a brief time to one of our illustrious associates. The V/STOL effort can be followed very effectively and developed because we have already spent half a billion dollars on V/STOL, on engines and on airplanes. We have come to the conclusion that, with the exception of a very narrow area of use—and this is primarily most adaptable to the Marine Corps—we give up too much payload to get the vertical take off capability and that the emphasis should be on short take off rather than give up this tremendous payload capability which has to be given up when we get a vertical take off. I think we need a few. The Marine Corps says 114. The Defense says that is enough.

Now I would like to yield such time as he may require to the Senator from Maryland (Mr. MATHIAS).

Mr. SYMINGTON. Mr. President, will the Senator yield to me?

Mr. SAXBE. On the Senator's time.

Mr. SYMINGTON. On my time.

With respect to the remarks purportedly made by the Secretary of Defense, the Deputy Secretary of Defense, who operates in logistics a great deal, said he would have no objection whatever to the planes being built in this country.

Mr. President, I would not have raised a certain situation on the floor if it had not been raised by the distinguished Senator from Ohio. When the Senator put in his amendment I did not discuss it with him, although naturally disappointed, because I thought this V/STOL aircraft should come to this country in the interest of national security.

The distinguished Senator from Ohio, as he would be the first to verify, came over on this side of the aisle last week and volunteered that a vice president of McDonnell Douglas had told him the Harrier was not desired for production by McDonnell Douglas, that they were not really interested in it.

Mr. President, that was a shocker. I had heard and had been written to and talked to differently. So I attempted to get the vice president in question. He could not be reached. I thereupon called the president of McDonnell Douglas, who said he was astounded to hear that observation because it could not be farther from the truth. The next morning, from the West Coast, this vice president called and denied having made any such statement to the Senator from Ohio. He said that they wanted the plane for his company, and wanted it very badly.

Whereupon I called the Senator from Ohio in an effort to give him this information, found he was out of town. So I wrote him stating what was the position of that McDonnell Douglas vice president.

I ask unanimous consent, as long as this matter has been brought up on the floor by the Senator from Ohio, that the letter written to the Senator be inserted in the RECORD at this point.

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

SEPTEMBER 23, 1971.

Hon. WILLIAM B. SAXBE,
U.S. Senate,
Washington, D.C.

DEAR BILL: When on the Floor the other day you disturbed me a lot by mentioning that the chief reason you opposed the Harrier was that John Allen, Vice President of McDonnell-Douglas, had told you he was against it.

I felt pretty sure that you must have misunderstood him, checked immediately, and find that is true; and if your amendment was based at least in part on that observation from John, perhaps you would hold off because there is literally no STOL or V/STOL technology of any kind whatever in the United States, despite our having spent over half a billion dollars in R&D to that end.

It took me a little time to check this out with John, because he was in California as a result of a death in his family. Then I called you immediately, however, only to find you had gone to Ohio.

With appreciation for any consideration you felt you could give the above and every good wish,

Sincerely,

STUART SYMINGTON.

Mr. SAXBE. Mr. President, in that regard, I would just like to say that there was no misunderstanding as to what that gentleman told me. I understand it and he understands it. If he is still a vice president, I assume that he has been straightened out on this matter. But I want to certainly advise my colleague that there was no misconception about what he told me at the time I talked to him.

I yield to the Senator.

Mr. SYMINGTON. In defense of the gentleman in question, a good friend of mine, surely there could be a difference of opinion as to just what was said. This puts this man in a difficult position. I would hope the Senator from Ohio would take his word of honor to me that there was a misunderstanding because he is a man of honor and a great deal is involved.

The PRESIDING OFFICER. The Senator from Maryland is recognized.

Mr. MATHIAS. Mr. President, I am rising to support the amendment of the Senator from Ohio, which does not mean that I disagree with the goals that have been outlined by the distinguished Senator from Missouri in any sense.

The Senator from Missouri has emphasized that he wants to see a greater priority given to V/STOL aircraft in the United States and an enhancement of our knowledge of V/STOL technology. That is what I want, and as I understand it, that is what the Senator from Ohio wants. So we are all meeting here with one goal in mind, and I think what we have to determine is the most effective way of reaching the goal.

My objection to the proposal in the bill, and the reason for my support of the amendment, has nothing to do with the Harrier itself. It seems to be a fine aircraft. It seems to be what the Marines want.

It has limitations. It operates in what you might call a leapfrog technique. It is not ideal. It has some limitation in its loitering capacity. But when you take all those things into account, it still is the plane that the Marines want, and they ought to have it.

I am not in any sense criticizing the plane or objecting to its procurement, even though I see some problems involved, far beyond the money question. But let me say that while $23 million is no insignificant sum to be saved, economy is not the sole or even the principal reason for this amendment. There are some problems with domestic production of the Harrier, because I think the question of the support facilities is raised, whether the airplane only or the complete aircraft program were chosen.

As I understand, the plan is to phase production gradually into the United States during the next year. For example, no parts would be produced; it would be an airframe only in the beginning, and from that point on would move to other aspects of aircraft production. During the interim period, what support problem would arise I am not prepared to say, and I doubt if anyone is prepared to say; but however that may be, I think there would be support problems.

But all of that, again, Mr. President, is beside the point as far as I am concerned. I agree with the Senator from Missouri that we ought to develop our own V/STOL technology. We have projected a very fine aircraft which would do just that, the AX. I think we ought to continue with the present procurement program of the Harrier, even though it is not from a domestic source, and at the same time increase the priority of and, if necessary, increase the funding on the AX. If we did that, we would do just what the Senator from Missouri, I think,

wants to see done—expand, improve, and increase our V/STOL technology, which we all recognize as a very necessary next step in aviation development.

For that reason, Mr. President, I support the amendment of the Senator from Ohio.

Mr. SAXBE. Mr. President, I am willing to yield back the remainder of my time.

Mr. SYMINGTON. Mr. President, I yield whatever time he wishes to the distinguished Senator from Nevada.

Mr. CANNON. I thank the Senator for yielding.

I think this argument is pretty well in proper perspective. However, having served as chairman of the Tactical Air Power Subcommittee for several years, I just want to say we considered this matter thoroughly in committee this year, and we considered it last year as well. When the Marines first came forward with the idea of purchasing the Harrier and purchasing it from the United Kingdom, who were the only people making it at that time, and still are, we went into the matter quite thoroughly, because I, too, was concerned then about the advisability of buying a weapons system from abroad.

But the Marines came in and convinced us they wanted this new aircraft, they wanted to learn about its operational conditions, they were willing to give up the purchase of more than a like number of F–4's to acquire the new aircraft, and so we did go ahead with the approval of it. But, at the same time, we recommended that it be produced in this country.

We recommended that last year and we recommended it again this year, unanimously, from our Tactical Air Power Subcommittee.

I think, insofar as the arguments for it are concerned, there is no question but that our V/STOL technology should be improved in the United States. A few moments earlier, one of the opponents of this program pointed out that this aircraft had a limited capability from the vertical takeoff position. That is true, but the aircraft does not have to be operated from a vertical position; it can be operated from very short runways, and it has extended range and extended capability when that is done.

But the things that impress me most on this matter, Mr. President, are twofold. One is the creation of U.S. jobs in the aerospace industry at a time when it is very seriously depressed, and the other is the problem of freeing us from dependence on foreign sources of supply, even though they be friends at the present time.

There is no question but that any product we want to buy today probably can be purchased at a lesser cost in some foreign country than it can be produced in our own country, and that is for the plain and simple reason that we have recognized the responsibility to improve the lot of the American workingman. We have increased our minimum wages far beyond those existing in any foreign country today, and we have made it so that the people of our country can enjoy the fruits of their labors and live under better living conditions than is possible in many foreign countries.

I am sure, Mr. President, that the opponents of this program would not want to consider buying a major product from Russia, for example, and yet only a short time ago I had a member of a Russian trade mission try to convince me that they should be permitted to sell commercial aircraft in this country, to compete with our commercial aircraft industry.

It was pointed that they could sell the YAK–40 airplane, a very fine commercial aircraft, for less than $1 million a copy in this country. We could not buy the same aircraft from an American producer for $3 million a copy. Yet we are trying to protect American industry and they are not permitted to sell that aircraft in the United States today. But, if we want to buy a product at the lowest cost, we had just as well forget about the American manufacturer, and in turn the American laborer, and go ahead and try to buy them from some country that can produce them at a lesser cost.

I assure my colleagues that we did give this matter great consideration. We felt that there is some possibility that it may be necessary, or may be desirable, at a later point in time, to keep a production line open, and if it is, then, of course, the cost of moving this production to the United States would certainly be better amortized over a greater number of aircraft.

I do not know that that is going to be the case. But, as I pointed out earlier, in the year, we have recommended an extension of productive capability, rather than see it closed down at this point in time, for the reason that we might desire to have additional capability in the future.

So, Mr. President, I hope my colleagues will approve the position taken by the Tactical Air Power Subcommittee and by the Committee on Armed Services. I myself was disappointed that the House of Representatives would not go along with us last year when we made this recommendation. I hope that our colleagues in the House of Representatives as well will join us this year.

Mr. SAXBE. Mr. President, I certainly agree with what the Senator from Nevada says about the domestic production of these weapons. I do not think that we should put emphasis on foreign production when it puts people out of jobs, and so on.

But if a mistake was made, it was made when we made the decision to buy this airplane, back in 1968. We are not going to bail it out by buying 12 airplanes, and we are not going to bail it out if we still have to go to the subcontractor. Having made this deal, I think we should make a memorandum that we will not do it again.

The Defense Department recognizes the problem, but they do not recommend that we change this contract, because they could not, in good faith, come before our committee and say, "Well, we want to change this now," because you can imagine the howl that would go up when we said:

You are the one who made this suggestion. Now you want to dump another umpteen millions of dollars in there to bail it out.

So I think, to get a direct look at the question, we should simply say that we have a contract. Can we afford to change it? We like the airplane. Can we change it in time to mean anything? I say no. Therefore, I think we should go through and fulfill our contract with them.

They are going to make the same amount of money whether they are made here or over there. But, certainly, it is going to make a tremendous impact upon our dollars when we are talking about $100 million to $275 million.

I yield back the remainder of my time.

Mr. SYMINGTON. Mr. President, I thank my able colleague, the Senator from Nevada, one of our foremost authorities in the field of tactical aviation.

As he said, we went into this matter carefully. We are not talking about 12 airplanes. We are talking about 84 airplanes. We are not talking about $275 million. We are talking about $113 million.

Mr. President, I was in my State yesterday where there was much talk about the problems of unemployment. I just do not know where we are going in this country, what the future is going to be. We have 25 million Americans currently below the poverty line.

We have tried to get the administration 5-year aid program, but were unable to do so. The staff of Foreign Relations accordingly has done a fine job in estimating what that 5-year program, economic and military aid to foreign countries will cost the American taxpayer. The estimate is for the next 5 years and amounts to $42 billion; $42 billion out of this country to go abroad in the next 5 years under present planning.

In summary, we are talking about $113 million for airplanes in the United States, for employment in an industry that has been seriously hurt. We are talking about a very small part of the overall budget for an airplane which the Marine Corps sold the Tactical Air Subcommittee as essential to their mission.

I yield back the remainder of my time.

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

The PRESIDING OFFICER. The clerk will call the roll.

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

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

ORDER FOR ADJOURNMENT FROM TOMORROW UNTIL 10 A.M. THURSDAY, SEPTEMBER 30, 1971

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that when the Senate completes its business on tomorrow, it stand in adjournment until 10 a.m. on Thursday.

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

ORDER FOR TRANSACTION OF ROUTINE MORNING BUSINESS ON THURSDAY

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that on Thursday, immediately following the

recognition of the two leaders under the standing order, there be a period for the transaction of routine morning business, for not to exceed 15 minutes, with statements therein limited to 3 minutes; that upon the completion of routine morning business, the Chair lay before the Senate the unfinished business, and that amendment No. 445, by the Senator from Missouri (Mr. EAGLETON) be then made the pending question.

The PRESIDING OFFICER. There already is an order that the Senator from Virginia be recognized.

Mr. BYRD of West Virginia. I thank the distinguished Presiding Officer. I misspoke myself.

I ask unanimous consent that on Thursday, immediately following any orders recognizing Senators, there be a period for the transaction of routine morning business, for not to exceed 15 minutes, with statements therein limited to 3 minutes.

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

MILITARY PROCUREMENT AUTHORIZATIONS, 1972

The Senate continued with the consideration of the bill (H.R. 8687) to authorize appropriations during the fiscal year 1972 for procurement of aircraft, missiles, naval vessels, tracked combat vehicles, torpedoes, and other weapons, and research, development, test, and evaluation for the Armed Forces, and to prescribe the authorized personnel strength of the Selected Reserve of each Reserve component of the Armed Forces, and for other purposes.

UNANIMOUS-CONSENT AGREEMENT

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that upon the completion of routine morning business on Thursday, amendment No. 445, by the Senator from Missouri (Mr. EAGLETON), then be made the pending question.

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

Mr. BYRD of West Virginia. I ask unanimous consent that upon the disposition of amendment No. 445 on Thursday, the Senate then proceed to the consideration of amendment No. 437, by the Senator from Montana (Mr. MANSFIELD)—the end-the-war amendment.

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

Mr. BYRD of West Virginia. I ask unanimous consent that on the disposition of amendment No. 437, hopefully on Thursday—and we expect it to be Thursday—the Senate then proceed to the consideration of amendment No. 438 by the Senator from Arkansas (Mr. FULBRIGHT), the so-called Rhodesian chrome ore amendment.

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

The question is on agreeing to the amendment of the Senator from Ohio. On this question the yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. BYRD of West Virginia. I announce that the Senator from Indiana (Mr. BAYH), the Senator from Oklahoma (Mr. HARRIS), the Senator from Hawaii (Mr. INOUYE), the Senator from Washington (Mr. JACKSON), the Senator from South Dakota (Mr. MCGOVERN), the Senator from Maine (Mr. MUSKIE), the Senator from Alabama (Mr. SPARKMAN), the Senator from California (Mr. TUNNEY), the Senator from North Carolina (Mr. JORDAN), the Senator from New Mexico (Mr. MONTOYA), the Senator from West Virginia (Mr. RANDOLPH) are necessarily absent.

I further announce that the Senator from Mississippi (Mr. STENNIS) is absent on official business.

I further announce that, if present and voting, the Senator from Mississippi (Mr. STENNIS) and the Senator from Washington (Mr. JACKSON) would each vote "nay."

I further announce that, if present and voting, the Senator from Indiana (Mr. BAYH) would vote "yea."

On this vote, the Senator from Alabama (Mr. SPARKMAN) is paired with the Senator from Pennsylvania (Mr. SCOTT).

If present and voting, the Senator from Alabama would vote "nay" and the Senator from Pennsylvania would vote "yea."

On this vote, the Senator from New Mexico (Mr. MONTOYA) is paired with the Senator from West Virginia (Mr. RANDOLPH).

If present and voting, the Senator from New Mexico would vote "yea" and the Senator from West Virginia would vote "nay."

Mr. COTTON. I announce that the Senator from Oregon (Mr. PACKWOOD) and the Senator from Ohio (Mr. TAFT) are necessarily absent.

The Senator from Kentucky (Mr. COOPER) is absent to attend the funeral of the late Representative John C. Watts.

The Senator from Kentucky (Mr. COOK) is absent by leave of the Senate to attend the funeral of the late Representative John C. Watts.

The Senator from South Dakota (Mr. MUNDT) is absent because of illness.

The Senator from Colorado (Mr. ALLOTT), the Senator from Michigan (Mr. GRIFFIN), and the Senator from Pennsylvania (Mr. SCOTT) are detained on official business.

On this vote, the Senator from Pennsylvania (Mr. SCOTT) is paired with the Senator from Alabama (Mr. SPARKMAN). If present and voting, the Senator from Pennsylvania would vote "yea" and the Senator from Alabama would vote "nay."

The result was announced—yeas 40, nays 40, as follows:

[No. 234 Leg.]

YEAS—40

Aiken	Fulbright	McIntyre
Baker	Goldwater	Miller
Beall	Gravel	Mondale
Bennett	Gurney	Nelson
Boggs	Hansen	Pearson
Brock	Hart	Proxmire
Brooke	Hatfield	Roth
Buckley	Hollings	Saxbe
Church	Hruska	Schweiker
Cranston	Humphrey	Stafford
Curtis	Javits	Stevens
Dominick	Jordan, Idaho	Weicker
Fannin	Kennedy	
Fong	Mathias	

NAYS—40

Allen	Eastland	Pell
Anderson	Ellender	Percy
Bellmon	Ervin	Ribicoff
Bentsen	Gambrell	Smith
Bible	Hartke	Spong
Burdick	Hughes	Stevenson
Byrd, Va.	Long	Symington
Byrd, W. Va.	Magnuson	Talmadge
Cannon	Mansfield	Thurmond
Case	McClellan	Tower
Chiles	McGee	Williams
Cotton	Metcalf	Young
Dole	Moss	
Eagleton	Pastore	

NOT VOTING—20

Allott	Jackson	Randolph
Bayh	Jordan, N.C.	Scott
Cook	McGovern	Sparkman
Cooper	Montoya	Stennis
Griffin	Mundt	Taft
Harris	Muskie	Tunney
Inouye	Packwood	

So Mr. SAXBE's amendment (No. 427) was rejected.

Mr. SYMINGTON. Mr. President, I move to reconsider the vote by which the amendment was rejected.

Mr. EAGLETON. I move to lay that motion on the table.

The PRESIDING OFFICER. The question is on agreeing to the motion to lay on the table the motion to reconsider the vote by which the amendment was rejected—putting the question. The yeas appear to have it. The yeas have it. The motion to lay on the table is agreed to.

Mr. STENNIS. Mr. President, I regret very much that I could not be in the Chamber when the vote was taken on the amendment offered by the Senator from Ohio. I was called away on official business, and I missed getting back by a few minutes. If present, I would have voted against the amendment offered by the Senator from Ohio.

ISSUES RAISED BY SENATOR PROXMIRE

Mr. CANNON. On September 23, 1971, Senator WILLIAM PROXMIRE submitted a press release to the news services and a 24-page document for the CONGRESSIONAL RECORD which made many firm comments and recommendations about Navy tactical aviation, carriers and the F–14 in particular. Many of those comments and recommendations are based on serious misunderstanding and had many inaccuracies. The overall picture of Navy carrier tactical air painted by Senator PROXMIRE is dangerous to national security if believed.

For the benefit of those who are responsible for the military posture of our Nation, the following comments address point-by-point the inaccuracies and misunderstandings of the material entered in the RECORD by Senator PROXMIRE.

I ask unanimous consent that the comparison statements be printed in the RECORD.

There being no objection, the comparison statement was ordered to be printed in the RECORD.

STATEMENT BY SENATOR PROXMIRE

Mr. President, a few days ago I said there were two basic questions which had to be answered in deciding whether to buy the F–14.

First, how reasonable is it to build an airplane, equip it with a terribly complicated and expensive air-to-air missile, and then stick it on an attack carrier to protect that carrier and its task force from the spectrum of threats the Soviets can throw against them?

SENATOR PROXMIRE—continued

Second, how reasonable is it to rely on that airplane, with all the performance compromises caused by carriage of that missile, as our next generation Navy fighter?

I tried to explain then why the Phoenix missile's fleet air defense mission makes little sense at all. What I want to show today is the fact that it makes even less sense to rely on the F-14 as our first-line Navy fighter of the future.

Here are a few reasons why:

Because a recent Pentagon study convincingly shows that the old F-4, modified only with leading edge slats, could out perform the F-14A at all speeds likely to be encountered in a dogfight;

Because it is almost certain that the F-14 would be no match for new Russian fighters which are likely to be produced over the next 5-10 years; and

Because the Navy could build at one-fourth the cost a new light fighter which could quickly put the F-14 to shame.

It is a basic, straightforward fact that the F-14 costs the most yet has the least performance of all the fighter options available to the Navy. Accordingly, our first priority is to start work now on a new light fighter development program for the Navy. If work were started this fall, new Navy prototypes could be ready for a fly-off in about two years. And in another two years the first production models would be ready for delivery to the fleet.

An equally important need is to scrap the F-14. The F-14 just can't hack it as a fighter. Therefore, there is no justification for keeping it going unless we want to buy a limited number of the planes—200 or so—for altogether different missions. But what missions?

NAVY COMMENTS

The Navy is unaware of any internal or Office of the Secretary of Defense Staff study that shows the F-4 aircraft with slats to be superior to the F-14A in any of the performance parameters that comprise a superior "dog fighter". The Navy Fighter Study analyses, concurred in by the Naval Air Systems Command, conclude that the F-14A is significantly superior to the F-4 with slats in energy, maneuverability (P_s), sustained turn (g's), turn radius, rate of climb, and acceleration.

All analyses to date, including a National Aeronautics and Space Administration assessment, conclusively indicate the F-14A is superior to the known and projected Soviet threat. This coupled with the weapons flexibility of the AWG-9, Phoenix, Sparrow, Sidewinder and Gun capability of the F-14A provides the *only* fighter that will meet the Navy requirements in the 1972-80 time frame.

Cost must be related to mission success. The advanced capabilities of the F-14/AWG-9/PHOENIX weapon system provides the only means of assuring success on future air superiority missions. Effectiveness and need were the measures used to determine the value of this fighter option.

In view of the threat spectrum posed to our Naval forces, and to our country, it was decided to develop as soon as possible an aircraft/weapon system capable of meeting and defeating the existing sophisticated, missile-equipped Soviet fighter aircraft under electronic command and control, their subsurface and surface-launched anti-ship missiles, mobile SAM batteries, and their heavily-defended bomber aircraft equipped with long-range air-to-surface missiles. The choice of aircraft systems to develop was dictated by the capability of the threat spectrum defined and to which we must react. As stated above, all analyses to date conclusively indicate the F-14A is superior to the known and projected Soviet threat in the 1970-1980 time frame.

The threat is already in being and serious *now*, and is becoming more severe because Soviet investment in military technology has reached the payoff stage.

To ignore or doubt the severity of threat predictions and not adequately prepare to counter them is strategically unsound. Inherent delays in the development required to achieve an operational capability with a new fighter design are not acceptable to national security. If we do not face the facts realistically and introduce the advanced superiority possessed by the F-14 against the entire threat spectrum, the long-term costs will be immeasurable.

SENATOR PROXMIRE—continued

Not Phoenix fleet air defense. The mission makes no sense and it could be performed by other aircraft anyway.

NAVY COMMENTS—continued

The Phoenix missile, carried on the F-14 has a real and required air intercept capability. An integral part of the F-14/AWG-9 Weapon System, Phoenix has been *designed* to cope with the *entire* air threat spectrum of the 1970-1980 time frame, ranging from low altitude (subsonic and supersonic) to high altitude Mach 3 weapons. These threat weapons include high performance fighter aircraft (Foxbat, Flagon, Fitter) carrying medium and long-range air-to-air missiles; surface launched cruise missiles (Styx and Shaddock); and supersonic bombers carrying long-range air-to-surface missiles (Kangaroo and Kitchen).

The AWG-9 Weapon Control System and the Phoenix missile have enjoyed one of the most successful test programs in the history of weapons development. The design and test phases have been closely monitored and participated in by operational people who will eventually use this weapon. Although not yet employed operationally, Phoenix tests to date demonstrate that all design performance requirements are being satisfied. Thus far, 42 missiles have been fired with unprecedented success against realistic threat target simulations. Many of these launchings were impossible to accomplish with any other known missile.

The weapons control system must be matched to an aircraft design of comparable aerodynamic performance to fully exploit the full capability of that system. The F-14 is that aircraft. It is equally capable in air intercept, combat air patrol, escort or in a dogfight. This versatility is only possible because of recent innovations, including its fan engine, the swing wing, maneuvering slats/flaps, and light alloys. The aircraft design has been evolving since 1959 and has benefited from the progress made since that time. F-14 aircraft are now flying successfully and rapidly exploring the entire aerodynamic envelope. It would be unsound today to cancel the program because it is expensive. The development of the atom bomb and the nuclear submarine were expensive but no strategic planner interested in the defense of this nation now questions their worth.

In considering other fighter options available, the Navy Fighter Study of 1968 thoroughly investigated the feasibility of installing the Phoenix missile control system in a new version of the A-6, and loading it with the Phoenix missile. The results indicate that the system could be put into the aircraft but that the subsonic characteristics of the A-6 would reduce the effectiveness of the system and the missile by a substantial

And we certainly don't need the F–14 for its interdiction bombing capability. We already have aircraft designed specifically for the interdiction mission which need escorts, not competitors, when they fly.

The third thing we should do is to put leading edge slats on a portion of the Navy's F–4 force. The cost would be minimal and it would give us a fighter better than the F–14A till the new Navy fighter came along.

These are the conclusions I hope to support today. Before they can be reached, three preliminary questions will have to be answered:

What is the role of Navy tactical air?

What is the Soviet fighter threat?

And just what capabilities do we want—and why—in a new Navy fighter of our own?

NAVY COMMENTS—continued

margin against the projected Soviet threat. The speed and rate of climb of the F–14 permits intercept to occur at maximum range and altitude, and serves to optimize the performance of the missile by giving it higher initial altitude and velocity. The A–6 is more vulnerable to attack by the incoming raid escort aircraft both prior and subsequent to launch of its weapons. The option of putting Phoenix on the A–6 was carefully considered but rejected for the reasons stated above.

It continues to be extremely difficult to obtain recognition that the F–14 has been designed, first and foremost, as an *air superiority* fighter and the design has never been compromised during its development. The F–14 has not been designed as a multimission fighter. The air-to-ground capability of the F–14 was not a dictating design requirement; such a capability exists, to a limited degree, as a "fall-out" from the other governing design features. The fact that the F–14 can carry air-to-ground ordnance does not in any way compromise the airframe or system design for its *primary* air superiority mission.

The story of the slatted F–4 is an interesting one. To produce a technically feasible slat installation for the Air Force and German F–4's a two position slat (either "in" or "out") is being developed. That two-position slat installation will not permit safe carrier landings for the Navy F–4J where landing speeds are critical.

A three-position slat is required for the Navy F–4J. That minimum installation is not the "simple addition" of a slat. It is essentially a new wing. The installation cost of a slatted wing for the carrier F–4J is far from minimal and adds slightly more than 1000 lbs., half a ton, to the overall nonpayload weight of the airplane.

The only performance area where the slatted F–4J is better than the present F–4J is in a slow-speed, turning fight. In all other mission areas it is degrading to performance, a thousand pounds degrading.

The F–14A has significantly better dogfight performance than *any* F–4 version, even in the slow-speed, turning arena:

40% better in Turn radius
27% better in P_s
21% better in Sustained "G"
21% better in Acceleration
20% better in Rate of Climb
21% better in Roll performance

I. THE ROLE OF CARRIER-BASED TACTICAL AIR SUPPORT

I argued a few days ago that the growing vulnerability of our carriers justified a reduction to nine in our overall attack carrier force level. There are two other considerations which reinforce this point.

NAVY COMMENTS—continued

The previous argument proposed that the United States Navy's combat capabilities be limited to meet only those threats to our national interests which came from countries other than the Soviet Union, because the Soviets are engaged in an extensive and expensive buildup, in quantity and quality, of their naval forces.

The repeated recommendation to cut the carrier force from 17 down to 9 would guarantee our inability to deter or to counter aggressive action by the Soviet Union or by any Soviet proxy. At these force levels we would certainly face the threat of intervention by a worldwide Soviet navy. Inability on our part to meet or overcome such a threat would amount to a large step toward second rate power status in world affairs.

Such an inevitable disaster can be better appreciated if it is understood how much weakness affects the foreign policy and the military strategy of the United States. In our effort toward peace and stable international relations, we are placing increased dependence upon our overseas allies to provide for their own defense, relying on the United States to provide the more sophisticated mobility forces and supporting arms if required. Of all the countries involved in treaties with the United States, only two of them border on the United States. All others are overseas nations, and there is no plan for our support of those countries by tactical ground or air forces which do not depend upon our free use of the seas. Any inter position or challenge by a Soviet navy that had been granted superiority by default through this recommended cut in our carrier force would nullify the strength upon which our strategy is based and would result in effecting surrender of our position of world leadership and trust.

Unless the United States can assure control of the seas against the most determined and capable opposition, our entire politico-military posture loses its credibility to friends as well as enemies. Once isolated, the United States would be denied a forward defense capability and our allies would be forced to seek accommodations with the Soviets or the Red Chinese. Sufficient evidence in peacetime of Soviet capability to do this in time of conflict would be enough to start the erosion of our alliances and compel our allies to come to some understanding with the U.S.S.R. Aircraft carriers constitute the margin of superiority of the United States Navy over the Soviet Navy. Only the aircraft carriers provide the essential umbrella of airpower at sea, without which other naval surface forces and merchant traffic could not operate. Without the carrier force we would lack any capability to control and use the seas.

One is the relative cost of land-based and sea-based tactical air support. Not surprisingly, Navy analysis shows the cost of the two to be about equal, while Air Force analysis concludes that sea-based support is several times more expensive. Depth of service rivalry notwithstanding, such a large disparity can exist only because of the difficulty in determining which costs—particularly in the areas of support requirements, shared defense costs, airlift, and the like—should be included in costing each alternative.

Most neutral observers would agree, however, that an individual sea-based wing is about 50 percent more expensive than a land-based wing composed of the same aircraft.

NAVY COMMENTS—continued

In April of this year the Weapons Systems Evaluation Group—neutral observers—completed a study wherein a methodology and comparison of costs of land-based tactical airwings with sea-based tactical air wings was developed. The study was done completely independent of the Services. The study shows the costs per wing for land-based tactical air to be from 1.1 to 1.6 times more expensive than sea-based air. The study included the support costs that have been the primary source of disagreement.

While this study shows that historically sea-based air has not been more expensive than land-based air, there is a fundamental point that should be made clear. It is illogical to base the number of carriers needed by the Navy on a direct comparison of land-based and sea-based costs. This is because * * * the two are militarily complementary systems, not competitive. Each system is needed. Each is employed where it is most effective: land-based air where suitable bases are available, carrier-based air where adequate land bases are not available. Any analysis to compare these complementary tactical air systems would be extremely sensitive to the contingency scenarios selected. Plausible scenarios can be applied which will favor the employment and effectiveness of either system singly or both in various combinations, thus reiterating their basically complementary nature as opposed to the universal primacy of either system.

One of the most neutral observers, in addition to being a recognized expert on the requirements for air support to ground forces, is Gen. Earle G. Wheeler, former Chairman of the Joint Chiefs of Staff. In his statement before the Joint Senate-House Armed Services Subcommittee on CVAN–70 aircraft carrier, General Wheeler explained:

Now, this is an extremely complex problem and the reason it is complex is that you first have to calculate what you are going to charge off against the cost of land-based tactical air versus what you charge off against sea-based tactical air. And depending upon what you charge off, you come up with these varying figures.

I must say that I don't regard any of these studies myself as being definitive and they certainly are not convincing to me as a basis for making a judgment as to the need for sea-based tactical air.

I looked at this problem in the context of the fact that much of the world's surface is water. Our forces are designed to fight overseas, not on our own land mass. In all of the wars in which I have had personal experience, we have had access to the sea. In some cases, we have had our backs in the sea as we had at the Pusan perimeter, and I have found that sea-based tactical air power is a most versatile and a most useful weapon system.

And Navy planes are themselves more expensive at the present time. The Air Force, for example, has had no tactical air counterparts to the Navy's EA–6B electronic countermeasures plane or its E–2C reconnaissance aircraft.

The second consideration is Air Force development of a "bare base kit" which allows it to set up operations within a few days on very primitive airfields, with nothing more than a runway, parking areas, and a water supply of some kind. There are over 1,700 such airfields in non-communist countries throughout the world, with some in virtually every country. Thanks to the "bare base kit" the Air Force is now able to set up operations in many areas abroad more quickly than carriers can be moved there from the United States.

NAVY COMMENTS—continued

The A–4 is the most inexpensive aircraft in the inventory today. The A–7 and F–4 are common to both services. The cost of the F–8 is comparable to that of the F–104. The A–6 is considerably less expensive than the F–111. These are the airplanes that comprise the major portion of the Navy Tactical Air inventory.

The Air Force AWACS, a multi-billion dollar program, will be the counterpart to the Navy EA–6B and E–2C.

Military air bases require extensive facilities such as maintenance shops, barracks, fuel depots and ammunition dumps, to provide the maintenance and supply support for complex military hardware. Such facilities are not normally found at austere or abandoned airfields. The U.S. Air Force has developed and is presently procuring a mobile "bare base kit" which would provide the necessary support facilities required by a military airfield. This "bare base concept" has been demonstrated only on a limited short term basis, under ideal conditions in the United States, where extensive preparation of the "primitive" airfield was made in the interest of safety. The concept pre-supposes the availability of adequate airlift resources and that the airfield would be invulnerable to airborne or ground attack. After the host nation has granted permission to use an airfield, or after it has been captured, the bare base equipment can be moved in. However, for one tactical aircraft wing (approximately 90 aircraft—the equivalent of one carrier air wing) a kit includes over 6,000 people, 7,000 tons of cargo, and 2500 vehicles in its initial lift. It must be maintained by a daily logistic resupply of 3200 tons of consumables. This daily supply, if provided by airlift to the Mid-East for example, would require more than 76 C–5A transport aircraft. Since this is obviously impractical, overseas land bases are dependent on keeping the sea lanes open for logistic support. In many areas adequate air defense of our sea lanes, and air lanes over the sea, can only be provided by carrier aircraft.

In reality these airfields must be considered vulnerable to air and protective measures must be taken for aircraft and personnel.

The "temporary over-run" of all the jet capable airfields in South Korea could have been anything but temporary had the carrier-based airpower not been available to provide support for the defenders. As General Wheeler stated, "In some cases we have had our backs in the sea as we had at Pusan perimeter, and I have found that sea-based tactical air power is a most versatile and a most useful weapon system." That near tragic reminder of the unique capabilities of aircraft carriers led to the emergency build-up of the Navy's inadequate force of 7 attack carriers to a level of 19. But that was possible only because there were many relatively

This is not to suggest for a moment that we should eliminate carriers altogether. I recognize that land bases, even if offered, might be temporarily overrun.

And unsheltered land-based aircraft have a vulnerability problem of their own, as demonstrated in Vietnam, where large numbers of such aircraft have been destroyed on the ground, while carrier-based aircraft have operated from a sanctuary granted by the North Vietnamese. Moreover, if we were to institute the changes in carrier defense alluded to in my earlier remarks, carriers

NAVY COMMENTS—continued

new carriers in "mothballs"—a far cry from today, when some of those same carriers are still operating but with no modern reserve to draw upon in a crisis.

The loss of bases is not the primary justification for a carrier fleet, however. Given a strategy based on rapid deployability of both land and sea forces, either land bases or sea bases must be available. With the current policy of continuous deployment of carriers to forward areas, the reaction time of one or more of the carrier strike forces is virtually zero. This capability cannot be maintained below programed carrier force levels.

When deploying TACAIR forces to land bases the following problem areas must be taken into account:

The acquisition of base rights can involve the United States in undesirable political commitments in addition to large investments and loans.

The U.S. presence is highly visible as a military manifestation—a factor which feeds "Yankee-Go-Home" sentiment in this era of rising nationalism.

Large numbers of military personnel with their dependents and the extensive facilities to accommodate them contribute to the outflow of gold problem.

Moreover, overseas bases in countries allied to the United States are not necessarily dependable from a long-range strategic aspect.

Bases can be lost by direct military action of enemy forces as happened during the Korean war.

Bases can be lost in peacetime as occurred in France where all U.S. tactical airbase privileges were revoked. It has recently occurred when the new regime in Libya revoked our base rights at Wheelus.

Bases can also be temporarily denied by reasons of political expediency on the part of a host nation. On at least one occasion, the denial of even emergency use of a base in a supposedly friendly country for the protection of U.S. nationals in a third country severely constrained our actions. Similarly, suspension of landing and overflight rights by a country which has been our staunch ally severely complicated deployment of land-based tactical air forces.

Concur.

This is indeed one of the key arguments in support of the carrier weapon system. More than 400 fixed-wing aircraft and helicopters have been destroyed on the ground in Southeast Asia. Over 4,000 additional aircraft and helicopters have been damaged by enemy ground attacks. These losses were suffered in a friendly host country in which bases were willingly offered (if we built

NAVY COMMENTS—continued

would become more competitive with land-based aircraft from a cost standpoint as well.

My only point is that nine carriers would give us the mix between land-based and sea-based tactical air support which a wise allocation of resources seems to require. And it is about time that we thought more about this in sizing our tactical air forces. Unfortunately, the main consideration in Southeast Asia has been to see to it that Navy and Air Force interdiction strikes have been divided up 50–50.

NAVY COMMENTS—continued

them) and they were defended by large numbers of dedicated U.S. and allied ground forces.

In contrast, the "sanctuary granted by the North Vietnamese" to the aircraft carriers is rather prudent recognition of the demonstrated capabilities of the U.S. Navy not only to repel the threat of surface attack and land-based air, but more importantly its ability to dominate air inland while inflicting punishment. The downing of MIG fighters over their own inland sanctuary by long range guided missiles from a U.S. Navy cruiser in the Tonkin Gulf probably provided an additional appreciation of the multiple defenses of carrier task forces. Any U.S. Navy "sanctuary", if not hard won, is at the least a grudging concession to the superior strength of carrier task forces.

Here again, the primary argument for a greatly reduced carrier force is based on the misconception that sea-based airpower is used only in a land support role. As has been repeatedly stated by the Navy, the primary function of the aircraft carrier is the control of the sea. Without carriers, the United States would lack any capability whatsoever to control and use the seas. Against a large force such as the Soviet Navy, only the aircraft carriers provide the opportunity of quickly overcoming the threat. Therefore, the Navy requires adequate numbers of the most capable aircraft carriers we can build to meet the threat of worldwide Soviet naval power. More than 20 carriers are required to support the mission of sea control and the mission of projection of power ashore in support of land operations. As stated previously, with an insufficient number of carriers to meet the growing Soviet threat, our entire politico-military posture loses its credibility.

"The main consideration in Southeast Asia" is misrepresented. The Navy did not size its carrier force for a Southeast Asia and especially not for an air campaign constrained to jungle interdiction. Never-theless, in the real-life situation of the war in Southeast Asia, the unified commander, Commander in Chief Pacific (CINCPAC), indicated that there was not enough land-based air to meet the needs for TACAIR in that theater, even after six years of war. He was asked by the Joint Chiefs of Staff to evaluate a proposal for replacing carriers with additional land-based squadrons. As Commander of a unified command, he was responsible for both the land-based and sea-based air forces. In January 1968 he submitted an analysis of the factors involved in such a trade-off from which he concluded:

The preceding analysis indicates that the disadvantages involved in a trade-off of CVAs for land-based air outweigh any advantages which might accrue; operational

However many attack carriers we decide to have, we will have to count on them to provide the full spectrum of offensive tactical air support missions—interdiction, air superiority, and close-air support.

To date, the Navy like the Air Force has given primary attention to the interdiction missions, notwithstanding the negligible results shown in Vietnam, Korea, and World War II. The A–6 and A–7 are its primary aircraft for interdiction strikes, and the F–14 itself has been given a considerable air-to-surface capability, at great cost both in dollars and dogfighting performance.

And perhaps the best indication of the Navy's limited affection for close air support was provided in this year's hearings before the Senate Armed Services Committee. When asked what aircraft the Navy would be using for close support in the next few years, Admiral Connolly replied:

"Well to a very large degree we will use A–7's, and as long as we have A–4's we will use A–4's, and we have used F–4's when it was necessary. And the Marines will be using the Harrier. And I wouldn't be surprised under some circumstances that they will load the F–14 up because it covers a lot of real estate and can carry a big load of bombs and under certain circumstances it might turn out that the F–14 would do close air support."

Unfortunately, the A–4 is the only aircraft at all suited to close support in the Navy's inventory, and as Admiral Connolly indicated, it already is being phased out. Once it is gone all the Navy itself will have for the mission is one interdiction aircraft and two fleet air defense fighters.

But air superiority is the subject today, and in many respects, the air superiority mission is more important than either close support or interdiction, since there is no way that either close support or interdiction aircraft can be made to influence land battles in progress unless we have air superiority in the first place.

NAVY COMMENTS—continued

considerations alone indicate that we should hold fast to our current flexible and balanced-basing arrangement. When we examine the high costs in money, men, and material along with the political and economic considerations, it is apparent that a trade-off is neither practical nor desirable.

CINCPAC is opposed to a cutback of CVA operations in the Tonkin Gulf in favor of land-based air in the current situation.

The full spectrum of offensive missions which the aircraft carriers and their air wings provide include the location, detection, identification and destruction of hostile forces on and beneath the sea and in the air, the destruction of such forces at their bases and destruction of the bases, establishment of air superiority anywhere in an area of naval operations, air support for amphibious assaults or for established shore based forces, and interdiction.

Navy fighter and attack pilots are trained and capable in a wide range of missions. In World War II, Korea and Vietnam. Naval Air responded to the threat with appropriate capabilities within the restrictions imposed.

Interdiction has by no means always received primary attention. In World II great emphasis was placed on counter fleet operations. The success of Naval Air in this role was a primary factor in the success of our Pacific operations. Though interdiction received primary attention in Korea and Vietnam, current fleet training places emphasis on counter-ship strike capabilities.

Naval fighter and attack pilots are fully trained in the Navy/Marine system of close air support. Naval aircraft have historically been capable of long range, endurance, large ordnance loads and high accuracy, which are requirements of a good good close air support aircraft. However, the A–4 is not the only aircraft suited to close air support in the Navy's inventory. The A–7E has proven to be vastly superior to the A–4 in the close air suport mission, as it is in all others. The primary consideration for effective weapon system selection for close air support is suggested by the mission title—*close* aerial support to ground forces. It is evident then that delivery accuracy is paramount. The A–7E has repeatedly demonstrated a degree of weapon delivery accuracy twice as good as the A–4 aircraft. During a recent combat operation in Southeast Asia the A–7E was the only aircraft that was allowed to deliver ordnance within 50 meters of friendly forces. In addition to greater accuracy, the A–7E has the capability to carry over two and one-half times as much ordnance as the A–4 and five times as much 20 millimeter strafing ammunition. The other Navy attack aircraft, the A–6, also has superior bomb load endurance and accuracy. The A–6 has demonstrated, in combat, it is the world's most effective all-weather attack aircraft and is capable of all-weather close air support of troops.

Historically the Navy has developed aircraft and weapons with a broad spectrum of capabilities. A majority of the aircraft and weapons used in the Vietnam conflict were Navy developed. Naval Air is uniquely trained and equipped to respond to any level of conflict is most areas of the world.

The F–4 has served well since its introduction into the fleet. However, it is in some respects inferior to present Soviet-fighter aircraft and cannot be significantly improved without major redesign amounting to a new airplane and costing many millions of dollars. Even then it would be unable to counter operational Soviet fighters.

The mix of fighter and attack aircraft on our attack carriers is by no means fixed. This ratio can be varied as required by the Fleet Commander in each tactical situation. The only constraint is total aircraft assets.

The F–4 has been since 1961 and is now the air superiority fighter of the Navy, going through several different versions over the years. Originally developed by the Navy alone, it has been the front line fighter for the Air Force as well. But while Navy purchases ceased after fiscal year 1970, the Air Force bought some late-model F–4's last year and will do so again this year.

At present, the Navy has about two aircraft supporting the interdiction mission aboard its carriers for each F–4 fighter. In a relatively benign environment such as Vietnam, where we have encountered only a handful of Mig–21's, it is possible to live with this ratio. It would not be so, however, against a more numerous enemy fighter threat.

And our carriers can fully expect to counter such a threat, even if they are specifically ear-marked for wars not involving Soviet naval forces. The Soviets have long shown a willingness to make Mig–21's available to their allies. The new Mig–23, or Foxbat, is supporting the Egyptians in small numbers, and we can expect large quantities of new air superiority fighters to be exported also in the next ten years, especially if the Soviets continue their traditional emphasis on light, highly maneuverable fighter designs.

This is a central fact which it is important to fully grasp. Due to their high costs and technical complexity, there is no way that the Soviets can make available to their allies the spectrum of sophisticated threats with which they themselves threaten our carriers, such as large numbers of submarines with cruise missiles and acoustic homing torpedoes. What they can give their allies is a limited number of patrol boats with Styx missiles, some diesel submarines and obsolete naval bombers, and a large number of cheap, high performance fighters. What we need to counter these items is a less complex and more reliable kind of carrier defense and some high performance fighters of our own.

Just what is the current status of the Russian threat these fighters will have to counter?

II. THE SOVIET FIGHTER THREAT

An in-depth discussion of the Soviet threat is not warranted here, but three important observations should be made.

First, the Soviets have done more work on

Inasmuch as third country conflicts will most probably see us matched against Soviet technology and equipment in the form of aircraft, missiles, and electronics, there is no real diminution of the requirement for aircraft/weapon system sophistication. All of the aircraft that would be necessary for sea control and projection ashore missions in "worst case" conflicts (e.g., the F–14 and A–6 all weather aircraft) are equally applicable and necessary for contingency operations. Not only do we see a steady buildup in the quality and quantity of third country arsenals (UAR and North Korea are examples where the latest Soviet equipment has been seen) but we have also seen how rapidly Soviet technology can be imported and made operational (NVN SAM installations). The only difference between third country requirements and those needed to counter a direct Soviet threat is in the balance that would probably be desired between ASW and tactical aircraft.

No intelligent decisions can be made with regard to U.S. fighter requirements without a thorough discussion of the Soviet threat in order to sort out facts from assumptions.

the development of new fighter aircraft during the past twenty years than has the United States. As the Navy itself is fond of pointing out, albeit with some exaggeration (accomplished by counting as separate models all versions of each basic design):

The Soviets, since 1954 when the F–4 was designed, have flown 18 new models of modern-type fighter aircraft. . . . The Soviet Union has concentrated on tactical aircraft specifically oriented for the air superiority role.

Second, the Soviets have approached the problem of new fighter design with a different design philosophy than the United States. As Air Force Secretary Seamans told the Senate Armed Services Committee in 1969:

Since their appearance in the Korean War, Soviet-designed fighters have generally been more maneuverable and have had better acceleration than U.S. fighters. Our fighters, on the other hand, have had better radiuses of action, firepower, avionics, and payload.

The Soviets, in other words, have steered clear for the most part from the kind of complex avionics and armament gear which has not worked for us in Southeast Asia and about which I will say more later. Their own fighters, freed from the weight and drag of this equipment, have emphasized the maneuverability required for aerial dogfights.

Their fighters have also cost far less. For example, the F–4 costs about three times as much as its most direct Soviet competitor, the MIG–21, based on direct comparisons of the cost of U.S. aircraft of

NAVY COMMENTS—continued

The Navy agrees that the Soviets have done more work on the development of new fighter aircraft during the past twenty years than has the U.S. The U.S. National Intelligence Community agrees that since 1954 the Soviets have flown at least 14 different designs (Fresco, Flashlight, Farmer, Flipper, Fitter, Fishpot, Fishbed, Firebar, Faithless, Freehand, Fiddler, Flagon, Foxbat, and Flogger) to our one (the F–4.)

The Soviets have not steered clear of complex avionics and armament solely to emphasize maneuverability. They simply have lagged the U.S. in sophisticated fighter electronics and air-to-air weapons. They lag several years behind in avionics and microminaturization as amply evidenced by their space program. The deemphasis of complex avionics has been, to some extent, a necessity rather than a choice for the Soviets. We have hard intelligence that the Soviets are closing the gap rapidly and that at least six of their fighters carry radar guided missiles.

In the early period after WW II the Soviet design trend was to copy from the West but as Soviet capabilities improved the trend switched to native systems although most of the principles and components are well known to Western designers. The current trend is toward solid state design to achieve significant improvements in technical effectiveness and reliability. The use of solid state devices will not necessarily result in significant reductions in weight and volume since new electronic systems are expected to have added functions which will regain the weight and volume otherwise saved. Thus the Soviet trend will be toward stabilized overall electronic system weight but with significant increases in functions and capabilities.

Their present capability is about as good as our current Sparrow. Foxbat and future fighters will carry radar missiles with longer range than the improved Sparrow 7F but not nearly as capable as Phoenix. (This means the Soviets shoot first against a Sparrow equipped fighter or one with only Sidewinder and gun. The F–14 with Phoenix can get the all important first shot against the Soviet fighters.) Thus, the make-up of the Soviet threat is shifting from "Dog fighter only" toward balanced air superiority fighters like the F–14.

It is doubtful whether any U.S. manufacturer could build a MIG–21 for $800,000. But that is not really an issue. It would seem that economists would think that the costs of an F–14 and Phoenix should be more comparable size and complexity. (I can't help noting that the $800,000 cost of a simple MIG-21 is the cost for only two of the six Phoenix missiles which would be carried by the F–14!)

Third, the fact remains that the Soviets have yet to develop a new tactical air-to-air fighter which is superior to the F–4. It appeared for a while that the new Foxbat, or MIG–23, might be such an aircraft, but it now seems clear that it is primarily a high altitude interceptor, rather than an air superiority fighter. As General Bellis, Air Force program manager for the F–15, told the Senate Armed Services Committee this year:

The Foxbat, a high speed, high altitude aircraft, became operational with the Soviet air defense forces in 1970 and appears to have excellent capabilities as an interceptor or reconnaissance aircraft, but it has limited maneuverability and low dynamic pressure limit. Because of these limitations, the Foxbat does not represent an overwhelming tactical air combat threat, but does represent an impressive technological threat.

Calling the Foxbat "an impressive technical threat" is a nice way of saying that the Soviets can probably build a much better fighter. No doubt they can and will when they try. And a true successor to the Mig–21 is due any year now. It is important therefore that we design our own new generation of fighters not only to counter existing threats but to provide the greatest possible assurance that they will also be able to handle new Soviet aircraft we have not yet seen and probably will not see until a Domodedovo air show in the 1972–76 period.

III. THE MAIN INGREDIENTS OF AIR-TO-AIR SUCCESS

It would be possible to jump at this point directly to a discussion of the F–14's deficiencies as a fighter. I want to take the time first, however, to consider what basic performance features we need—and why—in *any* new fighters we hope to buy.

Too often we in Congress attempt to make decisions on important defense issues without asking basic questions of this kind. As a result, we get snowed under with statistical data and a variety of conflicting claims.

What I propose to do is to organize my discussion around six ingredients which are absolutely essential and two which matter far less to air-to-air combat success. To sup-

NAVY COMMENTS—continued

meaningfully compared to the costs of the targets that might be destroyed by MIG-21s or MIG–21 escorted bombers. For example a strike group of twenty or thirty men and several multi-million dollar U.S. attack planes enroute to their target should be protected by the best we can provide. F–14 with a balanced weapons load of Phoenix, Sparrow, Sidewinder, and guns simultaneously is the best we can provide at any price. And it is cheap compared to a $13 million Foxbat or a $31 million Backfire (if these planes were built in the U.S.).

The Foxbat is everything that Senator Proxmire and General Bellis say it is—and more. What they neglect to mention is that Foxbat can fly in a haven above 70,000 feet and none of our dogfighters can engage it. Armed with four new Soviet radar guided missiles it can fire with total impugnity at our attack groups if they are escorted by the light dogfighters, Senator Proxmire would substitute for the F–14. The F–14's Phoenix missiles will get to the high altitude haven that our aircraft can't penetrate and have a high probability of killing Foxbat before it can kill our planes.

Certainly the Soviets can and will build a much better fighter than Foxbat or Mig–21J. The Navy has carefully evaluated Soviet aims and technological capability to determine the performance characteristics of the next several Soviet fighters. The F–14 has been designed to maintain superiority over these fighters. A study ordered by Mr. Packard to determine if the F–14 and F–15 will be able to counter new fighters of 1975–85 is nearing completion. Preliminary results of this effort which uses all the latest analytical and measurement techniques verify that the F–14 will be able to effectively handle the new fighter of the 1972–76 period.

No Comment.

port my arguments I will rely wherever possible on concrete evidence from our actual experience in World War II, Korea, and Vietnam. The basic points are simple, and I'll do what I can to keep technical details to a minimum.

1) *Aircraft Maneuvering Performance.* The object of any aerial dogfight is to maneuver out of vulnerable positions and into positions suitable for weapons delivery.

Initially, fighters escorting attack aircraft over enemy territory are likely to be "bounced" by enemy aircraft from behind. (The term derives from the early days of aerial combat, when the air currents generated by closely approaching fighters actually caused the plane set upon to "bounce" in the air.) Accordingly, the first performance requirement for a fighter is sufficient hard turn capability to defeat such an enemy attack by maneuvering defensively out of the launch envelope of an enemy's missiles and guns. This capability is usually measured in terms of the number of "g's" the aircraft can pull while flying at dogfight speeds.

The next requirement is an ability to convert to an offensive position. What this requires is sufficient acceleration and turn capability to bring enemy aircraft into the effective launch envelopes of our own missiles and guns. Acceleration is determined essentially by the thrust of the engines and the weight and drag of the plane.

The speed at which these maneuvers take place is largely determined by the speed of the defender at the outset of the engagement. This is almost certain to be his cruise speed—the maximum sustainable with efficient use of fuel—and is at best high subsonic even for today's supersonic aircraft. The attacking aircraft will want to be somewhat faster, but his desired speed advantage will be limited both by the maximum closure rate at which he can still set up for weapons launch and by his recognition that the poor turning radius associated with excess speed could cause him to overshoot into a vulnerable position if the defender detected his attack and executed a successful defensive maneuver. The attacker will therefore want to maximize his own maneuvering capability in the low supersonic speed regime.

A real problem for today's fighters is the fact that hard maneuvers at these speeds produce drag which, together with the weight of the aircraft, forces them to lose speed and/or altitude. In our new fighters, improved maneuverability at dogfight speeds will have to be a prime requirement. From a design standpoint, it will be a function of adequate wing area and a thrust to weight ratio comfortably in excess of one. These features will be far more important than those required for a very high supersonic dash speed which is seldom useful and which extracts its price in other areas.

The object of any aerial combat, including dogfight, is to win. In 1917 Baron von Richthofen, writing on figher tactics, stated that a good flight leader must prevent surprise. The "Red Baron" understood air combat very well. Fighters in a tactical air battle strive to both gain surprise and to avoid being surprised. The first requirement for victory is to achieve an offensive position. We cannot wait to be "bounced."

When offense cannot be gained by surprise a dogfight develops. Hard turns, rapid climbing and diving flight and good acceleration are required to achieve and maintain offensive position.

The F–14A air superiority fighter is designed to embody all of the classical elements of air superiority. When compared to the F–4J it will engage in close-in visual combat with a 20 to 40% advantage in all parameters for maneuvering flight.

Some interesting points have been raised recently about the differences in performance, physical characteristics, and configuration of the F–14 in comparison to other "fixed wing" aircraft. In the Navy's view these are more probably two philosophical approaches to solve the same problem—meet the threat.

In addition to allowing for better inherent range performance under cruise conditions, and exceptional take-off and landing performance from carriers or short airstrips, the variable sweep feature of the F–14 allows maneuverability optimization to be achieved over a considerably expanded speed/

altitude envelope. This is of primary interest in the lower altitude, lower speed regimes where combat experience and all computer and flight test simulations show aerial engagements to gravitate. Under these conditions, the wing of the F–14 would be extended forward to provide the lift and maneuverability increments achieved by the lower span loadings which are the aerodynamic benefits associated with an increased wing span. This lower loading along the wing span is a major contributing factor to the achievement of superior low speed, high "g" turning performance, and is not only a factor of wing loading or wing shape, as is often assumed.

Conversely, under those conditions when combat may be initiated at high speeds, and the ability to engage or disengage in the encounter could often prove of tactical advantage, the F–14's 68 degree wing sweep would obviously provide lower drag than a fixed lower (such as 45°) wing sweep, resulting in superior high speed and acceleration performance.

Sophisticated man-in-the-loop computer simulations of air combat between the F–14 and highly agile threat aircraft, conducted in government facilities have conclusively shown the ability of the F–14 to properly position its wing for all combat conditions encountered. The dynamic requirements of these combat situations were recognized during the design of the wing sweep mechanisms, and sufficient design margins have been incorporated to provide required sweep rates at load factors up to 7.5 "g".

Direct comparisons of "wing loading" and "thrust-to-weight" ratios can be misleading, as improper use of excess power can result in a tactical disadvantage. "Wing loading" may be improperly substituted for a more meaningful characteristic, lift efficiency. One measure of this efficiency is "span-loading", i.e., the ratio of wing lift to wing span. It is the correct measure of turning capability in the subsonic regime where 95 percent of combat occurs. A low span-loading yields low pressure drag at the high turning rates so important in close-in combat, thereby requiring less thrust to maintain the turn without losing speed. Along with buffet onset, roll rate and engine sensitivity of angle-of-attack, this span-loading is a driving factor in combat. By using a variable sweep wing, the F–14 achieves a very high lifting efficiency where turning combat occurs, and, when supersonic, low wing loading and low supersonic drag consistent with acceleration requirements.

It is important to realize that span loading, not wing loading, is the valid measure of maneuverability in the subsonic or low transonic speed region where most aerial combat occurs. The F–14's wing sweep program optimizes span loading for the environment encountered.

Finally, it is important to recognize that the advent of the air-to-air missile has actually put a premium on these traditional maneuverability requirements. In the old days one aircraft could bounce another and if unsuccessful in its attack, turn on full power and accelerate away from the limited range of aircraft guns. This tactic is today preceded by heat-seeking missiles which can at times be outmaneuvered but cannot be out-run. If an enemy aircraft today lit its afterburner and tried to accelerate away in level or diving flight, it would increase its IR signature by a large order of magnitude and becomes a sitting duck for a Sidewinder type of missile.

Our first requirement, then, is an aircraft which can both out-run and out-accelerate the enemy at all speeds encountered during a dogfight.

(2) *Stability and handling qualities.* A closely related need is an aircraft with good stability and handling qualities, since these factors are a prime determinant of a plane's actual as opposed to theoretical maneuverability. If a plane lacks stability and good handling qualities a pilot will be inhibited from using the full maneuvering capability it has, and his timing will also be affected in all dogfight engagements.

Unfortunately, many of our current fighters—the F–8, F–100, and F–4, for example—have had deficiencies in this regard which have led to restrictions on the realism of peace-time training exercises in an effort to avoid accidents. Despite these restrictions we have already lost over 90 F–4's in non-combat accidents. The great majority of these accidents have been from loss-of-control type problems, primarily spins and stalls.

(3) *Detection and Acquisition.* A Rand Corporation study indicates that roughly 50 percent of all aerial victories in World War II were achieved against unaware defenders, a figure which has probably increased since due to the high speeds of modern jets.

NAVY COMMENTS—continued

Achievement of reduced drag in turns via reduced span loading assumes good sustained turn performance even if the F–14A thrust to weight ratio is slightly less than 1.0. Under that circumstance, the only effect of reduced thrust to weight ratio is reduced acceleration capability which affects only the fighters ability to engage or disengage at will—not its ability to score a kill. As has been discussed elsewhere, the F–14A acceleration is superior to the MIG–21 and the F–4J. The F–14B when introduced will be even better.

It is perhaps more correct to say that, while the advent of the air-to-air missile has not eliminated the need for good aircraft maneuverability performance, it has added a new dimension to the definition of air combat. It has introduced a phase of long-range combat which most often will precede close-in combat and, in many cases, will remove the opportunity for close-in combat.

Hence, a predominant requirement for future fighter aircraft is to incorporate missile fire control systems to exceed the Soviet capability in these areas and win the long-range encounters as well. Since air-to-air missiles fly at speeds above Mach 3.0, the stated "requirement for an aircraft which can both out-run and out-accelerate the enemy," is beyond the current state-of-the-art of tactical fighter aircraft design, including particularly the "lightweight, cheap, and simple fighters."

Concur. And for that very reason the F–14 was designed to have excellent stability and handling qualities. Flight tests on the F–14A to date have verified this fact.

The F–14 design approach to combat superiority has been to provide a wing design and maneuvering aids (slats, flaps and glove vane) which give an extremely high maximum lift capability. This design approach which emphasizes control of wing flow breakdown yields maximum turn capability per unit wing area and a natural aerodynamic spin resistance.

NASA wind tunnel tests have shown that the F–14 provides good handling qualities throughout the aerial combat spectrum *without* stability augmentation. A stability augmentation system, similar to an augmentation system installed in any high performance airplane is incorporated in the F–14 in the pitch and yaw axis. An additional channel is provided in the yaw axis to insure minimum pilot workload and safety of operation at the high speed extremes of the envelope.

That some 50 percent of all aerial victories in WW II were achieved against unaware defenders is probably quite true, and certainly represents the tactic attempted, or desired by both adversaries in any form of combat. Our experience in Vietnam again has illustrated

A third important requirement, therefore, is an aircraft which is hard to detect but has excellent acquisition capabilities of its own.

The problem of minimizing one's *own* detection is quite straight-forward. The key factors, in order of importance, are lack of smoke trail, small physical size, a small radar cross section, and a low infrared signature. One of the problems with our present F–4 is that it has double the size of a Mig–21 and a smoke trail which can be seen for many miles.

The most important factor in detecting *enemy* aircraft is good visibility out of the cockpit, particularly over the sides and to the rear.

NAVY COMMENTS—continued

this point when, for a period of time, the North Vietnamese fighters were able to be vectored, under GCI control, to approach undetected to the rear of our aircraft for attack. Hence, it is most necessary that our aircraft incorporate "awareness" systems to provide long range, and essentially hemispherical, detection capabilities against attacking enemy fighters. Without such systems, the maneuverability potential of the aircraft about to be attacked is meaningless if prior warning is not available to the pilot to tell him when, and in what manner, to exercise this maneuverability.

Concur.

Smoke trails have been a serious factor, but this has now been overcome with the smokeless engines used in the F–14.

Excellent pilot visibility was emphasized in the 360° bubble canopy design of the F–14. However, to detect or acquire attacking enemy fighters under all conditions requires much more than visual ability of the crew. Assuming, for instance, that the crew knows *where* to look for an enemy fighter—a highly improbable situation without some form of external cues—very little time would be available for any evasive action to be taken. For example, at speeds of Mach 1 for both aircraft when approaching each other, only some 8–10 seconds would elapse between detection (on a clear day) and the time when the aircraft passed each other. This case also pre-supposes an enemy fighter which would not stand-off and launch the air-to-air missiles with which all first-line Soviet fighter aircraft are equipped. It is important to note that we have never engaged in combat with any such first-line Soviet aircraft, *yet!*, but the Foxbat is deployed to the UAR.

Hence, while visibility from the cockpit is a most necessary ingredient in fighter design—and this has been emphasized in the F–14—this capability is more required for maintaining visual contact *after* a close-in aerial combat has been initiated. The physical size of the fighter aircraft involved makes little difference in the visual detection factors noted, changing the above reaction times by only a few seconds at the most.

In the F–14, this problem is solved by the division of tasks between two people, sharing information unique to their aircraft, so that at least one pair of eyes is always in the head-up mode.

This two-man operation is especially suited to the sophisticated electronic environment. ECM is a head-down game, requiring patient

Also important are the presence of passive warning receivers on the plane and adequate use of ground-based radars.

Unfortunately, our own emphasis in recent years has been on complex and expensive high power-level radars in our planes themselves. It is worth spending a moment to see why this emphasis has been so unfortunate.

First, these airborne radars provide no protection against the most dangerous and difficult to detect enemy bounces, which are from under the sides or from the rear, since the radars sweep only in a narrow cone directly in front of the plane. This cone, it should be noted, is especially restricted for radars operating in a look-down mode. It is because of their narrow search patterns that these radars are no substitute for good visibility out of the cockpit with a pilot's unaided eyes.

NAVY COMMENTS—continued

attention to instrumentation if real targets are to be separated from the noise/deception background. No man-made complex is theoretically highly reliable sensors and processing equipment can solve the unpredictable challenges presented by the ever-changing combat environment. The tasks presented in these dynamic situations are divided between the pilot and MCO to allow for an orderly assessment of tactical challenges with a minimum amount of anxiety and excitement.

The pilot in a single-seat aircraft somehow must divide his attention between the outside and inside worlds while challenging the trend of deteriorating performances which will occur under the pressures of attack. The F–14 does not suffer from this problem since the second man can devote his time exclusively to sensor outputs. Also, F–14 radar detection is supplemented by either an IR sensor or a television sight unit (TVSU) which increases target identification ranges significantly in clear air daylight conditions.

The properly coordinated aircrew, a primary goal in Navy air combat maneuvering training, provides two sets of "eyeballs" for simultaneous forward and aft lookout and increased chances of keeping an opponent in sight during highly dynamic conditions. If faced with a choice of missions in a singly manned fighter, the comparatively static conditions of intercept role would be preferred.

It should be noted that "cheap, light weight fighter" advocates require a single piloted aircraft.

Concur.

To provide for satisfactory target detection and acquisition performance requires the use of electronic systems such as active-radar and passive electromagnetic warning systems, infrared systems, etc. Active, long-range radars and infrared systems are required to detect, and warn against, "passive" enemy aircraft which may not, at that particular time, have their radars operating. These are the only techniques by which such targets can be detected, tracked and then fire control systems activated to launch missiles against them. Unfortunately, the choice is not really ours to make whether we should, or should not, equip our fighters to carry such missiles and fire control systems—the Soviets already have made this choice.

It is not true that the AWG–9 radar search pattern is limited to a very narrow cone directly in front of the airplane. The cone has a very wide scan angle and can be searched by both sensors (radar and infrared) either slaved together or searching different volumes. Against a small fighter target, the effective horizontal scan pattern is more than 150 nm wide and 100,000 ft. high at maximum range. When penetrating enemy territory with a scan pattern of this dimension, the probative of detecting all approaching enemy aircraft is very high.

Second, these airborne radars have the unfortunate effect of broadcasting the plane's position for hundreds of miles around, thus negating all the other design features aimed at minimizing its detectability. That is why an important distinction must be drawn, as far as mechanical aids are concerned, between passive warning receivers on the plane—which do not alert the enemy to its position—and airborne radars which do.

It is because radar detection devices actively warn the enemy of their presence that they should be largely confined to ground-based sites. The Navy, it should be noted, can and has easily obtained the shipboard radar coverage needed to position our fighters for offensive operations in each of our major theaters—Europe, Korea, and Southeast Asia.

The deficiencies of high-power-level airborne radars have been amply demonstrated in Southeast Asia. Enemy pilots, directed from the ground, have been able to easily avoid their narrow search patterns and approach American fighters from behind. American pilots have been far too busy visually scanning their sides and rear to keep their eyes glued to their radar scopes. And they have often turned off their radars to avoid advertising their positions for hundreds of miles around.

NAVY COMMENTS—continued

The AWG–9 radar has been specifically designed to overcome the look-down deficiency as well as countermeasures vulnerability of older radars. The PHOENIX missile system has already demonstrated the capability to look down and shoot down into clutter in the most sophisticated countermeasures environment.

Escort studies conducted indicate that several F–14 maneuver choices are available to provide "all-around" coverage. Radar was developed to extend the limited range of the naked, "unaided" eye. The benefits derived from radar detection ranges extending to 100 miles versus "eyeball" detection limited to the immediate vicinity of your aircraft are obvious. Airborne radar is a superb complement to good cockpit visibility.

Anytime U.S. aircraft are flying over hostile territory, detection by enemy radars is assumed. This was especially true in North Vietnam, where a vast radar and intelligence network was in operation. It therefore made no difference whether the aircraft's radar was on or off. Protection is the reason for escorting strike aircraft with fighters. If the enemy is "scared away" by the presence of friendly radars, the mission has been accomplished.

There is a distinct difference between passive warning receivers and emitting airborne radars; however, the functional role of each receiver must also be understod. Passive warning receivers are not detection devices, but simply alert the aircraft that it is being illuminated by a radar. Radar is an active system, emitting a signal and receiving a returned signal, thus providing a detection capability. It should also be noted that passive detection devices are also employed in fighter aircraft, though the detection ranges are considerably less than an active system.

This point was discussed earlier. Additionally, to trade-off airborne radar, and with it the Phoenix and Sparrow missile capability and their associated standoff capability, confining radar to "ground-based sites" is not a logical rationale. The fighter weapons flexibility is then reduced to Sidewinder/guns, forcing every engagement to a dog fight, one-on-one environment, relying solely on shipboard radar and the eyeball for enemy detection and fighter positioning.

This point was discussed earlier. In addition, the pilot does *not* have to continually monitor the radar scope. The two-man crew concept employed by the Navy in the F–4, a pilot and radar intercept officer (RIO), and in the F–14, a pilot and missile control officer (MCO) has proven undisputably superior to a single-placed aircraft in all tactical situations. The pilot's eyes primarily stay out of the cockpit visually searching for aircraft, while the RIO or MCO control the sensors.

Radars are never turned off to avoid posi-

One final point should also be noted. In addition to their other problems airborne fighter radars have proven extraordinarily unreliable from a purely mechanical point of view. All in all, they have contributed only a tiny fraction of all enemy fighter detections throughout the long duration of the war.

(4) *Reliable and Lethal Weapons.* For the past twenty years, proponents of the air-to-air missile have argued that maneuvering combat would soon be obsolete. Fighter pilots would see each other only on their airborne radars (!) and engage by missiles at long range, without ever closing for a dog fight.

I have just discussed some of the problems with airborne radar acquisition, and since I have also dealt with many of our missiles' deficiencies in evaluating the Phoenix, I will only summarize them here, as demonstrated in our Southeast Asia experience.

First, due to the large number of aircraft over Vietnam and the impossibility of reliably separating enemy planes from Laotian airliners or Air Force planes not tied in on the Navy's communications system, few stand-off aerial battles have ever been fought.

NAVY COMMENTS—continued

tion disclosure. As discussed earlier, the intelligence gained is far more valuable, than position disclosure in a hostile environment.

Radars installed in fighter aircraft have not proven "extraordinarily unreliable." Airborne radars are sophisticated, electronic systems that enjoy reliability similar to comparable ground radars. Full system capability is not realized 100 percent of the time, but no such system does. Several operational modes are incorporated to offset for degraded system operation.

The reliability of the F–4 weapons system equaled or exceeded the reliability of the less sophisticated F–8 weapons system.

In the AWG–9 radar, proper operation is assured through the use of the on-board digital computer that effectively tests the complete weapon system. These tests, called BIT or Built-In-Test, are selectable anytime by the MCO in flight or on the ground, and by maintenance personnel. Fault isolation is immediately available to expedite post-flight maintenance efforts. The lack of enemy fighter detections was principally due to a lack of "look down" capability. The later generation airborne radars (i.e., AWG–9, AWG–10) have improved the "look down" capability of airborne fighter radars.

General discussion—no comment

Second, our missiles have never demonstrated the accuracy and reliability predicted by their manufacturers and first shown in artificial tests.

Phoenix could be employed anytime the operational commander deemed necessary since the self-imposed restrictions regarding the use of missiles when friendly aircraft were present would not necessarily pertain in future situations. Dramatic improvements in both identification of radar targets and the routing of air traffic through radar/navigational techniques can quickly be introduced that would assure the Phoenix stand-off launch capability. Also, Phoenix has demonstrated excellent performance under launch conditions not requiring stand-off.

During the early phases of the Vietnam conflict, the rules of engagement required mandatory visual identification prior to launch of our air-to-air missiles against enemy aircraft. Later, the Navy developed a command, control, and communication capability to obtain, without visual contact, positive identification of all friendly aircraft in a war zone. The unprecedented surveillance capabilities of the AWG–9 radar/IR

NAVY COMMENTS—continued

sensors, coupled with the data link will make the F–14 a natural extension of this successful command and control environment.

Navy air and surface Tactical Data Systems will receive all F–14 sensor information for direct use in the network. In addition, the F–14 weapon system itself will include provisions for positive identification of friendly airplanes.

These unique capabilities, exercised with appropriate doctrine, will satisfy the positive air control and identification requirement to employ the Phoenix Missile in support of the fundamental missions of the attack carrier. At the long ranges desired for initial Phoenix launches, identification and "clear to fire" will be available. After attrition at standoff ranges, engagements at short range with remaining hostiles may, depending on the particular situation, require visual identification. Phoenix will have equalized the threat at long range to permit efficient use of short range weapons in a close-in visual identification encounter.

Radar guided missiles in Southeast Asia, (particularly Sparrow) have experienced problems in five distinct areas: (1) missile reliability; (2) aircraft weapon control system radar, and computer accuracy and reliability; (3) launch envelopes—many missiles were launched outside their guidance envelopes; (4) fuze effectiveness; (5) launcher reliability. Consideration of these factors has been continually emphasized in the design, test, and evaluation of the Phoenix missile. In addition, the Phoenix has been designed and integrated with an adequate aircraft environmental control system to minimize the potentially damaging effects induced by typical carrier operation.

(1) MISSILE RELIABILITY

Through means of the on-board digital computer, all six Phoenix missiles carried on each F–14 can be thoroughly tested in flight. This test, called MOAT, missile-on-aircraft-test, takes less than 20 seconds to effectively test each missile. Design and test of many Phoenix missiles to date demonstrates the overall missile reliability requirement will be met or exceeded in fleet use.

(2) AMCS OPERATION

Proper operation of the Weapon Control System (AWG–9) is assured through use of BIT (built-in-test) similar in operation and performance to the MOAT described previously. In dogfights, experience has shown that present operational aircraft radars may lose lock or intentionally break off to avoid being unfavorably engaged by another enemy plane. To overcome this problem, the Phoenix missile has a self-contained guidance mode, this permits the F–14 crew to launch and leave, providing one added degree of flexibility and safety.

NAVY COMMENTS—continued

(3) LAUNCH ENVELOPE

The Phoenix provides a launch zone more than four times as large in range as any other operational air-to-air weapon. The AWG–9 digital computer is used to generate steering commands and to predict when the F–14 is in a region that will satisfy missile guidance launch requirements. The digital program will accurately compute and display missile launch envelopes even in a maneuvering dogfight environment. Thus, the possibility of launching outside the missile envelope causing unsuccessful missile intercept is remote.

(4) FUZE EFFECTIVENESS

Most fuze problems in Southeast Asia were associated with non-directive semiactive radar fuzes tied to the missile radar guidance system, requiring illumination by the launch aircraft's radar. There is no protection provided from firing prematurely on false targets. The Phoenix missile fuze has taken these problems into consideration and corrective design features have been incorporated.

(5) LAUNCHER RELIABILITY

Of all the launching failures experienced in Southeast Asia, approximately one-half were because of the launcher and one-half of those resulted from lack of motor ignition after missile separation. A new launcher has been developed and integrated into the F–14 airframe. Problems, such as corrosion and handling in the Fleet environment, are being overcome in the new design.

In the test of forty-two guided missiles and three powered separation missiles, one motor ignition problem occurred. The design has been altered and verified to preclude recurrence of the problem.

The reliability of the AIM–7E/E–2 has not achieved the goals set for the missile. However, an aggressive reliability program during the past two years has appreciably increased Sparrow reliability. Sparrow production monitoring tests since July 1969 have demonstrated better than 82% reliability. The "dogfight" version of the SPARROW (AIM–7E–2), a modified design to cope with the air combat maneuvering environment, was just coming into the inventory in 1968 as the air war in Vietnam was closing and was never used against the MIG's. The success rate of Sparrows would have been significantly better had the AIM–7E–2 been available.

The AIM–7F, an advanced Sparrow, has improved reliability built in as a result of solid state construction and a unique firing mode. A dogfight capability has also been incorporated into the design. Current test programs demonstrate superior performance over the older AIM–7E–2.

Targets can be expected to use violent maneuvers in an attempt to escape air-to-air guided missiles. These tactics have proven to

Third, enemy aircraft have been able to outmaneuver our missiles by hard turns at normal combat g's.

Fourth, missile performance has been substantially degraded by simple enemy countermeasures.

NAVY COMMENTS—continued

be effective against the SA–2 Russian surface-to-air missiles and the older U.S. air-to-air missiles that are maneuver limited and have exceptionally small launch zones (such as the AIM–9B/Sidewinder).

The Phoenix Missile has benefited from the experience in Southeast Asia being provided with a large launch zone, quicker response to target maneuvers and a modern fuze with a large warhead. Recent studies by the Navy and contractor demonstrate that these capabilities provide the Phoenix with the ability to counter evasive target maneuvers up to 8 g's at twice the range of the Advanced Sparrow (AIM–7F). This superiority results from the higher energy in the Phoenix at intercept, and the more efficient tail control design that conserves energy during missile maneuvers.

The current Aim-7E–2 and advanced Aim–7F have sufficient maneuvering capability to guide and intercept enemy aircraft maneuvering at normal combat g's (5–7). This has been demonstrated by both missiles.

An important factor in the evasive target maneuver tactic is the question of how will the enemy know when to commence evasive action. For instance, Sidewinder requires no radar. In the F–4B/J it is possible to lock-on a target providing an imminent launch indication anytime without firing a Sparrow missile. The same is true of the AWG–9 with the additional avantage that after the Phoenix missile is actually launched in a track-while-scan mode, the AWG–9 radar does not stop its scan to illuminate the target, but continues to sweep, illuminating all targets in the scan pattern, providing no indication of missile launch. Furthermore, the AWG–9 digital computer aids in the solution of the maneuvering target problem by providing steering signals and accurate launch zone displays to optimize the probability of launching inside the missile's envelope in a maneuvering environment.

Success in fighter missions can be achieved by not only killing targets, but causing them to waste fuel and range by conducting unnecessary and wasteful evasive maneuvers. While doing this, they can't launch missiles or reach their targets.

Electronic countermeasures and counter-countermeasures have greatly influenced military warfare in recent years. It is extremely unwise to publicly discuss the countermeasures capability of a missile which is presently in the U.S. inventory. However, in general terms, the Sidewinder is not susceptible to simple countermeasures.

The Sparrow has not shown itself susceptible to simple countermeasures.

And, contractor and Navy tests have been made on the entire Phoenix Missile and elements within the missile, using projected 1980 ECM threats and experimental ECM devices specifically conceived to defeat the

Fifth, radar missiles such as the Sparrow have greatly restricted aircraft maneuvering performance and positioning when employed, since it is necessary to set up and lock on to a target before launching them. In fact, the Sparrow had a minimum launch range so long our fighters often had to drop

NAVY COMMENTS—continued

missile's circuits. The weapon successfully copes with all these ECM techniques.

A discussion of the degree of effort oriented toward making the Phoenix effective in the ECM environment will be helpful in understanding the Navy's emphasis in this area. An important item in the initial Navy specification for the Phoenix Missile was the requirement to operate in the severest ECM environment. To that end, the Navy developed a comprehensive threat definition, design, test, and evaluation program that would continually monitor the Phoenix capability versus the expected ECM environment. The Naval Air Development Center (NADC) was tasked to update the ECM threat description on an annual basis, using the latest intelligence data and information based on U.S. ECM technology. The Naval Ordnance Laboratory Corona was tasked to conduct an independent test of the Phoenix ECM capability. Their purpose was to determine system capability in not only the defined ECM environment, but, using their detailed knowledge of the complete Phoenix system, to design and build special experimental ECM devices that might defeat the system. The Naval Missile Center/Point Mugu (NMC) was tasked to monitor the ECM tests at Hughes and supply ECM gear that represented the best that any potential enemy could be expected to produce.

Hughes was, and is, required to conduct ECM tests on the early breadboard system, the first flyable models, the pilot production and production models, and after every significant design modification. After each series of tests, the information gathered is used to incorporate minor modifications in either the software (AWG–9 digital computer) or the missile's own built-in logic to insure no degradation across the complete ECM spectrum. A new series of laboratory and flight tests are scheduled this fall to reconfirm the system's ECCM (Electronic Counter-Countermeasure) capability. To date, in the opinion of NADC, NWC Corona, NMC, and Highes, no system has ever been designed or as thoroughly tested with as much consideration to ECM. The results indicate that the Phoenix Missile System in a tactical environment will have no significant ECM weakness.

In summary, the missile, through its inherent design and coupled with the highly capable AWG–9 Weapon Control System, promises to be virtually immune to the predicted enemy countermeasure threat.

Radar missiles have no effect on aircraft maneuvering performance or positioning. Semi-active missiles possess an all around, 360 degree, launch capability. The aircraft purposely maneuvers to a desired position for firing. That position is determined by the flight crew to achieve a tactical advantage.

back to launch it after first closing for visual identification.

Sixth, radar missiles such as the Sparrow have suffered from the same defect as airborne radar detection systems—an enemy is alerted to their use and encouraged to use evasive tactics and countermeasures.

It is simply incredible how much money we have wasted on almost totally useless air-to-air missiles. We have invested over $2 billion to date on the Sparrow, which has missed its performance predictions by a factor of ten, and almost as much on the complex infrared Falcon.

Yet Penatgon studies of our Southeast Asia experience convincingly show that aircraft guns are still the most effective weapon against enemy fighters. Only one of our earliest and simplest missiles, the infrared AIM–9D Sidewinder, has shown a roughly comparable performance, at a cost of $15,000 per missile. The much more complex radar Sparrow, at $40,000 per shot, has been about one-third as effective as the Sidewinder at almost three times the price. The Sparrow has been one-quarter as effective as fighter planes' cannons or guns; while costing 200 times as much per firing or 800 times as much per kill!

NAVY COMMENTS—continued

There is no restriction, only maneuvering flexibility associated with semiactive radar missiles.

The Phoenix possesses an additional capability termed "launch and leave". When fired in an active mode, Phoenix does not require target illumination by the launch aircraft.

In reference to the Sparrow minimum range, this was rarely a problem associated with the stern visual identification. However, in dogfight situations on the enemy aircraft's tail, Sparrow's minimum range was discovered to be too long. Modifications have been incorporated to reduce the minimum range to an acceptable level in the Sparrow 7E, 7E–2 and 7F.

Semi-active radar missiles do not emit a signal, therefore there is no way for an enemy to be alerted to missile launch. With active radar missiles that do emit their own signals, the enemy may know a missile has been fired, but the basic question in both cases is how the enemy will know when to commence evasive action.

As stated earlier, success in fighter missions can be achieved not only by killing targets, but causing them to waste fuel and range by conducting unnecessary evasive maneuvers. While executing these maneuvers they cannot launch missiles or continue to a target.

Countermeasures have been previously discussed.

Previously discussed under missile accuracy and reliability.

It is possible but extremely difficult to predict all eventual combat situations. The AIM–7E version of the Sparrow missile was originally designed for use against bombers, before the Soviets produced in quantity and exported the short-range highly maneuverable MIG's to their Satellites. Previously, including the Korean action, guns were the principal air-to-air weapon. The Korean action resulted in a 10 to 1 U.S. kill ratio using guns. Guns underwent the same development and refinement processes as missiles are today. For instance, the success rate of Sparrows would have been significantly better had the AIM–7E–2, just being introduced into the missile inventory in 1968, been available before the halt of offensive air operations in North Vietnam. The advanced Sparrow, AIM–7F, has demonstrated superior performance over the AIM–7E-2 in the current test program.

Sparrow production monitoring tests since July 1969 have demonstrated better than an 82% reliability. As a result of solid state construction and a unique firing mode, improved reliability will be realized in the

Admiral Connolly himself was quite candid about the state of our air-to-air missile arsenal in testimony this year to the Senate Armed Services Committee:

It is one of my chief worries. It seems to be easier to go to the moon than it is to get a good air-to-air missile, and this is one of the weaknesses of our situation in U.S. forces—has been for a long time. The best missile we have is still the latest version of the Sidewinder.

There can be no doubt, then, that aircraft cannons or guns and the infrared Sidewinder remain at this time the most—in fact the only—lethal and reliable weapons in our fighter arsenal. Moreover, our fascination with more complicated weaponry has prevented us from taking full advantage of their own potential for improvement.

(5) *Force Structure Implications.* However good our fighters, they must be available in sufficient numbers to deny the enemy a significant numerical superiority in combat situations. We could use such an advantage ourselves, both to saturate enemy defenses and to replace any losses suffered. Accordingly, even with budgetary conditions far less stringent than those existing today, cost would have to be seriously considered in evaluating our fighter options.

A related consideration is the number of combat sorties each option would actually deliver. Historically, highly complex and sophisticated aircraft have not only cost more to maintain and repair, but have also not been usable much of the time. It is a simple point, too often neglected, that an aircraft will do us no good in time of battle unless it is flying regularly.

NAVY COMMENTS—continued

AIM–7. The Navy has every reason to believe that Phoenix will achieve the desired performance and reliability.

The F–14 with its mixed weapon load (Phoenix, Sparrow, Sidewinder, and Guns) and superior fire control system will allow the Pilot and Missile Control Officer to select the proper and most effective weapon for each particular tactical situation thus increasing the overall kill probabilities.

These remarks have been addressed in the above discussions concerning target identifications, missile performance and reliability, maneuvering targets, countermeasures, and evolutionary missile developments.

Modern air combat between fighter aircraft will inevitably involve relatively few contestants. The short duration of any one discrete event, perhaps two minutes or less, as well as the high speed maneuvers preclude effective use of a large number of fighters at one given point in space and time. However, engagements can and do occur in rapid sequence. The fighters staying power in terms of fuel and weapons therefore must be a consideration. The F–14A has no peer in terms of internal fuel (mission range) nor in terms of numbers of weapons available. On a per sortie basis the F–14A brings more combat power to bear than any known alternative.

The number of combat sorties available then becomes an important consideration. Historically, it is not true that a given sortie rate can be directly associated with sophistication. The F–4 for example has equalled or exceeded the sortie rate of the less complex F–8 series of aircraft. The F–14A design includes maintenance features which were unknown when the F–4J was introduced. Progress has been made in the effective use of a sophisticated weapon system, and indeed must continue. Our opponents show every indication of continued progress in this area. The F–14A will fly more regularly and can be reserviced more rapidly than any preceding Navy fighter.

Under the present contract, 301 F–14A's will be procured and become operational in conjunction with operating squadrons of F–4's. When F–14 operational experience is gained and it in fact proves vastly superior

(6) *Pilot Skill.* No discussion of the main requirements of air-to-air success would be complete without a reference to this final factor. Unless our pilots are trained in peacetime to be highly proficient in the complicated tactics made necessary by changes in the technological aspects of aerial combat, no amount of technological superiority in our aircraft themselves will bring victory.

Unfortunately, we have historically given our pilots short shrift, preferring to spend money on new and complex equipment rather than investing in adequate pilot skill. Due to its insistence on expensive procurement programs in the face of the continuing budget pinch, the Navy has cut flying hours in its training programs for the past three years while continuing to invest heavily in airframe and electronics hardware.

Maneuverability, stability and handling qualities, detection and acquisition, reliable and lethal weapons, force structure implications, and pilot skill—these are the main determinants of air-to-air success.

I would like to talk for a moment now about two other factors, the lesser importance of which it is also essential to establish.

(1) *Payload/Range.* An aircraft's payload and range potentials are obviously interrelated, since one can trade off the one for the other by varying the mix of fuel and ordnance carried.

As far as fighters are concerned, payload is much less important than range. That we have traditionally given our fighters significant air-to-surface capabilities is just another indication of the contining fascination of the Navy and the Air Force with multimission aircraft and the interdiction mission. Both services, however, already have aircraft designed for this mission which need escorts, not competitors, when they fly.

Range is a more legitimate concern. But since excessive internal fuel requirements have a powerful effect in degrading the weight and the performance capabilities of air superiority fighters, it is important that our fighters be designed only with the range and combat fuel actually needed for combat operations. What they will need is sufficient range to escort attack aircraft on their missions or to provide decently sustained loiter over a battlefield.

NAVY COMMENTS—continued

to the F–4 and provides the best U.S. capability to meet the ominous and growing Soviet threat, the Navy, DOD and the Congress will then determine the final inventory.

The U.S. Navy enjoys the most efficient tactical air arm in the free world. Air crew training has been and will continue to be of utmost concern. The majority of the tactical aviation hardware in the United States has been developed by the Navy and training in the use of that hardware has not been short changed. The Navy has complemented this process with the most innovative air crew training program in the free world. Air combat maneuvering training is of prime concern and has been the basis for establishing the Navy Fighter Weapons School. The Navy developed Air Combat Maneuvering Range, which will afford pilots the opportunity to experience the rigors of air combat maneuvering in a training environment, is an extension of this effort.

The Navy does not insist on expensive procurement programs, but in fact demands the total exploitation of our country's potential to insure the availability of realistic weapons systems so vital to our national defenses. The cost of these systems is a result of our economy and reflects the standard of living of our people.

Concur.

The F–14 has been designed as an Air Superiority Fighter and no "trade-offs" have been made that would degrade this mission. The air-to-ground capability of the aircraft is a fallout of fighter design and is not in competition with the Navy's attack bombers. The fact still remains that the F–14 can escort and defend the A–6 and A–7 attack bombers to and from their targets more effectively than any aircraft that will be flying in the foreseeable future and it is the only aircraft that will be able to do that job from carriers against the opposition of the late 70's.

Navy experience, backed up by many studies and analyses, shows that the effectiveness of an air superiority fighter is determined by vehicle performance parameters (energy for maneuverability (P_s), wing loading, visibility, roll rate, radius, combat ceiling, time to accelerate, etc.) and by the effectiveness of the air-to-air weapons carried. The F–14A represents the optimum balance between vehicle performance, weapons, and many other parameters (such as vulnerability, flexibility of weapon mix, interaction with combat support environment, etc.) that determine the overall effectiveness of a fighter within the weighted value of various mission profiles.

The F–14 possesses excellent payload/range

(2) *All-Weather Avionics Systems.* Bad weather fighting is one of the most misunderstood aspects of the whole dog-fighting issue. It is assumed at times that special avionics systems have now been invented which give our fighters the capability to operate in bad weather as easily as in broad daylight. Unfortunately, this just isn't so, and a few words are necessary to put the problem in perspective.

In theory, there are two contingencies for which night and bad weather avionics systems in our air superiority fighters might be useful.

First, we might want them to permit fighter escorts of our own interdiction aircraft—Navy A–6's and Air Force F–111's—on their night bombing missions. Actually, our night and all-weather radar equipped F–4's have never performed a single such escort in Vietnam. They have not shot down a single MIG–21 at night or in bad weather during the entire duration of our involvement in Southeast Asia.

The reasons are simple. It is hard to hold formation in the dark to begin with and if one of our fighters were ever bounced by the enemy, it would be virtually impossible for him to join up again after the encounter. It must be recognized in this regard that the problem of identifying radar acquired aircraft is even more difficult at night than in the day, because closing for visual identification is so much tougher. As a matter of fact, one of the arguments the Navy makes for night interdiction missions is their low cost, precisely because they require no escorts.

Second, we might more rationally want all-weather avionics systems to defend against enemy all-weather attacks with their interdiction forces on battlefield areas where our own forces are engaged. But there are several points to be noted here.

To start out with, the Soviets have never developed a tactical all-weather attack capability. Since the few light tactical Beagle and Brewer bombers turned out in the late 1950's, they have not developed a single all-weather interdiction aircraft, and their Mig–21 fighters have no all-weather attack capability either. Under the circumstances, Soviet allies cannot be expected to have such a capability of their own.

NAVY COMMENTS—continued

capabilities, but they are only a part of the total design concept.

Concur that bad weather operations—in the air, on the sea, and on the land—are not as easy as in broad daylight.

The F–14 is capable of providing fighter escort for A–6's, A–7's, etc. under all-weather conditions. F–4's only occasionally performed such missions over Vietnam primarily because the enemy fair-weather fighters encountered there did not challenge at night or under bad weather conditions. This role, however, was most effectively handled by AAA's and SAM's.

Formation flying in the dark in an escort role is not a problem for trained military aircraft crews—it is often done in practice with formation lights out. It is worthy to note, however, that such flying is considerably facilitated by the presence of a second crew member and a radar, as in the F–14.

The problem of identifying a radar-acquired target at night, compared to daylight conditions, is really irrelevant since the same visual identification restrictions, if they are observed at all, apply to any target acquired by any means. A friendly IFF capability exists on our side, in addition to tactical doctrines which would be instituted governing the launch of missiles against "non-friendlies". The usual rebuttal that a "non-friendly" might be a neutral airline flying in a combat area assumes a degree of bravado in future airline crews and passengers which has not yet been exhibited—such a postulation cannot be allowed to dictate operational design requirements for our military aircraft designed to meet a Soviet threat.

The Soviets already have "all-weather" fighter and attack aircraft such as Foxbat, Flogger, Flagon, Flashlight, Blinder, etc., equipped not only with radar control systems, but "all-weather" air-to-air and air-to-surface missiles. Their Air Force consists of more than a second-rate Mig–17 & 21 type airplanes we faced in Vietnam and which seem to mesmerize the thoughts of some in their prognostications of future military operations. In addition, the Soviet all-weather surface-to-air (SAM) systems have already been most vividly employed for years, and their surface-to-surface and ship-to-ship missiles and radar systems are equally developed and operational. Any belief that such

Moreover, our own experience with all-weather avionics systems on our attack aircraft demonstrates that they simply do not provide the pinpoint accuracy needed against battlefield targets and are therefore limited to relatively ineffective use against fixed economics and strategic targets.

Finally, it is doubtful whether all-weather fighters could handle all-weather equipped attack aircraft in any event without considerable reliance on more traditional ground-based help. The friend or foe identification problem would be extremely serious over a battlefield at night. Moreover, the fighters would be at an initial disadvantage for acquisition purposes. While the attack aircraft would be homing in on fixed land-based targets, the fighter radars, with their narrow effective cones, would be searching.

All-weather avionics systems, then, are not needed on our fighters for the escort and battlefield protection missions just discussed. The only time they would really be useful is if the fighter were operating in a pure interceptor role, e.g., protecting a carrier from enemy attack. But the only nation which has an all-weather equipped heavy naval bomber force capable of even modest-sized attacks against our carriers is the Soviet Union, and I have already explained why we should not employ our carriers when Soviet naval forces are involved—even in good weather and broad daylight. Other nations will not have an all-weather equipped anti-carrier force to worry about. Their tactical bombers or fighters will have no such avionics, and their heavy bomber force will be either small and of World War II vintage or altogether nonexistent.

NAVY COMMENTS—continued

systems and capabilities do not exist in operational quantities in the Soviet forces, and therefore are not required in our military arsenal, would be most disastrous to the security of this nation if allowed to dictate the requirements for our military systems.

In terms of all-weather interdiction missions with radar systems, the A–6 aircraft has performed admirably in Vietnam under conditions when "fair" weather systems (A–4, F–8, etc.) could not fly. Current radar systems do not have the capability for so-called "pinpoint" accuracy against small battlefield targets but contrary to the statement made, such systems are most effective against the larger "fixed" economic and strategic targets. It is also of utmost importance to note that the F–14 radar system will have a significant "all-weather" long-range search and detection capability against the cruise missile boats and destroyers, and the cruise missiles themselves, which pose a most potent threat to our fleet and the merchant marine logistic supply lines it must protect.

When the enemy employs his increasing number of all-weather capable, missile-equipped fighters against our all-weather strike aircraft, the F–14 will be providing the air superiority protective umbrella. The F–14/AWG–9 with track-while-scan large search volume sensor is the only system that provides that capability. The F–14 doesn't have to fly with the strike group, but tactics already studied for the F–14 indicate a successful protective umbrella can be provided by the F–14/Phoenix from optimum separation distances to kill attackers who will be vectored to sneak stern attacks or any other attack direction. The search volume of the F–14 is at least five times that of the F–4 and is certainly not a "narrow effective cone".

On the contrary, whether or not the enemy has an all-weather capability does not dictate the requirement for all-weather Navy aircraft.

Weather plus darkness remain uncontrollable but none-the-less vital factors in a tactical air war. An escort fighter can quite easily be in weather while his opponent, a few minutes away, is not. Early knowledge of the position of probable enemy fighters is essential to the success of the escort mission.

In like manner, enemy fighter-bombers can fly through clouds or proceed at night to attack a carrier that has excellent weather. We cannot guarantee our fighters a clear sunlit air mass throughout a contested air space.

All tactical fighter missions, whether escort or air intercept, may be characterized by a series of tasks involving:

Navigation
Search
Detection
Identification

One final point should also be noted. As proven by our extensive World War II experience (long before the days of sophisticated all-weather avionics) even clear night and marginal daylight weather operations require airframe and performance requirements quite different from those necessary for visual combat. They emphasize stalking skills rather than the violent maneuvers of aerial dogfights and require sufficient endurance, acceleration, and speed to overtake attack aircraft, but little maneuverability. Accordingly, if we wanted an all-weather fighter capability in a fraction of our force, existing airframes would suffice for the purpose—if we could develop avionics systems which worked well enough to justify their cost. The most important point is not to let the limited utility of such a capability serve as a justification for imposing weight and

NAVY COMMENTS—continued

Track
Convert/Maneuver
Weapon Selection and Delivery

Most of these tasks may be identified with monitoring of the changing situation. The F–14 is equipped with the necessary fire control, communications and electronic warfare sensors to maximize the crew's awareness.

During offense missions over hostile territory, the enemy typically has the advantage of GCI control. He can therefore outnumber the penetrators in a localized area and utilize standoff air-to-air missiles prior to dogfight. The objective of the friendly escorts is to provide *protection for the strike force.* When encountering hostile standoff missiles, *the standoff engagement is crucial.*

Range advantage and multiple engagement capability is *mandatory* for survival of the strike force. F–14/Phoenix provides this superiority.

The F–14 may engage up to six targets simultaneously with AIM–54A missiles. If a "dogfight" occurs with the enemy survivors, the F–14 will enter the dogfight phase with much more favorable odds. The more than 2:1 advantage in missile launch range, along with the F–14's multishot and superior target detection capability, provides an air-to-air standoff capability unmatched by any known weapon system.

The F–14 weapon capability, as already demonstrated in extensive test programs, is essential to the success of the Navy fighter missions, including escort over hostile territory. For escort, it provides:

Necessary standoff kill capability to protect the strike force and improve dogfight odds.

Continuous air battle surveillance with track-while-scan and sophisticated data link, useful for tactical planning, CCM efforts, and strike-force/escort coordination.

Two crewmen for optimum task sharing, particularly in ECCM and in dogfight.

Multiple simultaneous attack capability to avoid saturation by hostile fighter forces.

"Stalking skills" in World War II night operations were used only because of the lack of air intercept tracking radars and missiles. "Stalking skills" have no application in the current or future air combat environment where even attacking bombers or ASM launch vehicles will be cruising at mach 2 to 3. A subsonic aircraft, such as the A–6, even if equipped with the Phoenix weapon system, would have an infinitesimal probability of achieving a firing position against the Foxbat at 75,000 feet and mach 2.8.

The need for a high performance interceptor with a long-range missile system was considered in the F–14 design. The capability has been incorporated as an overload condition so that the F–14 day air superiority role is not compromised.

other design penalties which could compromise the performance actually attainable in a new air superiority fighter. Otherwise, the effect of our attempt to fight at night and in bad weather will be to give the enemy the day.

IV. A RATING OF THE F–14

This analysis of air-to-air combat will make it a lot easier to show why the F–14 is such an incredibly poor fighter candidate for the Navy. What I propose to do is to run through each of the items I have just discussed and to see how the F–14 measures up.

1) *Maneuverability.* Due to its small wing area and the many weight compromises associated with its complex avionics, its Sparrow and Phoenix missile carrying capability, and its large air-to-surface potential, the 54,000 pound F–14 will have dangerously low maneuverability. A few statistical comparisons will serve to make the point.

It has always been recognized that the F–14 would have a relatively poor hard-turn capability at dog fight speeds, less than a MIG–21 by a substantial margin.

NAVY COMMENTS—continued

The criticism of F–14 maneuverability seems to be based upon a superficial and uninformed concentration on wing area as the sole factor upon which maneuverability rests. A knowledge of maneuverability coupled with a study of the F–14 configuration would reveal the following:

1. Wing area is typically defined by NASA as the area bounded by the extension of the wing leading and trailing edges to the fuselage center line. The F–14 has more wing area than practically any tactical airplane flying today.

2. The variable wing sweep concept produces a configuration which may be adjusted for exactly the correct wing sweep angle at any flight condition. Wing span, which is the major factor in reducing drag in turns, is maximized at all flight conditions. When the wing is unswept (forward), its high lift streamwise airfoil section produces tight "hard" turns and yet, when swept, is typical of the razor-blade shape used to give low supersonic drag.

3. The F–14 designers, from the outset, recognized the importance of maneuvering aids to increase combat performance. The original F–14 proposal aircraft (October 1968) was equipped with maneuvering flaps and the leading edge "glove vane" or canard. Subsequently, upon Navy evaluation of the French Mirage "G" variable sweep prototype, maneuvering slats and flaps were evaluated to be much more effective on the thick, unswept high-lift, airfoil of the F–14 rather than on the highly swept thin F–4 wing—and due to structural wing depth, advantages are achieved at no weight penalty—which is quite contrary to the F–4 case. Ignoring these factors is like ignoring basic technological innovations such as the NASA Whitcomb wing—a low drag, high lift airfoil under intensive study for possible future incorporation into the F–14.

Sophisticated man-in-the-loop computer simulations of air combat between the F–14 and highly agile threat aircraft, conducted in government facilities have conclusively shown the ability of the F–14 to properly position its wing for all combat conditions encountered. Sufficient design margins have been incorporated to provide tactically required sweep rates up to the structural limit of the airplane.

The F–14, designed primarily as an air superiority fighter, is a weapon system that can shoot down long-range multi-raid aircraft and missiles as well as engage enemy fighters in close-in combat. Weight reducing

Moreover, its acceleration potential has been greatly dependent on successful development of the "B" engine, with its much better thrust rating than the "A".

As Admiral Connolly recently told the Senate Armed Services Committee:

The performance gap (between the two engines) is in acceleration, rate of climb, and service ceiling, not in top speed. It will affect that maneuverability because the B engine is going to have ability to send that plane straight up. This is a tactical realm that we have not yet worked in but I think the Air Force and Navy both are going to have spectacular possibilities opened up to them with the F–15 and F–14 having thrust to weight ratios that are about one or better to one.

Since Admiral Connolly spoke, the B engine production contract has been broken and the engine itself shelved, at least for the next two years and another 96 aircraft. What the Navy is left with is an aircraft which does not measure up well at all where maneuverability is concerned.

NAVY COMMENTS—continued

microminiaturization of avionics, balanced with aircraft and engine design, has eliminated performance penalties formerly associated with multi-mission fighters. Only one percent of the aircraft weight is sacrificed to make it possible to use the complete weapons suit of Phoenix, Sparrow, Sidewinder, Agile, a gun and air-to-surface weapons. A large part of that weight is in removable pallets not used for the "dog fight" configuration.

The Phoenix missile system complements the air superiority effectiveness of the F–14. The six Phoenix missiles and the external fuel will be carried as an over-load, that is, a reduction in load factor limits (from 6.5g to 6.0g) has been accepted. This design procedure saves weight and cost in the basic aircraft and retains full air superiority performance as a fighter. Said another way, it would be illogical to design the F–14 for "dog fighting" with six Phoenix missiles and extra fuel because this weapon load is for another purpose, i.e., to destroy a different enemy threat.

Navy performance estimates of the F–14 have been substantiated by an independent National Aeronautics and Space Agency assessment made at the request of Dr. John S. Foster, Jr., Director of Defense Research and Engineering. It was further concluded that the multimission performance estimates were attainable without degrading the pure fighter capability.

The F-14A at combat weight (gun and four Sparrows) will have a thrust-to-weight ratio of .85. Acceleration characteristics will be greater than the best Soviet Tactical fighter in production today. Furthermore, the F–14 with the Advanced Technology Engines will have a thrust-to-weight ratio greater than 1.1. Acceleration from .8M to 1.8M will take only 1.43 minutes; a significant improvement over the best Soviet fighter today.

Concur.

The F–14B engine has not officially been dropped from Navy plans for the F–14. Development of the engine is continuing and when fully developed and qualified the decision to incorporate it in the F–14 will be reviewed. Historically when better performance can be achieved in a tactical aircraft

The Air Force F–15 will have about a 40 percent advantage over the F–14A in acceleration and at least 60 percent better hard turn capability at dog fight speeds.

In fact, a recent Pentagon study convincingly shows that the old F–4, modified only with leading edge slats, could itself outmaneuver the F–14A. With these inexpensive slats, which could be deflected to improve turning performance and retracted to prevent drag during acceleration and climb, the F–4 would be able to both out-turn and outaccelerate the F–14A by as much as 10 percent for the most suitably equipped F–4 models. This is admittedly a small margin, but it is of devastating significance when we are thinking about replacing the F–4 with F–14's costing more than three times as much per plane.

It could prove equally devastating, in another way, if we relied on the F–14 as our frontline Navy fighter against Soviet MIG–21 successors which the F–4 itself won't be able to handle.

NAVY COMMENTS—continued

the capability has been incorporated. To quote one example; the F–4J differs from the F–4B through increased performance in the radar and increased thrust in the engines. Every objective analysis to date has concluded that the F–14A is a highly manueverable and extremely effective air superiority fighter.

The issue is not whether these aircraft have sizeable advantages over each other. The issue is whether or not they can defeat the enemy throughout the total threat spectrum. The F–14A has superior system acquisition and weapons capability for the nonvisual or long range duel and greatly exceeds projected enemy capability in turn and acceleration performance for the close-in maneuvering combat. In a recent letter to Aviation Week, two professional fighter pilots stated, "While the F–14 with its increased performance and advanced weapons system is more than a match for the MIG–23 at any realistic fighting altitude, it is even more urgently needed to combat the improved weapons capability of the MIG–21 expected in the near future.

The F–4 with slats is simply an F–4 with slats—improved but still technologically and tactically inferior. Based upon data from the NASA 30 foot by 60 foot free flight wind tunnel tests, The F–14 produces 65% more turning lift (expressed in "g's") than the F–4 equipped with slats.

Navy flight tests of an F–4 equipped with slats proved that a "simple" installation was not satisfactory for use in a carrier approach, although combat maneuverability and flying qualities at low speeds were enhanced. A more effective design is currently being studied. After flight test results, cost and time are considered, a decision will be made on the F–4 slat retrofit program. However, even under optimum assumptions as to slat operation, the F–14A will always out turn and out accelerate the F–4.

Over the years the threat has risen. The Soviets have been busy developing new and advanced aircraft—particularly fighters and interceptors. They have introduced a new or an improved fighter into their operational inventory at the rate of one per year. In July 1967 the Soviets flew six new fighters plus major "block improvements" of three older ones in an airshow. Two of these new fighters, the Foxbat and Flagon A, are estimated to have performance comparable to the F–4 at low and middle altitudes but higher top speeds and higher ceilings.

The Soviets have also shown both ability and intention to create improved weapons and fire control systems. Their latest fighters appear to have all-weather all-aspect long-range air-to-air capabilities. Fiddler, Foxbat and Flagon A have large radomes to house new radar fire control systems.

(2) *Stability and Handling Qualities.* The poor maneuverability of the F–14 will be further compromised, moreover, by its poor stability and handling qualities.

The Flat Spin Problem. As pointed out by NASA's Langley Research Center almost a year and one-half ago, the F–14 is likely to be very susceptible to flat spins and probably unable to recover from them.

What happens, in essence, when an aircraft enters a spin is that control of the aircraft is lost during hard maneuvers and it spins downward. For most aircraft, such spins can be corrected by proper control actions and the aircraft can be saved, given sufficient altitude.

NAVY COMMENTS—continued

The F–4 has not been exposed to first line Soviet aircraft. The MIG–21 (Fishbed), the latest Soviet fighter exported to satellite countries, has demonstrated excellent maneuvering performance over North Vietnam. Superior U.S. pilot skill and weaponry, higher speed at low altitudes and electronic countermeasure equipment are among the reasons our fighters have been able to hold their own with the MIG's over Vietnam. We cannot expect these advantages to prevail against later Soviet aircraft or against Soviet pilots.

New Soviet fighters are not the only problems. The Soviets have developed and built other systems designed to attack surface targets at sea and on land. Badger and Blinder bombers can launch any of five guided air-to-surface missiles at ranges up to 150 miles. Most of these missiles have terminal homing. In addition, advanced surface-to-surface guided missiles have been developed and are in service in Soviet forces. These weapons are accurate and lethal—witness the Israeli Eilat incident—and can be launched from submarines, ships and shore installations. Thus, "the problem" is clear—an early solution is essential.

We must have a new fighter as soon as possible that is superior in air combat to the best Soviet fighters in close-in visual encounters and in stand-off or all-weather conditions. This fighter must be able to defeat enemy bombers, air-to-surface missiles and surface-to-surface missiles. This threat is already in being and serious *now*. It will become more severe as time goes by because Soviet investment in military technology has reached the payoff stage across the board.

The F–14 is that fighter.

Previously commented on.

NASA Langley did not point out that the F–14 would likely be very susceptible to flat spins. The NASA research referred to did not, in fact, assess spin susceptibility. The NASA vertical spin tunnel can only assess what fully developed spin modes exist for the aircraft and its recovery characteristics. Langley did report that the F–14 has only one spin mode, flat, and that recovery by use of controls only is doubtful.

Recent research by NASA, using a free flight technique in an open-throat wind tunnel revealed that the F–14 remains controllable to very high angles of attack (approximately 32 degrees for all sweep conditions) and that the nose departure characteristics which limits angle of attack is relatively gradual. Since this control angle of attack range is fifty percent higher than the angle of attack at which maximum usable lift is developed, spin susceptibility must be classified as low.

There are two reasons, however, why recovery from spins may well be impossible for the F–14.

First, when it enters a spin, it might easily suffer a complete loss of engine power (or flameout), due to irregularities in the air flow entering the engines. Fan-jet engines, like the F–14's, are particularly sensitive to air flow irregularities. In fact, previous versions of the engine actually used on the F–14A have experienced serious flameout problems in use on the F–111.

An aggravating factor is the F–14's variable wing design, since if engine power is lost there is no power to move the wings. The wing area of the F–14 is so small it might be impossible to land the plane at any time engine power was lost. This would certainly be the case if the wings were not in an optimum recovery position at the time the flameout occurred.

The Navy is already at work designing sensors to warn F–14 pilots of impending spins, but there is no real solution to the problem.

A spin recovery chute has been rejected because it would have a terrible impact on aircraft size and weight.

Design changes to lengthen the fuselage and increase the vertical tail would have the same effect and still might not be successful.

The Directional Stability Problem. NASA

NAVY COMMENTS—continued

The same NASA spin tunnel facility indicated the existence of an unrecoverable flat spin mode for the F–5 (T–38) design, but subsequent evaluations indicated that spin entry was virtually impossible. Spin losses of this airplane are non-existent. Conversely, the tunnel indicates that the F–4 is recoverable but over 100 F–4's have been lost in service due to spins!

The angle of attack achieved by the F–14 will be limited by either natural means or automatic control application to levels below that at which engine flameout will occur. Inadvertent flight excursions in an F–111 equipped with the TF30–P412 engine (not the original stall-prone TF30–P3) revealed the engines remained lit up to an angle of attack of 65 degrees under highly adverse sideslip conditions. The less sensitive inlet configuration of the F–14 also helps insure full power availability to the pilot throughout the combat envelope.

Since double flameout is highly unlikely as previously commented on, wing sweep capability will not be lost. The wing area of the F–14 with wings fully swept is larger than any tactical fighter flying today with the exception of Foxbat.

Spin tunnel tests and analytical spin studies indicate the aircraft will not enter a spin following nose departure if the lateral controls are neutralized or canard surfaces are deployed. The present intent is to equip the F–14 with positive automatic lateral control application to guide the pilot away from incipient spin conditions (not by cockpit indications). The F–14 has set upon a course of developing spin resistance, either automatically or by natural aerodynamics which is the recommended NASA approach for both the F–14 and F–15. It is also being applied, somewhat belatedly, to the F–111A. NASA has demonstrated the feasibility of preventing spins without maneuvering envelope restrictions through the use of automatic control application by means of tests on its radio-controlled F–111 drop model. Such tests will be conducted shortly on the F–14.

The NASA Langley spin tunnel tests have also been used to develop spin recovery capability for the #2 F–14A flight test aircraft. The spin recovery parachute permits unrestrained flight test evaluation of aircraft characteristics. The chute was never considered for production incorporation.

Concur. Such changes will impact aircraft size and weight with no significant effect. Fortunately, with the NASA-endorsed spin prevention approach, such changes need not be considered.

The comments on the alleged directional

and Grumman wind tunnel tests also indicate that the F–14 will have serious directional stability problems at transonic speeds and above. The Navy presently hopes to solve them with a stability augmentation system it is working on, but major design changes may be needed. These changes would involve increases in the size of either the vertical tail or ventral area.

Unfortunately, these changes would increase weight and drag and further degrade maneuvering performance. They could also make it completely impossible for the F–14 to land on a carrier with a full ordnance load.

The Navy will therefore undertake those changes only if they are essential, but is already arguing with Grumman over who might have to bear their costs. The Navy claims the directional stability problem is a deficiency which Grumman would have to rectify, while Grumman claims that any modifications would be new work for which an Engineering Change Proposal and adjustment of contract prices would be needed.

Any way you look at it, the F–14 will have stability and handling problems which will severely limit the realism of peacetime training exercises with the plane. Just how bad these problems will be it is still too early to say. But as I noted earlier, over 90 F–4's have already been lost in non-combat crashes, primarily in loss of control type accidents. And all indications to date say that the F–14 will have significantly worse handling qualities.

(3) *Detection and Acquisition.* In this area, the F–14 would have two relative improvements over the F–4—its relatively smokeless engines and its improved visibility out of the cockpit.

At the same time its large physical size would significantly increase its own susceptibility to detection, even when its airborne radar has been turned off.

(4) *Weapons.* For armament, the F–14 re-

NAVY COMMENTS—continued

stability problem are a clear example of creating confusion by mixing unrelated facts taken out of context. The news is also a bit stale since the directional stability problem was identified and solved at least 2 years ago.

NASA did recommend the use of triple redundant directional stability augmentation system to insure aircraft safety at maximum speed in the event of engine seizure, which was so catastrophic on the YF–12. The Navy and the contractor reached the same conclusion from their studies and adopted the recommendations. The system is, in essence, a yaw damper device typical of those used on virtually all military and commercial aircraft in use today. It provides complete aircraft stability up to its maximum speed without dependence on pilot action.

Rather than having a directional stability problem, the F–14 illustrates a commendable efficiency of design—providing superior stability and control characteristics without the heavy brute force approach of oversized vertical fins.

No fin geometry changes have been proposed by the Navy or contractor since contract inception.

There is no argument between the Navy and Grumman referred to in the thesis as no directional stability problem exists at this time.

All competent assessments of the F–14 handling qualities evidence generally superior flying qualities with or without stability augmentation systems operating. The possibility of an unrecoverable spin mode is accompanied by the probability of high spin resistance and action by the Navy and Grumman to incorporate positive automatic spin prevention, without maneuver restriction, if required. Just how good the aircraft is, is being amplified with each additional assessment of the various models and the flight article itself.

Comparisons with F–4 *are* available now. The same pilots are flying both the F–4 and the F–14—their report—no contest, the F–14 is the sweetest flying machine they have ever flown. NASA free-flight tunnel tests, which correlate well with aircraft flight results, show that F–14 handling behavior to high angles of attack is superior to the F–4—with or without the slats.

Concur.

There is no evidence to indicate that the radar cross section will be any different than any other U.S. tactical aircraft, and from a size standpoint the carrier deck spotting factor of the F–14 will be equal to the F–4.

The issues concerning F–14 weaponry and

NAVY COMMENTS—continued

lies primarily on the Sparrow and Phoenix missiles, with all their attendant problems. A gun and Sidewinder capability will be present, but relegated to a secondary role, primarily because the F–14's limited maneuverability will make it difficult to employ these weapons.

It is important to note that while efforts are being made to solve our air-to-air missile problems, no clear solution is yet in sight. All indications are that the Phoenix will have even worse problems than the old Sparrow, and the new Sparrow—twice as expensive as the old—has had a disastrous test record to date which has kept it in development for more debugging.

I must admit, in all candor, that I have grave doubts whether some of the problems we have experienced will ever be solved.

I see no foolproof way of solving the friend and foe identification problem under conditions of stand-off launch.

I see no solution to the problem of countermeasures susceptibility.

And I also fear that future improvements in aircraft maneuvering performance may outdistance any improvements in the maneuverability of our air-to-air missiles. Since the airplane will always have the choice of what to do next, the time lag will always work against the missile. And since the missile will be going much faster than the plane, it will have to pull more g's to adjust, more than its own small wings may well allow.

In any event, it seems both wasteful and militarily dangerous to invest large sums in relatively unmaneuverable airframes which will be highly ineffective unless and until these armament problems are solved. We have really been putting the cart before the horse too long.

(5) *Force Structure Implications.* At a minimum of $16 million per copy, the F–14 has terrifying force structure implications. There is simply no way it could ever replace the F–4's now in our inventory on anything like a one-to-one basis. And the effects of its high investment costs would only be heightened when operating costs equal to them were tacked on every five years. Finally, the great complexity of the aircraft and its major components would maximize its time under repair.

NAVY COMMENTS—continued

associated tactical employment have been raised and discussed previously.

In summary, the F–14 has been designed and developed as a *balanced* weapon system. To accurately categorize weapons as primary or secondary, the tactical situation must be defined. Each weapon is optimized to a functional environment. For example, the "primary" weapons to achieve a standoff capability are Phoenix/Sparrow; Sidewinder/Guns in this case do become "secondary" weapons. The primary weapons in a close-in air combat maneuvering environment are Sidewinder/Guns, Phoenix/Sparrow being relegated to secondary status. However, Phoenix and Sparrow are also designed to provide an all-aspect weapon at close ranges.

Air-to-air missile evolution has identified weapon control system and missile improvements required to enhance missile reliability and performance. Older Sparrows have been modified and production monitored to realize considerable improvement. The new Sparrow incorporates state-of-the-art technological advances to overcome past problem areas. The Phoenix has evolved in an environment witnessing the first combat employment of air-to-air missiles. Benefitting from Southeast Asia experience and state-of-the-art technological advances, Phoenix tests to date, conducted under extremely realistic and demanding operating conditions, demonstrate that all major design performance requirements will be accomplished.

Advances in command and control procedures, communications, and self-contained target identification techniques do effectively overcome the identification of a target as friend or foe, permitting routine employment of the Phoenix standoff capability.

Effective solutions to possible countermeasures have been attained in Sparrow and Phoenix.

Demonstrations by Sparrow have exhibited sufficient maneuvering ability to guide and intercept enemy aircraft maneuvering at normal combat G's (5–7). Recent studies by the Navy and contractor demonstrate Phoenix capability to counter evasive target maneuvers up to 8 G's at twice the range of the Advanced Sparrow. Again, when to commence the evasive maneuver is the key point.

Previously commented on.

(6) *Pilots.* Because the F–14 measures up so poorly against the five main technological requirements for air air-to-air success, pilots have been understandably cool in their reactions to it. "Buy Mig-21's," one Navy pilot is said to have shouted at a meeting devoted to selling the F–14.

One of the reasons for the F–14's low performance and high cost is its emphasis on design features not essential to the air superiority mission.

I have no quarrel with its range, which will be better than a 30 percent improvement over the F–4.

NAVY COMMENTS—continued

It is unfortunate but true that the state-of-the-art in military aircraft design is never quite up to the desires of the user. This situation has existed since the dawn of military aviation and will surely continue. The development of a good aircraft and an advanced air superiority fighter is a process which involves the balancing of many requirements. Few aircraft are used in precisely the manner initially conceived and if too highly specialized, perhaps never used at all because the opponent changes his tactics.

Air supremacy is attained by achieving superiority in all tactical fighter roles. The offensive environment can vary from extremely hostile to relatively permissive. The measure of success achieved in this ever-changing environment varies with the degree of dominance sought. The initial phase of air superiority requires a favorable destruction or exchange ratio on the enemy's terms. Early detection for achieving first-shot and reliable systems for achieving the kill are the dominating requirements. Gaining this initial advantage permits operation of other elements of the tactical force, and these elements must be protected. The measure of success in this role is more demanding of the system as the air superiority fighter must defend itself and its supported elements in a well-coordinated attack against a well-coordinated ground and air defense.

The F–14 air superiority fighter is designed to embody all of the classical elements of air superiority and perform all of the essential roles consistent with superiority. The roles of sweep, escort, strike cover, air patrol, air defense and interception require (among others) early warning, endurance, speed, survivability, position advantage, maneuverability and the ability to act autonomously or in a controlled tactical environment. The weapon system is not tailored to a single mission, but will achieve superior kill ratios in all encounters versus the entire threat (including Foxbat). The threat ranges from maneuvering fighters through bombers and high performance cruise missiles.

The F–14 is equipped to accomplish all roles at virtually no penalty to performance in the classical close-in combat role associated with the "dog-fighter". This is achieved by:

Removable weapon rail/pallet for overload air defense and strike missions.

Automatic wing sweep positioning to reduce wing stress during overload, while retaining the ability to maneuver the aircraft to its basic limits.

The "built-in" penalty to the basic air superiority version is less than one percent of take-off weight.

Relative to the F–4J, the F–14A has 25 percent longer combat radius even when the F–4 is using a 600 gallon external tank. When both aircraft are compared using internal fuel capacity only, the F–14A has a 75 percent longer combat radius.

The unique design of the F–14 permits the incorporation of a significant air-to-ground capability without penalizing its air superiority mission.

Weight and performance penalties are avoided by palletizing equipment for air intercept roles and air-to-surface missions. The added weight is carried only on these missions. Phoenix and air-to-surface ordnance are carried as overload, and only as the tactical situation dictates.

The problem is clear and so is the solution. We must have a new fighter, superior in air combat to present and postulated Soviet fighters, for close-in visual encounters and for stand-off all-weather conditions. In addition, the new fighter must be able to defeat the enemy air threats to naval forces: bombers and missiles. The threat is serious now. It will become more serious in the future.

Cost must be related to mission success. The advanced capabilities of the F–14/AWG–9/PHOENIX weapon system provides the only means of assuring success on future air superiority missions. Effectiveness and need must be the measure to determine value of the requisite investment. We could purchase the World War II F–6F for far less dollars than the F–4J requires, increase the quantity of aircraft in the Navy inventory, but not be effective against the current and projected threat.

A similar comparison can be made between the F–4J and the F–14. The F–14 will meet the threat; the F–4J will not, regardless of the quantities procured. With F–4J we would be forced to spend more money to attain needed performance levels. There is no known substitute way to accomplish the stated missions against the anticipated fighter, interceptor, and cruise missile threat.

We are already very late with a new fighter program to counter superior Soviet capabilities. The F–14/Phoenix system will meet our fighter needs through the 1970s and into the 1980s.

It is true that the Air Force recently initiated a new light fighter program; however, it appears that this program is aimed at augmenting the F–15, not replacing it and for possible sales as an international fighter. Primary armament probably is just guns and Sidewinder missiles with very limited avionics, limited range, and a single pilot. Such a fighter aircraft does not meet the basic requirements for U.S. fighter missions although it could augment more capable fighters in certain specialized instances.

There is no question that a highly maneuverable light fighter can be an effective short range defensive system and would be adequate, assuming that the enemy was cooperative and would agree to fight only in good weather, never at night, without elec-

But there is no justification for its large air-to-surface capability. And it is chocked full of all-weather avionics systems.

The F–14, then, is simply not the answer to the Navy's fighter needs. It indisputably costs the most, yet offers the least, of all the options available. But just what should the Navy do?

V. THE NEW LIGHT FIGHTER ALTERNATIVE

Despite the fact that it was already developing a sophisticated front-line fighter much superior to the F–14, the Air Force recently initiated a new light fighter prototype program.

The need for such a highly maneuverable light fighter has long been recognized in a variety of circles. It has been no secret that the Russians have found their $800,000 Mig-21's a suitable counter to F–4's costing and weighing three times as much. And the

French have been selling for less than $1.5 million a Mirage fighter which has delighted the Israelis, who have used the larger payload of the F–4 mainly on bombing missions.

Dissident voices have therefore been raised—by civilian critics, by F–4 pilots returning from Vietnam, and by top American fighter plane designers, such as Lockheed's C. L. "Kelly" Johnson. I ask unanimous consent to insert in the Record at this point the summary of an interview with Johnson which appeared in Aerospace Daily on January 7th of this year:

LOCKHEED'S KELLY JOHNSON DEPLORES SHRINKING U.S. FIGHTER STRENGTH

Cost of new fighters such as the F–14 and F–15 is so high that it is cutting down the number of fighters the U.S. would need in a major air war, according to C. L. (Kelly) Johnson, head of Lockheed's Advanced Development Projects office.

"The problem of numbers is a very fundamental one," Johnson said in a recent interview. The lesson is clear from Southeast Asia, but doing something about it will be difficult, since costs of new fighters are now up to $8–$14 million apiece, Johnson indicated.

And while numbers of U.S. fighters are declining, the Soviet Union keeps in operation about 6,000 fighters, "not counting the ones they give away," Johnson said.

Furthermore, the Soviet fighters are designed from the ground up to have the advantage over U.S. fighters. They have only half the range, armament and electronic gear, but double the wing area. This allows them to outmaneuver current U.S. fighters in many instances, Johnson said.

Johnson—designer of the P–38, P–80, F–94, F–104, and F–12—also feels the U.S. does not have enough types of fighters. "I'm not an

NAVY COMMENTS—continued

tronic warfare and with short range missiles only. The Israeli Mirage's have been quite effective against the UAR Mig-21's in this environment over the Sinai. The Mig-21 can counter the F–4 in certain portions of its flight envelope. This was recognized in the 1967 time period when the VFAX, a multimission fighter concept, was discarded. At that time two options existed. Modify the F–4 to counter the threat or undertake the VFX (F–14) concept phase. The latter was chosen because the Navy determined at that time that a modified F–4 could not defeat the expected threat to aircraft in the mid 1970s. The on-going Navy Fighter Study in conjunction with NASA and DDR&E has reconfirmed the F–14A's superior dogfight capability over the F–4 with and without slats. As previously mentioned, the Mirage aircraft has achieved great success in the Middle-East conflict; however, the Mirage can neither carry the Sparrow missile (the primary armament of the F–4) nor as many bombs as the F–4 in the interdiction or close support role. The press has recently indicated that Foxbats have been flying reconnaissance flights over Israel.

Since none have been shot down is it not reasonable to assume that the F–4's and Mirage's are not capable of shooting one down?

The cost of the F–14 and F–15 fighters is higher than that of the F–4 aircraft developed fifteen years ago. However, the F–4 aircraft, when developed, was also more costly than the operational aircraft which existed then. The F–4 gave the Navy a plateau in combat and weapons system performance never before achieved. In a similar manner the F–14 provides a very significant increase in combat and weapons system performance over the F–4 and will outperform the projected Soviet threat aircraft in the 1970–1980 time period. The F–4 will not.

The Soviet Union seems to be maintaining its inventory at the 6,000 fighter level; however, there has been a significant increase in the number of sophisticated fighters equipped with longer range missiles, accompanied by a decrease in the number of day fighters. "The problems of numbers is a very fundamental one." What Mr. Johnson must mean is that with budget constraints, the more expensive the fighter the fewer the number that can be procured. At times during WW II the U.S. fought with inferior equipment and through tactics, pilot skill, tenacity and innovation, earned victory. Today we face a highly motivated enemy with a large numerical superiority in technically excellent but not in all cases superior weapons. Technical superiority must be given top priority in light of the developments and trends in the Soviet Union.

exponent for the carpenter who has only one tool in his tool box," he said.

Johnson also feels that the idea of intentionally giving the opponent the "high ground" in an aerial battle is bad tactics. He says new fighters must have capability for great increase in speed to take the high ground.

In addition, the idea of "just being able to shoot a missile (from a U.S. fighter to hit a high-flying enemy fighter) will not be sufficient," Johnson said. "It hasn't been in the past."

The veteran fighter designer also challenged the theory that two engines are better than one for a fighter. "In time of war, twins are not safer than singles," he said. With twin-engine P–38s, the Army Air Force found it had "twice the chance of having an engine shot out and one half the chance of getting home after it was," he said. "When a P–38 engine was shot out, the plane was downed (by enemy fire) because it was moving so slowly."

NAVY COMMENTS—continued

Over the years the threat has risen. The Soviets have been busy developing new and advanced aircraft—particularly fighters and interceptors. They have introduced a new or an improved fighter into their operational inventory at the rate of one per year. In July 1967 the Soviets flew six new fighters plus major "block improvements" of three older ones in an air show. Two of these new fighters, the Foxbat and Flagon A, are estimated to have performance comparable to the F–4 at low and middle altitudes but higher top speeds and higher ceilings.

The Soviets have also shown both ability and intention to create improved weapons and fire control systems. Their latest fighters probably have all-weather all-aspect long-range air-to-air capabilities. Foxbat has already appeared in the Middle East.

The F–4 has not been exposed to firstline Soviet aircraft. The MIG–21 (Fishbed), the latest Soviet fighter exported to North Vietnam, has demonstrated impressive performance. Tactics, skill and electronic countermeasure equipment are among the reasons our fighters have been able to hold their own with the MIG's over Vietnam. We cannot expect these advantages to prevail against later Soviet aircraft or against Soviet pilots.

New Soviet fighters are not the only problems. The Soviets have developed and have built other systems designed to attack surface targets at sea and on land. In addition, advanced surface-to-surface guided missiles have been developed and are in service in Soviet forces. These weapons are accurate and lethal—witness the Israeli Eilat incident—and can be launched from submarines, ships and shore installations.

The present trend in Soviet fighters is toward more range, armaments, and electronic gear at the expense of wing loading and close-in maneuvering capability.

The achievement of long-term air superiority requires the proper combination of system performance in order to provide tactical options to meet the changing environment. The balance achieved in the F–14 between performance, system integration, and a two-man crew provides superior performance plus long-range and stand-off missile capability. The F–14A utilizes the TF–30–P–412 engine, the most advanced engine that has been developed to date. The AWG–9 is the most advanced and versatile fire control system being developed in the free world.

When we have developed an engine with sufficient thrust to propel the fighter de-

Johnson has just submitted to the Air Force an unsolicited proposal for a high-wing, low horizontal tail modification of his F–104 Starfighter. He offered to build two prototypes of the new lightweight fighter—the X–27—for $35 million and to have them in the air within a year. The X–27, he told the Air Force, would be able to better the performance of the F–14, and he would design it so that it could be produced at one-third the cost.

Other unsolicited proposals were submitted shortly thereafter, and out of them grew the Air Force prototype program, now pointed toward the development of brand new fighter designs.

Until the Air Force took this initiative, it was well recognized in knowledgeable circles that new fighters superior to the F–14 could be designed at much better prices at the expense only of some dubious avionics and missile gear. But Pentagon officials usually refused to admit this basic fact.

NAVY COMMENTS—continued

signed to meet the future threat spectrum then a single engine design will be seriously considered as it has been in attack aircraft such as the A–7.

The X–27 is simply an airframe modification (a new wing with more area) to the F–104 which had inferior combat maneuvering performance compared to the F–4J and Fishbed aircraft.

No comment.

The question often asked concerning the desirability of a so-called "cheap, simple fighter" for the U.S. Navy, instead of the planned F–14, obviously implies, through some line of reasoning, that such a fighter would be "better" than the F–14. More to the point, it also implies that we enjoy the enviable position of being able to make such a choice, or, in essence, "choose our weapons". Nothing could be further from the facts of the issues involved.

Since the end of WW II, this country has maintained a tactical air force which has at times been required to try to quickly react to meet the capabilities exhibited—or publicized—by the enemy. The resulting activities have been analogous to playing "catch-up football". Our recent experience in SEA, against a second or third rate air force, has vividly shown the extreme and exasperating difficulties—and many failures—encountered in attempting to successfully engage enemy fighters when they were operating under the control of their air defense networks, and also in operating anywhere in the air spaces covered by their ground-based artillery or SAM's. These unforecasted obstacles to the expected ease of tactical operations of our own fighter aircraft arose not because of the "cheap, simple fighters" we encountered—and that is all they really were—but because of the manner in which a degree of sophistication was added to their tactics by the effective support of other enemy weapons and defense networks. But it is most interesting to note that, on the occasions early in the SEA conflict when these same "cheap, simple" enemy fighters *were* engaged without their GCI and SAM support, they were no match for the better weapon-equipped and more versatile U.S. fighters.

However, the threat we must face up to in the future is not typified by the threat we faced in SEA. Our greatest mistake in safeguarding the security of this nation would be to be mesmerized by the SEA

NAVY COMMENTS—continued

syndrome in defining the requirements for our next generation of fighter aircraft. There appears to be little disagreement on the alarming degree of technological advances in air-to-air and surface-to-air missiles, airborne command and control systems, electronic jamming techniques, etc., achieved by the Soviets and the most significant degree to which the build-up of their naval forces poses a threat to our fleet and the logistic supply lines it must protect. This situation is to be expected from even a simple examination of the magnitude of their continuing defense budget, and from the recognition of their dedication to the development of an offensive and defensive military capability second to none. In any possible future conflict between the Soviet and the U.S., or in any other conflict where first-rate Soviet military technology might be faced, there will not be time for "catch-up football". To prepare for such confrontations requires adherence to the advice and planning of military experts—not to the increasing number of "Monday morning quarterbacks".

Hence, in the light of the accepted nature of the spectrum of threats posed to our Naval forces—and to our country—an aircraft weapon system must be developed as soon as possible which will be capable of meeting—and defeating—the existing sophisticated, missile-equipped Soviet fighter aircraft under electronic command and control, their subsurface and surface-launched anti-ship missiles, mobile SAM batteries, and their heavily-defended bomber aircraft equipped with long range air-to-surface missiles. Only one of these (SAM) was faced in SEA. Unfortunately, the choice of the type of aircraft defense system to develop is not ours to make, but is dictated by the capability of the threat spectrum we can already define and to which we must react.

It is this level of threat capability for which the F–14 weapon system has been designed. By employing the highly efficient variable wing sweep technique and a high thrust-to-weight propulsion system, the F–14 can maneuver with—and outfight—the enemy's cheap, simple fighter when such combat conditions might occur. But, with the added combat capabilities provided by long-range air-to-air homing missiles, and electronic defensive techniques for enhanced survivability, the F–14 can successfully engage the new missile-equipped Soviet fighters much more likely to be encountered.

The associated "cost and simplicity" factors of the F–14 result from designing for the missions it must perform against these threats—they cannot be quantified beforehand then "an airplane" designed. To suggest the substitution of the "simple 'MIG Type', cheap" airplane for these missions is incongruous, and signifies either a complete misunderstanding, or unawareness, of the

Indicative of the situation is the following exchange between the distinguished Senator from Nevada (Mr. Cannon) and Admiral Connolly during hearings this year before the Tactical Air Subcommittee of Senate Armed Services:

Senator Cannon: Do you see any need for a high performance day fighter for the Navy, presumably a low-cost fighter, in the future:

Admiral Connolly: I don't want to be facetious but I haven't seen a low-cost airplane for an awful long time.

Equally representative is the following statement by the Senator from Nevada (Mr. Cannon) during Senate floor debate on the F–14 in 1969:

Let me make this point very clear. The navy experts have stated that if they designed an aircraft exclusively for air superiority without considering any other mission it would weigh only 600 pounds less than the present F–14. . . . I certainly am not attempting to convince any member of the Senate that the F–14 is a cheap aircraft. It is not . . . Unfortunately, we cannot go down to the local dime store and procure complicated weapon systems containing the highest sophistication.

The Air Force light fighter prototype program has now let the cat out of the bag. We don't have to go down to the local dime store. American designers can themselves give us first-rate fighters at prices competitive on the world market!

Admittedly, these fighters exist right now only on the drawing boards. There is every reason to believe, however, that when development work is finished, the Air Force will have fighter prototypes which score very well in all basic requirements for air-to-air success.

Their maneuvering capability will probably put the F–14 to shame. In all likelihood, they will show both acceleration and turning performance 80–100 percent better than the F–14A. In fact, they will probably be the first aircraft actually capable of executing dogfight maneuvers at supersonic speeds.

They should be able to achieve this dramatic performance by rigorously eliminating all weight not essential to the mission of shooting down enemy aircraft and then replacing a small fraction of this weight with more wing area and more engine. They will probably weigh about 15,000–20,000 pounds—25,000–30,000 pounds, not 600—less than the F-14.

Because they will be smaller physically than a MIG–21 and also have smokeless en-

NAVY COMMENTS—continued

potentialities *already in existence* in the Soviet military arsenal.

Concur

Concur

Previously commented on.

Previously commented on.

The Navy has studied lighter and simpler fighter designs, but has yet to find one which shows any potential of being superior to the F–14 in the total combat arena.

While many individual, special purpose aircraft could be designed to cope with each threat, at each altitude, at each speed while using an optimum weapon for each engagement, it is obvious that an aggregate of such types would be far more costly than the F–14. If a better solution exists, it has yet to be proposed to the U.S. Navy.

If these high performance fighters have thrust-to-weight ratios significantly greater than 1.0 and wing loadings less than 70 pounds per square foot their fighter escort radius on internal fuel with sufficient fuel for combat would be significantly less than the F-4.

These fighters would actually be about the same size as a MIG-21 and without some gines, they should be very difficult to detect. They will have good cockpit visibility, too, and they will carry no airborne radars when they fly.

For armament, they will forego the Phoenix and the Sparrow for the only reliable systems we have developed thus far—guns and the simple Sidewinder. At the same time, they will have the growth capability to carry more advanced passive missiles such as the Agile.

Even if they came in at about double the $2.5 million per copy now expected if they are produced in quantity, they would still have about a 3 or 4 to 1 cost advantage over the F–14. In fact, their cost advantage in terms of sorties deliverable in combat could rise as high as 8 to 10 when their probable low maintenance times are considered.

Their range will be a significant improvement over the F–4, and it could exceed that of the F–14 under maneuvering combat conditions. Finally, they will have only a modest air-to-surface capability and no complex all-weather avionics, at least in the standard version.

All in all, they are likely to be just what many of our pilots have long wanted to match the new Soviet fighters likely to be turned out during the next 5-10 years.

The Air Force is to be congratulated for undertaking this new fighter prototype program as a possible complement to the F–15. What is even more urgent is that the Navy undertake a similar program of its own.

Light high performance fighters would obviously be ideal for carrier use. Their small size would permit a spotting factor of less than one, i.e., it would be possible to accommodate about twice as many light fighters as F–14's in the same deck space. The slow takeoff and landing speeds permitted by their generous wing area and thrust would make them better suited to carrier takeoffs and landings than any current Navy fighters. And they would greatly alleviate the current inability of carriers to accommodate sufficient maintenance personnel to maintain today's complex first line aircraft.

In fact, if the Navy failed to undertake a prototype program to meet its own requirements, the Air Force prototypes could prove eminently adaptable to Navy use.

NAVY COMMENTS—continued

form of AI radar would be able to see their adversary at only about 2–3 miles. He could not operate effectively at night or in inclement weather. In any form of sophisticated environment he would be vulnerable to opposition fighters equipped with the simplest radar and missile.

Granted that Phoenix and Sparrow missiles would not be carried on a light weight fighter as previously discussed; however, without any radar, the ability to successfully bring the gun, Sidewinder or Agile missiles to bear, would be severely minimized.

It has been estimated that the flyaway cost per copy of a light weight fighter would be more than twice the value indicated for an aircraft that could perform only a small portion of the fighter missions.

The range of these light weight fighters will be significantly less than the present F–4 aircraft in the fighter escort mission, and the F–14A has 75% more combat radius than the F–4J.

Previously commented on.

As previously mentioned it has taken several years of tradeoff studies and threat analyses for the Navy to establish F–14 design criteria. The F–14A will provide the near term air superiority over the current Soviet inventory aircraft and, when introduced, the F–14B will provide the air superiority required through the 1930 time period.

The spotting factor of the Navalized version of the F–15 is 1.8 compared to 1.7 for the F–4J and the F–14A. Surprisingly, the Spot factor of a lightweight fighter design would be about 1.5 using the same calculation base. The reason is simple upon reflection. Both the Navalized version of an F–15 and the lightweight fighter, in spite of lower weight, are relatively long for low supersonic drag and have large wing areas for maneuverability—both of which contribute to spotting factor increase.

Thrust is a relatively minor factor in carrier takeoff and landing speed determination since the overwhelmingly major acceleration/deceleration forces in catapulting/arresting are provided by the deck catapult and arresting gear mechanisms rather than the aircraft.

Low Wing loading is certainly favorable to low carrier catapulting/arresting speeds. However, it is far from the whole story. A thin, highly swept leading edge fixed wing is notorious for its poor lifting capability per unit area at low speeds. Hence, it needs a takeoff/landing wing loading on the order

VI. CONCLUSIONS AND RECOMMENDATIONS

(1) Our single most important need is to start work now on a new light fighter development program for the Navy. The F-14 simply will not give us the new air superiority fighter our national security requires. It would almost certainly be no match for a new Russian fighter. And it could be put to shame by a new light Navy fighter of our own.

We could simply wait and hand the Navy an Air Force developed plane, but it would be better if we did not. A Navy program could give special emphasis to such things as spotting factor constraints and the rigors of carrier landings. Moreover, a second competitive prototype program at this time would give more design teams a chance to maintain and refurbish their languishing design skills. A second program would also provide insurance against not finding as superior a fighter as possible in the Air Force competition. And at a cost of less than $50 million for each of the two contractors in the Navy flyoff, we could well afford these benefits.

If work were started this fall, the new Navy prototypes could be ready for a flyoff in about two years. Another two years would probably then be required to make a final selection, initiate production, and make first deliveries to the fleet. This schedule would result in an initial operating capability date for a new light fighter in late 1975, little more than a year after the F-14 IOC date currently contemplated.

(2) An almost equally important need is to scrap the F-14. The F-14 simply cannot hack it as a fighter, so there is no justification for keeping the program going unless we wanted to buy a limited number of planes—perhaps 200 or so—for altogether different missions. But what missions?

Phoenix missile fleet air defense against the Soviet naval threat makes no sense at all. The Phoenix probably couldn't cope with the massed bomber attacks it was originally designed to meet, let alone the Soviet submarine-launched cruise missile and torpedo threat which has been growing in recent years. And if we insisted on wasting money on the fleet air defense mission, we could get by wasting less if we put the Phoenix on the A-6 or the new Sparrow on a modified

NAVY COMMENTS—continued

of half that of the F-14 to remain competitive. The F-14A can be launched from a carrier without using after burning when there is zero wind over the deck. The F-4J uses afterburners and requires up to 32 knots of wind depending on the load. The F-14A can be landed on the carrier under no wind conditions. The F-4J must have at least 16 knots of wind. These elements of superiority markedly increase operational usefulness and safety.

As previously stated, a simple light weight fighter has been examined in depth and all analyses to date conclude that such a fighter as described by Senator Proxmire will not meet the Navy fighter requirements.

Exhaustive wind tunnel tests (in excess of 26,000 hrs) and numerous analyses by the Navy, NASA and the contractor indicate that the F-14 will possess the performance and capability to defeat the present and predicted threat from the stand off environment to the close in dogfight.

The Navy would welcome prototype development of airframes, engines, and weapons control systems if funding were made available to pursue a program that would be continuing and would result in newer and more capable aircraft at much closer time intervals than has been achieved in the past 15–20 years. The Soviets have provided an enviable example of a continuing prototype approach to air superiority.

The Navy concurs that a prototype *airframe* could be ready to fly in two years. This assumes that an already existing engine is available. The Naxy does not concur that Fleet deliveries could be made in four years. Experience over the years has conclusively proven that a totaly new airframe, engine and weapons control system development program requires 7–9 years from initial design phases to Fleet introduction. The F-14 which utilizes an existing engine and weapons control system will require nearly four years to Fleet introduction.

The F-14 is the only fighter under development that can meet the Navy's fighter requirements. Senator Proxmire alleges that the F-14 "can't hack it as a fighter" but offers no facts to substantiate his claim. The Navy would welcome the opportunity to examine in depth any data that would add substance to the Senator's statements.

The conclusions presented concerning the Phoenix missile have been discussed repeatedly and are without basis in fact.

The F-14 air-to-ground capability is limited to that which "falls out" of the inherent design. No attempt is made to be totally competitive with attack aircraft.

The F-14 is designed to fulfill the total Navy fighter requirement—not merely one segment of the problem. The emerging threat

NAVY COMMENTS—continued

F-4. Either of these combinations might do every bit as good a job as the F-14/Phoenix combination.

We certainly don't need the F-14 for its air-to-surface capability. We already have aircraft designed specifically for the interdiction mission, and as I said earlier, they need escorts, not competitors, when they fly.

The F-14 can't be justified either for its night and all-weather capability. It is more reliable avionics, not new high cost airframes, which we need if we want to perform this mission.

3) Also required, but far less urgent, are improvements in what our F-4's can do. Actually, there is only one option which deserves a go-ahead at this time.

We can and should put leading edge slats on a portion of the Navy's F-4 force. The cost would be minimal and it would give us a fighter superior, in fact, to the F-14A till the new light fighter came along. If we bought new planes in preference to modifying existing F-4J's, a carrier-capable version of the slats-equipped F-4EF now being sold to the Germans would probably be our best buy. The F-4EF has been stripped of the AWG-10 fire control system already on the F-4J and itself relies not on the Sparrow but on guns and the Sidewinder as its primary armaments. It would be lighter, more maneuverable, and almost $2 million less expensive than any other model we could buy.

Additional F-4 modifications could also be considered—new fire control systems to launch the new sparrow in the fleet air defense role, or better all-weather avionics. But the least we could do, if we took this route, would be to rigorously test all new systems involved before we went and stuck them on the planes.

(4) Finally, there is nothing wrong with low priority studies of the F-15 as a possible Navy aircraft. I fully recognize that it is a better fighter than the F-14 itself. At the same time, there is little it could add to the capabilities of a new Navy light fighter and modified F-4's working in combination. And a carrier suitable F-15 might turn out to be difficult to build and virtually as expensive as the F-14 has become.

Mr. President, the F-14 program is in many respects a microcosm of many of the problems which plague our defense establishment today:

initial cost estimates which later balloon;

the incredible inertia of ten year old ideas which have never been thought through;

the failure to test new systems before they have been deployed; and

the continued emphasis on multi-mission aircraft which do no mission well.

We won't solve all these problems just by instituting the recommendations set forth

NAVY COMMENTS—continued

dictates much greater capability in the Navy than now exists.

The F-4 aircraft has been improved throughout the years to give it more capability. The Navy agrees that the addition of slats and an improved digital AWG-10 would increase the effectiveness of the standard F-4J, but categorically denies it would be better in any of the "dogfight" parameters than the F-14A. The F-4EF does not approach the Navy's fighter requirements and represents a step back rather than a step toward meeting the threat.

In summary Senator Proxmire has not understood or refuses to accept the judgment and knowledge of the experts. The Navy has consistently designed, developed and produced successful tactical aircraft to meet this country's needs. Time will prove the F-14 to be yet another succesful Navy aircraft that provides the required capability.

An air superiority fighter aircraft cannot be simply described or compared on the basis of any single performance parameter. A high performance fighter should be judged as a "balanced" weapon system and the overemphasis of any single parameter can lead to many erroneous conclusions of relative merit. For example, maximizing thrust to weight leads to a rocket like solution; maximizing low wing-loading leads to a glider; maximizing speed and altitude leads to Foxbat like performance. A comparison and evaluation of tactical fighter capability is at best extremely

here. But we will have made a pretty decent start.

NAVY COMMENTS—continued

complex and requires insight and experience in the balancing of total weapon system parameters. This "balancing" has been done in a thorough manner in terms of realistic technological forecasts for engines, avionics, aerodynamic design, materials, and structures. Of particular importance, in the design philosophy of the F–14, has been the emphasis on systematic growth in performance of an evolutionary family of aircraft to meet the estimated changes in the threat through the early 1980's.

AMENDMENT NO. 441

Mr. NELSON. Mr. President, I call up my amendment No. 441.

The PRESIDING OFFICER. The amendment will be stated.

The amendment was read as follows:

On page 9, line 10, strike out "$2,376,869,000" and insert in lieu thereof "$2,374,829,000 of which amount not more than $3,492,000 may be used to carry out research and development in connection with the Navy's Project Sanguine, and of which amount $150,000 shall be available only for carrying out an environmental compatability program in connection with the Sanguine project and of which amount $300,000 shall be available only for biological and ecological effects research in connection with the Sanguine project".

On page 9, between lines 15 and 16, insert a new subsection as follows:

(c) None of the funds authorized to be appropriated by this Act may be used to carry out any research and development work in connection with a deep underground system for the Sanguine project.

Mr. NELSON. Mr. President, there is a unanimous-consent agreement on this amendment for debate to begin after the morning hour tomorrow, to extend for 2 hours. The amendment proposes to remove $2 million from Project Sanguine.

Mr. President, I ask for the yeas and nays.

The yeas and nays were ordered.

The PRESIDING OFFICER. Does the Senator ask unanimous consent that the amendments be considered en bloc?

Mr. NELSON. Mr. President, I ask unanimous consent that the amendments be considered en bloc.

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

Mr. BYRD of West Virginia. Mr. President, there will be no further votes today. Time on the pending amendment by the Senator from Wisconsin (Mr. NELSON), amendment No. 441, will not begin running until tomorrow at the conclusion of routine morning business. There is a time limitation on that amendment of 2 hours, and the yeas and nays have been ordered.

UNANIMOUS-CONSENT AGREEMENT

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that time on the amendment No. 430 by Mr. ALLOTT, the so-called pay amendment—which will not be called up until Monday—be limited to 3 hours, the time to be equally divided between the mover of the amendment, the Senator from Colorado (Mr. ALLOTT) and the manager of the bill, the Senator from Mississippi (Mr. STENNIS); and provided further, that time on any amendment to the amendment be limited to 30 minutes, to be equally divided between the mover of the amendment in the second degree and the manager of the bill (Mr. STENNIS).

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

The unanimous-consent agreement reads as follows:

Ordered, That, during the further consideration of the unfinished business (H.R. 8687), debate on each of the following amendments be limited and considered in the following order:

(1) On Wednesday, September 29, 1971, following the morning business, debate on amendment No. 441 by the Senator from Wisconsin (Mr. Nelson), be limited to 2 hours, to be equally divided and controlled by the Senator from Wisconsin and the Senator from Mississippi (Mr. Stennis).

(2) Following the disposition of the Nelson amendment No. 441, the Senate consider amendment No. 435 by the Senator from Wisconsin (Mr. Proxmire) with debate limited to 2 hours, to be equally divided between Senator Proxmire and the Senator from Mississippi (Mr. Stennis).

(3) Following the disposition of the Proxmire amendment No. 435, the Senate consider amendment No. 443 by the Senator from Iowa (Mr. Hughes) with debate thereon limited to 1 and ½ hours, to be equally divided between Senator Hughes and the Senator from Mississippi (Mr. Stennis).

(4) Following the disposition of the Hughes amendment No. 443, the Senate consider amendment No. 444 by the Senator from Ohio (Mr. Saxbe) with debate limited to 2 hours, to be equally divided between Senator Saxbe and the Senator from Mississippi (Mr. Stennis).

Provided further, That debate on any amendments to any of the above amendments be limited to 30 minutes, to be equally divided and controlled between the mover of the amendment and the Senator from Mississippi (Mr. Stennis).

(5) On Thursday, September 30, 1971, following the morning business debate on amendment No. 445, to be offered by the Senator from Missouri (Mr. Eagleton), debate be limited to 2 hours, to be equally divided and controlled between Mr. Eagleton and the Senator from Mississippi (Mr. Stennis).

(6) Following the disposition of the Eagleton amendment No. 445, the Senate will proceed to consider amendment No. 437 by the Senator from Montana (Mr. Mansfield).

(7) Following the disposition of the Mansfield amendment No. 437 the Senate will proceed to consider amendment No. 438 by the Senator from Arkansas (Mr. Fulbright), with debate limited to 2 hours to be equally divided and controlled by Mr. Fulbright and the Senator from Mississippi (Mr. Stennis).

Provided further, That debate on any amendment to the above two amendments (No. 445 and No. 438) be limited to 30 minutes to be equally divided and controlled by the mover and the Senator from Mississippi (Mr. Stennis).

Ordered further, That on Monday, October 4, 1971, when the unfinished business is laid down, the amendment No. 430, by the Senator from Colorado (Mr. Allott) No. 430 be made the pending business and that debate thereon be limited to 3 hours, to be equally divided and controlled between Mr. Allott and the Senator from Mississippi (Mr. Stennis). Provided further, That debate on any amendment thereto be limited to 30 minuts, to be equally divided and controlled by the mover and the Senator from Mississippi (Mr. Stennis).

ORDER FOR ADJOURNMENT FROM FRIDAY, OCTOBER 1, 1971, TO 10 A.M., MONDAY, OCTOBER 4, 1971

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that when the Senate completes its business on Friday it stand in adjournment until 10 a.m. on Monday next.

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

ORDER FOR PERIOD FOR TRANSACTION OF ROUTINE MORNING BUSINESS ON MONDAY, OCTOBER 4, 1971

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that on Monday next, following recognition of the two leaders under the standing order—or immediately following the orders for the recognition of Senators, if there be such—there be a period for the transaction of routine morning business with statements limited therein to 3 minutes, and that such period be limited to 15 minutes.

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

ORDER FOR PAY AMENDMENT OF SENATOR ALLOTT TO BE THE PENDING QUESTION ON MONDAY, OCTOBER 4, 1971

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that at the conclusion of the period for the transaction of routine morning business on Monday next, the amendment No. 430 by Mr. ALLOTT, the so-called pay amendment, be then made the pending question.

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

ORDER FOR RECOGNITION OF SENATOR HARRIS ON THURSDAY

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that on Thursday, immediately following the recognition of the two leaders under the standing order, and at the conclusion of the remarks of the distinguished Senator from Virginia (Mr. BYRD), the distinguished Senator from Oklahoma (Mr. HARRIS) be recognized for not to exceed 15 minutes.

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

WHY THE SENATE SHOULD SUSTAIN ITS VOTE ON THE CHROME AMENDMENT

Mr. BYRD of Virginia. Mr. President, the Senator from Arkansas (Mr. FULBRIGHT) has presented an amendment to section 503 of the pending legislation. There are three reasons why I feel the Senate should reject the proposal of the Senator from Arkansas and thus sustain the action which the Senate took last Thursday by a vote of 46 to 36.

First. By sustaining last week's action, the Senate would be ending U.S. dependence on Communist Russia for a strategic and vital defense material, namely, chrome.

Second. Sustaining the Senate's position of last week would help save jobs in a period of high unemployment. As evidence, I point to the statement, inserted several times in the CONGRESSIONAL RECORD, by the director, District 19, United Steel Workers of America, who says that unless the Congress takes such action, there will be no specialty steel industry in the United States. He expressed his deep concern for the jobs of the black workers and the white workers in that industry.

Third. The Fulbright proposal would give more power to the President and reduce the Senate's role in foreign policy. The Senate has made great progress in the last 2 or 3 years in reasserting itself and in facing up to its responsibilities. Senator FULBRIGHT'S proposal would reverse that trend and, as he states, give the option to the executive branch to proceed as it wishes. He would leave the determination in the hands of the President at the expense of the Senate.

QUORUM CALL

Mr. BYRD of West Virginia. Mr. President, I suggest what I assume will be the final quorum call of the day.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

PROGRAM

Mr. BYRD of West Virginia. Mr. President, if no Senator desires recognition, I shall announce the program for tomorrow.

The Senate will convene at 10 a.m. tomorrow. Immediately following recognition of the two leaders under the standing order, the following Senators will be recognized, each for not to exceed 15 minutes, and in the order stated: Senators CRANSTON, MATHIAS, CHURCH, MONDALE, and BYRD of Virginia.

Immediately following the orders for recognition of Senators tomorrow, there will be a period for the transaction of routine morning business for not to exceed 15 minutes, with statements therein limited to 3 minutes.

At the conclusion of the period for the transaction of routine morning business tomorrow the Senate will resume consideration of the pending question, the amendment by Mr. NELSON, amendment No. 441, the so-called Sanguine amendment, on which there is a 2-hour limitation of time. A rollcall vote has been ordered on that amendment.

Upon disposition of the amendment by Mr. NELSON on tomorrow the Senate will proceed to the consideration of amendment No. 435, the so-called F–14 amendment, which has been introduced by Mr. PROXMIRE, with a time limitation thereon of 2 hours. Undoubtedly a yea and nay vote will occur thereon.

On disposing of the Proxmire amendment tomorrow, the Senate will proceed to the consideration of the ABM amendment to be offered by Mr. HUGHES, amendment No. 443, with a time limitation of 1½ hours, and with a rollcall vote undoubtedly to occur thereon.

On disposition of the Hughes' amendment No. 443 tomorrow, the Senate will proceed to the consideration of amendment No. 444, to be called up by Mr. SAXBE—which is another so-called ABM amendment—on which there is a time limitation of 2 hours. A rollcall vote is expected to occur thereon.

Senators are alerted to the fact therefore, that there will be at least three or four rollcall votes tomorrow.

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

Mr. BYRD of West Virginia. I yield.

Mr. STENNIS. Mr. President, first, I thank the Senator from West Virginia and others for working out these schedules and helping greatly in reaching agreements. Obviously, tomorrow will be a very busy day with two votes on the ABM. The first of those two amendments will be an amendment to strike the ABM from the bill and the second one, if that one fails, and I expect it will, would propose to put on the shelf or in escrow funds for the ABM.

On Thursday, as I understand the Senator has already announced, the agreement is for a limitation of time on the modern tank amendment.

Frankly, I was hoping there would be an agreement worked out with reference to taking up the Mansfield amendment, which is the same amendment we had with reference to the draft bill, also on Thursday. If that is possible it will make for another full day.

Mr. BYRD of West Virginia. Yes; the Mansfield amendment will follow the battle tank amendment on Thursday. The majority leader expects to reach an agreement with respect to time on his amendment, and he will announce that tomorrow, I am sure.

Mr. STENNIS. I think if we get all of these matters finished and then have the session on Friday, the bill will not be finished but it will be a long way toward being finished.

Mr. BYRD of West Virginia. Yes.

Mr. STENNIS. I am very much encouraged by what has happened.

ADJOURNMENT UNTIL 10 A.M.

Mr. BYRD of West Virginia. Mr. President, if there be no further business to come before the Senate, I move, in accordance with the previous order, that the Senate stand in adjournment until 10 o'clock tomorrow morning.

The motion was agreed to; and (at 4 o'clock and 37 minutes p.m.) the Senate adjourned until tomorrow, Wednesday, September 29, 1971, at 10 a.m.

HOUSE OF REPRESENTATIVES—*Tuesday, September 28, 1971*

The House met at 12 o'clock noon.

The Rev. Paul G. Behling, pastor, Grace Lutheran Church, Bronx, N.Y., offered the following prayer:

Gracious Lord, You have granted us another day to love and serve You and our neighbor. We who represent the people of America come to You, for You have commanded us to pray and have promised to hear: Forgive our every failure as individuals, a Congress, and a nation. Turn us away from a love of money and a lust for power. Impart to us wisdom to know and do Your will. We pray especially for our enemies: Turn their hearts and grant that they with us may pursue peace. Give us confidence to believe that all things are possible with Your help, for without You we can do nothing.

Therefore, grant us this day Your blessing and benediction. Through Jesus Christ our Lord. Amen.

THE JOURNAL

The SPEAKER. The Chair has examined the Journal of the last day's proceedings and announces to the House his approval thereof.

Without objection, the Journal stands approved.

There was no objection.

MESSAGE FROM THE SENATE

A message from the Senate by Mr. Arrington, one of its clerks, announced that the Senate had passed the following resolution:

S. RES. 174

Resolved, That the Senate has heard with profound sorrow the announcement of the death of Hon. John C. Watts, late a Representative from the State of Kentucky.

Resolved, That a committee of two Senators be appointed by the Presiding Officer to join the committee appointed on the part of the House of Representatives to attend the funeral of the deceased Representative.

Resolved, That the Secretary communicate these resolutions to the House of Representatives and transmit a copy thereof to the family of the deceased.

Resolved, That when the Senate adjourns today, it adjourn as a further mark of respect to the memory of the deceased Representative.

The message also announced that the Senate had passed a bill of the following title, in which the concurrence of the House is requested:

S. 1733. An act to amend the act of September 26, 1970 (84 Stat. 884).

REV. PAUL G. BEHLING

(Mr. BIAGGI asked and was given permission to address the House for 1