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Congressional Record

PROCEEDINGS AND DEBATES OF THE 92d CONGRESS, SECOND SESSION

SENATE—*Wednesday, March 22, 1972*

The Senate met at 9:30 a.m., and was called to order by Hon. JAMES B. ALLEN, a Senator from the State of Alabama.

PRAYER

The Reverend Andrew L. Johnson, Tuskegee Institute, Tuskegee, Ala., offered the following prayer:

O Thou Master of space, time, and eternity, we pray Thy blessings upon this session of our Nation's highest legislative body.

We thank Thee for the record of service to our Nation that it has compiled through the years, and we pray that each Member of the U.S. Senate might be so touched by Thy Holy Spirit that he might look with new eyes upon the critical needs of our Nation and our world.

Grant them the insight, the comprehension, the empathy, the compassion, and the resolution to make a constructive contribution to the solving of the problems, and in establishing the structure that will promote peace among all nations.

May this august body so plan and work that our culture and civilization will move toward the implementation of the visions of the ancient prophet:

"And they shall beat their swords into plowshares and their spears into pruning hooks; nation shall not lift up sword against nation, neither shall they learn war any more. They shall sit every man under his vine, and under his fig tree, and none shall make them afraid."

We thank Thee for our illustrious past which is our teacher, our arduous present which is our challenge, and our inscrutable future which is our hope.

In Thy holy name we pray. Amen.

DESIGNATION OF THE ACTING PRESIDENT PRO TEMPORE

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

The assistant legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, D.C., March 22, 1972.

To the Senate:

Being temporarily absent from the Senate on official duties, I appoint Hon. JAMES B. ALLEN, a Senator from the State of Alabama, to perform the duties of the Chair during my absence.

ALLEN J. ELLENDER,
President pro tempore.

Mr. ALLEN thereupon took the chair as Acting President pro tempore.

THE JOURNAL

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the reading of the Journal of the proceedings of Tuesday, March 21, 1972, be dispensed with.

The ACTING 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 be authorized to meet during the session of the Senate today.

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

ORDER OF BUSINESS

The ACTING PRESIDENT pro tempore. At this time, in accordance with the previous order, the Chair recognizes the distinguished Senator from Delaware (Mr. ROTH) for not to exceed 15 minutes.

(The remarks Mr. ROTH made when he submitted an amendment to H.R. 1, the Social Security Amendments of 1972, are printed in the section of the RECORD devoted to the transaction of routine morning business under the appropriate heading.)

ORDER OF BUSINESS

The ACTING PRESIDENT pro tempore (Mr. ALLEN). At this time, in accordance with the previous order, the Chair recognizes the distinguished Senator from New York (Mr. BUCKLEY) for not to exceed 15 minutes.

THE SITUATION IN CAMBODIA

Mr. BUCKLEY. Mr. President, the day before yesterday the armed forces of North Vietnam subjected the capital of Cambodia to the heaviest rocket and mortar bombardment yet delivered on any major city in the Indochinese war. This was Hanoi's latest, most spectacular act of aggression against a people whose only sin has been to attempt to deny the use of their seaports and territories as supply and staging bases for military assaults on a neighbor.

Although it is perhaps too much to hope, perhaps the sheer size and brutality of the attack will shock some of our self-styled leaders of opinion into a better understanding of what is happening in Indochina today. What we are witnessing is the reality of a state of war which has been imposed by the North Vietnamese on a people who want nothing so much as to be allowed to go about their daily lives in peace; a people who seek peace, but not at the sacrifice of their independence; a people who have already demonstrated an extraordinary tenacity and courage in their own defense.

I was in Cambodia just 2 months ago, and was able to observe firsthand, the efforts being made by the Cambodians to build up their own defenses despite their lack of the most rudimentary tools of war. I recall visiting the town of Kampong Cham in northeastern Cambodia, less than 2 miles across the Mekong River from the Chupp rubber plantation, then harboring two seasoned North Vietnamese divisions. I saw there a home defense brigade manned by a ragtag, but determined group of teenagers equipped with an assortment of small arms scavenged from the landscape—five different kinds of rifles of various vintage and of Chinese, European, and American manufacture, to be exact. The Cambodians have shown time and again that they have the will to defend themselves, but it is clear that they cannot hope to succeed without the arms with which to match the increasingly sophisticated weapons with which the Chinese Communists and the Soviet Union continue to supply their enemy.

This small country is a testing ground for the doctrine which the President announced at Guam in 1969 as an alternative to the direct involvement by American forces in future wars in Asia. "Cambodia is the Nixon doctrine in its purest form," the President stated recently. Yet, the significance of what is happening in Cambodia today, and by extension elsewhere in Indochina, seems lost on far too many Americans. This innocence, or ignorance, has nowhere been better exemplified than in an editorial which appeared in the New York Times on March 15. After referring to Cambodia as a "miserable Southeast Asian land," the editorial recommends in effect that the Congress scuttle the administration's proposal to provide its people with the basic military tools which are essential to their national survival.

If the New York Times editorial merely represented another example of the routine cultural sense of superiority which is exhibited by so many Americans who do not understand or care to understand Asia, it could simply be overlooked. But it cannot be overlooked because too many abroad are apt to take the Times' pronouncements seriously. One is tempted for example to ask whether the March 15 editorial had been read by the North Vietnamese commanders before they

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ordered the attack on Phnom Penh. It cannot be overlooked, because on too many occasions the Times has had its impact on domestic attitudes, witness the classic example of Herbert Matthews' reporting of Fidel Castro's struggle for Cuban freedom.

Although the New York Times has somehow failed to call the fact to the explicit attention of its readers, we do not have in Cambodia a situation, such as that which has existed in South Vietnam, where there can be endless academic debate as to whether the conflict is or is not a "civil war." There is simply no room for debate about the fact that Cambodia is and has been the victim of the most explicit aggression by the Government of North Vietnam.

Under these clear-cut circumstances, if we fail to supply the Cambodians with the minimum hardware required for their own defense, the possibility of encouraging other nations elsewhere in Asia to defend themselves against Communist expansionism must surely be doomed to failure; and if we show ourselves incapable of implementing "the Nixon doctrine in its purest form" on the small scale required for the defense of Cambodia, how can we expect others to place confidence in the one approach to problems of regional security in Asia which specifically precludes the future use of American troops?

Should the New York Times succeed in turning American public opinion against foreign military assistance in one part of the world where the lines are so clearly drawn, how can we be sure that American opinion will not turn against it in others—perhaps even in Europe and in the Middle East—with consequences unimagined by the sages who occupy the cloistered editorial offices of the New York Times?

For the sake of peace, and for the sake of freedom—yes, even if it involves only the freedom of those miserable Cambodians—I hope and pray that the New York Times will fail.

MESSAGE FROM THE HOUSE

A message from the House of Representatives, by Mr. Berry, one of its reading clerks, announced that the House had passed, without amendment, the bill (S. 3160) to provide for a modification in the par value of the dollar, and for other purposes.

The message also announced that the House had passed the following bills, in which it requested the concurrence of the Senate:

H.R. 2076. An act for the relief of Vladimir Rodriguez LaHera;

H.R. 3751. An act for the relief of Albert M. Reiser, Jr.;

H.R. 8395. An act to amend the Vocational Rehabilitation Act to extend and revise the authorization of grants to States for vocational rehabilitation services, to authorize grants for rehabilitation services to those with severe disabilities, and for other purposes; and

H.R. 9473. An act for the relief of Mrs. Rosanna Thomas.

HOUSE BILLS REFERRED

The following bills were severally read twice by their titles and referred, as indicated:

H.R. 2076. An act for the relief of Vladimir Rodriguez LaHera;

H.R. 3751. An act for the relief of Albert M. Reiser, Jr.; and

H.R. 9473. An act for the relief of Mrs. Rosanna Thomas; to the Committee on the Judiciary.

H.R. 8395. An act to amend the Vocational Rehabilitation Act to extend and revise the authorization of grants to States for vocational rehabilitation services, to authorize grants for rehabilitation services to those with severe disabilities, and for other purposes; to the Committee on Labor and Public Welfare.

ROUTINE MORNING BUSINESS

The ACTING PRESIDENT pro tempore. At this time, in accordance with the previous order, there will be a period for the transaction of routine morning business, with statements by Senators therein limited to 3 minutes.

THE CALENDAR

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar Nos. 664, 672, and 673, all of which have been cleared on both sides.

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

SMALL BUSINESS ACT

The Senate proceeded to consider the bill (S. 3166) to amend the Small Business Act, which has been reported from the Committee on Banking, Housing and Urban Affairs with an amendment to strike out all after the enacting clause and insert:

That paragraph (4) section 4(c) of the Small Business Act (15 U.S.C. 633) is amended—

(1) by striking out "$3,100,000,000" and inserting in lieu thereof "$4,100,000,000";

(2) by striking out "$450,000,000" and inserting in lieu thereof "$500,000,000"; and

(3) by striking out "$300,000,000" and inserting in lieu thereof "$350,000,000".

SEC. 2. Paragraphs 4(A) and 5(A) of section 7(a) of the Small Business Act (15 U.S.C. 636) are amended by striking out "$350,000" and inserting in lieu thereof "$500,000".

SEC. 3. Section 402(a) of the Economic Opportunity Act of 1964 (42 U.S.C. 2902(a)) is amended by striking out "$25,000" and inserting in lieu thereof "$50,000".

The amendment was agreed to.

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

Mr. MANSFIELD. Mr. President, I ask unanimous consent to have printed in the RECORD an excerpt from the report (No. 92–693), explaining the purposes of the measure.

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

HISTORY OF LEGISLATION

S. 3166 was introduced on February 14, 1972, and hearings were held by the Small Business Subcommittee on March 9, 1972. On March 15, 1972, the committee voted unanimously to report out the bill, S. 3166, with amendments.

EXPLANATION OF BILL

S. 3166 is divided into three sections.

Section 1 of the bill amends section 4(c) of the Small Business Act to increase the total amount of loans, guarantees, and other obligations or commitments outstanding by the Small Business Administration. Administrator Kleppe informed the committee in February that by the end of this fiscal year his agency will have reached the maximum levels set by Congress in May of 1971.

Paragraph 1 of this bill will increase from $3.1 billion to $4.1 billion SBA's lending authority for direct, immediate participation and guaranteed loans under section 7(a); displaced business loans under section 7(b)(3); trade adjustment assistance loans under section 7(e); subcontract authority under section 8(a); and economic opportunity loans under title IV of the Economic Opportunity Act of 1964.

Paragraph 2 of section 1 will increase from $450 million to $500 million SBA's lending authority to SBIC's under title III of the Small Business Investment Act of 1968.

Paragraph 3 of the bill will increase from $300 million to $350 million SBA's lending authority under title IV of the Economic Opportunity Act of 1964 for loans to low-income individuals and for businesses located in areas of high unemployment or low income.

The Small Business Administration estimates that these increases will assure continued lending activities through fiscal year 1973.

Section 2 of the bill will increase the Small Business Administration's lending authority under section 7(a) from a maximum loan of $350,000 to $500,000.

Small business is defined in the Small Business Act as one which is independently owned and operated and which is not dominant in its field of operation. The $350,000 limitation now imposed on SBA has not been increased since the agency was made permanent in 1958. During the intervening years business costs have increased considerably and if small business concerns are to remain competitive they must be assured of adequate sources of capital.

Section 3. During the committee's consideration of this bill an amendment was offered to increase from $25,000 to $50,000 the maximum loan that the Small Business Administration is authorized to make, participate (on an immediate basis) in, or guarantee to small business concerns located in urban or rural areas with high proportions of unemployed or low-income individuals or to small business concerns owned by low-income individuals.

The program ceiling increases proposed in S. 3166 represent neither an appropriation of funds nor an authorization for appropriations. They represent, rather, proposals to increase the amounts which may be outstanding from SBA's business loan and investment revolving fund at any one time for purposes of particular SBA financial assistance programs.

Section 4(c)(1) of the Small Business Act, as amended by Public Law 89–409 approved May 2, 1966, provided for the establishment of two revolving funds as of July 1, 1966 (a business loan and investment fund, and a disaster loan fund) for the financing of SBA's programs.

Section 4(c)(3) of the act authorizes appropriations to the two funds "* * * in such amounts as may be necessary * * *." However, with respect to the business loan and investment fund, the Congress has set limits on the amounts which may be used for the

various programs by providing in section 4(c)(4) for limitations on the amounts of loans, guarantees, and other obligations or commitments which may be outstanding at any one time from that fund.

With reference to these limitations, it is of considerable significance that they are neither an authorization for funds nor a mechanism by which funds are made available to carry out the various programs involved. Instead, they represent the means by which the Congress controls the extent of the use of available funds for the respective programs.

It is necessary for the financing of SBA's programs that the ceiling figures stated in section 4(c)(4) be raised from time to time. This results from a combination of medium-term loan repayment, steadily increasing loan volume, and a recent need to depend more on the use of guaranteed loans.

Public Law 87-550, approved July 25, 1962, requires that SBA advise the Congress periodically of the ceiling increases necessary for the continuation of its programs, and that such advice include program needs for the fiscal year under consideration plus the two succeeding fiscal years. In keeping with this requirement, S. 3166 proposes increases which would permit the continuation of SBA's financial assistance programs at presently projected levels through the current fiscal year plus fiscal year 1973.

CORDON RULE

In the opinion of the committee, it is necessary to dispense with the requirements of subsection 4 of rule XXIX of the Standing Rules of the Senate in order to expedite the business of the Senate in connection with this report.

LONGFELLOW NATIONAL HISTORIC SITE

The Senate proceeded to consider the bill (S. 3129) to authorize the establishment of the Longfellow National Historic Site in Cambridge, Mass., and for other purposes, which has been reported from the Committee on Interior and Insular Affairs with an amendment on page 3, line 3, after the word "this", to strike out "Act." and insert "Act, not to exceed, however, $586,600 (May 1971 prices) for development of the area, plus or minus such amounts, if any, as may be justified by reason of ordinary fluctuations in construction costs as indicated by engineering cost indices applicable to the types of construction involved herein."; so as to make the bill read:

S. 3129

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to preserve in public ownership for the benefit and inspiration of the people of the United States, a site of national historical significance containing a dwelling which is an outstanding example of colonial architecture and which served as George Washington's headquarters during the siege of Boston in 1775–1776, and from 1837 to 1882 as the home of Henry Wadsworth Longfellow, the Secretary of the Interior is authorized to acquire by donation the fee simple title to the real property and improvements thereon, together with furnishings and other personal property, situated at and known as 105 Brattle Street, Cambridge, Massachusetts, for establishment as the Longfellow National Historic Site.

SEC. 2. The Secretary of the Interior is further authorized to accept the donation of not less than $200,000, and such other sums of money as may be tendered from time to time by the Trustees of the Longfellow House Trust, established pursuant to indentures dated October 28, 1913, and November 18, 1914, and such funds or any part thereof and any interest thereon, may be used exclusively for the purpose of administration, maintenance, and operation of the Longfellow National Historic Site.

SEC. 3. The Longfellow National Historic Site shall be established when title to the real and personal property described in section 1 of this Act and the sum of $200,000 as set forth in section 2 of this Act have been accepted by the Secretary of the Interior, and upon such establishment, the Longfellow National Historic Site shall be administered by the Secretary of the Interior in accordance with the Act approved August 25, 1916 (39 Stat. 535), as amended and supplemented, and the Act approved August 21, 1935 (49 Stat. 666).

SEC. 4. There are hereby authorized to be appropriated such sums as may be necessary to carry out the purposes of this Act, not to exceed, however, $586,600 (May 1971 prices) for development of the area, plus or minus such amounts, if any, as may be justified by reason of ordinary fluctuations in construction costs as indicated by engineering cost indices applicable to the types of construction involved herein.

The amendment was agreed to.

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

Mr. MANSFIELD. Mr. President, I ask unanimous consent to have printed in the RECORD an excerpt from the report (No. 92-702), explaining the purposes of the measure.

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

PURPOSE

The purpose of S. 3129 is to establish the Longfellow National Historic Site in Cambridge, Mass., and authorizes the Secretary of the Interior to acquire by donation the former home, together with furnishings and other personal property, of one of the most popular American poets of the 19th century, Henry Wadsworth Longfellow. The bill also authorizes the Secretary of the Interior to accept the donation of not less than $200,000 from the trustees of the Longfellow House Trust, which may be used exclusively for the purpose of administration, maintenance, and operation of this proposed National Historic Site.

In addition to the Longfellow home, the proposed historic site includes the carriage house and formal garden, both designed by Longfellow himself. Over 100,000 people have visited the Longfellow home in the last 5 years alone, and in 1962 the home was designated as a registered historic landmark

BACKGROUND

The Longfellow House is of exceptional importance, and from the standpoint of national significance it is fully suitable for establishment as a national historic site for several reasons.

First, this handsome and very well preserved mid-18th century mansion is considered to be one of the best examples of the late Georgian period architecture and has been illustrated in most standard college textbooks on architectural history. Most of the interesting original elements remain intact, and it has lost none of its charm through the normal growth process of occasional alterations during two centuries of continuous use. The structure has always been carefully maintained and is in a good state of repair today.

Secondly, the house is rich in historical significance, as it was used as a hospital for Colonials wounded at Lexington, Concord, and Bunker Hill, and was, during 10 months in 1775–76, the headquarters of Gen. George Washington during the siege of Boston.

But it is as the home of Henry Wadsworth Longfellow that the house is most important. Longfellow's association with the house began in 1837 when he rented a room there. In 1843, upon his marriage to Frances Elizabeth Appleton, the house was given to the couple as a wedding present by the bride's father.

The only American to be memorialized in the "Poet's Corner" at Westminster Abbey, Longfellow's vivid commemoration of historic events, such as "Paul Revere's Ride," and homey descriptions of everyday life, such as "The Village Blacksmith," create a tableau of American culture which is widely read and loved by many people. Longfellow wrote portions of some of his most famous works, including "The Courtship of Miles Standish," "Evangeline," and "The Song of Hiawatha," while he resided in the house in Cambridge between 1843 and his death in 1882.

COSTS

Since the 1.98 acres of land on which the Longfellow House is situated will be donated, there will be no land acquisition costs. No additional land is deemed necessary to establish the site.

Total development costs, based on May 1971 prices, are estimated at $586,600, of which $578,800 will be spent on buildings and utilities, primarily to be used for rehabilitation and remodeling of the house, stable, and shed. The remaining $7,800 will be spent on roads and trails for rehabilitation of the walks and driveways. Annual operating costs are estimated to be $172,000 in the first year and are expected to be about $183,100 by the fifth year.

COMMITTEE AMENDMENT

The committee adopted the amendment recommended by the Department of the Interior to put a limitation on the sum to be authorized for development costs. The amendment is as follows:

On page 3, section 4, line 5, change the period to a comma and add the following: not to exceed, however, $586,600 (May 1971 prices) for development of the area, plus or minus such amounts, if any, as may be justified by reason of ordinary fluctuations in construction costs as indicated by engineering cost indices applicable to the types of construction involved herein.

COMMITTEE ACTION

The Parks and Recreation Subcommittee held open hearings on S. 3129 on February 15, 1972, and the full committee in executive session on March 15, 1972, unanimously recommended enactment of the bill.

VAN BUREN-LINDENWALD HISTORIC SITE

The Senate proceeded to consider the bill (S. 1426) to establish the Van Buren-Lindenwald Historic Site at Kinderhook, N.Y., and for other purposes, which had been reported from the Committee on Interior and Insular Affairs with amendments on page 2, line 4, after the word "the", to strike out "Van Buren Lindenwald" and insert "Van Buren"; in line 11, after the word "the", to strike out "Van Buren Lindenwald" and insert "Van Buren"; and, in line 21, after the word "this", to strike out "Act." and insert "Act, not to exceed, however, $225,000 for acquisition of land and $2,278,000 (April 1971 prices) for development of the area, plus or minus such amounts, if any, as may be justified by reason of or-

dinary fluctuations in construction costs as indicated by engineering cost indices applicable to the types of construction involved herein."; so as to make the bill read:

S. 1426

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, for the purposes of preserving for the education and inspiration of present and future generations the former residence (from 1841 until 1862) and only remaining structure intimately associated with Martin Van Buren, eighth President of the United States, the Secretary of the Interior shall acquire, on behalf of the United States, by gift, exchange, or purchase (with donated or appropriated funds) the real property and improvements thereon known as Lindenwald and located at Kinderhook, New York, together with such adjacent or related lands and interests therein as the Secretary determines are necessary for the establishment of a national historic site. The property so acquired shall be known and designated as the Van Buren National Historical Site. The Secretary may also acquire personal property used or to be used in connection with the administration and interpretation of the national historic site.

SEC. 2. The National Park Service, under the direction of the Secretary of the Interior, shall administer, protect, and develop the Van Buren National Historic Site, subject to the provisions of the Act entitled "An Act to establish a National Park Service, and for other purposes", approved August 25, 1916 (16 U.S.C. 1 and others), and the Act entitled "An Act to provide for the preservation of historic American sites, buildings, objects, and antiquities of national significance, and for other purposes", approved August 21, 1935 (16 U.S.C. 461 and others).

SEC. 3. There are authorized to be appropriated from time to time such sums as may be necessary to carry out the provisions of this Act, not to exceed, however, $225,000 for acquisition of land and $2,278,000 (April 1971 prices) for development of the area, plus or minus such amounts, if any, as may be justified by reason of ordinary fluctuations in construction costs as indicated by engineering cost indices applicable to the types of construction involved herein.

Mr. MANSFIELD. Mr. President, I ask unanimous consent to have printed in the RECORD an excerpt from the report (No. 92–703), explaining the purposes of the measure.

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

PURPOSE

The purpose of S. 1426 is to preserve the former residence of Martin Van Buren, eighth President of the United States, at the only remaining site that is intimately associated with him—Lindenwald, his mansion at Kinderhook, N.Y.

HISTORICAL BACKGROUND

Lindenwald was built in 1797 and purchased by Mr. Van Buren in 1839. The mansion itself has been altered several times since its construction in the late 18th century. The original house is a substantial Federal type with later additions in the Gothic and Victorian styles. The main portion of the Van Buren House is brick, 2½ stories tall, on a stone foundation; it contains 36 rooms and passageways. The interior of the mansion remains relatively unchanged since the historic period. Most of the original hardware remains, including silver-plated knobs and hardware on the first floor and the carpenter locks on the second floor.

Since the beginning of the 20th century many efforts have been made to preserve Lindenwald as a public historic site. Numerous attempts on the part of State agencies and private groups have been unsuccessful up to this point. The National Park Service expressed interest in Lindenwald as early as 1935, and in 1961 Lindenwald was registered as a national historic landmark in recognition of its exceptional value by way of its association with President Van Buren.

COSTS

The proposed Van Buren historic site will encompass approximately 42 acres. Land acquisition costs are estimated at $225,000, to acquire easements in 20 acres that are presently privately owned, and to acquire in fee 20 acres which are privately held. The remaining 2 acres, which are owned by the State of New York, are to be donated. Total development costs are estimated to be $2,278,000, of which $1,974,000 will be used for building and utilities, with the main expenditures for restoration of the mansion and other buildings, and for archeological and historical research.

The remaining $304,000 is to be spent on roads and trails, primarily to develop maintenance and parking areas. Annual operating costs are estimated to be $87,900 in the first year and are expected to be about $227,100 by the fifth year.

Mr. BUCKLEY. Mr. President, it was recently my privilege to make a favorable report from the Committee on Interior and Insular Affairs recommending passage of S. 1426, to establish a Van Buren National Historic Site at Kinderhook, N.Y.

The Van Buren homesite, known as Lindenwald and located in Kinderhook, N.Y., was registered as a national historic site in July 1961. As the only remaining edifice closely associated with President Martin Van Buren, it is fitting that the Lindenwald home should not only be preserved but also opened to the public.

Efforts on behalf of the preservation of the Van Buren home began early in this century. In 1936 concerned New Yorkers organized the Association for the Preservation of the Lindenwald house and property. At the same time the National Park Service expressed an interest. But not until 1961 was the Van Buren home at Kinderhook established as a national historic site.

The Lindenwald house is presently under private ownership. The legislation sponsored by Senator JAVITS and me as well as the companion legislation introduced in the House of Representatives by Congressman FISH will place the mansion in the National Park Service system.

This legislation requires the purchase of the house and surrounding property by the Federal Government. If purchased, Lindenwald will undergo restoration to recapture the original style of Martin Van Buren's home. Although subsequent owners of Lindenwald have remodeled and redecorated the house since President Van Buren's time, the interior is largely unchanged and according to the National Park Service, adequate research should facilitate restoration of the home to its condition during the time of Van Buren's occupancy.

The house is located in an agricultural area and has a clear view of the Hudson River Valley and of the Catskill Mountains. These surroundings should not be difficult to maintain.

Van Buren was born and buried in Kinderhook. He was admitted to the New York Bar in 1803 and held various county and State officers before he became involved with the Federal Government. Van Buren's political career encompassed the judiciary, the legislative and the executive fields. It was highlighted by his positions as New York Attorney General, United States Senator, Governor of New York, Secretary of State, Vice President and President. Certainly, the house in which this active American spent 20 years of his life should be preserved.

Van Buren purchased Lindenwald in 1839 as a place of retirement. It became his permanent residence in 1841. The historic value of this house is unique in its intimate association with President Van Buren. It is in the interest of the American people to preserve and to open to the public the home of our eighth President. Lindenwald expresses much of Van Buren's style and it is undeniably a part of our heritage.

The amendments were agreed to.

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

The title was amended, so as to read: "A bill to establish the Van Buren Historic Site, at Kinderhook, New York, and for other purposes."

Mr. JAVITS. Mr. President, I am pleased that the Senate has passed my bill, S. 1426, which would establish the Van Buren Historic Site at Kinderhook, N.Y. The proposed national historic site would preserve and protect Lindenwald, the home and most significant remaining structure associated with Martin Van Buren, the eighth President of the United States and a prominent New York citizen.

Since the beginning of the 20th century many efforts have been made to preserve Lindenwald as a public historic site. Numerous attempts on the part of State agencies and private groups have been unsuccessful up to this point. The National Park Service has expressed its interest in Lindenwald as early as 1935 and in 1961 Lindenwald was registered as a national historic landmark in recognition of its exceptional value by way of its association with President Van Buren. It is necessary that the Congress take the final step to establish Lindenwald as an historic site.

The original house at Lindenwald was built in 1797 by Peter Van Ness, a public figure of considerable prominence in the local community. In 1839 Martin Van Buren purchased the property which then consisted of a house and 130 acres of land. When his term as President ended in 1841 Van Buren returned to Lindenwald where he resided until his death in 1862. Lindenwald is the only remaining structure associated with President Van Buren.

The Interior Department has evaluated the site as to its possibilities for management as a national historic site and has determined that the site should be established as provided in S. 1426 with minor amendments. Adequate facilities

in existing structures on the site will allow the public to have great use and enjoyment of this historic property. Historians would be encouraged to study the site and the proposed collection of Van Buren memorabilia. Comprehensive planning would be coordinated with the appropriate State agencies to insure protection of the setting of Lindenwald.

I believe that it is important to establish memorials to those who have served as presidents of the United States whenever we have an appropriate opportunity. Lindenwald presents us with a fine opportunity and the Senate has it. A companion bill, H.R. 3619, has been introduced in the House by Congressman HAMILTON FISH of New York which hopefully will soon be acted on.

ELIZABETH R: A TRIBUTE

Mr. BYRD of West Virginia. Mr. President, a few years back, a prominent critic of the media referred to television as a "vast wasteland." More recently we have seen that alleged wasteland blossom like the proverbial rose, as a new trans-Atlantic wave of "quality television" continues to hit our shores. It all began with the "Forsyte Saga," based upon Galsworthy's sweeping panorama of a family through three generations. The unexpected popularity of that series proved to be prophetic.

A further evidence of public responsiveness to quality programing, when done with style and imagination, was the reception given Sir Kenneth Clark's "Civilisation" series. The current series of six broadcasts—I say "current" because even though the sixth in the series was shown on last Sunday evening, there will be a repeat of the sixth in the series on this coming Saturday evening—dealing with the life of the first Elizabeth. "Elizabeth R," has demonstrated yet again the immense appeal which quality fare can have. Millions of Americans have taken pleasure in following the dramatic portrayal of the "Virgin Queen" during one of the great ages of English and, indeed, of European history, a portrayal superbly delineated by Glenda Jackson. The complexity of the Queen's character, the difficult issues of politics and religion in a time which knew little or no tolerance, the rich diversity of Elizabethan life—brutal, passionate, intense—all these are vividly set forth in the current series, truly a distinguished contribution to television drama in our day.

"Elizabeth R" had been preceded—appropriately enough—by "The Six Wives of Henry VIII," a remarkable presentation by Keith Mitchell of that Tudor despot, father to Elizabeth and husband to no less than six wives in the course of his turbulent life. Here again, the complicated problems of the Reformation were effectively dramatized in the person of King Henry. Together, the two series have given the viewer a sense of participation in one of the greatest centuries in history—the period from the accession of Henry VIII in 1509 to the death of Elizabeth I in 1603, the age of Shakespeare and Drake, Philip II and the Armada, Raleigh and Bacon, Luther and Erasmus, an age—like our own—of disruption and change, destructive and creative alike. It is a special tribute to the BBC productions that the essential character of the 16th century has been so powerfully revealed in the personalities of Henry and Elizabeth and all whose lives they touched.

The series restores our faith in the possibilities of television to achieve quality drama without sacrificing human interest and appeal. The BBC is to be congratulated for this production, and for others in the past and yet to come. A standard has been set which cannot but have a healthy influence upon the American television industry. I am especially pleased to commend Station WETA-TV for carrying this series and thereby contributing so richly to the public good and to the cause of better television fare in this area. In so doing, WETA has truly performed a public service, in the best sense of that phrase.

The success of "Elizabeth R" has proved again that "educational" television need not be dull and uninspired. The romance of history, made tangible in the actual biographies of great personalities, is a never-failing resource, at once instructive and entertaining.

It is noteworthy that a new series is to be launched next week, based upon the Leatherstocking tales of James Fenimore Cooper, classics of well-loved Americana, "The Last of the Mohicans." Surely there is some irony in the fact that this—as well as a 13 part series on the history of the old colony, "America"—are being presented by the BBC. In fact, of course, several popular hits of the current season—"All in the Family" and "Sanford and Son"—are only recently naturalized descendants of British series.

A quality invasion of this kind represents, in fact, a kind of liberation, and we may hope that American television, with its immense technical resources, will respond to the stimulus. In the meantime, we are all the beneficiaries of these imaginatively conceived, stylishly produced, and beautifully acted series.

COMMUNICATIONS FROM EXECUTIVE DEPARTMENTS, ETC.

The ACTING PRESIDENT pro tempore (Mr. ALLEN) laid before the Senate the following letters, which were referred as indicated:

REPORT ON OVEROBLIGATIONS OF APPROPRIATIONS

A letter from the Director, Office of Management and Budget, Executive Office of the President, reporting, pursuant to law, that certain appropriations have been apportioned on a basis which indicates the necessity for supplemental estimates of appropriations (with accompanying papers); to the Committee on Appropriations.

REPORTS OF COMMITTEES

The following reports of committees were submitted:

By Mr. PELL, from the Committee on Rules and Administration, with an amendment:

S. Con. Res. 59. Concurrent resolution to authorize the loan of the Cornelia Fasset painting, "The Electoral Commission of 1877," to the National Portrait Gallery of the Smithsonian Institution (Rept. No. 92-706).

By Mr. HANSEN, from the Committee on Interior and Insular Affairs, with an amendment:

S. 3159. A bill to authorize the Secretary of the Interior to establish the John D. Rockefeller, Jr., Memorial Parkway, and for other purposes (Rept. No. 92-707).

REFERRAL OF A BILL

Mr. MANSFIELD. Mr. President, I ask unanimous consent that Calendar No. 558, H.R. 7117, to amend the Fisherman's Protective Act, be referred to the Committee on Foreign Relations, with instructions that it will be reported back to the Senate within 40 days.

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

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. COOK (for himself, Mr. YOUNG, Mr. MCGEE, Mr. PASTORE, Mr. STEVENS, Mr. HUMPHREY, Mr. BELLMON, Mr. MCGOVERN, Mr. DOLE, Mr. ANDERSON, and Mr. WILLIAMS):

S. 3393. A bill to amend title XVII of the Social Security Act to provide financial assistance to individuals suffering from chronic kidney disease who are unable to pay the costs of necessary treatment. Referred to the Committee on Finance.

By Mr. DOMINICK (for himself, Mr. HATFIELD, Mr. WEICKER, and Mr. ALLOTT):

S. 3394. A bill to permit citizens of the United States to buy, hold, and sell gold. Referred to the Committee on Banking, Housing and Urban Affairs.

By Mr. DOMINICK:

S. 3395. A bill to further the achievement of equal educational opportunities. Referred to the Committee on Labor and Public Welfare.

By Mr. FONG:

S. 3396. A bill for the relief of Roland Q. Lin; and

S. 3397. A bill for the relief of Joe M. Morgan. Referred to the Committee on the Judiciary.

By Mr. HARRIS:

S. 3398. A bill providing for the election of the tribal council of the Osage Nation of Indians. Referred to the Committee on Interior and Insular Affairs.

By Mr. MAGNUSON (by request):

S. 3399. A bill to amend the provisions of title 14, United States Code, relating to the flag officer structure of the Coast Guard, and for other purposes. Referred to the Committee on Commerce.

By Mr. MOSS:

S. 3400. A bill to provide for the issuance of a special series of postage stamps to commemorate the bicentennial of the Escalante Expedition. Referred to the Committee on Post Office and Civil Service; and

S. 3401. A bill to provide for the designation of the Escalante Trail, and for other purposes. Referred to the Committee on Interior and Insular Affairs.

By Mr. INOUYE:

S. 3402. A bill to provide that persons who are nationals and citizens at birth under section 301(a)(7) of the Immigration and

Nationality Act shall retain their citizenship without meeting certain physical presence requirements. Referred to the Committee on the Judiciary.

S. 3403. A bill to amend the act of June 20, 1918, relating to the retirement of lighthouse service personnel involuntarily separated. Referred to the Committee on Post Office and Civil Service.

By Mr. SPONG (for himself and Mr. BEALL):

S. 3404. A bill to amend the Cargo Preference Act of 1954 for certain purposes. Referred to the Committee on Commerce.

By Mr. RANDOLPH (for himself, Mr. BAYH, and Mr. COOPER):

S. 3405. A bill to amend title 23 of the United States Code to establish a national scenic and recreational highway program. Referred to the Committee on Public Works.

By Mr. BIBLE (for himself and Mr. CANNON):

S. 3406. A bill to declare certain Federal lands held in trust for the Confederated Tribes of the Goshute Indian Reservation. Referred to the Committee on Interior and Insular Affairs.

By Mr. WILLIAMS (for himself, Mr. RANDOLPH, and Mr. PELL):

S. 3407. A bill to amend the Education of the Handicapped Act to provide for improved opportunities for handicapped persons, and for other purposes. Referred to the Committee on Labor and Public Welfare.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. COOK (for himself, Mr. YOUNG, Mr. MCGEE, Mr. PASTORE, Mr. STEVENS, Mr. HUMPHREY, Mr. BELLMON, Mr. MCGOVERN, Mr. DOLE, Mr. ANDERSON, and Mr. WILLIAMS):

S. 3393. A bill to amend title XVII of the Social Security Act to provide financial assistance to individuals suffering from chronic kidney disease who are unable to pay the costs of necessary treatment. Referred to the Committee on Finance.

KIDNEY DISEASE TREATMENT ACT OF 1972

Mr. COOK. Mr. President, I send to the desk for appropriate reference a bill entitled "The Kidney Disease Treatment Act of 1972."

I introduce this measure on behalf of myself, Senators YOUNG of North Dakota, MCGEE of Wyoming, PASTORE of Rhode Island, STEVENS of Alaska, HUMPHREY of Minnesota, BELLMON of Oklahoma, MCGOVERN of South Dakota, DOLE of Kansas, ANDERSON of New Mexico, and WILLIAMS of New Jersey.

Mr. President, this bill is designed to provide financial assistance to individuals suffering from chronic kidney disease, "or end stage renal disease," who are unable to pay the costs of necessary treatment. In addition, this act will assure that any individual who suffers from chronic renal disease will have available to him the necessary lifesaving care and treatment, and that he will not be denied such treatment because of his inability to pay for it.

The need to provide financial assistance to those suffering from kidney failure is obvious; in fact, it is acute. In excess of 8 million Americans suffer from some sort of kidney disorder. Of that number, more than 55,000 persons die of acute kidney disease each year. Furthermore, recent statistics disclose that kidney diseases are responsible for about 140 million total days of restricted activity, 63.5 million days of bed disability, and 17 million work loss days.

Such a high degree of prevalence of morbidity, itself predicates the need for treatment. Unfortunately the neecssary lifesaving medical treatment is all too often beyond the means of the sick in spite of the fact that sophisticated medicine has developed the successful technique of treating kidney disorders. For example, there are three systems of delivering treatment—in the hospital, in an ambulatory care center, and in the home—all three of which are widely divergent in their costs to the patient.

Putting aside the geographic cost variations, experts who have studied health costs inform me that $25,000 per year is the mean representative cost of dialysis treatment in the hospital, that $20,000 per year is the price tag for treatment at an ambulatory care facility, and that $20,000 for the first year and $6,000 for each subsequent year is the median cost for dialysis treatment at home. At these prices, those in need of dialysis treatment can ill afford to stay alive.

This situation is a glaring absurdity in American medicine. For while methods have been developed essentially with Federal funds to create a successful means of treating and even curing kidney disorders, we have succeeded in pricing the treatment beyond the range of those who would most benefit by it.

Transplantation treatment pitifully reveals the same problem; prohibitively high costs. At the same time, however, somewhat more is involved than the purely financial obstacles which complicate the proper dispensing of treatment. Since the first successful transplant in 1956, success with transplantation of kidneys either from living donors or cadavers has been relatively consistent. The technical complexity of the operation is no longer a problem given our present-day medical sophistication. Instead, the body's natural immune response to foreign tissues continues to be the cause for kidney rejection.

The ultimate hope among sufferers of kidney disorders certainly lies in being totally cured. While dialysis sufficiently maintains that a human being will live a next-to-normal life so long as he receives his machine treatments 8 hours per day 3 days per week, it appears that many have been condemned to a life based upon the operatability of a machine. This need not be the case should kidney transplants become widely available at affordable prices.

At present, transplant cost estimates vary depending upon the extent of treatment required before and after the transplant operation itself, but by no means can one assume that it is affordable. One analysis of integrated home dialysis/transplant therapy presumes the cumulative expense of treatment to be in excess of $50,000 over a 10-year period. The implication to the family bread winner supporting a wife, two children, and earning an average wage is serious, and in all probability disasterous. He is doomed to a life of bills, creditors, and hardships because he may be one of the few people fortunate enough to receive a kidney transplant.

It is reported that approximately 50,000 persons victimized by kidney disorders are in need of treatment that is not available to them and that each year 7,000 more people develop kidney disorders severe enough to require dialysis maintainance. Virtually all of these people are prospective recipients of a kidney transplant. Unfortunately, problems arise with too few donors, tissue incompatibilities and dissimilar blood types so that the chance of receptivity of a kidney by a patient is dismal at best. Consequently, the incidence of those that must be maintained through a process which passes blood through an artificial kidney machine to filter wastes is indeed staggering.

The common misconception today is that too few machines are available for use. This is not so. In fact, all eligible patients do not have access to kidney machines primarily because they cannot finance this expensive form of treatment rather than because of a lack of kidney machines. The question is, then, how is it possible to improve upon the discrepancy between apparent demand and abundant supply?

To a small extent, amnesty for the needy comes from several areas. Among the current sources of funds are the Office of Vocational Rehabilitation, medicare, medicaid, and a few Blue Cross and private insurance programs. The Public Health Service is currently supporting several studies of the feasibility of undertaking mass screening programs while the National Kidney Foundation has an active program of studying kidney disease and its treatment. However, the most important philanthropic activities are the result of local fund raising campaigns supported by the citizenry. It is through these drives, campaigns, and solicitations that the greatest number of kidney disease sufferers are granted their reprieve. But these drives cannot and will not sustain those requiring treatment.

Throughout the Nation, and in my own State of Kentucky, the biggest problems in descending order are money, facilities, trained personnel, and equipment. Congressman WILBUR MILLS, the distintinguished chairman of the House Ways and Means Committee, recognized this and acted to correct the urgent need by introducing H.R. 12043 on December 6, 1971. Senator JOHN SPARKMAN of Alabama likewise recognized the urgency of assisting sufferers of kidney disorders, and to that end introduced S. 3286 on March 12 of this year.

At this time, it gives me great pleasure to join with these distinguished gentlemen in securing kidney disease treatment for all who need it. Like H.R. 12043 and S. 3286, the bill which I introduce today will provide for a program of assistance under which payments will be made to individuals requiring treatment for any part of the costs of such treatment which they are unable to pay from funds otherwise available to them. This bill will also provide that payments involving hemodialysis will be made only

to the extent that they do not exceed the cost of the least expensive form of dialysis which is medically and "socially" sufficient.

There are, however, differences between the two previously mentioned bills and the one I introduce today. They are two:

First, my bill contains no provision authorizing grants to States, localities, or public or nonprofit private institutions for the development of improved methods of treatment, the training of personnel, the dissemination of information, or the establishment of hemodialysis centers. This is done after much consultation with and at the recommendation of the National Kidney Foundation. I am firmly convinced that if patient costs are covered, the normal supply-demand situation will take care of the costs of training, artificial kidney center construction and supply. It would only remain to direct available moneys to an area where they will have the greatest impact on saving lives. By making funds directly available to people requiring medical treatment, I feel certain that we will accomplish this goal.

Second, a section is added to my bill defining the scope of benefits provided to an individual. It specifically states that a person receiving treatment shall not be required to pay costs of that treatment which exceed 10 percent of his taxable yearly income. Quite clearly, this method of payment has many advantages. The patient would be assured that medical treatment is not beyond his means, and therefore he would not be hesitant in seeking the necessary medical care. At the same time, the patient would be cognizant of the fact that this plan would be no dole, but rather a partnership which requires that he pay a portion of his medical expenses; in this case the equivalent of 10 percent of taxable income.

In arriving at a percentage which the patient would be required to pay, it was thought that 10 percent would be within the range of most people. We are attempting here to assist the low-income wage earner; a 10-percent payment would not have proportionally as drastic an economic impact as is now the case. Also, a person in a higher salary bracket, above $20,000 for example, would normally be excluded from this program being that the means are available to him to meet his medical expenses, and that he would surely be enrolled in a health insurance plan which would cover his expenses.

In closing, let me add that as the fourth greatest cause of death in the United States, we can ill afford to ignore the seriousness of kidney disease any longer. This Nation has perhaps the best trained physicians and the most sophisticated equipment in the world, yet the afflicted are constrained from receiving the proper care because the costs are well beyond their means. My bill, I believe, is a necessary approach toward reversing the current financial restrictions of delivering kidney treatment to all who need it.

By Mr. DOMINICK (for himself, Mr. HATFIELD, Mr. WEICKER, and Mr. ALLOTT):

S. 3394. A bill to permit citizens of the United States to buy, hold, and sell gold. Referred to the Committee on Banking, Housing and Urban Affairs.

Mr. DOMINICK. Mr. President, I introduce a bill on behalf of myself, Senators ALLOTT, HATFIELD, and WEICKER, which would restore to Americans the unfettered right to buy, possess, and sell gold. We should no longer tolerate 1933 circumstances as justification for continued prohibitions on the private ownership of gold.

The present-day realities are that the United States has less than $11 billion in gold reserves and roughly $50 billion in overseas dollar liabilities. As a matter of fact, the Eurodollar market has been estimated to equal about 30 years of South African gold production.

With the free market price of gold hovering around $48 per ounce and the increasingly uncertain international monetary market, it is quite clear that any return to convertibility would trigger a run on our remaining reserves. Domestic gold production in 1971 was 1.494 million ounces, a 14-percent decrease from the previous year. Imports increased from a 1970 level of 6.6 million ounces to 7.2 million ounces, with its adverse effect on our balance-of-payments problem.

The U.S. Bureau of Mines estimates that at prices up to $140 per ounce, we could mine 237 million ounces of gold. Beyond giving a much needed injection to our mining industry, such an increase in gold production would substantially alleviate our trade deficit.

The President's action suspending convertibility demonetized gold and relegated it to the role of a nonmonetary commodity. As a commodity, gold should be as freely available for ownership as pork bellies, scrap steel and silver. Of the 116 member nations in the International Monetary Fund, 100 have more liberal gold ownership laws than the United States. Yet, we continue to be prisoners to anachronistic concepts.

The cornerstone of our economic system is the free interaction of supply and demand as the determinant of worth or value; and this can only be accomplished with gold by restoring to Americans their right to own gold.

In addition to ending the ownership discrimination against Americans, my bill would insure that the U.S. Treasury has a continuing source of supply of gold upon which it would draw to meet international financial institution gold contribution requirements.

The bill provides that domestic refiners of new gold would be required to offer for sale to the Treasury 2½ percent of their quarterly production at the official price. As a result, Treasury could purchase 10 percent of the domestic gold production at a price of $38 per ounce. Any requirements above this amount would have to be satisfied through private market purchases at the prevailing private market price. In order to avoid the possibility that large gold sales by the Treasury could depress the private market, the bill only permits Treasury gold sales at a price which is 15 percent above the current private market price.

Mr. President, I urge that Congress act as expeditiously as possible and use this legislative key to free Americans from their 1933 prevention of gold ownership hobbles.

By Mr. DOMINICK:

S. 3395. A bill to further the achievement of equal educational opportunities. Referred to the Committee on Labor and Public Welfare.

Mr. DOMINICK. Mr. President, on March 17, President Nixon sent to the Congress a message addressing itself to what is currently this country's most compelling domestic dilemma—school busing. To remedy the present and threatened inequities and hardships caused by busing, President Nixon outlined a two-step legislative program promising reasonable solutions. The first step of the program, the "Student Transportation Moratorium Act of 1972," has already been introduced as S. 3388 by the distinguished senior Senator from Nebraska (Mr. HRUSKA).

Mr. President, I now introduce for appropriate reference the President's companion bill, the "Equal Educational Opportunities Act of 1972." Among other things, this bill is intended to be the legislation referred to in section 2(a)(4) of the "Student Transportation Moratorium Act of 1972" which establishes clear uniform school assignment standards to meet 14th amendment obligations further defined in this bill.

To accomplish the objective of the bill title, a dual program is outlined. Title I serves to reestablish commitments tragically lost in the scramble of the busing mania, that the ultimate purpose of any educational expenditure or effort must be to improve the educational opportunity of the children, regardless of race, color, national origin, or language. It provides assistance sufficiently concentrated to provide the critical resource mass necessary to make compensatory education a reality rather than a sociological term to the Nation's educationally disadvantaged children. Title I of the bill utilizes approximately $2.5 billion authorized under title I of the Elementary and Secondary Education Act of 1965 and the soon-to-be-enacted Emergency School Aid Act to upgrade the Nation's poorest schools. In upgrading the schools, the resources will be concentrated on improving basic instructional programs for language skills and mathematics and on basic supportive services.

Mr. President, the second phase of the bill seeks to guarantee a conducive educational atmosphere for our children substantially devoid of long-term large-scale, forced busing. It recognizes that our schools cannot solely shoulder the burden of eliminating racial disparities in our society—that our children should be taught rather than used to achieve a multiracial society which the adult community has been unable or unwilling to

do for themselves. Titles II, III, and IV of the bill activate congressional enforcement authority contained in the 14th amendment by setting national standards of equal educational opportunity and national remedies to guide courts in what heretofore has been the judicial jungle of school desegregation cases. Title II clearly defines what constitutes a denial of equal educational opportunity; title III identifies which parties can proceed in which judicial manner; and title IV creates a priority of remedies allowing increased busing only in extraordinary, short-term circumstances.

Mr. President, in conclusion, this bill, together with the Student Transportation Moratorium Act, offers a most reasonable vehicle for our children through unnecessary educational pitfalls created by well-intended adults. It relegates the schoolbus to its former position of prominence as an educational tool rather than as a dominant sociological force, while affirming this Nation's commitment to equal educational opportunities for all children. This being a matter of primary importance, I urge diligent legislative effort and timely enactment of the Equal Educational Opportunities Act of 1972.

Mr. President, I encourage and welcome cosponsorship from any and all of my colleagues, and I ask unanimous consent that the text of the bill 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. 3395

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 "Equal Educational Opportunities Act of 1972."

POLICY AND PURPOSE

SEC. 2. (a) The Congress declares it to be the policy of the United States that—

(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, or national origin; and

(2) the neighborhood is an appropriate basis for determining public school assignments.

(b) In order to carry out this policy, it is the purpose of this Act to provide Federal financial assistance for educationally deprived students and to specify appropriate remedies for the orderly removal of the vestiges of the dual school system.

FINDINGS

SEC. 3. (a) The Congress finds that—

(1) The maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, or national origin denies to those students the equal protection of the laws guaranteed by the Fourteenth Amendment;

(2) The abolition of dual school systems has been virtually completed and great progress has been made and is being made toward the elimination of the vestiges of those systems;

(3) For the purpose of abolishing dual school systems and eliminating the vestiges thereof, many local educational agencies have been required to reorganize their school systems, to reassign students, and to engage in the extensive transportation of students;

(4) The implementation of desegregation plans that require extensive student transportation has, in many cases, required local educational agencies to expend large amounts of funds, thereby depleting their financial resources available for the maintenance or improvement of the quality of educational facilities and instruction provided.

(5) excessive transportation of students creates serious risks to their health and safety, disrupts the educational process carried out with respect to such students, and impinges significantly on their educational opportunity;

(6) the risks and harms created by excessive transportation are particularly great for children enrolled in the first six grades; and

(7) the guidelines provided by the courts for fashioning remedies to dismantle dual school systems have been, as the Supreme Court of the United States has said, "incomplete and imperfect," and have failed to establish a clear, rational, and uniform standard for determining the extent to which a local educational agency is required to reassign and transport its students in order to eliminate the vestiges of a dual school system.

(b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems.

DECLARATION

SEC. 4. The Congress declares that this Act is the legislation contemplated by section 2(a)(4) of the "Student Transportation Moratorium Act of 1972."

TITLE I—ASSISTANCE

CONCENTRATION OF RESOURCES FOR COMPENSATORY EDUCATION

SEC. 101. (a) The Secretary of Health, Education and Welfare (hereinafter in this Act referred to as the "Secretary") and the Commissioner of Education shall,

(1) in the administration, consistent with the provisions thereof, of the program established by title I of the Elementary and Secondary Education Act of 1965, and

(2) in the administration of any program designed to assist local educational agencies in achieving desegregation or preventing, reducing, or eliminating isolation based on race, color, or national origin in the public schools,

take such action consistent with the provisions of this title, as the Secretary deems necessary to provide assistance under such programs (notwithstanding any provision of law which establishes a program described by clause (2) of this subsection) in such a manner as to concentrate, consistent with such criteria as the Secretary may prescribe by regulation, the funds available for carrying out such programs for the provision of basic instructional services and basic supportive services for educationally deprived students.

(b) A local educational agency shall be eligible for assistance during a fiscal year under any program described by clause (2) of subsection (a) of this section (nowithstanding any provision of law which establishes such program) if it

(1) is eligible for a basic grant for such fiscal year under Title I of the Elementary and Secondary Education Act of 1965,

(2) operates a school during such fiscal year in which a substantial proportion of the students enrolled are from low-income families, and

(3) provides assurances satisfactory to the Secretary that services provided during such fiscal year from State and local funds with respect to each of the schools described in clause (2) of this subsection of such agency will be at least comparable to the services provided from such funds with respect to the other schools of such agency.

(c) In carrying out this section, the Secretary and the Commissioner of Education shall seek to provide assistance in such a manner that

(1) the amount of funds available for the provision of basic instructional services and basic supportive services for educationally deprived students in the school districts of local educational agencies which receive assistance under any program described in clause (1) or (2) of subsection (a) of this section is adequate to meet the needs of such students for such services, and

(2) there will be adequate provision for meeting the needs for such services of students in such school districts who transfer from schools in which a higher proportion of the number of students enrolled are from low-income families to schools in which a lower proportion of the number of students enrolled are from such families,

except that nothing in this title shall authorize the provision of assistance in such a manner as to encourage or reward the transfer of a student from a school in which students of his race are in the minority to a school in which students of his race are in the majority or the transfer of a student which would increase the degree of racial impaction in the schools of any local education agency.

(d) The Secretary shall prescribe by regulation the proportions of students from low-income families to be used in the program established by this title and may prescribe a range of family incomes, taking into account family size, for the purpose of determining whether a family is a "low-income family."

EFFECT ON ENTITLEMENTS AND ALLOTMENT FORMULAS

SEC. 102. Nothing in this title shall be construed to authorize the Secretary or the Commissioner of Education to

(1) alter the amount of a grant which any local educational agency is eligible to receive for a fiscal year under title I of the Elementary and Secondary Education Act of 1965, or

(2) alter the basis on which funds appropriated for carrying out a program described by section 101 (a) (2) of this title would otherwise be allotted or apportioned among the States.

SEC. 103. Upon approval of a grant to a local educational agency to carry out the provisions of this title, the assurances required by the Secretary or the Commissioner of Education pursuant thereto shall constitute the terms of a contract between the United States and the local educational agency, which shall be specifically enforceable in an action brought by the United States.

TITLE II—UNLAWFUL PRACTICES

DENIAL OF EQUAL EDUCATIONAL OPPORTUNITY PROHIBITED

SEC. 201. No State shall deny equal educational opportunity to an individual on account of his race, color, or national origin, by:

(a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools.

(b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with title IV of this Act to remove the vestiges of a dual school system.

(c) the assignment by an educational agency of a student to a school, other than the one closest to his place of residence within the school district in which he resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his place of residence within the school district of such agency providing the appropriate grade level and type of education for such student.

(d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff.

(e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency.

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

RACIAL BALANCE NOT REQUIRED

SEC. 202. The failure of an educational agency to attain a balance, on the basis of race, color, or national origin, of students among its schools shall not constitute a denial of equal educational opportunity, or equal protection of the laws.

ASSIGNMENT ON NEIGHBORHOOD BASIS NOT A DENIAL OF EQUAL EDUCATIONAL OPPORTUNITY

SEC. 203. Subject to the other provisions of this title, the assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational opportunity unless such assignment is for the purpose of segregating students on the basis of race, color, or national origin, or the school to which such student is assigned was located on its site for the purpose of segregating students on such basis.

TITLE VIII—ENFORCEMENT

CIVIL ACTIONS

SEC. 301. An individual denied an equal educational opportunity, as defined by this Act, may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate. The Attorney General of the United States (hereinafter in this Act referred to as the "Attorney General"), for or in the name of the United States, may also institute such a civil action on behalf of such an individual.

JURISDICTION OF DISTRICT COURTS

SEC. 302. The appropriate district court of the United States shall have and exercise jurisdiction of proceedings instituted under section 301.

INTERVENTION BY ATTORNEY GENERAL

SEC. 303. Whenever a civil action is instituted under section 301 by an individual, the Attorney General may intervene in such action upon timely application.

SUITS BY THE ATTORNEY GENERAL

SEC. 304. The Attorney General shall not institute a civil action under section 301 before he—

(a) gives to the appropriate educational agency notice of the condition or conditions which, in his judgment, constitute a violation of title II of this Act; and

(b) certifies to the appropriate district court of the United States that he is satisfied that such educational agency has not, within a reasonable time after such notice, undertaken appropriate remedial action.

ATTORNEY'S FEES

SEC. 305. In any civil action instituted under this Act, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs, and the United States shall be liable for costs to the same extent as a private person.

TITLE IV—REMEDIES

FORMULATING REMEDIES APPLICABILITY

SEC. 401. In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws.

SEC. 402. In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, which may involve directly or indirectly the transportation of students, a court, department or agency of the United States shall consider and make specific findings on the efficacy in correcting such denial of the following remedies and shall require implementation of the first of the remedies set out below, or on the first combination thereof, which may remedy such denial:

(a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;

(b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;

(c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin to a school in which a minority of the students are of their race, color, or national origin;

(d) the creation or revision of attendance zones or grade structures without exceeding the transportation limits set forth in section 403;

(e) the construction of new schools or the closing of inferior schools;

(f) the construction or establishment of magnet schools or educational parks; or

(g) the development and implementation of any other plan which is educationally sound and administratively feasible, subject to the provisions of sections 403 and 404 of this Act.

TRANSPORTATION OF STUDENTS

SEC. 403. (a) No court, department, or agency of the United States shall, pursuant to section 402, order the implementation of a plan that would require an increase for any school year in

(1) either the average daily distance to be traveled by, or the average daily time of travel for, all students in the sixth grade or below transported by an educational agency over the comparable averages for the preceding school year; or

(2) the average daily number of students in the sixth grade or below transported by an educational agency over the comparable average for the preceding school year, disregarding the transportation of any student which results from a change in such student's residence, his advancement to a higher level of education, or his attendance at a school operated by an educational agency for the first time.

(b) No court, department, or agency of the United States shall, pursuant to section 402, order the implementation of a plan which would require an increase for any school year in

(1) either the average daily distance to be traveled by, or the average daily time of travel for, all students in the seventh grade or above transported by an educational agency over the comparable averages for the preceding school year; or

(2) the average daily number of students in the seventh grade or above transported by an educational agency over the comparable average for the preceding school year, disregarding the transportation of any student which results from a change in such student's residence, his advancement to a higher level of education, or his attendance at a school operated by an educational agency for the first time,

unless it is demonstrated by clear and convincing evidence that no other method set out in section 402 will provide an adequate remedy for the denial of equal educational opportunity or equal protection of the laws that has been found by such court, department, or agency. The implementation of a plan calling for this subsection, shall be deemed a temporary measure. In any event such plan shall be subject to the limitation of section 407 of this Act and shall only be ordered in conjunction with the development of a long term plan involving one or more of the remedies set out in clauses (a) through (g) of section 402. If a United States district court orders implementation of a plan requiring an increase in transportation, as described in clause (1) or (2) of this subsection, the appropriate court of appeals shall, upon timely application by a defendant educational agency, grant a stay of such order until it has reviewed such order.

(c) No court, department, or agency of the United States shall require directly or indirectly the transportation of any student if such transportation poses a risk to the health of such student or constitutes a significant impingement on the educational process with respect to such student.

DISTRICT LINES

SEC. 404. In the formulation of remedies under section 401 or 402 of this Act, the lines drawn by a State, subdividing its territory into separate school districts, shall not be ignored or altered except where it is established that the lines were drawn for the purpose, and had the effect, of segregating children among public schools on the basis of race, color, or national origin.

VOLUNTARY ADOPTION OF REMEDIES

SEC. 405. Nothing in this Act prohibits an educational agency from proposing, adopting, requiring, or implementing any plan of desegregation, otherwise lawful, that is at variance with the standards set out in this title, nor shall any court, department, or agency of the United States be prohibited from approving implementation of a plan which goes beyond what can be required under this title, if such plan is voluntarily proposed by the appropriate educational agency.

REOPENING PROCEEDINGS

SEC. 406. On the application of an educational agency, court orders or desegregation plans under Title VI of the Civil Rights Act of 1964 in effect on the date of enactment of this Act and intended to end segregation of students on the basis of race, color, or national origin shall be reopened and modified to comply with the provisions of this Act.

TIME LIMITATION ON ORDERS

SEC. 407. Any court order requiring, directly or indirectly, the transportation of students for the purpose of remedying a denial of the equal protection of the laws shall, to the extent of such transportation, terminate after it has been in effect for five years if the defendant educational agency is found to have been in good faith compliance with such order for such period. No additional order requiring such educational agency to transport students for such purposes shall be entered unless such agency is found to have denied equal educational opportunity or the equal protection of the laws subsequent to such order, nor remain in effect for more than five years.

SEC. 408. Any court order requiring the desegregation of a school system shall termi-

nate after it has been in effect for ten years if the defendant educational agency is found to have been in good faith compliance with such order for such period. No additional order shall be entered against such agency for such purpose unless such agency is found to have denied equal educational opportunity or the equal protection of the laws subsequent to such order, nor remain in effect for more than ten years.

SEC. 409. For the purposes of sections 407 and 408 of this Act, no period of time prior to the effective date of this Act, shall be included in determining the termination date of an order.

TITLE V—DEFINITIONS

SEC. 501. For the purposes of this Act—

(a) the term "educational agency" means a local educational agency or a "State educational agency" as defined by section 801(k) of the Elementary and Secondary Education Act of 1965.

(b) the term "local educational agency" means a local educational agency as defined by section 801(f) of the Elementary and Secondary Education Act of 1965.

(c) the term "segregation" means the operation of a school system in which students are wholly or substantially separated among the schools of an educational agency or within a school on the basis of race, color, or national origin.

(d) the term "desegregation" means "desegregation" as defined by section 401(b) of the Civil Rights Act of 1964.

(e) an educational agency shall be deemed to transport a student if any part of the cost of such student's transportation is paid by such agency.

(f) the term "basic instructional services" means instructional services in the field of mathematics or language skills which meet such standards as the Secretary may prescribe.

(g) the term "basic supportive services" means noninstructional services, including health or nutritional services, as prescribed by the Secretary.

(h) expenditures for basic instructional services or basic supportive services do not include expenditures for administration, operation and maintenance of plant, or for capital outlay, or such other expenditures as the Secretary may prescribe.

Mr. DOMINICK. Mr. President, in conjunction with my introduction of President Nixon's Equal Educational Opportunities Act of 1972, I wish to bring to the attention of my colleagues a most practical analysis of the problem of minority exclusion and injustice by Joseph Alsop in this morning's Washington Post.

Mr. Alsop quite validly traces upward mobility of previous minority groups to jobs—jobs acquired through improved education. The same avenue lies open to present excluded minorities through improved education gained, not through what Mr. Alsop identifies as the "phony cure" of busing, but through strong compensatory education. Mr. Alsop cites strong evidence that the concept is indeed the right approach toward achieving the future dignity of all races, creeds, and colors.

Mr. President, I ask unanimous consent that the text of Mr. Alsop's March 22 column be printed at this point in my remarks.

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

BUSING—A PHONY CURE

(By Joseph Alsop)

One other point positively demands to be made about the busing controversy, which seems to be tearing a lot of people to bits. It concerns the escape of minority groups from exclusion and injustice—a process that has been far too little studied.

Our current plethora of guilt-ridden Americans talk as though exclusion and injustice for every minority were permanent American specialties. The contrary is actually true.

Japan, at present, has no less than five very harshly excluded minorities.

These are, the local children of black and white American soldiers, and three groups of pure Japanese blood whose origins are also lost in the mists of history, the Eta, the Fox people, and incredibly enough, "the unpersons."

In England, too, black citizens began to feel exclusion, prejudice and injustice just as soon as their numbers began to mount. In this country alone, in the whole modern world, have fair numbers of formerly excluded minority groups almost wholly escaped.

It has happened fairly recently. What are now called the "ethnic groups" suffered serious job discrimination, housing discrimination, and other forms of exclusion only four decades ago. Today, however, their situation is just the same as that of the once-dominant WASP.

Only 25 years ago, the Chinese and Japanese situation was worse, if anything, than that of our black minority today. The black minority never suffered anything like the Asian land laws of the West Coast states, which the Supreme Court only struck down in 1948. Today, however, the Chinese and Japanese situation is far superior, on average, to that of the poor old WASP.

It is perfectly clear, too, what produced the escapes from exclusion of these minorities. The secret can be put in one word: jobs.

All the formerly excluded minorities got better and better jobs, some by degrees, while the Chinese and Japanese got better jobs with an astonishing rush, despite their supposedly fatal different skin color.

In case of the black minority in America, a much more terrible past history and very heavy and continuing economic handicaps, both make the escape from exclusion and injustice a lot more difficult. But experience has still shown that escape will surely result, if the model of the previous escapes can only be followed. The secret again is jobs.

That hooks the matter directly onto the busing row because the gateway to decent jobs is decent education. No power on earth can terminate the exclusion and injustice suffered by black Americans, so long as an actual majority of black school-leavers are not given the simple educational tools to get and hold decent jobs. That is where we are today.

If school desegregation by busing would provide the needed educational tools, we ought to bus on a huge scale. The school data plainly show, however, that this is not true. Mere desegregation does little or nothing to overcome the terrible educational retardation that afflicts the average black child in school. Hence busing is a phony cure.

That leaves one other cure, but this cure is now widely considered worthless. It was said, for instance, that "there is not a shred of evidence that a compensatory education program . . . will improve the 'education' now being dispensed" by ghetto schools. The author of those words writes for a great New York newspaper. Maybe he ought to bustle up to New York and raise a major row because he has been grossly misinformed.

The success was never reported in New York, for reasons of fashion, presumably, that leave one a bit bewildered. But there is far more than "a shred of evidence," generated right in New York City. It comes from the unique serious experiment in ghetto school improvement ever attempted in this country, this was called the More Effective Schools.

At the end of the 1966–67 school year, for example, the eighteen full-ghetto schools in the MES program underwent the usual reading tests. The end-third graders had every handicap other black children have. But in those tests they achieved a reading average bang on the nose of the national average.

It does not sound like much. But it was far, far more than has ever been achieved by simple school desegregation. It also meant that up through third grade, at least, there was no black education retardation. For want of local support, nonetheless, the MES experiment has been all but dismantled since 1967. Yet the real criticism of the President's new school message is still the flabbiness of the Nixon approach to ghetto school improvement.

By Mr. HARRIS:

S. 3398. A bill providing for the election of the tribal council of the Osage Nation of Indians. Referred to the Committee on Interior and Insular Affairs.

Mr. HARRIS. Mr. President, I send to the desk for appropriate reference a bill to provide for the election of the tribal council of the Osage Nation of Indians.

At a time when we profess to believe in tribal self-determination, the people of the Osage Nation are being frustrated in their efforts to gain control over their own lives, on issues which no longer only concern the disposition of oil, gas, and mineral estates in trust. The Osages rightfully expect to have a say in the vital decisions concerning the health, welfare, and education of their people. Yet, under present statutes, the existing powers of the Osage Tribal Council are limited to actions taken within the purview of the mineral trust estate. Perhaps the best explanation of this problem can be found in the official Bureau of Indian Affairs evaluation report for the Osage Agency, dated January 1971:

The present tribal council for the Osage Tribe was established by a 1906 Statute which provides for the election of a tribal council by headright share holders. There are many questions today as to the validity of the original roll which was created under the 1960 Statute. As it presently stands, it would be futile to challenge the roll. Aside from the questions which were raised as to the original roll, part of the dividedness which exists among the tribal members is the allegation that the present tribal council is not in fact truly representative of the Osage Tribe. In some respects these allegations may have merit. The 1906 Statute franchised the original headright holders but the present devolution of headright shares has caused the vote to become fractionalized, and further *the headright voting system has created the condition where a proportion of Osage Indians who may be of one-quarter blood or more, but who do not own a headright interest, cannot therefore vote for the tribal council.*

The present tribal council procedurally elected under the method delineated by the 1906 Statute is actively seeking to expand its functions in areas other than the mineral trust interest. These areas are education, housing, employment, and economic development. However, under the Statute the tribal council's powers are limited to actions

taken within the purview of the mineral trust estate.

The tribal council now finds itself in a legal quandry [sic] since their powers under the Statute are limited to the mineral trust estate but the needs of the Osage Tribe certainly extend beyond the mere management of that estate. The tribal council has recognized the shortcoming, but has not as yet accepted the limitation of the Statute and the lack of a formal constitution and bylaws. It finds itself in a legal dilemma since the tribal council enjoys the majority support of the headright holders [Osage Census roll in June 1970 numbered total of 8,200; in December 1970, 3,120 living persons with headrights, of whom 2,173 were eligible to vote for tribal council if over 21; 42% of headright owners live outside Oklahoma; one-third of all headright owners are non-Osage, since an Osage deemed "competent" to sell his headright may do so to non-Indians] while at the same time it may not necessarily enjoy the majority of the non-headright holders who are Osage Indians.

The Evaluation Team did discuss the situation with the tribal council and it is our present recommendation that the Commissioner consider presenting to the council various alternative methods to provide equal representation among all the Osage Indians, headright as well as non-headright holders. For instance, this could be accomplished by diverting the mineral trust estate from the general functions normally embodied in a tribal council by separating the mineral estate through a corporate trust structure and by establishing a tribal government governed by a constitution and bylaws. Another method could be to provide for an expansion of the tribal council and to allow the new members to be elected by the entire community while at the same time preserving the integrity of the mineral estate by the continuation of the present tribal council operation. These are not exclusive recommendations and they should be considered merely for discussion purposes. The underlying purpose of this recommendation is for the Commissioner to consider various alternatives which could be presented to the present governing body whereby representation of this [sic] unfranchised Osage Indians could obtain representation on a tribal governing body. [pp. 20–22] [emphasis added].

The recommendations contained in this report have yet to be put into action by the Commissioner of Indian Affairs. Therefore, in order to stimulate discussion within the Senate Committee on Interior and Insular Affairs on this issue, I am introducing a bill to amend the Osage Allotment Act of 1906 (34 Stat. 539, as amended) to provide for a new elected Tribal Council. This legislation, which was introduced in the House by Representative ABZUG, would also create an Osage Minerals Board as a separate entity. A principal chief would preside over both the Council and the Board, and the present members of the Tribal Council would become the initial members of the Osage Minerals Board. The creation of a separate Tribal Council and Minerals Board basically implements the recommendations contained in the evaluation report. Furthermore, this bill would provide greater participation of all Osages of one-fourth degree Osage blood or more in the election of the Tribal Council. This would do much to end the situation whereby non-Indians control internal tribal goverance.

Mr. President, I am delighted to see that the Senate Committee on Interior and Insular Affairs has scheduled hearings on the Osage claims distribution legislation on March 28. I certainly hope that at the same time the committee will consider this closely related bill that I have introduced today.

Mr. President, I ask unanimous consent that the full evaluation report for the Osage Agency be printed in the RECORD, along with a copy of my bill.

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

S. 3398

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 9 of the Act of Congress approved June 28, 1906 (34 Stat. 539) as amended by Section 7 of the Act of Congress approved March 2, 1929 (45 Stat. 1478) and further amended by the Act of Congress approved August 28, 1957 (71 Stat. 471) be, and the same is hereby, amended to read as follows:

(A) That the tribal government of the Osage Tribe of Indians, shall consist of one tribal council having the following officers: A principal chief, an assistant principal chief and eight members of the tribal council; said officers to be elected in a general election to be held in the city of Pawhuska, Oklahoma, on the first Monday in June, 1972, and on the first Monday in June each four years thereafter and said officers shall be elected for a period of four years commencing on the first day of July following said elections; that the Osage Tribal Council shall have or exercise all delegated or residual powers of tribal government excepting only management of the oil, gas, coal and other minerals underlying the area formerly known as the Osage Indian Reservation.

(B) The persons now holding office as councilmen of the present Osage Tribal Council shall, upon the election of officers to the tribal council in accordance with "A" above shall be thereafter members of the Osage Minerals Board and said board shall thereafter have all powers of management of the oil, gas, coal and other minerals that have prior to the date of passage of this act, been vested in the Osage Tribal Council by law.

(C) That person elected to the office of Principal Chief in the election provided for in "A" above shall be the presiding officer of the Osage Tribal Council and the Osage Minerals Board and in the absence of the Principal Chief the Assistant Principal Chief shall serve as presiding officer; the presiding officer shall vote only in case of a tie vote of the council or board.

(D) The person elected to the office of Assistant Principal Chief in the election provided for in "A" above shall have no vote in the proceedings of the Tribal Council or the Minerals Board unless he is presiding by reason of the absence of the principal chief; in the event that the office of Principal Chief becomes vacant, the person serving as Assistant Principal Chief shall assume the office of Principal Chief.

(E) No person may serve as Principal Chief or Assistant Principal Chief who is not an adult full-blood member of the Osage Tribe; no person may serve as a member of the Osage Tribal Council who is not an adult member of the Osage Tribe and possesses one-fourth degree or more of Osage Indian blood; and no person may serve as a member of the Osage Mineral Board who is not an allottee or a descendant of an allottee enrolled pursuant to the act of June 28, 1906 (34 Stat. 539) and who owns not less than one full Osage headright or mineral share.

(F) Voting for officers of the Osage Tribal Council shall be held at the Osage Agency and qualifications of voters shall be the same as qualifications for the office of tribal councilman; each person shall have one vote and voting shall be conducted by regulations established by the Commissioner of Indian Affairs; Provided, that the use of absentee ballots are prohibited for elections of tribal officers.

(G) Only adult persons who are allottees or descendants of allottees enrolled pursuant to the act of June 28, 1906 (34 Stat. 539) and whose names appear on the quarterly annuity roll at the Osage Agency may vote for members of the Osage Minerals Board; voting shall be conducted by regulations established by the Commissioner of Indian Affairs; Provided, that each ballot shall have exactly the same value as the voter's headright interest shown on the last quarterly annuity roll.

(H) Filling of vacancies in the office of Assistant Principal Chief, in the tribal council and in the mineral board shall be provided for by regulations by the Commissioner of Indian Affairs.

(I) The Commissioner of Indian Affairs is hereby authorized to remove from any office in the tribal council or minerals board any person for good cause, to be by him determined, after the party involved has had due notice and opportunity to appear and defend himself.

(J) The powers and duties of the Osage Minerals Board shall continue in full force and effect to January 1, 1984 and thereafter until otherwise provided by Congress.

(K) That nothing herein shall be construed as in any way changing the rights of the Osage Tribe in oil, gas, coal, and other minerals as fixed in the act of June 28, 1906 as amended be construed to change or amend any valid mineral lease entered into prior to 1 July 1968.

EVALUATION REPORT: OSAGE AGENCY, JANUARY 11–15, 1971

INTRODUCTION

The Osage Agency evaluation was conducted on the premise that the Agency is to be service-oriented to the needs of the Indian people while it performs the trust duties of the United States, which are substantial at Osage. Within this premise, the evaluation aimed at determining the degree and extent of implementation of the Commissioner's policies and programs. These included tribal involvement in preparation of the 1973 Program Memorandum, tribal opportunity for contracting for services, and the general relationship of the Agency to the tribe, and the tribe with the surrounding community. In addition, the manner in which the Indian Business Development Fund is being utilized.

The Osage Agency serves Indians in Osage County, corresponding to the original reservation area. The minerals of the entire county are held in trust for the tribe. Trust status also applies to the surface rights of 230,000 acres in the county, nearly all of which belongs to individuals.

The population of the county includes 2,565 Indians according to the 1970 Census. About half of these are Osages. The Osage tribal roll includes about 8,200 members.

The Bureau of Indian Affairs maintains a permanent staff of 38 persons. Their grades and Indian descent are shown in the section on findings. The tribe pays for 10 of the BIA employees who are concerned with minerals; in addition the tribe at the present time pays for 4 members of the Interior Department Solicitor's Office who are stationed at Osage.

PROCEDURE

The team consisted of:

BIA Central Office

Arthur J. Gajarsa, Chairman (Assistant to the Commissioner).

Raymond Butler (Social Services).

Donald Maynard (Real Property Management).

Louis Conger (Statistics).

Department of Interior Central Office

Linda K. Bemis (Program Analyst, Bureau of Land Management).

Osage Tribal Council

John Shaw (Councilman).

Other Osage

Joseph Shunkamolah, Jr. (served on January 14).

The schedule follows:

Monday, January 11, 1971

Day—Meeting with Sylvester Tinker, Tribal Chief, and John Pappan, Agency Superintendent.

Evening—Meeting with Osages for Action at Hominy. John Shaw did not attend. Commissioner Bruce had met with this group in the morning, but not as a part of the evaluation effort.

Tuesday, January 12, 1971

Day—Meeting with BIA branch chiefs and chief of tribe in tribal council chamber.

Evening—Meeting of BIA team members with Agency Superintendent.

Wednesday, January 13, 1971

Morning—Interviews with individual Indians and community representatives in Osage Museum.

Afternoon—Part of team met with Osage Nation Organization; rest of team continued interviews with public.

Thursday, January 14, 1971

Day—Part of team attended a special meeting of the full council in the afternoon. The rest interviewed individual BIA employees and continued the public interviews throughout the day.

Friday, January 15, 1971

Morning—Wrap up with Agency Superintendent.

FINDINGS

A. Past economic situation

Until recently, everything at Osage revolved around the wealth of the mineral trust.

1. Those Osages with one or more headrights were wealthy and had a continuous quarterly income. Osages could afford higher education, and many did so.

2. The BIA program was funded by the tribe, and confined itself largely to mineral and land rights. Indians without headrights or trust land were not served. The tribe also funded a field office of the Solicitor at Osage, and does so today, but has requested Government funding.

3. There is a corpus of Federal legislation applying only to Osages. For example, 25 CFR part 73 specifies the tribal council and limits voting to Indian headright owners. Other parts of 25 CFR applying to Osages are 17 (wills), 74 (government of Osage villages), 108 (IIM accounts and budgets), 123 (tribal roll and competency), 127 (lands), 175 (mineral), and 183 (oil and gas). Osages are excluded from the IRA and Oklahoma Welfare Acts.

4. An outsize population of lawyers grew up in Pawhuska, depending on Indian probates, guardianship actions, and other actions concerned with trust property, and competency status. In 1953, the BIA published a 192-page report "The Osage People and Their Trust Property" describing the situation and detailing abuses.

B. Current economic situation

In recent years income from the mineral trust has declined, and now stands at $2,800 a year, about one-half the 1960 figure. This situation is bringing about changes and particular stresses.

1. Older Osages accustomed to living on headrights income can no longer do so. Many who never worked face a difficult adjustment late in life. Jobs are not always open to Osages because the community still thinks of Osages as wealthy. Heirship fractionalization further reduces the amount received by individuals with only part of a headright.

2. Headright owners have a keen interest in raising oil and gas revenues. This tends to put the tribal council in the predicament to produce more income. When there may be little they can do about it. Whatever the prospect may be for secondary and tertiary recovery methods, and this is a major technical study in itself, there will be disagreements about the proper course of action. As an example, debate still goes on about a referendum taken years ago concerning reduced royalties for the waterflooding method of secondary oil recovery.

3. Other ways to increase tribal income are being pursued by the council:

(a) Reaffirming established water rights, charging for their use, and recovering just compensation for past and future condemnation actions. The tribe sees a Federal conflict of interest between the BIA and the Corps of Engineers in this field.

(b) Getting the BIA and the Department to take over the $250,000 in Agency and Solicitor expenses still funded by the tribe (until 1968 the tribe paid all costs; now BIA pays about half the Agency cost).

(c) Legislation, which was introduced but lapsed with the 91st Congress, covered a number of issues. It included transfer of probate from State to Federal jurisdiction, so as to reduce legal fees and provide better protection to Osage property. (The Bar Association of Osage County, on the other hand, feels that the present fee schedule set by the Secretary for certain actions is too low).

(d) Eliminating certain kinds of taxation on trust income, by legislation, litigation, or regulation.

4. *Agricultural leases.* The Superintendent and the BIA Appraiser (Couch) were frequently praised by Indians for substantially raising grazing lease rates on trust property, over the opposition of the cattlemen's association. The BIA appraisal policy is to include non-Indian land values as the comparable sales or lease standard; apparently a considerable change from previous practice. Most Indians lease out their surface rights; there are 88 restricted Indian operators but only five are of economic size. About 16 percent of Osage County surface is in trust status.

A troublesome case mentioned by various Indian people concerned a white rancher (Morrison) with a 1/27th interest in a parcel adjoining other land he holds, who run cattle on the whole parcel and brought suit against the principal owners when they sought to fence their land. The owners are receiving no lease money while the case is in court.

5. A tribal judgment of $13,000,000 has been appropriated by Congress. There are, of course, basic differences of opinion among the Osages on who should share and how the money should be programmed. Legislation is now being prepared for Congressional action.

6. The present council is moving into areas beyond the mineral trust by organizing committees for education, employment and industrial development, health and community services, and housing. A tribal housing authority is being established. The tribe has for some time been involved with OEO, especially in the NYC program. This expansion of the scope of council activity is resisted by the ONO group, which views the council as liimted to dealing with the mineral estate.

7. In the last few years, the Agency has extended its services beyond the mineral and trust land functions. Such programs as social services, employment assistance, and scholarships have been added, as well as the Indian Business Development Fund. These services are also available to non-Osage Indians living in Osage County. There were complaints about the one-quarter Indian blood requirement in some of these programs, especially scholarships.

8. *Trust status of the mineral estate.* The Act of October 6, 1966, states that minerals are reserved to the Osage Tribe until April 8, 1983, and thereafter until otherwise provided by Act of Congress, Osage opinion was virtually unanimous that the trust status must be continued beyond 1983 to permit secondary and tertiary recovery of oil and gas remaining in the ground (estimated presently to equal one-half the original total). Related to this is the fear that Osages who have competency forced on them are not yet ready to protect themselves and their property.

9. *Credit.* Osages do not participate in the Revolving Loan Fund, by statute. Need for Indian credit was mentioned, but not as a major problem. Local banks apparently are restrictive in loans, but this may be a general local policy not confined to Osages. Tulsa banks are stated to be more cooperative.

10. *Housing.* The Council is setting up an Indian Housing Authority. Three tracts of land for Osage Indian villages were established by 25 CFR part 74—Pawhuska, Hominy, and Grayhorse (at Fairfax). Members of the Pawhuska village community council mentioned needs for roads and utilities (the water pipes are old and tend to break). The county has started putting in streets, curbs, gutters, and signs. Housing did not surface as a major issue in the interviews.

C. Osage Tribe

1. Of 8,200 on the Osage Census roll in June 1970, 4 percent were fullbloods and 70 percent were less than one-quarter Indian blood. Apparently a number of mixedbloods were carried on the original 1906 roll, in addition to much intermarriage since. So far as can be determined from the addresses on the census roll, admittedly incomplete, 30 percent live in Osage County, 30 percent in other parts of Oklahoma, and 40 percent live outside Oklahoma.

2. In December 1970 there were 3,120 living persons with headrights (i.e., owners of the mineral estate) plus 122 estates of deceased persons not yet distributed to heirs. Owners of headrights may be original allottees from the 1906 roll, their heirs, and purchasers of headrights from competent Indians. Of these, 2,178 were Osages and thus eligible to vote for the tribal council if over age 21. The geographic distribution of headright owners resembles that for the Osage census, but the date are much more accurate. There are 31 percent in Osage County, 27 percent in other parts of Oklahoma, and 42 percent outside the state.

Since headrights usually pass by inheritance, elder persons predominate—25 percent are 61 or older, and 68 percent are 41 or older. Headright owners tend to feel, though not unanimously, that exclusion of younger members of the family from the headright was not a major problem because parents could and did share the income. The Osages interviewed supported voting rights for younger Osages more than income rights.

3. In June 1970 the tribal council was elected by headright owners as prescribed by statute, to serve from July 1970 to June 1974.

4. Dissension in the tribe centers in two relatively small groups. The basic issues are the powers of the council beyond the mineral estate, eligibility for voting and holding office and the resulting effect on the representativeness of the council and judgment fund distribution. The two groups are:

(a) *Osage Nation Organization* (ONO). Their leaders include Charles Lohah (whom the deam did not see), LeRoy Logan, Raymond Lasley, and Hazel Harper. Their basic

principle is control by persons of one-quarter or more Osage blood, regardless of headright interest. They view the present council as essentially a business committee representing only mineral affairs. All other Osage affairs should be under a different council elected by Osages. Similarly, the judgment distribution should be to descendants of one-quarter Osage blood or more, rather than being based on headrights and the 1906 roll which they feel included many persons of little or no Osage blood. ONO has an Oklahoma charter, a constitution, and by-laws, which were provided to the evaluation team. They have developed a program plan, copies of which have been given to Commissioner Bruce, and before him to Commissioner Bennett. They claim 800 members, but others dispute this. The Osage census lists about 2,500 persons with one-quarter or more Osage blood out of a total of 8,200. Although many of the ONO group have headrights, their general support must lie outside judging from the 1970 election in which Logan and Lasley ran last in a field of 14 candidates for councilman, receiving votes equal to 250 headrights. Such a vote from headright owners is not surprising considering that many of them have less than one-quarter Osage blood.

(b) *Osages for Action Organization* (OAO). Joe Shunkamolah is leader of this active but apparently small group. It is centered at Hominy. They feel the Council and the Agency are mismanaging tribal funds and are not furnishing information on the transactions. Accordingly, they want the tribal council suspended or removed, the Superintendent rotated, and a GAO audit of the Agency, particularly trust money. While they favor an Osage blood quantum requirement, the ONO group refuses to be associated with OAO. The OAO program was not made clear to the evaluation team, except for removal of incumbent officials and judgment distribution.

In response to OAO charges, the team determined that GAO conducts an audit of the Agency every two years, the latest in June 1970 with no adverse findings. Another issue, concerning the investment of mineral royalties while waiting for the quarterly distribution, is controlled by Federal regulations for trust money and is under BIA rather than the Council. The reasonableness of expenditures by the Council for its own activities is a matter of judgment, but less than one percent of the mineral receipts for this purpose does not seem excessive to the evaluation team.

The charge of inadequate information about Council business has substance and may partly explain other charges, or the acceptance of such charges by the Osages, as based on lack of information. The Council has no constitution or by-laws. Its sessions are recorded on tape, but this not transcribed, and the only minutes are summaries prepared by the Superintendent's secretary, an Osage who sits as secretary to the tribal council in open meetings. Closed meetings are held on occasion, but the bulk of the meetings are open. Tribal financial accounts are kept by the BIA, and an annual report is made to headright owners, but it appears that the monthly tribal account reports are made available only to headright owners on request.

In interviews the team held with individual Osages, a predominant attitude was that OAO was a small group that did not represent any considerable group of Osages, that it had publicity beyond its importance (partly as the result of the Commissioner's meeting), and was critical, but not constructive. Even some Indians who attended the Hominy meetings made such comments in private. Associated with this was frequently the comment—the Council was elected; now let them do their work and quit harassing them. On the other hand, in the June 1970 election, Joe Shunkamolah, who was one of two candidates for Assistant Principal Chief, received 40 percent of the headright vote for that office.

D. Other Indians in Osage County

It is estimated that about one-half the Indians in Osage County are not Osage. Many come from other Oklahoma tribes. It is safe to say that until the last few years these Indians, along with Osages who had no headright or trust land, received almost no services from the Agency.

Now the Agency has other programs, such as employment assistance, social services, and scholarships, that are available to Indians regardless of tribal or trust status (although there may be an Indian blood quantum requirement).

The staff members concerned with these programs make a point of serving all eligible Indians; however, the fact that they are eligible may be unknown to many Indians because of the long history of the Agency in serving only Osages with trust interests.

E. BIA agency

1. *Rotation.* Most Osages interviewed objected in principle to rotation every two years because it takes longer for a Superintendent to learn the situations so he can make a contribution. Support for the present Superintendent (Pappan) was extensive. Typical remarks, heard over and over again, were: "He is the best superintendent we have had in years. He understands Indians and really tries to help." The Agency staff also got good marks in general.

OAO definitely wants the present Superintendent rotated, and ONO is agreeable to rotation.

2. *Takeover.* The tribal council is not interested in takeover; quite the reverse. They want the BIA to take over funding of the remaining programs which the tribe is supporting, and feel that any takeover proposal by the tribe might jeopardize this goal. Very few interviews commented on tribal takeover.

3. *Tribal involvement with 1973 Program Memorandum.* The council was satisfied with their involvement. At a council meeting, the Superintendent and Agency branch heads explained their programs and proposals. Meetings were also held with individual council members concerned with a particular program area. The Agency and the council maintain close cooperation in the operating program.

4. *Indian Business Development Fund.* There were 7 applications received. Of these, 5 were funded at the Agency for a total of $14,100 as follows:

$4,800 Bates Shaw for leasing and managing tribal golf course.

$3,000 Raymond Redcorn for a food processing facility.

$2,500 Aaron Bighorse for a gas station lease and inventory.

$2,000 George-Ann Robinson to expand Indian craft shop.

$1,800 Lillie Page McGuire to expand beauty shop.

One project received from Osage Indians was outside the Agency jurisdiction and was funded from the Central Office. The amount was $13,800 for a haberdashery shop in Albuquerque.

One project was disapproved because outside financing failed. It concerned a gas station, but the gas company rejected the lease because the applicant wanted to have his son run it for him.

Additional inquiries have been received, and the Superintendent felt that eligible projects would be available in 1972, even through $4,000 of the 1971 money was returned to the Central Office.

5. *Employment of Indians in Osage Agency.* Of the 38 permanent BIA employees, 25 (66%) are Indians. Fifteen are Osage and 10 are from other Oklahoma tribes.

The distribution by grade is:

	Indian	Non-Indian
Grade:		
14	1	
13		1
12	1	5
11	3	4
9	1	
8	1	
7	2	
6	1	
5	6	2
4	5	
3	3	
Wage Board	1	1
Total	25	13

6. *Questionnaire for BIA employees.* Each permanent classified BIA employee was asked to complete a confidential questionnaire and return it to the team in a sealed envelope. The envelopes were opened in Washington and the answers were tallied. Highlights of the returns follow:

There were 32 respondents (91% of the 35 eligible, not counting the Superintendent):

Median age, 47 years.

Average service in BIA, 15 years.

Average Federal service, 16½ years.

Do you plan to continue working for BIA? 94% yes.

Do you like working for BIA? 78% yes; 22% so-so; 0% no.

How would you rate employee morale at the Agency? 34% good; 52% indifferent; 14% poor.

Do you think your fellow workers are satisfied with the opportunity for promotion in the Bureau? 34% more yes; 63% more no; 3% no answer.

Formal training in last 12 months? 38% yes.

Could you do better job with more training? 94% yes.

Are you satisfied with training opportunities offered by and through the Bureau?, 47% more yes; 53% more no.

Does job description show what work you do? 100% all or most.

Is person who tells you what to do most of the time shown as your supervisor in your job description? 97% yes.

Are you ever idle because you have no work to do? 73% seldom or never.

7. *HM Accounts.* For many restricted Osages, contact with the Agency centers on their HM accounts, consisting mainly of head right payments and agricultural lease rentals. There are special statutes for Osages, including Agency approval of individual expenditures above a certain basic allowance, and budgets where the Agency considers it necessary. A system of advance commitment of quarterly headright payments exists, whereby banks and merchants advance credit to Indians with Agency approval (purchase order) against the next headright payment, which the Agency in due course pays directly to the merchant. Some Indians regularly commit 80 percent (the maximum) of their headright in advance and are wired into a cycle that is hard to break. The banks and merchants are charging regular interest rates against what are really secured loans.

On its face the system smacks of undue paternalism. However, in the interviews only a few complaints were made—for example, that some Indians were afraid to come to the Agency to ask about their accounts (although less so than formerly), that information about one's account was not provided (a ledger on each account is sent out each January but had not gone out when we were there), and that one person was treated like a baby.

On the other hand, inability of some Osages to manage their funds was frequently mentioned, and alcoholism is a significant problem among Osages which may be restrained by HM controls.

8. *Time Sheets.* On three different occa-

sions Indians complained about some BIA staff members keeping their own time sheets. These were not specified, except for one in the Administrative Services branch. Another complaint concerned moonlighting by a BIA employee who had an accounting business downtown (we were informed later that written permission had been given and the time was being watched).

F. Other agencies

1. *Health.* Indian Health Service provides biweekly clinics at the Agency, there are community health representatives, and hospital services at Pawnee. Diabetes, alcoholism, and mental health are reported as problems. There is a difference of opinion between the tribe and IHS on who should fill a vacant doctor slot at Pawnee.

2. *OEO.* The Osage Tribe is sponsor of the NYC program, which serves Indians and non-Indians in a number of counties. The program was one of the first in the country and is regarded as a model. The tribe is pleased with other OEO services.

3. *Other agencies.* Relations appear to be generally good with county welfare, police, and public schools. On the other hand, there was a tendency to see the following as non-cooperative with Indians: local banks, courts and lawyers, and cattlemen.

RECOMMENDATIONS

1. The BIA is currently defining its trust responsibility. We recommend that when this is completed, the BIA should plan to take over funding of Agency activities now funded by the tribe which fall within the scope of the trust responsibility as defined.

2. We recommend that the BIA expedite the review and adoption of the new oil and gas regulations for Osage.

3. We recommend assistance to the tribal council in establishing Osage water rights.

4. The present tribal council for the Osage Tribe was established by a 1906 Statute which provides for the election of a tribal council by headright share holders. There are many questions today as to the validity of the original roll which was created under the 1906 Statute. As it presently stands, it would be futile to challenge the roll. Aside from the questions which were raised as to the original roll, part of the dividedness which exists among the tribal members is the allegation that the present tribal council is not in fact truly representative of the Osage Tribe. In some respects these allegations may have merit. The 1906 Statute franchized the original headright holders but the present devolution of headright shares has caused the vote to become fractionalized, and further the headright voting system has created the condition where a proportion of Osage Indians who may be of one-quarter blood or more, but who do not own a headright interest, cannot therefore vote for the tribal council.

The present tribal council procedurally elected under the method delineated by the 1906 Statute is actively seeking to expand its functions in areas other than the mineral trust interest. These areas are education, housing, employment, and economic development. However, under the Statute the tribal council's powers are limited to actions taken within the purview of the mineral trust estate.

The tribal council now finds itself in a legal quandry since their powers under the Statute are limited to the mineral trust estate but the needs of the Osage Tribe certainly extend beyond the mere management of that estate. The tribal council has recognized the shortcoming, but has not as yet accepted the limitation of the Statute and the lack of a formal constitution and by-laws. It finds itself in a legal dilemma since the tribal council enjoys the majority support of the headright holders while at the same time it may not necessary enjoy the majority of the non-headright holders who are Osage Indians.

The Evaluation Team did discuss this situation with the tribal council and it is our present recommendation that the Commissioner consider presenting to the council various alternative methods to provide equal representation among all the Osage Indians, headright as well as non-headright holders. For instance, this could be accomplished by diverting the mineral trust estate from the general functions normally embodied in a tribal council by separating the mineral estate through a corporate trust structure and by establishing a tribal government governed by a constitution and by-laws. Another method could be to provide for an expansion of the tribal council and to allow the new members to be elected by the entire community while at the same time preserving the integrity of the mineral estate by the continuation of the present tribal council operation. These are not exclusive recommendations and they should be considered merely for discussion purposes. The underlying purpose of this recommendation is for the Commissioner to consider various alternatives which could be presented to the present governing body whereby representation of this unfranchised Osage Indians could obtain representation on a tribal governing body.

5. The Agency has only recently begun to offer programs in the community services sector, and these may not yet be effectively reading eligible non-Osage Indians living in the county. Although the BIA role is largely coordination, advice, and referral in such fields as social services, education, and housing, we judge that additional services are needed. We recommend that BIA strengthen its support in these fields. The eligibility of all Indians in Osage County needs to be emphasized, as there appears to be misunderstanding on this point despite the efforts of BIA staff concerned.

6. Present legislation bars Indians in Osage County from BIA credit services available to Indians in other parts of Oklahoma. We recommend legislation and other necessary action to extend credit services to Indians in Osage County on the same basis as to other Indians in Oklahoma. If legislation cannot be filed forthwith, the BIA should assist the tribe in obtaining and/or establishing other credit sources, such as credit unions.

7. In accordance with Indian wishes and need, we recommend that BIA support legislation to improve the protection of Osage Indian interests during probate and similar actions.

8. Considerable misunderstanding of the handling of trust money was evident. We recommend Agency efforts to improve communication with the Indians on these matters, including (a) explanation of the procedure and regulations for handling trust receipts pending the quarterly distribution, the interest received, etc., (b) quarterly reports on the amounts of mineral receipts and disbursements by object to be printed and available to the public, and (c) distribution of IIM ledgers more than once a year, to be accompanied by an explanation of the procedures employed and the meaning of entries on the sheet.

9. The council apparently operates without official minutes or formalized by-laws of procedures. Because of the importance of its actions, we suggest that the council consider formalizing its operating procedures, establish official minutes, and make them available to the public upon request.

10. In view of the many discrepancies with regard to the handling of the Osage estates and other legal affairs by the private attorneys of Pawhuska, it is recommended that the Bureau, in cooperation with the Office of Hearings and Appeals of the Department of the Interior, review the procedures for descent and distribution of Osage Indian trust or restricted estates and determine what steps need to be taken to more fully protect the members of the Osage Tribe from the possibility of unscrupulous actions.

11. Recommend further evaluation of the petroleum engineer position with respect to the incumbent's effectiveness in his relationships with the tribe.

12. Recommend the Agency examine current procedures for keeping time records and institute needed changes, if any are called for.

13. The tribal council and a large proportion of the individual members of the tribe indicated that they would prefer to keep the present Superintendent in his post so that the overall Bureau program can be expanded and developed. One concern seems to be that the Superintendent should remain in his position with the Osage Agency unil the Judgment legislation has been enacted. It is the recommendation of the evaluation committee that the tribal council be consulted and that its wishes be taken into account.

By Mr. MAGNUSON (by request):

S. 3399. A bill to amend the provisions of title 14, United States Code, relating to the flag officer structure of the Coast Guard, and for other purposes. Referred to the Committee on Commerce.

Mr. MAGNUSON. Mr. President, at the request of the Department of Transportation, I introduce a bill relating to the flag officer structure of the Coast Guard.

I ask unanimous consent that a copy of the bill together with a letter of transmittal from the Secretary of Transportation be printed at this point in the RECORD.

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

S. 3399

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 14, United States Code, is amended as follows:

(1) The first sentence of section 41 is amended by striking out "a vice admiral" and inserting in lieu thereof "vice admirals".

(2) The first sentence of subsection (e) of section 42 is amended by inserting the words "or excluded under the provisions of section 9(d)(1) of the Department of Transportation Act" between the words "basis" and "shall".

(3) The second sentence of section 44 is amended by striking out the words "in the grade of captain or above" and inserting in lieu thereof the words "above the grade of captain".

(4) Section 47 is amended by striking out the word "Assistant" wherever it appears preceding the word "Commandant" and inserting in lieu thereof the word "Vice"; by striking out the words "in the grade of captain or above" in the second sentence of subsection (a) and inserting in lieu thereof the words "above the grade of captain"; and by striking out the word "An" in subsection (b) and inserting in lieu thereof the word "A".

(5) By adding the following new sections at the end of Chapter 3:

"§ 50. Area Commanders.

"(a) The President may appoint, by and with the advice and consent of the Senate, a Commander, Atlantic Area, and a Commander, Pacific Area, each of whom shall be an intermediate commander between the Commandant and the district commanders in his respective area and shall perform such duties as the Commandant may prescribe. The area commanders shall be appointed from officers

on the active duty promotion list serving above the grade of captain. The Commandant shall make recommendations for such appointments.

"(b) An Area Commander shall, while so serving, have the grade of vice admiral with pay and allowances of that grade. The appointment of an area commander is effective on the date the officer assumes that duty, and terminates on the date he is detached from that duty.

"§ 51. Retirement.

"(a) An officer who, while serving as Commander, Atlantic Area, or Commander, Pacific Area, is retired for physical disability shall be placed on the retired list with the grade and retired pay of vice admiral.

"(b) An officer who is retired while serving as Commander, Atlantic Area, or Commander, Pacific Area, or who, after serving at least two and one-half years in the grade of vice admiral, is retired while serving in a lower grade, may in the discretion of the President, be retired with the grade and retired pay of vice admiral.

"(c) An officer who, after serving less than two and one-half years in the grade of vice admiral, is retired while serving in a lower grade, shall be retired in his permanent grade and with the retired pay of that grade."

(6) The first sentence of section 287 is amended by striking out the word and figures "or 289" and by inserting in lieu thereof the word and figures "289, or 290".

(7) Section 290 is amended to read as follows:

"§ 290. Rear admirals; continuation on active duty; involuntary retirement.

"(a) The Secretary shall from time to time convene boards to recommend for continuation on active duty the most senior officers on the active duty promotion list serving in the grade of rear admiral who have not previously been considered for continuation in that grade. Officers serving for the time being or who have served in the grade of vice admiral are not subject to consideration for continuation under this subsection, and as to all other provisions of this section shall be considered as having been continued in the grade of rear admiral. A board shall consist of at least five officers serving in the grade of vice admiral or as rear admirals previously continued. Boards shall be convened frequently enough to assure that each officer serving in the grade of rear admiral is subject to consideration for continuation during a fiscal year in which he completes not less than four or more than five years service in that grade.

"(b) The Secretary shall, based upon the needs of the service, furnish each board convened under this section with the number of officers to be considered for continuation on active duty. The number that may be recommended for continuation shall be not less than 50 percent or more than 75 percent of the number of officers being considered for continuation.

"(c) The provisions of sections 253, 254, 258, and 260 of this title relating to selection and continuation boards shall to the extent they are not inconsistent with the provisions of this section, apply to boards convened under this section.

"(d) A board convened under this section shall submit its report to the Secretary. If the board has acted contrary to law or regulation, the Secretary may return the report for proceedings in revision and resubmission to the Secretary. After his final review the Secretary shall submit the report of the board to the President for his approval.

"(e) Each officer who is considered but not continued on active duty under the provisions of this section shall, unless retired under some other provision of law, be retired on June 30 of the fiscal year in which the report of the continuation board convened under this section is approved.

"(f) Each officer who is continued on active duty under the provisions of this section shall, unless retired under some other provision of law, be retired on June 30 of the fiscal year in which he completes a total of 36 years of active commissioned service, including service creditable for retirement purposes under sections 432, 433, 434 of this title.

"(g) Notwithstanding subsection (f) of this section, the Commandant, with the approval of the Secretary, may by annual action retain on active duty from fiscal year to fiscal year any officer who would otherwise be retired under subsection (f). An officer so retained, unless retired under some other provision of law, shall be retired on June 30 of that fiscal year in which no action is taken to further retain him under this subsection."

(8) The analysis of chapter 3 is amended by inserting the following new items:

"§ 50. Area Commanders.

"§ 51. Retirement."

(9) The analysis of chapter 11 is amended by striking out:

"290. Rear admirals; retention on the active list; involuntary retirement."

and inserting in lieu thereof:

"290. Rear admirals; continuation on active duty; involuntary retirement."

SEC. 2. Subsection (f) of section 202 of title 37, United States Code, is amended to read as follows:

"(f) The number of rear admirals on the active list of the Coast Guard entitled to the basic pay of a rear admiral of the upper half is one-half of the number of officers on the active list in grades above captain, less the number of officers serving in grades above rear admiral. If the division results in an odd number, the odd number shall be placed in the upper half. However, an officer who is entitled to the basic pay of a rear admiral of the upper half may not have his basisc pay reduced solely because the number of rear admirals is reduced.

INTERIM PROVISIONS

SEC. 3. This Act is effective upon enactment except that continuation boards pursuant to subsection (a) of section 290 of title 14, United States Code, as amended by this Act, may not be held until one year following enactment hereof. During the period of one year following enactment hereof the Secretary of the Department in which the Coast Guard is operating shall convene a board consisting of not less than three Coast Guard officers serving in the grade of vice admiral to recommend for continuation on active duty Coast Guard officers on the active duty promotion list serving in the grade of rear admiral, who during the fiscal year in which the board meets will complete not less than five years service in that grade. Subsections (b) through (g) of section 290 and other sections of title 14, United States Code, as amended by this Act, apply to continuation board action taken pursuant to this section. No officer who is entitled to the basic pay of a rear admiral of the upper half may have his basic pay reduced because of the reduction which results from this Act in the number of officers entitled to the basic pay of a rear admiral of the upper half.

THE SECRETARY OF TRANSPORTATION,
Washington, D.C., February 25, 1972.

Hon. SPIRO T. AGNEW,
President of the Senate,
Washington, D.C.

Identical letter to:

Hon. CARL ALBERT,
Speaker of the House of Representatives,
Washington, D.C.

DEAR MR. PRESIDENT: There is transmitted herewith a draft of a proposed bill,

"To amend the provisions of title 14, U.S. Code, relating to the flag officer structure of the Coast Guard, and for other purposes."

The proposed bill would make changes in the personnel provisions of title 14, United States Code, relating to the Coast Guard, and a related change in title 37, United States Code, relating to pay and allowances. Principally, these changes would require periodic continuation boards to recommend officers serving in the grade of rear admiral for continuation on active duty; establish the statutory positions of Commander, Atlantic Area, and Commander, Pacific Area, and authorize the grade of vice admiral for appointees; and effect related technical changes in other sections of title 14.

Under existing law, Coast Guard officers selected to the grade of rear admiral continue to serve in that grade until they complete seven years in grade or a total of thirty-five years commissioned service, whichever occurs earlier. At that time they are subject to involuntary retirement. The system has several deficiencies. At no time during his tenure in flag grade is an officer's performance subject to formal review as, for example, for identification and retention of the best qualified flag officers and possible separation of those not as well qualified. The inflexibility of a system which requires retention for a fixed period of each officer selected to flag grade, regardless of his performance, has impeded uniform promotion flow, and makes necessary an adequate management tool for presenting reasonably comparable selection opportunity to officers becoming eligible for selection to flag grade. The present system also discourages early selection of especially capable officers to flag grade. The seven-year limitation in grade makes selection to flag grade before the twenty-eighth year of service inefficient and somewhat imprudent because early selection forces retirement of such officers before completion of thirty-five years total service.

The proposed bill would require the periodic convening of a continuation board comprised of more senior officers to recommend for continuation on active duty not fewer than fifty percent nor more than seventy-five percent of rear admirals when they reach the approximate midpoint of average service in flag grade. Officers would only be subject to continuation board consideration a single time. Those not selected for continuation would be retired. The officers to be retired would have not more than five years in flag grade and would probably average a total of about thirty-two years commissioned service. Officers selected to continue on active duty, the better performers, would continue to serve until the completion of thirty-six years commissioned service. The removal of the seven years in grade limitation would assure that the early selection to flag grade of an especially capable officer would not have the adverse side effect of shortening his total career.

Another problem with which the Coast Guard has been faced under the present system, and which study shows will be aggravated in the future, is the rather severe variation in flag selection opportunity on a year-to-year basis. The annual opportunity is a function of several variables not now subject to management control. A significant factor is flag officer attrition uncontrolled except by the statutory "thirty-five years service or seven years in grade" limitation. The proposed bill, to the extent that it permits utilization of a controlled forced attrition of flag officers, will provide a significant capability to make the number of new flag officers that can be selected each year relatively uniform.

Under the existing organizational structure of the Coast Guard, the Coast Guard is divided into twelve districts, each headed by a district commander. In addition, districts on the East coast have been administratively grouped under a Commander, Eastern Area. Similarly, districts on the West coast and those encompassing Alaska and the mid and western Pacific have been grouped under a Commander, Western Area.

An area commander has important responsibilities beyond those of the district commanders. The planning, control, and support of operations requiring positive action to coordinate the forces and facilities of more than one district fall within his purview. He is primarily responsible for the organization of zones in his area for search and rescue, for the ocean-station program, for the mobilization planning and operational readiness of the districts within his area, for the communications network of the area, and he is the direct representative of the Commandant in matters involving planning and liaison with the heads of the other armed forces within his area.

The proposed bill would recognize the importance of areas and their commanders by providing a statutory basis for establishing areas and authorizing the grade of vice admiral for officers while serving as area commanders. The names of the areas would be changed to Atlantic Area and Pacific Area to reflect more accurately the geographic fields of responsibility.

Enactment of this proposal does not increase the number of Coast Guard flag officers which may be appointed under existing law. This proposal will, however, create for the first time a pyramidal flag officer structure which will parallel the existing pyramidal structure currently in effect for grades below rear admiral. A proposed change to title 37 will require that the number of rear admirals entitled to basic pay as rear admirals of the upper half will be reduced by the number of officers serving in grades above rear admiral. The change aligns the Coast Guard with Navy in this regard and contributes to a pyramidal structure by assuring that the number of rear admirals of the upper half will be less than the number of rear admirals of the lower half.

The essence of our proposal with regard to area commanders is contained in the proposed new sections 50 and 51 of title 14. To the extent that was possible, the substance and the form of expression used in related or similar provisions in title 14 was followed. For example, section 51 which deals with the retirement of vice admirals closely parallels existing subsections (b), (c) and (d) of section 47 which governs the retirement of the single Coast Guard vice admiral now authorized—the Assistant Commandant. The proposal would, therefore, make the law governing retirement of Area Commanders the same.

The principal operative provisions proposed regarding continuation of rear admirals are contained in the amended section 290 of title 14. The substantive approach, as well as the language, parallels the existing law in section 289, which relates to continuation boards for captains, to the fullest extent that provisions of the latter section could appropriately be made applicable to continuation of rear admirals.

The remaining provisions of the proposed legislation are technical changes to accommodate the major substantive changes, refinements in existing language, or minor substantive changes. An interim provision is included which will assist in the transition to an officer personnel scheme which includes continuation boards for rear admirals. The interim provision provides for an initial continuation board to consider all rear admirals with five or more years service at the time of enactment. The degree of forced attrition will be within the same limits as specified for the regular continuation boards which will follow after the first year following enactment of the proposal.

Enactment of the proposed legislation will lead to improved and more effective management of the resources of the Coast Guard and will recognize the stature of senior officers and the growth of the Coast Guard in numbers and responsibilities in recent years.

When compared to existing authority for officers above the grade of captain, this proposed legislation will cost about $7,000 more annually. The figure reflects the higher pay and allowances of two rear admirals to be appointed to the grade of vice admiral.

A comparative type showing changes in existing law made by the proposed bill is enclosed.

It would be appreciated if you would lay the proposed bill before the Senate. A similar bill has been transmitted to the Speaker of the House of Representatives.

The Office of Management and Budget had advised that there is no objection from the standpoint of the Administration's program to the submission of this proposed legislation to the Congress.

Sincerely,

———.

COMPARATIVE TYPE SHOWING CHANGES IN EXISTING LAW MADE BY THE PROPOSED BILL

(Matter proposed to be omitted is enclosed in brackets; new matter is underscored)

TITLE 14

§ 41. Grade and ratings.

In the Coast Guard there shall be an admiral; [a vice admiral] *vice admirals*; rear admirals; captains; commanders; lieutenant commanders; lieutenants; lieutenants (junior grade); ensigns; chief warrant officers, W–4; chief warrant officers, W–3; chief warrant officers, W–2; cadets; warrant officers, W–1; and enlisted men. Enlisted men shall be distributed in ratings established by the Secretary.

* * * * *

§ 42. Number and distribution of commissioned officers.

(a) * * *
(b) * * *
(c) * * *
(d) * * *

(e) Officers who are not included on the active duty promotion list, officers serving as extra numbers in grade under sections 432 and 433 of this title, and officers serving with other departments or agencies on a reimbursable basis *or excluded under the provisions of section 9(d)(1) of the Department of Transportation Act* shall not be counted in determining authorized strengths under subsection (c) and shall not count against those strengths. The number of officers authorized to be serving on active duty in each grade of the permanent commissioned teaching staff of the Coast Guard Academy, of the Reserve serving in connection with organizing, administering, recruiting, instructing, or training the reserve components, and of the Women's Reserve shall be prescribed by the Secretary.

§ 44. Commandant; appointment.

The President may appoint, by and with the advice and consent of the Senate, one Commandant for a period of four years, who may be reappointed for further periods of four years, who shall act as Chief of the Coast Guard. The Commandant shall be appointed from the officers on the active duty promotion list serving [in the grade of captain or above] *above the grade of captain* who have completed at least ten years of active service as a commissioned officer in the Coast Guard. The Commandant while so serving shall have the grade of admiral.

§ 47. [Assistant] *Vice* Commandant; assignment; retirement

(a) The President may appoint, by and with the advice and consent of the Senate, one [Assistant] *Vice* Commandant who shall rank next after the Commandant, shall perform such duties as the Commandant may prescribe and shall act as Commandant during the absence or disability of the Commandant or in the event that there is a vacancy in the office of Commandant. The [Assistant] *Vice* Commandant shall be selected from the officers on the active duty promotion list serving [in the grade of captain or above.] *above the grade of captain.* The Commandant shall make recommendation for such appointment. The [Assistant] *Vice* Commandant shall, while so serving, have the grade of vice admiral with pay and allowances of that grade. The appointment of [an Assistant] *a Vice* Commandant shall be effective on the date the officer assumes such duty, and shall terminate on the date he is detached from such duty.

(b) A[n] [Assistant] *Vice* Commandant, while so serving, who is retired for physical disability shall be placed on the retired list with the grade and retired pay of vice admiral.

(c) An officer who is retired while serving as [Assistant] *Vice* Commandant, or who, after serving at least two and one-half years as [Assistant] *Vice* Commandant, is retired after completion of that service while serving in a lower rank or grade, may, in the discretion of the President, be retired with the grade and retired pay of vice admiral.

(d) An officer who, after serving less than two and one-half years as [Assistant] *Vice* Commandant, is retired after completion of that service while serving in a lower rank or grade, shall be retired in his permanent grade and with the retired pay of that grade.

§ 50. Area Commanders.

(a) The President may appoint, by and with the advice and consent of the Senate, a Commander, Atlantic Area and a Commander, Pacific Area, each of whom shall be an intermediate commander between the Commandant and the district commanders in his respective area and shall perform such duties as the Commandant may prescribe. The area commanders shall be appointed from officers on the active duty promotion list serving above the grade of captain. The Commandant shall make recommendations for such appointments.

(b) An area commander shall, while so serving, have the grade of vice admiral with pay and allowances of that grade. The appointment of an area commander is effective on the date the officer assumes that duty, and terminates on the date he is detached from that duty.

§ 51. Retirement.

(a) An officer who, while serving as Commander, Atlantic Area, or Commander, Pacific Area, is retired for physical disability shall be placed on the retired list with the grade and retired pay of vice admiral.

(b) An officer who is retired while serving as Commander, Atlantic Area, or Commander, Pacific Area, or who, after serving at least two and one-half years in the grade of vice admiral, is retired while serving in a lower grade, may, in the discretion of the President, be retired with the grade and retired pay of vice admiral.

(c) An officer who, after serving less than two and one-half years in the grade of vice admiral, is retired while serving in a lower grade, shall be retired in his permanent grade and with the retired pay of that grade.

CHAPTER 11—PERSONNEL

§ 287. Separation for failure of selection for promotion or continuation; time of.

If, under section 282, 283, 284, 285, [or] 289, or 290 of this title, the discharge or retirement of any officer would be required less than six months following approval of the report of the board which considered but did not select him for promotion or continuation, the discharge or retirement of such officer shall be deferred until the last day of the sixth calendar month after such approval.

§ 290. Rear admirals; [retention on the active list] *continuation on active duty;* involuntary retirement.

[(a) Any rear admiral, unless retired under some other provision of law or retained on active duty under subsection (b) of this section, shall be retired on June 30 of the fiscal year in which he completes a total of seven years of service in the permanent grade

of rear admiral or a total of thirty-five years of active commissioned service, including service creditable for retirement purposes under sections 432, 433, and 434 of this title.

[(b) Notwithstanding subsection (a) of this section, the Commandant, with the approval of the Secretary, may by annual action retain on active duty from fiscal year to fiscal year any rear admiral who would otherwise be retired under subsection (a). A rear admiral so retained, unless retired under some other provision of law, shall be retired on June 30 of that fiscal year in which no action is taken to further retain him under this subsection

[(c) Subsections (a) and (b) of this section do not apply to any officer serving as Commandant.]

(a) The Secretary shall from time to time convene boards to recommend for continuation on active duty the most senior officers on the active duty promotion list serving in the grade of rear admiral who have not previously been considered for continuation in that grade. Officers serving for the time being or who have served in the grade of vice admiral are not subject to consideration for continuation under this subsection, and as to all other provisions of his section shall be considered as having been continued in the grade of rear admiral. A board shall consist of at least five officers serving in the grade of vice admiral or as rear admiral previously continued. Boards shall be convened frequently enough to assure that each officer serving in the grade of rear admiral is subjected to consideration for continuation during a fiscal year in which he completes not less than four or more than five years service in that grade.

(b) The Secretary shall, based upon the needs of the service, furnish each board convened under this section with the number of officers to be considered for continuation on active duty. The number that may be recommended for continuation shall be not less than 50 percent or more than 75 percent of the number of officers being considered for continuation.

(c) The provisions of sections 253, 254, 258, and 260 of this title relating to selection and continuation boards shall, to the extent they are not inconsistent with the provisions of this section, apply to boards convened under this section.

(d) A board convened under this section shall submit its report to the Secretary. If the board has acted contrary to law or regulation, the Secretary may return the report for proceedings in revision and resubmission to the Secretary. After his final review the Secretary shall submit the report of the board to the President for his approval.

(e) Each officer who is considered but not continued on active duty under the provisions of this section shall, unless retired under some other provision of law, be retired on June 30 of the fiscal year in which the report of the continuation board convened under this section is approved.

(f) Each officer who is continued on active duty under the provisions of this section shall, unless retired under some other provision of law, be retired on June 30 of the fiscal year in which he completes a total of 36 years of active commissioned service, including service creditable for retirement purposes under sections 432, 433, and 434 of this title.

(g) Notwithstanding subsection (f) of this section, the Commandant, with the approval of the Secretary, may by annual action retain on active duty from fiscal year to fiscal year any officer who would otherwise be retired under subsection (f). An officer so retained, unless retired under some other provision of law, shall be retired on June 30 of that fiscal year in which no action is taken to further retain him under this subsection.

TITLE 37—PAY AND ALLOWANCES OF THE UNIFORMED SERVICES

§ 202. Pay grades: assignment to; rear admirals of upper half; officers holding certain positions in the Navy.

(f) [Except for those whose basic pay is otherwise specifically authorized by law,] The number of rear admirals on the active list of the Coast Guard entitled to the basic pay of a rear admiral of the upper half is one-half of the number of officers on the active list in [that] grades *above captain, less the number of officers serving in grades above rear admiral.* If [that] *the* division results in an odd number, the odd number shall be placed in the upper half. However, an officer who is entitled to the basic pay of a rear admiral of the upper half may not have his basic pay reduced solely because the number of rear admirals is reduced.

By Mr. MOSS:

S. 3400. A bill to provide for the issuance of a special series of postage stamps to commemorate the bicentennial of the Escalante Expedition. Referred to the Committee on Post Office and Civil Service; and

S. 3401. A bill to provide for the designation of the Escalante Trail, and for other purposes. Referred to the Committee on Interior and Insular Affairs.

Mr. MOSS. Mr. President, in 1976 this Nation will be celebrating not only the bicentennial of our birth as a nation at Philadelphia in 1776, but the 200th anniversary of another event far out across the country which helped immeasurably to make our Nation great.

This second event was the expedition that Father Silvestre Valez de Escalante led from Santa Fe to the shores of Utah Lake, opening up the mountains west to European civilization.

The members of the expedition were the first Europeans to view the spectacular regions that now comprise the State of Utah, and the path that they marked through present-day Utah, Colorado, Arizona, and New Mexico blazed the way for traders and others who followed over the route that became known as "The Old Spanish Trail." The impact of this expedition on our history and development cannot be overstated.

I know that we as a nation will be deeply involved in celebrating the bicentennial of our national birth in 1976. That is as it should be, of course. But I hope we will also find time to give a nod to the expedition and the man who wrote such a momentous chapter of the history of the Far West in that same year.

I am introducing two bills today which, if enacted, will assure that the Escalante expedition will not be forgotten.

The first bill authorizes the Postmaster General to issue in 1976 a special series of postage stamps to commemorate the bicentennial of the Escalante expedition, with the series to consist of blocks of four different stamps, each representing that part of the route of the expedition through each of the four States.

The second bill authorizes the Secretary of the Interior to enter into agreements wtih the appropriate officials of the four States—Utah, New Mexico, Arizona, and Colorado—to encourage them to designate the route of the expedition as the Escalante Trail, and to erect or place appropriate markers along the route.

Mr. President, I find Americans becoming more and more interested in our history which has shaped the country in which we live, and I feel there will be tremendous desire in 1976 on the part of the people of the four States involved, as well as of people throughout the country, to relive and reenact the story of the Escalante Expedition.

The story begins in New Mexico, land of the Pueblo Indians and of the Spanish pioneers of the Southwest. Early in 1775 the Governor of that province, writing from his capital at Santa Fe, asked Father de Escalante, Franciscan missionary at Zuni, for a report regarding communication between New Mexico and Sonora; the possibility of opening a road between New Mexico and Monterey, capital of the newly founded missions in California; and the subjugation of the Moquinos, or Hopis, who, having long been hostile to Spanish authority and to Christian missionaries, were an obstacle to the desired communication between Santa Fe and the Pacific coast.

Escalante, a Franciscan friar of great intelligence and unusual ability, had for several years studied and planned to locate a route from Santa Fe to Monterey, by way of the higher latitudes, it being his idea in this way to avoid the vast difficulties of crossing that great chasm, the canyon of the Colorado, as well as the desert regions and the Colorado River itself below the canyon.

In addition to his desire to find a route by way of the higher latitudes, Escalante believed that the Yutas, through whose lands he must pass, were less warlike than the Apaches along the southern land route. The Apaches in the area adjoining the Gila River and the lower Colorado River had proved themselves very bold and warlike. They had attacked the Spaniards with great skill and cleverness, and had been successful in running off and stealing many of their horses and cattle, much of their equipment and provisions, and in wounding and killing many of the Spaniards and their followers.

To obtain data for the report, Escalante with a small party made a horseback journey from Zuni to Hopi land, keeping a detailed diary regarding the trail and affairs at the now famous Hopi mesas of Arizona. The primary purpose of his trek was to inquire about a route to Monterey by way of the great river of the Cosninas—Havasupais—which I judge to be the Colorado.

At the Hopi pueblos the people were sullen, but Escalante was able to interview one young Cosnina who was visiting there. The Indian told Escalante about his homeland in the West and made him a map of the trail from Oraibe to the Cosnina settlement in Havasupai Canyon, showing the turns, the days' journeys, watering places, villages, the size of the country, the course of the Colorado River, and neighboring tribes.

A Spaniard by birth, Escalante came from Spain to New Mexico in 1768. He

taught Christian doctrine in the Mission of Our Lady of Guadelupe of Zuni, N. Mex., and he was in charge of this mission. He was a remarkable man in many ways. He had traveled extensively through, and had resided in many parts of New Mexico and Arizona, and was, therefore, well acquainted with this region.

After presenting and urging his plans for several years to the Governor of New Mexico and to the Provincial Minister of the Franciscans, Escalante succeeded in persuading the Governor, in 1776, to sponsor and finance such an expedition, with Francisco Atanacio Dominguez heading the expedition, accompanied by Escalante and Don Bernardo de Miera y Pacheco, a well-known surveyor and mapmaker, who was to make a map of the land they might go through along with seven other residents of Santa Fe.

Escalante had conceived the idea of the excursion and labored with the civil and church authorities for a considerable period of time until the expedition became a reality. He thus became the actual leader, although his superior, Dominguez, assumed nominal charge. Escalante's name, however, has been handed down through history because of his writings, while Dominguez is seldom mentioned, except as Escalante's associate.

Escalante had proposed to make the journey provided his superiors would give him at least 20 men, but having his heart set on this enterprise, and hoping also to convert and civilize large numbers of pagan Indians, he prepared to set out on the hazardous undertaking with Dominguez and only eight men, fully realizing the great dangers and difficulties such reduced numbers might entail.

For a number of years before the historic Escalante expedition, New Mexico traders had been pushing north into the area that is now Colorado, exchanging Spanish goods for fur pelts. One such expedition in 1765 followed a route from Santa Fe northward to the San Juan River and across the northern spur of the La Plata Mountains in present-day Colorado, northwest down the Dolores River, eastward across the Uncompaghgre Plateau and River, and down the latter to the Gunnison. This general route was taken by others in the decade that followed, and thus, by 1776, the region east of the Colorado River and as far north as the Gunnison seems to have been fairly well known. That most of the more important physical features of the country were referred to in the diary of Escalante by names that are still on the map suggests that those names were already in common use at the time.

The historic group that set forth from Santa Fe on Monday, July 29, 1776, numbered 10 persons.

In addition to Escalante, Dominguez, and Miera, who carried an astrolabe and made astronomical observations on the way, the company included Don Pedro Cisneros, alcade mayor of the Pueblo of Zuni; Don Joaquin Lain, also a citizen of Zuni; Lorenzo Olivares of El Paso; the brothers Lucrecio and Andres Muniz, Juan de Aguilar, and Simon Lucero, who bore no official titles and whose residences are not given in the narrative. Some of these men were chosen because as traders and trappers they had been over part of the trail to the far north. Andres Muniz, who the previous year had been north as far as the Gunnison River and knew the Yuta language, went as interpreter. He proved to be highly important on the expedition, because for most of the way through the regions that are now the States of Colorado and Utah, until after the explorers crossed the Colorado River on the homeward trek, all the Indians spoke dialects of the Yuta tongue.

Although there is no specific statement in the diary on this point, it is probable that Escalante's plan was to follow the trappers' trail northwest past Mesa Verde, descend Dolores River some distance, turn west to Green River and the Colorado, and thence to Monterey through a pass in the High Sierra thought to have been sighted by another intrepid Franciscan explorer in the San Joaquin Valley in California.

The first part of the journey followed this plan. The little party made its way up through what is now western Colorado and turned west along the southern flank of the Uinta Mountains, entering the Utah region near the junction of White River with the present State line. They crossed the Green River, which they called the San Buenaventura, and pressed westward along the Duchesne and Strawberry Rivers, emerging at last into Utah Valley via Spanish Fork Canyon on September 23, after almost 2 months of the most arduous journeying.

Father Escalante was full of praise for this beautiful valley which alone, he said, "would provide for as many pueblos of Indians as there are in New Mexico." He described it in detail:

This lake of Timpanogotzis (Utah Lake) abounds in several kinds of good fish, geese, beaver, and other amphibious animals which we did not have an opportunity to see. Round about it live these Indians, who subsist on the abundant fish of the lake, for which reason the Yutas Sabuaganas call them Come Pescados or Fish Eaters. Besides this food, they gather grass seeds in the plain from which they make stole (porridge), supplementing this by hunting hares, rabbits, and fowls, of which there is a great abundance here. There are also buffaloes not very far to the north-northwest, but fear of the Comanches prevents the Come Pescados from hunting them. Their habitations are chozas or little huts made of willow, of which they also make nice baskets and other necessary utensils. In the matter of dress they are very poor, their most decent garments being a buckskin jacket and long leggings of the same material. For cold weather they have blankets made of the skins of hares and rabbits. They speak the Yuta language, but with notable differences in the accent and in some of the words. They have good features, and most of the men have heavy beards, especially those living farther south. In all parts of this sierra to the southeast, southwest, and west, live a large number of people of the same tribe, language, and docility as these Lagunas, with whom a very populous and extensive province could be formed.

Father Escalante devoted a separate paragraph to Great Salt Lake, of which he heard through the Lagunas but did not see. He wrote:

The otner lake . . . covers many leagues and its waters are noxious and extremely salty, for the Timpanois (Timpanogos) assure us that a person who moistens any part of his body with the water of the lake immediately feels much itching.

Miera, in his report to the king, gave an even more glowing description of a Spanish settlement that he envisioned on the shores of Lake Timpanogos, on one of the rivers flowing into it. This he proposed as the chief principal colony of a "New Empire" to be carved from the vast area between the lake and the Gila River; "for," he said:

This is the most pleasing, beautiful, and fertile site in all New Spain. It alone is capable of maintaining a settlement with as many people as Mexico City, and of affording its inhabitants many conveniences, for it has everything necessary for the support of human life. This lake and the rivers that flow into it abound in many varieties of savory fish, very large white geese, many kinds of ducks, and other exquisite birds never seen elsewhere, besides beavers, otters, seals, and some strange animals which are or appear to be ermines, judging by the softness and whiteness of their fur. The meadows of these rivers produce abundant hemp and flax without cultivation.

After resting 3 days at Utah Lake, the party turned southward to look for a pass over the mountains into California, but nowhere did they find any sign of a promising route. While the rest of the group camped along the Beaver River, two men sent out on reconnaissance returned to report that they had found no pass whatever by which to cross the sierra, that it was very rough and high in this direction, and that in front of it there was a wide plain without any pasturage or water whatsoever. Meanwhile, the arrival of winter also conspired to make ascent of the mountains impossible. On October 5 Father Escalante wrote:

On the preceding days a very cold head wind from the south had blown fiercely and without ceasing, followed by a snowfall so heavy that not only the peaks of the sierra but likewise all the plains were covered with snow tonight.

At a place they called Santa Brigida, on the Beaver River, the discouraged party decided to abondon the attempt to reach Monterey. Father Escalante wrote:

Winter had already begun with great severity, for all the sierras we were able to see in all directions were covered with snow. The weather was very unsettled, and we feared that before we arrived at our destination the passes would be closed, and we would be delayed for two or three months in some sierra, where there might be no people nor any means of obtaining necessary sustenance, for our provisions were already very low, and so we would expose ourselves to death from hunger if not from cold . . . Therefore, we decided to continue south, if the terrain would permit it, as far as the Rio Colorado, and from there proceed toward Cosnina, Moqui, and Zuni.

Not all the voyageurs were satisfied with this decision. Miera, Lain, and the interpreter Andres Muniz were not convinced that it would be impossible to reach Monterey.

Instead of listening to the force of our arguments, they opposed our views and from then on they were very insubordinate. Everything now was obnoxious to them and

everything insufferably difficult. They talked of nothing but how useless so long a journey would be.

At a point just east of present-day Lund, Utah, the issue was finally settled by casting lots, and it was decided in favor of Cosnina.

Crossing the Virgin River, the Spaniards marched southward, planning to continue in that direction as far as the Colorado River, which they thought could not be far ahead. However, they were advised by Indians in the area that they could reach the Colorado in 2 days, but would not be able to go the way they desired:

Because there was no watering place, nor would we be able to cross the river in this region because it ran through a tremendous gorge (the Grand Canyon), and was very deep, and had on both sides extremely high cliffs and rocks, and finally that from here to the river the terrain was very bad.

The Indians refused to escort the Spaniards to the great river, but offered to lead them south some distance along the foot of Hurricane Fault, and to put them on a trail leading eastward to the Cosninas.

At last, on October 26, the party reached the Colorado at Marble Canyon, but it was not until November 7 that they were able to locate a descent and a ford. In order to lead the horses down the side of the canyon, the men cut steps in a rock with axes for a distance of three varas or a little less—about 10 feet. These steps can still be seen, and the place was named Padre Creek in 1937 when it was shown that the party had forded the river here rather than at the so-called Crossing of the Fathers a mile west. From this point on the Colorado, the fathers and their company proceeded directly to Zuni and Santa Fe.

The impact of the Escalante Expedition is evidenced by the increased Spanish interest in the region following his return. Escalante observed a number of times in his journal that villages and towns could be supported by irrigation along streams, but no attempts at colonization were made, nor was the promised mission sent to the Yuta Indians. The international difficulties in which Spain was embroiled, and the formidable Great Plains and their newly mounted Indians, discouraged formal efforts toward colonial expansion or governmental exploitation of the Utah area. However, sanctioned and unsanctioned trading expeditions between Santa Fe and Utah Lake soon resulted in the well-defined route that became known as the Old Spanish Trail.

Father Escalante's journey of 5 months and nearly 2,000 miles, although it failed in its objective to locate and open a route to Monterey, was nevertheless one of the most important trips of exploration ever made from New Mexico into Colorado, Utah, and Arizona, having far-reaching consequences for these States and the areas adjacent to them. The members of Escalante's party were the first white men to see buffaloes near the Green River, Utah; the first to view Utah's magnificent Mount Timpanogos; the first to view the beautiful Utah Valley and Utah Lake. They were the first white men to go among and describe many of the mountain Indian tribes, and the first to cross the great gorge of the Colorado River. The story of their epic journey will forever remain one of the most thrilling and momentous chapters in American history.

By Mr. SPONG (for himself and Mr. BEALL):

S. 3404. A bill to amend the Cargo Preference Act of 1954 for certain purposes. Referred to the Committee on Commerce.

Mr. SPONG. Mr. President, the United States is becoming increasingly dependent on the import of foreign oil as a major source of fuel. In 1960, this country imported 1.8 million barrels of oil per day, or 18 percent of our petroleum demand. In 1970, imports of oil rose to 3.3 million barrels per day, or 23 percent of our demand. By 1985, it is estimated that the United States will have to import more than 14 million barrels of oil each day in order to satisfy our domestic demand. In other words, we may, by 1985, be relying on foreign sources for nearly 60 percent of our petroleum.

The problem presented by our increasing reliance on imports is complicated by the deterioration of the American-flag tanker fleet. As of January 1, 1972, the world tanker fleet totaled more than 190 million deadweight tons. Yet the U.S. fleet was only 7.6 million deadweight tons, or 4 percent of the total, and these few ships were engaged only in domestic tanker operations. In addition, 11 percent of our total fleet, or better than 850,000 deadweight tons, was laid up. Within a few months, prospects are that a minimum of 1.5 million deadweight tons will be laid up, including many of our newest and most modern vessels.

The situation thus presented is that on the one hand the United States has an increasing need for the tanker carriage of foreign oil to our country and on the other hand our tanker fleet is dwindling in size and wasting away in idleness. The reason is that no oil is being carried from foreign sources to our country aboard American-flag tankers.

If this situation continues, we will be faced with a situation in which we will be dependent on foreign sources for our supply and dependent on foreign sources for the transportation of our supply. Such a dual dependency doubles the risk that in the future, we will not receive the energy supply we require. While we probably cannot help but become more dependent on foreign oil, we can and should prevent total dependency on foreign sources for the carriage of this energy.

It is for this reason that I am introducing legislation on behalf of myself and Senator BEALL to amend the Cargo Preference Act of 1954 to require that a minimum of 50 percent of our oil imports be carried on U.S.-flag vessels.

This provision would automatically provide for a buildup in the U.S.-flag tanker fleet. New jobs would be provided for thousands of Americans in shipbuilding and allied industries and in seafaring, thus helping to alleviate our country's unemployment problem. The companies involved in shipping the oil would be American corporations paying taxes to our Government on their profits.

Militarily, modern mechanized armed forces depend heavily on petroleum products to function. Supplying this need, or logistical support, is becoming more and more the responsibility of the privately owned merchant fleet. As Rear Adm. G. H. Miller stated in the February 1972, issue of Sea Power:

Shipbuilding budgets have been insufficient in recent years to maintain an adequate Navy. Thus, with the compelling need to modernize its aging combat fleet, the Navy must turn to the U.S. Merchant Marine for an increasing proportion of the logistic support required by the combat fleet. An adequate U.S. Merchant Marine would provide a large reservoir of ships, which could be converted quickly to logistic support functions.

This legislation would help to insure that the United States has a merchant marine which could function as the Nation's fourth arm of defense.

The use of U.S.-flag vessels to carry oil will also assure the American public that this potentially dangerous and polluting cargo will be carried in the safest, most ecologically conscious manner possible. Legislation can be passed to prohibit harmful operating procedures, but such laws are difficult to apply to a foreign-flag vessel. In addition, enactment of this legislation would have a beneficial effect on our balance of payments. For every dollar spent on petroleum transport without this legislation, about $0.52 would go and stay abroad. With the 50–50 amendment, this would be cut to about 26 cents on the dollar, assuming the comparability between United States and foreign costs.

Enactment of this legislation would not make the United States unique in this area. France, Spain, Chile, and Peru have laws which establish quotas for their flag vessels. Japan and other maritime nations strongly promote their merchant fleets through Government policies which achieve the same result as if they had such laws. There has been no retaliation against these countries by the oil producing nations or by other maritime countries. The United States should require that its crude imports be carried in domestic tankers on the same economic and military grounds that caused other nations to adopt that policy.

Testimony before the House Merchant Marine and Fisheries Committee demonstrates that the importation of 50 percent of our oil aboard American-flag tankers will not result in an increase in cost to the consumer.

It is for these reasons that the United States should require that at least 50 percent of our oil imports be carried aboard American-flag tankers. Our national security, our economy, and our environment demand it.

Mr. BEALL. Mr. President, I am pleased to join with the distinguished Senator from Virginia in sponsoring legislation to amend the Cargo Preference Act of 1954. I wholeheartedly concur with the reasons presented by Senator SPONG in proposing that a minimum of 50 per-

cent of our oil imports be carried on U.S.-flag vessels.

There are two important aspects of this bill which must be fully considered. One is the impact of this legislation on the American shipbuilding industry. The second is its relationship to our national security.

It has been estimated that by 1985 we will have to import between 12 and 15 million barrels of oil per day from overseas sources. To supply the United States, a tanker fleet nearly equal to that of all of the tanker capacity in the world today will be required.

If the American flag were guaranteed a carriage of at least 50 percent of this vital cargo, between 50 and 75 million deadweight tons of tankers would be needed. The impact on American shipyards, and on the economy as a whole, would be enormous.

The average private shipyard employment for the first 11 months of 1971 was 128,800. This was the lowest figure since 1965. But, the construction of a 50,000 deadweight tons tanker, costing $14 million, would create jobs for 378 men for a full year. For a 250,000 deadweight ton supertanker costing $62 million, jobs would be created for 1,674 men for a full year.

So, when discussing the construction of a fleet of hundreds of modern tankers, we are talking in terms of ship construction jobs for thousands of skilled and semiskilled Americans. We are talking about giving Americans who are receiving unemployment compensation and welfare the opportunity to work and to make a worthwhile contribution to our society.

These benefits would also be felt by other segments of our economy. Allied industries—those which provide the materials necessary for ship construction—would be stimulated as production increased. The increase in the purchases of consumer goods and services would bolster the economies of the areas surrounding the shipyards and allied industries.

At the present time, it is difficult to regulate any part of the import oil transportation industry simply because American-flag vessels are engaged in the oil import trade. Our Nation must have an active tanker fleet engaged in transporting at least 50 percent of our oil imports. If this is not accomplished, the U.S. Government must be prepared to relinquish all control and regulatory powers over this entire industry to foreign nations.

There appears to be little choice in becoming more dependent on foreign sources for our supply of this vital and strategic raw material. The one remaining choice is whose transportation facilities will we utilize. Becoming dependent on third party foreign governments for transportation would create a dual dependency problem and would at least double the risk of being shut off from our supply of imported oil.

For example, using a third party nation as a transportation medium could create these problems:

A dispute between the producing exporting nation and the foreign-flag nation could effectively cut off all supply to our Nation.

Management and labor problems in the third party foreign-flag nation. Many of the corporations and labor unions of other nations are very politically oriented. For instance, some foreign-flag vessels crews and the companies themselves, refused to carry U.S. cargoes to Vietnam.

A dispute between our Nation and a third party nation transporting our energy resources could result in a withdrawal of all ships of that nation engaged in carrying oil to our country.

A dispute between our Nation and an international corporation that controls importing into the United States under a weak "flag of convenience." For example, if the United States pressures an international company to improve their safety and pollution standards, the company could instead withdraw its ships from our trade. Thus, we would either be without the supply we need, or else be forced to lower our standards and endanger our environment.

It therefore becomes apparent that in time of crisis, only U.S.-flag vessels can be directly controlled by our Government. In a future oil crisis, all the European-flag vessels currently engaged in transporting oil to the United States would either shift to their own oil trade or be nationalized by their governments. We could not afford to lose these ships, which currently carry about one-third of our imported oil. Yet, our European allies could not afford to let us keep these ships in our service.

Many arguments have been presented to attack the fact that our national security requirements command enactment of this amendment. There has been much testimony before the House Merchant Marine and Fisheries Committee to the effect that the United States can rely on the "effective control" fleet in time of national crises. But the truth of the matter is that the doctrine of effective control has never been put to the test. In other words, we have never been in the position to determine once and for all whether these Liberian-, Panamanian-, and Honduran-flag vessels would be available to the United States. We must have oil to survive as a nation, and we must import our oil. Our national security demands that we know we will be able to have the ships we require. There is only one way to so guarantee, and that is through the use of U.S.-flag vessels.

Another argument presented was that in time of an oil boycott against the United States, the exporting nations would load foreign-flag but not U.S.-flag ships. History has shown that this is not the case. The Department of Interior's Middle East Petroleum Emergency of 1967 contains an excerpt from Esso magazine. That article stated that:

> . . . But, following allegations of Anglo-American participation in the war, all loadings at Arab ports for British and U.S. destination were refused, while some Arab states placed an embargo on British and U.S.-flag vessels, irrespective of their destination . . .

The point is that in time of boycott, the exporting nations would not allow any flag to deliver oil to the United States. All participating nations joined in the boycott of the country of destination, whereas not all boycotted U.S.-flag vessels. Their argument in opposition to this legislation is therefore meaningless.

President Nixon, in late July 1970, asserted that "we are primarily—a sea power." Virtually surrounded by water, and hardly self-sufficient, the United States must rely on ships to import oil—vital and strategic material.

We cannot allow the carriage of this energy source to fall completely into foreign hands. We cannot allow our Merchant Marine—our Nation's fourth arm of defense—to deteriorate to such a point that in time of crisis it will be unable to meet our needs. The world is constantly changing. Our enemies of yesterday are our friends of today. And our friends may tomorrow's enemies. We must maintain ourself. We cannot place our fate in the hands of nations who may not desire to or be able to help us in time of trouble.

This legislation must be acted upon favorably. Americans need the jobs and the United States needs the guarantee of security.

By Mr. RANDOLPH (for himself, Mr. BAYH, and Mr. COOPER):

S. 3405. A bill to amend title 23 of the United States Code to establish a national scenic and recreational highway program. Referred to the Committee on Public Works.

NATIONAL SCENIC AND RECREATIONAL HIGHWAY PROGRAM

Mr. RANDOLPH. Mr. President, on behalf of myself, the junior Senator from Indiana (Mr. BAYH), and the senior Senator from Kentucky (Mr. COOPER), I introduce for appropriate reference a bill to amend title 23 of the United States Code to establish a national scenic and recreational highway program.

The purpose of this bill is to meet a long-recognized need for additional means of access to places of scenic, recreational, historical, archeological, and scientific interest. It is based on the acknowledged premise that significant esthetic, educational, and recreational values can be gained from viewing varied vistas of natural grandeur and beauty, utilizing outdoor, open-space recreational areas, and visiting the numerous scattered sites significant in our cultural heritage.

Nearly 8 years ago the development of a national system of scenic roads and parkways was advocated by President Kennedy's Recreation Advisory Council. In June 1966, the President's Council on Recreation and Natural Beauty—successor to the Advisory Council—issued a comprehensive report recommending adoption of a minimum $4 billion, 10-year program for the development of scenic roads and parkways. It should be noted that the report was founded on data submitted by each State and by affected Federal agencies proposing specific projects which were then carefully evaluated and ranked according to potential use, construction costs, and proximity to population centers.

Mr. President, the number and quality of scenic and recreational roads available to the motoring public is deficient. The quantity of open-space and recreational

areas, especially that which is readily accessible to many urban dwellers, has been decreasing at the same time more and more families have the time and financial resources necessary to enjoy them. Owners of private automotive vehicles are seeking highways upon which they can drive for pleasure at a more leisurely pace and can benefit from adjoining recreational and other leisure-time facilities.

My bill would attempt to remedy this apparent lack by a new, twofold program; assistance would be provided to both the States and Federal departments and agencies having jurisdiction over public lands of the United States for the development of scenic and recreational highways throughout the Nation. For each of the fiscal years ending June 30, 1974 and 1975, there would be authorized $150 million to be allocated to the States and $50 million to be allocated to Federal departments and agencies for the location, construction, or reconstruction of such highways. Although funding at inception would be only at half the level proposed by the President's Council, I believe the smaller scale would be preferable until the program is fully underway. In later years, increased amounts can be appropriated as demonstrated by future needs and experience.

Scenic and recreational highways built or improved on public lands of the United States, of course, would be financed entirely by the Federal Government, but those within State or local jurisdiction would be entitled to 80-percent Federal share of their total cost. Appropriations for the latter would be apportioned among the States according to a formula combining the elements now employed for Federal-aid highway, secondary, and urban-extension funds. Under this pattern all States would receive amounts proportionate to such factors as total area, population distribution, and highway mileage.

To be eligible for Federal aid under this program, States would comply with criteria to be established by the Secretary of Transportation. Scenic and recreational highways would have to be connected with other Federal-aid highways, marked with uniform identifying signs, and limit outdoor advertising signs, displays and devices in accord with the provisions of the Highway Beautification Act of 1965. Priority would be given to the location of such highways near or easily accessible to larger population centers, and no fees could be charged for the use of any facility constructed with the aid of Federal funds.

The Secretary would be authorized to consult with the heads of Federal departments and agencies having jurisdiction over public lands of the United States and to make agreements for the construction or reconstruction of scenic and recreational roads on such lands. As far as possible the same criteria developed for highways constructed or reconstructed by States under this program would also be made applicable to those established and paid for entirely by Federal funds on public lands of the United States.

In addition to the normal costs involved in planning, designing, engineering, constructing and reconstructing scenic and recreational highways, the bill would permit funds appropriated under both phases of the program to be used for such ancillary purposes as acquiring scenic easements, purchasing historical, archeological or scientific sites of interest, providing roadside rest and recreational areas or other facilities deemed appropriate by the Secretary.

Mr. President, as we approach the 200th birthday of this Nation, I think of this program as one which would provide worthwhile and lasting benefits for the people as a whole. This is contemplated by such a bill. It would be very fitting if by the time the national celebration is held in 1976 substantial sections of the new scenic and recreational highway program could be completed in many of our 50 States.

I ask unanimous consent that the full text of the bill be printed at the conclusion of my remarks.

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

S. 3405

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 1 of title 23 of the United States Code is amended by inserting at the end thereof a new section as follows:

"§ 145. National Scenic and Recreational Highway Program.

"(a) (1) The Congress finds—

"(A) that there are significant esthetic and recreational values to be derived from making places of scenic and natural beauty and historical, or scientific interest accessible to the public;

"(B) that there is a deficiency in the number and quality of scenic roads, parkways and highways available to the motoring public;

"(C) that with increased population, greater leisure time and higher percentage of privately owned automotive vehicles, more families than ever are seeking suitable areas in which to drive for pleasure and recreation;

"(D) that the growth of cities and large metropolitan centers has decreased the quantity of open-space and recreational areas available to the general public, especially urban dwellers; and

"(E) that substantial economic, social, cultural, educational and psychological benefits could be gained from a nationwide system of attractive roadways making possible widespread enjoyment of natural and recreational resources.

"(2) It is therefore the purpose of this section to provide assistance to the States and to other Federal departments and agencies having jurisdiction over Federal lands open to the public in order to develop highways throughout the Nation to satisfy such needs.

"(b) As soon as possible after the date of enactment of this section the Secretary shall establish criteria for the location and construction or reconstruction of highways by the States in order to carry out the purpose of this section. Such criteria shall include requirements that—

"(1) priority be given in the location of such highways near or easily accessible to the larger population centers of the State;

"(2) such highways be connected with other Federal-aid highways and preferably with the Interstate System;

"(3) such highways be marked with uniform identifying signs;

"(4) effective control, as defined in section 131 (c) of this title, of signs, displays, and devices will be provided along such highways;

"(5) the provisions of section 129 (a) of this title shall not apply to any bridge or tunnel on any such highway and no fees shall be charged for the use of any facility constructed with assistance under this section.

"(c) For the purpose of this section the term 'construction' includes the acquisition of areas of historical, archeological, or scientific interest, necessary easements for scenic purposes, and the construction or reconstruction of roadside rest areas (including appropriate recreational facilities), scenic viewing areas, and other appropriate facilities determined by the Secretary for the purpose of this section.

"(d) Highways constructed or reconstructed pursuant to this section (except subsection (g)) shall be part of the Federal-aid primary system except with respect to such provisions of this title as the Secretary determines are not consistent with this section.

"(e) Funds appropriated for each fiscal year pursuant to subsection (h) (1) shall be apportioned among the several States for payments to carry out the purpose of this section in the ratio which the total apportionments to each State pursuant to section 104(b) (1), (2), and (3) for such year bears to the total such apportionments to all States for such year.

"(f) The Federal share of the cost of any project for any construction or reconstruction pursuant to the preceding subsections of this section shall be 80 per centum of such cost.

"(g) The Secretary is authorized to consult with the heads of other Federal departments and agencies having jurisdiction over Federal lands open to the public in order to enter into appropriate arrangements for necessary construction or reconstruction of highways on such lands to carry out the purpose of this section. To the extent applicable criteria applicable to highways constructed or reconstructed by the States pursuant to this section shall be applicable to highways constructed or reconstructed pursuant to this subsection. Funds appropriated pursuant to subsection (h) (2) shall be used to pay the entire cost of construction or reconstruction pursuant to this subsection.

"(h) There is authorized to be appropriated out of the Highway Trust Fund (1) not to exceed $150,000,000 for each of the fiscal years ending June 30, 1974, and June 30, 1975, for allocations to the States pursuant to this section, and (2) not to exceed $50,000,000 for each of the fiscal years ending June 30, 1974, and 1975, to carry out the provisions of subsection (g)."

SEC. 2. The table of contents of chapter 1 of title 23 of the United States Code is amended by inserting at the end thereof the following:

"145. National Scenic and Recreational Highway Program."

Mr. COOPER. Mr. President, I am pleased to have the opportunity to join the distinguished chairman of the Committee on Public Works, Senator RANDOLPH, in introducing a bill to establish a national scenic and recreational highway program.

As Senator RANDOLPH has indicated, interest in a national program is not new. There already exist several thousand miles of scenic and recreational roads—National and State parkways which allow no commercial traffic, segments of the interstate and other Federal-aid highways, national forest and park roads, and designated boulevards in some cities. The responsibility for planning and building scenic roads is scattered—

carried out by numerous local, State and Federal agencies, with little reference to each other or to any coherent plan to insure desirable use of limited resources.

This bill provides the opportunity to examine the concept of scenic and recreational roads, to determine the desirable characteristics of a national system, and establish the degree of Federal support and guidance necessary to achieve the desired end.

I have been interested in Federal programs to beautify our highways for many years. In 1967 I introduced the scenic development and road beautification bill to encourage States to enhance the scenic value of selected roads within their borders. I have reviewed, with interest, Gov. Maurice Thatcher's ideas for a national, connected system of parkways. I have been concerned about the slow pace at which parkway development takes place, including lack of progress on the proposed Allegheny Parkway in Kentucky, Virginia, and West Virginia.

I hope that hearings on this bill will provide information useful in defining a national system, such as the type of traffic it is to carry—for example, the extent to which commercial vehicles will be allowed—the design and location characteristics best suited to its purpose; its extent and total cost; and which existing roads it should include.

To many travelers the destination has customarily been more important than the trip. I believe that we, as a nation, now recognize the opportunities we miss by concentrating only on the ultimate goal and that we are beginning to enjoy the journey as well as its end—which is, after all, in an old tradition. I think that a carefully conceived, well-executed national program for scenic and recreational roads could add the dimension of quality to highway travel in America.

By Mr. BIBLE (for himself and Mr. CANNON):

S. 3406. A bill to declare certain Federal lands held in trust for the Confederated Tribes of the Goshute Indian Reservation. Referred to the Committee on Interior and Insular Affairs.

Mr. BIBLE. Mr. President, on behalf of myself and my distinguished colleague from Nevada (Mr. CANNON), I introduce for appropriate reference a bill to declare certain Federal lands held in trust for the Confederated Tribes of the Goshute Indian Reservation located on the boundary line between the States of Nevada and Utah.

The lands in question, adjacent to the present reservation, are in one of the most isolated areas in the United States. The Indians of the Goshute Reservation live in a desolate portion of the great American desert where living is difficult and where the sole means of livelihood is through a marginal stockraising economy. The nearly 2,000 acres of land proposed to be added to the reservation are identical to those now within the reservation boundaries but will permit the tribe to enlarge the present livestock operations and contribute to the welfare of its members.

Mr. President, I ask unanimous consent that a copy of resolution No. 72–G–4 adopted by the governing body of the Confederated Tribes of the Goshute Reservation on December 9, 1971, be printed in the RECORD as a part of my statement.

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

RESOLUTION OF THE GOVERNING BODY OF THE CONFEDERATED TRIBES OF THE GOSHUTE RESERVATION

Whereas, by tribal resolution No. 71–G–4 dated July 9, 1970, the governing body of the Confederated Tribes of the Goshute Reservation requested the Superintendent, Nevada Indian Agency, to withdraw all available Public Domain lands within the corridor between the States of Utah and Nevada for addition to the Goshute Indian Reservation, and

Whereas, the tribal resolution No. 71–G–4 dated July 9, 1970 failed to include a certain parcel of Public Domain land described as the SE¼SW¼ Sec. 34, T. 9 S., R. 19 W., Salt Lake Meridian.

Now therefore be it resolved that since that certain parcel of Public Domain land described as SE¼SW¼ Sec. 34, T. 9 S., R. 19 W., Salt Lake Meridian, was not included in tribal resolution No. 71–G–4 dated July 9, 1970, we wish to include that certain herein described vacant Public Domain land in our application for withdrawal, and we do hereby rescind resolution No. 71–G–4 dated July 9, 1970.

Be it further resolved that we request the herein described vacant Public Domain lands adjacent to the Reservation be withdrawn and added to the Goshute Reservation to be held in trust by the United States of America for the Confederated Tribes of the Goshute Reservation.

Be it further resolved that the Nevada Congressional delegation is requested to introduce appropriate legislation that will convey this land to the Goshute Tribe.

Be it further resolved that the Tribal Secretary is authorized to send copies of this resolution to the Superintendent, Nevada Agency; Intertribal Council of Nevada; the Commissioner of Indian Affairs, and the Secretary of the Interior.

By Mr. WILLIAMS (for himself, Mr. RANDOLPH, and Mr. PELL):

S. 3407. A bill to amend the Education of the Handicapped Act to provide for improved opportunities for handicapped persons, and for other purposes. Referred to the Committee on Labor and Public Welfare.

SUPPLEMENTARY EDUCATION SERVICES FOR THE HANDICAPPED ACT OF 1972

Mr. WILLIAMS. Mr. President, I am today on behalf of myself, Mr. RANDOLPH, and Mr. PELL, introducing a bill to amend the Education of the Handicapped Act—a bill to be known as the Supplementary Education Services for the Handicapped Act of 1972. This bill will authorize the Commissioner of Education to acquire and distribute television products and theater productions, telecommunication aids for the deaf, and sensory and communication devices for the handicapped. And, it will create and support more inclusive opportunities for the handicapped in continuing adult and higher education.

The ideas in this bill were prompted by a visit I made to the National Advisory Committee for the Education of the Deaf several weeks ago to make the first interview ever conducted via teletype, and to celebrate the installation of a teletype at the Mount Carmel Guild in New Jersey. The demonstration of the teletype reinforced my interest in problems of communication for those with disabilities. It brought home to me again the inequalities in our Nation for those who have disabilities that they must cope with every day. And it made me ask a very fundamental question. With all of our advances in technology and additions to knowledge in the last few years, why has that knowledge not been put to use to devise methods to enable disabled persons to function more freely?

I believe too many of us take for granted what modern technology has provided at minimal cost—the telephone, newspapers, films, television, street signs, warning signals. We fail to realize that these benefits are too often unavailable to the handicapped. And therefore we fail to invest much thought, planning, and foresight into creating mechanisms which would enable the handicapped to take advantage of similar communication aids, and to enable them to move more freely and independently in our society.

A few weeks ago, I asked the Congress and the Nation to commit themselves to the goal of full integration of handicapped persons into working, living, and social patterns of this society. If we are to reach our goal, then we must plan now to include them, and enable them to make this integration with ease, and with as little expense as possible. But to do this, we must revise our ways of thinking about persons with disabilities.

I recently had the opportunity to read an address by Dr. James Gallagher, the first Commissioner of the Bureau of Education for the Handicapped and presently director of the Frank Porter Graham Child Development Center at the University of North Carolina. In his address, Dr. Gallagher defined the handicapped as individuals who have problems in processing information around them and responding to this information. In viewing the handicapped in this way, he suggested we might identify the handicapped according to four types of problems they face. There are those who have problems in the reception of information—individuals with hearing and visual handicaps; those who have problems linking new information to old information—individuals who are mentally retarded, or with learning disabilities; those who have difficulties with communication skills—individuals with cleft palates, with cerebral palsy or with motor difficulties; and those who have difficulties with executive control—individuals who have motivational control problems, difficulties with attention control or who are emotionally disturbed.

As simple and easily understood as this categorization is, its ramifications are profound. First, it suggests that if we are going to deal with the problems of the handicapped adequately, not only must we take steps to eliminate causes, but we must find ways to ameliorate the conditions each individual finds himself in. Second, we must plan and provide a continuum of services that will bring each individual with handicaps as close as possible to normal functioning in daily situations. Third, and most important, we must realize that in a rapidly changing society where all individuals

are taxed to keep up with rapid change, individuals who have difficulties processing and responding to even the simplest information are at a decided disadvantage.

If we are to find ways to fully integrate these individuals, we must also find ways to help them compensate for their disabilities and to allow them to compete on as equal a basis as possible. That is why I believe that the amendments I am introducing today are so important. We must begin as soon as possible to make their effects felt.

The first section of this bill authorizes the Commissioner to acquire and distribute telecommunications aids to the deaf. These aids would also be distributed to public and private nonprofit schools, agencies, and organizations which serve the deaf, and to police, fire, and other emergency service public agencies. These communication devices are to be made available for the purpose of providing public services to the deaf in times of emergency, to increase educational, cultural, and recreational opportunities for the deaf, and to increase normal communication opportunities between the deaf and hearing persons.

At the present time, there is a teletype system for the deaf in operation—a network of approximately 1,000 teletypewriters. These machines are largely refurbished and obsolete business machines which have been donated or purchased at a cost of approximately $250. This equipment, because it is old, does not have the capabilities of newer machines and therefore cannot communicate with other teletype networks used by motels, airlines, police, and other metropolitan agencies.

Under this section, an electronic keyboard could be provided that can be acoustically coupled with any telephone and will allow for two-way communication with any other phone with a similar system. For emergency services, these devices could communicate with other teletype systems or with central operators that could call emergency aid for the deaf. These systems can be purchased at $200 to $300 per system, and are compatible with existing devices such as the teletype. They are lighter, more portable, and cost about one-fifth what the teletypewriter costs. These devices would have the added capability of being able to connect with any similar computerized system in an educational institution, and therefore could be utilized for important educational services for deaf persons. There are many other telecommunication devices which have been developed that could be used or could be adapted for use by the deaf. This section gives the Commissioner authority to look into such aids and to provide them to the deaf, and to other agencies to improve deaf person's ability to communicate.

The second section of the bill authorizes the Commissioner to provide sensory and communications devices to local and State educational agencies, and other appropriate public or private nonprofit agencies that provide education for handicapped persons other than the deaf. Such devices are to be provided in order to allow handicapped children and adults to participate more fully in elementary, secondary, postsecondary, and continuing education programs.

Under this provision, the Commissioner could provide these aids to enable handicapped persons to more easily receive educational services or allow them to compete more easily with others without handicaps. For example, there are two devices which come to mind that would aid blind individuals in the pursuit of their education. One is a print reader which allows blind individuals to read anything that is printed. The second is a fast playback device like a tape recorder which allows ready access to printed materials, and is more portable and flexible than present talking books for the blind. Let me point out that the authorizations under these two sections represent an important first step toward providing these communication devices at no or low cost to all who need them.

The third provision would authorize grants and contracts for continuing adult and higher education opportunities for the handicapped, and would provide for the development of specifically designed educational programs, supplementary services, and other appropriate services designed to help handicapped persons enjoy equal education opportunities and to compensate for their handicaps. This is a provision that has long been needed. We know that each day more than 1,000 new books are published, more than 75 hours of television programing, and myriad magazines and newspapers are available. We talk often about the "information explosion"—about future shock—and the fact that we are being faced with rapid changes in society and major advances in knowledge and information. Community colleges, "open" universities, and external degree programs have been created offering a wider variety of learning experiences and providing most of us the possibility of continual learning. For one reason or another, the handicapped are often excluded from these experiences.

We know that there are many continuing and adult education programs operating in local communities. Colleges have undertaken to provide special advanced classes for the communities in which they are located. But we have forgotten that the handicapped are often excluded from these programs. If you examine all of these facilities, you will find few, if any, handicapped individuals enrolled. The reasons are obvious, even if the results are unintended. Theoretically, the handicapped should be involved in all of these classes, but there are physical obstacles to their enrollment: lack of transportation, inability to get into the building, inability to hear or see when they get there. For the more severely handicapped, there are other problems: the inability to keep up with the normal progress of a class or lack of familiarity even with basic processes of examination, because they have been denied education for too long. Most program coordinators have not considered these problems. Or, when they have, they have not had funds available to provide special facilities or special compensatory features which would allow the handicapped to participate more readily.

This provision will provide those additional funds. It will enable our communities to plan continuing educational services for the handicapped, and will provide for the creation of special classes and services to begin the compensatory education and training that many of the handicapped need.

Finally, the bill will expand the existing instructional media for the handicapped program to include television products, theater productions, and other media. This provision will allow the Commissioner of Education to provide outstanding theater, television, and other cultural productions to handicapped persons.

Mr. President, I believe that this bill provides important supplementary services for the handicapped. It fills in certain gaps in existing authority for programing for the handicapped, and will enable the Commissioner of Education to put to use developments in the area of technology and information processing which have been produced under research and development authority. And I expect under the broad research authority in title VI, ESEA, it will stimulate further research on applications of existing advances in communication and sensory technology to the real problems of information processing that face handicapped persons.

It is difficult for me to imagine that a Nation which developed the intricate communications technology involved in going to the moon, and supporting information satellites cannot find the expertise, and the money to allow persons with similar information problems to communicate more freely. I refuse to accept the argument that these are not similar problems. The answer has to lie in our willingness to make a commitment to people. And I, for one, will not accept our lack of commitment any longer.

Mr. President, I think it is particularly appropriate that we introduce this legislation today for today the Council for Exceptional Children opens the general sessions of its convention here in Washington at the Shoreham Hotel. CEC is celebrating its 50th anniversary of service and advocacy for exceptional children. This organization is well known throughout the Nation for its fine work and commitment on behalf of exceptional children, and I believe it is a fitting tribute that we join them in celebrating their 50th anniversary with the introduction of this bill.

Mr. President, I ask unanimous consent that the text of this bill be printed immediately following my remarks; and Mr. President, I ask unanimous consent that letters and excerpts from letters I have received on the Subcommittee on the Handicapped, S. 3158, the Office of the Handicapped, and Senate Joint Resolution 202, the White House Conference on the Handicapped be printed immediately following my remarks.

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

S. 3407

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 "Supplementary Education Services for the Handicapped Act of 1972".

SEC. 2. (a) Section 651 of the Education of the Handicapped Act (84 Stat. 178) is amended by striking out "(a)".

(b) Section 651 of such Act as amended by this Act is further amended by inserting immediately after "films" the following: ", television products, theatre productions, and other media".

SEC. 3. (a) Section 652(b)(1) of such Act is amended by inserting after "films" the following: "and television products,".

(b) Section 652(b)(3) of such Act is amended by inserting immediately before the semi-colon "and television products".

(c) Section 652(b)(4) of such Act is amended by inserting immediately after "films" the following: ", television products".

SEC. 4. Section 654 of the Education of the Handicapped Act is amended to read as follows:

"TELECOMMUNICATION AIDS FOR THE DEAF

"SEC. 654. (a) The Commissioner is authorized to acquire by purchase, lease, or gift, Teletype, telecommunication and similar communication systems.

'(b) The Commissioner is authorized to distribute by loan or direct grant such communication systems acquired under subsection (a) to public and private non-profit schools, agencies, and organizations which serve the deaf, and to police, fire and other emergency service public agencies and to deaf persons, for the purposes of providing equal opportunity for deaf persons to receive the protection of public agencies in emergencies.

"(c) In distributing communication devices under this section, the Commissioner shall consider the provision of—

"(1) public services to deaf persons in emergencies;

"(2) increased educational opportunity for deaf persons;

"(3) increased cultural and recreational opportunities for deaf persons; and

"(4) increased normal communication opportunity between deaf and non-deaf persons."

SEC. 5. The Education of the Handicapped Act is further amended by adding at the end thereof the following new sections:

"SENSORY AND COMMUNICATION DEVICES FOR THE EDUCATION OF HANDICAPPED PERSONS

"SEC. 655. The Commissioner is authorized to—

"(1) provide by contract, lease, or grant for the development or acquisition of, sensory and communication devices designed to allow handicapped children and adults to participate more fully in elementary, secondary, post secondary or continuing education programs and in increased cultural, recreational, and communication opportunities between handicapped and non-handicapped persons; and

"(2) to distribute such sensory and communication devices to local and State educational agencies, institutions of higher education, and other appropriate public or private non-profit agencies providing education for handicapped persons.

"AUTHORIZATION OF APPROPRIATIONS

"SEC. 656. For the purpose of carrying out this part, there are authorized to be appropriated $25,000,000 for the fiscal year ending June 30, 1973; $30,000,000 for the fiscal year ending June 30, 1974, and $35,000,000 for the fiscal year ending June 30, 1975.".

SEC. 6. The Education of the Handicapped Act is further amended by adding at the end thereof the following new part:

"PART H—CONTINUING AND HIGHER EDUCATION FOR THE HANDICAPPED

"STATEMENT OF PURPOSE

"SEC. 671. The purpose of this part is to develop, support, and improve opportunities for handicapped persons to partcipate in continuing education programs throughout their lifetime and for all handicapped persons to participate as fully as possible in the education programs of technical and vocational institutions and institutions of higher education which participate in educational programs with non-handicapped persons, thereby providing maximum opportunity for positive social, cultural and educational interaction between handicapped and non-handicapped persons.

"GRANTS AND CONTRACTS FOR CONTINUING AND HIGHER EDUCATION FOR HANDICAPPED PERSONS

"SEC. 672. The Commissioner is authorized to make grants and contracts to institutions of higher education, public or private, non-profit technical and vocational schools, State and local educational agencies, radio and television stations and other appropriate agencies for—

"(1) the development and conduct of specifically designed educational programs to meet the learning needs of handicapped persons;

"(2) providing supplementary services such as tutoring, interpreting services for deaf persons, note taking services for deaf or blind or physically handicapped persons; and

"(3) other appropriate services which are designed to help handicapped persons enjoy equal education opportunities and to compensate for their physical, sensory, mental or emotional handicaps.

"DEFINITION

"SEC. 673. For the purpose of this part, the term "continuing education" refers to educational offering designed to provide handicapped persons with (1) fundamental elementary and secondary educational programs designed to remedy deficiencies in the basic education of handicapped persons; (2) academic and technical materials at the high school and post-secondary level designed to help the handicapped person function more productively.

"AUTHORIZATION OF APPROPRIATIONS

SEC. 674. For the purpose of carrying out this part, there are authorized to be appropriated $5,000,000 for the fiscal year ending June 30, 1973, $7,500,000 for the fiscal year ending June 30, 1974, and $10,000,000 for the fiscal year ending June 30, 1975."

EDUCATION COMMISSION OF THE STATES,
Denver, Colo., March 17, 1972.

Hon. HARRISON A. WILLIAMS, Jr.,
U.S. Senator, Old Senate Office Building, Washington, D.C.

DEAR SENATOR WILLIAMS: On behalf of the Task Force and staff of the Handicapped Children's Education Program, I would like to take this opportunity to commend you sincerely for your recent successful efforts on behalf of the handicapped.

The establishment of a Subcommittee on the Handicapped as part of the Labor and Public Welfare Committee comes at a time when alternate strategies must be found to deliver services to the vast number of handicapped persons who need but do not now receive them. Your dedicated interest in the development of national policies and programs in this area clearly indicates your total commitment of serving this group.

It is our sincere hope that you will look to the Handicapped Children's Education Program for assistance in carrying out this new work. Your fellow Task Force members and the HACHE staff will be delighted to support you in any way that you feel may be helpful in achieving your goals.

Sincerely,

GENE HENSLEY,
Director, Handicapped Children's Edution Program.

STATE OF NEW JERSEY, DEPARTMENT OF INSTITUTIONS AND AGENCIES,
Newark, N.J., March 17, 1972.

Hon. HARRISON A. WILLIAMS, Jr.,
U.S. Senate, Committee on Labor and Public Welfare, Washington, D.C.

DEAR SENATOR WILLIAMS: I read with a great deal of pleasure your commitment to improve the lot of handicapped individuals in our society. It seems to me that the steps you are planning to create a new subcommittee on the handicapped; to support the calling of a White House Conference on the handicapped and to establish an office on the handicapped in the Department of HEW are all excellent steps that should lead to effective instruments for assuring equal opportunities for the bland and other handicapped individuals. * * *

With warmest personal good wishes.

Very truly yours,

JOSEPH KOHN,
Executive Director.

STATE OF RHODE ISLAND PROVIDENCE PLANTATIONS, DEPARTMENT OF EDUCATION,
Providence, R.I. March 16, 1972.

Senator HARRISON A. WILLIAMS, Jr.,
Chairman, U.S. Senate, Committee on Labor and Public Welfare, Washington, D.C.

DEAR SENATOR WILLIAMS: I reviewed your proposed bill, S 3158, and accompanying joint resolution with great interest. When one considers the large number of activities and programs for the handicapped scattered among the various agencies of Health, Education, and Welfare, the need for coordination becomes obvious. Please let me know of any way that I can support your proposal.

Sincerely yours,

FRANCIS B. CONLEY,
Coordinator, Special Education.

THE COUNCIL FOR EXCEPTIONAL CHILDREN,
March 13, 1972.

Hon. HARRISON A. WILLIAMS, Jr.,
Committee on Labor and Public Welfare, U.S. Senate, Washington, D.C.

DEAR SENATOR WILLIAMS: I was very pleased to receive your speech delivered February 9, 1972 as printed in the Congressional Record. I am sure that you know we appreciate your continued interest in the education of handicapped children and all of the important things you are helping to make possible for them.

Please be assured of our continued interest and cooperation in any way possible.

With kindest regards and best wishes.

Sincerely yours,

WILLIAM C. GEER,
Executive Secretary.

AMERICAN PSYCHIATRIC ASSOCIATION,
Washington, D.C., March 15, 1972.

Hon. HARRISON A. WILLIAMS, Jr.,
Chairman, Committee on Labor and Public Welfare, U.S. Senate, New Senate Office Building, Washington, D.C.

DEAR SENATOR WILLIAMS: The American Psychiatric Association, which represents 19,000 of the 25,000 practicing psychiatrists in the United States, wishes to commend you on the initiative you have taken in behalf of the handicapped people of this country.

We are aware that you have included the mentally retarded as recipients of your worthy efforts, and we wholly support your concerns since our members have been actively engaged in this area for many years.

The profession of psychiatry is interested in the mental health of all people, including the handicapped. If we, as a society, continue to impose additional hardships on this special group of people instead of finding ways and means to promote their personal welfare through rehabilitation, vocational training, and other aids, there is no question that, as a consequence, their mental health will suffer.

If you should require any assistance from our Association in your endeavors for the handicapped, be assured that we will hasten to be of service.

With very best personal regards, I am

Sincerely,

EWALD W. BUSSE, M.D.,
President.

COMMONWEALTH OF VIRGINIA,
STATE DEPARTMENT OF EDUCATION,
Richmond, Va., March 13, 1972.

Hon. HARRISON A. WILLIAMS, Jr.,
U.S. Senate,
Washington, D.C.

DEAR MR. WILLIAMS: Thank you for the remarks made recently by you on the Senate floor asking for a major Congressional and National commitment to the handicapped. You have made a strong and I trust useful statement which should move this Nation closer to a fulfillment of its obligation to the handicapped. This I view as morally necessary and economically feasible. Should you be successful in establishing an Office of the Handicapped, I hope that one of its primary efforts will be toward bringing cohesiveness to the multitude of now existing programs.

Sincerely,

S. P. JOHNSON, Jr., *Director,*
Elementary and Special Education.

SPECIAL EDUCATIONAL PROGRAMS,
Washington, D.C., March 13, 1972.

Hon. HARRISON A. WILLIAMS, Jr.,
The U.S. Senate,
Washington, D.C.

DEAR SENATOR WILLIAMS: I have read and studied your recent remarks calling for a national commitment to the handicapped (Congressional Record, Volume 118, No. 17, Wednesday, February 9, 1972). There has been too little attention to the condition of the handicapped in the United States. A condition which in some parts of the country has reached crisis proportions. Too many exceptional children are deprived of educational justice and as you stated, the realization of their personal and economic potential.

Discrimination against the handicapped is as invidious as any we know, and to paraphrase a popular notion that they are often last thought of and first cut off when budgetary allotments are made. Your remarks on the Senate Floor and the statistical data contained therein are all too accurate and once again point out the tragedy which is in the making in this country. I am enclosing copies of our own analysis of this problem right here in the shadow of the Capitol.

As a professional deeply involved in special education, I want to record my support for each of your proposals and to particularly identify myself with your call for a White House Conference on The Handicapped and provision in resolution 202 providing for "educational, health and diagnostic services for all children early in life so that handicapped conditions may be discovered and treated early."

I am willing to assist in this national endeavor you propose, and I enlist your assistance in alleviating the current tragic situation which exists right here in Washington, D.C.

Sincerely yours,

JOHN L. JOHNSON,
Associate Superintendent.

STATE OF WISCONSIN,
DEPARTMENT OF PUBLIC INSTRUCTION,
Madison, Wis., March 15, 1972.

Senator HARRISON A. WILLIAMS, JR.,
Chairman, Committee on Labor and Public Welfare, U.S. Senate, Washington, D.C.

DEAR SENATOR WILLIAMS: I sincerely appreciate receiving your letter concerning new congressional and national commitment to handicapped persons. I strongly support the ideas expressed in your remarks in the Congressional Record of Wednesday, February 9, 1972.

While there have been a number of successful programs, established by the federal government for handicapped children and adults, I feel that your call for a national commitment is most necessary and timely. I have served on a number of national groups, including the National Advisory Committee on Education of the Deaf, and currently the committee that you also serve on, the Task Force of the Handicapped Children's Education Program for the Education Commission of the States.

I think your ideas expressed in S. 3158 as they relate to coordinating programs is most feasible. I also strongly endorse the concept of a White House conference to focus the attention of the nation, at least for a brief time, on the achievements and needs of handicapped people.

Cordially yours,

JOHN W. MELCHER,
Assistant State Superintendent.

VIRGINIA COMMISSION FOR
THE VISUALLY HANDICAPPED,
Richmond, Va., March 15, 1972.

The Honorable HARRISON WILLIAMS,
U.S. Senate,
Washington, D.C.

DEAR SENATOR WILLIAMS: May I first congratulate you on your presentation in the Wednesday, February 9, 1972, edition of *The Congressional Record* concerning your subcommittee on the handicapped, the proposed creation of an Office of the Handicapped in the Department of Health, Education, and Welfare, and the proposed White House Conference on the Handicapped. I found the data you presented to be both thought provoking and challenging.

Sincerely,

FRANK S. PENLAND,
Director, Education Service Department.

KANSAS STATE DEPARTMENT OF
EDUCATION,
Topeka, Kans., February 22, 1972.

Hon. HARRISON WILLIAMS, Jr.,
U.S. Senate,
Washington, D.C.

MY DEAR SENATOR WILLIAMS: The three major initiatives which you have spearheaded should show a significant impact toward alleviating the problems and neglect of the handicapped. It would appear that such a move would give additional visibility to aid in the implementation of the various programming that is needed. * * *

Yours sincerely,

JAMES E. MARSHALL,
Director of Special Education.

INTERAGENCY COUNCIL FOR THE
HANDICAPPED OF BERGEN COUNTY,
Bergenfield, N.J., February 21, 1972.

Senator HARRISON A. WILLIAMS, Jr.,
U.S. Senate Office Building,
Washington, D.C.

DEAR SENATOR WILLIAMS: Thank you for your reply dated February 16th and a copy of the Congressional Record dated February 9th. Your comment appear to be "taken from the lips" of parents and professionals who for years have been accepting this piecemeal offering. Even those of us in Bergen County New Jersey who have accomplished far more than other parts of the nation still have many untolled tasks to bring the handicapped up to the second class citizen. Your three proposals will take a giant step forward. If I may contribute two areas which at first reading of the Congressional Record, do not appear covered. First a need to educate that public who are not handicapped or who do not have any handicapped loved ones, that the handicaped do not have a contagious disease and that children without handicaps can play with handicapped children. This applies to all ages including the adult working world where the handicapped are denied social associations which they desperately need to feel success.

In addition there is a need for living facilities for the handicapped young adult who must and desires to learn to live independently of his family. This may require some social services as the young adult learns. Some call these half way houses while others call them living centers. With these facilities must be vocational training or retraining facilities.

Please feel free to call upon our Council for support or reference or in anyway we can assist you in this most important work. We shall be ever grateful for this work you have undertaken.

NORMAN A. BLESHMAN.

UNITED CEREBRAL PALSY
ASSOCIATIONS, INC.,
New York, N.Y., February 22, 1972.

Hon. HARRISON A. WILLIAMS, JR.,
Chairman, Committee on Labor and Public Welfare, U.S. Senate, New Senate Office Building, Washington, D.C.

DEAR SENATOR WILLIAMS: We of United Cerebral Palsy Associations, Inc., are delighted to learn of your three initiatives on behalf of the handicapped, namely: the creation of a new Subcommittee on the Handicapped; the introduction of a resolution calling for a White House Conference on the Handicapped; and the introduction of legislation to establish an Office of the Handicapped in the Department of Health, Education, and Welfare. * * *

Sincerely,

ELSIE D. HELSEL, Ph. D.,
Washington Representative.

STATE OF DELAWARE,
DEPARTMENT OF LABOR,
Wilmington, Del., March 14, 1972.

Hon. HARRISON A. WILLIAMS, Jr.,
Chairman, Committee on Labor and Public Welfare, U.S. Senate, Washington. D.C.

DEAR SENATOR WILLIAMS: Thank you for providing us with a copy of the Congressional Record containing your comments on the needs of our handicapped citizens and the legislation which you introduced. We strongly endorse the action you have taken and welcome your aggressive leadership and commitment to the handicapped.

The most attractive aspect of your comments as viewed by us is your awareness that a significant part of the answer to our problems lies with the lack of coordination between programs already established. In our experience, even more than coordination is needed. We are increasingly talking about the need for "integration" of services across agency and program lines in such a way that there is a singular point of contact between the handicapped person and the total range of services that are needed to develop optimal potential. Encouraged by initial progress toward the integration of social, employment, and rehabilitation services toward the goal of vocational restoration or self-support, we are now attempting to devise plans for developing an integrated service delivery system which would add education to our program in Delaware. Our idea is to cut across "sole state agency" lines through the means of

contracts between agencies in such a way that a prime agency is provided the responsibility for developing a singular comprehensive plan for each handicapped or disadvantaged individual, calling upon the resources of all participating agencies as necessary. Although this offers many benefits and problems, the "client" is relieved of the necessity to work simultaneously with a host of agencies and programs.

Partly due to the categorical nature of public programs and reinforced by the self interests of professional groups and agencies, we frequently duplicate our efforts and utilize our extremely limited resources poorly. Bold and imaginative leadership and new approaches will, we believe, be required to realize the commitments of which you speak.

We wish you every success with your activities and pledge our efforts and resources to the same commitments.

Sincerely yours,

F. ARTHUR BRILL, *Director.*

BRONX, N.Y.
March 17, 1972.

DEAR SENATOR WILLIAMS: As the legislative director of the Co-op City Handicapped Adult Association, I would like to thank you for the clear and honest statements you made concerning the handicapped. We read your statements in the CONGRESSIONAL RECORD of February 9, and we saw it as a Magna Carta type announcement. The handicapped wish to be fully integrated into their communities; not treated as outcasts. We live in an exciting society and the handicapped can make a positive contribution. We think passage of S. 3158 and S.J. 202 will be a giant step towards social equality for the handicapped.

Anything we can do, please let me know.

Respectfully yours,

LAWRENCE DALEY,
Legislative Director.

STATE OF DELAWARE,
DEPARTMENT OF PUBLIC INSTRUCTION,
Dover, Dela., March 16, 1972.

Hon. HARRISON A. WILLIAMS, JR.,
U.S. Senate, Senate Office Building, Washington, D.C.

DEAR SENATOR WILLIAMS: The presentation which you recently made in the Senate asking for a major congressional and national commitment to the handicapped has been discussed with the members of our staff who are especially concerned with handicapped children. We commend you for your comments and for your interest in handicapped individuals.

We are highly supportive of the three major initiatives taken; we are particularly enthused about the legislation which you have introduced which would establish an Office of the Handicapped in the Department of Health, Education, and Welfare. With over one hundred different federally-funded programs for the handicapped, a coordinating office would indeed be desirable.

Best wishes in this endeavor.

Respectfully,

KENNETH C. MADDEN,
State Superintendent.

ADDITIONAL COSPONSORS OF BILLS AND JOINT RESOLUTIONS

S. 1819

At the request of Mr. BROCK, the Senator from New York (Mr. BUCKLEY) was added as a cosponsor of S. 1819, a bill to amend the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

S. 1883

At the request of Mr. MAGNUSON, the Senator from Wyoming (Mr. HANSEN) was added as a cosponsor of S. 1883, the Interstate Taxation Act.

S. 2161

At the request of Mr. HARTKE, the Senator from South Carolina (Mr. HOLLINGS) was added as a cosponsor of S. 2161 a bill 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. 2163

At the request of Mr. MATHIAS, the Senator from Delaware (Mr. BOGGS) was added as a cosponsor of S. 2163, the Vietnam Veterans Act of 1971.

S. 2579

At the request of Mr. HARRIS, the Senator from Texas (Mr. BENTSEN) and the Senator from Illinois (Mr. PERCY) were added as cosponsors of S. 2579, the Ocean Mammal Protection Act of 1971.

S. 2956

At the request of Mr. JAVITS, the Senator from Pennsylvania (Mr. SCHWEIKER) and the Senator from Minnesota (Mr. HUMPHREY) were added as cosponsors of S. 2956, the War Powers Act.

S. 3012

At the request of Mr. CURTIS, the Senator from South Carolina (Mr. THURMOND) was added as a cosponsor of S. 3012, the "Individual Retirement Benefits Act of 1971."

S. 3083

At the request of Mr. HARTKE, the Senator from Wisconsin (Mr. NELSON) was added as a cosponsor of S. 3083, a bill to amend the Fair Packaging and Labeling Act to provide for a uniform system of quality grades for food products, to provide for a system of labeling of food products to disclose the ingredients thereof, to provide for a system of national standards for nutritional labeling of food products, and to provide for a system of labeling of perishable and semiperishable foods.

S. 3121

At the request of Mr. SCOTT, the Senator from Oregon (Mr. HATFIELD) was added as a cosponsor of S. 3121, a bill to extend the Civil Rights Commission for 5 years.

S. 3276

At the request of Mr. DOLE, the Senator from Oregon (Mr. HATFIELD) was added as a cosponsor of S. 3276, a bill to enable wheat producers, processors, and end-product manufacturers of wheat foods to work together to establish, finance, and administer a coordinated program of research, education, and promotion to maintain and expand markets for wheat and wheat products for use as human foods within the United States.

S. 3355

At the request of Mr. DOLE, the Senator from Ohio (Mr. TAFT) was added as a cosponsor of S. 3355, a bill to authorize the payment of a death gratuity to the survivors of certain members of the Armed Forces who have been in a missing-in-action status and subsequently determined to have died during a period when no Government life insurance program was in effect for active duty personnel.

SENATE JOINT RESOLUTION 156

At the request of Mr. HARTKE, the Senator from Rhode Island (Mr. PASTORE) was added as a cosponsor of Senate Joint Resolution 156, to designate the month of April 1972 as "National Check Your Vehicle Emissions Month."

SENATE JOINT RESOLUTION 217

At the request of Mr. MCGEE, the Senator from Rhode Island (Mr. PELL) and the Senator from Maryland (Mr. MATHIAS) were added as cosponsors of Senate Joint Resolution 217, a joint resolution to create an Atlantic Union delegation.

SENATE RESOLUTION 284—SUBMISSION OF A RESOLUTION RELATING TO AGREEMENTS OR TREATIES CONCERNING LANDING RIGHTS OF SUPERSONIC AIRCRAFT

(Referred to the Committee on Foreign Relations.)

SUPERSONIC AIRCRAFT NOISE AND BOOM LIMITATIONS

Mr. CRANSTON. Mr. President, together with Senators MUSKIE and PELL, I submit two resolutions which express the sense of the Senate that any treaty or agreement granting landing rights within the United States to supersonic aircraft, limit both their noise levels and sonic booms. The resolutions provide: First, that noise levels from supersonic aircraft should be required to meet the international standards for new subsonic jet aircraft, and second, that sonic booms should not be allowed over the United States or within 3 miles of the coast. The noise standard included in the resolution is annex 16 of the International Civil Aviation Organization Convention—a treaty approved by the Senate.

Annex 16 establishes noise standards for all current and future generation commercial subsonic aircraft.

Aircraft noise is measured in effective perceived noise decibels. Annex 16 limits noise emissions at the level of 106 EPNDB for new generation aircraft the size of the Concorde. It is unclear exactly what noise levels will be emitted by the Concorde. The British and French Governments claim that the Concorde will emit noise at the level of 114 EPNdb. Critics of the Concorde, including the acoustical director of NOISE—a group of city governments organized to fight aircraft noise—claim that the Concorde will produce 120 EPNdb or more. The Concorde will therefore emit between 8 and 14 plus EPNdb more than annex 16 standards require.

The difference in these numbers does not seem great until you realize that noise is measured on a logarithmic scale. A noise differential of 10 EPNdb was described in the hearings on S. 1566—an aircraft noise retrofit bill—before the Senate Commerce Subcommittee on Aviation by Randall Hurlburt, the acoustical engineer for the City of Inglewood,

which is adjacent to Los Angeles International Airport:

[A reduction of 10 EPNDB] means that where there are presently 500 aircraft per day flying over a neighborhood, the noise will be approximately equivalent to 50 airplanes per day. Where there are 50 airplanes per day, the change will make the noise environment equivalent to 5 airplanes per day. In spite of what anyone says, this is a dramatic change!

In terms of the total noise environment around an airport, the Concorde will therefore produce between 8 and 14 times more noise than it would if the plane met Annex 16 standard. This would be a dramatic step backward. Our airport environments would become noisier. The goal of reduced aircraft noise pollution embodied in Annex 16 standards would be negated.

Any aircraft flying at speeds faster than sound must produce a sonic boom. There is no question sonic booms cause extensive damage. Sonic booms were inflicted on Oklahoma City during 5-month long tests run by the Air Force. The result was $218,000 in actual damage payments and court awards for damage to windows, plaster, et cetera. Boeing engineers calculated the boom from a Boeing SST would be twice as intense as the typical Oklahoma City boom. The Department of the Interior estimates that if supersonic transports become fully operational over the United States, damage claims would be $35 to $80 million each year. This is the most conservative of estimates ranging up to $160 million each year.

A sonic boom is not a phenomenon that lasts only a few moments. A sonic boom is continuous during all times an airplane is flying at supersonic speeds. If a plane flew at supersonic speeds from New York to Los Angeles, it would leave in its wake a boom carpet—a corridor of the earth's surface which feels the boom. The boom carpet would be approximately 50 miles wide and 3,000 miles long. Every human, every animal, and every structure unfortunate enough to be in that area would be struck by the sonic boom.

In Senate hearings last year, William Macgruder, head of the SST project with the Department of Transportation, said the administration had taken the position for 5 years that aircraft should not be flown at supersonic speeds over land. To make this position binding on airlines flying supersonic aircraft, the agreement granting landing rights should require that no supersonic flight shall occur over the United States or within 3 miles of its shores.

Annex 16 was adopted internationally to reduce aircraft noise. Progress is now being made toward this goal. Older aircraft such as 707's, 727's, DC–8's, and DC–9's, emit considerably more noise than the Annex 16 standard for new aircraft allows. 747's built 2 years ago did not meet annex 16, nor were 747's covered by annex 16. 747's now being built do meet annex 16 standards although they are not required to meet them. The new DC–10 and L–1011 have noise levels which meet annex 16 requirements. Boeing, Douglas, and Lockheed are all building aircraft that meet annex 16.

We must continue to progress in our fight against aircraft noise. If the Concorde is allowed to fly without first meeting annex 16 standards, the progress will be stopped. Aircraft noise will not be reduced, nor will it even remain constant. The Concorde will seriously increase aircraft noise. The Concorde, which will be replacing 747's on international flights, carries less than half the number of passengers at approximately twice the level of noise.

Before the Concorde can land in the United States, either an international agreement or a bilateral agreement must be signed by the United States. The United States should not sign such an agreement unless annex 16 standards for noise are included in such agreement.

Requiring the Concorde to meet annex 16 standards is a difficult decision. It may mean the Concorde will not land in the United States. Supporters of the Concorde believe the U.S. State Department will never allow environmental concern to prevent Concorde flights to the United States. Britain and France have over $1.3 billion invested. It is a serious matter to say to our allies that the largest market in air traffic will not be open to the Concorde. It is also a serious matter to say the progress making our environment more livable will be reversed. The high level of noise produced was one of the major reasons the American SST was discontinued. Can we apply lesser standards to the European supersonic transport? The aircraft noise problem was realized, yet work continued on the Concorde. Britain and France had no reason to believe our position would be different on the Concorde than it was on the American SST. If the Concorde cannot meet acceptable noise standards, then it must not be allowed to land in the United States.

The Senate must decide this now. Discussions on supersonic aircraft noise are currently taking place at talks sponsored by the International Civil Aviation Organization. If the United States does not take the position annex 16 limits should apply to supersonic aircraft, then by default the opposite will be the U.S. position. Applying annex 16 noise standards to supersonic aircraft is a position consistent with all that has transpired in the field of aircraft noise during the past few years. It is the position of the Airport Operators International Council, a group that represents operators of almost all major airports in the United States. It must be the official position of the United States.

The resolution is as follows:

S. RES. 284

Resolved, That it is the sense of the Senate that any treaty or agreement entered into by the United States, to permit or approve the conditions under which supersonic aircraft may land in the United States, should require at a minimum that the noise levels for such aircraft be no greater than the noise levels allowed for subsonic aircraft under Annex 16 of the Convention on International Civil Aviation.

SENATE RESOLUTION 285—SUBMISSION OF A RESOLUTION RELATING TO MINIMUM NOISE LEVELS FOR AIRCRAFT

AIRCRAFT NOISE REDUCTION

Mr. CRANSTON. Mr. President, for myself, Senator MUSKIE, and Senator PELL, I submit a resolution which expresses the sense of the Senate that the U.S. position at the ongoing negotiations of the International Civil Aviation Organization—ICAO—shall be that all subsonic aircraft flown in international flights should meet noise levels established in annex 16 of the ICAO Convention. Annex 16 applies only to new generation aircraft first manufactured after 1971—for example, L–1011, DC–10. Older generation aircraft—for example, 707, 727—in most instances will require retrofitting or modification to reduce aircraft engine noise levels down to annex 16 standards.

Modern technology has discovered a method, called retrofitting, that can reduce aircraft engine noise. Retrofitting involves lining the nacelle, or cowling, of a jet engine with soundproofing material, and enlarging the size of the engine's exhaust outlets. The present generation of planes such as the 737, 727, 707, DC–8, and DC–9, and the older 747, which do not meet acceptable noise level standards can be retrofitted. Retrofitting can reduce the aeronautical noise up to 75 percent on some types of aircraft and bring all types within the limits established by annex 16.

The great need for reducing aeronautical noise is immediate. Physical and emotional damage is being inflicted on persons living near airports. Excessive noise can create a situation where sleep is not restful and leisure time is not relaxing. Constant tension is the result. Vascular constriction and a lowered oxygen level to the cerebral tissues are physiological changes noise can cause.

Deafness is perhaps the most common known consequence of prolonged exposure to high levels of noise. Deafness can reduce the income earning capability of individuals and make their lives more difficult. It is not a handicap that we should allow to be inflicted when it is possible to prevent the high levels of noise that now exist around airports.

The effects of increased noise pollution is making areas of our urban environment unlivable. The most visible examples of this are the neighborhoods beneath the landing and takeoff paths at busy metropolitan airports. Land with a rating of NEF–40—noise exposure forecast is not compatible with residential living, according to the Department of Housing and Urban Development.

Major international airports in the United States often have considerable surrounding areas that fall within the NEF–40-plus category. Los Angeles International Airport has 9,000 acres surrounding it which is classified as NEF–40 or above. The city of Los Angeles is currently spending $300 million to eradicate 1,994 private homes around the airport because of public objection to jet noise. The 400 acres the money will buy accounts for only 5 percent of the NEF–40-plus land around the airport. Courts in California have ordered cities to buy up land with NEF–40 plus around municipal airports.

A study estimates the removal cost for the full project around the Los Angeles Airport alone will be $1.268 billion. Los Angeles would lose more than $20 million annually in property taxes. Similar results will occur in other cities. Not only

is the human cost in physiological and psychological damage high in unlivable areas, but the monetary cost to cities is becoming unbearable.

If the noise levels of aircraft utilizing Los Angeles International Airport is lowered by 10 EPNdb, 4,500 of the 9,000 acres in NEF–40-plus acres will no longer have NEF ratings above 40, according to Randall Hurlburt, acoustical expert for the city of Inglewood. Applying this figure to the projected cost for the removal of residences in NEF–40-plus acres around the Los Angeles Airport, savings in removal costs would be around $600 million. Tightening the aircraft noise standards would not only provide a more livable environment but will reduce monetary costs to already overburdened city budgets.

If each nation were to set its own standards on acceptable noise levels for international flights, the result would be confusion and perhaps a breakdown in international air regulation. Because the introduction of aircraft types could increase aircraft noise, and because the problem of aircraft noise was so serious, ICAO called an international conference on aircraft noise. From this meeting came annex 16 to the Convention on International Civil Aviation.

Annex 16 sets maximum noise levels for aircraft, but it is applicable only to aircraft types certified for airworthiness after March 1, 1972, if of engine type bypass ratio 2 or more—747, L–1011, DC–10—or after January 1, 1969, for other subsonic jet aircraft. This means the 737, 727, 707, DC–8, DC–9, and some 747's are not covered.

In March, and again in late summer of this year, preliminary meetings of the International Civil Aviation Organizations Convention on Aeronautical Noise will take place. These meetings seek to improve and extend the international accord on reducing aeronautical noise. To alleviate the severe noise pollution problem that is increasing day by day, the United States should take the position at these meetings, and in the agreement that will hopefully be reached, that subsonic jet aircraft used in international flights and exceeding aircraft engine noise levels prescribed in annex 16 should be retrofitted or modified to reduce aircraft engine noise so as not to exceed such levels.

The cost, both human and monetary, of increasing noise pollution requires that immediate steps be taken to reduce intolerable noise levels. Aircraft are one of the worst offenders. The technology exists to prevent excessive aircraft noise levels and it should be used.

The United States should also take the position that annex 16 standards should be reduced by 10 EPNdb. This means the basic acceptable noise level should be reduced from 108 EPNdb to 98 EPNdb. It is considered that 10 EPNdb is the maximum level of noise people can tolerate, according to acoustical engineer Randall Hurlburt; 90 EPDdb is considered the minimum level people will accept in their environment. A level of 90 EPNdb is the goal we must be working toward. The technology exists to retrofit aircraft engines, reducing noise to 10 EPNdb. It is expensive, but not prohibitively so. The many benefits such as reduced hearing loss and a more tension-free environment are worth the cost. Noise levels must be lowered now at least to the maximum level people can tolerate, and in the future noise standards should be further reduced.

The resolution is as follows:

S. RES. 285

Resolved, That it is the sense of the Senate that, at the preliminary meetings of the International Civil Aviation Organization Convention on Aeronautical Noise, to be held in Canada in March and August, 1972, and with respect to any agreement resulting from such meetings, it should be the position of the United States that any aircraft, of a type that is not presently used for international flights and hereafter is used for such flights, should have aircraft engine noise levels that are not in excess of 10 EPNdb below levels now prescribed in Annex 16 of the Convention on International Civil Aviation.

SOCIAL SECURITY AMENDMENTS OF 1972—AMENDMENTS

AMENDMENT NO. 1077

(Ordered to be printed and referred to the Committee on Finance.)

Mr. ROTH. I am submitting this morning an amendment to H.R. 1, the omnibus welfare, medicare, and social security legislation which is now under consideration by the Committee on Finance. Joining me as cosponsors of this amendment are the distinguished Senator from Alabama (Mr. ALLEN), the distinguished Senator from Tennessee (Mr. BROCK), the distinguished Senator from New York (Mr. BUCKLEY), the distinguished Senator from Colorado (Mr. DOMINICK), the distinguished Senator from Arizona (Mr. GOLDWATER), the distinguished Senator from Florida (Mr. GURNEY), and the distinguished Senator from Georgia (Mr. GAMBRELL).

In essence, it asks that the Congress authorize a 2-year test of both the new family assistance plan, with its uniform minimum benefits, and the newly conceived "workfare" plan, the opportunities for families program.

The language is similar to a measure adopted in 1970 when the Finance Committee reported out H.R. 17550, the previous welfare reform bill which failed to pass the Senate during the 91st Congress. The administration would be required to design two or four tests—half welfare, the other half "workfare"—to implement these tests in representative demographic areas, and to report to the Congress at least every 6 months on their substantive and administrative successes and failures. Separate evaluations and reports would be submitted both to the administration and the Congress by the Comptroller General.

At the end of the 2 years, the Congress would have a ledger of evaluation from which to enact more permanent legislation.

THE NEED FOR TESTING

Mr. President, H.R. 1 has been as hotly debated in the House as any piece of social legislation in recent years. Supporters of the bill cite the alarming statistics which show that the number of beneficiaries under Aid to Families with Dependent Children has risen 147 percent in the 1960's. Even more recently 2.25 million people were added to the AFDC roles during 1970. Costs too have climbed to such levels that many State treasuries are close to the breaking point, not to mention the increased costs of the Federal participation. Clearly these are intolerable developments. We must act to reverse this deteriorating trend.

Yet, opponents of the measure have argued that the family assistance benefits are either too generous, and thereby too costly, or too small to make any significant impact on the deplorable conditions of poverty currently prevailing in all parts of this country.

How are we to really know? At the present time, HEW and OEO are funding four limited experiments of income maintenance programs. However, an excellent report by the Finance Committee on the status of these experiments points out that only one, the New Jersey test, has been in operation long enough to permit any realistic evaluation, and that all four differ substantially from the House passed legislation.

These are pioneer social laboratories, and valuable for their contribution to our understanding of complex economic and behavioral issues. None of them, though, deals directly with the "workfare" elements of this legislation, and their welfare benefit levels are higher than the $2,400 approved so far under H.R. 1. In a sense, we have only reached the wind tunnel. What I am proposing is not only a mock up, but a full 2-year flight test for admittedly sweeping legislation.

IMPACTS OF THE LEGISLATION

Anyone who has reviewed the comprehensive committee report on the bill can not help but be struck by the enormous impact of these proposed reform measures. According to committee estimate, corroborated by the Treasury, H.R. 1 would cost at least an additional $5.5 billion in fiscal year 1973, and a total of $23.5 billion by the end of its currently authorized 5-year life. And if the medicare experience is any precedent, these estimates will prove to be on the low side. During fiscal year 1973, 10½ million additional people will become eligible for welfare or "workfare" benefits, bringing the total number of assisted people to more than 12 percent of our Nation's population. In Puerto Rico, eligible beneficiaries will nearly triple to roughly 1 million, meaning that one person in every three there will be under public assistance. Many States would better than double their welfare roles; every State would, of course, have its welfare lists increased.

The current panoply of combined Federal-State programs makes accurate prediction an impossible task. What will be the effect of increased benefits in the 22 States where a family of four now receives less than the $2,400 suggested minimum? Will the family in Alabama, now eligible for $720 in cash aid, react differently to the plan than the family in New York where cash benefits total $3,240? Can we assume that the family head in Nevada, currently eligible for $1,330 per year, will register for work

training when he will receive $1,600 under the proposed new scheme—$2,400 minimum less the $800 penalty imposed for people who fail to register under the "workfare" portion of the bill?

ADMINISTRATIVE PROBLEMS

Mr. President, in addition to this critical problem of work incentives, we must all face the fact that the proposed legislation will, at first, produce an administrative nightmare.

New procedures must first be developed to establish what is a family's true income. Documented proof will be required to establish bona fide beneficiaries. Many offices of HEW, and the Department of Labor will have to interact with probably hundreds of State and local agencies to verify incomes and beneficiaries, enroll 1.4 million new welfare families, provide job training and placement in an additional 2.6 million families, establish and administer day care centers to accommodate millions of children.

Can we logically expect to implement these vast procedures all at once? Can we not expect legitimate beneficiaries to be denied services due to a massive bureaucratic overload? And can we really feel comfortable launching a nationwide welfare reform system when the Comptroller General has only last week reported to us that HEW has had major problems establishing a system of quality control to assure that only currently eligible recipients receive welfare benefits.

This is a most enlightening report which I commend to all my colleagues, and I should like to ask unanimous consent that the digest of this analysis be included at this point in the RECORD.

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

[Comptroller General's Report to the Congress]

PROBLEMS IN ATTAINING INTEGRITY IN WELFARE PROGRAMS—SOCIAL AND REHABILITATION SERVICE, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

WHY THE REVIEW WAS MADE

Whether welfare assistance payments are being provided to eligible persons only is a source of increasing national concern aroused by the following facts.

From fiscal year 1960 to fiscal year 1971, Federal and State welfare costs more than tripled—from $2.8 billion to $8.7 billion.

The number of recipients increased from 5.8 million to 14.3 million.

The General Accounting Office (GAO) examined the effectiveness of the quality control system used by the States, to ensure that public assistance funds were being provided to eligible persons only and that public assistance programs were being managed fairly and efficiently. This system was developed by the Department of Health, Education, and Welfare (HEW).

GAO's review was made in California, Colorado, Louisiana, Maryland, Michigan, New York, Ohio, and Texas. These eight States spent about 50 percent of all Federal welfare funds in fiscal year 1971.

Background

The quality control system was adopted by HEW in 1964 for evaluating eligibility under the welfare programs. It is an adaptation of a technique which is used widely in industry for evaluating the quality of products and services. In October 1970 HEW required the States to implement a revised quality control system. The new system was based on experience under the prior system and on the States' increasing use of simplified method of determining applicants' eligibility.

Under the new system cases are selected on a statistical-sampling basis and are investigated to see whether the eligibility of recipients and the amounts of payments are within established levels of accuracy. If they are not, the States must identify the inaccuracies and take necessary corrective actions.

FINDINGS AND CONCLUSIONS

Benefits from the implementation of a well-conceived quality control system can be achieved only through effective Federal and State administration. Adequate staffing and timely resolution of problems are essential to effective administration.

The Federal quality control system had not been implemented fully in the eight States at the time that GAO completed its fieldwork (July 1971). Consequently quality control has not accomplished its purpose of maintaining integrity over the public assistance programs.

HEW does not know whether rates of ineligibility and incorrect payments are within established levels of accuracy.

The problems encountered in implementing and operating the quality control system are complex, as shown below.

HEW's problems

HEW decided that the Federal quality control system should be implemented as soon as possible after its design was completed. HEW's organization however, was not ready to deal with many of the complexities of implementing a system that required close cooperation between the Federal Government and the States.

HEW recognized, 5 months prior to the system's implementation, that 55 additional staff members were needed—45 for the regional offices and 10 for headquarters. As of September 1971—almost a year later—only 19 of these positions had been filled. (See p. 40.)

HEW was only marginally successful in obtaining State recognition of the importance of quality control and of the need to commit the resources necessary to ensure its success. (See p. 45.)

Once the quality control system was in operation, HEW was able to recognize the problems that the States were having with it. HEW's regional offices, because of insufficient staff and limited knowledge of the system, usually were able only to react to State problems as they occurred rather than to anticipate them and assist States in avoiding the problems.

States' problems

All States visited by GAO had encountered problems in carrying out quality control activities. These problems varied in intensity from State to State. (See p. 12.) Two States—California and New York—had not implemented the Federal system statewide as of July 1971 but had attempted to use other methods to control public assistance expenditures. The methods used were not designed to meet Federal objectives. (See p. 28.)

The remaining six States—which implemented the system statewide—encountered one or more of the following problems.

Staffing—As of April 30, 1971—7 months after the Federal system was to be implemented—only Colorado and Michigan had met their staffing needs. Insufficient staffing continues to be a major problem limiting quality control's effectiveness. (See p. 12.)

Investigations—HEW specified the number of cases to be reviewed in each State so that reliable statistical projections could be made concerning the total number of cases. None of the six States, however, completed the required number of quality control reviews for the quarter October to December 1970, although Colorado and Ohio came close. (See p. 16.)

For those cases that were reviewed, ineligibility rates or incorrect payment rates generally were high. Although these sample results could not be used for statistical-projection purposes for the total number of welfare cases, GAO believes that some error rates were sufficiently high—in view of the number of cases reviewed—for the States to have taken corrective action. (See p. 18.)

Verification—HEW requires that independent verification and documentation of all aspects of eligibility and payment be pursued to the point at which decisions on eligibility and the amounts of payment are conclusive. About 90 percent of the completed quality control reviews analyzed by GAO had not done this.

HEW guidelines did not specify the extent and types of verification to be obtained. For example, if recipients stated at the time of initial application that they had no savings or earnings, this information was reaffirmed in an interview and was accepted by reviewers without further attempts at verification. Use of additional sources—such as employment offices and local credit bureaus—to verify eligibility information could enable States to make more accurate decisions as to eligibility and amounts of payment. (See p. 19.)

GAO analyzed 150 quality control reviews in Colorado and Maryland and in Cuyahoga County, Ohio (50 cases selected at random from each). Had reviewers used additional sources, they could have had more assurance that their eligibility and payment decisions were accurate. (See p. 22.)

Pending legislation

Under pending welfare reform legislation (H.R. 1), HEW would take over administration of all federally assisted welfare programs and would have sole responsibility for quality control. GAO believes that HEW's plans for carrying out this proposed change, if effectively implemented, could restore public confidence in the integrity of the welfare programs.

Because the present Federal quality control system is to be the basis for such a system in the welfare reform program being considered by the Congress, HEW should make a concentrated effort to solve the problems in the present system not only to help accomplish the objectives of the present system but also to provide an adequate basis for the development of the quality control system to be used in the welfare reform program. (See p. 43.)

RECOMMENDATIONS OR SUGGESTIONS

HEW should:

Ensure, through appropriate efforts, that top State officials are aware of the benefits to be derived from an effective quality control system.

Increase headquarters and regional office quality control staffs to a level at which they can effectively assist and monitor State quality control operations.

Define, for the guidance of State and local quality control reviewers, necessary steps to be considered as requirements in determining recipients' resources, incomes, and other eligibility factors so that quality control investigations can provide conclusive findings. (See p. 46.)

AGENCY ACTIONS AND UNRESOLVED ISSUES

HEW has stated that:

Its regional commissioners are taking vigorous action to ensure that States which do not have fully operational quality control systems comply with Federal regulations.

Training seminars are being conducted for its regional staff so that they can provide assistance to States for realizing fuller use of quality control as a management tool.

As of March 1972 all but one of the 55 authorized quality control staff members had been hired, and a request has been submitted to the Congress for additional staff members.

It is developing additional guidelines for issuance to State agencies so that quality control investigations can provide conclusive findings.

The actions taken or planned by HEW should strengthen the quality control system and should make it more effective. (See p. 47.)

MATTERS FOR CONSIDERATION BY THE CONGRESS

This report provides the Congress with timely information for its consideration of welfare legislation and also provides the appropriations committees with information for their consideration of HEW's request for additional quality control staff members. It contains no recommendations requiring legislative action.

THE WISE MIDDLE COURSE

Mr. ROTH. Mr. President, none of us here knows exactly what the Finance Committee will do to modify H.R. 1, or what amendments will be accepted on the floor. Nor can we predict the outcome of the almost certain conference which will be required. Nevertheless, this is bound to be bold legislation, reaching every State and millions of disadvantaged people.

I am deeply concerned with the plight of current welfare programs, with the mounting costs in dollars and family desertions. We cannot ignore these problems, they are a growing blight on our society. I am not opposed to welfare reform, it is an absolutely essential priority if we are to come to grips with the abuses and mistakes of the current patchwork.

But I am asking that we insist on careful and objective analysis of whatever legislation eventually is enacted. I am asking for a 2-year test of family assistance and workfare, for timely and accurate evaluation and reporting both by the Federal agencies involved and the independent Comptroller General. Then, with experience, rather than conjecture, we can act to implement, nationwide, the necessary and workable, welfare reforms this country most certainly needs.

Mr. President, I ask unanimous consent that the amendment be printed at this point in the RECORD.

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

AMENDMENT No. 1077

Beginning on page 326, line 9, strike out all through page 400, line 22, and insert in lieu thereof the following:

TITLE IV—TESTING OF ALTERNATIVES TO PROGRAMS OF AID TO FAMILIES WITH DEPENDENT CHILDREN

AUTHORIZATION FOR CONDUCT OF TEST PROGRAMS

SEC. 401. (a) For purposes of this section—

(1) The term "family assistance test program" means a program which contemplates that—

(A) the assets and resources of families will (except to the extent otherwise prescribed by the Secretary) be taken into account in determining eligibility for or amount of payments under the program;

(B) there will be established minimum income levels for families of various sizes;

(C) money payments will be made (periodically) to families whose income is less than the applicable minimum income level so established;

(D) such money payments will be denied to any adult member of a family (other than such a member who is ill, aged, or disabled, is caring for another member of such family who is ill or disabled, or is caring for another member of such family who is a child of pre-school age) who refuses without good cause to accept employment or participate in a vocational training or similar training program which is designed to prepare such member to engage in employment;

(E) incentives for members of families to engage in employment will be provided by disregarding a portion of the earnings of such family for purposes of determining eligibility for and the amounts of the money payments payable to such family under the program; and

(F) there will be provided to the families participating in such program (in appropriate cases) (i) placement and employment training services, (ii) child care services when needed to facilitate participation, by adult members of such families, in employment or a vocational training or similar training program, (iii) family planning services, and (iv) other appropriate supportive services.

(2) The term "workfare test program" means a program which contemplates that—

(A) the assets and resources of families will (except to the extent otherwise prescribed by the Secretary) be taken into account in determining eligibility to participate in the program;

(B) families headed by an adult, who (by reason of advanced age, illness, or disability, caring for another member of the family who is ill or disabled, or caring for a member of such family who is a child of pre-school age) is presumed to be unable to engage in employment, will be entitled to receive welfare assistance in the form of money payments the amount of which shall be based on standards of need developed for families of various sizes, with provision for disregarding a portion of the earnings of such family for purposes of determining eligibility for and the amounts of the money payments payable to such family under the program;

(C) adult individuals who are heads of families and who are unemployed (or underemployed) will be eligible to register to participate in employment or in a training program designed to qualify them for specific jobs available in the locality in which they live;

(D) all registrants will be placed in employment (including subsidized public service employment) or such a training program;

(E) registrants placed in employment for wages at less than the rate of the minimum wage would receive wage supplement payments (in amounts which shall not be greater than the difference between any registrant's hourly wage and the minimum wage) for hours (not in excess of 40 hours for any week) during which work is performed by them in such employment;

(F) training allowances would be paid to registrants with appropriate reductions in the amount of such allowances in cases where registrants participate in training on less than a full-time basis; and

(G) there will be provided to the families participating in such program (i) child care services when needed to facilitate participation, by any registrant, in employment or a vocational training or similar training program, (ii) family planning services, and (iii) other appropriate supportive services. (3) The term "family" means a family with children.

(b) (1) The Secretary of Health, Education, and Welfare (hereinafter in this section referred to as the "Secretary") is authorized, effective January 1, 1973, to plan for and conduct, in accordance with the provisions of this section, not more than four test programs. One-half of such programs shall be family assistance test programs and one-half of such programs shall be workfare test programs.

(2) Whenever a family assistance test program is commenced, there shall commence, on the same date as such program, a workfare test program, and both such programs shall (except as may otherwise be authorized by the Congress) terminate on the same date. Except as may otherwise be authorized by the Congress, no test program under this section shall be conducted for a period of less than 24 months.

(3) Any such test program shall be conducted only in and with respect to an area which consists of a State, one or more political subdivisions of a State, or part of a political subdivision of a State, and shall be applicable to all the individuals who are residents of the State or the area of the State in and with respect to which such program is conducted.

(4) During any period for which any such test program is in effect in any State or in any area of a State, individuals residing in such State or the area of the State in which such program is in effect shall not be eligible for aid or assistance under any State plan or program for which the State receives Federal financial assistance under part A of title IV of the Social Security Act.

(5) The Secretary, in determining the areas in which test programs under this section shall be conducted, shall select areas with a view to assuring—

(A) that the number of participants in any such program will (to the maximum extent practicable) be equal to the number of participants in any other such program; and

(B) that the area in which any family assistance test program is conducted shall be comparable (in terms of size and composition of population, of average per capita income, rate of unemployment, and other relevant criteria) to an area in which a workfare test program is conducted.

(c) (1) No test program under this section shall be conducted in any State (or any area thereof) unless such State shall have entered into an agreement with the Secretary under which the State agrees—

(A) to participate in the costs of such test program; and

(B) to cooperate with the Secretary in the conduct of such program.

(2) Under any such agreement, no State shall be required to expend, with respect to any test program conducted within such State (or any area thereof), amounts greater than the amounts which would have been expended with respect to such State or area thereof (as the case may be), during the period that such test program is in effect, under the State plan of such State approved under part A of title IV of the Social Security Act. For purposes of determining the amount any State would have expended under such a plan during the period that any such test program is in effect within such State (or any area thereof), it shall be assumed that the rate of State expenditure (from non-Federal funds) under such plan would be equal to the average rate of State expenditure (from non-Federal funds) under such plan for the 12-month period immediately preceding the commencement of such test program.

(d) (1) The Secretary shall, upon completion of any plans for and prior to the commencement of any test program under this section, submit to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives a complete and detailed description of such program and shall invite and give consideration to the comments and suggestions of such committees with respect to such program.

(2) During the period that test programs are in operation under this section, the Secretary shall from time to time (but not less frequently than once during any 6-month

period) submit to the Congress a report on such programs which shall contain full and complete information and data with respect to such programs and the operation thereof, together with such recommendations and comments of the Secretary with respect to such programs as he deems desirable.

(3) At the earliest practicable date after the termination of all test programs authorized to be conducted by this section, the Secretary shall submit to the Congress a full and complete report on such programs and their operation together with (A) the Secretary's evaluation of such programs and such comments or recommendations of the Secretary with respect to such programs as he deems desirable (B) his recommendations (if any) for legislation to revise or replace the provisions of part A of title IV of the Social Security Act.

(e) (1) The Secretary shall—

(A) in the planning of any test program under this section; or

(B) in assembling information, statistics, or other materials, to be contained in any report to Congress under this section;

consult with, and seek the advice and assistance of, the General Accounting Office and the General Accounting Office shall consult with the Secretary and furnish such advice and assistance to him upon request of the Secretary or at such times as the Comptroller General deems desirable.

(2) The operations of any test program conducted under this section shall be reviewed by the General Accounting Office, and the books, records, and other documents pertaining to any such program or its operation shall be available to the General Accounting Office at all reasonable times for purposes of audit; review, or inspection. The books, records, and documents of each such program shall be audited by the General Accounting Office from time to time (but not less frequently than once each year).

(3) During the period that test programs are in operation under this section, the Comptroller General shall from time to time (but not less frequently than once during any 6-month period) submit to the Congress a report on such programs which shall contain full and complete information and data with respect to such programs and the operation thereof, together with such recommendations and comments of the Comptroller General with respect to such programs as he deems desirable.

(4) At the earliest practicable date after the termination of all test programs authorized to be conducted by this section, the Comptroller General shall submit to the Congress a full and complete report on such programs and their operation together with his evaluation of, and comments and recommendations (if any) with respect to, such programs.

(f) In the administration of test programs under this section, the Secretary shall provide safeguards which restrict the use or disclosure of information identifying participants in such programs to purposes directly connected with the administration of such programs (except that nothing in this subsection shall be construed to prohibit the furnishing of records or information concerning participants in such programs to the Committee on Finance of the Senate or the Committee on Ways and Means of the House of Representatives).

(g) For the purpose of enabling the Secretary to formulate operational plans and to conduct test programs under this section, there are authorized to be appropriated for each fiscal year such sums as may be necessary.

TEMPORARY AND EXPERIMENTAL NATURE OF TEST PROGRAMS

SEC. 402. It is the intention of the Congress, after the termination of the test programs authorized to be conducted under section 401, and after all reports required with respect to such program under such section have been submitted to the Congress, to study the matter of whether permanent legislation should be enacted permanently to establish, in lieu of the existing program of aid to families with dependent children (established by part A of title IV of the Social Security Act), some type of family assistance program or programs.

(b) Nothing in this Act shall be construed as a commitment, on the part of the Congress, to enact (at any future time) legislation to establish, on a permanent basis, any program tested pursuant to section 401 or any similar program.

On page 401, lines 4 and 5, strike out "titles III and IV" and insert in lieu thereof "title III".

On page 401, beginning with line 9, strike out all through line 25, and insert in lieu thereof the following: "except that appropriations for administrative expenses incurred during the fiscal year ending June 30, 1972, in developing the staff and facilities necessary to place in operation the program established by title XX of the Social Security Act, as added by this Act, and for child care furnished pursuant to section 508 during such fiscal year, may be included in an appropriation Act for such fiscal year."

On page 402, beginning with "Act" on line 8, strike out all before "Act" on line 11.

On page 402, line 18, strike out "or XXI".

On page 403, lines 13 and 14, strike out "and families".

On page 403, line 19, strike out "or XXI".

On page 403, line 22, strike out "and families".

On page 403, line 23, strike out "or XXI".

On page 404, line 7, strike out "or family".

On page 404, line 20, strike out "sections 2016 and 2156" and insert in lieu thereof "section 2016".

On page 404, line 24, strike out "and part A of title IV,".

On page 405, line 5, strike out "or family".

On page 405, line 10, strike out "or XXI".

On page 405, line 12, strike out "or 2153(b)".

On page 405, line 13, strike out "or family".

On page 405, line 16, strike out "or family".

On page 405, line 17, strike out "or 2156".

Beginning on page 405, line 25, strike out "or family of a given size)".

On page 406, line 3, strike out "part A of title IV,".

On page 406, line 17, strike out "or families".

On page 406, lines 25 and 26, strike out "and part A of title IV,".

On page 407, lines 5 and 6, strike out "or family".

On page 407, line 8, strike out "or family".

On page 407, line 10, strike out "or family".

On page 407, line 11, strike out "it" and insert in lieu thereof "he".

On page 407, line 11, strike out "its" and insert in lieu thereof "his".

On page 407, line 23, strike out "and part A of title IV,".

On page 408, beginning with "emergency" on line 1, strike out all through "Act," on line 3.

On page 408, line 12, strike out "403,".

On page 409, strike out lines 1 through 7.

On page 410, beginning with "(or" on line 18, strike out all through "XXI)" on line 20.

On page 411, line 2, strike out "or under part A or part B of title XXI".

Beginning on page 411, line 5, strike out all through page 412, line 11.

On page 412, lines 23 and 24, strike out "part A of title IV".

On page 413, line 1, strike out "sections 301 and 401" and insert in lieu thereof "section 301".

On page 413, beginning with "(other" on line 1, strike out all through "Act)" on line 5.

On page 413, beginning with "; except" on line 6, strike out all before the period on line 10.

On page 413, strike out lines 11 through 23.

On page 414, line 7, strike out "and families".

On page 414, line 11, strike out "sections 2016 and 2156" and insert in lieu thereof "section 2016".

On page 414, line 17, strike out "sections" and insert in lieu thereof "section".

On page 414, line 22, strike out "sections" and insert in lieu thereof "section".

On page 414, line 22, strike out "or family".

On page 414, line 23, strike out "or XXI".

On page 415, line 4, strike out "or family".

On page 415, line 6, strike out "or part A of title IV,".

On page 415, line 19, strike out "or 2156".

On page 416, line 2, strike out "or 2154 (b) (5)".

Beginning on page 416, line 5, strike out all through page 418 line 3.

On page 418, line 4, strike out "(b)" and insert in lieu thereof "Sec. 511."

On page 447, lines 13 and 14, strike out "or part A or part B of title XXI" and insert in lieu thereof ", or receives aid in the form of money payments in such month under a State plan approved under part A of title IV".

On page 447, line 19, insert "and" after "1101 (a) (1),".

On page 447, line 21, strike out the comma at the end of the line and insert in lieu thereof a period.

On page 447, strike out lines 23 through 25.

On page 448, lines 11 and 12, strike out "or any family pursuant to part A or part B of title XXI".

On page 448, line 14, strike out "or family".

On page 448, line 15, strike out "of part A or B of title XXI".

On page 448, line 18, strike out "or part A or B of title XXI" and insert in lieu thereof "or part A of title IV".

On page 451, line 9, strike out "sections 302 and 402" and insert in lieu thereof "section 302".

On page 452, line 8, insert, immediately before the semicolon at the end of the line, the following: "and inserting in lieu thereof 'receiving money payments under the Plan of a State approved under part A of title IV, or' ".

On page 452, line 14, insert, immediately before the period at the end thereof, the following: "and inserting in lieu thereof 'individuals receiving money payments under a plan of the State approved under part A of title IV, and' ".

On page 452, beginning with the word "by" on line 20, strike out all through ", and" on line 23.

On page 453, lines 21 and 22, strike out "receiving assistance to needy families with children as defined in section 405(b)" and insert in lieu thereof "receiving aid under a State plan approved under part A of title IV (or meet the income and resources requirement of such State plan),".

On page 454, lines 6, 7, and 8, strike out "who are not receiving assistance to needy families with children as defined in section 405(b)" and insert in lieu thereof "who are not receiving aid under a State plan approved under part A of title V."

On page 454, line 13, strike out "title I, X, XIV, or XVI, or".

On page 455, beginning with "or would" on line 10, strike out all through "405(b)" on line 13, and insert in lieu thereof "eligible for aid under a State plan approved under part A of title IV".

On page 455, lines 23 and 24, strike out "assistance to needy families with children as defined in section 405(b)" and insert in lieu thereof "money payments under a State plan approved under part A of title IV,".

On page 456, lines 15 and 16, strike out "assistance to needy families with children as defined in section 405(b)" and insert in lieu thereof "aid under the State's plan approved under part A of title IV,".

On page 456, strike out lines 20 through 25.

On page 457, strike out "(C)" and insert in lieu thereof "(B)".

On page 457, line 6, strike out "(D)" and insert in lieu thereof "(C)".

On page 457, line 10, strike out "(F)" and insert in lieu thereof "(D)".

AMENDMENT NO. 1078

(Ordered to be printed and referred to the Committee on Finance.)

SENATOR HUMPHREY PROPOSES 25-PERCENT INCREASE IN RETIREMENT BENEFITS

Mr. HUMPHREY. Mr. President, I am today introducing legislation that would provide a 25-percent increase in social security benefits for the senior citizens of our Nation.

This legislation would provide a start, a downpayment on adequate income for this country's older Americans. It is a badly needed measure—for the elderly are constantly beset by increasing cost for homes, food, property taxes, mortgages, rents, transportation, medical services, and hospital costs. Yet, many of our elderly must pay for these things out of a fixed, level income. Few of our elderly have any prospect of work, few have any prospect of seeing their income increase every year, and almost all of our elderly constantly ask themselves, "How are we going to pay our bills? How are we going to make ends meet?"

Mr. President, I see significant and far-reaching changes coming in our social security and railroad retirement benefit programs. Many of us in Congress have proposed new methods of financing these programs in order to increase benefits and decrease the tax burden on the working man.

This kind of financing is overdue. We ought not let the social security trust fund build up huge surpluses, while at the same time the basic benefits remain low.

It is in this spirit that I introduce a 25-percent increase amendment to H.R. 1 today. And it was in this spirit that I have previously introduced legislation that would begin a system of general revenue contributions to the trust fund, increase the contributions ceiling, lower the tax rates, and institute a minimum payment.

Mr. President, this amendment is necessary, it is honorable, it is required. I would hope that the Senate Finance Committee would give it a prompt and immediate hearing.

AMENDMENT NO. 1079

(Ordered to be printed and referred to the Committee on Finance.)

Mr. HARTKE submitted an amendment intended to be proposed by him to the bill (H.R. 1) to amend the Social Security Act to increase benefits and improve eligibility and computation methods under the OADSI program, to make improvements in the medicare, medicaid, and maternal and child health programs with emphasis on improvements in their operating effectiveness, to replace the existing Federal-State Public Assistance programs with a Federal program of adult assistance and a Federal program of benefits to low-income families with children with incentives and requirements for employment and training to improve the capacity for employment of members of such famiiles, and for other purposes.

SENATE INTERVENTION IN SUPREME COURT PROCEEDINGS—AMENDMENTS

AMENDMENTS NOS. 1080, AND 1083

(Ordered to be printed and to lie on the table.)

Mr. SAXBE submitted two amendments intended to be proposed by him to the resolution (S. Res. 280) authorizing Senate intervention in the Supreme Court proceedings on the issue of the scope of Article I, section 6, the so-called speech-and-debate clause of the Constitution.

AMENDMENT NO. 1081

(Ordered to be printed and to lie on the table.)

Mr. SAXBE (for himself and Mr. DOMINICK) submitted an amendment intended to be proposed by them jointly to the resolution (S. Res. 280), supra.

AMENDMENT NO. 1082

(Ordered to be printed and to lie on the table.)

Mr. SAXBE (for himself and Mr. MATHIAS) submitted an amendment intended to be proposed by them jointly to the resolution (S. Res. 280), supra.

ADDITIONAL COSPONSORS OF AMENDMENTS

AMENDMENT NO. 938

At the request of Mr. HARRIS, the Senator from New York (Mr. JAVITS) was added as a cosponsor of Amendment No. 938 intended to be proposed to the bill (H.R. 1), the Social Security Amendments of 1972.

AMENDMENT NO. 1059

At the request of Mr. BOGGS, the Senator from Pennsylvania (Mr. SCOTT) was added as a cosponsor of Amendment No. 1059 intended to be offered to the bill (S. 2760) to amend the Rail Passenger Service Act of 1970 in order to provide financial assistance to the National Railroad Passenger Corporation for the purpose of purchasing railroad equipment, and for other purposes.

ADDITIONAL STATEMENTS

ELEMENTARY SCHOOL PUPILS PLAN OWN NOON MEALS

Mr. ROTH. Mr. President, recently it has been called to my attention that the pupils at the Richard A. Shields Elementary School in Lewes, Del., are engaged in planning their own noon meals as a result of a program on nutritional education being carried out by Mrs. Betty V. Fisher and Mrs. Alice C. Allen, cafeteria staff members, under the guidance of Mrs. Ann M. Cerney, cafeteria manager and the school principal, Frederick D. Thomas.

I believe his activity merits the attention of all citizens who are concerned with the well-being of our Nation's schoolchildren. The knowledge gained by this practical experience in meal planning should serve to instill in each youngster the sound habits of eating which are so vital to their physical and mental development.

I ask unanimous consent that an article describing this program, published in the Delaware Coast Press on March 2, 1972, be printed in the RECORD.

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

LEWES STUDENTS PLANNING NOON MEAL

Four hundred and thirty students have been planning the noon meals for the Richard A. Shields Elementary School in Lewes since Feb. 14 as part of a program on nutritional education. The program is being carried out by Mrs. Betty V. Fisher and Mrs. Alice C. Allen, cafeteria staff members, with the cooperation and guidance of Mrs. Ann M. Cerney, cafeteria manager, and the school principal, Frederick D. Thomas.

Mrs. Fisher and Mrs. Allen are presently enrolled in the third unit of a school food service training program which meets for three hours a week for ten weeks at the Sussex Central High School.

In preparation for the student-planned menus, Mrs. Cerney distributed to each teacher in the third, fourth and fifth grades a health directive from the State Department of Public Instruction which stresses that educators can teach more effectively if their students are properly nourished. The publication showed current studies and research which proved an alarming decline in the physical condition of American youth in all economic and social groups.

In order to enlighten the students, teachers, and hopefully, through the students—their parents, about the National School Lunch program's requirements and values this new school project of the students preparing the menus was undertaken.

The National School Lunch Program was begun in 1946. It operates each school day and uses in excess of a billion dollars worth of food a year for the over nineteen million children that it reaches. The overall national plan is "to close the nutrition gap between food available at home and total food needs, thus meeting current nutritional needs for the child's growth and development and to shore up some nutritive reserves for the child's future growth, development, and well-being."

For the local plan, each classroom teacher at Shields School was given a Type "A" pattern for developing a lunch menu. All 15 classes were invited to participate and the local program will continue until each class has had its turn. The following menu pattern, which includes one third of the daily requirements for a 9–12 year old, is put on the chalk board and explained to each class: two ounces of cooked meat or protein, ⅜ cup of vegetable and or fruit, one slice enriched or whole grain bread, one tablespoon butter or fortified margarine, and ½ pint of whole milk.

Four basic foods had to be included in the menu which was chosen by each class. A variety of suggestions were placed on the board, then eliminated by a voting process. Each menu selected by a class was submitted to the cafeteria in the form of a colorful poster

which included pictures of the finished meal. The posters were displayed on a bulletin board in the cafeteria.

On the public address system during the morning announcements, a special tribute was given each day to the class which had prepared that day's menu.

A typical menu planned by Mrs. Barbara T. Smith's fourth grade class included fried chicken, mashed potatoes and gravy, tossed salad, homemade rolls, cherry pie, and milk.

An evaluation project was requested by the cafeteria staff and the form was left to the discretion of each teacher. Mrs. Smith's class chose to write formal letters of appreciation to the cafeteria staff and they were bound in a colorful folder entitled "Our Letters to the Cooks." The following quotations were taken directly from those letters:

"I enjoyed every meal you people cooked. All of you cook very nicely. I know all of you work very hard for the school."

"We liked the lunch. I hope every one liked it, even the teachers."

"I enjoy eating your food any day."

"It really was fun making up our own menu."

"It was so delicious that I could have some more, but I didn't want to be greedy. But boy I tell you that was so good."

"It took a long time to make up the menu. I liked everything but the salad, but everything else was divine."

"I voted for just about everything but the cranberry sauce."

"We did not pick pizza because we thought that most of the other classes would."

"The whole lunch was fantastic and delicious."

CLOSING AND MOVING OF INDUSTRIAL PLANTS

Mr. HARRIS. Mr. President, the problem of industrial plants closing and moving out of communities has been with us for a long time now. In the last few years, however, due to the malfunctioning of the American economy, the problem has seriously intensified.

I believe other Senators will be interested in an article by William Wong in The Wall Street Journal, February 28, which describes steps taken by American Oil Co. to make the separation of one of its refineries in the town of El Dorado, Ark., as painless as possible.

American Oil, according to Mr. Wong, took the plant closing seriously and made this decision only when it became absolutely necessary. When the company finally decided on the closing, it was careful to inform the town 6 months in advance of the shutdown date.

American asked their "other facilities to freeze outside hiring, so that El Dorado employees could have the first crack at job openings." It also helped its employees find jobs in the El Dorado area if they did not wish to leave their homes. Moreover, it gave most of the plant grounds and buildings, worth about $2.2 million, to the county in which the refinery is located.

Unfortunately, we have not yet reached the day when every company lives up to its responsibilities. As Mr. Wong also notes:

A "wholesome" approach, however, is far from universal. In many instances, workers are still suddenly assembled and summarily fired. In other cases, work forces are methodically trimmed creating an agonizing existence for those left on the job. They wonder when the ax with their name on it will fall. Plants involved in such gradual closedowns are usually allowed simply to die, with little or no explanation from management.

Mr. President, while we may applaud the forward-looking policies of American Oil in providing for the workers it displaced when it closed its plant in El Dorado, it is clear that we cannot depend on enlightenment alone to solve the problems caused by runaway plants. There is need for some national answer to the dilemma faced by hundreds of communities across the Nation.

I believe that there is an answer in Federal chartering. First proposed in the last century and endorsed over the years by such national leaders as Woodrow Wilson, Federal chartering would enable the Federal Government to require from corporations certain obligations toward the community in which they were located before they received the right to incorporate. Federal chartering also would end the practice which permits corporations to shop among various States to gain the lowest taxes or other concessions in the long run detrimental to the public interest.

Today corporations can hold a gun at the head of many communities. They often force the community to invest heavily in new roads, sewers and schools all in order to create the necessary climate to attract the corporation in the first place. Then by subsequently threatening to leave for a more permissive climate in another State, they can compel a community to continue to maintain inadequate pollution standards or to set property taxes at an inequitable and low level for the corporations.

Federal chartering could end these abuses. It could insure that every State would compete in fairness for the benefits of new industry. I think we shall soon see that it is an idea whose time is come.

Mr. President, I ask unanimous consent that Mr. Wong's article be printed in the RECORD.

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

[From the Wall Street Journal, Mar. 7, 1972]

A PLANT SHUTDOWN IS ALWAYS PAINFUL, BUT IT NEED NOT BE MERCILESS—AMERICAN OIL CO. IS HAILED FOR ITS "HUMANITARIAN" WAY OF CLOSING ONE REFINERY—A PARTING GIFT: 400 ACRES

(By William Wong)

EL DORADO, ARK.—Everywhere one looks around American Oil Co.'s refinery here, workers are busy. Some are carting shiny new parts in and out of warehouses. Others are piling personnel records and old inventory and supply records into boxes and attending a seemingly endless round of meetings with management. Things, in short, are humming.

But the flurry of activity is deceptive. It's not aimed at keeping the refinery going full blast. Instead, it's intended to accomplish just the opposite—a total shutdown—to be completed by March 1.

That's bad news for this peaceful southern Arkansas town of 26,000. For 50 years, the refinery has been one of El Dorado's economic mainstays. Employment at the refinery in recent years has averaged about 275, and property taxes paid by the facility have helped El Dorado achieve many a municipal improvement.

But as bad as the news is for El Dorado, it isn't as bad as it might be. The reason: American Oil is bending over backward to make the shutdown as painless as possible. From a public announcement nine full months before shutdown day to extensive efforts to relocate workers at other American Oil operations, the company has tried mightily to hurt as few people as possible.

"A WHOLESOME APPROACH"

This approach isn't unique to Americans. In fact, it has been taken with increasing frequency in recent times as the sluggish economy has resulted in scores of plant closings. "Most companies have gotten away from the abrupt and brutal closings of years past," says Alfred E. Cummins, a professor at Case Western Reserve University's School of Management. Adds Sidney Kriser, president of Industrial Plants Corp., a plan liquidating firm: "Management today in general has a wholesome, more humanitarian approach to what happens to employes after their separation. Most publicly held companies are trying to do the best possible thing for their employes."

A "wholesome" approach, however, is far from universal. In many instances, workers are still suddenly assembled and summarily fired. In other cases, work forces are methodically trimmed, creating an agonizing existence for those left on the job. They wonder when the ax with their name on it will fall. Plants involved in such gradual closedowns are usually allowed simply to die, with little or no explanation from management.

But on the whole, experts contend, companies these days are leveling more often with their employes, telling them the bad news as straight as it can be told. That's certainly the feeling among workers at the American Oil refinery here, as well as among civic leaders and townspeople in El Dorado. American Oil, they say, has gone to extreme lengths to make sure everyone involved knew in advance what was coming, how it would be handled and the reasons behind the action. As the refinery closing also illustrates, shutting down a plant can be a complex and exhausting process.

A DIFFICULT DECISION

From the outset, of course, the decision to close the refinery was anything but easy for American Oil. About three years before the final decision, officials say, long-range projections made an eventual shutdown a distinct possibility. Then, in late 1969, according to Frank K. Webb, American Oil's manager for refining coordination, it became clear that a decision had to be made.

"We got some of our economists together and got three or four different approaches to the problem," says Mr. Webb, who is in charge of the shutdown. In effect, he says, the economists tried to determine whether the company, looking five or 10 years ahead, would still need the capacity of the old and relatively small El Dorado refinery. Some of the economists said the refinery, capable of turning 43,600 barrels of crude oil daily into gasoline, fuel oil and other petroleum products, should be closed; others disagreed. But finally, due to economic factors, the study group decided in early April that it would recommend a shutdown.

While the economists were debating, other members of the study group delved into other areas of consideration. One area, for example, wsa what to do with the refinery's crude oil supply, some of which was shipped from Texas and some obtained locally. Another was to investigate the company's projected manpower needs for the next five years to determine what could be done with the El Dorado employes.

"Nobody was happy or glad that we were closing El Dorado," Mr. Webb says, "but once the decision was made, everyone pitched in with great enthusiasm to do the best possible job of devising plans to close it down well."

A PRECISE TIMETABLE

After the shutdown decision was made, the group began to devise detailed plans to handle each phase of the shutdown, including a

precise timetable on how and when to announce the decision to employes, politicians and community leaders. The entire shutdown package was given final approval on May 6, 1971, by the directors of Standard Oil Co. of Indiana, American Oil's parent company.

All told, harsh economic realities forced the final shutdown decision. The refinery's main source of crude—from the El Dorado area—had dwindled to 52,000 barrels a day from 85,000 barrels a day in 1960. This supply in recent years has been shared by American Oil and a refinery operated by Lion Oil Co., a division of Monsanto Co. Thus, it was necessary for American Oil to make high-cost pipeline shipments of crude from Texas to El Dorado. In addition, officials say, the El Dorado refinery was "too small to meet the technological competition of larger refineries, which can operate more efficiently at lower per-barrel costs."

The announcement timetable was elaborate. The company set May 20, 1971—a full nine months before the scheduled shutdown date—as the day it would publicly announce its decision. Six days before the announcement, American Oil officials began hopscotching from Chicago (corporate headquarters) to Washington, D.C., to Little Rock to El Dorado. The purpose of all the travel was to explain to Arkansas' U.S. Senators and Representatives and key state and local officials why the company was closing the El Dorado facility. Moreover, American Oil sent out explanatory letters on May 18 to 150 .ov civic and business leaders of El Dorado.

These elaborate advance briefings illustrate a lesson well learned by American Oil. Back in 1958, it abruptly closed a refinery in Destrehan, La.—without first telling local, state or federal politicians, who later complained loudly about the company's action. "We simply misjudged the political aspects" of the Destrehan closing, a company official admits.

The timing of the El Dorado announcement was particularly sensitive. The town was busily preparing for a big week-long celebration in June to commemorate the 50th anniversary of the discovery of oil in the area. Despite the obvious dampening effect American Oil's shutdown announcement might have on the impending gaiety, the company decided it couldn't wait beyond May 20. "We were concerned about our obligation to the employes to let them know the decision as soon as we could so that they might plan accordingly," says Larry Durland, the plant manager.

"We really searched our souls on this decision," sighs Mr. Webb. "We anguished over it more than anything else. It was fully two weeks that we wrestled with it."

Surprisingly, local leaders say the announcement didn't deflate the good times of the celebration. "It wasn't a hindrance nor did it hurt the celebration one bit," declares William Alley, executive director of the El Dorado Chamber of Commerce. A possible reason: American Oil participated fully in the celebration, contributing manpower and equipment to help set up (and then clean up) the replica of a 1920s oil-boom town.

May 20 itself was a day full of meetings, all for the purpose of telling what the company was doing and why. First, corporate officials and Mr. Durland, the plant manager, broke the news to the salaried employes. Then they faced local union leaders and groups of hourly workers. A press conference and a luncheon for civic leaders followed.

A GLOOMY PERIOD

Although rumors about the closing had been circulating for years, the actual announcement stung some like a slap on the face. Judge Carlton Jerry, the top county administrator, says the time of the announcement "certainly was a gloomy period of our people." John Phelps, chairman of the workmen's committee at the refinery, adds, "There were a lot of rumors, but still, when the announcement came, it was a shock to all of us."

Once the initial shock subsided, the company set about resolving its biggest question: What to do with the refinery's 275 employes. The study group discovered that the projected manpower needs of the company's 10 other U.S. manufacturing facilities and other units exceeded the total number of El Dorado employes affected by the shutdown. Mr. Webb therefore asked the other facilities to freeze outside hiring so that El Dorado employes could have first crack at job openings.

With that beginning, the job-placement program for El Dorado workers launched into a series of questionnaires and personal interviews aimed at giving employes one of three choices: to transfer to another company facility at company expense; to seek a job outside the company in the El Dorado area, again with company assistance; or to take early retirement.

The bulk of the placement program centered on job-transfer interviews, which stretched from early June to late November. Representatives from seven different American Oil facilities visited El Dorado and conducted a total of 862 interviews. According to Joseph Feeney, employe relations director at the El Dorado plant, 176 of El Dorado's 214 hourly employes and 31 of its 61 salaried workers received one or more job offers from other company plants.

When all is said and done, the company figures it will spend about $1 million for moving some 200 El Dorado employes to other company locations. Another $700,000, it estimates, will be spent on severance and early-retirement benefits. The money factor played virtually no part in the company's decision to transfer, rather than simply lay off, El Dorado workers, Mr. Webb maintains. He says the average costs of severance-retirement and moving expenses are about equal—$5,500 to $6,000 per employe. In transferring El Dorado workers, Mr. Webb adds, the company benefits by retaining experienced workers. However, he says there's also a disadvantage, since transferred workers are generally older than workers hired from outside the company.

PLEASED EMPLOYES

American Oil's efforts in helping workers find jobs has understandably pleased employes. "The company has bent over backwards for me," declares John Osborn, a 42-year-old mechanic who's transferring to the company's Whiting, Ind., refinery. Mr. Osborn surmises that "99%" of his fellow workers feel as he does. (The company paid for a week-long house-hunting trip to the Whiting area for Mr. Osborn and his wife and will pay moving and temporary living expenses when they get there.)

On the less sticky, but no less massive, question of what to do with the refinery property and machinery, American has made moves to benefit both the community and itself.

The refinery is located on about 440 acres of gently rolling hills. About 400 acres of the land will be donated to Union County. The company is currently negotiating to sell the other 40 acres to a pipeline company. The 400 acres to be given to the county adjoin a 600-acre industrial park, and Judge Jerry says the gift will be used for industrial purposes. The donation, valued by American Oil at $2.2 million, includes the company's water wells and a number of standing structures such as the single-story brick administration building, warehouse, several shacks and a boiler room.

According to Mr. Webb, selling the land would have netted the company 75% (or about $1.6 million at best) of the assessed valuation, after a 25% capital-gains tax, but would probably have required a long wait to find buyers. While donating, on the other hand, will net the company less money—a tax credit this year of about $1.1 million—the money in hand (through the tax credit) plus the positive impact on the community tipped the decision away from selling, Mr. Webb adds.

GIFTS TO CHARITY

Of the millions of dollars worth of machinery at El Dorado, American Oil is seeking to sell some refining units and other equipment to outside sources; other American Oil plants will also have a chance at claiming idled machinery. Office fixtures, such as furniture and filing cabinets, are being given to local charitable organizations and churches. And one of two plant fire trucks is being given to the nearby town of Norphlet.

Throughout the entire closing operation, American Oil corporate officials in Chicago have kept in constant touch with plant administrators. A recent visit to El Dorado by Mr. Webb was typical of the kind of corporate-plant coordination that has occurred.

After hearing a report from Mr. Durland, the plant manager, and his staff, on the current status of the job-placement program, Mr. Webb commented: "Well, it looks like we're in pretty good shape as far as the people situation is concerned." On the issue of machinery disposal, he declared: "Here's what I propose—we turn our purchasing people loose to start soliciting bids from 'junkies' (scrap dealers). It'll take them quite awhile—maybe even a year—to come in here, inspect, then bid."

Plant closings are nothing new for 55-year-old Mr. Webb. He had a hand in supervising the much-criticized Destrehan refinery shutdown in 1958, and he coordinated the closing of the company's Neodesha, Kansas, refinery in 1970. In fact, he admits, he's occasionally, although jocularly, called "undertaker" or "the hatchet man."

American Oil's performance in El Dorado has won raves from local leaders and employes, despite the fact that the community is losing an employer that pays about $3 million in annual salaries and wages and contributes, for example, $162,000 a year to the local school district.

County Judge Jerry says, "We're grateful for their generosity" in donating the property. El Dorado Mayor I. L. Pesses declares, "American Oil has done a commendable and excellent job in the way it announced and is closing the refinery. We have no ill feelings toward them; they've acted in good faith." Union leader Phelps adds, "The company has taken a step forward in plant closings."

EFFECTIVENESS OF YOUTH CONSERVATION CORPS

Mr. DOMINICK. Mr. President, the March issue of American Biology Teacher contains an article by Mr. Dennis Lynch, a district ranger for the Pike National Forest in Colorado, describing his experience with the Youth Conservation Corps program last summer. Mr. Lynch describes the enthusiasm of the 10 girls and 15 boys selected for the program in his area and quotes the participants as believing that it was a most fascinating and rewarding experience.

I believe the article provides some useful, firsthand observations on the effectiveness of the YCC program in its first year of operation. 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:

YCC . . . AN EXPERIENCE IN THE OUTDOORS

(By Dennis Lynch)

Joan Meyer is a tall, freckle-faced pixie with braids. This fall she waded into her high school chemistry and geology courses with exceptional enthusiasm. Something had hap-

pened to her—and to 24 other young people in Colorado Springs, Colo.—in the weeks just ahead of the return to classes.

"This summer has been the most meaningful and most rewarding experience of my life," said Joan, who is 17. "The Youth Conservation Corps program has left a great impression on me and I was proud to be a part of it. The work was fun, even though tiring. But the best part of the job was the education. I never knew my environment could be so interesting."

THE YOUTH CONSERVATION CORPS

What sort of program gets that kind of response? The Youth Conservation Corps (YCC) program of 1971 was the start of a three-year pilot program authorized by Congress to provide summer employment for youth in the nation's forests and parks. Its sponsors, Sen. Henry Jackson and Rep. Lloyd Meeds, both of Washington state, have described YCC as a program to provide youth with meaningful employment and environmental-education opportunities while enhancing our environment at the same time. "It is a way to harness the creative energies of our young people to change the face and character of the nation," Jackson said.

The first YCC program did just that. 2,200 young people were employed in national forests and national parks. It was such a success that Senator Jackson and many of his colleagues are calling for the employment of 100,000 boys and girls in 1972.

Unlike many current federal programs, YCC isn't necessarily for the poor. The bill specifically states that the corps shall be open to youth of both sexes and of all social, economic, and racial classifications. Also, youth employed in the program must be at least 15 years of age and not older than 19. No person can be employed as a member of of the corps for a term in excess of 90 days during any single year.

As a U.S. Forest Service district ranger I became excited about the program as soon as I learned about the bills proposed by Jackson and Meeds. I guess I thought back to my youth in Oregon, when I was 16. That summer I volunteered myself (and my 14-year-old brother!) to the local district ranger, for free, to help him out with trial maintenance and construction. I found out then (as have the kids who more recently, have volunteered themselves to me) that problems of liability, injury, and responsibility prevent the Forest Service from "employing" volunteers. I suppose my disappointment as a teenager caused me, last year, to make a pest out of myself until I was promised a YCC program for my ranger district.

SETTING UP THE PROGRAM

The Pikes Peak District, Pike National Forest, is adjacent to metropolitan Colorado Springs; in fact a portion of the district lies within the city limits. The district is subject to all the pressures and demands of big-city public parks—and we are woefully understaffed and underfinanced. The idea of 25 bright-eyed, eager helpers was exciting. We had worked with youth groups on conservation programs before, but we really began to see youth's potential when we held a "plant-in" on Earth Day, 1970, and had over 120 helpers. The helpers were mostly kids 15 to 18 who came to plant trees and stayed with us until dusk. With this knowledge—that today's kids want to, and can, do constructive work—we pressed ahead for a YCC program.

When at last we got the go-ahead it was for a 25-enrollee program. This was to be a coed program, with the kids living at home and working from 8 a.m., to 5 p.m. five days a week. Over 1,000 invitations went out to senior high students in School District 11, which was our cooperator for this pilot program effort. With the help of the schools' Larry Bussey, special services director, and Chuck Rezor, science adviser, the applications were reviewed by science teachers and counselors, who screened the applicants to a total of 100.

How do you pick 25 enrollees out of 100 enthusiastic and well-qualified young people? Warren Harper, our program director on the district, and I threw up our hands! An old-fashioned drawing of names out of the hat had to be the answer. The 25 lucky applicants were invited to bring their parents to meet with us for a discussion of the program. 15 boys, 10 girls, and their parents, from all walks of life, assured us that we hadn't been wrong. We told them it was their program, their chance: only they could make it successful.

PROJECTS OF ALL KINDS

On June 21, 1971, the boys and girls started their first day with a desire to make the program successful—a desire that never failed throughout the following eight weeks. That first day we hiked 10 km to build a nature trail for the school children of Manitou Springs and Colorado Springs. The enrollees were tired and thirsty but overwhelmingly enthusiastic that evening as they nursed their aching muscles and blisters.

Other projects followed: constructing trail bridges, revegetating eroded slopes, planting trees and shrubs, bulding new trails and maintaining existing trails, maintaining campgrounds, setting signs for a guided automobile tour, developing waterfowl nesting and feeding places, developing food and cover plots for birds and small mammals, and the unending task of cleaning up someone else's trash. The final project was a monument to the kids themselves. Working with our landscape architect, one of the girls, Linda Hansch, designed a campground—and the kids proceeded to build it.

The program included an environmental education effort, too. Each crew was led by a forestry student from Colorado State University. The college students were responsible for encouraging each of their five crew members to discover "environmental awareness" for themselves. No one was to be force-fed or lectured to. It was "learn while doing."

A theme for each week drew attention to a specific part of the environment. This was supplemented by field trips to the life zones (Upper Sonoran to Arctic-Alpine) that exist from Colorado Springs (elevation 1,830 m) to the summit of Pikes Peak (4,300 m), which is about 7 km, air-line, from the city. The corps members also visited a fire tower, recreation places, and timber-management sites. They were given a brief introduction to each trip; then, in the field, they made the measurements of air and soil temperatures and of tree heights, diameters, and ages, and they learned to name the plants and estimate their abundance. They were encouraged to reach their own conclusions about proper management techniques, and they tried these out on the professionals who accompanied them on the trip.

WEEKS OF SELF-DISCOVERY

Parents commented on the decided changes of character that occurred in their sons and daughters. Calmness, confidence, and enthusiasm replaced restlessness, hopelessness, and cynicism. The effect of the program is best summarized in the words of a very thoughtful enrollee. Mitch Corwine, who had shoulder-length hair and real questions about the "establishment" at the beginning, said at the end of the program: "This has been the most fascinating and rewarding summer in my life. I want to thank the people who created and supported the Youth Conservation Corps for giving me the opportunity to prove to a great number of people that I am as good as anybody else." (P.S.: Mitch kept his long hair.)

For me, it was the best program and summer I've ever spent in my 12 years in the U.S. Forest Service. You science teachers are lucky: you get to work with the kids for nine months; I have them for less than three!

DAMAGE FROM STRIP COAL MINING

Mr. HARRIS. Mr. President, more and more attention is being focused, and rightly so, on the human and environmental damage being caused all over this country by the strip mining of coal.

From my own examination of this problem, I have come to believe that the Tennessee Valley Authority is in part to blame for the widening use of stripping, especially in the Appalachian area.

TVA has become one of the largest consumers of stripped coal in the Nation. In the process, it has also become an accomplice in the senseless destruction of hills and streams in parts of Tennessee and Kentucky, West Virginia, and Ohio.

Mr. President, the March issue of Esquire magazine contains an exceptional article on the tragic consequences of strip mining for coal. It demonstrates convincingly why TVA must abandon its current policy as one of the strip coal industry's best customer.

Because of the widespread human suffering it uncovers in coal-stripping areas, this excellent article also illustrates why the Heckler-Nelson bill, calling for the complete abolition of coal stripping, is so urgently needed.

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:

POWER CORRUPTS

(By Osborn Segerberg, Jr.)

BUT THE QUESTION BEFORE THE T.V.A. IS, MUST CHEAP ELECTRIC POWER CORRUPT ABSOLUTELY?

In September, 1935, two years after President Franklin D. Roosevelt signed the bill creating the Tennessee Valley Authority, Senator George Norris went for a boat ride on Norris Lake behind the dam also named for himself. As T.V.A. Chairman David Lilienthal wrote in his *Journals*, Norris "looked at the dam and as the sun's rays were cutting across it toward sunset, he said, 'Gosh, it does take a long time and a lot of work to get ready.' This is an interesting clue to his point of view because all of this work is preliminary to the production of power and electricity which is the thing that he thinks of when he thinks about the T.V.A. The other things to him are interesting sidelines. . . ."

Five years later, however, F.D.R. complained: "The damned newspapers have made it out that T.V.A. is simply a power agency. Now that isn't the fact. We aren't just providing navigation and flood control and power. We are reclaiming land and human beings." And they were reclaimed. Today, behind the system's forty or so power-producing dams, lakes attract water skiers, fishermen, campers, recreation developers. Stimulated commerce and diversified industry radiate prosperity so that the standard of living in the region has climbed at a rate fifty percent above the national average. Nevertheless, in the long run, Senator Norris' view of the real priorities of T.V.A. prevailed over F.D.R.'s. As of June 30, 1970, T.V.A.'s net investment in power assets amounted to $2,850,000,000; its net investment in non-power assets slightly more than $600,000,000. Its 1970 power expenses were $405,000,000 with power revenues totaling $480,000,000 for a net income of $75,000,000. Net expenses for non-power programs in fiscal 1970 were $36,000,000.

T.V.A. is a powerhouse of statistics. But the ones it seems to favor most today em-

phasize the magnitude of its power production. In 1970, for the first time the system supplied more than 100,000,000,000 kilowatt-hours of electricity. T.V.A. has about 20,000,000 kw. of installed capacity—more than double the capacity of Con Edison, which supplies New York City—with another 10,000,000 kw. scheduled to go on the line by 1975. Average residential use of electricity in the region has grown from 600 kw.h. in 1933, when the average rate was 5.7 cents per kw.h., to 14,650 kw.h. in 1970—more than double the average consumption for the nation. The average residential customer in the T.V.A. area pays about one cent per kw.h., one half the national average. This cheap, generously used electricity is the key to the revival of the Tennessee Valley.

What generally goes unrecognized is that more than eight percent of T.V.A.'s power now comes not from dams but from its eleven steam plants, with the proportion of hydroelectric power dwindling all the time. T.V.A. started out as a harnesser of rivers. By the end of the World War II, most of the suitable hydropower sites had been utilized, while the demand for electricity kept soaring. In order to keep growing in the postwar period, T.V.A. was forced to turn to steam plants, and to reach outside its watershed for the coal to run them. The resort to coal profoundly altered the character of T.V.A., for while water power is free once the dams are built, coal is bought in the market.

In 1961, T.V.A. became embroiled in a nasty spate of publicity involving a complicated antitrust suit brought by east Tennessee and east Kentucky coal operators charging a conspiracy to advance the fortunes of big mechanized mines in western Kentucky. In one of a Pulitzer Prize-winning series of articles in *The Nashville Tennessean*, a state representative charged that in order to sell to T.V.A. the small coal operators "literally have cut wages to the point that kids go hungry." Another *Tennessean* article said T.V.A. used mechanized coal because it is produced more cheaply. "And T.V.A. notes it is bound by federal law to choose the lowest bidder on all coal contracts."

The simmering quarrel between T.V.A. and the coal industry boiled over in 1970 with shrinking fuel supplies and T.V.A.'s announcement of a new rate increase. T.V.A. blamed the rate hike in large part on skyrocketing coal prices. Chairman Aubrey Wagner, who in 1962 succeeded to the job first held by Lilienthal, accused the industry of "a gross lack of planning . . . to take care of essential public needs." T.V.A. customers, incensed at the rate increase, sallied into Washington to get to the truth of the matter. A National Coal Association official told them bluntly: "The days of cheap energy are gone."

In a more restrained tone, N.C.A. executive vice president James Garvey told the Senate Interior Committee in September, 1970, "T.V.A.'s past ability to use its monopoly purchasing power got T.V.A. into the habit of taking advantage of the coal industry's distressed condition caused by its overproductive capacity. As a result, T.V.A. finds it shocking and unacceptable to pay a fair price for coal." Garvey observed, "In the eastern section, T.V.A. has (following its system of accepting the lowest bid) taken advantage of the willingness of non-career coal companies to 'cream the contours.' T.V.A. in its eastern section has lived off the very inexpensive coal which could be, and was, obtained from strip mining the contours of the hills."

It made good economic sense for T.V.A. to use strip-mined coal. A road-construction boss could take off one week, go into the hills with a bulldozer, power shovel, and a few men, and be a coal operator the next week. It takes fewer men to strip; ton for ton, a man employed in strip mining produces up to five times as much coal and at about one third the cost as the same man working in a deep mine. And the men prefer stripping: a strip miner need not risk his life or his health underground. Moreover, the entire seam of coal can be removed: this is never possible in deep mining. This means cheap coal. In 1961, when the price for Kentucky coal was four dollars a ton, T.V.A. was purchasing supplies on at least one contract for *half* that rate. T.V.A. estimates that the cost of coal amounts to two thirds of the cost of power production. Cheap coal means cheap electricity.

Where T.V.A. pioneered, the notably cautious electric utility industry watched, waited, then followed. With the surging demand for cheap coal in the early 1960's, strip mining went big time. "A monster 115-cubic-yard shovel big enough to dwarf a ten-story building," proclaims a picture caption in a pamphlet on T.V.A.'s Paradise steam plant in Drakesboro, Kentucky, currently the biggest in the world. "It is the largest self-propelled land vehicle in history, and can scoop up, swing and dump a third of a million pounds of earth at a time." T.V.A. issued the brochure in the early Sixties; today's technology has provided shovels half again as large, able to take two-hundred-cubic-yard bites. But the Paradise plant, with a rated generator capacity of 2,500,000 kilowatts, is still the biggest.

The Paradise plant has no geographical relationship whatever to the Tennessee Valley. Its location in west central Kentucky is explained by the fact that it is our first "mine mouth" plant. "This plant burns 21,000 tons of coal a day," a guard proudly told me. "It's sitting right on a bed of coal."

The land surrounding the Paradise plant must be one of the most devastated areas in the United States. Approaching the plant is like entering a combat zone. Kentucky's Senator John Sherman Cooper described it this way in questioning Chairman Wagner at a committee hearing in Washington in August, 1970:

"I don't know that I can say that it is your fault, but one of the purposes, as I understand it, of the T.V.A. is that it deals with conservation and tries to make a better environment. Yet in Muhlenburg County and Ohio County, where Peabody Coal strip-mines—I think it is the second-largest coal company in the United States—these counties look like what we once thought the surface of the moon would look like—terrible."

I asked Chairman Wagner and Information Director Paul Evans how T.V.A. could be associated with the kind of environment that surrounds the Paradise plant. They explained that not all the coal stripped from the area goes to that particular plant (Peabody is mining 65,000,000 tons over a seventeen-year period), that the land mined for T.V.A. is being reclaimed and that the area was nothing but scrub bush or strip mines before the plant was built, anyway.

Although neither man said it, the T.V.A.'s mandate was to rehabilitate the Tennessee Valley, not to worry about Kentucky. A comparable Kentucky Valley Authority undoubtedly would have utilized *its* prime resource, coal. Without cheap Kentucky coal many of T.V.A.'s proudest accomplishments never would have come to pass. Two thirds of T.V.A.'s coal comes from Kentucky—more than 18,800,000 tons from the west, 3,600,000 tons from the east, in all more than twenty percent of the coal strip-mined in the state.

The strip mining that is conducted in the flat, rolling country of western Kentucky, where the Paradise plant is situated, is known as area mining. Here, as in Ohio or Illinois, the tier of coal may lie within thirty to sixty feet of the surface. A supershovel digs a great trench. The topsoil and other material, called the overburden, are piled alongside the trench. Then smaller shovels scoop out the coal. When the accessible coal has been removed, a parallel cut is gouged, with the overburden deposited into the first trench. And so on, so that the land is transformed into a washboard of ridges and valleys like a gargantuan plowed field.

In mountainous country, contour mining is practiced. This corresponds to the L-shaped cut made for a highway along a hillside. First, bulldozers clear trees, brush and vegetation. Dynamite blasting loosens the earth, then shovels and dozers remove the overburden, forming what is called a bench, what would be the roadway if a road were there, joined at right angles to what is called a highwall. Since there is no place to put the overburden, the custom has been to dump the broken trees, stumps, boulders and earth material over the side of the hill. The exposed layer of coal is lifted out by shovels, loaded onto trucks and carted away. The deeper the miners cut into a hillside, the taller the highwall becomes. A limit usually is reached when the highwall attains about thirty to fifty feet.

At this point, auger mining may commence. Drills up to seven feet in diameter bite as deep as seventy yards into the mountain, the spiral blades peeling out the coal. Stripping is the fastest growing method for mineral extraction, particularly for coal. It accounted for only five percent of coal mining in 1931; in the early 1950's, when T.V.A. came into the market, the figure was twenty-two percent; now strip and auger mining are up to forty-four percent.

Until the 1940's strip mining was unknown to the mountain people whose grandfathers had signed so-called "broad form" deeds with the coal companies. For ridiculously low prices—around fifty cents an acre—the natives gave the companies title to all coal, oil, gas and minerals underground, and authorized them to build roads and other structures wherever they wanted to, as well as to cut whatever timber they needed. The mountaineers watched the rape of their land with occasional resorts to violence and sorties to law—the latter futile, since even the rare legal victories against coal operators were doomed to eventual defeat if the case rose to the state's highest court. Where other states held that landowners could not have intended to sell the right to mine their land by a process unknown at the time the deeds were drawn, Kentucky's seven-judge Court of Appeals ratified the broad form in 1956. Another test case was brought in 1968. Not only was the landowner denied damages inflicted by mining, but the rights of the coal operator were extended by the ruling of a four-justice majority, which held: "It appears to us that if, as we in substance are holding, the mineral owner bought and paid for the *right to destroy* [emphasis added] the surface in a good faith exercise of the right to remove the minerals, then there is no basis upon which there could rest an obligation to pay damages for exercising that right." In 1970, Knott County, one of the counties most desperately affected, imposed a ban on strip mining as a public nuisance, but the state's attorney general ruled that the procedure was inconsistent with legal precedent.

If the law offers no redress to the mountaineers, neither does T.V.A. In the Summer of 1970 Leslie Dunbar of the Field Foundation and Eli Evans of the Carnegie Corporation talked to Mrs. Vernon Barnett who lives with her husband below Yellow Creek Mine near Anson, Kentucky. The three men wrote about their encounter in a letter to Frank Smith, a T.V.A. director.

"We asked her what it was like living below the mine, and she told me how they had to flee their house each time it rained for fear that tons of earth above might turn into a mud slide.

" 'My husband is a disabled miner and that house is all our life savings,' she said. 'It's a good house and what we always wanted because we never had a toilet or runnin' water until we moved here.' And then she said in a terrified voice, 'Someday that whole mountain is going to wash down through this gully and bury my house.' "

Mrs. Barnett told the Foundation men that she had talked to mine-owner William Sturgill, but he had done nothing. The letter goes on:

"Our quiet inquiries indicated that T.V.A. could be a major purchaser of the coal from Mr. Sturgill's mine and it seemed to us that you might be able to help Mr. and Mrs. Vernon Barnett and others like them. After all, the economics of strip mining indicate that an agency of the government of the United States may have placed this fine couple in fear of their lives to face night after night of uncertainty and outright terror. There are other people like her in Kentucky and we know it is easy to say that solving one person's problems can raise a lot of issues regarding responsibility for others, but T.V.A. could be so much to blame in this situation that we felt compelled to urge you to give it your personal attention."

Director Smith wrote back that Sturgill's Kentucky Oak Mining Company (now known as Falcon Coal Company) was indeed under contract to T.V.A. and that the company was in compliance with its reclamation obligations. Therefore the threat of a landslide was out of the question. However, Smith said, he was sending a man to check on it. "Let me point out again," Smith wrote, "that the coal is not being mined because of T.V.A. but because of the consumption of electric power throughout the country."

As it turned out, the T.V.A. inspector said that the slide situation was unpredictable. In other words, it could happen. The T.V.A. offered to replace the Barnetts' house at a safer location across the road or to move them to a new house, but several months after the inspector's report, the T.V.A. was still surveying land and the couple was still living jeopardy.

Dan Gibson is a living legend in eastern Kentucky because he beat the system and won a small victory. Dan Gibson is eighty-six years old, still full frame, still erect, still a man to be reckoned with. He cut down on his lifetime smoking habit a few months ago because he felt it was beginning to affect his wind.

Dan and his wife live in a typical small mountain cove that cups the head of Cockerel's Trace Fork of Clear Creek in Knott County near Hindman. Mrs. Gibson's son by an earlier marriage lives close by with his family. Mrs. Gibson's father had signed away the mineral rights in this hollow. "My father thought he sold just one seam of coal," Mrs. Gibson said. "Later they claimed the rocks and clay. Nobody ever thought about a bulldozer and shovel."

The bulldozers and shovels began arriving in their area in 1964. A crew would move in quietly and before anyone was aware of it a strip operation would be in full bloom. One neighbor surprised a coal operator, who had already ruined his farm and, with a rifle trained on him, got the operator to write out a check for $4,000 on the spot. But few residents got money or satisfatcion, since the operators were within their legal rights. When blasting dislodged the chimney stones of another neighbor's house, the house caught fire and burned down. Another dynamite explosion broke a gas line and, when a housewife lit a match, the resulting fire burned *that* house down. A third house was buried by tumbling overburden, a mother and her children escaping just in time. Smoke choked everyone, dust settled everywhere.

Then the strippers began probing Dan Gibson's cove. Once in the black of night he noticed lights on the ridge opposite his house. One shot and the lights were turned out. Another time, the strippers chewed the back of a hill and Gibson did not discover that operation until they had cut through the ridge. "Mine water as black as my pants came rolling down into our crick. People came here to fish. There used to be big chubs, but that cleared ever'thing out of the holler."

The showdown came in the Summer of 1965. The land belonged, or eventually would, to two stepsons and three grandsons who were in service, one fighting in Vietnam. Mr. Gibson didn't think it right for their property to be scalped while they were away like that. So he got his .22-caliber gun and went up to the ridge to confront the marauders.

He spotted the invaders when he had approached to about 150 yards; a deputy sheriff was standing in front of bulldozers. Gibson slipped behind the deputy, "I said, 'What are you doin' up here?' He said, 'I'm up here guardin' these men to work.' And I said, 'Mister, I don't want any trouble with you all. I ask you to walk in front of me and go out there and tell them fellers to get off. Go back across that line.' Well, he did. And they went back."

Gibson, whose right hand is crippled, got help from one of the mine crew to set up a hand-lettered sign on his property line. It read: "No Trespassing." This first confrontation occurred about ten in the morning. For the next four or five hours, Dan Gibson sat on his side of the boundary and about twenty of the strip-mining crew sat on the other side. In midafternoon, six state troopers appeared and crossed the border. Gibson asked the leader, whom he identifies as a Sergeant Mitchell, if he had come to run him off his own property. The police officer said he had a right to be there. In reply, Dan Gibson said he was eighty years old and never had trouble with anyone in his life.

* * * * *

Of Kentucky's four major rivers that rise in the eastern hills, Dr. Barbour said that only the Licking "is not in too bad shape except for tributaries in coal areas. Some of the most miserable streams are just gutters, boulders bloody red and glued in place with nothing alive that I could find."

Federal regulation of strip mining has been suggested by U.M.W. President W. A. Boyle, among others, and President Nixon has proposed federal guidelines with a provision for federal take-over if the state fails to enforce the guidelines. These positions are in contrast to the sentiments of T.V.A., which for many years preferred state regulation.

When the New York *Times* editorially proposed a ban on strip mining, T.V.A. Chairman Wagner quickly wrote to the editor opposing such action. He said that barren, treeless wastebands are not to be condoned, of course, but they don't have to exist. "T.V.A. in cooperation with some of its suppliers of coal, has demonstrated that coal can be removed by surface mining and the area involved restored to a condition as good or better than before the mining took place. The productivity of the land can be restored or improved and pollution controlled."

This claim recalls the contention of the lawyer who, in trying to block a claim against his client, argued that the arm of the young complainant actually was stronger since the time he had broken it. The counselor waxed eloquent on the powers of nature to repair and reinforce the site of the fracture until the opposing attorney inquired if his adversary recommended that everyone break his arm in order to improve it. Senior ecologist Dr. George Woodwell of Brookhaven National Laboratory calls T.V.A. brochures of its model reclamation "extremely superficial and misleading" and he estimates that the organic productivity "has been reduced to a fifth to one-tenth its potential prior to disturbance."

The closest thing to federal regulation so far has been the passage of the National Environmental Policy Act, whereby Congress has declared a national policy "to promote efforts which will prevent or eliminate damage to the environment and biosphere." The act says that unless some other national goal supersedes, it is the responsibility of the Federal Government to "attain the widest range of beneficial uses of the environment without degradation . . . maintain, wherever possible, an environment which supports diversity . . . enhance the quality of renewable resources." The law directs a federal agency to file a statement if any action it plans may have an adverse effect on environment, and consider alternatives.

Natural Resources Defense Council, the Environmental Defense Fund, and the Sierra Club, joined by National Audubon Society, have begun legal action to make T.V.A. file such statements with a view toward ending its procurement of coal from strip mining. While T.V.A. does not mine the coal directly, the environmental groups contend the agency is violating N.E.P.A. T.V.A. issued a hundred-page policy statement in December and said it would issue such environmental documents annually, but would not give environmental impact statements for each of the thirty to forty strip-mine contracts negotiated each year. John Adams, executive director of the Natural Resources, believes that by prodding T.V.A. to file an impact statement, "they'll realize what they are doing and stop it—we're forcing them to think." It is a good time for thinking. . . .

It is high time for thinking—thinking about the paradoxes involved in T.V.A.'s two-headed mandate as an environmental agency and as a purveyor of cheap electricity. Reconciling the two is going to be extremely difficult. For example, T.V.A. pioneered the use of electricity for home heating, and is quick to point out that this is a clean way to heat a home. One big power plant undoubtedly concentrates the pollution, and thereby makes it more amenable to control than a lot of little home furnaces. But the price of the gain in air quality is accelerated depletion of coal, for when the fuel is burned at a plant to generate electricity, sixty percent of the coal's heat is wasted. So the cost in energy rather than in dollars to heat an average home electrically is seven and a half tons of coal a year. The energy cost of a color television set is 375 pounds of coal a year, for an electric range nearly half a ton, and almost two tons for air conditioning. The demand for energy can only increase. Cheap thermonuclear power may lie on the distant horizon, but on the other hand it may not—the technological problems of controlling the reaction are enormous, there still is likely to be a highly poisonous by-product, the problems of dispersing the waste heat are immense. For decades the American demand for electric power has been doubling every ten years, and for the past couple of years the rate has been increasing even faster than that. In the long run this geometric increase in energy demand simply cannot continue, because whatever the energy resource limits of the earth may be, there are limits *somewhere*. But of course in the long run we are all dead. In the short run, we have a coal problem.

Some critics believe that bulk users of electric power should be made to pay the same rates as small residential users. These critics believe that providing preferentially cheap electricity acts as a spur to its extravagant use and a constant stimulant to the demand-supply spiral. T.V.A. opposes any such rate change, believing that the economic realities are such that the bulk user deserves cheaper rates. Wagner philosophically opposes any curtailment of the power that builds the products that provide the jobs that bring the money that gives us the standard of living we have. Start to cut back and the process could go into reverse: fewer products . . .

fewer jobs . . . unemployment . . . depression. The whole house of cards collapses.

Former T.V.A. and A. E. C. chairman Lilienthal says, "Cheap power has done its job. I think that changing the rate structure is the quickest and most natural way to bring about a de-escalation in the use of power. The bulk user should be made to pay for the increased costs as well as the housewife."

Even so, Mr. Lilienthal is under no illusions that this will materially affect the use of coal. "The coal is a resource," he said. "It will be used."

IS THE GENOCIDE CONVENTION RETROACTIVE?

Mr. PROXMIRE. Mr. President, one of the more sensitive questions concerning American ratification of the Genocide Convention stems from our own liability under the treaty. There appears to be some uncertainty as to whether the terms of the treaty are retroactive and whether the American people can be held accountable for alleged genocide involving American Indians.

While no citizen of the United States can take pride in our treatment of the Indian during this country's early settlement, there is no reason to fear charges of genocide. The terms of the treaty are not retroactive. Rather, the very essence of the treaty is the prevention and punishment of future acts of genocide committed throughout the world. What we did to the American Indian we will have to bear as part of a national conscience, but the Genocide Convention is not designed to resurrect dead issues. It is a constructive and positive international declaration which states with determination the world's abhorrence of violence and genocide.

Now is the time for America to take its place of moral leadership and swiftly ratify the long-neglected Genocide Convention.

ORGANIZATIONAL QUESTIONS BEFORE THE STOCKHOLM CONFERENCE

Mr. MUSKIE. Mr. President, recently Prof. Richard N. Gardner presented an excellent paper on the organizational questions facing the United States at the 1972 United Nations Conference on the Human Environment to the Secretary of State's Advisory Committee on that Conference.

Professor Gardner is a Henry L. Moses professor of law and international organization at Columbia University. His expertise in the field of international organization is well known.

These comments should prove of great value in developing a clear insight into global environmental problems and the possible institutional means by which these problems can be solved. I ask unanimous consent that Mr. Gardner's remarks be printed in the RECORD.

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

STATEMENT OF RICHARD N. GARDNER TO THE SECRETARY OF STATE'S ADVISORY COMMITTEE ON THE U.N. CONFERENCE ON THE HUMAN ENVIRONMENT AT THE U.S. MISSION TO THE UNITED NATIONS, FRIDAY, MARCH 3, 1972

Richard N. Gardner, Professor of Law and International Organization at Columbia University, served as Deputy Assistant Secretary of State for International Organization Affairs from 1961 to 1965. He is currently serving as consultant to the Secretary-General of the United Nations Conference on the Human Environment on international organizational questions. He also serves as U.N. representative of the International Union for Conservation of Nature and Natural Resources (IUCN). This statement, however, is made in his personal capacity.

I am grateful for this opportunity to present my views to this distinguished Committee on the organizational questions that will face us at the Stockholm Conference. My views on these questions are set forth in detail in the attached statement entitled "The Role of the UN in Environmental Problems." In these brief introductory remarks, I would like to emphasize three points that I believe have not yet received sufficient attention in either official or public discussion of international environmental organization.

First: The desire of the United States for effective international arrangements for environmental regulation is unlikely to be realized without major changes in present U.S. policy toward the United Nations and multilateral development assistance.

I believe, and have argued for more than a decade, that the national security of the United States is gravely threatened by the expensive and dangerous arms race, the uncontrolled growth of world population, the progressive deterioration of the human environment and the spreading frustration of people in the developing countries at their inability to achieve a decent life. A study by the Club of Rome published only this week suggests the very real likelihood of massive breakdowns in world society within the lives of our children or grandchildren if present trends continue. Although the most devastating consequences of these trends may lie some decades in the future, the measures necessary to avert disaster must be taken now.

If this diagnosis is correct, the United States ought to be doing everything within its power to strengthen the United Nations and other international institutions to deal with these global problems. Unhappily, however, the Vietnam tragedy is impelling us not only to reduce our unilateral responsibilities, which is good, but to disengage from our multilateral responsibilities, which is bad. United States support for multilateral institutions is in doubt or disarray all along the line. We take no serious initiatives to enlarge the U.N. role in peacekeeping or development. We take a penny-wise and pound-foolish attitude to the United Nations budget. We adopt a low financial profile as the United Nations drifts toward bankruptcy. We violate solemn treaty obligations by refusing to pay our assessments to the ILO and by breaching the Security Council's embargo on trade with Rhodesia. We move steadily away from the internationally agreed aid target of one percent of GNP as other industrialized nations move toward it. We fail to put up our promised share of funds for the multilateral aid agencies—the International Development Association, the Inter-American Development Bank and the Asian Development Bank.

We complain that the U.N. behaves "irresponsibly." How can we expect the institution to behave responsibly if we do not behave responsibly toward it? At a time of planetary emergency, we are rapidly becoming a global dropout. Our leadership is currently fascinated by the politics of the balance of power. Surely the time has come to devote more attention to the politics of world order.

What does all this have to do with the Stockholm Conference? Everything. A healthy set of environmental institutions is unlikely to flourish in a weak United Nations.

Moreover, an effective multilateral attack on the problems of environment and population growth is not likely to be mounted in the absence of an effective multilateral attack on poverty. Without an increase in the quantity and quality of global aid efforts, the financial and political basis for population control and environmental protection in the less developed countries will not exist. Not only does action on the population and environmental problems cost money that the developing countries do not have, but political resistance to population and environment efforts is likely to grow in these countries if international assistance is static or declining. Already, at the U.N., some countries are charging that the new emphasis by the United States on the environment and population is a gigantic "cop out" to justify our declining foreign aid effort.

Second: The most important single objective of the Stockholm Conference is to establish a flexible institutional framework capable of future growth in response to the needs and demands of the world community.

I do not wish to minimize the importance of the other matters that will be before the Stockholm Conference, such as the Declaration on the Human Environment, the Action Plan. the Convention on Ocean Dumping and the World Heritage Foundation. But the overriding necessity of the Stockholm Conference is to establish an institutional framework to carry on the work which we have only begun. If this is missing, no other achievements can prevent Stockholm from being deemed a failure.

In the attached paper, I describe in some detail my own views about the institutional arrangements that are required—an Environment Secretariat of the highest quality with adequate power of initiative; an inter-governmental body to which governments will send senior environmental decision-makers; effective arrangements to draw upon the expertise of the private scientific community; a substantial environment fund to assure the financing of priority projects; new measures for the prevention and settlement of environment disputes; and the development of more effective arrangements to deal with the marine environment.

The basic point that I wish to stress in these preliminary remarks is that our principal attention in the development of these institutions should be on substance rather than form. To take an example, the question of whether the inter-governmental body is an organ of the General Assembly or of ECOSOC is less important than the question of whether governments are prepared to send as representatives to it their environmental ministers or senior environmental decision-makers.

A related point is that we should not be too disappointed if the institutional arrangements do not spell out all the formal powers which some of us in the United States might like to include. Experience with international institutions inside and outside the United Nations suggests that a general and somewhat vague grant of authority can provide the basis for impressive organic growth over the years in response to the needs and aspirations of the member states. The important thing is to get something going that has the capacity for growth.

Third: The United States should support the establishment within the United Nations of an "international environmental coalition" of those countries that are prepared to undertake special responsibilities for environmental action.

I strongly believe that our major efforts for environmental action should be taken through the United Nations and its family of agencies. No other institutions presently exist in which we can pursue environmental diplomacy with developing countries and Communist nations as well as with the members of the North Atlantic community and Japan. While regional cooperation is also

necessary, global action through the U.N. system is indispensable if we are to secure the cooperation of the developing world and take vital decisions to protect the world's oceans and atmosphere.

At the same time, we have to face the fact that action within the U.N. does present special difficulties. There are now more than 130 members of the United Nations and these members have widely varying attitudes as to the seriousness of environmental problems and as to the extent to which they should limit their national freedom of action to deal with them. We need some formula to reconcile the need for global cooperation within the United Nations with the equally compelling need for cooperation that is adequate to the challenge.

I believe that such a formula can be found in an "international environmental coalition" operating within the United Nations. The concept is simple. At the Stockholm Conference and in subsequent meetings, an attempt should be made to reach the highest level of agreement among all U.N. members on institutional and other issues. In the foreseeable future, however, this level of agreement will undoubtedly be disappointing to those of us who feel a sense of urgency about the environmental threat. Therefore, the United States should join in organizing a coalition of environmentally concerned nations who would accept voluntarily a higher level of obligation than the membership as a whole.

One obvious example of this higher level of obligation would be willingness to contribute generously to an environment fund. Less obvious, but no less important, would be the voluntary acceptance by the members of the coalition of certain procedures for periodic reporting and submission of environmental disputes to third party settlement.

To be somewhat more specific, the United States and other members of such a coalition should agree to report to the new Environment Secretariat on all national activities (private as well as public) that might affect the environment of others and to consult in good faith with other members and with international agencies when questions or objections are raised. The members of the coalition should also agree that environmental disputes to which they are a party can be taken to the new intergovernmental body at the reqeust of any other party and that they will cooperate with any specially-constituted scientific fact finding panel which might wish to make on the spot investigations on their territories. The members of the coalition should also agree to make use of the good offices of the Environment Secretariat and to permit non-governmental groups like IUCN and ICSU to present independent testimony on matters at issue in environmental disputes. In addition, wherever possible, international agreements on such specific matters as oil pollution of the sea or ocean dumping should provide for the settlement of disputes at the request of any party by an arbitral commission or the International Court of Justice, which could organize itself into special chambers for this purpose and make use of scientific "assessors."

I doubt that the members of the "international environmental coalition" would be ready to accept an "environmental veto" by international agencies, much less an environmental "police force." But an international review process of the kind outlined above, even if it did not lead to legally binding decisions by international agencies, would represent a great step forward. I believe it would serve the enlightened self-interest of our country to promote such a process among as many countries as possible and to discharge to the full the obligations involved.

Whatever institutions are created at Stockholm, their vitality will obviously depend on the behavior of governments. The hard question is whether those leaders who now use the rhetoric of "spaceship earth" are really prepared to accept the political and economic costs that this rhetoric implies. The answer will be found in the resources that they are prepared to devote to international environmental efforts and the limitations they are prepared to accept on their traditional freedom of national action.

The institutional decisions which governments take at Stockholm and after will have the most profound consequences not only on the quality of environmental cooperation but also more broadly on the whole system of international relations. Failure to devise a workable pattern of cooperation to cope with urgent environmental issues could lead to international disputes and a poisoning of political relations. On the other hand, success in environmental cooperation could help humanity deal with other pressing problems.

A record of successful achievement in this area would demonstrate the U.N.'s capacity to adjust its institutional habits and deal efficiently with major threats to the survival of mankind. It could show the way to new approaches in the economic and political areas. Perhaps, in the long run, it could stimulate new perceptions of interdependence and strengthen the political commitment of governments to a stronger United Nations.

PLACEMENT OF STUDENTS ON COLLEGE BOARDS OF TRUSTEES

Mr. HARRIS. Mr. President, on February 29, the Senate gave an overwhelming 66-vote endorsement to an amendment which I was privileged to offer, urging colleges and universities to place students on their boards of trustees and boards of regents.

Since I first made public my intention to offer this measure, and since its adoption by this distinguished body, I have received numerous communications from students, faculty members, and administrators across the country concerning the question of student involvement on university governing boards.

After reading through these letters and telegrams, I am even more strongly convinced that student participation in the governance of schools can be of great value—not only to the students, but also to those more directly charged with the difficult task of administering an institution of higher education.

The responses were, almost without exception, highly favorable to increased student involvement. But the most enthusiastic were those from schools where students had been given this additional responsibility. College presidents and student representatives alike found that the perspective added by a student member of the governing board was a change which, in the words of one letter, "their elder colleagues respect, enjoy, and depend upon."

Mr. President, I ask unanimous consent that a number of these letters and telegrams be printed in the RECORD at the conclusion of these remarks.

Mr. President, we have sent 12 distinguished Senators to confer with Representatives from the House side on the final wording of the Higher Education Act. I am hopeful that the conference committee will retain the wording of the Senate version which gives a mandate for schools throughout America to more fully involve students in their governance.

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

THE CITY UNIVERSITY OF NEW YORK, OFFICE OF THE CHANCELLOR,

New York, N.Y., March 6, 1972.

Hon. FRED R. HARRIS,
U.S. Senate, Committee on Government Operations, Washington, D.C.

DEAR SENATOR HARRIS: You have asked for my views on how younger trustees have affected policy-making at City University.

After two under-thirty board members had been appointed (in August 1969), the local reaction was simply, "Why hasn't this been done before?" It seemed natural and appropriate that recent college graduates bear responsibility as members of a governing board for academic welfare of those coming after them. The "young" trustees have proved to be forceful allies of their elder colleagues in the university effort. As vigorous spokesmen of student concern, alert to current issues of the day and the university's role in these broader issues, the young board member keeps a board on its toes—the only stance for a governing body today.

At the time Miss Maria Joseph Canino, then 25, and Mr. Jean-Louis d'Heilly, then 28, were appointed by Mayor Lindsay, the average age of Board of Higher Education members was 60. The new members were welcomed wholeheartedly, not only for themselves (both are personable and extremely competent), but also for the liaison board members felt them to be with college students. Like other trustees of the period, the Board of Higher Education had been through the travail of campus unrest; they had found the advice of the newly-formed University Student Senate, which Mr. d'Heilly had chaired, extremely helpful and responsible; and they sensed the need for fresh approaches to academic questions.

One of the first steps taken by the new trustees was to visit the campuses to talk with students and esablish the board's and their own particular interest in student input. We have no doubt that a growing student surveillance of board action and an accelerating contribution to board deliberations through public hearings is in part a ratfication of this round of visits.

Another factor bringing board policy-making closer to students has been the presence of the University Student Senate chairman at board meetings. Although he has no vote, this official is persuasive. Both Miss Canino and Mr. d'Heilly have supported the maturing of this university-wide body.

Currently chairman of the Committee on Campus Governance and a member of the Committee on Student Services, Mr. d'Heilly has persistently moved to update college and university governing procedures to include both advisory and voting responsibility by students and younger (often untenured) members of faculty and staff. As Senate chairman, he initiated a study of governance procedures, following this up with the board's Committee on Law then and later, after he had become a board member. At one time the campuses were uniformly governed by Faculty Councils under board bylaws. Today each campus is required to develop its own governing plan within guidelines established by the board. These new plans provide for student—and often alumni—participation.

Mr. d'Heilly has been particularly concerned with the implementation, evaluation, and readjustment of open admissions procedures to serve student needs.

As a member of the Committee on Expanded Educational Opportunity, Miss Canino has contributed to the refinement and growth of academic programs for disadvantaged students, one of the most important

aspects of City University's responsibility. SEEK, College Discovery, and Open Admissions policies are the business of this committee. Similarly, she has been an advocate of increasing efforts to provide for minorities.

Her personal affiliation with Puerto Rican groups like ASPIRA has been enormously helpful to the university in its effort to encourage Puerto Rican students to take advantage of educational opportunities available to them.

She has been a strong proponent of the development of Puerto Rican studies on our campuses and has thus contributed to the overall expansion and deepening of ethnic studies at City University.

Miss Canino is now a member of the board's Committee on Community Colleges and, in that capacity, has provided new insights as to the aspirations and needs of youth today.

To sum it up, young board members bring enthusiastic, knowledgeable, and practical perspectives to a university governing board, which their elder colleagues respect, enjoy, and depend upon. May I congratulate you on your efforts to expand the involvement of young people in making the decisions which affect them. It is the conviction of CUNY's administration and governing board that the effective way to develop the responsibility of youth is to give youth responsibility.

Sincerely yours,

ROBERT J. KIBBEE,
Chancellor.

NICHOLLS STATE UNIVERSITY,
Thibodaux, La., February 18, 1972.

Re Senate Bill 659, Harris Amendment 398.

Senator FRED R. HARRIS,
Senate Office Building,
Washington, D.C.

DEAR SENATOR HARRIS: The Nicholls State University Administrative Council, which is the policy-making council of the University, includes among its membership the President of the Student Government Association.

By virtue of his election to office by the students, the Student Government Association President is automatically a member of the Administrative Council with full voting privilege and rights.

Full Administrative Council membership for the SGA President is a direct means of communication between students and administration, and it is a direct way by which problems of the students can be brought before the Council. Last week, for example, the Administrative Council was in session six hours for the purpose of considering a Code of Student Rights, Freedoms, and Responsibilities proposed by the students and presented to the Council through the SGA President and a group of his associates who attended the Council meeting as guests.

We personally feel that student membership on the Council has provided better communication between students and administration and much good has come from it. Many campus problems were solved because they were brought to the attention of the Council by the SGA President.

Sincerely,

VERNON F. GALLIANO,
President.
KERRY L. COOLEY,
SGA President.

WASHINGTON, D.C.,
February 23, 1972.

Hon. FRED R. HARRIS,
Old Senate Office Building,
Washington, D.C.

The youth in this nation are asking for the right to have a voice in what affects them, and that their voice be heard. For too many years now, countless student leaders throughout the nation have spent hours working within the system; proving to the Administration that they are responsible Consequently, at most colleges today, students are seen on just about every lower policy body. However only too often, their presence means nothing for it is the governing bodies of each institution that makes the major decisions.

Unfortunately, few institutions have students on their governing bodies. Thus, a frustration is felt by most student leaders for they realize that they are involved in little more than busy work. The only way seen by most students to remedy this situation is to have students on their own governing bodies.

Thus, the Undergraduate Student Government at the Catholic University in Washington, D.C., wholeheartedly supports the Harris Amendment. Just as the eighteen year old vote was a large step forward in giving first class citizenship to the youth of this nation, so too would the Harris Amendment be another large step forward for responsible student determinism.

Sincerely,

JOSEPH HURLEY,
President of the Undergraduate Student Government at Catholic University.

HOWARD UNIVERSITY,
Washington, D.C., February 15, 1972.

Hon. FRED R. HARRIS,
The U.S. Senate,
Washington, D.C.

DEAR SENATOR HARRIS: This will acknowledge receipt of your letter of February 10, relative to students serving as members on the Board of Trustees of Howard University.

The Board approved the seating of two student members in April, 1970. Full membership was granted with no attendant restrictions, except for terms of office. Student Trustees are elected for a term of one year with eligibility for re-election for an additional year. Other Trustees are elected for a term of three years, with eligibility for re-election.

It has been the experience of the University that inclusion of students on the Board of Trustees has greatly embellished the character of the Board. The insight, input, and perspectives of these members have contributed to a more meaningful and representative body. Student members have themselves gained invaluable experience by participating in University governance at the highest level.

I am pleased to have the opportunity to present you with this information.

Sincerely yours,

OWEN D. NICHOLS,
Vice President for Administration.

NATIONAL STUDENT LOBBY,
Washington, D.C., February 15, 1972.

DEAR SENATOR: As you know, the Higher Education Act—S. 659 is up for a series of votes this week, including an Amendment by Sen. Fred Harris to place a student on the governing boards of colleges receiving federal assistance.

The Amendment would require any institution of higher education receiving federal monies (either in direct aid or through contract) to place at least 1 student on its board (Board of Directors, Board of Trustees, or Board of Regents). This student would have the same rights, privileges, and compensation (if any) as any other member of the board of that institution.

In the past many students on campuses across the nation have attempted to gain representation on the boards of their institutions. Some students have been successful, and Princeton University, Boston College, Vanderbilt University—to name a few—now have students on their boards.

These first students on boards have been extremely effective in increasing communication and understanding between students and the trustees responsible for those institutions. It is our strong feeling that had students been seated at the board meetings a few years ago, much of the turbulence which higher education has experienced could have been avoided.

We strongly urge your support for a student on the board of colleges. The National Student Lobby considers this amendment, along with substantial funding of the Higher Education Act, to be our *No. 1 domestic priority* among the 800,000 students in our member student bodies.

If you have further questions, or would like further information about the NSL, please give our office a call.

Very truly yours,

LAYTON OLSON,
In behalf of 94 college, community college, and university student bodies across the country.

TELEGRAMS

LOS ANGELES, CALIF.

SENATOR FRED R. HARRIS,
Washington, D.C.:

Lamar Lyons, student body president, undergraduate Mark Bookman, graduate student body president, and Fred Weiner, director of the UC student lobby at UCLA, fully support your Higher Education Act (S. 659).

LAMAR LYON,
Student Body President.
MARK BOOKMAN,
UCLA Undergraduate.
FRED WEINER,
Graduate Student Body President, Director UC Student Lobby UCLA.

MILWAUKEE, WIS.,
February 29, 1972.

SENATOR FRED HARRIS,
U.S. Senate,
Washington, D.C.:

We the students of Milwaukee Area Technical College, representing 52,000 students, endorse and support Senate Bill 659. We agree there is a need in our own school for students to actively participate on the school board of directors.

GERALD O'SULLIVAN,
President Student Government,
Milwaukee Area Technical College.

MAYNARD C. DOLLOFF, OF MAINE, NEW PRESIDENT OF NATIONAL ASSOCIATION OF STATE DEPARTMENTS OF AGRICULTURE

Mr. MUSKIE. Mr. President, may I invite the attention of Senators to the announcement that Maynard C. Dolloff, commissioner of the Maine Department of Agriculture, has recently assumed the presidency of the National Association of State Departments of Agriculture. He is the first Maine agriculture commissioner to become President of NASDA since its founding 56 years ago.

Maynard Dolloff has served a long and distinguished career in agriculture, as chairman and secretary of the executive committee of the National Grange for 12 years, as former president of the Northeastern group of NASDA, and at present as commissioner of the Maine Department of Agriculture for the seventh year. His elevation to president of NASDA is just recognition for his many years of effective leadership in addressing the problems of the agricultural community and his contributions toward solving them.

Gov. Kenneth M. Curtis, Governor of Maine, pointed out the importance of

Commissioner Dolloff's new office in the following message:

I am always gratified when national recognition comes to a state official. The recent elevation of Commissioner Dolloff to the presidency of the National Association of State Departments of Agriculture is a well deserved honor for him and cannot help but bring prestige to the State of Maine.

I want to take this opportunity to congratulate him and to assure him of my fullest support in this important position among the leaders of American agriculture.

NASDA's members include the agriculture commissioners from each State and from Puerto Rico, Virgin Islands, Guam, and Samoa, whose responsibility is to develop uniform procedures for cooperative agreements with the USDA and other Federal agencies. The association also cooperates with the Council of State Governments, the National Governors Conference, and the National Legislative Conference to coordinate programs within the State's market services and national trade developments.

HOW FDA KEPT THE LEAD IN CHRISTMAS

Mr. MONTOYA. Mr. President, of all agencies in the Federal Government which have come under fire recently, none has been on the receiving end of more criticism than the Food and Drug Administration. I have indicated on a number of occasions my extreme dissatisfaction with its activities and performance in the consumer protection area. As a result of this ongoing concern, another situation has come to my attention I believe worthy of this body's consideration. It concerns what I choose to call, How FDA Kept the Lead in Christmas.

It centers around an agreement, arrived at in complete secret between FDA and makers of potentially dangerous lead tinsel for Christmas trees. FDA initiated both meeting and agreement, without knowledge of Congress, consumer protection organizations, health professions, media and, of course, the public. From start to finish, the intention was to keep this entire plot, for such it is revealed to be, from all deeply concerned and affected parties. Here is how its scenario developed.

On February 11, 1971, Mr. Henry Verhulst, of FDA, addressed a series of inquiries to various medical authorities concerning the potential hazard of lead Christmas tree tinsel to young children. One such inquiry was addressed to Dr. J. Julian Chisholm, associate professor of pediatrics at Johns Hopkins University School of Medicine. He is associate chief pediatrician of the Baltimore City Hospitals. I have obtained a copy of Dr. Chisholm's response to FDA, I ask unanimous consent that it be printed at this point in my remarks.

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

BALTIMORE CITY HOSPITALS,
Baltimore, Md., February 23, 1971.

Mr. HENRY L. VERHULST,
Pharmacist Director, Acting Director, Division of Hazardous Substances, and Poison Control PS-140, Bureau of Product Safety, Food and Drug Administration, Washington, D.C.

DEAR MR. VERHULST: This is in reply to your letter of February 11, 1971 concerning the potential hazard of lead Christmas tree tinsel to young children. If ingested, such tinsel would be potentially hazardous if the following conditions were fulfilled. *There are several reports in the medical literature that indicate that metallic lead substances, if retained in the stomach, will be slowly dissolved. Under these conditions, sufficient amounts of lead can be absorbed to produce clinical lead poisoning, even in normal children.* The literature indicates that the material will have to remain in the stomach for a period of one to two months. The question then is whether the tinsel would pass quickly through the gastrointestinal tract or whether it would be retained. This the FDA could very quickly determine in animals by simply rolling up a ball of tinsel, introducing it into the animal's stomach and taking serial X-rays to determine the disappearance time. I suspect that a young child with pica might very well roll up the tinsel in a ball and swallow it. However, I know of no scientific proof of this suspicion. So much for the potential hazard to normal children. *If, however, a child already has a high lead level in blood and tissues, then the absorption of even small additional amounts which might result from a shorter residence time of the tinsel in the gastric intestinal tract would certainly pose a serious health risk.*

With respect to the available action options, I would be inclined to declare the product a "banned hazardous substance," thereby removing it from commercial channels. Since alternative tinsels of aluminum and plastic composition are available, according to your letter, there seems to me to be very little sense in continuing the distribution of a potentially hazardous product, even though the precise hazard of that product is not documented scientifically. I would strongly urge you to request, however, that the FDA do the simple animal experiments along the lines suggested above. This, it seems to me, might buttress any testimony, should that become necessary. I would be willing to testify, should that become necessary and my testimony would follow the statements in this letter.

Yours sincerely,
J. JULIAN CHISHOLM, Jr., M.D.,
Associate Professor of Pediatrics, Johns Hopkins University School of Medicine, Associate Chief Pediatrician.

Mr. MONTOYA. Mr. President, note the following two quotations from his letter:

There are several reports in the medical literature that indicate that metallic lead substances, if retained in the stomach, will be slowly dissolved. Under these conditions, sufficient amounts of lead can be absorbed to produce clinical lead poisoning, even in normal children.

* * * * *

With respect to the available action options, I would be inclined to declare the product a "banned hazardous substance," thereby removing it from commercial channels.

Mr. President, according to an FDA fact sheet, GSS-HS1-571, this agency possesses the following authority:

The Child Protection Act of 1966 authorized FDA to ban from interstate commerce those household substances so hazardous that warning labels are not adequate safeguards.

It is to be presumed that appropriate officials in FDA's Bureau of Product Safety were aware of their authority under existing legislation when this information came to them.

For the past several years, a significant hue and cry has been raised about problems of childhood lead poisoning. An excellent piece of work has been produced on this subject by Jane S. Lin-Fu. It is entitled "Childhood Lead Poisoning . . . An Eradicable Disease." This article has been reprinted by the U.S. Department of Health, Education, and Welfare, parent agency of FDA. There is a pertinent quotation from that article:

The answer is that many health workers who work among the poor are not aware that lead poisoning in children is still a problem. They apparently think that the mandatory use of lead-free paint for toys, furniture and interiors of dwellings during the past quarter century has eliminated the problem. Furthermore, childhood lead poisoning is a disease that health workers may not recognize, even though it exists in epidemic proportions, because it has no distinctive clinical features. The symptoms of childhood lead poisoning are non-specific. Anemia, listlessness, excessive irritability, loss of appetite, abdominal pain, constipation—signs and symptoms that appear before obvious evidence of encephalopathy, such as vomiting or convulsions—can all be misinterpreted as indications of some other illness. Because children who suffer from lead poisoning come from the slums, their anemia may be considered to be the result of inadequate nutrition; their listlessness and excessive irritability, to be the results of a pathological home environment; their abdominal pain and vomiting, to be symptoms of indigestion and gastroenteritis. Even convulsions may be regarded as signs of epilepsy rather than as evidence of lead encephalopathy.

On all sides there has been a rising level of awareness regarding hazards of lead ingestion by Americans. The Lead-Based Paint Poisoning Prevention Act recognized the problem, aiming at removing old lead-based paint from existing housing and forbidding its use in federally financed housing. The growing body of evidence indicating the severity of the problem is illustrated by a story in the Washington Post of March 10, 1972.

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

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

TWENTY-FIVE PERCENT OF D.C. CHILDREN TESTED HAVE UNSAFE LEAD LEVELS

(By Bart Barnes)

City health officials announced yesterday that 25 percent of all children tested in a nine-month screening program in Washington's model cities area were found to have unsafe lead levels in their blood.

Thirty had to be hospitalized, the officials said, and the others were treated at hospital outpatient clinics and at neighborhood health clinics.

The screening program started last April and ran through December. It was the most extensive survey to date of lead levels in the blood of inner city children and was done by the Community Health and Hospitals Administration under a $204,154 grant from the Model Cities Commission.

Lead poisoning which usually results from the eating of lead-based paint that chips off woodwork, doors, windowsills and plaster of old houses, can cause severe mental retardation or even death.

It is most common among children between

the ages of 1 and 6 in the inner city where many old houses were painted with lead-based paint before World War II and which now are deteriorating.

Once thought to be the finest of interior paints, lead-based paint was used extensively in the homes of the wealthy in the pre-World War II era. Many of those homes are now the inner city tenements. Currently, lead-based paint is illegal for interior use.

Katherine James, coordinator for the lead screening program, said 2,214 children were tested for blood lead levels in the model cities area, which encompasses a 2.3-square-mile crescent north of Massachusetts Avenue and includes the Shaw, Stanton Park and Trinidad neighborhoods of the city.

Mr. James said 568 of those children had lead levels of 40 or more micrograms per 100 milliliters of whole blood, a level that physicians consider to be unsafe.

On a second testing, she said, the lead levels in 131 of those children had subsided to below 40 micrograms but the others were still above 40.

Mrs. James said removing the child from a home or an apartment where there was peeling lead-based paint or removal of the toxic paint could account for the levels subsiding in the 131 children. As long as no further lead is being ingested, the body gradually will rid itself of the lead contents, she said.

In every case where a lead level tested above 40 milligrams, Mrs. James said, the housing inspectors were sent to test the paint in the child's house or apartment for the content. Paint with a content of 1 percent lead or more was ordered removed.

The 25 percent who had dangerously elevated blood levels is less than the 33 percent indicated for elevated levels based on initial results of the screening program of November.

But it is still at the top span of 10 percent to 25 percent with elevated blood lead levels found by the Department of Health, Education and Welfare during 1970 in Baltimore, Minneapolis and Philadelphia inner city children.

It is also, Mrs. James said, consistent with a range of 10 percent to 25 percent of elevated lead levels among children tested regularly at neighborhood health clinics around the city.

City officials said they are seeking a $527,-861 grant from the Bureau of Environmental Management, an agency of the Department of Health, Education and Welfare, to extend the screening program to all areas of the city.

Mr. MONTOYA. Recently the Environmental Protection Agency announced it is ordering a reduction in gasoline lead content as a public health step. Bearing these cumulative facts in mind, let us then return to people in the Bureau of Product Safety at FDA.

Mr. Verhulst also sent out a letter on February 11, 1971, to the commissioner of health of the city of New York, Dr. Mary C. McLaughlin.

I ask unanimous consent that Dr. McLaughlin's reply be printed at this point in the RECORD.

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

THE CITY OF NEW YORK,
March 4, 1971.

Mr. HENRY L. VERHULST,
Pharmacist Director, Acting Director, Division of Hazardous Substances and Poison Control, Bureau of Product Safety, Food and Drug Administration, Washington, D.C.

DEAR MR. VERHULST: In reply to your letter of February 11, 1971 regarding lead Christmas tree tinsel, it is our opinion *that the safest and best course of action would be to ban the use of lead as Christmas tree tinsel because:*

1. A warning that it is a hazard probably would not protect against the hazard, and
2. There are all sorts of excellent commercial tinsels available which are non-toxic.

I hope this information is helpful to you.

Sincerely yours,
MARY C. MCLAUGHLIN, M.D., M.P.H.,
Commissioner of Health.

Mr. MONTOYA. Mr. President, let me emphasize one quotation from her letter to FDA:

It is our opinion that the safest and best course of action would be to ban the use of lead as Christmas tree tinsel . . .

Note that the letter from Dr. McLaughlin was dated March 4, 1971. FDA's people digested these facts for the rest of March, all of April, May, June, July, and much of August 1971. Obviously, the realities revealed shocked them into inaction.

On August 12, 1971, FDA's Bureau of Product Safety called a meeting of all domestic manufacturers of lead-foil icicles, or Christmas tree tinsel. This meeting was not advertised or publicized in any way. The public, Congress, consumer protection groups, and the media were left totally in the dark as to what was transpiring. This gathering was held in the office of Malcolm Jensen, Director of FDA's Bureau of Product Safety.

At the meeting, the FDA people proposed the following secret deal:

No manufacture of lead icicles after Christmas, 1971.

No sale of lead icicles after Christmas of 1972.

If all six affected companies agreed to the first two items, the Bureau of Product Safety would recommend that FDA accept this voluntary action and take no rulemaking or court action with regard to lead icicles until conclusion of the 1972 Christmas season.

In order to minimize manufacturer loss, FDA would not initiate or publicize the agreement or the alleged dangers from lead icicles until the conclusion of the 1972 Christmas season.

FDA would take whatever action would be appropriate to have the Bureau of Customs of the Treasury Department ban import of Christmas lead icicles at the conclusion of this Christmas season—1971.

Mr. President, I have in my possession the complete text of three letters from three different lead-tinsel manufacturers to Malcolm Jensen, head of FDA's Bureau of Product Safety, confirming this agreement; this astounding agreement. I ask unanimous consent that they be printed at this point in the RECORD. The first of them, from Paper Novelty Manufacturing Co., of Stamford, Conn., is the most revealing and complete, and I include it first.

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

PAPER NOVELTY MANUFACTURING CO.,
Stamford, Conn., August 26, 1971.

Re Christmas Lead Icicles

Mr. MALCOLM W. JENSEN,
Director, Bureau of Product Safety, Food and Drug Administration, Washington, D.C.

DEAR MR. JENSEN: Our attorney, Steven D. Newburg-Rinn, has reported to us concerning the meeting held in your office on August 12, 1971, as to the possible hazards caused by the ingestion of lead Christmas Icicles by children.

As I understand it, you proposed at the meeting that the six manufacturers of lead Icicles agree 1) not to manufacture any lead Icicles after Christmas 1971 and 2) not to sell any lead Icicles after Christmas 1972. If all six manufacturing companies agree to this proposal, it is my understanding that you will recommend that your agency accept such voluntary action and take no rulemaking or court action with regard to lead Icicles until the conclusion of the 1972 Christmas season. You also stated at the meeting that in order to help mitigate the economic losses to be suffered by the manufacturers, your agency would not initiate or give any publicity to the voluntary agreement of the Icicle manufacturers or the alleged dangers from lead Icicles until the conclusion of the 1972 Christmas season. We also understand that you agreed at the meeting that were the manufacturers to take voluntary action to take lead Icicles off the market, your agency would take whatever action is appropriate to have the Treasury Department (Bureau of Customs) ban the importation of Christmas lead Icicles at the conclusion of this Christmas season.

Paper Novelty is willing to proceed in the voluntary manner you have suggested. We hereby offer to cease manufacturing lead Christmas Icicles after Christmas 1971 and not to engage in any sales of Christmas lead Icicles after Christmas 1972.

Should you have any questions regarding this matter, please feel free to contact me at the above address or our attorneys, James B. Blinkoff and Steven D. Newburg-Rinn of Fried, Frank, Harris, Shriver, & Kampelman, Suite 1000, 600 New Hampshire Avenue, N.W., Washington, D.C. 20037, 965-9400.

Sincerely,
CHARLES G. MOSES,
Executive Vice President.

BRITE STAR MANUFACTURING CO.,
August 25, 1971.

M. W. JENSEN,
Director,
Public Health Service
Food and Drug Administration
Washington, D.C.,

DEAR MR. JENSEN: On August 12, 1971, your department called a meeting of the manufacturers of lead foil icicles.

At said meeting, your department requested withdrawal of lead foil icicles from the market.

We agree to stop manufacturing all lead foil icicles after Christmas 1971, and will not sell any lead foil icicles after Christmas 1972.

If our industry agreed voluntarily to phase out lead foil icicles by Christmas 1972, your department would not give this information to the news media or inflict a banning order until after Christmas 1972.

Also, you stated that you would see that the Treasury Department would stop all importation of lead foil icicles after Christmas 1971.

Sincerely yours,
ISRAEL KINDERMAN,
President.

THE GEORGE FRANKE SONS CO.,
Baltimore, Md., August 30, 1971.

Mr. M. W. JENSEN,
Director, Bureau of Product Safety, Food and Drug Administration, Washington, D.C.

DEAR SIR: This letter is being written in response to the meeting held in your office on August 12th with all the domestic manufacturers of lead foil Christmas Icicles. Our company was represented by Perry H. Wilt, a vice-president of our company.

It is my understanding from talking to our Mr. Wilt after the meeting that the manufacturers would agree to the following: All man-

ufacturing of lead foil icicles would cease at the end of 1971. Sale of these icicles would stop after Christmas 1972. If the industry would consent to the above, I understand your agency would agree not to initiate any legal action with regard to these lead icicles until after Christmas 1972, at the earliest. Also, your agency would not issue any publicity nor news releases concerning the possible hazards of this product until the end of next year's Christmas selling season. Foreign manufacturers of this item would also be covered by this agreement through action you would take with our U.S. Bureau of Customs.

If the other domestic manufacturers of these lead icicles are willing to abide by this voluntary agreement, our company will also offer not to manufacture these lead icicles after this year and not sell them beyond Christmas 1972.

If you have any questions or suggestions, I will look forward to hearing from you.

Yours truly,

EDWARD P. FRANKE,
President.

Mr. MONTOYA. Mr. President, here, then, is what FDA proposed to do.

First, let tinselmakers manufacture this deadly material from the middle of August 1971 until the end of Christmas, 1971. This is a period of almost 4½ full months. No exercise of authority to remove tinsel from the market under previously described existing authority was even mentioned, much less contemplated.

Second, allow full and free promotion and sale of this tinsel for the remainder of 1971 and all of 1972; two complete holiday seasons.

Third, take absolutely no action against the product during this entire period of time.

Fourth, within FDA suppress and not offer to make available any publicity of the agreement or news of danger from such tinsel to consumers for that entire period of time, which comes close to a year and a half.

Fifth, insure that foreign lead tinsel was banned after the end of the 1971 holiday season, presumably allowing domestic manufacturers to make a killing in the 1972 season under terms of the secret agreement. How is that for helping our balance of payments?

On October 14, 1971, Mr. Jensen wrote the president of the Stamford, Conn. company, thanking him before his cooperation. Presumably, the secret agreement was arrived at and implemented. I ask unanimous consent that the text of this letter be printed at this point in the RECORD.

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

OCTOBER 14, 1971.

Mr. CHARLES G. MOSES,
Executive Vice President, Paper Novelty Manufacturing Co., Stamford, Conn.

DEAR MR. MOSES: We have received replies from each of the companies manufacturing lead tinsel stating that the production of the lead tinsel will be discontinued by Christmas 1971 and no sale will be made after January 1, 1973.

We are grateful to each producer for his decision to remove this one source of lead from the child's environment, thus helping to reduce the occurrence of lead poisoning.

The cooperation of several industries in reducing or removing the lead content in household products accessible to children will eventually eliminate this threat to the health of the children of the nation.

Your assistance and that of all other members of your industry are sincerely appreciated.

Sincerely,

M. W. JENSEN,
Director,
Bureau of Product Safety.

Mr. MONTOYA. Mr. President, one of our distinguished and most courageous colleagues, the Honorable JOHN MOSS, of California, first exposed this unholy secret agreement. He promptly demanded that Jensen issue a public warning. Jensen vigorously defended the FDA deal, stating:

"The best information," from the Nation's 580 poison control centers and other sources indicated, "not one single case" of illness in a child from ingesting tinsel.

In other words, Mr. Jensen told Representative Moss that there was nothing to worry about.

Yet in his letter to Mr. Moss, president of the Paper Novelty Manufacturing Co., Mr. Jensen writes that the eventual termination of the production and sale of lead tinsel would help "to reduce the occurrence of lead poisoning." He continues, describing, "This threat to the health of the children of the Nation." In this letter, which he obviously never intended to see any light of exposure, he readily concedes this threat. Yet when first confronted with revelation of the secret deal, he denigrates the possibility of any threat posed by lead tinsel to America's children. Conscience is certainly a marvelous thing. One could get the impression that Mr. Jensen's opinion of the danger of lead poisoning from tinsel depends on who he is writing to.

Let us bear in mind the letter Mr. Jensen and Mr. Verhulst received from the pediatrician in Baltimore and the commissioner of health of New York City. Both recommended removal of this product from the market. Both indicated there was a significant possibility of hazard from lead tinsel. Let us also recall another quote from Dr. Chisholm's letter.

If, however, a child already has a high lead level in blood and tissues, then the absorption of even small additional amounts which might result from a shorter residence time of the tinsel in the gastrointestinal tract would certain pose a serious health risk.

His letter was addressed to Mr. Henry Verhulst in late February 1971. Mr. Verhulst is Director of the Nation's federally funded 580 Poison Control Centers. Presumably, if Mr. Jensen, after Congressman Moss asked for a warning, consulted with the Poison Control Center Director on a question of death from tinsel of this kind, he also asked or was informed by him of the other contents of Dr. Chisholm's letter. Or, perhaps, he did not.

At the very least, a public warning of the severest sort was merited. A ban on the product certainly should be considered. Or, perhaps, a series of tests on animals such as were suggested by Dr. Chisholm. Certainly FDA has such facilities immediately at hand.

Bear in mind the following two facts:

These tinsels are approximately 77 percent lead.

Other commercial tinsels, usually made of plastic, are easily available. These are safe, according to Dr. McLaughlin's letter of March 4, 1971.

Similar advice was given FDA by the environmental medical service of the Massachusetts Institute of Technology. Their words of warning were also ignored; totally and completely.

One would think that any public official, especially those involved in such work at FDA, would immediately suspect any product with such an overwhelming lead content. Easy availability of good substitutes offered a perfect alternative. Both factors were ignored by people charged with public safety; the safety of America's children. Representative Moss stated in his letter to Jensen that he knew of no authority for withholding such information from the public.

Mr. President, there, then, is the full story as far as I know it up to now. One point should be stressed. The office involved in this secret deal at public expense has been brought into question before in a variety of ways. The FDA's Bureau of Product Safety has proved to be a major bottleneck against enforcement of the Poison Prevention Packaging Act of 1970. From secret technical advisory meetings to closeness with industry lobbyists, this Bureau has raised a number of questions of propriety by its behavior in regard to this law.

An enormous furor has been raised in regard to this office over the Safe Toy Act, which sat unenforced for a lengthy period.

Now the same operation is directly involved in promoting secret meetings, proposing a secret deal and seeking to protect a potentially deadly product at the expense of the American public.

All these happenings are not accidents. A distinct anticonsumer pattern emerges from them that is undeniable, to say the least.

It will be fascinating in the extreme to hear what excuses will emanate from the FDA now. Will they say they had no personnel? Or will it be not enough money? Or will it be that they did not understand the law? Or that they did not understand that what they did was highly questionable? Perhaps we might even be treated to a new excuse.

FAP ADVOCATES WANT TO SEE CHILD CARE STANDARDS LOWERED

Mr. HARRIS. Mr. President, one of the key sections in the welfare reform provisions of H.R. 1 is title IV, which includes the family assistance plan, FAP. The purpose of FAP is to get mothers of dependent children off welfare, to save money by forcing mothers of children to go out of the home and take whatever jobs are available. Money for day care is provided as part of the package. Day care is the carrot; loss of benefits is the stick.

No savings can be made, however, if adequate day care is provided by the Federal Government. Adequate day care for the preschooler and two school-age children the average welfare mother has

would cost $4,500 a year. The wages the mother could earn, working 50 weeks a year at the minimum wage, come to $3,200 per year. That kind of mathematics would kill chances of the so-called welfare reform bill passing. If the extra costs for just 150,000 welfare families are computed on the basis of providing adequate child care, the net loss from such welfare reform would amount to $195 million the first year.

But FAP advocates are in a bind. Existing Federal requirements and regulations in many States are such that the only kind of child care that can be legally provided is adequate—and therefore somewhat expensive—care. If the existing Federal and State laws and regulations regarding the care of children are left unchanged, the day care needed to make welfare reform work could not be provided.

FAP advocates made the only move possible under the circumstances. WILBUR MILLS made an official request to HEW for:

* * * a report and recommendations based on a thorough review, in cooperation with State and local officials, of existing Federal standards as well as State and local licensing requirements in order to determine those requirements which are essential both to protecting the child and assuring an appropriate program for him.

Mr. MILLS asked that the report be furnished by February 1, 1971.

Mr. MILLS was very frank about his reasons for wanting the report, saying:

* * * Your committee is also concerned that unreasonable Federal, State and local standards and licensing requirements have interfered with the provision of essential child care services, and may prove a barrier to development and provision of the services essential to the success of the Family Assistance Plan."

The Nixon administration not only provided money from the Office of Economic Opportunity and the Office of Child Development for a contract with a firm to respond to WILBUR MILLS' request but also went a step further. The administration also began a revision of the Federal requirements aimed at lowering them—and, thus, the cost of day care—and decided to write a "model day care facility licensing code" which would lower existing State and local regulations.

The administration-funded project is now in its third phase, and the "model code" which was developed to meet WILBUR MILLS' objections is now being revised. The next step, according to the contractor running the project is:

* * * official endorsement by the Federal government and possible subsequent acceptance of part or all of the models by state and local authorities.

The timetable for this part of the "welfare reform" strategy is not working out well. At the Federal level, strong bipartisan support is developing for retention of the existing Federal requirements as a quality floor. Senator RIBICOFF, whose statement—CONGRESSIONAL RECORD, volume 117, part 24, pages 31241–31242—signaled the beginning of a continuing effort by the Senate to "exercise its legislative oversight" is leading the fight in the Senate.

The House most recently gave notice that it supports the requirements when H.R. 12350, the bill to extend the life of OEO, was passed on February 12, 1972. That bill includes a section similar to that introduced in the Senate by Senator RIBICOFF which requires programs to meet the existing Federal requirements. Despite some opposition—Representative RARICK attempted to link day care requirements to "local control of the schools"—CONGRESSIONAL RECORD, February 17, 1972, pages 4295–4296—the bill passed with the language Representative RARICK opposed intact.

Efforts to water down requirements for adequate day care can be expected to continue. But parents that would have to place their children in such custodial programs, and community groups that now are operating adequate programs will have a chance to comment on the activities. As a result of protests made by representatives of parents and community-operated programs, at a San Antonio meeting called by the Office of Child Development to "sell" their "model code" to a national conference, a contract was given to the designated organization chosen by those representatives, the Center for Community Change, to get other reactions to the "model codes."

The Center for Community Change's contract calls for a series of nine workshops throughout the country at which parents and their representatives can comment on the "model codes." Dates of the workshops and sites are: March 10–12, Frogmore, S.C.; March 17–19, Albany, N.Y., and Phoenix, Ariz.; March 24–26, Cincinnati, Ohio, and McAllen, Tex.; April 7–9, Lawton, Okla., and Lancaster, Pa.; April 14–16, Portland, Oreg., and Omaha, Nebr.

Directing the project for the Center for Community Change is Maurine McKinley, on leave from the Black Child Development Institute in Washington. Information about the project and the workshops may be obtained by contacting Maurine McKinley or other project staff members at the Center for Community Change, 1000 Wisconsin Avenue, N.W., Washington, D.C., 2007. Telephone (202) 338–6310.

Information may also be obtained from any of the organizations working with the project, who constitute the project committee. Those organizations, in addition to the Black Child Development Institute and the Center for Community Change, are: Ad Hoc Committee of Southeast Community Child Care Operators; American for Indian Opportunity; American Friends' Service Committee; Child Welfare League of America, Frente Unida de Educadores Puertorriquenos; Interstate Research Associates; National Urban League; Washington Research Project.

INNOVATIONS IN VA MEDICINE

Mr. CRANSTON. Mr. President, Dr. Marc J. Musser, the very able Chief Medical Director of the Department of Medicine and Surgery of the Veterans' Administration, authored an excellent article which appeared in the January 15 issue of U.S. Medicine. He describes the successful efforts made recently to insure that the VA system maintains its effectiveness and flexibility in meeting new situations and new challenges. Specifically, he cites the successes achieved through regionalization of medical programs, expansion of drug dependence treatment centers, improvements in hospital medical recordkeeping systems, increased association and involvement with medical leaders outside the Veterans' Administration, improvements in VA staff participation in policymaking decisions within VA facilities, and programs to make the medical treatment more pertinent to today's needs, such as a pilot program to utilize ambulatory care rather than bed care.

The Subcommittee on Health and Hospitals, which I am privileged to chair, of the Veterans' Affairs Committee, on February 16 reported to the full committee for action on S. 2354 and S. 2219, legislation I have authored to strengthen the VA's ability to continue and increase the scope of these improvements and enhance the VA's capacity to meet new health care challenges as they develop. Full committee action on this legislation and veterans' drug treatment legislation—S. 2108—is scheduled for March 28.

I believe that Dr. Musser's article provides information that will be of great interest to Members of the Senate and will portray to them some exciting developments and innovations in the Veterans' Administration medical program today. I ask unanimous consent that the article be printed in the RECORD.

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

[From U.S. Medicine, Jan. 15, 1972]

VA REGIONALIZATION FEARS PROVE FALSE

(By Marc J. Musser, M.D.)

In an article a year ago in this publication, I discussed the changing patterns in the delivery of health care in the nation, and defined what I considered to be the appropriate role of the health care system operated by the Veterans Administration's Department of Medicine and Surgery in the context of national needs. The passage of a year has sharpened what I feel is, and will be, the vital and pivotal position of that system in the national health picture.

The major challenge facing any health care institution or organization today is its potential to make quality care as readily available as possible to all of the people it was established to serve. I define the challenge to the VA health care system in the same terms with the added challenge of realizing its full potential as a part of the country's total health care system. Everything the VA does in patient care, education, and research in each of its hundreds of facilities in every section of the country is geared to meet both of those challenges.

At least two lessons are apparent in the current VA system. First, its quality and availability of service for all of the veteran patients it is charged to care for has established a model of equity to match efficiency and economy in a total health care system. Second, the flexibility of the system is such that it can readily expand or adjust its facilities, services and the population served,

or any one or combination of these. In short, the VA health care system can, if called upon, do more for more people.

In this past year, our efforts as described in the following selected areas of activity have been directed toward insuring that the VA system remains workable and responsive to professional, social, and economic changes, all of which are directly related to meeting and solving these challenges.

REGIONALIZATION

In my previous article, I reported the first step in the VA's program of regionalization—the activation of the Southern California Medical District. We have moved rapidly since that time; 17 additional districts have already been activated and four more will be by July. We expect to reach our planned goal of 37 districts by the end of calendar year 1972.

We are proud of this particular phase of VA operations. It shows the flexibility and adaptability that is an inherent part of our system. It proves that size is no deterrent to progress. Unfortunately, the private sector seems to be having some difficulty in bringing together its autonomous institutions and organizations through voluntary planning agencies, into a viable, effective undertaking.

When we began our regionalization program a year ago, some fears were expressed that it would result in a reduction of professional and institutional autonomy in the VA system. Some people thought regionalization was a serious threat to a status quo they had come to accept. Others saw it as "centralization."

I am happy to report that none of these fears has been realized. On the contrary, the benefits of our regionalization efforts are now beginning to be realized.

For example, we are guided by the principle that a facility which has the best cardiology diagnostic service in a particular regional district should be able, and encouraged, to use this service to benefit all the facilities in the region. This may mean that hospitals in that region will refer more cases of different types to other facilities within the region which have better services for those particular conditions.

In other words, each facility is encouraged, so far as is possible, to do more of the things it does best and to do fewer of the things it does less well or less economically. The result, we expect, will be optimum use of each service in each facility, optimum use of the region's facilities, thereby realizing optimum use of the total VA health care system.

IDEAL STAGE NOT REACHED

Of course, we have not yet reached that ideal stage by any means, and perhaps we never will. But it will not be for lack of effort, as evidenced by the progress of the past year.

The problem of drug dependence has generated social and political pressures upon the VA system. Our goal is the immediate treatment of every eligible veteran who comes to us for help in overcoming a drug abuse problem. The VA is aggressively pursuing the President's mandate and is cooperating wholeheartedly with his Special Action Office of Drug Abuse Prevention in ameliorating the drug problem and rehabilitating the drug victim in our veteran population.

From January 1, 1969, through June 30, 1971, the VA treated and discharged 7,856 patients manifesting drug abuse or dependence. We expect this figure to increase greatly this year.

Five drug dependence treatment centers were established in the VA fiscal year 1971. The Washington, D.C., VA hospital started up the first unit in October 1970 and four more units began operating in January 1971 in New York City; Houston; Battle Creek, Mich.; and Sepulveda, Calif. Thirteen more centers were activated in July. Additional drug programs were planned for July 1972 but because of the urgency of the situation, we requested a $14 million supplement to our budget to enable us to advance the opening of 14 more units. This funding was granted and as of now we have 32 centers in operation.

To provide easy access to services for many veterans who do not live near a drug dependence treatment center, we began early to plan "satellite" clinics in major population centers across the country.

These clinics will be most useful to veterans being treated with methadone maintenance and will be activated as needed. They will be located within the community and will be staffed by an ex-addict counselor, a part-time doctor, and a pharmacist or nurse authorized to dispense drugs.

Personnel from the nearest center will, on an itinerant basis, provide treatment and testing as needed. Counseling and other assistance also will be provided as needed. Two such clinics were opened recently in Houston and in San Francisco.

Our total capacity to treat eligible cases will be much greater than the number of beds of the units. We anticipate each bed will be turned over about 12 times a year so that approximately 6,000 veterans will be detoxified and started on a rehabilitation program on outpatient status.

As before, veterans with drug abuse and related disorders will continue to be accepted into our regular general medical and psychiatric wards, regardless of location. After initial treatment, they will be transferred to an appropriate addiction facility.

In line with our regionalization efforts, we have selected an additional 28 sites where drug dependence treatment centers may be established in July, depending upon the need and the resources available.

AREA HEALTH EDUCATION CENTERS

In introducing the concept of area health education centers, the Carnegie Commission on High Education recommended the development of consortia or other special cooperative arrangements among educational and health care institutions in communities not served by medical schools or major medical centers. The purpose of these centers was to strengthen and expand health manpower programs and thereby add to the quality and availability of health care.

The commission identified 16 such communities in which the VA hospitals were named as the institution most immediately capable of serving as a focal point for an area health education center. A subsequent assessment of VA's unaffiliated hospitals identified eight with an unusual potential in terms of hospital and community resources.

Visits to these eight communities were made with representatives of the Bureau of Health Manpower of the National Institutes of Health, the Health Services and Mental Health Administration of the Department of Health, Education and Welfare, and the VA central office.

The purpose of the visits was to identify interests and capabilities of those VA hospitals and communities in working together to develop community projects, given the appropriate support. Several of the eight hospitals have submitted proposals for developing plans to implement such area centers.

While the VA is providing immediate support for the necessary planning, it is expected that additional support will be forthcoming when new legislation is enacted and funds provided to enable the Department of Health, Education and Welfare to actively participate.

One of the major deficiencies in modern health care delivery is the complexity and inadequacy of the clinical record. As a result, the VA health care system has undertaken a number of pilot projects designed to improve this. Recently, both hospital staffs and central office have indicated interest in the concept of the problem oriented medical record.

Brought to national prominence by Dr. Lawrence L. Weed of the University of Vermont, this concept is an attempt to take the many problems with which the clinician must deal and arrange them in a systematic fashion to eliminate vague recordkeeping. By doing so, the clinician is assured better diagnosis, treatment plan, and follow-up capability.

A recent survey revealed that 50 VA hospital medical services already have adopted the Weed System. A steering committee for problem oriented medical record implementation has been established to conduct a pilot study of feasibility and acceptance of the system. There will be a follow-up study of the effect and use of the problem oriented record on the quality of health care delivery in those hospitals.

This approach, if thoroughly understood and efficiently used, can become an effective aid in providing comprehensive health care within the context of the VA system. It is a prime example of the ability and capacity of the VA to take new developments, implement them system-wide, study them, and make them available to other health care systems. It is the ideal for a collaborative effort in health systems research.

RESEARCH

In connection with research, a recent event demonstrated the capacity of the VA's health care system to do what no other single health care system or institution in the country can do. This was the presentation to Dr. Edward D. Freis of Washington, D.C., VA hospital of the 1971 Clinical Research Award of the Albert and Mary Lasker Foundation for his work in showing the life-saving effectiveness of diagnosis and treatment of moderate hypertension. Believing that even moderate hypertension is dangerous and that it should, and can, be treated, Dr. Freis and his colleagues set up the VA cooperative study group on antihypertension agents in 1964. The five-year study, in which 17 VA hospitals cooperated, established two major points:

That drug treatment for moderate hypertension reduced the death rate by more than 50 per cent.

That drug treatment is 67 per cent effective in preventing major complications which arise from cases of even moderately high blood pressure. These complications include, among others, stokes, congestive heart failure, and kidney failure.

All citizens should be entitled to health care which is comparable to that provided for VA beneficiaries. Consequently, the VA, as a total health care delivery system, or as an individual health care facility within a community, cannot fail to concern itself with the quality of health care and the needs of individuals and institutions in the private sector. Cooperation between VA facilities and those of the private sector is critical to the realization of this social goal.

VA's legal authorizations for community involvement are broad; they encompass a wide array of academic affiliations, sharing, and agreements related to exchange of medical information.

Recently, we have taken vigorous steps to strengthen VA ties on many fronts. Our special medical advisory group, which acts in an advisory capacity to the administrator, is a focal point for these developments. We have attempted to make this group representative of all the country's health care institutions, organizations, and interests. By the same token, we have attempted to actively

relate VA health care activities and staff to those organizations.

Dr. Edwin L. Crosby, executive vice president of the American Hospital Association, now serves on the special medical advisory group. I have been elected to the board of trustees of the American Hospital Association. Twice during the past six months, representatives of the Department of Medicine and Surgery have attended meetings of each of the five councils of the American Hospital Association. And in August, the administrator of veterans affairs was invited to address a plenary session at the annual convention of the association.

KNOWLEDGE LIMITED

Statistics indicate that nearly two-thirds of the practicing physicians of America have received some or all of their postgraduate education in VA health care facilities. However, it is obvious that these physicians really have limited knowledge and understanding of the VA health care system from their relatively short experience as residents, interns, or clinical clerks in one or another VA hospital. We are developing better orientation programs for the members of our current and future house staffs.

In addition, we are seeking to inform physicians already in practice about the VA health care system as both a local community resource and as a flexible national system. We are encouraging VA hospital directors and professional staff to become more involved with their colleagues in the community in planning and implementing community-oriented health care activities, and in establishing two-way communications with state and national health organizations. To help achieve these goals, we invited Dr. Russell B. Roth, speaker of the house of delegates of the American Medical Association, to become a member of the special medical advisory group and he has accepted.

ADVISORY GROUP MEMBERS

Several medical school deans or members of their faculty have always been members of the advisory group. The addition of Dr. John Gronvall, dean of the University of Michigan Medical School, to the group now brings the medical school representation to 13 of the total membership of 23.

The reality of the affiliation of 96 VA hospitals with 83 of the country's medical schools was affirmed by the establishment this past year of a new liaison committee of representatives of VA's Department of Medicine and Surgery and of the Association of American Medical Colleges. VA involvement and investment in medical education are now acknowledged by that national organization representing medical education. The association has testified on various legislative proposals before the Congress on veterans' affairs and one the VA health care budget during the past year, and has done so in concert with us.

National officers, eloquently and very directly, expressed deep concern not only about their own personal situations, but, more importantly, about their profesisonal feelings in regard to quality of patient care in the VA system. They pointed up the fact that communications among house officers, the hospital directors, and the VA staff in central office were either non-existent or in need of improvement.

HEALTH AND ENVIRONMENT DIRECTORATE

We have now formally requested all hospital directors and staff to work more closely with members of our house staffs to improve not only the care of the veteran patient, but also their personal and professional working conditions. The result had been that house staff physicians are now serving on policy-making bodies which are dealing in matters of major concern to them personally, and to the mission of the Department of Medicine and Surgery. For example, questionnaires sent out in July established the fact that house staff members were serving on various advisory committees at 35 VA hospitals.

Directly related to this is the fact that two young PHS physicians are now working in my office. Drs. Clement Lucas and Bryan Arling began in July to develop a new office of house staff affairs and to serve as ombudsmen for all VA house staff. Not only are house staff members calling them about their problems, but regular staff people are also contacting them regarding their problems with house staff.

A second VA house staff conference was held early in November. We plan to continue these conferences on a permanent basis. Further, the Department of Medicine and Surgery is also providing assistance for the second national house staff conference to be held in Atlanta in March.

AMBULATORY CARE

In my article last year I mentioned a pilot study structured to give VA admitting physicians the option of placing applicants in an ambulatory hospital care category as an alternative to bed care. More than 8,000 patients in 12 hospitals participated in the test. Our acceptance rate rose 30 per cent, if inpatient and outpatient rates are combined.

In general, patient response was quite favorable, though most were unaware that this was a new program. All 12 chiefs of staff responded enthusiastically to the program. Their recommendations dealt primarily with the passage of enabling legislation and the provision of adequate staff, funding, and space to carry out the program.

The findings were sufficiently encouraging to warrant continued study. Four of the original hospitals were retained for further study and nine new hospitals were added. These later data generally conformed to the findings in the initial test, but with some increases in workload. The number of applicants will probably increase by 10 per cent in 1973 but only by 5 percent in 1974 and by 3 per cent in 1975.

The principle of ambulatory care as a substitute for hospital care is under active consideration in Congress. H.R. 10880, the Veterans Medical Care Act of 1971 (the so-called Omnibus Bill) passed the House on October 4 and is now being considered by the Senate Veterans Affairs Committee. A provision of this bill would liberalize admission rules for VA outpatient care by authorizing outpatient treatment for non-service-connected veterans. Care would be permitted if treatment is necessary for hospital admission or where such care is reasonably necessary to prevent hospitalization.

Another provision of this bill would extend medical benefits to wives and children of veterans permanently and totally disabled from service-connected causes and to surviving widows and children of men who died from similar causes. An estimated 464,000 wives and children would be eligible for VA care.

These two provisions would remove some current limitations which have prevented us from becoming a comprehensive health care system and would enable us to develop the only three major services the VA now lacks—obstetrics, gynecology, and pediatrics.

These liberalizations of the VA medical care program would be accompanied by serious but not insurmountable difficulties, such as the necessity for updating facilities to meet new requirements and the realignment and integration of working relationships among inpatient and outpatient staffs.

I have tried in this article to show that the VA Department of Medicine and Surgery, which comprises the nation's largest health care system, is far from static. We constantly seek to prepare for not only the future needs of our veteran patients, but to prepare for the future that may well include legislation changing the country's health care delivery systems. The challenge of relevancy to which I referred at the outset is exciting; it is one the department can meet and solve for not only its own patients, but in the interest of all Americans.

HIGH MEAT PRICES

Mr. HUGHES. Mr. President, I have been profoundly disturbed by recent ads in the Washington newspapers that add to the already considerable confusion and anxiety in the public mind about high meat prices.

Beef is near the highest level since the end of the Korean war.

One full page ad of a supermarket chain reads:

> Why are they so high? It begins at the source: Livestock prices were not and are not now controlled under the present economic program. Less meat is reaching the market. Prices from our suppliers have skyrocketed. Because of all of these reasons, you will find higher prices on almost all fresh meats.

The implication of that one phrase—"it begins at the source"—as interpreted by the public is that the farmers, the livestock producers, are the beneficiaries of excessive prices for their products that are driving the consumers to the wall.

Nothing could be further from the truth. For the first time in years, the livestock producer is getting a price for some of his products that enable him to make a reasonable profit. But the prices he is getting are by no means excessive and are not, by any stretch of the imagination, the cause of the big bulge in prices at the supermarket. The real cause of high prices falls within the spread between what the farmer gets for his product and what the processed food sells for on the meat counter. For every cent the farmer gets, someone else along the line gets 5 cents or more.

In the meantime, lost in the shuffle is the fact that corn is selling at barely the cost of production—thereby reducing the total agricultural income of the farm belt. Lost in the shuffle is the mention of any price controls for the middleman, such as the processor. Lost in the shuffle is the fact that the annual per capita consumption of beef has increased from 62.2 pounds in 1952 to 114.5 pounds today. Lost in the shuffle is the fact that American consumers are demanding and getting ever fancier processing and packaging for their meat products—and these things cost money.

The administration appears to be working both sides of the street vis-a-vis relationships between the farmer and the consumer. On the one hand, Secretary Butz, with the zealotry of one who has just recently got religion, is loudly advertising and bragging about the prices livestock producers are getting. On the other hand, Mr. Grayson, head of the Price Commission, is criticizing Mr. Butz and suggesting that action should be taken to control the prices of raw agricultural products.

Actually, it is the farmer and the consumer both who are getting the shaft and it is a divisive disservice to the en-

tire country that the farmer is being made the fall guy and consumer resentment is being stirred up against him. The irony of it all is that the country has become accustomed to seeing food furnished by the farmer at the cost of production, or less, while others reap the high profits.

So the answer is not punitive action against the farmer, such as imposing a ceiling on raw agricultural products. Let the Price Commission, if they really want to protect the consumer, look to where the real profits are in the meat-to-market cycle.

The American consumer should know that the prices farmers and cattle feeders are getting these days are about what they were 20 years ago.

What other categories of producers can say the same? What other citizen would settle for the wages he was getting two decades ago?

INEFFICIENCY OF GIANT U.S. FIRMS

Mr. HARRIS. Mr. President, one of the contentions of those who support a vigorous antitrust policy by the Federal Government is that too many giant U.S. firms are too large to be efficient. They are like whales in shallow water. Still able to breathe, they are unable to maneuver like their smaller rivals.

On March 12, 1972, the New York Times published an article by John Bunting, chairman of the First Pennsylvania Banking & Trust Co., who agrees that corporate structure in this country is too topheavy. As Mr. Bunting states:

> The very size of many companies precludes any accurate evaluation of the efficiency of their individual parts or the contributions of their individual managers. Indeed the swollen structure of most corporations today argues against efficiency. It is easy to hide the operating inadequacies of one division in the total corporate structure. In fact, modern accounting practices often encourage management to tolerate a poor performance by one part of the corporation for tax purposes.

Mr. Bunting himself does not favor antitrust actions by the Federal Government as a solution. He argues at this point for voluntary decisions by large corporations to "break themselves up into smaller, relatively autonomous segments." He also is more sanguine than many including myself about the merits of conglomerates.

Nevertheless, his views are of great interest. Here is a man who spends his life evaluating the efficiency of corporations as part of his job as a banker and who has concluded that too many are bloated, topheavy and inefficient.

Mr. President, I ask unanimous consent that Mr. Bunting's thoughtful article be printed in the RECORD.

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

CORPORATE STRUCTURE REQUIRES RADICAL CHANGES

(By John Bunting)

Much has been said and written about President Nixon's new economic policies during the past few months. While establishing price and wage controls, seeking new tax reform and realigning world currency values are all important steps in establishing a kind of new economic ball game for the country, one key player is still missing from the roster: corporate management.

At a time when corporations have a responsibility to make a still greater contribution to the economy and society, they seem less prepared—financially and psychologically—than ever before to meet the challenges of the next decade. At a time when there is increasing pressure on labor to become more productive, no one has really pointed a finger at management and demanded that it become more efficient.

The sad but simple truth is that most corporate managements are anachronistic, self-serving and sorrily in need of radical restructuring. It's not a question of management marching to a different drum but of being out of step with the times.

In the past, the United States usually has had self-correcting devices built into its economy that forced management to be efficient. These "devices" took the form of severe recessions or depressions, which, in a kind of fiduciary Darwinism, weeded out the weak, purified corporate bureaucracies and permitted only the superefficient to survive. With all the terrible consequences of the Great Depression, the one good thing was that it knocked everybody down and made everybody equal for a while before the efficient grew up again.

Today, we have decided that severe recessions or depressions are against the law. While I am advocating the return of such severe economic dislocations, it is important to understand that as a nation we really haven't found a substitute for the one benign consequence of depressions and recessions: the restructuring of management.

In fact, the nature of the times seems intent on maintaining the status quo of helping the weak, poorly managed or mismanaged-company survive—while discouraging practices that in the end might lead to stronger corporate management. Indeed, there is something to the notion that weak managements are overprotected in the United States, as so dramatically illustrated by the Government's rescue of the Lockheed Aircraft Corporation.

More than that, some corporate management teams apparently look upon growth and size as a magic cure-all to inefficiency. The Penn Central situation is a good illustration.

It is equally important to note that the frequent incremental cost-cuttings instituted by management during slow business periods such as we have just experienced are, in effect, little more than fiscal tokenism designed to placate shareholders and reinforce the management team that undertook them in the first place. These cost-cuttings are extremely temporary, often insignificant and usually made within the framework of the existing management structure.

What, then, can be done to make corporations more efficient, short of a major recession or depression? How can management be made more aware of its important role in the revitalization of the nation's economy and meet its social responsibilities at the same time?

One thing that would greatly help would be a "fracturing" of corporations into more manageable pieces. By this, I don't mean that the Government should step in and break up large corporations, such as General Motors, A.T.&A. or I.B.M.; rather that corporation should break themselves up into smaller, relatively autonomous segments.

The very size of many companies precludes any accurate evaluation of the efficiency of their individual parts of the contributions of their individual managers. Indeed, the swollen structure of most corporations today argues against efficiency. It is easy to hide the operating inadequacies of one division in the total corporate structure. In fact, modern accounting practices often encourage management to tolerate a poor performance by one part of the corporation for tax purposes.

How can a shareholder of a huge corporation judge the value of separate divisions to the corporate whole when the results of each are hidden in a consolidated balance sheet? What incentive is there for the manager of one major divisions to be more efficient or more innovative than the manager of another when the efforts of each are sheltered by the total corporate entity? However, if a division were spun off and made a corporation with its own president and board of directors and its own profit-and-loss statement, the fresh air of such public exposure would force management to become more efficient, more competitive. And both the economy and the public would benefit in the end.

Hand in hand with corporate fracturing would be less interference by the Securities and Exchange Commission, the Federal Reserve and other Government agencies in corporate takeover actions. Not only does the Government seem to protect inefficient corporations by compensatory policies that tend to prevent bankruptcies, but efficient management is often restrained from taking steps or making acquisitions or mergers that could help the economy.

Able management, with a proven record of constructive growth and corporate efficiency, should be given greater latitude in making acquisitions. New policies are needed to permit the better managed, faster growing, more capable corporations to take over or eliminate the less able corporations that are wasting their (and the country's) resources. In other words, weak management shouldn't be protected against the "raid" by outsiders.

In this respect, many of our so-called conglomerates have been much maligned. As was noted earlier, merger for merger's sake is no answer to the problem of corporate efficiency, but there are sound economic arguments for advocating the diversification of large, well-financed, well-managed corporations into seemingly far-flung or distant fields.

Moving horizontally in the same industry is bad. When one steel company buys another steel company, it's usually bad for industry, since it reduces competition, and it's bad for the country, since it tends toward economic concentration. But when an I.T.T. diversifies into parking lots or housing, we achieve a kind of corporate integration that fits in with the economic needs of the country. We want insulation against recessions and we need corporations that are broad-based enough to live through a down year without going out of business and adding to the nation's unemployment rolls.

A conglomerate may have to cut back but it won't be forced to shut down. When one part of the conglomerate is suffering, other parts may be thriving, which gives management a kind of balance it would not have if its affiliated parts were separate, independent companies. The total corporation may still show a profit despite the poor performance of one member. At the same time, the shortcomings of the latter will be readily visible.

For example, if First Pennsylvania were engaged only in commercial banking, we would have shown only marginally higher profits last year due to declining interest rates. But because we also owned two consumer finance companies, a mortgage company, an adviser to the investment trust and a few other subsidiaries that did well, we

were able to substantially increase the earnings of the total corporation.

Still another change that might increase managerial efficiency would be the overhaul of the corporate board of directors. The No. 1 job of a board of directors is to evaluate management. But, in most cases, the boards are composed of cronies or business associates of management who do little more than rubber-stamp management's policies.

In other words, most boards of directors represent and reaffirm the corporate "establishment." If management is out of tune with what's going on in society, so undoubtedly will be the board. This is why it is crucial for corporations today to restructure their boards to include not only the usual type but also representatives from outside the business sphere, such as consumer, environmental or racial minority groups.

Finally, in keeping with the above, companies obviously need to take a fresh look at their own public relations. Because it has been overprotected—insulated from the pressing need to change—management is out of touch with the mood of the times.

In the area of environmental protection, for example, companies are always complaining about the cost of antipollution measures. It might be better if these companies would accent the positive by taking the attitude that these changes are good. Instead of waiting for pressure from government and environment groups, management should take the initiative in finding ways to restore an ecological balance, and maximize the advantages of pollution control. Since the public wants companies to do these things anyway, they might as well make a business—and a profit—out of it, and stop complaining about what it will cost them.

But more important, until management undertakes the kind of reforms needed to increase its efficiency and make it an active player in the new economic ball game now under way in the nation, it will remain unresponsive and unable to meet its growing social commitments. The time for change is now.

EROSION OF THE WORK ETHIC

Mr. FANNIN. Mr. President, our Nation faces some tough economic problems these days. Foreign goods are pouring into America; U.S. factories are stagnating or moving abroad.

Consumers who very justifiably want the most for their dollar are passing up high-priced American-made goods to purchase the less expensive foreign-made goods.

One of the main reasons for this is the fact that too many American workers are getting paid more and more for doing less and less. Unions have sought to convince workers that their main objective in life is not to produce products or services, but to wring as much as possible out of employers. Employers do as employers must—they pass the additional cost of goods on to the purchaser. The prices go up, the workers want more to offset the inflation, and prices go up again.

Meanwhile, in Japan, in Taiwan, in Korea, in Hong Kong, the world's top manufacturers—including American manufacturers—are finding willing workers who will produce much for relatively little in wages. These workers have energy, desire, and appreciation for their jobs.

I am not suggesting that American workers could or should accept what foreign workers get. We have a technology that allows us to produce more—that is, providing our workers will put forth a fair day's work for a fair wage, and providing our plants are allowed to fully utilize the technology as it is developed.

If we are to survive as a leading manufacturing nation, we must have a return of what once was known as the work ethic.

American workmen must once again take pride in being the best—rather than just the best paid—in the world. Our union leaders must start acknowledging the realities of economics. Workers must be allowed to produce, they must be encouraged to produce.

Mr. President, last Tuesday columnist James J. Kilpatrick provided us with some good insight in the problem. I ask unanimous consent that his column, published in the Washington Evening Star, be printed in the RECORD.

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

EROSION OF WORK ETHICS IS LAMENTED BY BUILDER

(By James J. Kilpatrick)

HOUSTON.—John E. Healy II spoke at more than 200 meetings last year—industry meetings, union meetings, committee meetings—and at many of them he told the story of the Empire State Building. The story takes only a few paragraphs, but it packs a wallop.

Healy is the handsome, hefty, third-generation builder from Wilmington, Del., who is the outgoing president of the Associated General Contractors of America. The association met here last week in its fifty-third annual convention. The 5,000 delegates went home with a renewed determination to restore some sense to their deeply troubled industry and they took with them the story of the Empire State.

The world's greatest skyscraper broke ground on Jan. 22, 1930. At peak employment, 3,400 men were working to erect 60,000 tons of steel, to lay 10 million bricks, to install 70 miles of water piping, and to connect 3,500 miles of telephone cable. The 102 stories went up at an average of four-and-a-half stories per week. On May 1, 1931, just one year and 98 days later, President Hoover dedicated the building and tenants moved in.

The same structure today, says Healy, would require three to three-and-a-half years to complete.

Granted, the Empire State Building lacked air conditioning, which a contemporary building would demand, but the man-hours required to install air conditioning have been more than offset by the new tools and new techniques of the past 40 years. The grim truth, in Healy's view, is that productivity in the building industry today is less than half what it was then. And why? "The work ethic has been lost."

It has been lost, he believes, through the power of avaricious trade unions, and through the weakness of contractors willing to buy labor peace at any price. The process has grossly inflated building costs, and it has sadly diminished the dignity of working men.

Members of the AGC are eager to have their troubles known. Day in and day out, their experience confirms the picture painted in a hard-hitting report last month by Engineering News-Record. In 1926, a Chicago mason laid 600 blocks a day; today two masons are required for the same work, and they lay 100 blocks a day. In the days when concrete was finished by hand, a contractor figured on 2,000 square feet of finished concrete per man per day; today, with all kinds of power tools, the rate is 600 square feet.

The magazine cited the sorry example of a power plant job that required several small gasoline-powered generators. The unions successfully demanded that each generator be watched by an operating engineer, an electrician, and a pipefitter. The operating engineer got $300 to $400 a week "for starting once or twice a day a gas engine smaller than those on many home lawn mowers."

Each electrician received the same kind of money "for pushing the wire plugs into the sockets of the machine whenever they were moved." The contractor said he never did discover what the pipefitter did.

Such examples are legion. A billion-dollar project in Albany has suffered repeated delays because of a dispute between teamsters and operating engineers: Who is to hold the nozzle of a fuel truck?

On a motel construction job in Philadelphia, electricians and carpenters quarreled over the installation of a chain-hung ceiling lamp.

Many labor leaders privately agree that this nonsense has to stop. Union members themselves are suffering, as many contractors turn to the open shop. Jobs are vanishing.

The contractors who met here in Houston gave Healy an ovation when he insisted that with the union's help, "or without it," productivity and morale must be restored. If the builders will match their convention zeal with hometown determination, the old concept of a fair day's work for a fair day's pay may yet be revived. It's what the unions have been asking all along.

LT. GOV. HENRY HOWELL, OF VIRGINIA

Mr. HARRIS. Mr. President, I invite attention to an article about Virginia's Lt. Gov. Henry Howell, published in this Monday's Washington Post. Lieutenant Governor Howell is a people's politician in the best tradition of Southern populism. The Post article describes his fight against unfair utility rate increases, his effort to repeal the State's sales tax on food and medicine, and his nearly successful campaign to stop the State tax code's preferential treatment of capital gains. The newspaper quotes Lieutenant Governor Howell as commenting on the latter: "This is no tax loophole. It is a major excavation."

Mr. President, I believe that Henry Howell is one of the leading voices for the new populism in the Democratic Party today. I expect we will be hearing a great deal more from him in the future. 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:

A "MATURED" HOWELL: MAN TO WATCH FOR 1973

"I'm quite capable of having a lovely tea and making polite conversation. My wife, Betty, will have string ensembles and flowers in the executive mansion. As governor, I will be as genteel as a dancer of an 18th century minuet."

—Henry Howell, Aug. 12, 1969.

(By Carl Bernstein)

RICHMOND.—On the final day of the 1972 General Assembly, Gov. Linwood Holton turned to Betty Howell, wife of Virginia's independent, populist lieutenant governor. Half seriously, the Republican governor

asked Mrs. Howell her plans for redecorating the executive mansion when his own term expires in January 1974.

The gubernatorial election campaign of 1973 is still a long way off, but Henry Howell—as evidenced by the governor's question—is very much the man to watch as the state's Republicans and Democrats try to derail his plans for succeeding Holton.

Once widely regarded as the enfant terrible of Virginia's Democratic Party, Howell has emerged from his first legislative session as lieutenant governor with new-found respect. "Maturity" is the word heard most often to describe Howell's supposed transformation, and favorable comments are coming from many quarters:

From his colleagues in the state Senate, over which Howell presided for eight weeks with a fairness acknowledged from both sides of the aisle.

From the state's press, which expended almost as many column inches on the lieutenant governor as the governor during the General Assembly.

From his constituents, who came to the Capitol to lobby for his programs and for whom he lobbied.

And, significantly, from his political enemies, who are legion.

Even House Majority Leader James M. Thomson of Alexandria, an avowed segregationist who regards Howell as something of a dangerous radical, rose on the floor one day to give the 51-year-old lieutenant governor some backhanded praise. The occasion was a debate on Gov. Holton's proposal to create an executive cabinet of six administrative secretaries.

"Henry won't need this reorganization," shouted Thomson, the brother-in-law of U.S. Sen. Harry F. Byrd Jr. "When Henry gets to be governor he'll do the job without all those secretaries and assistant governors because Henry Howell—unlike most people around here—knows how to get things done."

Later, Thomson remarked: "I suppose we might have to live with him as governor for four years. We can do it. The legislature will be here longer than Henry will and we're not about to give him the legislation he wants.

"But I've got to hand it to Henry," Thomson continued. "He's looking like a statesman. Henry's a real leader, which is something we've been a little short on in Richmond lately. The lieutenant governorship might not have much power, but Henry's been smart enough to make it powerful in spite of itself."

Howell came to the lieutenant governorship, his first statewide office after a dozen years in the Assembly, armed with little more than the 362,371 votes he received last Nov. 2 and his reputation.

A political iconoclast who had made a career of challenging the Byrd Machine's policy of annointment and appointment (Howell's phrase), he was an early leader in the consumerism fight; championed organized labor in a state that was among the first to adopt a right-to-work law; called for equal rights when Virginia was seized with the fervor of massive resistance to racial integration; alienated the state's bankers, insurance interests and utility companies by attacking their power and their rates, and parted with the state Democratic Party when it refused to hold a primary election for lieutenant governor in 1971.

The day after his election, Howell set about giving some power to the lieutenant governorship—an office that, by his own description, has traditionally meant "getting a gavel and lining up a preacher to give the Senate prayer and maybe a rabbi every now and then."

Holding a multicolored map of the election results in front of the television cameras, Howell said on Nov. 3: "Now all that blue you see is Henry Howell country. I am sure that these great legislators, who are very skilled in the art of elections, are going to look at all these blue areas of the map when evaluating my legislative program"—the first, he noted, ever submitted by a lieutenant governor.

Howell would establish a "People's Lobby," he said at that first press conference, to come to Richmond and buttonhole legislators on behalf of his key proposals. He would keep in touch with his unlikely constituency—senior citizens, blacks, Wallacites, liberals, state civil servants, union members and small businessmen—by turning his office into something akin to Andrew Jackson's White House, "with all the people invited into that little telephone booth they give the lieutenant governor for an office."

By the second week of the session, there was a steady stream of union members, state employees, teachers, welfare recipients, students, merchants and others in and out of Howell's office, sometimes keeping senators waiting.

"These people realize they are not being fairly treated by the government," says Howell. "They give me my ideas. Because of my record they see me as the best hope of getting heard, of getting the system back in balance."

In the fourth week of the session, a Howell-backed proposal to increase educational aid to the state's handicapped children came up for a public hearing. Busloads of parents of handicapped children—contacted earlier by Howell's office—began arriving at the Capitol in the early morning, so many that the hearing had to be held in the state government's biggest auditorium. At session's end, the bill had passed.

A week after the aid-to-the-handicapped hearing, hundreds of blue uniformed policemen and firemen recruited for the occasion by Howell roamed through the Capitol's halls, lobbying in support of another element of Howell's legislative program: compensation for the families of officers killed in the line of duty. That bill passed, too.

So did a bill backed by Howell that for the first time, Virginia employers were to establish private prepaid health care programs for their workers. ("You can't afford to be sick in this state," the lieutenant governor is fond of saying.)

However, Howell lost on other key elements of his legislative program; tax reform; wholesale reform of the powerful State Corporation Commission, which sets utility rates; elimination of trading stamps; an end to the state sales tax on food and nonprescription drugs, and enactment of a series of consumer bills.

On most of those issues, the lieutenant governor's "People's Lobby" was nowhere to be seen. "It takes a long time to thaw a watermelon if it's been frozen long enough," commented Howell.

"The people of Virginia are not used to being part of their government. Nobody's ever asked them to participate and the average citizen still is not willing to take part in his government. He's suspicious of it because he's been ignored for so long. That's what we're trying to change," he said.

One of the fights that Howell almost won—eliminating a capital gains income tax shelter—is indicative of how the lieutenant governor operates. A letter from Benjamin R. Moser of Vienna, one of the more than 300 Howell received each week from voters during the session, informed him of the situation and asked him to fight it.

The shelter results from the Virginia legislature's 1970 action passing a law that conforms Virginia's tax forms with the federal government, even though the state tax structure is not nearly so progressive as the federal model it conforms with.

Under that bill, Virginians pay state income taxes on only half the capital gains they realize from investments—such as stocks—held for more than six months. Howell said it will cost the state an estimated $16 million a year.

The letter made Howell aware of the tax shelter, and within a week the capital gains tax question had become one of the most controversial in the legislature.

Howell first carried the message to some Knights of Columbus members in Woodbridge, one of the four or five speaking appearances he makes each week. "The Big Boys" are pocketing $16 million a year "while the little old lady on social security pays a tax every time she puts jam on a piece of toast. This is no tax loophole," said Howell "It's a major excavation."

In the end, the tax-writing committees of the General Assembly refused by narrow votes to close the capital gains shelter. But the message had gotten across. "Henry," said one political opponent, "ought to pick up 20,000 votes on that alone. We'll never hear the end of it."

The lieutenant governor is probably the most able orator in Virginia politics, mixing his down-home analogies with the dialects of his personal brand of populism. He summons working class people of all races to join white-collar progressiveness and liberals in fighting "The Big Boys"—Howell's term for the state's big corporate interests and the old Democratic Party kingmakers. Opponents call him a demagogue.

The lieutenant governorship has given Howell constant exposure, from the daily civics lessons he gives to visitors in the Senate galleries, to his picture in Fortune magazine, to campaigning in Florida for his old friend Hubert Humphrey to mention in Jack Newfield's book on "The New Populism," to almost daily mention in the state's newspapers and on television.

It is this exposure that has particularly nettled Howell's political opponents, who fear he is riding a gravy train of free publicity to the governor's mansion, while the Democrats and the Republicans must wait another full year before even choosing their candidates.

"How to handle Henry" is a problem that the opponents concede has not been resolved to their satisfaction. Some moves against Howell:

The legislature refused his request for $50,000 to run his office, so Howell continues to pay four aides out of his pocket and from leftover campaign funds.

The state's Democrats declined to invite the lieutenant governor, who describes himself as a "national Democrat" abandoned by the state party, to their Jefferson-Jackson Day dinner.

There have been speeches, including a couple on the Senate floor, attacking Howell's positions as improper for a ceremonial officer to undertake.

Several legislators researched the possibility of introducing a bill that would preclude Howell from seeking the governorship as an independent (impossible without a state constitutional amendment, they found).

Conservatives are thinking about running an independent candidate against Howell with the backing of both parties, thereby hoping to eliminate the three-way race possibility that was instrumental in giving Howell the lieutenant governorship.

Meanwhile, Henry Howell goes about his business as usual. In the Senate, he has initiated a legislative digest, published by his staff, that for the first time gives senators full descriptions of the bills they are voting on. He has won some fights in his once-lonely battle against the utility rates, and has been joined now by a growing Virginia consumer movement.

His years of criticism of the State Corporation Commission, which regulates virtually every aspect of corporate practice in Virginia, has now been echoed by dozens of legislators, putting heavy pressure on the SCC to pay greater heed to consumers.

Despite the political repercussions, Howell has remained steadfast in his refusal to condemn court-ordered busing to achieve racial integration, or to attack the controversial metropolitan Richmond school consolidation order of Judge Robert R. Merhige.

In his private life, Howell has remained as conservative as the politics of many of his opponents.

He reads when he gets the chance (mostly history and biography), spends available spare moments with his family, helps his secretary rehearse her speeches for the Order of the Eastern Star and—in contrast to his mood on the campaign trail—is quiet, almost shy, and deferential to visitors. But he is constant in his theme:

"The business of government, as George Mason said, is to produce 'that which is capable of producing the greatest degree of happiness and safety.' In this state we still haven't done it. The people have lost their faith in their government. We must bring them back into the political process. That's what I've always been about. That's why the politicians of the past oppose me.

"I'm going to try to win this governorship and that would conclude my contribution. I see that as the last chapter in my political book. After that I want to go to Europe—I've never had the time to travel—and spend time with my family."

THE BENEFITS OF SPACE WORK

Mr. GAMBRELL. Mr. President, many inquiries come to Members of Congress regarding the benefits of space work. Those of us who serve on committees dealing with NASA hear about many applications but they seldom get into the newspapers or on TV. One of the most interesting applications of space technology which is finding wide use is a NASA-developed computer program called NASTRAN—NASA's structural analysis computer program—used to solve structural engineering problems. This computer program is now being used in more than 185 different applications ranging from the design of suspension units and steering linkages on automobiles to the design of power plants and skyscrapers. Initially this program was developed to analyze the elastic behavior of structures in the space program and has been, is and will be used extensively in the design of the space shuttle. But this program is also applicable to the design of other structures and is now considered virtually indispensable by many structural and design engineers who estimate that two-thirds of the projects in which it has been applied would not have been attempted without it. NASA says that a survey of 23 users outside the Space Agency indicates that the assistance provided by this computer program has already saved the users $2.5 million in costs. The program is distributed under contract by the Computer Software Management and Information Center located at the University of Georgia and purchases of the program have been made for an average cost of about $1,700.

Mr. President, the computer program, NASTRAN, has proved to be one of the most important spinoff benefits from the space program to date, but in addition to it, there are several hundred other computer programs available to the public through the Agency's technology utilization program for only modest charges. Information about these computer programs can be obtained from the Computer Software Management and Information Center, University of Georgia, Athens, Ga. 30601. The telephone number is 404–542–3256.

Mr. President, I ask unanimous consent that NASA News Release No. 72–40 on the NASA computer program, NASTRAN, be printed in the RECORD.

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

NASA COMPUTER PROGRAM AIDS AMERICAN DESIGNERS

More than 70 industrial firms, universities, laboratories and government agencies are now using NASTRAN, a NASA-developed computer program, to solve their structural engineering problems.

The program is presently being used in more than 185 different applications, ranging from suspension units and steering linkages on automobiles to the design of power plants and skyscrapers. At least 55 more uses of NASTRAN are currently planned.

NASTRAN (NASA's Structural Analysis Computer Program) is a general purpose digital computer program originally designed to analyze the behavior of elastic structures in the space program. One of its major uses by the National Aeronautics and Space Administration has been in the design of the Space Shuttle.

Since it was first made publicly available in November, 1970, more than 600 engineers have become acquainted with the use of NASTRAN. The computer program is now considered virtually indispensable by many structural and design engineers, who estimate that two-thirds of the projects in which it has been applied would not have been attempted without it.

Primary industrial users include aerospace companies, automobile manufacturers, consulting engineering firms and the construction industry.

Examples of their applications of NASTRAN include the design and analysis of:

Aircraft fuselages, wings and tail assemblies;

Automobile frames and other motor vehicle components;

High speed railroad tracks;

Turbine engines; and

Space vehicles and related launch facilities.

The engineering division of a major automobile manufacturer using NASTRAN in the design of its 1973 line of light trucks reports a 60 percent improvement in predicting the behavior of components under stress and a time saving of two-thirds in achieving such calculations. Similar savings in time and effort have been reported by most industrial users.

Firms using the new analysis program predict many improvements in product safety, reliability and quality, as direct benefits to their customers.

NASA spent more than $3 million to develop the program at the Goddard Space Flight Center. The Langley Research Center spends about $400,000 annually to update the program for NASA uses and to help new users apply it and learn its possibilities. A survey of 23 users outside the Space Agency indicates that assistance provided by the Langley Center has already saved them more than $2.5 million in start-up costs and other expenses associated with using the computer program.

The NASTRAN program is now being distributed under contract to NASA by the Computer Software Management and Information Center (COSMIC) at the University of Georgia. The program is user-oriented and organized to do much of its work automatically. Written in a versatile computer language, NASTRAN cas be used on a variety of computers. A complete set of program tapes and documentation can be purchased through COSMIC for an average $1,700, depending on the options required.

The program's capabilities include the analysis of: (a) static response to various loads, thermal expansion and deformation; (b) dynamic response to transient loads, harmonic loads and random stresses; and (c) solutions for vibration, dynamic stability and elastic stability analysis.

NASA-developed computer programs have proved one of the most important spinoff benefits from the space program. Besides NASTRAN, several hundred other programs are publicly available to United States users as part of the Space Agency's Technology Utilization Program. Only modest charges are made to meet the cost of evaluation, processing and distribution.

Further information on NASTRAN and other computer program tapes and documentation is available from NASA's Computer Software Management and Information Center (COSMIC), Barrow Hall, University of Georgia, Athens, Ga. 30601; telephone AC–404/542–3265.

Organizations reported as users of NASTRAN are:

Aerojet Solid Propulsion Company, Sacramento, Calif.

A. O. Smith Corporation, Milwaukee, Wisc.

Argonne National Laboratory, Argonne, Ill.

Atlantic Research Corporation, Costa Mesa, Calif.

AVCO, Lycoming Division, Stratford, Conn.

Bell Aerospace Company, Buffalo, N.Y.

Bell Helicopter, Forth Worth, Tex.

Bell Telephone Laboratory, Whippany, N.J.

Boeing Aerospace Company, Seattle, Wash.

Boeing Computer Service, Kent, Wash.

CHI Corporation, Cleveland, Ohio.

Computer Sciences Corporation, Richland, Wash.

Computer Sciences Corporation, Los Angeles, Calif.

COMSAT Laboratory, Clarksburg, Md.

Control Data Corporation, Minneapolis, Minn.

Control Data Corporation, Chicago, Ill.

COSMIC, Athens, Ga.

Esso Production and Research, Houston, Tex.

Fairchild Industries, Germantown, Md.

Ford Motor Company, Dearborn, Mich.

Franklin Institute, Philadelphia, Pa.

General Dynamics/Convair, Fort Worth, Tex.

General Dynamics/Convair, San Diego, Calif.

General Dynamics Corporation, Pomona, Calif.

General Motors Research Laboratory, Warren, Mich.

Georgia Institute of Technology, Atlanta, Ga.

Goodyear Aerospace Corporation, Akron, O.

B. F. Goodrich, Akron, O.

Grumman Aerospace Company, Bethpage, N.Y.

Hercules, Magna, Utah.

Hercules, Cumberland, Md.

Itek Corporation, Lexington, Mass.

JET Propulsion Laboratory, Pasadena, Calif.

Johns Hopkins University, Silver Spring, Md.

Lockheed Georgia Company, Marietta, Ga.

Lockheed California Company, Burbank, Calif.

Louisiana Tech. University, Ruston, La.

Los Alamos Scientific Laboratory, Los Alamos, N.M.

LTV Aerospace Corporation, Dallas, Tex.

MacNeal-Schwendler, Hampton, Va.
Martin-Marietta Corporation, Denver, Colo.
McDonnell-Douglas Aircraft Corp., St. Louis, Mo.
McDonnell-Douglas Automation Co., St. Louis, Mo.
McDonnell Douglas, Huntington Beach, Calif.
McDonnell Douglas, St. Louis, Mo.
NASA Goddard, Greenbelt, Md.
NASA Ames, Moffett Field, Calif.
NASA Houston, Houston, Tex.
NASA Lewis, Cleveland, O.
NASA MFSC, Huntsville, Ala.
NASA Kennedy, Cape Kennedy, Fla.
NASA Langley, Langley, Va.
Naval Air Development Center, Warminister, Pa.
Naval Ship Research and Development Center, Washington, D.C.
North American Rockwell Space Div., Downey, Calif.
Northrop Services Incorporated, Huntsville, Ala.
Old Dominion University, Norfolk, Va.
Perkin Elmer Corporation, Danbury, Conn.
Pioneer Services Incorporated, Chicago, Ill.
Pratt & Whitney Aircraft, West Palm Beach, Fla.
Raytheon Company, Sudbury, Mass.
Research Analysis Corporation, McLean, Va.
Sandia Laboratories, Albuquerque, N.M.
SCI-Tech., Wilmington, Dela.
Sperry Rand, Huntsville, Ala.
Structural Dynamics Research Corp., Cincinnati, O.
Teledyne Brown, Huntsville, Ala.
Teledyne Ryan, San Diego, Calif.
Teledyne Computer Center, Toledo, O.
Texas Instruments, Dallas, Tex.
TRW Systems, Redondo Beach, Calif.
United Aircraft Sikorsky Division, Stratford, Conn.
Watervliet Arsenal, Watervliet, N.Y.
Westenhoff & Novick, Chicago, Ill.
Westinghouse Telecomputer, Pittsburgh, Pa.
Westinghouse Defense and Space Center, Baltimore, Md.
Westinghouse, Research and Development Center, Pittsburgh, Pa.

STATEMENT ON HEALTH NEEDS

Mr. SPARKMAN. Mr. President, all over the country, in administration circles, in the Congress and among medical and hospital groups, there is a keen awareness of the desperate need for new types of medical personnel to deliver necessary medical services which we are unable to deliver under present conditions. The fact that we do not have enough doctors, enough nurses or medical personnel of other types to do the job we need is recognized by every person familiar with today's health and hospitalization problems.

Equally well known is the impossibility of training new doctors and new nurses fast enough to keep pace with the increasing need.

One of the most promising approaches to meeting this pressing need for medical assistants has been going on in Alabama as a joint venture of the University of Alabama, in Birmingham, and Calhoun Junior College. This program was designed to train and place workers in allied health fields. The training is being given at UAB's School of Community and Allied Health Resources.

Now this whole program which would have been turning out allied health workers, X-ray technicians, inhalation therapists, medical laboratory technicians, dental assistants, medical equipment repairmen, et cetera—all this is being slowed down, because adequate Federal assistance is not forthcoming. I am getting in touch with the Secretary of Health, Education, and Welfare today in an effort to get funds released to keep this program going. It is a pilot program which will be beneficial not only to Alabama and the Southeast, but throughout the Nation.

VOTER REGISTRATION

Mr. McGEE. Mr. President, several days ago the Senate, by the narrow margin of 46 to 42, voted to table the national voter registration bill, S. 2574.

One feature of that bill which raised great controversy in the Senate was the provision limiting durational residency requirements for voting in Federal elections to the period established by the Voting Rights Amendments of 1970—effectively, a 30-day residency. Several opponents of the voter registration bill spoke at length about how this modern provision invaded the prerogatives of the sovereign States, was clearly unconstitutional, and would bring havoc to the election process.

Apparently the constitutional experts of the Senate failed to advise the Supreme Court of the United States. Yesterday, by a vote of 6 to 1, the two recently appointed Justices not participating, the Court ruled that durational residency requirements beyond 30 days are unconstitutional in any election—mind you, not just the election of Senators or Representatives, but any election. I ask unanimous consent that the opinion of the Court be printed in the RECORD.

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

[Supreme Court of the United States]

DUNN, GOVERNOR OF TENNESSEE, ET AL. AGAINST BLUMSTEIN

(Appeal from the U.S. District Court for the middle district of Tennessee)

No. 70–13. Argued November 16, 1971—Decided March 21, 1972.

Tennessee closes its registration books 30 days before an election, but requires residence in the State for one year and in the county for three months as prerequisites for registration to vote. Appellee challenged the constitutionality of the durational residence requirements, and a three-judge District Court held them unconstitutional on the grounds that they impermissibly interfered with the right to vote and created a "suspect" classification penalizing some Tennessee residents because of recent interstate movement. Tennessee asserts that the requirements are needed to insure the purity of the ballot box and to have knowledgeable voters. *Held:* The durational residence requirements are violative of the Equal Protection Clause of the Fourteenth Amendment, as they are not necessary to further a compelling state interest. Pp. 5–30.

(a) Since the requirements deny some citizens the right to vote, "the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest." *Kramer* v. *Union Free School District*, 395 U.S. 621, 627 (emphasis added). Pp. 6–7.

(b) Absent a compelling state interest, Tennessee may not burden the right to travel by penalizing those bona fide residents who have recently traveled from one jurisdiction to another. Pp. 8–12.

(c) A period of 30 days appears to be ample to complete whatever administrative tasks are needed to prevent fraud and insure the purity of the ballot box. Pp. 15–19.

(d) Since there are adequate means of ascertaining bona fide residence on an individual basis, the State may not conclusively presume nonresidence from failure to satisfy the waiting period requirements of durational residency laws. Pp. 19–24.

(e) Tennessee has not established a sufficient relationship between its interest in an informed electorate and the fixed durational residence requirements. Pp. 24–30.

Affirmed.

MARSHALL, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, and WHITE, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result. BURGER, C.J., filed a dissenting opinion. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

[Supreme Court of the United States, No. 70–13]

WINFIELD DUNN, GOVERNOR OF THE STATE OF TENNESSEE, ET AL., APPELLANTS, AGAINST JAMES F. BLUMSTEIN

On Appeal from the United States District Court for the Middle District of Tennessee, March 21, 1972.

Mr. JUSTICE MARSHALL delivered the opinion of the Court.

Various Tennessee public officials (hereinafter "Tennessee") appeal from a decision by a three-judge federal court holding that Tennessee's durational residence requirements for voting violate the Equal Protection Clause of the United States Constitution. The issue arises in a class action for declaratory and injunctive relief brought by appellee James Blumstein. Blumstein moved to Tennessee on June 12, 1970, to begin employment as an assistant professor of law at Vanderbilt University in Nashville. With an eye towards voting in the upcoming August and November elections, he attempted to register to vote on July 1, 1970. The county registrar refused to register him, on the ground that Tennessee law authorizes the registration of only those persons who, at the time of the next election, will have been residents of the State for a year and residents of the county for three months.

After exhausting state administrative remedies, Blumstein brought this action challenging these residence requirements on federal constitutional grounds.[1] A three-judge court, convened pursuant to 28 U.S.C. §§ 2281, 2284, concluded that Tennessee's durational residence requirements were unconstitutional (1) because they impermissibly interfered with the right to vote and (2) because they created a "suspect" classification penalizing some Tennessee residents because of recent interstate movement.[2]— F. Supp.—(MD Tenn. 1970). We noted probable jurisdiction, 401 U.S. 934 (1971). For the reasons which follow, we affirm the decision below.[3]

I

The subject of this lawsuit is the durational residence requirement. Appellee does not challenge Tennessee's power to restrict the vote to bona fide Tennessee residents. Nor has Tennessee ever disputed that appellee was a bona fide resident of the State and county when he attempted to register.[4] But Tennessee insists that, in addition to *being* a resident, a would-be voter must *have been* a resident for a year in the State and three months in the county. It is this additional *durational* residence requirement which appellee challenges.

Durational residence laws penalize those

Footnotes at end of article.

persons who have traveled from one place to another to establish a new residence during the qualifying period. Such laws divide residents into two classes, old residents and new residents, and discriminate against the latter to the extent of totally denying them the opportunity to vote.[5] The constitutional question presented is whether the Equal Protection Clause of the Fourteenth Amendment permits a State to discriminate in this way among its citizens.

To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification. Cf. *William* v. *Rhodes*, 393 U.S. 23, 30 (1968). In considering laws challenged under the Equal Protection Clause, this Court has evolved more than one test, depending upon the interests affected and the classification involved.[6] First, then, we must determine what standard of review is appropriate. In the present case, whether we look to the benefit withheld by the classification (the opportunity to vote) or the basis for the classifications (recent interstate travel) we conclude that the State must show a substantial and compelling reason for imposing durational residence requirements.

A

Durational residence requirements completely bar from voting all residents not meeting the fixed durational standards. By denying some citizens the right to vote, such laws deprive them of a "fundamental political right, . . . preservative of all rights." *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964). There is no need to repeat now the labors undertaken in earlier cases to analyze this right to vote and to explain in detail the judicial role in reviewing state statutes which selectively distribute the franchise. In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. See, *e.g.*, *Evans* v. *Cornman*, 398 U.S. 419, 421–422, 426 (1970); *Kramer* v. *Union Free School District*, 395 U.S. 621, 626–628 (1969); *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 667 (1966); *Carrington* v. *Rash*, 380 U.S. 89, 93–94 (1965); *Reynolds* v. *Sims*, *supra*. This "equal right to vote," *Evans* v. *Cornman*, *supra*, 398 U.S., at 426, is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways. *See, e.g., Carrington* v. *Rash*, *supra*, 380 U.S., at 91; *Oregon* v. *Mitchell*, 400 U.S. 112, 144 (opinion of JUSTICE DOUGLAS), 241 (opinion of JUSTICES BRENNAN, WHITE, and MARSHALL), 294 (opinion of JUSTICE STEWART, in which CHIEF JUSTICE BURGER and JUSTICE BLACKMUN joined). But, as a general matter, "before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests severed by it must meet close constitutional scrutiny." *Evans* v. *Cornman*, 398 U.S. 419, 422 (1970); see *Bullock* v. *Carter*, —— U.S. —— (1972) (slip op. 8–9).

Tennessee urges that this case is controlled by *Druedling* v. *Devlin*, 380 U. S. 125 (1965). *Druedling* was a decision upholding Maryland's duration residence requirements. The District Court tested those requirements by the equal protection standard applied to ordinary state regulations: whether the exclusions are reasonably related to a permissible state interest. 234 F. Supp. 721, 724–725 (Md. 1964). We summarily affirmed *per curiam* without the benefit of argument. But if it was not clear then, it is certainly clear now that a more exacting test is required for any statute which "places a condition on the exercise of the right to vote." *Bullock* v. *Carter, supra*, —— U.S. ——. This development is the law culminated in *Kramer* v. *Union Free School District, supra*, 395 U. S. 621 (1969). There we canvassed in detail the reasons for strict review of statutes distributing the franchise, *id.*, at 626–630, noting *inter alia* that such statutes "constitute the foundation of our representative society." We concluded that if a challenged statute grants the right to vote to some citizens and denies the franchise to others, "the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest." *Id.*, at 627 (emphasis added); *Cipriano* v. *City of Houma*, 395 U.S. 701, 704 (1969); *City of Phoenix* v. *Kolodziejski*, 399 U. S. 204, 205, 209 (1970). Cf. *Harper* v. *Virginia State Board of Elections, supra*, 383 U. S., at 670. This is the test we apply here.[7]

B

This exacting test is appropriate for another reason, never considered on *Druedling:* Tennessee's durational residence laws classify bona fide residents on the basis of recent travel, penalizing those persons, and only those persons, who have gone from one jurisdiction to another during the qualifying period, Thus, the durational residence requirement directly impinges on the exercise of a second fundamental personal right, the right to travel.

"[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *United States* v. *Guest*, 383 U.S. 745, 758 (1966). See *Passenger Cases*, 7 How. 283, 492 (1849) (Taney, C. J.); *Crandall* v. *Nevada*, 6 Wall. 35, 43–44 (1868); *Paul* v. *Virginia*, 8 Wall. 168, 180 (1869); *Edwards* v. *California*, 314 U.S. 160 (1941); *Kent* v. *Dulles*, 357 U.S. 116, 126 (1958); *Shapiro* v. *Thompson*, 394 U.S. 618, 629–631, 634 (1969); *Oregon* v. *Mitchell*, 400 U.S. 112, 237 (opinion of BRENNAN, WHITE, and MARSHALL, JJ.), 285–286 (opinion of STEWART, J., with whom BURGER, C. J., and BLACKMUN, J., joined). And it is clear that the freedom to travel includes the "freedom to enter and abide in any State in the Union," *Oregon* v. *Mitchell, supra*, 400 U.S., at 285 (opinion of STEWART, J., with whom BURGER, C. J., and BLACKMUN, J., joined). Obviously, durational residence laws single out the class of bona fide State and county residents who have recently exercised this constitutionally protected right, and penalize such travelers directly. We consideerd such a durational residence requirement in *Shapiro* v. *Thompson, supra*, where the pertinent statutes imposed a one-year waiting period for interstate migrants as a condition to receiving welfare benefits. Although in *Shapiro* we specifically did not decide whether durational residence requirements could be used to determine voting eligibility, *id.*, at 638 n. 21, we concluded that since the right to travel was a constitutionally protected right, "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* state interest, is unconstitutional." *Id.*, at 634. This compelling state interest test was also adopted in the separate concurrence of MR. JUSTICE STEWART. Preceded by a long line of cases recognizing the constitutional right to travel, and repeatedly reaffirmed in the face of attempts to disregard it, see *Wyman* v. *Bowens*, 397 U.S. 49 (1970), and *Wyman* v. *Lopez*,—U.S.—(Jan. 24, 1972), *Shapiro* and the compelling state interest test it articulates control this case.

Tennessee attempts to distinguish *Shapiro* by urging that "the vice of the welfare statute in *Shapiro* . . . was its objective to deter interstate travel." Brief, at 13. In Tennessee's view, the compelling state interest test is appropriate only where there is "some evidence to indicate a deterrence of or infringement on the right to travel. . . ." *Ibid.* Thus, Tennessee seeks to avoid the clear command of *Shapiro* by arguing that durational residence requirements for voting neither seek to deter travel nor actually do deter such travel. In essence, Tennessee argues that the right to travel is not abridged here in any constitutionally relevant sense.

This view represents a fundamental misunderstanding of the law.[8] It is irrelevant whether disenfranchisement or denial of welfare is the more potential deterrent to travel. *Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other "right to travel" cases in this Court always relied on the presence of actual deterrence.[9] In *Shapiro* we explicitly stated that the compelling state interest test would be triggered by "any classification which served to *penalize* the exercise of that right [to travel] . . ." *Id.*, at 634 (emphasis added); see *id.*, at 638 n. 21. While noting the frank legislative purpose to deter migration by the poor, and speculating that "an indigent who desires to migrate . . . will doubtless hesitate if he knows that he must risk" the loss of benefits, *id.*, at 628–629, the majority found no need to dispute the "evidence that few welfare recipients have in fact been deterred [from moving] by residence requirements." *Id.*, at 650 (Warren, C. J., dissenting); see also *id.*, at 671–672 (Harlan, J., dissenting). Indeed, none of the litigants had themselves been deterred.[10] Only last Term, it was specifically noted that because a durational residence requirement for voting "operate to *penalize* those persons, and only those persons, who have exercised their constitutional right of interstate migration . . . , [it] may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial government interest." *Oregon* v. *Mitchell*, 400 U.S. 112, 238 (opinion of BRENNAN, WHITE, and MARSHALL, JJ.) (emphasis added).

Of course it is true that the two individual interests affected by Tennessee's durational residence requirements are affected in different ways. Travel is permitted, but only at a price; voting is prohibited. The right to travel is merely penalized, while the right to vote is absolutely denied. But these differences are irrelevant for present purposes. *Shapiro* implicitly realized what this Court has made explicit elsewhere:

"It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. . . . 'Constitutional rights would be of little value if they could be . . . indirectly denied'. . . ." *Harman* v. *Forssenius*, 380 U.S. 528, 540–541 (1965).[11]

See also *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), and cases cited therein; *Spevack* v. *Klein*, 385 U.S. 511, 515 (1967). The right to travel is "an *unconditional* personal right," a right whose exercise may not be conditioned. *Shapiro* v. *Thompson, supra*, 394 U.S., at 643 (opinion of JUSTICE STEWART); *Oregon* v. *Mitchell, supra*, 400 U.S., at 292 (opinion of JUSTICE STEWART, in which CHIEF JUSTICE BURGER and JUSTICE BLACKMUN joined). Durational residence laws impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right.[12] In the present case, such laws force a person who wishes to travel and change residences to choose between travel and the basic right to vote. Cr. *United States* v. *Jackson*, 390 U.S. 582–583 (1968). Absent a compelling state interest, a State may not burden the right to travel in this way.[13]

C

In sum, durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are *"necessary* to promote a *compelling* governmen-

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tal interest." *Shapiro* v. *Thompson, supra,* 394 U.S. at 634 (emphasis added); *Kramer* v. *Union Free School District, supra,* 395 U.S., at 627. Thus phrased, the constitutional question may sound like a mathematical formula. But legal "tests" do not have the precision of mathematical formulas. The key words emphasize a matter of degree: that a heavy burden of justification is on the State, and that the statute will be closely scrutinized in light of its asserted purposes.

It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with "precision," *NAACP* v. *Buton,* 371 U.S. 419, 438 (1963); *United States* v. *Robel,* 389 U.S. 258, 265 (1967), and must be "tailored" to serve their legitimate objectives *Shapiro* v. *Thompson, supra,* 394 U.S., at 631. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960).

III

We turn, then, to the question of whether the State has shown that durational residence requirements are needed to further a sufficiently substantial state interest. We emphasize again the difference between bona fide residence requirements and durational residence requirements. We have in the past noted approvingly that the States have the power to require that voters be bona fide residents of the relevant political subdivision. *E.g., Evans* v. *Cornman, supra,* 398 U. S., at 422; *Kramer* v. *Union Free School District, supra,* 395 U. S., at 625; *Carrington* v. *Rash, supra,* 380 U. S., at 91; *Pope* v. *Williams,* 193 U. S. 621 (1904).[14] An appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny.[15] But *durational* residence requirements, representing a separate voting qualification imposed on bona fide residents, must be separately tested by the stringent standard. Cf. *Shapiro* v. *Thompson, supra,* 394 U. S., at 636.

It is worth noting at the outset that Congress has, in a somewhat different context, addressed the question whether durational residence laws further compelling state interests. In § 202 of the 1970 Federal Voting Rights Act, Congress outlawed state durational residence requirements for presidential elections, and prohibited the States from closing registration more than 30 days before such elections. 42 U.S.C. § 1973aa–1. In doing so, it made a specific finding that durational residence requirements and more restrictive registration practices do "not bear a reasonable relationship to any compelling state interest in the conduct of presidential elections." 42 U.S.C. § 1973aa–1(a)(6). We upheld this portion of the Federal Voting Rights Act in *Oregon* v. *Mitchell,* 400 U. S. 112 (1971). In our present case, of course, we deal with congressional, state, and local elections, in which the State's interests are arguably somewhat different; and, in addition, our function is not merely to determine whether there was a reasonable basis for Congress' findings. However, the congressional finding which forms the basis for the Federal Act is a useful background for the discussion which follows.

Tennessee tenders "two basic purposes" served by its durational residence requirements:

"(1) Insure purity of ballot box—Protection against fraud through colonization and inability to identify persons offering to vote, and

"(2) Knowledgeable voter—Afford some surety that the voter has, in fact, become a member of the community and that as such, he has a common interest in all matters pertaining to its government and is therefore, more likely to exercise his right more intelligently." Appellants' Brief, p. 15, citing 18 Am. Jur., Elections, p. 217.

We consider each in turn.

A

Preservation of the "purity of the ballot box" is a formidable sounding state interest. The impurities feared, variously called "dual voting" and "colonization," all involve voting by nonresidents, either singly or in groups. The main concern is that nonresidents will temporarily invade the State or county, falsely swear that they are residents to become eligible to vote, and, by voting, allow a candidate to win by fraud. Surely the prevention of such fraud is a legitimate and compelling government goal. But it is impossible to view durational residence requirements as necessary to achieve that state interest.

Preventing fraud, the asserted evil which justifies state lawmaking, means keeping nonresidents from voting. But, by definition, a durational residence law bars *newly arrived* residents from the franchise along with non-residents. The State argues that such sweeping laws are necessary to prevent fraud because they are needed to identify bona fide residents. This contention is particularly unconvincing in light of Tennessee's total statutory scheme for regulating the franchise.

Durational residence laws may once have been necessary to prevent a fraudulent evasion of state voter standards, but today in Tennessee, as in most other States,[16] this purpose is served by a system of voter registration. Tenn. Code Ann. §§ 2–301 *et seq.;* see *State* v. *Weaver,* 122 S. W. 465 (1909). Given this system, the record is totally devoid of any evidence that durational residence requirements are in fact necessary to identify bona fide residents. The qualifications of the would-be voter in Tennessee are determined when he registers to vote, which he may do until 30 days before the election. Tenn. Code Ann. § 2–304. His qualifications—including bona fide residence—are established then by oath. Tenn. Code Ann. § 2–309. There is no indication in the record that Tennessee routinely goes behind the would-be voter's oath to determine his qualifications. Since false swearing is no obstacle to one intent on fraud, the existence of burdensome voting qualifications like durational residence requirements cannot prevent corrupt nonresidents from fraudulently registering and voting. As long as the State relies on the oath-swearing system to establish qualifications, a durational residence requirement adds nothing to a simple residence requirement in the effort to stop fraud. The nonresident intent on committing election fraud will as quickly and effectively swear that he has been a resident for the requisite period of time as he would swear that he was simply a resident. Indeed, the durational residence requirement becomes an effective voting obstacle only to residents who tell the truth and have no fraudulent purposes.

Moreover, to the extent that the State makes an enforcement effort after the oath is sworn, it is not clear what role the durational residence requirement could play in protecting fraud. The State closes the registration books 30 days before an election to give officials an opportunity to prepare for the election. Before the books close, anyone may register who claims that he will meet the durational residence requirement at the time of the next election. Although Tennessee argues that this 30-day period between registration and election does not give the State enough time to verify this claim of bona fide residence, we do not see the relevance of that position to this case. As long as the State permits registration up to 30 days before an election, a lengthy durational residence requirement does not increase the amount of time the State has in which to carry out an investigation into the sworn claim by the would-be voter that he is in fact a resident.

Even if durational residence requirements imposed, in practice, a pre-election waiting period which gave voting officials three months or a year in which to confirm the bona fides of residence, Tennessee would not have demonstrated that these waiting periods were necessary. At the outset, the State is faced with the fact that it must defend two separate waiting periods of different lengths. It is impossible to see how both could be "necessary" to fulfill the pertinent state objective. If the State has itself determined that a three-month period is enough time in which to confirm bona fide residence in the State and county, obviously a one year period cannot also be justified as "necessary" to achieve the same purpose.[17] Beyond that, the job of detecting nonresidents from among persons who have registered is a relatively simple one. It hardly justifies prohibiting all newcomers from voting for even three months. To prevent dual voting, state voting officials simply have to cross-check lists of new registrants with their former jurisdictions. See Note, Residence Requirements for Voting in Presidential Elections, 37 U. Chi. L. Rev. 359, 364 and n. 34, 374; cf. *Shapiro* v. *Thompson, supra,* 394 U.S., at 637. Objective information tendered as relevant to the question of bona fide residence under Tennessee law—places of dwelling occupation, car registration, driver's license, property owned, etc.[18]—is easy to double check, especially in light of modern communications. Tennessee itself concedes that "[i]t might well be that these purposes can be achieved under requirements of shorter duration than that imposed by the State of Tennessee. . . ." Appellants' Brief, p. 10. Fixing a constitutionally acceptable period is surely a matter of degree. It is sufficient to note here that 30 days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud—and a year, or three months, too much. This was the judgment of Congress in the context of presidential elections.[19] And, on the basis of the statutory scheme before us, it is almost surely the judgment of the Tennessee lawmakers as well. As the court below concluded, the cutoff point for registration 30 days before an election—

"Reflects the judgment of the Tennessee legislature that thirty days is an adequate period in which Tennessee's election officials can effect whatever measures may be necessary, in each particular case confronting them, to insure purity of the ballot and prevent dual registration and dual voting."—F. Supp.—(Appendix, pp. 48–49).

It has been argued that durational residence requirements are permissible because a person who has satisfied the waiting period requirements is conclusively presumed to be a bona fide resident. In other words, durational residence requirements are justified because they create an administratively useful conclusive presumption that recent arrivals are not residents and are therefore properly barred from the franchise.[20] This presumption, so the argument runs, also prevents fraud, for few candidates will be able to induce migration for the purpose of voting if fraudulent voters are required to remain in the false locale for three months or a year in order to vote on election day.[21]

In *Carrington* v. *Rash, supra,* 380 U.S. 89, this Court considered and rejected a similar kind of argument in support of a similar kind of conclusive presumption. There, the

Footnotes at end of article.

State argued that it was difficult to tell whether persons moving to Texas while in the military service were in fact bona fide residents. Thus, the State said, the administrative convenience of avoiding difficult factual determinations justified a blanket exclusion of all servicemen stationed in Texas. The presumption created there was conclusive—"incapable of being overcome by proof of the most positive character." *Id.*, at 96, citing *Heiner* v. *Donnan*, 285 U.S. 312, 324 (1932). The Court rejected this "conclusive presumption" approach as violative of the Equal Protection Clause. While many servicemen in Texas were not bona fide residents, and therefore properly ineligible to vote, many servicemen clearly were bona fide residents. Since "more precise tests" were available "to winnow successfully from the ranks . . . those whose residence in the State is bona fide," conclusive presumptions were impermissible in light of the individual interests affected. *Id.*, at 95. "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State." *Id.*, at 96.

Carrington sufficiently disposes of this defense of durational residence requirements. The State's legitimate purpose is to determine whether certain persons in the community are bona fide residents. A durational residence requirement creates a classification which may, in a crude way, exclude nonresidents from that group. But it also excludes many residents. Given the state's legitimate purpose and the individual interests which are affected, the classification is all too imprecise. See p. 13, *supra*. In general, it is not difficult for Tennessee to determine on an individualized basis whether one recently arrived in the community is in fact a resident, although of course there will always be difficult cases. Tennessee has defined a test for bona fide residence, and appears prepared to apply it on an individualized basis in various legal contexts.[22] That test could easily be applied to new arrivals. Furthermore, if it is unlikely that would-be fraudulent voters would remain in a false locale for the lengthy period imposed by durational residence requirements, it is just as unlikely that they would collect such objective indicia of bona fide residence as a dwelling, car registration, or driver's license. In spite of these things, the question of bona fide residence is settled for new arrivals by conclusive presumption, not by individualized inquiry. Cf. *Carrington* v. *Rash*, *supra*, 380 U.S., at 95–96. Thus, it has always been undisputed that appellee Blumstein is himself a bona fide resident of Tennessee within the ordinary state definition of residence. But since Tennessee's presumption from failure to meet the durational residence requirements is conclusive, a showing of actual bona fide residence is irrelevant, even though such a showing would fully serve the State's purposes embodied in the presumption and would achieve those purposes with far less drastic impact on constitutionally protected interests.[23] The Equal Protection Clause places a limit on government by classification, and that limit has been exceeded here. Cf. *Shapiro* v. *Thompson*, *supra*, 394 U.S., at 636; *Harman* v. *Forssenius*, 380 U.S. 528, 542–543; *Carrington* v. *Rash*, *supra*, 380 U.S., at 95–96; *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942).

Our conclusion that the waiting period is not the least restrictive means necessary for preventing fraud is bolstered by the recognition that Tennessee has at its disposal a variety of criminal laws which are more than adequate to detect and deter whatever fraud may be feared.[24] At least six separate sections of the Tennessee Code define offenses to deal with voter fraud. For example, Tenn. Code Ann. § 2–324 makes it a crime "for any person to register or to have his name registered as a qualified voter . . . when he is not entitled to be so registered . . . or to induce or procure any other person to register or be registered when such person is not legally qualified to be registered as such. . . ."[25] In addition to the various criminal penalties, Tennessee permits the bona fides of a voter to be challenged on election day. Tenn. Code Ann. §§ 2–1309 *et seq.* Where a State has available such remedial action to supplement its voter registration system, it can hardly argue that broadly imposed political disabilities such as durational residence requirements are needed to deal with the evils of fraud. Now that the Federal Voting Rights Act abolishes those residence requirements as a precondition for voting in presidential and vice presidential elections, 42 U.S.C. § 1973aa–1, it is clear that the States will have to resort to other devices available to prevent nonresidents from voting. Especially since every State must live with this new federal statute, it is impossible to believe that durational residence requirements are necessary to meet the State's goal of stopping fraud.[26]

B

The argument that durational residence requirements further the goal of having "knowledgeable voters" appears to involve three separate claims. The first is that such requirements "afford some surety that the voter has, in fact, become a member of the community." But here the State appears to confuse a bona fide residence requirement with a durational residence requirement. As already noted, a State does have an interest in limiting the franchise to bona fide members of the community. But this does not justify or explain the exclusion from the franchise of persons, not because their bona fide residence is questioned, but because they are recent rather than long-time residents.

The second branch of the "knowledgeable voters" justification is that durational residence requirements assure that the voter "has a common interest in all matters pertaining to [the community's] government. . . ." By this, presumably, the State means that it may require a period of residence sufficiently lengthy to impress upon its voters the local viewpoint. This is precisely the sort of argument this Court has repeatedly rejected. In *Carrington* v. *Rash*, for example, the State argued that military men newly moved into Texas might not have local interests sufficiently in mind, and therefore could be excluded from voting in state elections. This Court replied:

"But if they are in fact residents . . . they, as all other qualified residents, have a right to an equal opportunity for political representation. . . . 'Fencing out' from the franchise a section of the population because of the way they may vote is constitutionally impermissible." 380 U.S., at 94. See 42 U.S.C. § 1973aa–1(a)(4).

Similarly here, Tennessee's hopes for voters with a "common interest in all matters pertaining to [the community's] government" is impermissible.[27] To paraphrase what we said elsewhere, "All too often, lack of a ["common interest"] might mean no more than a different interest." *Evans* v. *Cornman*, 398 U.S. 419, 423. "Differences of opinion" may not be the basis for excluding any group or person from the franchise. *Ciprano* v. *City of Houma*, *supra*, 395 U.S., at 705–706. "The fact that newly arrived [Tennesseans] may have a more national outlook than longtime residents, or even may retain a viewpoint characteristic of the region from which they come, is a constitutionally impermissible reason for depriving them of their chance to influence the electoral vote for their new home State." *Hall* v. *Beals*, 396 U.S. 45, 53–54 (1969) (dissenting opinion).[28]

Finally, the State urges that a long-time resident is "more likely to exercise his right [to vote] more intelligently." To the extent that this is different from the previous argument, the State is apparently asserting an interest in limiting the franchise to voters who are minimally knowledgeable about the issues. In this case, Tennessee argues that people who have been in the State less than a year and the county less than three months are likely to be unaware of the issues involved in the congressional, state, and local elections, and therefore can be barred from the franchise. We note that the criterion of "intelligent" voting is an elusive one, and susceptible to abuse. But without deciding as a general matter the extent to which a State can bar less knowledgeable or intelligent citizens from the franchise, cf. *Evans* v. *Cornman*, *supra*, 398 U. S., at 422; *Kramer* v. *Union Free School District*, *supra*, 395 U. S., at 632; *Ciprano* v. *City of Houma*, *supra*, 395 U. S., at 705,[29] we conclude that durational residence requirements cannot be justified on this basis.

In *Kramer* v. *Union Free School District*, *supra*, 395 U. S. 621 (1969), we held that the Equal Protection Clause prohibited New York State from limiting the vote in school district elections to parents of school children and to property owners. The State claimed that since nonparents would be "less informed" about school affairs than parents, *id.*, at 631, the State could properly exclude the class of nonparents in order to limit the franchise to the more "interested" group of residents. We rejected that position, concluding that a "close scrutiny of [the classification] demonstrates that [it does] not accomplish this purpose with sufficient precision. . . ." *Id.*, at 632. That scrutiny revealed that the classification excluding nonparents from the franchise kept many persons from voting who were as substantially interested as those allowed to vote; given this, the classification was insufficiently "tailored" to achieve the articulated state goal. *Ibid.* See also *Ciprano* v. *City of Houma*, *supra*, 395 U.S., at 706.

Similarly, the durational residence requirements in this case founded because of their crudeness as a device for achieving the articulated state goal of assuring the knowledgeable exercise of the franchise. The classifications created by durational residence requirements obviously permit any long-time resident to vote regardless of his knowledge of the issues—and obviously many long-time residents do not have any. On the other hand, the classifications bar from the franchise many other, admittedly new, residents who have become minimally, and often fully, informed about the issues. Indeed, recent migrants who take the time to register and vote shortly after moving are likely to be those citizens, such as appellee, who make it a point to be informed and knowledgeable about the issues. Given modern communications, and given the clear indication that campaign spending and voters education occur largely during the month before an election,[30] the State cannot seriously maintain that it is "necessary" to reside for a year in the State and three months in the county in order to be minimally knowledgeable about congressional, state or even purely local elections. There is simply nothing in the record to support the conclusive presumption that residents who have lived in the State for less than a year and their county for less than three months are uninformed about elections. Cf. *Shapiro* v. *Thompson*, *supra*, 394 U.S., at 631. These durational residence requirements crudely exclude large numbers of fully qualified people. Especially since Tennessee creates a waiting period by closing registration books 30 days before an election, there can be no basis for arguing that any durational residence requirement is also needed to assure knowledgeability.

It is pertinent to note that Tennessee has never made an attempt to further its alleged interest in an informed electorate in a universally applicable way. Knowledge or competence has never been a criterion for participation in Tennessee's electoral process for

Footnotes at end of article.

long-time residents. Indeed, the State specifically provides for voting by various types of absentee persons.[21] These provisions permit many long-time residents who leave the county or State to participate in a constituency in which they have only the slightest political interest, and from whose political debates they are likely to be cut off. That the State specifically permits such voting is not consistent with its claimed compelling interest in intelligent, informed use of the ballot. If the State seeks to assure intelligent use of the ballot, it may not try to serve this interest only with respect to new arrivals. Cf. *Shapiro* v. *Thompson, supra,* 394 U.S. at 637–638.

It may well be true that new residents as a group know less about state and local issues than older residents; and it is surely true that durational residence requirements will exclude some people from voting who are totally uninformed about election matters. But as devices to limit the franchise to minimally knowledgeable residents, the conclusive presumptions of durational residence requirements are much too crude. They exclude too many people who should not, and need not, be excluded. They represent a requirement of knowledge unfairly imposed on only some citizens. We are aware that classifications are always imprecise. By requiring classifications to be tailored to their purpose, we do not secretly require the impossible. Here, there is simply too attenuated a relationship between the state interest in an informed electorate and the fixed requirement that voters must have been residents in the State for a year and the county for three months. Given the exacting standard of precision we require of statutes affecting constitutional rights, we cannot say that durational residence requirements are necessary to further a compelling state interest.

IV

Concluding that Tennessee has not offered an adequate justification for its durational residence laws, we affirm the judgment of the court below.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

FOOTNOTES

[1] Involved here are provisions of the Tennessee Constitution, as well as portions of the Tennessee Code. Article IV, § 1, of the Tennessee Constitution, provides in pertinent part:

"Right to vote—Election precincts . . . .— Every person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county wherein such person may offer to vote for three months, next preceding the day of election, shall be entitled to vote for electors for President and Vice-President of the United States, members of the General Assembly and other civil officers for the county or district in which such person resides; and there shall be no other qualification attached to the right of suffrage.

"The General Assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box. . . ."

Section 2–201, Tennessee Code Annotated provides:

"Qualifications of voters.—Every person of the age of twenty-one (21) years, being a citizen of the United States and a resident of this State for twelve (12) months, and of the county wherein he may offer his vote for three (3) months next preceding the day of election, shall be entitled to vote for members of the general assembly and other civil officers for the county or district in which he may reside."

Section 2–304, Tennessee Code Annotated provides:

"Persons entitled to permanently register—Required time for registration to be in effect prior to Election.—All persons qualified to vote under existing laws at the date of application for registration, including those who will arrive at the legal voting age by the date of the next succeeding primary or general election established by statute following the date of their application to register (those who become of legal voting age before the date of a general election shall election [sic] selecting nominees for such general election), who will have lived in the state for twelve (12) months and in the county for which they applied for registration for three (3) months by the date of the next succeeding election shall be entitled to permanently register as voters under the provisions of this chapter, provided, however, that registration or re-registration shall not be permitted within thirty (30) days of any primary or general election provided for by statute. If a registered voter in any county shall have changed his residence to another county, or to another ward, precinct or district within the same county, or changed his name by marriage or otherwise, within ninety (90) days prior to the date of an election, he shall be entitled to vote in his former ward, precinct or district of registration."

[2] On July 30, the District Court refused to grant a preliminary injunction permitting Blumstein and members of the class he represented to vote in the August 6 election; the court noted that to do so would be "so obviously disruptive as to constitute an example of judicial improvidence." The District Court also denied a motion that Blumstein be allowed to cast a sealed provisional ballot for the election.

At the time the opinion below was filed, the next election was to be held in November 1970, at which time Blumstein would have met the three-month part of Tennessee's durational residency requirements. The District Court properly rejected the State's position that the alleged invalidity of the three-month requirement had been rendered moot, and the State does not pursue any mootness argument here. Although appellee now can vote, the problem to voters posed by the Tennessee residency requirements is "capable of repetition, yet evading review." *Moore* v. *Ogilvie,* 394 U.S. 814, 816 (1969); *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498, 515 (1911). In this case, unlike *Hall* v. *Beals,* 396 U.S. 45 (1969), the laws in question remain on the books, and Blumstein has standing to challenge them as a member of the class of people affected by the presently written statute.

[3] The important question in this case has divided the lower courts. Durational residence requirements ranging from three months to one year have been struck down in *Burg* v. *Canniffe,* 315 F. Supp. 380 (Mass. 1970); *Affeldt* v. *Whitcomb,* 319 F. Supp. 69 (ND Ind. 1970); *Lester* v. *Board of Elections for District of Columbia,* 319 F. Supp. 505 (DC 1970); *Bufford* v. *Holton,* 319 F. Supp. 843 (ED Va. 1970); *Hadnott* v. *Amos,* 320 F. Supp. 107 (MD Ala. 1970); *Kohn* v. *Davis,* 320 F. Supp. 246 (Vt. 1070); *Keppel* v. *Donovan,* 326 F. Supp. 15 (Minn. 1970); *Andrews* v. *Cody,* — F. Supp. — (MDNC 1971), as well as this case. Other District Courts have upheld durational residence requirements of a similar variety. *Howe* v. *Brown,* 319 F. Supp. 862 (ND Ohio 1970); *Ferguson* v. *Williams,* — F. Supp. — (ND Miss., Aug. 30, 1971); *Cocanower* v. *Marston,* 318 F. Supp. 402 (Ariz. 1970); *Fitzpatrick* v. *Board of Election Commissioners,* — F. Supp. — (ND Ill. 1970); *Piliavin* v. *Hoel,* 320 F. Supp. 66 (WD Wis. 1970); *Epps* v. *Logan,* — F. Supp. — (No. 913) (WD Wash. 1970); *Fontam* v. *McKeithen,* — F. Supp. — (Civ. 71–2631) (ED La.). In *Sirah* v. *Brown,* — F. Supp. — (Civ. 70–164) (SD Ohio 1970), the District Judge refused to convene a three-judge court and summarily dismissed the complaint.

[4] Noting the lack of dispute on this point, the court below specifically found that Blumstein had no intention of leaving Nashville and was a bona fide resident of Tennessee. — F. Supp. — (App., p. 36).

[5] While it would be difficult to determine precisely how many would-be voters throughout the country cannot vote because of durational residence requirements, but see Cocanower & Rich, Residency Requirements for Voting, 12 Ariz. L. Rev. 477, 478 and n. 8 (1970), it is worth noting that during the period 1947–1970 an average of approximately 3.3% of the total national population moved interstate each year. (An additional 3.4% of the population moved *intrastate* each year.) U.S. Dept. of Commerce, Bureau Census, Current Population Reports, Population Characteristics, Series P–20, No. 210, Jan. 15, 1971, Table 1, pp. 7–8.

[6] Compare *Kramer* v. *Union Free School District,* 395 U.S. 621 (1969), and *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942), with *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955); compare *McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Harper* v. *Virginia Board of Election,* 383 U.S. 663 (1966), and *Graham* v. *Richardson,* 403 U.S. 365 (1971), with *Morey* v. *Doud,* 354 U.S. 457 (1957), and *Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522 (1959).

[7] Appellants also rely on *Pope* v. *Williams,* 193 U.S. 621 (1904). Carefully read, that case simply *holds* that federal constitutional rights are not violated by a state provision requiring a person who enters the state to make a "declaration of his intention to become a citizen before he can have the right to be registered as a voter and to vote in the State." *Id.,* at 634. In other words, the case simply stands for the proposition that a State may require voters to be bona fide residents. See TAN 15, *infra.* To the extent that dicta in that opinion is inconsistent with the test we apply or the result we reach today, that dicta is rejected.

[8] We note that in the Federal Voting Right Act, Congress specifically found that a durational residence requirement "denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines . . ." 42 U.S.C. § 1973aa–1(a)(2).

[9] For example, in *Crandall* v. *Nevada,* 6 Wall. (73 U. S.) 35 (1868), the tax imposed on persons leaving the State by commercial carrier was only $1, certainly a minimal deterrent to travel. But in declaring the tax unconstitutional, the Court reasoned that "if the State can tax a railroad passenger one dollar, it can tax him one thousand dollars," *id.,* at 46. In *Ward* v. *Maryland,* 12 Wall. (79 U. S.) 418 (1871), the tax on nonresident traders was more substantial, but the Court focused on its discriminatory aspects, without anywhere considering the law's effect, if any, on trade or tradesmen's choice of residence. Cf. *Chalker* v. *Birmingham & N. W. R. Co.,* 249 U. S. 522, 527 (1919); but see *Williams* v. *Fears,* 179 U. S. 270 (1900). In *Travis* v. *Yale & Towne Mfg. Co.,* 252 U. S. 60, 79–80 (1920), the Court held that New York could not deny nonresidents certain small personal exemptions from the state income tax allowed residents. The amounts were certainly insufficient to influence any employee's choice of residence. Compare *Toomer* v. *Witsell,* 334 U. S. 385 (1948), with *Mullaney* v. *Anderson,* 342 U. S. 415 (1952).

[10] JUSTICE STEWART specifically noted that quite apart from any purpose to deter, "a law that so clearly *impinges* upon the constitutional right of interstate travel must be shown to reflect a compelling governmental interest." *Id.,* at 643–644 (emphasis added). See also *Graham* v. *Richardson,* 403 U.S. 365, 375 (1971).

[11] In *Harman,* the Court held that a Virginia law which allowed federal voters to qualify either by paying a poll tax or by filing a certificate of residence six months before the election "handicap[ped] exercise" of the right to participate in federal elec-

tions free of poll taxes, guaranteed by the Twenty-Fourth Amendment.

[12] Where, for example, an interstate migrant loses his driver's license because the new State has a higher age requirement, a different constitutional question is presented. For in such a case, the new State's age requirement is not a *penalty* imposed solely because the newcomer is a new resident; instead, all residents, old and new, must be of a prescribed age to drive. See *Shapiro* v. *Thompson, supra,* 394 U. S., at 638 n. 21.

[13] However, as noted *infra,* TAN 15, States may show an overriding interest in imposing an appropriate bona fide residence requirement on would-be voters. One who travels out of a State may no longer be a bona fide resident, and may not be allowed to vote in the old State. Similarly, one who travels to a new State may, in some cases, not establish bona fide residence and may be ineligible to vote in the new State. Nothing said today is meant to cast doubt on the validity of appropriately defined and uniformly applied bona fide residence requirements.

[14] See n. 7, *supra.*

[15] See *Fontham* v. *McKeithen,* —— F. Supp. —— (Civ. 71–2631, Dec. 7, 1971, p. 12) (ED La. 1971) (Wisdom, J., dissenting); *Pope* v. *Williams,* 193 U.S. 621 (1904), and n. 7, *supra.*

[16] See, *e.g.,* Cocanower & Rich, Residency Requirements for Voting, 12 Ariz. L. Rev. 477, 499 (1970); MacLeod & Wilberding, State Voting Residency Requirements and Civil Rights, 38 Geo. Wash. L. Rev. 93, 113 (1969).

[17] Obviously, it could not be argued that the three-month waiting period is necessary to confirm residence in the county, and the one-year period necessary to confirm residence in the State. Quite apart from the total implausibility of any suggestion that one task should take four times as long as the other, it is sufficient to note that if a person is found to be a bona fide resident of a county within the State, he is by definition a bona fide resident of the State as well.

[18] See, *e.g., Brown* v. *Hows,* 163 Tenn. 178, 42 S. W. 2d 210 (1930); *Sparks* v. *Sparks,* 114 Tenn. 666, 88 S. W. 173 (1905). See generally Law Revision Commission, Title 2—Election Laws, Tentative Draft of October 1971, Section 222 and Comment. See n. 22, *infra.*

[19] In the Federal Voting Rights Act of 1970, Congress abolished durational residence requirements as a precondition to voting in presidential and vice-presidential elections, and prohibited the States from cutting off registration more than 30 days prior to those elections. These limits on the waiting period a State may impose prior an election were made "with full cognizance of the possibility of fraud and administrative difficulty. *Oregon* v. *Mitchell,* 400 U.S. 112, 238 (opinion of BRENNAN, WHITE, and MARSHALL, JJ.). With that awareness, Congress concluded that a waiting period requirement beyond 30 days "does not bear a reasonable relationship to any compelling state interest in the conduct of presidential elections. 42 U.S.C. § 1973aa–1(a)(6). And in sustaining § 202 of the Act, we found "no explanation why the 30-day period between the closing of new registration and the date of election would not provide, in light of modern communications, adequate time to insure against . . . frauds." *Oregon* v. *Mitchell, supra,* 400 U.S., at 239 (opinion of BRENNAN, WHITE, and MARSHALL, JJ.). There is no reason to think that what Congress thought was unnecessary to prevent fraud in presidential elections should not also be unnecessary in the context of other elections. See TAN 26, *infra.*

[20] As a technical matter, it makes no sense to say that one who has been a resident for a fixed duration is presumed to be a resident. In order to meet the durational residency requirement, one must, by definition, *first* establish that he is a *resident.* A durational residence requirements is not simply a waiting period after arrival in the State; it is a waiting period after *residence* is established. Thus it is conceptually impossible to say that a durational residency requirement is an administratively useful device to determine residence. The State's argument must be that residence would be presumed from simple *presence* in the State or county for the fixed waiting period.

[21] It should be clear that this argument assumes that the State will reliably determine whether the sworn claims of duration in the jurisdiction are themselves accurate. We have already noted that this is unlikely. See p. 16, *supra.* Another repeating problem for the State's position is the existence of *differential* durational residency requirements. If the State presumes residence in the county after three months in the county, there is no rational explanation for requiring a full 12 months' presence in the State to presume residence in the State.

[22] Tennessee's basic test for bona fide residence is (1) an intention to stay indefinitely in a place (in other words, "without a present intention of removing therefrom," *Brown* v. *Hows,* 163 Tenn. 178, 42 S. W. 2d 210 (1930)), joined with (2) some objective indication consistent with that intent, see n. 18, *supra.* This basic test has been applied in divorce cases, see, *e.g., Sturdavant* v. *Sturdavant,* 28 Tenn. App. 273, 189 S. W. 410 (1944); *Brown* v. *Brown,* 150 Tenn. 89, 261 S. W. 959 (1924); *Sparks* v. *Sparks,* 114 Tenn. 666, 88 S. W. 173 (1905); in tax cases, see, *e.g., Denny* v. *Sumner County,* 134 Tenn. 468, 184 S. W. 14 (1916); and in estate cases, see, *e.g., Caldwell* v. *Shelton,* 32 Tenn. App. 45, 221 S. W. 2d 815 (1948); *Hascall* v. *Hafford,* 107 Tenn. 355, 65 S. W. 423 (1901); and voting cases, see, *e.g., Brown* v. *Hows,* 163 Tenn. 178, 42 S. W. 2d 210 (1930); Law Revision Commission, Title 2—Election Laws, Tentative Draft of October 1971, § 222 and Comment.

[23] Indeed, in Blumstein's case, the County Election Commission explicitly rejected his offer to treat the waiting period requirement as "a waivable guide to Commission action, but rebuttable upon a proper showing of competence to vote intelligently in the primary and general election." Complaint in Appendix, p. 8. Cf. *Skinner* v. *Oklahoma,* 316 U.S. 535, 544–545 (1942) (Stone, C. J., concurring).

[24] See *Harmon* v. *Forssenius,* 380 U.S. 528, 543 (1965) (filing of residence certificate six months before election in lieu of poll tax unnecessary to insure that the election is limited to bona fide residents in light of "numerous devices to enforce residency requirements"); cf. *Schneider* v. *New Jersey,* 308 U.S. 147, 164 (1939) (fear of fraudulent solicitations cannot justify permit requests since "frauds may be denounced as offenses and punished by law").

[25] Tenn. Code Ann. § 2–1614 makes it a felony for any person who "is not legally entitled to vote at the time and place where he votes or attempts to vote . . . , to vote or offer to do so," or to aid and abet such illegality. Tenn. Code Ann, § 2–2207 makes it a misdemeanor "for any person knowingly to vote in any political convention or any election held under the Constitution or laws of this state, no being legally qualified to vote . . . ," and Tenn. Code Ann. § 2–2208 makes it a misdemeanor to aid in such an offense. Tenn. Code Ann. § 2–202 makes it an offense to vote outside the ward or precinct where one resides and is registered. Finally, Tenn. Code Ann. § 2–2209 makes it unlawful to "bring or aid in bringing any fraudulent voters into this state for the purpose of practising a fraud upon or in any primary or final election. . . ." See, *e.g., State* v. *Weaver,* 112 S. W. 465 (1909).

[26] We note that in the period since the decision below, several elections have been held in Tennessee. We have been presented with no specific evidence of increased colonization or other fraud.

[27] It has been noted elsewhere, and with specific reference to Tennessee law, that "[t]he historical purpose of [durational] residency requirements seem to have been to deny the vote to undesirables, immigrants and outsiders with different ideas." Cocanower & Rich, *supra,* 12 Ariz. L. Rev., at 484 and nn. 44, 45, and 46. We do not rely on this alleged original purpose of durational residence requirements in striking them down today.

[28] Tennessee may be revealing this impermissible purpose when it observes:

"The fact that the voting privilege has been extended to 18 year old persons . . . increases, rather than diminishes, the need for durational residency requirements. . . . It is so generally known, as to be judicially accepted, that there are many political subdivisions in this state, and other states, wherein there are colleges, universities and military installations with sufficient student body or military personnel over eighteen years of age, as would completely dominate elections in the district, county or municipality so located. This would offer the maximum of opportunity for fraud through colonization, and permit domination by those not knowledgeable or having a common interest in matters of government, as opposed to the interest and the knowledge of permanent members of the community. Upon completion of their schooling, or service tour, they move on, leaving the community bound to a course of political expediency not of its choice and, in fact, one over which its more permanent citizens, who will continue to be affected, had no control." Appellants' Brief, pp. 15–16.

[29] In the 1970 Voting Rights Act, § 201, 42 U. S. C. § 1973aa, Congress provided that "no citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election. . . ." The terms "test or device" was defined to include, in part, "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrates the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject. . . ." By prohibiting various "test[s]" and "device[s]" which would clearly assure knowledgeability on the part of voters in local elections, Congress declared federal policy that people should be allowed to vote even if they were not well informed about the issues. We upheld § 201 in *Oregon* v. *Mitchell, supra.*

[30] H. E. Alexander, Financing the 1968 Election 106–113 (Citizen Research Foundation 1969); *Affedt* v. *Whitcomb,* 319 F. Supp. 69, 74 (ND Ind. 1970); Cocanower & Rich, *supra,* 12 Ariz. L. Rev. 477, 498 (1971).

[31] The general provisions for absentee voting apply in part to "any registered voter otherwise qualified to vote in any election to be held in this state or any county, municipality, or other political subdivision thereof, who by reason of business, occupation, health, education, or travel, is required to be absent from the county of his fixed residence on the day of election. . . ." Tenn. Code Ann. § 2–1602. See generally Tenn. Code Ann. §§ 2–1601 *et seq.* An alternative method of absentee voting for armed forces members and federal personnel is detailed in Tenn. Code Ann. §§ 2–1701 *et seq.* Both those provisions allow persons who are still technically "residents" of the State or county to vote even though they are not physically present, and even though they are likely to be uninformed about the issues. In addition, Tennessee has an unusual provision which permits persons to vote in their *prior* residence for a period after residence has been changed. This section provides, in pertinent part: "If a registered voter in any county shall have changed his residence to another county . . . within ninety (90) days prior to the date of an election, he shall be entitled to vote in his former ward, precinct or district of registration." Tenn. Code Ann. § 2–304. See also Tenn. Code Ann. § 2–204.

[Supreme Court of the United States, No. 70–13]

WINFIELD DUNN, GOVERNOR OF THE STATE OF TENNESSEE, ET AL., APPELLANTS, AGAINST JAMES F. BLUMSTEIN

On Appeal from the United States District Court for the Middle District of Tennessee, March 21, 1972.

Mr. Justice Blackmun, concurring in the result.

Professor Blumstein obviously could hardly wait to register to vote in his new home State of Tennessee. He arrived in Nashville on June 12, 1970. He moved into his apartment on June 19. He presented himself to the registrar on July 1. He instituted his lawsuit on July 17. Thus, his litigation was begun 35 days after his arrival on Tennessee soil, and less than 30 days after he moved into his apartment. But a primary was coming up on August 6. Usually, such zeal to exercise the franchise is commendable. The professor, however, encountered—and, I assume, knowingly so—the barrier of the Tennessee durational residence requirement and, because he did, he instituted his test suit.

I have little quarrel with much of the content of the Court's long opinion. I concur in the result, with these few added comments, because I do not wish to be described on a later day as having taken a position broader than I think necessary for the disposition of this case.

1. In *Pope* v. *Williams*, 193 U.S. 621 (1904), Mr. Justice Peckham, in speaking for a unanimous Court that included the first Harlan and Mr. Justice Holmes, said:

"The simple matter to be herein determined is whether, with reference to the exercise of the privilege of voting in Maryland, the legislature of that State had the legal right to provide that a person coming into the State to reside should make the declaration of intent a year before he should have the right to be registered as a voter of the State.

* * * * *

"The right of a State to legislate upon the subject of the elective franchise as to it may seem good, subject to the conditions already stated, being, as we believe, unassailable, we think it plain that the statute in question violates no right protected by the Federal Constitution.

"The reasons which may have impelled the state legislature to enact the statute in question were matters entirely for its consideration, and this court has no concern with them." 193 U.S., at 632, 633–634.

I cannot so blithely explain *Pope* v. *Williams* away, as does the Court in its footnote 7, *ante*, p. —, by asserting that if that opinion is "carefully read," one sees that the case was concerned simply with a requirement that the new arrival declare his intention. The requirement was that he make the declaration *a year* before he registered to vote; time as well as intent was involved. For me, therefore, the Court today really overrules the holding in *Pope* v. *Williams* and does not restrict itself, as footnote 7 says, to rejecting what it says is meredicta.

2. The compelling state interest test, as applied to a State's denial of the vote, seems to have come into full flower with *Kramer* v. *Union Free School District No. 15*, 395 U.S. 621, 627 (1969). The only supporting authority cited at that point is in the "See" context to *Carrington* v. *Rash*, 380 U.S. 89, 96 (1961). But as I read *Carrington*, the standard there employed was that the voting requirements be reasonable. Indeed, in that opinion Mr. JUSTICE STEWART observed, p. 91, that the State has "unquestioned power to impose reasonable residence restrictions on the availability of the ballot." A like approach was taken in *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 809 (1969), where the Court referred to the necessity of "some rational relationship to a legitimate state end" and to a statute's being set aside "only if based on reasons totally unrelated to the pursuit of that goal." I mention this only to emphasize that *Kramer* appears to have elevated the standard. And this was only three years ago. Whether *Carrington* and *McDonald* are now frowned upon, at least in part, the Court does not say. See *Bullock* v. *Carter*, — U.S. — , — (1972).

3. Clearly, for me, the State does have a profound interest in the purity of the ballot-box and in an informed electorate and is entitled to take appropriate steps to assure those ends. Except where federal intervention properly prescribes otherwise, see *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), I see no constitutional imperative that voting requirements be the same in each State, or even that a State's time requirement relate to the 30-day measure imposed by Congress by 42 U.S.C. § 1973aa–1 (d) for presidential elections. I assume that the Court by its decision today does not depart from either of these propositions. I cannot be sure of this, however, for much of the opinion seems to be couched in absolute terms.

4. The Tennessee plan, based both in statute and in the State's constitution, is not ideal. I am content that the one-year and three-month requirements be struck down for want of something more closely related to the State's interest. It is, of course, a matter of linedrawing, as the Court concedes, *ante*, p. 18. But if 30 days pass constitutional muster, what of 35 or 45 or 75? The resolution of these longer measures, less than those today struck down, the Court leaves, I suspect, to the future.

[Supreme Court of the United States, No. 70–13]

WINFIELD DUNN, GOVERNOR OF THE STATE OF TENNESSEE, ET AL., APPELLANTS, AGAINST JAMES F. BLUMSTEIN

On Appeal from the United States District Court for the Middle District of Tennessee, March 21, 1972.

Mr. CHIEF JUSTICE BURGER, dissenting.

The holding of the Court in *Pope* v. *Williams*, *supra*, is as valid today as it was at the turn of the century. It is no more a denial of Equal Protection for a State to require newcomers to be exposed to state and local problems for a reasonable period such as one year before voting, than it is to require children to wait 18 years before voting. Cf. *Oregon* v. *Mitchell*, 400 U.S. 112 (1970). In both cases some informed and responsible persons are denied the vote, while others less informed and less responsible are permitted to vote. Some lines must be drawn. To challenge such lines by the "compelling state interest" standard is to condemn them all. So far I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection.

The existence of a constitutional "right to travel" does not persuade me to the contrary. If the imposition of a durational residency requirement for voting abridges the right to travel, surely the imposition of an age qualification penalizes the young for being young, a status I assume the Constitution also protects.

Mr. McGEE. In our committee hearings on voter registration, the Department of Justice opposed enactment of a Federal voter registration program on the grounds, among others, that it was unconstitutional. Of course, we are all constitutional scholars. There are 100 in the Senate, 435 in the House, and 200 million in the Nation. But only a few have any real voice in the matter, and only nine have any vote. I extend my sympathy to the former Attorney General, therefore, who directed the Department of Justice to point out the unconstitutionality of Federal legislation regulating durational residency requirements for Federal elections. He guessed wrong. I ask unanimous consent that the particular testimony of the Department of Justice be printed at this point in the RECORD.

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

TESTIMONY OF RALPH ERICKSON

If I may just recite that for the record I think it would be helpful. The abolition of durational residency in presidential elections can be justified on the basis that the offices involved are national and are intended to represent national interests. Senators and Congressmen on the other hand, are elected to represent the State from which they are elected. If a highly mobile population is permitted to vote wherever they please, regardless of their ties to or interest in the locality, then the fundamental constitutional concept of geographic representation is undermined.

Mr. McGEE. Mr. President, it has also come to my attention that during our consideration of S. 2574, the Department of Justice made numerous telephone calls to some of my colleagues urging them to vote against the voter registration bill. It is a sad irony that the Department of the Government of the United States charged with insuring voting rights for all citizens under law, for insuring the fair and impartial administration of justice, and charged, under our bill, with insuring that fraud does not occur in Federal elections spent its time lobbying against the enactment of legislation to simplify the procedures for citizens to register to vote.

The time for voting rights has come. The issue of simplified voter registration will not disappear, because of our setback last week. The Supreme Court has struck down another barrier to the people voting to have an effective voice in their government. Surely Congress will not be far behind.

MONOPOLY AND CORPORATE POWER

Mr. HARRIS. Mr. President, the issue of monopoly and corporate power is becoming increasingly important in the 1972 presidential campaign. When I introduced the Concentrated Industries Act last September, some people wondered whether Americans were really concerned about the dangers of unchecked corporate power. Since that time a number of things have shown that people do want action to protect their interests as consumers, workers, and citizens. The Federal Communications Commission responded to public pressure to reopen its investigation of A.T. & T.'s rates. The Federal Trade Commission has moved to break up the shared monopoly in the breakfast cereal industry. And every American has witnessed the sordid spectacle of high officials of the Justice Department and top executives of ITT explain on national television how big business gets its way with big Government.

In an effort to help stimulate thoughtful debate on these issues, Ralph Nader

and Mark Green, two outstanding young advocates of the public interest, wrote to each of the presidential candidates—except President Nixon—asking for their views on monopoly and corporate abuses. I ask unanimous consent to have printed in the RECORD a summary of the responses they received, a copy of their request, and the full statements by the candidates. These statements indicate, I believe, that most of the candidates do appreciate the problem we face in this area and are increasingly willing to face up to the necessary solutions. I hope to hear a great deal more from them on these issues in the months ahead.

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

VIEWS ON MONOPOLY

"Why does the American public 'tolerate' the degree of monopoly we now have," the editors of the Antitrust Law and Economics Review recently asked; "[t]he answer is they don't know about it." In an effort to inform the American public about the degree and costs—both economic and political—of monopoly, and to try, as individual citizens, to help broaden a campaign dialogue, we sent a letter containing a series of questions concerning antitrust and corporate power to every announced Presidential candidate on January 14, 1972 (sample copy attached). Since President Nixon had already stated that he would not become involved in any campaign statements, he was not included. Enclosed are replies from eight candidates: Senators Humphrey, McGovern and Muskie, Mayors Lindsay and Yorty, Representatives Chisholm and McCloskey, and former Senator McCarthy. Those not replying included Senators Hartke and Jackson, Governor Wallace (his letter is enclosed), and Rep. Ashbrook.

The issue of corporate power has recently threatened to become the equivalent of race in the 1950s and ecology in the 1960s—problems of great magnitude but all avoided in that time. Instead of ignored, the extent and impact of corporate power should be the issue of the seventies. Some towns or countries are developed while others are abandoned; trade tariffs or quotas are written; inflation worsened or eased; technology implemented or suppressed; political campaigns decisively affected; American style and taste manipulated by advertising campaigns; consumers and employees damaged by product or industrial environment hazards—all are issues intimately affected by aspects of corporate power and antitrust.

For the first time within recent memory, major candidates for the Presidency are here taking positions on these subjects. Among others, Mayor Lindsay wrote that, "The real need is for a declaration of independence—independence of government from corporate domination." Senator McGovern noted that:

"I agree with both of your premises—that the accumulation of corporate power is among the most critical issues to be addressed in 1972, and that the American people deserve to know how the candidates stand, and what they propose to do, on issues of this kind.

". . . As a practical matter, the decisions made in the board rooms of these companies (the top 200) can have as much influence on the country's directions, and perhaps more, than decisions made in the United States Congress or in the White House."

According to Senator Muskie, "the fundamental question raised by this issue must be faced by our political leadership. . . . I intend to speak to these issues in a thoughtful and comprehensive manner during the forthcoming campaign."

Considering the replies as a whole, it seems to us significant that: of seven replies concerning federal chartering as a mechanism for corporate accountability, all seven said they would support the concept or seriously consider supporting it as President; of six candidates addressing themselves to the issue of corporate secrecy, all urged that corporations disclose more of their activities to the public; of five commenting on shared monopolies (oligopolies), four favored either deconcentration suits or legislation.

The ITT-Kleindienst hearings have begun to make antitrust a word of common currency. Perhaps with the aid of this dialogue, antitrust can become more of a subject of uncommon interest to decision-makers charged with implementing or shaping the national policy for a competitive economy.

[Identical letter sent to all announced candidates]

WASHINGTON, D.C.,
January 14, 1972.

Senator EDMUND MUSKIE,
Old Senate Office Building,
Washington, D.C.

DEAR SENATOR MUSKIE: As the 1972 Presidential race begins, we consider it appropriate to raise with each of the announced candidates an issue whose importance is only matched by its omission during campaigns: corporate power and antitrust policy. It is a problem of intimate impact on all Americans, touching as it does the pocketbooks of all consumers. It decisively affects the level of innovation, the level of inflation, the quality of goods and services, the extent of pollution and product hazards, the role of small business and professionals, the health and safety of employees, and, of course, the prices we pay. These are all issues of magnitude and moment and all are affected by corporate power and antitrust enforcement.

Corporations are clearly a dominant presence in our lives. They account for 56% of national income; listing the top corporations by sales and the top states by general revenues, 21 of the first 25 are corporations. One hundred and eleven industrial firms have over one billion dollars in assets while six hundred have over a hundred million in assets. Our top one hundred firms control about 50% of all industrial assets, or more than what the top two hundred held in 1950, the year Congress enacted the Celler-Kefauver Act; and today's two hundred largest firms control about two-thirds of industrial assets, the same share as was held by the *1000* largest in 1941, the year the Temporary National Economic Committee (TNEC) submitted its final report to Congress recommending an "Investigation of Concentration of Economic Power."

Even more troubling than this extent of so-called aggregate concentration has been the level of actual market domination by a few firms. The best estimates put the proportion of manufacturing value added occurring in monopoly or shared monopoly industries at over 60%. And a monopoly or shared monopoly means, by definition, that competition has ceased to function; a few corporate managements, either by explicit collaboration or by cue, act in unison to keep prices high and to reduce the consumer's moneysworth. Examples of such industries are many: automobiles (GM, Ford and Chrysler), aluminum (Alcoa, Kaiser and Reynolds), rubber tires (Goodyear, Firestone, U.S. Rubber and Goodrich), steel (U.S. Steel, Bethlehem, National and Republic), soaps-detergents (Procter & Gamble, Colgate-Palmolive, Lever Bros.) and cereals (Kelloggs, General Foods).

A secret staff report now at the Federal Trade Commission estimates that "if highly concentrated industries were deconcentrated to the point where the four largest firms control 40% or less of an industry's sales, prices would fall by 25% or more." Such problems go far beyond the esoterica of economic data. They impose real costs on real people. For example: there were once numerous competing milk firms in Minneapolis-St. Paul in the mid-sixties, but only three big milk firms in neighboring Duluth-Superior; although costs were similar in both markets, the half-gallon wholesale price in 1967 was 33.8 cents in Minneapolis-St. Paul, 45 cents in Duluth.

While there was once as many as 88 competing auto manufacturers in 1921, today the "Big Three" produce 83% of all cars sold in the United States and 97% of all domestic models; industrial economist Leonard Weiss, of the University of Wisconsin, has estimated that the noncompetitive state of the auto industry costs consumers $1.6 billion. The oil import quota, by keeping out much foreign competition, permits domestic oil firms to overcharge by an estimated $5–$7 billion per year; for the family of four in New York, it means an average of $102.32 added to gasoline and home heating bills every year. While all Americans paid an average of 20 cents for a loaf of bread in 1964, consumers in Seattle paid 24 cents, or 20% more, due to a local price-fixing conspiracy.

In the aggregate, the economic cost inflicted by industrial concentration can only be described as staggering. Monopoly tends to misallocate resources and depress production. As a result, our Gross National Product is smaller than it would otherwise be. It has been recently estimated by two eminent economists, William Shepherd and F. M. Scherer, that the overall cost of monopoly in terms of lost product (or "lost GNP") is between *$48 billion and $60 billion annually.* Further, Shepherd has estimated that monopoly redistributes wealth regressively by *$23 billion annually.* How? Scherer explains that "monopoly profits realized by industrial corporations transfer income from the average consumer to the relatively rich," since it is the wealthy who own the lion's share of all publicly held stock.

"Why does the American public 'tolerate' the degree of monopoly we now have," asked the Editors of *The Antitrust Law and Economics Review;* "The answer is they don't know about it." The fault, to an extent, must lie with public officials who have failed both to bring it to public attention and to take a stand on it. Whatever the reason, it can no longer remain hidden. The results are too expensive: they provide the superstructure for much of our present inflation; they lead to Lockheed-bailout situations, where firms become so big and important that they cannot be permitted to fail; they cause the retardation of pollution technology for which we all pay the piper; they lead to the consolidation of political power with economic power; and they inspire the expansion of government controls to deal with noncompetitive and hence unaccountable markets, *viz.* Phases I and II.

Attorney General John Mitchell recognized verbally the dangers in a widely reported June 1969 speech: "I believe that the future vitality of our free economy may be in danger because of the increasing threat of economic concentration by corporate mergers. . . . The danger that this superconcentration poses to our economic, political and social structure cannot be overestimated." More recently, Congressman Emanuel Celler has introduced a bill to consolidate and enhance the antitrust enforcement powers of the Justice Department and the Federal Trade Commission.

Senator Fred Harris has introduced a bill to decentralize our major monopolies into more efficient and competitive units. Senator Philip Hart, Chairman of the Senate Antitrust and Monopoly Subcommittee, has announced that he intends to submit his own version shortly. The Federal Trade Commission is on the verge of issuing a complaint charging the three biggest cereal companies with being an illegal shared monopoly.

All the foregoing, however, are just pro-

posals. There are other proposals pushing in the pro-monopoly direction. The Nixon Administration has hinted for months that antitrust laws should be eased in order to permit mergers of domestic firms to improve their competitive position with their foreign competitors. It is anticipated that President Nixon will make just that recommendation in his State of the Union Address. But it has already been done for him by Senators Warren Magnuson and Daniel Inouye, who have introduced a bill which basically exempts export cartels from the reach of the Sherman Antitrust Act.

These and related issues all warrant the response of those public officials who seek the Presidency, that office best situated to change the thrust and pace of our antimonopoly enforcement. A Presidential campaign should candidly bring to the citizenry the great issues of the day and citizens, as well, should have an opportuntiy to stimulate such a response. We respectfully request, therefore, that you reply to the following questions. Our purpose is to compile the answers for distribution to interested citizens and press. We believe that the compiled answers will prove helpful to the American consumer in evaluating this vitally important matter.

(1) What our your views on the legislation proposed by Congressman Celler (H.R. 12004), and Senators Warren Magnuson and Daniel Inouye (S. 2754)? Do you favor the deconcentration of large shared monopolists—General Motors, for example—as would be accomplished by Senator Fred Harris' bill S. 2614?

(2) Do you agree with the antitrust enforcement policy of Presiden Nixon's Justice Department that conglomerates can and should be sued under prevailing antitrust doctrine but that shared monopolies cannot and should not be?

(3) Senator Nelson is holding a series of hearings inquiring into corporate secrecy. Do you think corporations should systematically make public, except in limited trade secret situations, the following information:

Profit and loss statements by product line;

Amount of pollution emissions and effluents for all product lines and plant facilities;

Occupational injuries and diseases suffered each year by type and number of employees affected;

Listing on the container or product the name and amount of all ingredients in the product;

Product testing, including test methodolgy, selection process and results, for every product marketed;

Public files of all consumer complaint letters, and documentation pro and con for all product hazards discovered internally or identified and alleged by outside parties;

Factual substantiation of all advertising claims.

(4) Do you think a new TNEC investigation should be called to probe and publicize economic concentration in America today?

(5) If elected President, would you consider supporting a Federal Chartering Act, which would require that large corporations doing interstate business get their corporate charters from the national government, rather than from the individual states as now?

(6) What are your general views regarding problems and solutions to corporate power and monopoly? What do you think of the following mentioned methods to achieve corporate accountability:

More "corporate democracy" and "shareholder rights";

Stronger and more frequently imposed white collar criminal sanctions;

More and better antitrust enforcement;

More and better health, safety and rate regulation;

"Public enterprise" (Comsat, Amtrak) or nationalized industries;

Appeals to corporate responsibility on the part of corporate managers;

Internal corporate due process to protect dissenters and to preserve constitutional rights of all employees.

Thank you for your considered responses.

Sincerely yours,

RALPH NADER,
MARK GREEN.

U.S. SENATE,
Washington, D.C., February 29,1972.

MSSRS. RALPH NADER and MARK GREEN,
Washington, D.C.

DEAR SIRS: Your letter concerning corporate power and antitrust policy asks pointed and probing questions on a subject of great importance that has been of concern to me for many years. Although I have not been able to analyze the details of all the statements in your letter, I am in basic agreement with the view that there must be limits to concentrations of economic power and that antitrust enforcement should be a major means of limiting such concentrations of power. Furthermore, I agree with the premise that the maximization of consumer welfare is the talisman—not the value of small or big enterprise for their own sakes, but the production and delivery of a diversity of quality goods at low prices.

The subject is a vast, technical and complex one (as the length of your study report indicates) and would require a lengthy analysis for complete discussion. I am unable to provide that. I can, however, provide you with relatively brief answers to your specific questions.

(1) Your first question refers to three altogether different legislative proposals. H.R. 12004 was introduced by Congressman Celler to deal with economic concentration by setting up an administrative organization to control large corporate mergers, acquisitions and interlocking relationships. Your letter refers to this as "a bill to consolidate and enhance the antitrust enforcement powers of the Justice Department and the Federal Trade Commission." That conclusion is in question. The bill creates a new Office of Industrial Organization under a cabinet level Administrator; it repeals Section 2 of the Sherman Act, Section 11 of the Clayton Act, and all of the major regulatory statutes. The net effect of these changes is to take a very substantial part of the antitrust enforcement power away from the Department of Justice and the Federal Trade Commission and lodge it in the Administrator of the new Office of Industrial Organization. It is open to question whether this will increase the efficiency or effectiveness of antitrust enforcement or merely add a third agency to the two now engaged in antitrust enforcement. There have been no hearings on this bill yet, so we do not have the benefit of comments from the Department of Justice or the FTC. In any event, I would want the comments of my Attorney General in the next administration and other experts before approving such a major reduction in the enforcement powers of the Department of Justice.

The substantive provisions of the Cellar Bill are similar in many respects to existing antitrust statutes, but do contain some provisions that may be an improvement in existing law. The proposed prohibitions on interlocking directorships and officerships, for example, go considerably beyond the present provisions of Section 8 of the Clayton Act and seem to be a distinct improvement. On the other hand, the provision for direct appeal of antitrust cases exclusively to the Supreme Court is retained.

Nearly all scholars who have studied this subject, including the Supreme Court itself and the Assistant Attorney General in Charge of the Antitrust Division under both Democratic and Republican administrations, have all concluded that this is an outmoded procedure which actually handicaps antitrust enforcement. In most cases, a Court of Appeals is able to give more expeditious and thorough review to a case than the Supreme Court, and for many years the Department of Justice has advocated eliminating or modifying this provision. This is a technical matter that illustrates the difficulty of now stating before hearings an overall judgment on this bill in its present form.

S. 2754, introduced by Senator Magnuson and Senator Inouye, is a very long and comprehensive proposal to expand U.S. exports. The bill, I notice, has 13 titles relating to such subjects as the establishment of an International Commerce Service (similar to the State Department Foreign Service), establishment of a Trade Development Corps, grants to state and local governments, an export trading program, regional American merchandise centers, export commercial paper, ocean freight rate disparities and other related matters. Many of these provisions seem worthwhile and the sections dealing with ocean freight rate disparities strike at a long standing abuse.

However, since the focus of your letter is on antitrust, I assume that you are concerned with the provisions dealing with chartered export associations. This title would give eemption from the antitrust laws to chartered export associations. This title would give exemption from the antitrust laws to chartered export associations approved by the Secretary of Commerce. It is similar to but broader than the present Webb-Pomerene Act. I am told that the Department of Justice has presented testimony on this bill criticizing provisions of Title VII and opposing their enactment.

I am inclined to oppose these provisions, but neither my staff nor I have been called upon to study the bill since it has not yet reached the floor, and I would want to see if there is persuasive evidence that the bill is in the national interest by stimulating trade and assisting our balance of trade position. The notion that there should be a favorable balance of payments is, of course, at the root of the Magnuson proposal, but reducing competition and hence output and efficiency is neither the means to the end nor a price worth paying. Reducing competition is simply not the way to make industry capable of producing efficiently, having effective research, adopting dynamic marketing techniques, and so on.

S. 2614, introduced by Senator Harris, is a bill which embodies recommendations of the White House Task Force on Antitrust Policy.

In introducing the bill, Senator Harris said that in his view all of the evils at which the bill is aimed are "already illegal under existing antitrust law." The FTC has recently brought suit against the four largest manufacturers of breakfast cereal on what is reported to be a theory of "shared monopoly" or oligopoly in action. There will, of course, be hearings on this bill before it is presented for legislative action. I will want to study and weigh the testimony and evidence of the hearings on the bill, as well as observe legal and economic developments in this area, in order to determine the need and desirability of such legislation before it is presented to me for action.

(2) The conglomerate problem involves primarily a concern for bigness and for concentration of wealth and the political and social power which accompanies such concentrations. And, the present Attorney General and the recent Assistant Attorney General in charge of the Antitrust Division have made some stirring speeches about the dangers of monopoly and economic concentration. However, their record has been considerably less impressive than their speeches. It has been a record of lost motions, moot questions, consent decrees, lost cases. The present Department of Justice has demonstrated that it can start antitrust suits against conglomerate mergers.

The FTC has recently shown that it can start proceedings against companies having "shared monopolies," hardly a new doctrine. It seems to me that the facts speak for themselves. The antitrust laws, like most other laws, are enforced effectively not by speeches or filing a few headline making cases, but by continuous, vigorous, fair and effective enforcement, day after day and month after month. This is the kind of antitrust enforcement I favor and will provide, and, in the long run, this is the only way to make the laws effective.

(3) I favor full disclosure of all information that may be significant or useful to consumers and to those concerned with effective operation of the economy. There should certainly be encompassing and effective laws or regulations requiring the disclosure to consumers of the identity, ingredients and significant characteristics of products. We must recognize that implementation of this principle is complicated and difficult, but we have made substantial progress in this area over the years and I'm confident that a new administration, truly responsive to consumer needs, can secure the promulgation and enforcement of effective laws and regulations requiring factual disclosures to consumers on labels and containers and substantiation of factual advertising claims.

With respect to a financial statement by product lines, such information may in fact enable the government better to ascertain where markets are monopolistic. With respect to the amount of pollution emissions and effluents for all product lines and plant facilities, this kind of information should be made public. Occupational inquiries, product ingredients, and product testing information should be made public. Public files of consumer complaints and factual advertising substantiation ought to be made public.

But we must recognize that the way to get disclosures on all of these categories is by having an administration dedicated to the public interest which will staff the departments and agencies with energetic and like-minded officials. If new laws should be needed to require disclosures necessary to protect consumers, workers or the public, I will not hesitate to advocate and actively seek appropriate legislation.

(4) A White House Task Force on Antitrust Policy was appointed by President Johnson and rendered a report in July 1968. A Task Force on Productivity and Competition was appointed by President Nixon and rendered a report in February 1969. Neither report has received much attention or study and from all appearances the present administration has sought to bury both reports. There has been no discussion of either report by a responsible spokesman of the present administration.

It seems to me that there has been too much of a tendency to appoint a study group and thereafter ignore it altogether. Certainly that has been the case in this administration. On the other hand, the two White House Task Forces have engaged only in surveying published work and rendering their own analysis and expert opinion. Although a great body of literature does exist, I do think that there should be a new effort to gather factual evidence regarding the question of economic concentration in the United States today.

More studying, however, ought not to hold up taking action when evidence is clear. I do not have a firm opinion whether this additional investigation can best be done by establishing a new commission, on the model of the TNEC, or by utilizing some one or more of the existing agencies on Congressional committees. I think that this is a subject for investigation and would certainly insist upon having current factual evidence on this subject gathered as a basis for decision and action by federal agencies.

(5) The question as to whether there should be a Federal Chartering Act for large corporations doing interstate business implies that the powers of the federal government to regulate corporate activity in interstate commerce are subject to legal limitations. I am not a lawyer, but it seems to me that the decisions of the Supreme Court in recent years have held that the federal government has all the authority that it needs to achieve any social objectives with respect to corporations engaged in interstate business. Is there a special purpose in having a corporation chartered by the federal government rather than by one of the states?

The important issues involve substantive matters with respect to conduct that is permitted, require or forbidden. The substantive laws are, of course, enacted by Congress and the issues have not concerned the power of the federal government to act but rather the desirability of proposed kinds of government action. I am not aware that any of the substantive problems will be simplified by the adoption of a Federal Chartering Act. If that should prove to be the case, and if it appeared that there were problems which required the federal chartering of large corporations, I would certainly support such a statute.

(6) In general, as indicated above, I believe that there must be limits set to the concentration of economic power and monopoly and that we must have sustained and vigorous enforcement of the antitrust laws in order to achieve this. However, the antitrust laws are not, by themselves, adequate to insure either the structure or the performance that we desire in our economy. There are many other provisions of law and government action that are also important. For example, the tax laws have done much to encourage mergers and acquisitions. It is quite possible that appropriate revisions in the tax law may be as effective, or more effective, than antitrust prosecution, in determining large corporate mergers.

Certainly corporations, as large aggregations of economic power, should have internal due process to protect the rights of their employees as well as their stockholders, and we should have more corporate democracy and greater legal concern for the rights of both employees and stockholders.

I am in favor of more and better health, safety and rate regulation, as well as more and better antitrust enforcement. Ultimately we must have a widespread recognition by the majority of corporate managers that business has a social responsibility, as well as the opportunity to earn a profit. We can accomplish much by laws and law enforcement. However, there are limitations to what can be accomplished by laws and law enforcement. In order to achieve the best of which we are capable, we must have leadership by the government together with an active sense of social accountability by responsible citizens and business leaders. Business, business leaders and other citizens must demonstrate a willingness to assume the full burdens of social responsibility in achieving the social goals which most of us share.

Sincerely,

HUBERT H. HUMPHREY.

U.S. SENATE,
Washington, D.C., February 29, 1972.

Mr. RALPH NADER and Mr. MARK GREEN,
Corporate Accountability Research Group, Washington, D.C.

DEAR RALPH AND MARK: Thank you very much for your letter inviting my views on the trend toward economic concentration in the United States.

I agree with both of your premises—that the accumulation of corporate power is among the most critical issues to be addressed in 1972, and that the American people deserve to know how the candidates stand, and what they propose to do, on issues of this kind. I am, therefore, presently preparing a detailed series of recommendations to deal with economic concentration. I hope you will regard what I have to say now as an interim response to your questions, and that you will also examine the more detailed recommendations I will be making in the weeks ahead.

(1) The Celler Bill to bring the anti-trust enforcement powers of the Justice Department and the Federal Trade Commission into a single unit would be a useful step, and I support it. However, this must be done under terms assuring that the new agency will be completely independent of political pressures.

I am opposed to a special anti-trust exemption for export firms as Senators Magnuson and Inouye have proposed, first because it would deny protection to our own consumers and domestic competitors and, second, because it could create as many problems as it would solve with respect to foreign competition. We have sufficient experience to know that monopoly power tends to worsen problems of inefficiency.

I have joined as a cosponsor of S. 2614, and it has my full support.

(2) I do not. Shared monopoly is much more of a threat to competition than the conglomerate, and that, rather than artificial organizational distinctions, must be the ultimate test in determining whether anti-trust enforcement should be applied.

(3) Yes. Corporate secrecy should be sharply limited to cases in which the information bears on trade or marketing secrets and in which release would deny the company a competitive advantage it has earned. All of the subjects listed are appropriate for shareholder and public review. As you may know, I have introduced legislation requiring substantiation of advertising claims and product testing.

(4) Yes. Although there may be better vehicles than the Temporary National Economic Committee used in 1941, I would support a current thorough investigation of economic concentration and its implications.

(5) Federal chartering would be of limited value in the abstract, but it could serve as an important vehicle for enforcing public interest limitations on corporate activities. Unlike the extremely liberal acts of most states, a Federal Chartering Act would have to be carefully drawn to achieve those results. In addition, I would consider federal chartering as a supplement to state statutes, rather than a substitute, to permit state regulation as well.

(6) The trend toward economic concentration raises at least two issues for serious debate and action.

First is the decline in competition itself, and the harmful consequences which follow from that trend—rising prices, a lack of innovation, inefficiency, and industrial stagnation. We have long since made the value judgments on this issue, and we have chosen in favor of protecting free enterprise against monopoly and monopolistic practices. The priority need here, therefore, is for better enforcement of existing anti-trust laws and for new legislation, where necessary, to account for changes in the nature of the economy and for methods of bringing about the results of monopoly which could not have been contemplated during consideration of the original Sherman and Clayton Acts.

On the second issue we have really made no value judgments, except by default. I refer here to the role played by the large corporations in both defining and shaping our political and economic institutions, and it is an issue which should concern us regradless of whether or not competition can be preserved.

Government thus far has made no attempt to regulate or discourage bigness *per se;* in fact the most passionate arguments have been made against efforts of that kind.

But it seems to me that there are profoundly important reasons for at least examining

what it means when just six firms receive one quarter of all manufacturing profits, or when 200 firms control two thirds of all industrial assets. As a practical matter, the decisions made in the board rooms of those companies can have as much influence on the country's directions, and perhaps more, than decisions made in the United States Congress or in the White House. Further, because of traditional methods of political financing, those companies have had the power to assure that their interests will be protected regardless of what else government does, and regardless of which party is in office. And protection of their interest can easily mean neglect of important public needs.

One way to respond to this growing corporate power is for the Federal government to use its own considerable influence as the country's biggest consumer, as has been done to some extent with respect to automobile safety standards. Federal procurement standards can certainly influence corporate priorities. They could also have a bearing on corporate size, and on such problems as runaway industries.

But in any case, considering the whole of our economy, I am not philosophically ready to say that such bigness is either inevitable or acceptable. I do not welcome the trend toward proportionately fewer independent entrepreneurs and proportionately more dependent employees because I think it has a negative impact not only on the goal of a free economy but also on the nature of our polical and social systems.

On the specific points you raised:

(a) There is certainly room for improvement in the area of shareholder rights, including access to information of the kind discussed in an earlier question. At the same time, however, I do not see much of value to be gained by attempts to remake the corporate structure in the image of political democracy, in order to influence its decisions in favor of the public interest. Certainly the public interest should be raised in corporate decisions, and that is one reason for favoring the inclusion of public directors on corporate boards. But we have to recognize, too, that the essential purpose of these institutions, and the reason shareholders invest in them, is to make money. It is probably futile and also unreasonable to expect them to perform the government's role as well. If government offers profits in exchange for the production of napalm, for example, I think it misses the mark to assign the primary blame to the corporation rather than to the government. To cite another case, it is at best a chancy proposition to expect that an industry which pollutes air and water will voluntarily end those practices so long as they are permitted by government. We urgently need government that is more responsive in these areas, and I intend to press for that goal. It is more realistic and more attainable than seeking corporations which are willing to regulate themselves.

(b) It is ludicrous to expect maximum fines of $50,000 to deter crimes which can net millions of dollars. It makes far more sense to deny the violator any benefit than to levy fines of treble damages, or, where appropriate, to impose prison terms on top of economic penalties. The fact that prison terms have been given on only three occasions in the entire history of anti-trust enforcement clearly documents the need for more rigorous application of existing sanctions.

(c) The consolidation of anti-trust law enforcement agencies could accomplish a great deal within the context of existing law. Since the decision as to whether or not to prosecute these cases is so obviously susceptible to political pressures, such decisions should not be made by political appointees serving at the pleasure of the President.

(d) I agree on each point. The Occupational Health and Safety Act has been a severe disappointment thus far from the standpoint of all parties, and it needs both revision and more vigorous implementation. Similarly, existing regulation on rates is exceedingly uneven at best. In many cases it appears that regulatory commissions exist to ratify and legitimatize, rather than to prevent, excessive rates.

(e) This may be appropriate in some areas, particularly in the few instances—such as power generation and transmission—where competition is not a practical alternative, and where the public interest is deeply invalued. I would, however, generally prefer steps to preserve and restore competition where that can be done.

(f) Such appeals should certainly be made, but they cannot effectively substitute for government steps to remove the profitability from or prohibit activities which are contrary to the public interest.

(g) The nation's labor unions have accomplished a great deal in this respect. I am still studying the question of whether it would be appropriate for the Federal government to adopt legislation extending similar rights to that proportion of the work force which is not unionized, and I have not yet reached a conclusion.

With every good wish, I am

Sincerely,

GEORGE MCGOVERN.

U.S. SENATE,
Washington, D.C., January 27, 1972.

Messrs. RALPH NADER and MARK GREEN,
Washington, D.C.

GENTLEMEN: Thank you for your letter of January 14 concerning economic concentration in the United States. I am glad you have raised these issues of paramount importance to our society. I, as well as you, feel that the fundamental question raised by this issue must be faced by our political leadership.

I have been concerned about these issues and my staff has been doing intensive research on them. I intend to speak to these issues in a thoughtful and comprehensive manner during the forthcoming campaign.

I also shall answer your detailed questions in the very near future, as soon as I can give some thought to them.

Sincerely yours,

EDMUND S. MUSKIE,
U.S. Senator.

U.S. SENATE,
Washington, D.C., February 4, 1972.

Messrs. RALPH NADER and MARK GREEN,

GENTLEMEN: I would like to respond to the questions you raised in your letter of January 14 concerning my position on the concentration of industry and on antitrust policy. Because you have asked specific questions, I shall make my response to them as brief and to the point as possible.

As I noted to you in my interim response to your letter, I intend to discuss the question of competition and monopoly in the forthcoming campaign.

In answer to your specific questions:

1. Congress clearly needs to reexamine the antitrust laws in the light of present day realities and revise them as necessary to provide the tools to deal with the problems of economic concentration. Also enforcement of present antitrust laws must be more vigorous and more consistent. I feel that Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act can be used effectively to combat the problem of concentration. I have under study proposals that will address the need of further legislation to deal with the problem of economic concentration.

2. I feel that prevailing antitrust doctrine permits suits against conglomerates as well as the so-called "shared monopolies" or oligopolies. The present action of the FTC against cereal manufacturers is a good example.

3. I agree that corporations should make public, subject to the limitations to which you refer in your question, all of the seven categories of information you list in your third question.

4. I very much favor a new TNEC investigation to focus public attention on the question of economic concentration.

5. If elected President, I would consider supporting a Federal Chartering Act.

You know of my commitment to increased corporate responsibility. The methods you suggest are useful tools toward that end, although public ownership may be appropriate in particular cases, like Comsat, but not in others.

Sincerely,

EDMUND S. MUSKIE,
U.S. Senator.

THE CITY OF NEW YORK,
OFFICE OF THE MAYOR,
New York City, N.Y., March 7, 1972.

Messers RALPH NADER and MARK GREEN,
Washington, D.C.

DEAR MESSERS. NADER AND GREEN: Enclosed is my response to your questionnaire on Corporate Power.

With best wishes.

Sincerely,

JOHN V. LINDSAY.

STATEMENT BY JOHN V. LINDSAY ON CORPORATE POWER AND ECONOMIC CONCENTRATION

During the six years I have served as Mayor of New York City, I have become increasingly aware of the costs of concentrated power in America—public and private. Unchecked private power, no less than arbitrary public power, seriously threatens a free society. The antidote for both involves diffusion of power, disclosure of information needed to make intelligent choices in the public and private marketplace, and access to decision-making by those most directly affected by it.

In the last five years New York City has pursued more vigorously than any government in the nation a campaign to protect the public and the consumer from unfair or unwarranted actions of business.

We have established the first Department of Consumer Affairs in the nation, which has enacted tough regulations to give consumers the information and tools needed to stand on an equal footing with industry. These include strong rules against deceptive advertising, the country's first municipal unit-pricing law to enable consumers to shop comparatively, and an open-dating law to give consumers full information about food freshness.

We have established in that Department an Office of Consumer Advocacy, authorized to bring class actions on behalf of aggrieved consumers.

We have been the first City in the nation to establish a Consumer Protection Division within its Department. We have instituted over 20 anti-trust cases and secured millions of dollars of refunds for consumers, including $37 million from price-fixing drug companies.

We have brought suit against unjustified telephone rate increases and demanded that any such increases be linked to service.

We have established a cabinet-level committee, with full time staff, to monitor the City's public utilities and represent users before regulatory commissions, the first effort of its kind by any city in the nation.

We have brought consumer protection programs to the people through neighborhood offices to assist individual consumers in gaining redress from offending businesses.

We have scrutinized, scaled down, and, in some cases, rejected plans for construction of electric power plants, in order to preserve the quality of New York's environment.

We have cast the shares in New York City's pension fund on behalf of the corporate responsibility proposals submitted by

Campaign GM, the only government in the nation to do so.

Many of the needed reforms of big business, however, are beyond the range of even the most active local government. The growing concentration of economic power has become one of the root problems of the American economy. In industry after industry, the basic decisions that shape our economic lives—decisions on wages, prices, product quality, product safety, and pollution—are made not by the anonymous forces of the marketplace, but by a handful of corporate executives.

Instead of acting as a check on big business, the federal government has too often acted as its silent partner. One by one, steps taken to control private power have been undermined and diluted. The anti-trust laws have never been systematically directed against "shared monopolies." The securities acts of the New Deal have made corporations disclose information needed by investors, but have left vital public questions unanswered. The regulatory agencies have shielded some industries from competition rather than subordinating them to the public interest.

Last year, President Nixon spoke of a "New American Revolution"—which turned out to be no more than a reshuffling of federal bureacracies. The real need is for a declaration of independence—independence of government from corporate domination. It must include the following guarantees:

1. *Corporate Information and Disclosure:* The executives of some of our largest corporations have as much discretionary power over the lives, lungs, and pocketbooks of American citizens as do our Governors. Yet it is often impossible for public officials and private citizens to probe the soundness of those decisions because they are cloaked in secrecy. Corporations should, of course, be permitted to preserve legitimate trade secrets. However, they should be required to disclose information dealing with the public impact of their private decisions.

Specifically, I propose a Corporate Freedom of Information Act which would require an *annual report to the public* with the following information:

1. Profit and loss by product line;

2. An Environmental Impact Statement specifying the amounts and kinds of pollution discharged;

3. Job-related employee health and safety data;

4. Contents of each product as well as the unit price where appropriate (which would also be listed on the product container);

5. Results of product testing;

6. Factual substantiation of advertising claims;

7. Consumer complaints, recognized product hazards, and records of recoveries by consumers in defective product suits.

8. Corporate lobbying expenses and all contracts with government officials involved in decisions affecting the company.

In addition to opening up corporate decision-making to public scrutiny, government decision-making involving the regulation and supervision of business should be taken from behind closed doors. Anti-trust settlements, private rate-making, and the formulation of regulatory policies are particularly susceptible to political interference and should therefore be placed on the public record.

2. *Anti-trust and deconcentration:* The anti-trust laws must be made to apply to the giant "shared monopolies"—great corporations which co-ordinate their prices and thereby extract a premium from the consumer's dollar.

There is considerable support for the proposition that existing anti-trust laws can be effectively employed to proceed against oligopolistic industries. However, to the extent that existing legislation is inadequate, I support new legislation to give the government a clear mandate to proceed against "shared monopolies." I support the recommendations of the Neal Task Force on Anti-Trust, empaneled by President Johnson, that the growth of the handful of mammoth corporations which control some of our most critical industries should be stopped and their power reduced. I subscribe to the basic objectives of the Harris bill.

I also endorse the general approach of the proposals to shift the burden of justification to corporations proposing mergers with significant economic impact. This will provide a useful tool for anti-trust enforcement.

I am not convinced however, that removing enforcement power for structural anti-trust offenses from the Justice Department and the FTC and establishing a new Office of Industrial Organization, will provide substantial benefits. The only guarantee of a vigorous anti-trust policy is a President thoroughly committed to one and a public that is aware of its stake in anti-trust enforcement. An anti-trust President will appoint an anti-trust Attorney-General and ensure an anti-trust Justice Department.

I oppose any effort to broaden the anti-trust exemption for export cartels and, instead, call for repeal of the special provisions allowing such cartels.

The alarming concentration of two particular industries—energy and agriculture—deserve special attention. Oil, gas, coal and atomic fuel ownership is becoming increasingly mingled, under the benevolent gaze of the Federal Power Commission. New legislation may be necessary to divest this common ownership wherever feasible. The entry into agricultural production by giant, non-farm conglomerates threatens the existence of the small and efficient independent farm in America. I support the legislative proposals to prohibit vertical integration into agriculture by large, non-farm corporations and force the divestiture of existing agricultural holdings by these corporations.

The Nader questionaire suggests a new set of national hearings modeled on the TNEC hearings on economic concentration held in the late 1930's. I propose a broader investigation, into the nature and extent of corporate power, not simply within particular industries but in the economy as a whole. The investigation should encompass:

1. The conglomerate merger movement;

2. Economic concentration through vertical and horizontal integration;

3. Economic effects of state and federal regulation in communications, power, oil, agriculture, shipping, ground transportation, airlines, professional regulation, and other fields;

4. Corporate involvement in government decision-making, including the extent of corporate lobbying and expenditures in political campaigns;

5. Tax, subsidy, and tariff concessions enjoyed by corporate interests.

Such hearings should be—as a matter of law—undertaken every ten years.

1. *Regulation and subsidization:* A Senate committee recently estimated that the federal government gives out $63 billion in subsidies every year—a major fraction to narrow business interests. These subsidization policies have often developed without extensive public debate and are often maintained long after their original purpose has been exhausted. As a result, they are often contradictory, dysfunctional, and counter-productive. Oil companies, shipping companies, agri-business corporations, and trucking firms are among those who receive a generous boost from the American taxpayer.

Other regulatory policies have the effect of transferring money directly from the consumers pocketbook to the bank accounts of favored industries. Government-imposed oil import quotas nick every American family for over $100 a year. A government-sponsored price fix for truck transportation raises the cost of virtually everything we buy and use. Airline tickets cost more because the government fences out competition. Telephone charges increase constantly while a basic re-examination of the phone company by government gets bogged down in intra-governmental buck passing.

I propose the following:

The abolition of oil import quotas as recommended by President Nixon's own Task Force and vetoed by the White House.

A thorough and comprehensive review of federal subsidies—direct payment, tax loss, and in-kind services—to determine which are essentially private windfalls and must be abolished or modified.

Elimination of minimum rate regulation and entry controls for all forms of transportation—air and surface.

A strengenthened FCC investigation of ATT rates with the full cooperation of all government agencies.

Tighter regulation of large, national corporations is imperative. Because of their pervasive impact on our lives and their deep involvement in government, they have become, in many cases, essentially "quasi-public" entities. Such regulation—over the social impact of corporate decisions, over the scope of shareholder rights, and over public access to corporate information—can only be accomplished on the federal level. It can be carried out either under the rubric of federal chartering or by special legislation, such as the Corporate Freedom of Information Act, the "shared monopoly" legislation and the other legislative proposals I have suggested. The practicality and value of federal chartering as the method to achieve tighter regulation deserves serious consideration.

Effective Consumer Remedies: As long as the marketplace is an ineffective mechanism for protecting the consumer, new methods must be devised to ensure that he will not be victimized by excessive corporate power. I support:

Legislation to facilitate the initiation of consumer class actions.

A Federal Consumer Protection Agency, with the power to intervene on behalf of consumers before all federal agencies and the ability to bring class actions on behalf of consumers.

The encouragement of public interest advocates by permitting the deductability of contributions to such tax exempt entities and permitting public interest law firms to pursue litigative strategies without endangering their tax exempt status.

HOUSE OF REPRESENTATIVES,
Washington, D.C., February 18, 1972.

Mr. RALPH NADER and Mr. MARK GREEN,
Washington, D.C.

DEAR MESSRS. NADER AND GREEN: I am pleased to respond to your letter of January 14, discussing corporate power and anti-trust policy in America. I am, of course, very familiar with your work in this area and want to take this opportunity to note how great a debt is owed to you by the unemployed, the working man and the consumer of this nation.

My campaign is based on many of the assumptions which your previous work and your letter support. At the heart of my campaign is the conviction that the concentration of economic power and wealth in America is largely responsible for many of the internal social problems we face today, and that the Nixon Administration, so closely allied to and dependent on big business, is either unwilling or unable to act effectively for the public benefit.

My position papers will elaborate on this theme. In the enclosed copy of my economic policy position, I have called for increased corporate income taxes as part of major tax reform. The enclosed position paper on our criminal justice system calls for greater at-

tention to white collar crime including price-fixing, perjury, bribery, and antitrust policy, and the environmental policy paper documents the servile knuckling under of the Nixon Administration on pollution matters. Other position papers on health and consumer affairs will similarly show how great is the influence of big business on all facets of American society and our foreign policy as well. Copies of these papers will be forwarded to you as soon as they are published.

I stand on such a platform with the knowledge that the leading candidates for the Democratic nomination, according to the polls, may well eventually find themselves beholden to wealthy, corporate contributors whose influence could remain considerable during their administrations. I offer my candidacy without the endorsements or support of the rich, feeling myself to speak out candidly and realistically on the key issues.

I address myself to your specific points, which rightly provide for the dispersal of economic power and greater governmental authority to force changes in the structure of our economic institutions.

(1) I support and will vote for Congressman Celler's Corporation Control Act, H.R. 12004. I expect to oppose S. 2754. I most emphatically support Senator Harris' bill, S. 2614, and will work for the deconcentration of large shared monopolists.

(2) No.

(3) Yes.

(4) Yes.

(5) Yes.

(6) I support each and every one of the methods you suggest. May I note that I have doubts about the likely success of our "public enterprises" such as Comsat and Amtrak. The superior performance of the nationalized railroad system in Europe suggests that nationalization be seriously considered for such enterprises here. You have proposed, I believe, that corporate managers be made personally liable for corporate responsibility. To some extent, as you may know, this idea is already in practice in Italy where I understand owners and managers have been jailed for pollution offenses. I feel this proposal has real merit.

May I close with the comment that I am devoting my political career to turning this country around, to reversing its priorities and ending the unfairness, injustice and inequality which permeates our national life. In dedicating yourselves to the same cause, you give me the confidence to believe that this effort can succeed, despite the enormity of the task. I earnestly hope your letter and related activities will encourage more political figures to begin to challenge the political and economic power of the corporate state, and its ability to impose its will on the Nixon Administration and its distorted values on the American people.

Sincerely,

SHIRLEY CHISHOLM,
Member of Congress.

SHIRLEY CHISHOLM SPEAKS OUT

PRESIDENTIAL CAMPAIGN POSITION PAPER NO. 4—THE ECONOMY

The disastrous performance of the economy under the Nixon Administration can be largely understood as the result of the Big-Business orientation of this government and its utter disregard for critical problems of the consumer, the worker, and the unemployed poor. Millions of low-income Americans have deeply suffered from the Nixon Administration's callous handling of the economy. The Nixon recession has, of course, created tragic side effects—increased crime, increased welfare rolls, and widespread despair among the poor and unemployed of America over the moral intentions of this Administration.

More and more Americans now realize how close is the Nixon Administration's alliance with the huge corporate interests of this country. They remember clearly when, six days after his inauguration, President Nixon announced that the government would not intervene in price and wage discussions. They remember very clearly when the Administration calmly admitted that an increase in unemployment in America would be necessary to reduce inflation. The result of this passivity towards the rich, on the one hand, and this incomprehensible coldbloodedness toward the worker and the poor on the other, has been the worst possible economic crisis—virtually complete economic stagnation, increased and continuing inflation, record-high unemployment, the first trade deficit since 1893, a huge balance of payments deficit, a world monetary crisis and forced devaluation of the dollar.

The economic record of this Administration is very clear, and its statistics are appalling for the average American taxpayer. The cost of living in America has risen under this Administration at a rate double that during the previous Administration. Food prices have skyrocketed, the cost of owning a home has soared, medical and hospital costs have shot beyond control. Local transit fees have gone up 18%. Basic commodities such as copper and steel mill products increased in the first year of this Administration to the percentage increase during the entire eight-year period from 1961–8.

Nixon policies have caused the largest increase in unemployment in over a decade, an increase from 3½% to over 6% of the labor force, or 2 million jobless workers. The unemployment rate for construction workers has more than doubled. The unemployment rate for manufacturing employees has almost doubled. The number of workers forced to live on unemployment compensation has doubled. The unemployment rate for Black Americans has climbed to over 10%. Black teenage unemployment is at an intolerable 38%. There is little sign that this aloof Administration has any real concern for the personal impact of unemployment in terms of relatives out of work, or for its social impact in terms of Black and youth unemployment.

While prices have soared and the low-income worker has lost his job, the Nixon Administration's bungling has virtually halted this nation's economic growth. The industrial production index fell steadily during the past 3 years and the real Gross National Product declined. The cost of borrowing has risen at an alarming rate with interest rates soaring to the highest level in 100 years. Housing construction has fallen more than 20%. State and local governments have been unable to borrow for vital public projects, so they have had to close schools or saddle taxpayers with burdensome interest costs.

The Nixon recession represents the fourth major recession of the past 20 years—all having occurred under Republican Administrations. At the root of it all is the unique, privileged relationship which these Administrations have enjoyed with this nation's giant corporate and industrial interests, whose arrogant power has for too long been permitted to control Washington and thus, all our lives. In the time-honored Republican tradition of "what is good for General Motors is good for the country," this Administration refused to act when, at the outset of its first year in office, big business cooly and confidently proceeded to announce huge price increases on a wide range of products. As prices began to rise along the entire economic front, the Administration then began to cut back on government spending in an effort to cool the inflation.

Which were the federal programs to be cut? Federal assistance to libraries and related community services, education centers, aid for handicapped children, bilingual education, community health centers, medical libraries, and health research facilities, assistance to medical schools, and consumer assistance. Jobs in these vital fields were abolished, and people were thrown out of work. The Job Corps Program has been substantially reduced and the Office of Economic Opportunity is being gutted.

At the same time, this Administration energetically pushed those wasteful and enormously expensive programs benefitting its big business constituency—the ABM, SST, the C5A, Lockheed, highway construction, and unjustified subsidies for corporate farms.

By slashing domestic programs, by continuing the 10% income tax surcharge, and by its tight money policy of high interest rates, the Nixon Administration sacrificed the ambitions and energies of millions of low-income Americans, those who could least afford to bear the burden of such a sacrifice.

We had heard much in the 1968 campaign of Nixon promises of jobs and training for Black Americans, and of his "firm" support for "Black Capitalism." One look at the record and at the ghettos of America's cities shows the utter emptiness of those campaign promises. The only action by the Administration to promote "Black Capitalism" was the creation of an office of Minority Business Enterprise in the Commerce Department, an office with no authority to make loans or to fund or supervise programs. One after another of the helpless officials of this program have, not surprisingly, been forced to quit.

With the Nixon Administration having virtually destroyed any hope for improvement in the miserable economic position of the poor and the low-income worker, Congress acted. It passed a law to provide hundreds of thousands of immediate jobs to the unemployed—and the President vetoed it. Congress passed a bill providing Day-Care Centers for children, whose mothers could then join the work force, and the President vetoed it too.

The Administration then turned around and, showing where its real interests lay, acted to give billions of dollars of tax relief to business via the 10% investment credit, on top of its $4 billion a year depreciation "reform." The President killed an effort to limit political campaign contributions by the rich, in full knowledge that he will count on these huge sums to buy his re-election next November. So this incredible story ends—with the chairman of the board of General Motors earning a salary of ¾ of a million dollars in 1971 at the same time that the unemployed in Seattle have so little to eat that Japan feels obligated to ship food to help them survive.

More and more thoughtful Americans, including a growing number of businessmen, have been shocked to learn of the economic inequality and exploitation which are destroying the very fabric of American society. They have come to realize that this is a government of, by, and for big business. The Nixon Cabinet and other top officials in the Administration represent one of the greatest concentrations of individual wealth in the world, and, as such, they predictably resisted for so long the use of the powers of the Presidency in curbing the inflationary pressures that have been destroying the value of the American dollar. This country can no longer stand the Nixon Administration's divisive and incompetent economic policies.

The economic philosophy of the Nixon Administration is based on the principle that the business of America is business. This being the case, the economic reality for the inexperienced and untrained Black man and the poor will be "last to be hired and first to be fired." This is an Administration which ignores the social and psychological costs of its policies to the common man. It is an empty shell, the tool of slick advertising techniques, the prisoner of narrow political allegiances, and the faithful servant of those privileged and selfish economic interests

which systematically block every attempt to narrow the great gap between the rich and the poor in this country.

If this Administration again triumphs at the polls in November, we can expect further abuse of the poor. We may expect new regressive taxes, such as a national sales tax (value added), which will fall on those least able to afford. There will be substantial, new increases in defense spending, new space shuttle, and fat new contracts for the war industry. Those programs tending to eliminate some of the intolerable inequities of our economic system will continue to be vetoed. Funds for an adequate family assistance program will be cut and slashed.

Rebuilding and revitalizing the society after four traumatic years of the Nixon Administration depends more than anything else on meaningful changes in our economic priorities, and this, the Nixon Administration, by its very nature, can never accept. This Administration's values and sense of social relations constitute a fatal obstacle to any hopes for real social and economic progress in America. A government so heavily dependent on a small clique of corporate millionaires, industrial polluters, and privileged power brokers can never be seriously expected to concern itself with the daily problems of the poor, the working man, the unemployed, the black, the young, or the elderly pensioner.

No Administration can be so indissolubly connected to the interests of big business and special interests and still work to eliminate its crisis or credibility and intent among millions of Americans.

I believe that the future of our great society depends upon the ending of government by the conservative, repressive, and selfish. It depends upon the ending of the economic exploitation of the common man, black and white, by those privileged powers which now rule Washington.

My Administration will move emphatically to assist those Americans presently estranged from the American economic system. It will seek representation for those performing vital services, such as domestic workers, while gaining miserable compensation. It will devote itself to the creation of an ultimately more balanced economy and to the final elimination of the intolerable inequality and poverty which we should all be ashamed to admit exists in this, the wealthiest nation in the history of man. Some of the principal means which I support toward these ends are as follows:

1. Ending the billion dollar cost of U.S. military involvement in Indochina;

2. Creation of a Federal Family Assistance Program to replace the present Welfare Program and the Food Stamp Program which is a failure. The initial minimum guaranteed income for a family of four would be $6,400.

3. Tax Reform. The tax proposals of the Nixon Administration have consistently favored business over the low-income consumer. State, local, and city taxes are increasing while the progressive, graduated income tax has been reduced. My Tax Reform Program will reduce unfairness and special privilege in the following ways:

I. (A) Increased individual and corporate income (even a 1% increase would raise $6 billion);

(B) Elimination of the oil depletion allowance;

(C) Elimination of the capital gains tax;

(D) Elimination of regressive federal payroll taxes;

(E) Establishing of excess profits tax;

4. Reductions in Federal spending;

(A) Elimination of the huge federal subsidies paid to rich farmers not to grow crops;

(B) Reduced spending on federal highway construction;

(C) Reduced defense spending, including the closing of unnecessary military installations and the reduction of our troop levels abroad by 50%;

(D) Reduced spending on space programs and cancellation of the space shuttle project;

5. Expansion of job opportunities through creation of useful 500,000 public service jobs, with preference to the 350,000 unemployed veterans. Greater federal assistance for labor manpower training programs. Increased federal programs to put highly skilled unemployed engineers to work in mass transit, air and water pollution control programs; maintenance of some form of wage-price controls, particularly on rents;

6. Federal legislation to guarantee equal opportunities for women in attaining jobs, equal pay, and promotions.

7. Creation of a comprehensive national day-care system to permit more mothers to work.

8. Greater federal support for O.E.O., E.E.O.C., O.M.B.E., and S.B.A.—greater support for minority enterprise and employment.

Shirley Chisholm for President Headquarters, 20 E Street, N.W., Washington, D.C. 20001.

HOUSE OF REPRESENTATIVES,
Washington, D.C., January 24, 1972.

Mr. RALPH NADER,
Washington, D.C.

DEAR RALPH: This is an initial response to your letter of January 14.

I would like to comment more fully in the future, but thought you might get at least a partial idea of my thinking from the enclosed speech I gave at Dartmouth.

Keep up the good work.

Best regards,

PAUL N. MCCLOSKEY, Jr.

REMARKS BY CONGRESSMAN PAUL N. MCCLOSKEY, DARTMOUTH COLLEGE, NOVEMBER 29, 1971

I would like to discuss tonight two or three fundamental issues in the 1972 campaign. The issue is what John Gardner recently referred to as "The Dirty Little Secret That Everyone Knows"—the vast influence of money in politics.

The influence of money in political decision-making is not new—it has been with us since the inception of Democratic self-government. Under the Nixon administration, however, the threat of concentrated wealth, working secretly to influence governmental decision-making, has reached crisis proportions, and threatens the very existence of the nation itself.

Why should this be so? The reason lies in the fact that the faith of our people is the strength of our system of government. It is not just a desired aspect of our national stability and security—it is essential to that national stability and security.

We can never forget that we are a nation which operated by the consent of the governed. Our people must consent to file honest tax returns, consent to give honest judgment in jury cases, consent to serve in the armed services in time of conflict. That consent is and can only be based on faith in government—faith that the government is honest and faith that it is truthful.

What is the present measure of the faith of Americans that their government is honest, truthful and worthy of trust? A recent poll taken by the Center for Political Studies at the University of Michigan reflects specifically the trend which I believe all of us have instinctively sensed in recent years.

Since 1958, the faith and trust of Americans has been diminishing rapidly. During the past seven years, the number of Americans trusting the government to do what is right all or most of the time dropped from 63.7% in 1964 to 37.7% in 1970.

During the same time frame, the question was asked: "Would you say the government is pretty much run by a few big interests looking out for themselves or that it is run for the benefit of all the people?" The percentage of Americans believing the government was run for the benefit of all the people dropped from 63% in 1964 to 41% in 1970. By 1970, the second year of the Nixon administration, nearly half of the people interrogated stated their belief that the government was being run by a few big interests looking out for themselves.

There was ample reason for that belief in 1970. There is even clearer reason today. An increasing concentration of wealth working secretly to support political candidates and to influence government decisions is not only welcomed but encouraged by the Nixon administration. Let me define precisely the three evils which so endanger the nation.

First, the new concentration of wealth primarily in big business;

Second, the new importance of wealth in electoral politics;

Third, the administration's encouragement of secrecy in the application of that wealth in political campaigns and in governmental decision-making.

With respect to the new concentration of wealth, there can be no question. Attorney General Mitchell recognized the problem over two years ago. By June 1969, 200 large corporations controlled nearly 60.7% of the manufacturing assets of the nation. Corporate mergers had more than doubled in the previous year. The Attorney General said in a speech in June 1969, "The danger that this super concentration represents to our . . . political . . . structure cannot be overestimated."

He went on to mention "the unacceptable probability that the nation's manufacturing and financial assets will continue to be concentrated in the hands of fewer and fewer people,"—the very evil that the Sherman Act, the Clayton Act and other antitrust and anti-price-fixing laws were designed to combat.

What did the Attorney General mean when he used the words "danger to our political system" by the concentration of economic power? In effect, he was recognizing the basic fact that the concentration of economic power also meant the concentration of political power.

The whole thrust of our constitutional form of government was to restrain the accumulation of power. James Madison had said "the accumulation of all power, legislative, executive and judicial, in the same hands may justly be pronounced the very definition of tyranny. An accumulation of economic power sufficient to control political decisions can likewise create tyranny.

Senator Kefauver once said: "Through monopolistic mergers the people are losing power to direct their own economic welfare. When they lose the power to direct their economic welfare they also lose the means to direct their political future.

Why, then, has the Nixon administration failed to provide leadership to reduce this increasing concentration of wealth and power?

The answer may lie in the second evil. The influence of big money on the political process. This Administration is the primary beneficiary of the economic power of big business. This is the Administration which has placed primary emphasis on the profits of big business as the goal of our economy—on the theory that those profits will ultimately "trickle down to the public at large."

This Administration resurrected the SST after it had been abandoned by the Johnson Administration, supported the bail-out of the Penn-Central Railroad and urged the granting of a federal loan guarantee to Lockheed under conditions no small business in America could have hoped to obtain.

This administration's chief fund raiser, Maurice Stans, was named Secretary of Commerce. Now, for the next campaign, is reported that he will resign his post in order to again raise funds chiefly from the big businessmen of America.

Who besides big businessmen can afford to attend $500 per plate dinners? The $5 million dollars raised from those nation-wide dinners several weeks ago was raised almost entirely from big businessmen. In Houston, Texas, nearly all of the 400 people in attendance (raising $200,000 for the President's re-election) were reported to be oil men. What does this bode for the hope of ending the oil import quota system as recommended by the President's task force over two years ago?

Three years ago, the Republican party was able to raise twice as much money from businessmen as was the Democratic party from *all* sources. As the administration in power, the Republican leadership is in a beautiful position to cash in on its enthusiasm for big business. A concentration of wealth unaccompanied by campaign spending and contribution reform merely makes it that much easier to raise more money than the opposition. The White House just announced that the President will veto the proposed public financing bill just passed by the Senate. Getting $1.00 from each of 20,000,000 is far less beneficial than getting $20,000,000 from a few thousand corporate executives and oil men, particularly when the opposing party cannot hope to raise equivalent sums.

This administration has not hesitated to respond swiftly and helpfully to those who make large campaign contributions.

Consider the great milk boondoggle of last spring finally disclosed in the newspapers only a few weeks ago.

The government has long had the power to guarantee the price of manufactured milk. Last March that guarantee was $4.66 per hundred weight. The dairy farmer leaders came to Washington to seek an increase. Secretary of Agriculture Hardin denied the increase, finding no evidence to support it.

The dairy farmers, then, ten days later, on March 12, paid $10,000 to four Republican campaign committees. The next day, March 23, the dairy farmer leaders were granted an audience with the President himself at the White House.

The following day, March 24, the dairy farmers paid $25,000 to ten Republican committees for the re-election of the President. Lo and behold, the following day, March 25, Secretary Hardin announced that he would grant a price increase of 27 cents per hundred weight on the basis that "continuing research" had turned up new information on rising costs.

Ten days later, April 5, $45,000 was given to nine additional committees. And by August 20, a total of $170,000 had been given to at least 68 committees, most if not all of them based in Washington, D.C. where a loophole in the law permits them to go unrecorded as to the source and amount.

On September 3, 40,000 dairy farmers met for the biggest and perhaps happiest dinner in the history of Chicago. The President dropped by to pay his respects, and no wonder.

The importance of money to politics can be easily recognized when we look at last year's Senate races in seven large states. Fifteen candidates (New York had three) ran in those seven states. Eleven of the candidates were millionaires, and all seven of the winners were millionaires.

The cost of campaigning has skyrocketed. No candidate for public office today has even the remotest chance of winning unless he has either immense personal wealth or wealthy backers. This is a tragedy for the democratic process. Only 2½% of our people earned over $25,000 per year in 1969. Who, earning less than that sum, can afford more than a few dollars for the candidate of his or her choice? The importance of campaign financing is threatening to subvert the whole process of democracy. The concentration of the wealth necessary to campaign financing threatens to subvert our whole concept of a government of separated powers and to destroy that most priceless asset of all, our faith that our government is *not* controlled by a few big financial interests.

Let me give you one additional example of the *power* of wealth and the power of generous campaign contributions to President Nixon. This example came to light only recently in testimony before my own House subcommittee on Conservation and Natural Resources.

ARMCO Steel was the 69th largest corporation in the United States in 1970. Its corporate officers were reported by the *Washington Star* to have given $14,000 to the Nixon campaign.

ARMCO Steel has also been one of the worst polluters of the Houston ship channel. Its Houston plant for years has been putting nearly a half ton of cyanide per day into the ship channel. Cyanide is one of the most toxic substances known to man.

On December 9, 1970, the EPA filed an action to force a termination of the cyanide discharge after all negotiations with the company had failed.

On September 17, 1971, the federal district judge issued an order requiring that the discharge of cyanide cease forthwith.

On September 28, the President of ARMCO, Mr. C. William Verity, wrote a letter to President Nixon at the White House, asking him to look into the Court's decision. On September 30, Mr. Verity was reported to have commented that Secretary of the Treasury Connally had been contacted and that through his influence, high level consultations were going on at that moment between the Justice Department and the EPA concerning the decision.

On October 4, the Houston Business Journal quoted Verity as saying, "I pray every night for John Connally . . . if I could only have another son, his name would be John Connally Verity. At last there is reality in Washington and it changes the entire outlook for the steel industry and most gratefully ARMCO."

The letter Mr. Verity had sent to the President and the efforts of Mr. Connally were apparently successful, because a few days later on November 4, 1971, the EPA and the Justice Department stipulated to a modification of the Court's judgment of September 17, permitting ARMCO to continue the discharge of cyanide until July 1, 1972.

The seriousness of this set of circumstances lies in the fact that after a lawsuit was in progress, after a judgment was obtained, the posture of the prosecution was relaxed not by the arguments of counsel for ARMCO, communicated to the government attorneys and the court, but by the direct intervention by the steel company president with the President of the United States. This sort of conduct is reprehensible. Any ordinary litigant who sought personally to stop a lawsuit by the Justice Department would be condemned or prosecuted.

Only recently, a Justice Department attorney, Richard Kleindienst, testified against an aide of Senator Fong who had suggested that a large campaign contribution might be forthcoming if a particular prosecution against a constituent would be halted. This aide was convicted.

Since the inception of this country, attempts to interfere with the prosecution of the litigation by the parties themselves have been considered a violation of law and reprehensive. President Nixon is a lawyer. Nevertheless, his personal assistant Peter Flannigan admittedly contacted EPA and the Justice Department after the President received Mr. Verity's letter.

Mr. Flannigan is no stranger to big business. He was also a fund raiser for Mr. Nixon's 1968 campaign as the President of the Barracuda Tanker Corporation, owner of the Liberian flag tanker Sansinena. Under United States law, the tanker was ineligible for U.S. coastal shipping unless a waiver could be granted by the Treasury Department. Being ineligible for such trade, the Sansinena was worth an estimated $4.5 million; if the waiver could be granted, it would be perhaps worth $11 million.

For several years, Mr. Fred Hartley, President of the Union Oil Company, had reportedly been trying to obtain a waiver for the Sansinena. The waiver could be not be granted so long as U.S. tankers were available for the coastal trade. On February 25, 1970, Flannigan's 300 shares of stock in Barracuda were sold to others in the Barracuda venture. On March 2, the Treasury granted an unusually broad waiver for the ship, on the ground that the national security required it.

Senator Joseph Tydings disclosed these facts in a speech to the Senate on March 9th, stating that by a stroke of the pen, the government had made $6.5 million for Barracuda. My own Committee on Merchant Marine & Fisheries prepared to hold a Congressional inquiry on the subject, whereupon the White House called Treasury officials to the White House on the evening of March 9. The next day, Secretary of the Treasury David Kennedy announced that the waiver would be cancelled. The national security apparently no longer required the Sansinena for the coastal shipping of oil.

These examples merely illustrate the power of wealth applied to the governmental decision-making process.

By far the worst evil we face today is the secrecy of large financial contributions which are permitted by loopholes in the law. The Corrupt Practices Act passed in 1925 purports to limit both campaign contributions and spending. Yet, when I commenced this campaign for President, I found that the law has loopholes that a truck could be driven through. The law does not apply to primaries, for example. As mentioned earlier, it does not apply to committees based in Washington, D.C. One wealthy individual can give millions of dollars if he wishes, merely by limiting his gifts to a $5,000 contribution to separate committees. To receive the $170,000 kindness of the milk producers, for example, the Republican National Committee merely set up a whole series of Washington committees, with names like "The Committee for the American Dream," or "Committee for Sound Econoy." But for the error of the attorney who thought the law applied, we might never have had the chronological relationship between the campaign contributions to the President and the Administration's change of heart on milk prices.

A funny occurrence in Chicago was disclosed recently. Vice President Agnew attended a $1,000 per plate dinner in Chicago in 1968. False listings of campaign contributors of at least $22,000 were then filed with the Clerk of the House of Representatives. Let me quote from the report of James R. Polk, a former Associated Press reporter who investigated 1968 campaign spending under a grant from the Fund For Investigative Journalism:

"Eighteen donors listed for $22,000 in the Victory '68 record confirmed in interviews that they didn't give the money. Bunched among the false listings were names of a dozen more persons who refused to answer questions, didn't remember, couldn't be found, or died."

Who *did* give the $22,000 in question remains a mystery. Chances are that they were big businessmen of considerable wealth.

The examples of secrecy in campaign contributions are legion. Within six months of my own first election to Congress in 1967, lobbyists from three large industries or associations of industries dropped by my Congressional office to pay their respects and leave me an envelope filled with five or ten $100 bills. Being new to the business, I politely inquired of each one as to the names and addresses of the donors—the gift bearer

in each case indicated that the names would be furnished later, and in due course I received a list of names of people from Omaha to Baton Rouge who had each given me $100. I had the distinct impression my inquiry was not the usual practice.

In 1968, 181 Members of Congress filed statements that they had received *no* contributions and had spent no money on their campaign. Committees had done it for them.

The evil lies not in the gift, but in its secrecy.

I raise this issue tonight because the President has made it clear that he intends to veto the public campaign financing bill just passed by the Senate as he did the spending limitation bill a year ago. And only a few days ago his Congressional Liaison representative dropped by the Republican cloakroom in the House of Representatives to let it be known that the White House would not be unhappy if the campaign reform legislation now before the House is killed altogether this year.

This is a key issue to the future of America and the restoration of both the honesty and openness of government as well as public faith in government.

The answers are relatively simple. We need a new law which absolutely limits individual contributions, which provides a tax write-off for small contributions, which reasonably limits expenditures in the various media, which grants a reasonable chance for equal debate time to all candidates at the lowest available rates, and above all else requires complete disclosure of contributions and adequate enforcement powers and procedures. Many of these provisions are included in the Senate bill which the President has said he will veto and in the legislation now before Congress. As compared with the present system of secrecy and corruption, I strongly favor the Senate bill. If the President continues to oppose campaign contribution disclosure and reform, I believe he should be defeated on that basis alone in the March 7th primary. I hope, for the good of the country, he will withdraw his opposition.

OFFICE OF THE MAYOR,
Los Angeles, Calif., February 4, 1972.

Messrs. RALPH NADER AND MARK GREEN,
Washington, D.C.

GENTLEMEN: I welcome the opportunity you have given me to comment on the very important issue of corporate power and antitrust policy. Before responding to the specific issues raised by you in your letter of January 14, 1972, I would like to point out that our free enterprise system is one of the primary reasons that this country is so great. We must work hard to maintain our free enterprise system and instruct our children in its many merits and its relationship to our personal freedoms and liberties. We all have a stake in maintaining the free enterprise system and must not abuse it as is being done by the present administration which is using our credit rating based upon the productivity of our economy to borrow excessively thus producing unprecedented federal deficits and debt increases.

I favor competition as necessary to the survival and proper functioning of the free enterprise system and for the protection of the nation's consumers. I am not anti-business, large or small, but big power is subject to big abuse making necessary government intervention on behalf of the consumer-citizen. The "cue" or "follow the leader" system is obviously used by some to evade anti-price fixing statutes. When detected, this practice must be dealt with promptly. Also, when management representing a monopoly bargains with a monopolistic Union, the consumer can be the victim of unfair prices, especially where foreign competition is not a factor in pricing policies.

Now, as to the specific issues raised by you:

I favor vigorous enforcement of existing laws against monopolistic practices without fear or favor. I also favor legislation to insure competition, thus strengthening our free enterprise system and giving reasonable protection to the consumer.

As regards corporate secrecy, I feel that corporations should be required to disclose most of the information you mention. Reporting of such things as profit and loss by product line, pollution emissions by plant facilities, and documentation of consumer complaints, appear to be reasonable requirements. However, I do not feel that we should so burden industry with disclosure requirements as to unreasonably hinder their operations and raise the costs of production which would then have to be passed on to the consumer. These matters should be based on reason and not emotion.

Your suggestion that a new investigation be made similar to that conducted by the (TNEC) to probe and publicize economic Temporary National Economic Committee concentration in America may have some merit. You will recall that the original TNEC was formed by Congressional resolution prior to World War II (1938) to study the monopoly and the concentration of economic power in the United States. This Committee published some important monographs and had its effect on the American Economic System. Before another such a committee is formed, however, we should make a determination that existing agencies cannot and are not adequately performing this function. Also, I would not want to see this type of activity degenerate into a "witch hunt" as is too often the case.

If I were elected President, I would definitely consider supporting a Federal Chartering Act requiring large corporations doing interstate business to secure their corporate charters from the federal government, rather than from the individual states as they now do. This would go a long way in securing needed conformity in reporting and accountability, and corporations would no longer find it possible to easily "escape" these requirements by obtaining their charters in one state as opposed to another.

Many of my general views regarding problems and solutions to corporate power and monopoly are outlined above. However, here again I feel that we must proceed in a reasonable manner. I cannot quarrel with many of the methods you propose for achieving corporate accountability but I do feel that as much as possible we should attempt to get voluntary compliance from industry on these matters. When that fails, of course, we must go to the courts. I do not believe in harassment of business or exaggeration of faults.

Thank you for this opportunity to express some of my views on this subject.

Very truly yours,

SAM YORTY,
Mayor.

WASHINGTON, D.C.,
January 24, 1972.

Mr. RALPH NADER,
Washington, D.C.

DEAR RALPH: I have received your letter of the 14th including the questionnaire.

I am glad that you are raising this question. The corporation has been a matter of concern to me in public speeches since at least 1960 when I began to talk about its arbitrary power and to use the term *corporate feudalism* as descriptive of the institutionalization and the economic and political independence of the large corporations.

I have watched for 20 years the evidence of the ineffectiveness of our anti-trust laws. Whereas I do not despair of their having some effect, I am not very encouraged and am of the opinion that more direct regulation of the large corporations that are non competitive, and also of the large ones which have the appearance of competition such as the automobile industry, is the only available effective way of proceeding. I am not convinced that having 20 automobile companies rather than four major ones would move us any closer to the solution of the problem of the automobile.

On most of the issues you have raised, I have been making the record clear for 20 years.

I do think we should move toward federal chartering of corporations.

I am in favor of more corporate democracy and regulation in all critical areas, and possibly a public member on the board of corporations above a determined size.

With best wishes.

Sincerely yours,

EUGENE J. MCCARTHY.

THE WALLACE CAMPAIGN,
Montgomery, Ala., March 6, 1972.

Mr. MARK GREEN,
Washington, D.C.

DEAR MARK: Due to our extremely heavy mail load, we received your letter only this morning. Unfortunately, the Governor has been on a tour in Florida and we would not have been able to get to him by your deadline, anyway. Unlike other candidates, Governor Wallace answers these type questions himself. He does not allow anyone else to speak for him. He feels this is the only honest way to answer questions.

Please keep in touch with us and call us anytime.

We certainly appreciate your interest.

Very truly yours,

JOE AZBELL,
Director of Communications.

OKLAHOMANS GIVE THEIR VIEWS

Mr. BELLMON. Mr. President, periodically Oklahomans are invited to give their opinions on various matters of public interest. Recently our office distributed a questionnaire dealing with three major issues before the Senate this year: welfare reform, revenue sharing, and deficit spending.

Mr. President, I ask unanimous consent that the questionnaire, with results shown in percentages, be printed in the RECORD.

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

QUESTIONNAIRE

1. *Welfare Reform:*

Please indicate by a check which of the following you favor:

6% Guaranteed annual income for poor people.

32% System that would encourage a welfare recipient to take a job without losing benefits.

84% Requiring able-bodied welfare recipients below 65 to register for a job or training and take a job when one is offered.

43% If no jobs are available, create public works jobs.

6% Stop welfare entirely and let people go hungry if they can't or won't work.

2. *Revenue Sharing:*

Each year the federal government returns large amounts of money to state and local governments in the form of special aid programs. Proponents of revenue sharing say that under the present system the decisions on where this money goes are made by federal bureaucrats who do not have to stand for election and sometimes tend to become dictatorial. They favor returning a portion of federally-collected tax revenues directly to state and local officials with no strings attached. One big argument is whether the money should go directly to mayors and other local officials or to the state government to be divided.

Do you favor the general concept of revenue sharing? 43% Yes, 35% No.

Do you prefer the present system of Federal grants for hospitals, highways, education and crime control? 53% Yes; 31% No.

Which level of government do you have the most confidence in? 19% City; 17% County, 30% State, 33% Federal, 4% None.

Would you prefer that any new Federal funds go to the state government, (42%); county government, (16%); or city government, (25%).

If the state government had the responsibility of allocating funds to local units of government, who should make the decision? 9% Governor, 82% Legislature.

3. *Deficit Spending:*

President Nixon's new budget contains a deficit estimated at nearly $38.8 billion, the 17th deficit in 20 years. Do you favor deficit spending? 9% Yes, 86% No.

To cut the size of the federal deficit, would you raise taxes (6%); or reduce spending, (89%).

If you favor raising taxes, which ones would you raise? 11% Income, 3% Property, 16% Gasoline, Liquor-tobacco 14%, None 9%.

Do you favor a federal added-value tax, with funds going to support local schools in lieu of property taxes? 28% Yes, 53% No.

If you favor reducing expenditures, where would you cut? 10% National Defense, 85% Foreign Aid, 44% Space Research, 12% Agriculture, 4% Natural Resources, 9% Highways and Airports, 38% Community Development and Housing, 9% Education and Manpower, 5% Health, 58% Welfare, 9% Veterans Benefits.

SOME NEWS ABOUT OUR PERFECT NUCLEAR SAFETY RECORD

Mr. GRAVEL. Mr. President, although there has not yet been a disastrous nuclear power accident in this country, there have been some close calls, like the Fermi accident in 1966, and numerous operating fiascos which indicate how lucky we have been.

The AEC's regular reports, called "Reactor Operating Experiences" or ROE, describe blunders and problems which would be comic except that some day these problems may result in a nuclear accident which renders several States of this Nation uninhabitable.

LEAVING IT TO THE EXPERTS

Five ROE examples typify the mechanical and human defects:

ROE 69–9 concludes as follows:

> In the recent past, there have been a number of occurrences at reactors where human error resulted in undesirable situations. None of these situations represented a threat to the health and safety of the public. The absence of more serious effects is largely the result of good luck.

From ROE 69–10 we learn that, during a routine check at a power reactor, abnormal radioactivity was observed in the building water distribution. The presence of radioactivity was confirmed in the plant drinking fountains. The contamination was found to have arisen from an inappropriate cross-connect between a 3,000-gallon radioactive waste tank and the water system. The report concludes:

> The coupling of a contaminated system with a potable water system is considered poor practice in general.

From ROE 71–22 we learn that 63 out of 191 containment isolation valves failed to operate when tested at one nuclear powerplant; their failure apparently resulted from rust, oil, and water, present due to lack of preventive maintenance.

ROE 69–8 reports that:

> Within the past two years at licensed reactors, a number of instances have occurred wherein important valves failed to operate properly.

In one case, an entire core spray system was found inoperative because check valves had been jammed during assembly. The system, which is a critical component when the reactor is in trouble, may have been inoperative for a year before discovery.

The implications of ROE 71–3 may be the worst of all, for, during low-power operation of a large nuclear plant, safety rods failed to respond to a reactor SCRAM, or shutdown. A number of safety elements, in redundant array, were simultaneuosly disabled by an accidental arrangement of components. Periodic maintenance procedures were incapable of detecting the problem.

Such reports cast a new light on promotional claims about nuclear safety, and also on a question which may come to a vote here in the next few days:

Should Congress amend the Atomic Energy Act to allow nuclear powerplants to start operation before the regular licensing procedures are complete? Or should Congress instead declare a moratorium on nuclear power construction and operation until fundamental safety problems have been resolved?

Members of Congress, nuclear investors, the board members of every electric utility in the country, the Office of Emergency Preparedness, the Department of Defense, and the general public, should become familiar with the AEC's Reactor Operating Experience reports.

Fortunately, a compilation of very recent reactor operating experiences was made in January 1972, by Dr. Henry W. Kendall, who is a high-energy physicist at MIT and a leading member of the Union of Concerned Scientists.

PAPERS PLACED IN THE RECORD

Mr. President, I ask unanimous consent to have his report, entitled "Reactor Accidents: Some Recent Experiences," printed at the end of my remarks, as well as excerpts from a report entitled "Dresden II Incident of June 5, 1970," which appeared in the AEC's journal Nuclear Safety, September–October 1971.

The events described in these papers are fully understandable, even when the technical terms are unfamiliar.

We discover, in the case of the Dresden II incident, that a huge reactor was out of control for 2 hours after one meter gave a false signal and another monitor got its pen stuck. Once control was regained, the plant had to be put out of operation for repairs.

During the accident, radioactive iodine had been released from the nuclear reactor into the drywell area of the containment, and was measured at 100 times above the permissible concentration.

Fortunately, the public was not exposed to radiation, but as Dr. Kendall points out, the Dresden II accident demonstrates vividly how design flaws, sequential instrument and equipment failures, and human errors, can "chain together" to prolong and amplify the severity of what initially may be a relatively minor incident.

THE ODDS ON IMPOSSIBLE ACCIDENTS

Furthermore, the Dresden II accident should warn us to ignore calculations which purport to show that the chance of a severe nuclear accident is negligible. The calculated probability for the accident which actually did happen at Dresden II would have been so low as to be called negligible or even impossible.

Because of this accident and the repairs it required, some other defects were discovered in the plant. For instance, it was learned that the sequence and starting-times of the Emergency Core Cooling System components were not according to design during the incident, though their actual use was, fortunately, not required.

PROOF OF FALLIBILITY

Anyone who reads these Reactor Operating Experiences will realize what arrogance we suffer from nuclear promoters who claim they can foresee and engineer around all hazardous contingencies.

One of the outstanding admissions about the Dresden II accident was that insufficient thought had been given to the dangers of high-water-level situations; all the attention had been on low-water-level situations.

ON BECOMING HUMAN GUINEA PIGS

I hope that Members of Congress will give serious attention to a moratorium on nuclear power plant operation, as proposed in S. 3223, when they ponder the implications of the closing comment about the Dresden accident, which I quote from the journal Nuclear Safety:

> It is unfortunate that procedural, mechanical, and control inadequacies can be recognized only upon the occurrence of some incident that puts them to a real test. The Dresden Two installation, its procedures, and its operating staff have benefited substantially, in the long run, from having suffered and recovered from this particular incident."

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

REACTOR ACCIDENTS: SOME RECENT EXPERIENCES BY HENRY W. KENDALL, JANUARY 1972

(The Union of Concerned Scientists, Box 289, MIT Station, Cambridge, Mass. 02139)

I. INTRODUCTION

Evaluating probabilities of having reactor accidents of varying degrees of severity is very difficult. This is a consequence both of lack of a data base of sufficient size, and of the uncertainties associated with making estimates of the likely paths by which accidents can occur.

The following abstracts have been assembled from the AEC publication *Reactor Operating Experiences*, with critical comments added. They are extremely revealing—especially with regard to the frequent divergences between the way things are supposed to go and the way they frequently do go. Several of the incidents might well have developed into far more damaging accidents. Notice that two of them resulted in partial or complete uncovering of a reactor core.

It is clear from these reports that the potential for the development of a major accident on a number of instances has been very great. One particularly disquieting accident and its recent sequela are discussed at considerable length in the last abstract.

The a priori probability of this kind and sequence of events occurring at all, computed by conventional estimation procedure, is so small as to be utterly negligible by any standard. Yet the incident occurred and it was an ominous indication of what may reoccur. No better emphasis of the need for the utmost diligence in assuring reactor safety can be found than in reports of this kind.

II. EXTRACTS FROM REACTOR OPERATING EXPERIENCES (R.O.E.)

ROE 71–3.—During low power operation of a large reactor, the safety rods failed to respond to a reactor SCRAM. A number of safety elements, in redundant array, were *simultaneously* disabled by an accidental arrangement of components. Periodic maintenance procedures were *incapable* of detecting the error in the arrangement.

ROE 71–2.—A malfunction in a hydraulic control valve in a main steam bypass valve system of a BWR led to *uncovering of the reactor core.* This, combined with an excess hydraulic pressure (the consequence of a relief valve set at 4800 psi rather than 3000 psi) caused the transient, during which reactor pressure varied from 1280 to 200 psig. It was fortunate the reactor had been operated at low power for only 28 hours, following a 7-month shutdown, otherwise, there would have been risk of severe accident.

ROE 69–20.—A power outage in a small reactor initiated substantial leakage of the reactor pool water. The report concluded that "This occurrence demonstrates again that an unlikely sequence of events can lead to a potentially serious problem".

ROE 69–10.—During a routine check at a power reactor, abnormal radioactivity was observed in the building water distribution. The presence of radioactivity was confirmed in the plant drinking fountains. The contamination was found to have arisen from an inappropriate cross connect between a 3000 gallon radioactive waste tank and the water system. The report concludes that "The coupling of a contaminated system with a potable water system is considered poor practice in general".

ROE 69–9.—In a discussion of a number of reactor operating errors, the report concludes: "In the recent past, there have been a number of occurrences at reactors where human error resulted in undesirable situations. None of these situations represented a threat to the health and safety of the public. The absence of more serious effects is largely the result of good luck."

ROE 69–8.—"Within the past two years at licensed reactors, a number of instances have occurred wherein important valves failed to operate properly". In one case a core spray test was carried out during reactor shutdown. The entire core spray was inoperative owing to check valves that had been jammed during assembly. It appeared possible that the valves had not been operative for one year. This spray system is a critical component for reactor safety.

ROE 69–4.—"Safe operation of plant compromised". ". . . human error, displayed by non-adherence to established plant procedures and failure to promptly recognize abnormal plant conditions, resulted in the deborating portion of the occurrence".

ROE 69–2.—"When SCRAM occurred, the reactor operator on duty erred in his assessment of the cause and also in his failure to notify a senior operator of the event (a beam port moderator failure) before attempting to return to full power. Because of previous problems with the servo system, other operators at this facility stated that they, too, would have attributed the SCRAM to a failure in the power control servo. A sticking recorder-pen in the power channel was another fairly common cause of previously unplanned shutdowns. It is apparent that operations permitted by management over extended periods of time with instrumentation exhibiting obvious deficiencies led to complacency on the part of the operators and to possible misinterpretation of information as evidenced. Reliable instrumentation would eliminate this type of fallacy".

ROE 17–3.—Malfunctions of motor-operated valves have occurred recently at several power reactor facilities. These malfunctions were attributed to mechanical or electrical faults or maladjustments of the valve motor-operators. *These valves were located in emergency cooling systems.*

1. Motor-operated valve did not close completely. The cause of the operational failure was not evident during the previous routine witnessing of the operation of the valve. . . . A similar failure had occurred earlier.

2. A valve used in both the feedwater and safety injection systems failed. Investigation revealed that no down-limit switches had been provided for the valves, and a torque-switch failure resulted in searing of the 2½" diameter valve stem.

3. Following a complete loss of off-site power and a reactor SCRAM (with main steam line isolation) at a BWR facility, the motor-operated valve in the condensate return line on the emergency condenser (reactor isolation heat sink) failed to operate as required. Later investigation revealed a tripped thermal overload that prevented operation, a malfunction not immediately evident to the control room operators. The cause of failure of the motor-operated valve (which caused the trip out) could not be determined.

ROE 71–72.—Rupture of Main Steam Safety Valve Pipe Nozzle . . . during hot functional testing of a new PWR. A six-inch diameter pipe nozzle welded to a 26-inch O.D. main steam pipe spool piece, *failed completely.* No nuclear core was in place in the reactor. The extremely loud noise produced by escaping steam rendered communications by the plant intercom system ineffective, and plant operators reported in person to the control room for instructions.

At the time of this report, the cause of the failure had not been determined by post-incident investigation. The stress analysis performed for the failed valve nozzle indicated that the *sum* of *known stresses* was significantly *less* than the yield strength and ultimate strengths of the failed nozzle material. ". . . it appears that the inlet nozzle may have been marginally designed for a full discharge load condition." . . . "The 12 main steam-line safety-valve inlet nozzles were redesigned to provide for a conservative design. . .".

ROE 71–7.—Investigation showed numerous cracks on the inner surface of a 24-inch diameter main reactor coolant line, resulting from thermal fatigue. The cracks were from ¼-inch to 1⅜-inch long and up to a maximum depth of ¼-inch.

ROE 71–8.—During normal testing at an operating BWR, one of two emergency cosdenser condensate valves did not open. The valve operator-motor was repaired to eliminate overheating. Four months later it failed again, requiring extensive repairs. After three months more of operation, it failed a third time.

ROE 71–18.—During routine testing of the standby gas treatment system at a BWR facility prior to initial criticality, *the inlet valve to one of two filter trains did not open.* The malfunction resulted from the presence of an extraneous piece of teflon tape and improper adjustment. Testing later established that operation of valves *on both trains* proceeded too slowly. The potential significance of these deficiencies is that in certain kinds of accidents, it is essential that the valves operate within specified time limits in order to prevent (radioactive) gas from reaching the building housing the system.

ROE 71–22.—Numerous pneumatically—operated *Containment Isolation Valves failed to function properly* during a routine containment isolation test conducted at a PWR facility. It was determined that *water, oil,* and *rust* contamination of the air supply for the air-operated components was the principal reason for the failures. A protracted outage of the facility along with a *lack of preventive maintenance* apparently contributed to the multiple failures. Sixty-three of 191 valves failed to operate on test.

(Abstracted from Nuclear Safety Nov.–Dec. 1971).—Two reactor SCRAMS at a BWR two days apart occurred. The first was initiated by low reactor-vessel water level caused by insufficient feedwater flow. The second occurred when a malfunction closed the turbine control valves. Vessel pressure then exceeded normal from abnormal (sluggish) functioning of part of steam pressure control. Coolant void collapse *increased reactivity* of reactor and caused high-flux monitor SCRAM.

III. Partial Blowdown Accident at Dresden 2

The AEC series of documents describing reactor accidents entitled *Reactor Operating Experiences* contains one description of a pressure control system malfunction in a large reactor that resulted in partial blowdown of the primary coolant system and overpressure of the containment. The accident is strikingly revealing of the manner in which design flaws, sequential instrumental and equipment failures, and defective reactor operating procedures can chain together to prolong and amplify the severity of what initially may be a relatively minor incident.

In order to clarify the sequence of events, we have inserted parenthetical remarks that include, *inter alia,* some of the post-accident analysis, both from the AEC documents and from a discussion of the accident in *Nuclear Safety.*

The accident occurred in the second generation Boiling Water Reactor, Dresden 2, on June 5, 1970. A similar accident occurred at Dresden III on December 8, 1971. It is described in a preliminary way.

1. A spurious signal in the reactor pressure-control system initiated events.

(This was later found to have originated in a defective wire-wound potentiometer).

2. The spurious signal caused the turbine control valves to open, which in turn caused the steam bypass valve to the main condenser to open.

3. These events in turn initiated a turbine trip-out, which in its turn initiated a reactor SCRAM.

4. The collapse of steam bubbles (void collapse) gave an initial reactor water level drop. This drop automatically initiated an increase in the feedwater system rate.

(Except for the spurious signal, all of this sequence of events was correctly initiated).

5. Immediately both feedwater pumps tripped-off, from too-low suction pressure warning signal.

(It was found later that levels were improperly set, and, post-accident, the trip levels were re-assigned.)

6. One feedwater pump restarted automatically. With this pump operating, and as a result of system depressurization from the open bypass lines, the reactor water-level began rising rapidly.

7. The spurious signal now apparently disappeared, and so the reactor pressure decrease was able to initiate closure of the bypass valves.

8. The reactor water-level again started to decrease rapidly, from void collapse augmented by the injection of subcooled feedwater. The depressurization had greatly lowered the main steam line pressure, so that a low-pressure sensor activated to close the main steam isolation valves. The reactor vessel water level at the time was varying over a wide range.

(The closure was a trip-out, and the valves *stayed closed,* so as later to prevent a necessary pressure reduction).

9. The reactor water-level now started to

rise, as before, fed by the automatic operation of the one feedwater pump able to function.

10. The water level recorder stuck at the *low-level* position.

11. The reactor operator reacting to this false low-level indication, switched feed pumps to *manual control* and *maximum flow*.

(Other, adjacent gauges gave correct high-level readings. They were disregarded by the operator. Post-accident procedure changes were made to *prevent* feedwater flow when the level was high. The real difficulties started with the reading of the recorder with the stuck pen).

12. The actual water level rose, flooding the isolation steam condenser and the main steam lines.

13. After ½ minute, the operator tapped recorder case and recorder came unstuck. Operator set feedwater flow at *minimum*. The flow should have gone to zero but did not owing to *valve leakage*. During this time the reactor pressure had dropped to 775 psi and then started to rise again.

14. The operator tried to reduce this potentially hazardous rise by three means:

1. Actuating the isolation condenser.

(This failed to go into service. Moreover, the fact that it was not operating was not discovered for some minutes. It was discovered later to have been deactivated by the high-flow signal from the flooded lines. The flow trip-level for these lines had been set too low by an erroneous technical specification requirement.)

2. Reopening the main steam isolation valves.

(These failed to open as they were not reset from an earlier low-pressure trip-out).

3. Opening electromagnetic relief valves.

(These opened).

15. The reactor pressure dropped rapidly from 1050 psi to 960 psi, and the operator closed the valves.

16. The reactor pressure rose rapidly as soon as valve closed, (as a result of core decay heat, and water-level rise from feedwater injection).

17. The pressure rise became a pressure *surge* in the main steam line. The surge opened one safety valve.

(After the accident it was estimated that a *water hammer* developed in the line because of the presence of water in the steam lines).

(The discharge fluid from this open valve impinged on the lifting levers of two safety valves, cocking them both open. A design mistake made this error possible. These valves remained open throughout the full depressurization and cooldown that followed. The condition was not recognized during the remainder of events).

18. The operator opened another electromagnetic relief valve, causing rapid depressurization.

19. The operator closed the valve, and the pressure started rising rapidly as feedwater flow exceeded the loss through the safety valves.

20. The operator opened the relief valve again, and the pressure rise stopped.

21. The deactivation of the isolation condenser was corrected, and the unit brought into service. Pressure now slowly decreased.

22. Twenty minutes after the initial spurious signal, the reactor water-level was approximately constant with a slow pressure decrease owing to the undiscovered leaks from the partially opened safety valves. The area of concern now became the reactor containment. The primary containment-vessel pressure was increasing.

23. At 2 psi a pressure signal initiated the Emergency Core Cooling System: the reactor building ventilation system was isolated, standby diesel power started, standby gas treatment system was initiated.

(The high pressure emergency coolant system was not available: it had been shut down for repairs following earlier damage. Even if it had been available, it would not have functioned owing to high water-level trip out.

(The low-pressure cooling injection was inhibited, as reactor pressure was above 350 psi level for automatic lock-out.)

24. The operator manually locked out the low-pressure cooling injection system as the reactor pressure decreased below 350 psi. The containment pressure continued to rise above 5 psi. Pressure information became unavailable.

(Procedures called for initiation of containment sprays in order to reduce containment pressure when pressure exceeded 2 psi. The operators were unable to determine the containment pressure, however, for the only pressure gauge in service was off-scale on its 5 psi range. The operators were unable to determine the cause of the accident from the information available to them at the time. In spite of this the operating staff decided, in violation of procedures, not to employ containment sprays. Two licensed senior reactor engineers concurred in this decision. In retrospect, it was determined that this decision was not warranted in view of lack of available information on conditions of leakage, temperature, pressure, and radioactivity within the containment).

25. Thirty minutes after the spurious signal, the operators decided to vent the containment, and so the drywell was valved open to the standby gas treatment system. The highest drywell temperature measured was 205°F but the recorder then ran out of paper and subsequent temperature history was lost.

(Both the pressure and temperature of the containment exceeded the design values appropriate for the use of the gas treatment system. The gas treatment system was designed to operate at near atmospheric pressure and was tested only to 1.5 psig. It was later determined that the drywell peaked at 20 psig and 320°F. The temperature could have reached 340° F. The design temperature was 281°F).

26. Eighty minutes after the spurious signal, the operators bypassed the isolation signal from drywell overpressure in order to use drywell coolers and to allow the use of the drain sump-pump to clear the drywell into the radwaste system.

(This action was forbidden *both* by the technical specifications of the AEC Operating License and by applicable plant procedures when drywell pressure exceeded 2 psig. Two licensed engineers concurred in this decision to negate the isolation signal. At this time the containment pressure was still off-scale on the single available gauge).

27. Finally, the "incident" was brought under control, so that, two hours after the spurious signal the drywell pressure fell below 2.2 psig.

Comments.

The comments in quotes are taken from *Nuclear Safety* Vol 12, no 5 Sept, Oct., 1971.

"A review of events indicated that existing procedures were not altogether adequate".

"Much emphasis had been placed on the dangers of allowing the pressure-vessel water level to fall below the top of the fuel, but not enough emphasis was given to the dangers of high-water-level situations. Both the normal and emergency operations procedures were to be reviewed and revised. . . ."

Electric cables were damaged and electric motors developed low resistance problems.

Recovery included replacing some electric cables with improved cables having higher temperature ratings, rerouting other electric cables, drying electric motors, reorienting the discharge direction of safety valves, revising the reactor pressure control system, improving the capability of the isolation condenser, and revising operating and emergency procedures.

The failures of the electrical cables occurred at temperatures as low as 220° F. Some of the types of cable failure had been enhanced by earlier handling abuse, twisting, and crowding in ducts.

During the shutdown repairs, it was discovered that the sequence and starting times of the emergency—core-cooling-system—components were not according to design during the incident, although their actual use was not required.

Release of radioactivity from the reactor core occurred. Samples taken in the dry well indicated about 100 times the permissible concentration of I–131 on June 5 and 82 times on June 6.

It was necessary to increase the gas flow through the standby gas treatment system in order to make the radioiodine concentration decrease rapidly enough. Personnel were able to enter the drywell on June 7.

No member of the general public was exposed to radioactivity. Although the existence of fuel damage from the accident was denied by the reactor owners, the plant was refueled after the accident. It had been refueled two months prior to the accident. No report on the condition of the fuel was made public. It is difficult to understand the radioactivity release in the absence of fuel damage.

This accident displayed an incredible level of irresponsibility and incompetence.

One should recognize that such an unexpected combination of poor design, inadequate maintenance, and defective operating procedures can, in unfortunate circumstances, inject radioactivity into the atmosphere in amounts that can be lethal at dozens, if not close to 100 miles.

Extraordinary efforts have to be made to prevent such an event from occurring, and it is abundantly clear that they have not been made.

IV. THE SECOND PARTIAL BLOWDOWN ACCIDENT AT DRESDEN III

On 8 December 1971 an accident occurred in the Dresden III nuclear power reactor which resulted in a primary containment pressure of 20 psig. Only very scanty information is available.

The accident was initiated by a condensate booster pump trip. This caused loss of the feedwater pumps on low suction pressure. Resulting lowering of the reactor water-level initiated reactor SCRAM. Approximately 50 seconds after the SCRAM, the main steam isolation valves closed on low steam-line pressure. As a consequence of the closure of these valves, the reactor-vessel water-level rose rapidly under control of the feedwater control system and reached the level of the steam lines.

Five minutes after the start of the accident, the primary containment pressure reached 2 psig. This event apparently initiated operation of some of the Emergency Core Cooling Systems. Containment pressure continued to rise to a maximum of 20 psig, then dropped. Torus sprays were placed in service to assist in containment heat removal. Five and three-quarters hours after the start of the accident, the containment pressure was still 3.8 psig.

Union of Concerned Scientists comment

This accident was evidently moving along the same path as the accident of the sister plant Dresden II—the feed-water pump trip-offs, main steam isolation valve closure, automatic reestablishment of uncontrolled feedwater flow with water-level again reaching the main steam lines, what was evidently a reactor vessel depressurization that resulted in automatic initiation of Emergency Core Cooling Systems, and development of a containment pressure that reached the high value of 20 psig.

As some measure of the scale of this pressure it should be noted that the *maximum credible* accident involving complete loss of reactor coolant (following a postulated double ended break of the largest recirculating line in the reactor) the containment pressure is expected to rise only to about 60 psig.

It had been recognized after Dresden II that feedwater control, especially for high water-levels, had previously been inadequate. It is apparent that the lesson was not learned.

We wonder what is required in order for these potentially hazardous reactor installations to be designed, constructed, maintained, and operated in safe and reassuring ways.

[From the Journal Nuclear Safety, September–October 1971]

EXCERPTS FROM "DRESDEN 2 INCIDENT OF JUNE 5, 1970"

(By C. D. Cagle)

Abstract: On June 5, 1970, while Dresden Unit 2 (a second-generation boiling-water reactor) was undergoing power testing and was operating at approximately 75% power [1875 MW(t), 623 MW(e)], a spurious signal in the reactor pressure-control system altered the steam flow to the turbine and caused a turbine trip followed by a reactor scram. Subsequent erratic water-level and pressure control in the reactor vessel, compounded by a stuck indicator pen on a water-level monitor—recorder and inability of the isolation condenser to function as needed, led to discharge of steam and water through safety valves into the reactor dry well. Electric cables were damaged and electric motors developed low-resistance problems. No significant amount of radioactive contamination was discharged to the environment. There was no pressure damage of the reactor vessel or the dry-well containment walls. Recovery included replacing some electric cables with improved cables having higher temperature ratings, rerouting other electric cables, drying electric motors, reorienting the discharge direction of safety valves, revising the reactor pressure-control system, improving the capability of the isolation condenser, and revising operating and emergency procedures. The reactor remained shut down until Aug. 8, 1970. Two to 3 weeks of this downtime was ascribed to refueling.

Dresden Unit 2 is a second-generation 2527-MW(t) [809-MW(e)] General Electric boiling-water reactor (BWR) operated at the Dresden Nuclear Power Plant by the Commonwealth Edison Company, Chicago, Ill. * * *

* * * * *

On June 5, 1970, the reactor was undergoing initial-startup power tests and was operating at approximately 75% power [1875 MW(t), 623 MW(e)] at near equilibrium conditions with full recirculation flow in the core. * * *

ASSESSMENT OF DAMAGE

Damage was confined to equipment within the dry well and was caused by the steam and water discharged through the safety valves. A total of about 30 ft of thermal insulation needed replacement on one main steam line, a feedwater riser, and a recirculation riser. Low resistance was found in five valve motors, a floor-drain pump motor, and a dry-well-cooling blower motor. Seven dry-well electrical penetrations had small leaks through the inboard sides of their double seals. Two of four source-range monitor cables were shorted or open. Four of eight intermediate-range monitor cables had low insulation resistances. Ninety-three local power-range monitor cables were shorted, 10 were open, and 61 were operable. Control cables to the traversing in-core probe indexer were shorted. Two safety valves were jammed partly open owing to their lifting levers having been rotated by the steam and water jet from a third safety valve. Minor paint damage occurred on the dry-well wall.

Although the dry-well temperature history during the incident had been lost by lack of instrument chart paper, damage to plastic connector caps and cable insulation indicated (as shown by later tests) that temperatures in excess of 250°F had occurred. Calculations based on steam conditions in the dry well indicated that the maximum atmospheric temperature could have been no higher than 320°F and that the wall temperature was much less. Tempilstik marks on the walls indicated that 200°F was not exceeded. The containment-structure design temperature is 281°F at 0 psig.

The maximum pressure experienced by the pressure vessel and the main steam lines during the incident was determined to be less than the design pressure.

CORRECTIVE ACTIONS

Tests with new samples of local power-range monitor cables revealed that failures of center conductors occurred by buckling at as low as 220°F and that drifting of the center conductor caused shorts at as low as 300°F. This type of failure was enhanced by handling abuse, twisting, and crowding in ducts. Not all tests produced failure, even up to 500°F for 1 hr. Since these cables are vendor-specified for continuous operation at 275°F, the same kind of cable was reinstalled but with great care and with less crowding in ducts.

Source-range and intermediate-range monitor cables were not tested, since it was known that their temperature ratings were less than that of the local power-range monitor cables. They were replaced with a new type of cable having a temperature rating of 350°F. New ducts were provided to separate the source-range and intermediate-range monitor cables from the local power-range monitor cables to avoid crowding.

The traversing in-core-probe-indexer control cables were replaced with new cables rated for 300°F.

The main-steam-line safety valves that lifted were inspected and tested in accordance with the manufacturer's recommended criteria and the ASME and Illinois Boiler Code requirements. Their associated rupture disks were replaced, and the valves were oriented so that damage to other equipment by their discharge would be minimized. Since lifting levers on the valves are not required by the ASME Code, approval to remove them was requested from the Illinois Boiler Board.

Motors on all valves were dried and passed inspection. One of seven dry-well-cooling blower motors had to be replaced. All leaks in the inboard electrical-penetration seals were repaired. The feedwater-control system was improved to minimize control-valve leakage, insensitivity of flow control, and low suction trip caused by pump-runout conditions.

The sequence and starting times of the emergency core-cooling-system components were not according to design during the incident, although their actual use was not required. The system controls were revamped to conform to the design requirements.

The condensate-return-isolation trip point on the isolation condenser was raised from 120 to 300% of normal flow to agree with the design intent and the operating conditions. The Technical Specifications were revised to reflect this change.

The electrohydraulic-control system, in which the spurious signal that triggered the incident originated, was revised to minimize noise pickup. Specifically the malfunctioning device, a potentiometer located at some distance from the pressure-amplifier card, was replaced with a ceramic potentiometer located near the pressure-amplifier card, and some associated terminals were eliminated. Cables from the electrohydraulic-control adjustment panel were rerouted so that the signal cables were separated from power cables. A control circuit relating the automatic load-following circuits, the recirculation-flow-control system, and the electrohydraulic-control load-frequency-control circuit was rearranged to eliminate the possibility of introducing erroneous voltages to the electrohydraulic-control panel.

PROCEDURE MODIFICATIONS

Although the actions of the operators resulted in a safe and more or less orderly shutdown despite equipment malfunctions, a review of events indicated that the existing procedures were not altogether adequate.

Much emphasis had been placed on the dangers of allowing the pressure-vessel water level to fall below the top of the fuel, but not enough emphasis was given to the dangers of high-water-level situations. Both the normal and emergency operating procedures were to be reviewed and revised to place more emphasis on the seriousness of high-water problems.

The standby gas-treatment system was used as a venting path to reduce the pressure in the dry well when the only knowledge of the pressure there was that it was greater than 5 psig. This was done under closely controlled conditions and through a 2-in. bypass line rather than the 18-in. line provided. The gas-treatment system, however, was designed to operate at near atmospheric pressures and was tested at only 1.5 psig. Therefore it is felt that a safer procedure would have been to reduce the dry-well pressure to below 2 psig by condensing steam with the torus sprays or, if necessary, the dry-well sprays before venting to the gas-treatment system. New procedures and revisions of existing procedures have been issued to establish this requirement.

COMMENTS

If loss of control of the pressure-vessel water level had not occurred during the incident, apparently nothing more than a simple shutdown would have occurred and would have been followed, either then or eventually, by the rewiring of the electrohydraulic-control system to eliminate noise pickup. The real incident began with the loss of water-level control, which was caused by the operator observing a single water-level indicator that had a stuck pen. The incident reports mention revised procedures to better emphasize the problems associated with high water level, but fail to say whether more than one readout instrument has been provided or the reliability of the instruments has been improved. Once the high-water-level condition developed, there seemed to be no clear-cut procedure for reducing the level.

Since it was known that the isolation condenser needed a greater condensate-return-line capability, it seems surprising that no special procedures regarding its use and limitations were observed. After initial actuation of the condenser, several minutes elapsed before the operator was aware that it had almost immediately quit functioning.

Although the instrumentation cables in the dry well have been made less susceptible to moisture and temperature damage, it is not clear that the various electric motors affected by steam and water during the incident have been made less vulnerable. So long as the pressure-vessel safety valves vent directly into the dry well, the operation of electric motors in the dry well must be considered unreliable following pressure-surge incidents.

The loss of the dry-well temperature history during the incident, owing to a single recorder having run out of chart paper, again demonstrates the value of complete redundancy. Although a number of temperature monitors were provided, the use of a single recorder thwarted the value of whatever redundancies might have been supplied in other parts of the temperature-monitoring system.

It is unfortunate that procedural, mechanical, and control inadequacies can be recognized only upon the occurrence of some incident that puts them to a real test. The Dresden 2 installation, its procedures, and its operating staff have benefited substantially, in the long run, from having suffered and recovered from this particular incident.

EDUCATIONAL OPPORTUNITIES FOR WAR VETERANS

Mr. TOWER. Mr. President, the first GI bill was enacted for the veterans of World War II. All of its successors, including the present GI bill for Vietnam era veterans, have a single recurring theme—education is opportunity.

As a nation, we have committed ourselves to assisting our veterans to make a successful readjustment to civilian life. An education, with its attendant opportunities for gainful employment and a full life, is a key to a successful transition.

The GI bill, which provides financial assistance to meet educational costs, is a powerful incentive for a veteran to continue his education. Over 42 percent of the veterans of World War II used their educational benefits. Presently 38 percent of our Vietnam era veterans are using their GI bill. However, even the financial assistance of the GI bill is not sufficient to overcome other obstacles which frustrate the educational goals of many veterans.

Therefore, I note with great pleasure some of the recent developments to remove some of these obstacles. These developments—variations of the traditional mode of financial assistance—promise to enrich the education possibilities for the Vietnam era veteran. I commend them to the attention of my colleagues.

THE BROCK AMENDMENT TO THE HIGHER EDUCATION BILL

The GI bill does not cover the entire cost of the veteran's education. The veteran must demonstrate his commitment by financing the remainder of this educational expense.

The present unemployment situation for Vietnam era veterans is critical The part-time job market, a primary source of additional financial support for a college student, is slight. In an effort to expand the part-time job market, Senator BROCK introduced amendment 972 to S. 659, the higher education bill.

I was pleased to have the opportunity to join Senator BROCK as a cosponsor of the work-study for community service learning program. This proposal contains two key proposals. The first provision authorizes $10 million to be allocated to the States to be distributed to public, private, or nonprofit agencies. These funds will be used to pay the compensation of students employed by these agencies which are providing needed community services. Community services includes, but is not limited to, work in such fields as environmental quality, health care, education, public safety, crime prevention and control, housing and neighborhood improvement, and other fields of human betterment and community improvement. These public service jobs are very much in demand by communities across the Nation. Furthermore, the agencies would make an effort to relate the projects performed by the students to their general academic program and to a comprehensive program for college student services to the community.

The second major provision of amendment 972 is the assurance that the Vietnam era veterans will be given preference. Hence, this amendment will enable veterans who are in need of additional financial support to attend institutions of higher education to obtain earnings from employment. This proposal offers the maximum potential both for effective service to the community and for the enhancement of the educational development of such students.

This amendment was withdrawn upon request of the Senate leadership in order to minimize the difference between the House version and the Senate version of the higher education bill. However, I was extremely pleased that Senator JAVITS gave his assurances that the Senate conferees will work for a work-study program which would emphasize community service and a veterans' preference. I am hopeful that these constructive, positive recommendations will be included in the final version of the higher education bill's work-study program.

THE MED-VET PROJECT

A second type of variation consists of individualized programs being developed by universities and community colleges across the country to meet the educational needs of the veterans. An outstanding example of such a program is Project Med-Vet, initiated by the Dallas County Junior College District—El Centro branch—in Dallas, Tex. With a grant from the Division of Nursing, U.S. Public Health Service, a curriculum has been developed for an associate degree in nursing tailored to the needs of a veteran who has acquired medical training and experience in the armed services.

Each year, over 30,000 men and women leave the military who have received extensive training in an allied health field. These veterans represent a great resource which could be developed to alleviate the critical health manpower shortage in the civilian sector.

Regrettably, the attempts of these veterans to pursue a civilian health career are often discouraged and frustrated. They need certification or licensure from the State agencies to practice. In order to qualify for these examinations, however, the veteran needs an appropriate degree from an accredited institution.

Although many veterans would be willing to take courses to refresh or supplement their training in order to qualify for the State examinations, few schools will recognize and grant credit for their training and experience. Therefore, the education is needlessly repetitive, costly, and time consuming.

Project Med-Vet, however, eliminates this deterrent for the veteran by extensively testing his knowledge and skills. If he can demonstrate competence in a subject matter, he is given credit for the course and passed out of it. Thereby, many basic courses are bypassed. The student can emphasize those areas of training in which he needs additional help, and still reduce the time necessary to obtain a degree.

In addition to this challenge system, special seminars are conducted to explore the differences in the practice of military and civilian medicine.

The first class of 12 students graduated in December. Eleven are presently working in the Dallas area and one is working in New Mexico. These students will sit for their State licensure examination in April. There are currently 38 students in the course of study.

I commend El Centro and the very capable leadership of Dr. Bill J. Priest, chancellor, and Dr. Robert Leo, director of special projects, for this exciting innovation in the education of veterans and allied health personnel.

A COMMUNITY COLLEGE FOR THE AIR FORCE

Although a serviceman receives excellent training and experience in many technical fields, he often finds it difficult to transfer this knowledge into a meaningful record for employment and education purposes. A most innovative and challenging concept—A Community College for the Air Force—is being developed by Lt. Gen. George B. Simler. I ask unanimous consent that the text of an article in the Air Force Magazine, written by Capt. John T. Correll, USAF, be printed in the RECORD.

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

A COMMUNITY COLLEGE FOR THE AIR FORCE

(By Capt. John T. Correll, USAF)

RANDOLPH AFB, TEX.—In line with new trends in American vocational education, the Air Force plans to activate its own community college here this spring.

It will be a different kind of school, to be called the Community College of the Air Force. There are no classrooms at the home "campus" in San Antonio. Its initial task will be to provide the airman a transcript of his in-service education and training in a form acceptable to civilian schools and employers. At the same time, the Air Force is proceeding toward full civilian accreditation for its technical training centers. Provided this happens, the Community College will grow to a consortium of accredited schools—hopefully within two years.

The Community College was created to serve the unique needs of USAF airmen, whose training now receives limited recognition in the civilian world, and who often have difficulty in consolidating the academic credits they earn while in uniform.

"I'm convinced that this is one of the most progressive steps the Air Force has taken in the interests of its people and in the interest of the country, from the national resource standpoint, in twenty-five years," said Lt. Gen. George B. Simler, Commander of the Air Training Command, of which the Community College will be a part.

Col. John L. Phipps, ground-level planner in the Community College venture, and who holds a Ph.D. in Education, will serve as the institution's first president.

"What we're doing is not in isolation," Colonel Phipps observed. "We're a part, really, of a larger movement in American education as a whole."

He cites a number of recent attempts to recognize educational experience outside the traditional model. These include establishing a University Without Walls for the Department of Housing and Urban Development, in which unconventional course material can be accredited, and the practice of the New York Board of Regents in granting academic

credit on the basis of examinations to any student, registered or not.

The Community College will issue a transcript, with credits from both its own accredited technical schools and college-level courses the airman took in off-duty time.

"We are starting out with the objective of giving these young men credit for the things that they achieve in the technical training area while they're in the service," General Simler told Air Force Magazine. "In the initial stages, we're going to work very closely with the academic institutions that are interested in working with us through the various accrediting associations."

The idea for a Community College of the Air Force was born in ATC, but planners here soon sought the counsel of two other commands—Air University and the Air Force Academy—both of which had extensive experience in higher education and long association with the civilian academic world. In Lt. Gen. Albert P. Clark of the Academy and Lt. Gen. Alvan C. Gillem II of Air University, General Simler found enthusiastic colleagues. Together, they proposed the concept to the Pentagon, where both the need for and the value of a Community College of the Air Force were quickly recognized.

Vocational training is the Air Force's biggest recruiting incentive. Human Resources Laboratory researchers discovered that many young people enlisted because they wanted training and a chance to improve their skills.

The Air Force provides that kind of training. Its courses—ninety percent of which teach skills that can be used in civilian occupations—are equal or superior to the material taught in the top vocational and technical schools. Nevertheless, a veteran's training is very difficult to certify in a way that is meaningful to anyone outside the Air Force.

In addition, some airmen have accumulated many hours of college credits on their own time, seldom leading up to anything because they didn't stay in one place long enough to graduate, and had trouble transferring their work to a new school when they moved.

"In my opinion," General Simler declared, "there is a big deficiency in the recognition of the kinds of technical training we do in the Air Force. The employer may or may not have any knowledge of the degree of that training, the depth of it, the value of it, or the academic hours that went into making this man a qualified technician. So what we're attempting to do in this idea of a Community College of the Air Force is pull all that together."

As soon as the Community College data system is built and Air Force course content is translated into civilian language and semester hours—probably about the midsummer 1973—the Community College of the Air Force will begin issuing transcripts to ATC-trained airmen. (At present, the planners aren't sure just how far back in history they can go with the transcript service, but say they plan to serve as many people as possible.)

Such a transcript will be valuable to a prospective employer as well as to the airman.

"I anticipate that the transcript will be favorably received, because it's going to give an employer a definitive record of what this young man has accomplished," General Simler continued. "It will not only contain information on how he did in his training, but will include how he did subsequent to that in on-the-job training and in the Weighted Airman Promotion System. It will also contain any other courses he has been able to take from civilian institutions. The employer will have a very clear record of what this fellow has achieved—probably a better record from the standpoint of the personnel man who's going to hire him than anything else he'll get from any other candidate. It'll be a real pedigree."

One of the pillars on which the Community College of the Air Force is built is the Utah project, carried out by the Air Force Association's Aerospace Education Foundation and the U.S. Office of Education (*see page 69*).

In 1967, Utah placed three Air Force courses—in their original form—in civilian high schools, vocational schools, and a college. The Air Force materials proved as efficient and more popular than the previously used material. This prompted a seminal question: If ATC courses are taught in college for college credit, then why not arrange for direct college credit for Air Force people when they take these courses in the Air Force?

The breakthrough came when ATC's Sheppard Technical Training Center at Wichita Falls, Tex., was accepted last July as an affiliate of the Southern Association of Colleges and Schools. This is the first step toward accreditation, which can be conferred by a vote of member schools following a year of self-study by an affiliate to document the manner in which it meets Association standards.

General Simler instructed other ATC schools to take similar initiatives and seek affiliate status from the accrediting agency in their areas. The tech schools at Keesler AFB, Miss., and Lackland AFB, Tex., as well as the Security Service's school at Goodfellow AFB, Tex., have since affiliated with the Southern Association of Colleges and Schools. ATC's two other technical training centers—at Chanute AFB, Ill., and Lowry AFB, Colo.—are in the area of the North Central Association, which does not have an affiliation step in its accrediting process. Both Chanute and Lowry, however, are working on self studies to present to the Association.

Accreditation, ATC points out, is highly desirable because it provides assurance to institutions of higher education that an independent educational accrediting association has conducted a thorough review of Air Force technical training and found it to meet comprehensive standards.

At present, an individual who has received Air Force training can ask a college or university to give him credit for that training. The American Council on Education provides a listing of most military courses, and, where appropriate, recommends that credit be given for those courses. There is no requirement, however, that institutions accept military training for credit, and accreditation is expected to increase the likelihood that credit will be given.

"We're going to get some very serious questions about the Community College of the Air Force and its purpose," General Simler predicted. "We'll be tasked to justify why we should be accredited, I'm sure, and we feel that we have all the justification that we need, and that we can support our position."

Acceptance by civilian educators is especially important.

"We work hand in glove with the academic civilian world," General Simler asserted. "To this point in time, they have been most cooperative and most receptive."

Community College planners have been advised all along by civilian educators, and the school's advisory committee will include a number of educators, as well as Air Force officials and people from other federal agencies.

"The key idea behind the Community College of the Air Force concept," stresses Colonel Phipps, "is that existing Air Force technical training programs can be documented as formal education experiences. These experiences—supplemented by further formal instruction and experience—can be folded to meet the requirements of licensing and certifying agencies and educational institutions."

In a forthcoming article for ATC's *Instructor Journal*, Colonel Phipps wrote: "The importance of degrees, licenses, certificates, and other symbols of qualification in today's society cannot be overemphasized. The world of work has been called a 'certified meritocracy'—a world in which doors open only to those who have the 'papers' attesting to their achievements. Perhaps that is too Orwellian a view, but few would argue that diplomas often sharply separate the socioeconomic status of some members of our society from others who are equally deserving, but lack formal recognition of their qualifications."

Parallel to the effort to accredit ATC tech schools, the physician's assistant training program at Sheppard is already accredited by the American Medical Association. Graduates can be licensed in several states.

On the surface, it would seem that accrediting and certifying an airman's skills to make him more competitive in the job market would work to the detriment of Air Force retention. General Simler doesn't foresee any great problem.

"First of all," he said, "I think we have an obligation to Americans who come into the Air Force to provide them this kind of service, regardless of whether they stay in the Air Force or return to civilian life. I think we have an obligation to the industry of the United States to provide them with a man who has recognized skills that are usable by them.

"I think we can compete in the numbers of people we take in annually to retain a sufficient number for our own purposes. We should have a flow of people into and out of the Air Force on their initial enlistment. We don't want to retain everybody. It just wouldn't be healthy for us."

(General Simler's comments on retention carry special credibility. Through December, his Air Training Command led the entire Air Force in retention rates for the year, having reenlisted 46.7 percent of its first-term airmen who were eligible to reenlist.)

There are benefits to the career man, too, and they go beyond the increased prestige accruing to him as a certified master of his trade. He will be in an improved position to seek post-service employment.

"He isn't going to be in the Air Force forever," General Simler pointed out. "If a youngster who comes to us at seventeen years of age leaves after twenty years of service, he's only thirty-seven years old."

The President's National Advisory Council on Vocational Education has expressed keen interest in the Community College of the Air Force and, along with representatives of AFA's Aerospace Education Foundation, will visit San Antonio this spring for a firsthand look.

The benefit to society in general will be significant. Each year, more than 100,000 veterans leave the Air Force, trained for work in civilian occupations. With the coming of the Community College of the Air Force, they will represent a skilled manpower resource that can be drawn upon much more readily than is now possible.

"We haven't run into any problems that we haven't been able to resolve," General Simler said. "We've been able to justify our position as we moved along, each step of the way—and I think this will probably maintain itself. The only thing that remains is a lot of hard work."

EXPERTS OPPOSE VALUE-ADDED TAX

Mr. PROXMIRE. Mr. President, yesterday the Joint Economic Committee began hearings on the value-added tax and on alternative methods of raising the needed additional revenues for meet-

ing the educational, health, and basic income distribution requirements of the Nation. It is clear that by the mid-1970's the Federal Government will need at least extra revenues of $50–$100 billion to finance vast unmet needs, especially at the State and local level.

Some of these revenues can come from improvement or elimination of existing Federal programs. But a large part will necessarily have to come from additional Federal taxes. The administration has narrowly focused its attention on the possibilities of instituting a value-added tax to finance new initiatives. Yet this tax seems to perpetuate and extend the inequities that already exist in our tax system.

That the value-added tax is a regressive tax is generally recognized; this was corroborated by the witnesses that appeared before the committee yesterday. Among the three witnesses who testified yesterday, two were flatly opposed to the tax and the other gave it only qualified support. Prof. John Due stressed that the tax will place the greatest burden on lower income groups. He emphasized that the tax:

Will be distributed in a relatively regressive fashion because lower income groups spend higher percentages of their incomes on taxable goods than do persons in the higher income groups. Even more serious than the relative regressivity, which can be offset to some extent by the progressivity of the income tax, is the absolute burden on the lowest income groups, already living below a minimum subsistence budget.

These sentiments were echoed by Mr. Sheldon Cohen, former Commissioner of the Internal Revenue Service, who also brought out the inflationary aspects of a tax on value added. Mr. Cohen pointed out that:

Imposition of a value-added tax generally results in increasing the cost of consumer items. Thus, the cost of living rises—generally, very sharply. Inflation in the United States is a serious and persistent problem at the moment and for the foreseeable future. A value-added tax would only add fuel to the fire, making more difficult the job of moderating inflationary pressures in the economy.

Mr. President, I think that this is a quite important point that has been ignored in the discussion of value-added tax thus far. When I questioned the witnesses they suggested that imposition of a 5-percent VAT might raise consumer prices in excess of 4 or 5 percent.

Finally, one witness did give the value-added tax his qualified support. Prof. Charles McClure, of Rice University, would endorse VAT if the income and corporation income taxes were substantially reformed. He indicated that:

Ideally, imposition of a tax on valued added would occur in the context of integration of the personal and corporate income taxes, reform of the newly integrated income tax, and initiation of low income relief. A less ambitious, but acceptable, program would replace income tax integration with reform of capital gains taxation. Failing this, the VAT should not be substituted for the corporation income tax.

These witnesses raised serious questions about the equity, efficiency of operation, cost of living, and balance-of-payment aspects of the value-added tax. Mr. President, I ask unanimous consent that the excellent papers presented to the Joint Economic Committee follow the text of my remarks in the RECORD.

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

STATEMENT OF SHELDON S. COHEN, BEFORE THE JOINT ECONOMIC COMMITTEE, MARCH 21, 1972

Mr. Chairman and Members of the Committee: My name is Sheldon S. Cohen. I am a partner in the law firm of Cohen and Uretz in Washington, D.C. During the period December, 1964, through January, 1969, I served as Commissioner of Internal Revenue.

I appreciate very much your invitation to appear today to present my personal views concerning proposals that a value-added tax be enacted to provide a new source of Federal revenues.

At a time when all levels of government—Federal, State, and local—are hard pressed to raise funds needed to finance vitally needed public services and programs, we must search diligently for means of raising additional revenues efficiently and equitably, whether from existing taxes or new ones. Any serious proposal to raise revenue must be judged carefully in the light of these standards and on its merits.

It is important, therefore, that the issues presented in examining the desirability and feasibility of a value-added tax be put in proper perspective.

There are some who would have the public believe that a value-added tax is the way—indeed, the only way—to relief from the increasing burden of local property taxes. That is simply not true. Whether property tax relief is needed or desirable is an independent question. If careful analysis demonstrates that less reliance should be placed on local real estate taxes as a source of local funding, there are many alternatives, only one of which is a value-added tax, that must be examined to find the best solution—and not just an expedient answer.

The value-added tax must, therefore, withstand scrutiny on its own to determine whether it has the potential of meeting the dual tests of efficiency and equity better than other means at our disposal.

The essence of a value-added tax system is that at each stage of production and distribution a tax is imposed at a given rate on the value added to the product or service. Although there are various ways in which the tax may be structured, it is generally accepted that in most cases the tax is passed along to the ultimate consumer in the form of a price increase at least equal to the aggregate tax which the product or service bears. The tax, therefore, is a tax on consumption—how much a person spends—rather than a tax on income—how much a person earns.

A consumption tax has the inherent characteristic of regressivity—lower income groups pay proportionately greater taxes than those with higher incomes, since a greater portion of their earnings are expended for living costs. Although there may be devices which can moderate the severity of the regression, a viable system remains, nevertheless, dominantly regressive. Although proponents of the tax suggest it is a simple tax to administer, attempts to reduce regressivity will necessarily increase the complexity and administrative difficulties of the system, both for the public and the Government. A value-added tax studded with the requisite exemptions and exclusions merely to remove its most serious regressive impact, will present intensely serious administrative problems.

Clearly, the income tax is more equitable and fair, since it is based on ability to pay—rather than on the need to consume. If the income tax system were presently structured to yield fully its revenue potential with reasonable progressivity in fact, other alternatives for the raising of revenues might have to be considered. But, the income tax system is not operating in accord with its potential. The system is overloaded with unwise and unneeded tax preferences which narrow the base and permit many with large incomes to avoid paying their fair share. Large amounts of revenue can be raised now by meaningful tax reform—and at the same time we can restore public confidence in the fairness of the system. Given these circumstances, I see no justification to enactment of a value-added tax which would only shift more of the tax burden to low and middle income families.

These considerations aside, the case for a value-added tax is still not persuasive.

Proponents of the tax point to its use in European countries as demonstrative of its success and the need for us to follow their lead in order to more fully integrate our system of taxation with theirs. But the European experience generally has been quite different from ours. The level of compliance with the income tax, indeed, any tax, in Europe has been relatively low, compelling those countries to find alternatives—such as value-added taxes—which, though less equitable, are more productive of revenue. That has not been the case in the United States where we have an enviable record of an overall high degree of compliance with the progressive income tax system. Many a tax official from abroad has marveled at our system and expressed to me his keen desire that his own system could function as well.

Moreover, in some countries, such as Sweden, the adoption of the value-added tax was accompanied by a repeal of the retail sales tax—the substitution of one form of consumption tax for another—not the substitution of a consumption tax for an efficient income tax.

I am also unconvinced that adoption of a value-added tax would have any significant beneficial effects insofar as foreign trade or balance of payments problems are concerned. The fact that a value-added tax is adopted which, as an indirect tax, may be rebated to exporters under the General Agreement on Tariffs and Trade, does not improve the existing situation. It is only where a value-added tax is substituted for a non-refundable direct tax that a positive impact on pricing of export articles in foreign markets occurs. Even if the enactment of a value-added tax were accompanied by a concurrent reduction in some other tax, such as the property tax, the effect is likely to be so modest as to have little or no impact on our trade position. For example, the amount of property taxes borne by business as a percentage of sales is so slight, that even if property taxes were repealed completely in favor of a value-added tax, there would likely be no significant impact on the pricing of export goods. But even were we to assume that a convincing case can be made that a value-added tax would have a favorable effect on our foreign trade of meaningful proportions, the argument is still not won. The anticipated benefit still must stand the test of comparison with its cost, its effect on various segments of society, and the degree to which its regressive characteristics can be tolerated as a matter of tax justice. The benefits may well not be worth the burdens.

Another serious aspect of a value-added tax is its adverse effect on inflation. Imposition of a value-added tax generally results in increasing the cost of consumer items. Thus, the cost of living rises—generally, very sharply.

European countries experienced significant inflationary pressures following adoption of value-added taxes—with prices frequently rising by more than the amount of the tax, as some businesses used the tax as a device for passing on general price increases. Since

the tax also results in increased cost of operation and investment, as a practical matter prices are likely to increase in amounts greater than the amount of the tax itself.

Inflation in the United States is a serious and persistent problem at the moment and for the foreseeable future. A value-added tax would only add fuel to the fire, making more difficult the job of moderating inflationary pressures in the economy.

Many businesses, as well as consumers, may also be adversely affected by a value-added tax. The tax would involve new and expanded administrative costs in order to maintain the records needed for compliance. More importantly, some business groups would be caught in a squeeze which would have significant adverse financial effects.

Although it is generally assumed that the tax would be passed on in the form of higher prices to consumers, that may well not be the universal experience. The rate of tax would be very high in relation to profits in industries which have high volume and low percentage yields. For example, assume a business has an annual volume of $10 million and earns a 1 percent net profit of $100,000. A three percent value-added tax could amount to as much as $300,000. If by reason of competitive conditions, or otherwise, any portion of that tax is not passed on to consumers, the company's profit picture would be altered drastically—to a much greater degree than would result from a significant rise in corporate income tax rates.

The value-added tax has serious drawbacks—for consumers, for business, and for our economy. I believe we ought to be focusing our efforts on strengthening our income tax system, which can raise revenues more fairly and efficiently. In summary, the United States in the 1970's is neither the time nor the place for a value-added tax.

STATEMENT ON THE PROPOSAL FOR A FEDERAL VALUE ADDED TAX TO PROVIDE FUNDS TO REPLACE LOCAL PROPERTY TAXES FOR THE FINANCING OF EDUCATION

(By John F. Due, professor of economics and chairman of the department, University of Illinois, Urbana)

Reform of the methods of financing education is long overdue and action to reform the system is being prompted by recent court decisions. There are a number of alternative avenues of reform: replacement of the local property taxes by a uniform state property tax; increases in state income and sales taxes to provide the necessary funds; grants of funds out of Federal income tax revenues; and the recent suggestion by the administration, now under study by the Advisory Commission on Intergovernmental Relations, for a Federal value added tax to raise money for this purpose.

While the need for reform is unquestioned, there are a number of serious objections to the value added tax proposals:

Equity—A value added tax is simply a form of sales tax, equivalent in base and yield at a given rate to a retail sales tax, differing only in that the tax is collected in increments from each firm in production and distribution channels on the value added by each firm, rather than entirely from the retailer on the final selling price at retail. The sum of the values added at each stage in production and distribution of course equals the retail selling price. The presumption is that the value added tax will shift forward to the final consumer, with some deviations, in the same pattern as a retail sales tax. To the extent that it does not, it rests in an inequitable and capricious fashion on the owners of various businesses and their employees.

Under the assumption of forward shifting of the value added tax, the tax will be distributed in a relatively regressive fashion because lower income groups spend higher percentages of their incomes on taxable goods than do persons in the higher income groups. Even more serious than the relative regressivity, which can be offset to some extent by the progressivity of the income tax, is the absolute burden on the lowest income groups, already living below a minimum subsistence budget.

The regressivity and the absolute burden on the poor can be lessened by exemption of food from the value added tax. But this approach is highly unsatisfactory in many respects. Exemption favors those persons who spend relatively high percentages of their income on luxury foods. It unnecessarily exempts food expenditures of the higher income groups and causes a much greater reduction in tax revenue than is necessary to accomplish the objectives. The exemption does not free the lowest income groups from their entire tax burden. It materially complicates the tasks of retailers in applying the tax and of auditors in checking upon the accuracy of returns.

A much more satisfactory approach is the provision of a credit against income tax representing value added tax paid on minimum necessary purchases, with refund for those persons having no income tax liability. This system is used with the sales taxes in Indiana, Colorado, and several other states. Compared to food exemption, this approach causes less loss in revenue and is much less discriminatory against various families, while relieving the very poor of all tax liability. It causes far fewer administrative and compliance complications than food exemption. But experience in the states does show two limitations. A substantial number of the poor do not file for their refunds, and thus the intent of the program is not fully attained. Secondly, there is also some multiple filing, a person obtaining several refunds.

Even with food exemption or a credit against income tax, however, the value added tax suffers from several limitations on equity grounds. The tax cannot be made progressive as can the income tax. The tax favors those families at each income level that deliberately spend relatively low percentages of their incomes. No adjustment for family circumstances is possible, except crudely under the credit against income tax system.

Despite popular views to the contrary, the property tax is not regressive except at the very low and very high income groups.[1]

Certainly the value added tax provides no improvement over the property tax in terms of overall distributional patterns. Much of the property tax—an estimated 40 percent—rests on land. One of the few subjects on which economists agree is that a tax on land values is one of the least objectionable of all forms of taxation and has much merit from an equity standpoint. Reduction in taxes on land will result in increases in land values and a bonus to large landowners. If the Federal government is to increase its contribution for schools, the obvious solution, from the standpoint of equity, is to improve the structure of the income tax, close additional loopholes, and if necessary increase the rate. We have just witnessed substantial reductions in the income tax; the obvious solution to obtain more revenue is to call upon an improved income tax to supply it, not to add a new tax which on equity grounds is inevitably an inferior levy.

Fiscal Policy Effects. A Federal value added tax should undoubtedly have greater adverse effect on employment than other forms of tax, because of its greater effect in restricting consumption, per dollar of revenue. The tax hits more heavily those families consuming all or most of their income and gives some incentive to curtail consumption. While in theory this effect could be offset by other fiscal or monetary policies, in fact such policies do not appear easy to implement or fully effective.

At the same time, the value added tax would add to inflationary pressures by raising the cost of living. This reaction would likely more than offset the anti-inflationary effect of the tax in reducing consumption. While virtually all taxes may have some effect in leading to demands for higher wages, a levy that directly increases the cost of living index is likely to have the greatest influence, per dollar of tax revenue.

Intergovernmental Relations. Establishment of a Federal value added tax would infringe upon the states' major revenue source, the retail sales tax, now used in 45 states and yielding 30% of state tax revenues. The states are restricted in the income tax field by the substantial Federal use; their one major autonomous source is the sales tax. Without question establishment of the Federal value added tax would restrict the ability of the states to gain additional revenue from this field.

Operational Complications. A Federal value added tax would create a vast new complex of tasks for business firms of all types and necessitate a major new enforcement and audit staff for the Internal Revenue Service. The number of taxpaying firms would be in the neighborhood of 5 million (with farmers excluded from the tax).[2] These firms would have to keep records and file returns for the new tax in additional to the ones now required of them for the state retail sales taxes. For smaller businesses, the very concept of the value added tax would create complications, at least initially.

The value added tax, under the usual tax credit system, as used in Europe, works most smoothly when there are no exemptions of types of taxpayers, since the tax paid by one firm constitutes a deduction for another. Each firm calculates tax by subtracting the tax paid on its purchases from the figure obtained by applying the tax rate to its taxable sales. Whenever this chain is broken, special techniques are required to avoid multiple taxation by exempting sales by vendors to exempt firms or granting refunds to firms that have paid tax on purchases but are not registered vendors on their sales. To make the three million farmers in the United States subject to the tax would add greatly to compliance and enforcement problems. But if they are exempt, either the sales to them must be specifically exempted, a refund provided to them for tax paid on purchases, or the price of the products purchased from them assumed to contain a certain tax element which the purchasers, if registered firms, can deduct against their tax liability. Any of the approaches creates major complications. Commodity exemptions create more problems than under retail sales taxes since the exemption must carry through several production and distribution stages. Other exemptions are likely to be made for various social and economics reasons: medical care, hospital service, urban transport. The concept of value added is not clearcut or easily defined with banks and insurance companies. On the whole the value added tax is not nearly as simple a levy as is sometimes argued.

These complications suggest that if the Federal government were to move into the sales tax field, it should use the retail sales tax form instead. This is a simple levy familiar to most business firms in the United States, and Federal operation could be coordinated with the state sales taxes. Only firms selling at retail are vendors and the number of taxpaying firms is therefore somewhat less. The only potential advantage of

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[1] This is shown in studies by the Advisory Commission on Intergovernmental Relations.

[2] There are 4.1 million firms now registered under the state sales taxes.

the value added tax over the retail sales tax is the possible greater ease in excluding all producers goods from the tax if desired. Firms can be permitted to deduct tax paid on all of their purchases and not just those of materials and parts, and check needs to be made only on the firm itself. With the retail sales tax the exemption applies to the sale of producers goods by the suppliers and therefore check must be made upon both supplier and purchaser. This argument has been stressed by Professors Ann Friedlaender and Carl Shoup.[3] But the argument can easily be exaggerated. Most sales of producers goods can be excluded under retail sales taxes if desired; the states have never actually systematically sought to do so.

The other arguments for the value added form of sales tax, that it lessens evasion because much of the tax is collected at the manufacturing and wholesale levels where firms are larger, and that it provides automatic cross check since tax deducted by merit in the United States, in view of the ability to enforce retail sales taxes with little evasion. This argument is highly significant in countries that cannot collect heavy taxes from retailers.

THE FOREIGN TRADE QUESTION

The argument is often advanced that use of a value added tax would aid the position of American producers competing in foreign markets, since the tax would be rebated on exports. As a replacement for the property tax, there would be virtually no net advantage, except possibly for a few property intensive firms now heavily burdened by local property taxes not refunded at export. But for most manufacturers, property taxes constitute a negligible element in the costs of goods they are selling for export. As compared to a personal income tax there is no advantage whatever since the income tax does not affect export prices.

The personal income tax may, it is true, result in higher wage demands, but the value added tax also has this effect, almost certainly of greater magnitude per dollar of revenue.

Even as compared to the corporate income tax, the value added tax offers little advantage, even though the value added tax can be refunded on exports while the corporation income tax cannot. The inability to refund the corporate income tax is relevant for our exports only if the corporate income tax is actually reflected in higher prices of commodities exported. There is no clearcut evidence that the corporate tax is even reflected in the prices of domestic goods, despite the vehement insistence of many persons that it is; even if it is, the tax is not necessarily reflected in export prices. But more significantly, our major competitors in world markets have corporate income taxes comparable to ours in height; our producers are under no net competitive disadvantage. The European value added taxes were introduced to replace the turnover form of sales tax, not income, property, or other levies.

In general, no field of taxation has seen so much nonsensical discussion than the value added tax. To some persons, the mere act of levying a value added tax and then refunding it on exports, even without elimination of any other tax, would aid our exports; this is ridiculous nonsense. To others we must have a value added tax because other countries are using one—there is a frantic running scared—we have to use it because they are using it—copycat bandwagon attitude on the part of many people who should know better. In reality, much of the support for the tax comes from persons who are primarily interested in reducing the overall progressivity of the tax structure; the term "value added tax" smells sweeter, they hope, than the term "sales tax." The dogged insistence of a few persons that a value added tax is not a sales tax plays into their hands. The property tax is notoriously unpopular; to the supporters of a federal sales tax, the school finance crisis offers the golden opportunity to introduce the levy by tying it to elimination of a highly unpopular levy. There are far simpler and more attractive methods to meet the need to eliminate the local property tax for financing education: statewide property taxes, higher state sales and income taxes; a more effectively progressive Federal income tax.

[3] Ann F. Friedlaender, "Indirect Taxes and Relative Prices", *Quarterly Journal of Economics*, Vol. 81 (Feb. 1967), pp. 125–39; Carl Shoup, "Experience with the Value Added Tax in Denmark and Prospects in Sweden", *Finanzarchiv*, Vol. 28 (March, 1969), pp. 236–52.

STATEMENT TO THE JOINT ECONOMIC COMMITTEE OF THE CONGRESS OF THE UNITED STATES ON VALUE ADDED TAXATION

(By Charles E. McClure, Jr., associate professor of economics, Rice University, March 21, 1972)

Like most questions of tax policy, whether the United States should adopt a federal tax on value added (TVA) has no simple answer. The verdict depends upon the alternative sources of revenue available and the context in which the decision must be made. A choice that would be acceptable under one set of circumstances might be totally unacceptable under another. In my testimony today I want to examine two widely discussed alternatives to imposition of a federal tax on value added, with special emphasis upon the historical and institutional context in which we are facing the issue.

I. Substituting TVA for the Corporation Income Tax

Until recently, the tax on value added was discussed most commonly as a replacement for part or all of the corporation income tax. Advocates of the switch to TVA ordinarily predicated their case primarily upon hoped-for improvements in the balance of payments, with an occasional nod to the expected growth effects and neutrality of the tax on value added.

The balance of payments argument has ranged from the simplistic, but unconvincing, truism that under the General Agreement on Tariffs and Trade border tax adjustments (export rebates and compensating import duties) are allowed for the TVA, but not for the corporation income tax, to more sophisticated analysis involving assumptions about the shifting and incidence of the two taxes. The growth argument relies upon the assumption that corporate saving and investment would rise substantially if the TVA replaced the corporation income tax. Finally, the neutrality of the ideal TVA contrasts sharply with the distinct non-neutrality of the corporation income tax. The latter tax discriminates between the incorporated and unincorporated sectors of the economy, against equity financing and the use of capital in the incorporated sector, and between industries.

Opponents of the substitution of the tax on value added for the corporation income tax have tended to play down the supposed advantages of such a move and have questioned whether the advantages, even if real, would be worth the cost in terms of equity. First, they have questioned both the likelihood that the balance of payments would benefit much from the shift and the desirability of predicating important decisions of internal tax policy upon their presumed balance of payments implications. I share both these doubts, the second especially strongly in the light of the recent realinement of exchange rates.

There is little doubt that substituting a TVA for the corporation income tax would increase saving and investment significantly, provided the corporation tax is not shifted. Of course, if it is shifted, little effect is to be expected. But one must ask whether further stimulus to corporate saving and investment is needed in the wake of the recently enacted ADR system of depreciation for tax purposes and restoration of the investment tax credit. Moreover, even if more stimulus to saving and investment is needed, there are other, and perhaps better, ways of providing it than through substitution of a TVA for the corporation tax. Finally, one could question the wisdom of creating a huge flow of corporate saving that might go uninvested if business confidence were weak, contributing to deflationary pressures.

Opponents of the tax on value added are also usually willing to admit the superiority of the TVA on neutrality grounds, with several provisos. First, elimination of the corporation income tax would create an enormous tax haven in retained earnings. Besides having obvious implications for tax equity, this tax haven would itself distort economic decisions in important new ways. Second, it is virtually certain that any tax on value added would contain exemptions for administratively hard-to-tax items, and it might well also contain exemptions to reduce the regressivity of the value added tax. Thus it is an open question whether the gain in economic efficiency resulting from the tax substitution would be great. This is an issue which deserves further exploration.

The heavy artillery in the case against substituting a tax on value added for the corporation income tax is the regressivity of the TVA. Like any general sales tax, the TVA takes a decreasing share of income as income rises. Thus it imposes a proportionately heavier burden on low income families than on high income families. If the corporation tax is borne by recipients of profit income, as many economists think, the tax substitution under examination would represent a substantial shift toward regressivity—a shift which many see as unconscionable. Whether this equity effect should outweigh the supposed advantages of the TVA balance of payments, growth, and neutrality grounds, as opponents of the TVA contend, involves important value judgements about which opinions can reasonably differ, though I personally think it should. Of course, if the corporation tax is shifted, as some economists and most businessmen think, there is somewhat less reason to oppose the change on equity grounds, but there is also less gain to be expected on the growth side. Unfortunately, we do not know the incidence of the corporation income tax, and are not likely to achieve early agreement on it.

On balance, I would oppose the simple substitution of the TVA for the corporation income tax, even though I am no fan of the latter tax. The balance of payments effects probably would not be large, and should not weigh heavily in the decision in any case. The growth effects, while potentially important, can be achieved in other ways, and should be viewed as less important than before the Nixon administration's measures to stimulate investment. The TVA is probably more nearly neutral than the corporation income tax, though even it is likely to be far from completely neutral. But most important, I question the advisability of the substitution because it would leave the United States with an undesirable combination of income and consumption taxation.

I do not object in principle to a dual federal system of income and consumption taxes, as I shall make clear in a moment. But I do object strongly to the kind of dual system that the simple tax substitution would produce. The consumption tax portion would not necessarily be at fault, provided its regressivity at the lower end of the income scale were relieved. (I should hope that this relief would be provided directly through refundable tax credits or low income relief, rather than by exempting "necessities" (see below), and that administrative exemptions

would be kept to a minimum, in order to preserve the neutrality of the tax.)

The fault, rather, would lie in the form of income taxation that would remain beside the TVA. The portion of income attributable to individuals taking the form of retained earnings of corporations would be reached only by the capital gains tax—a most imperfect fiscal device indeed. Massive amounts of economic income would be taxed at the preferential capital gains rates or—given present tax law—would escape income taxation completely when transferred by reason of death. The preferential taxation of capital gains is, of course, most relevant for high income taxpayers. Moreover, various other well-known loopholes in the personal income tax laws would remain unfilled. Many of these are also available primarily to upper income taxpayers. So long as these blatant violations of vertical equity—not to mention horizontal equity—remain, replacement of the corporation income tax with a tax on value added seems totally unacceptable on equity grounds.

This does not, however, mean that I would not support a general sales tax at the federal level under the right circumstances. But the circumstances are fairly special, and would involve a thorough overhaul of the federal income tax. First, I would like to see integration of the personal and corporation income taxes, preferably utilizing the partnership method. Corporate profits would be attributed to shareholders and included in their ordinary personal income for tax purposes. A corporation tax would exist, if at all, only as a means of withholding. This would eliminate the double taxation of dividends, if it now occurs, without creating a tax haven in retained earnings. Second, substantive reform of the newly integrated income tax system along lines that have been advocated for years by economists and others interested in equitable income taxation would greatly increase both the horizontal and vertical equity of the U.S. income tax. Finally, a meaningful program of low income relief, such as a negative income tax, would provide a given minimum standard of living for those families at the bottom of the income distribution.

In this context of meaningfully progressive income taxation, a federal sales tax would not be a particularly objectionable addition to the federal revenue system. On balance, the federal revenue system would have been rendered substantially more progressive in the top income brackets by the integration and reform of the personal and corporation income taxes. And any tendency towards regressivity at the bottom end of the scale—including that involved in a TVA—would have been more than offset by the initiation of important low income relief. In this setting it seems difficult to fault the addition of a federal sales tax to our fiscal arsenal, especially since in principle the tax rates applied under the integrated income tax (including the negative income portion) could be adjusted as necessary in the interests of tax equity.

The tax reform just described is ambitious, or even Utopian, and perhaps it is senseless to bother to describe it. Yet I believe the description is worth the bother, if only to highlight the stringency of the circumstances under which elimination of the separate corporation income tax and imposition of a general federal sales tax would be acceptable on equity grounds. Certainly those circumstances are a far cry from what has usually been envisaged by those advocating the simple substitution of the TVA for the corporation income tax.

It would be possible to stop short of this extreme proposal for thorough tax reform in search of acceptable conditions for imposition of a federal sales tax. Substitution of a sales tax for the corporation income tax might be acceptable provided capital gains taxation were significantly reformed in order to prevent the tax haven in retained earnings described earlier. The necessary reform would involve both taxation of capital gains more nearly like ordinary income and constructive realization at death, with periodic valuation of assets for tax purposes being a further useful feature of such reform. Of course, loophole closing would remain a worthy goal of tax policy.

It would be desirable to combine reform of capital gains taxation and the newly imposed federal sales tax with general low income relief of the type mentioned in the discussion of the ideal tax package. But lacking that, relief for the burden of the sales tax should be allowed low income families by providing refundable credits under the personal income tax. Such credits would result in refunds to those families with income tax liabilities smaller than the amount of the credit. This approach would, of course, involve a considerable administrative burden, which would be avoided by including relief for the burden of the sales tax in the general program of low income relief. Finally, relief to low income families provided through exemption of necessities would distort choices and would rank as a distinctly third-best choice. Of course, as noted earlier, simple substitution of a TVA for the corporation income tax without either taxation of capital gains or low income relief would be completely unacceptable on equity grounds.

II. REPLACING LOCAL PROPERTY TAXES WITH TVA REVENUES

Though details are still quite sketchy, it is said that the Nixon administration is considering proposing a federal tax on value added, the revenue from which would be used to relieve the burden of existing local property taxes used to finance public education. Thus in recent months the revenue from a tax on value added has been discussed primarily as a replacement for local property taxes, rather than as a substitute for the corporation income tax. In this portion of my remarks I want to comment briefly upon what I take to be the Nixon position.

In general, it seems that reduced reliance on local property taxes is a worthwhile goal of public policy. In the early days of this nation, when economic activity was largely agricultural, the local property tax might have been a reasonable way to attempt to tax according to benefits received or ability to pay, or both. But in an industrial society, the local property tax is inferior on both counts; tax liabilities are related closely to neither benefits nor ability to pay taxes. Moreover, the portion of the tax levied on improvements tends to distort locational decisions within metropolitan areas and to retard the economic redevelopment of our central cities. In a related vein, financing public education through local property taxes means that a child's educational opportunities depend crucially upon where he lives. Recent court cases have found this unacceptable. Finally, the local property tax is usually thought to be significantly regressive in the low income range, due to the heavy burden on housing. Thus it seems better on virtually all grounds to finance local public services, including education, through local taxes on sales or income or through shared revenues from state or federal taxes on sales or income than to continue to rely on the local property tax on improvements. (There is no compelling case for discontinuing taxation of land values. In fact, there is a strong argument on both equity and efficiency grounds for continuing the taxation of land. The tax on land, unlike almost all other taxes, causes no economic distortions, and removing it would result in windfall capital gains to present landowners.)

Given the many faults inherent in local property taxation—not all of which would be remedies under state imposition of property taxes, another frequently discussed response to the court cases mentioned above—the Nixon proposal would not necessarily be objectionable. Certainly it would be preferable to both foregoing badly needed public services and continued reliance on the property tax. It would be a step forward on efficiency grounds. And it might not have overly adverse effects on the equity of the tax system, since the property tax is probably even more regressive than the value added tax over the low income range. (This difference arises largely from the treatment of housing under the two taxes: the property tax imposes a heavy burden on housing, whereas the TVA would probably exempt it.) However, any endorsement of the Nixon proposal must be closely qualified.

If the ideal federal income tax system outlined earlier was implemented, education could acceptably be financed largely through local sales or income taxes, with a minimum quality of education being assured through state or federal grants-in-aid. This would have the advantage that local control of education would be maintained. In principle, even regressive local sales taxes would be acceptable, since they could be offset by adjusting the level of transfers under the assumed federal program of low income relief. Alternatively, more reliance could be placed on state or federal taxation and revenue sharing or grants to local governments, through perhaps at the expense of some loss of local control. In any case, substituting sales tax financing of education for property tax financing would be most acceptable in the context of thorough reform of the federal income tax system, including initiation of a system of low income relief. Seen in this light, the Nixon proposal to replace property tax revenue with revenue from a federal TVA, without reforming federal income taxation, represents a distinctly inferior, though perhaps acceptable, compromise with tax equity.

But other compromise solutions are available, and some are superior to the Nixon choice. The most obvious alternative, and the only one I want to discuss here, would be to use revenues from reform of the existing income taxes to replace revenues from the local property tax. Base broadening would produce considerable revenue and an income tax that is more equitable, both horizontally and vertically, as well as more nearly neutral, and should be a high priority legislative item. The choice of income tax reform over imposition of a federal tax on value added seems especially appropriate in the present context, in that the progressivity of the federal tax system has recently been reduced by the initiation of the ADR system and the investment tax credit. It simply seems undesirable on equity grounds to follow the granting of these incentives to business investment with imposition of a national sales tax. Thus while the Nixon proposal may be acceptable if the alternative is to forgo important public services or to continue to rely upon the property tax revenues is distinctly inferior to replacing these revenues through reform of the income tax system. It is to this matter of income tax reform, and not to the tax on value added, that I urge the Congress to address its attention.

III. TVA OR RETAIL SALES TAX

To this point the discussion has focused upon the substitution of a federal tax on value added for the federal corporation income tax or the local property tax, with or without concomitant income tax reform. It is desirable to pause briefly at this point, however, to ask whether an American federal sales tax—if one is to exist—should be levied as a tax on value added or in the more familiar form of a retail sales tax. The two forms of sales tax can be expected to have roughly equivalent economic and distributional effects, so the choice between them should be made primarily on administrative grounds.

The primary advantages of the value added

approach to taxing sales are the relative ease of exempting business services, capital goods, and intermediate products from the tax and the self-enforcing features of the tax.

The advantages of the retail sales tax include its familiarity to American businessmen, the smaller number of firms and amount of paperwork involved, and the greater ease of piggybacking state and local sales tax on a federal retail sales tax. Which set of considerations should control any decision about a federal sales tax is far from clear; knowledgeable authorities can be found on both sides of the issue. But one thing is certain. Any decision to levy a tax on value added, rather than a retail sales tax, should not be made by default because no one bothered to consider it explicitly. Any detailed analysis of the question will almost certainly involve considerations such as those mentioned above, and will put to rout such irrelevant or specious, but often repeated, arguments for the TVA as "the Europeans are using it" and "border tax adjustments are allowed under the value added tax."

IV. SUMMARY OF CONCLUSIONS

The most important policy conclusions offered in my remarks today can be summarized briefly. First, the simple substitution of a value added tax for the corporation income tax would be completely unacceptable on equity grounds. Ideally imposition of a tax on value added would occur in the context of integration of the personal and corporate income taxes, reform of the newly integrated income tax, and initiation of low income relief. A less ambitious, but acceptable, program would replace income tax integration with reform of capital gains taxation. Failing this, the TVA should not be substituted for the corporation income tax.

The Nixon proposal to replace property tax revenues with a tax on value added would be acceptable, if the alternative were to forgo badly needed public services or to continue to rely upon the local property tax. But a preferable alternative would be to replace lost property tax revenues by reforming the income tax system, rather than by imposing a national sales tax. Finally, whether any future American sales tax at the national level should take the form of a value added tax or a retail sales tax deserves far more explicit consideration than it has thus far received.

THE EXPENDABLES

Mr. HUMPHREY. Mr. President, on January 20, 1972, I introduced, for myself and the Senator from Illinois (Mr. PERCY), S. 3044, a bill to amend the Civil Rights Act of 1964 in order to prohibit discrimination on the basis of physical or mental handicap in federally assisted programs. This bill responded to an awakening public interest in millions of handicapped children, youth, and adults who suffer the profound indignity and despair of isolation, discrimination, and maltreatment. It is essential that the right of these forgotten Americans to equal protection under the laws be effectively enforced through prohibiting their exclusion from services receiving Federal assistance. Increasing support for this position in the Congress is reflected in the current addition of 10 Senate cosponsors of this legislation.

In my remarks upon the introduction of the bill to protect the civil rights of the handicapped, I described some of the broad categories of people who would be directly affected—children who are mentally retarded, physically handicapped, or emotionally disturbed; disabled veterans; the mentally ill; and handicapped youth and adults who can and want to learn a trade and experience the dignity of work and a paycheck. But the fundamental fact that one confronts is a paucity of information, an absence of firm statistics, regarding the true extent of this great human need across America. Truly, this fact, in itself, demonstrates the segregation of millions of Americans from society—suggesting a disturbing viewpoint that these people are not only forgotten but perhaps expendable.

An excellent series of articles appeared in the Evening Star, published in Washington, D.C., during January, in which this point is made precisely in the title of the series, "The Expendables." The author of this series, staff writer John Mathews, has performed a vital service, and in the finest tradition of in-depth reporting, in laying before the public the true story of exclusion and inadequate concern experienced by hundreds of handicapped children in the Washington metropolitan area.

Developing interest by the press, radio, and television in this vital issue has been indicated by editorials by WRC–TV in Washington, D.C., and by the Washington Post. The February 10, 1972, editorial by the NBC-affiliated television station asserted that—

> Thousands of people, especially children, have been excluded outright from the public education and job training that could have led them to a healthier, happier, more productive life.

And its conclusion underscores the purpose of my legislation:

> We have an obligation to these hidden and forgotten people—we can and should no longer avoid it.

Most recently, an editorial, entitled "The Legal Rights of the Retarded," published in the Washington Post of March 15, 1972, drew attention to the significance of an order by a Federal court in Montgomery, Ala., requiring the correction of conditions at an institution for the mentally retarded in Tuscaloosa. The editorial stated:

> According to one observer, this is the first time a court has ever held that mentally retarded persons involuntarily confined in an institution have a right to adequate treatment and care.

And the editorial goes on to cite the national significance of expanding litigation efforts in this area.

I offer these important items in the hope that they will help to promote informed public debate and action on the vital need to affirm and guarantee the rights of the handicapped. Representative CHARLES A. VANIK, of Ohio, who introduced a bill, H.R. 12154, identical to mine, has made an active and continuing effort to develop the statistical and case record on the denial of the civil rights of persons with mental and physical handicaps. In a statement in the CONGRESSIONAL RECORD of February 7, 1972, on "Discrimination Against Handicapped Veterans," Representative VANIK emphasized the despair and indignity felt by some 224,000 veterans registered at Public Employment Service offices in fiscal 1971, who were not placed in regular nonagricultural jobs. And in a further statement in the RECORD of February 17, 1972, he spelled out the State-by-State statistics of 4¼ million handicapped children of school age who are excluded from public schools in America.

These statistics are shocking and demand decisive action by Congress. I have joined in sponsoring legislation introduced by the Senator from New Jersey (Mr. WILLIAMS), authorizing funds for a White House Conference on the Handicapped in the Office of the Secretary of Health, Education, and Welfare. These can be important steps in identifying human needs and coordinating Federal programs of assistance. I also urge that action be taken on my bill, S. 3044, which proposes a direct solution of the central problem: The denial of the civil rights of millions of Americans.

Mr. President, I ask unanimous consent that the articles and editorials cited in my remarks—the five-part series, entitled "The Expendables," by John Mathews, appearing in the Evening Star; the WRC–TV editorial, "Hidden People," of February 10, 1972; and the editorial, entitled "The Legal Rights of the Retarded," appearing in the March 15, 1972, issue of the Washington Post—be printed in the RECORD.

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

THE EXPENDABLES—I

(By John Mathews)

In Washington and its Maryland and Virginia suburbs there are hundreds of children society treats as expendables: Children with physical, mental and emotional handicaps who are either excluded outright from public education or inadequately served by their school systems.

These are the children it has become fashionable to call "exceptional," or "special." They are the mentally retarded, the emotionally disturbed and the physically handicapped—the innocent victims of disease, accidents, environment, heredity or circumstances. They can be born to the poor in the inner city or to the affluent in the suburbs.

Handicapping conditions do not discriminate between Larry, who lives in the District, or Joyce from Prince Georges County, Daniel from Montgomery County, or John from Fairfax.

These are not their real names. Their situations, however, are real—all too real, in fact, to them and their parents.

Larry is 11½ and cannot talk. He can signal anger and pleasure through a personal code of guttural grunts. Psychologists have labeled him "brain-damaged," that imprecise, catch-all tag used to describe children whose normal growth and development has been mysteriously stunted.

Although Larry has never spoken, you can give him the "Yellow Pages" section of the phone book and say, "Find me the Hecht Co.," and Larry will flip to page 432 and place his finger on the department store's name in a display advertisement. He will then point to the Sears ad, but if you try to trick him by telling him it's Penney's, he grunts angrily, then "Ummms" approvingly when you finally say "Sears." Larry can identify gasoline companies, motels and carryouts in the same way.

Larry's mother has a desperate faith that somehow a key can be found to unlock those words shut up within her son's mind. But, like hundreds of other handicapped children in Washington, Larry has never had a single day of public education in his life.

Five years ago, a school principal, in effect, unilaterally banished Larry from public education. He told Larry's mother that the Dis-

trict school system had no special programs for her son. Along with the parents of about 500 other children, Larry's mother has been waiting—for two years now—to get a District grant to pay for tuition in a specialized school that could help her son.

Meanwhile, Larry attends a recreation program for two hours a day at the dismal Anacostia Park Playground. There are four such play centers for retarded children around the city. Officials say about 30 children in the programs (nearly half) have never been to public schools.

Joyce, 7, lives in Prince Georges County. She is what is known as "multiple-handicapped." Joyce is deaf and also said to be emotionally disturbed. She has been out of school since September.

As in the District, schools in Prince Georges, and, for that matter, other Maryland and Virginia suburbs—have no programs for children with such multiple handicaps. Joyce may also have difficulty getting accepted at a specialized school for the deaf, since schools for the deaf or the blind often exclude children who are also emotionally disturbed or mentally retarded.

Before Joyce's parents can find a school for their child and qualify for special state aid given in Maryland to educate children with serious handicaps, they must obtain an evaluation from a psychiatrist. But they can't afford the fee, usually $50 or more.

After a frustrating search lasting several months, the county's special education staff finally was able to arrange a free evaluation for Joyce this month at the District's St. Elizabeths Hospital. No such free service existed in Prince Georges.

By the time the results of the evaluation are forwarded to the state education department and papers are processed, Joyce probably will have missed nearly a year of the valuable schooling and therapy she needs.

Daniel is luckier than Larry or Joyce, because he is in school in Montgomery County. He is 15, tall for his age (well over 6 feet), able to get along with people, adept and responsible when he is given jobs like mowing lawns or washing cars.

Daniel is also mentally retarded. His IQ is around 50, about half that of the so-called normal child. For several years, he has been in a school program for the trainable retarded—now euphemistically called the "moderately" retarded—those who test in the 35 to 55 IQ range.

At the Concord School in Bannockburn, Daniel goes to classes with other retarded children, ranging in age from 5 to nearly 21. His principal says most of the children eventually will wind up in state institutions for the retarded after they reach 21, when their right to further public education ends, or when their parents die or can no longer cope with them in the home.

In effect, the principal says, much of the training in self-care and obedience to rules at Concord School is designed to enable the children "to function better in an institutional setting" later.

Daniel, however, could function with some help in society, the principal says. But the county has no program of on-the-job training or placement for children of Daniel's competence. The principal is trying now to start his own.

John, whose family lives in Fairfax County, is not retarded, but he is in the intensive social habilitation ward—the "locked up" ward—at Lynchburg Training School and Hospital, the state institution for the retarded which serves half the state, including Northern Virginia.

The 17-year-old boy, and about 25 other young men and adolescents, are at the institution for the retarded because state correctional schools say they cannot handle disturbed children. Lynchburg's director, Dr. Benedict Nagler, has unsuccessfully resisted accepting such cases, claiming his training school is not equipped to function as a correctional institutional or as a mental hospital. "This is one of the grey areas in our state," he says.

The cases of Larry, Joyce, Daniel and John are similar to hundreds in Washington, its suburbs and the nation. Some specialists have estimated that perhaps as many as 1 million retarded children in the country are excluded from schools as "uneducable."

Locally, the best estimates of the number of children barred from public edudcation, or badly served by it, have been made recently in Washington, where a new associate superintendent, Dr. John L. Johnson, is making a strong case to the school board, the city government and Congress for vastly increased financial support.

Dr. Johnson calculates that at least several hundred children in the District are totally excluded from public schools. Nearly 900 more children have been individually identified as needing special education programs not now provided because there are no funds. These children include 223 diagnosed as emotionally disturbed, 269 retarded children and 329 with a variety of special learning problems. The remainder are handicapped by degrees of blindness, deafness or poor physical health.

In the suburbs, officials in charge of special education programs insist no children are barred from schools or special tuition aid for private schooling, but that can be a matter of definition.

With the exception of Alexandria, all suburban public school systems have disowned any direct responsibility for a small group of handicapped children—the profoundly retarded children—often called "uneducables"—with IQs below 30, who function at the level of 1- an 2-year-old infants.

To fill this gap, the Montgomery County Association for Retarded Children recently began its own program for the profoundly retarded. Three children, age 6 and above, were known to need such schooling. But, between May and October, as word of the new program spread, a dozen or more prospective students emerged. These were children sheltered by their parents, unknown to school authorities.

There's little doubt that school programs for handicapped children in the suburbs are in most respects light years ahead of those in the District. Montgomery, for example, has been known to attract parents of handicapped children from neighboring states who specifically settle in the county because of its special education programs.

While the suburbs can claim superiority, their programs generally are deficient when it comes to dealing with emotionally disturbed children and those with special learning problems, like reading difficulties.

School officials in Washington and the suburbs readily acknowledge those days that they may lose control soon over placement of children in special education programs—that is, who qualifies and who doesn't. The handwriting on the wall, as they see it, is a three-judge federal court decision issued in Pennsylvania last October.

After expert testimony, the court ruled that the state could not exclude any retarded children from the right to public education, since all such children can be educated in some way. For some, this means reading at a fourth-grade level; for others, it means being taught to feed, clothe and toilet themselves.

In the District, the parents of seven children—all excluded from public education—have filed a similar class action law suit contesting school board rules that give officials wide discretion in barring children from public education.

Children, particularly those with behavoir problems, have been expelled permanently from schools under board rules that give as causes for expulsion: "Immoral conduct, indecent language, violent or pointed opposition to authority, persistent disobedience or disorder, habitual tardiness, unauthorized absence, poor personal hygiene and continuing academic failure."

THE EXPENDABLES: IT'S 3 AGAINST 1—II

(By John Mathews)

At Boys Junior-Senior High School, the prime facility in Washington's public school system for adolescent boys said to have "emotional and behavioral problems," a typical school day began recently with the singing of the religious hymn, "Holy, Holy, Holy, Lord God Almighty. . . ."

Following the hymn, both students and teachers at the assembly recited in unison the vintage verse "Teamwork" by Edgar A. Guest, the popular poet of the '20s and '30s. A teacher moralized to the boys about the self-reliant and non-conformist messages of Ralph Waldo Emerson and Henry David Thoreau.

Then, Hiram F. Jones, the 65-year-old principal who has run the school for six years, delivered what amounted to a short inspirational sermon. "Look at life's bright side. Look at life through rose-colored glasses" he told the boys. "Life is what you make it no matter how you take it."

Later, Jones singled out individual boys for praise or criticism. An embarrassed teenager was called, "My No. 1 man," and complimented for his good behavior and well-shined shoes. Another boy was told that he was "going to learn how to obey," and was required to make a public apology for an infraction of rules.

"It's three against one," Jones told him. "Your mother wants you to straighten out, your parole officer and me. We're going to break your spirit, brother."

The assembly wound up with a mathematics contest and an award for the best-dressed student. Teachers voted in the contest, Jones told a visitor, "because the boys used to gang up and vote for somebody who looked like a vagabond and someone who looked like Clark Gable wouldn't win."

Principal Jones' special brand of exhortation and evangelism for dealing with troubled young people has been repeatedly questioned in recent years by outside critics.

Evaluations have said that criteria for placing students in the school are unclear, that the school has an inadequate program, lacking psychological services, and that no accurate record has been kept of what happens to its students.

Fifty-six students are currently enrolled, but daily attendance seems to hover around 20, giving the school with eight teachers and one counselor an incredibly high and costly student-teacher ratio.

Washington's Boys Junior-Senior High School illustrates a problem shared by both the District and suburban school systems: The needs of students with emotional problems have been dealt with inadequately—or not at all.

In the field of special education—the name given to school programs for handicapped children—disturbed children are the most neglected.

Besides emotionally disturbed children, most area schools are also virtually rejecting any responsibility for school programs for these groups of children:

Preschool retarded and physically handicapped children, the 3-, 4- and 5-year-olds whose parents must find private schooling much of which they consider inadequate.

So-called profoundly retarded children those with IQs of 30 or below.

Adolescent and young adult handicapped students, who can find little in the way of job training available to them in public school programs.

For students with emotional problems, Prince Georges County has "no program as such," according to a school official. Arlington, Fairfax and Montgomery counties have

classes in some elementary schools, but virtually no programs for junior and senior high school students. Alexandria pays attention to the older students, but ignores the younger children.

How to handle children with emotional problems raises many basic questions not only about this group, but also about other handicapped children, such as the retarded or physically disabled.

Teachers and administrators in the special education field—often prodded by parent and community organizations—are asking these days whether handicapped children are helped or harmed by being segregated in separate school buildings and into special classes.

Do children suffer a psychological stigma from special placement? Does isolation from normal children and confinement with children having the same problems reduce or reinforce the problems? And, in the case of emotionally disturbed children, are separate classes and schools actually helping troubled children or are they helping teachers and principals rid themselves of children they consider troublemakers?

In Arlington, Margaret Wadsworth, the county supervisor for special education, says she has resisted establishing classes for older emotionally disturbed students. "As soon as you create such classes, they are filled up," she said. "All teachers have students they consider emotionally disturbed and want removed from their classes."

In Washington, one of the committees of a special education task force that examined programs for emotionally disturbed children said the District's "social adjustment" classes, currently enrolling nearly 600 children, "often serve as dumping grounds for second-rate teachers and for disruptive children." Children are often assigned "arbitrarily and unfairly" to what are known as "sack classes," because, in the words of a junior high school principal quoted by the committee, the children "dare to be different."

In Montgomery County, a consulting team headed by Prof. Paul H. Voelker of the University of Pittsburgh surveyed special education programs. In its March 1970 report the consultants said it was hard to find a difference between children labeled as "emotionally handicapped" and placed in special classes and children in other classes said to suffer from "specific learning disabilities."

The consultants warned that "the very fact of special class placement, assignment to a teacher in a self-contained class . . . is likely to lead to a certain amount of inflexibility, labeling and self-fulfilling prophecy."

Visits to classes for children with specific learning disabilities appear to bear out the consultants' warnings. Children in these classes are said to be of normal or higher intelligence but have perceptual-motor problems. They have difficulty dealing with symbols or controlling hand movements and often see letters and numbers in reverse fashion.

In one school with a middle and upper income population, the 11 children in a class for specific learning disabilities were largely isolated from the rest of their classmates. The teacher said that virtually all the children exhibited degrees of emotional problems and at least two belonged in a class for disturbed children. During her two years with the class, the teacher said, only one child made enough progress to return to a regular class.

Despite the increasing trend against special, separate schools for handicapped children—especially the emotionally disturbed—Montgomery County is ready to open one. The new Mark Twain School in Rockville will eventually have 250 students, aged 11 to 16, who are no longer tagged with the label "emotionally handicapped," but are described as having a "range of behavior patterns and educational needs" that cannot be met in a regular school setting.

The Pittsburgh consultants have expressed fears that Mark Twain School will become a "dumping ground" for disturbed students. At a time when the labeling and isolating of handicapped children is being de-emphasized, the consultants said it was "unfortunate" the county should start a school that "can hardly help but lead to the utimate in labeling."

In Washington, the city's new head of special education, Associate Supt. John L. Johnson, plans major changes for the archaic Boys Junior-Senior High School and for the city's entire approach to disturbed children. Formerly an associate professor at Syracuse University specializing in the problems of emotionally handicapped children, Johnson is planning to establish what he calls therapeutic centers, homes in the community and even store fronts where troubled children will spend part of their school day, or relatively brief period in their school careers, getting special help.

"I don't think we ought to be building anything separate or special for any specific group of handicapped children," he said in a recent interview.

Johnson, however, has inherited another special school, the Mamie D. Lee School, a facility for retarded children in Northeast Washington.

It took parent groups about a dozen years of pressuring the school board and the city and lobbying congressional committees to get the school built as a center for trainable retarded, children with IQs in the 30 to 55 level. The new school opened in the fall, but is still at half its capacity. It lacks a principal and an assistant principal, as well as shop, home economics and physical education teachers. Dr. Johnson says he is resisting parent and staff pressure to fill the school with students and complete staffing until he finds the best qualified personnel available.

Even with a full enrollment of 200 students, the Lee school will take care of only a fraction of the city's estimated 700 retarded children classified as trainable. The remaining children will still go to school in some of the system's oldest facilities, such as the nearly 100-year-old Lennox School Annex opposite the Navy Yard in Southeast Washington, or in makeshift classrooms invariably located in the basements of regular school buildings.

Johnson and many specialists in the field of educating handicapped children agree that children at the trainable or moderately retarded level do not need special classes. But, he feels that the traditiona. approach of segregating these children in separate schools or isolated classes with regular school buildings—the pattern in Washington and the suburbs— is wrong.

The isolation of the moderately retarded dates from a time when educators felt that because children of this level of retardation often look and act differently from normal children they should be sheltered for their own good or the "protection" of normal children.

John and other specialists argue that if the objective of education for the retarded—or for the deaf, blind and physically handicapped children—is to give them every chance to live as normal a life as possible in society, they must have early and frequent contacts with normal children.

Perhaps the most debate and disagreement in the special education field centers on the so-called educable retarded, children in the 50–55 to 78–80 IQ range. Research in recent years has raised doubts as to whether children scoring on the upper end of the scale, in the 70s and 80s, are actually retarded, or are merely slow in developing because of deprived backgrounds.

Much of Judge J. Skelly Wright's 1967 de facto segregation decision dealt with this group of children. In barring the then current track system, the judge ruled that over 5,000 children classified as educable retarded and confined to special classes had been denied their rights to equal educational opportunity.

Wright found that the special "basic track" classes were dumping grounds for children with a variety of problems, that the instructional program was inadequate and that once assigned to such a class a child was condemned to an inferior education.

In Fairfax County, Beatrice Foster, the supervisor for special education, candidly acknowledges that "there is no question classes for educable retarded have often been a dumping ground." In the last two years, she has been reducing the number of children assigned to such special classes.

Prince Georges County schools have tried to limit the number of children in educable retarded classes by having "floater" teachers. These special teachers work with individual children and small groups, who remain part of regular classes. Montgomery County is using the same approach on a smaller scale.

Like most special educators, Montgomery's director Philip J. Stromowsky sees special placement of handicapped children as a last resort. In coming years, he maintains, the county will emphasize special help for children with special needs who will remain in the mainstream of public education.

Archie S. Oliver Jr., Alexandria's first full-time director of special education who has had extensive teaching experience in the field, including several years in the District, takes a more radical view. "I see the time when there will be no special classes for handicapped children," he says. Special education teachers will act as supports to regular classroom teachers, he adds.

The ever changing approach to handicapped children is illustrated, Oliver says, by the fact that "only 20 years ago, schools thought mildly retarded people could not be educated and should be placed in institutions for their entire lives."

PRESCHOOLS RARE FOR HANDICAPPED

Just about everybody believes that children benefit from early education. Parents pay out money for cooperative and private preschools. The federal government supports Head Start programs for 3- and 4-year-olds and many public school systems have established preschools and kindergartens.

Often, however, programs which seem to be beneficial to normal children are generally denied handicapped children. Among area public schools only the small Alexandria school system has a well-established preschool program for handicapped children.

FEW EARLY PROGRAMS

If you live in Washington, or in other Maryland and Virginia counties, and you have a handicapped child, there are no public school programs generally available before age 6.

In Alexandria, the preschool program at Lee School for children who are retarded and sometimes have physical handicaps is largely the result of the work of a dynamic educator, Mrs. Cressie Miller.

Enrolling children as young as 2, the program has been operating for eight years. During that time, Mrs. Miller has encountered several cases of children who were diagnosed as retarded. These diagnoses, however, were wrong.

A withdrawn 2-year-old could not speak when he came to the preschool. Another child, who had spent two years in the District's Junior Village, could not play with toys and barely responded to adults and other children. A little girl, who had enjoyed a favored place in her family as the youngest

of seven children, had drawn a cloak of silence about her after her mother had a new baby.

ENTER REGULAR CLASSES

All of these children broke out of their shells and eventually entered regular first-grade classes. If they had not had the benefit of early education, Mrs. Miller believes they probably would have entered special classes for the retarded at age 6 and the prophecy of the incorrect diagnosis would have been fulfilled.

"There must be many children like these who actually become retarded because they have not had a chance at early education." she concludes.

THE EXPENDABLES: OUT OF SIGHT, OUT OF MIND—III

(By John Mathews)

The women—teen-agers to middle-aged—are dressed in identical, loose-fitting, striped robes. Many wear oversized diapers with "D.C. Government" stenciled in ink on them. They wander about the large, barren, yellow-tiled room in dazed, bizarre postures. Some clutch after unseen objects, others crouch in fetal positions, still others chatter aimlessly.

In another section of the new Curley Building—designed, you are told, in modules to "make it more humanizing"—the teen-age boys are eating lunch. Some have their faces literally in their trays, so they can scoop the food with their bare hands into their mouths. As they finish eating and leave the small dining room, an attendant swabs food off their naked bodies, covered only with diapers bearing the government stamp. The boys are then pointed down a hallway where another attendant checks them into another large, bare, tiled room.

They are all "residents" at Washington's institution for the retarded, which bears the idyllic name of Forest Haven. They are the so-called "profoundly retarded"—adolescents and adults with the mental capacity of 1- and 2-year old infants.

These scenes are duplicated at virtually any large state institution for the retarded, like Maryland's Rosewood or Virginia's Lynchburg Training School and Hospital.

But conditions like these need not exist.

At Forest Haven in the Poplar Cottage 10- to 24-year-old males at about the same level of retardation as those in the Curley Building have been taught to dress and feed themselves. Most are now toilet trained. A rigorous program of "operant conditioning" has been used in which tokens are given as rewards for acceptable behavior. They can be cashed in for toys or candy.

The reason some profoundly retarded people at Forest Haven are living at virtually an animal level and others are not is simply a matter of money. It takes more staff to run a carefully controlled training program like that in the Poplar unit. But the city institution has about 100 vacant positions (of an authorized strength of 500), resulting from congressional and city government fund cutbacks and job freezes.

"Out of sight, out of mind," is how R. Rimsky Atkinson, Forest Haven's acting director for the last three months, characterizes public and government attitudes toward institutions for the retarded here and elsewhere. Invariably, such institutions, as well as mental hospitals and prisons, are tucked away in some rural setting or hidden behind high walls.

Like Washington's Forest Haven, Lynchburg Training School and Hospital—the Virginia institution for the retarded that services Northern Virginia—is also "out of sight, out of mind."

With about 3,600 "patients"—as they are called at Lynchburg—the institution is at least 500 beds above capacity. At last count, 160 patients were sleeping on mattresses on the floor. Last year, a hepatitis epidemic, probably abetted by crowded living conditions, struck several hundred inmates, two of them fatally.

Lynchburg, which has nearly 600 patients from Northern Virginia, spends an estimated $8 a day per patient, which Dr. Benedict Nagler, the institution's "superintendent," says is probably the lowest figure for any comparable institution in the nation. Washington's Forest Haven spends $18 a patient, also inadequate in view of higher personnel and food costs here than in Southern Virginia, said Atkinson, the acting director. The cost in Maryland institutions is over $30 daily per resident.

Maryland's largest facility for the retarded, Rosewood State Hospital, the subject of much media attention recently, is also badly overcrowded with its 2,500 patients, 500 more than its capacity. After his first visit to Rosewood, the state's new director of mental retardation, Bert W. Schickel, called it one of the worst he had seen in his 35 years in the field.

Schickel said he was even more concerned with what he called dehumanizing conditions—such as jail cottages, locked doors and isolation cells—than by the overcrowding.

Conditions at both Rosewood and Washington's Forest Haven have been the subject of recent court actions. At Rosewood, an attendant was charged last year with whipping several young residents. In the District, parents of three children have brought civil actions against the city, charging negligence at Forest Haven resulted in injuries to their children.

In all of the three District cases, negligence is attributed to lack of supervisory personnel and overcrowding—the direct result of congressional and city fund cutbacks. A group of youths in one case shoved a helpless boy into a scalding shower and, in another incident, a child was intentionally burned on the ear with an electric iron by another child. The third case involves the scalding in a hot tub of a paralyzed child who was being bathed by an attendant.

With 1,300 residents, Forest Hayden is at least several hundred above capacity, but Atkinson, acting director, considers shortage of personnel an even more critical problem. In Pine Cottage, for example, where 82 severely retarded boys and men aged 15 to 50 are housed, three counselors are assigned to day shifts and two at night.

Beds in dormitories are less than a foot apart and residents are confined most of the day to two rooms because of the scarcity of counselors.

To operate something beyond the custodial program now offered, Atkinson said, 18 counselors are needed for each day shift instead of three and four at night instead of two. The cottage population should also be reduced from 82 to about 60, he said.

Beyond the visible conditions—the overcrowding, the programs which consist largely of endless hours of television, many residents of mental institutions could be living in the outside world. Hundreds of retarded people at Forest Haven, Lynchburg, Rosewood—and even Maryland's new Great Oak's Center, considered a model institution—do not belong in those institutions.

For example, Lynchburg has among its 3,600 residents 16 persons, most of them over 50, who are officially classified as not retarded. An additional 21 patients are "borderline" retarded and 379 more are classified as mildly retarded.

Some of these people have crippling handicaps or conditions requiring constant bed care, and others have been "institutionalized" to such a degree that they could not function in the outside world. But many could live outside the institution, just as thousands of other retarded persons do successfully.

At the District's Forest Haven, according to Atkinson, about 50 school-age children could live at home, but do not because city schools lack adequate educational programs for them. At least 135 adults are ready for job training programs that could help them acquire a skill and possibly employment and self sufficiency outside the institution. But, Forest Haven has funds for only 50 on-the-job placements off its grounds.

"If we had group homes and social services—we only have two social workers with 1,300 residents—we could return at least one-third of the residents to the community," said Atkinson. Another third of the residents could benefit from "training activities, rather than the babysitting we give them now," he added.

Even at Maryland's new Great Oaks Center in the Calverton section of Silver Spring—considered a model of institutions for the retarded—there are children who do not belong there. The center has at least 10 school-age children of the trainable retarded level who could be at home, if Prince Georges County had room for them in school programs.

Dr. Bruce H. Hobler, the institution's clinical director, says a "large number" of the center's children, infants to 12-year-olds from five counties, including Montgomery and Prince Georges, could live outside the center if there were community resources to support them at home. "Our ability to move children out depends entirely on the availability o. community resources," Hobler said.

The lack of community resources is keeping institution for the retarded filled above capacity. Many residents of institutions come from broken homes or problem-ridden families, but little has been done to line up foster homes willing to take handicapped children. School educational programs have been slow in developing here, again limiting the chances of some residents returning to their families.

The new movement in other states of developing group homes—small living units in the community for the retarded—is just beginning in the Washington area. The Montgomery County Association for Retarded Children plans to open a network of such homes in the next few years for retarded children, adolescents, young adults and older people, most of whom come from institutions.

NOVEL GREAT OAKS METHOD OVERCOMES BASIC HANDICAPS

In a ward at Maryland's Great Oaks Center 8- to 12-year-old retarded children are routinely condemned by society to live their lives out as permanent 1- and 2-year-old babies.

They are "profoundly retarded" children said to have barely measurable IQs and the mental capacity of infants.

In most institutions, attendants spoon-feed these children, diaper and dress them. But, at Great Oaks in the Calverton section of Silver Spring, some of these children are now feeding themselves with utensils, dressing themselves and even becoming toilet-trained. They may be the first profoundly retarded children with severe physical handicaps ever to learn these skills in any institution in this country.

The acquisition of such basic skills means that some of the children will actually be able to leave the institution and return to their families.

The unique training program at Great Oaks has been developed by Howard Reuben, a retired government psychologist, who uses controversial operant conditioning techniques, suggested by the research of the eminent behavioral scientist B. F. Skinner. The approach seeks to reward positive behavior and ignore improper behavior.

Some private and public schools and institutions in the Washington area are experimenting with varieties of these techniques for training seriously retarded and other

handicapped children. Some students are given tokens for positive behavior that can later be cashed in for toys or candy, and in other programs, small money payments are made for good attendance and behavior.

Public school officials are skittish about discussing operant conditioning or behavior modification programs since they fear negative public reactions. "It's hard to explain to people that we are using techniques with children that have been used to train white rats and pigeons," one teacher said.

When Reuben first began working with an 11½-year-old child we will call Jimmy, doctors said the child had virtually no measurable intelligence and had a physical condition making it impossible for him to grasp and hold objects in his hands. He was usually fed by an attendant, or placed his face partially in a tray so he could push food into his mouth.

Reuben used a $90-a-week attendant he trained as the prime teacher and recorded Jimmy's progress on video tape.

The training program for Jimmy began with the attendant holding a spoon in the child's hand, dipping it into food and lifting it to Jimmy's mouth. Soon, Jimmy began to exert pressure on the spoon and the attendant could let go of his hand just before the food went into his mouth.

Gradually, the attendant over a few days moved her hand away from the child's hand to his wrist. Already the medical prediction was refuted. Jimmy was holding the spoon, but still required the aid of the attendant's hand on his wrist.

By the end of 2½ weeks, the attendant was holding Jimmy's arm at the elbow. It took another week to get Jimmy to feed himself independently without even the slightest pressure of the attendant's hand at his elbow. During the whole training period, food provided the incentive. When Jimmy did not cooperate, or failed in his task, he experienced delays in getting the food he craved.

A more involved procedure was used to toilet train Tom, an 8½-year-old profoundly retarded child with a spinal defect that makes it impossible for him to walk. He has to pull himself along the floor with his pathetically limp legs tucked beneath him.

Psychologist Reuben noticed that Tom did not like wet diapers and would often pull them off when they were not changed immediately. Tom was indifferent to food, but loved hot showers, which became the primary reinforcement tool in his training.

Tom's intervals of wetting his diaper were recorded and found to occur in a regular pattern. One day he was taken to the shower, just before a regular period of urination, and placed over the drain. When he urinated in the drain, he was immediately rewarded with a hot shower.

Later, a plastic bowl was placed over the shower drain. Tom quickly learned to urinate in the bowl and empty it in a nearby toilet, which he enjoyed flushing. The next step was to have a carpenter construct a "potty chair," since none for 8½-year-olds is manufactured commercially.

Tom quickly made the transition to the chair, using it soon for defecation as well. Soon, the chair's legs were cut and the seat was placed over a regular toilet. A ramp had to be built so Tom could drag himself up to the toilet seat without assistance.

Tom is also learning to feed and clothe himself and psychologist Reuben's objectives for him are widening. He wants to see how much language a child said to be destined to live his life at an infant level can learn.

THE EXPENDABLES: SOME AREAS HELP MORE—IV

(By John Mathews)

If you have a handicapped child needing specialized treatment and education which public schools cannot provide, perhaps your first concern should be where you happen to live in the Washington area.

It's no small matter, either.

Full-time residential treatment and education offered only by a private psychiatric hospital for an emotionally disturbed child can cost $20,000 or more annually. Day programs for retarded or physically handicapped students can cost $8,000 or more.

In Maryland, you can expect to receive over $10,000 to pay for your child's education and therapy, but, if you live in Virginia the maximum you can get is about $4,000. In the District you can get up to $4,500.

Parents with high-option military or government insurance can make up much of the deficit. Families without such protection are out of luck.

These disparities in payments may soon become a legal issue involving the right of every child to a free education at public expense, regardless of his disability and regardless of the cost of that education.

The District, Maryland and Virginia have what are called "tuition-grant" or "excess-cost" programs based on the rationale that it is not feasible for public schools to operate programs for some categories of severely handicapped children.

Children who are both deaf and blind, or who are deaf or blind, as well as retarded or physically impaired, require programs with specialized equipment and expert personnel. Some severely neurotic or psychotic children also need a full-time hospital setting.

Since there are relatively few of these children, it would not make economic sense for public school systems to operate such programs themselves. As a result, the tuition-grant and excess-cost programs have been established to help pay the costs of educating such severely handicapped children in private schools and institutions.

Virginia, Maryland and the District in effect acknowledge through their special grant programs that seriously handicapped children who cannot be educated by local school systems have a right to a free public education. But limited funds—particularly in Virginia and the District—curtail that right.

Maryland's excess-cost program with its more liberal payments has provided as much as $14,000 annually for some individual children, but the State Board of Education will soon consider a recommendation from its education department to place a $6,000 limit on individual grants.

Such dollar limits, however, may become a moot question in the future. Court decisions are sprouting up around the nation prohibiting school authorities from excluding severely handicapped children from public education. In Washington, a case has been filed on behalf of emotionally handicapped and retarded children who have been excluded from local public schools.

One of the remedies for satisfying the courts is for public school systems to start programs for handicapped children they have previously not educated. Washington last fall began a small experimental class for profoundly retarded children, which enrolled several children who are plaintiffs in the court suit.

If a school system faced with a court decree, however, decides not to take on a new program for previously unserved children, it has the alternative of providing payments for education in private schools and institutions. Plaintiffs in that event are likely to ask the court to order full payment of all costs, which would vastly inflate tuition grant budgets.

Under current tuition grant programs, costs have escalated annually. The District now spends $1.3 million a year for 505 children, an average grant of $2,500 a child.

When the program began in Maryland in 1968, 32 children received grants costing $103,579. Last year, 104 children, or more than three times as many, received grants, but costs increased more than 500 percent to $554,058. Over $200,000 more is budgeted for the current year. Grants last year averaged above $5,300 a child, more than twice Washington's average.

Officials in both the District and Maryland concede that the tuition grant programs have been inherently discriminatory. They blame soaring costs, however, on private schools' increasing their tuitions—often in anticipation of increased state support available to parents of handicapped children.

Washington's new Associate School Supt. John L. Johnson, who is trying to reform the District's tuition grant program, says flatly, "In the past, a large number of children whose parents had influence with Congressmen and with the school board were able to get tuition grant payments." Parents, he adds, who were "not skilled at negotiating the bureaucracy" ended up on waiting lists for grants, which currently total about 500.

Maryland's administrator of tuition grants, Richard L. Gamble, who has been in the job for a year, acknowledges also that his state's excess-cost program is used disproportionately by people "who are more sophisticated and have the know how."

With only one full-time person in any school system concentrating on getting state aid for its handicapped children, Montgomery County last year got the highest number of grants, 34, nearly 30 percent of the statewide dollar total. Baltimore City, with the highest concentration in the state of children from low-income families got only five grants. A number of rural counties, like Wicomico, Garrett and Washington, had no excess cost grants.

Besides the excess-cost program, Maryland grants local school districts $1,000 for each handicapped child in their school systems. This program cost $11.9 million last school year, with $2.2 million of the amount paid out for private schooling.

In addition, three counties—Montgomery, Prince Georges and Howard—provide their own grants for private schooling. In Montgomery some of these grants can even be used for placing children with behavior problems in military schools.

In the District, an income breakdown for the 505 tuition grants shows a majority of the awards, 346, went to families with less than $10,000 income. Forty-five children receiving grants, however, came from families earning $20,000 or more yearly. Six families were in the $30,000-plus income bracket.

Many lower-income parents in Washington are still on waiting lists for tuition grants, although the situation has improved in the last year or so. Such persons have had an advocate in the Information Center for Handicapped Children, a small dynamic office funded directly by the U.S. Office of Education and independent of the school system. The center, which has also made the first local attempt to catalogue all programs available for handicapped children, is scheduled to go out of business at midyear.

Despite such special help many lower-income parents—as well as many in the middle income brackets—cannot make up the difference between the government grants available here and the high cost of special private schooling.

In calling for a $6,000 limit on excess cost aid in Maryland, the state education department is raising an issue that may well have to be settled by the state legislature, which has set no limit on the amount that can be spent for individual cases. Some organizations for handicapped children have argued that the state department had already violated the intent of the law by limiting grants, before the general ceiling was proposed.

The department's memorandum to the board argues that the primary reason for setting an excess cost limit is that private

school tuitions are soaring "to astronomical levels." Experience in other states has shown, the memorandum continues, that setting a grant limit forces private schools to use a sliding scale for tuition based on parent income. The limit also would "encourage shopping around to obtain adequate service at the best price," the memorandum adds.

To illustrate the current situation faced by some private schools for handicapped children which depend almost exclusively on the excess-cost program to pay their tuition, a specialist in the field sketched this scenario:

"I don't mean to say that people running private schools are motivated solely by money, but you can't ignore the economic side of it. Let's say you and I wanted to start a school for emotionally disturbed adolescents. We would describe ourselves as a therapeutic day school staffed by young, emphatic teachers and aides who use positive reinforcement techniques and milieu therapy to effect behavioral changes.

"We would set our enrollment at 30 boys and girls and our tuition at $6,000 for a 10-month year, all of it probably coming from excess cost or insurance. That's a gross of $180,000. Okay, we hire three teachers at $12,000 apiece and three young aides at $5,000 each, so that's $51,000 in salaries. Of course, we both teach part-time, giving the school a very impressive staff to student ratio, much individual attention.

"We pay out $6,000 a year to rent a church Sunday-school hall, $10,000 for supplies and equipment, $5,000 for food, $1,000 for utilities—roughly a round figure totaling about $80,000 for all costs. Subtracting that from our gross of $180,000, leaves us with a very substantial $100,000. We both could make $30,000 a year and leave a good bundle for construction of a permanent building and expansion. It's a pretty good proposition, and nonprofit too."

In Washington, Dr. Johnson is also concerned about private schools and the services they are providing handicapped children. He is planning to ask each private school with a child supported by a District tuition grant to outline every year a specific program for the child with specific goals, then report back at the end of the year on whether objectives have been met.

Johnson would also like to contract with specialized schools to take a class of District students, supported by tuition grants, and a District teacher as a trainee. After a year or two, the trained teacher and the class could be incorporated in the public school system.

"That would be a way of testing the commitment of private schools to the community," he said.

DON'T LOOK THROUGH THEM . . .

Like black people, Chicanos, Indians, women and some others—handicapped people are now being discovered as a neglected class. The handicapped, particularly the retarded, do not speak out for themselves; their parents or advocates are their voices.

"We are a new breed. The day parents came out of the backroom was the day the children came out," said Carole Hosey, the mother of 9½-year-old Stevie, who is categorized as profoundly retarded.

"We want you to know our children," she says. "We want you to ask questions, to stare at them—if you wish—but not to look at them as if they are transparent. Look at them carefully, because they are a part of life."

Mrs. Hosey, the Bethesda wife of a civilian employe of the Department of Defense and the mother of four "normal" children, and Hilda Ederer of Rockville, the mother of two children diagnosed as retarded, agreed to speak on the record recently to a Star reporter.

They spoke openly, candidly about their frustrations and tensions at caring for their children, who are—infinitely more difficult to care for then the most troublesome "normal" infant.

They also spoke angrily about pediatricians and purported experts in the field of retardation—the professionals who know pathetically little about the unused potential of retarded children and who continually discourage and delude parents.

"We need the truth more than anybody else," said Mrs. Ederer. "We need the truth early so we can find help for our children. If we are made to look through rose-colored glasses, we aren't helping our children."

Mrs. Hosey remembers a pediatrician who called her child "a moron," and a neurologist who said, "If you had eight hours a day and 20 years, maybe you could teach Stevie to feed himslf."

She also remembers with a touch of bitterness other doctors who urged her and her husband to put Stevie in an institution and forget about him. "There was so much willingness to eliminate the child, because they did not consider him a productive member of society," she said, "but we only thought of him as our child and we did not feel guilty about him."

Both Stevie Hosey and Julian Ederer, who is 8½, have made remarkable progress in the last few months. They are enrolled in a special training program at Great Oaks Center in Silver Spring, a state institution for retarded children. There psychologist Howard Reuben uses operant conditioning—a system of positive rewards and step-by-step repetition—to teach the children to feed, toilet and clothe themselves.

"A miracle," is the way both mothers described that precious moment when they saw their boys for the first time dip a spoon into food, raise the spoon unaided to their mouths and eat the food. "Stevie had never eaten a cookie himself—imagine a 9½-year-old child who had never eaten a cookie by himself—but he does now," said Mrs. Hosey.

Neither mother now entertains inflated ideas about the ultimate capabilities of their children. They share, however, a deep anger at the system: A system which regularly has written off certain categories of handicapped children, their children, as hopeless.

THE EXPENDABLES: NEW TERMS NEEDED?—V

(By John Mathews)

After weeks of examining programs for handicapped children and adults in public and private schools and in state institutions, there are some images which are hard to erase:

At Lynchburg Training School and Hospital in a ward for children confined to wheelchairs and beds, there is a 5-year-old boy whose arms and legs will never develop. In place of limbs, he has little stunted flippers. His condition is believed to have resulted from his mother's taking the drug Thalidomide—which several years ago was found to cause birth defects—during pregnancy. The child is not retarded and does not belong in an institution for the retarded, but the state has no other facility for children like him with severe physical handicaps.

Linwood School, a private institution in Ellicott City, Md., has a program for autistic children—victims of a largely unexplained disorder which leaves them unable to communicate, locked into what has been described as a "cage of unbreakable glass." In a class for young children, a little girl holds a scrap of paper in front of her eyes and constantly chases what may be to her an imaginary butterfly. A 7-year-old boy endlessly tries to put too many plastic chips in a small container. He repeatedly reaches an intolerable level of frustration, flings the chips across the room, then later begins his futile cycle again.

In a dark room at an isolated recreation department building in Anacostia Park, 11 children, 8 to 13-year-olds, take part in a two-hour play program five times a week. None of the children, all of whom are diagnosed as retarded, has ever been in a public school. Their mothers have not been able to cope successfully with the bureaucracy, in some cases being told by principals that there is no place for their children in school. "I want my child to learn her address and telephone number, to learn to count and read," says one mother. "She needs more than recreation; she needs an education."

In all the state institutions, there are hospital wards where children and adults with a variety of defects which cripple their brains or nervous systems see life through the ever-present bars of hospital beds. Dedicated attendants—and there are many in the badly neglected state hospitals—painstakingly feed them, change them and wheel them to sun porches and television-viewing areas. The lack of physical therapists in the past, and inadequate therapy programs at present, mean that at least some of them are permanently condemned to bedridden lives, doctors say, though some may have had a chance of becoming at least partially mobile.

Initially, you are shocked by these schools and institutions; perhaps, for that matter, even repelled by the cruelties of nature, disease and heredity. Mongoloids, hydrocephalics, the brain-damaged and the retarded are beyond our narrow view of what constitutes normality in appearance and behavior.

But, when a middle-aged retarded woman at the Lynchburg institution makes you read a letter from home and tells you of the joy she anticipates from the expected Christmas visit of her parents, the initial uncomfortable strangeness you feel begins to dissolve.

Or, when an autistic child, who does not speak or hear what you say, touches your face and clasps your hand or when a group of so-called emotionally disturbed boys get you to join and mediate their intense kickball game, the fear and insecurity of encountering people who are different wears off.

As an attendant who takes care of patients with severe handicaps and physical deformities in a state institution's hospital ward put it, "We don't think of them as patients. They're people to us."

To most of the rest of us, handicapped children and adults are not people. They are, instead, abstractions—medical problems we hear or read about. Essentially, they are invisible, hidden people from whom we have carefully shielded ourselves.

In schools, handicapped children—the blind, the deaf, the retarded, the emotionally troubled or the physically impaired—are usually confined to special classes or to separate schools. It has become fashionable to call them "exceptional." Their programs are even labeled "special education."

That term particularly infuriates one parent of a retarded child, James P. Chapman of Silver Spring. "It sounds like you're getting special treatment, like a charity case. We should get rid of the term and just call it public education," he said.

Chapman, who has headed a committee of the Montgomery County Association for Retarded Children now planning a radically new way of ending the segregation of many retarded persons, is also irritated by other traditional terms. " 'Trainable retarded' and 'training schools for the retarded,' " he said, "are fine for animals in the zoo, but not appropriate names for people." The term "educable retarded," Chapman added, "seems to make the assumption that all other retarded people are not educable."

His own organization is now planning to substitute "retarded citizens" for "retarded children" in its title. "If you think of a 30-year-old person as a child, he will act as a child," he said. "It's a self-fulfilling prophecy."

Society has found it easy to segregate the handicapped, because it does not view the hidden and invisible people as a direct threat.

Handicapped children are unlikely to ever march on the school board and retarded adults have never been known to stage a revolt in a state institution.

The deliberate segregation of the handicapped and their resulting invisibility have led to their traditionally low rating on the priority list of educational and community programs. "We have long been the bastards of educational and social services, put out of the family deliberately and forgotten," said one specialist in the field.

Beyond the inadequate funding, the incomplete programs for the handicapped in public schools, and the sorely neglected state institutions, there is a larger issue at stake these days. It deals with the basic relationship between handicapped people and the so-called "normal society."

So far, what has become known as the "normalization principle" is usually discussed when dealing with the retarded, the largest category of handicapped people, but its implications apply to other handicaps as well.

The principle has been defined by Bengt Nirje, a specialist on the retarded in Sweden, where the principle is being practiced, as "making available to the mentally retarded patterns and conditions of everyday life which are as close as possible to the norms and patterns of the mainstream of society."

What this means is that retarded and other handicapped people must become as much as possible a part of society, living and working in the community, managing their financial affairs, making decisions for themselves. The vehicle for integrating the retarded into the community is the group home where retarded children—or adolescents or younger and older adults—can live beyond the wards of institutions with the assistance of nonretarded houseparents.

The concept has revolutionary implications for school programs. It means that many schools will have to change the objectives of their programs from preparing retarded people for life in an institution or in a sheltered family to semi-independent living in the community. If successful, the movement will hopefully reduce the number of people generally condemned to a life isolated from society.

So far, the movement towards normalization is largely a European phenomenon, but a healthy start has been made in this country in the states of Nebraska and Washington. Locally, the Montgomery County Association for Retarded Children is planning to open a network of group homes for the retarded in the county beginning this year.

The county program would start initially with probably four "training hostels," homes where young adult retardates, mostly over age 16, would gain their first experience in living away from home or an institution. They would be enrolled in job training or school programs while living in the group home. Each home would have no more than eight retarded persons, plus houseparents. In time, some of the retarded people would be expected to leave and find a place in the community with or without supervision.

Eventually, the county plans calls for establishing group homes for infants, 3 to 5-year-old children, adolescents, young adults and older retardates. One special home, called a crisis relief unit, would offer temporary residence for retarded children and young adults whose families are experiencing a difficult period, or simply need placement for their retarded family member in order to move or take care of some family business.

Chapman, an IBM computer salesman who headed the county association's committee planning the group home network, visited Omaha and Lincoln, Neb., to see five residences and apartment living units now serving 50 mildly and moderately retarded young and older adults. The program there is operated by a unique five-county agency, called the Eastern Nebraska Community Office of Retardation.

Chapman likes to cite the case of John Bynum, who became something of a celebrity when he was named handicapped employe of the year in the state. Now 46, Bynam spent 38 consecutive years in a Nebraska institution for the retarded until he entered a group home two years ago.

Bynum is black, has a speech impediment, experiences seizures and lacks a formal education, because his club foot prevented him as a child from climbing to the second-floor classroom in the institution where he grew up. A psychologist once said he was "totally incapable of functioning" outside the state institution for the retarded.

For the last two years, Bynum has operated a dishwashing machine at a hospital, never missing a day of work. He discovered at one point that the washing line had been set up incorrectly and suggested improvements that were carried out.

Chapman feels there are hundreds of John Bynums in Montgomery County and elsewhere, who have been cheated of the right to a normal life.

If society gives them a chance to show they are people, and not problems, perhaps they will reach that goal, he adds.

WRC-TV EDITORIAL: "HIDDEN PEOPLE"

We, as a society, have for years, deliberately segregated ourselves from the retarded, the emotionally disturbed and the physically handicapped. We have hidden them away from our thoughts and priorities. As a result thousands of people, especially children, have been excluded outright from the public education and job training that could have led them to a healthier, happier, more productive life.

In the District, it is estimated that as many as 15,000 children require some form of special education, yet less than 5,000 are getting even minimal help. Hundreds more are not receiving any education or training in school at all.

No one in the District government or on Capitol Hill has ever officially acknowledged an obligation to educate these unfortunate children. Only this year Congress began to recognize the extent of the D.C. school problem. Funds, for the first time, are available to seek out and hire more highly trained teachers, buy the sophisticated equipment needed and set up special schools for emotionally disturbed—something the District has never had before.

However, corresponding needs for these people such as vocational services—have been and still are neglected or ignored. They are under the Human Resources Department and there is where more effort must now be made. Without vocational services, the handicapped are thrown out of the schools into a void—left, again, to waste away the years.

We have an obligation to these hidden and forgotten people—we can and should no longer avoid it.

THE LEGAL RIGHTS OF THE RETARDED

Accounts of gruesome and pitiful conditions in mental hospitals have been regularly reported in the press in recent months. Few states are without their human warehouses where large numbers of the sick and retarded are allowed to be stacked indefinitely on shelves of despair and deprivation. In many places, perhaps even all, inhumanity to the retarded is not intentional nor the result of designed contempt; instead, the sorry treatment of so many proceeds from lack of money and lack of staff—traditionally the twin causes of institutional neglect.

The situation is grim but not entirely hopeless. A recent order by a federal court in Montgomery, Alabama, may mark the beginning of a new national attitude toward people who are mentally retarded. Judge Frank M. Johnson Jr. ordered state officials to correct conditions at the Partlow State School and Hospital at Tuscaloosa. The evidence seen by Judge Johnson "vividly and undisputably portrayed Partlow as a warehousing institution which, because of its atmosphere of psychological and physical deprivation, is wholly incapable of furnishing treatment to the mentally retarded and is conducive only to the deterioration and debilitation of residents." In more personal terms, Harold E. Martin, editor and publisher of the Montgomery Advertiser-Journal wrote in his newspaper after a visit to the hospital: "I have covered wars and death in almost every kind of catastrophe during 30 years in the newspaper business but was totally unprepared for the horrors of an institution whose whole concern for the more severe cases is uncivilized and dehumanized custodial care . . ." Judge Johnson entered an interim order to correct immediately such things as fire hazards and unhealthful food, and to begin a disease immunization program. A March 31 deadline was issued for the hiring of 300 staff persons; this deadline has already been met. According to one observer, this is the first time a court has ever held that mentally retarded persons involuntarily confined in an institution have a right to adequate treatment and care.

The importance of this decision lies in the fact that not only has actual help been given to thousands of the retarded in Alabama, but that the decision may have a positive affect nationally. Other suits may be brought involving other hospitals. Already, a proposal has been made by the American Civil Liberties Union, the American Orthopsychiatric Association and the Center for Law and Social Policy—a Washington public interest law firm—to form a national council on the rights of the mentally impaired. Through test case litigation, the council would identify and implement the rights of the mentally ill and retarded. As the group notes, "mental impairment is more than just a health problem for our society. It is also a pressing legal problem. Despite their numbers, the mentally impaired are among our society's most abused minorities . . . The hospitals in which these persons are confined are often worse than prisons and the 'treatment' which is the purported justification for such confinement is often nonexistent."

Successful court cases are an important and obviously much-needed way to guarantee the rights of the retarded. Ideally, states should not have to be forced to provide adequate treatment, but since legislative appropriations for mental health are often small, decisions like Judge Johnson's will become more and more crucial. It is also welcome news that mental health lawyers will be active.

SUPPLEMENTAL AIR TRANSPORTATION EXCEEDS CONGRESSIONAL AUTHORITY — ADMINISTRATION DEPARTMENTS ARE WRONG IN THEIR INTERPRETATION OF THE LAW

Mr. RANDOLPH. Mr. President, many months ago the Civil Aeronautics Board proposed the creation of a new concept in air transportation called the "non-affinity charter." In late December of 1971 the Board moved toward adoption of this proposal by issuing a notice of proposed rulemaking. Under this notice the name of the new concept would be changed to "travel group charter." The proposal, however, differs little from that which the Board originally announced.

I bring this matter to the attention of the Senators because it seems to me to

be a very unfair proposal. The air transport network of the United States is unsurpassed in any other country of the world. It provides a system of regular and predictable scheduled services to smaller communities as well as to large ones, and in times of low traffic demand as well as in times of high traffic demand. This system of air transportation came into being by virtue of the wisdom and foresight of our predecessors in the Congress. In 1938 they adopted the Civil Aeronautics Act, which I assisted in drafting and passing in the U.S. House of Representatives, when a Member of that body. The legislation placed duties on the shoulders of the scheduled airlines in exchange for the rights which were granted to them. Since the enactment of that original measure the scheduled carriers have responded well to this combination of responsibility and right. They have produced for us an air transportation system which has strengthened the mobility and the security of our Republic and of our traveling and shipping public.

After World War II a second type of airline came into existence. It was known as the nonscheduled carrier. Such a carrier was authorized to operate by the Civil Aeronautics Board, using its exemption authority, on condition that its operations would be truly nonscheduled, and that those operations would not interfere with the services provided by the scheduled airlines.

Mr. President, these carriers, in my opinion, far exceeded the scope of their operating authority and was not in accordance with the terms of their operating permits. Moreover, the courts held that the authorizations issued by the Civil Aeronautics Board exceeded those which were permissible under the Board's exemption authority.

To solve this problem the Congress, in 1962, amended what had become the Federal Aviation Act so as to provide a proper statutory basis for certification of the nonscheduled airlines. By that legislation it called these airlines supplemental air carriers, defined them, and defined the permissible scope of their activities in air transportation. We established two tests: First, that any air transportation they would be authorized to perform would fit within the meaning of the word "charter"; second, that they could only provide such air transportation was would supplement the scheduled services.

I am sure that the Civil Aeronautics Board recognizes these limitations and will apply them in determining whether the supplemental air carriers should be authorized to perform the new travel group charters. In my view, this type of air transportation cannot be considered as a true charter, and authorization of the supplementals to perform this type of air transportation would amount to authorizing the supplementals to supplant, rather than supplement, the scheduled services.

All persons desiring to do so were permitted to file comments on the Board's new proposal last month. Many comments were filed, some in support of the proposal and some in opposition. I am particularly disturbed, however, by two filings which came from the executive branch. These comments were submitted by the Department of Justice and the Department of Transportation. Both comments seem to ignore the standards established by the Congress for determining what type of air transportation authority should be granted to the supplemental carriers. Instead, these two Departments have embraced what they call the "substantial impairment" theory. In other words, they appear to tell the Board that it may authorize the supplemental carriers to carry passengers and cargo so long as their activities do not "substantially impair" some given level of scheduled service.

I emphatically point out the administration that this is not the law. I further tell the administration that it has no power to make the law. That is the function of Congress, and Congress has set the boundaries defining supplemental air transportation. We expect the Board, as an administrative agency created by Congress, to follow the law.

TRIBUTE TO SENATOR GOLDWATER

Mr. BROCK. Mr. President, throughout his public career, the Senator from Arizona (Mr. GOLDWATER) has been a staunch defender of Taiwan, the leading spokesman in this country for the defense of that nation against potential aggression from the mainland. The free men and women of Taiwan could have no better champion in the Congress of the United States than this man who has taken up their cause against those who would write them off as sacrifices on the bloody altar of detente.

With such a distinguished record behind him, it is no accident that Senator GOLDWATER is admired, respected, and supported by millions of Americans who share his concern for the defense of this Nation and allied nations against Communist aggression and subversion. As the Senator said about himself in addressing the Young Republicans Leadership Conference on March 10:

> . . . I am a very vociferous, strong champion of Nationalist China, and will still be. . . .

Mr. President, it took a very special kind of political courage for the man acknowledged as the foremost American champion of a free and independent Taiwan—for a man known throughout the world as a crusader against communism and all forms of collectivism—to support his President when he visited the People's Republic of China last month. It took a special kind of man to take the lead in defending the President against the attacks of many men and women who have been his friends and political supporters for a decade or more.

But Barry Goldwater is that kind of man—very special. I know. I will always hold a place in my heart and mind for him as an example of integrity, courage and conviction which I believe constitutes the standard which the rest of us must strive to attain. His action in this regard, in supporting a President because he was right, again illustrates the point only too well.

Since he spoke out in defense of the President, the Senator from Arizona has been the object of an often bitter attack by many Americans who in my opinion should know better. There is something very dispiriting in this reaction—dispiriting and disquieting. BARRY GOLDWATER, Mr. President, represents the best that is in us. Throughout his time in the Senate, he has earned and gotten the respect and admiration of many men within and without his party who disagree with him on specific issues yet can never doubt his decency, intelligence and character.

I know beyond the shadow of any possible doubt that there is not a man in this body who sympathizes with the goals and tactics of the Chinese Communist Government of the People's Republic of China. I know that the overwhelming majority of Americans are vehemently opposed to what that government and its accompanying ideology represent. Yet, in the face of that, most of us in the Senate and a huge majority of Americans approve of President Nixon's trip to China. We have come to realize that the government of mainland China constitutes a force in the real world with which we must deal. Certainly President Nixon harbors no illusions on the humanity of that government—but he also harbors no illusions on what it will take to build a generation of peace throughout the world.

In supporting the President's initiatives in the Pacific, none of us has been the object of the attacks which Senator Goldwater has suffered. It is not as though these attacks were unexpected. It is not as though there was no other course open to him. But he chose the right course knowing what the price would be.

It is a source of satisfaction to me that the Senator, not his detractors, reflects the overwhelming response of this Nation—Republican and Democrat, liberal and conservative. It is an honest response, rooted in faith in our President and faith in the ability and character of free men.

WELFARE REFORM: THE TIME IS NOW

Mr. HUMPHREY. Mr. President, poverty is a condition of life that most Americans do not have and are not likely to experience. For some Americans though, poverty is real and depressing. Life for poor Americans is indeed bleak. To go without eating, to lack money for decent shelter and adequate clothing, to say again and again to one's children, "No, we cannot buy a new pair of shoes or a new toy," to be without the standard elements of human comfort is an existence with little reward and much heartache.

Simultaneously, the poor, the welfare recipient, and the hungry are the most vilified, least understood segment of our population. We can close our eyes and hope they will go away or pretend that we do not see them, but they remain, a testimony to an affluence that has not yet arrived. And, always, the poor live on the other side of the street, or across

the tracks, or beyond the bend in the river.

In August 1969, the President of the United States, in his welfare reform message, called upon the Nation to accept the notion that "a measure of the greatness of a powerful nation is the character of the life it creates for those who are powerless to make ends meet."

Welfare rolls continue to spiral. From 1960 to 1969, rolls increased some 4.4 million. The Department of Health, Education, and Welfare estimates that left unchanged, rolls will increase until, in 1977, the level will reach 20.3 million. The public assistance figures for September 1971 indicate that some 12.9 million recipient families received aid. There were an additional 2 million individuals receiving aid under the adult categorical program.

In our urban areas, the scope of public assistance is even more frightening. New York, according to data from the National Center for Social Statistics has 13.4 percent of its population on welfare. In St. Louis, the percentage is 12.5. Philadelphia has a percent rate of 11.5 and Boston-Suffolk has 15.3 percent of its population receiving public assistance.

Cost figures, in terms of dollars, have also increased. In 1960, the Federal Government spent 2.05 billion on public assistance. Expenditures estimates for 1970 indicate that total outlay for assistance, exclusive of medicaid, administrative, and general assistance will be about 10.2 billion. Of that total, the non-Federal share is about $4.481 billion and the Federal share equals $5.795 billion. Once medicaid, administrative, general assistance, and social services are included the total cost increases to an estimated $20.939 billion, with Federal cost estimated at $11.6 and non-Federal cost at $9.3 billion.

Something is wrong and something must be changed.

GOALS OF WELFARE REFORM

First, we can and must put an end to hunger in America. We must end forever poverty-related malnutrition. And, to do it will require both an expanded food stamp program and a basic benefit level above $2,400. We simply must have a national goal to end hunger in this Nation.

Second, we can and must enact a system that treats recipients fairly and provides coverage for all the needy—not just families, or the elderly, or those who are physically disabled.

Third, we must maintain and strengthen the family. We can begin by providing assistance to the working poor, by providing adequate day care centers, and by expanding job training and public service employment at a fair minimum wage.

Fourth, we can and must simplify the administration of public assistance. Administration should be federalized; red tape should be reduced; and employee protection for social workers and support personnel should be assured.

Fifth, we should guarantee that no recipient receives less assistance under a reformed welfare system than he does receive under the present system.

Sixth, we must assure that a reformed welfare system must be as fair to the middle and moderate income taxpayers as it is to the recipient. We must guard against fraud and deception and provide an opportunity to work for those who can work.

We can and must provide fiscal relief from the crush of local taxes. We can do so by federalizing the complete cost of public assistance and by closing the loopholes in our Federal tax system.

Seventh, we must recognize that welfare is a national problem demanding national answers and the commitment of national resources.

WHO RECEIVES PUBLIC ASSISTANCE?

As our Nation considers welfare legislation, I believe it is highly important to keep a perspective on the problem by understanding the composition of the welfare population.

Who receives public assistance? The welfare myths would have us believe that almost all recipients are black, that all the families have 10 or more children, that all are on welfare for generations, that all recipients are shiftless or lazy, and that few of the recipients work but almost all could, if forced, go to work.

The results of the latest Department of Health, Education, and Welfare study, gives a different picture of AFDC recipients. According to this report, 48.3 percent of recipients are white, 43.3 percent are black, and 8.4 percent are other races. The average number of children in a welfare family is three, a decrease from the 1967 figures. Over half of all AFDC families have two or less children. Only 11.5 percent have six or more children. The median age of a child on AFDC is 9, with about one-third of all the children under the age of 6.

Families on welfare generally do not receive assistance more than 2 years. In fact, 51 percent of the recipients are on AFDC less than 2 years. Thirty-two percent are on less than a year. The median length is 20 months.

The employment data for AFDC fathers reveals that of those presently unemployed, 71.1 percent are normally blue collar, 6.2 percent are service workers and 11.6 percent are formworkers. Less than 2.4 percent of all AFDC fathers have never held employment. For the AFDC mother, 13 percent are employed in regular or part time jobs; 7 percent are enrolled in training programs or are waiting for training programs; 35.5 percent did not work because they were needed in the home, caring for small children. Thirty-six percent were physically or mentally incapacitated, had no marketable skill or could not find suitable employment.

Of the missing father, 5.5 percent are dead, 11.5 percent are incapacitated, 75.4 percent are absent from the home—with 13.7 percent divorced, 15.9 percent deserted, and 27.9 percent not married to the mother. No information for the remainder.

The average monthly income of an AFDC family is $50.65, with $25.55 in earnings and $25.10 in unearned income, not including assistance monies. One-half of all AFDC families participate in the food stamp program; 12 percent live in public housing; and 80 percent have not received any family planning services.

Three of every 10 recipients receive less than $100 aid; four of 10 receive anywhere between $100 and $199; and three of 10 get over $200 a month in aid.

Categorically, the public assistance rolls are composed of 24 percent enrolled in the old age assistance program; 8 percent are in the aid to blind; 50.3 percent are children; 2.9 percent are incapacitated adults; 13 percent are AFDC mothers. Of this 13 percent, 7 percent are in training; 36 percent are incapacitated; 35.5 percent are mothers in homes; and 13 percent are presently employed; the remaining mothers are unavailable for work.

The President's Commission on Income Maintenance sums up work potential this way: Of 1.2 million people, nonaged family heads who did not work, one-half were women with responsibilities for children, one-third were incapacitated adults; 230,000 were attending school; 15 percent continually searched for work but because of economic conditions, could not find work; and less than 100,000 men were able-bodied and did not work.

Thus, of the 12.9 million people receiving public assistance, 2.6 million could be considered eligible for work. Among this number 2 million are women—mothers with children—and of these only about 44.5 percent can move into regular employment once child care, training, and jobs are assured.

Of the other 600,000 employment potentials, less than one-fifth would be considered suitable for employment. Work and potential for work boils down to this: Less than a million of the 12.9 million on public assistance, and any addition to the welfare system through the inclusion of the working poor.

This is the welfare population.

They demand our consideration and compassionate judgment, as we in the Senate make decision.

I would now like to examine the goals I have outlined.

1. ENDING HUNGER AND MALNUTRITION

No condition of human life pains me more than to realize that there is still hunger in America.

As a Senator, I was intimately involved in food programs.

As Vice President, I worked for child feeding programs, for school lunches, and for food stamp programs.

Now once again as a Senator, I pledge to continue the battle against hunger.

FOOD STAMP PROGRAM

I believe we have made a start by providing additional funds for the food stamp program. More families than ever are using stamps. And, with proper regulations, increased funding, the relaxing of eligibility requirements and a sympathetic Presidential leadership, we can continue to increase participation.

But, we must remember that a cash-out of food stamps is really a cash-down if hunger is not reduced. Food stamps should not be cashed out if the net effect of such action is to reduce the purchasing power of the poor, and if such action will lead to an increased utilization for the

commodity distribution program as now legislated and operated—a program which food stamps were designed to replace.

The food stamps cash-out under the House bill increases the probability that in some States, if these States do not maintain current benefits, total dollar benefit will be reduced. A family of four in Michigan presently receives, if they have no other income, an AFDC benefit of $3,156. This family is eligible for $444 in food stamps, for a total benefit of $3,600. Under the House proposal, the total cash benefit, assuming the States maintain current levels, would be $3,165; but food stamps no longer exist; the result would be a $444 loss in benefits for this family. On the other hand, a State such as Louisiana, which only has a total benefit level—cash and food stamps—of $2,304, the recipient family would gain about $95.

Overall, if States do not maintain benefits at the current cash-plus-food stamp levels, recipients in 46 States will have welfare payment cuts.

COMMODITY DISTRIBUTION PROGRAM

Indirectly, the House action on food stamps increases the pressure that the commodity distribution program will double and triple in size and scope. The House bill, while it does ban recipients of family assistance from participation in the food stamp program, does not ban recipients from participating in the commodity distribution program.

The commodity program is filled with errors of design and operation which work to the disadvantage of the poor. These errors have been well documented by hearings before the House Committee on Agriculture, Senate Committee on Agriculture and Forestry, a Select Committee on Nutrition and Human Needs, and before citizens groups such as the Board of Inquiry Into Hunger in the United States. The problems of the commodity program are familiar: Transportation centers far away from the population; restricted hours; heavyweight of the commodities; inadequate nutritional value; insufficient quantities of food; irrational and illogical application for eligibility procedures.

The greatest failing, though, of the commodity programs, from the standpoint of being an integral part of any income maintenance scheme, is that the support and concepts which underlie it are farmer, not welfare recipient, oriented. The Nixon administration bluntly intimated this fact in its response to the recommendations of the White House Conference on Food, Nutrition, and Health:

> . . . we maintain that commodity programs are of a different nature. Their primary thrust is to help balance the agricultural economy rather than to provide income substitutes. They serve a different constituency than that concerned with health and nutrition. (Page 77, Comprehensive Report, White House Conference on Food, Nutrition and Health, February, 1971)

This statement will remain as a serious and fatal indictment of the commodity programs as nutritional improvement mechanisms.

CASH ASSISTANCE

Cash assistance, not just for families but for all needy is a key element in ending hunger. But, the cash income must be adequate.

I have previously introduced legislation that would lift about 6 million elderly out of poverty. We can do this with an immediate financial increase in adult categories and in social security benefits.

The $2,400 annual assistance for a family of four is at least $1,500 below the Government's own recognized poverty line. The $2,400 family assistance for a family of four in deficient when one realizes that the changes mandated for the adult categories would provide a $2,400 benefit level for an aged family of two. Surely a four-person family has more dollar needs than a two-person family.

The poverty level for a family of four is at least $3,000 below the lower living level budget of the Bureau of Labor Statistics. In my own city of Minneapolis, the Bureau of Labor Statistics estimates that the total cost of four-person family consumption on a lower income budget is $5,561, including $1,866 for food, $1,465 for housing, $492 for transportation, $843 for clothing and personal care, $540 for medical care, and $355 for other expenses. In addition, it is estimated that such a family will pay $343 in social security and disability insurance and $892 in personal income taxes. A $2,400 level without any supplementation is woefully inadequate.

THE COST

The reason usually offered for not increasing the benefits is cost. Public welfare cost today, including medicaid, administration and emergency assistance, totals $21 billion, of which $11.6 is Federal and $9.3 billion is State and local funds. A family program with a $2,400 Federal base costs excluding administration, medicaid, and emergency assistance, $9.1 billion increasing that base to the $3,600 for a family of four would cost $15.8 billion. This figure, some argue, is unrealistic, beyond Federal budget capacities, and remains but a goal for some distant future action.

But, there is another dimension to the cost datum—the human cost. What does it cost if we do not increase benefits? What does it mean in terms of sustained malnutrition—in terms of babies and children who are underfed, who go to bed night after night hungry, who exist on staples of beans and grits?

What does it cost society to keep people in perpetual states of inactivity, or listlessness, or nonproductivity? What is the cost if families do not have adequate shelter or plumbing facilities? What is the cost of combating disease aggravated by the lack of sanitary conditions?

What is the cost in terms of babies yet unborn who upon birth have a 30-percent less chance of survival the first year, three times the chance of normal children of being mentally retarded because they are likely to be undernourished, not likely to finish elementary school, let alone high school and have better than an even chance of being on the same welfare system their parents so deplored and so hated?

The immediate solution is this: Increase the benefit level and do more for those who have less. We are a great country; surely we can take care of our people.

There are a variety of alternatives to a static Federal floor. We could increase the floor each year by a percentage of the poverty level until at some time in the future the poverty level becomes the Federal minimum. Or, we could provide that the floor increase a percentage of the family food consumption component of the Bureau of Labor Statistics low-income budget, until that component becomes the Federal floor. Or, we could change the ceiling each year by enacting new legislation. However it is done, it is my opinion that an escalator should be a part of the legislation—to move the basic Federal payment to levels of adequacy.

Finally, we should build into any Federal payment a cost of living and regionalization factor. It is only fair and equitable that differences in living expenses be recognized as a legitimate ingredient of welfare cash assistance.

A sound food assistance program and an adequate Federal income program can help accomplish the goal of ending hunger—the most urgent domestic priority.

2. ADEQUATE COVERAGE

The second goal is adequate coverage.

The family assistance plan covers only those poverty families with children. It does not cover the 1.8 million childless couples living in poverty nor does it cover the 2.3 million single adults living in poverty.

The plan assumes that these individuals will be covered by State welfare payments. But not all States pay what is called general assistance—benefits which go to those who do not qualify for the regular categories of assistance.

Conceivable, this omission could be a subtle pressure for a childless couple to have children—at least then they could receive family assistance.

A national program should cover all the needy.

3. WORK OPPORTUNITY

In the United States work is honorable and it is expected. Those recipients who can work should work. And, indeed, data tends to support the conclusion that almost all recipients able would like to work—if only jobs were available.

However, to make work opportunity more effective, we should spell out in detail what is and what is not suitable employment. And, we should assure that day care, public service, and upgraded training will be available.

Day care and public service employment are vital to any welfare reform. Without them, reform legislation could only institutionalize a welfare crisis.

The Department of Health, Education, and Welfare estimates that 1.3 million children will require day care if H.R. 1 becomes law. Cost figures for these children vary between $1,600 and $2,000 a child. But, present day care programs provide services for less than 250,000 children. And there are serious questions whether or not the funds in H.R. 1 are sufficient to meet this need. The House committee report states that well-de-

signed child care including educational, health, nutritional, and other services should be the basis of our child care programs.

H.R. 1 also provides for 200,000 public services employment jobs. This is vital to the success of a comprehensive welfare program. However, we must be certain that at a time when the economy is sluggish and depressed, as it is now, we provide sufficient public service jobs.

Public service jobs are not necessarily dead end meaningless jobs. Public service can be jobs of opportunity and a path to career mobility. I have called for 1 million public service jobs. I would hope the Congress and administration would enact at least that many jobs.

INCENTIVE

There is one other work opportunity feature of the welfare program that should be examined: incentive to work.

One of the major problems with the present welfare system is the lack of incentive for the working poor to earn additional dollars. Under the present procedures, earned income is deducted from the benefit at a rate of $30 and one-third the remainder. Unearned income is reduced dollar-for-dollar from the benefit check.

I believe the working poor must be included in any welfare program—either as an integral part of program or as part of a pilot project that would be automatically triggered into effect.

I favor a work incentive of 50 percent—allowing the working poor to keep 50 cents of every dollar.

It is my feeling that a restricted and regressive 67-percent incentive rate as presently slated will actually be a disincentive. The Heniman Commission has said that a 50-percent tax rate is better than a 67-percent tax rate. A 50-percent tax rate does increase program cost, for it increases the break-even level and brings more potentially eligibles into the program. But, it also provides an adequate work incentive that may hasten the removal of the recipient from the welfare rolls.

4. ADMINISTRATION

Although I strongly favor the assumption of welfare administration by the Federal Government, I also believe that administering the program should be as simple and as concise as possible. I am fearful that splitting responsibility between the Department of Labor and the Department of Health, Education, and Welfare, though admirable, might increase the difficulty of coordination, increase the red tape, and increase the confusion.

A. APPLICATIONS

The application procedure of the House bill is vague and unclear. On one hand, the language does specify what happens when the recipient fails to file his income report—the recipient is summarily cut off from benefits. And, if the failure to file persists, then benefits for any subsequent reapplication are reduced by a specified dollar amount.

On the other hand, the procedure for filing an application and the kinds of information that are to be included on that application remains the realm of secretarial discretion. What kinds of "data and material" must the recipient file—income wage statements, home ownership policies, birth certificates, death certificates, baptismal certificates, income taxes, car titles?

If we are going to have complicated eligibility and certification procedures, then we should be legislatively specific as to kinds of data and material that the potential recipient must supply. In the long run, I believe we can guard against fraud and illegal acts and still have a certification system that is simple and rapid.

B. REVIEW AND HEARINGS

It is in the hearings and review proceedings that capriciousness, while maybe not deliberate often, is more a function of the fact that the welfare recipient often does not know his rights, is not informed in clear and understandable language of them, or is just too scared to speak for those rights. Given the history of welfare procedural review, it would seem necessary to specify as clearly as possible the rights, regulations, and provide for the publication and communication of those rights.

C. LOCAL COMMITTEES

The House bill provides for local advisory boards set up throughout the country to evaluate and 'report on the country to evaluate and "report on the effectiveness of the program." The language of the bill says that each committee "shall consist of equal numbers of representatives of labor, business, and the general public, as specified by the Secretaries." Just what does the "general public" mean? Does it mean that welfare recipients are to be included or excluded?

We have had numerous Federal programs in which the consumers of the program have no opportunity to participate in the design or the evaluation of the program. In fact, social scientists are agreed that the failure to ask the poor, to consult with them, and obtain their thinking about policies which affect them is one cause behind the failure of many social programs. Since recipients of public housing aid have served on the board of the public housnig authorities and food stamp recipients have served on food stamp advisory committees, does it not make sense to allow welfare recipients to serve on a board that will be charged with evaluating the delivery capacity of the family assistance plan?

D. EMPLOYEES

I believe that State and local government employees should be assured of accrued rights during the transition from State to Federal administration. We must and should protect the right of those workers who might be assimilated into the federal system and I believe that we should assist all others to find new and equally productive jobs.

It is important also to have workable accounting income procedures. We simply must make every effort to be as current and as fair as possible in the calculation and definition of a recipient's income for assistance payments.

5. MAINTENANCE OF BENEFITS

It seems axiomatic that any reform of the present welfare system would at least guarantee that recipients would not receive less cash benefits than they are presently receiving.

The Federal legislation must include a maintenance of benefits clause. States must be mandated to provide present levels of benefits to public assistance clients; because, in fact, if we do not guarantee existing benefits, we subtly increase the pressure to reduce benefits.

This pressure is great and may be overpowering—the burden of welfare costs is more than most States can bear.

When this pressure for a reduction in total State costs is coupled with the notion that some States do not pay 100 percent of needed standards now, the lack of a maintenance of benefit clause will likely prove catastrophic to welfare recipients.

President Nixon's once famous dictum that no recipient will receive less than his current benefit is laughable, if it were not so tragic.

The most positive way out of this dilemma is to include a maintenance of benefits clause along with a hold harmless for both people and States and a high rate of Federal participation in the financing of State supplementary welfare payments.

The essential point is this: The taxpayers of our States need massive fiscal relief from the crush of taxes used to pay welfare cost. At the same time, children, mothers, and older Americans ought to have protection against any cut in benefits.

STANDARD OF NEED

Even a maintenance of benefit clause, though helpful as a guarantee to recipients, does not provide as much in fact as in theory. It is true that no recipient will get less than current levels; it is also true, in some States, that many people do not get enough to cover their needs.

Fourteen States pay recipients 100 percent of the monthly amount for basic family needs, as these needs are defined by the State. All 14 of these States—Colorado, Connecticut, Hawaii, Illinois, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, South Dakota, and Washington also have benefit levels above the proposed Federal floor of $2,400. A maintenance of benefits provision is important in these States to assure continuance of the payment level.

Other States, such as Alabama, Arizona, Delaware, Mississippi, Nevada, South Carolina, and West Virginia, pay considerably less than the full standard of need. Alabama, for example pays only 35 percent of the standard—$81 of the estimated $230 monthly amount for basic needs. Delaware pays 65 percent—$187 of a $236 need standard. Mississippi pays 40 percent—$70 of an estimated $230 need standard.

For recipients in these States, a $2,400 Federal floor will increase their incomes. The maintenance of benefit provision is not wholly applicable—though any Federal sharing of voluntary State supplementation may encourage those States to increase payment levels.

6. FAIRNESS

No one denies that there are two costs to every welfare system: to the recipient who must bear the burden of living under

the system and to the taxpayer who must pay dollar cost of the system.

The cities and the States are in financial trouble.

They need help and they need it as rapidly as possible.

There are serious reservations whether or not the relief promised by welfare legislation is sufficient to meet the crisis demands of State and local government. It could mean that the inequitable distribution of State cost which originally led to a reform of the welfare system, will be frozen into law. Those States which now provide cash payments substantially above the proposed Federal floor would not find their cost increasing, but neither would they find any State savings from their cost of maintaining benefits to the 1971 level, once the basic Federal payment is deducted.

On the other hand, those States which presently pay less than the $2,400 level will have little or no State welfare cost under the new program. The limitation on increases in expenditures has no direct and immediate effect on these States.

Since one of the goals of this legislation is to provide fiscal relief to beleaguered States and local governments—to save the States money that is desperately needed for other programs—the Federal Government should provide for increased starting Federal floor and contribute a share of the supplementary payment States would make to recipients over and above the basic $2,400.

This Federal participation in State supplementary payments will have three effects. First, it would provide States an incentive not to reduce benefits from present levels. This would protect welfare recipients from a cut in public assistance.

Second, it would mean that the welfare program would be on its way to true federalization. If the percentage which the Federal Government aids in State supplements was continuously increased, then there eventually would be a complete federal system of both costs and administration. Third, Federal participation would provide the fiscal relief that the high payment States desperately need.

And adequate benefit level or a phased-in increase in the percent of Federal aid for State supplements would provide the fiscal relief the States want and it would truly recognize the welfare crisis as a national and not a local crisis.

7. WELFARE AS A NATIONAL PROBLEM

The House bill recognizes that welfare is no longer a local or State problem. It is a national problem demanding national standards of eligibility, basic national benefit floors, national administration, and national distribution of the cost.

Welfare reform is but one of the "reforms" we must make this year. Hand in hand with it we must have "revenue sharing reform" and "tax reform." In fact, these three "reforms" fit together.

Our present taxing system is grossly unfair to the middle-, moderate-, and low-income individual. There is something unfair about a society that taxes poor people while millionaires and the wealthy are allowed to escape from taxation. Yet that is precisely what happens. Poor people pay over $5.4 billion collectively in direct taxes, $2.8 billion in social security taxes, $2 billion in indirect taxes, and $14.5 billion in indirect consumer taxes.

I have previously offered amendments to eliminate the poor from Federal tax liability. This amendment was adopted by the Senate, but the Nixon administration fought it in the conference committee over the Revenue Act of 1971.

I think we must move ahead quickly on tax reform. And, I have joined in sponsoring a comprehensive tax reform proposal.

I think we must move ahead quickly on revenue sharing.

I think we must move ahead quickly on welfare reform.

The administration has delayed on these reforms all too long—they have asked for postponement in revenue sharing and welfare reform. And the administration refuses to propose a tax reform program.

As in the past, Congress must take the initiative.

These are national problems and they must receive national answers.

The time is not tomorrow; the time is now.

POLL OPPOSES GUARANTEED ANNUAL INCOME

Mr. CURTIS. Mr. President, as the Committee on Finance continues its consideration of welfare reform and the "guaranteed annual income" proposal contained in H.R. 1, I wanted especially to invite attention of Senators to the results of a recent poll taken in his State by the distinguished senior Senator from North Dakota (Mr. YOUNG).

The Senator received 11,000 responses to his questionnaire. A total of 9,327 responded to the question, "Do you favor the President's welfare reform proposal with its guaranteed annual income?" Of those, 30 percent favored the proposal and 70 percent opposed it. A very significant result of the poll was that of 274 students who responded to the question only 35 percent favored the proposal and 65 percent opposed it.

Not only does the Senator's poll reflect overwhelming opposition to the "guaranteed annual income" approach to welfare reform in his State, but it indicates that young people do not view the matter substantially differently from their elders.

In a Federal Republic such as ours, it ill behooves Congress to force upon the citizens of an entire State a program they oppose by so wide a margin. I know that the results of Senator YOUNG's poll has been or would be substantially duplicated in many other States—almost certainly in my own.

I commend Senator YOUNG for this important contribution by his office and his constituents to the enlightenment of Congress on this and other issues. The full results of the poll appear at page 8947 of the CONGRESSIONAL RECORD of March 17.

OCEANS

Mr. NELSON. Mr. President, the current issue of the Sierra Club bulletin includes an article entitled "Long Island Sound: The Urban Sea," written by Donald Squires. It is a very informative piece, describing the threats to the environment of the sound and the beginnings now of steps to try to save it, with concerned citizens groups providing the push.

Similar stories could be told all over the country, of course: Accelerating pollution, tragic consequences, public awareness and concern, governmental efforts to stop the wastage and destruction before the resource is completely and irreversibly spoiled.

But there is something unique in the Long Island Sound story: It is not a lake or a river that is being destroyed; it is a part of the ocean itself.

"The urban sea" is the new tag for the sound. It is a term that gives little cause for comfort: If we do not act now to protect and manage the marine environment, minimizing conflicts in uses, surveying and preserving its ecology, we will quickly make the same mess of the supposedly limitless ocean environment as we have of much of our land.

I ask unanimous consent that the article entitled "The Urban Sea" be printed at this point in the RECORD, along with two New York Times articles, one just this morning reporting a 60,000 gallon oil spill in the sound from a grounded tanker, and the second reporting active consideration by the New Jersey Assembly of a measure to create an offshore sanctuary for the entire length of the State.

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

LONG ISLAND SOUND THE URBAN SEA

(By Donald F. Squires)

Some 10,000 years ago the great wall of ice which covered most of northern North America stalled in its advance, retreated and advanced again. Two great ridges of sand and gravel, over 100 miles in length and up to 30 miles in width, were piled up on the Continental Shelf ten to fifteen miles off the Connecticut shore forming, when the ice withdrew, Long Island. As the ice continued its retreat a fresh water lake was formed in the embayment between the glacial ice on the Connecticut shore and Long Island. This soon was replaced by sea water, forming what is now Long Island Sound.

Because of this geological history, Long Island Sound is not a typical estuary with a great river at one end, the sea at the other. The Sound is an enclosed arm of the Atlantic Ocean, with several important rivers such as the East Housatonic, Connecticut and Thames Rivers, draining into it. But this is not what makes Long Island Sound of interest today, but rather the fact that this body of water has become an urban sea.

Today the Sound is a playground for some 12 million people. On its shores the citizens of New York and Connecticut bathe (where possible), boat, race, fish, bird watch, dig for clams (where possible), and earn a living through shell fishing and fin fishing. Today the Sound is also used as a dumping ground for 1.8 million tons of dredge tailings, materials from metropolitan excavations, and for waste products of certain industries. Additionally, sixty municipal sewage treatment plants discharge over 170 million gallons of

waste water per day into the Sound, and it receives the waste heat of power plants generating more than 3,000 megwatts.

What makes this urban sea interesting is that from the Metropolitan complex of Queens and Westchester Counties on the western boundaries of the Sound, the scene changes slowly and steadily to the east as urbanization gives way to suburbia and finally to the agricultural areas of eastern Long Island and eastern Connecticut. (Suffolk County, Long Island, is the leading agricultural county in New York State.) Here, at the eastern end of the Sound, the cluttered, industrialized shoreline and the hustle and bustle of harbor, airports and bridges has given way to the open coasts which still have vestiges of their earlier maritime history. Mystic Seaport, Connecticut, with its whaling museum and square riggers, is matched by the quaint village of Sag Harbor, Long Island and its whaling museum and traditions. Old oyster industries, once a multi-million dollar venture in Long Island Sound, still hang on, but only a few companies are still fighting the increased costs of labor, starfish, and pollution. The famous Stonington fishing fleet still operates and the Stonington dragger, though no longer built, is still a familiar sight in this area.

Long Island Sound presents the full spectrum of man's impact on the sea from the urban sea at the western end to the open, relatively unpolluted waters at the eastern end. The eastern end of the Sound is relatively open and has good exchange of water between the Atlantic Ocean and Block Island Sound. At the western end, access to the sea is greatly constricted through the East River, a toruous channel which, before the boulder fields of Hell's Gate were cleared was considered one of the most difficult passages for sailing ships. The exchange of waters between the New York Harbor and western Long Island Sound is still a subject of debate among hydrologists, but apparently there is a great input to the Sound of nutrient laden waters derived in large part from the sewage treatment plants of Manhattan, Queens and Westchester Counties.

What has happened to Long Island Sound over the years? Nothing dramatic. Just a slow, general, wasting through misuse coupled with a general indifference because the problems were not observable by the public. In the past few years the situation has changed; public awareness of the importance of the Sound has reached high levels and the public concern expressed by civic and conservation groups has not been unheeded. Spurred on by the activities of these groups, Senator Abraham Ribicoff of Connecticut and Congressman Lester Wolff of Long Island sponsored legislation in the Congress to establish a Long Island Sound Commission to study, recommend and manage this body of water. In response to the congressional action, President Richard Nixon, by executive order, increased the responsibility of the New England River Basins Commission to include the waters of Long Island Sound and called for a three-year study to formulate a 20-year plan for its management. As with so many of these actions, the legislative and executive intent has not been backed with funds, and presently the Long Island Sound study is making haste slowly.

The most pressing problem of Long Island Sound, to isolate the one single factor to which to attribute its present decay, is the concentration of sewage outfalls in the western end. The impact of sewage and the resulting biological stimulation from the nutrient materials placed in the waters has caused responsible reporters to project the imminent death of Long Island Sound—the difficulty is to define "death." The immediate observable impact of sewage outfalls is the build-up of what has been termed a "nutrient-wall" at about a third of the length of the Sound from its western extremity. From the "normal" levels of nitrates and phosphates, the essential chemical building blocks for life, which exist in much of the eastern Sound, there are sharply increasing values from roughly the point of Lloyds Neck westward. In the westernmost portion of the Sound, the concentrations of nitrogen and phosphorus are among the highest in marine waters anywhere in the world.

Each year the tiny plants of the sea, the phytoplankton, the base of the entire food chain of the sea, respond to the lengthening day and the slight warming of the water temperatures by increasing in numbers. This rapid growth of the phytoplankton is termed a bloom, and the growth intensity of the bloom is governed to a large extent by the nutrient materials in the waters. In short, when the phytoplankton bloom begins, the single-celled plants divided, grow and divide again, increasing in numbers until all the nutrients which support their growth are exhausted. The numbers of these plants then fall off sharply to a base level where the "crop" remains at a relatively stationary level until the waters build up a new supply of nutrients. In Long Island Sound these blooms generally occur in February and August. As man has increased the nutrient levels of the Sound through introduction of sewage, the intensity of the blooms has increased with time until they have reached the critical point at which the wildly developing populations of phytoplankton have gone beyond the point of being beneficial to the environment and have become, at their peaks, detrimental.

The problem of extreme phytoplankton blooms, the result of a process called eutrophication, has many dimensions. Upon death of the phytoplankton individuals, many species of which have very short life spans, the organic material of the cells sinks and is oxidized by the dissolved oxygen contained in the waters. Organic material added to the Sound through sewage also utilizes oxygen in the waters, further reducing amount of oxygen available to organisms living at or near the bottom. Depletion of oxygen in the western portion of the Sound has reached levels which are now critical for many months of the year—and new sewage plants being developed by communities on both the Connecticut and Long Island Shores call for additional outfalls. Despite the fact that the sewage will be "highly" treated, the treatment is not sufficient to remove the nutrients from the waters and the situation can be expected to worsen.

Long Island Sound once boasted a commercial fishery of consequences, but today there are very few commercial fishing activities left. Pollution is only one factor in this reduction, for with the increase in human population the Sound has become an important recreational fishery area. Although current fisheries data are sketchy, there are many indications that the problem of the Long Island Sound fisheries may result from the competition between the sports fisherman and the commercial fisherman for the same species of fishes, with the sportsman taking the largest portion of the catch. Though the commercial fisheres are highly regulated and much scientific effort has been put into the development of management programs for commercially important species, salt water recreational fishing is largely unregulated and management techniques have not yet been developed comparable to those of the fresh water fisheries. Even though the sports fishermen may be taking the largest portion of the catch, the laws are still oriented towards protecting the sports fishermen rather than the basic fishery itself.

Fishes taken in Long Island Sound are beginning to show distressingly high levels of mercury. Larger specimens of bluefish and striped bass, both highly prized by the sports fisherman, have shown mercury contents as high as 1.2 parts per million. Should these values continue to rise an important recreational asset may be lost. Here, however, the problem is less well defined and may not be assessable against the waters of the Sound. Most of the species of fish taken in the Sound are migratory, ranging from Cape Cod to the Chesapeake Bay. Much research must be devoted to determining where these species acquire the mercury before we will be able to control the problem.

Shell fisheries, once an important industry for Long Island Sound, are hard pressed on many fronts. Oyster spat produced in Connecticut were formerly taken out to beds in Long Island Sound to grow to market size. High quality marketable oysters were produced in large quantities until the mid-1950's when the industry was decimated by an influx of predatory starfish. The cause of the invasion is still unknown and the starfish remain. Their presence alone, but with the situation worsened by pollution, has resulted in the almost complete collapse of the Long Island Sound oyster industry. At the present time efforts are being made to revive the production of oysters through mariculture including the use of heated waste waters from power plants for stimulating more rapid growth of the oyster. These efforts, however, are still very small in scale. Pollution has affected recreational shell fishing in Long Island Sound. At the present time over 75,000 acres of bottom lands have been closed to shellfishing because of contamination by coliform bacteria from human sewage.

The New York Bight region has received a great deal of national publicity because of the dumping of sewage sludge in the coastal ocean. While newspaper reports often include the word "garbage" in describing these dumping practices, in fact no garbage is dumped at sea in the New York region. But Long Island Sound is the unhappy recipient of 1.8 million tons of debris dumped yearly in its nineteen designated dumping grounds. The materials dumped here consist primarily of dredge spoils from harbor management programs. These spoils present a very real hazard to the future of Long Island Sound. Studies conducted at the Marine Sciences Research Center demonstrate that most dredging operation sites are industrialized harbors which receive both treated and untreated sewage and industrial wastes. As a result a thick accumulation of fine grained, highly carbonaceous material has built up on the harbor bottoms. It is this material which is most frequently dredged and carried off to the dumping grounds. The restirring of these fine grained sediments exposes the organic material contained in them to the waters of Long Island Sound, creating yet another drain upon the oxygen of its waters through release of contained nutrients. It may also release various toxic or deleterious chemicals derived from industrial wastes into the waters of the Sound.

Dredging operations are manifold in the waters of Long Island Sound. They range in scope from the maintenance of major channels for commercial shipping to the opening of shallow embayments for recreational boating and the construction of marinas. Over 185,000 pleasure craft are registered in areas surrounding Long Island Sound. Nowhere has this been more important than on the eastern end of Long Island where the number of natural harbors decreases rapidly to the east and the pressures from population growth in the last decade have created long waiting lists for marina space. To meet these demands, local authorities dredged wetlands at increasing rates. Recently the trend has slowed as pressure from conservation groups and the environmental community has led, in certain areas, to the placing of very high priority upon public acquisition of wetlands and their preservation as open space and vital segments of the marine ecosystem. However, the action came sufficiently late so that between 1954 and 1964 over 29 percent of the wetlands of Long Island were lost.

Oil is a perpetual problem. Long Island Sound has not been looked upon as a favorable site for the production of oil, and the nearest producing areas are sufficient distant to not directly endanger its waters. However, the Sound does provide a sheltered corridor for the transport of oil by barges and small tankers. Both sides of the Sound are dotted by tank farms and oil transhipment facilities. In 1970 and 1971 major spills of over 300,000 and 600,000 gallons occurred. The impact of large volumes of oil in marine waters is a part of the dreary litany too well known to environmentalists. However, potentially more serious, and more difficult to assess, is the cumulative effect of the small spills occurring at transshipment points over long periods of time. Though the volumes of each spill may be undramatic, the biological effects may in time be as important as the larger, more conspicuous events which catch the public eye.

The catalogue of woes of Long Island's waters has been scarcely touched. Unwritten here are the effects of pesticides, PCB's, agricultural run-off, changes in fresh-water run-off through increasing utilization of groundwaters on Long Island, the effects of highway expansion upon recreational areas, and the process of urbanization. To end on such an unhappy note is to do Long Island Sound's clamoring public a great disservice. There is a great deal of positive action and, to a large extent, it has been generated by pressures from the public who now clearly see the deteriorating water quality.

Both Connecticut and New York State, through their environmental agencies, are beginning to take tougher positions in the enforcement of existing regulations. Many will reckon that these actions are too little, too late, but the direction is correct. Connecticut has passed a Wetlands Act which provides for greater State control of wetlands areas. Suffolk County, Long Island, is proposing legislation requiring zoning review by the County rather than solely by local municipalities. A Regional Planning Board established by Nassau and Suffolk Counties has made pioneering efforts in attempting to integrate the quality of the marine environment into regional planning. The Board established an advisory group, the Regional Marine Resources Council, which has engaged in a program of research which will lead to a comprehensive management program for the marine region of the two counties. Citizens' groups have emerged as an active and potent force in guiding public opinion and governmental action. Groups such as the Nature Conservancy, the Audubon Society, and more recently the Sierra Club, are continuing long standing efforts to conserve the natural resources of the Sound. Other, newer environmental groups have joined forces, such as the Long Island Environmental Council and the Junior League in New York and Connecticut. The governments of New York and Connecticut have begun discussions leading to the development of a compact providing for better controls for Long Island Sound.

What of the future? It is not wise to attempt to predict the course of events about which so little is known. Surveys of Long Island Sound conducted in the mid-fifties by the Bingham Oceanographic Institute of Yale University, and in the past two years by the Marine Sciences Research Center, State University of New York, provide only two points on a graph of water quality. Projection beyond these points becomes an exercise in anticipation of the wisdom of the people. The accumulation of pollutants in Long Island Sound has probably not reached its maximum and the levels of metals, insecticides and nutrients will continue to increase for as much as ten years.

Will the recuperative forces of Long Island Sound be pushed to the point beyond which environmental quality precipitously declines? The prospects for the urban sea are linked to the future of the cities. If we save the cities, restoring the quality of their environment and life experiences, we can do the same for the urban sea which provides so much life enhancement for the populace living on its shores.

Dr. Squires is director of the Marine Sciences Research Center and professor of Biological Sciences and of Earth and Space Sciences at the State University of New York, Stony Brook. A Research Associate at the American Museum of Natural History and the Smithsonian Institution he is also an Associate for Natural History Information Resources at the Smithsonian. Dr. Squires is the author of numerous biological, geological, and oceanographic articles.

[From the New York Times, Mar. 22, 1972]

GROUNDED TANKER SPILLS OIL IN L.I. SOUND

(By David A. Andelman)

FISHERS ISLAND, L.I., March 21.—A 2.5-million gallon tanker ran aground and split open early today, spilling more than 60,000 gallons of oil into Long Island Sound.

The spill, the largest in more than three years in Long Island Sound, quickly spread, covering more than 45 square miles. Late this afternoon it began washing ashore in areas of southern Connecticut near Niantic and on Fishers Island, which, though closer to Connecticut, is part of Long Island.

Officials of the Connecticut Department of Environmental Protection said that a number of gulls already had been seen coated with oil, a No. 2 home heating oil.

In the last two months, oil from two other spills, both of unknown origin, has washed up on the beaches of Long Island—one along a 25-mile front of Fire Island National Seashore, the other on the north shore of Suffolk County.

In December, an empty 640-foot tanker split in half and sank at the dock in Port Jefferson harbor and last month another tanker ran aground in the same harbor, but no oil escaped.

Shortly after 3 A.M. today, the F. L. Hayes, a 240-foot coastal tanker owned by Spentenbush Inc. of New York City, ran aground on Bartlett Reef, about two miles from the Connecticut shore. Coast Guard officials refused to state the cause of the error that caused the grounding.

The ship, bound from Bayonne, N.J. to the Dahl Oil Company in Norwich, Conn., was carrying 600,000 gallons of No. 2 oil.

Two of its seven tanks ruptured on impact and it was nearly four hours before workers from the New England Pollution Control Company were able to place oil-containment barriers around the ship and stop the flow of oil. An estimated 63,000 gallons of oil had already escaped, Coast Guard officials reported.

At 2:30 P.M. today, after the oil in the tanker had been removed to barges, the ship was refloated using tugboats and was transported to New York City for repairs.

The last spill of comparable magnitude in Long Island Sound also occurred on Bartlett's Reef, in January 1969, when a barge ran aground. That slick extended from Waterford, Conn., to Point Judith, R.I., and resulted in the death of "hundreds of birds."

Shortly after yesterday's incident became known, officials of the Federal Environmental Protection Agency's regional headquarters in Boston flew to the scene.

Due to the size of the spill in navigable waterways, the provisions of the National Oil and Hazardous Pollution Contingency Plan were invoked, giving authority to the Coast Guard to take charge of clean-up operations.

[From the New York Times, Mar. 22, 1972]

JERSEY ASSEMBLY MOVES TO BAN FLOATING A-PLANTS

(By Ronald Sullivan)

TRENTON, March 20.—The State Assembly unanimously approved a legislative resolution today aimed at blocking the construction of two floating nuclear-power generating plants off New Jersey's southern coast.

Plans for the nuclear plants were made public last Wednesday by the Public Service Electric and Gas Company.

A few hours after the Assembly action, the chairman of the Assembly's Agriculture, Conservation and Natural Resource Committee announced that her committee probably would clear another legislative measure next week creating a state sanctuary extending three miles to sea from Sandy Hook to Cape May. Such a measure would effectively bar the power stations as well as any other intrusion into coastal waters within the state's three-mile jurisdiction.

The sanctuary measure has Assembly Speaker Thomas J. Kean among its sponsors.

The sanctuary would be protected from "any exploitation, development or activity that would seriously alter or otherwise endanger the ecology or the appearance of the ocean, the sea bed or the sub-soil therein."

NEW POLITICAL REALITY

According to the chairman, Assemblyman Josephine Margetts, a Morris County Republican, the approved resolution and the bill in her committee represented a powerful new political realty in New Jersey. Any proposal that poses any threat to the environment, she said, will encounter legislative opposition unheard of here five years ago.

Mrs. Margetts cited last week's emphatic rejection in the Assembly of a proposal by the New Jersey Turnpike Authority to construct a $322-million expressway extension through the middle of the state.

Today's resolution, which approved by a vote of 65 to 0, called on the Atomic Energy Commission in Washington and the State Department of Environmental Protection to oppose plans for the reactors pending environmental studies.

However, sponsors of the resolution readily conceded that the primary objective was to block the plans entirely.

Public Service announced that it had signed a letter of intent with the Westinghouse Electric Corporation for the construction of two 1.15-million kilowatt nuclear-power generators that would be anchored offshore—either in front of the Long Beach island community of Harvey Cedars, or near Little Egg Harbor inlet.

The generators would cost $1-billion and Public Service, the state's largest power utility, said it hoped to start construction by 1976 and have them running by 1980.

The new proposals have led to a storm of opposition in southern New Jersey, where state legislators, county officials, and local office-holders plan a rally in opposition at the National Guard Armory in Toms River on Saturday.

ACCIDENTS WILL HAPPEN

Assemblyman Franklin H. Berry Jr. of Ocean County said no one would want to sit, much less swim, at a beach with a nuclear-power generating plant "staring you in the face."

He also stressed the threat to sea life and the fact that "accidents will happen, no matter what the engineers say," and cited the collapse of Air Force radar tower 66 miles off the Monmouth shoreline in 1961.

"Can you imagine a nuclear-power plant running amok in the Atlantic?" he asked.

A spokesman for Public Service said the Assembly resolution was "redundant" because the A.E.C. required lengthy environmental studies as a matter of policy before any approval would be considered.

RURAL DEVELOPMENT BILL REPORTED—"MAGNA CARTA" FOR RURAL AMERICA

Mr. HUMPHREY. Mr. President, yesterday the full Committee on Agricul-

ture and Forestry approved the Rural Development Act of 1972 which I, Senator HERMAN E. TALMADGE, chairman of the committee, and other members of the committee and Senate sponsored. This bill represents the culmination of almost a full year's effort by the Rural Development Subcommittee, of which I am privileged to serve as chairman, and the full Committee on Agriculture and Forestry. It is truly a "Magna Carta" for rural America.

Almost immediately following the formation of the newly established Rural Development Subcommittee last April, I began hearings both here in Washington and in various parts of the country concerning rural development and legislation designed to further the objectives embodied in rural development. The bill reported yesterday by the full committee takes into account much of the findings of those hearings.

Among the first major bills introduced last year as a part of our subcommittee's efforts was S. 2223, sponsored by Senator HERMAN TALMADGE and myself. This bill, which now is almost wholly contained in the bill reported yesterday, will provide for the establishment of a new and expanded system of credit and financial assistance for rural communities and for industrial and job development in rural America. That bill alone was cosponsored by 51 Senators. Other provisions added to this legislation which now comprise the new bill that were reported yesterday also had many sponsors in both the Senate and the House.

When we began our subcommittee work last year, I made it very clear that rural development was a "bipartisan" matter. And I am happy to report, Mr. President, that throughout our work and efforts concerning this legislation, we have maintained strong bipartisan support in the Congress, and in particular, within the committee and the subcommittee.

The bill reported by the full committee yesterday, is one of the most far-reaching and comprehensive pieces of rural development legislation probably ever to be reported by any committee of Congress.

If enacted, and properly funded, this piece of legislation will serve as a new foundation for rebuilding rural America and the thousands of towns and communities that are located within our Nation's countryside. It represents a strong beginning toward renewing both the promise and potential of rural America and in building a better America. And as such, it also will play a vitally important role in helping to achieve our goal of a more balanced national growth and development pattern in the United States.

It will give new hope to millions of young people who want to live and work in our Nation's smaller communities and family farms, young people, who otherwise, will be forced by economics and lack of opportunity to migrate to our Nation's larger cities.

It will provide desperately needed financial assistance, through revenue sharing, to States, nonmetropolitan planning and development districts and to local governments to help them plan and build new tomorrows.

It will provide needed incentives to industry to establish and expand businesses and jobs throughout the rural regions of our Nation for the millions of unemployed and underemployed people now residing there.

It will provide for the establishment of a research and education program needed to support and guide the future development of our rural communities and countryside, including special efforts to help small farmers, as farmers, in reaching their goals of improved income through better management.

It will broaden our conservation and environmental efforts in rural areas to conserve and better utilize water, land, and other valuable natural resources.

It will establish a badly needed program of financial assistance for small communities to improve their fire protection services.

It will liberalize credit for farm loans, including loans for young people to get started in agriculture.

It will extend all of these rural development programs to our Nation's first citizens; namely, American Indians.

And it will vest primary responsibility for national rural development with the U.S. Department of Agriculture.

Hopefully, Mr. President, when this bill is considered by the Senate it will receive the support and vote of every Member of this distinguished body. Although many of us often think of rural America as merely farms and open country, containing few people, let me call attention to the fact that the rural America we are addressing ourselves to in this new legislation, encompasses close to 70 million Americans or 35 percent of the Nation's total population.

Mr. President, now let me discuss the major provisions of the new rural development bill reported yesterday by the committee.

First. It provides for the establishment of a borrower-owned, nonfarm credit system, similar to the existing farm credit system. The Federal Government would appropriate $200 million a year for 10 years. It is anticipated that the system would provide a loan fund up to 20 times the size of the capital in the system. Since borrowers would have to purchase stock in the system, the Federal contribution would eventually be paid off, and the system would be owned by its borrowers and participants.

Second. The bill provides authority for unlimited Farmers Home Administration loans for essential community facilities; to finance business; and improve the environment of rural areas. It also provides loans for small business, and expands the number of eligible applicants and loan purposes for community facility loans.

Third. It liberalizes Farmers Home Administration lending authority for farm loans. It increases from $35,000 to $50,000 the limit on operating loan indebtedness for farmers. It increases Farmers Home appraisals on farm real estate by providing for appraisals at market value rather than "normal basis." By changing the farm operating loan program to an insured loan program, it will provide a larger loan fund for all farmers. There is also a provision for loans for young people to get started in farming or other rural business enterprises.

Fourth. The bill includes a total first-year grant authority of $730 million. Five hundred million of this is part of a revenue sharing provision of the bill which would be provided to the States for rural development purposes. Unlike the Nixon administration's original special revenue sharing plan for rural community development, the committee bill would not "fold in" any of 11 categorical grant programs, such as the Appalachian Regional Commission or the rural environmental assistance program, or the Cooperative Agricultural Extension Service.

One hundred million of the authorization would go to borrowers to be used as an incentive for business location in rural areas and for community facilities development.

Fifty million dollars is authorized for grants to the land grant universities for the establishment of rural development extension programs, research and training for rural development and for small farmers.

Five million dollars are authorized for a new rural community fire protection program.

Fifth. The proposal greatly extends the purposes for which cost sharing grants can be made by the Soil Conservation Service, providing for 10-year contracts for soil and water conservation practices. It permits grants from other agencies for land acquisition, and authorizes Federal cost sharing for municipal and industrial water supplies. The authorization for this program is $75 million.

Sixth. It includes a tough antipiracy provision, prohibiting any financial assistance that would result in the transfer of employment or business activity either by an applicant firm or a directly competing firm.

Seventh. The bill reorganizes the Department of Agriculture and gives it prime responsibility for rural development. It would reorganize the Farmers Home Administration into the Farm Development Administration and the Rural Enterprise and Community Development Administration, each under its own Administrator. It provides an Assistant Secretary for Rural Development Credit.

In order to be eligible for loans to grants, individuals and communities must be located outside cities of 50,000 population and their suburbs.

A committee report on the bill is expected in about 10 days.

THE BUSING DEBATE

Mr. GAMBRELL. Mr. President, the busing debate has largely been one of high intensity and low-grade yield. It has been characterized by political posturing and useless and misleading rhetoric.

In the midst of all the chaos and clamor a few voices have sought in temperate tones and with compelling logic

to fasten our attention on some of the fundamental and underlying truths relating to public school desegregation.

One of the most sensitive and knowledgeable commentators on this subject, who has consistently offered light, as opposed to heat, and who has persistently sought solutions rather than acclaim, is the distinguished junior Senator from Virginia (Mr. SPONG). On Monday, he entered in the RECORD his views on the antibusing and equal education proposals made by President Nixon last Friday evening.

Senator SPONG's statement is characteristically thoughtful as well as forceful, articulate, and persuasive. In particular, Senator SPONG's comments on the essentially useless distinction between racial segregation, which is described as "de facto" and that which is described as "de jure" has received attention in an editorial published in the Roanoke Times of March 21, 1972, The Times is one of Virginia's leading daily newspapers. I ask unanimous consent that the editorial be printed in the RECORD at the end of my remarks.

Senator SPONG has well served his country and his constituents in Virginia by urging the end of forced busing to achieve racial balance for integration purposes and the adoption of a uniform national policy on the subject of school desegregation; one which will be uniformly enforced.

If the so-called leadership of this country, in the Capitol and in the White House, ever ceases playing political games with this issue and gets around to resolving it in a way which will receive public acceptance, the contributions of Virginia's Senator SPONG will surely be among the most significant. His diligence and his statesmanship will make it possible for workable solutions to be arrived at.

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

[From the Roanoke Times, Mar 21, 1972]

SENATOR SPONG, HAMMER AND TONG

Virginia Sen. William B. Spong Jr. is performing a service by pounding away on every occasion at one of the central mistakes of the times: court doctrine which treats Northern localities one way and Southern localities another way in school desegregation cases. The justification is that Southern states once had segregation by law (de jure) while Northern states had segregation in fact (de facto).

There is abundant historical evidence that Northern states also discriminated in law and in fact before and after Reconstruction; discrimination has been a matter of degree. The harm done by this "separate and unequal" treatment before the courts has kept the Congress frrom mobilizing its entire intelligence behind ways to cure the unfairnesses of the past, North and South, East and West.

Secure in their de facto segregated strongholds (and oftentime sending their own children to private schools), Northern Congressmen have been too pious, too full of preaching and too blind to realities. Massive busing, criss-cross busing, two-way busing has wrenched support for public education; it has damaged a hard-won public support for, or at least acquiescence in, the desegregation process. In the South, of course. What difference did that make to the de facto segregated strongholds in the North?

Times have changed. School desegregation orders, with wild busing plans, have been issued now in Northern cities. Automatic liberal representatives from Northern districts are switching positions so dramatically it would be comical if it were not tragic. They have helped sow the wind, Gov. George Wallace of Alabama is reaping the whirlwind.

If the nation is lucky, and it probably will be, it will survive the next eight months without the reversal of the 1954 and 1955 Supreme Court decisions prophesied too freely. If a new Congress sits down and tries to solve the problem on a uniform, national basis, the solution will be fair and more enduring. For that, Senator Spong would deserve a good deal of the credit. He is hitting at a basic part of the problem.

YOUTH FOR UNDERSTANDING

Mr. HARTKE. Mr. President, I invite the attention of Senator to the fine work being done by the Youth for Understanding exchange student program. This organization earlier this year marked the exchange of its 20,000th student.

The mission of this group is to provide an opportunity for high school students to travel to a foreign country and live with a foreign family as though they were a member of that family. In this way, international understanding is brought to the personal, the family, the school, and the local community level. The young people are carefully selected on the basis of their academic achievement and their involvement in the community.

Many of these outstanding young students from the United States and the exchange countries indicate that the understanding that they gained as the result of this people-to-people exchange has been of vital importance to them, and, in turn, to their communities, in bringing about the understanding that promotes international goodwill. In this space age when the telecommunication has brought the events of the world into our homes, it is more important than ever before that we learn to understand one another and to appreciate and share our differences in culture, language, and attitudes. I know of no better way to accomplish this than by allowing our young people to live the culture of another country while foreign students see our country through our eyes.

Mr. President, I am particularly proud of the participation of students from the State of Indiana. An average of 40 high school youth each year have had an intercultural experience with families in other countries. Six last year had the opportunity to study for a full year in Sweden, Holland, Germany, and Finland, in the language of that country.

We owe a great deal to the 20,000 students who have participated in these exchanges, to the host families with whom they have lived in their exchange programs and to those who are constantly working to arrange the exchanges. Only as these young people become leaders in their own communities and countries will we be able to fully appreciate how much has been accomplished by this excellent group.

MARIHUANA AND THE LAW—NATIONAL COMMISSION REPORT

Mr. JAVITS. Mr. President, the National Commission on Marihuana and Drug Abuse—of which the Senator from Iowa (Mr. HUGHES) and I are members—today made public its long-awaited report and recommendations to the President and the Congress on the subject of marihuana.

The report deals in great detail not only with the medical and health implications of marihuana use, but also with the legal, economic, and social issues.

It covers the nature and scope of use, effects of the drug, the relationship of marihuana use to other social behavior, and the efficacy of existing law.

The Commission held formal and informal hearings developing extensive evidence from all points of view, including those of public officials, community leaders, district attorneys throughout the country, young people, medical, and other professional experts and students.

More than 50 projects were funded, ranging from a study of the effects of marihuana on man to a field survey of enforcement of the marihuana laws in six metropolitan jurisdictions.

Mr. President, I ask unanimous consent that there be included in the RECORD at the conclusion of my remarks a summary of the major findings presented in the report and recommendations of the Commission.

Of singular importance is the recommendation of the Commission that criminal penalties be eliminated for the private possession and use of marihuana. The Commission has taken a forthright and enlightened position which should go far toward deemphasizing marihuana as a confusing and controversial public policy issue. It is a most salutary and significant step.

But, my distinguished colleague, Senator HUGHES, chairman of the Special Senate Subcommittee on Alcoholism and Drug Abuse, and I would carry the decriminalization recommendation further, and have filed a joint statement containing our separate views so indicating.

We differ from the other commissioners in our view that certain activities involving possession and use of marihuana, which are deemed to be necessarily incident to private possession and use, ought also to be decriminalized. It is for this reason that we have taken exception to those parts of the recommendations dealing with the doctrine of contraband, the casual not-for-profit sale and the limited public possession of marihuana.

Mr. President, I ask unanimous consent that the full text of our separate views be printed in the RECORD following the summary of the findings and recommendations of the Commission, and that a list containing the names of the members of the Commission also be printed.

The report is comprehensive and thorough, and will assist materially in clearing the air of much misinformation and emotion which has heretofore prevented the development of rational social policy regarding this drug.

I urge Members of Congress to give their closest attention to this important report and the recommendations of the Commission. Senator HUGHES and I intend to introduce shortly appropriate legislation to accomplish several of the objectives found in the recommendations of the Commission.

We hope that others—in Congress, as well as parents, young people and others throughout the Nation—will take a fresh look at the problem of marihuana in our society with the new perspective provided by the Commission's report.

I commend the distinguished former Governor of Pennsylvania, Raymond P. Shafer, who, as Chairman of the Commission, provided important leadership in the development of the report. I commend also the Vice Chairman, Dr. Dana L. Farnsworth, other members of the Commission and its Executive Director, Michael Lowenreich—Americans of dedication and insight—who devoted much time away from their personal and professional interests to participate so productively in this effort. Lastly, I wish to congratulate the staff of the Commission which worked particularly effectively under great pressure to complete the first year's work of the Commission.

I look forward to the second-year study of the Commission which will deal with the critically important subject of drug abuse in the United States.

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

SUMMARY OF FINDINGS AND RECOMMENDATIONS AND MEMBERSHIP OF THE COMMISSION

WHO USES THE DRUG

At least 24 million Americans 12-years-old and over have used marihuana at least once, and at least 8.3 million are current users.

More than 40% of college and graduate students have tried the drug.

Of those persons who have ever used marihuana, 41% of the adults (18 and older) and 45% of the youth (12-to-17) no longer use it.

The great majority of marihuana users use the drug less than once a week, probably on weekends, or at a party.

Two percent (500,000) of "ever-users" can be classified as heavy users and use the drug more than once a day.

THE EFFECTS OF MARIHUANA

There is no evidence that experimental or intermittent use of marihuana causes physical or psychological harm. The risk lies instead in the heavy, long-term use of the drug, particularly of the most potent preparations.

Marihuana does not lead to physical dependency. No tortuous withdrawal symptoms follow the sudden cessation of chronic, heavy use. Some evidence indicates that heavy, long-term users may develop a psychological dependence on the drug.

The immediate effects of marihuana intoxication on the individual's organs or bodily functions are transient and have little or no permanent effect. However, there is a definite loss of some psychomotor control and a temporary impairment of time and space perceptions.

No brain damage has been documented relating to marihuana use, in contrast with the well-established brain damage of chronic alcoholism.

A careful search of literature and testimony by health officials has not revealed a single human fatality in the United States proven to have resulted solely from use of marihuana.

Tests on monkeys have demonstrated that the dose required for "overdose death" is enormous and for all practical purposes unachievable by humans smoking marihuana.

No reliable evidence exists indicating that marihuana causes genetic defects in man; however, since fetal damage cannot be ruled out, the use of marihuana is not advisable during pregnancy.

The incidence of psychosis from marihuana use is exceedingly rare, and such reactions tend to occur in predisposed individuals.

MARIHUANA AND PUBLIC SAFETY

The evidence indicates that marihuana does not cause violent or aggressive behavior or crime.

Recent research has not proven that marihuana use significantly impairs driving ability; however, reliable research has not yet been conducted and the Commission strongly suspects that the acute effects of marihuana use (such as spatial and time distortion and slowed reflexes) may impair driving. The Commission believes that driving while under the influence of any intoxicant is a serious risk to public safety.

MARIHUANA AND PUBLIC WELFARE

From what is now known about the effects of marihuana, its present level of use in American society does not constitute a major threat to public health; the high-risk group constitutes the 2% of American "ever-users" who use the drug heavily and pose a concern for public health officials.

The Commission emphasizes the need for increased research into long-term psychological effects, especially with regard to effects on motivation.

Although some segments of society fear that marihuana use leads to idleness and "dropping out," little likelihood exists that the introduction of a single element such as marihuana use would significantly change the basic personality of any person; rather, an individual is more likely to drop out when circumstances join to produce pressures which he cannot handle effectively.

MARIHUANA AND OTHER DRUGS

Recognizing that one of the most controversial issues in the study of marihuana is its relationship to other drugs, the Commission explored in depth the hypothesis that marihuana use leads to the use of other drugs.

The overwhelming majority of marihuana users do not progress to other drugs, although statistically marihuana users are more likely to experiment with other drugs than are non-users.

Marihuana use does not dictate whether or which other drugs will be used.

As stated by Governor Shafer, "If any one reason can characterize why people in the United States escalate their drug use and become multidrug users, it is peer pleasure."

ENFORCEMENT OF THE MARIHUANA LAWS

The Commission was directed by Congress to evaluate the existing federal and state laws relating to marihuana. The vast majority of arrests occur at the state level (at least 200,000) as opposed to the federal level (approximately 4,000). In a study of enforcement in six metropolitan jurisdictions in different states, the Commission found:

93% of the arrests in the sample were for possession.

69% of the arrests were preceded by no investigation, occurring in vehicles or on the street.

Arrests were concentrated among the young (88% were 25 or under); typically the arrestee was a white male, in a school or employed in a blue collar job, without a prior record.

Two-thirds of the arrestees were arrested for possession of an ounce of marihuana or less.

Offenders were generally (67%) arrested in groups of two or more persons.

The Commission pointed out that the criminal justice system often responded to this unusual group of "criminals" in a lenient way:

At least 48% of the adult cases and 70% of the juvenile cases were dismissed by the police, the prosecution or the judiciary.

One-third of the arrestees were convicted and sentenced.

Of those convicted of possession, 24% were incarcerated, usually for a year or less.

The Commission concluded that the law enforcement community has adopted a policy of "containment." "Although effort is sometimes expended to seek out private marihuana use," the Report states, "the trend is undoubtedly to invoke the marihuana possession laws only when the behavior (possession) comes out in the open." Governor Shafer added: "The overriding feature of the present marihuana laws is the threat of arrest for indiscretion."

After considering the effects and social impact of marihuana use, the Commission considered four alternative social control policies for the drug: (1) Approval; (2) Elimination; (3) Neutrality; and (4) Discouragement.

The Commission emphasized that society should not approve or encourage the recreational use of any drug. On the other hand, the Commission concluded that elimination of marihuana and its use is unachievable, and the drug's relative potential for harm to individuals and society does not justify a social policy designed to seek out and firmly punish those who use it.

The most difficult question, the Commission explained, was whether society should try to dissuade its members from using marihuana or should defer entirely to individual judgment, remaining neutral. After lengthy consideration of this issue, the Commission chose to recommend to the public and its policy-makers a social control policy seeking to discourage marihuana use, while concentrating primarily on the prevention of heavy and very heavy use.

The Commission's next step was to consider three legal responses as a means of implementing the discouragement policy: (1) total prohibition (2) partial prohibition; and (3) regulation.

The Commission explained that the total prohibition scheme now in effect prohibits all marihuana-related behavior, including possession for personal use. Partial prohibition would prohibit cultivation and distribution of the drug but would not prohibit private consumption or acts related to consumption. The distinct feature of a regulation scheme (legalization) is that distribution of the drug is legal.

The Commission, rejecting both the present system and the regulatory scheme, was of the unanimous opinion that marihuana use is not a sufficiently grave problem to subject its users to criminal procedures, but that legalization was inadvisable for a drug which does alter short-term perception, which has uncertain long-term effects and which may be of transient social interest.

Instead, the Commission recommended a partial prohibition scheme which symbolizes a continuing societal disapproval of use, yet removes the criminal stigma and threat of incarceration for users, and also maximizes the flexibility of future public responses as new information comes to light.

The major features of the recommended scheme are that: production and distribution of the drug would remain criminal activities as would possession with intent to distribute commercially;

Marihuana would be contraband subject to confiscation in public places;

Criminal sanctions would be withdrawn from private use and possession incident to

such use, but, at the state level, fines would be imposed for use in public;

In order to keep use private, possession of more than one ounce in public would be prohibited;

In addition, casual, not-for-profit transfers of small amounts, permitted in private, would be prohibited in public.

(Specific recommendations for federal and state law are attached).

Five of the 13 Commissioners differed in minor respects regarding the recommendations. Commissioners Rogers, Carter and Ware agree with the discouragement policy and the decriminalization aspects of the recommendations but would recommend, in addition, a civil fine for possession of any amount of marihuana and would limit casual transfers only to those instances where there is no remuneration at all. Commissioners Hughes and Javits believe that marihuana should not be contraband, that all not-for-profit sales should be excluded from the criminal sanction, and that the "ounce or less" requirement for possession in public should be removed.

"A most important question," said Governor Shafer in explaining the Commission's position, "and one which is still too early to answer, is whether the use of marihuana is fad or fashion. It is possible that the widespread use of marihuana could well disappear of its own accord."

In the Commission's opinion, the proposed partial prohibition scheme would permit the law enforcement community to concentrate on what it is best able to do, reduce trafficking and supply of the drug. At the same time, the Commission believes that responsibility for discouraging consumption should rest with non-legal institutions, such as family, schools, church, and the medical profession.

In anticipation of the Commission's responsibility to present a report on all drugs in 1973, Governor Shafer said:

"From the many surveys and research studies, and from our formal and informal hearings and deliberations, it is evident that the phenomenon of drug abuse in our country poses a very serious threat to our society which will require a massive and sustained effort in drug education and in the revision of our laws to make them uniform, appropriate, effective, and humane. However, such responses are in effect only medications that will help to contain the social illness of drug abuse. The causes of drug abuse must be identified more precisely and must be attended to by the cooperative efforts of all institutions of our society. We will not be able to deal effectively with the problem of drug abuse until we find answers to the larger problem of the diminishing concern among some of our citizens for such matters as long-range personal objectives, self-discipline and the sense of public obligation."

RECOMMENDATIONS*

I. Federal

a. Possession of marihuana for personal use would no longer be an offense, but marihuana possessed in public would remain contraband subject to summary seizure and forfeiture.

b. Casual distribution of small amounts of marihuana for no remuneration, or insignificant remuneration not involving profit would no longer be an offense.

c. A plea of marihuana intoxication shall not be a defense to any criminal act committed under its influence, nor shall proof of such intoxication constitute a negation of specific intent.

II. State

a. Cultivation, sale or distribution for profit and possession with intent to sell would remain felonies (although we do recommend uniform penalties).

b. Possession in private of marihuana for personal use would no longer be an offense.

c. Distribution in private of small amounts of marihuana for no remuneration or insignificant remuneration not involving a profit would no longer be an offense.

d. Possession in public of one ounce or under of marihuana would not be an offense, but the marihuana would be contraband subject to summary seizure and forfeiture.

e. Possession in public of more than one ounce of marihuana would be a criminal offense punishable by a fine of $100.

f. Distribution in public of small amounts of marihuana for no remuneration or insignificant remuneration not involving a profit would be a criminal offense punishable by a fine of $100.

g. Public use of marihuana would be a criminal offense punishable by a fine of $100.

h. Disorderly conduct associated with public use of or intoxication by marihuana would be a misdemeanor punishable by up to 60 days in jail, a fine of $100, or both.

i. Operating a vehicle or dangerous instrument while under the influence of marihuana would be a misdemeanor punishable by up to one year in jail, a fine of up to $1,000, or both, and suspension of a permit to operate such a vehicle or instrument for up to 180 days.

j. A plea of marihuana intoxication shall not be a defense to any criminal act committed under its influence nor shall proof of such intoxication constitute a negation of specific intent.

k. A person would be absolutely liable in civil court for any damage to person or property which he caused while under the influence of the drug.

ANCILLARY RECOMMENDATIONS

In addition to these legal recommendations for federal and state action, the Commission believes certain other ancillary recommendations should be presented for action.

Legal and Law Enforcement Recommendations

I. Federal

a. Federal law enforcement agencies, especially the Bureau of Narcotics and Dangerous Drugs and the Bureau of Customs, should improve their statistical reporting systems so that policies may be planned and resources allocated on the basis of accurate and comprehensive information.

b. The Federal Bureau of Narcotics and Dangerous Drugs should increase its training programs of state and local police with special emphasis on the training in the detection of trafficking cases.

c. Increased border surveillance, a tightening of border procedures, and a realistic eradication program to diminish the supply of drugs coming into the country, coupled with a more effective program for diminishing the domestic production and distribution of marihuana, are required.

II. State

a. All states should adopt the Uniform Controlled Substances Act to achieve uniformity with regard to marihuana and other drug laws, with the exception that the legal response to possession for one's own use be uniformly adopted in accordance with our recommendation in Chapter V of this report.

b. Each state should establish a centralized compulsory reporting and record-keeping authority so that adequate and accurate statistics of arrests, sentences and convictions on a statewide basis are available.

c. Those states requiring physicians to report drug users seeking medical assistance should change such requirements to insure the confidentiality of the drug user's identity, so that persons needing medical help will feel free to seek it.

III. International

If the United States should become a signatory of the proposed Psychotropic Convention, we recommended that cannabis be removed from the existing Single Convention and consideration be given to listing it in the proposed Psychotropic Convention among drugs which have similar effects.

MEDICAL RECOMMENDATIONS

1. Fuller coordination of the marihuana research conducted by governmental and private agencies is needed to reduce the duplication of effort, assure a diversity of new approaches and new objectives, and to provide efficient integration of findings into the available body of knowledge.

2. Research efforts to develop an inexpensive, easy method for detecting and quantifying the presence of marihuana in the blood, breath or urine of a person suspected of being intoxicated should be accelerated.

3. An accelerated program for funding foreign research should be undertaken immediately.

4. Increased support of studies which evaluate the efficacy of marihuana in the treatment of physical impairments and disease is recommended.

5. Community-based treatment facilities should be promoted in caring for problem drug users utilizing existing health centers when possible and appropriate.

6. Public health courses on the social aspects of drug use should be included in the curricula of the schools of the health professions.

OTHER RECOMMENDATIONS

1. The Commission recognizes that several state legislatures have improperly classified marihuana as a narcotic, and recommends that they now redefine marihuana according

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*The 13 Commissioners are in basic agreement with the Report and its recommendations. However, several Commissioners diverge with specific recommendations and their opinions are presented in a footnote on pages 151–156. A brief summary of this footnote follows:

Commissioners Rogers and Carter agree with the discouragement policy and the decriminalization aspects of the recommendations, but feel that the contraband concept is not a sufficiently strong expression of societal disapproval of the use of marihuana. They would recommend, in addition, a civil fine for possession of any amount of marihuana in private or in public. This civil fine would not be reflected in a police record.

Commissioner Ware agrees completely with the statements of Congressmen Rogers and Carter but wishes to reemphasize that the social policy and legal scheme adopted is applicable only to marihuana and should not be construed to embrace other psychoactive drugs. He advocates some penalty short of criminalizing the users, such as a civil fine or some type of extensive drug education. Further, he is opposed to the use of any drug, including alcohol, for the express purpose of becoming intoxicated.

Commissioners Hughes and Javits, while agreeing with the Commission's recommendation that the private use of marihuana be taken out of the criminal justice system, disagree with three specific recommendations relating to the implementation of the discouragement policy.

First, they would eliminate the contraband provision from the partial prohibition scheme adopted by the Commission. Second, believing the Commission has not set forth a clear standard as to what constitutes the casual not-for-profit sale, they recommend that all not-for-profit sales be excluded from criminal sanction. Third, they feel there is no need to retain criminal sanction on public possession of more than one ounce of marihuana and would permit public possession of "some reasonable amount" for personal use.

to the standards of the recently adopted Uniform Controlled Substances Law.

2. A single federal agency source should disseminate information and materials relating to marihuana and other drugs. The National Clearinghouse for Drug Abuse Information should be charged with this responsibility.

3. The Special Action Office for Drug Abuse Prevention in the White House should be responsible for the coordination, development and content review of all federally-supported drug educational materials and should issue a report as soon as possible, evaluating existing drug education materials.

4. The Commission notes the significant role played by the voluntary sector of the American community in influencing the social, religious and moral attitudes of our nation's citizens and recommends that the voluntary sector be encouraged to take an active role in support of our recommended policy of discouraging the use of marihuana.

Separate Views of Senators Javits and Hughes

Commissioner Hughes (Senator from Iowa) and Commissioner Javits (Senator from New York) believe that the Commission has taken a major, highly laudable step in recommending that the private use of marihuana be taken out of the criminal justice system. They concur in its threshold judgment that overall social policy regarding this drug should seek to discourage use, while concentrating primarily on the prevention of irresponsible use. They disagree, however, with three specific recommendations relating to the implementation of this discouragement policy.

First, they would eliminate entirely the contraband provision from the partial prohibitory model adopted by the Commission. They want it eliminated first because its legal implications are confusing and the subject of disagreement even among lawyers. Whether or not possession of a given substance is criminal, possession of material designated as contraband makes that possession *unlawful*. Also, marihuana designated as contraband would be subject to government search and seizure, even though the underlying possession is no longer criminal. The provision—which does not apply to marihuana held for personal use within the home—is considered by both Commissioners to be an unnecessary "symbol" of the discouragement policy. It will not foster elimination of the misunderstanding and mistrust which is a hallmark of our current marihuana policy.

Commissioners Hughes and Javits seek to eliminate it also because as a practical matter it serves no useful law enforcement purpose within the overall partial prohibitory model. If marihuana held for personal use within the home is not contraband, why should marihuana held for personal use within one's automobile be contraband? As a matter of fact, the area of operation of the contraband provision is extremely narrow. If one possesses *more* than one ounce of marihuana in public, it may be seized without regard to the contraband doctrine since such possession is a criminal violation.

Since the contraband provision does not apply to marihuana possession and use in private, the only effective area covered by the contraband provision is the area of possession in public of *less* than one ounce. The Commission has chosen to remove the stigma of the criminal sanction in this kind of case. To impose instead a contraband provision, which it is argued is in the nature of a civil "in rem" seizure which does not operate against the person, is to cloud the issue and to weaken the force of the basic decriminalization step. A persuasive justification simply has not been made.

Both Commissioners seek to eliminate it also because they believe that the voice of the Commission should be loud and clear that the preservation of the right of privacy is of paramount importance and cannot be casually jeopardized in the pursuit of some vague public or law enforcement interest which has not been defined and justified with clarity and precision.

The second area of disagreement with the Commission's recommendations concern the casual distribution of marihuana and the not-for-profit sale. As they understand:

(1) The totally donative transfer is not subject to criminal penalty, regardless of where it takes place.

(2) The transfer of *small* amounts for *insignificant* remuneration not *involving a profit* is not subject to criminal penalty, (except if it is accomplished in public, in which case it is subject to criminal sanction), but,

(3) The transfer of *"large* amounts" for *"significant"* remuneration not involving a profit is subject to criminal penalty.

In a footnote on page 63 of the Report, the Commission refers to a Report of the Senate Judiciary Committee on the Comprehensive Drug Abuse Prevention and Control Act of 1970. In substance, it implies that within the meaning of the Act transfers of more than one or two marihuana cigarettes in return for 50 cents or one dollar to cover cost are not intended to be covered as casual transfers, but rather are to be treated as unlawful sales.

Commissioners Hughes and Javits feel that the Commission has failed to set forth a clear standard which will adequately inform the public of their obligations under the law. The recommendation and its discussion in the Report are confusing and fail to provide the individual with sufficient guidance to allow him to act without having to dodge in and out of illegality. It also undermines a basic, stated objective of the Commission i.e., to concentrate the weight of the criminal sanction upon significant supply and distribution activities rather than upon casual consumption.

Moreover, proscribing even the most casual not-for-profit transfers when they occur in public is, in their opinion, incorrect. Such transfers are necessarily incident to private possession and use. To hold that they should be subject to criminal sanction is logically inconsistent with the Commission's rationale and recommendation on decriminalization of such private activities.

Instead, both Commissioners recommend that all not-for-profit sales be excluded from the criminal sanction. It is fundamental that there be a clear separation between the serious, commercial, profit-making-seller, or "pusher" as he is known, and the individual who merely splits the cost of a reasonable supply of the drug with his friends or acquaintances.

Thirdly, exception is taken to the retention of the criminal sanction on public possession of more than one ounce.

The individual who buys an ounce and a half would be a criminal when he buys on the corner, when he puts it in his pocket, when he gets in his car and drives home, when he is on his doorstep, but not when he crosses the threshold of his home. Again Commission policy should direct the attention of the law enforcement community to the person who sells the drug for profit, and not to the person who uses the drug privately.

If an individual has more than a few ounces in his possession, and there is probable cause to believe that he intends to sell it for profit, that activity is already covered under the Commission's recommendation that possession with intent to sell is illegal. Therefore, there is no need to further proscribe simple public possession.

All the component parts of the recommended policy of the Commission should be consistent with its objective of non-interference with casual transfers, and possession and use which is essentially and fundamentally private and personal.

The contraband device, the not-for-profit sale, and public possession of some reasonable amount which should be presumed to be necessarily incident to private use should all be removed from the ambit of legal sanction. To do so would be to strike down "symbols" of a public policy which had never been adequately justified in the first instance. Such steps would in no way jeopardize the firm determination of the Commission that the use of marihuana ought to be discouraged.

Commission Members

By law, the National Commission on Marihuana and Drug Abuse has 13 members. Nine public members were appointed by the President who also named the Chairman and Vice Chairman (five maximum from one political party).

Of the four congressional members, two were named by the President of the Senate and two by the Speaker of the House (two from each political party).

Raymond P. Shafer, Chairman, former Governor of Pennsylvania, Chairman of the Board and Executive Director, Teleprompter Corporation, New York.

Dana L. Farnsworth, M.D., Vice-Chairman, former Director of Health Services, Harvard University, Cambridge, Massachusetts.

Henry Brill, M.D., Director of Pilgrim State Hospital, West Brentwood, Long Island.

Representative Tim Lee Carter (R-Kentucky).

Mrs. Joan Cooney, President of the Children's Television Workshop and Producer of "Sesame Street," New York, New York.

Charles O. Galvin, Dean of Southern Methodist University, Law School, Dallas, Texas.

John A. Howard, Ph.D., President of Rockford College, Rockford, Ill. and President of the American Association of Independent College and University Presidents.

Senator Harold E. Hughes (D-Iowa).

Senator Jacob K. Javits (R-New York).

Representative Paul G. Rogers (D-Florida).

Maurice H. Seevers, M.D., Professor and former Chairman of the Department of Pharmacology, University of Michigan, Ann Arbor.

J. Thomas Ungerleider, M.D., Assistant Professor of Psychiatry, U.C.L.A. Neuropsychiatric Institute, Los Angeles.

Mitchell Ware, Attorney, Mazza, Mazzio and Ware, Chicago, former Superintendent of the Illinois Bureau of Investigation, Chicago.

NATIONAL OR STATE PRESIDENTIAL PRIMARIES?

Mr. HRUSKA. Mr. President, the distinguished Senators from Montana (Mr. Mansfield) and Vermont (Mr. Aiken) recently proposed that State presidential primaries be eliminated in favor of one national primary.

Their reasoning as always was logical and persuasive. The financial drain, the physical drain, and the circus aspects of a long series of State primaries are valid arguments for a change in the system.

There are also many good arguments, however, for a continuation of State primaries. If we look at the primaries in a broad perspective, it is possible to see virtues peeping through the curtain of disadvantages.

In an editorial entitled "A National Presidential Primary?" published on March 19, 1972, the Omaha World-Herald has taken such a look at the situation in its editorial columns. It has weighed the arguments for and against

State primaries succinctly but carefully. In my opinion it has done a commendable job of stating a persuasive case for their continuation.

In essence, the World-Herald concedes the wasteful and sometimes silly aspects of State primaries. But it goes on to point out that in the broader view the primaries do furnish a proving ground for presidential candidates which may well be a vital contribution to the complex process of selecting the right man to lead the Nation.

This thought-provoking and reasoned analysis of the question is worthy of study and I commend it to my colleagues. I ask unanimous consent, Mr. President, that the text of the editorial be printed in the RECORD.

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

A NATIONAL PRESIDENTIAL PRIMARY?

Should we scrap state presidential preferential primaries?

Sens. Mansfield and Aiken say they think we should. The Senate majority leader and the Republican veteran would amend the Constitution to provide for a national primary.

The system of state preferential elections is a political circus, they say. It is unfair to candidates and to the voters.

A presidential primary is a political circus. No doubt of that. So is a national political convention, or any rousing political rally, especially when some political prize is in contention.

Moreover, the primaries are wearing upon the candidates. They cost a lot of money. Sometimes the tired candidates say foolish things. (Sometimes they say foolish things when they're rested, too.)

If anybody wants to take another punch at our friends of the electronic media, it might be said that the eye of a network camera focusing on a candidate touring the boondocks can make him and that particular boondock seem a lot more important than they probably are to the process of picking a candidate.

Yet when all is said and done, we think that more is to be said for the state primaries than against them, and that not much is to be said for a national primary.

Columnist Max Lerner observed the other day that for all their barbarities the primaries are not useless. They test the candidate by making him go through a punishing physical and political ordeal. If he can't survive these preliminary tests, how is he going to act when he has to make great decisions dealing with crises that may mean peace or war?

A man should be stretched and tempered in the primaries. If he buckles under such stresses, then he's not the man to be president.

The New Hampshire and Florida primaries have been enlightening, not only because they have reshuffled the relative positions of the candidates but because they have helped to establish what is surely a major issue of this campaign.

McGovern and Muskie appear in different perspective than they did before the two primaries. Gov. Wallace's standing has changed. Humphrey and Jackson look a little better than they did. And Florida voters demonstrated the importance of the busing issue.

Would the national interest have been served if Sen. Muskie had gone unchallenged as his party's front-runner until a national primary in August? We think not. The state primaries provide a series of useful tests for which a single primary would not be a suitable replacement.

AUTHOR OF NEWS TWISTERS TESTIFIES

Mr. HRUSKA. Mr. President, the Senate Judiciary Subcommittee on Constitutional Rights, on which I am privileged to be ranking minority member, has been holding hearings on freedom of the press for several months. Under the chairmanship of the distinguished Senator from North Carolina, the subcommittee has been developing what I believe will prove to be a most useful and educational body of information on this subject.

On February 2 the subcommittee heard testimony from Miss Edith Efron, a writer for "TV Guide," whose recent book, "The News Twisters," has caused a considerable reaction both within and outside of the major television networks. During her appearance Miss Efron outlined the methodology she employed in studying television news coverage of the 1968 presidential campaign, and discussed her rather striking results. Among other things, she was led to conclude that a simple word-count revealed a substantial bias against Richard Nixon. According to Miss Efron's pro-and-con word computation, the following totals were reached: 16 to 1 against Nixon on CBS; 10 to 1 against Nixon on NBC; 8 to 1 against Nixon on ABC.

Mr. President, I believe all Senators will find Miss Efron's testimony both startling and fascinating. I therefore ask unanimous consent that her prepared statement be printed in its entirety in the RECORD.

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

TESTIMONY OF EDITH EFRON, PRESENTED BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS, FEBRUARY 2, 1972

Senator Ervin, Members of the Committee: A view has crystallized in this country that the bias controversy is a relatively new phenomenon, spawned by a repressive Nixon Administration, and bred in the dark shadows of right-wing conspiracies.

This view is a symptom of our anti-historical age, where memories are increasingly confined to the parameters of the daily press.

The bias controversy was actually born in the 30's with the collectivist concept of public ownership of the airwaves. Until that time, if people did not like the bias of a publication or a news service, they solved the problem by refusing, individually, to buy it—a simple and rational system that still prevails in all media have broadcast news. It is when they were informed by the United States Government that they collectively "owned" the airwaves, and were quasi-proprietors of the broadcast press, that they began to haggle collectively over the political orientation of that press.

The Government took its first drastic action to control bias in 1941, when the FCC, with its Mayflower Decision, deprived all American broadcasters of their First Amendment rights by forbidding them to express their own views on controversial issues. This solved the bias problem satisfactorily: there were no longer any controversial views on the air to get excited about. Unfortunately, the solution was more deadly than the problem: it constituted a frontal lobotomy of the entire broadcast medium. America had to endure eight years of government-induced vacancy in a major communications system—and the marks of the lobotomy have never disappeared—before the error was acknowledged and corrected.

The correction did not take the form of restoring unbreached First Amendment rights to the individual broadcaster; he remained a second-class citizen. It took the form, in 1949, of the Fairness Doctrine—which allowed the broadcaster to express his own opinions on major controversies, provided that he gave "equal", "equally forceful" and "non-partisan" coverage to other points of view as well.

And from 1949 to this present day, there has been constant dissension in this country over the problem of fairness in broadcast news. It has been most acute with respect to network news which, by virtue of government permission and protection, has acquired a monopoly over the nationwide dissemination of the facts and interpretations of American political life.

As a staff writer on TV Guide, I have been covering this constantly simmering antagonism to the political attitudes in network news for ten years. It was a serious problem in 1960. By 1964, under the Kennedy Administration, the anger had become so intense that it inspired a Congressional investigation. And by 1968, under the Johnson Administration, this anger exploded like a bombshell—with nationwide protests being registered over network coverage of the race riots, the Republican convention, the Democratic convention, the anti-war riots in Chicago. The number of Americans by then who felt that network news was biased ranged between 57 and 70 percent, according to polls of the period.

Throughout this remarkable decade of mounting protest, network management has militantly refused to grant that there is the slightest basis in reality for these public reactions. It has attributed them to a variety of neurotic responses ranging from selective perception, through escapist intolerance of bad news, to a hostile desire to kill the messenger who brought the bad news. Apart from this parlor psychoanalysis of the majority of the population, the networks have had nothing to say save to attest with regularity to their own impeccably objective perceptions.

It was in 1968, at the height of the nationwide protests against network bias that I undertook to do a study of my own—a study of how the networks covered the critical two-thirds of the Presidential campaign of 1968, the last seven weeks until Election Day. I was given a small grant to cover taping, typing and research expenses by the New York Historical Research Foundation, and I set to work.

Time does not permit an extensive presentation of my theory and method, but I will mention three points:

First, I concentrated on prime-time news alone, because all studies indicate that these early-evening news programs are the most important source of political information for the majority of the country.

Secondly, I used an intrinsically journalistic observation as my key test for bias. There is one slanting device known to every editor and reporter in the land. It is this: if a reporter wishes to load coverage of a controversy in favor of a certain position—he will simply stuff his coverage with opinions from those who take the desired position, while giving little or no room to the other side. There are other far more subtle editorial slanting techniques—in The News Twisters, I name and illustrate 33 of them—but this is the central one on which my entire analysis is based: I did a systematic check on the equity of pro and con opinion on a group of controversial subjects. This test simultaneously served to check on the

network's adherence to the Fairness Doctrine.

Third and last: I selected the major controversial subjects of the period: The Presidential Race, the War, Black Militancy, Left-Wing protest movements, and several subaspects of these broad subjects. In classifying opinion on these matters as pro and con, my basic rule was always to conform to the reporters' own classifications where they existed. If, for example, a reporter described an opinion as "heckling" or "opposition" or as "booing", I classified it as antagonistic opinion; if he described it as "endorsement" or "support" or as "cheering", I classified it as favorable or pro-opinion. The great bulk of opinion in the study turned out to be of this variety which already came precategorized in one way or another by the reporter. The opinion which I classified independently was usually covert or implicit opinion by reporters.

This, in essence, was my method. I applied it systematically to seven weeks of network coverage—300,000 words. And the results appeared in The News Twisters. I will not report on all my findings here. Instead, I will give you a close-up view of the results of my investigations into two of the most important controversies of the 1968 period—The Nixon-Humphrey race and the War.

The results on Mr. Nixon alone have caused the greatest consternation. Speaking quantitatively, in terms of simple word-count, the pro and con opinion on the Republican Candidate for the Presidency ran as follows:

16 to 1 against Nixon on CBS
10 to 1 against Nixon on NBC
8.5 to 1 against Nixon on ABC.

The anti-Nixon opinion is so voluminous in contrast to the pro-Nixon opinion that it verges on the ludicrous. The content of most of this criticism itself cannot be challenged. Most of the attacks on Nixon were journalistically legitimate. They came from Democratic Party and Independent Party challengers, from assorted Democratic Party Politicians, from Democratic union chiefs, and, as such, were a valid part of the campaign.

What was bizarre was primarily the quantity and repetitiousness of the criticism, often in purely optional matters. To illustrate: on CBS, Nixon was charged with telling untruths seven times by political opponents—twice by Hubert Humphrey, twice by Wallace, once by Ramsey Clark, once by Clark Clifford, and once by Lawrence O'Brien. But NBC and ABC deemed such charges newsworthy only three times each. Thus, CBS viewers heard politicians charge Nixon with dishonesty more often than did the viewers on the other two networks put together. All one can conclude is that CBS particularly liked to air this charge.

Similarly, the degree of hostile editorialization about Nixon, his personality, his morality, his campaign techniques, and so on, was quite voluminous. ABC viewers were privileged to hear Nixon described as a man who went for his enemies' "jugular" and who would like to assault them with a "meat-axe".

Startling as was the vast body of anti-Nixon opinion, even more startling were the pro-Nixon findings. In their way, these are the most deadly.

Here, for example, is a summary of all pro-Nixon opinion, from the public and from Republican political figures, carried by CBS TV News during the seven weeks of the campaign period studied: on only *six* days during the entire seven-week period did CBS news stories include opinion favorable to Nixon from members of the public.

On only *one* day during the seven week period—on October 28th, towards the very end of the campaign—did CBS news stories include any Republican political opinion which praised Richard Nixon. It came specifically, from Dwight and Mamie Eisenhower, and from Nixon assistants Patrick Buchanan and Raymond Price.

The picture is even bleaker for Nixon on ABC-TV. ABC news stories also reported only 6 times in seven weeks on opinions favoring Nixon from the public. And as for Republican political figures: once, on October 8th, ABC News informed its viewers that Senator Javits supported Nixon. Unless one wants to count Bud Wilkinson as a Republican political figure—there was no more.

Of the three networks, NBC was most generous. NBC viewers actually heard opinions favorable to Nixon from the public 12 times in seven weeks. And NBC cited four Republican politicians, on four different days as having favorable attitudes to Nixon. They were: Senator Dirksen, Representative Gerald Ford, Vice Presidential Candidate Spiro Agnew, and State Senator David Stanley.

Given facts like these, one need hardly look at the anti-Nixon opinion at all to know that this was politically biased coverage. The opinions of American citizens who supported Nixon, and the opinions of the Republican Party representatives who were working to elect him President, were simply not on the air.

By contrast, the coverage of Humphrey was fair. Most network newsmen were not enamored of Humphrey—at least not until he had come out for a unilateral bombing halt and won the support of the anti-war groups; but by the end of the campaign period, pro and anti-Humphrey opinion was fairly equitable on all three networks—with ABC and CBS being a touch more friendly, and NBC a touch less. In general, the early sources of political antagonism to Humphrey were thoroughly explored by the reporters; and the later sources of support were given a full airing.

My statistical findings on the Presidential race have aroused something of an uproar in the country. And inevitably, a great many people are frantically denying their reality and are charging me with writing fiction, most particularly in the area of the Nixon findings. You will be interested, therefore, in the comments made in the Winter issue of The Public Interest by Professor Paul H. Weaver of the Harvard University Department of Government. He writes as follows:

". . . there are three points to be made about this problem. First, my own inspection of two different samples of Miss Efron's file of anti-Nixon opinion convinces me that, by any reasonable standard, the large majority of such items are in fact quite clearly anti-Nixon opinion; no more than 20 or 30 percent of the anti-Nixon items might be questioned. Nobody has shown that the proportion of questionable items is larger; indeed, so far critics have merely adduced a few extreme examples, as if these were enough to invalidate the entire study. And this brings me to the second point. What is significant about Miss Efron's findings is not the absolute numbers of words pro and con; it is the *relative size* of the two bodies of opinion. In order to invalidate the finding of a huge disparity between pro-Nixon and anti-Nixon opinion, it is not enough to show that *some* anti-Nixon opinion has been incorrectly classified—one must show that *most* of it has been incorrectly classified. Even if one were to find that she had overestimated the amount of anti-Nixon opinion by 100 percent and underestimated the amount of pro-Nixon opinion by 50 percent, there would still be 2.5 times more anti-Nixon opinion than pro-Nixon opinion, a clearly "unfair" pattern. Needless to say, nobody has yet established errors of this magnitude, and it seems unlikely that anyone will."

You will also be interested in a statement issued to the press on October 27th of last year by Dr. George Weinberg. Dr. Weinberg is a psychologist, a research consultant, a statistician, and author of one of the leading statistics texts in use in American colleges and universities for the past decade. Dr. Weinberg said:

"I saw Miss Efron's research before reading her book and before knowing her conclusions. I found that my judgments coincided with hers well over 90% of the time. The great majority of the statements she classifies as pro or con opinion could hardly be classified otherwise. Miss Efron is far more objective, systematic and explicit in her method than anyone known to me who has ever written a book about TV. After examining her data, I believe that any systematic tabulation by any method would result in essentially the same findings."

In brief, I have not been writing fiction.

Given these findings on Nixon the question inevitably comes up: Was this bias deliberate? The answer to this question is complex and I cannot do justice to it in a few words. But briefly my own answer is this. it was not deliberate in the sense of an organized plot or of a conscious cabale. But it was inevitable given the virtually all-liberal composition of network staffs.

During the campaign, Eric Sevareid acknowledged on the air that most newsmen were for Hubert Humphrey—leaving to implication the fact that most were against Richard Nixon. On February 8, 1970 Howard K. Smith brought this implication out into the open. He generally confirmed Vice President Agnew's charges and said this about the newsmen's prejudices: "Johnson was politically assassinated and some are trying to assassinate Nixon politically. They hate Richard Nixon irrationally."

I believe that my findings are evidence of such antagonism, that it was so deep and widespread that it contaminated professional decisions—and that network managements must be held responsible for the result.

Now, to examine another subject, briefly—the War.

In The News Twisters, opinion on the Vietnam War is classified under different headings, just as it appeared in network news stories. There is: opinion on the U.S. War Policy in general; and opinion on the U.S. Bombing Halt policy in particular.

And once again, we see precisely the same pattern of heavy loading of opinion on one side—and a virtual void of opinion on the other.

In the seven weeks studied, the three networks carried 72 different stories in which opinion was heard condemning the U.S. Policy on the war, and demanding a unilateral bombing halt in opposition to the Johnson policy of reciprocity. Seventy-two stories means that about 10 times every week, the networks were pounding America—and the Johnson Administration—with opinion opposed to government policies on the war. This editorially selected outcry, subtly interlaced with editorial opinion, came from the following sources:

Senators Fulbright, Javits, Morse, and McGovern; Paul O'Dwyer, John Gilligan; Eldridge Cleaver, Dick Gregory, The President of Yale, SDS Leader Tom Hayden, Actress Vanessa Redgrave; The Socialist Workers' Party, The Peace and Freedom Party, The Freedom and Peace Party, The Socialist Labor Party, The Communist Party; Arthur Goldberg, George Ball, Averill Harriman, Cyrus Vance; U Thant; Indira Gandhi; Xuan Thuy, the North Vietnamese Negotiator; Soviet Premier Kosygin; British and Tokyo demonstrators—and assorted domestic students, demonstrators, Black militants, soldiers, pacifists, artists and so on.

Many of these sources were frequently repeated in successive newscasts. It is quite clear that the networks concentrated on the views of an assortment of Doves and Leftists, foreign and domestic, who were opposed to U.S. war policies.

And what did we hear on the other side? I'll summarize it for you precisely. It was to be found in only 13 stories—13 as opposed to 72, meaning: a 6 to 1 ratio against the Government:

ABC aired only four opinions opposed to a unilateral bombing halt in 7 weeks—three from President Johnson, alone or in combination with Walt Rostow and Dean Rusk; and one from President Thieu of South Vietnam.

CBS aired only two such opinions—one from Ohio Republican William Saxbe, and a paraphrased opinion citing "the generals in Vietnam and the Secretary of State".

And NBC also presented two opinions—one from President Thieu, and one from Iowa State Senator David Stanley.

That is: 8 opinions in 7 weeks opposing a unilateral bombing halt, on all 3 networks combined.

On the subject of the general war policy:

ABC aired four favorable opinions—those of President Johnson and or Ambassador James Wiggins—twice each.

CBS aired only one such opinion—from President Johnson.

And NBC aired none.

That is: 5 opinions in 7 weeks favoring the Johnson policies, on all 3 networks combined.

This is remarkable coverage indeed of the biggest controversy in the nation. It totally failed to reflect the attitudes in the nation, which at the time was giving President Johnson majority support. The Administration's allies, both domestic and foreign, were simply not on the air.

On February 27, 1968, Walter Cronkite presented a special report from Vietnam. In it he said: "It seems now more certain than ever that the bloody experience of Vietnam is to end in a stalemate", and he predicted that the United States would not be victorious in this war. And on March 10, 1968, Frank McGee presented a Sunday Report in which he said that "the enemy now has the initiative" and that "the war as the Administration has defined it is being lost". The New York Times headlines read on March 12: "U.S. is losing war in Vietnam, NBC declares".

Apparently having decided that the war was being lost, these two networks, and ABC as well, resolved to give little or no air time to any view which supported President Johnson's policies.

Whatever one may think about the war, this is not balanced reporting of diverse opinions on a crucial controversy. It is disguised, political advocacy.

Very much the same situation prevails in the other controversial areas which I investigated. Over and over again on all 3 networks—whether the subject was Black Militants, or the White Middle Class, or the Left, or the Right—this lopsided opinion can be found. It favored Black power, it opposed the White Middle Class; it favored the left, it opposed the Right. Almost always the opinion was loaded on the left-liberal side of the controversies. Almost always there was a vacuum, or a dramatic shortage, where strong opposition views could and should have been present.

Because of this acute shortage of opinion on one side of almost every controversy, one can state with extraordinary precision which groups in this country were deprived of representation on network news programs during the 1968 period of study. These groups were:

The broad white middle class majority, Republican and Democrat

Conservative and Republican leaders

The broad black majority

Moderate black civil rights leaders

And the ideological pro-violence New Left.

And these happen to be the very groups which in 1968 and 1969 charges the network repeatedly with bias. They, in fact, are exactly what remains when you subtract the left-liberals from the American political spectrum. It is no great surprise that when Vice President Agnew delivered his speech on network bias a year after the period of this study, there was a volcanic eruption in the nation—with some 57 percent of the public, including 60 percent of all college graduates, supporting him. This public explosion appears to have been a direct and cumulative response to the opinion loading, to the one-sided advocacy that passed for balanced reporting on controversies.

The Americans who protested are obviously the Americans whose views were chronically left out.

Omission—the crudest slanting technique in the journalistic repertoire—is the principal technique in network slanting. It is perhaps inevitable therefore that when CBS chose to attack The News Twisters, its attack was a monument to this very slanting technique.

In September, before The News Twisters was published, a 10 page document was distributed to the nation's media by CBS. The mailing literally blanketed the country. It is a study of The News Twisters conducted by The CBS News Department itself. It claimed to present hard, documentary evidence of the degree to which I had grossly distorted CBS transcripts. This evidence, said CBS, was based on a "spot check" of those transcripts.

This document is a fraud. Its fraudulence consists in a systematic omission of every conceivable piece of information either from CBS transcripts or from The News Twisters' text which would make my classifications intelligible and would reveal the reasoning behind them. The effect of these omissions was to make my work seem arbitrary, irrational and dishonest.

Seventeen charges were listed by CBS—a number that is statistically insignificant for my study; although CBS did not mention this fact to its readers—and of these 17 charges, 15 contained active misrepresentations of either CBS transcripts of The News Twisters' text or both. I have prepared a detailed report in which I identify every misrepresentation; restore every violated context; present the stories that CBS sought to conceal; and I have identified the precise principles by which CBS conducted its so called random "spot check". My analysis reveals that it was not a "spot check" at all but a carefully calculated smear planned to discredit my book before publication. I call this report "How CBS Tried To Kill A Book". I cannot cite from it, textual analyses must be read. I hope that every member of the Committee will read it and I request that it be published in the record of these hearings. I believe that this report will assist the Committee in its examination of the conflicts that have arisen nationally over network news.

Now I respectfully submit that the very existence of an ideological oligopoly that controls the airwaves—let alone one which acts to destroy both criticism and critics—is an immense danger to this country. A considerable awareness already exists in Congress of this danger and some substantial proportion of Congressmen are as angered by the bias as are members of the public. But Congress is nonetheless afflicted by a characteristic paralysis when it comes to action in this area. Even an explosion of nationwide protest—a protest that included 3 out of every 5 college graduates according to the Harris and Gallup polls—could not move Congress into action.

It is quite apparent why the Congress—and the FCC—are paralyzed. This misadventure of Congressman Staggers reveals the bitter truth: that their hands are permanently tied; that they *cannot* act against this monolithic bias on the nation airwaves; that the Fairness Doctrine is an impotent ideal which cannot be enforced without violation of the First Amendment; that the First Amendment does not deny the right of a news service to be biased, it only states that the news service is free; that even the Supreme Court cannot talk the discrepancy between the Fairness Doctrine and the First Amendment out of existence; and that the nation in fact has no protection whatever from this ideological oligopoly.

The day must come when Congress acknowledges this truth—and more: when it acknowledges that it alone has created this situation, that it is by Congressional permission alone that this oligopoly exists and has so long been sheltered from any challenge to its power. On that day, Congress will recognize that this artificial tyranny must be destroyed—by the Congress which brought it into being.

There is only one way to destroy it without violating the First Amendment. That way is not by the petty chivvying and nibbling and the proliferation of regulations that has gone on for years. It is for the government to acknowledge the sacred status of the First Amendment in this country; to acknowledge that it has no business regulating an intellectual and artistic medium—that it never had any business doing so—that it never should have violated the First Amendment rights of individual broadcasters and allowed 3 nationwide monopolies to form on this intellectually stagnant base—and that it should not year after year, have blocked economic and technological competition in this area to protect the profits of these 3 giant monopolies.

The government must acknowledge all this however painful it may be. It must get out of broadcasting lock, stock and barrel and let CATV, Pay TV, and cassette technology rip, uncontrolled, unlicensed, unregulated, uncensored, and uninhibited—dominated exclusively by the desire to win voluntary customers, and regulated by the law of supply and demand alone. Only this hurricane of fresh air will bring about in broadcasting the intellectual freedom and diversity that is now lacking.

What is desperately needed in broadcasting is the classical American system that prevails in all the other free media in this land—a free enterprise, pay system, in which each producer of intellectual and artistic commodities is absolutely sheltered by the First Amendment; in which each individual consumer purchases only the products that please him and leaves those who have tastes and views alien to his strictly alone. It is this competitive system—free of the twin plagues of government intervention and nationwide monopolistic concentrations of power—which alone have given us the huge spectrum of intellectual and artistic alternatives in this country. It is this proved and honorable system which must be introduced into broadcasting.

Only one thing is needed to accomplish this and that is for government to withdraw from this media. Poetry does not need the government; plays do not need the government; movies do not need the government; documentaries, newspapers, magazines, novels, photographs and sports events do not need the government. All this country has gotten from government intervention into this realm is the stupidest, most restricted, and most venal medium of communications in the country.

There may be chaos for a while if the government gets out. This chaos would be temporary and supportable. And when it settles, and when the long pent up creative and competitive energies flow into this government-created vacuum—health will be restored to this medium.

In the process, those arrogant parasitical growths known as the networks will shrink down to the size of normal syndicated operations—selling their wares in an open mar-

ket and feeling the bite of direct competition for the consumer dollar. This is, of course, precisely as it should be.

The irrational power of the networks today is purely a function of the freedom which has so long been denied to others. It is the government which must take that power back.

CONCLUSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Is there further morning business? If not, morning business is closed.

EQUAL RIGHTS FOR MEN AND WOMEN

The ACTING PRESIDENT pro tempore. In accordance with the previous order, the Chair lays before the Senate the unfinished business, which will be stated by title.

The assistant legislative clerk read as follows:

A joint resolution (H.J. Res. 208) proposing an amendment to the Constitution of the United States relative to equal rights for men and women.

The ACTING PRESIDENT pro tempore. The pending amendment is amendment No. 1068, offered by the Senator from North Carolina (Mr. ERVIN). Time is limited to 2 hours, equally divided between the proponent of the amendment and the manager of the bill. Who yields time?

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum, and I ask unanimous consent that the time not be charged against either side.

The ACTING PRESIDENT pro tempore. Is there objection? The Chair hears none, and it is so ordered.

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

Mr. ERVIN. Mr. President, the pending amendment reads as follows:

At the end of section 1 add the following sentence: "This article shall not impair the validity, however, of any laws of the United States or any State which extend protections or exemptions to women.".

I am constrained to offer this amendment because I remember how faithfully my own mother performed the obligations devolving upon her as a wife and mother. I am also constrained to offer this amendment because of my realization that my life has been made happy by a wife who has stood beside me for many years and has faithfully performed all of the obligations devolving upon her as a wife and mother.

My own mother and my own wife have given me the capacity to comprehend what Rudyard Kipling said in his poem entitled "Mother o' Mine" from "The Light That Failed."

If I could, I would compel every Member of the Senate to read the poem before he votes on this amendment. If every Member of the Senate would read it before he casts his vote, I am confident that he would have great difficulty in voting to rob wives and mothers and widows of the protections which commonsense and reality and the experience of the human race have placed around them, to enable them to perform their roles as wives and mothers, to give necessary nurture and training to their children, and to impart to their children the training which is absolutely indispensable to their intellectual and spiritual development.

The poem reads:

If I were hanged on the highest hill,
Mother o'mine, O mother o'mine!
I know whose love would follow me still,
Mother o' mine, O mother o' mine!
If I were drowned in the deepest sea,
Mother o' mine, O mother o' mine!
I know whose tears would come down to me,
Mother o' mine, O mother o' mine!
If I were damned o' body and soul,
I know whose prayers would make me whole,
Mother o' mine, O mother o' mine!

Mr. President, in appraising the objectives of the militants, we are confronted by the question whether there is any rational basis for reasonable distinctions between men and women in any of the relationships or undertakings of life.

We find in chapter 1, verse 27, of the Book of Genesis this statement which all of us know to be true:

God created man in His own image. In the image of God, created He him. Male and female, created He them.

For this reason I share completely the recent observation of a legal scholar, Mr. Bernard Schwartz of the New York University Law School:

Use of the law, in an attempt to conjure away all the differences which do exist between the sexes, is both an insult to the law itself and a complete disregard of fact."

While I believe that any laws making unfair or unreasonable distinctions against women should be repealed by legislative bodies, or judicially annulled by courts under the provisions of the 14th and 15th amendments, I have an abiding conviction that the law should make such distinctions between men and women as are fairly or reasonably necessary for the protection of women and the existence and development of the race.

When He created them, God made physiological and functional differences between men and women. These differences confer upon men a greater capacity to perform arduous and hazardous physical tasks. Some wise people even profess the belief that there may be psychological differences between men and women. To justify their belief, they assert that women possess an intuitive power to distinguish between wisdom and folly, good and evil.

To say these things is to imply that either sex is superior to the other. It is simply to state the all-important truth that men and women complement each other in the relationships and undertakings on which the existence and development of the race depend.

The physiological and functional differences between men and women empower men to beget and women to bear children, who enter life in a state of utter helplessness and ignorance, and who must receive nurture, care, and training at the hands of adults throughout their early years if they and the race are to survive, and if they are to grow mentally and spiritually. From time whereof the memory of mankind runneth not to the contrary, custom and law have imposed upon men the primary responsibility for providing a habitation and a livelihood for their wives and children to enable their wives to make the habitations homes, and to furnish nurture, care, and training to their children during their early years.

In this respect, custom and law reflect the wisdom embodied in the ancient Yiddish proverb that God could not be everywhere, so he made mothers. The physiological and functional differences between men and women constitute the most important reality. Without them human life could not exist.

For this reason, any country which ignores these differences when it fashions its institutions and makes its laws, is woefully lacking in rationality.

The common law and statutory law of the various States recognize the reality that many women are homemakers and mothers, and by reason of the duties imposed upon them in these capacities, are largely precluded from pursuing gainful occupations or making any provision for their financial security during their declining years. To enable women to do these things and thereby make the existence and development of the race possible, these State laws impose upon husbands the primary responsibility to provide homes and livelihoods for their wives and children, and make them criminally responsible to society and civilly responsible to their wives if they fail to perform this primary responsibility. Moreover, these State laws secure to wives dower and other rights in the property left by their husbands in the event their husbands predecease them in order that they may have some means of support in their declining years.

If the equal rights amendment should be interpreted by the Supreme Court to forbid any legal distinctions between men and women, it would nullify all existing and all future laws of this kind.

The purpose of my amendment is to prevent the equal rights amendment from nullifying all existing laws and disabling Congress and the 50 State legislatures to enact future laws which grant protections to wives and mothers and widows.

As appears from pages 936 to 954 of the Yale Law Journal, the equal rights amendment is expressly designed to nullify the State laws which give these economic and social protections to wives, mothers, and widows and to provide in their stead that the rights and responsibilities of men and women in the areas covered by these laws shall be absolutely coequal. To sustain the assertion which I have just made, I wish to read what the Yale Law Journal says on this subject:

Given the traditional social and economic view that woman's place was in the home, it is not surprising that laws affecting domestic relations have defined women's rights and duties with great specificity.

At common law, a woman who married became a legal non-person—a *femme couverte*. Upon marriage, she lost virtually all legal

status as an individual human being and was regarded by the law almost entirely in terms of her relationship with her husband. Statutory developments in the nineteenth and early twentieth centuries tended to frame a more dignified but nevertheless distinct and circumscribed legal status for married women. At the present time domestic relations law is based on a network of legal disabilities for women, supposedly compensated by a corresponding network of legal protections. The law in this area treats women, by turns, as mental incompetents and as more mature persons than men of the same age; as valuable domestic servants of their husbands and as economic incompetents; as needing protection from their husbands' economic selfishness and as needing no protection from their husbands' physical abusiveness. In many respects, such as name and domicile, the law continues overtly to subordinate a woman's identity to her husband's.

Mr. President, I digress to assert that none of these so-called disabilities are imposed upon the business or professional women who elect not to become wives or mothers. I also take the risk of saying that this paragraph which I have just read is written by young ladies who have never been married.

I continue to read:

Much of the national discussion about women's status has focused on marriage and divorce laws, and rightly so, because the issues involved are important to people personally, and because women's domestic role has traditionally been considered their primary one.

Unquestionably, the trend in marriage and divorce law is in the direction of treating the spouses equally or on the basis of their individual capacities. Progressive present-day models for change in the area of family law eliminate virtually all differentiation on the basis of sex. Thus, in most instances, the effect of the Equal Rights Amendment on marriage and divorce law will be to move the law more directly, more forcefully, and more expeditiously in the direction it is already going.

In considering the following discussion of the impact of the Equal Rights Amendment on some aspects of domestic relations law, the reader should keep in mind the law's limited power to predetermine and control the nature of intimate personal relationships. In the realm of marriage and the family, social customs, economic realities, and individual preferences have a far greater influence on behavior than the law.

I digress to thank the Almighty that this is so.

I resume reading:

This is not to say that the law does not play an important role in shaping and channeling these other forces, but rather to point out that a change in the law—insofar as the change leaves room for choice, as do the possibilities suggested below—will not result in immediate widespread change in what are essentially social customs. Furthermore, it is important to remember that the impact of the marriage and divorce laws varies according to the economic class of the family. In preparing this section, we have been limited by the dearth of academic research about the differential impact of domestic relations law according to economic class.

1. LAWS AFFECTING THE ACT OF MARRIAGE

The statutory requirements for a lawful marriage are generally very simple. They include in most states a valid license, a waiting period before issuance of the license, a medical certificate, proof of age, parental consent for parties below the age of consent, and a ceremony of solemnization. Of these, only age requirements for marriage with and without parental consent involve widespread discrimination on the basis of sex. A 1967 survey of state marriage laws by the United States Department of Labor showed that only ten states set the same minimum age for marriage (age below which marriage, even with parental consent, is prohibited) for men and women. Only eighteen states set the same age of consent (age at which marriage is permitted without parental consent) for both men and women. In every state with an age differential, the minimum age for men was one to three years higher than the minimum age for women.

Since the minimum marriage age in all states is now well above the normal age of puberty, physical capacity to bear children can no longer justify a different statutory marriage age for men and women. Instead, there seem to be two current rationales for the higher marriage age for men. One is that, mentally and emotionally, women mature earlier than men. Maturity is such a relative and subjective concept that a court could never use it as a test for an inborn characteristic distinguishing all women from all men. Furthermore, mere estimates of emotional preparedness founded on impressions about the "normal" adolescent boy and girl are based on the kind of averaging which the Equal Rights Amendment forbids. The other rationale for the age difference is that men should not be distracted during adolescence from education and other preparation for earning a living. This rationale is obviously untenable: the law should give as much encouragement to women to prepare themselves to earn a living as it gives to men.

Under the Equal Rights Amendment, a court challenge to the age differential would most likely be made by a man suing to require issuance of a license to him at the lower women's age. Faced with such a challenge to the state law a court would have to find, for the reasons just discussed, that the marriage age differential did not meet the strict criteria of the unique physical characteristics tests required by the Equal Rights Amendment. Once it had concluded that a state could not constitutionally set one marriage age for men, and one for women, a court would be able to increase the marriage age for women upward to match the age for men, on the theory that the state should be equally solicitous of a woman's training as a man's. Or a court might find that the legislature had pegged the age for men unreasonably high and revise the marriage age for men downward to correspond to the marriage age for women. A legislature reconsidering laws about the minimum age for marriage, either before or after a court challenge, would have to set a single age for men and women after weighing the policy considerations underlying the age limit. These considerations might indicate the higher age, the lower age, or an age in between the two.

I digress to observe that if this be a correct interpretation of the equal rights amendment, the courts are to have the powers to make laws rather than the power to interpret laws. I base that on the statement of the authors that under the equal rights amendment a court could lower the marriageable age of men down to the marriageable age of women, or raise the marriageable age of women up to the marriageable age of men. Personally, I think courts have enough jobs to do when they stick to their judicial knitting and leave the making of the laws to legislative bodies.

2. MERGER OF THE WOMEN'S LEGAL IDENTITY INTO HER HUSBAND'S

a. *Name Change.* The requirement that a woman assume her husband's name at the time she marries him is based on long-standing American social custom. It is also firmly entrenched in statutory and case law. In some states statutes indicate that a married woman must not only take but keep her husband's name. Women who continue to use their maiden names after marriage may encounter resistance from the Internal Revenue Service, voting registrars, motor vehicles departments or any number of non-governmental sources.

I emphasize the following sentence:

The Equal Rights Amendment would not permit a legal requirement, or even a legal presumption, that a woman takes her husband's name at the time of marriage. In a case where a married woman wished to retain or regain her maiden name or take some new name, a court would have to permit her to do so if it would permit a man in a similar situation to keep the name he had before marriage or change to a new name. Thus, common law and statutory rules requiring name change for the married woman would become legal nullities. A man and woman would still be free to adopt the same name, and most couples would probably do so for reasons of identification, social custom, personal preference, or consistency in naming children.

However, the legal barriers would have been removed for a woman who wanted to use a name that was not her husband's.

Some state legislatures might decide there was a governmental interest, such as identification, in requiring spouses to have the same last name. These states could conform to the Equal Rights Amendment by requiring couples to pick the same last name, but allowing selection of the name of either spouse, or of a third name satisfactory to both.

I digress to say it would be a terrible thing if the husband and wife could not agree on the last name under the equal rights amendment. That is one cause of friction which does not exist now, but would arise under the equal rights amendment.

I resume reading:

Similarly, statutes which now permit the judge in a divorce case to use discretion in determining whether to allow a woman to resume her maiden name or to take a new name would be extended under the Equal Rights Amendment to cover all men, or at least men who had changed their names at marriage. Moreover, any state coercion regarding an individual's choice of name might still be open to attack under developing constitutional principles of due process and privacy.

In a state where both spouses were required to have the same last name, the children would simply take their parents' name. If the state had no requirement that husband and wife take the same name, it could either require that parents choose one of their names for their children, or it could decide to have no rule at all. The Amendment would only prohibit the states from requiring that a child's last name be the same as his or her father's, or from requiring that a child's last name be the same as his or her mother's.

I want to digress from the reading to call attention to what a drastic impact this interpretation of the equal rights amendment, in respect to the names of husbands, wives, and children, would have upon the existing law and the fact that the change would serve no useful purpose whatever.

I call attention to the minority views contained in the report on this measure at pages 50, 51, and 52:

One of the most interesting assertions of the article in the *Yale Law Journal* which Representative Griffiths says "explains the workings of the amendment," is the statement that:

"The Equal Rights Amendment would not permit a legal requirement, or even a legal presumption, that a woman takes her husband's name at the time of marriage . . . The states could conform to the Equal Rights Amendment by requiring couples to pick the same last name, but allowing selection of the name of either spouse, or of a third name satisfactory to both . . . thus common law and statutory rules requiring name change for the married woman would become legal nullities."

The effects of this requirement on the record-keeping demanded by our society would be staggering. Imagine an attorney searching a land title with this type of last-name system.

The wisdom of allowing a state to determine that a wife's legal name shall be that of her husband has just been upheld 8–0 in a per curiam decision of the Supreme Court in the case of *Forbush* v. *Alabama*. The interest of the State in maintaining control over licensees and requiring the most efficient way to do so should be obvious to everyone, as it was to all the members of the Supreme Court. But it's not obvious to the proponents of the ERA who want to abolish all legal pronouncements favoring the husband's surname.

Just a cursory check of only a very few of the laws of the states will indicate just how far-reaching the Equal Rights Amendment will be in this area alone. Most states appear to recognize the common law rule that a wife assume her husband's surname. *E.g. People ex. rel. Rago v. Lipsky*, 327 Ill. App. 63, 63 N.E. 2d 642 (1945); *Freeman v. Hawkins*, 77 Tex. 498, 14 S.W. 364; *Chapman v. Phoenix National Bank of the City of New York* 85 N.Y. 437 (1881); *Bacon v. Boston Electric Railway Co.*, 256 Mass. 30, 152 N.E. 35 (1926).

In addition, many state statutes are based upon the assumption that a woman assumes her husband's surname upon marriage. For example, statutes relating to the issuance of driver's licenses often include a provision requiring licensed drivers to notify a state agency of changes in name resulting from marriage, *See, e.g. Colo. Rev. Stat. Ann.* Sec. 13–4–17; *Fla. Stat. Ann.* Sec. 322–19; *Ill. Ann. Stat.* Ch. 95½, Sec. 6–116; *Ind. Ann. Stat.* Sec. 47–2710; *Kan. Stat. Ann.* Sec. 8–248; *Ky Rev. Stat.* Sec. 186–540; *Me. Rev. Stat.* tit. 29, Sec. 546; *Minn. Stat. Ann.* Sec. 171.11; *Mont. Rev. Codes Ann.* Sec. 31–140; *N.M. Stat. Ann.* Sec. 64–13–53; *N.D. Century Code* Sec. 39–06–20; *Okla. Stat. Ann.* tit. 47, Sec. 6–116; *R.I. Gen. Laws Ann.* Sec. 31–10–32; *S.C. Code Ann.* Sec. 46–170; *Tenn. Code Ann.* Sec. 59–708; *Tex. Rev. Civ. Stat. Ann.* Art. 6687b, Sec. 20; *W. Va. Code Ann.* Sec. 173–2–13.

State statutes relating to divorce often authorize courts to change a woman's name upon divorce. *See, e.g., Alaska Stat.* Sec. 09.55.010 (no court order necessary); *Arizona Rev. Stat. Ann.* Sec. 25–319; *Ark. Stat. Ann.* Sec. 34–1216; *Cal. Civ. Code* Sec. 4457 (annulment), 4521 (dissolution); *Conn. Gen. Stat. Ann.* Sec. 46–21; *Del. Code Ann.* tit. 3, Sec. 1536; *D.C. Code Ann.* Sec. 16–915; *Ga. Code Ann.* Sec. 30–121; *Hawaii Rev. Laws* Sec. 574–5; *Ill. Ann. Stat.* ch. 40, Sec. 17; *Ind. Ann Stat.* Sec. 3–1225; *Kan. Stat. Ann.* Sec. 60–1610; *Ky. Rev. Stat. Ann.* Sec. 403.060 (if divorce obtained by wife); *Me. Rev. Stat. Ann.* tit. 19, Sec. 752; *Mass. Gen. Laws Ann.* ch. 208, Sec. 23; *Mich. Comp. Laws Ann.* Sec. 552. 391 (if no minor children); *Minn. Stat. Ann.* Sec. 518.27 (if *wife* obtained divorce); *Mo. Ann. Stat.* Sec. 452.100 (if *wife* obtains divorce); *Nev. Rev. Stat.* Sec. 125.130; *N.J. Stat. Ann.* Sec. 2A:34–21; *N.C. Gen. Stat.* Sec. 50–12; *Okla. Stat. Ann.* tit. 12, Sec. 1278 (if husband at fault); *Ore. Laws 1971*, ch. 280, Sec. 13; *Pa. Stat. Ann.* tit. 23, Sec. 98 (woman may *elect* to use maiden name after divorce); *R.I. Gen. Laws Ann.* Sec. 15–5–17 (if *wife* obtains divorce); *S.C. Code Ann.* Sec. 20–117; *Tex. Rev. Civ. Stat.* art. 5931 (either party may change name upon divorce); *Vt. Stat. Ann.* tit. 15, Sec. 557 (if *wife* obtains divorce); *Va. Code Ann. Ann.* Sec. 20–121; *Wash. Rev. Code Ann.* Sec. 26.08.130; *W. Va. Code Ann.* Sec. 48–2–23 (if no children); *Wis. Stat. Ann.* Sec. 247.20 (if no children and no alimony).

State voter registration laws often include provisions requiring women to reregister when their names are changed by marriage. *See, e.g., Colo. Rev. Stat. Ann.* Sec. 49–4–19; *Del. Code Ann.* tit. 15, Sec. 1750; *Ill. Ann. Stat.* ch. 46, Sec. 46, Sec. 6–54; *Ind. Ann. Stat.* Sec. 29–3428 (but women may vote or run for office under professional name); *Kan. Stat. Ann.* Sec. 25–2316; *Ky. Rev. Stat. Ann.* Sec. 117.735; *La. Rev. Stat Ann.* Secs. 18:41, 234, 241; *Me. Rev. Stat. Ann.* tit. 21, Secs. 638, 831 (notification of change required); *Md. Ann. Code* art. 33 Secs. 3–9, 3–18; *Mass. Gen. Laws Ann.* ch. 51 Sec. 2 (notification); *Neb. Rev. Stat.* Sec. 32–216; *Nev. Rev. Stat.* Sec. 293.517; *N.J. Stat. Ann.* Sec. 19:31–13; *N. M. Stat. Ann.* Sec. 3–4–5; *Ohio Rev. Code Ann.* Sec. 3503.19 (not necessary to reregister if name is *not* changed upon marriage); *Ore. Rev. Stat.* Secs. 247.290, 247.440; *R.I. Gen. Laws Ann.* Sec. 17–9–18 (notification); *S.D. Comp. Laws Ann.* Sec. 12–4–18; *Tenn. Code Ann.* Secs. 2–303, 2–305; *Va. Code Ann.* Sec. 24.1–51; *Wash. Rev. Code Ann.* Sec. 29.10.040.

State laws regulating notaries public also often contain provisions involving name changes resulting from marriage. *See, e.g., Iowa Code Ann.* Sec. 77.12 (married female notaries may continue to use maiden names); *N.J. Stat. Ann.* Sec. 52:7–7 (married female notaries to use hyphenated name); *Pa. Stat. Ann.* tit 57, Sec. 156 (female married notaries must notify state agency of change of name); *Va. Code Ann.* Sec. 55–117 (female married notaries to indicate maiden name); *Wyo. Stat. Anne.* Sec. 32–2 (female married notaries to notify state agency of name change and to add husband's surname to signature).

State statutes which authorize civil actions for change of name also sometimes have provisions which are clearly based on the assumption that a wife's legal surname is the surname of her husband. *See, e.g., Iowa Code Ann.* Sec. 674–1 (married woman may not bring action to change her name); *Iowa Code Ann.* Sec. 674–10 (if husband changes his surname, wife's name is also changed); *Ky. Rev. Stat. Ann.* Sec. 401–010 (married women not allowed to change name); *Mich. Comp. Laws Ann.* Sec. 711.1 (if husband changes name, wife's name also changes); *Minn. Stat. Ann.* Sec. 259.10 (if husband changes name, wife's name changes if she joins in the application-statute does not indicate what happens if wife fails to join in application); *Vt. Stat. Ann.* tit. 5, Sec. 814 (if husband changes name, wife's name also changes).

Finally, in some state statutes reference is made to "change of legal name" without it being specified whether this includes name changes resulting from marriage. *See e.g., Mass Gen. Laws Ann.* ch. 30, Sec. 13 (notaries must reregister upon change of name); *Neb. Rev. Stat.* Sec. 64–114 (notaries changing legal name may continue to use name under which they received commission); *N.H. Rev. Stat. Ann.* Sec. 261–2 (driver's license holders required to make notification of change of legal name may continue to use name under (notaries to apply for change of name on commission upon legal change of name). In light of the common law rule, however, such provisions are likely to be held to apply to changes of name by marriage.

It should be noted, in conclusion, that the above listing of state statutes is not exhaustive. Rather, it is meant to suggest the kinds of state statutes which include provisions based upon the assumption that a woman's legal name changes upon marriage.

Mr. President, those are just a few of the many thousands of State laws which would be nullified by an equal rights amendment. This shows that we would have absolute chaos from a legal standpoint if 38 of the States should be so foolish as to emulate the august example that Congress is about to set, and ratify the equal rights amendment.

I resume the reading from the Yale Law Journal:

b. *Domicile.* The location of a person's domicile affects a broad range of legal rights and duties, including the place where he or she may vote, run for public office, serve on juries, receive free or lowered tuition at a state school, be liable for taxes, sue for divorce, and have his or her estate administered. The common law rule for determining the wife's domicile was simple: the domicile of the wife merged in that of her husband; moreover, she had the duty to follow him if his choice was a reasonable one, and her refusal to do so was considered desertion. Legislative or judicial changes have modified this blanket rule in most states for some purposes, most commonly for divorce jurisdiction. However, only three states—Alaska, Arkansas, and Wisconsin—permit a woman to have a separate domicile from her husband for all legal purposes.

A court suit challenging discriminatory domicile rules could arise after a woman had been denied some right or benefit because her husband's domicile had been imputed to her. In such a suit a court would have to hold that the Equal Rights Amendment requires rules governing domicile to be the same for married women as for married men. Extending women's dependent status to men would simply create a circular situation with each spouse's domicile dependent on the other's. Thus, equal treatment of men and women for purposes of domicile implies giving married women the same independent right to choice of domiciles as married men now have. A court would probably resolve the inequality by striking down whatever statute or portion of a statute sets out a special rule for married women. It would leave standing the general domicile law which would automatically be extended to married women. For similar reasons, a court would do away with the rule that refusal to accompany or follow a husband to a new domicile amounts to desertion or abandonment. A husband would no longer have grounds for divorce in a wife's unjustifiable refusal to follow him to a new home, unless the state also permitted the wife to sue for divorce if her husband unjustifiably refused to accompany her in a move.

These results would cause little disruption.

Mr. President, I must repeat that statement:

These results would cause little disruption and would be beneficial to those women who are now adversely affected by the domicile law. Professor Kanowitz concludes that the domicile rule "has become useless as an influence within the family. Its most important practical effects are to deprive wives of certain governmental benefits they would otherwise have and to create technical legal difficulties for third parties. The cases in which the issue is raised typically do not involve the resolution of a dispute between spouses in an ongoing marriage. . . . Its retention serves only to evoke bygone images of the husband as master and the wife as obedient servant."

With respect to children, the traditional rule is that the domicile of legitimate chil-

dren is the same as their father's. Even those states which permit a married woman to have a separate domicile from her husband appear to retain this rule with respect to the child's domicile. The Equal Rights Amendment would not permit this result. Either by legislative action or judicial determination, a state would have to devise a sex-neutral basis for determining the child's domicile.

I have to observe at this point, oh, how these militants who advocate equal rights for women must hate sex, to judge from their efforts in seeking to abolish it. I resume the reading:

Either by legislative action or judicial determination, a state would have to devise a sex-neutral basis for determining the child's domicile. The most reasonable domicile would be the place the child actually lives most of the time.

I digress to observe that if that means anything, it means that a child, by running away from home, can select its own domicile, despite its immaturity, and despite the fact that existing laws require the father to support the child—in the father's home.

I resume the reading:

If the family lives together but one of the parents is domiciled in a separate place, the child's domicile should be the place of family residence. If the parents live apart, then the child's domicile should be the domicile of the parent with whom he or she lives most of the time. Alternatively, the state could allow the child to determine his or her own domicile on the basis of where he or she actually lives or works, if apart from both parents.

3. RIGHTS OF HUSBANDS AND WIVES INTER SE

The reluctance of courts to interfere directly in an ongoing marriage relationship is a standard tenet of American jurisprudence. As a result, legal elaboration of the duties husbands and wives owe one another has taken place almost entirely in the context of the breakdown of the marriage—either voluntary breakdown through separation, desertion, or divorce, or involuntary breakdown through incapacitation or death. Any legal changes required by the Equal Rights Amendment are thus unlikely to have a direct impact on day-to-day relationships within a marriage, because the law does not currently operate as an enforcer of a particular code of relationships between husband and wife.

a. *Rights of Consortium.* One of the law's most comprehensive efforts to define the rights and obligations of the partners to a marriage relationship occurs in personal injury actions, after one or the other spouse has been seriously incapacitated. In order to instruct the jury as to the proper standards for awarding damages, the judge must define what benefits the plaintiff should have expected from his or her now incapacitated spouse. At common law these standards were rigidly defined and totally male-oriented. A man had a right to recover damages for loss of his wife's services when she was injured by intentional or negligent action. In time, a husband's rights of consortium were defined to include love, affection, companionship, society, and sexual relations. A woman, by contrast, had no right to sue for loss of her husband's services, since in theory, he provided none.

The Equal Rights Amendment would not permit men to have a greater right than women to recover for loss of their spouse's services and companionship. Courts in many states have already extended to women the right to sue for loss of consortium, although some courts continue to uphold this differential between men's and women's rights. The Equal Rights Amendment would settle the current uncertainty and disagreement among the states by requiring them all to grant women the same right to sue that men now have.

More fundamentally, however, the Equal Rights Amendment would prohibit enforcement of the sex-based definitions of conjugal function, on which the discriminatory consortium laws are based. Courts would not be able to assume for any purpose that women had a legal obligation to do housework, or provide affection and companionship, or be available for sexual relations, unless men owed their wives exactly the same duties. Similarly, as discussed more fully below, men could not be assigned the duty to provide financial support simply because of their sex.

Mr. President, I digress from the reading to emphasize the last sentence from the Yale Law Journal. It states that under the equal rights amendment, men could not be assigned the duty to provide financial support for their wives simply because of their sex. I assert that if that be so—and it necessarily is so, because the equal rights amendment would abolish all legal distinctions between men and women, no matter how reasonable they are—then the courts of this land would have a highly uncertain duty and would be confronted by legal confusion every time they had a husband indicted for nonsupport of a wife, every time a wife sued the husband to recover sums expended by her for her own support, and every time a wife sought alimony from her husband in a divorce or a support proceeding.

This illustrates the truth of what Prof. Paul A. Freund of the Harvard Law School said—that the adoption of the equal rights amendment would fill this country with "constitutional and legal chaos" and would make every law regulating in any way the relationship of men and women a matter to be ultimately decided by the Supreme Court of the United States. That means every law, for all practical intents and purposes.

The only reason we have any law is to prescribe rules of conduct for people; and there are only two kinds of people—the equal rights amendment to the contrary notwithstanding—and those people are divided into men and women. So all will be involved in a state of constitutional and legal uncertainty if this amendment is adopted.

I digress from reading the article in the Yale Law Journal to read a telegram which has just been sent to me by Rabbi Boruch Liebowitz. The telegram reads as follows:

DEAR SENATOR ERVIN: The Rabbinical Alliance of America, a national organization representing over 500 orthodox rabbis and Hebrew educators, is alarmed over the threat to religious practices and feelings of orthodox Jews inherent in the proposed so-called Womens Rights Amendment.

The implicit sanction in the proposed amendment for drafting women into the armed services is a direct threat to orthodox Jewish women who could be subjected to intolerable pressures even with allowances for conscientious objectors.

The possibility of the proposed amendment, if enacted, ending separate restroom facilities in transportation and elsewhere is abhorrent to our people.

This bill could jeopardize the maintenance of separate dayschool education for boys and girls in many Jewish communities.

We, therefore, respectfully request that Congress carefully consider our feelings and that any proposal for equal rights for all Americans, which we as Jews have long championed, clearly specify that the religious practices of our faith shall be in no way harmed or endangered.

RABBI ABRAHAM GROSS,
President.
RABBI BORUCH LIEBOWITZ,
Administrator.

I now resume reading from the Yale Law Journal, and I start with section 6, entitled "Allocation of the Duty of Family Support Between Husband and Wife":

b. *Allocation of The Duty of Family Support between Husband and Wife.* In all states husbands are primarily liable for the support of their wives and children, although the details of this liability and the possible defenses vary. A wife may be liable for supporting her husband in many states, but generally only if the husband is incapacitated or indigent. In most states the mother is liable for support of the children only if the father refuses or fails to provide for their support.

Criminal nonsupport laws are the legal system's most heavy-handed technique for enforcing the husband's current duty of support. Nonsupport was not an indictable offense at common law. But criminal statutes in all but three states now penalize a man's desertion or nonsupport of his wife, and all American jurisdictions set criminal penalties for nonsupport of young children. While these laws typically penalize either parent who fails to provide support for a minor child, the duty of interspousal support is placed solely on the man.

The child-support sections of the criminal nonsupport laws would continue to be valid under the Equal Rights Amendment in any jurisdiction where they apply equally to mothers and fathers. However, the sections of the laws dealing with interspousal duty of support could not be sustained where only the male is liable for support. Applying rules of narrow construction of criminal laws, courts would have to strike down nonsupport laws which impose the duty of support on men only. Legislatures might decide not to re-enact any husband-wife criminal nonsupport laws. Criminal sanctions against the husband are widely recognized as poor compensation for a wife's unpaid domestic labor and discriminatory treatment against her in the labor market; a legislature might choose to use its resources for a more direct attack on these problems. Alternatively, a state legislature could adopt a law which makes no distinctions on the basis of sex, like the Model Penal Code's nonsupport provision.

I digress here to say that this is a direct assertion that the equal rights amendment will invalidate every law now in existence which makes a husband primarily responsible for the support of his wife, and which makes the father primarily responsible for the support of his children.

If there was no other basis for rejecting the equal rights amendment than that, that alone should justify its rejection.

I resume reading:

With regard to civil enforcement of support laws, courts could take a more flexible approach.

The PRESIDING OFFICER (Mr. PEARSON). The time of the Senator from North Carolina, under the unanimous-consent agreement, has expired.

Mr. ERVIN. Mr. President, may I ask how much time I have remaining on the bill?

The PRESIDING OFFICER. The Senator has 252 minutes remaining.

Mr. ERVIN. That is about 4 hours if

my mathematics are correct. I yield myself such time on the bill as I may use.

The PRESIDING OFFICER. The Senator from North Carolina may proceed.

Mr. ERVIN. Mr. President, I resume reading:

The Equal Rights Amendment would bar a state from imposing greater liability for support on a husband than on a wife merely because of his sex. However, a court could equalize the civil law by extending the duty of support to women.

I digress a moment here to observe that that is another assertion made by the proponents of the equal rights amendment, that under the equal rights amendment the courts could usurp and discharge the legislative function of making the laws.

Perhaps I am somewhat old fashioned in my views, but I think that the court has enough to do if it just sticks to its judicial knitting, without attempting to invade the field of the legislature. There is no doubt that the court will not be able to extend laws limited to women, to men.

I resume reading:

With regard to child support this is already the rule in Iowa, where father and mother are under the same legal duty to support the children.

Alarmists claim that the Equal Rights Amendment would change the institution of the family as we know it by weakening the husband's duty of marital support in an ongoing marriage. This concern is based on a misunderstanding of the role laws about support actually play. Many courts flatly refuse to enter a support decree when the husband and wife are living together. In most such cases the husband, as head of the family, is free to determine how much or how little of his property his wife and children will receive.

Mr. President, I digress here to say that if there is any court in the United States that says a husband can permit his wife to starve to death while she is living with him, I have never heard of it.

I am glad to say that the Legislature of the State of North Carolina has had more intelligence than that, that a husband can be reached either criminally or civilly if he fails to support his wife while he and his wife are living together.

I resume reading:

The Equal Rights Amendment would not require mathematically equal contributions to family support from husband and wife in any given family. A functional definition of support obligations, based on current resources, earning power, and nonmonetary contributions to the family welfare, would be permissible and practical under the Equal Rights Amendment, so long as the criteria met the tests of reasonable classification described above in Part III(C). If husband and wife had equal resources and earning capacity, neither would have a claim for support against the other. However, if one spouse were a wage earner and the other spouse performed uncompensated domestic labor for the family, the wage-earning spouse would owe a duty of support to the spouse who worked in the home. Creating in each spouse equal liability for support might give creditors an advantage in some instances where they would not currently be able to reach the wife's resources. If this extra liability created hardship for families, the legislature could make rules limiting the extent of creditors' access to a family's resources.

Mr. President, I digress here to observe that in one of James Russell Lowell's poems, a father gives his son the advice not to marry for money but to marry where the money is.

The equal rights amendment would certainly encourage some sons to take that advice of their fathers', because if the wife had some money or some property, the son could compel the wife to support him under this interpretation of the equal rights amendment, which I take to be absolutely correct.

I resume reading:

c. *Ownership of Property.* The law has attempted to recognize women's contribution to the family by giving each spouse an interest in property acquired during the marriage. Two different systems have been adopted in the United States for distributing property rights within a family—the community property system and the common law system. In both systems the woman's right matures primarily upon separation or death of her spouse. As both systems currently operate, they contain sex discriminatory aspects which would be changed under the Equal Rights Amendment.

(1) *Community Property.* In the eight community property states—Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington—property acquired by each spouse during the marriage is owned in common by both husband and wife. This system is sometimes championed by advocates of women's rights because it gives a housewife who earns no independent income a legal share in the family property. However, in all the community states, except Texas and Washington, the husband has power of management and control over the community property; and in some states he can assign, encumber or convey the property without his wife's consent. Thus, in some of the community property states a working wife may be put in the position of a woman before passage of the Married Women's Property Acts: she may lose control of her own earnings to her husband.

Under the Equal Rights Amendment, laws which vest management of the community property in the husband alone, or favor the husband as manager in any way, would not be valid. In the absence of new legislation, the courts would leave decisions about disposition of the community property to be made jointly by husband and wife. This would be consistent with the general judicial preference to allow married couples to work matters out between themselves.

Legislatures might prefer to follow the example of the recent amendment of the Texas community property law. The new Texas law provides that "each spouse shall have sole management, control and disposition of that community property which he or she would have owned if a single person.

Mr. President, I digress to observe that this virtually nullifies the community property system.

I resume reading from the Yale Law Journal:

Rather than leaving decisions about the community property to husband and wife together, this rule would give the spouse who had earned or been given property the power to dispose of it. This rule obviously favors the wage-earning spouse, who in most instances under current conditions will be the man. Thus it would require scrutiny as a rule neutral on its face, which falls more heavily on one sex than the other. The Texas law also states that property of one spouse which is mixed or combined with property of the other spouse is subject to the joint control of husband and wife unless they agree otherwise. This part of the law would certainly be valid under the Equal Rights Amendment.

(2) *Common Law Ownership.* The other forty-two states have a common law basis for distributing marital property. However, Married Women's Property Acts in every state have modified the harsh common law principles that gave the husband complete control over his wife's property and the products of her labors. With certain exceptions these statutes give a woman the right to control property she owned before marriage as well as property she earns or receives by gift or devise during marriage. Except for qualifications relating to the right of a surviving spouse to inherit, therefore, each spouse now owns his or her separate property free of legal control of the other spouse.

The Married Women's Property Act did not automatically abolish the common law estates of dower and curtesy, but today most states have abandoned these cumbersome devices for protecting the interests of widows and widowers, and others have modified them substantially. In their place, the states have substituted other forms of protection of a marital share of the property of one or both spouses. All states except North Dakota and South Dakota give the woman a nonbarrable share in her husband's estate, but a number of states fail to give the husband a corresponding legal claim in his wife's estate. The widow's allowance or family allowance, homestead, and limitation on gifts to charity are other devices to protect a surviving spouse against complete disinheritance.

Where these devices give the surviving husband rights equal to the surviving wife, they would be valid under the Equal Rights Amendment. In the many states, however, where the wife still has a protected position, the discriminatory laws would either be invalidated or extended. Where a legal device has proved to be a useful protection, legislatures would probably be inclined to extend its coverage to men, but where the technique has provided little real protection, the legislatures could take the opportunity for review provided by the Equal Rights Amendment to revise or repeal the law.

d. *Grounds for Divorce.* Professor Leo Kanowitz points out that "there is almost an air of unreality about the enumeration of specific grounds of divorce found in the statutes of all the states." This is because the great mobility of middle class Americans permits them to go to a state which has liberal grounds for divorce, or abroad, when they want to dissolve a marriage. In addition, a high proportion of couples seeking divorce agree to allege as fictions the requisite grounds for divorce. Furthermore, divorce laws have typically been written in terms that make sense only to an ongoing marriage, permitting divorce if, and only if, a fundamental element of the marriage compact has been violated.

Recognizing these factors, as well as the unreasonableness of permitting divorce only for certain limited and specific reasons, proponents of legislative reform recommend evaluating the overall health of the marriage rather than pinning particular guilty action on one or the other of the spouses. The Uniform Marriage and Divorce Act, adopted by the National Conference of Commissioners on Uniform State Laws, provides for a decree of separation or divorce to be granted upon a finding that "the marriage is irretrievably broken." California currently permits divorce on a finding of irreconcilable differences between the parties. North Carolina, Ohio, and the District of Columbia permit a divorce after voluntary separation for a year. Nevertheless, the statutory grounds for divorce which remain in effect in most states are of concern because they still control in contested divorce situations, because they affect the economic and personal relations of the parties even if consent divorces, and because there is evidence that they cause a disproportionate amount of difficulty to poor people.

In the past many grounds for divorce were highly sex discriminatory; today only a few apply solely to one sex or the other. These are non-age, pregnancy by a man other than husband at time of marriage, nonsupport, alcoholism of husband if and only if accompanied by wasting of his estate to the detriment of his wife and children, wife's unchaste behavior (without actual proof of adultery), husband's vagrancy, wife's absence from state for ten years without husband's consent, wife's refusal to move with husband without reasonable cause, wife a prostitute before marriage, husband a drug addict, indignities by husband to wife's person, and wilful neglect by husband.

Except for nonsupport and pregnancy, all the sex discriminatory grounds for divorce listed above are anachronisms, surviving in only one or two states, and are not deserving of extended discussion here. In each instance, a court could invalidate such a provision without doing any serious harm to the overall structure of the state's divorce law. On the other hand, the court could also extend the law to the opposite sex without risking serious criticism that it was usurping legislative authority.

I digress to observe that is a very remarkable statement, that a court acting under the equal rights amendment could change the law of the State without risking serious criticism to its usurping legislative authority.

I resume the reading:

Even without the pressure of the Equal Rights Amendment, these provisions are likely to be dropped or extended to the opposite sex in the course of divorce law reform.

Of the thirty states which allow a woman a divorce for nonsupport, only two—Arkansas and North Dakota—give a husband whose wife has failed to support him a cause of action. This disparity is a reflection of the sex bias in support laws, described above. Like the duty of support during marriage and the obligation to pay alimony in the case of separation or divorce, nonsupport would have to be eliminated as a ground for divorce against husbands only, or else extended to the wife where the husband was without resources and the wife had the financial capacity to support him.

The laws that grant a husband a divorce because at the time of marriage he did not know his wife was pregnant by another man would be subject to strict scrutiny under the unique physical characteristics tests. As with paternity laws, the argument can be made that the ease of identifying the mother of a child, as opposed to the difficulty of identifying the father, is a kind of unique physical characteristic which justifies different rules regarding the relationship of mothers and fathers to illegitimate children.

However, no reason exists for distinguishing between the duties and obligations of the mother and the father when the father of an illegitimate child has acknowledged parternity or has been adjudged the father in a paternity proceeding. Furthermore, the divorce laws are not based primarily upon the physical act of giving birth but upon other considerations. The laws derive, at least in major part, from the fact that any child born of a woman during marriage is presumed to be her husband's child. Whether the husband claims the child or not, the law imposes on him the duty to support the child and gives the child his name. In this respect the law places an unequal burden on the husband, for his wife receives no corresponding obligations to support or nurture any children her husband may conceive. Since the Equal Rights Amendment would require men and women to bear equal responsibility for the support and nurture of their children, it eliminates most of the justification for giving men alone this ground of divorce. The Equal Rights Amendment would permit resolution of the disparity either by giving a woman a claim for divorce if, at the time of marriage, she did not know that her husband had impregnated another woman, or by abolishing the ground altogether.

I disgress to observe that that is a rather remarkable statement that the equal rights amendment might invalidate a State law which grants the husband grounds for divorce against his wife if his wife is pregnant by another man at the time of his marriage and he is ignorant of the fact of such pregnancy.

e. *Alimony.* Alimony following divorce involves issues similar to those discussed above in connection with support laws. However, a different set of laws and rules is involved. In jurisdictions where fault is still central to divorce proceedings, alimony awards are closely linked to the judicial determination of fault. More than one-third of the states authorize divorce courts to grant alimony to either spouse, but the remaining jurisdictions permit alimony awards to the wife only.

The Equal Rights Amendment would not require that alimony be abolished but only that it be available equally to husbands and wives. This result is consistent with the recommendations of Robert Levy to the Special Committee on Divorce of the National Conference of Commissioners on Uniform State Laws, who concludes,

[T]he distinction [permitting alimony for wives but not husbands] is an historical idiosyncrasy; there is no principle reason for maintaining the distinction between husbands and wives; almost all recent commentators and official studies of divorce-property doctrines have recommended that the distinction be abolished.

I digress to observe that would be quite a surprise for the women of America to learn that the equal rights amendment will require them to pay alimony to their husbands on exactly the same grounds their husbands are required to pay alimony to them.

I resume the reading.

Alimony laws could be written to grant special protection to a spouse who had been out of the labor force for a long time in order to make a non-compensated contribution to the family's well-being. Similarly the laws could provide support payments for a parent with custody of a young child who stays at home to care for that child, so long as there was no legal presumption that the parent granted custody should be the mother. In short, as long as the law was written in terms of parental function, marital contribution, and ability to pay, rather than the sex of the spouse, it would not violate the Equal Rights Amendment.

The maintenance provisions of the Uniform Marriage and Divorce Act serve as an example of the kind of law which would be valid under the Equal Rights Amendment. The Act provides for maintenance to be paid from one spouse to the other if the spouse seeking maintenance lacks sufficient property to provide for his reasonable needs and is unable to support himself through appropriate employment, or is the custodian of a child whose condition or circumstances make it appropriate that the parent not seek employment outside the home. The amount and duration of payments for maintenance are to be determined after the court considers the financial resources of the party seeking maintenance, the time necessary to acquire sufficient training to enable the party to find appropriate employment, the standard of living established during the marriage, the duration of the marriage, the age and physical and emotional condition of the spouse seeking maintenance, and the ability of the spouse from whom maintenance is sought to meet his or her own needs while making maintenance payments.

f. *Custody of Children.* At common law the father, if living, was the natural guardian of his child and as such was nearly always entitled to custody of the children in case of separation or divorce. Some states, including California and Utah, changed this by statute which prefers the mother if the child is young. Others, including Missouri, Florida, Minnesota, New York, and Colorado, give both spouses equal right to custody of the children. In most states there is no statute favoring one parent or the other; rather, preference for the mother or father exists as a result of judicially created presumptions in favor of the mother for girls and young children and in favor of the father for older boys.

The Equal Rights Amendment would prohibit both statutory and common law presumptions about which parent was the proper guardian based on the sex of the parent. Given present social realities and subconscious values of judges, mothers would undoubtedly continue to be awarded custody in the preponderance of situations, but the black letter law would no longer weight the balance in this direction.

4. SUMMARY

The present legal structure of domestic relations represents the incorporation into law of social and religious views of the proper roles for men and women with respect to family life. Changing social attitudes and economic experiences are already breaking down these rigid stereotypes. The Equal Rights Amendment, continuing this trend, would prohibit dictating different roles for men and women within the family on the basis of their sex.

I digress to observe that is a rather remarkable statement. The equal rights amendment would prohibit dictating different roles for men and women within the family on the basis of their sex.

I resume the reading:

Most of the legal changes required by the Amendment would leave couples free to allocate privileges and responsibilities between themselves according to their own individual preferences and capacities. By and large these changes could be made by courts in the process of adjudicating claims under the Amendment. In any area where the legislature felt that sudden extension of the law to men and women alike would cause undue hardship, it could pass new legislation basing marital rights and duties on functions actually performed within the family, instead of on sex.

That completes the reading of this portion of the article from the Yale Law Journal, which deals with present domestic relations between husband and wife and what domestic relations between husbands and wives would be if the equal rights amendment were adopted.

I digress to observe that Professor Kanowitz, the author of the book "Women and the Law, the Unfinished Revolution," states the equal rights amendment will have no impact on the laws making distinctions between men and women because those distinctions are based upon function and not upon sex. I wish I had the confidence that Professor Kanowitz' interpretation of the equal rights was correct. His interpretation is in sharp contrast to that of Professor Freund of Harvard Law School and Professor Kurland of the University of Chicago Law School, and that of the

late Dean Roscoe Pound of the Harvard Law School, and other illuminating statements of legal scholars which I have placed in the RECORD.

Under the interpretation of these great legal scholars, the Supreme Court is likely to hold that the equal rights amendment compels Congress and the legislatures of the 50 States to blind their eyes to sex when they enact legislation and to make and to convert all men and all women into identical legal beings, having identically the same rights and identically the same responsibilities. If that interpretation should prevail, then one can only say that the equal rights amendment constitutes an effort to destroy the handiwork of God when he created mankind male and female instead of one sex.

I yield the floor.

Mr. BAYH. Mr. President, I yield myself as much time as might be required.

The Senator from Indiana will be brief, inasmuch as much of this subject matter was discussed at some length yesterday, and he sees no reason to belabor further the Senate with his counterargument to that of the Senator from North Carolina. I think the Senator raises a legitimate concern. I am convinced he is sincere in his beliefs, but I think the strong weight of opinion would prove that the effect of this amendment would be contrary to that which he has outlined.

Insofar as the protection of wives and mothers, as far as alimony and children and dower rights and all other rights are concerned, what we are suggesting is that, rather than wipe out all these rights, we are going to say to a woman and to a man that each will be treated equally under the law, both men and women; that both husband and wife will be treated equally; that if a father and husband has certain rights, a wife and mother should have the same rights; that if a husband or widower has certain rights, then the wife or widow should have them. It seems to me that is what equality is all about.

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

Mr. BAYH. I yield.

Mr. COOK. May I say I would like to be associated with the remarks of the Senator from Indiana. It bothers me that a woman can marry and have rights and responsibilities taken away from her, and then, if her husband dies and she becomes a widow, she immediately is emancipated, and then if she remarries, she goes back into the state she was in before.

It seems to me rather odd that, somehow or other, we should make a chattel out of a particular individual under a constitutional form of government.

It also bothers me, relative to the statement that the Creator made this great distinction between men and women, that, somehow or other, it seems to me what in effect has been said is that when the Creator made that distinction, God said to man, "You make all the laws and make them restrictive on woman."

All I can say is that is it not fortunate that woman did not take the ball first and legislate against us, because, if that were the case, we would be here now challenging all these things. We would be here trying to say that, under a constitutional form of government, we should be equal. But instead, today, we live within the framework of the great document and under, frankly, the freest system of society in the world, save as it applies to one particular segment of our society, 53 percent of our society, the female individual in this Nation.

I yield back the remainder of my time.

Mr. President, have the yeas and nays been requested?

The PRESIDING OFFICER. No; they have not.

Mr. COOK. Mr. President, we yield back our time.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BAYH. 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. ERVIN. Mr. President, I ask for the yeas and nays.

The yeas and nays were not ordered.

The PRESIDING OFFICER. Who yields time?

Mr. BAYH. Mr. President, I yield myself whatever time I may need, pending the arrival of one of our brethren.

Mr. ERVIN. Mr. President, I ask for the yeas and nays.

The yeas and nays were ordered.

The PRESIDING OFFICER (Mr. TUNNEY). The question is on agreeing to the amendment (No. 1068) of the Senator from North Carolina (Mr. ERVIN). On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. BYRD of West Virginia. I announce that the Senator from Florida (Mr. CHILES), the Senator from Indiana (Mr. HARTKE), the Senator from Minnesota (Mr. HUMPHREY), the Senator from Washington (Mr. JACKSON), the Senator from Arkansas (Mr. MCCLELLAN), the Senator from South Dakota (Mr. MCGOVERN), and the Senator from New Hampshire (Mr. MCINTYRE) are necessarily absent.

I further announce that, if present and voting, the Senator from Florida (Mr. CHILES), the Senator from Minnesota (Mr. HUMPHREY), the Senator from Washington (Mr. JACKSON), the Senator from South Dakota (Mr. MCGOVERN), and the Senator from New Hampshire (Mr. MCINTYRE) would each vote "nay."

Mr. GRIFFIN. I announce that the Senator from Oregon (Mr. PACKWOOD) is necessarily absent.

The Senator from South Dakota (Mr. MUNDT) is absent because of illness.

If present and voting, the Senator from Oregon (Mr. PACKWOOD) would vote "nay."

The result was announced—yeas 14, nays 77, as follows:

[No. 116 Leg.]

YEAS—14

Buckley	Eastland	Hollings
Byrd, Va.	Ervin	Long
Cannon	Fannin	Miller
Cooper	Goldwater	Stennis
Cotton	Hansen	

NAYS—77

Aiken	Fulbright	Pearson
Allen	Gambrell	Pell
Allott	Gravel	Percy
Anderson	Griffin	Proxmire
Baker	Gurney	Randolph
Bayh	Harris	Ribicoff
Beall	Hart	Roth
Bellmon	Hatfield	Saxbe
Bennett	Hruska	Schweiker
Bentsen	Hughes	Scott
Bible	Inouye	Smith
Boggs	Javits	Sparkman
Brock	Jordan, N.C.	Spong
Brooke	Jordan, Idaho	Stafford
Burdick	Kennedy	Stevens
Byrd, W. Va.	Magnuson	Stevenson
Case	Mansfield	Symington
Church	Mathias	Taft
Cook	McGee	Talmadge
Cranston	Metcalf	Thurmond
Curtis	Mondale	Tower
Dole	Montoya	Tunney
Dominick	Moss	Weicker
Eagleton	Muskie	Williams
Ellender	Nelson	Young
Fong	Pastore	

NOT VOTING—9

Chiles	Jackson	McIntyre
Hartke	McClellan	Mundt
Humphrey	McGovern	Packwood

So Mr. ERVIN's amendment (No. 1068) was rejected.

MESSAGES FROM THE PRESIDENT—APPROVAL OF BILLS AND JOINT RESOLUTION

Messages in writing from the President of the United States were communicated to the Senate by Mr. Leonard, one of his secretaries, and he announced that the President had approved and signed the following acts and joint resolution:

On March 17, 1972:

S. 602. An act to provide for the disposition of judgments, when appropriated, recovered by the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, in paragraphs 7 and 10, docket No. 50233, U.S. Court of Claims, and for other purposes;

S. 996. An act relating to the transportation of mail by the U.S. Postal Service;

S. 3244. An act to amend the Military Construction Authorization Act, 1970, to authorize additional funds for the conduct of an international aeronautical exposition; and

Senate Joint Resolution 190. Joint Resolution to provide for an extension of the term of the Commission on the Bankruptcy Laws of the United States, and for other purposes.

On March 18, 1972:

S. 671. An act to provide for division and for the disposition of the funds appropriated to pay a judgment in favor of the Blackfeet Tribe of the Blackfeet Indian Reservation, Montana, and the Gros Ventre Tribe of the Fort Belknap Reservation Montana, in Indian Claims Commission docket No. 279–A, and for other purposes.

On March 21, 1972:

S. 860. An act relating to the trust territory of the Pacific Islands; and

S. 2097. An act to establish a Special Action Office for Drug Abuse Prevention and to concentrate the resources of the Nation against the problem of drug abuse.

EXECUTIVE MESSAGES REFERRED

As in executive session, the Presiding Officer (Mr. GAMBRELL) laid before the Senate messages from the President of the United States submitting sundry nominations, which were referred to the appropriate committees.

(The nominations received today are printed at the end of Senate proceedings.)

APPOINTMENT BY THE VICE PRESIDENT

The PRESIDING OFFICER (Mr. GAMBRELL). The Chair, on behalf of the Vice President, pursuant to Public Law 84–1028, announces the appointment of the Senator from Oregon (Mr. HATFIELD) to the Board of Visitors to the U.S. Military Academy in lieu of the Senator from North Dakota (Mr. YOUNG).

EQUAL RIGHTS FOR MEN AND WOMEN

The Senate continued with the consideration of the joint resolution (H.J. Res. 208) proposing an amendment to the Constitution of the United States relative to equal rights for men and women.

AMENDMENT NO. 1069

Mr. ERVIN. Mr. President, I call up my amendment No. 1069 and ask that it be stated.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read the amendment as follows:

At the end of section 1 add the following sentence: "This article shall not impair the validity, however, of any laws of the United States or any State which impose upon fathers responsibility for the support of their children.".

Mr. ERVIN. Mr. President, I ask for the yeas and nays.

The yeas and nays were ordered.

Mr. ERVIN. Mr. President, I now yield to the Senator from New Hampshire (Mr. COTTON) such time as he may need.

Mr. COTTON. I shall only speak for 3 minutes.

Mr. BYRD of West Virginia. Would the distinguished Senator from North Carolina indicate, as there are several Senators in the Chamber at this moment, whether we might expect a vote on this amendment within the next 30 minutes?

Mr. ERVIN. The Senator from New Hampshire would be the better Senator to inform the Senator from West Virginia on that, as he has the time to speak. I shall only require two or three sentences for my statement.

Mr. COTTON. I see no reason why we could not vote within 10 minutes. I shall not take much time.

Mr. BYRD of West Virginia. Would the Senator then agree to a time limitation?

Mr. ERVIN. I shall have only two or three sentences to say. It would be up to the Senator from New Hampshire.

Mr. COTTON. Mr. President, this is the only amendment that the Senator from New Hampshire is really interested in. It is one which I have always supported in the past whenever the question of a constitutional amendment on the rights of women has been considered.

For years, the Senator from New Hampshire has frankly informed constituents who write to him from time to time that he is perfectly willing that there shall be written into the Constitution of the United States an amendment guaranteeing equal rights for women. But, Mr. President, he has also said that he will never vote—and that goes for today—for a constitutional amendment that would release fathers from the obligation to contribute to the support of their minor children. That is why I urge the adoption of this brief and simple amendment. If it is adopted, I can vote for the constitutional amendment. If it is not adopted, I shall be compelled to vote against it. If the laws of our States requiring men to contribute to the support of the children they beget, whether legitimate or illegitimate, are to be nullified by the proposed amendment, it should be known not as the women's lib amendment but as the men's lib amendment for an amendment which does not clearly permit States by their laws to make men fulfill their responsibilities relieves men and takes away the rights of women.

But, even worse, it takes away the rights of small, infant children. No one in his senses could look forward to a generation in which small children would be placed in foster homes or in institutions because we have written into the Constitution an amendment that makes it impossible for the mother to receive contributions from the father of her children in order that she can be with them and they may have the benefit of a mother's love and care.

Mr. President, this amendment is so simple and yet so necessary and merely provides that—

This article shall not impair the validity, however, of any laws of the United States or any State which impose upon fathers responsibility for the support of their children.

Mr. President, the Senator from New Hampshire feels strongly on this because he served for 9 years as a county prosecuting attorney. It is largely a rural county. The women in that county were not the kind of women who cry out for this amendment and whom it is supposed to benefit. They were mostly like my own mother—country housewives and mothers who knew from time to time the pinch of poverty. They were not the socially elite, the highly educated, or the politically active.

Mr. President, in the 9 years I served as county attorney, it seemed to me that I spent 25 percent of my time trying to make the men who had deserted their wives with four or five small children, contribute to the support of those children.

That is why, Mr. President, I cannot vote for this proposed constitutional amendment unless it is safeguarded by the amendment now offered to it. Mr. President, I am now glad to yield to my good friend from Wyoming.

Mr. HANSEN. Mr. President, I thank my distinguished colleague from New Hampshire for yielding to me at this time.

Mr. President, what the Senator from New Hampshire is saying is most important. The Finance Committee, of which I am a member, has been holding hearings on H.R. 1. We have heard testimony from individuals, including county prosecuting attorneys testifying to the effect that if they were able to go across State lines, if they had the support of State departments of public welfare, and the support of the Department of Health, Education, and Welfare, in the opinion of one county attorney from the State of Arkansas who estimated that he could reduce the burden of welfare brought about by aid to families with dependent children by as much as 20 percent.

I shall certainly support the pending amendment. It seems ridiculous to me that we should pass a constitutional amendment which wipes out and obliterates all distinctions between the sexes. And I say that as one Senator who has cosponsored the amendment and as one who has told the people of the State of Wyoming that I would support the amendment. However, that was before I listened to some of the more learned Members of the Senate who had delved more deeply than I had at that time into the ramifications of the amendment.

This is an amendment which should be adopted if we are concerned about the rights of those on welfare, if we are concerned about the breaking up of families, and if we are concerned about the fathers who do not seek to fulfill their responsibility but pull out and leave their wives and their families unattended.

I appreciate very much the very important observations made by my good friend, the Senator from New Hampshire. I shall support the amendment.

Mr. COTTON. Mr. President, I thank the Senator from Wyoming. I yield to the Senator from Kentucky.

The PRESIDING OFFICER. The Senator from Kentucky is recognized.

Mr. COOPER. Mr. President, I, too, urge the Senate to support the pending amendment. I speak as one who served as county judge and as circuit judge for 9 years.

The problem arises from two situations. The problem arises from legitimate children born in wedlock where, many times, there is a divorce or separation and a judgment for alimony and child support.

I have seen again and again where the father would fail to meet the orders of the court and would be hailed into court, cited for contempt, and placed in jail for a time. Then he would finally be released upon his agreement to resume the payment to his infant children. After that time, he would again fail to keep those promises.

Many times a father moves into another State where our State law could not reach the father because usually the Governors of other States would not permit extradition in such cases.

The situation also arises in the case of illegitimate children, in which the man is charged with being the father of the child and is brought into court. The case is tried, and the jury determines that the man is the father of the child. The court orders that he make payments for the

maintenance of that child. As I recall, that would be until the age of 18 years.

It is against the impulse of a man to do this unless he is an honorable man. In most of these cases the burden would fall upon the mother and eventually upon the State, as many of the mothers in most cases would not be able to maintain the child.

It is a serious question. I believe that there are thousands—perhaps hundreds of thousands—of children in our country today who are in this situation. I noticed in the newspaper the other day that in the District of Columbia it is believed that this year 50 percent of all children born in the District of Columbia would be illegitimate. As I have just noted, most of the times there is not the slightest responsibility on the part of the father to provide for the child.

Mr. PASTORE. Mr. President, will the Senator from New Hampshire yield for a question?

Mr. COTTON. I yield to the Senator from Rhode Island.

Mr. PASTORE. Mr. President, will the Senator point out—because I am very interested in the dialog that has transpired on the floor—wherein the equal rights amendment without this particular amendment would absolve the fathers of children from the responsibility to support those children. Where does the Senator get that? It is common law that, if one is decreed to be the father in the case of an illegitimate child, he contribute to the support of that child. There is nothing in the equal rights amendment that denies the right to impose responsibility upon that parent.

I did not think that the equal rights amendment has anything at all to do with the matter at hand.

Mr. COTTON. Mr. President, I believe there is grave danger that, if the amendment in its present form becomes a part of the Constitution, courts would be compelled to impose exactly the same obligations for support of minor children upon the mother and the father. If the father leaves the jurisdiction, as is often the case, the whole obligation would fall upon the mother, for she is accessible many times when the father is not.

This would serve to obliterate the family concept that has always been the cornerstone of our society—that the father is principally the breadwinner and the mother provides the loving care so necessary to infants and young children. Mr. President, I am not so much worried about the strain put upon public welfare referred to by the distinguished Senator from Wyoming, but I am concerned that mothers should be able to be at home and that children attain a certain age because there is a period to my mind from which the children will never recover and their entire lives may be affected by the lack of constant care and supervision of a mother who loves the child.

Mr. PASTORE. Is the Senator actually saying, should the equal rights amendment pass without this particular amend ment, that where a mother goes before a court for an order for child support, the court would be obligated to say, "You go out and get a job and support the child because the Constitution says that it is your responsibility as much as your husband's responsibility?" Is that what the Senator is saying?

Mr. COTTON. That is almost what I am saying, but not quite. I am saying that the court would be obligated to make an order that the mother share in that support, because they would have to be treated exactly alike. There is also grave danger that it will be held that they would have to be treated exactly alike in any order that would issue. The mother would have to pay half and the father would have to pay half of the support.

Mr. PASTORE. Mr. President, I am interested in hearing the position of the opposition to the amendment.

Mr. COTTON. Before I surrender the floor, I wish to utter some final words. It is because of my own vivid experience during 9 years and the evidence I had of the disposition of men to beget children and then walk out on their responsibilities that I see danger in a constitutional amendment that does not make it clear that this is a reservation. Perhaps the amendment is safe without the adoption of this provision. There are distinguished lawyers in this body who appear to think so, but there are also many legal authorities of the highest repute that have indicated their fear that a bald, all-encompassing constitutional amendment would strike down the power of the States to place the responsibility of financial support of young children upon the father.

I hope that the Senator from Rhode Island is correct in his interpretation, but if he should be wrong and the present proposed language is not added, the results would be tragic.

I cannot bear to visualize my country in a situation where children bereft of a father's support and a mother's care grow up in day care centers or institutions. I fear that more than anything in the world, and I cannot bring myself to vote for a constitutional amendment that for lack of safeguarding language might bring this to pass.

Mr. President, I yield the floor.

Mr. PASTORE. Mr. President, I do not want my position to be misunderstood. I was Governor of my State before I came to the Senate 22 years ago. No one worked harder to clear up the social welfare rolls than I did. I had the director of public welfare in my office every other day to make sure that every father was made responsible for supporting his children. I did not care where the father was. I said, "Go and get him, even if it costs twice as much as it would to support the child, because we have to set an example."

I am afraid that the Senator is reading something into this amendment that is not the case. That is what disturbs me.

Mr. ERVIN and Mr. BAYH addressed the Chair.

The PRESIDING OFFICER. The Senator from North Carolina has the floor.

Mr. ERVIN. Mr. President, I am sorry that the distinguished Senator from Rhode Island was not in the Chamber this morning when I read into the record the article from the Yale Law Journal for April 1971. This article was written by a constitutional scholar, Prof. Thomas Emerson, of the Yale Law School, and by three highly educated young lady lawyers.

It states specifically that under the laws in all the States the husbands are primarily liable for the support of their wives and children. It stated expressly that where the State law imposed on the husband primary responsibility for support of the child that that law would be unconstitutional under the equal rights amendment because it makes a legal distinction between the legal responsibility of the husband and the wife. That is an inescapable conclusion.

Why in the world they want to rob little children of the right that they be primarily supported by their fathers is something the Senator from North Carolina is incapable of conceiving.

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

Mr. ERVIN. I yield.

Mr. PASTORE. I am looking now at the report filed by the committee, page 17. I guess this amendment came up in committee. I assume so.

Mr. ERVIN. I do not recall.

Mr. PASTORE. At any rate the report of the committee states that the report of the Association of the Bar of the City of New York accurately describes the amendment's effect in this area.

> The Amendment would bar a state from imposing a greater liability on one spouse than on the other merely because of sex. It is clear that the Amendment would not require both a husband and wife to contribute identical amounts of money to a marriage. The support obligation of each spouse would be defined in functional terms based, for example, on each spouse's earning power, current resources and nonmonetary contributions to the family welfare.
>
> Thus, if spouses have equal resources and earning capacities, each would be equally liable for the support of the other—or in practical effect, neither would be required to support the other. On the other hand where one spouse is the primary wage earner and the other runs the home, the wage earner would have a duty to support the spouse who stays at home in compensation for the performance of her or his duties.

The Senator from North Carolina says that this gentleman from Yale disputes this?

Mr. ERVIN. Yes. He said that the child support sections of criminal nonsupport laws could not be sustained where only the male is liable for support.

That is exactly what the laws of all 50 States of this Union do and if the equal rights amendment is passed without this amendment it will invalidate the laws of 47 States which place primary obligation on the father.

Mr. PASTORE. It was the impression of the Senator from Rhode Island that the primary responsibility of a father to support his family is common law. It is common law and it is codified. I understand that, and I agree with the Senator from North Carolina.

Mr. ERVIN. The Senator is mistaken. There is no obligation at common law for the father to support the child. All of the obligation for the father to support the child is statutory.

Mr. BAYH. The Senator from Indiana

wishes to interject one brief observation that may or may not be accurate. There is a subject under discussion here in which there is legitimate difference of opinion. The Senator from North Carolina and the Senator from New Hampshire have one position. I certainly feel they have a right to have that position but so far the contrary position has not been expressed at all. With respect to my friend from Rhode Island I do not think he will get my position expressed by asking questions of the Senator from North Carolina because my friend from North Carolina feels very strongly on the other side.

Mr. ERVIN. Not only the Senator from North Carolina says this, but some of our outstanding legal scholars say the same thing: Prof. Roscoe Pound, Prof. Paul Freund of Harvard Law School and not only them but most knowledgeable supporters of the equal rights amendment, Professor Emerson, of Yale Law School and these three young ladies agree with me.

Mr. PASTORE. Mr. President, in connection with what was just said by the manager of the bill, I want him to understand that while he is going to present his case, and I am going to stay to listen, I have every perfect right to ask the questions I have been asking. I am the one who is going to be voting on the question. I do not care who manages the bill or who sponsors an amendment, I am going to vote on the question. I am going to hear both sides, and the idea that we are not going to get to your side until the Senator from North Carolina sits down, he is going to sit down after the Senator from Rhode Island asks him the questions.

Mr. BAYH. I hope the Senator from Rhode Island will reread the RECORD. There was no inference that he was doing anything short of his rights, by fact or by inference. I would be the last one to deny the Senator the right to ask anybody he wants to ask questions.

Mr. PASTORE. I suggest to the Senator from Indiana that he read the RECORD as well. He said we are not going to get to the other side of the coin until the Senator from North Carolina sits down, and he cannot sit down until you stop asking questions.

If you want to tone it down I will accept your apology.

Mr. BAYH. I did not say that, but if the Senator from Rhode Island wants an apology, he has it.

Mr. PASTORE. Thank you very much.

Mr. ERVIN. Mr. President, the AFL–CIO Executive Council adopted a report on this subject.

That report expressly states:

> The proposed equal rights amendment would render all protective labor laws for women workers unconstitutional, as well as any other laws treating the sexes differently. Such laws, for example, include marriage laws which place primary responsibility for family support on husbands and fathers.

Mr. COOK. Mr. President, will the Senator yield me 5 minutes?

Mr. BAYH. May the Senator from Indiana have a chance to express himself, inasmuch as we had a little dialog that I think led to a little misunderstanding of what the Senator from Indiana was trying to say and what the Senator from Indiana did in fact say?

I agree that every Member of this body should be concerned about and study what impact, if any, this amendment will have on the responsibility imposed on parents and the kind of tender, loving care that is provided for their children.

Although I know there is a real difference of opinion on this matter, I think the strongest case can be made to support my position that the well-intentioned and sincere concerns expressed by the Senator from New Hampshire and the Senator from North Carolina are not well founded. The Senator from Indiana suggests that some of those who have been pushing hardest for this amendment agree with his interpretation.

I do not know how you can judge depth of conviction. But there are not too many people around who have been pushing harder for this particular amendment than the Senator from Indiana. I do not think that, because a few people who might be categorized as supporting the equal rights amendment might share the belief think this would lead to totally absolving husbands of any responsibility, that necessarily is the fact.

Let me suggest that I think we are talking about two things, and I think it is important to recognize that. First, we are talking about illegitimacy. I think this was very accurately stated by the Senator from Rhode Island. He nailed it to the wall. We are talking about illegitimate children and we are talking about putative fathers. We cannot do anything about that by passing or rejecting the equal rights amendment.

The fact is that there are a large number of illegitimate children, which should be recognized. I wish we could say we could pass a joint resolution or a constitutional amendment or a law that would say we are not going to have any more illegitimate children. But we are. We are going to have more, with or without this amendment.

Mr. PASTORE. Mr. President, will the Senator yield at that point?

Mr. BAYH. I yield.

Mr. PASTORE. I realize that this has nothing to do with putative fathers and illegitimate children. I realize that. We are talking about the support of these children.

Let us assume that a woman does have a child by a man, and each of them earns $50 a week. What is the purport of that without this particular amendment? Do they each have to contribute an equal amount to the support of that child?

Mr. BAYH. The court would take into consideration the capacity of each to support the child and would so decide.

Mr. PASTORE. And each one would make a contribution to the support of the child?

Mr. BAYH. Depending on their ability to contribute that support.

Mr. PASTORE. Whereas if there is a State law that says the responsibility is primarily that of the father, then, of course, we are changing the statute through this amendment.

Mr. BAYH. Primarily of the father, yes, if not solely of the father.

Mr. PASTORE. Let us assume there was a law which provided it is the obligation of the father to support the children. Let us assume there is such a State law. This particular equal rights amendment, without the Ervin amendment, would change that law?

Mr. BAYH. Exactly.

Mr. PASTORE. That is all I want to know.

Mr. BAYH. It would let each case be decided on its own merits, and not on the irrelevant basis of sex.

Let me quote from what the bar of the city of New York has said about the obligation to support children. It said:

> The support obligation of each spouse would be defined in functional terms, depending on each spouse's earning capacity, current resources, nonmonetary contributions to the family welfare.

Interestingly enough, there was a case stated in yesterday's Washington Post, which I have been trying to run down, relative to alimony and child support, in which the court refused to strike down an agreement that was entered into earlier which gave to the woman the primary support of the children. The particular circumstances involved were that the woman was a doctor, earning $42,000 a year, and the man was a college professor, earning $18,000 a year, and the judge indicated that the woman, who made twice as much as the man, ought to contribute twice as much to the well-being of the children.

I want to suggest to those who think this is going to change the whole equation that I do not think it is. Most fathers in this country are still going to have the primary responsibility of supporting the raising of their children, not because they are men, not because they are fathers, but because most fathers are the primary wage earners. They are the ones who, if there is a dissolution of the family unit, are still going to have the earning power on the marketplace. The mothers are not.

It is the intention that this amendment would continue to impose the obligation on that spouse, mother or father, man or woman, who has the greatest capacity to provide for the children—nothing more, nothing less.

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

Mr. BAYH. I yield to the Senator from Kentucky.

The PRESIDING OFFICER. The Senator from Kentucky is recognized.

Mr. COOK. Mr. President, I want to associate myself with the remarks of the Senator from Indiana, and then I would like the Senator from Rhode Island to listen to how well off a woman is now, married and with children, and not separated, not divorced.

I might say to the Members of the Senate that when we started this debate, on the first day of it, I put a long statement into the RECORD. One of the sections of that statement was entitled "The Equal Rights Amendment and Alimony and Child Support Laws."

I would like Senators to know what great shape a woman is in now who is married and has children, and read to them the best and one of the few cases in the United States that we have had on the subject of a wife who tries to get

adequate support from her husband, when there is no separation and there is no support. I read from the case of McGuire against McGuire, a case in Nebraska:

This was a Nebraska case involving the wife of a well-to-do farmer. During her marriage of 34 years, the plantiff testified she had been a "dutiful and obedient wife" who had "worked in the fields, did outside chores, cooked and attended to her household duties . . . raised as high as 300 chickens, sold poultry and eggs, and used the money to buy clothing, things she wanted, and for groceries." Her husband did not tolerate any charge accounts. He would give her only small amounts of money and for the last three of four years had not given her any money nor provided her with clothing except a coat a few years previous. The house had no bathroom, bathing facilities or inside toilet and kitchen sink. Water was secured from a well. The furnace had not been in good working order for 5 or 6 years. The furniture was old, and the defendant was driving a 1929 Ford equipped with a heater which did not operate.

Let me emphasize, there was no divorce, no separation; this is just the case of a wife seeking adequate support and maintenance:

The District Court had required the husband to pay for certain items in the nature of improvements and repairs to the house and for furniture and appliances for the household in the amount of several thousand dollars. They had ordered the defendant to purchase a new automobile with an effective heater, required that his wife be entitled to pledge the credit of the defendant for "necessaries of life," and awarded a personal allowance in the amount of $50 a month.

The Supreme Court of Nebraska overturned the ruling, stating:

". . . to maintain an action such as the one at bar, the parties must be separated or living apart from each other.

"The living standards of a family are a matter of concern to the household, and not for the courts to determine, even though the husband's attitude toward his wife, according to his wealth and circumstances, leaves little to be said in his behalf. As long as the home is maintained and the parties are living as husband and wife it may be said that the husband is legally supporting his wife and the purpose of the marriage relation is being carried out. Public policy requires such a holding, it appears that the plaintiff is not devoid of money in her own right. She has a fair-sized bank account and is entitled to use the rent from the 80 acres of land left by her first husband, if she chooses . . ."

That is the shape she is in now, I say to the Senator from Rhode Island. That is the shape she is in without a divorce and without a separation. If she has a husband who does not want to spend a dime on her, that is tough, says the court in effect. If he does not want to spend a dime on the children, that is tough. If he does not want to fix the furnace, that is tough. If he does not want to give her a bathroom, that is tough.

I can only say to the Senator—and unfortunately the Senator from New Hampshire is not here at the moment—if he weeps for children when their fathers leave, and he will only vote for this if the father has left and he is compelled to pay by reason of a separation or a divorce, what is he going to do for the wife who has a husband who will not spend a nickel on her or the children?

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

Mr. COOK. I yield.

Mr. PASTORE. Will the Senator from Kentucky please tell me how the equal rights amendment will cure that Nebraska case?

Mr. COOK. Yes, it could.

Mr. PASTORE. Tell me how.

Mr. COOK. I think it would give an entirely different interpretation to the marriage situation. It would give an entirely different interpretation relative to the constitutional right of a male and the constitutional right of a female.

Mr. PASTORE. What has that got to do with giving her support? Suppose the husband says, "I just won't pay"? Then where are you? You cannot eat the Constitution.

Mr. COOK. I think at least we could carry it out within that confined situation where people are not going to get a divorce.

Mr. PASTORE. I want the Senator to understand that I am going to vote for the equal rights amendment, whether it contains any amendment or not, but I am a little concerned about some of the things said by the Senator from New Hampshire. I am concerned that this is not going to be an escape hatch for people who have the responsibility to support their children.

Mr. COOK. I do not think it is at all. Let me state what I think is the easiest answer: I think there will not be a distinction simply by reason of sex, but I think that has nothing to do with the distinction every State legislature can make by law, by reason of financial responsibility to support. We now impose one degree of recognition and distinction upon the father, and say we do it because he is the breadwinner. I do not think we make any distinction as to his ability to pay. His assumed ability to support today is because he is the wage earner, and that is why, in the past, they have used the word "father," because he was the wage earner. Is the Senator telling me we will have fewer on welfare than there are now? Is he saying that because the father is gone and we cannot find him, this amendment is going to change that? Not at all. But we have shifted the emphasis to where it ought to be, to the ability to support rather than to an image.

That is all I say to the Senator. I think it is very clear, and I do not think there can be any great argument about it. Is this constitutional amendment, if passed, going to say to a man who has the ability to work and the financial ability to support, that he may hide behind this constitutional amendment, if a State statute says that the individual of the family who has the financial ability shall do the supporting, that he is not required to and does not have that obligation? I do not think anyone in this room or any legal expert can say that when we take away the word "father" and take on the new term "financial responsibility to pay" that we have not bridged the gap.

The PRESIDING OFFICER. Will the Senator yield to receive a message from the House of Representatives?

Mr. COOK. I yield the floor.

Mr. BAYH. Mr. President, again I think this is a legitimate concern, but I just reemphasize what I said a moment ago. I read for the RECORD and the consideration of those present section 230.5 of the Model Penal Code, which I think suggests the way this particular subject would be handled.

Mr. ERVIN. Which is not the law anywhere in the United States.

Mr. BAYH. But it is a well-taken and well-respected document, I think, and it can be taken as a point of reference for what could be and probably would be the law of the land if this amendment were passed.

The section entitled "Persistent Nonsupport" reads as follows:

A person commits a misdemeanor if he or she persistently fails to provide support which he or she can provide and which he or she knows he is legally obliged to provide to a spouse, child, or other dependent.

There is no reason why either spouse should not be responsible for the support of the child, depending on which one has the income and earning capacity. I come back again to the best case I could find, no longer ago than yesterday morning, where a woman making $42,000 was required to provide greater support for a child than her husband making $18,000.

In most of the cases in the courts today, in accordance with tradition, it will be the other way around, and what will happen is, it will be found that the man is making $42,000, and the woman is not making anything in the way of income, but is doing all the work at home and making it possible for the father to go out and pursue his profession.

That is the way it is in most cases today, and no doubt will be tomorrow, and it results in the father being the sole support of the child because he, throughout the marriage relationship, is the one who has developed the capacity to earn and provide the children with maintenance.

Mr. PASTORE. That is the situation now, without the equal rights amendment. But my experience in the courts has been that when the court, in any separation or divorce case, states the amount of alimony to be paid or the amount to be given to the children, he usually takes into account what the financial status of the woman is as well. We do not need an equal rights amendment to the Constitution to do that. That has historically been the case: If the woman makes twice as much as the man, and the man is required to contribute to the support of the children, usually, in assessing the amount, the judge should be able not only to take into account the ability to pay, but also the financial status of the woman. That has always been the case.

I am just wondering if we change that. If we do not change it, we have no trouble. But the argument has been made here that we would, and that is the reason we have conducted this little debate, so we will not have any misunderstand-

ing that this is going to be an escape hatch for wayward fathers.

Mr. BAYH. Quite the contrary. The Senator from North Carolina seeks to change this by suggesting that this is not the case, and that the whole responsibility ought to rest on the fathers. The Senator from Indiana respectfully dissents from that opinion.

Mr. ERVIN. Well, the Senator from North Carolina regrets that he was unable to make a statement which would enlighten the Senator from Indiana as to his position.

The Senator from North Carolina stated that under the laws of 47 of the 50 States of this Union, the father is primarily responsible for the support of his children, and that there are only three States in the Union which have laws which place an equal obligation to support on the father and the mother.

If the equal rights amendment is passed, the laws of 47 States will immediately be stricken down, and there will be no laws until some subsequent laws are enacted.

Now, under the present system, if a prosecuting attorney bringing a criminal action or a next friend bringing a civil action proceeds against the father for the support of a child, all he has to do is show two things: first, that the defendant is the child's father, and, second, that the defendant has failed to support his child. That is all there is to it. Those are matters which can be litigated very quickly. This is an extremely important advantage over what would happen if the equal rights amendment is passed.

If the equal rights amendment is passed, the father, who is called on by the court, by the prosecuting attorney, or by a next friend to support his child, can say:

I have a defense to this accusation. My wife is a better worker than I am. My wife has more property than I have, and my wife is the one who has to be called upon to support.

I say that this amendment ought to be voted for by every Senator who believes that the Scripture speaks correctly when it says that it is better that a man should have a great millstone tied about his neck and should be drowned in the depths of the sea than to have him wrong a little child.

I am ready to vote.

Mr. BAYH. I yield back the remainder of my time.

The PRESIDING OFFICER. All time on the amendment has been yielded back.

The question is on agreeing to the amendment of the Senator from North Carolina. On this question the yeas and nays have been ordered, and the clerk will call the roll.

The second assistant legislative clerk called the roll.

Mr. BYRD of West Virginia. I announce that the Senator from Florida (Mr. CHILES), the Senator from Indiana (Mr. HARTKE), the Senator from Minnesota (Mr. HUMPHREY), the Senator from Washington (Mr. JACKSON), the Senator from Massachusetts (Mr. KENNEDY), the Senator from Arkansas (Mr. MCCLELLAN), the Senator from South Dakota (Mr. MCGOVERN), and the Senator from New Hampshire (Mr. MCINTYRE) are necessarily absent.

I further announce that, if present and voting the Senator from South Dakota (Mr. MCGOVERN), the Senator from Massachusetts (Mr. KENNEDY), the Senator from Washington (Mr. JACKSON), the Senator from Minnesota (Mr. HUMPHREY), the Senator from Florida (Mr. CHILES), and the Senator from New Hampshire (Mr. MCINTYRE) would each vote "nay."

Mr. GRIFFIN. I announce that the Senator from Oregon (Mr. PACKWOOD) is necessarily absent.

The Senator from South Dakota (Mr. MUNDT) is absent because of illness.

The Senator from Colorado (Mr. DOMINICK) is detained on official business.

If present and voting, the Senator from Oregon (Mr. PACKWOOD) would vote "nay."

The result was announced—yeas 17, nays 72, as follows:

[No. 117 Leg.]

YEAS—17

Bennett	Cotton	Hollings
Buckley	Eastland	Jordan, Idaho
Byrd, Va.	Ervin	Long
Byrd, W. Va.	Fannin	Pastore
Cannon	Goldwater	Stennis
Cooper	Hansen	

NAYS—72

Aiken	Gambrell	Pell
Allen	Gravel	Percy
Allott	Griffin	Proxmire
Anderson	Gurney	Randolph
Baker	Harris	Ribicoff
Bayh	Hart	Roth
Beall	Hatfield	Saxbe
Bellmon	Hruska	Schweiker
Bentsen	Hughes	Scott
Bible	Inouye	Smith
Boggs	Javits	Sparkman
Brock	Jordan, N.C.	Spong
Brooke	Magnuson	Stafford
Burdick	Mansfield	Stevens
Case	Mathias	Stevenson
Church	McGee	Symington
Cook	Metcalf	Taft
Cranston	Miller	Talmadge
Curtis	Mondale	Thurmond
Dole	Montoya	Tower
Eagleton	Moss	Tunney
Ellender	Muskie	Weicker
Fong	Nelson	Williams
Fulbright	Pearson	Young

NOT VOTING—11

Chiles	Jackson	McIntyre
Dominick	Kennedy	Mundt
Hartke	McClellan	Packwood
Humphrey	McGovern	

So Mr. ERVIN's amendment (No. 1069) was rejected.

Mr. BAYH. Mr. President, yesterday the very distinguished Senator from Mississippi (Mr. STENNIS) and I debated the effect of the equal rights amendment. My friend was apparently quite concerned about the effect the amendment would have on police forces in our States and localities. I said then, and I repeat now, that the amendment will require that all governmental action be based not on the irrelevant characteristic of sex, but on relevant characteristics such as intellectual ability and physical strength.

Yesterday's Evening Star contains an article concerning Mrs. Prentiss Strickland, of the District of Columbia, who has become Washington's first full-time policewoman with full line responsibilities. Mrs. Strickland is assigned to the traffic division, is directing traffic near the White House, and is doing so quite successfully.

According to the article, the Washington police force is attempting to increase the number of women on its staff. These women will perform the same jobs and receive the same pay as policemen. Thus, Washington is already moving in the direction that the equal rights amendment will take the rest of the country.

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:

FOR THE FIRST TIME

(By Duncan Spencer)

She drew on the fresh white gloves this morning, adjusted the cap, buckled on her .38, told her husband to get breakfast for their two little children and walked out to direct traffic.

It was the first time for Mrs. Prentiss Strickland, and the first time for any full-time policewoman in Washington. "I don't know how I feel," she said, slightly flattered, slightly embarrassed that the TV crews were there every moment.

Mrs. Strickland, Officer Strickland, of the 3700 block of King Avenue SE., is 25, wears octagonal granny glasses, carries a pack of orange traffic tickets and, for the time being, flashes a wide beautiful smile.

She was at the northeast corner of the White House grounds early with her instructor, a white-haired veteran sergeant, Charles Blackburn. Even during the interviews, Blackburn told her to keep an eye on the traffic—as he put it. "I told her to maneuver so she always had the intersection under observation."

"I've wanted to go to the Traffic Division since I graduated," she explained. "I don't really know why, I just like the idea of being outside." A Park Police officer nearby was heard to say, "Women's lib is eating this up—but when you see 3,000 to 4,000 pounds of cars coming, what can you do?" She didn't hear him.

Officer Strickland's gentle, immaculate debut is part of a Metropolitan Police Department drive to get 110 policewomen in the same jobs as men do on the force. The women get the same pay as the men—$8,500 to start. In her seven months as a police officer, Mrs. Strickland has been a clerk and has done patrol duty with a male counterpart. She has written one ticket in her career—for parking.

Blackburn took her out to the middle of Pennsylvania Avenue as the flood of cement trucks, buses and cars grew. For a few moments they worked close together, almost like a pair of dancers, practicing their hand motions. Then she was alone—with her whistle shrilling, her white gloves flashing and the cars doing what they were told.

There was only one mishap—there almost had to be—the whistle broke and Blackburn gave her his.

Mr. BAYH. Mr. President, I ask unanimous consent to have printed in the RECORD a statement of the Communications Workers of America entitled "CWA and the Equal Rights Amendment."

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

CWA AND THE EQUAL RIGHTS AMENDMENT

The Communications Workers of America is an international union composed of half a million workers, 60 percent of whom are women. In negotiating better wages and benefits for our members, as well as handling their workplace grievances, we pay closest attention to any federal and state legislation which could affect our members' economic and social well-being. With such a

large female membership, we have, of course, examined carefully the proposed Equal Rights Amendment now before the Senate.

The Communications Workers of America has always believed in equality of protection under the laws for all. We have fought on the state and federal level for legislation which would guarantee the rights of workers to equality of opportunity on the job and have worked to improve and extend the coverage of benefits presently available under the law. Our effort has been exerted on behalf of all of our members, regardless of race or sex.

Our extensive efforts in this behalf have made it very apparent to us that certain powerful groups catering to corporate interests work hard at frustrating our attempts to extend meaningful protections and benefits presently available either to men or women as a class under state laws and contracts. Indeed, there exist employers who have actually perverted the uses of some of these existing laws to withhold employment or promotional opportunity to individual workers.

However, where the beneficial aspects of legislation limited to one group had been such that it earned the support of our own members in that favored group, we supported the retention of these laws, as well as efforts to extend them to all workers. We opposed efforts to scratch all these laws in one fell swoop. However, actions taken under Title VII of the 1964 Civil Rights Act have voided many of these laws. We applauded those courts which saw fit to extend to men benefits that were available only to women.

On October 12, 1971, the U.S. House of Representatives passed by a 354 to 23 vote an equal rights for women amendment to the Constitution. This amendment, H.J. Res. 208, states: "Equality rights under the law shall not be denied or abridged by the United States or by any state on account of sex." What is the relationship of this constitutional amendment to the laws with which we are concerned in this discussion? Many fear it will lead to the abolition rather than the extension of beneficial state laws which protect only women, rather than both sexes. The Senate Judiciary Committee refused to incorporate language in the amendment aimed at preserving these laws, so that Senate passage and state ratification of the constitutional amendment could place the fate of this state protective legislation in question.

We went to make clear, however, that even without the incorporation of language specifically addressed to the state protective labor laws, we see the Equal Rights Amendment as a means of asserting not an equal right to be abused, but equality of the right to protection. The Communications Workers of America has always supported the extension of existing protective legislation for women to men. We look upon the Equal Rights Amendment as constitutional guarantee, a national commitment that will aid us in achieving this goal. If the safety and family commitment of women have been recognized as valid concerns in the past, why not today extend the same concern and compassion to men?

Anyone who protests discriminatory treatment does so in hopes of obtaining at least the same privileges as have been enjoyed by the favored class. We reiterate our belief that equal rights and privileges do not mean equality of abuse. Where benefits of employment have been enjoyed by one class of people and not another the employer's duty to remedy the present effects of past discrimination has been made clear by the courts. We ask those state legislatures who will be active in the processes of ratification and reconsideration of state statutes which apply to only one sex to remember that the mere abolition of truly beneficial laws will meet with fierce opposition by working people.

In closing, we offer that the Equal Rights Amendment is one more step in a long American history of securing individual liberties. American citizens should have equal access to whatever opportunities their abilities and choice incline them. This right of access should be safeguarded by our Constitution no less when these citizens are women. We enjoin the various state legislatures, however, to observe the dictates of justice, equity and concern for the common good, as well as a growing legal precedent when considering laws that confer benefits for working women and men.

AMENDMENT NO. 1070

Mr. ERVIN. Mr. President, I call up my amendment No. 1070 and ask that it be stated.

The PRESIDING OFFICER (Mr. STEVENSON). The amendment will be stated.

The assistant legislative clerk read the amendment as follows:

At the end of section 1 add the following sentence: "This article shall not impair the validity, however, of any laws of the United States or any State which secure privacy to men or women, or boys or girls.".

Mr. ERVIN. Mr. President, I ask for the yeas and nays.

The yeas and nays were ordered.

Mr. BYRD of West Virginia. Mr. President, will the distinguished Senator from North Carolina yield for a question?

Mr. ERVIN. I am delighted to yield to the Senator from West Virginia for a question.

Mr. BYRD of West Virginia. Would the distinguished Senator from North Carolina be willing to agree to a unanimous consent agreement cutting the time in half on amendments? In other words, reducing the time from 2 hours to 1 hour, to be equally divided, as in the previous order?

Mr. ERVIN. That will be entirely satisfactory to me.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the time on any amendment to the pending measure be limited to one hour to be equally divided and controlled as heretofore agreed upon.

The PRESIDING OFFICER. Is there objection to the request of the Senator from West Virginia? The Chair hears none, and it is so ordered.

Mr. BYRD of West Virginia. I thank the distinguished Senator from North Carolina.

Mr. ERVIN. Mr. President, there are statutes on the Federal statute books and on the statute books of all the States which secure the right of privacy to men and women and to boys and girls.

The statute that illustrates statutes of this character is section No. 95–48 of the General Statutes of North Carolina which provides:

§ 95–48. *Separate toilets required.*—In the interest of public health and in compliance with G. S. 130–160 and 143–138, adequate, well-lighted and ventilated toilet facilities plainly lettered and marked, for each sex shall be provided and maintained in a sanitary condition by all persons and corporations employing both males and females. Such toilet facilities shall be separated by full and substantial walls. (1913, c. 83, s. 1; C. S., s. 6559; 1963, c. 1114, s. 1.)

In addition to that, there are statutes which require separate toilet facilities for boys and girls in public schools. There are statutes that require separate toilet facilities for men and women in public buildings and in buildings used for the interstate transportation of passengers. In addition to that there are statutes in every State and there are statutes upon the Federal statute books which require that men and women prisoners serving sentences under court order shall be confined in separate cells and, in many cases, in separate prisons.

Virtually, every State in this Union has laws establishing reformatories for boys and girls who transgress the laws of the States. Those laws require that the reformatories for boys and girls be separate.

Then there are many statutes which provide, as in the case of section 148–44 of the General Statutes of North Carolina, that the Department of Prisons shall provide quarters for female prisoners separate from those of male prisoners; and shall provide for separate facilities for youthful offenders, as required by sections 15–210 to 15–215.

The question raised by this amendment is what will be the effect of the Equal Rights amendments on laws which establish privacy of this nature and which require that the sexes be separated in restrooms and reformatories and prisons. I have read what might be called the bible of what some people designate as the women's lib, the Yale Law Journal article which appeared in the issue for April 1971.

Here is what it says, summing up its comments, reading from page 901 to 902:

It is impossible to spell out in advance the precise boundaries that the courts will eventually fix in accommodating the Equal Rights Amendment and the right of privacy. In general it can be said, however, that the privacy concept is applicable primarily in situations which involve disrobing, sleeping, or performing personal bodily functions in the presence of the other sex. The great concern over these matters expressed by opponents of the Equal Rights Amendment seems not only to have been magnified beyond all proportion but to have failed to take into account the impact of the young, but fully recognized, constitutional right of privacy.

It should be added that the scope of the right of privacy in this area of equal rights is dependent upon the current mores of the community. Existing attitudes toward relations between the sexes could change over time—are indeed now changing—and in that event the impact of the right of privacy would change too.

In other words, the opponents of the equal rights amendment say that they cannot spell out in advance the boundaries that the courts will eventually fix in accommodating the equal rights amendment to the right of privacy. They also say that the effect on the amendment of the right of privacy is not only uncertain at present, but that it may fluctuate or change one way or the other in the future.

That is not the opinion of persons who are experts in the field of constitutional law and the interpretation of statutes.

The distinguished Senator from Indiana wrote a letter to Fred Buzhardt, General Counsel of the Defense Department, in which some comment was made on this point. As the Senator from North

Carolina interprets the letter from the General Counsel of the Department of Defense, the General Counsel expressed the opinion that even though in the military it would be possible to arrange separate facilities for men and women while they were at some established posts, he pointed out that under this amendment the men and women would be sent into combat the perform exactly the same service, and after doing this, he pointed out the obvious:

Even if segregation in living quarters at facilities were allowed under the amendment, during combat duty in the field, there are often, in effect, no facilities at all. The privacy for both sexes might be impossible to provide or enforce.

Let us see what the effect of the equal rights amendment on the right of privacy of men and women and boys and girls who are not affiliated with the military is.

Professor Freund, of the Harvard Law School, testified about this matter before the Senate Judiciary Committee in 1970. After stating that the amendment would be absolute, Professor Freund stated that it would follow that the equal rights amendment "would require that there be no segregation of the sexes in prisons, reform schools, public restrooms, and other public facilities."

Prof. Philip Kurland, editor of the Supreme Court Review and professor of law at the University of Chicago Law School, is one of this Nation's greatest constitutional scholars. He testified in response to questions put to him by me at the hearings on the equal rights amendment before the Senate Committee on the Judiciary as follows:

Senator ERVIN. . . . the law which exists in North Carolina and in virtually every other state of the Union which requires separate restrooms for boys and girls in public schools would be nullified, would it not?

Professor KURLAND. That is right, unless the separate but equal doctrine is revived.

Senator ERVIN. And the laws of the states and the regulations of the Federal government which require separate restrooms for men and women in public buildings would also be nullified, would it not?

Professor KURLAND. My answer would be the same.

Many women are compelled by necessity rather than by choice to work in industrial plants. Under the laws of virtually every State in the Union, industrial plants and other facilities are required to provide separate restrooms and separate dressing rooms for women in instances where those men are required to change their wearing apparel.

Yesterday I placed in the Record and read to the Senate a statement made by representatives of most of the working women of America who belong to the union, in opposition to the equal rights amendment. In this statement the representatives of these working women gave many reasons why Congress should not submit the equal rights amendment to the States and many reasons why the States should not ratify such amendment if Congress should be foolish enough to submit to them. They gave as one of the reasons that the equal rights amendment would destroy rights cause new problems by destroying laws "that require restrooms and dressing rooms for women workers."

I do not care to elaborate this point. I merely suggest that those Members of the Senate who believe that government should not have the power to segregate men and women and boys and girls in restrooms or to segregate male and female prisoners in institutions of correction and prisons ought to vote against my amendment. But those Senators who believe that the right of privacy of men and women and boys and girls ought to be preserved against obstruction by the equal rights amendment ought to vote for my amendment.

It is clear as the noonday sun in a cloudless sky that the only reason that this Nation has separate restrooms for men and women and boys and girls and separate prisons for men and women prisoners is sex. Consequently, being a distinction based on sex, the equal rights amendment would abolish the power of the Federal Government and the power of the 50 States to require separate facilities of this nature for persons of different sexes.

I am ready to yield back the remainder of my time on the amendment.

Mr. BAYH. Mr. President, inasmuch as this is a very significant point raised by the Senator from North Carolina I think a few words of response are required. The point has been raised, so I feel that I must at least express my very strong contrary views to our distinguished colleague from North Carolina. I think that perhaps the best way and the most efficient way to do this is, first, to read a quotation from Professor Dorsen of the New York University Law School. I think he pretty well describes this matter. Second, I ask unanimous consent to have printed in the RECORD after the quotation by Professor Dorsen portions of the opinion in the case of Griswold against Connecticut.

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

(See exhibit 1.)

Mr. BAYH. Professor Dorsen states:

It is sometimes claimed that an amendment would require all public restrooms to be integrated, along with the sleeping quarters of prisons and other public institutions. This, of course, is nonsense. The Constitution must be read as a whole, and an equal rights amendment would fit into the total constitutional framework. In particular, the right of privacy, recognized by the Supreme Court in the Connecticut birth control case, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), must be considered in the present context. While the limits of the right of privacy are as yet undefined, it seems plain that its implications would permit, and might require, separate restrooms for the sexes and separate sleeping quarters in public institutions. We should not readily assume that the proposed constitutional amendment would be pressed unreasonably to a point where other constitutional guarantees would be compromised. Accordingly, we find no serious problem in the "restroom-bedroom" specters raised by opponents of an equal rights amendment.

EXHIBIT 1

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See *Poe* v. *Ullman*, 367 U.S. 497, 516–522, 81 S.Ct. 1752, 6 L.Ed.2d 989 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourth and Fifth Amendments were described in *Boyd* v. *United States*, 116 U.S. 616, 630, 6 S. Ct. 524, 532, 29 L.Ed. 746, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life."

We recently referred in Mapp v. Ohio, 367 U.S. 643, 656, 81 S.Ct. 1684, 1692, 6 L.Ed.2d 1081, to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people." See Beaney. The Constitutional Right to Privacy, 1962 Sup.Ct. Rev. 212; Griswold, The Right to be Let Alone, 55 Nw.U.L. Rev. 216 (1960).

We have had many controversies over these penumbral rights of "privacy and repose." See, e.g., Breard v. City of Alexandria, 341 U.S. 622, 626, 644, 71 S.Ct. 920, 923, 933, 95 L.Ed. 1233; Public Utilities Comm. v. Pollak, 343 US 451, 72 S.Ct. 813, 96 L.Ed. 1068; Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 492; Lanza v. State of New York, 370 U.S. 139, 82 S.Ct. 1218, 8 L.Ed.2d 384; Frank v. State of Maryland, 359 U.S. 360, 79 S.Ct. 804, 3L.Ed.2d 877; Skinner v. State of Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655. These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 U.S. 288, 307, 84 S.Ct. 1302, 1314, 12 L.Ed.2d 325. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Reversed.

Mr. BAYH. It is unequivocally clear in the report of the Committee on the Judi-

ciary that this is the intention of the Senate. It is equally clear because identical language is in the House report, that this is the intention. The right to privacy will continue to exist and will be fully protected after the equal rights amendment is ratified.

Mr. COOK. Mr. President, this is the amendment my staff in reviewing it affectionately referred to as the "potty amendment."

What I do not understand, if the logic of the Senator from North Carolina is correct, is this. He said if I had all of these constitutional rights up to now as a man, and a woman has not, that I had the right to go into a lady's restroom. But as a matter of fact today if a man goes to a lady's restroom he gets arrested. We do not have that right.

If the theory of the Senator is correct that it is as clear as the sun in a cloudless sky with respect to what we are talking about, it must be a rainy day, such as today, when we cannot see the sun. It is said I have had these rights all along and we are giving equal rights under the Constitution which, in essence, means we have not been doing it up to now.

If I had more rights than the feminine sex, and my rights were equal with my brethren, and equal to the rights of women, then I had the right to utilize both of those facilities, but she only had the right to use one facility. Obviously, this is not the case.

I get the notion that we are being told there is a statute in every State of the Union, and I expect that we could be told, if time had not expired, that all those statutes are going to be eliminated; but, if I had all those rights and I could go to both, I would be arrested if I went to the other. So I think this is, although I hate to use the word, a specious argument. I do not think it can stand the march of legal opinion. It cannot stand up against the Griswold case, because the constitutional right of privacy can be used to sanction separate male and female facilities for activities which involve disrobing, sleeping, and personal bodily functions. It cannot stand the march of logic. I do not think it has anything to do with the argument of constitutionality and that it would do a great injustice to the intelligence of the American people if the amendment were attached to the constitutional amendment, because the equal rights amendment does not prohibit the separation of the sexes where the right of privacy is involved.

I yield back my time.

Mr. ERVIN. Mr. President, if I could recapture some of the time I have yielded back——

Mr. COOK. Mr. President, I have no objection.

Mr. ERVIN. The distinguished Senator from Kentucky may think this is specious, but two of the greatest constitutional lawyers in the United States do not think it is specious. I have read into the RECORD the testimony of Prof. Paul Freund, of the Harvard Law School, and the testimony of Phil Kurland, professor of law at the University of Chicago Law School. I do not think anything could be more plainly demonstrated than the fact that the equal rights amendment will prohibit separate restrooms for men and women.

We have a law passed that says a certain restroom must be marked as being usable for women and another as being usable for men.

The present law provides that a person of neither sex can use a restroom marked for the other sex. That distinction is the most obvious distinction based on sex. The only reason we have separate restrooms is on account of sex, and the equal rights amendment will render unconstitutional every distinction based on sex and it will clearly render unconstitutional every Federal and State law requiring separate restrooms for the two sexes and every Federal and State law requiring that men and women prisoners be detained in different cells or in different prisons.

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

Mr. ERVIN. Mr. President, I do the same.

The PRESIDING OFFICER. All time on the amendment has been yielded back.

The question is on agreeing to the amendment of the Senator from North Carolina. The yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. BYRD of West Virginia. I announce that the Senator from Florida (Mr. CHILES), the Senator from Indiana (Mr. HARTKE), the Senator from Minnesota (Mr. HUMPHREY), the Senator from Washington (Mr. JACKSON), the Senator from Arkansas (Mr. MCCLELLAN), the Senator from South Dakota (Mr. MCGOVERN), and the Senator from New Hampshire (Mr. MCINTYRE) are necessarily absent.

I further announce that, if present and voting, the Senator from Florida (Mr. CHILES), the Senator from Minnesota (Mr. HUMPHREY), the Senator from Washington (Mr. JACKSON), the Senator from South Dakota (Mr. MCGOVERN), and the Senator from New Hampshire (Mr. MCINTYRE) would each vote "nay."

Mr. GRIFFIN. I announce that the Senator from Oregon (Mr. PACKWOOD) is necessarily absent.

The Senator from South Dakota (Mr. MUNDT) is absent because of illness.

The Senator from Vermont (Mr. STAFFORD) is detained on official business.

If present and voting, the Senator from Oregon (Mr. PACKWOOD) would vote "nay."

The result was announced—yeas 11, nays 79, as follows:

[No. 118 Leg.]

YEAS—11

Bennett	Ervin	Long
Byrd, Va.	Fannin	Stennis
Cooper	Hansen	Talmadge
Eastland	Hollings	

NAYS—79

Aiken	Brooke	Dominick
Allen	Buckley	Eagleton
Allott	Burdick	Ellender
Anderson	Byrd, W. Va.	Fong
Baker	Cannon	Fulbright
Bayh	Case	Gambrell
Beall	Church	Goldwater
Bellmon	Cook	Gravel
Bentsen	Cotton	Griffin
Bible	Cranston	Gurney
Boggs	Curtis	Harris
Brock	Dole	Hart
Hatfield	Montoya	Smith
Hruska	Moss	Sparkman
Hughes	Muskie	Spong
Inouye	Nelson	Stevens
Javits	Pastore	Stevenson
Jordan, N.C.	Pearson	Symington
Jordan, Idaho	Pell	Taft
Kennedy	Percy	Thurmond
Magnuson	Proxmire	Tower
Mansfield	Randolph	Tunney
Mathias	Ribicoff	Weicker
McGee	Roth	Williams
Metcalf	Saxbe	Young
Miller	Schweiker	
Mondale	Scott	

NOT VOTING—10

Chiles	McClellan	Packwood
Hartke	McGovern	Stafford
Humphrey	McIntyre	
Jackson	Mundt	

So Mr. ERVIN's amendment (No. 1070) was rejected.

The PRESIDING OFFICER. The bill is open to further amendment.

AMENDMENT NO. 1071

Mr. ERVIN. Mr. President, I call up my amendment No. 1071, and ask for its immediate consideration.

Mr. BYRD of West Virginia. Mr. President, may we have order?

The PRESIDING OFFICER. The Senate will be in order.

The amendment will be stated.

The legislative clerk read as follows:

At the end of section 1 add the following sentence:

This article shall not impair the validity however of any laws of the United States or any State which make punishable as crimes sexual offenses.

Mr. BAYH. Will the Senator request the yeas and nays?

Mr. ERVIN. Mr. President, I ask for the yeas and nays on this amendment.

The yeas and the nays were ordered.

Mr. ERVIN. Mr. President, virtually every State in this Union has certain criminal statutes which prohibit the use of obscene language to female telephone operators, or prohibit the use of obscene language in the presence of women, or which make it a criminal offense for a man to seduce an innocent and virtuous woman under the promise of marriage, or which make it a crime for a man to have carnal knowledge of an immature girl under the age of consent. These laws will be stricken down by the equal rights amendment.

There is another law which we have known in popular parlance as the Mann White Slavery Act. This law makes it a crime for men to transport women in interstate or foreign commerce for immoral purposes or for the purposes of debauchery or for the purposes of prostitution. This law will also be stricken down as unconstitutional by the equal rights amendment.

I find my views on this subject sustained by the article by Prof. Thomas Emerson and three young lady lawyers which appeared in the Yale Law Journal for April 1971. An article which is supported completely by Congresswoman GRIFFITH who is the primary supporter of the ERA in the House of Representatives. I read from page 954 of that article:

C. Criminal law

The Equal Rights Amendment will not affect most criminal laws because statutory definitions of crimnal activity make men and women equally liable for most offenses; that

is, men and women can commit and be punished for most crimes equally. However, in the area of sexual activity the norm changes. Sex differentiation and sex discrimination pervade laws about overt sexual behavior and behavior with sexual overtones, reflecting the confluence of social stereotypes about gender and sexuality. Many of the laws, such as seduction laws, statutory rape laws, and laws prohibiting obscene language in the presence of women, embody a stereotype of women as frail and weak-willed in relation to sexual activity. Others, such as the prostitution and "manifest danger" laws, display a contradictory social stereotype: women who engage in certain kinds of sexual activity are considered more evil and depraved than men who engage in the same conduct. The Equal Rights Amendment would not permit such laws, which base their sex discriminatory classification on social stereotypes. Courts would generally strike down these laws rather than extend them to men because of the rule of strict construction of penal laws, described above.

This article points out that there are in many States criminal statutes which make the forcible commission of sodomy serious offenses, felonies, punishable by long terms of imprisonment. I read what the article in the Yale Law Journal says about what the equal rights amendment would do to laws of this nature:

Rape laws—

Speaking of forcible rape—

could thus be sustained as a legislative choice to give one part of the body (unique to women) special protection from physical attack. By contrast, the statutes which include penetration "per anum and per os" in the definition of rape, could not justifiably be limited to female victims because no physical characteristic unique to women is being protected by these laws. A court could choose between invalidating these broader rape laws or else limiting them to penetration of a woman's genitals. In the case of such a serious offense, courts would probably choose to retain the central and valid portion of the law and invalidate only the part referring to "penetration per anum and per os."

In other words, the article says that if a man forcibly penetrates the mouth of a woman against her will, that would be stricken down as unconstitutional by the equal rights amendment.

I now read another passage, on pages 957, 958, and 959:

With a few notable exceptions, laws which punish sexual intercourse per se as a constructive assault rest on the premise that the female party is incapable of giving meaningful consent. Best known among these are the statutory rape laws, which punish men for having sexual intercourse with any woman under an age specified by law, frequently sixteen. Other laws, covering more specific situations, prohibit men from having sexual intercourse with female wards, patients, and students. A related series of laws explicitly prohibit men from obtaining women's consent to sexual intercourse through misrepresentation, deception, or fraud.

These laws suffer from a double defect under the Equal Rights Amendment. First, they single out women for special protection from sexual coercion, even where men in similar circumstances are equally in need of protection; in this sense the laws are "underinclusive."

To be sure, the singling out of women probably reflects sociological reality: in this society, young women, who learn both that marriage is the most important goal for them and that they may pursue it only passively, are undoubtedly more susceptible than young men to the lures of persons who want to take sexual advantage of them. Likewise, in this society, the bad reputation and illegitimate child which can result from an improvident sexual liaison may be far more ruinous to a young woman's psychological health than similar conduct is to a young man's. But the Equal Rights Amendment forbids finding legislative justification in the sexual double standard, and requires such statutes to be framed in terms of the general human need for protection rather than in terms of crude sexual categories.

Second, traditional laws protecting all women of a particular age or status against sexual assault are "overinclusive" to the extent that they punish sexual activity when unwanted penetration of the vagina is not involved. It might be argued that statutory rape laws and other laws which render a woman's consent inoperative should be sustained on the same theory that forcible rape laws are upheld: that the legislature wished to give special protection to young women's genital organs. However, it is unlikely that such claims could withstand close court scrutiny under the unique physical characteristics tests. In particular, a court would be unable to find a close correlation between the activity being regulated (consensual sexual intercourse) and the justifying physical basis (susceptibility of the vagina to unwanted penetration).

Even if it found noncoerced sexual intercourse rarely physically harmful to postpubescent girls, a court might find that sexual intercourse is physically dangerous to girls who have not reached puberty. Upon finding such a fact situation, the court would conclude that the class of women victims is defined too broadly. If it made such a determination, a court could limit the operation of the statutory rape laws to prepubescent children. In the alternative, the court could strike down the law altogether because of its overbreadth and because it fails to base its sex difference upon a unique physical characteristic of women.

If invalidated, some of the laws, such as the seduction laws, which derive from outdated standards of courting and morality, would probably not be resuscitated.

So this passage says the equal rights amendment would render unconstitutional all laws dealing with consensual sexual intercourse by a man with a girl unless the girl was under the age of puberty. In other words, a mature man, wise in the ways of the world, could induce a young girl above the age of puberty and under the age of 16 to have intercourse with him and he would go unwhipped by justice under the equal rights amendment.

Then this article also says that the prostitution laws prohibiting the interstate transportation of women for purposes of prostitution would be stricken down under the equal rights amendment, unless extended to cover prostitution on the part of men.

With reference to the White Slavery Act, I read at page 965, as follows:

As prostitution laws are redefined to cover male as well as female prostitutes, a court faced with a challenge to the Mann Act might also be inclined simply to extend this law to apply to the transportation of men for illicit purposes. Under current conditions, such an extension would not subject a large number of additional people to criminal liability. However, this would disregard the legislative history and body of court decisions interpreting Congressional intent, which have placed great emphasis on the weakness of women. As late as 1960, the Supreme Court declared: "A primary purpose of the Mann Act was to protect women who are weak from men who are bad." *Denning* v. *United States*, 247 F. 463, 465. It was in response to shocking revelations of subjugation of women too weak to resist that Congress acted. See H.R. Rep. No. 47, 61st Cong., 2d Sess., pp. 10–11. As the legislative history discloses, the Act reflects the supposition that the women with whom it sought to deal often had no independent will of their own, and embodies, in effect, the view that they must be protected against themselves.

Given this background, a court might feel that extending the law to cover men would be expanding criminal liability further than Congress intended. Here, as with other criminal laws, a court would probably resolve doubts about congressional intent by striking down the law.

I digress to remark that the courts are not empowered to change the language of congressional enactments. They could not possibly change the meaning of the Mann White Slavery Act by substituting the word "men" where it talks about women being victims of the offense. So I concur in the last remark which the authors of this article make, that the court would probably resolve doubts about congressional intent by striking down the law.

Mr. President, I ask unanimous consent to have printed in the RECORD the excerpt in the article from the Yale Law Journal dealing with criminal law.

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

EXCERPT FROM YALE LAW JOURNAL

C. CRIMINAL LAW

The Equal Rights Amendment will not affect most criminal laws because statutory definitions of criminal activity make men and women equally liable for most offenses; that is, men and women can commit and be punished for most crimes equally.[200] However, in the area of sexual activity the norm changes. Sex differentiation and sex discrimination pervade laws about overt sexual behavior and behavior with sexual overtones, reflecting the confluence of social stereotypes about gender and sexuality.[201] Many of the laws, such as seduction laws, statutory rape laws, and laws prohibiting obscene language in the presence of women, embody a stereotype of women as frail and weak-willed in relation to sexual activity. Others, such as the prostitution and "manifest danger" laws, display a contradictory social stereotype: women who engage in certain kinds of sexual activity are considered more evil and depraved than men who engage in the same conduct. The Equal Rights Amendment would not permit such laws, which base their sex discriminatory classification on social stereotypes. Courts would generally strike down these laws rather than extend them to men because of the rule of strict construction of penal laws, described above.[202] Legislatures, of course, would be able to extend or re-enact any laws about sex offenses to apply equally to men and to women. A few types of criminal statutes, most notably rape laws, may be justified as deriving their sex bias from physical realities. Here the courts would closely scrutinize the laws to determine whether they fall within the scope of the exception for unique physical characteristics.

1. SEXUAL ASSAULTS

Rape laws undoubtedly raise one of the most difficult problems under the Equal Rights Amendment because they deal with such a serious offense and because, though

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Footnotes at end of article.

apparently simple, they involve two very different kinds of sex distinction. As most commonly defined in the laws of the states, as well as in the Model Penal Code, rape is the forcing of sexual intercourse by a man on a woman, without her consent.[203] This definition involves two kinds of sex differentiation: only a man can be found guilty as a perpetrator of rape, and only a woman can be the victim of rape.[204] These distinctions are usually not made explicit in the language of the statutes, but their interpretation is central to the treatment of rape laws under the Equal Rights Amendment.

Insofar as rape is defined as penetration into the vagina by the penis, courts could uphold forcible rape laws which limit liability to men as based on a unique physical characteristic of men.[205] Laws which define rape as forced sexual intercourse could also be sustained if a court defined sexual intercourse as an act done only by a man and a woman together, and if the statute clearly and appropriately defined women as the sole victims of rape.[206] Using the criteria described in Part III for determining whether a law bears the necessary close relationship could conclude that, on balance, the law to a unique physical characteristic,[207] a court should be sustained. Among other things, the court might find that rape is an extremely traumatic event for the victim; that most men are capable of penetration, and therefore, rape; that a major proportion of sexual assaults consist of sexual intercourse forced by men; that penetration by a man's penis carries with it the possibility of unwanted pregnancy for the victim and forcible penetration carries high danger to injury to the victim; that a criminal penalty is an appropriate way of deterring rape; and that, accompanied by procedural and substantive rights, the law is sufficiently narrow and specific in its scope to be upheld.

Similarly, insofar as a court could find that the rape laws are intended to give special protection from assault to women's vaginas, it could sustain the laws even though their protection is limited to women. A court would conduct an inquiry analogous to that described above for determining whether, under the unique physical characteristics tests, the rape laws could properly be limited to female victims. All or nearly all women's genitals differ from all or nearly all men's genitals in that they can be penetrated in an act of sexual assault against the victim's will. Rape laws could thus be sustained as a legislative choice to give one part of the body (unique to women) special protection from physical attack. By contrast, the statutes which include penetration "per anum and per os" in the definition of rape, could not justifiably be limited to female victims because no physical characteristic unique to women is being protected by these laws. A court could choose between invalidating these broader rape laws or else limiting them to penetration of a woman's genitals. In the case of such a serious offense, courts would probably choose to retain the central and valid portion of the law and invalidate only the part referring to "penetration per anum and per os." Alternatively, the legislature could extend the laws to cover the designated assaults on all persons, regardless of sex.

Rape is only one of a number of nonconsensual sexual acts which are penalized throughout the United States.[208] Laws governing such offenses are based on two related sets of concerns. The first is that unwanted sexual contact may be imposed on a person in ways ranging from physical force and threats to more subtle coercion in the form of deception and abuse of positions of trust and authority. The second range of concerns is that particular groups in the population may be especially susceptible to such sexual coercion. By merging these two aspects of the problem of sexual assault, traditional laws provide highly uneven and irrational coverage permeated by sex discrimination.

With a few notable exceptions, laws which punish sexual intercourse per se as a constructive assault rest on the premise that the female party is incapable of giving meaningful consent.[209] Best known among these are the statutory rape laws, which punish men for having sexual intercourse with any woman under an age specified by law, frequently sixteen.[210] Other laws, covering more specific situations, prohibit men from having sexual intercourse with female wards, patients, and students.[211] A related series of laws explicitly prohibit men from obtaining women's consent to sexual intercourse through misrepresentation, deception, or fraud.[212]

These laws suffer from a double defect under the Equal Rights Amendment. First, they single out women for special protection from sexual coercion, even where men in similar circumstances are equally in need of protection; in this sense the laws are "underinclusive." [213] To be sure, the singling out of women probably reflects sociological reality: in this society, young women, who learn both that marriage is the most important goal for them and that they may pursue it only passively, are undoubtedly more susceptible than young men to the lures of persons who want to take sexual advantage of them. Likewise, in this society, the bad reputation and illegitimate child which can result from an improvident sexual liaison may be far more ruinous to a young woman's psychological health than similar conduct is to a young man's. But the Equal Rights Amendment forbids finding legislative justification in the sexual double standard, and requires such statutes to be framed in terms of the general human need for protection rather than in terms of crude sexual categories.

Second, traditional laws protecting all women of a particular age or status against sexual assault are "overinclusive" to the extent that they punish sexual activity when unwanted penetration of the vagina is not involved. It might be argued that statutory rape laws and other laws which render a women's contest inoperative should be sustained on the same theory that forcible rape laws are upheld: that the legislature wished to give special protection to young women's genital organs.[214] However, it is unlikely that such claims could withstand close court scrutiny under the unique physical characteristics tests. In particular, a court would be unable to find a close correlation between the activity being regulated (consenusal sexual intercourse) and the justifying physical basis (susceptibility of the vagina to unwanted penetration).[215]

Even if it found noncoerced sexual intercourse rarely physically harmful to postpubescent girls, a court might find that sexual intercourse is physically dangerous to girls who have not reached puberty. Upon finding such a fact situation, the court would conclude that the class of women victims is defined too broadly. If it made such a determination, a court could limit the operation of the statutory rape laws to prepubescent children. In the alternative, the court could strike down the law altogether because of its overbreadth and because it fails to base its sex difference upon a unique physical characteristic of women.

If invalidated, some of the laws, such as the seduction laws, which derive from outdated standards of courting and morality, would probably not be resuscitated. Upon reexamination, legislatures might decide that the existing kidnap laws or other unlawful restraint laws already penalize any serious offensive deception or decoying, and that further penalties would be duplicative. Legislatures would be free, however, to extend the laws against sexual coercion to protect men as well as women. This is particularly likely where sexual relations with preadolescent children are involved.[216]

A slightly different problem is raised in states which set penalties for sexual activities initiated by women, as well as by men, but where different laws, standards of guilt, and penalties apply depending on whether the actor is a woman or a man. Michigan, for example, prohibits women from engaging in sexual intercourse with boys younger than fifteen.[217] But the law requires that the defendant actually knew the boy was under fifteen (the statutory rape law does not require actual knowledge of the girl's age), and the penalty is a maximum of five years, as compared with the lifetime maximum for statutory rape.[218] Aside from the forcible rape laws, whose special coverage can be justified on the basis of physical characteristics unique to men and women, the Equal Rights Amendment would require sexual assault laws to provide equal standards of guilt and penalties for men and women offenders.[219]

Considering the variety of laws regulating nonconsensual sexual activity, ranging from rape to sexual contact, it is surprising to realize that all of them can be reduced to a few basic elements: the touching of or with genitals, by means of force or deception, and, in the case of young people, the touching of genitals by an older person. The current sexual offense laws are highly duplicative, both of one another, and of general penal laws against kidnap, assault, and battery. The great degree of overlap in these laws, as well as the many distinctions without differences, provide a fertile field for confusion; they also encourage overcharging and extreme penalties. Moreover, the particular situations with which many of the laws deal evoke strongly emotional reactions and foster legislative mandates of higher penalties than the actual act usually merits. For instance, rape is singled out from other sexual offenses and classified with murder for the purposes of sentencing. This classification helps neither the accused [220] nor the victim.[221] Moreover, it tends to reduce the seriousness of other forms of sexual assault besides actual intercourse, which may well be equally disturbing for the victim.

The Model Penal Code has undertaken to bring together the confusing disparity of sexual offenses into a few categories structured in terms of the nature of the act, the vulnerability of the victim, and the coerciveness of the situation.[222] The Equal Rights Amendment would require legislatures in all states to reformulate at least some of their laws. While legislatures could very simply bring the laws into line with the Amendment by substituting the word "person" every time the words "female," "male," "man" or "woman" appear, hopefully they would be encouraged to re-evaluate, rationalize, and simplify this crazy-quilt area of criminal law.

2. CONSENSUAL SEXUAL RELATIONS

Criminal laws in every state penalize some sexual liaisons, even though both partners are fully responsible for their conduct and engage in the acts voluntarily and privately. As with nonconsensual sexual conduct, legislatures have frequently linked the definition of these crimes to the sex of one or both partners.

Statutes prohibiting sodomy generally sweep in alike men and women, married and unmarried persons, heterosexuals and homosexuals.[223] As a result, most of these statutes would not violate the Equal Rights Amendment, prohibiting as they do certain acts regardless of the identity of the actor or the circumstances of the act. A few states, however, limit liability under their sodomy statutes to males.[224] Like rape, the definition of sodomy can be limited to penetration by the penis. Where sodomy is defined in this way, such that females are incapable of com-

Footnotes at end of article.

mitting it, laws restricted to males may be sustained under the Equal Rights Amendment. However, a statute which defined sodomy more broadly, to include all oral-genital contact, would violate the Amendment if it were restricted to males.

A few adultery laws also contain sex discriminatory provisions which would be impermissible under the Equal Rights Amendment. Roman law defined adultery as sexual intercourse with another man's wife.[225] Some states reflect this one-sided view by failing to define intercourse between a married man and a single woman as adultery.[226] In Massachusetts and Oregon, an unmarried woman cannot be punished for relations with a married man, although an unmarried man is criminally liable if he participates in an adulterous relationship with a married woman.[227] Discrepancies like these in the liability of men and woman derive from social attitudes toward the relative offensiveness of extramarital activity by men and by women. The singling out of married women's extramarital activity harks back to concepts of a married woman as the property of her husband, although common law justifications focused on the fact that a married woman's liaison might produce offspring who would have her husband's name and whom her husband would have the duty to support.[228] However, the core idea in adultery is that extramarital intercourse per se threatens the marriage relationship. If this is the case, a court could not permit a state to set stricter penalties for a woman's extramarital activity than for a man's.

Following the rule of narrow construction of criminal statutes, courts will most likely invalidate sodomy or adultery laws that contain sex discriminatory provisions, instead of solving the constitutional problems by extending them to cover men and women alike.[229] This is especially likely since statutes regulating consensual sexual activity are also open to attack under the constitutional right to privacy in intimate sexual matters.[230] However, a legislature intent on retaining criminal penalties for sodomous or adulterous conduct could easily bring the laws into line with the Equal Rights Amendment by extending them to apply equally to men and women.

3. PROSTITUTION

At common law and still today in most parts of the United States, prostitution is, by definition, a crime committed only by women.[231] Even statutes neutral on their face turn out to be enforced only against women offenders.[232] Prostitution laws have been the focus of much heated controversy about the proper role of law in regulating moral or sexual behavior, and many people believe prostitution should not be criminalized at all.[233] But more narrowly, prostitution laws have been attacked as discriminating against women. Two kinds of sex bias are written into the majority of prostitution laws: first, women who sell access to their own sexual conduct are penalized, whereas men who do the same thing are not; and, second, the prostitute, who under current psychosocial conditions is usually a woman, is penalized, whereas the patron, who is usually a man, is not.[234]

Courts may be expected to hold that laws which confine liability for prostitution to women only are invalid under the Equal Rights Amendment. There is no unique physical characteristic of women which would justify outlawing prostitution when it is done by women, and not when it is done by men. Earlier beliefs that women are the carriers of venereal disease because of their sex have no scientific basis. Ideas that women who sell access to their bodies are social problems, whereas men who do the same thing are not, derive their only rationality from a social double standard which may not enter into legislative or judicial determinations under the Equal Rights Amendment. Even in the absence of the Equal Rights Amendment, recent reforms of prostitution laws have extended the coverage to men. Thus, the Model Penal Code refers to a person guilty of prostitution as "he or she." [235] The New York Penal Code contains a section explicitly stating that both men and women may be guilty of prostitution.[236] With the impetus of the Equal Rights Amendment, other state legislatures can be expected to move in this direction.

If prostitution laws were redefined to cover male prostitutes, then the courts would be unlikely to find a per se violation of the Equal Rights Amendment in the fact that prostitution laws penalize the "seller" but not the "buyer." In general, regulating the conduct of the seller and not the buyer is a rational governmental choice, although in the case of prostitution such a choice may not make sense, even in terms of effective deterrence.[237] Nevertheless, prostitution laws which penalize only the seller would be subject to judicial scrutiny as classifications which fall more heavily on one sex than the other.[238] Thus, to sustain its laws, a state would bear a heavy burden of demonstrating the rationality of regulating only the seller and not the buyer in a prostitution transaction. Reformed penal laws have already begun to regulate patrons as well as prostitutes.[239] It is likely, and desirable, that legislatures, in removing the sex bias from their laws, will follow this lead.

Just as the Equal Rights Amendment would invalidate prostitution laws which apply to women only, so it would require invalidation of laws specially designed to protect women from being forced into prostitution. In addition to many state laws of this type, the federal White Slave Traffic Act (Mann Act) prohibits the transportation in interstate "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery or to engage in any other immoral purpose." [240]

Related sections of the Act also prohibit persuading, inducing, enticing, or coercing a woman to travel in interstate commerce for the above purposes.[241] Cases interpreting the Mann Act have held that a woman may be found guilty as a principal under the Act; in some circumstances she may even be convicted of agreeing to transport herself in interstate commerce.[242] However, it is no crime to transport a man or boy in interstate commerce for the purposes set forth in the statute. Congress could easily bring the Mann Act into conformity with the Equal Rights Amendment by substituting the word "person" for the words "woman or girl" in the statute.

As prostitution laws are redefined to cover male as well as female prostitutes, a court faced with a challenge to the Mann Act might also be inclined simply to extend this law to apply to the transportation of men for illicit purposes. Under current conditions, such an extension would not subject a large number of additional people to criminal liability. However, this would disregard the legislative history and body of court decisions interpreting Congressional intent, which have placed great emphasis on the weakness of women. As late as 1960, the Supreme Court declared:

"A primary purpose of the Mann Act was to protect women who are weak from men who are bad." *Denning v. United States*, 247 F. 403, 465. It was in response to shocking revelations of subjugation of women too weak to resist that Congress acted. See H.R. Rep. No. 47, 61st Cong., 2d Sess., pp. 10–11. As the legislative history discloses, the Act reflects the supposition that the women with whom it sought to deal often had no independent will of their own, and embodies, in effect, the view that they must be protected against themselves." [243]

Given this background, a court might feel that extending the law to cover men would be expanding criminal liability further than Congress intended. Here, as with other criminal laws, a court would probably resolve doubts about congressional intent by striking down the law.

4. INDETERMINATE SENTENCING

In addition to separate substantive law for men and women, some states have special sentencing provisions for women. These laws in effect require or permit judges to place women in a separate correctional status in which the lengths of their sentences are determined not by the judge but by correctional authorities within the limits set by statute. When women are placed in such a status, they may be subjected to longer sentences than those provided for in the substantive statute, thereby creating higher maximum penalties for women than for men convicted of the same crime.

In *United States* ex rel. *Robinson v. York* [244] and *Commonwealth v. Daniel*,[245] two indeterminate sentencing laws were successfully attacked under the Fourteenth Amendment as denying women equal protection of the laws.[246] However, similar laws remain on the books in a number of states.[247] Such laws, if not invalidated under the Fourteenth Amendment. in general, the special laws for sentencing of women are in the form of separate additional sentencing statutes. Thus, if a court invalidated the special law for women, it would simply leave women subject to the standard sentencing laws. This was the result in *Robinson* and *Daniel*.

FOOTNOTES

200. The Equal Rights Amendment would forbid sex discriminatory enforcement just as the Fourteenth Amendment forbids enforcement which discriminates on the basis of race. Yick Wo v. Hopkins, 118 U.S. 356 (1886). However, such attacks involve very difficult problems of proof and are not discussed here. See, for a discussion of the recent rapid rise in the crime rate of women, and of changing law enforcement attitudes toward women offenders, Roberts, *Crime Rate of Women Up Sharply Over Men's*, N.Y. Times, June 13, 1971, at 1, col. 1.

201. The proportion of all women arrested who are arrested for sex offenses, including forcible rape and prostitution, is nearly four times the proportion of all arrested men. F.B.I., U.S. DEPT. OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 124 (1967).

202. See the discussion in Part IV(B), at p. 915 *supra*.

203. *See, e.g.*, MODEL PENAL CODE § 213.1 (Proposed Official Draft, 1962).

204. The language of some rape statutes suggests that either a man or a woman may be guilty of rape. Even these statutes, however, generally preclude the possibility of charging a woman with rape by defining sexual intercourse as the penetration of a man's penis into a woman's vagina, or, in some cases, her mouth or anus. Furthermore, a Yale Law Journal study in 1952 found no reported case in which a woman had been convicted of rape as a principal. See Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55 n.2 (1952). For the general rule that rape can be committed by a male only, see 75 C.J.S. *Rape* § 6 (1952).

In all states, both by common law and statute, only women can be victims of forcible rape; see 75 C.J.S. *Rape* §§ 1, 2, 7 (1952). Forcible sexual assault on an adult male is not defined as rape. Many states have enacted additional laws penalizing nonconsensual sexual assaults on men, but none of these laws bears the extreme penalties of the standard rape laws. A few states severely penalize sexual relations with children of

both sexes, but force is not an essential element of those statutes; they are discussed at p. 959 *infra*, in conjunction with statutory rape.

205. Statutes which define rape as "penetration" mostly fail, with Victorian delicacy, to specify what instruments of penetration are included. The common law antecedents of the rape statutes, as well as contemporary case law, indicate that courts have limited the application of rape laws to penetration by a man's penis. However, penetration of a woman's vagina may be made by many instruments other than a man's penis, and with equally devastating consequences for the victim's psyche. Whether or not pregnancy has resulted from the rape is immaterial under current laws; similarly, sterility is not a defense for a man accused of rape. Thus a court might conclude there is no rational reason for differentiating such assaults, of which women are as capable as men, and hold the rape laws invalid unless they extend to women assailants as well as men.

206. The MODEL PENAL CODE, § 213.1 (Proposed Official Draft, 1962) adopts this definition of rape.

207. See the discussion in Part III(B), at p. 895 *supra*.

208. A few states still have statutes which extend the concept of "sexual assault" to the use of obscene or insulting language in the presence of a woman. For instance, Alabama penalizes any person who in the presence or hearing of any girl or woman, uses abusive, insulting, or obscene language. ALA. CODE, tit. 14, § 11 (1958). See also MICH. COMP. LAWS ANN. § 750.337 (1968); ARIZ. REV. STAT. § 13–377 (1956). A variation on the same theme is a Georgia libel law which forbids anyone to utter or circulate "any defamatory words or statements derogatory to the fair fame or reputation for virtue of any virtuous female," GA. CODE ANN. § 26–2104 (1953). Such laws, based on a stereotyped view that women are morally pure, yet morally fragile, rather than on any unique physical characteristic of women which actually distinguishes them from men, would be invalidated under the Equal Rights Amendment.

209. The few statutes which declare young or helpless males incapable of consent are: COLO. REV. STAT. ANN. § 40–2–25(1)(k) (1963) (intercourse with male under 18 solicited by female); ILL. ANN. STAT. ch. 38, §§ 11–4 and 11–5 (Smith-Hurd 1964) (indecent liberties with a child and contributing to the delinquency of a child, regardless of sex); IND. ANN. STAT. § 10–4203 (1956) (intercourse with male over 14 knowing he is epileptic, imbecile, feeble minded or insane); KY. REV. STAT. § 435.100 (1970) (carnal knowledge of male child under 18); MICH. COMP. LAWS ANN. §§ 750.339–340 (1968) (debauching a male under 15); WASH. REV. CODE ANN. § 9–79.020 (1961) (sexual intercourse with male under 18).

210. *See, e.g.*, 44 AM. JUR. *Rape* § 17 (1942). Some states make an exception for intercourse with women who are not virgins, *e.g.*, FLA. STAT. § 794.05 (1961).

211. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 750.342, 750.341 (1968) (prohibiting intercourse with female wards and patients in mental institutions); D.C. CODE ENCYCL. ANN. § 22–3002 (1967) (penalizing male teachers who have sexual intercourse with any woman currently their student).

212. Seduction laws penalize men for inducing unmarried women to engage in sexual conduct by a promise, usually of marriage. *See, e.g.*, N.J. STAT. ANN. §§ 2A: 142–1, 142–2 (1969). Michigan, like many other states, makes it a crime for a person to entice a woman under 16 away from her parents or guardian for purposes of prostitution, concubinage, sexual intercourse, or marriage. MICH. COMP. LAWS ANN. § 750.13 (1968).

213. *See, e.g.*, the report of the Carroll County, Maryland, grand jury calling for legislation "to prevent mental and physical harm to unsuspecting, unprepared adolescents by forced, coerced or seduced sexual activity which may warp the development of such children as useful citizens to society." The report was prompted by evidence presented to the grand jury that two women elementary school teachers had seduced boys 11 and 12 years old. The grand jury concluded that the Maryalnd criminal code provided no statute under which the teachers could be indicted and called for state legislation "giving male juveniles equal protection under the laws." Washington Post, Jan. 2, 1971, at 3, col. 2. The Royal Commission on the Status of Women in Canada has reached a similar conclusion. Its recent Report recommended "that the Criminal Code be amended to extend protection from sexual abuse of all young people, male and female, and protection to everyone from sexual exploitation either by false representation, use of force, threat, or the abuse of authority." REPORT OF THE ROYAL COMMISSION ON THE STATUS OF WOMEN IN CANADA ch. 9, par. 42, at 374 (1970).

214. It is true that statutory rape may involve breaking the hymen, but very few states consider the victim's chastity material to the question of guilt. Moreover, statistical reports show that few statutory rape complainants are virgins. See Schiff, *Statistical Features of Rape*, 14 J. FOR. SCI. 102 (1969).

215. The law in most states presumes that a sixteen year old girl can consent to marriage (with her parents' approval), and, by implication, to sexual relations, while an unmarried girl of sixteen is legally presumed to be incapable of giving consent to a single act of sexual intercourse. However, there are no physical differences between the sexual acts involved. As discussed at pp. 938–39 *supra*, the minimum marriage age is not based on a unique physical characteristic of women. Therefore, the statutory rape law, which also deals with consenual sexual relations, cannot be justified as based on such a unique characteristic. There are, of course, social and psychological differences between marital and extramarital sexual relations, and the state may recognize them through sex-neutral legislation about extramarital sexual intercourse involving either young men or young women.

216. Some states already have laws that protect all children, regardless of sex. For example, Illinois has merged its statutory rape law into laws prohibiting indecent liberties with any child or contributing to any child's sexual delinquency. ILL. ANN. STAT. ch. 38, § 11–4 (Smith-Hurd Supp. 1971) and ch. 38, § 11–5 (Smith-Hurd 1964).

217. MICH. COMP. LAWS ANN. § 750.339 (1968).

218. *Compare* MICH. COMP. LAWS ANN. § 750.339 *with* § 750.520 (1968).

219. Where a state has mirror-image statutes which penalize men and women for the same conduct, by the same standards, and with the same penalties, the laws could be upheld under the Equal Rights Amendment. For example, Michigan's identical laws prohibiting acts of "gross indecency" between two men and between two women would not have to be invalidated; a court would not require the formality of rewriting a statute such as this, where in effect, it already covers men and women alike. *See* MICH. COMP. LAWS ANN. §§ 750.338, 750,338(a) (1968).

220. The Fourth Circuit recently held that Maryland's death penalty for rape was so excessively disproportionate as to violate the Eighth Amendment's guarantee against cruel and usual punishment. Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970).

221. Between 1960 and 1967 the number of forcible rapes known to law enforcement officials increased 61 per cent. In contrast, the proportion of forcible rapes solved by arrest of the offender decreased annually between 1965 and 1967. UNIFORM CRIME REPORTS, *supra* note 201, at 12 13.

In conjunction with the severe penalties for forcible rape, the defense of consent has developed. The existence of the consent defense (which is unique to rape) has the effect of putting the complainant on trial, for she will usually be subjected to a relentless defense examination, in an attempt to impugn her character and suggest that she actually consented to sexual attack. The consent defense and corresponding trial tactics thus have the effect of deterring women from making complaints about rape attacks; the Federal Bureau of Investigation estimates that forcible rape "is probably the most underreported crime by victims to police." UNIFORM CRIME REPORTS, *supra* note 201, at 13. As a result, some women's rights advocates have argued that women would actually be better protected if rape were prosecuted simply as aggravated assault.

222. MODEL PENAL CODE §§ 213.0–06 (Proposed Official Draft, 1962). For instance, the Model Penal Code's crime of "sexual assault" prohibits offensive "touching of the sexual or other intimate parts of the person of another for the purpose of arousing or gratifying sexual desire of either party." MODEL PENAL CODE § 213.4 (Proposed Official Draft, 1962).

223. "Sodomy" is used here, as it is used in many statutes, to include both oral-genital contact and anal intercourse. In some states it also includes mutual masturbation, sexual relations with animals, and sexual contact with dead bodies.

224. *See, e.g.*, 81. C.J.S. *Sodomy* § 1 (1953).

225. M. PLOSCOWE, SEX AND THE LAW, 146 (1951).

226. In Indiana, adultery is defined as intercourse between a man and a married woman, while intercourse with an unmarried woman is defined as the lesser offense of fornication. Warner v. State, 202 Ind. 479, 175 N.E. 601 (1931). A similar discrepancy is apparent in the "unwritten law defense," which survives in some states for men. The unwritten law defense permits a man to argue in complete defense to a homicide prosecution that the man he killed was, at the time of the homicide, in the act of sexual intercourse with his wife; it is, in other words, a license to men to murder in the face of adultery. No state gives women who kill their husbands' lovers a corresponding defense. TEX. PENAL CODE, Art. 1220 (Vernon's 1961); N.M. STAT. ANN. § 40A–2–4(1953); UTAH CODE ANN. § 76–30–9(4) (1953).

227. Both married men and married women are liable for extramarital sexual intercourse. ORE. REV. STAT. § 167.010 (1969); MASS. GEN. LAWS, ch. 272 § 14 (1932).

228. R. PERKINS, CRIMINAL LAW 337 (2d ed. 1969).

229. *Cf.* Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970) in which a federal court invalidated Texas's entire sodomy law because of its overbreadth in extending to acts between husband and wife. The decision was vacated by the United States Supreme Court *sub nom.* Buchanan v Wade, 91 S. Ct. 1222 (1971), and remanded for consideration in the light of Younger v. Harris, 401 U.S. 37 (1971), and Samuels v. Mackell, 401 U.S. 66 (1971).

230. *See* Griswold v. Connecticut, 388 U.S. 479 (1965). At least two states have already repealed their laws against consensual homosexual relations. *See* ILL. ANN. STAT. ch. 38, §§ 11–2, 11–3 (Smith-Hurd 1964); CONN GEN. STAT. REV. §§ 53a–65, –75 to –77 (Supp. 1969) (effective Oct. 1, 1971).

231. *See* "Prostitution," BLACK'S LAW DICTIONARY 1386 (4th ed. 1951); 73 C.J.S. *Prostitution*, § 1 (1951); Eisner v. Commonwealth, 375 S.W. 2d 825 (Ky. 1964). *But cf.* D.C. CODE ENCLY. ANN. § 22–2701 (1967). At least one

state still imposes special punishment on young women who are considered "in manifest danger of falling into habits of vice." No corresponding provisions are made for young men. *See* CONN. GEN. STAT. ANN. §§ 17–379, 18–65. Connecticut's statutes survived constitutional attack in State v. Mattiello, 4 Conn. Cir. 55, 225 A.2d 507 (1967), *appeal dismissed*, 395 U.S. 209 (1969).

232. S. Harmon, Attitudes Toward Women in The Criminal Law Process 5 (1970) (unpublished paper on file at Yale Law School Library.)

233. *Compare* A. FLEXNER, PROSTITUTION IN EUROPE (especially at 11–14) (1914), *with* REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION [The Wolfden Report] (1957). If the newly articulated constitutional right to privacy receives expanded interpretation, *see* discussion in Part III(D) at p. 900 *supra*, all regulation of prostitution, other than public health measures, may be ruled unconstitutional.

234. Men may be punished as entrepreneurs for trafficking in women or keeping a house of ill fame. They are seldom prosecuted for mere patronage of a prostitute. KANOWITZ, *supra* note 2, at 16–17.

235. MODEL PENAL CODE § 251.2 (Proposed Official Draft, 1962).

236. N.Y. PENAL LAW § 230.10 (McKinney 1967).

237. The recidivism rate for prostitution is so high that prostitution has been called "life on the installment plan." Lukas, *City Revising its Prostitution Controls*, N.Y. Times, Aug. 14, 1967, at 1, col. 2. Compare the Soviet Union's success at deterring prostitution by posting publicly the names, addresses and places of employment of the customers of prostitutes. KANOWITZ, *supra* note 2, at 17.

238. In its published statistics, the Federal Bureau of Investigation classifies "commercialized vice" together with prostitution. Even so 30,866 women were arrested for prostitution or commercialized vice as compared with 8,878 men. This figure is particularly striking in light of the fact that the total number of men arrested in 1967 was seven times greater than the total number of women arrested. UNIFORM CRIME REPORTS, *supra* note 201, at 124.

239. *See* N.Y. PENAL LAW § 230.05 (McKinney 1967); CONN. GEN. STAT. ANN. PENAL CODE § 84, 1969 Public Act No. 828 (effective Oct. 1. 1971). However, New York's law penalizing the patrons of prostitutes has only rarely been enforced. Speech by Elizabeth Schneider, Yale Law School, April 29, 1971.

240. 18 U.S.C. § 2421 (1964).

241. 18 U.S.C. §§ 2422-23 (1964).

242. United States v. Holte, 236 U.S. 140 (1915); *but cf.* Gebardi v. United States, 287 U.S. 112 (1937).

243. Wyatt v. United States, 362 U.S. 525, 530 (1960).

244. 281 F. Supp. 8 (D. Conn. 1968).

245. 430 Pa. 642, 243 A.2d 400 (1968).

246. In *Robinson*, the court ordered the petitioner released because she had already served the statutory maximum sentence for breach of the peace and resisting arrest. The court stated that to hold her for the full three years permitted under the sentencing law for women offenders would have denied her the equal protection of the laws. In *Daniel*, appellants' cases were sent back for resentencing because the court held that Pennsylvania's law requiring judges to impose the statutory maximum on all women sentenced to the State Correctional Institution at Muncy violated the Equal Protection Clause.

247. *E.g.*, ME. REV. STAT. ANN., tit. 34, § 802 (men); §§ 853–54 (women) (Supp. 1970). Disparities also exist in the juvenile laws of several states. For instance, in New York a court can order incorrigible, ungovenable, or habitually disobedient women to be held in custody until they are 20, if they are adjudged "persons in need of supervision" (PINS); whereas, boys can be held under the PINS statute only until age 18. Since most of the commitments under the PINS law stem from activity which could not result in criminal conviction, the law imposes on women two years of extra liability for non-criminal activity. N.Y. FAMILY COURT ACT, §§ 712, 756 (McKinney 1963).

Mr. ERVIN. Mr. President, this article makes it plain that the equal rights amendment will render unconstitutional State statutes which make it a crime for a man to seduce an innocent, virtuous woman under the promise of marriage, State statutes which make it a crime for a man to have carnal knowledge of an immature girl above the age of puberty and under the age of 16, and the White Slavery Act which makes it a crime for a man to transport women in interstate or foreign commerce for immoral purposes or for purposes of debauchery and prostitution.

Mr. President, my amendment is merely designed to make it certain that the equal rights amendment will not impair the validity of any laws of the United States or of any State which makes sex offenses punishable as a crime.

Mr. President, I sincerely trust that the Senate will adopt this amendment.

Mr. BAYH. Mr. President, I yield myself such time as I may need. I shall be brief, inasmuch as the distinguished Senator from North Carolina and I had a rather detailed discussion about this matter on yesterday, and anyone who cares to examine it in further detail will find my remarks in yesterday's RECORD.

I certainly think that the Senator from North Carolina has made a significant contribution to this debate by bringing this issue into focus.

None of us who support the equal rights amendment—perhaps I should not say none, but at least, including myself, I should say most of us who are supporting the equal rights amendment—have no desire at all that it have the effect attributed to it by the Senator from North Carolina.

Perhaps the best place to start in this brief rebuttal would be to read from the committee report which states as a general rule particularly relative to the question of rape and statutory rape:

> The Amendment will not invalidate laws which punish rape, for such laws are designed to protect women in the way that they are uniformly distinct from men.

None of the items the Senator from North Carolina is concerned about would be stricken by the equal rights amendment. Rather, because of their sexual bias, in the judgment of the Senator from Indiana and the majority of the Judiciary Committee, such laws will be sustained. They will not be stricken down as unconstitutional, because the distinction between the laws as to their application to men and women is not based simply on their sex, but on their unique physical characteristics—their distinct physical differences. Indeed, men and women do have unique physical characteristics and that is why we need unique, distinct and different laws relating to various sex crimes. To determine whether the law is based on unique physical characteristics, the Senator from Indiana suggests that one must look at both the group protected by the law and the group which might be punished. Again let us use the rape law in question. Rape laws, under this analysis, are perfectly constitutional, for both the groups which is protected; namely, women, and the group which can be punished; namely, men, have unique physical characteristics which are directly related to the crime, to the act for which an individual is punished.

With respect to statutory rape, the same analysis can be drawn, I suggest most respectfully. Only men can physically commit the crime of statutory rape and only women can physically be the victims of the crime.

The PRESIDING OFFICER (Mr. TOWER). Who yields time?

Mr. BAYH. Mr. President, I yield back the remainder of my time.

Mr. ERVIN. Mr. President, the Senator from Indiana mentioned the fact that men and women have unique physical characteristics which are distinguishable from each other. That is true. That is exactly what makes the distinction between men and women and makes them members of different sexes. This equal rights amendment is designed to outlaw every law which is based on the distinction of sex. So, it is impossible to maintain the position of my good friend, the Senator from Indiana. The whole equal rights amendment recognizes that men are men and women are women, because they have different unique physical characteristics which divide them into two sexes. And manifestly, a constitutional amendment which says that we cannot have a law based upon distinction between sexes would invalidate any law based upon this distinction.

Mr. President, I am willing to yield back the remainder of my time.

Mr. BAYH. Mr. President, I yield myself a couple of minutes under the bill.

The PRESIDING OFFICER (Mr. ROTH). The Senator from Indiana is recognized.

Mr. BAYH. Mr. President, the Senator from Indiana has not contended in debate with the Senator from North Carolina throughout these many hours and many days that men and women did not have distinct characteristics that made them different. It has been quite to the contrary.

There is no way we can pass a constitutional amendment to change this. However, by definition the crime of, let us say, rape, can apply to only one group who are the victims and one group who are the perpetrators of this crime. This is based on the unique physical characteristics of the sexes.

Thus, in the judgment of the Senator from Indiana and, indeed, even in the judgment of the Yale Law Review article which I quote with some reluctance, because of the different interpretations the Senator from North Carolina and I have put upon it, that is one area in which I have agreement with the scholars who wrote that article when they said that rape laws would continue to be valid after ratification of the equal rights amendment.

The PRESIDING OFFICER. The ques-

tion is on agreeing to the amendment of the Senator from North Carolina. 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 Florida (Mr. CHILES), the Senator from Indiana (Mr. HARTKE), the Senator from Minnesota (Mr. HUMPHREY), the Senator from Washington (Mr. JACKSON), the Senator from Arkansas (Mr. MCCLELLAN), the Senator from South Dakota (Mr. MCGOVERN), and the Senator from New Hampshire (Mr. MCINTYRE) are necessarily absent.

I further announce that, if present and voting, the Senator from Florida (Mr. CHILES), the Senator from New Hampshire (Mr. MCINTYRE), the Senator from South Dakota (Mr. MCGOVERN), the Senator from Minnesota (Mr. HUMPHREY), and the Senator from Washington (Mr. JACKSON) would each vote "nay."

Mr. GRIFFIN. I announce that the Senator from Oregon (Mr. PACKWOOD) is necessarily absent.

The Senator from South Dakota (Mr. MUNDT) is absent because of illness.

The Senator from Colorado (Mr. ALLOTT) and the Senator from Kentucky (Mr. COOPER) are detained on official business.

Also, the Senator from Tennessee (Mr. BAKER) is detained on official business.

If present and voting, the Senator from Oregon (Mr. PACKWOOD) would vote "nay."

The result was announced—yeas 17, nays 71, as follows:

[No. 119 Leg.]

YEAS—17

Bennett	Dominick	Hollings
Buckley	Eastland	Long
Byrd, Va.	Ervin	Miller
Byrd, W. Va.	Fannin	Stennis
Cannon	Goldwater	Talmadge
Cotton	Hansen	

NAYS—71

Aiken	Griffin	Pell
Allen	Gurney	Percy
Anderson	Harris	Proxmire
Bayh	Hart	Randolph
Beall	Hatfield	Ribicoff
Bellmon	Hruska	Roth
Bentsen	Hughes	Saxbe
Bible	Inouye	Schweiker
Boggs	Javits	Scott
Brock	Jordan, N.C.	Smith
Brooke	Jordan, Idaho	Sparkman
Burdick	Kennedy	Spong
Case	Magnuson	Stafford
Church	Mansfield	Stevens
Cook	Mathias	Stevenson
Cranston	McGee	Symington
Curtis	Metcalf	Taft
Dole	Mondale	Thurmond
Eagleton	Montoya	Tower
Ellender	Moss	Tunney
Fong	Muskie	Weicker
Fulbright	Nelson	Williams
Gambrell	Pastore	Young
Gravel	Pearson	

NOT VOTING—12

Allott	Hartke	McGovern
Baker	Humphrey	McIntyre
Chiles	Jackson	Mundt
Cooper	McClellan	Packwood

So Mr. ERVIN's amendment (No. 1071) was rejected.

Mr. ERVIN. Mr. President, for the information of the Senate I propose to offer two more amendments, and virtually back to back. I think we can finish voting on these two amendments in a very few minutes. I would suggest that Senators remain in the Chamber instead of returning to their offices or committee rooms.

Mr. BYRD of West Virginia. Mr. President, would the Senator agree to a unanimous-consent order limiting time on each of the two amendments to not to exceed 10 minutes, to be divided equally between the mover of the amendment and the manager of the bill?

Mr. ERVIN. That is satisfactory to me.

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

AMENDMENT NO. 472

Mr. ERVIN. Mr. President, the first of these amendments in amendment No. 472. I wish to modify that amendment so that it will conform to the amendment I now send to the desk, and I ask that it be stated as set forth in the amendment.

The PRESIDING OFFICER. The amendment will be stated.

The amendment, as modified, was read as follows:

Strike out all after the resolving clause and insert in lieu thereof the following:

"ARTICLE—

"SECTION 1. Neither the United States nor any State shall make any legal distinction between the rights and responsibilities of male and female persons unless such distinction is based on physiological or functional differences between them.

"SEC. 2. The Congress shall have the power to enforce the provisions of this article by appropriate legislation."

Mr. ERVIN. Mr. President, I ask for the yeas and nays on the amendment.

The yeas and nays were ordered.

Mr. ERVIN. Mr. President, this amendment is very simple. It is a substitute for the equal rights amendment. It would invalidate every Federal and every State law which makes any distinction between the legal rights of men and women unless that distinction is based upon physiological or functional differences between them.

In other words, I think most of the laws which now make the distinction between men and women are based on physiological and functional differences. The criminal laws are based on physiological differences, and the laws relating to labor and the rights of wives, mothers, and widows are based on functional differences between men and women.

I ask the Senate to repent of the evil course of conduct it has been following since these repentant amendments have been called up by adopting this amendment. The amendment would abolish the laws on the important relations between men and women, but still leave Congress with power to make reasonable distinctions between them.

I yield back the remainder of my time.

Mr. BAYH. Mr. President, once again we discuss basic philosophical differences that exist between the Senator from Indiana and the Senator from North Carolina. Suffice it to say that if this amendment is adopted, we might as well lock up shop and go home. We would have destroyed all the efforts we have been making to try, at long last, to provide equal opportunity—not special privilege, but equal opportunity—for women.

Let us be brutally frank as we take a look at various State laws in the country. These law were not passed and they are not administered in a way which admittedly discriminates against women. No State legislature has courage enough to pass a bill and say the reason for passage is that it is trying to deny equal pay for equal work, or limit the admissions of women to State university to keep women out of work by requiring her to get a court order before she can go into business. These are specific laws which now exist. No, the reason why a woman must go into court and get a court order is that we are trying to protect her because of her physiological and functional differences is what is said by those who pass such laws. That is the basis which permits the discrimination to exist.

I know the Senator from North Carolina does not have that motive in mind, but that is the impact which the statutes that exist in the States of the Union often have.

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

Mr. BAYH. I yield.

Mr. COOK. We have debated this substitute in committee on many occasions. If this substitute should prevail, we would have to send the amendment to the Senate-House conference where it will die. And then we would not have this volume of hearings of 800 pages and the other volumes of hearings, that go with this, to explain the meaning of the amendment. Is that not true?

Mr. BAYH. That is correct.

Mr. COOK. All the work of 49 years would be for naught. Agreeing to such proposals now would mean that we would have to introduce the original amendment again next year, and we would start on its 50th year. Is that correct?

Mr. BAYH. Yes.

Mr. COOK. As a matter of fact, if this is adopted, it would not be up to this body's interpretation of whether or not it applies to the laws as passed and for the purpose for which the substitute is submitted, but it would be for every State legislature, for every city council, for every legislative body, at any level, to make a determination of what they thought, within their wisdom, was the basis for which they could make a distinction. Is that not true?

Mr. BAYH. That is accurate. Permit me to cite two specific examples. A State legislature in State X could come to the conclusion that women generally, as a whole, as a group, are not able to defend themselves against attack at night. Thus, on that basis, the legislature could, under the wording of the present amendment, deny women the right of being employed at night because of the distinction that exists between them and men.

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

Mr. BAYH. I yield.

Mr. COOK. Let me give the Senator another example. If a State held that physiologically it was not wrong for a woman to work 40 hours, or even 60 hours, or more, and that it was not wrong

for a woman to work overtime, then she would have that privilege in one State but might be denied that in another.

Mr. BAYH. Yes.

Mr. COOK. Because the concept of the distinction could be settled differently in 50 different jurisdictions, as far as the States are concerned, and all the distinctions that any legislative body anywhere in the country could make. Is that correct?

Mr. BAYH. That is correct.

I yield back my time.

Mr. ERVIN. Mr. President. I yield back my time.

The PRESIDING OFFICER. All time on the amendment has been yielded back. The yeas and nays have been ordered, and the clerk will call the roll.

The second assistant legislative clerk called the roll.

Mr. BYRD of West Virginia. I announce that the Senator from Florida (Mr. CHILES), the Senator from Arkansas (Mr. FULBRIGHT), the Senator from Indiana (Mr. HARTKE), the Senator from Washington (Mr. JACKSON), the Senator from Arkansas (Mr. MCCLELLAN), the Senator from South Dakota (Mr. MCGOVERN), and the Senator from New Hampshire (Mr. MCINTYRE) are necessarily absent.

I further announce that, if present and voting, the Senator from New Hampshire (Mr. MCINTYRE), the Senator from South Dakota (Mr. MCGOVERN), the Senator from Washington (Mr. JACKSON), the Senator from Arkansas (Mr. FULBRIGHT), and the Senator from Florida (Mr. CHILES) would each vote "nay."

Mr. GRIFFIN. I announce that the Senator from Oregon (Mr. PACKWOOD) is necessarily absent.

The Senator from South Dakota (Mr. MUNDT) is absent because of illness.

The Senator from Alaska (Mr. STEVENS) is detained on official business.

If present and voting, the Senator from Oregon (Mr. PACKWOOD) would vote "nay."

The result was announced—yeas 12, nays 78, as follows:

[No. 120 Leg.]

YEAS—12

Bennett	Ervin	Hollings
Buckley	Fannin	Long
Byrd, Va.	Goldwater	Stafford
Eastland	Hansen	Stennis

NAYS—78

Aiken	Ellender	Muskie
Allen	Fong	Nelson
Allott	Gambrell	Pastore
Anderson	Gravel	Pearson
Baker	Griffin	Pell
Bayh	Gurney	Percy
Beall	Harris	Proxmire
Bellmon	Hart	Randolph
Bentsen	Hatfield	Ribicoff
Bible	Hruska	Roth
Boggs	Hughes	Saxbe
Brock	Humphrey	Schweiker
Brooke	Inouye	Scott
Burdick	Javits	Smith
Byrd, W. Va.	Jordan, N.C.	Sparkman
Cannon	Jordan, Idaho	Spong
Case	Kennedy	Stevenson
Church	Magnuson	Symington
Cook	Mansfield	Taft
Cooper	Mathias	Talmadge
Cotton	McGee	Thurmond
Cranston	Metcalf	Tower
Curtis	Miller	Tunney
Dole	Mondale	Weicker
Dominick	Montoya	Williams
Eagleton	Moss	Young

NOT VOTING—10

Chiles	McClellan	Packwood
Fulbright	McGovern	Stevens
Hartke	McIntyre	
Jackson	Mundt	

So Mr. ERVIN's amendment (No. 472), as modified, was rejected.

(Disturbance in the visitors' galleries.)

Mr. BYRD of West Virginia. Mr. President, may we have order in the Senate and in the galleries?

The PRESIDING OFFICER. The attention of visitors in the galleries is called to the fact that no demonstrations are permitted, either in favor or against.

Mr. STAFFORD subsequently (on March 28, 1972) said: Mr. President, on Vote No. 120, of March 22, 1972, I am incorrectly recorded as having voted "yea." I voted "nay" on that vote. I ask unanimous consent that the permanent RECORD and the Journal be corrected accordingly.

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

Therefore, on the above vote, the yeas are 11 and the nays are 79.

THE 2,000TH CONSECUTIVE ROLLCALL VOTE FOR SENATOR PROXMIRE

Mr. MANSFIELD. Mr. President, I am happy to announce to the Senate that with the most recent rollcall vote, our distinguished colleague, the Senator from Wisconsin (Mr. PROXMIRE), has completed his 2,000th consecutive vote on a rollcall, beginning in April 1966. I think he deserves the credit of the Senate.

MESSAGE FROM THE HOUSE—ENROLLED BILLS SIGNED

A message from the House of Representatives, by Mr. Berry, one of its reading clerks, announced that the Speaker had affixed his signature to the following enrolled bills:

S. 904. An act to amend the Uniform Time Act to allow an option in the adoption of advanced time in certain cases; and

S. 3160. An act to provide for a modification in the par value of the dollar, and for other purposes.

EQUAL RIGHTS FOR MEN AND WOMEN

The Senate continued with the consideration of the joint resolution (H.J. Res. 208) proposing an amendment to the Constitution of the United States relative to equal rights for men and women.

AMENDMENT NO. 1044

Mr. ERVIN. Mr. President, I call up my amendment 1044.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk proceeded to read the amendment.

Mr. ERVIN. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered; and, without objection, the amendment will be printed in the RECORD.

The amendment is as follows:

Strike out all after the resolving clause and insert in lieu thereof the following:

That the two articles set forth in sections 2 and 3 of this resolution are proposed in the alternative as amendments to the Constitution of the United States, one of 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 a period of seven years after the date of their admission by the Congress to the States. Upon the ratification of one such proposed amendment within that period, the other such proposed amendment shall have no further force or effect.

SEC. 2. The first article of amendment so proposed is the following:

"ARTICLE—

"SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

"SEC. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

"SEC. 3. This amendment shall take effect two years after the date of ratification.".

SEC. 3. The second article of amendment so proposed is the following:

"ARTICLE—

"SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. The provisions of this article shall not impair the validity, however, of any laws of the United States or any State which exempt women from compulsory military service, or from service in combat units of the Armed Forces; or extend protections or exemptions to wives, mothers, or widows; or impose upon fathers responsibility for the support of children; or secure privacy to men or women, or boys or girls; or make punishable as crimes rape, seduction, or other sexual offenses.

"SEC. 2. The Congress shall have the power to enforce the provisions of this article by appropriate legislation.

"SEC. 3. This amendment shall take effect two years after the date of ratification.".

Mr. ERVIN. Mr. President, this amendment is very simple. It is based on the realization that the people of the States have an interest in constitutional amendments just as much as Congress has.

This amendment provides that two proposed amendments to the Constitution shall be submitted to the States in the alternative, that one of these amendments shall be the equal rights amendment as set forth in House Joint Resolution 208, and that the second of these amendments shall embody provisions of the various separate amendments which I have heretofore submitted and upon which votes have heretofore been cast. In other words, it submits these amendments to the States, in the alternative, to allow them to take their choice between the two amendments—the equal rights amendment, as set out in House Joint Resolution 208, and an amendment embodying the separate amendments I have heretofore proposed, reading as follows:

The provisions of this article shall not impair the validity, however, of any laws of the United States or any State which exempt women from compulsory military service, or from service in combat units of the Armed Forces; or extend protections or exemptions

to wives, mothers, or widows; or impose upon fathers responsibility for the support of children; or secure privacy to men or women, or boys or girls; or make punishable as crimes rape, seduction, or other sexual offenses.

"SEC. 2. The Congress shall have the power to enforce the provisions of this article by appropriate legislation.

"SEC. 3. This amendment shall take effect two years after the date of ratification.".

In other words, it just submits two amendments in the alternative to the States and allows the States to take their choice between the two amendments and to ratify the one of which they may approve.

I do not recall whether I have asked for the yeas and nays, but I do so now.

The yeas and nays were ordered.

Mr. BAYH. Mr. President, the Senator from North Carolina is one of the most, if not the most, tenacious, and dedicated adversaries one can possibly have in debating a measure on the floor of the Senate.

The proposal he asks us to accept now would permit the various State legislatures to go on a fishing expedition to determine whether they thought the equal rights amendment as embodied in the pending order of business was their preference or the so-called equal rights amendment as embodied in the amendment of the Senator from North Carolina was their preference.

In my judgment, in the constitutional amendment process, Congress has to stand up and be counted. In this day and age particularly, let us not waffle. We are either for this amendment, the equal rights amendment, which has been the product of study and deliberation for 50 years, or we are against it. If we do not think it is good, let us not send it out to the State legislatures and shift the buck onto them. Let us make that determination for ourselves.

I should add that we have had five rollcall votes today and two or three yesterday, and each of the individual parts that is now embodied in the whole by the amendment of the Senator from North Carolina already has been decided; and the Senate, by a 70-some vote to a handful, has voted "no" on each of the parts. I respectfully suggest that the whole is no more acceptable.

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

Mr. BAYH. I yield.

Mr. COOK. Would this not, in effect, say that the States could not exercise responsibility toward acquiring a constitutional amendment in this field, because particular States could decide to accept first article and reject the second one and the next State could accept second article and reject the first one? In fact, we would have to have a tabulator, when we got all through, to find out where we stood, to be sure of coming to a conclusion, because part of it could be accepted and part rejected. Or would we have to see all 50 legislatures get together and see which one they were going to accept and which one to reject?

Mr. ERVIN. Only 38.

Mr. COOK. It would be difficult to get even 38 out of such a conglomeration as we have in front of us today.

Is that not correct?

Mr. BAYH. The Senator from Indiana said earlier that the best way to defeat the equal rights amendment was to divide our shots and then let each State legislator go back to his constituency and say, "I voted for the equal rights amendment when it was in my legislature." But you would never get three-quarters in agreement on anything. Just as Members of this body would like to add a word or a sentence, we are never going to get two-thirds in agreement until we recognize that this is as good a measure as we can have.

Let us vote this matter down so that we can, in short order, send to the State legislatures the one measure on which there is great support in the Senate and in the House and throughout the country.

Mr. MAGNUSON. Before we come to final passage, this may be a good time to put a query to the Senator from Indiana or any other Senator who can answer it.

Some concern has been expressed in my State and the other States that have had community property laws for a long time. I recall that last year or the year before, we had a long colloquy on the floor, the Senator from Indiana and I, as to how the amendment might affect the community property law system which is in effect in some States of the Union. It is a law which, I am sure, both men and women in my State would not like to see jeopardized or in any way to be modified or watered down. The community property laws offer great protection for women in many cases, particularly in cases of divorce suits and estates. I do not think there would be any sentiment for this amendment in my State legislature if it touched the traditional community property laws which are based on the old Spanish laws which have been in existence in my State ever since it was a territory. So I wonder whether the Senator from Indiana could briefly comment on that.

Mr. BAYH. That is a good point raised by the Senator from Washington. The equal rights amendment will in no way affect the disposition of community property under a community property law settlement. The State of Washington and particularly the State of Texas would not be affected at all because both the State of Washington and more recently the State of Texas have changed the provisions which existed in a handful of States which would permit, after an equal division, the husband to maintain sole managerial capacity in those few——

Mr. MAGNUSON. That used to be the law in the State of Washington.

Mr. BAYH. Yes; but it is not now.

Mr. MAGNUSON. It is not now.

Mr. BAYH. Texas recently revised its statute; so that the equal rights amendment will not affect the community property law one iota as written in the State of Washington.

Mr. MAGNUSON. My last question—and I shall be brief—is, when we come to the question of estates, basically the community property law is a matter of a 50-percent automatic division in a community estate which is set aside if the wife is the survivor. That is not necessarily true the other way. She can will her separate property, but there have been some decisions that have declared in our State that if the husband is the sole survivor, he may not be able to touch her 50 percent. How would this affect estates? Leave the law as it is?

Mr. BAYH. The equal rights amendment would leave the statute as it is, yes. But the courts could not give to the widow rights in the estate of her husband which it would not give a widower in the estate of his wife.

Mr. MAGNUSON. As to the estates—

Mr. BAYH. Yes—equal disposition.

Mr. MAGNUSON. That has to be made crystal clear when it gets out into the community property States.

Mr. BAYH. I appreciate the Senator from Washington bringing this point to our attention.

Mr. ERVIN. Mr. President, if I may make one or two observations on that point. The community property States allow the husband to be the manager of the property and to control the property, so that the equal rights amendment would invalidate the community property law in every State where the husband is allowed to manage or control the property. There is no question about that. It depends on what the law of a particular State is on that point, but the community property laws would be invalidated by the equal rights amendment because it would discriminate against women by giving men the management and control of community property.

The PRESIDING OFFICER (Mr. ROTH). All time on this amendment has now been yielded back.

The question is on agreeing to the amendment (No. 1044) of the distinguished Senator from North Carolina (Mr. ERVIN).

On this question the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. BYRD of West Virginia. I announce that the Senator from Florida (Mr. CHILES), the Senator from Michigan (Mr. HART), the Senator from Indiana (Mr. HARTKE), the Senator from Washington (Mr. JACKSON), the Senator from Arkansas (Mr. MCCLELLAN), the Senator from South Dakota (Mr. MCGOVERN), and the Senator from New Hampshire (Mr. MCINTYRE) are necessarily absent.

I further announce that, if present and voting, the Senator from New Hampshire (Mr. MCINTYRE), the Senator from South Dakota (Mr. MCGOVERN), the Senator from Washington (Mr. JACKSON), the Senator from Michigan (Mr. HART), and the Senator from Florida (Mr. CHILES) would each vote "nay."

Mr. GRIFFIN. I announce that the Senator from Oregon (Mr. PACKWOOD) is necessarily absent.

The Senator from South Dakota (Mr. MUNDT) is absent because of illness.

If present and voting, the Senator from Oregon (Mr. PACKWOOD) would vote "nay."

The result was announced—yeas 9, nays 82, as follows:

[No. 121 Leg.]

YEAS—9

Bennett	Ervin	Hollings
Byrd, Va.	Fannin	Long
Eastland	Hansen	Stennis

NAYS—82

Aiken	Fong	Pastore
Allen	Fulbright	Pearson
Allott	Gambrell	Pell
Anderson	Goldwater	Percy
Baker	Gravel	Proxmire
Bayh	Griffin	Randolph
Beall	Gurney	Ribicoff
Bellmon	Harris	Roth
Bentsen	Hatfield	Saxbe
Bible	Hruska	Schweiker
Boggs	Hughes	Scott
Brock	Humphrey	Smith
Brooke	Inouye	Sparkman
Buckley	Javits	Spong
Burdick	Jordan, N.C.	Stafford
Byrd, W. Va.	Jordan, Idaho	Stevens
Cannon	Kennedy	Stevenson
Case	Magnuson	Symington
Church	Mansfield	Taft
Cook	Mathias	Talmadge
Cooper	McGee	Thurmond
Cotton	Metcalf	Tower
Cranston	Miller	Tunney
Curtis	Mondale	Weicker
Dole	Montoya	Williams
Dominick	Moss	Young
Eagleton	Muskie	
Ellender	Nelson	

NOT VOTING—9

Chiles	Jackson	McIntyre
Hart	McClellan	Mundt
Hartke	McGovern	Packwood

So Mr. ERVIN's amendment (No. 1044) was rejected.

MESSAGE FROM THE HOUSE

A message from the House of Representatives, by Mr. Berry, one of its reading clerks, announced that the House had agreed to the report of the committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 18) to amend the U.S. Information and Educational Exchange Act of 1948 to provide assistance to Radio Free Europe and Radio Liberty.

LEGISLATIVE PROGRAM

Mr. SCOTT. Mr. President, I rise to ask the majority leader the schedule for the remainder of the day and the rest of the week.

Mr. BYRD of West Virginia. Mr. President, may we have order in the Senate so that the Senators can hear the majority leader?

The PRESIDING OFFICER. The Senate will please be in order.

Mr. MANSFIELD. Mr. President, in response to the question raised by the distinguished Republican leader, it is my understanding that as of this moment there will be no further amendments and that very shortly we will reach the question on adoption of the pending joint resolution. Some Senators will want to make statements, and rightfully so, but I would hope other Senators who have not been so active in connection with this measure would consider the possibility of placing their remarks in the RECORD. It would be helpful. I make that suggestion because it is the intention to call up next the Ervin-Mansfield amendment, Senate Resolution 280, authorizing Senate intervention into Supreme Court proceedings on the issue of the scope of article I, section 6, the so-called speech and debate clause of the Constitution.

It is my further understanding that there may be five amendments offered to that measure. At the present time the joint leadership is trying to work out a time limitation. Therefore, there will be further votes today.

When that is disposed of today, if it can be, it is anticipated that tomorrow we will take up the last two items on the calendar, if they are cleared on both sides, and evidently they are noncontroversial.

Then, we can take up S. 3178, to relieve broadcasters of the equal time requirement of section 315 with respect to candidates for President and Vice President. There will be rollcall votes on that measure tomorrow.

When that measure is disposed of we will take up S. 2895, a bill to enable producers of commercial eggs consistently to provide an adequate but not excessive supply of eggs to meet the needs of consumers, and so forth. That will take up most of tomorrow.

Then, on Friday we will take up an act to authorize certain naval vessel loans, H.R. 9526, to which there will be an amendment offered.

On Tuesday next the Senate will take up S. 1821, the measure dealing with air-cargo. There is a time limit agreement on this proposal.

Also on Tuesday next we will take up the so-called war powers bill; and in between, hopefully, the legislative appropriation bill which should be ready Tuesday or Wednesday. On Friday, or Monday, or Tuesday—and probably Friday—the conference report on Radio Free Europe and Radio Liberty should be ready.

Mr. SCOTT. Mr. President, will the Senator yield briefly with respect to the bill which provides for an adequate but not excessive supply of eggs? Since this is the Easter season, could the majority leader inform me how many is "not excessive"?

Mr. MANSFIELD. I do not know about eggs, but I know that hens are supposedly in excessive supply. [Laughter.]

Do not get me wrong.

Mr. SCOTT. I suggest the Senator wait until the final vote on the equal rights amendment.

Mr. MANSFIELD. I was not being facetious, but I did hear on the radio the other night in connection with this bill that there is an excess of 250 million hens, and that legislation has been recommended by the Committee on Agriculture to correct this imbalance.

Mr. SCOTT. I thank the majority leader.

PROBLEMS IN THE TRANSPORTATION INDUSTRY

Mr. MAGNUSON. Mr. President, with the current emphasis on the environment and the sharpening awareness of the flaws in our transportation system, it is natural that we be concerned. Daily, we search for the answers to the questions which will lead to a sound national transportation policy.

Mr. President, the remarks of John A. Creedy president of the Water Transportation Association, Kentucky Chapter, made recently at the University of Louisville, highlight some of the problems in the transportation industry. Mr. Creedy's remarks show considerable expertise in the field and I ask unanimous consent that the text of his remarks be printed in the RECORD.

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

TRANSPORT POLICY REFORM: CAN PROGRESS BE MADE NOW?

It is a pleasure and a privilege to be back in Louisville again to discuss transportation policy before the American Society of Traffic and Transportation.

The topic is: "Does the transportation industry really want deregulation?"

I could simply say "no" and sit down. But the problem isn't that simple—nothing in transportation is that simple. The concept of deregulation is a target that is changing shape rapidly as we go along—so rapidly that I think it can fairly be said that the deregulation issue is now obsolete.

Karl Marx lived to say he wasn't a marxist. I am told that Freud lived long enough to say he wasn't a freudian. In the end, Keynes denied he was a Keynesian. Similarly the deregulators have been around long enough now to deny they are any longer in favor of deregulation.

In testimony in January Richard W. McLaren, former chief of the antitrust division of Justice, stressed that he was not calling for an end to regulation, but rather a form of re-regulation.

So, to answer the question, we are not talking about the deregulation as it first burst upon us—the abolition of the ICC. There seems to be a growing recognition among shippers and in the Department of Transportation that the problem is not quite so simple as it first appeared, a willingness to say that maybe the deregulation proposal isn't perfect. One doesn't hear quite so often the refrain that those who run the transportation industry are uniquely stupid, that their views should be ignored, that solutions must be imposed on them over their opposition.

The most extreme form of this view was the suggestion advanced last year by one group of shippers that the industry was so incompetent that a commission should be formed, outside the ICC and the DOT, dominated by shippers, to determine cost standards for the industry—rather like asking the fox to guard the chickens.

Some of the errors of the more extremist thinking which so long held the center stage no longer have widespread support. We may be in a new phase in which we are prepared for progress. Dryden, the 17th Century English poet, put it neatly with these lines:

"Errors like straws upon the surface flow
He who would search for pearls must dive below."

It seems to me that a little intensive diving below, a little additional work on the propositions before us could bring back the pearls we all seek, action on a number of important change in national transport policy of a type which reasonable men can agree are inherently sound.

With open-mindedness and good will, we may arrive this year at those far-sighted policies which will enable the industry to attract investment on a basis that is competitive with the rest of the economy and thus forestall the present danger of nationalization and meet the industry's long range responsibility to the expanding economy.

We start with the public statement of the Department of Transportation that their bills are not necessarily the last word in wisdom. The carriers, on their part, have never described the Surface Transportation Act,

which rail, truck and water carriers support, as the complete answer to every problem. Both measures include very useful ideas. There would appear to be a real basis for common action between the DOT and the carriers.

I believe also that there is much common ground between the producers of transportation and the consumers, the shippers. Shippers are expecting the transportation industry to lay out tens of billions of dollars in the next few years for expansion of capacity to meet the needs of the growing economy and for improvement in service. Ultimately that investment must be underwritten by adequate earnings. If the transport industry is to remain under private enterprise, those earnings must be the basis for debt and equity investment on terms competitive with the rest of the economy. Rate levels must be adequate to provide those earnings.

In the last analysis, there is no dodging that issue.

It should therefore be possible for the shippers and carriers to agree on reasonable standards for adequate revenues and earnings, with proper safeguards to assure the shippers that adequate rate levels are indeed translated into adequate new capacity and improved service.

The water carriers have long advocated a method for taking most of the controversy out of the issue of adequate revenues and earnings. We have proposed that a careful study be made of capital requirements of the industry for the next five years or 10 years. Water Transport Association has done this for six of the major barge lines and the amount of money needed to take care of a modest expansion of five per cent a year and to maintain the fleet at an optimum 15 years average age is staggering. Reasonable people should have no problem with rate levels adequate to provide capacity needed by the public. If we show the shippers the role earnings have to play in their interest much of the controversy should fall away. Unless shippers are expecting the transportation industry to subsidize them—and I do not believe this is the case—a meeting of minds on the earnings issue should be possible.

There are a number of issues on which the DOT and the carriers may not agree in detail, but they certainly are in basic agreement in principle. Liberalization of abandonment procedures for unneeded railroad facilities, some kind of government loans or government guaranteed loans, accelerating the elimination of dangerous railroad grade crossings, minimizing discriminatory state taxation and eliminating ICC prescribed rates which are below out-of-pocket cost are broadly non-controversial.

It is hardly worth elaborating on the details of these issues because the public need is so evident.

But so far we haven't been able to resolve two issues of great importance, the lessening of government intervention in transport management decisions and the encouragement of vigorous competition. Of course fostering healthy competition inevitably reduces the need for detailed regulation.

Anyone who criticizes the effectiveness of competition in transportation has to answer the question "compared to what." The unregulated segment of the economy, judging by its price record alone, has performed less well than the transportation industry.

Freight rates have lagged for behind the wholesale and consumer price indices. Indeed, the economists who describe the structure of the unregulated economy say that managers of most of it are "too intelligent" to compete on a price basis. Thus over most of industry we have "administered prices," "mutual forbearance" and a general preference for competing by advertising or by service, but not, if they can help it, on a basis of price.

While we believe that transportation has done well compared to industry generally, and that there is active intermodal price competition in transportation, certainly there is no room for complacency. No one, least of all the ICC, believes the regulatory process is perfect.

As we come down to the wire this year, I suggest that the important changes in national policy on which we will, in the end, all agree will be those changes which greatly improve the regulatory process rather than undermine it.

Everything points in this direction. First, the carriers find many legitimate objections to proposals for deregulation. Second, the shippers are splintered in their views of what needs to be done and have been little help in determining new policies. Beyond the incantation "remove outmoded regulation" the actual proposals founder against the practical realities of the transportation market place.

The rate bureaus, for example, meet the pragmatic needs of both carriers and shippers and cannot be abolished or greatly weakened. If they remain, a public referee on the decision of rate bureaus must also remain. Rate deregulation founders on that basic dilemma.

It should however be possible to reform any abuses of rate bureaus, such as they are, without interfering with their legitimate function. All carriers are agreed on the need to identify and eliminate rate bureau abuses.

But I think we have to give urgent attention to ideas which would lead to the improvement of regulation. It is a proper objective of economic regulation to foster competition to the maximum extent feasible. Both the pressures and incentives of competition help to assure optimum performance in the public interest and lessen the need for regulatory action.

It wonderfully clears the mind in considering the issue of what constitutes a proper concept of healthy competition to review antitrust policies. In the unregulated segment of the economy, ambitious businessmen have tried a wide variety of tactics which, when stripped of all their complexities have a common theme. The would-be monopolist is the fellow who uses his inordinate leverage or market power to prevail on the basis of power and not of efficiency. That's the key. The antitrusters' objective is to make sure that the more efficient but less powerful competitor is not artificially shut out of an opportunity to compete.

Some 12 years ago, the water carrier industry commissioned a study of antitrust policies and at that time recommended that the experience of the antitrusters could both simplify and strengthen the regulatory process.

A fundamental aspect of existing antitrust policy is that it seeks to assure to the public the economic benefits associated with healthy competition—productive efficiency, price and quality rivalry, innovativeness—not by prescribing but by proscribing.

The basic goal is to insure, insofar as possible, that the way will be kept open for competitors to prevail in the market place on the basis of superior efficiency and performance, which advances the public interest, rather than superior power and leverage, which advances only the private interest. Accordingly, a basic approach may be to outlaw, as being truly anti-competitive, efforts to enhance market position through conduct, devices or practices which reflect, not the accomplishments of efficiency and performance, but the wielding of power and leverage.

We can identify explicitly in transportation, as we have in the unregulated segment of the economy, those practices which can and should be outlawed because they lead to the suppression of competition. Supplementing regulatory experience with antitrust experience in factual situations, we can greatly stimulate and expedite the regulatory process and free up new opportunities for competition.

It will interest you that at a forum on March 11 last year at the University of Louisville, before this same group, in commenting on how to strengthen the transportation system, I advocated common action on an industry program by railroads, water carriers and truckers. The suggestion was not an idle one. Over the previous six months I had been visiting with eastern, southern and western railroads and with truckers to explore such a program. Independently, the truckers had been thinking along the same lines. It was very shortly after your meeting last year that the three modes were able to agree on a common program which became the Hartke-Adams Surface Transportation Act.

The program we developed was heavily weighted in favor of the railroads. There was relatively little in it for the water carriers or the truckers. It represented our mutual recognition that the railroad problem was more severe than ours, but of a nature that would reach all of us if it were not turned around. There is today a distinct danger of nationalization of the railroads. If that happened it would be a turning point in the long history of our country because if we can't solve the railroad problems under free enterprise, the rot will spread to the rest of transportation and from there to the electric utilities, from there to coal and from there to steel and who knows where it will end. The truckers, the railroads and ourselves believe that every effort reasonable men can put forward should be exerted to prevent nationalization of the railroads. Our competitive free enterprise system is a bright passage in human experience, more productive, more capable of spreading the benefits of civilized living to more people than any other system devised by man.

The most important single thing about this rail-water-truck alliance is the ability it has demonstrated to reach agreement on important issues. That is new in the transportation industry. Always before we have spent our energies and time defeating each other's proposals.

This is a new force. Shippers, the Congress, the Department of Transportation should use it and build on it.

It is my faith that, working together, we can discover and then achieve in the public interest those broad new policies which men of good will recognize as inherently sound.

UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT AT STOCKHOLM, SWEDEN

Mr. MAGNUSON. Mr. President, in June, more than a thousand delegates from 130 countries will meet at the United Nations Conference on the Human Environment at Stockholm. Their mandate is to arrive at agreement on the first steps of a cooperative global effort to keep this planet habitable for man. Their responsibility is so awesome and their task of such enormity, that few can fully comprehend it at this time. The success of this first international venture in managing man's only habitat is so critical to his biological and physical health that we dare not comprehend its failure.

Preparations for the Conference have been underway now for well over a year. Those of us who have observed these events are confident that the Conference's Secretary-General, Mr. Maurice Strong, was an excellent choice to head up such an important undertaking. He

has been extremely effective in stimulating a broad program of preparatory work at both the national and international levels, and he has brought to the task an infectious enthusiasm that is providing a great deal of hard thinking on the issues that will hold the center of the stage at Stockholm.

Not the least among these efforts is the considerable amount of interest and work that has been generated here in the United States. Our representative on the Conference's Preparatory Committee, Mr. Christian Herter, Jr., Special Assistant to the Secretary of State for Environmental Affairs, is supported by the work of a number of Federal agencies and interagency groups as well as by the generous contributions being made by private organizations of highly qualified experts from the professional, academic and industrial communities. Finally, the Secretary of State has established an Advisory Committee on the Conference, which is chaired by our colleague, the Senior Senator from Tennessee. This committee acts as a channel through which the views of the public can be made known to our representatives to the Stockholm Conference.

The agenda for the Stockholm Conference has been set to include the environmental aspects of six main subject areas, and it is expected that discussions of these areas will lead to the adoption of an action plan. Generally speaking, the six areas include: planning and management of human settlements; natural resource management; identification and control of pollutants; educational and informational aspects; development; and the organizational implications of action proposals.

It is the last of these subjects—the question of what agency will be designed or designated to carry out an effective program of environmental management—that is of particular interest to me. I am persuaded that unless the Conference is able to take decisive steps on the question of how the effort is to be organized, then any agreements that might be reached on other agenda items can never be implemented.

The question of organization of an international environmental effort is one that has concerned and occupied a number of groups and individuals ever since the idea of a global effort was conceived. It is one which continues to be studied with diligence, for I believe there is growing recognition that this may be one of the thorniest problems facing the Conference.

At the center of the problem of organizing a global effort is the question which continues to present the most serious hurdle to the understanding and agreement that the making of public policy requires. That is the question of how to translate scientific information generated throughout the various disciplines to the public decisionmaking level. Among the complex problems facing society today, few contain in such measure the ingredients that make for a full flowering of this dilemma as the one we have tagged "the environmental problem"—in reality, a whole class of problems.

It is axiomatic that solutions to environmental problems—if they are to be achieved—must be based, first, on intelligent assessments of their nature, extent, and consequences. Second, they require that decisionmakers understand the technological possibilities and methods that can be utilized for the amelioration of those problems. Both of these areas are functions of the translation—or transference—of scientific information to the public decisionmaking level.

At this point in time, scientific information on the environment is fragmented and scattered throughout the disciplines. A great number of organizations have been involved for years in one or another of the diverse activities subsumed by the term "environment."

This is demonstrated by the most cursory examination of hundreds of publications whose focus is one or another aspect of man's relation to his physical environment.

That there are a great number of international organizations involved in the diverse activities connected with the environment is demonstrated by a study published early last year by the Committee on Commerce. In that study, we attempted to identify as many international organizations as possible whose functions and interests concerned one or another aspect of the environment. Our report, which is entitled "Environmental Activities of International Organizations," identified about a hundred such organizations. While some had interests that covered a wide range of environmental problems, we found most to be concerned with only a part of the total picture—in many instances, in activities that were incidental to their main function; for example, economic development, food production, disease prevention, or scientific research.

A WORLD ENVIRONMENTAL INSTITUTE

Senators will remember that more than a year ago this body addressed itself to the question of bringing all of this diverse scientific information together so that legislators and other public policymakers could benefit from the knowledge being generated by the scientific community. Senate Resolution 399, which was approved by the Senate on October 9, 1970, recommended that our representatives to the Stockholm Conference propose the creation of a World Environmental Institute, "to act as a global research center and to disseminate knowledge of environmental problems and their solution to all nations of the world . . ." I was proud to have introduced that resolution, which was cosponsored by more than 40 Senators, and I was gratified that it was approved by this House.

I noted, when we passed Senate Resolution 399, that its aims were supported by the international scientific community as represented by the International Council of Scientific Unions, as well as by our National Academy of Sciences Committee for International Environmental Programs and the U.S. Executive Committee for the International Biological Program.

Last June, the Interparliamentary Union adopted a motion which, as I read it, adds the endorsement of yet another distinguished body to the concept of a worldwide clearinghouse for environmental information. At its Conference on the Environment, held in Bonn, the IPU representatives adopted a motion recommending that legislators support "urgent international consultation and action" to arrangements to provide the institutional framework which was contemplated in Senate Resolution 399. Specifically, the IPU motion stated:

> Information on public environmental programs and their implementation both at national and international levels should be centralized in order to give easy access to procedures and techniques which can be of potential benefit to the environment.

And further, the IPU motion stated:

> An international Data Bank whose function it would be to collect information on pollution, to interpret it and make it available to all countries, should be established.

In recent months, Mr. President, two notable studies of this problem of the institutional framework for an international environmental effort have been made. Both of these studies were conducted by highly qualified scholars and scientists. Their recommendations, I believe, deserve the serious attention of our representatives to the Stockholm Conference.

SCIENCE AND INTERNATIONAL DECISIONMAKING

The first of these groups was jointly sponsored by the International Institute for Environmental Affairs and the Aspen Institute for Humanistic Studies. This "International Environmental Workshop" was held at Aspen, Colo., last summer, and its report contains the recommendations of the group for organizing the global environmental effort. I understand the report entitled "The Human Environment: Science and International Decision-Making," has been forwarded to Secretary General Strong. I have read it and commend what I consider its sound conclusions and recommendations to every Member of Congress.

By way of introducing a very brief description of the Institute's recommendations, Mr. President, I want to quote one sentence from the report. It is this:

> The most compelling organizational requirement is to forge an intimate working relationship in international environmental affairs between the intergovernmental community and the world of science and technology.

I was struck, when I read that conclusion both by its logic and by its essential agreement with the conclusions reached by a group of scientists and statesmen who met here at the Capitol in May of last year, at a Colloquim on International Environmental Science. That meeting, sponsored jointly by the Senate's Committee on Commerce and the Committee on Science and Astronautics of the House of Representatives, was attended by a number of distinguished leaders and environmental scientists who met to discuss with Members of Congress the needs of international environmental science. We had a productive 2-day exchange of views which inevitably turned to the question of how scientific knowledge could be organized and used as the basis for policy decisions on what is basically a scientific problem. At the end of the second day's discussions, Dr. Thomas Malone, vice president of the International Council of Scientific

Unions, who acted as rapporteur for the colloquium, in his summary remarks stated a general consensus of the meeting. He said:

> We will have to set up institutions . . . We need a small policy council at the U.N. level to review and to coordinate. We need national governments carrying on monitoring programs, coordinated by specialized agencies. We need regional organizations working together.
>
> But the big need is the knowledge need, and as I sat and listened to these discussions, I became more and more convinced that we do need a World Environmental Institute, which can bring to bear on this problem these sophisticated techniques . . . that will provide the link between informative environmental knowledge and public policy . . .

With this as a background, let me turn now to a brief discussion of the recommendations of the International Environmental Workshop, which I mentioned a moment ago. The report describes the workshop's proposals as "minimal steps" to meet present organizational needs and to generate further institutional partnership in the future. To initiate this institutional system for environmental cooperation, four instruments are recommended:

First. The establishment of a small, dynamic, self-contained unit for environmental affairs at a high level in the United Nations.

The report does not specify the kind of "unit"—whether it take the form of a council or committee, or some other—but assumes that agreement on the functions and roles of such a unit would ultimately determine its administrative form. The purpose of the unit would be to provide an overall focal point and to perform specified central services for member governments as well as for U.N. agencies. Most important, it would constitute liaison between the intergovernmental community and the community of science and technology.

Second. The workshop recommends the establishment, by the world scientific community, of a World Institute for Environmental Research and Development.

This is envisioned as a counterpart to the U.N. environmental unit and as its principal partner in the nongovernmental world of science and technology. The recommendation contemplates the Institute as one removed as far as possible from questions of political motivation, yet linked in some explicit way with the intergovernmental community. Such "insulation" would be insured by provisions calling for financing the Institute through voluntary contributions from governments, and for management of the Institute by the scientific community.

Third. The group recommends that "regional centers of excellence" in environmental affairs be created in major developing areas of the world.

As I understand this recommendation, the regional centers would be essentially independent units, to promote an integrated approach to environmental problems in each region, to provide the scientific information needed by decisionmakers within the region, and to advise—and be assisted by—the environmental unit established within the United Nations. No standardized regional unit is contemplated by the workshop recommendation, but each would reflect patterns of organization commonly found in various regions of the world. One may think of these centers as regional partners of the unit established within the United Nations.

Fourth. The group's final organizational component is the establishment, by voluntary government contributions, of a World Fund for the Environment, to be administered by the United Nations unit for environmental affairs.

While most of the funds required for environmental protection and improvement will probably be invested in national programs by governments and other bodies, the operation of this new proposed international structure, as well as the need for new surveys, research, and educational needs connected with the international approach will require additional expenditures. Financing cannot be accomplished by diverting funds from already-approved programs at the intergovernmental level; most of these are probably not receiving sufficient funding at the present time to carry out their assigned functions. So new sources of financing must be provided to implement new functions, such as filling out the missing links in a complete global monitoring system, aiding the establishment of the regional centers, providing special assistance to developing countries for environmental surveys, and the like.

INSTITUTIONAL IMPLICATIONS OF INTERNATIONAL ENVIRONMENTAL COOPERATION

The second examination of the problem of providing adequate institutional arrangements for environmental protection and management at the international level was made by the Committee for International Environmental Programs of the National Academy of Sciences. The Committee's report, "The Institutional Implications of International Environmental Cooperation" was released on November 1, 1971. The tone of the report is set out in its introduction, particularly in the paragraph following a statement to the effect that the burden of environmental problems on the organizations determining policy is such that, unless institutional capacities are improved we will face "an accelerating decline into chaos." The report's introduction then states:

> The irony here is that organized man is not now using effectively either knowledge or resources currently available for the amelioration of social and environmental problems; nor is he yet moving effectively to generate new knowledge essential to the resolution of these problems. The irony could turn to tragedy if he now fails to direct the rapidly growing potential of science and technology toward coping more effectively with his difficulties. An imperative need to put knowledge more fully at the service of social decision making is the basic factor of the instutitional question.

The Committee's recommendations, which are directed to the Department of State, focuses on issues which are among the principal agenda items of the 1972 U.N. Conference. As stated in the introduction they are to be regarded as "first steps" rather than "ideal solutions" of problems of coming to terms with the environment at the international level. I should like to include those recommendations at this point, with the comment that their similarity to other findings and recommendations I have mentioned commend their serious consideration by those who will represent the United States at the Stockholm Conference.

The report recommends that the U.S. Government:

First. Initiate and responsibly participate, as a matter of policy serving the national interest and the interests of other nations, in international programs designed to cope with critical environmental problems; and

Second. Initiate and support, to this end, the establishment of new, and the adaptation of existing, institutions to assure effective and systematic exploration and treatment of such problems.

Specifically, the report recommends that the U.S. Government support:

> The establishment of a single focal point in the United Nations system to provide central leadership, to assure a comprehensive and integrated overview of environmental problems and develop stronger linkages among environmental institutions and the constituencies which they serve.
>
> The creation of an independent global environmental science advisory and research board to provide scientific counsel to decision makers in intergovernmental and governmental agencies, supported by such research capabilities as are needed to assure and substantiate scientific credibility of judgments rendered.
>
> Proposals, such as those advanced by the UN Intergovernmental Working Group on Monitoring or Surveillance and by the Scientific Committee on Problems of the Environment (SCOPE) of the International Council of Scientific Unions (ICSU), to have the United Nations develop a global monitoring system based on the coordinated use of existing facilities but supplemented by such additional institutional arrangements as will be required to observe, trace, and assess the impact of critical substances affecting man and the biosphere.
>
> The establishment of a world fund for the human environment to support the non-housekeeping activities of the UN environmental unit and to be administered by that unit to meet the costs of catalyzing global environmental action.
>
> Current initiatives by transnational or regional organizations to deal with environmental problems as an integral or supplemental part of ongoing programs and that it encourage and support current trends to establish transnational or regional organizations wherever such arrangements are instituted to address common problems of critical importance and where national capabilities are inadequate to deal with them effectively.

Mr. President, in closing these remarks, I want to restate my conviction that mankind faces no greater challenge than the one posed by the environmental predicament his activities have produced, and will continue to produce, as the earth's growing populations in the very near future continue to exact increasing demands on the planet. The answer to that predicament lies in effective cooperation between the world of science and the institutions of government—both national and international.

The recommendations I have just reported appear to me to call for sensible and feasible first steps toward achieving that cooperation. I hope they will be seriously studied by our delegates at Stockholm in June, and I hope that Senators will examine and support them.

EQUAL RIGHTS FOR MEN AND WOMEN

The Senate continued with the consideration of the joint resolution (H.J. Res. 208) proposing an amendment to the Constitution of the United States relative to equal rights for men and women.

The PRESIDING OFFICER. The joint resolution is open to further amendment. If there be no further amendment to be proposed, the question is on the third reading of the joint resolution.

The joint resolution (H.J. Res. 208) was ordered to a third reading and was read the third time.

Mr. MILLER. Mr. President, I shall vote for the pending proposed constitutional amendment.

For 50 years, women's groups have sought to put an end to discrimination by reason of sex—especially in the areas of education and employment. They have also been understandably resentful of practices and, in some cases, laws which treat their sex as "inferior"—a position which is morally unjustifiable and completely incompatible with an enlightened, progressive society.

I believe they are entitled to have their preferred version of an equal rights constitutional amendment referred to the State legislatures for possible ratification.

I regret that the particular version they have chosen admits of interpretations which could cause serious trouble in the ratification process. For example, will three-fourths of the State legislatures ratify a constitutional amendment under which young women could be drafted and, further, assigned to combat duties?

The Senate rejected an amendment which would have avoided such an interpretation. I voted for the amendment for two reasons: First. I doubt that a majority of the people I represent desire such a result; and second, such a result is not needed to achieve the objectives being sought—objectives which most of us fully support.

However, if ratification should fail, there can still be no doubt but what the Congress is clearly on record against Federal laws which would discriminate against our citizens because of their sex. This, alone, is a major achievement.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent to have printed in the RECORD a statement by the distinguished Senator from Florida (Mr. CHILES).

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

STATEMENT BY SENATOR CHILES

Mr. CHILES. Mr. President, I strongly support the Equal Rights Amendment. This amendment will declare the national policy and supreme law of the land to be that sex discrimination on any level of government is wrong. I think we have at long last come to realize that it is only through such a strong declaration—through an amendment to the U.S. Constitution, that we can eliminate the legal sex discrimination that exists in certain aspects of life throughout our country.

While I recognize that there has been some important progress made toward the goal of equal rights and responsibilities for women and men, particularly in recent years, I know too that definite patterns of sex discrimination persist.

Up until today, we have been trying to eliminate the legal sex discrimination that permeates our society on a purely piecemeal basis. We have passed some laws—title VII of the Civil Rights Act of 1964 for example, which excluded women from juries altogeployment, or the Equal Pay Act; but our legislative action, like our court action has been slow, fragmented, and inadequate.

It is hard for me to believe that today, in 1972, women are sometimes still denied even the basic rights and responsibilities of citizenship. Up until 1966 there were three States which excluded women from juries altogether and even today there is one State which requires that women, but not men, register specially to be eligible to serve on juries. Discrimination against women is evident in the criminal laws of some States, in college admissions policies, in acceptance into the professions; and the business and labor laws of certain States are also often blatantly discriminatory. Many States have so-called "protective" labor legislation—laws that often serve rather to restrict and discriminate than to protect. Sex discrimination in employment is today even obvious in Government employment. Women constituted 34 percent of all fulltime white collar Federal civil service employees in 1967. At that time they filed more than 62 percent of the four lowest grades and only 2.5 percent or less of the four highest grades.

I fully realize there are those who argue that the discriminatory laws, rules and practices could possibly be eliminated administratively, or legislatively without recourse to constitutional amendment. But the Court has refused to hold that discrimination based on sex, like racial discrimination is inherently "suspect" and cannot be justified in the absence of a "compelling and overriding State interest."

We cannot, I believe, wait any longer for Congress or the State legislatures to take the time to weigh, consider and debate their various laws concerning the equality of men and women before the law. And I think it is high time the women of our country had some tangible evidence of this Nation's commitment to their equal treatment. Therefore, I am pleased to support this historic legislation before the Senate today. After careful consideration, I cannot come to any other conclusion than this: Because of the legal sex discrimination in our country today, the best way to rid our social, cultural and economic life of this discrimination is through the passage of the Equal Rights Amendment. I support the House Joint Resolution 208 without amendment.

Mr. BUCKLEY. Mr. President, I have studied the committee report in support of the equal rights amendment with the greatest care, just as I have the arguments on the floor of the Senate in favor of and in opposition to the amendment in its present form.

I find myself in full agreement with the finding that there still exists in our country a discrimination against women which cannot be justified and which ought not to be tolerated. As to this I feel there is virtually no disagreement either within the Senate or within the United States as a whole. The argument, therefore, concerns only the question of how best to redress these legitimate grievances.

In America today we find three factors which affect the relative rights, prerogatives, duties, immunities, and obligations of men and women. Some of these are cultural, others social, and the balance economic. I speak of distinctions based on sex, deferences conferred because of sex, and discrimination which is predicated on sex. Only the last, I submit, is the proper target of the amendment now under consideration and of the enormous effort by the women of America to redress their longstanding and legitimate grievances. Yet the proposed equal rights amendment would have the inevitable effect of obliterating all of these differentiations—these distinctions, deferences, and discriminations—in the name of an abstract equality, of whether they in fact infringe upon the substantive rights of women.

It is because of this—because, quite specifically, of my deep respect for women—that I cannot support the amendment; and I cannot support it because whatever the intentions of its sponsors, I think we will inevitably find it tugged and twisted and extended far beyond the limits of commonsense and reason. I am opposed to the proposed amendment because, in its attempt to eliminate discrimination against women, it will at the same time inevitably strike down those distinctions and those deferences which our society now extends to women. It seems to me that the discriminations which all of us want to see ended can be more effectively accomplished in other ways, as I shall discuss later in my remarks.

Now I recognize that many militants regard the deferences and distinctions which are embedded in our social customs as discriminatory per se. Yet, if in fact these customs and attitudes do not penalize women, I cannot see why we should be forced to abandon them. Yet that is precisely what would happen to many of our existing conventions based on the analyses given by the proponents themselves.

Let me merely cite a few examples of the effects of the equal rights amendment which are reported in the committee report, and in an article in the Yale Law Journal, which has been cited by the principal proponents of the amendment as best describing its probable consequences.

One of the most immediate and obvious results of the amendment would be to make women equally subject to being drafted into military service as men; and more than that, "women will serve in all kinds of units, and they will be eligible for combat duty." Quite frankly, I cannot see why we should adopt a constitutional amendment which would preclude American society from determining that the obligation to serve in the infantry and other combat forces will be restricted to men. I cannot, for the life of me, see where this distinction would relegate women to the category of "second class citizens."

We are also told, with respect to deferment policies for parents with dependent children, that such policies "could provide that one, but not both, of the parents would be deferred. For example, whichever parent was called first might be eligible for service; the remaining parent, male or female, would be de-

ferred." This despite the fact that the mother in our country usually has the primary, direct responsibility for the care and upbringing of children. While stating unequivocally that women would be as subject to combat duty as men, the article in the Yale Law Journal mentions that "it is important to remember that all combat is dangerous, degrading and dehumanizing." If this be so, then why is it wrong for our society as a whole men and women alike, to conclude that it is to our social benefit to see to it that that parent who is most closely associated with the upbringing and training of the next generation is spared that "degrading and dehumanizing" experience?

Let us move on to the field of criminal law. We are told by the proponents of the amendment that—

> Statutory rape laws, which punish men or having sexual intercourse with any woman under an age specified by law—(would) suffer a double defect under the Equal Rights Amendment. To be sure, the singling out of women probably reflects sociological reality . . . Likewise, in this society, the bad reputation and illegitimate child which can result from an improvident sexual liaison may be far more ruinous to a young woman's psychological health than similar conduct is to a young man's. But the Equal Rights Amendment forbids finding legislative justification in the sexual double standard.

With respect to the traditional concepts of parental and familial obligations, the proposed amendment would have, according to its sponsors, the following effects:

> In ninety percent of custody cases the mother is awarded the custody. The Equal Rights Amendment would prohibit both statutory and common law presumptions about which parent was the proper guardian based on the sex of the parent. . . . In all states husbands are primarily liable for the support of their wives and children . . . (but) the child support sections of the criminal nonsupport laws . . . could not be sustained where only the male is liable for support. . . . The Equal Rights Amendment would bar a state from imposing greater liability for support on a husband than on a wife merely because of his sex.

These, then, are the admitted practical consequences of the adoption of the proposed amendment. I would like to suggest, however, on the basis of our experience with the sometimes extravagant extension of newly defined rights in other fields, that in due course extremist groups will demand, and some Federal regulators and some Federal courts will concede, other interpretations too bizarre to contemplate.

Mr. President, this entire discussion and debate rests at bottom on certain assumptions about the meaning of the word "equality."

It is a word of singularly elusive meaning, and it is therefore incumbent upon Congress, in passing on this proposal, to make as clear as it possibly can just what is intended. As Mr. Justice Frankfurter once remarked:

> Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effectuate a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the lanugage of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek and effectuate, and he ought not to be led off the trail by tests that have overtones of subjective design.

It is here, I must confess, that in seeking to limit the ambiguity of the word "equality" to an irreducible minimum, I find the proponents of the measure to be less than fully enlightening. From the outset, proponents of the amendment both within Congress and without, have oscillated between two conflicting interpretations of the amendment's central purpose. Even now, on the eve of the vote, they seem uncertain as to which understanding ought to operate as the controlling intent.

The first interpretation, which derives from what might be called the "unisex" approach to the problem, holds in effect that any lgeal classification based on sex would be per se unconstitutional under the proposed amendment. The second interpretation, seeking to avoid the necessary rigidities of a per se rule, holds that sexual classifications are valid provided that they are applied equally to both sexes.

The first view is articulated by Prof. Thomas I. Emerson and others, who in the Yale Law Journal article so widely praised and disseminated by congressional sponsors of the amendment, writes as follows:

> The basic principle of the Equal Rights Amendment is that sex is not a permissible factor in determining the legal rights of women, or of men. This means that the treatment of *any* person by the law may not be based upon the circumstance that such person is of one sex or of the other.

The second view will be found, among other places, in a legal memorandum being distributed by the Citizens' Advisory Council on the Status of Women, which warmly endorses the amendment in its present form. The memorandum states:

> The Equal Rights Amendment would not nullify all laws distinguishing on the basis of sex, but would require that the law treat men and women equally.

The Emerson view would, presumably, obliterate all distinctions based on sex; whereas the council view would, presumably, tend in the direction of "separate but equal." But it is not at all easy to say. It was the Emerson view, presumably, which prompted the Coast Guard recently to promulgate regulations to allow female members of a ship's crew to use washroom and toilet facilities that are also used by male members of a crew. The council view, presumably, would permit separate facilities. But, again, it is not easy to say which view ought to be thought of as controlling the intention of Congress. But if the intention of Congress is ambiguous with respect to something so ludicrous as washroom and toilet facilities, how can we expect the courts to find clarity of intention with respect to a whole host of genuine and important problems of construction that may arise once this amendment is passed? I pity the judge who will be obliged to wallow through the legislative history of this proposal in search of clarity where there is none, vainly trying to pin Congress down where Congress has deliberately sought to be evasive.

Mr. President, I do not commonly find myself in agreement with the editorial writers of the New York Times, and, as it happens, we are in disagreement as to the substantive merits of the proposal now before us. But on the occasion of the passage of the equal right amendment by the House, the Times, I thought, said something that badly needed saying:

> Equal rights for women is a proposition so unarguable in principle and so long overdue in practice that it is a pity to have it approached by the House of Representatives as an exercise in political opportunism. For 47 years that body regularly rejected out of hand all proposals for a women's rights amendment to the Constitution. Now it approves, without committee hearings and after only an hour's debate, a constitutional change of almost mischievous ambiguity.

Despite extended hearings, and despite debate here on the floor, it seems to me that the Senate is indulging precisely the same kind of mischievous ambiguity that possessed the House. At the root of this ambiguity is a fundamental confusion between so-called equal rights—which is in itself a problematic concept, as I suggested earlier—and so-called women's rights. The former tends in the direction of, and if some proponents of the measure are to be believed, actually embraces the idea of sameness and would therefore tend to obliterate altogether any legal distinctions based on sex. The latter, rightly understood, seeks to eliminate only those laws which discriminate against women as such and which relegate them to an inferior legal status. If the latter concept were the controlling intention of the proponents, and if it were certain that the courts would implement that intention and refrain from indulging the excesses of "unisex," I would glady support an amendment designed to accomplish the goal.

But I am convinced, Mr. President, that the present amendment is not so limited, and I am further convinced that adequate remedies exist today to correct the inequities which are the appropriate targets for a women's rights amendment. The most important of these, of course, is the 14th amendment. In the past, some have doubted whether that amendment could be used as an effective vehicle for the elimination of unreasonable classifications based on sex. But the Supreme Court last December clearly opened the door to future litigation to test the constitutionality of all such classifications.

In the case of Reed against Reed, the court struck down an Idaho statute which granted preference to males over females in the appointment of administrators for decedents' estates, holding that the discrimination bore no reasonable relationship to the purpose sought to be accomplished by the law of estate administration.

To all but the most ardent zealots of the women's liberation movement, the decision must be considered as a dramatic breakthrough on behalf of women's rights. And it suggests, as Prof. Paul Freund of Harvard has pointed out, that if the advocates of the proposed amend-

ment had in the past devoted as much time, energy, and money to artful litigation under the 14th amendment as they have in the past year or so to lobbying for the equal rights amendment, the alleged necessity for such a wide-ranging amendment might not have existed at all in 1972. But if past opportunities cannot be recovered, I believe that Reed against Reed bodes well for the future and that a wide variety of unjustly discriminatory laws can be struck down as arbitrary and unreasonable.

The 14th amendment, of course, is not the only legal remedy available to aggrieved women. Title VII of the Civil Rights Act of 1964, which Congress recently amended to provide greatly enlarged enforcement powers for the EEOC, provides yet another powerful tool for the relief of women discriminated against in the field of employment. Litigation under the 14th amendment and under title VII seems to me to provide adequate remedies for the great majority of cases in which women are relegated to an inferior legal status.

It has been suggested that litigation under the 14th amendment, involving as it does a test of "reasonableness," would be unavailing in those cases where women are the ostensible beneficiaries of State legislation, the theory being that the courts would be disposed to uphold laws designed for the benefit of women, notwithstanding their adversely discriminatory character. Given Reed against Reed and certain other cases on the lower Federal court and State court levels, I am not convinced that this argument is so weighty as perhaps it once was.

I am, therefore, encouraged in the belief that a case-by-case approach will produce efficacious results. Certain advocates of the women's liberation movement tend to pooh-pooh the effectiveness of such piecemeal litigation. But experience will testify to the fact, I believe, that rights won by the gradual, if admittedly sometimes tedious process of litigation acquire a more permanent constitutional security than the often ephemeral promises of vaguely worded statutes, fleshed out with grandiloquent humanitarian sentiments but very little else.

Litigation under existing constitutional and statutory provisions would have another advantage, one that is to my mind the most important of all. It is that litigation, proceeding as it does from case A to case B to case C until a rule of reasonable general applicability is framed, is more likely to protect the interests of those women who want and need protection. This is something that very much needs talking about, although given the passions which animate the women's liberation movement it has for the most part been so far ignored.

The most conspicuous and outspoken representatives of the women's liberation movement have a habit of talking as if they were the duly appointed guardians of the women of America. Whether the women of America want or need this kind of guardianship, however, is another matter altogether. I am unaware of any plebiscite granting representative authority to the women's liberation movement from the women of America, nor am I aware of any demonstrable indication that the women of America approve of what their self-appointed guardians would have delivered up for them. On the contrary, as the distinguished Senator from North Carolina has pointed out, in the only detailed poll taken on the subject, the overwhelming majority of those polled revealed a singular indifference, if not hostility, toward the more obvious legal consequences that would flow from the passage of the equal rights amendment. Fully 77 percent of American women opposed equal treatment with respect to military service; 83 percent opposed the idea that a wife should be the breadwinner if she were a better wage earner than her husband; and 69 percent opposed the idea that a woman should pay alimony if she has money and her husband does not.

Yet, as I suggested earlier, if the equal rights amendment were to be ratified, women would be drafted and could be required to serve in combat; States would be barred from imposing greater liability for support on a husband than on a wife merely because of his sex; criminal sanctions for failure to support one's family could not be sustained where only the male is liable for such support; and obligation for alimony could be placed upon either spouse. Such changes in the law may bring joy to the hearts of the more militant advocates of the women's liberation movement, but they are not necessarily in the interests of most American women. As Prof. Philip Kurland, of the University of Chicago, has pointed out:

> There remains . . . a very large part of the female population on whom the imposition of such a constitutional standard could be disastrous. There is no doubt that society permitted these women to come to maturity not as competitors with males but rather as the bearers and raisers of their children and the keepers of their homes. There are a multitude of women who still find fulfillment in this role. This may be unfortunate in the eyes of some; it remains a fact. It can boast no label of equality now to treat the older generations as if they were their own children or grandchildren. Nor can women be regarded as unified in their desire for this change. Certainly the desire to open opportunities for some of them can be achieved without the price of removal of the protection of others.

I concur with Professor Kurland, but I would go him one further. I not only believe that the great majority of American women find fulfillment in their roles as wives and mothers, but I suspect that the great majority of American women are inclined to resent the demeaning, derogatory, and cynical posture taken against marriage and motherhood by some of the outspoken advocates of the women's liberation movement, as if marriage and motherhood were the hallmarks of inferiority and servitude. To be sure, not all feminists share this jaundiced view, a fact for which we can all be thankful. There are many articulate and engaging activists in the movement, and they have made a compelling case for altering many of our laws which unjustly discriminate against women, especially in the area of job opportunities. With many of their grievances I am in great sympathy, but with Professor Kurland, I am satisfied that present constitutional and statutory law provide ample opportunities for redress. I am not at all convinced that the "liberation" of some women requires the removal of legal protections from others or the imposition of greater legal burdens upon those who do not share the goals of the liberationists.

Professor Kurland has written:

> The temper of our times demands instant and simplistic answers to complex problems. And it is this temper that assumes that the cure for such problems lies in the incantation of the word "equality" by our highest governmental means, the Constitution. . . .

I believe that a principled case can be made for the elimination of such laws as may unjustly discriminate against women. The operative word in that formulation, of course, is "unjustly." But "injustice" is no less slippery a term than "equality," and it is difficult in the abstract—as every wise man since Plato has known—to declare fully and finally what it entails. The central difficulty with the equal rights amendment is that it assumes that equality constitutes the whole of justice, and that sameness of treatment constitutes the whole of equality.

I must admit to being somewhat skeptical about the validity of either proposition. I can conceive of cases where the status of women in our society would be advanced by granting or retaining certain legal protections, which, from the perspective of the women's liberation movement, would be considered as remnants of an outmoded "male chauvinism"; but I can also conceive of cases where such ostensible protections or benefits actually work undue hardships upon women and ought therefore to be struck down or modified.

I do not believe, however, that the best way to go about deciding these complex matters is to adopt an ambiguous far-reaching, and ideologically rigid constitutional amendment. I am prepared, in short, to examine each case as it arises, and I am convinced that the Constitution as it now stands, combined with a variety of State and Federal statutory remedies, is sufficient to the task. There are many injustices in this world, but a constitutional amendment, least of all one so vague in its thrust as this one, is not always the best way to eradicate them. Should this amendment be ratified by the several States, I fear that "victory" for some women will have been bought at the price of injuring others. It will not be the first time that a proposal designed to eliminate alleged injustices actually ends up by creating injustices far worse than those it sought to eliminate.

Mr. BROOKE. Mr. President, I support House Joint Resolution 208, the equal rights amendment, presently before us, and believe it should be promptly passed without qualification or change.

The amendment—in 24 simple words—"equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex," gives the women of this country the per-

sonal magna carta they have sought for so long. They seek nothing more than equality. They deserve no less.

Women now outnumber men; they comprise 53 percent of our population. But despite their number, despite their suffrage, the doors of equal opportunity have been shut to them since before the American Revolution. In State after State—instance after instance—the law itself discriminates against them: here, women cannot own property or do business without their husband's—and in some cases the court's—consent. There, a woman cannot get a loan at a bank, sign a lease or invest her own money without her husband's consent. Millions of women in the labor force do not receive social security benefits equal to their payments into the fund if their husband also receives social security. The women who serve in the military do not receive housing allowances and health benefits for their dependents. Women can be, and are, sentenced to far harsher prison terms for an offense which would earn a much lighter sentence if committed by a man.

Many of the laws which "protect" women did, in fact, perform that necessary function 50, 60, or 70 years ago when the sweatshop and the blatant exploitation of women and children were a reality. Tens of thousands of those women were immigrants, newly arrived in this country, unfamiliar with our laws, and desperate for income to support themselves and their families. Unions were in their infant stage, almost impotent. Wages and hours legislation had not been enacted for all our people. Government, at every level, had to throw its weight into the scales as the ally of women and children who had no vote and were powerless to protect themselves.

What was designed to liberate and succor, generations ago, shackles today.

The growth of unions, the economic floor which wages and hours legislation has placed under all workers, an alert media and the public conscience now make most of these unnecessary.

They are, in fact, a roadblock to the realization of the equal-pay-for-equal-work concept.

The statistics condemn the status quo: On an average, families with male heads had an income of $7,783 in 1969; families with female heads had an average income of $4,007.

Only 3 percent of workingwomen earn more than $10,000 per year; yet 26 percent of workingmen earn over $10,000 per year.

One hunts through the professions—business, industry—in vain, for enlightenment in regard to the status of women. Look at education, for example.

Women in the teaching profession are consistently relegated to the less demanding, lower paying positions as elementary and secondary school teachers. Only 10 percent of women college teachers attain the rank of full professor, while 50 percent of the male teachers do so. Women average $576 less per year at the rank of assistant professor; $742 less per year as associate professors; and $1,119 less per year as full professors. Yet 91 percent of all the women in this country with Ph. D.'s are working today—81 percent of them full time.

I wish I could exempt my own profession—the law, from this indictment. I cannot. It is no accident that there are so few women judges. Or that so few women lawyers become partners in the prestigious, affluent law firms of this country.

Mr. President, it is time to call a halt. It is time for Congress to redress the balance. The adoption of this amendment would help to do that.

There are some ancillary benefits for men which will flow from enactment of this amendment—paying alimony to a woman who is self-supporting will become a thing of the past. Men will also inherit and enjoy the same protection which is now afforded to women in business and industry.

But what of the women who desire no change in their present status? Women who want to be mothers and housewives rather than "breadwinners." Women who have always been dependent upon a husband's earned income, retirement pay or survivors' benefits. Women who do not want to invest or own property in their own name.

Those women can rest easy. Those who prefer or elect to retain the status quo may do so. But for most of the 42 percent of American women who are in the work force in some capacity, for the many millions of American women who are single and self-supporting or who are the sole support of other dependents, this amendment guarantees new opportunity and that most elementary but elusive status: equality.

No longer will they be denied the opportunity to hold a job simply because they are women. No longer will they be denied loans, access to housing or other benefits solely on the grounds that they are women.

Equal rights for women is long overdue. I applaud this amendment and support its passage.

Mr. DOLE. Mr. President, this is a significant day for America, After more than a half century, Congress has approved the constitutional corollary of the 13th, 14th, and 15th amendments which guarantee equality of rights to all citizens, regardless of race, and it has brought to full force the spirit of the 19th amendment which extended universal suffrage to all citizens, regardless of sex. Congress has passed the equal rights amendment proclaiming that women are full and equal citizens of this great Nation.

I note this day with a particular sense of its historic importance for the State of Kansas and the Republican Party. I do so because the equal rights amendment was first proposed in Congress by Charles Curtis, a great American who was elected Vice President under President Herbert Hoover. He was also a great Kansan, who devoted virtually his entire adult life to public service through six terms in the House of Representatives and four terms in the Senate. And he was a great Republican, who, in addition to his national offices, was majority leader of his party in the Senate and a widely respected and admired Republican leader on the national level.

The lanaguage of Senator Curtis' amendment was as follows:

Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction. Congress shall have the power to enforce this article by appropriate legislation.

When Senator Curtis introduced the equal rights amendments in 1923, he drew attention, both for Kansans and Republicans, to a solid and forthright position in the cause of women's rights. This position has been maintained and built upon throughout the years, and today I know the Republican Party and the people of Kansas appreciate the significance of having Senator Curtis' initiative fulfilled.

But more than being merely a matter of State or party pride, passage of the equal-rights amendment should be a source of strong national satisfaction in seeing a major step toward the extinction of a fundamental and far-reaching shortcoming in our legal and social systems. This step has been long in coming, but it has at last been taken.

Now we must look ahead. The job has been passed to the legislatures of the States. I am hopeful they will respond as they did last year when the amendment providing for the 18-year-old vote was ratified with the utmost dispatch and regard for the importance of its contents.

More work is in store, but today's action establishes a milestone in the history of women's rights and the rights of the individual. Congressional approval has been secured, and women and men—Americans—can now look ahead to the day when the equal rights amendment will be known by another and more significant name: the 27th amendment to the U.S. Constitution.

Mr. STEVENSON. Mr. President, this is the 50th year that the equal rights amendment has been before the Senate, it having been introduced in every Congress since 1923. Numerous committee hearings have been held over the years, and the amendment has been debated on the floor several times. It has now been debated again in the Senate over the last several days.

As a cosponsor of this amendment, I would like to reiterate my support.

There is but one principle involved, although, as is clear from the discussions, the ramifications are many and varied.

The principle is that sex, by and of itself, cannot be used as a classification to deny or abridge any person of his or her equal rights under the law. This, of course, is more than a mere negative statement that henceforth there can be no legally sanctioned discrimination against women. The amendment should accomplish that, but it will do more. It will tell the Federal Government and the governments of the several States that in all their laws they must set up reasonable distinctions and qualifications based not on the overbroad categorization of sex, but rather on the characteristics of individuals. Certainly, for example, if an occupation requires a basic level of physical fitness, that level can still be required, and it may be that women will not be able to meet those physical qualifications and that men will. Or vice versa. But, under the law it will no longer be acceptable to say that sex by and

of itself is a reasonable factor by which to say that an individual will not be able to hold that job. A man or woman will no longer be denied the right to hold that job, to "pursue happiness," simply because of his or her sex. The burden will be on the State to show that a particular individual does not possess the physical qualities necessary to function in the job.

How the courts and judges of the future will interpret the infinite sets of factual situations which will confront them is not, and can not, be known to us. Similarly, in 1868 it could not be known that within 30 years the Supreme Court would hold that "separate but equal" facilities for blacks and whites would not violate the equal protection of the laws, or that in 1954 the Supreme Court would reverse that initial decision.

What we are doing is enunciating a principle in the Constitution of the United States. There are and will be classifications based on sex which will be held not to deny or abridge any particular individual's equal rights. Indeed, such classifications will be necessary in some cases to assure the individual's constitutional right to privacy. But where such a classification does impinge on an individual's equal rights under the law, there will now be a firm constitutional basis for the courts to end the discrimination.

The 19th amendment, of course, uses language similar to the equal rights amendment when it says that:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

The State of Illinois was the first State to ratify that amendment.

Section 18 of article I of the new Illinois constitution, which became effective last July 1, upholds a principle similar to that of the proposed equal rights amendment:

> The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts.

Illinois is one of only three States to have enshrined this principle in its Constitution.

As a Senator from Illinois, therefore, I feel that I am acting within the traditions of my State as I lend support to the equal rights amendment. The Constitution does not give Congress the final say on constitutional change. Illinois may yet speak again on this issue, this time in its largest context. It is now time to let Illinois, and every State, have that final say.

Mr. TOWER. Mr. President, I rise today in unequivocal support of the equal rights amendment. We have been discussing this matter for some time now and I believe that the time has come for those of us here in the Senate to affirm our support of this amendment and pass the question on to the States, so that they, acting collectively, may finally be able to decide the issue.

I am convinced that we in the United States are not making anything near maximum utilization of the resource we have in our women. From the standpoint of their intellects, their talents, and their capabilities, given the opportunity, women, in many instances, excel at jobs that are traditionally held to be men's jobs.

As a working politician, I have witnessed the effectiveness of women in politics and am more than impressed. In my own instance, I have appointed a woman as my campaign manager. So far as I know, I am the only major statewide candidate in the country to intrust the future of his or her career to a woman. Both of my Texas offices are managed by women. These responsibilities and the commensurate authority, I have delegated to them, not because they are women, but because they have earned it. They have taught me that the traditional taboos against women in such jobs are to be ignored.

Mr. President, I believe that the most certain way in which women's rights can be fully guaranteed is to pass a constitutional amendment. We have tried several times in this decade to resolve this matter by legislation, yet sex discrimination continues to prevail in all too many fields. In 1938, we passed a very significant piece of legislation to guarantee women equal rights in jobs and pay. The Fair Labor Standards Act specifically prohibited an employer from discriminating on the basis of sex in payment of wages for equal work and equal jobs in equal working conditions. In the Civil Rights Act of 1964, we passed an even more important law dealing with equal employment opportunity. Title VII of that act prohibited discrimination in employment by any major firm engaged in interstate commerce. Also covered were labor organizations and employment services. In addition to such Federal laws, there are numerous State laws banning sex discrimination. For example, 35 States have enacted equal pay laws; 16 have adopted fair labor employment laws which specifically include women.

In theory, then, there would appear to be ample guarantee that a woman with the same qualifications as a man should be considered equally with that man for a particular position, that she should receive the same pay and have the same chances for advancement. In practice, however, this has simply not been the case. In 1970, there were 31 million women in America's labor force—or 38 percent of the total number of workers. This represents an increased during the last few decades and, therefore, a fuller use of our Nation's labor potential. Women over 16 are concentrated in the field of clerical work. In fact, this constitutes about 34 percent of the women's working force. Since this field is commonly grouped with white collar jobs, and since white collar jobs often are more remunerative than blue collar work, the large number of women clerical workers would appear to be in a good economic position. However, the median wage of full-time, year-round clerical workers who are women was $4,789 in 1968, while men in this field were earning $7,351.

Unfortunately, the situation is not improving over time despite the enactment of clearly worded legislation. In 1955, the median salary for full-time, year-round workers was $2,719 for women and $4,252 for men. Women were then receiving 63 percent of what men were earning. In 1968, the median salary for women increased in real terms to $4,457; however, that of men had reached $7,664. Speaking in terms of median wage, women in 1968 received only 58.2 percent of what men were earning—a decrease of nearly 5 percent.

One traditional and important field for women in past years has been teaching; it seems somewhat easier to combine this career with family life. Even here, however, there appears to be bias. The National Education Association found that in 1965–66 the median wage for women who were members of teaching staffs in colleges was less than that of men on all professional levels. In fact, women who were full professors had a median annual salary of $11,649 and men, $12,768.

In overall occupational patterns, the position of women in the labor force has deteriorated in recent years. Since the period before World War II, women have become increasingly concentrated in service trades and clerical work; however, their position in professional and technical work areas has become worse over the years—in fact, it dropped from 45 percent in 1940 to 38 percent in 1968. If there were a substantial rationale for such differences in occupations and salary levels, there might be some justification for the existing situation. Instead, more education and more freedom from homemaking tasks indicate the position of women in the labor force should have improved over time.

Also, women have tended to show up as well or better than men in time-on-the-job studies, and their turnover rates are comparable to men's. In fact, women show less tendency to leave jobs as they acquire higher responsibility.

In another important area, we also find evidence which tends to show a biased treatment of the female—education. Education is a major key to individual success in our society, besides being vital to our technological, sociological and psychological progress as a nation. Hearings before the House Special Subcommittee on Education have indicated that higher levels of previous achievements are required of women in order to gain admission to a college or university. In fact, many schools admit fixed proportions of men and women each year—in favor of men.

The courts have not been of much assistance in solving the discrimination problem in either labor or education. Women's work rights have generally not been considered to be covered under the "equal protection" clause. In Muller against Oregon, a leading 1908 Supreme Court case, the Court upheld a limitation on the number of hours a woman could work in a bakery, declaring that sex was a valid basis for classification. Not until passage of the Civil Rights Act of 1964 was this doctrine seriously challenged; however, the EEOC, which has the authority to enforce title VII of the act, has not been very successful to date in winning court cases which it has initiated in response to specific complaints. Only recently has the Supreme Court

agreed to hear a title VII case. Likewise, just a few weeks ago the Supreme Court upheld an Alabama law which prohibits a married woman from obtaining a driver's license in any but her married name.

Mr. President, this recognition of the equal civil rights of women coming as it is over 50 years after the adoption of the women's political rights amendment, is long overdue. Another very basic right this amendment will secure for women is the basic right to contract in their own behalf. It will make certain that women will have full contractual rights with their male counterparts. In our free society, as in any truly free society, contractual rights are a basic ingredient in the freedom syndrome. Clearly, if one is not free to contract as he sees fit, within broadly based public policy limits, then freedom is illusory. I hope that, at this hour in time, we here in the Congress will remove the last vestiges of restrictions on women's civil rights and give this amendment the approval that should have been forthcoming from this great body during the last Congress.

In spite of some of the dire predictions that have been made, I do not feel that any earth-shattering disruptions will come from this amendment. In our system of Anglo-Saxon justice, the most prevalent of all our rules is the rule of reason. All changes that come about will, and should, be in our historical perspective. I have faith in our system, and know that we will do the right thing at the right time.

What we are in effect doing here, Mr. President, is continuing along the historical process of women's equality. As I have stated, this amendment will allow the States, collectively, to decide the issue once and for all. In this way, the legislatures in every State will have the opportunity to fully consult with their constituents and make a separate judgment on the merits of the amendment. This is part of the checks and balances of our constitutional system that has sustained us for so long. When the results are in, I have little doubt that this amendment will be ratified, most probably in record time.

In conclusion, Mr. President, I am pleased to have had a small part in helping to bring about the consideration of this amendment before this body. I hope that it will be quickly sent to the States for their consideration and ratification. Let us proclaim that in 1972 women in America have achieved full equality with men.

Mr. SPARKMAN. Mr. President, I rise in support of the joint resolution proposing an amendment to the Constitution relating to equal rights for men and women. I am proud to remind the Senate that I am an enthusiastic cosponsor of that measure.

I think the time has come for the Senate to go on record. By passing the Senate joint resolution, we are not saying that a woman's place is not in the home. We simply wish to say to the Nation—men and women alike—that if a woman wants to bake bread and garden, that is her choice.

If she wants to be an aerospace engineer or a banker—then she has the right to her choice and full equality in the pursuit of her profession. If she wants to design machinery or become an architect, then she should be able to do so and with the same pay and the same opportunities as a man.

In a nation where equal protection under the law is one of our basic foundations, women too often have been neither equal nor protected.

She has been and is being shortchanged by archaic work laws, by property laws, by limitations that sometimes even make her unemployable. This certainly is one reason why unemployment among women has been so high. The time is now to bring women more into the mainstream of economic life and to seek for her the same quality of life we seek for the Nation as a whole.

We have come a long way in recent years in the field of women's rights, but we have many inequities to overcome before women can share in the general advances in our society.

Some State laws preserve inequities based on social attitudes of 50 years or a century ago. For example, in four States in order to set up her own business, a woman must go to court to prove her fitness. Many States have laws restricting the working hours of women—which prevents them earning the same extra money through overtime that men do. Several States have arbitrary laws stopping a woman from working before or after childbirth regardless of her or her employer's wishes in the matter. Some property and inheritance laws are basically discriminatory against women. Additionally, many States have rules that women may not hold certain jobs or enter certain professions.

In our own Federal Government, Foreign Service wives for almost 200 years were governed by a strict set of rules although they were not employees of the Federal Government. Just this year the State Department has issued welcome new rules for the wives of State, AID, and USIS employees stating that wives could hold jobs or pursue careers abroad, that certain duties cannot be levied on them against their will, and that evaluation of wives' participation or lack of participation in volunteer or other activities cannot be used in the performance evaluation reports of their husbands.

Women hold more property and control three-fourths of all consumer spending in this country. Yet in private enterprise, we find few women in management or positions of power. In fact, a smaller number of top echelon professional jobs are held by American women than in any other developed country in the world.

Only 9 percent of American doctors are women—compared to 50 percent in Russia and 18 to 25 percent in the Western European countries. Only 3 percent of all lawyers are women and only two percent of the judges in the United States. Proportionately, there are more women physicists in Italy than in the United States.

Although education is one field in which women have done particularly well, only 10 percent of college professors are women. Women tend to be held to the elementary and secondary level, and few are promoted to administrative positions. Last year at the Harvard School of Education, where 65 percent of the students are women, only 12 women were on the faculty of 185.

Clearly, the time has come to go on record in favor of equal pay for equal work, for equal opportunity, and equal participation in our national life, and for an end to some of the anachronisms of law regarding women.

Mr. President, various actions on this subject have been introduced in the Congress over the decades, and every President since President Eisenhower has endorsed the equal rights proposal.

About a dozen States have taken official action already in support of the pending amendment, which has received endorsement by such varied organizations as the American Association of College Deans, the National Association of Women Lawyers, the National Education Association, the National Federation of Business and Professional Women's Clubs, and the United Automobile Workers.

Mr. President, I urge my colleagues to join me in support of the Senate joint resolution.

Mr. TUNNEY. Mr. President, I wholeheartedly support the equal rights amendment which provides in part "equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

My colleagues, the junior Senators from Indiana and Kentucky are to be congratulated for their careful and articulate campaign to convince us all that this provision—which has been pending before this body in various forms for the past 50 years—was long overdue and crucial to end various forms of direct and invidious discrimination against a majority of the population of this country: women.

I think it is no longer questioned—and it is amply documented by the Senate hearings in 1970 and the House hearings in 1971—that women are not afforded equal protection under the laws of the United States or by our institutions. Resolutions proposing an equal rights amendment have been introduced in every Congress since 1923, and the amendment for which I vote today was passed without any amendments by the House of Representatives. It is high time for the Senate to cast its vote to assure equality of legal rights for all our citizens.

Accepting the fact that discrimination against women does exist, many people still argue that a constitutional amendment is an inappropriate remedy. First, they say, such an amendment is unnecessary. I disagree. It is true that the 14th amendment, by its terms, guarantees equal protection under the law, but the courts have not interpreted the 14th amendment to protect women from many forms of discrimination. As it was ably stated by "Women United":

The question is not whether the 14th Amendment could provide protection for the rights of women, but whether it has been

interpreted to protect women from discrimination. It has been the contention of equal rights advocates that the equal protection clause should be extended to women. Granted, there has been some progress through recent judicial actions to eliminate sex discrimination. No woman seeking protection of her rights under the 14th Amendment ever won a case before the Supreme Court until 1971, when the court struck down a state law which favored men over women administrators of estates. That case, however, was narrowly confined to its facts. (Reed v. Reed. No. 70–4, November 22, 1971). Unless legislators, by adopting the "era," express their firm conviction that reform must be vigorously undertaken, progress will be slow and costly, with no guarantee of success. It is the highest type of discrimination to require that women assert their rights under the 14th Amendment by having issues of discrimination adjudicated on a case-by-case basis.

I concede that, if the courts were to move forward with regard to interpreting the 14th amendment to afford true equal protection for women, this new amendment could be redundant. Even so, the enactment of this amendment will symbolize and emphasize this country's dedication to providing true equality for all. This sort of dedication cannot be emphasized enough, and I feel it appropriate to include it in our Constitution.

I think that the literature and my colleagues who have been so outspoken on this issue have said about all one could say on the specifics and importance and ramifications of this amendment. I will just add one more voice to theirs: "We must wait no longer to remove this last barrier to equality in our Nation." In this country which prides itself on the freedoms that its people have, it is an outrage that we have waited this long to grant women truly equal treatment under law.

In conclusion, let us take equal treatment under law as a first step, and move on to eliminate the other subtle forms of social and personal discrimination against women that derive from socially ingrained ideas about the woman's proper role. These notions, too, have kept women from developing their full potential. The enactment of the equal rights amendment will go a long way toward providing the kind of dignity and legal status to which every American is entitled: I pledge myself to go even further.

Mr. GAMBRELL. Mr. President. Having made a careful study of the proposed equal rights amendment to the U.S. Constitution, I have concluded that I will vote in favor of its passage through the U.S. Senate. The study leading up to this decision has caused me considerable concern. I have serious reservations about the desirability of this constitutional amendment which might have prompted me to vote against it if passage by Congress insured its adoption. Fortunately, the drafters of our Constitution provided that Congress can only propose amendments to it, and that ratification by three-fourths of the States before an amendment becomes law. If the Senate passes this amendment and consideration of it moves on to the local level, I trust that the people of this country, and especially the women of this country, will fully inform themselves on the consequences of enactment, and will then either support or reject it on that basis.

Careful investigation of the subject reveals that the precise meaning of the amendment in regard to responsibilities of women—as distinguished from rights—and on the legal effect of the amendment with respect to domestic relations and the obligations of support within the family is unclear.

A wide variety of specific questions in these areas are dealt with in the article, "A Constitutional Basis for Equal Rights for Women" Yale Law Journal 871 (1971) by Professors Brown, Emerson, Falk, and Friedman. To mention a few such as marriage, divorce, sexual relations, support and custody of children, and alimony, will illustrate that these issues are not insubstantial.

The amendment is phrased in terms of "equality of rights". However, many authorities suggest that equality of responsibility is also contemplated. Some even go so far as to suggest that sexual identity shall not be recognized in any respect under the law. To me this seems as foolish as to say that no law may take cognizance of the difference between night and day. Permitting laws which recognize this difference is not to say that either night or day is superior, but is simply to recognize that they are not the same.

In regard to the important subject of domestic relations, and the obligations of support within the family, even the Senate Judiciary Committee report is ambiguous. The majority report of the committee states that the ERA "may" have an effect on domestic relations laws, and that courts "probably" would be reluctant to alter the obligations of support within the family. In other words, the family relationship, which is the cornerstone of our society, may have to fly blind until the courts have had an opportunity to define the meaning of the amendment.

Frankly, I do not think that a majority of women, and certainly not of men, in this country want the law to be required to ignore the differences between men and women and I do not so interpret the amendment. At the same time, I think the majority of American men and women support the elimination of discrimination against women, purely on the basis of sex, in areas where an individual's sex is immaterial. The Supreme Court of the United States has, in fact, held this to be the law at present under the Constitution of the United States, Reed against Reed —— U.S. —— 40 U.S. Law Week 4013 (1971). Legislation now could be enacted pursuant to the 14th amendment of the U.S. Constitution which would implement women's rights in this respect. On this basis, I have supported and voted for the Equal Employment Opportunities Act of 1972, and could support other similar legislation.

At the same time, I can appreciate that the enactment of an appropriate constitutional amendment might accelerate the elimination of invidious sex discrimination in areas where it now exists.

But according to many authorities, the equal rights amendment in the form now presented, goes much further than this.

Many women with whom I have discussed the matter, upon being informed of the amendment's potential in the areas which I have mentioned, are inclined to oppose it.

As the matter now stands, I am faced with the obligation of voting on a constitutional proposal, the meaning of which is in question. Yet, the proposal has twice previously received overwhelming support from the House of Representatives, and is heavily favored in the U.S. Senate. Furthermore, it has the ardent support of organized women, although many of them seem to be poorly informed on the legal consequences of the proposal they advocate.

Possibly a happy solution would be to submit the proposal to a referendum among women, before permitting it to become law. However, we do not have this option at the present time.

All things considered, I have concluded that I should not stand in the way of permitting the amendment to be submitted for ratification or rejection at the local level. Therefore, I have concluded to vote for passage of the amendment. However, my vote for its passage through the U.S. Senate, is certainly not a vote in favor of it, without regard to its meaning and regardless of whether the people want it or not.

To me the amendment means that legal distinctions based solely upon sex are prohibited, except in instances where sex as such is the matter under consideration.

Such a change in our fundamental law is the people's business, and a matter for them to decide at the local level. If the amendment, fully understood, is what the American people want, then I will not use my vote in Congress to deny it to them.

Mr. FULBRIGHT. Mr. President, I want the record to reflect my strong support for House Joint Resolution 208, the proposed constitutional amendment insuring equal rights for women. I have actively supported and cosponsored this measure for many years, and I am quite pleased to be able to join the overwhelming majority of Senators who have shown by their vote today the recognition of the justness of the basic principle of this amendment: that sex is not an allowable determinant of the legal rights of men or women. Particularly significant in our action today is that we in Congress, after 49 years of debate, have cleared for the States an undiluted amendment to the Constitution stating simply that:

Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex.

Opponents of this amendment have said that the ERA will bring about too many changes in our society. While it is true that some changes will occur once the amendment has been ratified, it is also true that the changes destined to occur have been needed for a long time. Many questions have been raised expressing fears which are based upon what I believe to be misconceptions about House Joint Resolution 208. These questions have been answered most per-

suasively in each instance. The public record on this measure is quite complete, and I am personally satisfied that the changes which we can look forward to are those which will have a healthy effect upon the fabric of our society. With the passage of this amendment, Mr. President, we will not be forcing social change, but rather we will be helping to provide the legal framework for change that is both just and responsive to the needs and requests of a majority of American citizens.

Mr. HARTKE. Mr. President, although it has been 50 years since women in this country achieved political equality with men, there has not yet been complete realization of equality between the sexes.

For most of that half century, a constitutional amendment which would guarantee such full equality has been before the Congress. Introduced first in 1923 and revised in 1943, I am proud to be the present sponsor of the equal rights amendment which first received the support of the Senate Judiciary Committee 28 years ago and which in 1970 received the overwhelming support of the House.

The substance of the equal rights amendment is contained in the following sentence:

Equality of rights under the law shall not be denied or abridged by the United States on account of sex.

Some maintain that such a constitutional amendment is unnecessary and would represent a "constitutional frill." While the 14th amendment has proved an effective tool for combating discrimination against members of certain groups, notably racial minorities, the Supreme Court has not extended this tool to combat sex discrimination.

That there is a need for the equal rights amendment cannot be disputed. The most indifferent survey of State and Federal laws reveals a dark, insidious pattern of discrimination. For example, laws and practices operating to exclude women from State colleges and universities; dual pay schedules for men and women performing the same jobs; State laws placing restrictions on the legal capacity of married women or on their right to establish a legal domicile; State laws which require married women, but not married men, to go through a formal procedure of obtaining court approval before they may engage in independent business; social security and other social benefits legislation which give greater benefits to one sex than to the other; and areas of family law, military law, and labor law in which women are treated differently from men. Each of these instances of discriminating laws and practices can be abolished one by one, but there is no adequate substitute for a constitutional guarantee against prejudice.

Unfair laws do not create discrimination but merely reflect it. Society and, in this case, men, act out their prejudices by enacting discriminatory laws. The discrimination exists before the law and is reflected in the place which women occupy in our society. In industry and in Government, in the home and in the office, women are paid less, hired last, promoted least and given the least demanding work. Statistics as well as statutes reveal the same sad discriminatory pattern and this is so even though women are now a vital part of the economy. Today, 31 million American working women represent 38 percent of the U.S. work force. Despite the growing number of working women and the enactment of various legislation such as the Equal Pay Act and the Civil Rights Act relating specifically to sex discrimination in employment, economic discrimination against women is worsening, not improving.

In 1955, the median salary of full-time, year-round workers was $2,719 for women and $4,252 for men. Women were thus receiving only 63.9 percent of what their male counterparts received. In 1968, while the median salary for women workers had increased to $4,457, that of men had reached $7,664. In other words, women in 1968 received only 58.2 percent of what their male counterparts earned.

Even in fields traditionally associated with women, such as teaching, the economic bias persists. The National Education Association found that in 1965–66 the median wage of women who were members of college teaching staffs was less than half that of men on all professional levels.

Women suffer from discrimination not only in the money they receive, but also in the jobs they are offered. There is not only a money gap, but also a professional gap. Few women have been allowed to enter the professions. Only 1 percent of Federal judges are women, only 1 percent of engineers are women. Despite greater education for women and more freedom from household tasks, women's job opportunities have declined. In 1940, women constituted 40 percent of the professional and technical work force, but by 1968, they constituted only 30 percent. Once again, we see that the problem is getting worse, not better.

The Equal Rights Amendment which I have proposed has often been reported favorably by the Senate Judiciary Committee, most recently in 1964. It has twice passed the Senate, in 1950 and in 1953, and in 1970 it had the support of 87 Senators. Because of the discussion on this proposal in the 91st Congress, some have suggested that changes be made in the amendment which will assure its passage. In fact, Senate Joint Resolution 8 and 9, and House Joint Resolution 208 embody those suggested changes. I oppose such changes as being unnecessary.

The primary issue is in regard to State enforcement. When the Equal Rights Amendment was first introduced in 1923, the enforcement clause read:

Congress shall have power to enforce this article by appropriate legislation.

This wording of the enforcement clause was adhered to in the resolutions on the Equal Rights Amendment introduced from 1923 to 1943. In 1943, the Senate Judiciary Committee voted to change the enforcement clause by extending the enforcing power to the several States. The enforcement clause as changed by the 1943 Judiciary Committee read:

Congress and the several States shall have the power, within their respective jurisdictions, to enforce this article by appropriate legislation.

The reference to State enforcement was the major change embodied in this revision. In its report, the committee commented on its reasons for opposing the original clause which restricted enforcement to the Federal level—

First, it envisioned geographic uniformity throughout the United States.

Second, it tended to impair the right of each of the several States to determine for itself its public policy.

Third, it surrendered to the Federal Government the power to enforce the article within the several States by appropriate legislation notwithstanding its effect upon such local statutes as those governing—

The title, transfer, and descent of real estate;

Community property;

Domicile;

Public morals, health, and welfare;

Domestic relations; and

Police power.

I see no reason for changing the wording of the enforcement clause.

The clause serves two important functions. In the first place it gives power to both Congress and the State legislatures to pass affirmative legislation implementing the substantive provisions of the equal rights amendment. Provisions of this nature, such as those embodied in the 13th, 14th and 15th amendments, have come to be important in legislative efforts to enforce the rights guaranteed. The Federal and State governments must, of course, exercise the powers conferred "within their respective jurisdictions."

In the second place the provision is designed to avoid the possibility that the conferring of power upon the Federal legislature will exclude the exercise of State power to implement the amendment. As we know, the Supreme Court has sometimes held that the existence of Federal power in a certain area precludes the States from legislating in that area, even though the Federal power has not actually been exercised. In the case of the equal rights amendment, it is clear that many of the problems in assuring equal rights for women will arise in areas where the States have primary jurisdiction, such as marriage and divorce, property, welfare and the like. It is important therefore, that, although Congress should be given full power to enforce the amendment, the grant of such power to the Federal Government be not construed to preempt the States from legislating.

It will be noted that, in the only other recent amendment which posed a similar question of assuring the continuance of State power—namely the 18th amendment enacting prohibition—a similar provision was included.

Of course, if there is a conflict between legislation passed by Congress and legislation passed by a State, the Federal law takes precedence under the supremacy clause. In the absence of such a conflict, however, the equal rights amendment establishes that the States and the Federal Government have concurrent jurisdiction.

Some have suggested that the provision quoted above might be subject to two interpretations which "would obstruct, not advance, the purposes of the amendment." It is my opinion that such concern is unnecessary. Dean Lewis Pollak of Yale Law School, first voiced such concern in 1970. He believes that Federal courts might read this cause as requiring the same degree of judicial deference to State statutes purporting to implement the amendments as would normally be given to Federal statutes implementing the amendment;" and "this could mean that the parochial—and, as might often be the case, mutually inconsistent—statutes of State legislatures would assume an unprecedented degree of apparent dignity and consequent unreviewability merely because they were denominated implementations of this amendment."

I agree with Professor Emerson's response to Dean Pollack. Professor Emerson stated:

I do not follow the reasoning on this. There is no constitutional doctrine that the Supreme Court gives less deference to action of State legislatures than it does to action of the Federal legislature. To the extent that any such result obtains in practice, it is due to basic factors inherent in the nature of the Federal system and the function of the Supreme Court. I cannot believe that the Supreme Court would alter its attitude or position on these matters because of a faint, hidden implication in the concurrent jurisdiction clause of the Equal Rights Amendment. Only an explicit command could effectuate such a basic alteration of constitutional law and practice.

The arguments made by Dean Pollak are well worth considering. They have convinced a number of constitutional scholars within the past year. Nonetheless, it is still my contention that such fears can be overcome by developing the proper legislative history stressing that my version of the equal rights amendment is not to preempt the Federal Government from acting to enforce the amendment but to avoid the possibility that the conferring of power upon the Federal legislature will exclude the exercise of State powers to implement the amendment.

Another difference between the current resolution pending on the floor and the traditional equal rights amendment is a requirement that the amendment be ratified within 7 years and that, if ratified, it not take effect until 2 years from the date of ratification. Only four of the 25 amendments adopted so far have contained a requirement that they be ratified within 7 years, and none of the adopted amendments has included a stipulation that it not take effect until 2 years following ratification.

No such provision appears in the 19th amendment establishing women's suffrage, the one most comparable to the traditional equal rights amendment. Nor does any such provision appear in the last three amendments adopted—the 23, 24, and 25. It seems clear that the 7-year limitation has not been considered necessary in the past. Furthermore, the assumption that the States will act within a 7-year period may well be erroneous.

If the States follow the Congress' example in action on the equal rights amendment, it is quite unlikely that the equal rights amendment will be ratified within 7 years. If there is such a delay, then we must begin the entire process once again. I think that the women who have been involved in the equal rights struggle for any length of time can easily document the delay and procrastination they have encountered in their efforts to secure equality for women.

In addition, the clause stating that the effective date of the equal rights amendment should be 2 years from the date of ratification rather than 1 year, is unnecessary. The only prior amendment that has had a limitation on its effective date is the 18th amendment and that was 1 year. There is no reason why 1 year should not suffice in the case of the equal rights amendment.

The traditional amendment's provision for a 1-year period is adequate since both State and Federal legislatures would have time to conform their laws during the ratification process. It should be stressed that, just as a Governor can convene the legislature for the sole purpose of acting on State matters, he has the same authority to convene a special session of the State legislature for the purpose of conforming State statutes with the equal rights amendment. In fact, it would probably be more appropriate to convene such a session rather than attempting to change such discriminatory laws during the normal course of legislative business.

Mr. President, during the past year I have been contacted by many women concerned with the passage of the equal rights amendment. Some of them have worked for decades in its behalf. They have endured frustration and delay, but they have remained undefeated and undaunted. In 1970, when the amendment passed the House and had 87 sponsors in the Senate, they watched in disbelief as their efforts came to naught.

Following that disappointment, they watched as the wording of the amendment—wording which had survived more than 20 years of testing—was altered to suit some of the arguments first raised by its opponents. They have watched as many in the House voted for the newly revised amendment thinking that it was the traditional amendment. Today, I join with these women in sharing a sense of frustration and dismay.

Mr. President, I support the traditional amendment and oppose any substitute to it. There can be no substitute for justice. What women want is equality, nothing more, nothing less. I urge the Senate to respond unanimously to this longstanding call to justice.

Mr. SYMINGTON. Mr. President—

Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex.

This statement of principle proposed to be embodied in the Constitution, presages a national and concrete commitment for the equal treatment under law of men and women.

The equal rights amendment concerns legal rights, not private courtesies. In their 1970 report the Missouri Commission on the Status of Women emphasized that:

It is equal legal rights, equality under the law, women are seeking—not to be men or to replace them. Too often equality has been mistaken for sameness.

A St. Louis Post-Dispatch editorial comment is worth repeating:

. . . women's equality has nothing to do with opening doors for them or lighting their cigarettes. Such acts symbolize respect, which equality need not destroy. Nor does equality mean that women, in order to be equal, must be able to perform the rigorous physical labors. After all, many men can't. Women's equality has its immediate applications in the area of job accessibility and salaries, but in the broader context it seeks to assure the breadth of opportunity for self-fulfillment that men now enjoy. It has nothing to do with sameness, and if it ever should the game is up.

To be sure some progress, old and new, has been made in long efforts to improve the status of women.

In 1919 the 19th amendment gave women the right to vote. In 1964 title VII of the Civil Rights Act barred discrimination against women in employment where sex was not a bona fide employment qualification.

Despite these and other changes that have been made in both Federal and some State laws, arbitrary classifications persist in most jurisdictions. As example, in some States women are subject to heavier prison penalties than men for commission of the same criminal offense.

In many States, protective labor laws bar women from certain types of occupations or limit the hours or conditions of employment. Although these laws were well-intentioned, the Equal Employment Opportunities Commission has found that their tendency is to discriminate and restrict opportunities rather than to protect women.

I believe women as well as men should have the right to seek those situations in life for which, as individuals, they are qualified. This concept is at the core of the equal rights amendment and admittedly it presents difficulties in its application to military service.

Whereas women now volunteer and serve admirably in the military services, they do so under limitations as to number; also educational and age requirements are different for women than for men.

It is necessary to recognize that equal rights mean also equal responsibilities. This is not to say, however, that all women would be required to undertake military tasks for which they as individuals might not be suited, any more than all men meet the standards required for induction or for particular assignments.

The duties of citizenship should not be considered any less for young women than for young men; else, as Prof. Norman Dorsen of New York University Law School told the Senate Judiciary Committee, the unequal obligations suggest an inferior status for women:

When women are excluded from the draft—the most serious and onerous duty of citizenship—their status is generally reduced. The social stereotype is that women should be less concerned with the affairs of the world than men. Our political choices and our political debate often reflect the belief that men who have fought for their country have a special qualification or right

to wield political power and make political decisions.

Still another positive aspect concerns fairness in affording women who desire to volunteer to do so and to thereby earn benefits that flow from military service. As example, there are educational benefits under the GI bill, employment preferences inside and outside Government for veterans and also special advantages in home loans.

While the impact of the amendment on domestic relations and child support laws is another troubling area, I have been impressed by the reasoned statements of the Citizens Advisory Council on the Status of Women which support passage. The Council points out that:

> . . . the Equal Rights Amendment would not deprive women of any enforceable rights of support and it would not weaken the father's obligation to support the family. Because it would require complete equality of treatment of the sexes, it might be used to require that the spouses in divided families contribute equally within their means to the support of the children so that the spouse with the children is not bearing the larger share of responsibility for support than the other spouse."

Inasmuch as State laws cover matters relating to marriage, grounds for divorce, property rights of widows and widowers and presumptions as to the parent preferred for child custody, it is well to remember that the Equal Rights Amendment requires the approval not only of two-thirds of the House and the Senate but also three-fourths of the State legislatures.

The ratification process will afford an excellent and needed opportunity for the States to consider the molding of present laws to conform to the greater realities of today's families and to the requirements of the Equal Rights Amendment.

I will vote for the Equal Rights Amendment because I believe it is a symbol needed now to assure that the fundamental law of the United States will afford women an equal opportunity for growth as individuals in accordance with their desires and capacities.

EQUAL RIGHTS—LONG OVERDUE

Mr. HUMPHREY. Mr. President, today is a great day for America. In the next few minutes the Senate will vote overwhelmingly to pass House Joint Resolution 208, the equal rights amendment.

The first equal rights amendment was introduced in the Congress in 1923 and has languished here ever since. The stage has been set since 1920, the year the 19th amendment gave women the vote. Since that time, women have strived to achieve full participation in all facets of American society. Now the time is long overdue for us in Congress to give women what they should have had all along—the rights of all citizens in America.

This afternoon, after 48 long years, we have the opportunity to guarantee their equal protection under the law by voting on final passage of the equal rights amendment.

The case for the amendment has been made clear. We can ill afford to do without the energies and abilities of half of our population. The time has come to bring to the forefront of our national conscience the fact that a nation founded on justice can no longer relegate more than half its population to second-class citizenship.

The American dream—the dream of meaningful participation in all that society offers—must move from dream to reality. The women of America have been systematically excluded from full and meaningful participation. This discrimination tarnishes our Nation and its promise.

The great problem of women in America is a problem of access, alternatives, and opportunity. Women must receive equal pay for equal work. Women must have equal access to leadership positions in business and government. And millions of women—particularly minority women—must be provided with adequate job training so that their opportunities range far beyond domestic employment which often means dead-end jobs at the poverty level.

Today it is not enough that we talk of the Nation's "manpower" needs, we need womanpower as well. You know that when business is bad as it is today the people who are the most expendable are let go first. And all too often the "expendable" people are women.

The problem of women's rights is the problem of human rights. In order to achieve a truly just society, we must attack all aspects of discrimination. Discrimination on the basis of sex will not disappear immediately even with the passage of this amendment today. People will have to change the way they think about the roles of women and men in American society.

As that great American Lucy Stone said in 1855:

> In education, in marriage . . . in everything, disappointment is the lot of the woman. I wish that women, instead of being walking show-cases, instead of begging of their fathers and brothers the last and gayest new bonnet, would ask of them their rights.

Today women are not asking, but finally demanding their full rights as citizens. Are we to remain insensitive to the injustices perpetuated against 104 million of our citizens? Let us begin to redress the injustices of the past by voting overwhelmingly for the passage of the equal rights amendment before us today.

EXPANDING FREEDOM: EQUAL RIGHTS FOR WOMEN; MOSS SUPPORTS EQUAL RIGHTS FOR WOMEN AND MEN

Mr. MOSS. Mr. President, the Senate now faces a rare opportunity to expand equality and liberty in this country. Most of our efforts to extend legal rights in recent years have been directed toward minority groups in our society. Today we have an opportunity to expand equality in the form of a constitutional amendment for the majority of our citizens—for women, who are 51 percent of our population.

Since this amendment was first introduced in 1923, the path toward its adoption has been strewn with parliamentary obstacles. Those have now been swept aside. If the Senate will adopt a constitutional amendment that does not require a conference with the other House, we can insure the passage of an equal rights amendment in this Congress. We can be participants in a very historic event.

WHAT THIS AMENDMENT MEANS

Women face pervasive discrimination in employment practices. This amendment would help to open the occupational structure for those women who desire to work. At present, the median salary income of women is 59.5 percent the level received by men. In spite of the general impression held by the public, this income gap has actually been widening in recent years. It is this kind of discrimination that has led America's teachers to endorse the constitutional amendment by a vote of 83 percent.

Under present law, women are often paid less for jobs that appear to be identical to tasks performed by men. More important than this, however, is the fact that the upper occupational categories are often closed to women, not on the basis of ability, but simply on the basis of being a woman. Though universities are by no means unique, they are one example of this kind of discrimination.

Medical schools received applications from women at an increasing rate over the past three decades. The number of applications rose 300 percent from the period 1929–66. Yet admissions for women actually declined. The average amount of money per scholarship for female students is significantly less than that of male students. The picture does not get better at the graduate level. Many university programs openly discriminate against women in their admission policies. This amendment would mean that such university programs could only exclude women on the basis of qualifications that are applied equally among men and women. There are similar examples throughout society. Universities are by no means peculiar in this discrimination.

The legal rights of America's women would be significantly expanded by the adoption of this constitutional amendment. All married women would be able to hold ownership of personal property; amazingly, some States still prohibit a married woman from holding property in her own name. One State in our Nation imposes jail terms of 30 days on men who are convicted from some crimes, but applies a term of 3 years for women who are convicted on identical charges. This kind of blatant violation of basic equality will no longer be allowed once this constitutional amendment is adopted.

Many of us are now aware of the extensive roots of legal discrimination that still permeate the subsoil of our society. Some States still allow a man to use "passion killing" as a partial defense in court when he feels his marriage has been undone by the acts of his spouse, but do not allow the same defense by women who feel they have been wronged in the same fashion.

These laws often serve to protect men from competition in employment rather than to protect women, as the opponents of this amendment often suggest. When women are not allowed to work more than a limited numbers of hours in some States, and are barred from competing for jobs with certain lifting requirements in other States, then they are often frozen out of jobs. The limitation placed

on these jobs should not be stricken—they should simply be applied to both sexes rather than one. If a job has a requirement for strength and physical stamina, that requirement should be applied equally to both sexes.

This amendment will mean that child support, alimony, and other payments related to separation and divorce will be based on the merits of the argument, such as the earning capacity of the parties and the need established in a given situation. These will no longer be determined on the basis of sex. The Citizens' Advisory Council on the Status of Women reported that

> * * * the data available, though often scanty, indicates that in practically all cases, the wife's ability to support herself is a factor in determining the amount of alimony; that alimony is granted in only a very small percentage of cases; that fathers by and large, are contributing less than half the support of the children in divided families; and that alimony and child support awards are very difficult to collect.

It is not likely, therefore, that such payments will be substantially increased by this amendment; what is likely is that judgments regarding such payments will be based upon justifiable criteria rather than on the basis of sex differences.

What this amendment really means is that women will be judged as individuals. When they apply for jobs, they will be judged on their ability, training, and other job-related factors. They will not be branded categorically and faced with a separate, and often prejudicial, set of standards. They will be free to develop in their own individual way.

WHAT THIS AMENDMENT WILL NOT MEAN

The adoption of the equal rights amendment will not lead to the merging of public restroom facilities. The bizarre charges leveled at this amendment are simply not true. It will not impose quotas on all aspects of hiring.

The equal rights amendment would in all probability lead to the drafting of some women if drafting of men is also in process. But it would not mean that women would serve in every aspect of our military effort: if some military jobs, such as certain aspects of combat action, had requirements that eliminated women, then so be it. Women would not serve in those jobs. Neither would the men who did not qualify for the standards set for that specific kind of activity. This would be allowable under the amendment, as long as the standards are set on the basis of the job performance, and not on the basis of sex.

I have consistently supported the goal of a volunteer army. This would eliminate the kind of debate that occurs over whether women should or should not be drafted. Until we reach that point, women would be called upon to serve their country to the same degree that men serve.

It is not true that this amendment would necessarily result in women being drafted into the Armed Forces to the detriment of the family. At present, men who are the sole support of families may claim exemption. When persons are needed to care for their children, exemptions can be granted. These exemptions simply must be uniform for both sexes.

We must make a distinction between "sameness" and "equality." Let me quote from the report issued by members of the House Judiciary Committee:

> "Equality" does not mean "sameness." As a result, the original resolution would not prohibit reasonable classifications based upon characteristics that are unique to one sex. For example, a law providing for payment of the medical costs of childbearing could only apply to women. In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative.

After the adoption of this amendment, States would have 2 years to clarify their laws on this subject. When present laws create unfair obstacles, I would expect the State legislatures to eliminate those laws. When State laws provide useful protection, such as minimum wage laws in States where only women are covered, I would expect that State to extend those laws to cover all workers regardless of sex. There is ample case law to demonstrate that the courts have the authority to make this kind of extension if the State legislatures do not.

CONCLUSION

The fight for equal rights for women is very close to victory. It is closer than it has ever been before. The time has come, the stage is set, and the need is apparent. I hope that Senators will join together to support these words, unencumbered by any modifying amendments:

> Equality of rights under the law shall not be denied or abridged on account of sex.

EQUAL RIGHTS AMENDMENT PASSAGE IS TIMELY AND NECESSARY

Mr. RANDOLPH. Mr. President, I reiterate my support for the adoption of the resolution insuring equal rights for men and women. I am a cosponsor of this proposed constitutional amendment being debated and have cosponsored several similar amendments in previous Congresses. I have voted against all of the amendments offered to this resolution. Their approval, even in part would have torn into legislative shreds the purpose of this historic effort.

Our Nation was founded on the basis that:

> All . . . are created equal, . . . with certain unalienable Rights, . . . among these are Life, Liberty, and the Pursuit of Happiness. . . .

However, this Declaration of 1776 has not yet applied to those of the female sex.

It is inconceivable to me that, in this supposedly enlightened age, there should be such ponderous deliberation on the equality of humans. Yet, Congress has delayed for five decades the passage of the equal rights amendment, but today will act to rectify this condition.

We are not discussing rights which need be or have been earned but rather rights which American women are willing to accept and desire to receive. There is no such thing as a woman's place. She has always shouldered her share in our society. The contributions of women have been very great in all phases of the development of not only our Nation but the world. Very often, however, we attempt to cut them off summarily from the continuing and expanding productivity of American life. Women have been forced to overproduce and to overperform to overcome the barriers to recognition and acceptance as an effective, viable participant in our society—culturally, socially, and economically.

The enfranchisement of women on August 26, 1920, to participate in the political life of our country was only the first major step in recognizing women's equality under the law. American women have come a long way from the days when nursing and teaching were considered the only proper occupations. Today, one in every three workers outside the home is a women. Women must be encouraged to prepare for whatever jobs they are interested in and aspire to do. No field should be closed to capable and well-trained women. It is not a matter of competition with men but rather permitting each person to make the fullest use of his or her talents. In the recognition of individual differences, we establish a base from which to work on the equalization—not of sex, but of opportunity.

It is past time that these legal barriers be removed. Our affirmative action, of course, will not wipe out sex discrimination prejudices in the minds and activities of private individuals, groups, and companies. By removing the legal restrictions we can accord women greater opportunity to pursue a richer, fuller life and the opportunity to attack the prejudices that continue to exist in the minds of people.

It is appropriate that as we approach our bicentennial that we not only celebrate the creation of our Republic but that we also further the creed on which our great Nation was founded—liberty, justice, and equality for all—by adoption of the proposed 27th amendment to the Constitution. I am certain the necessary 38 States will ratify—and do it soon.

I recommend the Chairman of the Constitutional Amendments Subcommittee (Mr. BAYH) for his leadership and perseverence in this matter and in his continuing efforts to insure that our Constitution and the rights guaranteed therein are available to all Americans. Last year we accomplished such an expansion by the approval of the 26th amendment according 18-19-20-year olds the right to vote, a change which I worked to achieve for almost 30 years.

EQUAL RIGHTS FOR WOMEN—AN AMENDMENT WHOSE TIME HAS COME

Mr. BYRD of West Virginia. Mr. President, there is ample evidence in the report from the Committee on the Judiciary, that equality of rights for women under Federal and State law especially—in employment—does not now exist, and that certain inequities currently and historically suffered by women due to unequal provisions of the law should be eliminated forthwith.

The equal rights amendment to the Constitution now being considered in this body has a legislative history going back almost half-a-century. Shortly after the ratification of the 19th amendment, when women's suffrage became a reality, a constitutional amendment was proposed giving equal rights to men and women. In nearly every Congress since 1923, similar action had been proposed, and resolutions were reported favorably

by the Subcommittee on Constitutional Amendments in the 88th, 89th, and 90th Congresses. Resolutions were reported favorably by the Committee on the Judiciary in the 80th, 81st, 82d, 83d, 84th, 86th, 87th, and 88th Congresses.

House Joint Resolution 208, which we are currently considering in this body, was adopted in the House of Representatives in October of 1971 by the overwhelming margin of 354 to 23. By a vote of 15 to 1, the Senate Committee on the Judiciary, on February 29, 1972, ordered House Joint Resolution 208, Senate Joint Resolution 8, and Senate Joint Resolution 9 reported favorably to the Floor of the Senate, unamended.

It is clear from this legislative history that there is strong support for the equal rights amendment in both the House of Representatives and in the Senate. This is as it should be. Sex should not be a factor in determining the legal rights of women or of men, and the discrimination against women prevalent in our laws in the fields of education, business and labor, and private and public employment is an anchronism. While I am sure that these restrictions stem from an original desire to protect, rather than to dispossess, their effect in today's society is appreciably more toward restriction than protection, and they should be eliminated. The adoption by the Senate of the equal rights amendment is an important and necessary step in that direction.

Mr. ERVIN. Mr. President, at long last I have become convinced that a two-thirds majority of the Senate is going to join the House in submitting the equal rights amendment to the States for ratification or rejection. This being true I would like to make some information available to members of legislatures by inserting it in the RECORD at this point. I ask unanimous consent that two statements made by Prof. Philip Kurland of the University of Chicago Law School and a statement made by Justice Philip Frankfurter, and certain comments made by me thereon be printed in the RECORD.

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

[From the CONGRESSONAL RECORD, Sept. 14, 1970]

THE EQUAL RIGHTS FOR WOMEN AMENDMENT

Mr. ERVIN. Mr. President, one of the most amazing facts in the present debate on the House-passed equal rights for women amendment is that no law professors were called to testify by either the House or the Senate subcommittees considering the matter. It is unbelievable to me that the Congress would seriously consider a proposed amendment to the Constitution which was not discussed at all by those who have spent their lives studying and teaching constitutional law.

In the Senate Judiciary Committee hearings this week, we have attempted to hear several law professors discuss the ramifications of the equal rights for women amendment, if it passes. Yesterday, I placed in the CONGRESSONAL RECORD the statement of Paul J. Freund, of the Harvard Law School, in opposition to this amendment. Today, I ask you to consider the testimony of another outstanding constitutional law expert—Prof. Philip Kurland of the University of Chicago Law School. Professor Kurland is editor of the Supreme Court Review and is truly one of the most knowledgeable men in the United States in his field.

In his statement, Professor Kurland writes that the equal rights amendment is an "instant and simplistic" solution to a complex problem. He foresees many problems resulting from the amendment, including the possible use of quota figures in Federal agencies as a guide to discriminations against women.

While Professor Kurland feels that "the proper answer to the very real problem of inequality now bedevilling some women in this country would be better answered by specific legislation than by the proposed constitutional amendment," he does state that the amendment which I introduced, Senate Joint Resolution 231, would be preferable to the House-passed version.

The passage of a constitutional amendment is serious business, and I hope that every Senator will be able to thoughtfully consider Professor Kurland's statement.

Mr. President, I ask unanimous consent that Professor Kurland's testimony be printed at this point in the RECORD.

STATEMENT OF PHILIP B. KURLAND

I am honored by the Committee's invitation to appear before it today. I am, however, dubious that I can materially contribute to a solution of the problems confronting you. I come with questions not answers.

My bias should be made clear. I am satisfied, though I cannot provide the Committee with documentary evidence, that women in this country suffer from unreasoned discrimination against them in many phases of their lives, not least in the sphere of employment. I am anxious to help diminish such unjustified discrimination. But I am not sure that the proposed constitutional amendment offers a realistic means for bringing about such a result.

My doubts may be based in part on my personal notions about constitutional amendments. I think that they are clearly the best means of bringing about changes in governmental structure. I think they offer an appropriate means for reversal of constitutional construction by the Supreme Court. I think they may be the necessary means for protecting minorities from imposition by majorities and the unenfranchised from imposition by the enfranchised. Women, however, are neither a minority nor unenfranchised. This would suggest to me that the most appropriate means for securing the desired results on their behalf would be by way of appropriate legislation rather than constitutional amendment.

The answer which this Committee is considering, however, is an amendment to the Constitution. H.J. Res. 264 has already passed the House by an appropriate majority. Its provisions also seem to have been endorsed, if not finally, by the necessary majority of the Senate. Such an answer is in keeping with much of the temper of our times that demands instant and simplistic solutions to complex problems, that assumes that the cure for such problems is the utterance of the magic word "equality," and that the proper governmental agency for effecting the cure is the judiciary. All three of these contemporary attitudes are represented in H.J. Res. 264.

I don't think the answer is that easy, much as I wish it were.

The arguments against the amendment, putting aside that of the unenlightened who would endorse the notion that the only proper place for women is as helpmates for men, are four.

First. It is contended that in light of the newly expanded meaning of the Equal Protection Clause of the Fourteenth Amendment, there is no need for further constitutional provision to protect women against invidious discrimination. It is clear that, to the extent the proposed amendment authorizes legislation by Congress and the States, no addition is needed. Section 5 of the Fourteenth Amendment plus the Commerce Clause gives the Congress an almost unlimited reach in commanding equality between the sexes. There are no inhibitions on State legislatures that would prevent them from doing the same, except for the concept of preemption by either federal legislation or the Commerce Clause. The question remains, however, whether the equality talked about by the Court in construing the Fourteenth Amendment is the same equality as is the subject of the proposed amendment. Only if the answer to that question is in the affirmative does the proposed amendment become redundant. The ambiguity of meaning of the proposed amendment does not make clear its equation with current Equal Protection Clause doctrines.

Second. It is argued that the proposed amendment will raise a myriad of legal problems involving such matters as family law and decedent's estates to the status of constitutional issues that will have to be decided by a Supreme Court already unduly burdened with an unbearable load of constitutional business. The answer offered to this argument is that any fundamental change in the social structure of our society to be brought about by constitutional amendment will place such a burden on the federal judiciary. The Court itself has shown no reluctance to add similar social issues to its docket. Insofar as more important matters make claims on the Court's jurisdiction, it remains within the discretion of the Court to decide which cases it will decide. Again, the extent of the burden may well depend upon the clarity of purpose and meaning of the proposed amendment. The more ambiguous it is, the greater the problem of constitutional adjudication will be.

Third. It is said that the proposed amendment will invalidate a host of state laws enacted not for the purpose of discriminating against women but with the objective of favoring them. One can readily see the difficulty of determining whether a law favors or discriminates against women. For example, my classical economist friends would say that laws protecting women against overtime work and night work do not in fact favor them because these laws place women at a competitive disadvantage in the employment market. In any event, the question of the extent to which laws classifying on the basis of sex would be invalidated would again depend on the meaning and purpose of the proposed amendment.

Fourth. It is suggested that the proposed amendment seeks not equality of the two sexes before the law but identity of them. Surely the elimination of differences between men and women cannot be obliterated by constitutional fiat. And the current state of knowledge of the biological sciences is not yet adequate to bring this about as a fact. But once more we are thrown back to the question of the meaning and purpose of the proposed amendment.

It is evident that the language of the proposed amendment is itself too barren to provide sure answers to these objections. It simply provides that: "Equality of rights under law shall not be denied or abridged by the United States or by any State on account of sex." With all due respect to Senator Ervin, I cannot agree with his statement on the floor of the Senate that the difficultly inheres in the construction of the word "sex." For me, at least, it derives rather from the use of the word "equality."

It was almost a century ago that Sir James Fitzjames Stephen, in his book, *Liberty, Equality, and Fraternity,* asserted that "equality is a word so wide and vague as to be by itself almost unmeaning." Nothing that has happened in the intervening years has done anything to make it more specific.

It seems to me, therefore, that it is incumbent on Congress, unless it wishes to leave the matter wholly in the hands of the federal judiciary, to attempt to define, to the extent that it can, what it means by the word "equality" as it is used in the pro-

posed amendment. It can do this in two ways. The first and better way would be to write its meaning into the language of the amendment itself. Certainly this is a difficult undertaking. And perhaps the political situation being what it is, Senators and Congressmen may well believe that it is the greater part of wisdom not to risk the costs of delay in the preparation of the amendment. I would remind them, however, that constitutions are not written for the moment. Henry Clay once said on the floor of the Senate, admittedly with some hyperbole, that constitutional provisions are "not merely for the generation that then existed, but for posterity—unlimited, undefined, endless, perpetual posterity." Perhaps, then, it is worth the cost of delay to present an amendment the meaning of which is as clear as it is in the power of Congress to make it.

The alternative to careful drafting of the amendment itself is the careful preparation of the legislative history, primarily by way of the report of this Committee to the Senate. This is no certain cure for the defects of ambiguity. The resort by Justices of the Supreme Court to the legislative history behind the Reconstruction Amendments makes clear the dangers of this game. Legislative history will as frequently compound the confusion as resolve it. Nevertheless, if this is the only open road, it must be taken.

The essential question to be answered by this Committee's report then, if nowhere else, is what it understands to be the meaning of "equality" as used in the proposed amendment. Again, this is no easy task. Hints may be found in some data of Mr. Justice Frankfurter in his construction of the Equal Protection Clause of the Fourteenth Amendment. In *Whitney* v. *Tax Commission* (309 U.S. 530, 542 (1940)) he said: "The Equal Protection Clause was not designed to compel uniformity in the face of difference." And during the same Term, he announced in *Tigner* v. *Texas* (310 U.S. 141, 147 (1940)): "The Constitution does not require things which are different in fact or opinion to be treated by the law as though they were the same." It was his belief, as stated in *Dennis* v. *United States* (339 U.S. 162, 184 (1950)) that "there is no greater inequality than the equal treatment of unequals." And it was Mr. Justice Holmes who told us that: "The Constitution is not to be satisfied with a fiction." (*Hyde* v. *United States*, 225 U.S. 347, 390 (1912).) I should think that these statements would provide a clue for the meaning of the word "equality" in the context that it is to be used. Governmental distinction between males and females must be justified in fact before it can pass muster under the proposed amendment. If the distinction is based on reason, then the legislation should be presumptively valid. The mere fact that there are two sexes is not reason in itself for distinguishing between them in legislation. On the other hand, that a distinction is drawn between them in legislation should not be sufficient to invalidate the law.

It may be said that this is already the command of the Equal Protection Clause. And it may well be. But there are cases that suggest this is not true. Nor has such a clear doctrine emerged from the Supreme Court's Equal Protection cases as to make this construction certain.

There are other questions to which the Committee should address itself, questions revealed by recent Supreme Court cases and others on their way to adjudication in that tribunal.

One question is whether the proposed amendment would tolerate in certain circumstances a doctrine of separate but equal facilities. Certainly there are still some, albeit old-fashioned, notions of privacy that might properly evoke the use of such a rule.

A second area of concern should be to what extent does the amendment by its terms condemn only governmental action and when does private action become government action for purposes of the amendment. Still further, to what extent is it contemplated that the authorization for legislation contained in the proposed amendment is to be restricted by a limitation to "state action?"

Finally, the Committee might like to speak to the issue whether the proposed amendment contemplates legislation authorizing "compensatory discrimination" or "benign quotas." This necessarily involves the problem of what constitutes proof of discrimination and the problem of remedies. Should it be enough, for example, to show that the ratio of male employees to female employees at the executive level in the Department of Labor or the Department of Health, Education, and Welfare is not in the same proportion as men to women in the population at large? If proof of discrimination is made what are appropriate remedies for its elimination?

When the time comes for the Supreme Court to look to the legislative history of the proposed amendment to aid it in providing answers to these questions, the answers should be there for them to find.

Let me turn to the proposed alternative in S.J. Res. 231. It must be apparent that the Senate proposal answers more of the questions that I have raised than does the House amendment. It certainly does not answer all of them. And it creates a problem of its own, to define more precisely the area covered by the general proposition in light of the exceptions thereto.

There is clearly one fact that speaks up loudly for the choice of the Senate proposal. Times have changed in such a way that it may well be possible for the generation of women now coming to maturity, who had all the opportunities for education afforded to their male peers and who had an expectation of opportunities to put that education to the same use as their male peers, to succeed in a competitive society in which all differences in legal rights between men and women were wiped out. There remains a very large part of the female population on whom the imposition of such a constitutional standard would be disastrous. There is no doubt that society permitted these women to come to maturity not as competitors with males but rather as the bearers and raisers of their children and the keepers of their homes. There are a multitude of women who still find fulfillment in this role. In the eyes of some, this may be unfortunate, but it is true. It can boast no label of equality now to treat the older generations as if they were their own children or grandchildren. Nor can women be regarded as unified in their desire for change. Certainly the desire to open opportunities to some need not be bought at the price of removal of legal protections from others. The Senate proposal would allow for such differences, the House proposal would not.

In summary then, I think that the proper answer to the very real problem of inequality now bedeviling some women in this country would be better answered by specific legislation than by the proposed constitutional amendment. If the route of constitutional amendment is taken, the amendment ought clearly to spell out what it means. If this cannot be accomplished by new drafting, then it should be attempted by explanation in this Committee's report to the Senate. As between the House version and the Senate version of proposed constitutional amendments, there are good reasons for choosing the latter.

[From the CONGRESSIONAL RECORD, Jan. 31, 1972]

VIEWS OF JUSTICE FELIX FRANKFURTER ON THE EQUAL RIGHTS AMENDMENT

Mr. ERVIN. Mr. President, many years ago the late Justice Felix Frankfurter wrote to the New Republic magazine which I feel expresses a great deal of truth about the equal rights amendment that will soon be considered by the Senate. Justice Frankfurter certainly expresses my feelings in his letter when he states that he "cares as deeply as a man can care for the elimination of unjustifiable differentiations in law between men and women," but Justice Frankfurter goes on to criticize the strenuous efforts of the equal rights for women advocates to remove all differences in the law in the treatment of women and men. Justice Frankfurter concludes his letter by stating that—

"The Woman's Party cannot amend nature. But it can add considerably to the burdens already weighing too heavily upon the backs of women, the industrial workers, who are least able to bear them."

I certainly agree with Justice Frankfurter and I hope every Member of the Senate will read his letter as a contribution of a very wise man to the up-and-coming debate on the amendment. Realistically, I feel the soundness of his pronouncements are evidenced by the fact that most labor unions in this country, including AFL–CIO, strongly oppose the equal rights amendment.

Mr. President, I ask unanimous consent that the letter by Justice Felix Frankfurter which appeared in the New Republic be printed in the RECORD.

UNIVERSITY OF CHICAGO,
Chicago, Ill., April 6, 1971.

Representative DON EDWARDS,
House Judiciary Committee,
Rayburn House Office Building,
Washington, D.C.

DEAR MR. EDWARDS: If the record on the equal rights amendment hearings is not yet closed, I should like to append thereto a letter by Felix Frankfurter, written to the New Republic way back in 1924 but which still has, I think, great relevance to the issues pending before the committee.

I regret very much that my mother's very serious illness prevented me from attending the hearings.

Sincerely yours,

PHILIP B. KURLAND.

THE EQUAL RIGHTS AMENDMENT

Miss Crystal Eastman challenges the gallantry of men by offering as a poser, in connection with the "equal rights" amendment of the Woman's Party, the question: "How would you feel about it if you were a woman?" Her question assumes a power of imagination which, alas, has been denied to mere man just because he can only think within his own skin. Therefore, I can't tell her how I would feel about it as a woman. It may be more relevant for me to tell her how I feel about it as one who cares, I suspect, as deeply as a man can care for the elimination of unjustifiable differentiations in law between men and women, but one who also happens to be a lawyer and perhaps familiar with what law can do and what law cannot do, in the significant details that matter.

The legal position of woman cannot be stated in a single simple formula, especially under our constitutional system, because her life cannot be expressed in a single simple relation. Woman's legal status necessarily involves complicated formulation, because a woman occupies many relations.

The law must have regard for woman in her manifold relations as an individual, as a wage-earner, as a wife, as a mother, as a citizen. Only those who are ignorant of the nature of law and of its enforcement and regardless of the intricacies of American constitutional law, or indifferent to the exacting aspects of woman's industrial life, will have the naivete or the recklessness to sum up woman's whole position in a meaningless and mischievous phrase about "equal rights." (I am aware that Crystal Eastman once upon a time knew something about law; but that was long ago and far away. Now she disregards her former learning and writes as a "feminist.") Nature made man

and woman different: the Woman's Party cannot make them the same. Law must accommodate itself to the immutable differences of nature. For some purposes men and women are persons and for these purposes the law should treat them as persons, subjecting them to the same duties and conferring upon them the same rights. But for other vital purposes men and women are men and women—and the law must treat them as men and women, and, therefore, subject them to different and not the same rules of legal conduct.

The unjustifiable legal differentiations as to women still existing in different States vary greatly from State to State. Now that women have the vote, these discriminations will readily yield to correction by appropriate State action, provided the attempts at reform are preceded by an effective analysis of the legal situation in each State, an understanding formulation of remedies and an adequate educational exposition of the evils and remedies as a preliminary to legislation. But in a binding effort to remove remaining differences in the law, in the treatment of women as compared with men, which do not rest on necessary policy based on inherent differences of sex, the Woman's Party would do away with all differences which arise from the stern fact that male and female created He them. The Woman's Party cannot amend nature. But it can add considerably to the burdens already weighing too heavily upon the backs of women, the industrial workers, who are at least able to bear them.

[From the CONGRESSIONAL RECORD, Feb. 4, 1972]

UNIVERSITY OF CHICAGO LAW PROFESSOR OPPOSES EQUAL RIGHTS FOR WOMEN AMENDMENT

Mr. ERVIN. Mr. President, one of the Nation's most outstanding law professors, Philip B. Kurland, professor of law at the University of Chicago Law School and editor of the Supreme Court Review testified last year before the House Judiciary Committee in opposition to the equal rights for women amendment.

In his statement, Professor Kurland maintains that adequate authority now exists for the legislatures of the States and Congress to pass legislation "that is directed to specific evils and effective administration of that legislation will be far more effective in accomplishing the purpose of eliminating invidious discrimination." I agree with Professor Kurland and I think that the advocates of the equal rights amendment could make much better use of their time in bringing forth specific proposals before Congress and the State legislatures that would be designed to correct specific areas of discrimination against them.

Professor Kurland finds a great deal wrong with the fact that the equal rights amendment could be interpreted to abolish all legal differences in the treatment of men and women. Professor Kurland called this "a demand for unisex by constitutional mandate." And, with simple clarity, Professor Kurland explains what is wrong with the unisex amendment. He said:

"There are physiological and biological differences between men and women that are not subject to eradication even by constitutional amendment."

Professor Kurland discusses in detail one very practical problem which could be caused by the passage of the equal rights amendment. I sincerely hope that each Senator, before voting on the equal rights amendment, will think about this problem. Professor Kurland has this to say:

"Times have changed in such a way that it may well be possible for the generation of women now coming to maturity to surrender all special legal protection and privileges. A great majority of them have had all the opportunities for education and training afforded to their male peers, with an expectation of full opportunities to put that education and training to the same use as their male peers. They may well be able to succeed in a competitive society in which all differences in legal rights between men and women were wiped out. There remains, however, a very large part of the female population on whom the imposition of such a constitutional standard could be disastrous. There is no doubt that society permitted these women to come to maturity not as competitors with males but rather as the bearers and raisers of their children and the keeper of their homes. There are a multitude of women who still find fulfillment in this role. This may be unfortunate in the eyes of some; it remains a fact. It can boast no label of equality now to treat the older generations as if they were their own children or grandchildren. Nor can women be regarded as unified in their desire for this change. Certainly the desire to open opportunities to some of them can be achieved without the price of removal of the protection of others."

Mr. President, I ask unanimous consent that Professor Kurland's statement be printed at this point in the RECORD.

STATEMENT BY PHILIP B. KURLAND, PROFESSOR OF LAW, THE UNIVERSITY OF CHICAGO

I am grateful to the committee for its invitation to express my views on the subject of a proposed constitutional amendment to provide "equal rights for women." I am not sure that I have any contribution to make to a subject that has received such extensive attention by the Congress over a period of almost 50 years now.

Indeed, I have but two points to make to this committee on the subject. First, I do not believe that a constitutional amendment is either necessary or appropriate to alleviate the very real discriminations suffered today by women in American society. I say this for two reasons. The discriminations from which women suffer in our society are essentially not those imposed by laws of either national or local governments. I submit, too, that legislation, for which Congress and the States already have ample authority, that is directed to specific evils and effective administration of that legislation will be far more effective in accomplishing the purpose of eliminating invidious discrimination.

My second proposition is that if such an amendment is to be proposed by Congress, its aims and purposes are to be clearly delineated, either in the language of the amendment or by the reports of the committees recommending the amendment to the respective houses of Congress. Congress should particularly indicate whether it is fostering a "unisex" approach or one that bars only invidious discrimination against women. They are not the same, however much some of the sponsors of the proposed amendments would like them appear to be the same.

At the risk of trying to teach my grandmother to suck eggs, I should like to begin by referring to the tortured history of the proposed amendment.

I. SOME LEGISLATIVE HISTORY

Last year, some 47 years after it was first proposed in Congress, a joint resolution to initiate an equal rights amendment was sprung from the grasp of this committee, rushed through the House after a debate of less than 1 hour, and failed of endorsement in the Senate by a whisker. The 1923 version was put simply and ambiguously: "Men and women shall have equal rights throughout the United States and in every place subject to its jurisdiction. Congress shall have power to enforce this article by appropriate legislation." Obviously, the language so chosen was rife with problems of appropriate construction. The 1970 language, in a form that has essentially been used for the last 15 years or so, and repeated in the proposed resolutions under consideration here today, afforded different, but no less challenging, ambiguities. It reads:

"Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Congress and the several States shall have power, within their respective jurisdictions, to enforce this article by appropriate legislation."

The proposal for an equal rights amendment obviously had not lain dormant between 1923 and 1970. After the initial impetus provided by the suffragettes, it emerged again in the period following the Second World War, during which much of what had therefore been considered men's work was ably performed by women. Indeed, in the years 1942, 1944, 1946, 1948, 1950, 1952, 1953, 1956, and 1962, the Senate Committee on the Judiciary had reported favorably on essentially the same proposal as that under consideration in 1970. And, in 1950 and 1953, the Senate had approved those resolutions with the votes of 63 to 19 and 73 to 11, respectively. There was, therefore some irony in the fact that the proposal that had in the past succeeded in the Senate but languished in the House of Representatives should, in 1970, have met its doom in "the other body" after passage in the House of Representatives.

There is an explanation for this. The Senate had not in fact changed its position in the interim. The two successful Senate forays in 1950 and 1953, had been accomplished only after the proposal had been amended by Seantor Hayden's language, which appended the following: "The provisions of this article shall not be construed to impair any rights, benefits or exemptions conferred by law upon persons of the female sex." Had the proponents of the 1970 proposal taken cognizance of this history and accepted the conditions of the Hayden qualifications, I venture that the proposal would have again readily secured Senate acquiescence. The refusal by some protagonists to accept the qualification was probably not, however, inadvertent; it was calculated. It represented a deliberate choice between two different objectives, either but not both of which the proposed amendment might fully serve.

II. CONSTRUCTION AND RECONSTRUCTION

Mr. Justice Frankfurter once told us: "Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effectuate a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek and effectuate, and he ought not to be led off the trail by tests that have overtones of subjective design." If it is the duty of the judiciary to effectuate the aim of legislation, it is no less the duty of the legislation, to the best of its capacity, to make clear what its aims are. It ought to say what mischief it wishes to obviate, what inadequacy it wants to supply, what change of policy it desires to effectuate, or what the plan of government is that it is seeking to formulate. If it is an act of usurpation for the judiciary to read legislation to effect its own aims and purposes, it is an act of abdication for the legislature to fail to state its purposes and aims in framing the legislative act that it promulgates.

The prime difficulty with the proposed 1970 equal rights amendment was that the National Legislature came close to approval of constitutional legislation without defining—without knowing?—its aims and purposes. This is not a lawyer's cavil. It was a defect so patent that newspaper editorial writers could see it. Thus, the New York Times wrote:

"Equal rights for women is a proposition so unarguable in principle and so long overdue in practice that it is a pity to have it

approached by the House of Representatives as an exercise in political opportunism. For 47 years that body regularly rejected out of hand all proposals for a women's rights amendment to the Constitution. Now it approves, without committee hearings and after only an hour's debate, a constitutional change of almost mischievous ambiguity."

The Times itself was guilty of compounding the confusion, for it fell into the trap of thinking that equal rights and women's rights are necessarily descriptive of the same legislative objectives. It is of the essence of the problem that frequently they are not. And so there is merit in its desire for elimination of almost mischievous ambiguity, just as there is merit in the editorial proposal of the Wall Street Journal: "Well, we're all for the ladies, but even so, before we write some new words into the Constitution it would be nice to know what they really do mean."

A. A basic conflict of purpose

The primary problem of construction offered by the proposed equal rights amendment derives from the fact that the movement for women's rights is Janus-faced. The proposed amendment presented one aspect, while much of its support was voiced in terms of its other visage. The first would command the treatment of men and women as if there were no differences between them, even at the price of removing protections and benefits that have otherwise been afforded to females. It was a demand for unisex by constitutional mandate. And much of the benefit of such a proposal, to the extent it was possible to effectuate it, would inure to males rather than females, since equality may be attained by applying to all the rules that had theretofore been applied only to females, such as a lower age of emancipation, no legal obligation of family support, exemption from military service.

The second attitude sought only the elimination of discrimination against women, a ban on treating females as a disabled class. Legislation purporting to afford—and in fact affording—privileges to women that were not also available to men would not run afoul such constitutional provision. The difference is essentially the difference between the amendment without the qualifying Hayden language, and with it. And herein lies the conflict among those who would support some constitutional amendment to abate the legal incapacities of women, certainly a sufficient majority of both the House and the Senate to promulgate a proposed amendment if they could but agree on its purpose and function.

There are some basic difficulties with the unisex approach, not the least of which is that there are physiological and biological differences between men and women that are not subject to eradication even by constitutional amendment. Practically, of course, this may present no difficulties for the very reason that nature cannot be subjected to human laws while humans must bow to the laws of nature. The essential claim for such a declaration of equality of the sexes is its symbolic value. The temper of our times demands instant and simplistic answers to complex problems. And it is this temper that assumes that the cure for such problems lies in the incantation of the word "equality" by our highest governmental means, the Constitution, or by the voice of the Constitution, the Supreme Court of the United States. Without denying the importance of symbols, it is necessary to recognize that when they are only the creatures of the Constitution, thus far at least, their effect has been less than pervasive.

A second difficulty with a constitutional mandate of instant equality of the sexes is that proferred by history. Times have changed in such a way that it may well be possible for the generation of women now coming to maturity to surrender all special legal protection and privileges. A great majority of them have had all the opportunities for education and training afforded to their male peers, with an expectation of full opportunities to put that education and training to the same use as their male peers. They may well be able to succeed in a competitive society in which all differences in legal rights between men and women were wiped out. There remains, however, a very large part of the female population on whom the imposition of such a constitutional standard could be disastrous. There is no doubt that society permitted these women to come to maturity not as competitors with males but rather as the bearers and raisers of their children and the keeper of their homes. There are a multitude of women who still find fulfillment in this role. This may be unfortunate in the eyes of some; it remains a fact. It can boast no label of equality now to treat the older generations as if they were their own children or grandchildren. Nor can women be regarded as unified in their desire for this change. Certainly the desire to open opportunities to some of them can be achieved without the price of removal of the protection of others.

On the other hand there are also difficulties in an amendment that does not ban all legislative distinction in treatment of men and women, that would leave unchallenged those laws that purported to confer, in Senator Hayden's language, "rights, benefits or exemptions * * * upon persons of the female sex." The question when a statute confers a benefit rather than imposing a disability is often difficult to answer. The most cited example of the problem are those laws that provide for minimum wages, maximum hours, limitations on night work, and requirements of sanitary conditions for women workers. Certainly since Louis D. Brandeis fought for the validity of such legislation, it has been assumed by right-thinking people that the legislation was for the benefit of women.

Classical economists, on the other hand, are clear that such laws put women at a competitive disadvantage in the employment market. A Department of Labor study, however, purported to show that there was no difference in women's employment between those States that have laws providing minimum wages or banning night work and those that didn't and only a very small difference between the States that banned women's overtime work and those that did not. This sort of question, whether the legislation affords privilege or imposes disability, however, may be one appropriate or judicial resolution on a case by case basis, with the results dependent on the facts adduced and the values assigned to them.

B. The problem of equality

If an amendment were passed that in effect prohibited all legislative classification in terms of sex, the results might not be desirable but the problems of construction would be minimal. The judicial answers could be mechanical and, therefore easy. The difficulty is that not even the sponsors of such a unisex amendment have made the claim for rigid classification. Apparently embarrassed by the prospect of the abolition of such existent requirements as separate toilet facilities for men and women or the availability of maternity leaves, proponents of the equal rights amendment asserted that certain distinctions could continue to be maintained, so long as the principle of equality is assured. The concept of equality is not, however, one that is easily defined or confined.

The phrase "equal rights" might be repeated an infinite number of times without providing additional guidance to the speaker or listener. Mr. Justice Cardozo noted some time ago that "a great principle of constitutional law is not susceptible of comprehensive statement in an adjective." And it was almost a century ago that Sir James Fitzjames Stephen asserted that "equality is a word so wide and vague as to be by itself almost unmeaning." Nothing that has happened in the intervening years has done anything to make it more specific.

There are suggestions in some of Mr. Justice Frankfurter's opinions to mark the perimeter of a constitutional notion of equality that have an appeal, if only to a small audience. In *Whitney* v. *Tax Commission*, he pointed out that: "The equal protection clause was not designed to compel uniformity in the face of difference." And, in the same term of Court, he announced in *Tigner* v. *Texas*. "The Constitution does not require things which are different in fact or opinion to be treated by the law as though they were the same." It was also his view that "there is no greater inequality than the equal treatment of unequals." Applying these notions in the context of the equal rights amendment, one might work out some generalizations. Governmental distinction between males and females would have to be justified in fact before it could pass muster under the proposed amendment. If the distinction were based on reason, then the legislation should be presumptively valid. The mere fact that there are two sexes should not be reason in itself for distinguishing between them in legislation. On the other hand, the mere fact that a distinction was drawn between them ought not to suffice to invalidate the law. I should think that appropriate data of sociological conditions, especially those deriving from a history of different treatment of the sexes, might warrant the continuance of certain benefits and protections. This should certainly be true of laws relating to domestic relations where marriage contracts were made under laws that created certain expectations or obligations of one spouse to the other, including the male's obligation to support not only his wife but his children as well.

C. The Equal Protection Clause

Such a construction necessarily raises the question whether the equal protection clause of the 14th amendment does not already afford all that the proposed equal rights amendment would offer. The difficulty is that the other informed answer must be that it probably does, but we have no definitive construction by the Supreme Court to give us adequate assurance. Certainly there are cases in the past that raise some doubts that this notion of nondiscrimination on the ground of sex has yet been constitutionally established. Certainly *Breedlove* v. *Suttles*, *Goessart* v. *Cleary*, and *Holt* v. *Florida*, to the extent that they are still viable precedents, do not make it clear that classification by sex is yet regarded, under the 14th amendment, as a "suspect classification" like those of race or religion.

On the other hand, there can be little doubt that the 14th amendment together with the Commerce clause give more than adequate authority to the national legislature to ban discrimination on the basis of sex. And the 1964 Civil Rights Act affords ample evidence that the power can be utilized where the legislature finds that such invidious discrimination needs extirpation.

The scope of the 14th amendment as a direct restraint on Government action still reveals some ambiguities, however, that would also trouble the proposed equal rights amendment. To what extent is the constitutional ban to be read as one against State action only? When is individual action to be treated as State action? And to what degree does the constitutional ban on discrimination authorize legislation providing for "reverse discrimination" or "benign quotas?" If a new amendment does not—and it is not likely that it will—reveal the answers to these questions in its language, it would be helpful to its proper construction to know from the legislative history what Congress

thought to be the proper answer to these questions. As of now, the entire legislative history—from 1923 to 1970—is less than enlightening on these subjects.

I tend to believe that an equal rights amendment would be more important for its enabling clause than for its direct substantive effect, especially if the "unisex" construction were not adopted. And such an enabling clause would certainly add little to what is already provided by the 14th amendment and the Commerce clause. Today, the area of governmentally compelled or sanctioned discrimination against women is very limited and is growing smaller all the time. It should be noted, for example, that some of the primary planks of the "women's liberation" platform, such as the right to abortion, or to "child care centers," would be totally unaffected by the proposed amendment even in its "unisex" version.

III. CONCLUSION

I come back to the point at which I started. I don't think that the controversy over the proposed amendment goes to the question whether invidious discrimination against women should be eliminated, but rather to the question of the appropriate means for accomplishing that objective. If the answer is to be by amendment, which I regard as unnecessary because the legislative power that it would confer already exists, the amendment should be something more than a license to the judiciary to create that kind of amendment that Congress was itself unable to frame. Congress should, at least, choose between a proposal that would purport to say that there are no differences between men and women that are cognizable by law and its alternative that would seek to protect women against discrimination.

Mr. ERVIN. Mr. President, I ask unanimous consent to have printed in the RECORD the minority views expressed by me in respect to the committee report.

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

MINORITY VIEWS OF MR. ERVIN

Is the Equal Rights Amendment to be the Tonkin Gulf Resolution of the American social structure?—Dr. Jonathan H. Pincus, Professor of Neurology, Yale Medical School.

I. INTRODUCTION

To abolish unreasonable and unfair discriminations against women is a worthy goal. No one believes more strongly than I that discriminations which society makes against women in certain areas of life ought to be abolished and they ought to be abolished by law in every case where they are created by law.

To stop discriminations against women we are considering Constitutional amendments which would abolish all legal distinctions between men and women. Therefore, the question to be resolved by the Senate is that: Should all laws which treat men and women differently be abolished and should the Federal government and the State legislatures be forbidden by the Constitution to pass any such legislation in the future?

Before we abolish all legal differences in the treatment of men and women to reach the admittedly unfair discriminations which do exist against women, I believe that we should consider the following questions:

1. What is the character of the unfair discriminations which society makes against women?

2. Does it require an amendment to the Constitution of the United States to invalidate them?

3. If so, would the Equal Rights Amendment constitute an effective means to that end? In other words, would the ERA reach areas in which the Congress does not really want to act?

It is the better part of wisdom to recognize that discriminations not created by law cannot be abolished by law. They must be abolished by changed attitudes in the society which imposes them.

II. DO WOMEN REALLY WANT THE EQUAL RIGHTS AMENDMENT?

One of the recurring myths that surround the equal rights for women amendment is the allegation that all women are for the amendment. This is not so.

The only detailed poll that has been taken on women's feelings on the equal rights question was done by Elmo Roper in September 1971. It is interesting to compare the feelings of women on specific subjects with what the sponsors of the equal rights amendment, including Congresswoman Griffiths, indicate will be the effect of the amendment.

a. In Elmo Roper's poll, 77 percent of the American women disagree "that women should have equal treatment regarding the draft." Yet, there is no doubt that all those interpreting the amendment believe that it will cause women to be drafted and to serve in combat. A *Yale Law Journal* article which the amendment sponsors, including Congresswoman Griffiths, have lauded as explaining how the amendment will work after passage says, "the amendment permits no exception for the military . . . Women will serve in all kinds of units, and they will be eligible for combat duty."

b. In Elmo Roper's poll, 83 percent of American women disagree that "a wife should be the breadwinner if better wage earner than husband." Yet, the supporters of the amendment in the *Yale Law Journal* say that "the equal rights amendment would bar a state from imposing greater liability for support on a husband than on a wife merely because of his sex . . . child support sections of the criminal nonsupport laws could not be sustained where only the male is liable for support."

c. In the Elmo Roper poll, 69 percent of American women disagree that "a divorced woman should pay alimony if she has money and her husband hasn't." Yet, the supporters of the amendment say in the *Yale Law Journal* that "the equal rights amendment would not require that alimony be abolished but only that it be available equally to husbands and wives."

In interpreting these figures, it is important to remember that these large percentages of American women do not want the very things the ERA proposes. The primary sponsors of the ERA, including Congresswoman Griffiths, maintain that: A wife should have the legal responsibility for family support if she is the better wage earner; the alimony laws should apply equally to men and women with the result that a divorced woman should pay if she has the money; the draft laws should apply equally to men and women with the result that women will serve in combat.

So what we have with the equal rights amendment is a proposition that will destroy all legal distinctions between men and women and the majority of men do not want this and the majority of women do not want this.

III. UNFAIR EMPLOYMENT DISCRIMINATION

From the information given me by many advocates of the Equal Rights Amendment and from my study of the discriminations which society makes against women, I am convinced that most of the unfair discriminations against them arise out of the different treatment given men and women in the employment sphere. No one can gainsay the fact that women suffer many discriminations in this sphere, both in respect to the compensation they receive and the promotional opportunities available to them. Some of these discriminations arise out of law and others arise out of an absence of law.

When I sought to ascertain from them the specific laws of which they complain, the advocates of the Equal Rights Amendment have cited certain state statutes, such as those which impose weightlifting restrictions on women, or bar women from operating saloons, or acting as bartenders, or engaging in professional wrestling. Like them, I think these laws ought to be abolished. I respectfully submit, however, that resorting to an amendment to the Constitution to effect this purpose is about as wise as using an atomic bomb to exterminate a few mice.

Let me point out that Congress and the Executive Branch have done much in recent years to abolish discriminations of this character insofar as they can be abolished at the Federal level.

a. Under the Equal Pay Act of 1963 (29 USC 206) Congress made it obligatory for employers to pay men and women engaged in interstate commerce or in the production of goods for interstate commerce equal pay for equal work, irrespective of the number of persons they employ.

b. Under Title VII of the Civil Rights Act of 1964 (42 USC 2000) Congress decreed that there can be no discrimination whatever against women in employment in industries employing 15 or more persons, whose business affects interstate commerce, except in those instances where sex is a bona fide occupational qualification reasonably necessary to the normal operation of the enterprise. Just recently, the Congress has vastly extended the powers of the Equal Employment Opportunity Commission to enforce women's employment rights by allowing the EEOC to seek enforcement orders from the Federal District Court.

c. The President and virtually all of the departments and agencies of the Federal government have issued orders prohibiting discrimination against women in Federal employment, and have provided for affirmative action in the hiring and promotion of women.

Moreover, State Legislatures have adopted many enlightened statutes in recent years prohibiting discrimination against women in employment.

If women are not enjoying the full benefit of this Federal and state legislation and these executive orders of the Federal government, it is due to a defect in enforcement rather than a want of fair laws and regulations. Since the ERA is not self-enforcing, this defect in enforcement will survive the passage of the amendment, and women will still have to bring suits to enforce their rights in the employment sphere with no more remedies than they presently enjoy.

IV. EQUAL RIGHTS AMENDMENT UNNECESSARY BECAUSE OF THE 14TH AMENDMENT

A good case can be made for the proposition that it is not necessary to resort to a Constitutional amendment to abolish state laws which make unfair discriminations between men and women in employment or any other sphere of life. This argument rests upon the Equal Protection Clause of the Fourteenth Amendment which prohibits states from treating differently persons similarly situated, and is now being interpreted by the courts to invalidate state laws which single out women for different treatment not based on some reasonable classification.

To be sure, the Equal Protection Clause may not satisfy the extreme demands of a few advocates of the Equal Rights Amendment who would convert men and women into beings not only equal but alike, and grant them identical rights and impose upon them identical duties in all the relationships and undertakings of life.

It cannot be gainsaid, however, that the Equal Protection Clause, properly interpreted, nullifies every state law lacking a rational basis which seeks to make rights and responsibilities turn upon sex.

My view is shared by legal scholars. Their views on this subject are succinctly expressed by Bernard Schwartz in his recent commentary on the Constitution of the United

States which declares "that a law based upon sexual classification will normally be deemed inherently unreasonable unless it is intended for the protection of the female sex."

The best example of the Supreme Court's willingness to use the 14th Amendment to strike down laws which discriminate against women, thus rendering the ERA unnecessary, is the case of *Reed* v. *Reed*.

The Reed case

On November 22, 1971, the Supreme Court, in a unanimous decision, gave a strong indication that they would find all unreasonable sex-based classifications to be in violation of the equal protection clause of the 14th Amendment.

In the case of *Reed* v. *Reed*, 40 L.W. 4013 (1971), the Court found unconstitutional an Idaho statute requiring preference of male relatives over female relatives for appointment as administrators of an intestate's estate. The Court applied the conventional test of reasonableness and found an "arbitrary preference established in favor of males." The Court continued by saying, "By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the equal protection clause."

A *New York Times* editorial on November 23, 1971, construed the decision to mean that:

"The effect of this ruling is to place the fate of various sexually discriminatory laws on a case-by-case basis. This is a slower but preferable way to correct the evils of discrimination than the passage of the proposed equal rights amendment."

Professor Paul Freund of the Harvard Law School has the same view. He stated in a recent letter to me on the significance of the *Reed* case:

"In view of the *Reed* decision, however, I believe more strongly than ever that the subject should be left to be worked out under the equal protection clause, as are other questions of group classification. The equal protection guarantee, together with the ample legislative powers of Congress, is the best avenue to achieve meaningful equality of the sexes under law. This approach is greatly to be preferred to one that would force all the manifold legal relationships to men and women, from coverage under selective service to the obligation of family support, into a mold of mechanical unity."

Professor Phil Kurland of the Chicago Law School and Editor of the *Supreme Court Review* also wrote to me concerning the significance of the *Reed* case. Professor Kurland is convinced that the *Reed* case will pave the way for action by the courts and the legislatures to rectify many of the admittedly unfair discrimination which confront women, but without the dangers resulting from an absolute Constitutional amendment. Professor Kurland said:

"But I am of the view that a sound program of legislative reforms would do more, especially under the mandate now received from the Supreme Court in *Reed* v. *Reed*, to eliminate more of the grievances that women have against their roles frequently imposed on them in our society. Legislation can get at specific problems in a way that no constitutional provision can."

I believe the *Reed* case indicates that the Supreme Court will act under the 14th Amendment to strike all discriminations of which women now complain and, therefore, I believe the *Reed* case renders the ERA unnecessary.

V. RECENT DEVELOPMENTS IN THE LAW

I firmly believe that recent case law illustrates very dramatically a statement made by Professor Freund last year. He said:

"It seems to me, incidentally, if the energy and dedication that have gone into the movement for the equal rights amendment over the past 40-odd years had been devoted to the selection and the sponsorship of test cases with respect to some of the unjust State laws that we have heard about this morning, a great deal more accomplishment could be shown with respect to the advancement of equal rights than we can boast of today."

Proponents of the equal rights amendment have frequently cited what they believe to be hesitance on the part of courts to deal with inequalities facing women. The Supreme Court particularly has received criticism on this score.

Yet this term the Supreme Court has heard several cases relating to sex discrimination. On October 19, 1971, the Court heard oral argument in a case challenging a provision of the Illinois Juvenile Court Act which regards unwed mothers as parents but does not consider unwed fathers as parents for the purpose of deciding who shall have custody of illegitimate children. *In re Stanley*, 256 N.E. 2d 814 (Ill. 1970), cert. granted, No. 70–5014. In upholding this provision the Illinois Supreme Court held that this is not a denial of equal protection because the distinction between the class of mothers and the class of fathers "is rationally related to the purposes of the Juvenile Court Act" (presumably to protect the best interests of the children). A case heard by the Court on December 7, 1971, involves the holding of the Louisiana Supreme Court that the absence of women on general venire lists for grand jury duty is not cause for quashing an indictment. *State* v. *Alexander*, 233 So. 2d 891 (La. 1970), cert. granted, No. 70–5026.

In a case already decided this term, the Supreme Court unanimously struck down an Idaho statute which required preference of male relatives over female relatives as administrators of intestates' estates. *Reed* v. *Reed*, 40 L.W. 4013 (November 22, 1971). I have discussed this case earlier at length. Chief Justice Burger, writing for the Court, quoted from *Royster Guano Co.* v. *Virginia*, 153 U.S. 412, 415 (1920), to the effect that a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similiarly circumstanced shall be treated alike." *Reed*, slip opinion, p. 5.

Last term the Court reached a decision in a landmark case arising under Title VII of the Civil Rights Act of 1964. In the first sex discrimination case arising under Title VII to reach the Supreme Court, a Court of Appeals decision permitting a corporation to distinguish between women with pre-school age children and men with pre-school age children in hiring was reversed. *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971). The Supreme Court remanded the case for an evidentiary hearing in the District Court as to whether the family obligations of women with pre-school age children are so relevant to job performance that hiring or other employment distinctions based on the fact of a woman having pre-school age children are justifiable as a bona fide occupational qualification.

I think it is very obvious that the Supreme Court is not ignoring the issue of discrimination against women. Certainly the lower courts are tackling the question and usually deciding in favor of women's equality. Many successful employment discrimination suits have been brought under Title VII. For example, numerous state labor laws have been held invalid as being in conflict with Title VII's mandate for equal employment opportunity. A federal district court has held a California statute prohibiting female employees from lifting objects weighing 50 pounds or more to be in conflict with Title VII and, therefore, void. *Local 246, Utility Workers Union of America, AFL–CIO* v. *Southern California Edison Co.*, 320 F. Supp. 1262 (C.D. Calif. 1970). In an earlier decision, a California statute regulating hours and conditions of employment for women was struck down as being in conflict with Title VII. *Rosenfeld* v. *Southern Pac. Co.*, 293 F. Supp. 1219 (C.D. Calif. 1968). Illinois hours limitations for working women have fallen. *Caterpillar Tractor Co.* v. *Grabiec*, 317 F. Supp. 1304 (S.D. Ill. 1970). Ohio legislation restricting female employment in workshops and factories and prohibiting female employees from lifting anything weighing more than 25 pounds has also been held invalid. *Ridinger* v. *General Motors Corp.*, 325 F. Supp. 1089 (S.D. Ohio 1971); *Jones Metal Products Co.* v. *Walker*, 25 Ohio App. 2d 141 (1970).

In addition, certain policies relating to the employment of women have been held to violate Title VII. Recently the Supreme Court declined to review a Seventh Circuit decision holding that a retirement plan which requires female employees to retire at 62, but does not require men to retire until 65 is sex discrimination in violation of Title VII. *Drewrys Limited U.S.A., Inc.* v. *Bartmess*, 444 F. 2d 1186 (1971), rev. denied 40 L.W. 3212 (November 9, 1971). The Court also declined to review a Fifth Circuit ruling that an airline company's refusal to hire males as flight cabin attendants is sex discrimination in violation of Title VII. *Pan American World Airways, Inc.* v. *Diaz*, 442 F. 2d 385 (1971), rev. denied 40 L.W. 3212 (November 9, 1971). In two other cases employers' policies of refusing to hire women for jobs requiring the lifting of weights over a certain amount have been held invalid under Title VII. *Weeks* v. *Southern Bell Telephone and Telegraph Co.*, 408 F. 2d 228 (5th Cir. 1969); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969). An airline's no-marriage rule for stewardesses have been held to constitute sex discrimination under Title VII. *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194 (7th Cir. 1971).

Other employment cases favorable to women have been brought under the Equal Pay Act. For example, payment of men at a higher rate than women for the same job has been held to violate the Equal Pay Act. *Schultz* v. *Wheaton Glass Co.*, 421 F. 2d 259 (3rd Cir. 1970).

Women have also made gains in other areas of sex discrimination. Many of the long-accepted prohibitions and segregations are being removed. An example is state laws prohibiting female bartenders, which have been struck down in New Jersey and California. *Paterson Tavern and Grill Owners Assn., Inc.* v. *Borough of Hawthorne*, 108 N.J. Super. 433 (1970); *Sail'er Inn, Inc.* v. *Kirby*, 485 F. 2d 529 (1971). In another case a federal district court in New York held that the refusal of an ale house to serve women violated the equal protection clause of the Fourteenth Amendment. *Seidenberg* v. *McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593 (1970).

Other suits challenging the treatment of women on equal protection grounds have also been successful. A Pennsylvania statute providing for longer prison terms for women than for men committing the same crimes was held to violate equal protection. *Commonwealth* v. *Daniel*, 430 A. 2d 400 (1968). (See also, *U.S. ex rel, Robinson* v. *York*, 281 F. Supp. 8 (D. Conn. 1968), in which a federal court struck down a similar Connecticut statute.) A school board regulation requiring women teachers to take a leave of absence at the end of the fifth month of pregnancy has been held to violate equal protection.

Cohen v. *Chesterfield County School Board*, 326 F. Supp. 1159 (E.D. Va. 1971). In *Kirstein* v. *Rectors and Visitors of the University of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970), a three-judge federal court held that the denial to women of education equal to that offered men at the University of Virginia at Charlottesville violated equal protection. The court approved a plan setting quotas for the admission of women.

The Justice Department has taken action to aid women in fighting discrimination. In an important suit against Libbey-Owens-Ford, the Attorney General won a decree giving women opportunity to achieve promotions and advancement on the same basis as male employees.

These events are not typical of a society which does not care to eliminate discrimination. Nor are they characteristic of a judicial system determined to maintain the status quo.

VI. HOW WOULD THE ERA BE INTERPRETED

If the Equal Rights for Women amendment is approved, I believe that the Supreme Court will reach the conclusion that the ERA annuls every existing Federal and state law making any distinction between men and women however reasonable such distinction might be in particular cases, and forever robs the Congress and the legislatures of the fifty states of the Constitutional power to enact any such laws at any time in the future. I am not alone in entertaining this fear.

When the so called Equal Rights Amendment was under consideration in 1953, Roscoe Pound of the Harvard Law School and other outstanding scholars joined one of America's greatest legal scholars, Paul A. Freund of the Harvard Law School, in a statement opposing the Equal Rights Amendment upon the ground that they feared that this devastating interpretation might be placed upon it if it should be adopted. This statement made these indisputable observations:

"If anything about this proposed amendment is clear, it is that it would transform every provision of law concerning women into a constitutional issue to be ultimately resolved by the Supreme Court of the United States. Every statutory and common law provision dealing with the manifold relation of women in society would be forced to run the gauntlet of attack on constitutional grounds. The range of such potential litigation is too great to be readily foreseen, but it would certainly embrace such diverse legal provisions as those relating to a widow's allowance, the obligation of family support and grounds for divorce, the age of majority and the right of annulment of marriages, and the maximum hours of labor for women in protected industries.

"Not only is the range of the amendment of indefinite extent, but, even more important, the fate of all this varied legislation would be left highly uncertain in the face of judicial review. Presumably, the amendment would set up a constitutional yardstick of absolute equality between men and women in all legal relationships. A more flexible view, permitting reasonable differentiation, can hardly be regarded as the object of the proposal, since the Fourteenth Amendment has long provided that no state shall deny to any person the equal protection of the laws, and that Amendment permits reasonable classifications while prohibiting arbitrary legal discrimination. If it were intended to give the courts the authority to pass upon the propriety of distinctions, benefits and duties as between men and women, no new guidance is given to the courts, and this entire subject, one of unusual complexity would be left to the unpredictable judgments of courts in the form of constitution decisions.

"Such decisions could not be changed by act of the legislature. Such a responsibility upon the courts would be doubtless as unwelcome to them as it would be inappropriate. As has been stated, however, the proposal evidently contemplates no flexibility in construction but rather a rule of rigid equality. This branch of the dilemma is as repelling as the other."

After analyzing in some detail the laws whose validity might be jeopardized by the Equal Rights Amendment, the statement concluded with these observations:

"The basic fallacy in the proposed amendment is that it attempts to deal with complicated and highly concrete problems arising out of a diversity of human relationships in terms of a single and simple abstraction. This abstraction is undoubtedly a worthy ideal for mobilizing legislative forces in order to remedy particular deficiencies in the law. But as a constitutional standard, it is hopelessly inept. That the proposed equal rights amendment would open up an era of regrettable consequences for the legal status of women in this country is highly probable. That it would open up a period of extreme confusion in constitutional law is a certainty."

Appearing before the Senate Judiciary Committee hearings in September, 1970, it was obvious that Professor Freund has the same view today of the proposed amendment. In a colloquy with me, Professor Freund had the following to say:

Senator ERVIN. I also interpret your statement and what you have said to indicate a conviction on your part that there is grave danger that the courts will interpret the House-passed equal rights amendment, if it is ratified by the requisite number of states, as depriving Congress of the powers it now has under the equal protection clause to adopt legislation which is for the benefit of women?

Mr. FREUND. Yes. I think that is quite right because there must be intended some more absolute standard of equality than the equal protection clause embodies. That would be the point of the amendment.

Senator ERVIN. And if the House-passed equal rights amendment were ratified by the states, thus made a part of the Constitution, it is susceptible of interpretation that it would require the courts to strike down all legal distinctions made between men and women, no matter how reasonable and necessary those distinctions might be?

Mr. FREUND. That is my understanding of what the language as well as the purpose of the sponsors is today.

Professor Philip Kurland of the Chicago Law School also arrived at the same conclusion as Professor Freund. He said:

Professor KURLAND. I would think that the amendment as it is now simply provides that classification by sex by any governmental action is invalid.

Senator ERVIN. In other words, your interpretation of the amendment as presently phrased is that it would be probably interpreted to eliminate sex as a basic for classification in legislation?

Professor KURLAND. If I were charged with the interpretation of the language, that would be the conclusion that I would reach.

Senator ERVIN. If that interpretation would be correct, the law which exists in North Carolina and virtually every other state of the Union which requires separate restrooms for boys and girls in public schools would be nullified, would it not?

Professor KURLAND. That is right, unless the separate but equal doctrine is revived.

Perhaps one of the best guides to a general interpretation of the Equal Rights Amendment can be found in the *Yale Law Journal* article of April, 1971. That article has been called a "masterly piece of scholarship" by Senator Bayh and has been cited by Congresswoman Griffiths, the primary sponsor of the ERA in the House of Representatives, to "help you understand the purposes and effects of the ERA . . ." The *Yale Law Journal* gives us the following guidelines for the general interpretation of the ERA:

1. "The basic principle of the Equal Rights Amendment is that sex is not a permissible factor in determining the legal rights of women, or of men. This means that the treatment of *any* person by the law may not be based upon the circumstance that such person is of one sex or the other." (p. 889) ". . . the principle of the Amendment must be applied comprehensively and *without* exceptions." (p. 890)

2. "Only an *unequivocal ban* against taking sex into account supplies a rule adequate to achieve the objectives of the Amendment." (p. 892) ". . . prohibition against the use of sex as a basis for differential treatment applies to *all* areas of legal rights." (p. 891) ". . . From this analysis it follows that the constitutional mandate must be *absolute*." (p. 892)

3. "Our legal structure will continue to support and command an inferior status for women so long as it permits *any* differentiation in legal treatment on the basis of sex." (p. 873) ". . . Equality of rights means that sex is not a factor." (p. 892)

VII. SPECIFIC AREAS AFFECTED BY THE EQUAL RIGHTS AMENDMENT

Time and space preclude me from an attempt to picture in detail the constitutional and legal chaos which would prevail in our country if the Supreme Court should feel itself compelled to place upon the Equal Rights Amendment the devastating interpretation feared by these legal scholars.

For this reason, I must content myself with merely suggesting some of the terrifying consequences of such an interpretation.

While the amendment would affect all areas of our society, I will mention only a few of the specific areas including: the military, the criminal law, privacy, domestic relations, and protective labor legislation.

VIII. MILITARY

The impact of the ERA on the military will be *massive*.

The Congress and the legislatures of the various states have enacted certain laws based upon the conviction that the physiological and functional differences between men and women make it advisable to exempt or exclude women from certain arduous and hazardous activities in order to protect their health and safety.

Among Federal laws of this nature are the Selective Service Act, which confines compulsory military service to men; the acts of Congress governing the voluntary enlistments in the armed forces of the nation which restrict the right to enlist for combat service to men; and the acts establishing and governing the various service academies which provide for the admission and training of men only. There is no question that these laws will be abolished. As Professor Paul Freund of the Harvard Law School said, "And so women must be admitted to West Point on a parity with men; women must be conscripted for military service equally with men . . ." Professor Phil Kurkland of the Chicago Law School agrees.

The position of the Justice Department and the Defense Department is that women will be subject to the draft. In a letter to Senator Bayh dated February 24, 1972, the General Counsel for the Defense Department, J. Fred Buzhardt, dealt with some of the problems which would be caused by the ERA in the military. Mr. Buzhardt said:

"Further, there is the possibility that assigning men and women together in the field in direct combat roles might adversely affect the efficiency and discipline of our forces.

"On the other hand, if women were not assigned to duty in the field, overseas, or on board ships, but were entering the armed forces in large numbers, this might result in a disproportionate number of men serving more time in the field and on board ship because of a reduced number of positions available for their reassignment.

"If this amendment allowed no discrimination on the basis of sex even for the sake of privacy, we believe that the resulting shar-

ing of facilities and living quarters would be contrary to prevailing American standards.

"Even if segregation of living quarters and facilities were allowed under the amendment, during combat duty in the field there are often, in effect, no facilities at all, and privacy for both sexes might be impossible to provide or enforce."

In a letter to Senator Ervin, Deputy Assistant Secretary of Defense Don R. Brazier said that Defense had not made any estimates of costs on changing the military to conform with the Equal Rights Amendment. Furthermore, Mr. Brazier said:

"The Department has not made such estimates and without specific programs for such 'equal' service, it is impossible to make any estimate. One of the major areas that would contribute to increased costs would be separate facilities, both in terms of living quarters, as well as working facilities in areas where women are not currently stationed.

"Until a definitive plan is developed indicating where and under what circumstances women would serve in isolated areas, with combatant forces, aboard ships, etc., it is not possible to make a definitive estimate of costs. *If extensive additional facilities or modifications to current facilities were required, the costs could be considerable.*"

A very complete analysis of the ERA's effect on the military was compiled in the *Yale Law Journal* in April 1971. The significance of this article that Congresswoman Griffiths has said that the article ". . . will help you understand the purposes and effects of the Equal Rights Amendment" and Senator Bayh has called it a "masterly piece of scholarship." Thus, the supporters of the amendment feel that it will have the following effect on the military and I agree with them. No clearer or more unique history of legislative intent can be presented of the amendment and the military because both the opponents and the proponents agree on the amendment's effect in this area.

Significant excerpts from the *Yale Law Journal* which is supported by the amendment's proponents are as follows:

1. "The Equal Rights Amendment will have a substantial and pervasive impact upon military practices and institutions. As now formulated, the Amendment permits no exceptions for the military." (p. 969)

2. "Women will serve in all kinds of units, and *they will be eligible for combat duty.* The double standard for treatment of sexual activity of men and women will be prohibited". (p. 978)

3. "Neither the right to privacy nor any unique physical characteristic justifies different treatment of the sexes with respect to voluntary or involuntary service, and pregnancy justifies only slightly different conditions of service for women." (p. 969)

4. "Such obvious differential treatment for women as exemption from the draft, exclusion from the service academies, and more restrictive standards for enlistment will have to be brought into conformity with the Amendment's basic prohibition of sex discrimination." (p. 969)

5. "These changes will require a *radical* restructuring of the military's views of women." (p. 969)

6. "The Equal Rights Amendment will greatly hasten this process and will require the military to see women as it sees men." (p. 970)

7. "A woman will register for the draft at the age of eighteen, as a man now does." (p. 971)

8. "Under the Equal Rights Amendment, all standards applied through (intelligence tests and physical examinations) will have to be neutral as between the sexes." (p. 971)

9. "The military will clearly have sufficient time during the period after ratification to make the minor adaptations, such as the expansion of gynecological services, necessary to comply with the statute." (p. 971)

10. "First, height standards will have to be revised from the dual system which now exists." (p. 971)

11. "The height-weight correlations for the sexes will also have to be modified." (p. 972)

12. Deferment policy "could provide that one, but not both, of the parents would be deferred. For example, whichever parent was called first might be eligible for service; the remaining parent, male or female would be deferred." (p. 973)

13. "If the rules continue to require discharge of women with dependent children, then men in a similar situation will also have to be discharged . . . The nondiscriminatory alternative is to allow both men and women with children to remain in the service and to take their dependents on assignments in noncombat zones, as men are now permitted to do." (p. 975)

14. "Distinctions between single and married women who become pregnant will be permissible only if the same distinction is drawn between single and married men who father children." (p. 975)

15. "Thus, if unmarried women are discharged for pregnancy, men shown to be fathers of children born out of wedlock would also be discharged. Even in this form such a rule would be suspect under the Amendment, because it would probably be enforced more frequently against women. A court will therefore be likely to strike down the rule despite the neutrality in its terms, because of its differential impact." (p. 975)

16. "Under the Equal Rights Amendment the WAC would be abolished." (p. 976)

17. "Women are physically as able as men to perform many jobs classified as combat duty, such as piloting an airplane or engaging in naval operations . . . there is no reason to prevent women from doing these jobs in combat zones." (p. 977)

18. "No one would suggest that . . . women who serve can avoid the possibility of physical harm and assault. But it is important to remember that all combat is dangerous, degrading and dehumanizing." (p. 977)

19. "Male officers are provided a dependent's allowance based on their grade and the number of dependents . . ." The Equal Rights Amendment will recognize "the husband of a female officer . . . as a dependent." (p. 978)

20. "Athletic facilities will also have to be made available to women personnel." (p. 978)

IX. CRIMINAL LAW

Because of different physical characteristics, and health considerations, and other reasons, legislatures have adopted some criminal laws which apply to only one sex or the other or treat men and women differently in some degree. Because the Equal Rights Amendment will forbid any legal distinctions between men and women, all existing and future criminal laws of this nature would be nullified.

As in several areas, a good review of the types of laws that will be changed by the ERA was discussed in the April 1971 issue of the *Yale Law Journal*. This article has been cited with approval by the proponents of the ERA and the statements which I have excerpted should constitute a good example of what we could expect after passage of the act in the area of criminal law. The excerpts from the *Yale Law Journal* are as follows:

1. "Courts faced with criminal laws which do not apply equally to men and women would be likely to invalidate the laws rather than extending or rewriting them to apply to women and men alike." (p. 966)

2. "Courts will not likely invalidate sodomy or adultery laws that contain sex discriminatory provisions, instead of solving the constitutional problems by extending them to cover men and women alike." (p. 962)

3. "Seduction laws, statutory rape laws, laws prohibiting obscene language in the presence of women, prostitution and 'manifest danger' laws . . . The Equal Rights Amendment would not permit such laws, which base their sex discriminatory classification on social stereotypes." (p. 954)

4. "The statutory rape laws, which punish men for having sexual intercourse with any woman under an age specified by law . . . suffer from a double defect under the Equal Rights Amendment." (p. 957)

5. "To be sure, the singling out of women probably reflects sociological reality . . . Likewise, in this society, the bad reputation and illegitimate child which can result from an improvident sexual liaison may be far more ruinous to a young woman's psychological health than similar conduct is to a young man's. *But the Equal Rights Amendment forbids finding legislative justification in the sexual double standard . . .*" (p. 958)

6. "Adultery laws also contain sex discriminatory provisions which would be impermissible under the Equal Rights Amendment." (p. 961)

7. "Courts may be expected to hold that laws which confine liability for prostitution to women only are invalid under the Equal Rights Amendment." (p. 963)

8. "Just as the Equal Rights Amendment would invalidate prostitution laws which apply to women only, so the ERA would require invalidation of laws specially designed to protect women from being forced into prostitution." (p. 964)

9. "A court would probably resolve doubts about congressional intent by striking down the Federal White Slave Traffic—Mann Act." (p. 965)

X. DOMESTIC RELATIONS LAWS

The common law and statutory law of the various states recognize the reality that many women are homemakers and mothers, and by reason of the duties imposed upon them in these capacities, are largely precluded from pursuing gainful occupations or making any provision for their financial security during their declining years. To enable women to do these things and thereby make the existence and development of the race possible, these state laws impose upon husbands the primary responsibility to provide homes and livelihoods for their wives and children, and make them criminally responsible to society and civilly responsible to their wives if they fail to perform this primary responsibility. Moreover, these state laws secure to wives dower and other rights in the property left by their husbands in the event their husbands predecease them in order that they may have some means of support in their declining years.

If the Equal Rights Amendment should be interpreted by the Supreme Court to forbid any legal distinctions between men and women, it would nullify all existing and all future laws of this kind.

As with the military, a good analysis of what the amendment will accomplish in the area of domestic relations was set out in the *Yale Law Journal* which has been fully endorsed by Congresswoman Martha Griffiths and other proponents of the ERA. As I have stated earlier, no clearer legislative intent can be presented because I agree with the amendment's proponents that the ERA will have the following effects.

Significant excerpts from the Yale Law Journal which is supported by the proponents of the ERA in the area of domestic relations are as follows:

1. "The Equal Rights Amendment, continuing this trend, would prohibit dictating different roles for men and women within the family on the basis of their sex." (p. 953)

2. "Thus, common law and statutory rules requiring name change for the married women would become legal nullities." (p. 940)

3. "These states could conform to the

Equal Rights Amendment by requiring couples to pick the same last name, but allowing selection of the name of either spouse, or of a third name satisfactory to both." (p. 940)

4. "The Amendment would also prohibit the states from requiring that a child's last name be the same as his or her father's, or from requiring that a child's last name be the same as his or her mother's." (p. 941)

5. "In ninety per cent of custody cases the mother is awarded the custody. The Equal Rights Amendment would prohibit both statutory and common law presumptions about which parent was the proper guardian based on the sex of the parent." (p. 953)

6. "physical capacity to bear children can no longer justify a different statutory marriage age for men and women." (p. 939)

7. "mere estimates of emotional preparedness founded on impressions about the 'normal' adolescent boy and girl are based on the kind of averaging which the Equal Rights Amendment forbids." (p. 939)

8. "The Equal Rights Amendment would not permit a legal requirement, or even a legal presumption, that a woman takes her husband's name at the time of marriage." (p. 940)

9. "a court would do away with the rule that refusal to accompany or follow a husband to a new domicile amounts to desertion or abandonment." (p. 942)

10. "A husband would no longer have grounds for divorce in a wife's unjustifiable refusal to follow him to a new home." (p. 942)

11. "the traditional rule is that the domicile of legitimate children is the same as their father's . . . The Equal Rights Amendment would not permit this result." (p. 942)

12. "In all states husbands are primarily liable for the support of their wives and children . . . the child support sections of the criminal nonsupport laws . . . could not be sustained where only the male is liable for support." (p. 944 and 945)

13. "The Equal Rights Amendment would bar a state from imposing greater liability for support on a husband than on a wife merely because of his sex." (p. 945)

14. "Two different systems have been adopted in the United States for distributing property rights within a family—the community property system and the common law system . . . As both systems currently operate, they contain sex discriminatory aspects which would be changed under the Equal Rights Amendment." (p. 946)

15. "Under the Equal Rights Amendment, laws which . . . favor the husband as manager (of community property) in any way, would not be valid." (p. 947)

16. "All states except North Dakota and South Dakota give women a nonbarrable share in her husband's estate, but a number of states fail to give the husband a corresponding legal claim in his wife's estate . . . the discriminatory laws would either be invalidated or extended." (p. 948)

17. "a court could invalidate (many grounds for divorce) without doing any serious harm to the overall structure of the states' divorce laws . . . These are pregnancy by a man other than husband at time of marriage, nonsupport, alcoholism of husband, wife's unchaste behavior, husband's vagrancy, wife's refusal to move with husband without reasonable cause, wife a prostitute before marriage, indignities by husband to wife's person, and willful neglect by husband." (p. 950)

18. "Like the duty of support during marriage and the obligation to pay alimony in the case of separation or divorce, nonsupport would have to be eliminated as a ground for divorce against husbands only . . ." (p. 951)

19. "The laws that grant a husband a divorce because at the time of marriage he did not know his wife was pregnant by another man would be subject to strict scrutiny under the unique physical characteristics tests." (p. 951)

20. "The Equal Rights Amendment would not require that alimony be abolished but only that it be available equally to husbands and wives." (p. 952)

21. "the laws could provide support payments for a parent with custody of a young child who stays at home to care for that child so long as there was no legal presumption that the parent granted custody should be the mother." (p. 952)

22. The ERA could require "for maintenance to be paid from one spouse to the other if the spouse seeking maintenance lacks sufficient property to provide for *his* reasonable needs and is unable to support *himself* through appropriate employment." (p. 952)

XI. PROTECTIVE LABOR LEGISLATION

Many states and the Federal government have enacted labor legislation which protects women from certain forced activities. These protections were not always easy to develop. As Margaret Mead, noted anthropologist, said to a AFL–CIO meeting in March, 1971, "In the beginning of mining, there were women down those mines and children . . . we got the women and children out of the mines you know." Dr. Mead then goes on to say, "I've been against the equal rights amendment always."

The largest labor organization in the country, the AFL–CIO has recommended that Congress not pass the Equal Rights Amendment for the same reason that Margaret Mead opposed it: The adverse effect the amendment will have on hard-won protective legislation for women.

In its Resolution No. 122, the AFL–CIO states:

"We continue opposition to the so-called equal rights amendment as an unnecessary addition to the Constitution, ultimately more harmful than helpful to the legal rights of women."

Prior to the adoption of the resolution, the executive council of the AFL–CIO, in a report to its convention, said:

"We have opposed the equal rights amendment to the Constitution because of its potentially destructive impact on State labor legislation for women workers . . . Experience, to date, shows that 'equality' has been used to remove labor law protections for women, rather than to extend them or adapt them to man. The proposed equal rights amendment would render all protective labor laws for women workers unconstitutional, as well as any other laws treating the sexes differently. Such laws, for example, include marriage laws which place primary responsibility for family support on husbands and fathers."

A librarian at the University of California Library, Mrs. Laurel Burley, has written on the drastic consequences which would result to the protective labor laws for women if the ERA passes. Those upper-class, well-educated women who are pushing so hard for this amendment should ponder Mrs. Burley's words. She states that:

"The major danger in the proposed ERA lies in the fact that it would in one fell swoop invalidate all protective legislation enacted by the States to protect working women from exploitative employers . . . Protective legislation not only sets maximum hours and minimum wages standards, but also mandates such provisions as rest areas, toilet facilities, and elevators, adequate lighting and ventilation, rest and meal breaks (including the right to eat one's meal away from the immediate work area), adequate drinking water (important for women and children who are farmworkers), and protective garments and uniforms."

Mrs. Burley feels that some of the results of court action under Title VII of the 1964 Civil Rights Act are indicative of the changes which will be brought about to the extreme because of the Equal Rights Amendment. On this point, she states:

"Some idea of what might be expected were the ERA to pass can already be seen in the use being made of Title VII of the Civil Rights Act. In late 1969 Fibreboard Corporation in Antioch, California began to force women to work 16 hours a day and to lift backbreaking weights. Pacific Telephone in 1970 began ignoring state protective legislation relating to minimum hours. In fall 1970 Oregon took away the right of women to have two ten-minute rest breaks in an eight-hour day; and another large California corporation, Crown Zellerbach, began denying meal breaks to both men and women working in the Antioch plant. In summer 1971 a U.S. Court of Appeals struck out the sections of the California Labor Code regulating maximum weight lifting and the eight-hour day, 48-hour week for women. All these actions were justified on the basis that Title VII and EEOC guidelines superseded state protective legislation. Such instances are mounting at an incredible rate. On the basis of Title VII, 17 states have either totally or substantially annulled or repealed protective legislation covering women. *The ERA as it stands will add the finishing touch.*

As in other areas, I believe the *Yale Law Journal* article which has been adopted by Congresswoman Griffiths as "explaining the ERA" should be read to determine its effects on labor legislation. Excerpts from the article state that:

1. "Under the Equal Rights Amendment, courts are thus not likely to find *any* justification for the continuance of laws which exclude women from certain occupations." (p. 929)

2. "Laws which require employers to impose leave on pregnant employees for a specified period before and after childbirth, without providing job security or retention of accrued benefits, such as seniority credits . . . would fall." (p. 929) The article cites as an example which will be struck down in every state, a school board regulation imposing maternity leave at least four months prior to the expected birth of her child." (p. 931)

3. "There is little reason to doubt, therefore, that courts will invalidate weightlifting regulations for women under the Equal Rights Amendment." (p. 935)

4. "This result (to invalidate maximum hours which apply only to women) would also be predicted from principles of statutory construction under the Equal Rights Amendment." (p. 936)

5. "The courts are likely to . . . equalizing both sexes under the Equal Rights Amendment by invalidating (a law protecting women from coerced overtime)." (p. 936)

6. "Laws which restrict or regulate working conditions would probably be invalidated." (p. 936)

XII. MISCELLANEOUS

Because of the broad nature of the ERA, there is really no way to tell just how afar it will reach. As Professor Paul Freund of the Harvard Law School said, "The range of potential litigation is too great to be readily foreseen . . ." Therefore, I believe it would be profitable to mention just several random examples which were brought out in the April 1971 *Yale Law Journal*. As I have mentioned, before, the *Yale Law Journal* is unique because it provides a very minimum level of change which the ERA will bring about. This is true because of the strong support of the article by Congresswoman Griffiths and other supporters of the ERA. Under miscellaneous examples, the article mentions:

1. "the government cannot rely upon the administrative technique of grouping or averaging where the classification is by sex . . . whatever the price in efficiency, the classification must be made on some other basis." (p. 891)

2. "It is obvious that the marginal relationship of the unique physical characteristics of pregnancy to the problem of absenteeism would require invalidation . . . of a government regulation to reduce absenteeism by barring women from certain jobs.

3. Men will get extensive leave for child rearing because "if only women can get extensive leave for child rearing it becomes economically impossible for men to stay at home to care for children while their wives work." (p. 897)

4. "A rule allowing sick leave only to mothers when a member of their household is sick is a prohibited sex classification." (p. 898)

5. "A law might prohibit adults with primary responsibility for child care from working in managerial jobs, on the grounds that the function of caring for children was inconsistent with substantial occupational responsibility. Such a law or government regulation would constitute a serious evasion of the Equal Rights Amendment." (p. 898)

6. "Protection against indirect, covert or unconscious sex discrimination is essential to supplement the absolute ban on explicit sex classification of the Equal Rights Amendment." (p. 900)

7. "Thus the courts have power to grant affirmative relief in framing decrees in particular cases . . . such decrees could provide remedies for past denial of equal rights which take into account sex factors and give special treatment to the group discriminated against." (p. 904)

8. "Affirmative action may appear, paradoxically, to conflict with the absolute nature of the Equal Rights Amendment. But where damage has been done by a violator who acts on the basis of a forbidden characteristic, the enforcing authorities may also be compelled to take the same characteristic into account in order to undo what has been done." (p. 904)

9. "There is no doubt that the Equal Rights Amendment would eliminate differentiation on account of sex in the public schools and public university systems." (p. 906)

10. "It would seem clear that the basic principles of state action would, as a general proposition, require that the state eliminate male domination from the educational system." (p. 907)

11. "States which grant jury service exemptions to women with children will either extend the exemption to men with children or abolish the exemption altogether." (p. 920)

XIII. RIGHT TO PRIVACY

I believe that the absolute nature of the Equal Rights Amendment will, without a doubt, cause all laws and state-sanctioned practices which in any way differentiate between men and women to be held unconstitutional. Thus, all laws which separate men and women, such as separate schools, restrooms, dormitories, prisons, and others will be stricken. Also, men and women will be thrown together with no separation on the grounds of sex in the military.

The proponents of the ERA mention that the Constitutional right to privacy will protect and keep separate items such as public restrooms; however, this assertion overlooks the basic fact of constitutional law construction: The most recent constitutional amendment takes precedence over all other sections of the Constitution with which it is inconsistent. Thus, if the ERA is to be construed absolutely, as its proponents say, then there can be no exception for elements of publically imposed sexual segregation on the basis of privacy between men and women.

Even assuming the *very unlikely* result that privacy will allow segregation of the sexes in places like the military, Fred Buzhardt, General Counsel of the Defense Department, mentioned the physicial impossibility of providing this always in the military. Mr. Buzhardt said:

"Even if segregation of living quarters and facilities were allowed under the amendment, during combat duty in the field there are often, in effect, no facilities at all, and privacy for both sexes might be impossible to provide or enforce."

Professor Paul Freund of the Harvard Law School testified about this matter before the Senate Judiciary Committee in 1970. After stating that the amendment would be absolute, Professor Freund said that it would follow that the ERA "would require that there be no segregation of the sexes in prison, reform schools, public restrooms, and other public facilities."

Professor Phil Kurland, Editor of the *Supreme Court Review* and a Professor of Law at the University of Chicago Law School stated before the Judiciary Committee:

Senator ERVIN. The law which exists in North Carolina and in virtually every other state of the Union which requires separate restrooms for boys and girls in public schools would be nullified, would it not?

Professor KURLAND. That is right, unless the separate but equal doctrine is revived.

Senator ERVIN. And the laws of the states and the regulations of the Federal government which require separate restrooms for men and women in public buildings would also be nullified, would it not?

Professor KURLAND. My answer would be the same.

As Professors Freund and Kurland indicate there is no qualification of the ERA for the privacy of women just as there will be none for the draft or protective labor laws.

A few examples in our society where the privacy aspect of the relationship between men and women would be changed are:

1. Police practices by which a search involving the removal of clothing will be able to be performed by members of either sex without regard to the sex of the one to be searched.

2. Segregation by sex in sleeping quarters of prisons or similar public institutions would be outlawed.

3. Segregation by sex of living conditions in the armed forces would be outlawed. This includes close quarter living in combat zones and foxholes.

4. Segregation by sex in hospitals would be outlawed.

5. Physical exams in the armed forces will have to be carried out on a sex neutral basis.

There are, of course, numerous other examples which flow from the absolute nature of the Equal Rights for Women amendment.

XIV. THE RADICAL EFFECT OF THE EQUAL RIGHTS AMENDMENT ON THE AMERICAN SOCIAL STRUCTURE

In the hearings before the Senate Judiciary Committee last year, Professor Paul Freund of the Harvard Law School testified that:

"Indeed, if the law must be as undiscriminating concerning sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation. Whether the proponents of the amendment shrink from these implications is not clear."

Like Professor Freund, it is not clear to me either if the proponents of the amendment shrink from these implications. This matter illustrates as well as any the radical departures from our present system that the ERA will bring about in our society. Speaking in opposition to the ERA, Professor James White of the Michigan Law School also mentioned certain bizarre results which would flow from passage of the ERA. Professor White said:

"With the exception of Illinois and perhaps a few other states, there are laws on the books which make it a crime to engage in certain kinds of homosexual activity. First of all, I suppose the amendment would bring in question all that law . . . I think the question is, is this the way we should do away with it or should we allow the states to control this themselves?"

Professor White continued that there would certainly be litigation on the sexual requirements of the marriage ceremony and that "conceivably a court would find that the State had to authorize marriage and recognize marital legal rights between members of the same sex." At that point in the testimony, Professor White's comments centered on the effect on the community property laws of homosexual marriages. I wondered about the effect on adoption procedures.

* * * * *

Professor of Neurology at the Yale Medical School, Dr. Jonathan H. Pincus, has asked the following question: "Is the Equal Rights Amendment to be the Tonkin Gulf Resolution of the American social structure?" In a statement in opposition to the ERA, Dr. Pincus goes on to answer his question in the affirmative, and in his discussion he sheds some real light on the radical changes which will be made in our social structure.

At the present time in all states husbands are primarily liable for the support of their wives and children but, as Representative Griffiths' approved article in the *Yale Law Journal* states, "The ERA would bar a state from imposing greater liability for support on a husband than on a wife merely because of his sex." Dr. Pincus is very concerned about the effects of this removal of a husband's responsibility. Dr. Pincus said:

"It seems to me that the removal of legal responsibility from a man for supporting a family, giving the family a name and protecting his daughters from the sort of influences the U.S. Army might have in store for them before marriage is likely to have some effect on the manner in which men relate to their wives and children and vice versa; those traditional ties will be weakened."

Dr. Pincus feels that "a solid happy family life is the foundation of mental health and happiness," and as to the effects of the ERA on this family life, he goes on to state:

"I would predict that the Equal Rights amendment and many of the other goals of its proponents will bring social disruption, unhappiness and increasing rates of divorce and desertion. Weakening of family ties may also lead to increased rates of alcoholism, suicide and, possibly, sexual deviation."

Whether or not one agrees with the predictions of Dr. Pincus, I believe he is asking very genuine questions which should be discussed before the Constitution is amended. Before we begin tinkering with the very subtle mechanisms of family relationships and social responsibilities, should we not consider that we might in fact be passing a Tonkin Gulf Resolution of the American social structure?

* * * * *

While I believe that any unfair discriminations which the law has created against women should be abolished by law, I have the abiding conviction that the law should make such distinctions between them as are reasonably necessary for the protection of women and the existence and development of the race.

I share completely this recent observation by Mr. Bernard Swartz: "Use of the law in an attempt to conjure away all the differences which do exist between the sexes is both an insult to the law itself and a complete disregard of fact."

The late Justice Felix Frankfurter, in an eloquent statement in the *New Republic* magazine many years ago put it a different way. Justice Frankfurter said:

"Only those who are ignorant of the nature of law and of its enforcement and regardless of the intricacies of American constitutional law, or indifferent to the exacting aspects of woman's industrial life, will have the naivete or the recklessness to sum up woman's whole

position in a meaningless and mischievous phrase about "equal rights'."

Let us consider for a moment whether there be a rational basis for reasonable distinctions between men and women in any of the relationships or undertakings of life.

When He created them, God made physiological and functional differences between men and women. These differences confer upon men a greater capacity to perform arduous and hazardous physical tasks. Some wise people even profess the belief that there may be psychological differences between men and women.

To say these things is not to imply that either sex is superior to the other. It is simply to state the all important truth that men and women complement each other in the relationships and undertakings on which the existence and development of the race depend.

The physiological and functional differences between men and women empower men to beget and women to bear children, who enter life in a state of utter helplessness and ignorance, and who must receive nuture, care, and training at the hands of adults throughout their early years if they and the race are to survive, and if they are to grow mentally and spiritually. From time whereof the memory of mankind runneth not to the contrary, custom and law have imposed upon men the primary responsibility for providing a habitation and a livelihood for their wives and children to enable their wives to make the habitations homes, and to furnish nuture, care, and training to their children during their early years.

In this respect, custom and law reflect the wisdom embodied in the ancient Yiddish proverb that God could not be everywhere, so he made mothers. The physiological and functional differences between men and women constitute the most important reality. Without them human life could not exist.

For this reason, any country which ignores these differences when it fashions its institutions and makes its laws is woefully lacking in rationality.

Our country has not thus far committed this grievous error. As a consequence, it has established by law the institutions of marriage, the home, and the family, and has adopted some laws making some rational distinctions between the respective rights and responsibilities of men and women to make these institutions contribute to the existence and advancement of the race.

It may be that times are changing and more and more women will leave the home to compete in the business and professional community. However, I would like to call the Senate's attention to the remarks of Professor Phil Kurland of the University of Chicago Law School on this point. He said:

"Times have changed in such a way that it may well be possible for the generation of women now coming to maturity, who had all the opportunities for education afforded to their male peers and who had an expectation of opportunities to put education to the same use as their male peers, to succeed in a competitive society in which all differences in legal rights between men and women were wiped out. There remains a very large part of the female population on whom the imposition of such a constitutional standard would be disastrous. There is no doubt that society permitted these women to come to maturity not as competitors with males but rather as the bearers and raisers of their children and the keepers of their homes. There are a multitude of women who still find fulfillment in this role. In the eyes of some, this may be unfortunate, but it is true. It can boast no label of equality now to treat the older generations as if they were their own children or grandchildren. Certainly the desire to open opportunities to some need not be bought at the price of removal of legal protections from others."

XV. THE EQUAL RIGHTS AMENDMENT: A CASE STUDY IN ONE SPECIFIC AREA

One of the most interesting assertions of the article in the *Yale Law Journal* which Representative Griffiths says "explains the workings of the amendment," is the statement that:

"The Equal Rights Amendment would not permit a legal requirement, or even a legal presumption, that a woman takes her husband's name at the time of marriage . . . The states could conform to the Equal Rights Amendment by requiring couples to pick the same last name, but allowing selection of the name of either spouse, or of a third name satisfactory to both . . . thus common law and statutory rules requiring name change for the married woman would become legal nullities."

The effects of this requirement on the record-keeping demanded by our society would be staggering. Imagine an attorney searching a land title with this type of last-name system.

The wisdom of allowing a state to determine that a wife's legal name shall be that of her husband has just been upheld 8–0 in a per curiam decision of the Supreme Court in the case of *Forbush* v. *Alabama*. The interest of the State in maintaining control over licensees and requiring the most efficient way to do so should be obvious to everyone, as it was to all the members of the Supreme Court. But it's not obvious to the proponents of the ERA who want to abolish all legal pronouncements favoring the husband's surname.

Just a cursory check of only a very few of the laws of the states will indicate just how far-reaching the Equal Rights Amendment will be in this area alone. Most states appear to recognize the common law rule that a wife assume her husband's surname. *E.g. People ex. rel. Rago* v. *Lipsky*, 327 Ill. App. 63, 63 N.E. 2d 642 (1945); *Freeman* v. *Hawkins*, 77 Tex. 498, 14 S.W. 364; *Chapman* v. *Phoenix National Bank of the City of New York*, 85 N.Y. 437 (1881); *Bacon* v. *Boston Electric Railway Co.*, 256 Mass. 30, 152 N.E. 35 (1926).

In addition, many state statutes are based upon the assumption that a woman assumes her husband's surname upon marriage. For example, statutes relating to the issuance of driver's licenses often include a provision requiring licensed drivers to notify a state agency of changes in name resulting from marriage. *See, e.g. Colo. Rev. Stat. Ann.* Sec. 13–4–17; *Fla. Stat. Ann.* Sec. 322.19; *Ill. Ann. Stat.* Ch. 95½, Sec. 6–116; *Ind. Ann. Stat.* Sec. 47–2710; *Kan. Stat. Ann.* Sec. 8–248; *Ky. Rev. Stat.* Sec. 186.540; *Me. Rev. Stat. Ann.* tit. 29, Sec. 546; *Minn. Stat. Ann.* Sec. 171.11; *Mont. Rev. Codes Ann.* Sec. 31–140; *N.M. Stat. Ann.* Sec. 64–13–53; *N.D. Century Code* Sec. 39–06–20; *Okla. Stat. Ann.* tit. 47, Sec. 6–116; *R.I. Gen. Laws Ann.* Sec. 31–10–32; *S.C. Code Ann.* Sec. 46–170; *Tenn. Code Ann.* Sec. 59–708; *Tex. Rev. Civ. Stat. Ann.* Art. 6687b, Sec. 20; *W. Va. Code Ann.* Sec. 173–2–13.

State statutes relating to divorce often authorize courts to change a woman's name upon divorce. *See, e.g. Alaska Stat.* Sec. 09.-55.010 (no court order necessary); *Arizona Rev. Stat. Ann.* Sec. 25–319; *Ark. Stat. Ann.* Sec. 34–1216; *Cal. Civ. Code* Sec. 4457 (annulment), 4521 (dissolution); *Conn. Gen. Stat. Ann.* Sec. 46–21; *Del. Code Ann.* tit. 3, Sec. 1536; *D.C. Code Ann.* Sec. 16–915; *Ga. Code Ann.* Sec. 30–121; *Hawaii Rev. Laws* Sec. 574–5; *Ill. Ann. Stat.* ch. 40, Sec. 17; *Ind. Ann. Stat.* Sec. 3–1225; *Kan. Stat. Ann.* Sec. 60–1610; *Ky. Rev. Stat. Ann.* Sec. 403.060 (if divorce obtained by wife); *Me. Rev. Stat. Ann.* tit. 19, Sec. 752; *Mass. Gen. Laws Ann.* ch. 208, Sec. 23; *Mich. Comp. Laws Ann.* Sec. 552. 391 (if no minor children); *Minn. Stat. Ann.* Sec. 518.27 (if wife obtained divorce); *Mo. Ann. Stat.* Sec. 452.100 (if wife obtains divorce); *Nev. Rev. Stat.* Sec. 125.130; *N.J. Stat. Ann.* Sec. 2A:34–21; *N.C. Gen. Stat.* Sec. 50–12; *Okla. Stat. Ann.* tit. 12, Sec. 1278 (if husband at fault); *Ore. Laws 1971*, ch. 280, Sec. 13; *Pa. Stat. Ann.* tit. 23, Sec. 98 (woman may *elect* to use maiden name after divorce); *R.I. Gen. Laws Ann.* Sec. 15–5–17 (if *wife* obtains divorce); *S.C. Code Ann.* Sec. 20–117; *Tex. Rev. Civ. Stat.* art. 5931 (either party may change name upon divorce); *Vt. Stat. Ann.* tit. 15, Sec. 557 (if *wife* obtains divorce; *Va. Code Ann.* Sec. 20–121; *Wash. Rev. Code Ann.* Sec. 26.08.130; *W. Va. Code Ann.* Sec. 48–2–23 (if no children); *Wis. Stat. Ann.* Sec. 247.20 (if no children and no alimony).

State voter registration laws often include provisions requiring women to reregister when their names are changed by marriage. *See, e.g., Colo. Rev. Stat. Ann.* Sec. 49–4–19; *Del. Code Ann.* tit. 15, Sec. 1750; *Ill. Ann. Stat.* ch. 46, Sec. 6–54; *Ind. Ann. Stat.* Sec. 29–3428 (but women may vote or run for office under professional name); *Kan. Stat. Ann.* Sec. 25–2316; *Ky. Rev. Stat. Ann.* Sec. 117.735; *La. Rev. Ann.* Secs. 18:41, 234, 241; *Me. Rev. Stat. Ann.* tit. 21, Secs. 638, 831 (notification of change required); *Md. Ann. Code* art. 33 Secs. 3–9, 3–18; *Mass. Gen. Laws Ann.* ch. 51 Sec. 2 (notification); *Neb. Rev. Stat.* Sec. 32–216; *Nev. Rev. Stat.* Sec. 293.517; *N.J. Stat. Ann.* Sec. 19:31–13; *N. M. Stat. Ann.* Sec. 3–4–5; *Ohio Rev. Code Ann.* Sec. 3503.19 (not necessary to reregister if name is *not* changed upon marriage); *Ore. Rev. Stat.* Secs. 247.290, 247.440; *R. I. Gen. Laws Ann.* Sec. 17–9–18 (notification); *S.D. Comp. Laws Ann.* Sec. 12–4–18; *Tenn. Code Ann.* Secs. 2–305; *Va. Code Ann.* Sec. 24.1–51; *Wash. Rev. Code Ann.* Sec. 29. 10.040.

State laws regulating notaries public also often contain provisions involving name changes resulting from marriage. *See, e.g., Iowa Code Ann.* Sec. 77.12 (married female notaries may continue to use maiden names); *N.J. Stat. Ann.* Sec. 52:7–7 (married female notaries to use hyphenated name); *Pa. Stat. Ann.* tit. 57, Sec. 156 (female married notaries must notify state agency of change of name); *Va. Code Ann.* Sec. 55–117 (female married notaries to indicate maiden name); *Wyo. Stat. Ann.* Sec. 32–2 (female married notaries to notify state agency of name change and to add husband's surname to signature).

State statutes which authorize civil actions for change of name also sometimes have provisions which are clearly based on the assumption that a wife's legal surname is the surname of her husband. *See, e.g., Iowa Code Ann.* Sec. 674–1 (married women may not bring action to change her name); *Iowa Code Ann.* Sec. 674–10 (if husband changes his surname, wife's name is also changed); *Ky. Rev. Stat. Ann.* Sec. 401–010 (married women not allowed to change name); *Mich. Comp. Laws Ann.* Sec. 711.1 (if husband changes name, wife's name also changes); *Minn. Stat. Ann.* Sec. 259.10 (if husband changes name, wife's name changes if she joins in the application—statute does not indicate what happens if wife fails to join in application); *Vt. Stat. Ann.* tit. 5, Sec. 814 (if husband changes name, wife's name also changes).

Finally, in some state statutes reference is made to "change of legal name" without it being specified whether this includes name changes resulting from marriage. *See e.g., Mass. Gen. Laws Ann.* ch. 30, Sec. 13 (notaries must reregister upon change of name); *Neb. Rev. Stat.* Sec. 64–114 (notaries changing legal name may continue to use name under which they received commission); *N.H. Rev. Stat. Ann.* Sec. 261–2 (driver's license holders required to make notification of change of legal name); *S.C. Code Ann.* Sec. 49–6.1 (notaries to apply for change of name on commission upon legal change of name). In light of the common law rule, however, such provisions are likely to be held to apply to changes of name by marriage.

It should be noted, in conclusion, that the above listing of state statutes is not exhaustive. Rather, it is meant to suggest the

kinds of state statutes which include provisions based upon the assumption that a woman's legal name changes upon marriage.

XVI. A REASONABLE ALTERNATIVE TO THE ERA

This brings us to the question whether Congress should consider the submission to the States of a Constitutional amendment to deal with the matter, and whether such amendment should permit Congress and the States acting within their respective jurisdictions to make reasonable distinctions between the rights and responsibilities of men and women in appropriate areas of life.

I honestly believe that the equal protection clause, properly interpreted, is sufficient to abolish all unfair legal discriminations made against women by state law.

Despite this belief, I intend to offer an amendment to the ERA which would prevent constitutional chaos. The amendment to the ERA which I plan to offer on the floor of the Senate reads as follows:

"The provisions of this article shall not impair the validity, however, of any laws of the United States or any State which exempt women from compulsory military service, or from service in combat units of the Armed Forces; or extend protections or exemptions to wives, mothers, or widows; or impose upon fathers responsibility for the support of children; or secure privacy to men or women, or boys or girls; or make punishable as crimes rape, seduction, or other sexual offenses."

Mr. BAYH. Mr. President, will the Senator yield briefly so that we may ask for the yeas and nays on final passage?

Mr. ERVIN. I yield for that purpose.

Mr. BAYH. Mr. President, I ask for the yeas and nays on final passage.

The PRESIDING OFFICER. There is a sufficient second. The yeas and nays are ordered.

Mr. ERVIN. Mr. President, may we have order in the Senate?

The PRESIDING OFFICER. The Senate will be in order.

The Senator from North Carolina may proceed.

Mr. ERVIN. Mr. President, I believe that the overwhelming majority of the good women who have been advocating——

Mr. BYRD of West Virginia. Mr. President, may we have order in the Senate?

The PRESIDING OFFICER. Will the Senate please be in order? Senators who wish to confer with fellow Senators will please retire to the cloakroom. The Senate will be in order.

The Senator may proceed.

Mr. ERVIN. Mr. President, I believe the overwhelming majority of good women who have been advocating and who are still advocating adoption of the equal rights amendment are like a majority of the Members of the Senate and House of Representatives in respect to their knowledge of what this amendment will do.

For this reason I hope that all of us will note this prayer:

Father, forgive us for we know not what we do.

Mr. BYRD of West Virginia. Mr. President, may we have order in the galleries?

The PRESIDING OFFICER. Visitors in the galleries are reminded they are guests of the Senate and that the rules require there be no demonstrations of any type at any time. The Chair respectfully requests that you abide by that rule.

The Senator from North Carolina is recognized.

Mr. ERVIN. Mr. President, I have attempted unsuccessfully to persuade the Senate to adopt various amendments which would make the equal rights amendment more understandable. My motive in so doing has been as lofty as the motive which actuated the conduct of Job Hicks in my county about the turn of the century. At that time they had in my county a good bricklayer, a very skillful bricklayer named John Watts. John Watts took the notion he had been called upon to preach. While he was very proficient in the art of bricklaying, he was somewhat deficient in theology, and that fact was noted by one of his contemporaries, Job Hicks. John Watts had a practice of getting some of the local rural churches to let him use their pulpits on Sunday. On one occasion he was preaching in one of these small rural churches when Job Hicks happened to come by. Job Hicks had had several drinks of Burke County corn liquor, which is alleged to be a very potent beverage.

When Job staggered by this little country church and saw John Watts in the pulpit, exhorting the congregation, Job staggered up the aisle, grabbed John Watts by the coat collar, dragged him to the door of the church, and threw him out upon the ground. Job Hicks was prosecuted in the superior court of my county for disturbing religious worship. He was convicted by a jury and was called to the bar of the court by Judge Robinson for sentencing.

Judge Robinson evidently felt like Job Hicks—that there might be some deficiencies in the theological doctrines being expounded by John Watts at the time of this unseemly event, and so, in seeking somewhat to temper the wind to the shorn lamb in his sentence, Judge Robinson said, in a very stern voice, "Job Hicks, when you were guilty of this unseemly conduct on the Lord's Day, you must have been so intoxicated as to not realize what you were doing." Job Hicks responded and said, "Your Honor, it is true I had had several drinks of corn liquor, but I would not want Your Honor to think that I was so drunk that I could stand by and see the word of the Lord be mumicked up like this without doing something about it."

So I have offered amendments, because I did not wish to see the Constitution of the United States being mumicked up.

I am just as much interested as any Member of this Congress is in seeing to it that unfair and unreasonable and arbitrary discriminations in laws against women are abolished. I am convinced, and my conviction is shared by some of the greatest legal scholars of this country, that all unfair or unreasonable or arbitrary discriminations made by law against women in our country are unconstitutional under the due process clause of the fifth amendment, which is applicable to the Federal Government, and the equal protection clause of the 14th amendment, which is applicable to the States.

I, therefore, believe that it is wholly unnecessary for the Constitution to be amended to abolish unfair or unreasonable or arbitrary distinctions made against women by the acts of Congress or by the laws of any of the States.

I certainly believe that it is very unwise and very undesirable to adopt the equal rights amendment in its present form, because that amendment is susceptible of the interpretation—and many legal scholars think that is the only interpretation that could be placed upon it—that it converts men and women into identical legal beings and confers upon men and women identical legal rights and subjects men and women to identical legal responsibilities.

I fear this will be the interpretation which the Supreme Court will necessarily have to place upon the equal rights amendment, because the equal rights amendment is absolute and rigid in terms and admits of no exceptions or limitations. It declares, in substance, that neither Congress nor the legislatures of the 50 States can make any legal distinction based upon sex.

Well, the good Lord made some substantial distinctions between men and women when He created them. The Book of Genesis informs us quite truly that when God created mankind He created them male and female. I am of the opinion that Mrs. Myra Wolfgang, a high officer in a union which represents women, stated an indisputable truth when she said the difference between men and women cannot be changed by an act of Congress or by a constitutional amendment.

Now, to be sure, Congress and the States can amend the Constitution and say to all legislative bodies in this Nation that they must pretend that men and women were not created as two sexes, but created as one sex. That will not settle any problems. It will merely magnify the problems and make Congress and the States rather ridiculous in that they would be attempting to repeal the handiwork of God.

I am troubled by a constitutional amendment which undertakes to do something which is impossible, and that is to convert men and women into identical legal beings.

I am troubled by this amendment on another ground, and I have been surprised to notice so many Members of the Senate who profess to believe in States' rights and State responsibilities support this amendment. When he wrote his great opinion in Texas against White, Chief Justice Salmon P. Chase stated that the Constitution in all its provisions look to an indestructible Union composed of indestructible States. I fear—and I say this in all seriousness—that if this equal rights amendment is adopted by the States, it will come near to abolishing the States of this Union as viable governmental bodies. I think it will virtually reduce the States of this Union to meaningless zeroes on the Nation's map. I think it will transfer virtually all the legislative power of government from the States to Congress.

I do not know how many Members of the Senate have read the decision of the Supreme Court in the case of Katzenbach against Morgan, which laid down the

strange doctrine that the fifth section of the 14th amendment, which empowers Congress merely to enforce the first section of the 14th amendment, gives Congress the power to nullify State laws and substitute for State laws, even in areas committed by the Constitution to the States, Federal laws.

I invite the attention of the Senate to this proposed amendment in its present form:

SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

SEC. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

If the decision of the Supreme Court in Katzenbach against Morgan is adhered to by the Supreme Court, section 2 of this equal rights amendment in its present form will empower the Congress of the United States to supplant the States in every field of legislation which relates to men and women or boys and girls; and I respectfully submit that that applies to virtually every field of legislation and to virtually every law.

Why do I say that? I say that because laws are not passed to regulate the conduct of animals or birds or fishes; laws are passed for only one purpose, and that is to govern the conduct of people. And despite the clamor of some of the supporters of the equal rights amendment, there are only two kinds of people in this world, and those two kinds of people are males and females.

So I think that some of us might well get down on our knees and pray, "Father, forgive us, for we know not what we do."

This is the most drastic proposal for amendment of the Constitution ever recommended or supported in the history of this Nation. If it is susceptible of the interpretation which the Supreme Court placed upon the fifth section of the 14th amendment in Katzenbach against Morgan, then this amendment, if ratified by the States, will give Congress the power to occupy the entire legislation field in this Nation in respect to the manifold union composed of indestructible States, will be bereft of their power in this respect. The States will become to all intents and purposes meaningless zeroes upon the Nation's map.

Not only that, the federal system, which contemplates an indestructible union composed of indestructible States, as it is now established by all of the provisions of the Constitution, will be substantially destroyed, and all legislative power relating to the manifold relations of men and women will be concentrated in the Congress of the United States.

And not only that, but the ultimate power to interpret all of the laws of this nature will be lodged in the Federal courts to the exclusion of the State courts.

I believe, and I honestly believe, that this proposed amendment is susceptible of these drastic interpretations. Indeed, since it has no exceptions and no limitations, and is absolute and rigid in its provisions, I do not see how it can be interpreted otherwise. That is a bad situation, thus to concentrate all power of this nature in the Federal Government, because nothing truer was ever said than the statement which Woodrow Wilson uttered on one occasion in which he said that when we resist the concentration of governmental power, we resist the processes of death, because concentration of power always precedes the destruction of human liberties.

So much for my fears about the interpretation which will be placed upon the equal rights amendment. I want to take this occasion to thank the distinguished majority leader, the Senator from Montana (Mr. MANSFIELD), the distinguished assistant majority leader, the Senator from West Virginia (Mr. BYRD), and the distinguished floor manager of this measure, the Senator from Indiana (Mr. BAYH), for their great courtesy, their patience, and their forbearance which they have manifested toward me during the days this resolution has been under debate.

I also wish to take this occasion to thank one of my aides, Robert Bland Smith, Jr., for the dedicated, diligent, and untiring assistance which he has given to me in my efforts to present to the Senate views which I feel deeply and which I entertain honestly.

I also wish to pay tribute to the small band—an exceedingly small band—of stouthearted Senators who have shared my views in respect to the equal rights amendment and have supported my efforts to bring some degree of order out of the legal chaos which the amendment is likely to inflict upon our country. It is almost impossible to conceive the state of legal chaos which will ensue if this amendment is ratified by the States. It will invalidate thousands of laws which make legal distinctions between men and women, many of which are based upon entirely rational grounds and a recognition of the fact that God did create two sexes.

These stouthearted Senators who have stood by me in this body sought in vain to make it certain that the equal rights amendment would not compel the Congress to subject women to compulsory military service when there was no necessity for so doing. They sought, and sought in vain, to make it certain that the daughters of America would not be sent into combat to die or to be maimed by the bayonets, the bombs, the bullets, the grenades, the mines, the napalm, the poison gas, and the shells of an enemy.

They tried to make certain that the laws of the United States and the laws of the States which extend protections and exemptions to women in general and to wives, mothers, and widows in particular, which commonsense and reality and the experience of mankind have shown to be needful to enable them to perform their roles as wives and mothers, and to extend to helpless children the nurtures which they require in their infancy, and to give them the training necessary to their intellectual and spiritual role, were not outlawed by this amendment. They sought to do that in vain.

They also sought to make certain that the laws which imposed upon husbands the primary obligation to support their wives, and upon fathers the primary obligation to support their children, would not be abrogated by this amendment. They also sought to do that in vain.

They also sought to make certain that the laws of the United States and the laws of the States which secure privacy—an invaluable right—to men and women and to boys and girls would not be abrogated by this amendment. They sought to do that in vain.

They also sought to make certain that mature men would not go unwhipped of justice if they seduce innocent and virtuous women under promises of marriage, or if they have carnal knowledge of immature girls under the age of consent, or if they transport women and girls in interstate or foreign commerce for the purpose of debauchery and prostitution. These stouthearted Senators also sought that objective in vain.

The stouthearted Senators, who stood by me in this flight, and I have sustained an overwhelming defeat. But I believe that we have sustained this defeat under circumstances in which defeat serves better than victory to shake the soul and let the glory out. I say to those stouthearted Senators who supported me in this fight that they can lay to their hearts the satisfaction that they have not aided in an effort to crucify American womanhood upon the cross of dubious equality and specious uniformity. They have pursued this course because they cannot blind themselves to the proposition that when God created mankind, he created them male and female.

I cannot vote for this resolution on final passage.

I sincerely hope that the State legislatures will give serious consideration to all the arguments which have been made for the resolution and all the arguments which have been made against the resolution. I hope they will not agree to a constitutional amendment which would compel Congress to send my 5-year-old granddaughter on a subsequent occasion into combat with armed enemies of the United States where there are millions and millions and millions of men available to perform that duty.

I appreciate the indulgence of the Senate, and I yield the floor.

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

Mr. ERVIN. I yield.

Mr. MANSFIELD. Mr. President, first, may I extend my congratulations to the distinguished senior Senator from North Carolina for the fight he has waged in all honesty, with deep conviction, and with great vigor.

If this constitutional amendment is adopted in the Senate by a two-thirds vote, it will not be a catastrophic defeat for the distinguished Senator; but if defeat there is, it will be an honorable defeat, because he has stated his case with cogency and clarity, and he has waged the good fight for what he thinks is right, and perhaps history will prove him right. But, as the Senator has indicated, it is going to take three-quarters of the States to affirm or to approve what Congress will have done if this body this afternoon passes the constitutional amendment by

a two-thirds majority, and that remains to be seen.

I want to pay my deepest respects to the distinguished Senator not only for the fight he has waged, consistently and with clarity, but also for the fact that he is the only Member of this body who, since we returned to the second session of this Congress on January 18, has been engaged in debate, day in and day out, without fail. He has been the first Member to come into the Chamber, along with the joint leadership. Almost always, he has been the last Member to leave.

So I commend the distinguished Senator for the remarkable physical stamina he has shown, and I honor him for the intellectual integrity he has displayed.

Mr. ERVIN. Mr. President, I thank the distinguished majority leader for his most generous and gracious remarks. If I had not entertained heretofore the profound admiration for him which I do, I would certainly entertain it now.

Mr. BAYH. Mr. President, I ask unanimous consent that excerpts from the majority report of the Senate Judiciary Committee, explaining in significant detail some of the issues which have been discussed here today be printed in the RECORD, so that the State legislatures of the 50 States may have the benefit of that information.

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

[Excerpts from the majority report of the Committee on the Judiciary on the Equal Rights Amendment—submitted by Mr. BAYH]

STATEMENT

The proposed Equal Rights Amendment reads as follows:

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 when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE—

"SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

"SEC. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

"SEC. 3. This amendment shall take effect two years after the date of ratification."

The history of the proposal, the need for an Equal Rights Amendment, and the effect of the Amendment are discussed in detail in later sections of this Report. The basic principle on which the Amendment rests may be stated shortly: sex should not be a factor in determining the legal rights of men or of women. The Amendment thus recognizes the fundamental dignity and individuality of each human being. The Amendment will affect only governmental action; the private actions and the private relationships of men and women are unaffected. And the Amendment only requires equal treatment of individuals; it does not require any State or the federal government to establish quotas of men or women in, for example, admission to State supported schools.

Both major political parties have repeatedly supported this proposal in their national party platforms. It has received the endorsement of Presidents Eisenhower, Kennedy, Johnson and Nixon. Both the Citizens' Advisory Council on the Status of Women, created by President Kennedy, and the President's Task Force on Women's Rights and Responsibilities, created by President Nixon, have recommended in strongest terms approval of the Amendment. At least eleven states (California, Connecticut, Delaware, Florida, Louisiana, Maryland, Minnesota, Nebraska, New York, North Dakota, Pennsylvania) have taken official action in support of the Amendment. The House of Representatives on October 12, 1971 approved the Amendment 354 to 23. And S.J. Res. 8, which is identical to H.J. Res. 208, is cosponsored by over half the Senate.

Moreover, an impressive list of organizations have recorded their support of the Equal Rights Amendment. Among them are the following:

American Association of College Deans.
American Association of University Women.
American Association of Women Deans and Counselors.
American Association of Women Ministers.
American Civil Liberties Union.
American Federation of Soroptimist Clubs.
American Home Economics Association.
American Jewish Congress.
American Medical Women's Association.
American Newspaper Guild.
American Nurses Association.
American Society of Microbiology.
American Society of Women Accountants.
American Society of Women Certified Public Accountants.
American Women in Radio and Television.
Association of American Women Dentists.
B'nai B'rith Women.
Church Women United.
Common Cause.
Council for Christian Social Action, United Church of Christ.
Council for Women's Rights.
Ecumenical Task Force on Women and Religion (Catholic Caucus).
Federally Employed Women.
General Federation of Women's Clubs.
Intercollegiate Association of Women Students.
International Association of Human Rights Agencies.
International Brotherhood of Painters and Allied Trades.
International Brotherhood of Teamsters.
International Union of United Automobile, Aerospace & Agricultural Implement Workers UAW.
Interstate Association of Commissions on the Status of Women.
Ladies Auxiliary of Veterans of Foreign Wars.
League of American Working Women.
National Association of Colored Women.
National Association of Negro Business and Professional Women's Clubs.
National Association of Railway Business Women.
National Association of Women Lawyers.
National Coalition of American Nuns.
National Education Association.
National Federation of Business and Professional Women's Clubs.
National Organization for Women.
National Welfare Rights Organization.
National Women's Party.
National Women's Political Caucus.
Professional Women's Conference.
St. Joan's Alliance of Catholic Women.
Unitarian Universalist Women's Federation.
United Automobile Workers.
United Methodist Church—Women's Division.
Women's Equity Action League.
Women's International League for Peace and Freedom.
Women's Joint Legislative Committee for Equal Rights.
Women United.

Finally, a number of distinguished constitutional scholars have testified in support of the Equal Rights Amendment, including Professor Norman Dorsen of New York University, Professor Thomas I. Emerson, Lines Professor of Law at Yale Law School, and Leo Kanowitz, Professor of Law at the University of New Mexico. Moreover, the Association of the Bar of the City of New York, through its Committee on Civil Rights and Special Committee on Sex and Law has urged "adoption of the [Equal Rights] Amendment as the best means of establishing equality before the law." And the American Bar Association recently adopted a resolution which "supports constitutional equality for women, and urges extension of legal rights, privileges and responsibilities to all persons, regardless of sex."

In sum, the Committee was impressed with the broad base of political, public and scholarly opinion in favor of the Equal Rights Amendment, and recommends that it be approved.

I. LEGISLATIVE HISTORY

Proposed constitutional amendment providing for equal rights for men and women have been introduced in nearly every Congress since 1923, shortly after the ratification of the 19th Amendment extended the right to vote to women. Resolutions were reported favorably by the Subcommittee on Constitutional Amendments in the 88th, 89th and 90th Congresses, as well as a number of earlier Congresses. Resolutions were reported favorably by the Committee on the Judiciary in the 80th, 81st, 82nd, 83rd, 84th, 86th, 87th and 88th Congresses.

In the 81st Congress, and again in the 83rd Congress, resolutions passed the Senate with a floor amendment. This floor amendment provided that the Amendment "shall not be construed to impair any rights, benefits or exemptions now or hereafter conferred by law upon members of the female sex." In both instances, the House of Representatives failed to act. The same floor amendment was added to an equal rights resolution during Senate consideration in the 86th Congress. The proponents of the amendment objected to this addition because it diluted the equality of rights and responsibilities among men and women, which is the Amendment's goal. Accordingly, the resolution's principle sponsors moved to recommit it to the Judiciary Committee, and that motion was passed.

On May 5, 6, and 7, 1970, the Subcommittee on Constitutional Amendments held hearings on the Equal Rights Amendment. It received testimony from 42 witnesses, received 75 additional insertions of material, and compiled a hearing record of almost 800 pages. *The Equal Rights Amendment*, Hearings Before the Senate Subcommittee on Constitutional Amendments, 91st Cong., 2d Sess. (1970). The Subcommittee met and reported the Amendment to the full Committee on August 10, 1970. Soon thereafter the full Committee held a further series of hearings on the Amendment, on September 9, 10, 11, and 15, 1970. It listened to 25 witnesses and compiled a 430 page record of hearings. *Equal Rights 1970*, Hearings Before the Senate Committee on the Judiciary, 91st Cong., 2d Sess. (1970).

In the meantime, the House of Representatives voted to discharge its Judiciary Committee from further consideration of the Equal Rights Amendment and, on August 10, 1970, by a vote of 350 to 15, approved the Amendment (H.J. Res. 264).

The House-passed joint resolution was not referred to the Senate Judiciary Committee but was placed directly on the Calendar pursuant to the request of the Senate leadership. H.J. Res. 264 became the pending Senate business on October 6, 1970. After several days of debate, on October 13, 1970, the Senate adopted by a vote of 36 yeas to 33 nays Amendment No. 1049, which added a second sentence to the first section of the

joint resolution, as follows: "This article shall not impair, however, the validity of any law of the United States which exempts women from compulsory military service." Amendment 1049 also imposed a seven-year time limit on the ratification process and made the joint resolution effective two years—instead of one year—after ratification. Thereafter, the Senate also adopted, 50 yeas to 20 nays, Amendment No. 1048, which added to the pending joint resolution a second section proposing an additional constitutional amendment relating to prayers in public buildings. After further debate the Senate laid aside the joint resolution, as amended, on November 19, 1970, and proceeded to the consideration of other business. No further action was taken in the 91st Congress.

In the 92d Congress, Subcommittee No. 4 of the House Judiciary Committee held hearings on H.J. Res. 208—which is identical to S.J. Res. 8 and 9 in the 92d Congress—on March 24, 25, and 31, and April 1, 2, and 5, 1971, hearing testimony from 35 witnesses. *Equal Rights for Men and Women*, Hearings Before Subcommittee No. 4 of the House Judiciary Committee, 92d Cong., 1st Sess. (1971). On April 29, 1971 the Subcommittee by a voice vote ordered the measure reported to the House Judiciary Committee. The full Committee amended the joint resolution on June 22, 1971 by a vote of 19 to 16 by adding a section which provided that the Amendment would "not impair the validity of any law of the United States which exempts a person from compulsory military service or any other law of the United States or any State which reasonably promotes the health and safety of the people." It then, by vote of 38 to 2, ordered the joint resolution reported favorably. The Committee Report, H.R. Rep. 92-259, was filed on July 14, 1971. Separate views were filed by 14 Representatives; Minority views were filed by 3.

On October 12, 1971 the House rejected by vote of 104 to 254 the Committee amendment to H. J. Res. 208. After further debate, it approved the resolution in its original form by vote of 354 to 23. (117 Cong. Rec. H. 9392 (Daily ed. Oct. 12, 1971)).

In the Senate, the Subcommittee on Constitutional Amendments met on November 22, 1971, and adopted by vote of 6 to 4 a motion to substitute the following language for sections 1 and 2 of S.J. Res. 8, and S.J. Res. 9, and H.J. Res. 208:

"SECTION 1. Neither the United States nor any State shall make any legal distinction between the rights and responsibilities of male and female persons unless such distinction is based on physiological or functional differences between them.

SEC. 2. The Congress shall have the power to enforce the provisions of this article by appropriate legislation."

The subcommittee then voted unanimously to report all three joint resolutions, as amended, to the full Judiciary Committee.

By vote of 15 to 1 on February 29, 1972, the Senate Judiciary Committee ordered S.J. Res. 8, S.J. Res. 9 and H.J. Res. 208 reported favorably to the floor unamended. Prior to ordering the Equal Rights Amendment reported favorably and unamended, the Committee took the following actions:

(1) Rejected by roll call vote of 1 to 15 a motion to substitute for sections 1 and 2 of the Equal Rights Amendment the language (printed above) recommended by the Subcommittee on Constitutional Amendments (see Part IV, *infra*);

(2) Rejected by voice vote a motion to add the following language to section 1 of the Equal Rights Amendment: "The provisions of this article shall not impair the validity, however, of any laws of the United States or any State which exempt women from compulsory military service, or from service in combat units of the Armed Forces; or extend protections or exemptions to wives, mothers, or widows; or impose upon fathers responsibility for the support of children; or secure privacy to men or women, or boys or girls; or make punishable as crimes, rape, seduction, or other sexual offenses," (see Part IV, *infra*);

(3) Rejected by voice vote a motion to add the following language to section 1 of the Equal Rights Amendment: "Nothing contained in this article shall be construed to deprive the United States and the several States of the legislative power to extend to female persons any right or protection sanctioned by the fifth or fourteenth articles of amendment";

(4) Rejected by roll call vote of 2 to 14 a motion to add the following language to section 1 of the Equal Rights Amendment: "This article shall not impair the validity of any law of the United States which exempts women from compulsory military service or service in combat units of the Armed Forces", (see Part III(B), *infra*);

(5) Rejected by roll call vote of 3 to 13 a motion to add the following language to section 1 of the Equal Rights Amendment: "This article shall not impair the validity of any law of the United States which exempts women from compulsory military service," (see Part III(B), *infra*);

(6) Rejected by voice vote a motion to add the following language to section 1 of the Equal Rights Amendment: "No Federal law shall prohibit an institution of higher education from enrolling only male or female students or students of both sexes. If any such institution of higher education enrolls both male and female students, such institution shall not be allowed to accept only a certain percentage of individuals of either sex," (see Part III(E), *infra*).

II. THE NEED FOR THE EQUAL RIGHTS AMENDMENT

A. Discrimination against women

While there has been some progress toward the goal of equal rights and responsibilities for men and women in recent years, there is overwhelming evidence that persistent patterns of sex discrimination permeate our social, cultural and economic life. The magnitude of sex discrimination in the country today can be gauged by the simple and eloquent statement of Congresswoman Shirley Chisholm when she testified before the Subcommittee on Constitutional Amendments in May 1970: "I have been far oftener discriminated against because I am a woman than because I am black."

Some legislative progress has been made toward equal rights, but not enough to wipe out all discrimination against women in State and Federal law. Congress approved Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment unless sex is a "bona fide occupational qualification." And Congress approved the Equal Pay Act which assures that many persons who do equal work receive equal pay regardless of sex. But these laws fail to reach discrimination in many areas, allow for substantial exemptions in some cases, and have often been implemented too slowly.

The Supreme Court has been slow to move too: recently, for the first time, it did invalidate a state law which discriminated against women, but it did so in a way which left the burden of proof on each woman plaintiff to show that the law is unreasonable. The Court has consistently refused to apply the Fourteenth Amendment to discrimination based on sex with the same vigor it applies the Amendment to distinctions based on race.

In the States, progress has been mixed. Some States have made diligent efforts to revise outmoded and discriminatory laws, and three States—Illinois, Pennsylvania and Virginia—have recently approved State constitutional provisions banning sex discrimination. But in other States, there has been no progress at all.

On the whole, sex discrimination is still much more the rule than the exception. Much of this discrimination is directly attributable to governmental action both in maintaining archaic discriminatory laws and in perpetuating discriminatory practices in employment, education and other areas. The social and economic cost to our society, as well as the individual psychological impact of sex discrimination, are immeasurable. That a majority of our population should be subjected to the indignities and limitations of second class citizenship is a fundamental affront to personal human liberty.

Specific examples of sex discrimination are legion, and have been brought to the attention of Congress many times, through hearings on the Equal Rights Amendment and on other legislation (for example, *Discrimination Against Women*, Hearings Before the Special Subcommittee on Education of the House Committee on Education and Labor, 91st Cong., 2d Sess. (1970)). In assessing the need for the Equal Rights Amendment, it is useful to review a few of the best known and most far reaching cases of invidious sex discrimination.

1. Criminal Liability and Civil Responsibility

Difficult as it is to believe, the record shows that women are sometimes denied even the basic rights and responsibilities of citizenship in the United States today. Until 1966, for example, three States exluded women from juries altogether. And today there is still at least one State which requires women, but not men, to register specially to be eligible to serve on juries.

There is also invidious discrimination against women in the criminal laws of some States. One State has a statute allowing women to be jailed for three years for habitual drunkenness, while a man can receive only 30 days for the same offense. In two States, the defense of "passion killing" is allowed to the wronged husband, but not to the deceived wife. And in another State, female juvenile offenders can be declared "persons in need of supervision" for non-criminal acts until they are 18, while males are covered by the statute only until age 16.

2. Education

Governmental action also contributes significantly to sex discrimination in education. Approximately 75 percent of the college students in the country attend publicly supported institutions. These colleges and universities have a crucial role in determining employment opportunities for women by providing access to professional training and careers. Yet widespread patterns of sex discrimination are found in the admissions policies and hiring practices of institutions of learning throughout the country. As an independent report prepared for the Department of Health, Education and Welfare this year stated: "Discrimination against women, in contrast to that against minorities, is still overt and socially acceptable within the academic community."

Discrimination in admission to college is widespread. In 1968, only 18 per cent of the men entering public four-year colleges had a high school grade average of B+ or better. But 41 per cent of the freshman women had attained such grades. In 1969 one State university published an admissions brochure which stated that "admission of women on the freshman level will be restricted to those who are especially well qualified." Another State university admitted women only for summer school sessions, and never to the regular academic curriculum, unless they are related to employees or students and wish to pursue a course of study otherwise unavailable. In 1970, the percentage of the female population enrolled in college was markedly lower than the percentage of the male population. Over 40 percent of the

males between the ages of 18 and 21, and over 20 percent of the males between 23 and 24 were enrolled in college. But the comparable figures for females were 29 percent and 9 percent respectively.

Discrimination in admission to graduate schools is, if anything, even more widespread, despite the fact that women's undergraduate grade point averages are higher than men's. Testimony before the House Special Subcommittee on Education in 1970 revealed, for example, that the number of women applying for admission to U.S. medical schools increased by more than 300 percent between 1929–30 and 1965–66 (while male applications increased by only 29 percent). The percentage of women applicants who were accepted actually declined during the same period. And while women received 55 percent of the Bachelors degrees awarded in all fields in 1968–69, women received only 37 percent of the Masters degrees, only 13 percent of the Doctorates, and only 4 percent of the professional degrees.

Discrimination against women does not end with admission; it pervades every level of the teaching profession. While 75 percent of the teachers in public elementary and secondary schools are women, only 22 percent of the elementary school principals and only 4 percent of the high school principals are women. At the college level, statistics show that while almost half of the male teachers become full professors only 10 percent of the female teachers are granted that status. And according to a recent survey of 36 prominent law schools, to take a final example, only 2.1 percent of the faculty members are women, and a quarter of those are classified as Librarians.

3. Business and labor

The business and labor laws of some States discriminate invidiously against women. Some States place special restrictions on the right of married women, but not married men, to contract or to establish independent businesses or to become a guarantor or a surety. Perhaps even more astounding, the Committee discovered at the hearings in 1970 that twenty-six States then had laws or regulations which prohibited the employment of adult women in specified occupations or industries which were open to adult men.

Most States have enacted so-called "protective" labor legislation in one form or another. Many of these laws are not protective at all, but rather are restrictive, and have been shown to have a discriminatory impact when applied only to women. For example, a law which limits the working hours of women but not of men makes it more difficult for women to obtain work they desire and for which they are qualified, or to become supervisors. State laws which limit the amount of weight a women can lift or carry arbitrarily keep all women from certain desirable or high-paying jobs, although many if not most women are fully capable of performing the tasks required. Speaking of such restrictive laws as a whole, the Equal Employment Opportunities Commission states in its guidelines on sex discrimination:

"The Commission believes that [state laws which restrict or limit the employment or conditions of employment of females] although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences and abilities of individual females and tend to discriminate rather than protect."

Partially because of these laws, and also because of other sorts of sex discrimination, working women are at a great disadvantage in the private sector. The median salary income for women is only 59.5 percent of that earned by men—and in recent years the gap between male and female median incomes has been widening. In 1969, less than 5 percent of all fulltime female workers earned over $10,000 per year, compared with 35 percent of all male workers. At the other end of the scale, 14.4 percent of women, but only 5.7 percent of men, earned less than $3,000. Indeed, sex discrimination is so pervasive that women with four years of college education made only slightly more than men with an eighth grade education. And while women account for more than 40 percent of all white collar jobs, they hold only one in ten managerial positions and one in seven professional jobs.

Sex discrimination is clearly present even in government employment, which in total accounts for more than 20 percent of the labor force. For example, although women constituted 34 percent of all full-time white collar Federal Civil Service Employees in 1967, they filled more than 62 percent of the four lowest grades and only 2.5 percent or less of the four highest grades. And sex discrimination in government has an effect even greater than the numbers involved, for private employers often look to government as a model for employment practices.

B. Inadequacy of legislative or judicial relief

It is sometimes argued that all of the discriminatory laws and practices which exist could be eliminated without a constitutional amendment. If the Supreme Court were to hold that discrimination based on sex, like discrimination based on race, is inherently "suspect" and cannot be justified in the absence of a "compelling and overriding state interest", then part of the reason for the Amendment would disappear. But the Court has persistently refused so to hold. Indeed, the Court has upheld many laws which plainly discriminate against women.

Its first significant case involving sex discrimination was *Bradwell* v. *Illinois*, 83 U.S. 130 (1872), in which the Court upheld the refusal of the Supreme Court of Illinois to allow women to practice law. The Court relied on the Privileges and Immunities Clause of the Fourteenth Amendment and not the Equal Protection or Due Process Clauses, to uphold the law. Two years later, the Court held that the Fourteenth Amendment did not confer on women citizens the right to vote, in *Minor* v. *Happersett*, 88 U.S. 162 (1874), a position which stood until ratification of the Suffrage Amendment in 1920.

Later, the Court began to apply a standard of "reasonableness" to laws which discriminated on the basis of sex. This test was employed to uphold against constitutional attack labor laws which appeared to have little if any reasonable justification. A good example is the case of *Goesart* v. *Cleary*, 335 U.S. 464 (1948), in which the Court upheld a Michigan statute prohibiting all females—other than the wives and daughters of male licensees—from being licensed as bartenders. The Court in *Goesart* assumed that such patently discriminatory legislation could be sustained if it were "reasonably" related to the State's objective in making such a classification. The Court did not even explore the possibility that a more rigorous constitutional standard should be applied.

More recently, in *Hoyt* v. *Florida*, 386 U.S. 57 (1967), the Court upheld a Florida statute providing that no female would be called for jury service unless she had registered to be placed on the jury list. The Court found that such discrimination was permissible under the Fourteenth Amendment, since it was reasonable 'for a state, acting in pursuit of the general welfare to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities."

Last year the Supreme Court for the first time struck down a law which discriminated against women. In *Reed* v. *Reed*, ——— U.S. ———, 40 U.S.L.W. 4013, (1971, the Court invalidated a State law which arbitrarily favored men over women as administrators of estates. But the Court did not overrule such cases as *Goesart* and *Hoyt*, and it did not hold that sex discrimination is "suspect" under the Fourteenth Amendment. Instead, the Court left the burden on every woman plaintiff to prove that governmental action perpetuating sex discrimination is "unreasonable." And that is a difficult burden to carry, indeed. As the Association of the Bar of the City of New York pointed out in its recent report "[t]he 1971 *Reed* case indicated no substantial change in judicial attitude." Passage of the Equal Rights Amendment will make it clear that the burden is *not* on each woman plaintiff to show sex discrimination is "unreasonable"; the Amendment will, instead, assure all men and women the right to be free from discrimination based on sex.

Of course, it would theoretically be possible for Congress and each State to revise their laws and eliminate those which discriminate against women. But without the impetus of the Equal Rights Amendment, that process would be far too haphazard and much too slow to be acceptable. We cannot afford to wait any longer for Congress and each of the 50 State legislatures to find the time to debate and revise their laws. As in other areas where the Constitution has been amended, there is an imperative for immediate action. The Nation has waited too long already—it has been 49 years since the Equal Rights Amendment was first introduced. Only a constitutional amendment can provide the legal and practical basis for the necessary changes.

Finally, we cannot overlook the immense symbolic importance of the Equal Rights Amendment. The women of our country must have tangible evidence of our commitment to guarantee equal treatment under law. An amendment to the Constitution has great moral and persuasive value. Every citizen recognizes the importance of a constitutional amendment, for the Constitution declares the most basic policies of our Nation as well as the supreme law of the land.

The Committee concludes that because of the pervasive legal sex discrimination which now exists, and because of the inedaquacy of legislative and judicial remedies, there is a clear and undeniable need for the Equal Rights Amendment.

III. THE EFFECT OF THE EQUAL RIGHTS AMENDMENT

A. General principles

The general principles on which the Equal Rights Amendment rests are simple and well-understood. Essentially, the Amendment requires that the federal government and all state and local governments treat each person, male and female, as an individual.

It does not require that any level of government establish quotas for men or for women in any of its activities; rather, it simply prohibits discrimination on the basis of a person's sex. The Amendment applies only to governmental action; it does not affect private action or the purely social relationships between men and women.

The Separate Views of Congressman Edwards and 13 other members of the House Judiciary Committee in the House Report on the equal rights amendment, H.R. Rep. 92–359, state concisely and accurately the understanding of the proponents of the Amendment:

"The basic premise of House Joint Resolution 208 in its original form is a simple one. As stated by Professor Thomas Emerson of Yale University, one of the Nation's foremost authorities on constitutional law, the original text is based on the fundamental proposition that sex should not be a factor in determining the legal rights of women or of men.

"The existence of a characteristic found

more often in one sex than the other does not justify legal treatment of all members of that sex different from all members of the other sex. The same is true of the functions performed by individuals. The circumstance, that in our present society members of one sex are more likely to be engaged in a particular type of activity than members of the other sex, does not authorize the Government to fix legal rights or obligations on the basis of membership in one sex. The law may operate by grouping individuals in terms of existing characteristics or functions, but not through a vast over-classification by sex.

"The main reason underlying the basic concept of the original text derives from both theoretical and practical considerations. The equal rights amendment (H.J. Res. 208) embodies a moral value judgment that a legal right or obligation should not depend upon sex but upon other factors—factors which are common to both sexes. This judgment is rooted in the basic concern of society with the individual, and with the right of each individual to develop his own potentiality.

"The legal principle underlying the equal rights amendment (H.J. Res. 208) is that the law must deal with the individual attributes of the particular person and not with stereotypes of over-classification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. "Equality" does not mean "sameness." As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example a law providing for payment of the medical costs of child bearing could only apply to women. In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative.

"Just as the principle of equality does not mean that the sexes must be regarded as identical, so too it does not prohibit the States from requiring a reasonable separation of persons of different sexes under some circumstances. In this regard, two collateral legal principles are especially significant. One principle involves the traditional power of the State to regulate cohabitation and sexual activity by unmarried persons. This principle would permit the State to require segregation of the sexes for these regulatory purposes with respect to such facilities as sleeping quarters at coeducational colleges, prison dormitories, and military barracks.

"Another collateral legal principle flows from the constitutional right of privacy established by the Supreme Court in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). This right would likewise permit a separation of the sexes with respect to such places as public toilets, as well as sleeping quarters of public institutions.

"With respect to other constitutional considerations, it should be noted that (H.J. Res. 208) would apply only to governmental action, and not to private or individual action. In this regard, as well as in some of its other features, (H.J. Res. 208) is similar to those provisions of the 14th Amendment which are directed against racial, ethnic, and religious discrimination. Thus, in interpreting (H.J. Res. 208) the courts would have available a substantial body of case law which could be used as a guide when relevant. At the same time much as the struggle of women for equality is comparable to that of racial, ethnic, and religious minorities, there are some differences which the courts could also take into account in appropriate cases."

Because substantial controversy has arisen over the impact of the Equal Rights Amendment in a few specific areas, it is appropriate to suggest the likely application of these general principles in such areas.

B. Military service

It seems clear that the Equal Rights Amendment will require that women be allowed to volunteer for military service on the same basis as men; that is, women who are physically and otherwise qualified under neutral standards could not be prohibited from joining the service solely on the basis of their sex. This result is highly desirable for today women are often arbitrarily barred from military service and from the benefits which flow from it: for example, educational benefits of the G.I. bill; medical care in the service and through Veterans Hospitals; job preferences in government and out; and the training, maturity and leadership provided by service in the military itself.

It seems likely as well that the ERA will require Congress to treat men and women equally with respect to the draft. This means that, if there is a draft at all, both men and women who meet the physical and other requirements, and who are not exempt or deferred by law, will be subject to conscription. Once in the service, women, like men, would be assigned to various duties by their commanders, depending on their qualifications and the service's needs.

Of course, the ERA will not require that all women serve in the military any more than all men are now required to serve. Those women who are physically or mentally unqualified, or who are conscientious objectors, or who are exempt because of their responsibilities (e.g., certain public officials; or those with dependents) will not have to serve, just as men who are unqualified or exempt do not serve today. Thus the fear that mothers will be conscripted from their children into military service if the Equal Rights Amendment is ratified is totally and completely unfounded. Congress will retain ample power to create legitimate sex-neutral exemptions from compulsory service. For example, Congress might well decide to exempt all parents of children under 18 from the draft.

Our understanding of the effect of the Equal Rights Amendment comports with that of the House. The members of the House Judiciary Committee, quoting from the Report of the Senate Judiciary Committee on the Equal Rights Amendment in 1964, said:

"It could be expected that women will be equally subject to military conscription and they have demonstrated that they can perform admirably in many capacities in the Armed Forces. But the government would not require that women serve where they are not fitted just as men [are not required to serve where not fitted]."

Or, as Congresswoman Martha Griffiths, the primary sponsor of H.J. Res. 208, said on the floor:

"The draft is equal. That is the thing that is equal. But once you are in the Army you are put where the Army tells you where you are going to go."

Congressman Edwards, who had chaired the House Subcommittee Hearings on the Equal Rights Amendment, put it this way:

"Women in the military could be assigned to serve wherever their skills or talents were applicable and needed, in the discretion of the command, as men are at present."

Furthermore, our understanding comports with that of the witnesses at the hearings and other interested parties. See, for example, the testimony of Professor Norman Dorsen of New York University Law School in *Equal Rights for Men and Women 1971*, Hearing Before Subcommittee No. 4 of the House Judiciary Committee, 92d Cong., 1st Sess. 162–164 (1971); Report of the President's Task Force on Women's Rights and Responsibilities, *A Matter of Simple Justice* (April, 1970) (the Equal Rights Amendment "would impose on women an obligation for military service"); National Association of Women Lawyers, Letter to Hon. Emanuel Celler (April 27, 1971) (females "would be . . . subject to the draft on the same basis as young men" and "women in the military would receive the same benefits and veterans' preferences, employment, education skills learned in the service").

One question often raised is whether men and women can serve together efficiently in the Armed Services. Perhaps the best answer is that they are doing so now without apparent difficulty. The experience of other countries supports this conclusion. In Israel, women are required to serve in the Defense Forces just as men. They are not, however, assigned to combat posts, nor are they required to engage in physical combat. Rather, they perform critical noncombatant tasks in the clerical, communication, electronics and nursing fields. Separate and independent facilities are maintained for women soldiers. Under these circuimstances, no significant difficulties have arisen from having men and women serve together.

C. Labor legislation

A number of States have laws which restrict or limit the occupations or conditions of employment of females, but not of males. These laws are often called "protective", but in practice many of them discriminate against women by making it difficult and sometimes impossible for a fully qualified woman to obtain certain jobs, often highly desirable ones. Because of Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment in certain instances where sex is not a "bona fide occupational qualification", these laws are not nearly as great a barrier to fair employment for women as they once were. Nevertheless, some States retain their laws.

Most of the so-called "protective" laws were passed to protect women from exploitation in another era, and they represented hard won progress. But today, some are merely restrictive, and because they apply only to women confer no real benefit. For example, some States have laws which absolutely prohibit women, whether qualified or not, from certain jobs—jobs which are open to men. Other States have weight lifting laws applicable only to women which effectively deny fully qualified women certain jobs. Still others have laws limiting the hours women may work—and these sometimes prevent women from gaining promotions to supervisory positions. As the Equal Employment Opportunity Commission has found, such laws "do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect."

Ratification of the Equal Rights Amendment will result in equal treatment for men and women with respect to the labor laws of the States, as in other legal matters. This will mean that such restrictive discriminatory labor laws as those which bar women entirely from certain occupations will be invalid. But those laws which confer a real benefit, which offer real protection, will, it is expected, be extended to protect both men and women. Examples of laws which may be expanded include laws providing for rest periods or minimum wage benefits or health and safety protections. Men are now sometimes denied the very real benefits these laws offer. As Professor Leo Kanowitz pointed out to your Committee at its Hearings in September 1970: "The fears of some opponents of the [Equal Rights] Amendment that its adoption would nullify laws that presently protect women only are thus unfounded—since the equality of treatment required by the [A]mendment can be achieved by extending the benefits of those laws to men rather than by removing them for women." The Association of the Bar of the City of New York pointed out in discussing laws requiring rest periods for women only, that they "may be extended to both sexes without burden or disruption."

D. Expansion versus nullification of unconstitutional statutes

The question of whether laws found unconstitutional under the Equal Rights Amendment will be struck down or extended to cover both men and women, is a question which extends beyond the area of labor legislation. Of course, the legislatures of the several States will have the primary responsibility for revising those laws which conflict with the Equal Rights Amendment. Indeed, the purpose of delaying the effective date of the Equal Rights Amendment for two years after ratification is to allow legislatures—particularly those which meet only in alternate years—and agencies an opportunity to review and revise their laws and regulations. As stated above, the Committee expects that any labor law, or other legislation, which is truly protective will be extended to include both sexes, while laws which are restrictive will become null and void.

In those situations where a court finds a State or federal law in conflict with the Equal Rights Amendment, the legal infirmity will be cured either by expanding the law to include both sexes or nullifying it entirely. As discussed above, it is expected that those laws which are discriminatory and restrictive will be stricken entirely as the court did in *McCrimmon* v. *Daley*, 2 FEP Cases 971 (N.D. Ill. March 31, 1970) which involved a law banning women from a certain occupation. On the other hand, it is expected that those laws which provide a meaningful protection would be expanded to include both men and women, as for example minimum wage laws, see *Potlatch Forests, Inc.* v. *Hays*, 318 F. Supp. 1368 (E.D. Ark. 1970), or laws requiring rest periods, *cf.* Equal Employment Opportunities Commission Case No. 6-8-6654 (June 23, 1969), 1 CCH Employ. Prac. Guide 6021.

There can be no question that the courts, upon holding a statute unconstitutional, can expand the scope of the statute if necessary to cure its legal infirmity. As Mr. Justice Harlan said, concurring in *Welsh* v. *United States*, 398 U.S. 333, 361 (1970) (footnote omitted):

"Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *See Skinner* v. *Oklahoma ex rel. Williams*, 316 U.S. 535, 543 (1942); *Iowa Des-Moines Nat'l. Bank* v. *Bennett*, 284 U.S. 239, 247 (1931); *Developments In the Law-Equal Protection* 82 Harv. L. Rev. 1065, 1136-37 (1969).

The Supreme Court has applied this principle in many cases. In 1880, for example, the Court extended a State statute limiting jury service to "electors" to include blacks enfranchised by the 14th and 15th Amendments rather than striking the law down. *Neal* v. *Delaware*, 103 U.S. 370 (1880). In *Sweat* v. *Painter*, 339 U.S. 637 (1950), and *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950) the Court held that State laws restricting access to State institutions of higher education on the basis of race were unconstitutional; it expanded the laws so that black students had equal access. And in *Levy* v. *Louisiana*, 391 U.S. 68 (1968), the Court extended to illegitimate children the right, restricted by a State statute to legitimate children, to recover wrongful death benefits. See generally Dorsen, *The Necessity of a Constitutional Amendment* in Equal Rights for Women: A Symposium on the Proposed Constitutional Amendment, 6 Harv. Civ. Rts.—Civ. Lib. L. Rev. 216 (1971).

As previously stated, courts have had a great deal of experience in dealing with laws which discriminate on the basis of sex, for Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex unless sex is a "bona fide occupational qualification". Under that Federal statute a State overtime wage law was extended to include men, *Potlatch Forests, Inc.* v. *Hays*, 318 Supp. 1368 (E.D. Ark. 1970) as were weightlifting limitations, *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969). On the other hand, State laws banning women from an occupation have been struck down, *McCrimmon* v. *Daley*, 2 FEP Cases 971 (N.D., Ill. March 31, 1970), *on remand from* 418 F. 2nd 366 (7th Cir. 1969). See generally *Developments In the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Har. L. Rev. 1109, 1188-1190, 1194-1195 (1971).

E. Criminal law, education and family law

The general principles discussed above will govern the application of the Equal Rights Amendment to all fields of law. With respect to criminal law, for example, the Amendment will prohibit a State from providing for different punishments for men and women who commit the same crime, *cf. Commonwealth* v. *Daniel*, 430 Pa. 642, 243, 243A. 2d 400(1968). But the Amendment will not invalidate laws which punish rape, for such laws are designed to protect women in a way that they are uniformly distinct from men.

With respect to education, the Equal Rights Amendment will require that State supported schools at all levels eliminate laws or regulations or official practices which exclude women or limit their numbers. The Amendment would not require quotas for men and women, nor would it require that schools accurately reflect the sex distribution in the population; rather admission would turn on the basis of ability or other relevant characteristics, and not on the basis of sex. A similar result may be expected with respect to the distribution of scholarship funds. State schools and colleges currently limited to one sex would have to allow both sexes to attend. Employment and promotion in public schools would, as in the case of other governmental action, have to be free from sex discrimination.

It should also be noted with respect to education that the Amendment would not require that dormitories or bathrooms be shared by men and women. As explained above, the Amendment does not prohibit the separation of the sexes where the right of privacy is involved. As the Association of the Bar of the City of New York pointed out in its report, "[t]he constitutional right of privacy could be used to sanction separate male and female facilities for activities which involve disrobing, sleeping and personal bodily functions."

The Equal Rights Amendment may also have an effect on those State laws affecting domestic relations. In this area, as elsewhere, the Amendment will prohibit discrimination based on sex. This will mean that State domestic relations laws will have to be based on individual circumstances and needs, and not on sexual stereotypes. The report of the Association of the Bar of the City of New York accurately describes the Amendment's effect in this area:

"The Amendment would bar a state from imposing a greater liability on one spouse than on the other merely because of sex. It is clear that the Amendment would not require both a husband and wife to contribute identical amounts of money to a marriage. The support obligation of each spouse would be defined in functional terms based, for example, on each spouse's earning power, current resources and nonmonetary contributions to the family welfare.

"Thus, if spouses have equal resources and earning capacities, each would be equally liable for the support of the other—or in practical effect, neither would be required to support the other. On the other hand where one spouse is the primary wage earner and the other runs the home, the wage earner would have a duty to support the spouse who stays at home in compensation for the performance of her or his duties.

"Although courts still probably would be reluctant to interfere in the allocation of support between husband and wife in an ongoing marriage, upon the dissolution of marriage, both husbands and wives would be entitled to fairer treatment on the basis of individual circumstances rather than sex. Thus alimony laws could be drafted to take into consideration the spouse who had been out of the labor market for a period of years in order to make a non-compensated contribution to the family in the form of domestic tasks and/or child care."

As Professor Norman Dorsen pointed out to the Committee:

"The National Conference of Commissioners on Uniform State Laws recently adopted a Uniform Marriage and Divorce Act which takes an approach similar to that contemplated by the Equal Rights Amendment. It provides for alimony or maintenance for either spouse, and child support by either or both spouses, by defining all duties neutrally in terms of functions and needs of the people involved, rather than in terms of their sex. The action by the Commissioners, a respected and prudent body, deserves special consideration."

In sum, there is no reason to fear that the Equal Rights Amendment will have undesirable effects on the rights of men and women under State domestic relations laws.

* * * * *

V. SECTIONAL ANALYSIS

Resolution: This is the traditional form of a joint resolution proposing a constitutional amendment for ratification by the States. The seven year time limitation assures that ratification reflects the contemporaneous views of the people. It has been included in every amendment added to the Constitution in the last 50 years. It is interesting to note that the longest period of time ever taken to ratify a proposed amendment was less than 4 years. The power and responsibility of Congress to impose a reasonable time limit for ratification of constitutional amendments was made clear in both *Dillon v. Gloss* 256, U.S. 368 (1921), and *Coleman v. Miller*, 307 U.S. 433 (1939).

Section 1: This is the operative portion of the Amendment, described in detail above.

Section 2: This section grants Congress the power to implement the provisions of the Amendment by legislation. The wording is taken from Section 5 of the 14th Amendment, and almost identical language is found in the 13th, 15th, 19th, 23d, 24th, and 26th Amendments.

Section 3: This section delays the effective date of the Amendment for two years after ratification. The purpose of this section is to give the States and the federal government an opportunity to review and revise their laws, regulations and practices so as to bring them into compliance with the Amendment. Those State legislatures which meet only in alternate years, of course, will need this length of time to have an adequate opportunity to review their laws.

Mr. BAYH. Mr. President, I also ask unanimous consent to have printed in the RECORD a list of those organizations which have been particularly helpful to the Senate and to the Judiciary Committee in its deliberations. I only wish I had the time to name all the individuals, both staff members of these organizations and others who have worked on their own, whose countless hours of work have been of incalculable value to those of us in Congress who have been involved in this effort. I am also indebted to my staff for all the efforts they have made to make possible the adoption of this important amendment by the Senate.

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

American Association of College Deans.
American Association of University Women.
American Association of Women Deans and Counselors.
American Association of Women Ministers.
American Civil Liberties Union.
American Federation of Soroptimist Clubs.
American Home Economics Association.
American Jewish Congress.
American Medical Women's Association.
American Newspaper Guild.
American Nurses Association.
American Society of Microbiology.
American Society of Women Accountants.
American Society of Women Certified Public Accountants.
American Women in Radio and Television.
Association of American Women Dentists.
B'nai B'rith Women.
Church Women United.
Common Cause.
Council for Christian Social Action, United Church of Christ.
Council for Women's Rights.
Ecumenical Task Force on Women and Religion (Catholic Caucus).
Federally Employed Women.
General Federation of Women's Clubs.
Intercollegiate Association of Women Students.
International Association of Human Rights Agencies.
International Brotherhood of Painters and Allied Trades.
International Brotherhood of Teamsters.
International Union of United Automobile, Aerospace & Agricultural Implement Workers UAW.
Interstate Association of Commissions on the Status of Women.
Ladies Auxiliary of Veterans of Foreign Wars.
League of American Working Women.
National Association of Colored Women.
National Association of Negro Business and Professional Women's Clubs.
National Association of Railway Business Women.
National Association of Women Lawyers.
National Coalition of American Nuns.
National Education Association.
National Federation of Business and Professional Women's Clubs.
National Organization for Women.
National Welfare Rights Organization.
National Woman's Party.
National Women's Political Caucus.
Professional Women's Conference.
St. Joan's Alliance of Catholic Women.
Unitarian Universalist Women's Federation.
United Automobile Workers.
United Methodist Church—Women's Division.
Women's Christian Temperance Union.
Women's Equity Action League.
Women's International League for Peace and Freedom.
Women's Joint Legislative Committee for Equal Rights.
Women United.

Mr. BAYH. Mr. President. I also wish to bring to the attention of my colleagues an article by Marguerite Rawalt, an attorney at law, concerning the necessity of the equal rights amendment. Mrs. Rawalt is a past president of the National Association of Women Lawyers and is the general counsel of Women United. She has worked long and hard to secure passage of the equal rights amendment and in this article she describes persuasively the reasons that the Senate must join the House and give congressional approval to the equal rights amendment.

I ask unanimous consent that an article entitled "Women Are Constitutional Outcasts" from "The Woman Physician," official publication of the American Medical Women's Association, vol. 26, December 1971, be printed in the RECORD at this point.

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

WOMEN ARE CONSTITUTIONAL OUTCASTS

(By Marguerite Rawalt)

(ABSTRACT.—*The legal status of women is reviewed, and shows that women do not have the same legal rights and privileges as men. The passage of an* Equal Rights Amendment *is therefore a necessity.*)

The hidden truth about the U.S. Constitution is that it applies to men only. The founding fathers who drafted this document to govern the new democracy based it upon the English common law under which women and slaves were mere chattels. After 187 years of application and interpretation, women alone are still outside its pale, with the single exception of the right to vote granted by a specific amendment, in 1920. Only by further amendment can American women be brought into the rarified atmosphere of constitutional protection, since both the judicial and legislative branches have failed to recognize women as full beneficiaries of the law. Accordingly, the "Equal Rights Amendment" has been introduced in *every Congress for the past 48 years* and reads as follows:

"Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."

WHY IS AN EQUAL RIGHTS AMENDMENT NEEDED?

The U.S. Supreme Court is the final interpreter of the Constitution. It has never ruled that the female half of the population is entitled to the benefits readily accorded to all males, either citizens or aliens. Since the original Constitution did not include females, cases claiming constitutional protection have arisen under the Fifth and Sixth Amendments thereto. The Fifth Amendment, applicable to the Federal Government, declares that no person may "be deprived of life, liberty or property without due process of law." The 14th Amendment adopted in 1868, forbids any state to "deprive *any person* of life, liberty or property without due process of law; or to deny to *any person* the equal protection of the laws."

The "equal protection" clause has been often and variously applied by the U.S. Supreme Court to insure legal rights of male citizens and of male non-citizens; to alien Chinese laundrymen and Japanese fishermen; to corporations; to racial groups; to school children; to juveniles; and to arch criminals. It seems irrefutable to say that the Court has embraced everybody and everything within the ambit of the 14th Amendment except only women of America. There follows an analysis of the high Court's controlling rulings.

1. *The right to work is not a woman's right under the 14th Amendment.*

The Supreme Court refused to apply the 14th Amendment to insure women the right to follow the profession of law. It has never been held to give women the right to work at any lawful occupation of the individual's choice. Illinois and Virginia statutes denying admission of women to the practice of law were early upheld by decisions in 1872 and in 1894.[1] The rationale was that:

"The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . at common law a women had no legal existence separate from her husband . . . and many rules of law dependent upon this cardinal principle still exist in full force in most states, one that a married woman is incapable, without her husband's consent, of making contracts" and

"That God designed the sexes to occupy different spheres of action, and that it belonged *to men to make, apply, and execute the laws,* was regarded as an almost *axiomatic truth.*"

State legislatures later voluntarily opened the legal profession to all.

On the other hand, the Court has never failed to uphold the right to work for the men of this country. When Yick Wo, one of many Chinese laundrymen in San Francisco appealed from denial of a license, the Supreme Court in 1886 found "no reason whatever . . . why they should not be permitted to carry on their harmless and useful occupation on which they depend for a livelihood." [2]

In 1948, the Court granted certiorari "to review this question of importance" being the constitutionality of a California law prohibiting the licensing of "alien Japanese" interned during the war. Said the Court, ruling in his favor:

"The 14th Amendment and laws under its authority embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws." [3]

Yet women have been excluded as persons and citizens under the 14th Amendment. In fact, as women view the matter today, with 31½ million women in the work force, not only are they excluded from equal protection, but the words of the Constitution have been turned into limitations, conditions exclusions, weight-lifting limitations to bar them from promotions to supervisory jobs, to deny them opportunity to earn premium pay for overtime, and even to cause the employer to lower the percentage of women hired in his work force. This reserves the better jobs for male workers.

When the Supreme Court was faced with the contention in 1908 that the Oregon law restricting women from working more than ten hours per day was a denial of their right to work, a denial of equal protection, the Court's rationale for refusing to uphold the same hours for all workers, men or women, was that *"Sex is a valid basis for classification."* [4] It ruled that women, as a class, could be denied equal protection; that there was no discrimination or differentiation as between all women, by placing them in a "reasonable" category. The Court refused to follow its own decision given just three years earlier striking down a New York statute that limited hours for men and women. The Court declared: [4]

"She is properly placed in a class by herself and legislation designed for her protection may be sustained when like legislation is not necessary for men and could not be sustained.

In *Lochner v. New York* we held that a law that no laborer may work in a bakery over 60 hours a week was not *as to men* a legitimate exercise of the policy power of the state, but an unreasonable and unnecessary and arbitrary inference with the *right and liberty of the individual* . . . as such void under the Federal Constitution."

In 1948, the Court upheld a Michigan statute denying a license to work as bartender to any female *"unless* she be wife or daughter of the male owner." [5] Women, as a class, could be thus denied the better paying job behind the bar, although they were free to serve in lower paid waitress jobs on the public side of the bar—was this equal protection? However, the New Jersey State Supreme Court in 1970 overruled such a state law "in light of current customs and mores."

TITLE VII OF THE CIVIL RIGHTS ACTS OF 1964

A first breakthrough in restrictive labor laws came with enactment of Title VII of

Footnotes at end of article.

the Civil Rights Act of 1964, which makes it unlawful for an employer, employment agency, or labor organization to discriminate in employment on account of race, religion, national origin, or sex. An exception was written into the law for a "bona fide occupational qualification" (BFOQ) to cover such instances as guards in prisons, religion of employees in a religious institution, and the like. The first cases to reach the courts were brought by women in trade unions, to challenge the state restrictive labor laws imposing maximum hours of work, weight-lifting, separate seniority lists, and job descriptions which served to relegate women to the lower paying levels. The cases were decided against the women plaintiffs in the trial courts whereupon women attorneys, and newly formed civil rights for women organizations, came to the side of the litigants and carried their cases up to higher courts on appeal. In the two cases which have become final, the U.S. Court of Appeals reversed the trial courts and ruled in favor of the women, ordering that they receive back pay and the jobs which they had been refused. *Weeks v Southern Bell Tel. & Tel. Co.* (March 4, 1969)[6] decided by the U.S. Court of Appeals, Fifth Circuit, sitting in New Orleans, ruled against the employer's weight-lifting condition on the job in question, and set down the rule that the employer "had the burden of proving that all, or substantially all, women would be unable to perform safely and efficiently the duties of the job involved." In *Bowe v Colgate-Palmolive Co.* (Sept. 26, 1969)[7] the U.S. Court of Appeals, Seventh Circuit, sitting in Chicago, ruled that if weightlifting conditions were to be applied,[7] they must be applied to each individual, male or female; outlawed separate seniority lists for male and female employees; and struck down union contracts fixing job categories which gerrymandered women into the lowest paying job levels.

Two lower Court decisions have overruled state laws fixing maximum hours for women only, not by application of the 14th Amendment, but on the ground that such laws violate Title VII, which, as a Federal law, takes precedence over state law under the Supremacy Clause of Article VI of the Constitution.[8] However, the Supreme Court refused to review a decision by the California Federal Court in which the female plaintiff challenged the *Muller v Oregon* ruling on maximum hours laws.[9] And thus the 1908 "sex is a valid basis for classification" doctrine still stands not only as to labor laws, but throughout other areas of law which single women out for different treatment.

Maternity leave regulations imposing arbitrary periods of absence for pregnancy, have produced two irreconcilable federal court decisions under the 14th Amendment.[10] A District Court sitting in Virginia ruled that a school board regulation requiring teachers to take leave of absence from duty at the end of the fifth month of pregnancy, was a violation of the equal protection clause. It ruled that the school board was an arm of the State so that its regulations constituted state action. However, a District Court, sitting in Ohio, about the same date, refused to find any constitutional denial in such a provision, quoting *Muller v Oregon* and its whole progeny of cases ruling that "sex was a reasonable classification."

The one and only employment rights case to reach the Supreme Court since 1964 did not present a 14th Amendment issue, simply the question whether the fact that the employee was a mother of pre-school children amounted to "BFOQ" exception under Title VII to warrant the company's refusal to hire her. *Ida Phillips v Martin Marietta Corporation* (Jan. 25, 1971).[11] The Court remanded the case to the trial court with an "indication that a BFOQ exception could be established by a showing that some women, even the vast majority, with pre-school age children have family responsibilities that interfere with job performance and that men do not usually have such responsibilities." Justice Thurgood Marshall said, however, "I fear that in this case . . . the Court has fallen into the trap of assuming that the act permits ancient canards about the proper role of women to be a basis for discrimination. Congress, however, sought just the opposite result."

Meanwhile, a number of states have voluntarily applied the provisions of Title VII and the regulations thereunder which hold that such state laws imposing conditions upon women only, are superseded by the Federal law, and are no longer enforceable. Thus, without Supreme Court retraction, these laws are being dropped through a piecemeal, state by state, process. However, the all-pervasive principle that "sex is a reasonable classification" marches on and has put its tentacles into other fields of law to deny equality of rights to women.

2. *The 14th Amendment does not insure fair and equitable property rights to married women.*

In every state in the Union, one or another kind of legal disability or restriction limits the property rights of married women, as reported by the President's Commission on the Status of Women (1963). The 1944 opinion of the Florida Supreme Court aptly summarizes the situation:

". . . a woman's responsibilities and faculties remain intact from age of maturity until she finds her mate; whereupon, incompetency seizes her and she needs protection in an extreme degree. Upon the advent of widowhood she is reinvested with all her capabilities which had been dormant during her marriage, only to lose them again upon remarriage. Intermittently, she is protected and benefited according as she is married or single."

Under common law principles which undergird the statutes in 42 states, each spouse owns whatever property he or she earns. Where the husband is the sole income producer, *all* the property acquired during marriage is therefore *his* property. While state laws have variously modified the common law principle, some limitation remains in every jurisdiction. In the eight community property states, husband and wife each owns an outright one-half of the property acquired during marriage, even though the wife has no outside earnings. But in most jurisdictions the husband, and not the wife, has the management rights, enabling him to create debts and dissipate the property without knowledge or consent of his wife. Texas notably revised its community property laws in 1968 to equalize management and ownership. Florida changed its Constitution to recognize a property right for married women.

A tremendous step toward equalizing property rights was taken in the model and proposed Uniform Marriage and Divorce Act promulgated in August 1970, and given endorsement by the American Bar Association. It is hoped that the states will adopt such a uniform act, thus clearing the maze of divorce grounds, and of provisions governing division of property upon dissolution of marriage. The Act would provide that upon dissolution of marriage, the marital property be divided by the Court without regard to marital misconduct, after considering such relevant factors as the economic circumstances of each spouse and the contribution of each to the acquisition of the property, including an evaluation of the contribution of a spouse as homemaker. Alimony, as such, is discarded in favor of court-assessed "maintenance payments" which may be assessed against either husband or wife, based upon reasonable needs, and the ability to support himself or herself by employment. The Court may order either or both parents to pay reasonable amounts for support of a child, and retains control over enforcement of the payment. Previous defenses of condonation, connivance, collusion, recrimination, in divorce actions would be abolished. The grounds for divorce, to be decided upon by the court after considering many outlined relevant factors, are that "the marriage is irretrievably broken" and that children are provided for. This proposed uniform act embraces "equality of rights under the law." The Equal Rights Amendment would undergird and hasten its adoption by all the states.

3. *The 14th Amendment does not guarantee the right to female students to attend any public college of their choice.*

In 1938 the Supreme Court held that the Missouri State University could not refuse to admit a person to study on the ground of his race, and ordered it to admit Mr. Gaines to its law school because he was otherwise denied equal protection of the laws.[12] Yet, 20 years later, the same court refused to review a ruling by the State Court of Civil Appeals of Texas which upheld the denial of the right to enroll in that state's university by a female student, on the ground of her sex. This was in face of the undisputed fact that she could not major in the course in floriculture in any other school of the state. The state court relied upon the doctrine that "sex is a reasonable classification" and refused to follow the Gaines decision precedent because the "question of race was different."[13] Two lower court decisions in 1970 raise an interesting conflict. The U.S. District Court in Virginia ruled that the exclusion of women from the state university violated the 14th Amendment's equal protection clause. The U.S. District Court in South Carolina refused to find such a violation in the case of male students seeking admission to the state supported female-only college, this latter case citing with satisfaction the whole line of leading cases stemming from *Muller* v. *Oregon*—"sex was a reasonable classification."[14]

But while the wheels of justice grind slowly in the courts, women have brought before federal administrative agencies, charges of sex discrimination against universities and colleges challenging quotas for student admissions, discrimination in scholarships and financial assistance, and in the hiring and promotion of women faculty members.[15]

4. Not until 1968 was the 14th Amendment applied to eliminate longer prison sentences for women than for men committing the same crime.

In 1968, two courts invalidated state laws which imposed longer prison sentences upon women than upon men for the same crime, and did so by rejecting the doctrine that "sex is a valid classification."[16] This shocking difference in treatment of the sexes was said to stem from legislative convictions that it required longer to rehabilitate a female than a male criminal. The U.S. District Court in Connecticut concluded that "nothing in the different nature of men and women noted by the Supreme Court in the Muller, Goeseart and Hoyt cases suggests any reasonable or just relation between the misdemeanors involved here and the inequality in potential punishments. . . ." The Supreme Court of Pennsylvania similarly was "convinced that considerations of factors which would justify a difference between men and women in matters of employment, as well as in a number of other matters, do not govern or justify the imposition of a longer or greater sentence of women than is imposed upon men for the commission of the same crime." And, is there such difference in the nature of men and women as to uphold a statute which excuses as justifiable homicide a husband's killing of his wife's paramour, but leaves a wife chargeable with murder for the killing of her husband's partner in adultery?"[17]

Footnotes at end of article.

5. The denial of constitutional coverage for women because it is lawful to treat them as a class apart (an outcast class!) extends into other areas of law, for example such as conditions upon right to serve on juries, married women's compulsory domicile as that of her husband, and right to serve as estate fiduciaries. A case is now waiting decision in the Supreme Court, testing an Idaho statute that "males shall be preferred to females" as administrators of an estate.[18]

CONGRESS AND THE EQUAL RIGHTS AMENDMENT

The Equal Rights Amendment which would make women of America citizens and persons under the Constitution, has been introduced in every Congress since 1923. All that Congress is asked to do is to submit the proposed Amendment to the states for their ratification. At least 11 states have already taken official action memorializing the Congress to do so.

Year after year, the resolution proposing the Equal Rights Amendment was stymied in the House Judiciary Committee, until in 1970, the unusual procedure of a discharge petition ordered the measure removed from Committee and gave opportunity to the 435 members to vote on the measure. A woman member of Congress, Martha Griffiths, introduced the petition. The resounding vote in favor of the Amendment was 350 to 15, on August 10, 1970. The House-passed Resolution was later killed in the Senate by crippling amendments.

Through the years, the Senate has voted on the proposed Amendment at least four times, only after shamefully nullifying its meaning and scope with a rider of exceptions for all state laws.

Powerful opposition persists from the AFL–CIO unions. However, the also powerful UAW has officially supported the Amendment.

The Amendment was introduced in the 92nd Congress in January 1971, by Hon. Martha Griffiths, persistent champion of the measure. The House Judiciary Committee broke precedent by promptly holding hearings in March, but the full Committee by a majority of one vote, added a nullifying "Wiggins Amendment." At this writing, in such devitalized form, the measure is scheduled for floor debate following the end of the Congressional recess on September 8, '71.

CONCLUSION

Women of the United States *are not* now persons and citizens under the Constitution as presently worded and interpreted, because controlling decisions of the U.S. Supreme Court establish and adhere to this exclusion.

Women *should be* full participants in this democracy, without exclusion by reason of sex.

Therefore, women and enlightened men must fight on until the Constitution embraces the principle that *"equality of rights under the law . . . shall not be denied or abridged* on account of sex."

FOOTNOTES

[1] Bradwell v. Illinois (1872) 83 U.S. 130; In re Belva Lockwood (1894) 154 U.S. 116.

[2] Yick Wo v Hopkins, 118 U.S. 356 (1886).

[3] Takahashi v Fish & Game Commission 334 U.S. 410 (1918).

[4] Muller v Oregon, 208 U.S. 412 (1908). Sixty years later, in Mengelkoch v Industrial Welfare Comm., 284 F. Supp. 950 (C. D. Calif.) the court commented: "It was in Muller v Oregon that Louis Brandeis submitted his famed brief containing medical and socio-economic data to establish the reasonableness of the state classification by sex", a brief used in many later types of litigation . . . . Mr. Felix Frankfurter represented the State in a later case of Bunting v Oregon, thus solidifying the doctrine of excluding women from 14th Amendment equal protection."

[5] Goeseart v Cleary 335 U.S. 464 (1948) (Michigan law) Paterson Tavern & Grill Owners Assn. v Hawthorne, 270 A. 2nd 628 (N.J. Sup. Ct. 1970).

[6] Weeks v Southern Bell Tel. & Tel. Co. 408 F. 2d 228 (CA–5, March 4, 1969) reversing 277 F. Supp. 117 (S.D. Ga. 1968).

[7] Bowe et al v Colgate-Palmolive Co. 416 F. 2d 711 (CA–7, 1969) reversing 272 F. Supp. 332 (S.D. Indiana, 1967).

[8] Leah Rosenfeld v Southern Pacific Co. 293 F. Supp. 1219 (C.D. Calif. 1968) Caterpillar Tractor Co. and Illinois Bell Tel. & Tel. Co. v Grabiec, 317 F. Supp. 1304 (S.D. Ill. 1970).

[9] Mengelkoch v Industrial Welfare Comm. 284 F. Supp. 950 (C.D. Calif. 1968) review denied, case, remanded, 393 U.S. 83 (1968).

[10] Cohen v. Chesterfield County School Board, 326 F. Supp. 1159 (E.D. Va. 1971) La Fleur et al. v. Cleveland Board of Education, 326 F. Supp. 1208 (N.D. Ohio. 1971).

[11] Ida Phillips v. Martin Marietta Corp. (Jan. 25, 1971) remanding 411 F. 2d 1 (CA–5, 1969) and 416 F. 2d 1257.

[12] Missouri ex rel Gaines v. Canada 305 U.S. 337 (1938).

[13] Allred v. Heaton 336 S.W. 2d 251 (Tex. Civ App. 1960) cert den 364 U.S. 517.

[14] Kirsten v. Rectors & Visitors of U. of Virginia, 309 F. Supp. 184 (E.D. Va. 1969) Williams v. McNair, 316 F. Supp. 134 (D.C. S. Car. 1970).

[15] The Woman's Equity Action League (WEAL), Cleveland, Ohio, organized in 1967, has filed complaints in Office of Federal Contract Compliance of Dept. of Labor, and to Secretary, Health, Education and Welfare, pursuant to Ex. Order 11375, forbidding sex discrimination by government contractors.

[16] U.S. ex rel Carrie Robinson v. Janet York, Supt. 281 F. Supp. 8 (D.C. Conn. 1968) Commonwealth v. Jane M. Daniel et al 430 Pa. 642, 243 A. 2d 400 (Sup. Ct. Pa. 1968).

[17] Texas Penal Code, Art 1220 and annotated cases.

[18] Reed v. Reed 465 P. 2d 635 (Idaho Sup. Ct. 1970) cert gto. Oct. Term. 1970 No. 430.

Mr. BAYH. Mr. President, I join in the remarks just made by the distinguished majority leader relative to the part the distinguished Senator from North Carolina (Mr. ERVIN) has played in this debate. As I said earlier, I cannot think of a more tenacious, dedicated, sincere, and worthy adversary than he. It has been the good fortune of the Senator from Indiana on occasion to find a strong ally in the Senator from North Carolina. Indeed, he can be a strong ally. I remember well my first experience in amending the Constitution. It was a great moment when the Senator from North Carolina came through the door of the rear of this Chamber at 11:30, after having driven all night from North Carolina, to be in this Chamber to support the position the Senator from Indiana had taken at that time, on the issue of presidential disability and vice presidential succession. It is fair to say that without the significant support of the Senator from North Carolina, the 25th amendment to the Constitution would not now be the law of the land.

As he was a most comforting ally then, he is a most worthy adversary now. The difference of opinion the Senator from Indiana has had with him has in no way diminished my feeling that he has not been sincere. He has been totally sincere. He is a tremendous debater.

I do not think it is necessary to say more. I just feel that perhaps I might touch on one or two points in which the Senator from Indiana differs with his friend from North Carolina. There is the question of the need for a constitutional amendment at all. The Senator from Indiana, as chairman of the Constitutional Amendments Subcommittee, asked himself that question some time ago. I wish a constitutional amendment were not necessary.

As the Senator from Indiana reads the Constitution, women should be considered as fully equal persons under the 14th amendment. Women have never been accorded full equality under the 14th amendment of the Constitution.

The view expressed by my friend from North Carolina that passage of this amendment will destroy the States and take away all their power would cause me some concern, if I agreed with the distinguished Senator. I am sure that each Member of this body is capable of making his own judgment on that particular issue. But, I am of the opinion that if the States of this Union survived back in the 1800's when Congress by constitutional amendment said it was unlawful to discriminate against a black citizen of the United States, certainly now, over 100 years later, the States of this Union will be able to survive a constitutional amendment that declares, "Thou shalt not discriminate against citizens of the United States on the basis of sex."

I shall not repeat the differences I have had with my friend from North Carolina in the area of the draft and combat, the obligation of fathers to support their children, the impact that this amendment would have on sex crimes, or the impact that this amendment would have on mothers, wives, and widows, because that has all been debated fully on the floor. Each Senator has had the chance to listen, to express himself, and to vote accordingly.

The Senator from North Carolina suggested that the supporters of this amendment feel it is possible to create identical human beings, through a constitutional amendment. That is impossible in the judgment of the Senator from Indiana. There is no way we can create two identical males or two identical females; nor can we create a man and woman with the same identity.

The distinguished Senator from North Carolina went further to say that what we were trying to create were identical legal rights. I agree 100 percent with my good friend from North Carolina on that point. I suggest that the Senate would be well advised to make that judgment.

But identical human beings? Impossible. Identical legal rights, based on the God-given talents and skills that one human being possesses? Indeed, that is the very thing we are trying to protect and to insure.

Mr. President, it is my firm conviction that our action today in removing the last legal barriers to full participation in American life by the women of this country is in the finest tradition of our constitutional heritage. It is the heritage of a Nation whose prime objective has been the continuous struggle for an open and equal society—an open and equal society for all, black, brown, red, white—and, hopefully, at long last, men and women.

Mr. COOK. Mr. President, I wish to commend the distinguished Senator from North Carolina for his debate, although we have disagreed from the outset.

Mr. President, 4 years from now, this Nation will be 200 years old. For those women in this Nation that sought the right to vote many years ago, the New York Times, and many Senators on the floor of the Senate, stated that this country would indeed be ruined by woman suffrage. They said, "Back to the kitchen." They said it was unthought of and unheard of, that it was unconscionable, for anyone to consider that the women in this Nation should have the right to vote. The consistency of the editorials published in the New York Times during those days was unbelievable. They almost succeeded, because it took 72 years from the start of the crusade, at the Seneca Falls Convention in 1848, for women to gain the right to vote, in the 19th amendment in 1920.

Congress has now been on this matter for 49 years, since 1923. Forty-nine years to give to a body of individuals freedom under a Constitution in the freest form of government in the world today. Forty-nine years to say in fact that in this Nation of ours all "men" are, indeed, created equal—using the word "men" in its widest, broadest, and its all-inclusive form.

It came as a rather startling revelation to me when the distinguished Senator from North Carolina said that, indeed, he thought that if this equal rights amendment should pass, all of the States would lose their legislative power.

It never dawned upon me that the 50 States of this Union now maintain their separateness by reason of the fact that they could discriminate and legislate against women. I did not know that. It came rather as a shock and surprise to me.

I can only say that I am sorry, that this is a cause whose time has come because this is a cause that should have always been.

I wish to sincerely thank Miss Barbara Schuhmann from my office who has worked on this now ever since she came here. She has been the most tenacious individual on this matter that a Senator could ever have as a part of his staff. She came here from Louisville, where she left school; finished college here and is now in law school. I think I can truly say that her contribution to me in this matter has been absolutely remarkable.

Mr. President, at this time I would like to explain the time factors involved with the equal rights amendment for my Senate colleagues.

After the Senate passage of the unchanged amendment, it will be submitted to the States. Three-fourths, or 38 of the State legislatures must agree to this amendment within 7 years of our vote. Even after that is accomplished, we must wait another 2 years before the amendment becomes effective, unless the courts take heed of our mandate prior to that time.

It would be fitting for me to point out here that if the Senate changes the wording of the amendment as passed by the House of Representatives, the amendment will be killed for this year. Any change at this point would send the amendment to a Senate-House conference where it would die. The criticism day before yesterday by some Members of the Senate that the proponents are unreasonable in insisting upon the exact House language, therefore, is not justified. The proponents know as well as the critics that any change whatsoever in the wording of the amendment means failure. The proponents are not being unreasonable in insisting upon the exact language of the House: We are only being realistic.

What I am saying is this: Even Senate passage of the original wording does not assure that this amendment will become effective; and even if three-fourths of the States agree to this amendment this year, the State and Federal governments will have 2 years in which to change their laws which discriminate on account of sex.

Mr. President, I agreed to these time limitations 2 years ago only as a compromise to those who were concerned that the amendment would bring such sweeping changes in the law that a flood of litigation would follow its effective date. These compromise measures, although realistically speaking are unnecessary, further point out the ease with which this amendment can take effect. In addition, these compromise measures prove that the proponents are not being unreasonably intolerant of change in the wording of the proposal. We simply realize that in a constitutional amendment, we must have a declaration for future generations that we will not tolerate discrimination on account of sex to be part of our laws. We will not accept less. We will not tolerate any change at this point in the wording of the amendment because any change now means defeat.

It is conceivable that the amendment would not take effect for another 9 years after Senate passage. However, I doubt that this will be the case. I believe that the time has come when everyone realizes that our laws unjustly and unreasonably discriminate on account of sex. I believe that everyone has come to realize that the discrimination is so imbedded in our laws that a constitutional amendment is needed to assure every person in this country the equal protection and due process of law. I believe that everyone realizes that the equalization of our laws should have occurred when the Constitution was written. I believe that the Senate realizes that it must vote for an unchanged equal rights amendment.

We are not considering a piece of legislation that can be changed next year or the year after that. We are considering a constitutional amendment that will remain the law until changed by another amendment or until this country no longer exists. In view of the magnitude and importance of the measure before the Senate, I submit that the proponents are only being realistic when we state that we will not tolerate any change in the wording. Any change will defeat the measure. And any change will not assure the equalization of our laws that is long overdue and so vitally necessary.

Mr. President, my distinguished colleague from North Carolina has quoted the late dean of the Harvard Law School, Roscoe Pound. Dean Pound said in regard to the equal rights amendment:

> With respect to the proposed constitutional amendment I feel very strongly that it is a mistake to pile up specific prohibitions in addition to the general guarantees of the Bill of Rights. The guaranty of due process in the Fifth and Fourteenth Amendments secures against arbitrary and unreasonable legislation of every sort, whether on the part of Congress or of State Legislatures. With this protection against arbitrary and unreasonable legislation it certainly ought not to be necessary to add specific prohibitions. If the things aimed at are arbitrary and unreasonable there is already protection against them; if they are reasonable they ought not to be inhibited.

At this time I certainly do not want to list, once again, the numerous cases in which the courts have failed to include women within the framework of the equal protection clause. However, it does require some response.

More specifically, I refer to an extremely interesting law review article by Prof. John D. Johnston, Jr. and Prof. Charles L. Knapp of New York University Law School. The authors have analyzed a wide variety of sex discrimination cases in the State and Federal courts dealing with the following subjects:

> A. Professional and occupational restrictions;
> B. Labor regulation;
> C. Places of accommodation;
> D. Jury qualifications;
> E. Public education;
> F. Criminal sentencing, and;
> G. Consortium.

From an examination of these cases the authors made the following conclusions:

> (1) Despite the enactment of various laws designed to improve the position of women, male-dominated legislatures and courts have historically exhibited the belief that women generally are—and ought to be—confined to the social roles of homemaker, wife and mother, and gainfully employed (if at all) only in endeavors which comport with their assumed subservient, child-oriented and decorative characteristics;
>
> (2) A small but significant number of courts has recently perceived that some legislation mandating sex discrimination presents substantial constitutional questions, and several such laws have been struck down on equal protection grounds;
>
> (3) Despite such holdings by a number of state and lower federal courts, opinions continue to appear in which both the result and the reasoning are virtually indistinguishable from those issued nearly a century ago. *In the absence of a definite shift of position on the part of the Supreme Court, and in the face of continued adherence by many state and federal courts to traditional sexist attitudes, it is far too soon to assert that a clear trend toward judicial recognition of women's rights has developed.* (Emphasis added)

I urge my colleagues to read this article and then to explain to me why a constitutional amendment in the form of House Joint Resolution 208, specifically prohibiting sex discrimination is not needed. A constitutional amendment was needed to give women the right to vote; another constitutional amendment is needed to specifically and forever prohibit arbitrary and unreasonable discrimination based upon sex. With all due respect to the late and great legal scholar, Dean Pound, the fifth and 14th amendments have not given women the

intended "due process" and "equal protection" under the law.

As Professors Johnston and Knapp have stated:

Sexism—the making of unjustified (or at least unsupported) assumptions about individual capacities, interest, goals and social roles solely on the basis of sex differences—is as easily discernible in contemporary judicial opinions as racism ever was.

Mr. President, I have a lengthy law review article from the New York University Law Review which I ask unanimous consent to have printed in the RECORD at this time, so that it will be available for those who peruse it in the future to make up their minds on this rather remarkable step we are taking today. This step is not one that will put everything in this country in chaos but it is a constitutional amendment that will be submitted to the States so that we might accomplish, after 4 years short of 200 years, equality for every individual in this Nation, regardless of whether they may be male or regardless of whether they may be female.

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

SEX DISCRIMINATION BY LAW: A STUDY IN JUDICIAL PERSPECTIVE

(By John D. Johnston, Jr. and Charles L. Knapp*)

(NOTE.—In this article, the authors analyze a wide variety of cases in which the courts have dealt with sex discrimination by law and conclude that the performance of American judges in this area has generally ranged from "poor to abominable." Arguing that many of the considerations which have led to the invalidation of racially discriminatory laws are equally present when legislative classifications are based on sex, they suggest that the general failure of the courts to perceive this point may be due to certain deeply ingrained attitudes that judges share with a majority of American males. The authors therefore conclude by proposing several countermeasures which judges may employ to overcome any male bias and bring a more objective outlook to the resolution of sex discrimination issues.)

I. INTRODUCTION

Women's liberation is: a slogan—a challenge—a movement—a threat—a cliche—an enigma—or something else, depending on who you are. It is not surprising that "women's lib" connotes different things to different people; their perceptions of it reflect differing social and cultural backgrounds and varying levels of sensitivity to the disadvantages inflicted on some members of society solely for being female. It follows that any contribution (pro or con) to the growing body of "women's lib" literature is likely to be disparaged by some readers as the product of an uninformed mind or a distorted sense of values. It can thus be easily dismissed, on the ground of fatal bias—intentional, subconscious, or naive—by anyone who has strong opposing feelings on the subject.

Though mindful of these pitfalls, we nevtheless tender our own analysis of judicial attitudes toward the relationship between the sexes, gleaned from opinions in cases involving sex-based discrimination. We do not claim to be particularly, much less uniquely, qualified to comment on such matters. Each of us is a middle-aged, white male—some might characterize us as fairly typical WASPs, of the subspecies "law professor." Neither of us has ever been radicalized, brutalized, politicized or otherwise leaned on by the Establishment in any of the ways that in recent years have led many to adopt heretical views of various kinds.

Each of us, however, was led last year—one through bar association activity,[1] the other in response to questions from female students about the property rights of women—to begin to investigate the ways in which American judges have responded to various types of sex discrimination.[2] Our research has been of the most traditional kind: finding, analyzing, attacking and defending judicial opinions. We believe that our selection of cases is representative, though admittedly far from exhaustive.

Our conclusion, independently reached, but completely shared, is that by and large the performance of American judges in the area of sex discrimination can be succinctly described as ranging from poor to abominable. With some notable exceptions, they have failed to bring to sex discrimination cases those judicial virtues of detachment, reflection and critical analysis which have served them so well with respect to other sensitive social issues. Particularly striking, we believe, is the contrast between judicial attitudes toward sex and race discrimination. Judges have largely freed themselves from patterns of thought that can be stigmatized as "racist"—at least their opinions in that area exhibit a conscious attempt to free themselves from habits of stereotypical thought with regard to discrimination based on *color*. With respect to *sex* discrimination, however, the story is different. "Sexism"—the making of unjustified (or at least unsupported) assumptions about individual capabilities, interests, goals and social roles solely on the basis of sex differences—is as easily discernible in contemporary judicial opinions as racism ever was.

We will attempt to demonstrate this thesis through a sampling of what American judges have said in opinions in sex discrimination cases over the past hundred years. Some opinions contain assertions that are, by any rational analysis, overt declarations of "male supremacy." In others, more or less objective rationales for sex discrimination are advanced. The relatively few (and for the most part quite recent) decisions invalidating sex discrimination will also receive consideration, substantively and as possible precursors of a changing judicial attitude.

We make no particular claim for the originality of any of the ideas expressed in the discussion that follows. Indeed, it seems to us that most of them have probably been expressed already by others, although sometimes in a different form or context.[3] We have, however, attempted to compile, from judicial opinions in several major areas of sex discrimination by law, those arguments and statements that most clearly reveal the attitudes shaping judicial decisions. We will avoid protracted discussion of particular questions of constitutional doctrine, such as the precise interpretation and application of the due process and equal protection clauses; we also prefer not to join the increasingly heated debate over the desirability of a new "Equal Rights" amendment.[4] We have avoided emphasizing these issues in part because of our lack of constitutional expertise, but also because we are convinced that preoccupation with legal doctrine has left largely unexplored the surprising extent to which the survival of sex discrimination can be attributed to pervasive judicial attitudes.

We have investigated a number of areas in which the states discriminate by law on the basis of sex. Taken individually, some may appear of less than overwhelming importance; in the aggregate, however, they encompass a broad spectrum of activity, affecting women in several significant aspects of their relationship to society.[5]

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II. SEX DISCRIMINATION BY LAW

A. Professional and occupational restrictions

1. Practice of Law

One of the earliest Supreme Court decisions upholding sex discrimination by state action was *Bradwell v. Illinois*.[6] In that case the Illinois Supreme Court had denied a woman's application for a license to practice law solely because she was a female. Although the state statute delegating to the court authority over bar admissions made no specific provision for the exclusion of females, the state court found this to have been the legislative intent and denied the application. It assumed that at the time the statute was enacted the legislators held certain fixed ideas about the roles of the sexes: "That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws was regarded as an almost axiomatic truth."[7]

The petitioner appealed this ruling to the Supreme Court on constitutional grounds. There was no opposing counsel, but none was needed since only Chief Justice Chase dissented from the decision affirming the denial of the application.

The opinion of the court was mainly addressed to the petitioner's claim that the state court's action violated the privileges and immunities clause of the fourteenth amendment. This claim was rejected on the ground that the petitioner, having become a citizen of Illinois, could no longer claim the protection of that clause. The court further indicated that, in any event, admission to law practice was not one of the privileges or immunities of a citizen of the United States.

The opinion did not expressly refer to equal protection. This may be attributable to the fact that, in the *Slaughterhouse Cases*[8] decision handed down just prior to *Bradwell*, the Court had expressly limited the scope of fourteenth amendment equal portection to cases involving racial discrimination.[9]

The most interesting feature of the case, however, is the concurring opinion of Mr. Justice Bradley, in which two of his brethren joined. As an affirmation of God's grand design for the sexes, we believe it is unexcelled in legal literature. The significant passages are the following:

"The claim that, under the fourteenth amendment of the Constitution, which declares that no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, the statute law of Illinois, or the common law prevailing in that State, can no longer be set up as a barrier against the right of females to pursue any lawful employment for a livelihood (the practice of law included), assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life.

"It certainly cannot be affirmed, as an historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment

in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor.

"It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

"The humane movements of modern society, which have for their object the multiplication of avenues for woman's advancement, and of occupations adapted to her condition and sex, have my heartiest concurrence. But I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities. In the nature of things it is not every citizen of every age, sex and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State; and, in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex." [10]

Unfortunately, the reader is not favored with any indication of the manner by which this "divine ordinance" was transmitted by the Creator to Mr. Justice Bradley.

Twenty-one years after *Bradwell*, the Supreme Court affirmed another state's denial of a woman's application for admission to law practice. In *re Lockwood*,[11] the petitioner had already been admitted to the bars of the Supreme Court and the District of Columbia (and allegedly of several other states as well). A Virginia statute provided that any "person" who had been previously admitted to practice in any state or in the District of Columbia could also practice in Virginia's courts. The Supreme Court of Appeals of Virginia simply construed "person" to mean "male" and denied the petition. The primary issue for the Supreme Court was the state court's interpretation of the statute. In a short opinion for a unanimous Court, Chief Justice Fuller refused to issue a writ of mandamus ordering petitioner's admission to practice. As in *Bradwell*, there was no mention of equal protection; and, of course, *Bradwell* had already foreclosed the privileges and immunities argument.

The Supreme Court has not decided any other cases involving exclusion of women from the practice of law. It is quite clear by now, of course, that the equal protection clause does apply to state regulation of bar admissions and that a denial of admission on grounds having no "rational connection with the applicant's fitness or capacity to practice law" is invalid.[12] By the time these principles became clearly recognized, however, total exclusion of women from law practice was no longer an active problem. Thus, *Bradwell* and *Lockwood* remain the only Supreme Court decisions on the subject.

It is inconceivable, were the issue to arise, that any court today would conclude that there is a rational basis for the total exclusion of women from law practice. In this area, God's grand design has thus been overtaken by the demonstrated fact that women are not, as a class, inherently unfit to practice law.[13] As we shall see, however, the attitudes revealed by Justice Bradley have been widely shared by American judges and have decisively influenced their response whenever the validity of sex discrimination has been called into question.

2. Sale of liquor

The states undoubtedly possess broad powers over the sale of intoxicating beverages.[14] State regulation has frequently included restrictions on the issuance of bartending licenses to women unless they are closely related to the male owner of a licensed establishment. A Michigan statute prohibiting the issuance of a bartending license to a female, unless the wife or daughter of an owner, was challenged on equal protection grounds in *Goesaert v. Cleary*.[15]

The principal defect complained of, however, was not the general exclusion of women from bartending but the *exception* made in favor of wives and daughters of owners. Appellant's contention was that this exception had no national basis. The statute was nevertheless upheld by the court, voting six-to-three. Writing for the court, Mr. Justice Frankfurter declared:

"Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic. See the Twenty-First Amendment and *Carter v. Virginia*, 321 U.S. 131. The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards." [16]

The majority obviously did not perceive any serious equal protection problems arising from a complete exclusion of women from bartending.[17] But what *is* the rational basis for exclusion, in terms of fitness or capacity to be a bartender? The opinion contains only a vague reference to "moral and social problems" against which the state is permitted to protect itself. Nothing else.

Having concluded that total exclusion would be upheld, the majority then considered the validity of Michigan's exception:

"Since bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures, the legislature need not go to the full length of prohibition if it believes that as to a defined group of females other factors are operating which either eliminate or reduce the moral and social problems otherwise calling for prohibition. Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight. This Court is certainly not in a position to gainsay such belief by the Michigan legislature. If it is entertainable, as we think it is, Michigan has not violated its duty to afford equal protection of its laws. We cannot cross-examine either actually or argumentatively the mind of Michigan legislators nor question their motives. Since the line they have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling." [18]

The three dissenters did not comment upon the majority's assertion that total exclusion of women from bartending would be valid. Instead, they dissented only because the exception operated in favor of female relatives of a male owner, but did not extend to daughters of a *female* owner—or, for that matter to a female owner herself. This fact convinced them that the legislature was not actually motivated by "solicitude for the moral and physical well-being" of would-be female bartenders. Furthermore, they concluded that such solicitude would be the "only conceivable justification" for this type of discrimination. The opinion of the Court did not respond to the dissenters' argument.

Perhaps the most striking feature of the case, though, is the fact that in 1948 no member of the Court openly challenged the assertion that, in the interest of protecting itself against unspecified "social problems," a state could exclude all women from the occupation of bartending. The opinion displays only token adherence to the requirement that, in order for a legislative classification to be valid, there must be a rational connection between the classification and some proper legislative goal. Since this is usually the minimum requirement for upholding a state statute against an equal protection challenge, the Court clearly did not consider the statute to be class legislation in the area of protected civil liberties, to be sustained only if a compelling state interest in the classification is shown.[19]

Prior to *Goesaert*, a number of state courts had sustained similar statutes, brushing aside constitutional challenges with expressions of deference to legislative judgment in matters of "public morality." [20] A rare exception was the unanimous decision by the Supreme Court of Florida [21] invalidating a statute which prohibited women from serving "liquor by the drink over any bar or counter." The short opinion is couched mainly in substantive due process terms, ignoring the array of contrary decisions in other states.

In cases decided after *Goesaert*, state courts have tended to rely heavily on that opinion in sustaining statutes against constitutional challenge.[22] At least two state courts, however, have repudiated the reasoning of *Goesaert* and similar cases.

In *Paterson Tavern & Grill Owners Association, Inc. v. Borough of Hawthorne*,[23] the Supreme Court of New Jersey invalidated a local ordinance which excluded women from bartending. Noting that *Goesaert* had been the subject of critical academic comment, the court concluded that its precedential value was highly questionable. Having so concluded, however, the court nevertheless declined to invalidate the ordinance on equal protection grounds. Rather, it declared that the ordinance exceeded the borough's delegated police power, "in the light of current customs and mores," [24] and the court thereby limited its holding to the specific regulation presented.[25] Thus, it appears that the New Jersey court will now seriously test any sex-based discriminatory legislation to determine whether it has any rational basis; indeed, it might eventually be persuaded to employ an equal protection rationale in such cases.

In invalidating a California statute prohibiting female bartenders,[26] however, that state's supreme court refused to confine itself to such a limited rationale. Its unanimous decision in *Sail'er Inn, Inc. v. Kirby* [27] is the most far-reaching state court decision on the

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subject of sex discrimination, and seems destined for landmark status.

In *Sail'er Inn*, several bar owners who were employing female bartenders sought a writ of mandamus to prevent the state's alcoholic beverage control authority from revoking their liquor licenses in consequence of their violation of the statute. The court might have held that the statute had been impliedly repealed by a 1970 amendment to the California Fair Employment Practices Act expressly barring sex discrimination.[28] This would not have been a novel holding [29] and by itself would have furnished a sufficient ground for granting the requested relief. The court chose, however, to address itself to questions of greater import.

Initially, the court considered petitioners' contention that the state statute had been superseded, as a matter of federal supremacy, by Title VII of the 1964 Civil Rights Act.[30] Title VII prohibits any employer under its coverage [31] from discriminating on the basis of sex except where a "bona fide occupational qualification" is concerned. In harmony with a growing body of authority,[32] the court held that the state law was superseded by Title VII as to those petitioners whose employers were subject thereto, the state having failed to advance sufficient facts to justify excluding females from the occupation of bartending.

Furthermore, the court could have rested its decision solely upon a provision of the California constitution which prohibits the disqualification of any person, on account of sex, "from entering or pursuing a lawful business, vocation, or profession." [33] An early precedent had construed the provision as follows:

"As we understand the section, it does establish, as the permanent and settled rule and policy of this State, that *there shall be no legislation either directly or indirectly incapacitating or disabling a woman from entering on or pursuing any business, vocation, or profession* permitted by law to be entered on and pursued by those sometimes designated as the stronger sex. . . . [T]here are no exceptions in this section, and neither we nor any other power in the State have the right or authority to insert any, whether on the ground of immorality or any other ground. All these are considerations of policy, the determination of which belonged to the convention framing and the people adopting the Constitution; and their final and conclusive judgment has been expressed and entered in the clear and unmistakable language of the Constitution itself . . ." [34]

The *Sail'er Inn* opinion accepted this view: "[A]lthough an inability to perform the tasks required by a particular occupation, sex-linked or not, may be a justification for discrimination against job applicants, under section 18, mere prejudice, however ancient, common or socially acceptable, is not." [35]

Three arguments were presented to the *Sail'er Inn* court in support of the proposition that women are in some respects less able to perform the duties of a bartender. First, it was contended that women are incapable of preserving order and protecting patrons of a bar. The court answered:

"This argument ignores modern day reality. Today most bars, unlike the saloons of the Old West, are relatively quiet, orderly and respectable places patronized by both men and women. Even if they were not, many bars employ bouncers whose sole job is to keep order in the establishment. Furthermore, the experience in the states which permit women to tend bar indicates that the dire moral and social problems predicted by the Attorney General do not arise.[36]"

Second, the statute was said to be a measure for protecting women against injury at the hands of inebriated customers. The court replied:

"The desire to protect women from the general hazards inherent in many occupations cannot be a valid ground for excluding them from those occupations under section 18. Women must be permitted to take their chances along with men when they are otherwise qualified and capable of meeting the requirements of their employment . . . We can no more justify denial of the means of earning a livelihood on such a basis than we could deny all women drivers' licenses to protect them from the risk of injury by drunk drivers. Such tender and chivalrous concern for the well-being of the female half of the adult population cannot be translated into legal restrictions on employment opportunities for women.[37]"

Finally, it was argued that the statute tends to prevent "improprieties and immoral acts." The court responded:

Section 18 in no way prevents the Legislature from dealing effectively with the evils and dangers inherent in selling and serving alcoholic beverages; it merely precludes resort to legislation against women rather than against the particular evil sought to be curbed.[38]"

Concluding that the statute was in conflict with the constitutional provision, the court declared it void.

This construction of the state constitutional provision relating to sex discrimination in business and employment furnished ample basis for granting the relief sought by the petitioners in *Sail'er Inn*; it was therefore unnecessary for the court even to consider the application of the equal protection clauses of the California and United States constitutions.[39] Nevertheless, the court did reach this question—and its discussion of equal protection is clearly the most significant part of the opinion.

The court properly recognized that the initial issue was which equal protection test to apply. Conceding that the Supreme Court had never expressly so held, the court nevertheless concluded that "fundamental interests" were affected and that the "strict scrutiny" test was therefore appropriate. The court perceived two reasons for applying this high standard to the statute; it infringed upon the "fundamental right to pursue a lawful profession," and it involved a sex classification, which "should be treated as suspect." [40] The court's discussion of the latter point is particularly apt and persuasive. After noting several cases in which the Supreme Court had applied this test to such classifications as race and national origin,[41] the court then drew this analogy to sex classification:

"Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classification is that the characteristic frequently bears no relation to ability to perform or contribute to society. . . . The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. . . . Where the relation between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic least outdated social stereotypes result in invidious laws or practices.

"Another characteristic which underlies all classifications is the stigma of inferiority and second class citizenship associated with them. . . . Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities. Like black citizens, they were, for many years, denied the right to vote and, until recently, the right to serve on juries in many states. They are excluded from or discriminated against in employment and educational opportunities. Married women in particular have been treated as inferior persons in numerous laws relating to property and independent business ownership and the right to make contracts.

"Laws which disable women from full participation in the political, business and economic arenas are often characterized as "protective" and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage. We conclude that the sexual classifications are properly treated as suspect, particularly when those classifications are made with respect to a fundamental interest such as employment.[42]

The court then considered the state interests allegedly served by the statute. The state had argued that female bartenders might commit "improprieties" and that they would be an "unwholesome influence" on bar patrons. The first contention was rejected with these comments:

"This rationale fails as a compelling state interest because it is wholly arbitrary and without support in logic or experience.

* * * * *

"Where the evil which the Legislature seeks to prevent can be directly prevented through nondiscriminatory legislation, and where the class singled out by the Legislature has no necessary connection with the evil to be prevented, the statute must be struck down as an invidious discrimination against that class." [43]

The second argument fared no better:

"The claim of unwholesomeness is contradicted by statutes which permit women to work as cocktail waitresses, serve beer and wine from behind a bar (Bus. & Prof. Code, § 25655), or tend bar if they or their husbands hold a liquor license. The objection appears to be based upon notions of what is a "ladylike" or proper pursuit for a women in our society rather than any ascertainable evil effects of permitting women to labor behind those "permanently affixed fixtures" known as bars. Such notions cannot justify discrimination against women in employment." [44]

The court's conclusion was stated with devastating simplicity: "The state has not only failed to establish a compelling interest served by [the statute], but it has failed to establish any interest at all." [45] The statute was held to be violative of the equal protection clauses of the California and federal constitutions.

Sail'er Inn is a remarkable decision. Although a few other state and federal courts have invalidated various types of sex discrimination on constitutional grounds, this opinion is by far the most penetrating. The California court is the first state court of last resort to accept the thesis that sex is a "suspect" classification. The same conclusion has been reached by at least one lower federal court,[46] but *Sail'er Inn* appears at this time to be the most persuasive opinion addressed to the constitutional question. If other courts are moved to adopt this test of equal protection in the area of sex discrimination, then a greater incidence of success by those attacking sex classifications in future cases can be anticipated.

Sail'er Inn may even have an influence upon those courts that choose not to apply the "strict scrutiny" standard to sex classifications. The California court's finding that the state had shown "no interest at all" in support of the statute suggests that the exclusion of women from bartending would not have survived even the "rational basis" test of equal protection. If other courts can be persuaded to follow this example and carefully analyze any alleged state interests that are advanced to justify sex discrimination,

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then it is likely that future decisions will more frequently accord with *Sail'er Inn* in result, if not precisely in legal theory.

Finally, *Sail'er Inn* must be recognized as a challenge to the Supreme Court to reexamine its traditional position on the constitutionality of sex discrimination, since the California statute was expressly held to be in violation of the equal protection clause of the fourteenth amendment. Although the court made a ritual attempt to distinguish *Goesaert*,[47] the main thrust of the *Sail'er Inn* opinion is irreconcilable with the sexist assumptions underlying that case, and the California court has in effect rejected its authority. This is an open invitation to the Supreme Court to reexamine *Goesaert* and similar decisions in the light of contemporary understanding of sex discrimination.

Finally, we note a recent case involving alleged discrimination against *men*.[48] A New York statute required the fingerprinting of all male employees of liquor wholesalers. A wholesaler whose license was cancelled for failure to comply with the fingerprinting requirement brought an action to have his license restored, on the ground that the requirement was discriminatory and therefore invalid.

This contention was rejected by the court on the ground that a rational basis exists for requiring fingerprints of male employees only. The legislature, it said, must have been concerned about the possibility that "strong-arm" tactics would be used by wholesalers against retailers in order to obtain business (a practice apparently dating back to Prohibition). In addition, the legislature apparently concluded that wholesalers would be likely to employ men for this purpose, but not women. Conceding this reasoning to be "slightly tenuous," [49] the court nevertheless deferred to the legislative determination.

Sophisticated training in the use of physical force against another person is, of course, widely available to both men and women. Women who have mastered karate, judo or the use of firearms can injure or kill an adversary as easily as any man. How, then, can the legislative distinction be rationally justified? Only, it would seem, by clear evidence that women would not in fact *utilize* their destructive capabilities to further such illegal solicitation. The court concluded that such utilization would be "highly improbable," but failed to suggest any basis for this conclusion. Recent arrests of mugging gangs including females suggest that the conclusion is tenuous at best. This 1970 decision plainly demonstrates the stubborn persistence of the old myth of woman as a frail and delicate creature.

3. Wrestling

In its expression of male dissatisfaction with women's changing status, and of willingness to obstruct further change wherever possible, *State* v. *Hunter* [50] is a remarkable recent descendant of Mr. Justice Bradley's opinion in *Bradwell* v. *Illinois*.[51] An Oregon statute regulating wrestling "exhibitions" totally excluded females from participation. The court upheld it against an equal protection challenge, purporting to find a rational basis for the exclusionary classification:

"We believe that we are justified in taking judicial notice of the fact that the membership of the legislative assembly which enacted this statute was predominantly masculine. The fact is important in determining what the legislature might have had in mind with respect to this particular statute, in addition to its concern for the public weal. It seems to us that its purpose, although somewhat selfish in nature, stands out in the statute like a sore thumb. Obviously it intended that there should be at least one island on the sea of life reserved for man that would be impregnable to the assault of woman. It had watched her emerge from long tresses and demure ways to bobbed hair and almost complete sophistication; from a creature needing and depending upon the protection and chivalry of man to one asserting complete independence. She had already invaded practically every activity formerly considered suitable and appropriate for men only. In the field of sports she had taken up, among other games, baseball, basketball, golf, bowling, hockey, long distance swimming, and racing, in all of which she had become more or less proficient, and in some had excelled. In the business and industrial fields as an employe or as an executive, in the professions, in politics, as well as in almost every other line of human endeavor, she had matched her wits and prowess with those of mere man, and, we are frank to concede, in many instances had outdone him. In these circumstances, it is any wonder that the legislative assembly took advantage of the police power of the state in its decision to halt this ever-increasing feminine encroachment upon what for ages had been considered strictly as manly arts and privileges? Was the Act an unjust and unconstitutional discrimination against woman? Have her civil or political rights been unconstitutionally denied her? Under the circumstances, we think not." [52]

This passage reveals, as clearly as any we have seen, that male judges are now fully aware of the growing dissatisfaction of many women with their male-imposed subordinate status. Significantly, judges will even concede that, once admitted to many of the spheres of human activity formerly denied them, women have performed at least as competently as men. Nevertheless, this court openly applauds legislative resistance to further female "encroachment," disdaining to conceal its male bias behind any protectionist facade such as the preservation of women's health or the prevention of "social problems." Candor, yes. Evenhanded administration of justice by an impartial tribunal, no. Indeed, the opinion virtually glories in its own revealed bias.

The same issue was raised recently in New York, where the State Athletic Commission refused to license female wrestlers.[53] An action seeking to invalidate this rule was dismissed by the Appellate Division [54] with the following comments:

"It has been argued that females have fared less well under the Equal Protection Clause than have males of certain minority groups which have long been the victims of discrimination. . . . Furthermore, the presumption of constitutionality of a classification requires the courts to *assume* the existence of a reasonably conceivable state of facts to sustain it. . . . It has also been suggested that the Commission's determination is founded on a mid-Victorian concept which females have long since abandoned and which has no place in this enlightened last third of the Twentieth Century. Notwithstanding any personal opinion or attitude we may hold in this respect, there is legal justification and support, under the legislation which created the Commission, for the determination made by it." [55]

Even assuming that the court has stated the proper equal protection test, what "reasonably conceivable state of fatcs" justifies this particular discriminatory classification? *Stating* a test is no substitute for *applying* it. At an earlier point, the opinion contains a vague reference to past "infestation" of boxing and wrestling by "undesirable elements." Even if this is true, what is the rational connection between such infestation and the challenged rule? The court was silent. While the opinion is by no means an expression of overt sexism like *State v. Hunter*, it is also a far from satisfactory exposition of the reasoning process by which the decision was reached. If there was any rational basis for the exclusion of women from wrestling, it does not emerge from a reading of the opinion.

4. Appointment of Administrators

Unlike corporate fiduciaries, individuals do not customarily make a business of serving as executors or administrators. In that respect, a limitation upon service by women in these fiduciary capacities is not a business or professional exclusion. But competent estate administration does require, among other things, sound judgment, administrative ability and an understanding of business practices. Male domination of the business world is a historical fact, although not nearly so pronounced now as previously.[56] In view of all this, may the legislature validly mandate a preference for males over females in the appointment of administrators?

This is the question raised by *Reed* v. *Reed*.[57] In Idaho, persons applying for letters of administration are entitled to judicial consideration according to a statutory order of priorities. The statute favors certain classes of relatives of the decedent over others and prefers all eligible relatives before creditors.[58] Certain persons are completely disqualified, including nonresidents, infants, criminals and those adjudged incompetent to perform the duties of administrator "by reason of drunkenness, improvidence or want of understanding or integrity." [59] Within any eligible class the probate court may grant letters to more than one person.[60] The controversial requirement is this: "Of several persons claiming and equally entitled to administer, males must be preferred to females. . . ." [61]

The disqualification provision makes it clear that the court is not required to prefer *incompetent* males over competent females; on the other hand, it also plainly shows that the purpose of the male preference provision could not be simply to prevent the selection of incompetent females. Rather, among members of the highest eligible category, none of whom is otherwise disqualified, the court is required to give preference to males.

In *Reed*, the decedent was survived by both adoptive parents. Each parent applied separately for letters of administration, and the probate court obeyed the legislative command by appointing the father. The mother then challenged this appointment on the ground that the male preference provision denied her equal protection of the laws. She was successful in the district court, but that judgment was reversed by the Supreme Court of Idaho.

That court purported to apply the "rational connection" test to determine whether or not the male preference requirement was so arbitrary and capricious as to violate equal protection. It was able to suggest two possible motives for the legislature's action: (1) promotion of prompt settlement of estates by curtailing disputes over the appointment of administrators; and (2) a feeling that men are generally better qualified than women to act as administrators. The second proposition apparently troubled the court somewhat, prompting this further amplification:

While this classification may not be entirely accurate, and there are doubtless particular instances in which it is incorrect, we are not prepared to say that it is so completely without a basis in fact as to be irrational and arbitrary." [62]

Both of these rationales are faulty, even if one concedes that the appropriate standard of judicial review is "rational connection." There is an obviously legitimate state interest in expediting the process of estate administration; that does not mean, however, that every means by which this interest may be furthered is rational. Requiring every successful applicant to have red hair or demonstrate a capability to jog two miles in sixteen minutes would undoubtedly reduce the

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number of competitors for appointment and thereby curtail litigation, but such requirements would have no rational connection with fitness to act as an administrator. The expediting-of-appointments argument is thus clearly a makeweight.

The second rationale, then, must be the decisive one. The court suggested that the Idaho Legislature had apparently determined that, as compared with men, women are generally deficient in business acumen. Nevertheless, the court conceded that such a characterization was not universally accurate; hence, a particular female applicant might in fact be as well or even better qualified to administer an estate than her male counterpart. Despite the obvious possibility that such cases will arise, the statute leaves the probate judge no discretion: Where the applicants are equally qualified, the male must be appointed; indeed, he must be preferred to the female even if he is in fact demonstratably less qualified. A clearer case of arbitrariness can hardly be imagined.

Perhaps the pernicious effect of the male preference requirement can be further illuminated by consideration of an analogous statute discriminating on the basis of race rather than sex.[63] Suppose the Idaho Legislature had enacted a similar statute which mandated a preference for whites over nonwhites. Also, suppose that a particular decedent had no immediate family or that no member of his family wished to administer his estate; consequently, creditors of the estate would be eligible for appointment as administrator. Also suppose that the estate has only two creditors: Ebony Trust Co. and Joe's Grocery. The senior trust officer of the former (a black man) and the proprietor of the latter (white) have applied for letters of administration. While the grocer is a respected citizen operating a successful business, he did not finish high school, and has never served as a personal representative. Unless disqualified "for want of understanding or integrity," however, he must be appointed.

The trust officer appeals from the order of appointment, challenging the statute on equal protection grounds. Both arguments advanced by the court in *Reed* could be relevant here: the statutory preference for whites could help to avoid time-consuming controversies; and it might be shown that, on the average, whites have more formal education, more responsible jobs and more business experience than blacks.

Would these two arguments be sufficient to sustain the hypothetical statute against the trust officer's constitutional attack? Obviously not: the statute is based on an assumption of racial inferiority that is clearly invidious as applied to this individual appellant.

Can the statute in *Reed* be logically distinguished from this hypothetical statute? We would suggest that it cannot. Both types of discrimination rest on the fallacious assumption that generalizations which can accurately be made about a class as a whole are equally accurate with respect to each individual member of the class. In addition, statutes mandating various types of sex discrimination have reinforced a historical pattern of male domination over females. In this respect, such statutes serve the same function as statutes discriminating on the basis of race: they support and strengthen the power of one group (and its individual members) to dominate the members of another.

5. The "Judicial Process" in Female Exclusion Cases

With the notable exceptions of *Paterson Tavern & Grill Owners Association* and *Sail'er Inn*, the opinions considered so far reveal three distinct forms of rationalization used to uphold state legislation that excludes or disadvantages females with respect to various occupations or offices. These include: (1) express reliance on a mythology of male supremacy, which confines women to a subordinate social role and then patronizingly "protects" them against even their own attempts to change that role; (2) total deference to the legislature, despite serious assertions that its discriminatory enactments violate specific constitutional guarantees; and (3) cursory dismissal of these serious constitutional issues, on the basis of inadequately supported conclusions that rational connections do exist between sex discrimination and the promotion of some vaguely articulated state interest. The first of these is crude, unjudicial and offensive to an increasingly large number of both men and women. The other two are inadequate substitutes for clear thinking and reasoned analysis. Taken together, they constitute a pattern of flagrant judicial insensitivity to the injustice visited upon women by male-dominated state legislatures.

This pattern, we believe, will also be evident in the areas surveyed in the remainder of our discussion.

B. Labor regulation

It is a transcendent irony that one of the most celebrated and widely respected decisions in the history of the Supreme Court has, after sixty-odd years, come to be viewed as a "roadblock to the full equality of women."[64] The case is, of course, *Muller v. Oregon*,[65] Brandeis brief and all. *Muller*, it will be remembered, upheld the constitutionality of an Oregon statute that restricted the employment of women in any "mechanical establishment, or factory, or laundry" to ten hours per day. Three years earlier, in *Lochner v. New York*,[66] the Court had declared unconstitutional a New York law regulating maximum hours of work for all bakery employees, male as well as female. *Muller* did not overrule *Lochner*, but distinguished it on the ground that women require special treatment which the legislature may properly require employees to supply. Here is the relevant portion of the opinion:

"That woman's physical structure and the performance of material functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

"Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the school room are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her."[67]

The second quoted paragraph seems shockingly close to *Bradwell* in its male supremacist assumptions. The first properly recognizes that pregnant women are not able to perform some of the tasks that men or non-pregnant women do. Significantly, though, the statute applies to *all* women, whether pregnant or not: Thus, the court was moved to imply that woman's primary social function is reproduction. This idea is, of course, an integral part of the "grand design myth. While the *Muller* opinion is slightly more restrained than Justice Bradley's concurring opinion in *Bradwell*, its sexist assumptions are no different.

It now seems unfortunate that the Court did not expressly overrule *Lochner* and hold that "freedom of contract" does not inhibit states from exercising their police power to set maximum working hours. The sexist rationale would then not have been necessary, and the judiciary would have been deprived of one of its most frequently cited authorities for the general proposition that sex is a valid basis for legislative classification.[68]

The constitutional issues raised by protective legislation have not been in the spotlight in recent years, due to the enactment of Title VII of the Civil Rights Act of 1964, which prohibits sex-based discrimination in employment unless the employee's sex is "a bona-fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[69] In the wake of *Muller* and similar cases, several states enacted statutes regulating employment of women in a variety of respects.[70] In addition to wage and hour standards, these included limitations on the poundage that women could be required to lift. Since the effect of such laws frequently is to render women ineligible for certain jobs, their validity under Title VII was soon questioned.[71] The Equal Employment Opportunity Commission has taken the position that protective regulations "have ceased to be relevant to our technology or the expanding role of female workers in our economy" and should not therefore be a defense to an otherwise unlawful employment practice.[72] Several courts have now held that Title VII supersedes conflicting state protective laws as a matter of federal supremacy.[73] The issue will very likely make its way to the Supreme

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Court. To the extent that Title VII is held to invalidate such state regulation, *Muller* will have been superseded by congressional fiat.[74]

Meanwhile, the Court has ruled on another aspect of Title VII in *Phillips v. Martin Marietta Corp.*[75] In that case, the employer's policy was to refuse even to consider hiring females with preschool children for a certain position, although no such exclusion was made in the case of similarly situated males. An unsuccessful female applicant challenged this policy, contending that it was a per se violation of the statute. This contention was rejected, and the case was remanded for further proceedings to determine whether or not the policy was within the bona fide occupational qualification exception.

Although Title VII has substituted the supremacy issue for equal protection where state-mandated sex discrimination is concerned, its ultimate effect may be to induce some judges to rethink their position on the broader question of sex discrimination and equal protection. If it does, the reason will be the bona fide occupational qualification exception. In *Richards v. Griffith Rubber Mills*,[76] for instance, an employer refused to promote a woman because of a state regulation prohibiting women from lifting more than fifty pounds; in the new job, she would occasionally be required to lift as much as sixty pounds. The court conceded that the regulation was probably valid under *Muller*, but nevertheless held it invalid under Title VII, which "no longer permits either employers or the states to deal with women as a class in relation to employment to their disadvantage. . . . Individuals must be judged as individuals and not on the basis of characteristics generally attributed to racial, religious, or sexual groups."[77]

That "individuals must be judged as individuals" is, of course, also the essence of the equal protection argument. The reasoning employed in *Richards* to find a violation of Title VII could thus just as easily be used to strike down, on equal protection grounds, any state regulation that discriminates against individuals solely on the basis of their sex.

Weeks v. Southern Bell Telephone & Co.[78] also involved an employer's refusal to consider hiring women for certain jobs on the ground that these jobs were too "strenuous" for females. The court not only narrowly construed the bona fide occupational qualification exception, but placed on the employer the burden "of proving that he had reasonable cause to believe, that is, a *factual basis* for believing, that *all or substantially all* women would be unable to perform safely and efficiently the duties of the job involved." [79] This test seems less stringent than the principle stated in *Richards*, in that it would not necessarily invalidate every discrimination based on attributed group characteristics. On the other hand, it clearly prohibits discrimination justifiable only by reference to characteristics attributed to an "average" member of the affected group.[80]

C. Places of public accommodation

Statutes and ordinances prohibiting women from patronizing bars or taverns, or regulating the manner of their patronage, were the subject of a flurry of litigation in the early twentieth century. These regulations, like those excluding women from working in bars, apparently reflected a strongly held belief that the combination of men, women and liquor in such places would be somehow detrimental to "public morality."

In an influential 1902 Colorado case,[81] a saloon owner sought to enjoin the enforcement of such a regulation on constitutional grounds. A Denver ordinance, authorized by a provision of that city's charter, prohibited keepers of "liquor saloons, dram shops, or tippling houses" from admitting any women to their establishments, either as customers or as employees. The petitioner had argued that a woman had the same right as a man to enter a saloon and buy a drink of liquor, and that to forbid him to sell liquor to women was therefore an unjustified interference with his business and a deprivation of property without due process of law. Granting its major premise, this argument seems compelling. The court, however, was not at all impressed. While conceding some validity to the petitioner's case, it nevertheless found a reason to sustain the ordinance:

"If a discrimination is made against women solely on account of their sex, it would not be good; but if it is because of the immorality that would be likely to result if the regulation was not made, the regulation would be sustained. That injury to public morality would ensue if women were permitted without restrictions to frequent wine rooms, there to be supplied with liquor, is so apparent to the average person that argument to establish so plain a proposition is unnecessary. But if some people might not be willing to concede this, it is enough to say that the general assembly, speaking through the city council, with whom the decision entirely rests, has so determined. Women, therefore, may properly be excluded from wine rooms, as this ordinance provides, and, if they have no constitutional right to insist upon being admitted to places there to be supplied with liquor, when the effect would be demoralizing to society, *a fortiori* the saloonkeeper may be prevented from furnishing them facilities for contributing to that result. . . . [T]he classification made with respect to the persons permitted to frequent wine rooms for supplying themselves there with liquor [is] based upon reasons that have their seat in the facts of nature, and . . . such regulations are conducive to, and are reasonably adapted to secure, the worthy object of preserving public morality." [82]

A contrary result had been reached, however, in a 1900 Kentucky case. There the ordinance not only prohibited women from going into or out of saloons, but also made it a misdemeanor for any woman to "frequent, loaf, or stand around" within fifty feet of such an establishment. Penalties for violation of the ordinance could be assessed against both the offending female and any saloon keeper who permitted her to enter. In *Gastenau v. Commonwealth*,[83] a saloon keeper convicted of violating this ordinance appealed on constitutional grounds. The prosecution argued that the ordinance had been enacted because "very disreputable, low and vile women congregate in and about saloons and places where liquor is sold, thereby causing affrays, fights, murder, and other crimes." [84] Agreeing that regulation of the conduct of such women was a proper subject for exercise of the police power, the court nevertheless held the statute invalid for overbreadth. For instance, it pointed out that lawful activities might quite properly bring even morally upstanding women within fifty feet of saloons. Furthermore, the court doubted whether well-behaved females could be excluded from frequenting saloons so long as their behavior was orderly and their purpose was lawful. The ordinance was held to be "unreasonable and an unnecessary interference with individual liberty." [85]

Six years later, however, Kentucky courts were again presented with a challenge to the constitutionality of a similar ordinance, which provided as follows:

"It shall be unlawful for any infant or female to go into or be in and drink intoxicating liquors in any saloon . . . or for the keeper or proprietor or controller, or one in charge of such room or place of business, to suffer and admit such infant or woman to drink therein or to be or remain for over five minutes. . . . It shall be a defense to this ordinance if the person charged with its violation shall show that such infant or female was of good repute and was at the time sober and orderly and had the consent so to do of the parent or guardian of the infant or husband of the female, or in case of reasonable necessity." [86]

A prosecution for violation of this ordinance was dismissed by the circuit court, and the state appealed. The Court of Appeals upheld the ordinance, distinguishing *Gastenau* on the ground that the overbreadth found in that case was not repeated in this ordinance.[87] The court was apparently convinced that the new ordinance offered sufficient protection to orderly, well-behaved women who visited saloons for lawful purposes, even though it placed upon defendants the burden of proving that they were within one of the exceptions stated in this ordinance.

Nevertheless, the ordinance was frankly sexist. It classed women with infants, as creatures requiring man's protection. It subjected any woman who remained in a saloon more than five minutes to the possibility of a criminal charge, and then placed the burden on *her* to justify herself—on the assumption, no doubt, that most females in bars for over five minutes were a threat to public morals. For married women, it required a showing of spousal consent, confirming the male role as woman's keeper or guardian.

Why should such an ordinance be enacted? Why did the court so readily agree that, when certain women are present together with liquor in a saloon, they "cause" men to fight and murder? Was the ordinance designed to keep "nice" girls "nice," by discouraging them from going into saloons? To protect men from their own antisocial, aggressive impulses? To make bars into male sanctuaries? To keep the husbands of "good" women from being tempted into liaisons with "loose" women? Whatever the motivation for such ordinances, they achieved their aim of regulating conduct by ascribing criminal or immoral tendencies to citizens on the basis of their sex, rather than by requiring a showing of actual immoral conduct.[88] These ordinances reflect two different facets of the female stereotype in the mythology of male supremacy. On the one hand, the female is viewed as a pure, delicate and vulnerable creature who must be protected from exposure to immoral influences; and on the other, as a brazen temptress, from whose seductive blandishments the innocent male must be protected. Every woman is either Eve or Little Eva—and either way, she loses.

Similar ordinances can still be found in some municipalities. In a 1969 case, *Gallagher v. City of Bayonne*,[89] the ordinance prohibited tavern owners from allowing women to stand or sit at a bar; they could be served liquor only if seated at a table. Despite an earlier dictum suggesting the contrary,[90] the court held that the ordinance exceeded the limits of the city's police power. Reasoning by analogy to a recent decision invalidating a regulation which had prevented owners from allowing homosexuals to congregate at bars,[91] the court concluded that the scope of permissible regulation extended to specific antisocial or immoral *acts*, but not to the "mere congregation" of women at a bar.

The practice of refusing service to women at bars is not solely the result of state law. It often reflects private policies. For instance, the Rainbow Lounge in the Hotel Syracuse had a policy against serving unescorted women at its bar, although apparently they could be served at tables. In *DeCrow v. Hotel Syracuse Corp.*,[92] a female who had been refused service sought a federal court injunction against the continuance of this policy on the ground that it violated the equal protection clause, the Civil Rights Act of 1964 [93] and a number of other federal civil rights statutes.[94] Her action was dismissed for lack of jurisdiction on two grounds. First, it was held that the public accommodations provi-

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sions of the 1964 Act[95] (unlike Title VII) do not prohibit sex discrimination; secondly, the equal protection clause and the other statutes were interpreted as requiring a showing of state action, which the court found to be absent in this case.

Plaintiff then proceeded in the state courts, contending that defendant's policy was in violation of various provisions of the New York Civil Rights Law. She was again unsuccessful.[96] Although the state statute provides that "all persons" are *entitled* to full and equal facilities and privileges in places of public accommodation, it only prohibits owners from denying equality "on account of race, creed, color or national origin." [97] The court held that sex discrimination was not a violation of the latter provision. Another section of the statute declares it to be a misdemeanor for any innkeeper to refuse "without just cause or excuse, to receive and entertain any guest." [98] This provision was not violated, said the court, because the defendant did not *refuse* to serve the plaintiff; service was merely *conditioned* on the female's having an escort or being willing to sit at a table.

The first line of reasoning may be defensible on the ground that sex discrimination was not specifically prohibited by the statute; it is nevertheless a narrow construction in the light of the statute's purpose and the declaration that all persons are entitled to equal service. The second rationale, however, is indefensible: The attempt to characterize the effect of the hotel's policy as conditional service, rather than as a refusal to serve, is an exercise in sophistry. Suppose persons of a certain race were prohibited from sitting in certain sections of restaurants, or from living in certain areas of a city or riding in certain parts of a bus. Would anyone seriously contend that this is "conditional acceptance" of, rather than refusal to accept, members of that race?

The hotel's policy should have been recognized for what it was—a refusal to serve unescorted women under circumstances where unescorted men would receive service. The fact that unescorted women (and men) could sit at tables or that escorted women (or men) could sit at the bar is therefore simply irrelevant. In terms of the statute, then, the only real question is whether or not this refusal of service was for "just cause or excuse." It was incumbent upon the court to inquire as to the reasons for the defendant's policy and then to test them against the statute's purpose of guaranteeing freedom from discrimination in places of public accommodation. By resorting to the specious "conditional service" rationale, the court abdicated this responsibility.

Private discrimination was again challenged on federal constitutional grounds in *Seidenberg v. McSorley's Old Ale House, Inc.*[99] The facts were similar to the *DeCrow* cases, except that no female had ever been served at the defendant's establishment, at the bar or elsewhere. Declining to follow the first *DeCrow* decision, however, the district court denied a motion to dismiss the action for want of jurisdiction.[100] There being no issue as to any material fact, both parties moved for summary judgment, and the plaintiff's motion was granted.

In order to reach the constitutional issue, the court first had to find that the defendant's exclusionary policy constituted state action. It conceded that the Supreme Court has never ruled that a private commercial enterprise is subject to the fourteenth amendment solely because it is licensed by the state. The court nevertheless held that the compelling public interest in the liquor trade, coupled with New York's pervasive regulatory scheme, justified the requirement that the defendant conduct its business on the same principle of equality applicable to the state itself.

Having reached the equal protection issue, the court proceeded to test defendant's policy against the rational basis standard:

"In the case before us no difference between men and women, as potential customers of the defendant, has been offered as a rational basis for serving the one and not the other. It may be argued that the occasional preference of men for a haven to which they may retreat from the watchful eye of wives or womanhood in general to have a drink or pass a few hours in their own company, is justification enough; that the simple fact that women are not men justifies defendant's practice. The answer is that McSorleys' is a public place, not a private club, and that the preferences of certain of its patrons are no justification under the Equal Protection Clause. Such preferences, no matter how widely shared by defendant's male clientele, bear no rational relation to the suitability of women as customers of McSorleys'.

"Nor do we find any merit in the argument that the presence of women in bars gives rise to 'moral and social problems' against which McSorleys' can reasonably protect itself by excluding women from the premises.... Outdated images of bars as dens of coarseness and iniquity and of women as peculiarly delicate and impressionable creatures in need of protection from the rough and tumble of unvarnished humanity will no longer justify sexual separatism." [101]

In *Seidenberg*, as in *Gallagher*, a court has finally repudiated the notion that every woman should be viewed as either an innocent or a temptress—and in either case, as somehow man's inferior—to be guarded or guarded against. Once this attitude has been overcome, there is no further justification for discrimination against female patrons in bars. These two opinions have established a new model for judicial review of discriminatory ordinances and policies applicable to places of public accommodation.

Their influence need not be confined to this area of law, however. Many kinds of sex discrimination are rationalized, even today, on the basis of stereotypes just as simplistic and exaggerated as those reflected in the liquor cases. As other courts are persuaded to follow the example set in *Sail'er Inn, Seidenberg* and *Gallagher*, they will be obliged to make a more searching inquiry into the rationality of any sex classification challenged on equal protection grounds. They will no longer be content to uphold discriminatory laws merely as a gesture of total deference to the legislature or as a shield against some ill-defined threat to public morality. Even more importantly, they will reexamine their own uncritical acceptance of stereotypical ideas about sex characteristics as appropriate grounds for legislative distinctions.

D. Jury qualification

The common law jury, grand and petit, was exclusively a male institution.[102] The right (or duty) of women to serve as jurors was not recognized in America until the early twentieth century, when women began to obtain voting rights.[103] There is, however, one series of nineteenth-century opinions from the Washington Territory which vividly suggests how one male judge viewed the desirability of permitting women to serve on juries.

A Washington statute provided that all "qualified electors" were eligible to serve as petit jurors and all "qualified electors and householders" were eligible to serve as grand jurors. In *Rosencrantz* v. *Territory*,[104] a female defendant had been indicted by a grand jury composed in part of married women living with their husbands. She appealed, claiming that her indictment had been returned by an improperly constituted grand jury. The Supreme Court of the Territory denied her appeal, noting that the franchise had been extended to Washington women by statute and that the female jurors were thus "qualified electors." But the court construed the statute as requiring grand jurors to be *both* "qualified electors" and "householders." Whether a married woman living with her husband could be a "householder" was thus the determinative issue. The court concluded that the local Married Women's Act conferred sufficient joint control over the family property and children so that both husband and wife could be deemed "householders" within the meaning of the jury statute. The majority opinion did not discuss the desirability of having women on juries; it did, however, suggest that the principle of equality expressed in the Married Women's Act constituted a "spirit of progress." [105]

The decision evoked a furious dissent from Judge Turner. He contended that, in light of the jury s history as an institution, "qualified electors" was meant to refer exclusively to qualified *male* electors; in any event, he argued, married women were not "householders." In elaborating the first of these two arguments, he revealed a strong opinion on the underlying question of policy:

"It is said that the rights of the weaker sex, if I may now call them so, are more regarded than in the days of Blackstone, and that the theory of that day, that women were unfitted by physical constitution and mental characteristics to assume and perform the civil and political duties and obligations of citizenship, has been exploded by the advanced ideas of the nineteenth century. This may be true. No man honors the sex more than I. None has witnessed more cheerfully the improvement in the laws of the states, and particularly in the laws of this territory, whereby many of the disabilities of that day are removed from them, and their just personal and property rights put upon an equal footing with those of men. I cannot say, however, that I wish to see them perform the duties of jurors. The liability to perform jury duty is an obligation, not a right. In the case of woman, it is not necessary that she should accept the obligation to secure or maintain her rights. If it were, I should stifle all expression of the repugnance that I feel at seeing her introduced into associations, and exposed to influences which, however others regard it, must, in my opinion, shock and blunt those fine sensibilities, the possession of which is her chiefest charm [*sic*], and the protection of which, under the religion and laws of all countries, civilized or semi-civilized, is her most sacred right.

"If one woman is competent as a juror, all women having the same qualifications are competent. If women may try one case, they may try all cases. It is unnecessary to say more; to suggest the shocking possibilities to which our wives, mothers, sisters, and daughters may be exposed, unless the legislature should hereafter relieve us from what I believe to be a mistaken construction of the law. These observations, however, are not pertinent here. The question is, what is the law? I say that the law now concerning the important incidents of a jury trial are, by express constitutional provision, what they were at the common law, and that under that law a jury was no jury unless it was composed of men." [106]

Judge Turner had an equally strong view on the question of whether a married woman living with her husband could be a "householder" within the meaning of the statute:

"The husband was not only the head of the family at common law, because under that law he had the right to be obeyed by all the family, including the wife, but because of inherent and acquired differences between himself and wife in mental and physical constitution. He was better fitted to wage the war for present subsistence, and to accumulate the competence that was to

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make provision against want in the future. The experience gained by him in prosecuting this branch of the partnership matured his judgment, strengthened his will, and made him confident and self-reliant. I believe that the facts I have mentioned obtain to this day, and that they operate and will continue to operate to give the husband paramount authority in the household, as that term is understood at common law, until an upheaval of nature has reversed the position of man and woman in the world. Legislative enactment would not make white black, nor can it provide the female form with bone and sinew equal in strength to that with which nature has provided man. No more can it reverse the law of cause and effect, and clothe a timid, shrinking woman, whose life theater is and will continue to be and ought to continue to be, primarily the home circle, with the masculine will and self-reliant judgment of a man." [107]

Three years later, in *Harland v. Territory*,[108] the same court was faced with the same issue of jury service by women. Perhaps in part due to personnel changes on the court, a majority of the judges joined in Judge Turner's opinion overruling *Rosencrantz*.[109]

Female eligibility for jury service was not widely litigated until the years immediately following World War I, when, as result of the nationwide women's suffrage movement, the nineteenth amendment was adopted. Since jury qualification in many states was linked in some respetc to voting eligibility, the extension of suffrage to women frequently raised—as it had in the Washington Territory cases—the question of whether women were thereby qualified to serve on juries.[110]

Where the statute defined eligibility for jury service in terms of "qualified electors" or some similar phrase, many state courts held that the extension of suffrage to women automatically made them eligible to serve as jurors.[111] In other states with similar statutes, the opposite result was reached; a notable example is *Commonwealth v. Welosky*.[112]

In *Welosky*, the defendant challenged the array of jurors on the ground that women had been excluded. The applicable Massachusetts statute provided that every "person qualified to vote" for the legislature should be eligible for jury service.[113] Despite the extension of suffrage to female citizens of Massachusetts, the court held that the legislature had not intended the reference in the statute to a "person qualified to vote" to include females:

"It is unthinkable that those who first framed and selected the words for the statute now embodied in G.L.c. 234, § 1, had any design that it should ever include women within its scope. It is equally inconceivable that those who from time to time had reenacted that statute had any such design. When they used the word "person" in connection with those qualified to vote for members of the more numerous branch of the General Court, to describe those liable to jury service, no one contemplated the possibility of women becoming so qualified. The same is true in general of those who from time to time reenacted the statute in substantially the same words. No intention to include women can be deduced from the omission of the word male. That word was imbedded in the Constitution of the Commonwealth as a limitation upon those citizens who might become voters and thereby members of a class from which jurors might be drawn. It would have been superfluous also to insert that word in the statute.[114]"

The court's conclusion as to legislative intent was bolstered by two other points, both of which have become familiar themes: a felt necessity to exempt at least some women from jury service, and the lack of suitable accommodations for women jurors.[115]

As in *Welosky*, most state courts treated the eligibility issue as one of statutory construction.[116] In North Carolina however, a constitutional issue was determinative. In *State v. Emery*[117] it was held that the state constitution, which provided for the "ancient mode of trial by jury" and for conviction only by "a jury of good and lawful men," precluded the extension of jury service to females. The majority rested its holding entirely upon the unchallenged fact that trial by jury at the common law consisted of trial by male jurors. One dissenting justice commented on this at length:

[I] thing the language of the Constitution should not be held to a rigid and inelastic construction when it conflicts with the progress of human thought and changing social conditions. It should be more liberally constructed so as to meet the needs of a complex and growing civilization. I think this section of the Constitution is capable of the reasonable interpretation, in accord with modern thought, which would not disqualify women from this important service. I think it should be given this interpretation in the light of the progressive changes in the status of women and their equal share with men in the powers and responsibilities of government and justice. I do not think the courts should be restricted to the mere ascertainment of what we think now was in the minds of the framers of the Constitution who, however wisely they laid the foundations, could not envision the limitless future, else we should be fettered by the dead hand of the past." [118]

The other dissenter, however, delivered the *coup de grace* to the majority with a more laconic observation: "The most insistent argument advanced in behalf of appellants is that women have never been permitted to serve on juries. Which goes to show that an attitude can be more formidable than an argument." [119]

As the eligibility of women for jury service came to be more widely recognized and the presence of females on juries became commonplace, two new questions were raised: Can a state properly *exclude* all women from jury service? Alternatively, can a state permit all prospective women jurors voluntarily to *exempt* themselves from service?

The United States Supreme Court has never directly ruled on the first question, but *Strauder v. West Virginia*[120] contains a frequently quoted dictum on the subject. The issue in *Strauder* was whether a Negro could lawfully be tried under a statute limiting jury service to white male citizens. Holding the statute's racial classification to be in violation of the equal protection clause of the fourteenth amendment, the Court added:

"We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it. . . . We are not now called upon to affirm or deny that it had other purposes." [121]

Since *Strauder*, the Court has decided three cases involving the exclusion of women from juries. In none of these, however, was the exclusion prescribed by state law. Two involved federal juries chosen at a time when the federal statute referred to state law for standards of jury eligibility. In *Ballard v. United States* the Court indicated that exclusion of females from the federal jury had been improper, since the state law involved there expressly qualified women for service.[122] Speaking for four of the five-man majority, Mr. Justice Douglas eloquently stated a case for inclusion of women on juries:

"It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded." [123]

The third case, *Fay v. New York*,[124] involved a number of challenges to a New York "blue ribbon" grand jury, one of which alleged systematic discrimination against women in selecting the venire.[125] The Court affirmed the lower court's conclusion that appellant's evidence did not establish this contention, but went on to suggest that the exclusion of women from juries would not raise a serious constitutional question:

The first state to permit women jurors was Washington, and it did not do so until 1911. In 1942 only 28 states permitted women to serve on juries and they were still disqualified in the other 20. Moreover, in 15 of the 28 states which permitted women to serve, they might claim exemption because of their sex. It would, in the light of this history, take something more than a judicial interpretation to spell out of the Constitution a command to set aside verdicts rendered by juries unleavened by feminine influence. The contention that women should be on the jury is not based on the Constitution, it is based on a changing view of the rights and responsibilities of women in our public life, which has progressed in all phases of life, including jury duty, but has achieved constitutional compulsion on the states only in the grant of the franchise by the Nineteenth Amendment. We may insist on their inclusion on federal juries where by state law they are eligible but woman jury service has not so become a part of the textual or customary law of the land that one convicted of crime must be set free by this Court if his state has lagged behind what we personally may regard as the most desirable practice in recognizing the rights and obligations of womanhood." [126]

Although understandable in its reluctance to impose federal constitutional standards in an area historically within the states' competence to control, this dictum nevertheless calls to mind—in its total reliance on historical practice as justification for sex discrimination—the dissenter's observation in *State v. Emery* that attitudes can be more formidable than arguments.

A 1939 Florida opinion is also worthy of note on the exclusion issue. In *Hall v. State*,[127] a statute restricting jury service to males was challenged by a female defendant. Relying on the *Strauder* dictum, the court rejected her contention that the statute violated the fourteenth and fifteenth amendments. The court further concluded

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that the exclusion of women from the jury could not have prejudiced the defendant:

"It is not contented that juries composed of men would be less fair to women defendants than would juries composed of women. Indeed, experience would lead to a contrary conclusion. The spirit of chivalry and of deep respect for the rights of the opposite sex, have not yet departed from the heads and hearts of the men of this country." [128]

The court's facile assumption may be questioned in light of the fact that the defendant in this case was accused of having given perjured testimony against a male defendant in an earlier murder trial. She was convicted by the all-male jury and sentenced to life imprisonment.[129]

The first square holding that exclusion of women from juries violates the equal protection clause of the fourteenth amendment was *White v. Crook*,[130] a case involving the Alabama jury statute. Ignoring the *Strauder* dictum, the court expressed its conclusion as follows:

"Women are allowed to serve on juries in the federal courts and in the courts of forty-seven states. Only in three—Alabama, Mississippi and South Carolina—are women completely excluded from jury service. The time must come when a state's complete exclusion of women from jury service is recognized as so arbitrary and unreasonable as to be unconstitutional. As to Alabama, we can see no reason for not recognizing that fact at the present time." [131]

Without questioning the soundness of the result, we might point out that the opinion relies on nose-counting as its means of determining the scope of fourteenth amendment guarantees; in this respect, it is open to the same criticism as *Fay v. New York*.

The State of Alabama did not appeal from the *White* decision, and all three statutes completely excluding women from jury service have since been repealed.[132] Subsequent to *White*, and prior to its repeal, however, the Mississippi statute was upheld by the supreme court of that state.[133] The following paragraph is the only portion of the opinion in which any reason was advanced to justify exclusion:

"The legislature has the right to exclude women so they may continue their service as mothers, wives, and homemakers, and also to protect them (in some areas, they are still upon a pedestal) from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial." [134]

With the demise of exclusionary state statutes, the issue raised in *White* might appear to be moot. Cases may well arise, however, in which relief is sought from various other exclusionary practices. For example, the Fifth Circuit Court of Appeals has recently ruled that, in light of Mississippi's new statute making women eligible for jury service, state officials have a duty not to discriminate by including only a token proportion of women on the jury list.[135]

Now that statutory exclusion of females from juries is at least out of fashion, if not unconstitutional, primary attention is shifting from exclusion to exemption. Statutes in a number of jurisdictions permit women, though eligible for service, to exempt themselves solely on account of their sex. Such statutes have been consistently upheld against the claim that they unconstitutionally discriminate against female defendants [136] or against prospective male jurors.[137]

Some exemption statutes give every female summoned for jury duty the privilege of excusing herself from service. In a few states, the statutes have gone even further, providing that no woman is to be placed on the jury list unless she has previously filed a statement of her willingness to be called for service. The rationale for the latter type of statute is that it avoids the inefficiency of summoning many women who would choose to claim their exemption if called.

In *Hoyt v. Florida*,[138] a statute of this latter type was upheld by the Supreme Court against an equal protection attack. Noting that eighteen states permitted an automatic exemption for women and that three of these implemented this policy by calling only those women who had previously volunteered, the Court found that there was a rational basis for Florida's system:

"Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities." [139]

The appellant also contended that Florida's statute, as applied, was unconstitutionally discriminatory. She pointed out that, out of some 46,000 eligible women voters in her county, only 220 had volunteered for jury duty during the eight years women had been eligible for such service. "Beside the point," the Court responded; "[g]iven the reasonableness of the classification . . . the relative paucity of women jurors does not carry" any "constitutional consequence." [140] Given the fact—accepted by the Court—that the end product of the Florida system in defendant's county was a jury list of 10,000 persons, of which only ten—ten!—were women, it is apparent that the Florida system was the functional equivalent of total exclusion.[141]

As indicated above, the Court has never held that outright exclusion of women from juries is a violation of equal protection. For many years, however, the Court has consistently condemned racial exclusion in jury selection.[142] The *Hoyt* opinion attempted to explain this seeming anomaly:

"This case in no way resembles those involving race or color in which the circumstances shown were found by this Court to compel a conclusion of purposeful discriminatory exclusions from jury service. . . . There is present here neither the unfortunate atmosphere of ethnic or racial prejudices which underlay the situations depicted in those cases, nor the long course of discriminatory administrative practice which the statistical showing in each of them evinced."[143]

The meaning of this passage is obscure. At best, it overlooks the obvious fact that statutes exempting women from jury service do reflect the historical male prejudice against female participation in activities outside the family circle. At worst, it can be read as *condoning* that prejudice by suggesting that, although racial and ethnic prejudice are "unfortunate," sex prejudice is not.

Notwithstanding *Hoyt's* susceptibility to such criticism, any judge thereafter facing a federal constitutional challenge to a similar exemption for women could simply cite that case as dispositive.[144] In two recent cases involving the New York jury statute however, judges have seen fit to add further embellishment to the *Hoyt* rationale, thereby reflecting their own attitudes toward this type of sex discrimination.

In *Leighton v. Goodman*,[145] a male called for jury duty sought an injunction against the county clerk's enforcement of the summons. Plaintiff challenged the jury statute on equal protection grounds: that by providing automatic exemption for women—*all* women—it in effect discriminated against all males. Although acknowledging that "the time may very well be ripe" for the legislature to amend the statute, the district court nevertheless held the constitutional claim "patently insufficient as a matter of law." Adhering to the "rational basis" test, the court suggested a justification for the exemption:

"Granted that some women pursue business careers, the great majority constitute the heart of the home, where they are busily engaged in the 24-hour task of producing and rearing children, providing a home for the entire family, and performing the daily household work, all of which demands their full energies. Although some women now question this arrangement, the state legislature has permitted the exemption in order not to risk disruption of the basic family unit. Its action was far from arbitrary." [146]

Even if the court's factual assumptions were correct,[147] the view of women here expressed is reminiscent of that expressed by Judge Turner nearly ninety years ago.

In *DeKosenko v. Brandt*,[148] plaintiff, a female tenant suing her landlord, also challenged the New York jury law on constitutional grounds, claiming that it would deprive her of a fair jury. Her claim was denied by the New York County Supreme Court in an opinion defective in so many different ways that no description here could possibly do it justice. As an inducement to the reader to see for himself, we present the final passage:

"Plaintiff is in the wrong forum. Her lament should be addressed to the "Nineteenth Amendment State of Womanhood" which prefers cleaning and cooking, rearing of children and television soap operas, bridge and canasta, the beauty parlor and shopping, to becoming embroiled in plaintiff's problems with her landlord." [149]

We offer the following translation: "Plaintiff cannot complain of the absence of women on her jury, because that results from the willingness of women to claim their exemption, not from the mere existence of the exemption itself." As the dissenting Florida judge in *Hoyt* remarked in his opinion:

"[I]t seems to me that if the present restriction upon female jury service were constitutional, then we must hold that the legislature could validly require all women to serve but limit male service to volunteers and thus, in effect, create an all female jury system." [150]

In such a situation, would an absence of *males* from the jury thereafter be ascribed to "the State of Manhood, which prefers golf, bowling and working for a living to becoming embroiled in another male's lawsuit"?

Despite the general judicial acquiescence, we submit that an automatic jury exemption for women should raise a serious equal protection question. We doubt that any statute would today be upheld which provided that all black persons (or, for that matter, all white persons) should have an automatic exemption from jury service.[151] Is a blanket exemption for all females any more justifiable? Granted that many females have work or child care responsibilities (or health disabilities) which might justify excusing them from service, it is difficult to imagine any excuse (except pregnancy, a condition hardly shared at any one time by even a majority of the women in America) which could not also be advanced by a man similarly situated.[152] How then is it possible to maintain that an exemption for every woman—including even the childless, single woman, and the working wife or mother—is not an arbitrary discrimination when based solely on her sex? Such a scheme, we submit, is based—and court opinions right up to the present day support our contention—on an additional assumption: that women are delicate creatures to be encouraged to stay at home and be protected from the hard, cruel world—and incidentally, as long as they *are* at home, to do the cooking, cleaning, mend-

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ing and ironing for those of us who do have the affairs of the world to attend to.

E. Public education

Although the dominant form of public education in the United States today is obviously "coeducation" (both sexes taught in the same schools and usually in the same classes), a number of public institutions of higher learning are not coeducational. In recent years a few courts have been called upon to decide the validity of a state educational policy providing for separation of the sexes; overall, the results represent at best a limited recognition of the right to equal educational opportunity regardless of sex.

Two such cases have come before the Texas Court of Civil Appeals. In 1958, in *Heaton v. Bristol,*[153] female plaintiffs had sought to enter Texas A. & M., an all-male institution. Reversing the lower court, the appellate court held—despite uncontroverted findings by the trial court that Texas A. & M. offered several courses of study not available at any other public institution of higher learning in the state—that no constitutional right of the plaintiffs had been violated. First, it was not shown that plaintiffs desired to take any of the courses unique to that institution. Nor was the court impressed by plaintiffs' argument that, by denying them the right to attend this particular institution, which was most near their homes and thus most convenient, the state had denied them equal protection. Finally, the court relied upon the existence of compulsory military training at Texas A. & M. as evidence of its unsuitability for females and pointed to the lack of any precedent upholding plaintiffs' position.

To determine whether there is unequal treatment of the sexes, the court stated, one must view the state's entire higher education system. The court concluded that the Texas system did make "ample and substantially equal provision for the education of both sexes." [154] In the court's view, the question was simply whether the state may constitutionally maintain, along with sixteen coeducational institutions, two which are not coeducational—one male, one female:

"We think undoubtedly the answer is Yes. Such a plan exalts neither sex at the expense of the other, but to the contrary recognizes the equal rights of both sexes to the benefits of the best, most varied systems of higher education that the State can supply." [155]

A similar action was brought two years later in *Allred v. Heaton,*[156] and in that case, at least one of the plaintffs declared her desire to enroll in floriculture, one of the courses apparently not available at any other campus in the Texas university system. The court, possibly dubious of her good faith since she had once declared an intention to study law, held that, since the applicants (relying on the stated policy of exclusion) had not submitted applications for admission, they were precluded from relief. In affirming generally its earlier position with respect to sex-segregated education, the court indicated in dictum that should the plaintiff in fact apply for admission to study floriculture, she should not be excluded solely on the basis of her sex.[157] Upon rehearing, the college moved to strike that paragraph from the court's opinion, as constituting dictum. The court granted the motion without comment. This was not the only dictum in the opinion, however; consider the following:

"Surely the Supreme Court of the United States will not attempt to interfere with the public policy of the sovereign states of this nation in the management and control of their respective education systems so long as such systems do not discriminate against color or race.[158]

A far different view of the constitutional issues was expressed in *Kirstein v. Rector and Visitors of the University of Virginia,*[159] a 1970 decision involving the College of Arts and Sciences of the University of Virginia at Charlottesville. A three-judge federal district court held that refusal to admit women to the college was a denial of equal protection, since the college offered courses of instruction not found elsewhere in the state and because its degree had greater "prestige" than that of any other state college. The court did, however, deny plaintiffs' claim for relief, on the ground that a plan for implementing coeducation at the campus had already been adopted. The court expressly declined to decide whether it was impermissible for the state to operate *any* institution of higher learning restricted to one sex, on the ground that plaintiffs lacked standing to raise the issue. The court was also careful to skirt—in a footnote—the question of whether the ghost of *Plessy v. Ferguson* [160] still walks: "We need not decide on the facts of this case whether the new discontinued principle of "separate but equal" may have lingering validity in another area—for the facilities elsewhere are not equal with respect to these plaintiffs." [161]

The most recent case to call into question a state's operation of sex-segregated educational facilities is *Williams v. McNair,*[162] a suit in which several males sought to enjoin South Carolina's operation of Winthrop College on a for-girls-only basis. South Carolina maintains a substantial number of university-level institutions, only two of which are segregated by sex—Winthrop and the Citadel, an all-male military academy. The court denied relief, noting that there is a respectable body of opinion which supports single-sex education on the ground that an educational institution can advance its effectiveness by concentrating on "areas of primary interest to only one sex." In the court's view, this was sufficient to demonstrate that the state's discrimination was not "wholly wanting in reason." [163] The court did not go so far as to suggest that the state could maintain all its educational institutions on a sex-segregated basis, but it did declare that on the facts presented, where there were coeducational institutions available to every student in the state, equal protection had not been denied. The *Kirstein* case was distinguished with ease on the ground that the court there had specifically found that equal facilities were not available to women elsewhere in the state university system. The *Williams* decision has recently been affirmed without opinion by the United States Supreme Court.

The district court in *Williams* was careful to avoid the kind of overt sexist rhetoric that has marred court opinions in many sex-discrimination cases, and at first blush the decision seems not only predictable but reasonable in light of the general availability of quality coeducation in the state. But closer examination may be in order. The statute establishing Winthrop College described its curriculum as follows: "such education as shall fit them [young women] for teaching" and also "stenography, typewriting, telegraphy, bookkeeping, drawing (freehand, mechanical, architectural, etc.), designing, engraving, sewing, dressmaking, millinery, art, needlework, cooking, housekeeping and such other industrial arts as may be suitable to their sex and condusive to their support and usefulness," together with such other subjects "as the progress of the times may require." [164] To evaluate this case, it may be useful to return to the racial analogy:

1) May the state properly operate only one college, for whites only? Clearly not. Could it operate only one, and only for men? The *Williams* opinion concedes that it could not.

2) Could it operate only two colleges, one for whites and one for blacks? Again, clearly not. Could it operate only two colleges, one for women and one for men? The *Williams* opinion is silent. In view of the long history of male dominance, we suggest that the adoption of such a scheme by a male-dominated legislature would at least raise a constitutional question. If accompanied by different curricula, clearly reflecting stereotypical attitudes about sex roles, a strong inference would arise that the scheme reflected an assumption that women are inherently incapable of education on an equal basis with men—just as clearly as the race-segregated schools of the South indicated a similar belief about the races.

3) Can the state operate separate schools for the races, so long as it maintains at least some school where the races *are* mixed? Any plan where the white citizens of a state were given the option of education in black-free state colleges would seem in clear violation of the school segregation decisions,[165] *whether or not* any integrated schools were also available. Should the same result follow in a sex-segregation case?

To the *Williams* court and apparently to the Supreme Court as well, the answer is clear: no violation here. But consider the facts of *Williams*: In addition to its coeducational colleges, South Carolina operates two sex-segregated institutions—Winthrop, a school apparently designed to produce secretaries and homemakers, and the Citadel, a military school offering a full range of liberal arts and engineering degrees. To pursue the race analogy a bit further, suppose that South Carolina, in addition to operating one or more racially mixed institutions, should maintain two other colleges. One, Dred Scott Institute, would offer degrees in agriculture, music, dance and physical education; it would accept only black students. The other, Calhoun College, would offer degrees in nuclear physics, medicine, law, engineering and business administration; only whites need apply. Even assuming that all of these studies were available at a biracial institution in the state, would such a scheme survive constitutional scrutiny?

It is difficult to see how; indeed, any other answer is unthinkable. And yet, the maintenance of two institutions for the sexes in South Carolina, one for male warriors and the other for female domestics, is different only in that the assumptions it reflects about individual capabilities and aspirations are more widely shared. The role of a housewife or a secretary is an honorable and productive one; so of course is the role of a champion athlete or a tenant farmer. To attack the attitudes reflected in the *Williams* decision is not to denigrate the individuals for whom such stereotypes happen to be accurate; it is to attack the arrogant assumption that merely because these stereotypes are accurate for some individuals, the state has a right to apply them to all individuals—and, indeed, to shape its official policy toward the end that they shall *continue* to be accurate for all individuals.

F. Criminal sentencing

State statutes prescribing the term of imprisonment for various crimes sometimes distinguish between offenders on the basis of sex. In some cases, the statute permits the the sentencing judge to set a fixed term (within a stated range) for an offender of one sex, while requiring an indeterminate sentence for an offender of the other.

In *State v. Heitman,*[166] a Kansas statute provided that a female over eighteen should be sentenced to confinement for an indeterminate term of no more than the maximum sentence fixed by law for her offense. The female defendant had been convicted of a misdemeanor punshable by thirty days to six months imprisonment and was accordingly sentenced to an indeterminate term of six months. She appealed on equal protection grounds: Had she been a man, the judge in his discretion could have sentenced her to a fixed term of less than six months. The trial court's action was affirmed. Although recog-

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nizing the principal that "no different or higher punishment shall be imposed on one than that which is prescribed for all, for the same offense," [167] the Kansas Supreme Court concluded that sufficient differences exist between men and women to justify classification by sex in the correction and rehabilitation of criminals:

"It required no anatomist, or physiologist, or psychologist, or psychiatrist to tell the Legislature that women are different from men. In structure and function human beings are still as they were in the beginning. 'Males and females created He them.' It is a patent and deep-lying fact that these fundamental anatomical and physiological differences affect the whole psychic organization. They create the differences in personality between men and women, and personality is the predominating factor in delinquent careers. It was inevitable that, in the ages during which woman has been bearer of the race, her unique and absolutely personal experiences, from the time of conception to the time when developed offspring attains maturity, should react on personality, and produce what we understand to be embraced by the term 'womanhood.' Woman enters spheres of sensation, perception, emotion, desire, knowledge, and experience, of an intensity and of a kind which man cannot know. Her individualities and peculiarities are fostered by education and by social custom—whether false and artificial or not is of no consequence here; and the result is a feminine type radically different from the masculine type, which demands special consideration in the study and treatment of non-conformity to law." [168]

It is sadly ironic that the court's opinion was largely devoted to praise of indeterminate sentencing as an example of the scientific foundation and humane approach of "the new penology." In retrospect, the court's touching faith in the rehabilitative capabilities of prisons seems naive at best.

Statutes of this sort apparently were not successfully challenged until 1968.[169] In that year several courts, both state and federal, concluded that such discrimination violated equal protection. The first such case was *United States ex rel. Robinson v. York,* [170] a federal habeas corpus proceeding. In this case, the effect of the Connecticut statute was to require an indeterminate (maximum three years) sentence for petitioner, even though a male convicted of the same offense would receive at most a total sentence of eighteen months. In addition to the disparity between fixed and indeterminate sentences, the case thus raised an issue not presented in *Heitman:* a longer maximum sentence for the female. Citing *Loving v. Virginia* [171] for the proposition that equal protection requires any *racial* classification to be subjected to the "most rigid scrutiny," the *Robinson* court held that sex discrimination should bear the same heavy burden of justification:

"While the Supreme Court has not explicitly determined whether equal protection rights of women should be tested by this rigid standard, it is difficult to find any reason why adult women, as one of the specific groups that compose humanity should have a lesser measure of protection than a racial group." [172]

Tested by this standard, the statute was found wanting. Suggesting that imprisonment is still imprisonment, whatever euphemisms may be employed to describe it, the court was unable to discern any reason sufficient to justify the difference in treatment:

"It may be granted that a broad discretion should be given to the courts in order that the punishment imposed should bear a proper relation to the enormity of the offense. But the circumstances which may affect the sentences must be circumstances connected with the crime. That there are differences between men and women cannot be denied, but that these differences justify a longer imprisonment of women cannot be sustained. There is no connection whatsoever between a breach of peace or resistance to arrest and being a woman. Those misdemeanors may be committed by persons of either sex. [173]

The principle announced in *Robinson* has since been applied in two other Connecticut cases: once again in a federal district court, [174] and once in the Superior Court of Connecticut. [175]

In *Commonwealth v. Daniel,*[176] the Pennsylvania Supreme Court reached a similar result. The statute in that case did not prescribe for women a sentence longer than the maximum for men, but, like the Kansas statute attacked in *Heitman,* it did deprive the court of the power to impose upon females a fixed sentence shorter than the statutory maximum. The *Daniel* opinion fell short of articulating the "rigid scrutiny" test employed in *Robinson;* on the contrary, it stated that a "strong presumption of Constitutionality" [177] attaches to every statute. Nevertheless the court concluded:

"[W]e fail to discern any reasonable and justifiable differences . . . between men and women which would justify a man being eligible for a shorter maximum prison sentence than a woman for the commission of the same crime, especially if there is no material difference in their records and the relevant circumstances." [178]

This opinion supports our contention that not only are many forms of sex discrimination vulnerable when subjected to "rigid scrutiny," but they cannot even survive a serious application of the "rational basis" test.[179]

In light of the consistent holdings in these recent cases, *Wark v. State* [180] is a disagreeable surprise. For escaping from a Maine prison farm, the defendant had been sentenced to an additional term of six to twelve years. He contended (and the Supreme Judicial Court of Maine assumed) that a female convicted of escaping from the women's reformatory would have been subject to a maximum sentence of no more than eleven months. Appellant therefore argued that his sentence constituted a denial of equal protection. The court distinguished the recent sentencing cases on the ground that they involved sex discrimination justified only by considerations of rehabilitation and "reform." Maine's statute, said the court, was enacted for a different reason: deterrence of a particular offense. With respect to escape, the court felt, the "distinctive attributes of the sexes" were both "relevant" and "controlling": [181]

"The Legislature could on the basis of long experience conclude that women, even those sentenced to the State Prison for serious offenses, tend for the most part to be more amendable to discipline and custodial regulation than their male counterparts and can therefore be effectively confined in an institution which lacks the high walls, armed guards and security precautions of a prison. By the same token the Legislature could reasonably conclude that the greater physical strength, aggressiveness and disposition toward violent action so frequently displayed by a male prisoner bent on escape from a maximum security institution presents a far greater risk of harm to prison guards and personnel and to the public than is the case when escape is undertaken by a woman confined in an institution designed primarily for reform and rehabilitation. Viewing statutory provisions for punishment as in part a deterrent to criminal conduct, the Legislature could logically and reasonably conclude that a more severe penalty should be imposed upon a male prisoner escaping from the State Prison than upon a woman confined at the 'Reformatory' while serving a State Prison sentence who escapes from that institution. We conclude that a classification based on sex under these circumstances is neither arbitrary nor unreasonable but is a proper exercise of legislative discretion which in no way violates the constitutional right to equal protection of the law." [182]

One indication of the tenacity of sex stereotyping is the fact that an opinion like that in *Wark* will so often seem sensible on first reading—at least to a male reader. After all, men are bigger and stronger on the average than women; if we were prison guards, we would probably be more afraid of an escaping male prisoner than a female. Isn't the court's reasoning therefore correct?

The trouble with the court's approach is that, in its preoccupation with group characteristics, it ignores the fact that the law punishes *individuals.* Again, the best way to illustrate the defect in this approach may be by analogy. For instance, suppose it could be demonstrated that persons of one race do commit a particular crime more frequently (in proportion to their numbers) than persons of other races. Could the state constitutionally prescribe a higher sentence for persons of that race who commit that crime, on the sole ground that this would constitute a greater deterrent to those who most need to be deterred? The answer—even if one did not agree with it—is clear. Can similar sex discrimination be any more justifiable?

Of course, it might be argued that the *Wark* court was speaking not only of propensity to commit the crime, but also of ability to commit it. Men are, by and large, bigger and stronger than women; not only may they be more likely to try to escape, they could be more likely to succeed. Is it not then proper for the state to consider this factor in fashioning a sentencing statute aimed at deterrence?

Since is is awkward to pursue a racial analogy at this point (it being virtually impossible for the writers to imagine any crime which members of one race have more ability to commit),[183] let us use another physical characteristic which, like sex and race, is not the result of individual choice: the ability to see. It seems perfectly plausible to assume that sighted persons are more capable than blind persons of committing virtually any crime. Would a statute be valid which provided that for any blind adult convicted of a felony, the penalty should be reduced by one-half?

If such a statute would be held to violate equal protection, the statute in *Wark* should clearly fare no better. Even if the hypothetical statute could be upheld, however, the *Wark* statute is still deficient by comparison. It distinguishes between defendants not on the basis of their *individual* characteristics, but solely on the basis of the extent to which two groups differ in *average* size and strength—differences which may not at all apply to particular individuals within either group.

In support of the *Wark* result, it might further be argued that men may properly be confined in separate institutions, made more "escapeproof" than those for women. This point may be well-taken,[184] even so, it does not necessarily follow that a higher sentence is in order for the crime of escape by a male, since, as the *Wark* court recognized, the sentence is properly to be regarded as "punishment," even though it may have a deterrent effect. It might well be argued that a defendant cannot properly be punished in part simply for being a male. Nor, even if all males *were* bigger, stronger and more aggressive than all females, is the statute necessarily justifiable by analogy to criminal statutes which punish an offense more harshly when accompanied by a greater threat of harm, *e.g.,* "armed robbery." In those cases, the offender may be influenced in his choice of weapons by the varying

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punishments held out. The male does not choose his sex, however; in our view, he therefore cannot appropriately be punished for it.

G. Consortium

The concept of "consortium" combines two disparate elements: (1) companionship and affection (including sexual relations) between spouses, and (2) the right of one spouse to the services of the other spouse.[185] It will come as no surprise to the reader that originally both of these elements were obligations owed by wives to their husbands, but not vice versa. The underlying assumptions about sex roles are by now all too familiar:

"But the right of consortium was by no means fully expressed [at common law] in the terms of society, companionship, and conjugal affection. The right to service was a prominent factor in it, and in respect to certain kinds of injuries, without doubt, the predominant factor. If we go back to the times when it took on its meaning the conditions were that the wife was socially and legally regarded as the husband's inferior, as having her existence merged into that of her husband, and as owing to him the duty, which he was entitled to command, of serving and administering to him in all the relations of domestic life. Her emancipation of recent years was centuries in the future. She was looked upon as the servant of and ministrant to her liege lord, to whom and to whose interests she was, by virtue of her marriage vow, devoted. He was entitled to her services, and these she was expected to render in the care of his home, in the rearing of his children, and in attending upon his wants." [186]

Since wifely services could easily be equated with those of any servant, legal liability for interference with the master-servant relationship was easily extended to cases of injury to the husband-wife relationship.[187] Eventually, loss of consortium became recognized as a material element of damage in four types of actions by husbands against third parties: (1) criminal conversation, (2) alienation of affection, (3) malicious interference with the marital relationship and (4) negligent personal injury to the wife, resulting in loss of her services.

While corresponding recovery was available to wives in actions of the first three types, it was not in the fourth. Four primary reasons were advanced to justify this dichotomy.[188] By 1950, courts in at least eighteen jurisdictions had accepted these arguments,[189] with no clear holdings to the contrary.[190] Notwithstanding this overwhelming support for the no-recovery rule, each of the four assigned justifications is questionable.

The first is that a wife had no common law right to maintain an action in her own name. This argument is of little or no weight now that such disabilities have been removed; at any rate, it hardly justifies denial of a cause of action for only one of the four types of injury to the martial relationship.

The second argument is that, in the first three types of action, the wife's injury is "direct," but in the fourth it is merely "consequential." Even if this distinction does have some validity however, it affords no apparent justification for applying this limitation to wives but not to husbands.

A third rationale advanced in favor of the no-recovery rule is that a wife has no right to the services of her husband, as contrasted with his companionship, affection, etc. This argument depends on the premise that the only element of recovery in the wife's consortium action would be loss of services. This premise appears unjustified, however, since the husband's recovery for loss of consortium has always included damages for loss of conjugal relation as well as loss of service.[191] Moreover, even if loss of services *were* the only element of recovery, the wife might nevertheless be entitled to a cause of action by virtue of the Married Women's Acts. These acts removed many disabilities formerly imposed upon married women, and they could have been interpreted as giving the wife a reciprocal right to her husband's services. But they were not.[192]

The fourth reason for denying the wife's recovery for loss of consortium is that the husband in his own action against the tortfeasor can recover for impairment of his ability to provide support. Permitting the wife to sue the same defendant for loss of her husband's services would therefore result in double recovery. Since husbands do have a duty to support their wives, it must be conceded that this rationale has some validity, and recent opinions have treated it as the determinative issue in evaluating the no-recovery rule.

The leading authority for rejection of the no-recovery rule on nonconstitutional grounds is *Hitaffer v. Argonne Co.*[193] In this case of first impression, the court carefully considered the principal justifications for the rule, and found each of them insufficient. The court answered the double recovery argument by asserting that it would be a simple matter to deduct from the wife's damages any amount recoverable by the husband for impairment of support.[194] Rejecting the unbroken succession of contrary precedent in other jurisdictions as based on "specious and fallacious reasoning," the court then adopted for the District of Columbia a rule allowing the wife to recover.[195]

In the twenty-one years since *Hitaffer*, a number of courts have been called upon to reconsider the wisdom of continued adherence to the no-recovery rule. Although the decisions have been divided, *Hitaffer* has attracted a considerable following.[196] Indeed, very recent cases indicate a clear trend in favor of permitting recovery.[197] In this area at least, the courts appear to be awakening to the fact that rules of law based upon outmoded concepts of uxorial status do not deserve contemporary reaffirmation.

In jurisdictions where the courts have refused to abandon the no-recovery rule, it is not surprising that equal protection claims have been raised. In two recent diversity cases, federal district courts in Michigan and Illinois were required to apply Indiana law in determining whether a wife could recover for loss of consortium. Since Indiana precedent at the time was clearly against recovery,[198] the only question was whether such a rule contravened the fourteenth amendment. In one case,[199] the opinion simply announced the court's conclusion that the Indiana rule violated equal protection. In *Karczewski v. Baltimore & Ohio Railroad*,[200] however, a similar conclusion was reached only after a carefully stated analysis of the problem. After reviewing the standard arguments against recovery, the court rejected them as unconvincing:

"[T]hat women cannot sue for loss of consortium is not excusable because based upon an historical legal doctrine which viewed a woman as her husband's chattel or "servant." Some positive justification is required. Nothing persuasive is offered by any of the cases which deny her this right.

"Marriage is no longer viewed as a "master-servant" relationship. It has assumed a special status in which each party has equal rights under the law." [201]

Concluding that there was in fact no rational basis for the no-recovery rule, the court then held it to be a violation of equal protection.[202]

Slightly more than a year later, however, *Karczewski* was in effect overruled by the Seventh Circuit Court of Appeals in *Miskunas v. Union Carbide Corp.*[203] In that case, the Indiana no-recovery rule was again contested on equal protection grounds. The only rational basis that the court could discover for the Indiana rule was the avoidance of double recovery. But that, it felt, was sufficient:

"Because a husband can recover for lost earnings, Indiana could reasonably conclude that it would be undesirable to give the wife an action that might permit double recovery. Since 87.8% of married men are employed and only 34.4% of wives are employed, Indiana could justifiably discriminate in this respect between the spouses. Indiana could infer that more often in a wife's suit than a husband's the jury would award her duplicating damages for some of the same elements of injury." [204]

At first glance, the employment statistics relied upon by the court seem to support its conclusion that there is a rational basis for the no-recovery rule, since they do demonstrate that the great majority of actions by wives will involve the possibility of double recovery. On closer examination, however, the figures reveal that, for 12% of the wives, an action for loss of consortium could not possibly result in double recovery. The arbitrariness of the no-recovery rule is demonstrated by the unfairness of its application to these wives. If the double-recovery problem is sufficiently acute to warrant an exclusionary rule at all, using the plaintiff's sex as the basis for exclusion seems questionable. It would be much fairer (and would impose no special burden on the courts) to entertain the wife's cause of action at least in every case where the husband was unemployed at the time of injury.

The consortium cases reflect a variety of ways in which sexist patterns of thought retain their influence over rules of law. In its inception, the rule granting only the husband an action for loss of consortium was blatantly male-supremacist: At common law, wives could be analogized to servants; a husband could therefore claim the benefit of the established cause of action for loss of the services of a negligently injured servant. Today, of course, no course could seriously declare that a husband is the "master" of his wife and that he is entitled to her services, companionship and sexual attentions without incurring any reciprocal obligations. Where the no-recovery rule survives, its principal justification is now the fear of double recovery—seemingly more a rationalization than a reason.

Although not stressed in judicial opinions, there may be another reason why the no-recovery rule is still adhered to. There is ample evidence that American courts have been reluctant to extend tort liability for purely "emotional" injury—largely because of their apprehension that indulgent juries will award excessive damages, given the intangible nature of such an injury and the ease with which it can be feigned. Thus, negligent infliction of mental suffering has only recently received wide recognition as a compensable wrong.[205] The principal element in a wife's consortium recovery is apt to be the loss of her husband's companionship and affection; it would hardly be surprising if many courts regard this as an essentially "psychological" injury, requiring similar caution.

If this hypothesis is valid, then judicial retention of the no-recovery rule is understandable, but hardly commendable. Even if the fear of unjustified recoveries does furnish sufficient reason for a rule of exclusion, it surely does not require the perpetuation of irrational distincitons based on sex alone. Whatever the rule, it should be the same for both sexes; both should be permitted to recover, or neither.

H. Conclusions from the cases

Although the above cases deal with sex discrimination in a wide variety of activities, they by no means exhaust the examples which might be shown. We believe they are sufficient, however, to demonstrate the following general propositions:

(1) Despite the enactment of various laws

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designed to improve the position of women, male-dominated legislatures and courts have historically exhibited the belief that women generally are—and ought to be—confined to the social roles of homemaker, wife and mother, and gainfully employed (if at all) only in endeavors which comport with their assumed subservient, child-oriented and decorative characteristics;

(2) A small but significant number of courts has recently perceived that some legislation mandating sex discrimination presents substantial constitutional questions, and several such laws have been struck down on equal protection grounds;

(3) Despite such holdings by a number of state and lower federal courts, opinions continue to appear in which both the result and the reasoning are virtually indistinguishable from those issued nearly a century ago. In the absence of a definite shift of position on the part of the Supreme Court, and in the face of continued adherence by many state and federal courts to traditional sexist attitudes, it is far too soon to assert that a clear trend toward judicial recognition of women's rights has developed.[206]

III. SEX AND RACE

In nearly every section of this study, we have advanced the analogy of racial discrimination in order to clarify and strengthen our arguments that various forms of sex discrimination constitute a denial of equal protection. Although we elected to postpone discussion of the general aptness of the analogy between race and sex, we are of course aware that the reader may not be ready to concede the validity of any argument based primarily on such an analogy. We are convinced, however, that each example we have suggested is appropriate and that all of them can be justified by the same general considerations.

Analytically, state-enforced sex discrimination is virtually identical to racial discrimination in at least three significant ways: (1) each reflects a group stereotype based on imputed characteristics which, if not purely imaginary, are nonetheless inapplicable to many individual members of the group; (2) each provides governmental endorsement for the opinion privately held by members of a dominant group that, due to the supposed existence of these characteristics, each member of the subordinate group is inherently inferior; and (3) proceeding from the assumption that the stereotypes are accurate, each attempts to confirm and perpetuate the existence of the supposed characteristics by requiring every citizen to conform to a variety of rules, all of which reflect the belief that one group is in fact inferior to another.

The falsity of certain racial stereotypes, notably with respect to blacks and American Indians, has become widely recognized in recent years. That the female stereotype is also untrue (and even a bit foolish) has been convincingly argued by many, but the myth of female inferiority stubbornly persists—even among supposedly enlightened judges. The preceding sections document the consistency with which our (overwhelmingly male) judiciary has supported enactments of our (predominately male) state legislatures that require women to conform to the expectations of the dominant group. In addition, the case law clearly shows that women have been denied equal treatment in employment, public education, places of public accommodation and—shamefully—in those supposed bastions of "equal justice," the criminal and civil courts. In all of these respects, contemporary sex discrimination closely resembles the pre-*Brown* pattern of racial discrimination by law

As bases for classification, sex and race share three important similarities: (1) by and large, members of the subordinate group are readily identifiable; (2) membership in the "inferior" group is initially nonvolitional; and (3) once acquired, this membership cannot be renounced. (Particularly in the last respect, race and sex discrimination are of a different order from discrimination against the poor or the young; members of these latter groups are not inevitably trapped for life in a subordinate status.) It is repungent to the most rudimentary sense of fairness that a person should be officially relegated to an inferior status, severely limiting his opportunities for self-expression and achievement, solely because of an accident of birth. Stripped to its essentials, this is precisely the effect of racial and sex discrimination.

Belatedly, whites are starting to comprehend the enormity of the injustice perpetrated upon nonwhites in America. White males, on the other hand, have hardly begun to recognize that the society we control has visited exactly the same type of injustice upon nonmales—though admittedly with less heinous consequences. Notwithstanding the fact that a far greater degree of visible harm has been suffered by nonwhites than by females, a general pattern of economic and political disadvantage is easily demonstrable in both cases.

In terms of other, less obvious effects upon individual members of the subordinate group, sex and race discrimination are again distressingly similar. When it enforces either kind of discrimination with a broad range of sanctions, the state encourages its citizens to relate to each other according to group stereotypes, rather than as individuals. This is dehumanizing—for the dominant group as well as the subordinate. But the effect on the "inferior" individuals is particularly unfortunate: constant subjection to pervasive reinforcement of group stereotypes tends to influence—to *distort*—their perception of themselves. As one recent commentator put it:

"Lowered cultural expectations of success and higher expectations of failure result in a self-fulfilling prophecy: From those of whom little is expected little is achieved. These patterns of discouragement, the perpetuation in our education processes of women as "helpmate," the absence of "appropriateness," all these handicaps to women in our society are key factors in a woman's choosing to be a nurse rather than a doctor, a law secretary rather than a lawyer, a researcher rather than a writer, a teacher rather than a practitioner.[207]"

At best, these effects of racial and sex discrimination are wasteful of invaluable human resources; at worst, they are damaging and degrading to the individuals affected.

In light of all these similarities between the operation and effects of both types of state-imposed discrimination in education, employment and the judicial process, we believe it entirely appropriate to use racial analogies to assist in the resolution of cases involving the rights of women. Indeed, we would contend that, at least with respect to the areas surveyed above, both types of discrimination should be subjected to the identical equal protection standard.

True, there may be areas of state regulation where the analogy between sex and race should not be employed—where certain types of sex discrimination should be recognized as valid although corresponding racial discrimination would not be. Several areas of law not discussed above quite explicitly distinguish between the sexes, and often operate upon them unequally. One obvious example is the regulation of sexual activity by criminal statutes that punish one sex exclusively or more severely than the other; another is the regulation of family relationships by statutes—such as those relating to marriage and divorce, abortion and sterilization, child custody and support, etc.—that in many ways define the rights and duties of the marital partners differently according to their sex. There are those who feel that all laws governing sexual conduct and familial relationships are in need of drastic overhauling, so as to make them completely neutral between the sexes. On the other hand, many would argue that there are basic societal interests in these areas which might be threatened by such a readjustment.

One need not hold any particular opinion about society's regulation of sexual activity and marriage, however, in order to respond to the issues of equal protection arising in education, employment, and the judicial process. On the contrary, the argument for sex equality in these areas is made even more compelling by the fact that the sexual discriminations there involved have nothing whatever to do with sexual activity or inherent sex differences. This is not to deny that equal protection issues may be raised by laws regulating sexual conduct or familial relationships; it is simply to suggest that such issues should be all the more visible in the many cases where sex differences or sexual activity are not directly involved.

IV. JUDICIAL ATTITUDES TOWARD SEX DISCRIMINATION CASES

Despite the strong argument that sex discrimination has much the same destructive potential as race discrimination, it is nevertheless undeniable that American judges have responded more readily to claims of injury from the latter. It is possible, of course, that this merely establishes that sex discrimination is not inherently harmful—thereby disproving our thesis. It is also possible, however, that there are reasons why male American judges should have difficulty in perceiving its harmful effects. We should like to offer our intuitive suggestions as to what some of these reasons may be. We believe that what follows is to a great extent applicable to all males, although our primary concern is with the extent to which it may be true of judges in particular.

The failure of any male to perceive the harmful potential of various sexually discriminatory laws and practices can perhaps be initially ascribed simply to a lack of knowledge. This is particularly true in contrast with race discrimination. For at least the past ten years, the white public has been exposed to a rather steady and wide-ranging stream of information about the effects of one hundred years of segregation and discrimination on the black citizens of America. Only recently, however, has the public begun to be aware of the injurious effects of sex discrimination. It is the responsibility of counsel, of course, to educate the judge about the facts of any lawsuit, and in a case involving sex discrimination, this includes helping him to understand in what respects the practice complained of is harmful to those affected.

Like most other men, male judges suffer from an additional handicap in comprehending the effects of sex discrimination. With respect to race, it is likely that the white judge has close personal association with few if any black persons; although his information about the harms of race discrimination may therefore be secondhand, it nevertheless may have considerable validity for the black population in general. Virtually every judge, however, is in daily contact with one or more women on a close personal basis—a wife, a daughter, a mother, a sister, or one or more office employees. If the women with whom he is associated are all apparently happy and satisfied, he is likely to conclude from this that all "sensible" women are content with their lot. In this respect, judges—like the authors of law review articles—must be alert to the dangers in overgeneralizing from their personal experience.

Even assuming that a judge does understand the effects of sex discrimination, he may nevertheless be deterred from granting relief in a particular case because of personal attitudes of which he is not even aware.

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There are a number of emotional responses to "women's liberation" which it seems to us are shared by many men, including some judges. One of these, the fear of competition from individual women, is probably not present in the judge's case; judges, by and large, hold positions where women are no particular danger to either job retention or possible promotion. This may of course change in another generation, as the proportion of female law graduates rapidly increases, but for the present generation of judges, women probably pose little or no threat of personal competition.

In a more abstract way, however, competition from women as a group may indeed seem to threaten the judge's interests. Most judges hold their offices at least in part because of past activity in a political organization under predominately masculine control. Although there are of course able and successful female practitioners of the art of politics, they remain exceptions proving the rule that politics, like most exercises of power, is still a "man's game." Any change in the respective roles of the sexes which militates against such masculine domination—even if only in an insubstantial, largely symbolic way (as for example the question of whether women should serve on juries)—may stir uneasiness in the heart of one amply rewarded by, and comfortable with, the political status quo.

Fear of economic or political competition even if wholly subconscious, is of course an obvious reason why one might be moved to support discriminatory practices. There are, however, other emotions which may influence any male judge's response to a suit involving sex discrimination. All lawyers know that the "law" as represented by the results of litigated cases is as much the product of the court's evaluation of the "morality" of the parties' behavior and the "fairness" of the possible decisions as it is of any set of abstract rules. One way in which a good judge will utilize his emotional responses in partnership with his intellect is by engaging in a process of *empathy*—attempting to perceive the case before him as it is viewed by *the parties themselves*. Olympian detachment is indeed the best posture from which to render final decision, but it should be assumed only after the judge has first exercised his ability to emphasize with the parties to the lawsuit.

Faced with a black man's complaint of racial discrimination, a white judge may well do at least a passable job of empathizing with the plaintiff—of temporarily imagining himself to be black-skinned. This will of course vary with the judge's own conditioning on the matter of race. For a judge taught from birth to regard every black person as a subhuman creature, empathizing with a black man is as inconceivable as empathizing with an eagle or a Labrador retriever. The judge not so severely handicapped, however, will be able to imagine how it would feel to be on the receiving end of such discriminatory treatment. From this perspective, the judge's answer to the hypothetical question "How would I feel if someone did that to me" is likely to be "Furious!"—because if there is *anyone* unaccustomed to being treated as inferior or subordinate, it is a white male American judge. Having subjected himself, even if fleetingly, to what he imagines to be the plaintiff's mental tribulations, the judge is better equipped to test the parties' competing claims against an abstract principle of law.

Where sex discrimination is alleged, however, most male judges are likely to have considerable difficulty empathizing with a female complainant. Even before the typical American child first become aware of sex differences, he (or she) is conditioned to conform to the social role expected of his sex—which interests he should pursue (and which to shun), which occupations he should consider (and which to ignore), how he should talk, walk, think and *feel*. And one of the very worst things he can do, in society's eyes, is to express a desire to be—or to behave as though he were—a member of the other sex. Although there is some evidence that preoccupation with secondary sex differences may be declining, for the present generation of judges it may be easier to assume the imagined mental state of a black male, of whatever station in life, than it is successfully to imagine that one is a *female* (even a white, middle-class one). The wonder is not that some judges display insensitivity toward the sexist features of our society but rather than an increasing number of judges are apparently able to break through the strictures of their own conditioning.

An even more deeply rooted emotion which judges share with most of mankind is a general hostility to change—especially change of such a fundamental and far-reaching character as to transform radically the basic institutions of society. Although complaints about sex discrimination may focus on particular practices, the whole battery of "women's liberation" goals seems to some (both men and women) to portend a future society in which the roles of men and women as members of a family unit would be so different from those of today as to make it almost unrecognizable. Perhaps children would not be raised by their parents at all; perhaps marriage as we know it would disappear completely; perhaps the concept of "family" would mean something completely different—or nothing at all. To many white southerners of twenty years ago, the end of racial segregation seemed to spell the end of civilization. For the elderly or even middle-aged person today, any prospect of a basic change in the family structure of society as he has known it may seem equally disquieting. Even the most modest demand for equality, if perceived as the spearhead of a wide-ranging assault on the social order, may thus be viewed as a threat. But the reconciliation of stability and change is the essence of the judicial function; judges are therefore required to transcend their natural aversion to change—to join in shaping the course of social evolution, rather than adamantly opposing it.

If the above analysis has any validity, it follows that male judges are likely to decide issues of sex discrimination from a narrow perspective and under certain psychological handicaps. Are any countermeasures available to them?

First, the judge can avoid the temptation to dismiss summarily any claim of impermissible sex discrimination as "lacking in substance." The fact that a particular statute or practice has received general acquiescence for many years from both males and females should not foreclose judicial consideration of its constitutionality. (Here again, race discrimination furnishes an instructive parallel.)

The next suggestion is implicit in what has been said earlier about the process of judicial empathy. The judge must make a conscious effort to educate himself as to the effect of the statute or practice in question, from the point of view of the different types of women it affects. If the statute is one which prohibits all women from engaging in a certain occupation, for instance, he cannot be content with merely considering whether he, a mature male, is inclined to think that women generally ought not to engage in the proscribed activity (much less whether he thinks his own wife or daughter should do so). Rather, he must consider how a variety of women—single women as well as married, older women as well as young, black women and white, those with much education and those with little, those with children and those with none—are affected.

Further questions should be explored: Do the reasons advanced to support the discrimination in question apply only to *some* women? To some *men*, as well? Does it represent an expression of the stereotype of woman as a homebody, fit only for domestic labor? Or as some sort of harlot, wantonly corrupting innocent men? Does it appear to represent a conclusion that some portion of the community's affairs are—and should continue to be—run completely or primarily by men? That some kinds of decisions are better left to men? If the answer to some of these questions is yes, we would suggest that a prima facie case has been made against the validity of the statute or practice in question, as a denial of equal protection.

If the judge has reached this conclusion, then the next question is whether there is a basis for the legislature's action sufficient to overcome the initial finding that improper class legislation may be involved. We have earlier suggested that a classification based on sex is one which demands "scrutiny" as "strict" as any other, including race. If the reader disagrees, he will probably concede that there must at least be a "rational basis" for the discrimination. How does the judge ascertain whether such a "rational basis" exists?

It is perhaps more appropriate to suggest what the judge should *not* do in this regard. One suggestion would be to avoid merely concluding (as some judges apparently do) that the legislature must have had *some* reason, and whatever it was, it is good enough. Certainly a presumption of validity attaches to any legislative act, but when that presumption has been overcome by a showing of unequal treatment, it should be incumbent on the proponent of the act to demonstrate what its purpose was and why that purpose justifies treating the sexes in an unequal manner.

A second response to avoid is acquiescence in discrimination merely on the ground that it may obviate some degree of expense or inconvenience. An easy example is the jury statute considered in the *Hoyt* case, which was supported by the argument that calling only female volunteers would avoid the inconvenience occasioned by calling women who would then claim exemption. Another might be the claim of an educational institution that requiring it to admit females would entail the burden of providing them with restroom and other facilities not currently available. In our view, a state's policy of discrimination is not justifiable merely because it is more convenient or less expensive than a nondiscriminatory policy. It would be cheaper and more convenient to choose our President only from the citizens of one particular state, to have only citizens of that state elect him and to elect a new one only when the incumbent dies or retires. It would also be cheaper and quicker to do away with trial by jury in criminal cases. There are competing interests in both cases, however, which are stronger than the mere desire for efficiency and economy. The policy against sex discrimination should also be strong enough to prevail in such a competition. While efficiency and economy are in general "rational bases" for legislation, they do not justify discrimination against individuals on the basis of inborn characteristics which they are powerless to alter.

V. CONCLUSION

Having presented the results of our legal research, as well as our own intuitive hypotheses about judicial attitudes in sex discrimination cases, we would add only one item to a presentation perhaps already overlong. Freely conceding as we do that male judges are not unique in manifesting sexist habits of thought but rather share them with most other males (even law professors, ourselves included), have we any justification for singling out the judiciary for special criticism?

The judge in American society occupies a position of unique esteem in the eyes of his fellow citizens. In return for this particular honor, the judge assumes a special burden of personal responsibility for the fairness, objectivity and disinterestedness of his approach to the legal issues presented to him for resolution. This duty requires him, insofar as he is humanly able, to perform his judicial functions without yielding to the many prejudices and superstitions that influence other men in every aspect of their daily lives. Just as the policeman's special role entitles society to expect him not to react violently to taunts or expletives that would incite most men to action, so the judge can fairly be expected to free himself as nearly as possible from the limitations of his personal attitudes about sex roles in cases involving constitutional challenges to sex discrimination. The judicial role must transcend social conditioning in such matters; in this respect, the judge must be *above* other men.

Another aspect of the judicial role is the responsibility to be *ahead* of other men. Judges are not entitled to the luxury of shielding themselves behind public opinion or community attitudes, however strongly held those may be. The judiciary thus cannot shift responsibility to the legislatures, the press, women's liberation activists or anyone else. Nor can it postpone affirmative action until public opinion is overwhelmingly convinced that the time is appropriate. A judge whose opinions on important questions of public policy reflect nothing more than his private estimate of public majority opinion is engaging in journalism, not jurisprudence.

Our study has convinced us that, to date, most male American judges faced with issues of sex discrimination have not adequately met these special responsibilities. There are, however, some encouraging signs of progress. It is our hope that this study will contribute to an increasing judicial understanding of and sensitivity toward the serious constitutional issues raised by state laws that discriminate against individuals solely on the basis of their sex.

FOOTNOTES

*Professors of Law, New York University School of Law. The authors gratefully acknowledge the assistance of four New York University law students, Messrs. Douglas Behr, Lawrence Vaughan, Darman Wing and Richard Wolf, each of whom performed research which is reflected in the discussion that follows.

[1] Professor Knapp was a member of the Committee on Federal Legislation of the Association of the Bar of the City of New York, which studied proposed constitutional amendments designed to redress discrimination on the basis of sex. The committee's findings appear in Report, Amending the Constitution to Prohibit State Discrimination Based on Sex, 26 Record of N.Y.C.B.A. 77 (1971).

[2] "Sex discrimination" can be used in a generic sense, connoting differing treatment of individuals solely on the basis of their sex. It can also be used in a pejorative sense to denote those situations in which inequality of treatment is designed to benefit one sex to the detriment of the other. Except where the context indicates otherwise, we will use the term in the former sense.

[3] Some of the most valuable references are: L. Kanowitz, Women and the Law (1969); Crozier, Constitutionality of Discrimination Based on Sex, 15 B.U.L. Rev. 723 (1935); Murray & Eastwood, Jane Crow and the Law: Sex Discrimination and Title VII, 34 Geo. Wash. L. Rev. 232 (1965); Note, Sex Discrimination and Equal Protection: Do We Need A Constitutional Amendment?, 84 Harv. L. Rev. 1499 (1971); Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971); Note, Sex Discrimination and the Constitution, 2 Stan. L. Rev. 691 (1950). Also of interest is Brown, Emerson, Falk and Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L.J. 871 (1971), which appeared as this article was going to press.

[4] For a recent exchange of views on the subject by eminent constitutional lawyers, see Symposium, Equal Rights for Women: A Symposium on the Proposed Constitutional Amendment, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 215 (1971). See also Brown, Emerson, Falk and Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, supra note 3.

[5] A March 1970 memorandum of the Citizens' Advisory Council on the Status of Women lists 15 specific areas of sex discrimination:

1. State laws placing special restrictions on women with respect to hours of work and weightlifting on the job;
2. State laws prohibiting women from working in certain occupations;
3. Laws or practices operating to exclude women from State colleges and universities (including higher standards required for women applicants to institutions of higher learning and in the administration of scholarship programs);
4. Discrimination in employment by State and local governments;
5. Dual pay schedules for men and women public school teachers;
6. State laws providing for alimony to be awarded, under certain circumstances, to ex-wives but not to ex-husbands;
7. State laws placing special restrictions on the legal capacity of married women or on their right to establish a legal domicile;
8. State laws that require married women but not married men to go through a formal procedure and obtain court approval before they may engage in an independent business;
9. Social Security and other social benefits legislation which give greater benefits to one sex than to the other;
10. Discriminatory preferences, based on sex, in child custody cases;
11. State laws providing that the *father* is the natural guardian of the minor children;
12. Different ages for males and females in (a) child labor laws, (b) age for marriage, (c) cutoff of the right to parental support, and (d) juvenile court jurisdiction;
13. Exclusion of women from the requirements of the Military Selective Service Act of 1967;
14. Special sex-based exemptions for women in selection of State juries;
15. Heavier criminal penalties for female offenders than for male offenders committing the same crime.

CONGRESSIONAL RECORD, vol. 116, pt. 7, p. 9684. We shall treat in some detail the first three and the last two items on this list. In addition, we will discuss discrimination in places of public accommodation and with respect to recovery for loss of consortium.

[6] 83 U.S. (16 Wall.) 130 (1873).

[7] Id. at 132.

[8] 83 U.S. (16 Wall.) 36 (1873).

[9] We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this [equal protection] provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.
Id. at 81.

[10] 83 U.S. (16 Wall.) at 140–42.

[11] 154 U.S. 116 (1894).

[12] See Konigsberg v. State Bar, 353 U.S. 252, 262 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232, 238–39 (1957).

[13] In 1949, then U.S. Supreme Court Associate Justice Thomas C. Clark described women lawyers in the following words:

As lawyers they have demonstrated their ability in all phases of law. . . . Any debate as to their legal ability would be as obsolete as a discussion on the merits of Woman Suffrage . . . [Y]ou can depend upon a woman lawyer for a careful painstaking legal job. . . . The legal profession has been immeasurably strengthened by the presence of women lawyers.

Tally, Women Lawyers of Yesterday, Today, and Tomorrow, 46 Women Lawyers J., Summer, 1960, at 21, 23–24.

Women have proved themselves to be capable practitioners and have risen to important positions within the legal profession:

According to the United States Department of Labor, about 175 women were judges of Federal, State, County, and City courts in 1955. . . . This figure does not include women justices of the peace. In 1957 a woman was presiding judge of the Sixth Circuit . . . of the United States Court of Appeals, the highest judicial post ever held by a woman in the United States. Another woman was judge of the United States District Court, one of the fifteen judges for the District of Columbia. In California, a woman was, as of 1957, an associate Justice of the Tax Court of the United States and a woman was appointed a judge of the United States Customs Court in June, 1955, the second woman to hold this post . . .

Harris, Women and the Law, 47 Women Lawyers J., Winter, 1961, at 20, 21. Furthermore, the number of women sitting as judges has now risen to 200 and the number of female federal district judges has increased to three. There is still only one woman on the United States courts of appeals. Sassower, Women in the Law: The Second Hundred Years, 57 A.B.A.J. 329, 330–31 (1971). Nevertheless, the legal profession remains male dominated; women lawyers constitute only about 3% of the total. Moreover, this percentage has remained virtually constant over the past 20 years. The percentage from 1948 to 1966 rose only from 1.8 to 2.8%. The 1967 Lawyer Statistical Report 15 (Weil ed. 1968).

After admission to the bar, women encounter further discrimination. In a study of women lawyers, James J. White found on the basis of a questionnaire study that "males make a lot more money than do the females." White, Women in the Law, 65 Mich. L. Rev. 1051, 1057 (1967). Furthermore, the practices of women lawyers seem to be centered around certain areas: "The proportion of females engaged in trusts and estates (60%), domestic relations (50%) and tax (31%) [was] higher than the proportion of men engaged in these activities. These data accord with the commonly held beliefs about women's practice." Id. at 1062. See generally Dinerman, Sex Discrimination in the Legal Profession, 55 A.B.A.J. 951 (1969); Sassower, Women in the Law: The Second Hundred Years, 57 A.B.A.J. 329 (1971); Testimony Submitted by the Women's Rights Comm. of N.Y.U. School of Law for Hearings Conducted by the House Subcomm. on Educ., 116 Cong. Rec. H7980 (daily ed. Aug. 10, 1970).

[14] The twenty-first amendment provides that "the transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2. This amendment has been interpreted as relaxing the usual commerce clause limitations on state regulation of the liquor trade. Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 330–31 (1964); Carter v. Virginia, 321 U.S. 131, 140 (1944) (Frankfurter, J., concurring); Ziffrin, Inc. v. Reeves, 308 U.S. 132, 137–38 (1939). The amendment does not, however, similarly relax the due process and equal protection guarantees of the fourteenth amendment. See Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966); Parks v. Allen, 409 F.2d 210 (5th

Cir. 1969); Krauss v. Sacramento Inn, 314 F. Supp. 171, 177–78 n.5 (E.D. Cal. 1970).

[15] 335 U.S. 464 (1948).

[16] Id. at 465–66.

[17] The three-judge district court from which the appeal had been taken was no more enlightening in its discussion of the legislative intent, referring to a conceivable (but unspecified) "grave social problem" that could be created by female bartenders and to the likelihood that male owners would be motivated to maintain a "wholesome atmosphere" if their wives or daughters were tending bar. The statute was then categorized as a "special provision for the protection of women." Goesaert v. Cleary, 74 F. Supp. 735, 739 (E.D. Mich. 1947).

[18] 335 U.S. at 466–67.

[19] For a general discussion of the difference between the usual "reasonable classification" test of equal protection and the more strict "compelling state interest" test applied to certain "suspect" classifications, see Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969). For a recent illustration of the manner in which the determination of the applicable test may affect the result of a case, see Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971).

The Supreme Court has never held that sex discrimination is inherently suspect, nor has it ever invalidated such discrimination by applying the "reasonable classification" test. See note 206 infra.

[20] See, e.g., City of Hoboken v. Goodman, 68 N.J.L. 217, 51 A. 1092 (Sup. Ct. 1902): "The supposed evil aimed at is the employment of women in connection with a traffic likely to induce vice and immorality." Id. at 221, 51 A. at 1093. See also State v. Considine, 16 Wash. 358, 364, 47 P. 755, 757 (1897):

The legislature is the supreme authority, within constitutional limitations, to determine what is and what is not an immoral business or a nuisance, and when it has so determined, its enactment is valid unless the legislative act is clearly partial, arbitrary, and oppressive. The prohibition of employment of a female person in the statute under which defendant was convicted uniformly applies to all persons employing, and who are engaged in a like business with defendant, and extends to all female persons employed.

Fifty years later, the pattern remained the same. See, e.g., Fitzpatrick v. Liquor Control Comm'n, 316 Mich. 83, 105, 25 N.W.2d 118, 127 (1946): "The extent to which the legislature may be influenced by a newer conception . . . as to the rights of women in employment and in social life, and particularly to act as bartenders in licensed liquor establishments, is for the legislature, and it only, to decide."

[21] Brown v. Foley, 158 Fla. 734, 29 So. 2d 870 (1947).

[22] E.g., Hargens v. Alcoholic Beverage Control Appeals Bd., 263 Cal. App. 2d 601, 69 Cal. Rptr. 868 (Ct. App. 1968); State v. Burke, 79 Idaho 205, 312 P. 2d 806 (1957).

[23] 57 N.J. 180, 270 A.2d 628 (1970).

[24] Id. at 186, 270 A.2d at 631.

[25] A similar technique was employed by the New Jersey courts to invalidate an ordinance prohibiting women from being served liquor at a bar unless seated. Gallagher v. City of Bayonne, 106 N.J. Super. 401, 256 A.2d 61 (Super. Ct. App. Div.), aff'd, 55 N.J. 159, 259 A.2d 912 (1969). See text accompanying notes 89–90 infra.

[26] This statute declared it a misdemeanor for a female to serve as a bartender and subjected both employer and employee to criminal sanctions. It also contained an exception for female owners of bars and wives of male owners. Cal. Bus. & Prof. Code § 25656 (West 1964).

[27] 485 P.2d 529, 95 Cal. Rptr. 329 (Sup. Ct. 1971).

[28] Cal. Labor Code §§ 1411–12 (West 1971).

[29] See, e.g., Longacre v. State, 448 P.2d 832 (Wyo. 1968).

[30] Civil Rights Act of 1964, §§ 701–16, 42 U.S.C. §§ 2000e-2000e–15 (1964). The effect of Title VII on state regulation of employment conditions is considered more fully in the next section.

[31] Employers with fewer than 25 employees are exempt from Title VII. Id. § 701(b), 42 U.S.C. § 2000e(b) (1964). Apparently some, but not all, of the employers in *Sail'er Inn* were exempt on this ground. See 485 P.2d at 532 n.4, 95 Cal. Rptr. at 332 n.4.

[32] See text accompanying notes 69–74 infra.

[33] Cal. Const. art. 20, § 18 (West 1954).

[34] In re Maguire, 57 Cal. 604, 608 (1881) (emphasis added).

[35] 485 P.2d at 533, 95 Cal. Rptr. at 333.

[36] Id. at 533–34, 95 Cal. Rptr. at 333–34.

[37] Id. at 534, 95 Cal. Rptr. at 334.

[38] Id.

[39] The court asserted that the clauses are substantially identical, citing County of Los Angeles v. Southern Cal. Tel. Co., 32 Cal. 2d 378, 196 P.2d 773 (1948). 485 P.2d at 538 n.13, 95 Cal. Rptr. at 338 n.13.

[40] 485 P.2d at 539, 95 Cal. Rptr. at 339.

[41] Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Korematsu v. United States, 323 U.S. 214 (1944); Truax v. Raich, 239 U.S. 33 (1915).

[42] 485 P.2d at 540–41, 95 Cal. Rptr. at 340–41.

[43] Id. at 542, 95 Cal. Rptr. at 342.

[44] Id. at 542, 95 Cal. Rptr. at 342.

[45] Id. at 543, 95 Cal. Rptr. at 343.

[46] United States ex rel. Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968). Cf. White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966); Commonwealth v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968).

[47] The court distinguished *Goesaert* on the ground that the Michigan statute permitted women to tend bar only under circumstances where a close male relative was the actual owner of the bar and presumably could be expected to supervise the female bartender's activities. The California statute, on the other hand, contained an exception which allowed female owners to tend bar even in the absence of a male "protector." 485 P.2d 543, 95 Cal. Reptr. at 343. Thus *Goesaert's* protectionist rationale could not sustain the California statute.

[48] Vintage Soc'y Wholesalers Corp. v. State Liquor Authority, 63 Misc. 2d 287, 311 N.Y. S. 2d 735 (Sup. Ct. 1970).

[49] Id. at 289, 311 N.Y. S. 2d at 739.

[50] 208 Ore. 282, 300 P.2d 455 (1956).

[51] See text accompanying note 10 supra.

[52] 208 Ore. at 287–88, 300 P.2d at 457–58.

[53] N.Y. Unconsol. Laws § 8906 (McKinney 1961) confers upon the commission "sole control . . . over all licenses to . . . persons who participate in . . . wrestling matches or exhibitions." Pursuant to this authorization, Rule A–14, denying wrestling licenses to women, was promulgated.

[54] Calzadilla v. Dooley, 29 App. Div. 2d 152, 286 N.Y.S.2d 510 (4th Dep't 1968).

[55] Id. at 156–57, 286 N.Y.S.2d at 516 (emphasis added).

[56] The National Association of Bank Women reports that 270 women are bank chairmen or presidents, 20 are senior vice-presidents and 50 are executive vice-presidents. For Women, A Difficult Climb to the Top, Bus. Week, Aug. 2, 1969, at 42, 44. "The National Association of Bank Women, Inc. . . . is an organization of 6,431 women holding bank corporate titles . . . [M]embership includes about one-third of all women officers in the country." Foster, Executive Potential on the Distaff Side, Business, June 1969, at 47. Moreover, about 10% of all accountants and 2% of all CPA's are women. A. King, Career Opportunities for Women in Business 68 (1963).

Many women also have less specialized business experience. In 1968, over one million women were managers, officials or proprietors. U.S. Dep't of Labor, Women's Bureau Bull. No. 294, 1969 Handbook on Women Workers 90 (1969). Also, over 16,000 or 58.8% of women workers held white collar jobs. Id. Finally, 406 women earned master's degrees in business and commerce (2.7% of the degrees awarded), and 106 earned degrees in economics (9.5% of the total). More than 5,000 bachelor's degrees in business and commerce (8.6%) and over 1,000 degrees in economics were awarded to women. Id. Furthermore, in 1956, there were 5,900 women life insurance agents, about 3% of the total full-time underwriters. At the same time women made up about 1% of the agency managers and assistants. U.S. Dep't of Labor, Women's Bureau Bull. No. 229, Life Insurance Selling, Careers for Women as Life Underwriters 5 (1961).

[57] 93 Idaho 511, 465 P.2d 635 (1970), prob. juris. noted, 401 U.S. 934 (1971).

[58] Idaho Code § 15–312 (1948) establishes the order of priorities as:

(1) surviving spouse,
(2) children,
(3) parents,
(4) brothers [!],
(5) sisters [!],
(6) grandchildren . . .
(10) creditors . . .

[59] Id. § 15–317.

[60] Id. § 15–315.

[61] Id. § 15–314.

[62] 93 Idaho at 514, 465 P.2d at 638.

[63] Analogies to racial discrimination will also be suggested with regard to other specific issues discussed in later sections. The general aptness of the race analogy to sex discrimination cases is considered in Section III, infra.

[64] Murray, The Rights of Women, in The Rights of Americans 521, 525 (N. Dorsen ed. 1971). For a much earlier statement of a similar view, see Comment, 13 B.U.L. Rev. 276 (1933).

[65] 208 U.S. 412 (1908).

[66] 198 U.S. 45 (1905).

[67] 208 U.S. at 421–23.

[68] In West Coast Hotel v. Parrish, 300 U.S. 379 (1937), for example, the Court upheld a minimum wage statute for women by forthrightly rejecting the *Lochner* rationale and clearly establishing the principle that "freedom of contract" is no bar to state regulation of wages and working conditions. Id. at 391–95. While the Court did uphold a species of sex discrimination in *Parrish*, and in passing quoted several of *Muller's* sexist statements with apparent approval, it is possible that the Court would today be less ready to sustain such a statute against an equal protection (as opposed to a due process) attack.

[69] Civil Rights Act of 1964, § 703(e), 42 U.S.C. § 2000e–2(e) (1964). For a discussion of the application of Title VII to sex discrimination, see Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, supra note 3, at 1166–95.

[70] For a discussion of protective statutes currently in force in a number of states, see Murray, supra note 64, at 537–39.

[71] See generally Oldham, Sex Discrimination and State Protective Laws, 44 Denver L.J. 344 (1967).

[72] 29 C.F.R. § 1604.1 (b) (1971).

[73] Rosenfeld v. Southern Pac. Co., No. 71–23983 (9th Cir., June 1, 1971); Ridinger v. General Motors Corp., 325 F. Supp. 1098 (S.D. Ohio 1971); Kober v. Westinghouse Elec. Corp., 325 F. Supp. 467 (W.D. Pa. 1971); Caterpillar Tractor Co. v. Grabiec, 317 F. Supp. 1304 (S.D. Ill. 1970); Richards v. Griffith Rubber Mills Corp., 300 F. Supp. 338 (D. Ore. 1969); Southern Cal. Edison Co. v. Utility Workers Local 246, 61 CCH Lab. Cas. ¶ 9369 (C.D. Cal. 1969); Sail'er Inn, Inc. v. Kirby, Sup. Ct. 485 P.2d 529, 95 Cal. Rptr. 329 (1971). See also Mengelkoch 1. Industrial Welfare Comm'n, 284 F. Supp. 956 (C.D. Cal.), appeal dismissed and remanded, 393 U.S. 83 (1968). But see Krauss v. Sacramento

Inn Corp., 314 F. Supp. 171 (E.D. Cal. 1970); Ward v. Luttrell, 292 F. Supp. 162 (E.D. La. 1968).

Title VII also prevails over privately imposed sex discrimination of a like nature. See Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969); Cheatwood v. South Cent. Bell Tel. & Tel. Co., 303 F. Supp. 754 (M.D. Ala. 1969); Division of Human Rights v. New York-Pa. Professional Baseball League, 36 App. Div. 2d 364, 320 N.Y.S.2d 788 (4th Dept. 1971).

[74] If weightlifting and similar regulations are invalidated by Title VII, then exclusionary statutes of the sort discussed in the previous section will also fall unless based on a "bona fide occupational qualification." Title VII does not extend beyond employment discrimination, however. Hence, the constitutional issues will be decisive in an area such as public accommodations, discussed in the next section.

[75] 400 U.S. 542 (1971).

[76] 300 F. Supp. 338 (D. Ore. 1969).

[77] Id. at 340.

[78] 408 F.2d 228 (5th Cir. 1969).

[79] Id. at 235 (emphasis added).

[80] For a criticism of the *Weeks* decision, see Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, supra note 3, at 1179–81.

[81] Adams v. Cronin, 29 Colo. 448, 69 P. 590 (1902), aff'd, 192 U.S. 108 (1904).

[82] Id. at 496–97, 69 P. at 593.

[83] 108 Ky. 473, 56 S.W. 705 (1900).

[84] Id. at 475.

[85] Id.

[86] See Commonwealth v. Price, 123 Ky. 163, 164–65, 94 S.W. 32, 33 (1906).

[87] Id. at 166–67, 94 S.W. at 34.

[88] Cf. Coates v. City of Cincinnati, 402 U.S. 611, 615 (1971).

[89] 106 N.J. Super. 401, 256 A.2d 61 (Super. Ct. App. Div.), aff'd per curiam, 55 N.J. 159, 259 A.2d 912 (1969).

[90] Eskridge v. Division of Alcoholic Beverages Control, 30 N.J. Super. 472, 476–77, 105 A.2d 6, 9 (Super. Ct. App. Div. 1954).

[91] One Eleven Wines & Liquors, Inc. v. Division of Alcoholic Beverage Control, 50 N.J. 329, 235 A.2d 12 (1967).

[92] 288 F. Supp. 530 (N.D.N.Y. 1968).

[93] 42 U.S.C. §§ 2000a–2000h–6 (1964).

[94] Id. §§ 1983, 1985.

[95] Id. §§ 2000a–2000a–6.

[96] De Crow v. Hotel Syracuse Corp., 59 Misc. 2d 383, 298 N.Y.S.2d 859 (Sup. Ct. 1969).

[97] N.Y. Civ. Rights Law § 40 (McKinney 1948).

[98] Id. § 40–e (McKinney Supp. 1970).

[99] 317 F. Supp. 593 (S.D.N.Y. 1970).

[100] Seidenberg v. McSorley's Old Ale House, Inc., 308 F. Supp. 1253 (S.D.N.Y. 1969).

[101] 317 F. Supp. at 605–06.

[102] The sole exception was a jury of females called to determine the fact of pregnancy. 3 W. Blackstone, Commentaries *362 (1775).

[103] See generally Fay v. New York, 332 U.S. 261, 289–90 (1947).

[104] 2 Wash. Terr. 267, 5 P. 305 (1884).

[105] Id. at 274, 5 P. at 306.

[106] Id. at 278–79, 5 P. at 309–10.

[107] Id. at 281, 5 P. at 311.

[108] 3 Wash. Terr. 131, 13 P. 453 (1887).

[109] The ground chosen was a narrowly technical one, but the result was sweeping: For failure to properly express its "object" in its title, the statute conferring voting rights on women in Washington Territory was held to be invalid. The result was to render women not only ineligible for jury service, but also ineligible to vote. In 1888, the Washington Legislature acted again to confer suffrage on women, but the statute was again struck down, this time as being outside the power of the territorial legislature. Bloomer v. Todd, 3 Wash. Terr. 599, 19 P. 135 (1888).

[110] Of course, the nineteenth amendment took precedence over any contrary provision of state law; if it had provided that jury qualifications should be equal for both sexes, no state law to the contrary would have prevailed. The amendment was universally held, however, to be directed solely at suffrage. E.g., State v. Mittle, 120 S.C. 526 113 S.E. 335, writ of error dismissed for want of jurisdiction, 260 U.S. 705, cert. denied, 260 U.S. 744 (1922).

[111] E.g., People v. Barltz, 212 Mich. 580, 180 N.W. 423 (1920); Parus v. District Court, 42 Nev. 229, 174 P. 706 (1918). For a collection of cases, see Annot., 157 A.L.R. 461, 470 (1945).

[112] 276 Mass. 398, 177 N.E. 656 (1931), cert. denied, 284 U.S. 684 (1932). Another example is People ex rel. Fyfe v. Barnett, 319 Ill. 403, 150 N.E. 290 (1925). But see People ex rel. Denny v. Traeger, 372 Ill. 11, 22 N.E.2d 679 (1939).

[113] Ten years earlier, the Supreme Judicial Court of Massachusetts had been asked by the state's House of Representatives whether, in light of the ratification of the nineteenth amendment, women were automatically qualified as jurors, and, if not, whether the legislature had the power to declare them qualified. The court answered these questions in the negative and affirmative, respectively. In re Opinion of the Justices, 237 Mass. 591, 130 N.E. 685 (1921). The jury statute under consideration in *Welosky* was the statute which had been considered in the court's earlier opinion; because of its advisory nature, however, the earlier opinion was expressly treated in *Welosky* as nonbinding although, as the text indicates, it was not repudiated). 276 Mass. at 400, 177 N.E. at 658 (1931).

[114] 276 Mass. at 407–08, 177 N.E. at 661.

[115] Id. at 410–11, 177 N.E. at 662. As examples of cases where these two factors were given weight, see People v. Shannon, 203 Cal. 139, 141–42, 263 P. 522, 523 (1928); State v. Kelley, 39 Idaho 668, 676, 229 P. 659, 662 (1924).

[116] Cases which found no constitutional obstacle to the addition of women to juries include: People ex rel. Denny v. Traeger, 372 Ill. 11, 22 N.E.2d 679 (1939), and Commonwealth v. Maxwell, 271 Pa. 378, 114 A. 825 (1921). See also United States v. Wood, 299 U.S. 123, 145 (1936), where there is dictum to the effect that the jury trial provision of the sixth amendment is no bar to the addition of women to the jury.

[117] 224 N.C. 581, 31 S.E.2d 858 (1944).

[118] Id. at 591, 31 S.E.2d at 865 (Devin, J., dissenting).

[119] Id. at 601, 31 S.E.2d at 871–72 (Seawell, J., dissenting). Another way to deal with the historical argument is to meet it on its own ground. In Commonwealth v. Maxwell, 271 Pa. 378, 114 A. 825 (1921), the court held that historically the most important feature of trial by jury had been that the legislature had the power to set jury qualifications.

[120] 100 U.S. 303 (1879).

[121] Id. at 310.

[122] 329 U.S. 187, 193–94 (1946). In the earlier case, Glasser v. United States, 315 U.S. 60 (1942), the Court had refused to find that an all-male federal grand jury had been improperly constituted. This holding, however, was based on the fact that only a very short period of time had elapsed between the enactment of the Illinois statute qualifying women for jury service and the selection of the grand jury in question. Id. at 64–65. The Court's clear implication was that absent these circumstances, the exclusion of women from the jury list would have been error.

[123] 329 U.S. at 193–94 (1946).

[124] 332 U.S. 261 (1947).

[125] The defendants in *Fay* were male labor union officials who had been convicted of extorting payments from employers by threats of various kinds. Their principal ground of appeal was the asserted invalidity of the process by which the special "blue ribbon" jury panel was drawn, alleging that the process discriminated both against women and against laborers, craftsmen and service employees—the "working class" in general. The five-member majority's opinion appears to hold that the record on appeal justified a finding of no purposeful discrimination; it also declares that such discrimination, even if present, would not necessarily constitute a denial of equal protection to defendants. Mr. Justice Murphy's dissenting opinion does not touch on the issue of sex discrimination, and, in light of the nature of the defendants' activities, it seems likely that the allegations of economic and social discrimination were the main basis of defendants' argument.

[126] 332 U.S. at 289–90.

[127] 136 Fla. 644, 187 So. 392 (1939).

[128] Id. at 665, 187 So. at 401.

[129] The court's rationale is also called into question by the many cases throughout the country which have considered whether a particular defendant has standing to raise the issue of exclusion of women from the jury lists. A rule applied in many state courts, although apparently not favored in the federal courts, is that only a female defendant has standing to raise the issue, on the theory that it is the female defendant whose interests are threatened by practices which operate to exclude women. For cases applying the majority rule, see, e.g., Griffin v. State, 183 Ga. 775, 190 S.E. 2 (1937); McKinney v. State, 3 Wyo. 719, 30 P. 293 (1892). Contra, Walter v. State, 208 Ind. 231, 195 N.E. 268 (1935). As to the federal courts, compare United States v. Butera, 420 F.2d 564, 567 n.2 (1st Cir. 1970), with Woodruff v. Breazeale, 291 F. Supp. 130 (W.D. Miss. 1967), aff'd, 401 F.2d 997 (5th Cir. 1968).

[130] 251 F. Supp. 401 (M.D. Ala. 1966) (3-judge court).

[131] Id. at 409.

[132] Ala. Code tit. 30, § 21 (Supp. 1969), amending Ala. Code tit. 30, § 21 (1958); Miss. Code Ann. § 1762 (Supp. 1970), amending Miss. Code Ann. § 1762 (1942); S.C. Code Ann. § 38–52 (Supp. 1970), amending S.C. Code Ann. § 38–52 (1962).

[133] State v. Hall, 187 So. 2d 861 (Miss.), appeal dismissed, 385 U.S. 98 (1966). See also Philpot v. State, 43 Ala. App. 326, 190 So. 2d 293 (1966).

[134] State v. Hall, 187 So. 2d 861, 863 (Miss. 1966).

[135] Ford v. White, 430 F.2d 951, 955 (5th Cir. 1970). See also United States v. Butera, 420 F.2d 564 (1st Cir. 1970) holding that inclusion of a disproportionately small number of women on the master jury list raises an inference of purposeful discrimination. Occasionally, the intentional exclusion of women jurors from a particular case will be frankly admitted. E.g., Abbott v. Mines, 411 F.2d. 353 (6th Cir. 1969) (trial judge had barred all women from jury empaneled to try malpractice action involving cancer of the penis); State ex rel. Passer v. County Bd., 171 Minn. 177, 213 N.W. 545 (1927) (trial court excluded females from panel when a number of "carnal knowledge" cases were pending).

[136] E. g., State v. Bray, 153 La. 103, 95 So. 417 (1923).

[137] E.g., Leighton v. Goodman, 311 F. Supp. 1181 (S.D.N.Y. 1970).

[138] 368 U.S. 57 (1961).

[139] Id. at 61–62.

[140] Id. at 65.

[141] The idea that exclusion is the natural result of the women-volunteers-only type of exemption statute is also strongly suggested by the Louisiana cases. See State v. Reese, 250 La. 151, 171, 194 So. 2d 729, 737, cert. denied, 389 U.S. 996 (1967); State v. Dreher, 166 La. 924, 943, 118 So. 85, 92, cert. denied, 278 U.S. 641 (1928); State v. Bray, 153 La. 103, 106, 95 So. 417, 418 (1923). In each of these cases involving a female defendant there were apparently no women on the jury panel in the defendant's parish.

[142] E.g., Strauder v. West Virginia, 100 U.S. 303 (1879). See generally, Swain v. Alabama, 380 U.S. 202, 204, 228–29 (1965).

[143] 368 U.S. at 68.

[144] Before the Florida statute was amended in 1967, it was once more unsuccessfully challenged, this time on the ground that it operated unfairly to exclude *black* women from juries. Scott v. State, 207 So. 2d 493 (Fla.), cert. denied, 393 U.S. 884 (1968).

[145] 311 F. Supp. 1181 (S.D.N.Y. 1970).

[146] Id. at 1183.

[147] In 1965, 37% of all women of working age were in the labor force. Nearly 60% of these women were married, and over a third had children under 18 years of age. In families where all children were over six years old and the fathers were at home and working, 43% of the wives were employed. U.S. Dep't of Labor, Women's Bureau Bull. No. 240, 1965 Handbook on Women Workers 15, 21, 37, 42 (1965). Whether these figures show that the "great majority" of women spend a 24-hour day at home is debatable. They certainly do not support the proposition that the working woman represents an aberration, which seems to be the court's view.

[148] 63 Misc. 2d 895, 313 N.Y.S.2d 827 (Sup. Ct. 1970).

[149] Id. at 898, 313 N.Y.S.2d at 830. The *DeKosenko* opinion was written by a judge who had earlier exhibited insensitivity to the aspirations of women. See Goldblatt v. Board of Educ., 52 Misc. 2d 238, 275 N.Y.S.2d 550 (Civ. Ct. 1966), aff'd, 57 Misc. 2d 1089, 294 N.Y.S.2d 272 (Sup. Ct. 1968) (holding a female teacher not entitled to benefit of differential salary payment during her period of jury service, though male teacher would be so entitled).

[150] Hoyt v. State, 119 So. 2d 691, 701–02 (Fla. 1960) (Hobson, J.), aff'd, 368 U.S. 57 (1961).

[151] A Florida Supreme Court judge who dissented in the *Hoyt* case raised this point:

No one in this enlightened age would question the fact that if a limitation such as is placed upon women by our statute with reference to jury service were engrafted into our statutory law in regard to some of the so-called minority groups comprising our citizenry, it would be stricken down as violative of constitutional guarantees of due process and equal protection of the laws.

Id. at 700.

[153] There seems to be no reason why a jury statute could not simply provide an exemption for any individual (regardless of sex) having the personal responsibility of caring for a minor child. While most of the prospective jurors thus excused might still be women, the exemption would then be related to a relevant circumstance affecting particular individuals, and men coming within its provisions would be entitled to a similar exemption. Such a statute was upheld against constitutional challenge in State v. Smith, 102 N.J. Super. 325, 246 A.2d 35 (Super. Ct. 1968), aff'd, 55 N.J. 476, 262 A.2d 868, cert. denied, 400 U.S. 949 (1970).

[153] 317 S.W.2d 86 (Tex. Civ. App. 1958), cert. denied, 359 U.S. 230 (1959).

[154] Id. at 99.

[155] Id. at 100.

[156] 336 S.W..2d 251 (Tex. Civ. App.), cert denied, 364 U.S. 517 (1960).

[157] Id. at 262–63.

[158] Id. at 261.

[159] 309 F. Supp. 184 (E.D. Va. 1970).

[160] 163 U.S. at 537 (1866).

[161] 309 F. Supp. at 187 n.1, There is one other recent case involving a state university in which sex discrimination was successfully challenged on equal protection grounds. In Mollere v. Southeastern La. College, 304 F. Supp. 826 (E.D. La. 1969), female plaintiffs complained of a rule which required all female students under the age of 21 (regardless of their year) to live in college dormitories while subjecting only *freshmen* men to the same requirement. The court held the rule to be a violation of equal protection, but the significance of its opinion is unclear in light of the conceded fact that the rule's sole purpose was to insure adequate income from dormitory fees; there was apparently no argument that the policy was based in any respect on any differences between men and women. The opinion is an interesting example of one court's application of the equality principle in a sex-discrimination case, however, particularly in its use of a race-discrimination analogy to make a point about arbitrary treatment. Id. at 827 n.1.

[163] 3 16 F. Supp. 134 (D.S.C. 1970), aff'd mem., 401 U.S. 951 (1971) (Justice Harlan dissenting on the issue of whether direct appeal to the Supreme Court was available).

[163] Id. at 137.

[164] Id. at 137 n.3.

[165] See Green v. County School Bd., 391 U.S. 430 (1968); Goss v. Board of Educ., 373 U.S. 683 (1963).

[166] 105 Kan. 139, 181 P. 630 (1919).

[167] Id. at 140–41, 181 P. at 631.

[168] Id. at 146–47, 181 P. at 633–34.

[169] See, e.g., Ex parte Gosselin 141 Me. 412, 44 A.2d 882 (1945), appeal dismissed sub nom. Gosselin v. Kelly, 328 U.S. 817 (1946); Ex parte Brady, 116 Ohio St. 512, 157 N.E. 69 (1927).

[170] 281 F. Supp. 8 (D. Conn. 1968).

[171] 388 U.S. 1 (1967) (invalidating Virginia's antimiscegenation statute).

[172] 281 F. Supp. at 14.

[173] Id. at 16.

[174] United States ex rel. Sumrell v. York, 288 F. Supp. 955 (D. Conn. 1968).

[175] Liberti v. York, 28 Conn. Supp. 9, 246 A.2d 106 (Super. Ct. 1968).

[176] 430 Pa. 642, 243 A.2d 400 (1968).

[177] Id. at 650, 243 A.2d at 404.

[178] Id.

[179] The principle of the *Daniel* case has also been applied in Pennsylvania to the issue of where the defendant will be imprisoned. In Commonwealth v. Stauffer, 214 Pa. Super. 113, 251 A.2d 718 (1969), the defendant had been sentenced to a state penitentiary for women. On appeal, she was ordered returned to the county jail, it being conceded that any man convicted of the same offense would be confined in a county institution. The opinion nowhere suggests that separate imprisonment of men and women is constitutionally suspect; it does, however, suggest that the type of confinement must be substantially the same for both sexes.

Another recent Pennsylvania case involved still a different type of sex discrimination. In In re Williams, 210 Pa. Super. 388, 234 A.2d 37 (1967), aff'd sub nom. In re Jones, 432 Pa. 44, 246 A.2d 356 (1968), the commitment of two youthful males to a correctional institution as "defective delinquent juveniles" was challenged on the ground that the stated procedure was applicable only to males. The Superior Court held the constitutional challenge to be without merit, supporting its holding largely by quotations from its opinion in the *Daniel* case, 210 Pa. Super. 156, 232 A.2d 247 (1967), later reversed by the Pennsylvania Supreme Court. The issue of unconstitutional sex discrimination was apparently not argued on appeal. Cf. Chambers v. Director, 244 Md. 697, 223 A.2d 774 (1966) (dictum that limiting a state procedure for the treatment of "defective delinquents" to males is not unconstitutional). But see Morgan v. State, 179 Ind. 300, 101 N.E. 6 (1913) (holding unconstitutional a state statute providing for the commitment to an institution for "insane criminals" of any male defendant acquitted of a felony charge solely by reason of insanity).

The Pennsylvania Supreme Court has also indicated a willingness to extend the principle of the *Daniel* case to invalidate sentences meted out to juvenile offenders that are longer than those imposed on adults for identical offenses. In re Wilson, 438 Pa. 405, 430–32, 264 A.2d 614, 617–18 (1970). At least one other court has rejected this approach, in the absence of a showing by the accused that the state's juvenile correction system is devoid of rehabilitative aspects beyond those of mere confinement and discipline. Smith v. State, 444 S.W.2d 941, 948 (Tex. Civ. App. 1969). See also the cases cited in Comment, 82 Harv. L. Rev. 921, 925–26 n.25 (1969). On the general topic of sentencing, see Rubin, Disparity and Equality of Sentences: A Constitutional Challenge, 40 F.R.D. 55 (1967).

[180] 266 A.2d 62 (Me.), cert. denied, 400 U.S. 952 (1970).

[181] Id. at 64.

[182] Id. at 65.

[183] For one hypothetical example, see the suggestion by Professor Graham Hughes in The Right to Special Treatment, in The Rights of Americans 102 (N. Dorsen ed. 1971).

[184] Some doubt may be cast on this proposition, however, by a decision such as Commonwealth v. Stauffer, 214 Pa. Super. 113, 251 A.2d 718 (1969). See note 179 supra. *Stauffer* can be distinguished, however, on the ground that in that case it was a *female* defendant who was being treated as the greater risk.

[185] See Lippman, The Breakdown of Consortium, 30 Colum. L. Rev. 651 (1930).

[186] Marri v. Stamford St. R.R., 84 Conn. 9, 12, 78 A. 582, 583 (1911).

[187] Lippman, supra note 185, at 652–53.

[188] For a good short discussion of these rationales, see Note, Equal Protection: The Wife's Action For Loss of Consortium, 54 Iowa L. Rev. 510, 517–21 (1968). For a trenchant criticism of the rule barring recovery by wives, see Foster, Relational Interests of the Family, 1962 U. Ill. L.F. 493, 520.

[189] See cases cited in Hittafer v. Argonne Co., 183 F.2d 811, 812–13 n.5 (D.C. Cir.), cert. denied, 340 U.S. 852 (1950).

[190] To the extent that Hipp v. E. I. DuPont, 182 N.C. 9, 108 S.E. 318 (1921) was not in accord, it was overruled by Hinnant v. Tidewater Power Co., 189 N.C. 120, 127–29, 126 S.E. 307, 311–12 (1925).

[191] See Lippman, supra note 185, at 665–69.

[192] In a few jurisdictions, the Married Women's Act was held to deprive the husband of his cause of action for loss of consortium, forcing him to share the wife's disability. See, e.g., Marri v. Stamford St. R.R., 84 Conn. 9, 78 A. 582 (1911); Bolger v. Boston Elevated Ry., 205 Mass. 420, 91 N.E. 389 (1910); Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945).

[193] 183 F.2d 811 (D.C. Cir.), cert. denied, 340 U.S. 852 (1950).

[194] Id. at 819.

[195] The *Hitaffer* case involved two different issues: whether a wife can recover for loss of consortium as a matter of general law, and whether the workmen's compensation statute for the District of Columbia permitted any recovery for loss of consortium. The court answered both questions affirmatively. In Smither & Co. v. Coles, 242 F. 2d 220 (D.C. Cir.), cert. denied, 354 U.S. 914 (1957), *Hitaffer* was overruled on the second issue. It was reaffirmed on the first issue, however, in Rollins v. District of Columbia, 265 F. 2d 347 (D.C. Cir. 1959).

[196] See W. Prosser, Torts § 119 (3d ed. 1964); Restatement (Second) of Torts § 695, at 13–21 (Tent. Draft No. 14, 1969); Annot., 23 A.L.R. 2d 1378 (1952).

[197] Three recent decisions following *Hitaffer* and overruling contrary precedent are Troue v. Marker, 252 N.E. 2d 800 (Ind. 1969); Millington v. Southeastern Elevator Co., 22 N.Y. 2d 498, 239 N.E. 2d 897, 293 N.Y.S. 2d 305 (1968); and Clouston v. Remlinger Oldsmobile Cadillac, Inc., 22 Ohio St. 2d 65, 258 N.E. 2d 230 (1970). Pennsylvania reaffirmed its adherence to the no-recovery rule by a 5–2 margin in Brown v. Glenside Lumber & Coal Co., 429 Pa. 601, 240 A. 2d 822 (1968).

[198] Burk v. Anderson, 232 Ind. 77, 109 N.E. 2d 407 (1952); Boden v. Del-Mar Garage, 205 Ind. 59, 185 N.E. 860 (1933); Miller v. Sparks, 136 Ind. App. 148, 189 N.E. 2d 720 (1963). All three were expressly overruled in Troue v. Marker, 252 N.E. 2d 800, 806 (Ind. 1969).

[199] Owen v. Illinois Baking Corp., 260 F. Supp. 820 (W.D. Mich. 1966).

[200] 274 F. Supp. 169 (N.D. Ill. 1967).

[201] Id. at 175.

[202] Contra, Krohn v. Richardson-Merrell, Inc., 219 Tenn. 37, 406 S.W.2d 166 (1966), cert. denied, 386 U.S. 970 (1967); Seagraves v. Legg, 147 W. Va. 331, 127 S.E.2d 605 (1962).

[203] 399 F.2d 847 (7th Cir. 1968), cert. denied, 393 U.S. 1066 (1969). At the time of the *Miskunas* decision, both Illinois and Wisconsin had followed *Hitaffer*. Subsequently, Indiana did also. Troue v. Marker, 252 N.E.2d 800 (Ind. 1969). The equal protection issue now appears moot in the Seventh Circuit, except as to causes of action arising prior to the changes in state law.

[204] 399 F.2d at 850.

[205] See generally W. Prosser, Torts § 55 (3d ed. 1964).

[206] The Supreme Court has never squarely held that any form of sex discrimination violates the equal protection guarantee. Moreover, as recently as the spring of 1971, in Williams v. McNair, 401 U.S. 951 (1971), the Court summarily affirmed a decision upholding South Carolina's operation of a sex-segregated college against an equal protection challenge. (We have already noted our reservations about the Court's disposition of that case; see text accompanying notes 162–65 supra.) Since no opinion was handed down in *Williams*, however, there is no way to discover the basis for the Court's conclusion that no constitutional violation had been demonstrated.

The Court obviously has not foreclosed the possibility that some forms of sex discrimination can violate the guarantee of equal protection, however, as evidenced by its agreement to hear at least three cases in which this issue is directly presented: Reed v. Reed, 93 Idaho 511, 465 P.2d 635 (1970), prob. juris. noted, 461 U.S. 934 (1971), discussed in the text accompanying notes 57–63 supra; In re Stanley, 45 Ill.2d 132, 256 N.E.2d 814 (1970), cert. granted sub nom. Stanley v. Illinois, 400 U.S. 1020 (1971), involving alleged discrimination against the male parent in awarding custody of illegitimate children; and State v. Alexander, 255 La. 941, 233 So.2d 891 (1970), cert. granted sub nom. Alexander v. Louisiana, 401 U.S. 936 (1971), involving a claim that females were systematically excluded from the grand jury which returned a rape indictment against the defendant, a male Negro. (The state court's opinion in the *Alexander* case indicates that *race* discrimination was the principal ground of defendant's motion to quash the indictment, however.) The decisions in these three cases are expected to reveal the attitudes of the current members of the Court toward equal protection as it applies to sex discrimination.

It must be acknowledged, however, that several recent Supreme Court decisions have appeared to restrict, rather than enlarge, the scope of the equal protection clause. In James v. Valtierra, 402 U.S. 137 (1971), the Court upheld a provision of the California constitution prohibiting construction of any low rent housing project unless it had received prior approval in a local referendum. Petitioners had contended that this special obstacle to the provision of low income housing discriminated against the poor, violating their right to equal protection. In Hunter v. Erickson, 393 U.S. 385 (1969), the Court had earlier held invalid a similar law requiring a referendum as a prerequisite to the passage of any "fair housing" ordinance designed to prohibit racial discrimination. Mr. Justice Black (the sole dissenter in *Hunter*) wrote the Court's opinion in *James*; four justices joined him in refusing to extend the *Hunter* holding to invalidate discrimination which was apparently directed only against persons of low income, without regard to race. (Justices Marshall, Brennan, and Blackmun dissented; Justice Douglas did not participate.)

In Levy v. Louisiana, 391 U.S. 68 (1968) and Glona v. American Guarantee and Liability Insurance Co., 391 U.S. 73 (1968) the Court (dividing 6–3 declared discriminatory treatment of illegitimates in a State's Wrongful Death Act to be a violaton of equal protection. After Chief Justice Warren and Justice Fortas had been replaced by Chief Justice Burger and Justice Blackmun, however, a new 5–4 majority reached a different conclusion in Labine v. Vincent, 401 U.S. 532 (1971), involving an illegitimate's right to inherit from his natural father. Mr. Justice Black, again writing the majority opinion, attempted in *Labine* to distinguish *Levy* and *Glona; Labine* nevertheless casts great doubt on the validity of the proposition—which arguably had been established in *Levy* and *Glona*—that illegitimacy constitutes a "suspect classification" for purposes of equal protection.

These decisions indicate that the Court is sharply divided over the scope of the equal protection clause, and specifically over the question of what (if any) application it may have outside the area of race discrimination. In this regard, see also Oregon v. Mitchell, 400 U.S. 112 (1970), especially the discussion at 126–31 (Mr. Justice Black's opinion, seemingly arguing that the fourteenth amendment applies only to racial discrimination) and 150–52 (appendix to the opinion of Mr. Justice Douglas, listing cases said to have struck down, on equal protection grounds, statutes discriminating on bases other than race). The only prediction that the authors feel safe in making about the three currently pending cases is that the decisions are not likely to be unanimous, and are even less likely to be embodied in a single opinion.

[207] Sassower, supra note 13, at 330.

Mr. BAYH. Mr. President, I yield 5 minutes to the Senator from Illinois.

The PRESIDING OFFICER. The Senator from Illinois is recognized for 5 minutes.

Mr. PERCY. Mr. President, I shall be very brief. I hope I can be briefer than 5 minutes.

Mr. President, I have tremendous respect for my colleague, the Senator from North Carolina. I have joined him in the past on many issues, such as "speedy trial" and others involving individual rights and liberties. However, I could not be more opposed than I am now to the position the Senator from North Carolina has taken for men and women in this area of equal rights.

I have deep respect for his knowledge and the Constitution and for the knowledge possessed by Professor Kurland of the University of Chicago. I agree with him that adequate authority now exists for Congress and the legislatures of the States to pass legislation that, as he has put it, is directed at specific evils and for effective administration of legislation to eliminate invidious discrimination.

I would only ask one queston: If this authority does exist and has existed all these years, then why have we not, for heaven's sake, done something about exercising this authority?

I do not know of anyone in this body who would not recognize and appreciate that there is discrimination against women in business; that there is discrimination against women in the labor unions in this country; on virtually every university campus in this country; and in virtually every governmental agency and department.

If we had authority to do something about it, why did we not do something about it before?

Mr. President, the Senate's imminent action in approving the equal rights amendment draws to a close the 49-year debate that has surrounded the issue of equal rights for men and women. It is the culmination of a great deal of effort on the part of the amendment's supporters in the House and Senate. I think we are deeply indebted to the distinguished Senator from Indiana (Mr. BAYH) and the distinguished Senator from Kentucky (Mr. COOK), who have worked relentlessly to see the amendment through the Judiciary Committee and to muster support from both sides of the aisle. As a cosponsor of Senate Joint Resolution 9, I have strongly endorsed not only this proposal but each one directed toward insuring equal treatment under the law for men and women since first coming to the Senate in 1966.

I believe the Senate has done a great service to this country by rejecting every single effort to cripple the basic amendment which is to be submitted to three-fourths of the States for ratification.

Even among the resolution's opponents, there seems to be little question but that tradition and law have worked together to relegate women to an inferior status in our society. In many cases this has been intentional, based on an archaic precept that women, for physiological or functional reasons, are inferior. This concept has lead to the implementation of laws that prohibit women from engaging in certain businesses, managing their own properties and finances, entering into legal contracts, holding jobs which they are deemed incapable of performing, actively competing in public and private educational institutions for a quality education, and serving on a jury.

Certainly a form of male chauvinism was practiced in the Senate for almost two centuries, until only last year by preventing young women from gaining invaluable experience in Government through serving as Senate pages. Certainly as we look back at the experience we have had since last year with girl pages in the Senate, we can see that the arguments conjured up against their being permitted to so serve have certainly evaporated. These arguments look as shallow to us today as many of us felt they were all along.

Where discrimination has been less overt, we have imposed on women certain responsibilities that make it impossible for them to achieve equality. Marriage and divorce laws are primary examples of this.

Married women may by law expect in many instances nothing more than their husbands decide to give them. Once the marriage has been dissolved, a woman ordinarily has custody of the couple's children making it difficult if not impossible for her to work outside the home, although she must also assume the major responsibilities of supporting those children. Statistics on alimony and child support, which I have entered into the record, indicate that 1 year after the divorce only 38 percent of the fathers are in compliance with courts' support orders. After 10 years, only 13 percent are in compliance. What this means is that women, under the concept of maternity rights, must physically care for

the children and assume the financial responsibility of earning a living for them as well.

Application of our criminal laws to women offenders is another example of inequality. Many States' laws automatically prescribe longer prison sentences for women than for men.

We now live under an ambiguous, conflicting, and discriminatory set of laws that in many cases do not even pretend to insure equal treatment for men and women. It seems a fairly simple principle of equity that the difference of treatment under the law should not be based on sexual distinctions, but rather, if there must be a difference, on the basis of some relevant material facts which compel the distinction. I am confident that the constitutional amendment which the Senate is about to approve will achieve that equality.

I suppose, in all candor, that other methods such as amending current labor, marriage, contract and corporate laws could also achieve this desired purpose. But the approach would be piecemeal, timeconsuming and for some States, ineffective. Only a constitutional amendment will provide the universal applicability and impetus to States to reform their laws and practices to be consistent with the constitutional mandate.

There are numerous misunderstandings as to what a constitutional amendment will, in practice, do. Many feel that an amendment will bring chaos to the employment field. It is true that the ERA will overturn States' so-called protective labor laws where they exist. But in view of the fact that modern technology has made such laws unnecessary and nonessential, the disruptive impact of the amendment would, in my view, be minimal. The amendment sets no quotas on the employment of women in any business, neither does it encourage women to abandon their homes to compete with men in the business area. It simply says that if a woman chooses to work, she must have the unfettered opportunity to do so and be regarded as equal to men in all phases of her employment, promotion, and working conditions.

Neither does the equal rights amendment lessen or demean the importance of women as wives, mothers, and mainstays of the home. Equality does not imply sameness. While the family structure is at the heart of our society and this legislation does nothing to disrupt that notion, we must recognize that women of today are different, they are aware of and willing to accept their responsibilities as citizens in a modern society and ought to be free to accept those responsibilities much as they are free to remain in the home if that is their choice. It was Susan B. Anthony, great defender of women's rights, who said almost a century ago that:

> Modern invention has banished the spinning wheel, and the same law of progress makes the woman of today a different woman from her grandmother.

Today we will truly acknowledge that equality can no longer be legally conditioned upon sex, that women, as they assume new roles in our society, deserve as a matter of law equal treatment under the law.

I commend the Senate in advance for the action it is about to take passing the amendment without any crippling changes and am proud that I was able to play a role in bringing about this important change in the law.

Mr. BAYH. Mr. President, I yield 1 minute to the Senator from South Carolina.

The PRESIDING OFFICER. The Senator from South Carolina is recognized.

Mr. THURMOND. Mr. President, in my inaugural address as Governor of South Carolina, I advocated equal rights for women. I have favored this principle since that time.

I am very proud of the action that I feel the Senate will take today in passing this amendment so that it may be submitted to the States for ratification. I predict that the States will approve it.

Mr. President, I would like to say a few words in support of the equal rights amendment. This proposed constitutional amendment providing for equal rights for men and women has been introduced in nearly every Congress since 1923, shortly after the ratification of the 19th amendment extending the right to vote to women. The mere fact that this amendment has persevered so long is evidence of the grave need many people have attached to the importance of the amendment.

Even though there has been progress in recent years toward the goal of equal rights and responsibilities for men and women, there is overwhelming evidence that persistent patterns of sex discrimination permeate our social, cultural, and economic life. This holds true in spite of recent laws and Supreme Court decisions aimed at prohibiting such blatant discrimination.

For an example, working women are at a great disadvantage in private business. The median salary income for women is only 59.5 percent of that earned by men and the gap between male and female median incomes has been widening in recent years. In 1969, less than 5 percent of all full-time female workers earned over $10,000 per year, compared with 35 percent of all male workers. Sex discrimination also is present in government employment, which accounts for more than 20 percent of the labor force.

Mr. President, many States have business and labor laws which invidiously discriminate against women. These laws vary in their direction and import, but all have the effect of restricting or prohibiting women from engaging in a particular job or occupation. Many of these so-called "protective" labor laws are well intended, but they are a great disadvantage to the working women. For example, a law which limits the working hours of women but not for men makes it more difficult for women to obtain work they desire and for which they are qualified to perform or to become supervisors.

Last year the Supreme Court for the first time struck down a law which discriminated against women. The Court in Reed against Reed invalidated a State law which arbitrarily favored men over women as administrators of estates. This case is a step in the right direction; however, it does not go far enough. The Court did not hold that sex discrimination is "suspect" under the 14th amendment, but left the burden on every woman plaintiff to prove that governmental action perpetuating sex discrimination is "unreasonable."

Theoretically, this amendment may not be necessary because the Court, Congress, and the States could eventually strike down all sex discrimination laws. This approach is not practical mainly because it is too haphazard and too slow to be acceptable.

Therefore, the only practical basis to provide the necessary changes is through a constitutional amendment. The Nation has waited far too long for this important congressional action. It is now time for the Senate of the United States to act affirmatively on this important constitutional amendment.

The context of this amendment is short and concise and accomplishes the necessary change with a minimum of verbage. The amendment essentially requires that the Federal Government and all State and local governments treat each person, male and female, as an individual. It applies only to governmental action; it does not affect private action or purely social relationships between men and women.

Mr. President, I have long been a supporter of the equal rights amendment. However, this amendment would compel women to be drafted into the armed services and subject them to combat duty which may be neither necessary or desirable in our society. For this reason, I supported amendments to prevent this. The intent of these proposals was to allow the Congress to exempt our women from certain military obligations without infringing upon the great benefits guaranteed by the basic amendment. I do not feel that such obligations should be imbedded in the Constitution and believe Congress should have the power of decision concerning selection of persons eligible for the draft.

Mr. President, despite Senate rejection of the draft provision, I feel the need for the equal rights amendment is obvious. The time for this amendment is now. I, therefore, urge the Senate to act immediately and favorably on this necessary amendment to the U.S. Constitution.

Mr. BAYH. Mr. President, I yield 3 minutes to the Senator from Kentucky.

The PRESIDING OFFICER. The Senator from Kentucky is recognized for 3 minutes.

Mr. COOPER. Mr. President, I will be brief. I have voted for practically all of the amendments which the distinguished Senator from North Carolina has offered. I voted for them because I thought they raised the valid question whether certain protections now accorded by law to women would be abrogated if the constitutional amendment is finally approved. I hope the State legislatures of our country will give due consideration and debate to these important questions raised by the Senator from North Carolina.

I believe they have merit, and although I shall vote for the constitutional amendment, I believe it will pose difficult problems for State legislatures and the Congress when they attempt to maintain

protections, such as exemption from military draft, and protection and support of children by fathers.

The Senator from North Carolina is a great constitutional lawyer, and an honor to the Senate. However, he has suggested an interpretation of the amendment which I believe should be opposed on the floor of the Senate. It is his suggestion of a possible interpretation by the courts of the amendment that would have the practical effect of abrogating the Federal-State relationship and of vesting in the Congress jurisdiction of practically all legislation under the control of the Congress.

With all due respect, I do not think such an interpretation could prevail. There are other provisions of the Constitution securing the Federal-State relationship and the jurisdiction of the courts; which would be considered if such is raised and they are as strong as the pending amendment.

I must say that I believe we could secure by statute practically any question to assure women necessary protection against discrimination. Some groups with whom I have talked do not understand all of the grave questions raised about their own protections and their own privileges. But they want, more than anything else, the Congress of the United States, the people of the United States to declare through a constitutional amendment they are equal to men and entitled to all possible rights.

I must say that it is compelling argument.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. ERVIN. Mr. President, I yield to the Senator from Kentucky any time that he needs.

The PRESIDING OFFICER. The Senator from Kentucky is recognized.

Mr. COOPER. Mr. President, I want to say that I am doubtful that the amendment is really needed, but I have the belief that the women of this country believe it is needed, and that they want Congress and the State legislatures to express their full equality. I shall vote for the measure. I am hopeful and I believe we have enough faith in the courts and our Supreme Court to interpret it in such a way that it will guarantee full rights, and at the same time it will not remove from women the protections they need.

Mr. FONG. Mr. President, I ask unanimous consent to have printed in the RECORD the individual views of the Senator from Hawaii which appear in the report so that they may be available to members of State legislatures.

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

INDIVIDUAL VIEWS OF MR. FONG

It is an undisputed fact that women have not been treated the some as men in industry, in the professions or under our various State and Federal laws.

A. HISTORICAL BACKGROUND

The so-called protective legislation, such as minimum wage laws, maximum hour laws, limitations on nightwork for women, when enacted in the early part of this century was intended to protect the health, safety and morals of female workers.

Unfortunately, as more and more women joined the working force, these laws have at times been used to the detriment of women. These laws have prevented or hindered the employment of women and their promotion to positions utilizing all their abilities. This has worked not only to the detriment of women, but to the detriment of the nation, which has been denied the full benefits of their talents, training and ability.

Equal rights for women is not a new concept. As early as 1848, at the first meeting for equal rights for women, held in Seneca Falls, New York, Elizabeth Cady Stanton read her now famous "Declaration of Sentiments":

"The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her."

The Declaration, under some 15 headings, then summarized the many discriminations against women at that time. Married women were unable to own property, to retain their own earnings, to sue, to retain counsel, or even to be the guardians of their own children so long as the husband lived. And, for the most part, they were barred from all but a primary grade education, nor could they vote.

Progress has been made toward equal treatment under law for women.

The 19th Amendment in 1920 gave women the right to vote.

The Civil Rights Act of 1964, among other things, prohibited discrimination based on sex, although Section 703(e) of that Act provides that discrimination based on sex can be justified if it is pursuant to a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

However, Executive Order 11375 (October 13, 1967), as amended, explicitly prohibits discrimination on the basis of sex in Federal employment and employment on Federal contracts.

Concededly, this is not enough.

B. HAWAIIAN ISLANDS

My state of Hawaii has been in the forefront of the move to eliminate statutory discrimination based on sex. Our fair employment practice law, our minimum wage and overtime pay laws apply equally to men and women. Jury qualification for men and women is the same. Women, equally with men, have the right to contract and to own property.

But even in Hawaii some laws are different for men and women. To cite a few: the laws of inheritance give a widow greater rights than they give to widowers. Certain preferences in State government employment and housing are given to widows, but not to widowers. A wife is not liable for her husband's debts. A husband is liable for a wife's debts, her proper support and maintenance. If he fails to provide suitable support, that is a ground for divorce, with temporary alimony and attorney's fees afforded only to women.

C. EFFECTS OF DISCRIMINATORY LEGISLATION BASED ON SEX AND NEED FOR REMEDIAL LEGISLATION

In many other states and under some Federal laws, there is greater discrimination, based solely on sex.

Sometimes this discriminatory legislation works to the detriment of women: higher standards are often required of women than of men; women too frequently are not hired or promoted to better paying jobs because of so-called protective legislation.

As outlined in the Report, all the criminal and civil discrepancies in treatment of men and women, in education, in business and the professions concededly exist.

On the other hand, some discriminatory legislation is beneficial to women; Women are eligible for Social Security benefits at 62, men at 65; rights to old-age, survivors, disability and other benefits under the Social Security Act and laws administered by the Department of Defense and the Veterans Administration are much more favorable to women than men.

As the Report of the Committee points out, under the Equal Rights Amendment, one standard would be applied to all—regardless of sex. Since all persons will be treated alike, it will be necessary to amend each Federal or State law which is discriminatory in any way, be that descrimination beneficial or detrimental to women. Unless the Congress and the legislatures of each of the States enact such amendatory statutes within the two-year period provided for in the Amendment, it will fall to the courts to determine which discriminatory legislation is to be declared void and hence inapplicable to either sex, and which discriminatory legislation is to be extended to both sexes.

This legislative function should not fall to the courts by default.

After a preliminary survey of the legislation most likely to be affected, I find almost all Federal laws which treat women differently from men can be amended. For instance: depending on cost and other factors, women's eligibility to all benefits under Social Security can be (1) kept at age 62 and men's lowered to that age, or (2) men's present eligibility age of 65 extended to women, or (3) a new age for eligibility applicable to both sexes can be fixed. The third alternative may be the fair and feasible solution.

D. COMPULSORY MILITARY SERVICE

(1) Effect of Equal Rights Amendments on draft and assignment of women

However, there is one area in which insurmountable difficulties arise—military service. It is conceded by the proponents of this amendment that women, like men, will have to register for and be subject to the draft.

The Selective Service System in a letter dated February 25, 1972 advises:

"Should the legislation administered by our agency be affected by the amendment proposed in H.J. Res. 208, we would be required to register approximately two million more persons a year, twice the present number, with additional cost resulting in the areas of registration. If the additional registrants are further processed, additional costs for classification, examination and induction would result. Roughly, these costs would be doubled. The cost of operating national headquarters, the states' headquarters and the service centers, would not be materially increased but the work of the local boards and their paid employees would reach twice its present level.

"In more specific terms, in our budget for fiscal year 1973, service to registrants is $64,726,000. To double the number of registrants might not double the cost of this phase of our activity, but would substantially increase this item. Our examination services, budgeted at $1,107,000, is more closely related to the size of calls by the Department of Defense than to the number of registrants, and might not be substantially increased. Costs of administrative services and other activities would undoubtedly increase, but should not be doubled."

Going one step further, once women are registered, the question arises whether women must be assigned on an equal basis for all types of military service. If women are found physically qualified (under the same tests administered to determine men's qualifications) they will, in all likelihood, be required to serve in combat.

The Majority Report chooses not to face this reality. On the one hand they want equal treatment in drafting women for compulsory military service, but then, not being willing to fact the consequences of this action, they fall back on the words of Congresswoman Martha Griffiths, the primary sponsor of H.J. Res. 208, on the floor:

"The draft is equal. That is the thing that is equal. But *once you are in the Army you are put where the Army tells you where you are going to go.*" (Emphasis supplied)

Fortunately, these words were uttered by a woman. A man would have been accused of male chauvinism and of advocating discriminatory treatment of women.

The Majority Report is replete with "expectations"; including that women will not be "assigned to combat posts, nor . . . required to engage in physical combat," as is the case of the Israeli Army. They overlook the realities. Israeli women do not serve in the Armed Forces because of their demands for equal treatment regardless of sex, but because of Israeli's small population, the services of each individual is indispensable to the defense of the country. Hence, different treatment of the women and the men in the Israeli Army is acceptable, even though incompatible with the concept of the Equal Rights Amendment.

Interestingly, on the subject of the present service of men and women in the Israeli Army, the maintenance of "separate and independent facilities" for women soldiers, is conceded, as is the fact that women soldiers perform tasks "in the clerical, communication, electronics and nursing fields." These tasks are characterized in the Report as "critical noncombatant tasks,"—yet, women are assigned these tasks on the basis of sex.

Hence, under H.J. Res. 208, as reported out by the Senate Judiciary Committee, it is my firm conviction that if women pass the same tests as given men prior to assignment to duty, they must also serve on combat duty, if found qualified for such duty.

Furthermore, the Department of Defense points out that if women could not be assigned to field duty, it might result in a disproportionate number of men serving more time in the field and on board ship because there would be a reduced number of positions available for their reassignment to non-combat duty. That would clearly be discriminatory against men—unless all persons who serve on combat duty are released from service in a shorter period of time. This same situation applies to the Army, Navy, Marine Corps, Air Force, Merchant Marine and the Coast Guard.

(2) *Effect of equal rights amendment on right of privacy*

Separate units for women will, I believe, be abolished just as separate ethnic and racial units in the Armed Forces have been abolished—both men and women will serve in the same units. What privacy women will be able to be afforded, if any, is uncertain. The Department of Transportation has already published in the Federal Register its notice of proposed rule-making to amend Coast Guard regulations to allow female members of the crew to use washrooms and toilet rooms that are used by male crew members. This, I believe, is indicative of the future if women are subjected to the draft.

(3) *Additional costs of military service of women under equal rights amendment*

I have requested of the Department of Defense an estimate as to what additional costs, if any, would be involved were women required to serve in all positions on an equal basis with men in the military service.

The Department's response, in a letter dated March 13, 1972, states, in pertinent part:

"The Department has not made such estimates and without specific programs for such "equal" service, it is impossible to make any estimate. One of the major areas that would contribute to increased costs would be separate facilities, both in terms of living quarters, as well as working facilities in areas where women are not currently stationed.

"Until a definitive plan is developed indicating where and under what circumstances women would serve in isolated areas, with combatant forces, aboard ships, etc., it is not possible to make a definitive estimate of costs. If extensive additional facilities or modifications to current facilities were required, the costs could be considerable."

As responsible Legislators, I feel we should have some definite indication as to what additional costs will be involved if the proposed amendment in its present form becomes part of our Constitution.

E. CONCLUSION

I voted in the Judiciary Committee to report out the Equal Rights Amendment.

However, for all the above set forth reasons, I am not ready or willing to support compulsory military service. If and when an all-volunteer military force comes into being, of course those women who wish to volunteer and serve in the field or on board ships may do so. But, so long as we have a draft law, I intend to vote to exempt women from compulsory military service, and to support such modification of the Equal Rights Amendment.

With this reservation, I give my fullest support to the Equal Rights Amendment and will do all possible to introduce necessary legislation to eliminate other differing treatment afforded men and women under our Federal laws.

Mr. BYRD of Virginia. Mr. President, will the Senator from Indiana yield to me for 3 minutes?

Mr. BAYH. I yield.

Mr. BYRD of Virginia. Mr. President, I shall vote in favor of House Joint Resolution 208, the equal rights amendment for women.

I share many of the concerns voiced by the distinguished senior Senator from North Carolina. I voiced those concerns by supporting clarifying amendments.

I think we would have had a better package to send to the States to consider as a constitutional amendment had clarifying amendments been adopted, but the majority of the Senate felt otherwise.

I would like to see more women interested in politics. I would like to see more women taking an interest in government. I think women can make many contributions to government. They can bring an idealism to government that is badly needed.

I would like to see more women in the Senate and in the House of Representatives. I would like to see more women in the State legislatures. I would like to see more women in the Cabinet of the United States and in high positions in the executive branch of Government. Yes, I believe women can make a great contribution.

As I mentioned earlier, I have some concern about the broadness of this constitutional amendment, as does the senior Senator from Kentucky, which he just voiced. I think it would have been a better proposal had clarifying amendments been agreed to, but I nevertheless shall vote in favor of House Joint Resolution 208.

The PRESIDING OFFICER. Who yields time?

Mr. BAYH. I yield back the remainder of my time.

Mr. ERVIN. I yield back the remainder of my time.

The PRESIDING OFFICER. All time has been yielded back. The question is on agreeing to the joint resolution. The yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. EASTLAND. Mr. President, on this joint resolution, I have a pair with the Senator from Arkansas (Mr. McCLELLAN) and the Senator from Florida (Mr. CHILES). If they were present and voting, they would vote "yea." If I were permitted to vote, I would vote "nay." I therefore withhold my vote.

Mr. BYRD of West Virginia. I announce that the Senator from Florida (Mr. CHILES), the Senator from Washington (Mr. JACKSON), the Senator from Arkansas (Mr. McCLELLAN), the Senator from South Dakota (Mr. McGOVERN), and the Senator from New Hampshire (Mr. McINTYRE) are necessarily absent.

I further announce that, if present and voting, the Senator from New Hampshire (Mr. McINTYRE), the Senator from South Dakota (Mr. McGOVERN), and the Senator from Washington (Mr. JACKSON) would each vote "yea."

Mr. GRIFFIN. I announce that the Senator from Oregon (Mr. PACKWOOD) is necessarily absent.

The Senator from South Dakota (Mr. MUNDT) is absent because of illness.

If present and voting, the Senator from Oregon (Mr. PACKWOOD) would vote "yea."

The yeas and nays resulted—yeas 84, nays 8, as follows:

[No. 122 Leg.]

YEAS—84

Aiken	Fulbright	Muskie
Allen	Gambrell	Nelson
Allott	Gravel	Pastore
Anderson	Griffin	Pearson
Baker	Gurney	Pell
Bayh	Harris	Percy
Beall	Hart	Proxmire
Bellmon	Hartke	Randolph
Bentsen	Hatfield	Ribicoff
Bible	Hollings	Roth
Boggs	Hruska	Saxbe
Brock	Hughes	Schweiker
Brooke	Humphrey	Scott
Burdick	Inouye	Smith
Byrd, Va.	Javits	Sparkman
Byrd, W. Va.	Jordan, N.C.	Spong
Cannon	Jordan, Idaho	Stafford
Case	Kennedy	Stevens
Church	Long	Stevenson
Cook	Magnuson	Symington
Cooper	Mansfield	Taft
Cranston	Mathias	Talmadge
Curtis	McGee	Thurmond
Dole	Metcalf	Tower
Dominick	Miller	Tunney
Eagleton	Mondale	Weicker
Ellender	Montoya	Williams
Fong	Moss	Young

NAYS—8

Bennett	Ervin	Hansen
Buckley	Fannin	Stennis
Cotton	Goldwater	

PRESENT AND GIVING A LIVE PAIR, AS PREVIOUSLY RECORDED—1

Eastland, against.

NOT VOTING—7

Chiles	McGovern	Packwood
Jackson	McIntyre	
McClellan	Mundt	

The PRESIDING OFFICER (Mr. ROTH). Before announcing the result, the Chair would like to remind the occupants of the galleries that no demonstrations are permitted under the rules of the Senate. The Chair respectfully requests that the galleries comply with that request.

On this vote the yeas are 84, the nays are 8. Two-thirds of the Senators present having voted in the affirmative, the joint resolution is passed.

[Demonstrations in the galleries.]

Mr. BAYH. Mr. President, I move to reconsider the vote by which the joint resolution was passed.

Mr. PASTORE, Mr. COOK, and other Senators moved to lay the motion on the table.

The PRESIDING OFFICER. The question is on the motion to lay on the table.

The motion to lay on the table was agreed to.

ORDER OF BUSINESS

Mr. BYRD of West Virginia. Mr. President, may we have order?

The PRESIDING OFFICER. There will be order in the Senate.

The Senator from Montana.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that we——

Mr. BYRD of West Virginia. Mr. President, we cannot hear the Senator. May we have order?

The PRESIDING OFFICER. The Chair once again requests that the Senate and the galleries be in order. The majority leader has an important announcement to make, and we cannot hear him.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that Calendar No. 356, Senate Joint Resolution 150; Calendar No. 660, Senate Joint Resolution 8; and Calendar No. 661, Senate Joint Resolution 9, all companion measures to the legislation just passed, be indefinitely postponed.

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

SENATE INTERVENTION IN SUPREME COURT PROCEEDINGS ON THE SPEECH AND DEBATE CLAUSE OF THE CONSTITUTION

Mr. MANSFIELD. I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 670, Senate Resolution 280, the so-called Ervin resolution, so that it may become the pending business.

The PRESIDING OFFICER. The resolution will be stated by title.

The assistant legislative clerk read as follows:

A resolution (S. Res. 280) authorizing Senate intervention in the Supreme Court proceedings on the issue of the scope of Article I, Section 6, the so-called speech and debate clause of the Constitution.

The PRESIDING OFFICER. Without objection, the Senate will proceed to its consideration.

Mr. MANSFIELD. Mr. President, what this means is that as far as the distinguished Senator from North Carolina is concerned, he still gets no respite, because he will have to take the lead in trying to make clear the significance of this resolution.

PROGRAM

Mr. MANSFIELD. Mr. President, if I may have the attention of the distinguished acting minority leader, I should like to state to the Senate, in better form, what the schedule will be.

When Senate Resolution 280 is disposed of, hopefully this evening, or, if not, tomorrow, the Senate will proceed to the consideration of the bill dealing with equal broadcasting time, which will be handled by the distinguished senior Senator from Rhode Island (Mr. PASTORE). It will be followed by the egg bill, and may I say that in referring to the excess hens somewhat earlier, I was referring to a term that has come up known as henocide, and I have checked the various records, which bear out my statement.

Following the egg bill, the items on the calendar which have to do with changing the name of Cape Kennedy to Cape Canaveral and to establish the Gulf Islands National Seashore will be taken up tomorrow or Friday, together with naval vessel laws and Radio Free Europe.

The act to extend the Export Administration Act will come down on Tuesday, along with the bill amending the Federal Aviation Act with respect to civil air carriers. The War Powers Act will be laid down that day, hopefully, and debate will begin. The legislative appropriation bill may well be taken up on Tuesday.

For the information of the Senate, there will be no session on Monday, the reason being that seven of our colleagues will be in Denver on official business. After talking it over with the leadership on the Republican side, we have come to the conclusion that it is only fair that this group be given that consideration. Furthermore, in relation to that, the calendar is in fairly good shape. Does the distinguished acting Republican leader agree?

Mr. GRIFFIN. Yes; I agree, and I think that is very considerate of the majority leader.

Mr. MANSFIELD. Of the joint leadership.

That is it, Mr. President.

Mr. MOSS. Mr. President, will the Senator yield for a unanimous-consent request?

Mr. MANSFIELD. How long?

Mr. MOSS. About 2 minutes.

Mr. MANSFIELD. Very well. Make it 1 minute.

OBJECTION TO REQUEST FOR CHANGE OF REFERENCE OF S. 2032, TO AMEND THE HATCH ACT

Mr. MOSS. Mr. President, on June 9, 1971, I introduced S. 2032, a bill aimed at long overdue reform of the so-called Hatch Act, which has been governing the political activities of Federal employees since 1939.

At the time I introduced this legislation, it was referred to the Committee on Rules and Administration. Today, however, I am informed by Senator CANNON, who is chairman of its Subcommittee on Privileges and Elections, that because the Hatch Act provisions do not affect elections per se, but only the activities of the Federal employees in those elections, he would have no objection to having S. 202 re-referred to the Committee on Post Office and Civil Service.

His position on this matter agrees with that of the Rules Committee chairman. On Monday, Senator JORDAN indicated that another Hatch Act reform measure, introduced by Senator MCGEE, would most appropriately be referred to the Committee on Post Office and Civil Service.

Mr. President, since the Committee on Post Office and Civil Service, of which I am a member, is most deeply concerned with Federal employee issues, I ask that S. 202 be re-referred to this latter committee, where it can be considered along with other proposals to liberalize the Hatch Act. I believe this would greatly facilitate Senate action on long overdue reform of laws which continue to deny over 3 million Federal employees any responsible role in our democratic processes.

Mr. GRIFFIN. Mr. President, I object.

The PRESIDING OFFICER. Objection is heard.

SENATE INTERVENTION IN SUPREME COURT PROCEEDINGS ON THE SPEECH AND DEBATE CLAUSE OF THE CONSTITUTION

The Senate continued with the consideration of the resolution (S. Res. 280) authorizing Senate intervention in the Supreme Court proceedings on the issue of the scope of article I, section 6, the so-called speech and debate clause of the Constitution.

Mr. ERVIN. Mr. President, this resolution recognizes the fact that the Supreme Court case which is to be reviewed on writs of certiorari, which is concerned with certain legislative activities of the junior Senator from Alaska (Mr. GRAVEL), presents a question of grave moment to the Senate in respect to the meaning and the scope of the speech and debate clause set out in article I, section 6, of the U.S. Constitution.

As is well known to the Senate, the distinguished Senator from Alaska read, at the time this case arose, certain extracts from the so-called Pentagon Papers at a session of a subcommittee of which he was chairman. The Senator from Alaska was acting in the execution of his office as a Member of the U.S. Senate.

After that event, an aide of the Senator from Alaska was summoned before a grand jury sitting in the city of Boston, and an effort was made on the part of the Government to examine the aide of the Senator from Alaska in respect to the action taken by the Senator from Alaska on the occasion which I have mentioned.

This was recognized by the Senator from Alaska to raise a grave constitutional question under article I, section 6, the speech and debate clause, and so he intervened in the proceedings before the grand jury in Boston, and asked that the subpena for his aide be quashed, or, in lieu thereof, that the scope of the questions which would be put to the aide be restricted so as to prevent any inquiry being made by the grand jury in respect to the action of the Senator from Alaska in the execution of his office as Senator.

The speech and debate clause provides, in substance, that no Member of Congress can be required to answer for anything he says in a speech or debate in any other place, that is, otherwise than in the Congress itself.

This privilege is given to Senators and Representatives because of the experience of Members of the British Parliament prior to the independence of this Nation. They had a situation in which Members of the British Parliament were actually prosecuted and punished at the insistence of the Crown for daring to speak their honest views on the floor of the House of Commons.

Mr. President, this privilege is not given to a Senator or a Representative for his own benefit. It is given to Senators and Representatives for the benefit of the Nation.

It is recognized that it is essential for Senators and Representatives to have an absolute privilege to say in speech and debate anything which they feel their duty to their country requires them to say. They are given this privilege or this right for the benefit of the Nation, in order that the Nation may have the benefit of courageous action on the part of those who are our lawmakers.

While the provision of the Constitution is restricted by the terms to speech and debate, it has been recognized by the decisions of the Supreme Court that this privilege extends to every activity taken by a Senator or a Representative in the execution of what he conceives to be the duties of his office, even though the matter is not connected with something which is germane to the action of the House of which he is a Member.

It is absolutely essential that this be so, because, as we know, a large part of the labor of each Member of Congress is done in committee. So the privilege is not restricted to the floor of the House of which the Member is a Member. It extends to any of his official actions, and it is not required that his action to which the privilege extends shall be germane to any matter pending before the House or before the committee of which he is a Member. This is essential, for without this right, the privilege or right would amount to nothing. A Senator or Representative, who is elected to Congress, if he disagrees—as he would have a right to do and as he might conceive it to be his duty to do—with the majority of the other Members of the House of which he is a Member, would be denied this privilege if the privilege could be exercised only in respect to a matter which was germane at the moment to some business pending before the Senate or the House or a committee of the Senate or the House.

Otherwise, an individual Senator or an individual Representative could be robbed of the privilege in its entirety. This is a privilege which is given to a Senator and a Representative, and it protects no matter how much his action may be disapproved of by the other Members of the House of which he is a Member. This is essential in order to make the privilege or the right of any value whatever.

I have no reference to the distinguished Senator from Alaska in saying this, but I think that the right which arises out of the speech and debate clause of the Constitution is intended to protect every Member of the Senate and is even intended to allow a Senator or a Representative—to put it in plain English—to make a damn fool of himself. It is necessary that this be so if the American people are going to have the courageous and the honest representation which they are entitled to have in Congress.

The Senator from Alaska, in the judgment of the Senator from North Carolina, has been fighting a fight which is essentially a fight on behalf of the Senate of the United States. When his aide was called to testify before the grand jury, he rightly intervened in his aide's behalf and pointed out to the Federal district court, and subsequently to the circuit court of appeals of that circuit, that if the courts are going to take note of the realities of the situation, the courts are bound to conclude that it is impossible, in the present state of duties which devolve upon a Senator, for a Senator to act without the assistance of his aides.

The Government took a peculiar position in the matter originally and took the position—according to the brief I have read—that it not only had a right to summon the aide of the Senator from Alaska to testify before the grand jury but also had the right to subpena the Senator, himself—a position which is clearly untenable.

This matter has been heard on appeal by the court of appeals of that circuit, and the court of appeals has handed down a very fine decision. The court of appeals recognized the position taken by the Senator from Alaska that it is essential that this privilege extend to the Senators' aides, insofar as the Senators' aides are acting at the instance of the Senator and the Senator is acting within the execution of his office. This was an extension of the recognition of the privilege beyond what had been recognized in the previous decisions of the Supreme Court of the United States.

This case, which is being reviewed on writs of certiorari applied for both by the Department of Justice and by the Senator from Alaska, presents squarely the question as to whether or not this right or privilege, secured by article I, section 6, of the Constitution, extends to the aides of Senators.

It is essential, it seems to me, for the Senate, as an official body, to make an appearance in this case as an amicus curiae and insist that the Supreme Court accept the interpretation based upon article I, section 6, by the court of appeals in a most enlightened opinion.

There also are other questions which should be debated and presented to the court for its consideration; namely, the question of to what extent a Senator has the power to inform the public about matters in which the public has a grave concern. Certainly, the public has had no graver concern in recent years than its concern in respect to the war in Southeast Asia.

I am constrained to say that the position of the Senator from North Carolina and the position of the Senator from Alaska in respect to the war in Southeast Asia are about as divergent from each other as are the views of any other two Senators on that particular matter. But I think it is essential for us to present to the court the position that the Supreme Court should adhere to the very wise opinion and decision made by the court of appeals in respect to the extension of this privilege of the Senator to the aides of the Senator when acting within the course of the Senator's orders and the Senator has acted within the execution of his office.

I also think it is necessary to try to persuade the court to make some decision with respect to the question of what actions a Senator can take to inform the public about public questions in which he feels a great concern; that is, the question of publication.

We have no authoritative decision of the Supreme Court which settles the last question. When we take the position that the privilege must necessarily be extended from the Senator to the aide who assists the Senator in the execution of his office, we are merely asking the court to accept reality, because that is the way Senators function. When we ask that the court make some definite decision on the question of the extent of the right of a Senator to undertake to inform the country of matters in which he has a deep interest—that is, public matters—I think we are also taking note of reality.

Those of us who sit in the Senate day after day know that it is extremely difficult to get the attendance of Senators, with their manifold duties, to hear debates on the floor of the Senate, and that one of the ways in which we can reach Senators and bring conviction to them about the soundness of our views is to get the news media to take note of those views, and in that way indirectly inform the other Senators of the views we entertain and give them an opportunity to weigh their soundness.

This resolution would authorize the filing of an amicus curiae brief on behalf of the Senate, to present the questions to the Supreme Court. It recognizes, in effect, that the Senator from Alaska has, thus far, been fighting a battle which is essentially the battle of the Senate, insofar as it involves the extent of the privilege based on the right of the speech and debate clause in the Senate. It contains a provision that would let the Senate finance out of its contingent fund the cost of the Senator from Alaska going to the Supreme Court but not the expenses accrued prior to that time.

I sincerely trust that the Senate will adopt the resolution because I consider that the adoption of the resolution is necessary to protect the prerogatives of the Senate and the prerogatives of every Senator.

I would say that the resolution expresses the claim that its adoption by the Senate will not be construed to be the expression of any opinion as to whether the Senator from Alaska, whose conduct is involved in this case, was wise or foolish; but it does recognize that it is essential for the Senate to see that this prerogative of Senators is protected to the fullest extent that the Constitution permits.

Mr. PASTORE and Mr. SAXBE addressed the Chair.

The PRESIDING OFFICER (Mr. BENTSEN). The Senator from Ohio is recognized.

Mr. SAXBE. Mr. President, first, I should like to state that not only do I have an argument but I also have sev-

eral amendments which are now at the desk. It is my intention to ask for rollcall votes on the amendments as well as a rollcall vote on the resolution itself.

I should like to make it perfectly clear that there is no opposition as to the purpose of the Mansfield-Ervin resolution. I have listened to what the Senator from North Carolina has just said, and I agree, and I think the minority agrees also, that the Senate as a whole should be represented at the Supreme Court by the filing of an amicus curiae brief. We oppose only the provision which authorizes the expenditure of public funds to provide for the legal expenses of the Senate and the junior Senator from Alaska.

Mr. President, the relevant facts and procedural history of this case began June 29, 1971, when the Senator from Alaska unsuccessfully attempted to insert into the CONGRESSIONAL RECORD a classified study prepared by the Department of Defense popularly called "The Pentagon Papers." Not being able to accomplish his purpose before the entire Senate, he convened the Subcommittee on Buildings and Grounds, of which he was chairman, of the Senate Public Works Committee. And, even though the documents bore an overall defense security classification of top secret sensitive, he began at midnight on the 29th to read aloud extensive portions of the study. At the close of the subcommittee hearing, and when he could read no longer, the Senator from Alaska placed the entire study, comprising some 7,000 pages of material in 47 volumes, into the public subcommittee record.

The question of whether the subcommittee meeting was legal I want to raise in passing, but I think the circuit court of appeals has taken care of that to our satisfaction. Needless to say, the fact that the subcommittee meeting was called after the offices were closed and notification was given by slipping a note under the doors of the members of the subcommittee after the offices were closed, certainly is not in the spirit or intent of the committee rule then existing.

I might further raise the point that the new rules of the Senate which have been adopted by the Committee on Public Works would not permit this, but at that time those rules had not been adopted. They were adopted shortly thereafter. The questionable nature of calling of this subcommittee meeting will not be an important element in the amicus curiae brief before the Supreme Court.

Returning to the facts of the case, the Senator from Alaska contacted the Institute for Policy Studies here in Washington sometime on June 29 for the express purpose of obtaining someone to edit the record containing the Pentagon papers. Dr. Leonard S. Rodberg, a physicist and resident fellow at the institute, reported to the Senator's office, and was immediately placed on his staff. Dr. Rodberg received no compensation from the Senate, but was cloaked with all other indicia of Senate employment. He immediately went to work for the Senator from Alaska, editing the transcript of the subcommittee hearing after he had assisted the Senator at the subcommittee meeting. Dr. Rodberg is still on the Senator from Alaska's staff.

After the committee transcript containing the Pentagon papers was prepared, Dr. Rodberg assisted the Senator from Alaska in negotiating with several publishing firms for private publication of the study. An agreement was ultimately concluded with Beacon Press of Boston to publish a four-volume work entitled "The Senator Gravel Edition of the Pentagon Papers: The Defense Department History of Decisionmaking on Vietnam." Beacon Press is the publishing arm of the Unitarian Universalist Association.

On August 24, 1971, Rodberg received a subpena from a Federal grand jury in Boston. And, the Unitarian Universalist Association received two subpenas duces tecum which were withdrawn because of a stay order in the lower court. Rather than appear as a witness before the Federal grand jury, Dr. Rodberg filed a motion to quash the subpena in the Federal district court. The Senator from Alaska was allowed to intervene in this litigation and argued that Dr. Rodberg, as his legislative aide—which the Senator from North Carolina (Mr. ERVIN) has just referred to—was protected by the speech or debate clause of the Constitution from any inquiry regarding the Senate subcommittee meeting or his efforts on behalf of the Senator from Alaska to publish the Pentagon Papers.

The district court denied the motion to quash but said:

> No witness before the Grand Jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor about things done by the Senator in preparation for and intimately related to said meeting.

Also, the court stated:

> Dr. Leonard S. Rodberg may not be questioned about his own actions on June 29, 1971 after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting.

The district court's opinion also stated that the arrangement for private publication of the study by Beacon Press was not within the Senator's constitutional privilege and therefore Dr. Rodberg could not refuse to testify before the grand jury concerning publication. While the Senator from Alaska was seeking modification of the district court's order, a grand jury subpena was also served on Howard Webber, editor of the Massachusetts Institute of Technology Press, with which ultimately unsuccessful negotiations for publication took place. This subpena was also stayed by a supplemental order from the court of appeals.

Both sides appealed. The first circuit court of appeals held:

> No witness before the Grand Jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor if the questions are directed to the motives or purposes behind the Senator's conduct at that meeting, about any communications with him or with his aides regarding the activities of the Senator or his aides during the period of their employment, in preparation for and related to said meeting." The Court further held that "Dr. Leonard S. Rodberg may not be questioned about his own actions in the broadest sense including observation and communications oral or written, by or to him, or coming to his attention while being interviewed for, or after, having been engaged as a member of Senator Gravel's personal staff to the extent that they were in the course of his employment.

The court also rested its decision on a common law privilege that prevents questioning the legislative aide, instead of relying on constitutional immunity. Finally, the court of appeals dealt with private, third parties, recognizing that they could be asked certain questions concerning their own conduct regarding the publication of the Pentagon Papers.

Senator GRAVEL and the United States both sought and were granted writs of certiorari by the Supreme Court. On the merits, the court will consider the following questions:

First. Is the publication of the public records of a congressional subcommittee protected by the Constitution from judicial inquiry; that is, can the executive branch use the subpena and contempt powers of the judicial branch to test legislative activity;

Second. Are personal Senate aides and third parties—here Beacon Press—assisting in the informing function of the Member of Congress protected from judicial inquiry;

Third. Can a court inquire into the procedural regularity of a Senate subcommittee hearing or is this strictly the function of the legislative branch; and

Fourth. Did the circuit court err in relying upon the common law immunity for Senators and aides established for the executive branch rather than the constitutional immunity contained in article I, section 6.

The fact pattern which I have previously enumerated makes it obviously clear that the junior Senator from Alaska abused scope of "legitimate legislative activity" when he convened the Subcommittee on Buildings and Grounds of the Public Works Committee. Even though he may have complied with the "letter of the law" insofar as following required procedures for convening the subcommittee is concerned, it is clear that there is no acceptable rationale for a review and rendition of the "Pentagon Papers" before that particular subcommittee. Consequently, how can the Senate as a body now authorize and obligate itself to pay the legal expenses incurred as a result of the cause of action which directly arose out of the abuse of the rules surrounding this incident? It is, to say the least, a non sequiter.

Second, to assume now the legal expenses of the Senator from Alaska, as this resolution provides, would establish a dangerous precedent. That precedent would enable any one Member of the Senate to effectively bind the Senate as a body to authorize payment of legal expenses merely by the act of intervening in a lawsuit whenever he chose to do so. I do not believe it is the desire of this body to place ourselves in that position.

Further, to allow now for the fees of private counsel is not warranted. Surely we who make the laws are qualified to fashion our own legal arguments before the Supreme Court, which in turn is charged with the obligation to interpret those laws.

Finally, the Senate recently has on two occasions authorized the retention of and payment for private counsel. Those two cases, Dombrowski against Eastland and McSourley against McClellan, clearly establish the proposition that the Senate should only assume the legal expenses when one of the Members has been sued and must answer as a defendant. This is not the case before us now. Here we have a situation where a Member has interviewed in a preexisting legal action. Now it might be argued that the junior Senator from Alaska had no choice but to intervene. This is not so. He clearly had the option to intervene or not to intervene, and his intervention in no way altered the basic question of the interpretation of article I, section 6, of the U.S. Constitution which is now before the court. To maintain that his intervention was necessary to protect the Senate's interest cannot be supported. If such were the case then why do we find it necessary to be debating this resolution which provides for the Senate to file our own amicus brief?

We can only conjecture as to the reason for his intervention. Was it to pay Dr. Rodberg's expenses, or was it at the time to keep alive the issue of the Pentagon papers when interest was beginning to die? I cannot help feeling that it was an attempt to keep alive something which at that time was an extremely controversial issue.

Again I say to the Senate that our interests in article I, section 6, are the same. We wish to protect the immunities which we enjoy in this body, conferred years ago against incursions of the executive and judicial into the narrow field of legislative immunity.

However, in this particular case I cannot help feeling that this is primarily an in-house situation that we as Senators should have settled on the floor of the Senate.

Certainly it was a violation of the spirit of the Senate, and it was a violation, while not perhaps of the rules which did not exist at that point, but certainly of the orderly and mannerly procedure we have been following over the years.

The frustration over not being able to read the Pentagon papers on the floor of the Senate must have been great. The Senator then called a meeting of the Subcommittee on Buildings and Grounds. I have here a selected area set out for the Committee on Public Works, and nowhere does it, by any stretch of the imagination, go to an issue such as this. Then he issued an order which obviously could not have been successful without members of that subcommittee, and then proceeded to read classified and secret material for the sole purpose of publishing it in a yet-to-be selected paper.

I cannot help feeling that it is an embarrassing incident for the Senate and an embarrassing incident that we should police ourselves. Obviously, there is little interest in so doing, but I think we can show our indignation and our contempt for such procedures by not bailing out the Senator from Alaska at this point.

The Senator from North Carolina referred to the question of paying only those fees that are prospective. I find nothing in the resolution which states that they are only prospective; and I find nothing in it which would limit the amount of the fees.

In an effort to determine the amount of the fees, we contacted counsel representing the Senator from Alaska and asked if they would give us an indication. The answer was, "Well, it is not substantial; but then it is not insubstantial." We asked "Is it over six figures?" They answered "It will probably be less than six figures."

I would say that would mean that $99,000 is less than six figures. This is as much as we could get on it.

Nobody has discussed expenses for the Senate's representation. Amendments I have at the desk will go to this question. But then, again, a committee of Senators is proposed in the resolution. There is no number, no question of bipartisanship, and it gives them no power to negotiate this matter.

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

Mr. SAXBE. I yield.

Mr. MANSFIELD. There were sums bruited about in the policy committee. We had before us for that purpose the Senator from North Carolina (Mr. ERVIN), whom I look upon as the outstanding constitutional lawyer in this body. Some of the figures bruited about were—and I stand to be corrected—between $20,000 and $25,000.

Second, the policy committee did consider a committee of Senators equally divided between the two parties, but the final decision was that only one Senator would be appointed from our side, and he would be the distinguished Senator from North Carolina. All of this was predicated on bringing the matter to the attention of Republican Senators, so they would be able to give us the benefit of their judgment. If they decided to join us, fine; if they did not, that was their privilege.

So we did discuss these matters. If a Senator is selected from our side, he would be the Senator from North Carolina (Mr. ERVIN) only; and if any money is to be expended, the figure I heard suggested was between $20,000 and $25,000.

I make this statement to the Senate for its information.

Mr. SAXBE Did the Senator contemplate that figure to be for representation of the Senate as a body, or did that amount include both the Senate representation and fees to counsel for the Senator from Alaska?

Mr. MANSFIELD. As I gather—and I am not a lawyer—it included the fees the Senator from Alaska might incur in relation to this process from here on out. I understand the briefs have to be filed by April 7, but it was primarily—and again I wish the Senator from North Carolina would corroborate this or correct me if I am wrong—for the use of outside counsel and advice to help representatives of the Senate in appearances before the court. Is that correct?

Mr. ERVIN. Yes; that is the way I understand it. No action was definitely taken, but that was the consensus in the matter.

Mr. MANSFIELD. The brief has to be filed April 3 or 4 rather than April 7.

Mr. MATHIAS. Mr. President, will the Senator from Ohio yield?

Mr. SAXBE. I yield.

Mr. MATHIAS. Mr. President, I thank the Senator for yielding. I concur with his statement that there is considerable sympathy on this side of the aisle for the basic proposition which has been set forth by the distinguished Senator from North Carolina. The Senate does have a primary interest in these proceedings, and that interest should be represented in an impartial and objective brief that would be filed in an attempt to lay out the constitutional law on this very difficult subject.

Scholars in recent years have been talking about the twilight of parliaments, stating that the age of strong legislative arms of government is in fact coming to an end. We see all too often that the executive branch of a government, not only of this Government but also of many other governments, is stronger due to the different kind of world in which we live.

One cause for the increase in the power of the executive branches of government in many parts of the world is the growth of what we in this country call executive privilege. Executive privilege is the claim by the executive branch of government that it has the right and, in fact, the duty and responsibility, in the interests of the country, to withhold information. I think we in Congress have at least tacitly admitted there is such a right because we have failed to press witnesses who have claimed executive privilege.

Clearly the President takes counsel not only within himself but also with his trusted advisers to reach the goal of Government. All of this has led to certain practices on behalf of the executive branch of government which have strengthened it very greatly since the time when the legislature had the right to question anything the executive did.

Concurrently, of course, there have been changes in the legislative branch of Government. The basic constitutional immunity given to legislators by the Constitution of the United States—to allow legislators in the House and the Senate to counsel among themselves freely in open debate for the good of the country—has become inadequate if it is limited to this floor alone because many legislative activities take us away from the floor of the Senate.

It is also inadequate if it is limited to Members of this body alone because we, as well as officials in the executive branch, have found it necessary to have advice and counsel. We should very clearly have that part of our legislative activity covered within the immunities which the Constitution originally gave us.

These are all purposes which existed before the Senator from Alaska called a subcommittee hearing, and I hope they will exist for a long time hereafter. That is our basic governmental proposition dealing with the organic law of the country, and it is in that context, I think, that it demands our attention.

It is the broad, objective view that we seek to present to the court, and not a narrow view based on a single case. In that light I think that, with some amendments which we will propose, we can support the thrust of the resolution presented by the Senator from North Carolina.

Mr. DOMINICK. Mr. President, will the Senator from Ohio yield?

Mr. SAXBE. I yield.

Mr. DOMINICK. I thank the Senator from Ohio.

Mr. President, I have listened to these statements with considerable interest. I also have done quite a lot of work on this particular resolution, with the aid and assistance of my staff. I have consulted with the Senator from Ohio, the Senator from Maryland, and many other Senators. I think that if we are going to take a look at this matter we ought to try to put it somewhat into perspective. First of all, we are faced with the situation in which the Senator from Alaska, as I understand it, is claiming immunity not only for himself and for Dr. Rodberg, who went on his staff the same day the publicaion occurred but who did not appear on the Senate payroll, but also is claiming immunity for anyone with whom he has discussed the matter, whether he is in or out of government.

So it is a very broad exemption that is being claimed by the Senator from Alaska.

Section 6, article I, of the Constitution says—and I read it in part—that Senators and Representatives shall not only be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same—and I will interpolate here—but also that for any speech or debate in either House they shall not be questioned in any other place.

The Senator's claim is not that he is being questioned in any other place, but that other people are being questioned. They are being questioned not because any charge has been filed against them, but solely in order to secure information for a grand jury to determine whether or not any prosecution is even advisable.

In other words, we are dealing at the moment with a purely hypothetical case where a grand jury has simply been brought together to try to learn what the evidence is and to determine whether any prosecution is even warranted. That is the first situation we are faced with.

The second situation is that apparently no factual questions are involved in this case. As I said a few minutes ago, Dr. Rodberg—and this was pointed out by the Senator from Ohio—was apparently a physicist who was working outside the Senate as a friend, or aide, or assistant, or ideological friend, or whatever it was, with the Senator from Alaska, and was not made an aide except for the specific purpose, so far as I can find out, of assisting in the publication of the Pentagon papers at the subcommittee hearing. This was the Subcommittee on Public Buildings and Grounds of the Committee on Public Works.

The Public Works Committee has jurisdiction—and I read this into the RECORD because it is important—over proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

(1) Flood control and improvement of rivers and harbors.

(2) Public works for the benefit of navigation, and bridges and dams (other than international bridges and dams).

(3) Water power.

(4) Oil and other pollution of navigable waters.

(5) Public buildings and occupied or improved grounds of the United States generally.

(6) Measures relating to the purchase of sites and construction of post offices, customhouses, federal courthouses, and government buildings within the District of Columbia.

(7) Measures relating to the Capitol Building and the Senate and House Office Buildings.

(8) Measures relating to the construction or reconstruction, maintenance, and care of the buildings and grounds of the Botanic Gardens, the Library of Congress, and the Smithsonian Institution.

(9) Public reservations and parks within the District of Columbia, including Rock Creek Park and the Zoological Park.

(10) Measures relating to the construction or maintenance of roads and post roads.

Under no conceivable circumstances does the committee have jurisdiction over a classified defense document called "The Pentagon Papers," no matter how one views it.

There is a rule of the Senate, which perhaps is not totally applicable here, because of the circumstances, but it does provide that should a committee take jurisdiction over a subject matter over which it has no jurisdiction, it is then subject to challenge.

It is very difficult to challenge anything before a one-man subcommittee meeting held at midnight, with no notice of the meeting having been given. But I feel certain, as the Senator from Ohio has said, that if the rules were not flatly broken, they were at least impliedly broken, and most certainly the spirit was violated.

Then we were suddenly faced with this resolution, drawn up and presented to us in our conference on the Republican side. We looked it over, and it seemed to us that it involved us immediately in the question of the activities of the Senator from Alaska about which the Senate had not undertaken any inquiry up to this time; but under this resolution we are being asked to participate with the sponsors of the resolution in authorizing the payment of public funds for the Senator from Alaska as well as for the Senate. It is not just the expenses of the Senate itself which we are being asked to underwrite, but also the expenses of the Senator from Alaska.

I am a lawyer, although I have not practiced since 1961, when I came to Congress. But in my 20 years of experience, expenses, generally speaking, refer to out-of-pocket expenses. They do not necessarily refer to legal fees, but I gather it to be so in this case.

In determining what a legal fee is, any lawyer—I do not care who he is or where he is from—usually delays billing the client until after he has seen what has happened in the case. Therefore, I would presume the legal fees and the expenses of the Senator from Alaska will be presented after the Supreme Court hearing, and will be considered as a part of the Supreme Court hearing. So to that extent we are already underwriting the work which has been done—very effective work, I might say, from the standpoint of the Senator from Alaska and the Senate—in both the district court and the court of appeals. We will then be faced with a brief and with legal fees on the question of how broad the exemption is in the Constitution in a case in which the Senator from Alaska himself intervened and in a case in which no criminal charge had been leveled, but in which a grand jury was simply trying to find out whether there were any facts sufficient to warrant an indictment.

If we start getting the Senate involved to that extent at the expense of the taxpayer, it strikes me that we are going way beyond the scope of any other Senate involvement. This question was discussed at some length in the Republican conference, a quorum being present; and a resolution was adopted, which I read as follows:

Resolved, That the Republican Conference authorize the Chairman, Senator Smith of Maine, to appoint a committee to perfect and file a brief; that said brief pray the Supreme Court to rule in such manner so as to protect the necessary immunities of the Legislative Branch notwithstanding the misconduct or alleged misconduct of a single Member. No expenditure of taxpayer funds to be authorized.

That was the position that we took in our conference, after we had had some quite spirited debate on the whole subject. Pursuant to that resolution, Senator SMITH did appoint a committee, consisting of the Senator from Ohio (Mr. SAXBE), as chairman, and Senator MATHIAS and myself as the other members. That is one of the reasons why we are on the floor of the Senate today.

But in all conscience, I simply cannot see how the Senate can take the position that we are going to use public funds, not only to take care of the expenses of the Senate itself in its brief to the Supreme Court, but also absorb the expenses which the Senator from Alaska has incurred by intervening in the district court initially. This, to me, simply does not mean that we are operating reasonably or sensibly insofar as the public of the country is concerned.

Having said that, I think the next thing that we ought to take a look at is what will be before the Supreme Court.

I have brought up the questions of fact which I wish had been debated, discussed, and considered at least by Members of the Senate long before this, because I do believe that we ought to take care of our internal situations as best we can, and to do it promptly. But the district court, as the Senator from Ohio has said, has assumed that Dr. Rodberg was an employee, and the Justice Department has not denied that, so that is not an issue.

Second, as I understand it, the question of whether the publication was improper as a result of an nonauthorized

committee meeting is also not an issue before the Court. The parameters of the question which have been presented now for discussion before the Court read as follows——

Mr. ERVIN. Mr. President, will the Senator pardon me for an observation on the point he just mentioned?

Mr. DOMINICK. I am happy to yield to the Senator from North Carolina.

Mr. ERVIN. There is a decision of the Supreme Judicial Court of Massachusetts, which was handed down shortly after 1800, and which held that the courts would not inquire into the legality of the proceedings as to which the legislator invokes the speech and debate privilege, and that is recited with apparent approval by Justice Frankfurter in the decision which involved the legislative committee from the State of California in, I believe it was, the Brandhove case. I shall supply the correct citation later.

But the findings of the Court have placed those questions outside the parameters of the matters being heard on these writs of certiorari.

Mr. DOMINICK. I thank the Senator from North Carolina, and I think this helps the record.

In other words, what the Senator and I are both saying is that the questions vital to this case, particularly insofar as the Senate intervention in the Supreme Court is concerned, are not really to be considered because they involve the question of action or inaction of the Senate in regard to the conduct of a Member.

The Supreme Court, in granting certiorari, simpy states the questions presented as follows:

(1) Does the constitutional responsbility of a U.S. Senator to inform his constituents and colleagues about workings of government require that his action in publishing an official, public record of a subcommittee of which he is chairman, containing documentary information critical of executive conduct in foreign affairs, be accorded protection as legislative activity under the Speech and Debate Clause?

That is the first point. There is nothing in this question which would bring up the issue, which is what we are talking about, as to whether the subcommittee of which the Senator from Alaska is chairman had any right to review any of these documents whether in secret or in public session. So that apparently is not to be considered.

The second question for discussion is:

(2) Does the Speech and Debate Clause bar grand jury questioning of aides of members of Congress and other persons about matters that may touch on activities of members of Congress which are protected "speech or debate"?

Notice that, again, there is nothing here in connection with the Senator from Alaska; nor is his immunity being questioned. The issue is whether a grand jury can question, not only aides, or perhaps not aides but other persons who are not even connected with the Senator from Alaska except by research that they may have done or by other activities whereby, somehow or other, they may have been connected with him.

The third question is:

(3) Does a senatorial aide have a common law privilege not to testify before a grand jury concerning the private republication of material which his Senator-employer had introduced into the record of a Senate subcommittee?

In other words, here we are not even dealing with the speech and debate clause given as a privilege under the Constitution to Members of the House and Members of the Senate, but a common law right which is being asserted on behalf of aides not to testify before a grand jury.

I gather that the Justice Department is taking the view that no one has any immunity under the speech and debate clause of the Constitution except a Senator himself, and then only for speech or debate on the floor of the Senate. This is their position. It has been their position in the lower courts, and they have been beaten in the lower courts on this point, and are going to the Supreme Court on the same issue.

It strikes me that whatever brief we are filing—and I do not know who is going to prepare it, but I hope that Senator ERVIN will in the light of his unmatched qualifications—will not go so far as to assert that any person contacted by any Senator in any way is exempt from giving testimony before a grand jury or a court. If we go that far, it means that with modern means of publication, either by radio, television, or letters, and with the frank now being used freely by Members of the House and the Senate, everyone is going to be immune from any questioning anywhere in the country. I certainly hope we do not go that far.

I would say again that I think we are here dealing with an extremely sensitive subject. I see absolutely no reason why members of the public, who have not been involved in this matter and who in many cases object strenuously to what Senator GRAVEL and others did, should be saddled with the expense of paying his costs in the lower court. I think it is wrong, and it was for that reason that I was willing to serve on this committee and speak my piece here tonight.

Mr. MANSFIELD. Mr. President, will the Senator yield to me briefly?

Mr. DOMINICK. I yield to the Senator from Montana.

UNANIMOUS-CONSENT AGREEMENT

Mr. MANSFIELD. Mr. President, I have been talking with the distinguished Senator from North Carolina, who is carrying the burden of the pending legislation, and the distinguished Senators from Ohio (Mr. Saxbe), Colorado (Mr. DOMINICK), and Maryland (Mr. MATHIAS). I should like at this time to propound a unanimous-consent request: That beginning at the hour of 10:15 tomorrow morning there be a limitation of 1 hour on each amendment and 1½ hours on the resolution.

The PRESIDING OFFICER. Is there objection?

Mr. GOLDWATER. Mr. President, reserving the right to object, I should like to ask the majority leader the status, now, of the so-called War Powers bill. I was told earlier today that it would be taken up next week, maybe Tuesday or maybe Thursday. I have been told, however, within the last 15 minutes, that as a result of this unanimous-consent agreement it would be taken up on Thursday of this week.

Mr. MANSFIELD. No, no. The best we can say as of now is that it will be taken up possibly on Tuesday. That is a long shot; it may more likely be Wednesday or Thursday, and I am not sure we can finish it by the time we begin the Easter recess at the conclusion of business a week from Thursday. But not this week.

Mr. GOLDWATER. I am very deeply interested in that bill. I also have a son, who is currently in Congress, and who is getting married. I do not wish to turn down my duties to him in deference to my duties here in opposition to that measure. I have to live with him a lot longer than with my fellow Senators.

Mr. MANSFIELD. I know; but may I ask the Senator what Solomon-like answer he would give were he in my shoes?

Mr. GOLDWATER. Well, if I were in the Senator's shoes I would join the Republication Party. [Laughter.]

I would suggest, because this matter is not going to be settled quickly—I think there will be 3 or 4 days of debate on it—that if it could be put off until after Easter, it would serve the Senate better, and we can take care of some other bills that can be taken care of better in the interim.

There is no big hurry about having the war powers bill passed right now. It can pass at any time.

Mr. MANSFIELD. That is correct.

May I say that the joint leadership will do its best to cooperate with the distinguished Senator from Arizona. But I wish he would exercise his usual forbearance—and I say that most seriously—and recognize the position we are in. If we can accommodate him, we will; but it is my impression that the bill will take 3 or 4 days, and I do not think we can finish it before we go out on a 2-day Easter recess beginning at the conclusion of business a week from tomorrow.

Mr. GOLDWATER. I thank the Senator.

The PRESIDING OFFICER. Is there objection to the request of the Senator from Montana? The Chair hears none, and it is so ordered.

The unanimous consent agreement reads as follows:

Ordered, That effective at 10:15 a.m. on Thursday, March 23, 1972, during the further consideration of S. Res. 280, a resolution authorizing Senate intervention in the Supreme Court proceedings on the issue of the scope of article 1, section 6, the so-called speech and debate clause of the Constitution, debate on any amendment shall be limited to 1 hour, to be equally divided and controlled by the proponents of the amendments and the Senator from North Carolina (Mr. Ervin). *Ordered further*, That debate on the resolution be limited to 1½ hours to be equally divided and controlled by the Senator from North Carolina (Mr. Ervin) and the minority leader or his designee.

Mr. MANSFIELD. This agreement will not become effective until the hour of 10:15 tomorrow. There will be no morning hour for the conduct of morning business. There will be three speeches, however. So what will be said tonight

will be to lay the foundation for the discussion which will be resumed tomorrow.

I hope that Senators who want to speak on the matter will do so, because I should like to read the RECORD in full before we get back on the resolution tomorrow morning.

There will be no more votes tonight.

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

Mr. DOMINICK. I yield.

Mr. BROCK. I should like to take this opportunity to clarify a couple of points.

The Senator from North Carolina, the Senator from Montana, and the Senator from Ohio were discussing the matter of fees. Perhaps the Senator from Ohio or the Senator from North Carolina can tell me whether or not he has any assurance from the Senator from Alaska or his counsel as to the amount of the fees which might be anticipated under the resolution.

Mr. SAXBE. I believe the Senator heard what I said about the matter. We made a diligent attempt to obtain that information in contacting the Senator's counsel, and the nearest they would come to say that it would be less than six figures. But I might add that that certainly is not binding in any way upon this body or upon them.

Mr. BROCK. The Senator from Montana said that he understood the figure might be closer to $20,000 to $25,000.

Mr. MANSFIELD. I said that that was a figure which was bruited about. We had nothing to go on to confirm it. It was just a figure taken out of thin air, so it has no validity.

Mr. BROCK. Would the Senator from North Carolina be able to give us any idea of what the fees for the Senate portion of the resolution might be?

Mr. MANSFIELD. I would have to defer to the distinguished Senator from North Carolina for an answer to that question.

The question was whether we could give the Senator from Tennessee any idea as to what fees might be necessary to carry on such a proceeding before the Supreme Court. Is that correct?

Mr. BROCK. Yes.

Mr. ERVIN. I was just in consultation with the Senator from Alaska, and he said that he could inform me in the morning as to what his counsel thought it would be. I would suggest that we await that information, which I think the Senator is entitled to have.

Mr. BROCK. I would appreciate it very much. I would be delighted to wait until morning.

I should like to ask the Senator a further question. I think he would like to assure his constituents, as I would mine, that this action does not constitute an expression of support or even an attempt to condone any action which may have been undertaken by the Senator from Alaska personally.

Mr. ERVIN. The resolution contains a provision at the top of page 3 which reads:

Resolved, That these resolutions do not express any judgment of the action that precipitated these proceedings.

I think that under that reservation it would not.

I do not think it involves a question of whether the Senate approves the action which resulted in this lawsuit. The question is whether the Senate will stand up and fight for its undoubted privileges under the speech and debate clause.

Mr. BROCK. Would the Senator then clarify for me why the resolution has to go to the point of expressing willingness to pay the legal fees of the Senator from Alaska. He has voluntarily sought to be a party to this suit. Why could we not then limit ourselves to paying the fees of the Senate, which many of us could support?

Mr. ERVIN. The answer to that question is simply this: The ability of the Senate to present its views on this point depends upon the ability of the Senator from Alaska to make a presentation of his appeal, because our appeal would be much like a veriform appendix. It would be annexed to his appeal.

The thought of the Democratic Policy Committee was that we ought to make certain that he would be financially able to present his cause to the Supreme Court. Otherwise, our cause would fall, too.

Mr. BROCK. By this action does the Senator from North Carolina, or the Democratic Policy Committee, endorse every element of the Senator from Alaska's appeal?

Mr. ERVIN. I do not.

I mean no offense at all to the Senator from Alaska, but I invite the attention of the distinguished Senator from Tennessee to a statement in one of the Supreme Court opinions—I believe it was by Justice Brandeis—that some of the greatest constitutional doctrines have been declared in cases which involved people who were not too respectable.

I am not referring to the Senator from Alaska on that point, but it is to illustrate the fact that out of conduct of which we may disapprove sometimes arise decisions which establish great constitutional principles.

Mr. BROCK. I am in favor of great constitutional privileges so long as they are not rooted in something with which I very much disagree.

I have a great caution about asking my constituents in the State of Tennessee to pay legal expenses for an action with which they would disagree.

I raise this point because it seems to me, that the Senate could act fully, properly, and in the public interest in presenting its own case without being involved with the actions of the Senator from Alaska, either by implication or otherwise.

It seems to me that if the Senator says, as he has said, that he cannot in good conscience support the brief or the appeal of the Senator from Alaska as stated, then it is somewhat out of phase with our own responsibilities to ask the people of the country to pay the expenses of that suit. It seems to me that we have every right to protect the prerogatives of the Senate.

Mr. ERVIN. I did not quite say that. I said that I thought the adoption of the resolution authorizing the Senate to file an amicus curiae brief did not constitute an endorsement of the action taken by the Senator from Alaska. In fact, that is exactly what the resolution expressly disclaims.

Mr. BROCK. If the Senate is going to present its own view to the Supreme Court, which it has every right to do, then should it not hire its own counsel? Should we then designate one Member of the Senate to retain counsel for the Senate, because is that not what the Senator has done when he says we are going to pay the legal fees of the Senator from Alaska?

Mr. ERVIN. I am cautious about things like that, because I do not like to hire counsel and have no authority to pay, when no authority exists to pay the fee.

Mr. BROCK. The resolution empowers the Senator from Alaska to retain counsel or to continue paying counsel he already has, and to add additional counsel without limit.

Mr. ERVIN. I do not think so.

Mr. BROCK. I do not see anything in the resolution which limits him.

Mr. ERVIN. I would construe the resolution as allowing the Senate to employ counsel to prepare a brief, not the Senator from Alaska.

Mr. BROCK. I would refer the distinguished Senator to line 6 of page 2, which reads:

Resolved, That any expenses incurred pursuant to these resolutions, including the expenses of the junior Senator from Alaska.

That has no limit, no condition, no criteria. He can hire anybody he wishes, as many as he wishes, at whatever price he wants to pay, and we have no assurance as to what kind of brief is going to be presented. Yet we purport to present it on behalf of the Senate and that the people are going to foot the bill.

Mr. ERVIN. I do not think we would have the authority to tell the Senator from Alaska what kind of brief to file.

Mr. BROCK. I do, if the Senator is going to ask the taxpayers to pay for it.

Mr. ERVIN. It would not work that way because we cannot file a brief for the Senate unless the Senator from Alaska prosecutes his appeal—is proceeding on a writ of certiorari. We do not have to adopt the same position that he takes in his brief.

Mr. BROCK. Does the Senator honestly tell me that the Senate itself cannot submit its own brief before the Supreme Court as amicus curiae in this case without referring to the Senator from Alaska at all?

Mr. ERVIN. Yes, because if it were not for the Senator from Alaska's case, there would be no need for the Senate to intervene as amicus curiae.

Mr. BROCK. Then, why do we have to participate? Why do we have to pay counsel for the Senator from Alaska when we have our own counsel? That is what I cannot seem to get through to the Senator.

Mr. ERVIN. That is just the point which I understand the Senator from Ohio (Mr. SAXBE) is going to present by an amendment which, I presume, would be to eliminate this matter; in which event, of course, the Senator from Tennessee will be at liberty to vote for that amendment. He would also be at liberty to vote against the resolution in case such an amendment were rejected.

Mr. BROCK. The Senator can count on one thing, and that is that the Senator from Tennessee will support that amendment very vigorously.

Perhaps the distinguished Senator will answer one more question for me: How can I explain to my constituents that because this body, even if it is protecting the interests of the Senate and ultimately the interests of a legislative body, would raise their taxes and levy a fee upon their incomes so as to pay for the actions of the Senator from Alaska and his legal counsel in his defense?

Mr. ERVIN. The Senator from Tennessee has just put to the Senator from North Carolina a most difficult question. Tennessee used to be a part of North Carolina. North Carolina tried to explain things to the people of Tennessee, but the people of Tennessee would not take North Carolina's explanation. Finally, to settle the problems which arose between North Carolina and Tennessee, we gave them to the Federal Government. [Laughter.]

Mr. BROCK. We bless you for that. We have both prospered in the process. My grandfather came from North Carolina. We are proud of that heritage. We have learned from the process. However, the Senator is not responding to my question.

Mr. ERVIN. North Carolina, notwithstanding the fact that Tennessee was sometimes a wayward child, is very proud of her daughter, Tennessee. I think the Senator from Tennessee could explain to the people of Tennessee that here is a case which involves, in a most serious manner, the prerogatives of all Members of the Senate under the speech and debate clause of the Constitution, and that if he votes for the resolution, he can tell his people that he voted for the resolution in order to make it certain that the prerogatives of the Senate were fully sustained insofar as we could do so by persuasion upon the Supreme Court.

Mr. BROCK. I very much respect and admire the distinguished Senator from North Carolina. He is the most able constitutional lawyer in this body. I honor him.

Mr. ERVIN. I appreciate that compliment, but sometimes I think the Supreme Court had such an aversion to approving anything I knew on that subject, that it left me in a state of total ignorance. [Laughter.]

Mr. BROCK. I do respect the Senator from North Carolina, and I respect his statement that great constitutional questions can come from unfortunate situations.

I find the implications of this unfortunate situation of compelling interest at this particular juncture. I find it somewhat difficult to rationalize the first "Whereas," on page 2, which reads:

> Whereas this case necessarily involves the right of the Senate to govern its own internal affairs and to determine the relevancy and propriety of legislative activity and the scope of a Senator's duties under the rules of the Senate and the Constitution;

Mr. ERVIN. I will say that I do not have any difficulty with that, although I do not like "whereases" as a proposition. But under the Constitution of the United States, the Senate has the right to discuss with any Member of the Senate any conduct in which he may engage, which may be in violation or which the Senate might consider to be disorderly. I think that one of the crucial questions involved in this case is: Can a Senator of the United States be required to answer, either directly or indirectly, before a grand jury, for conduct which the Senate alone has the power to deal with? I think that is a very serious question.

Mr. BROCK. I would agree as to the seriousness of the question. I, frankly, would be more prone to follow the leadership of the Senator from North Carolina if the Senate had openly considered this question. But it has not. To my knowledge, no official body of the Senate of the United States has undertaken any action, or made any effort, to investigate the conditions surrounding this case.

Mr. SAXBE. Mr. President, if I might interject a comment, I was informed that the Committee on Public Works, in executive session, did consider the reporting fee, and the chairman and the ranking minority member objected to it. It was not further considered. That is as near an action in this regard that the Senate has taken.

Mr. GRAVEL. Mr. President, will the Senator from Tennessee yield at that point?

Mr. BROCK. I am delighted to yield to the Senator from Alaska.

Mr. GRAVEL. I wonder: Did I hear correctly that there was a reporting bill which was discussed in the Public Works Committee?

Mr. SAXBE. I was told that the reporting fee for the reporting of the subcommittee meeting was presented to the full Committee on Public Works and that it was objected to by the chairman of the committee, the Senator from West Virginia (Mr. RANDOLPH), and by the ranking minority member, the Senator from Kentucky (Mr. COOPER), and it was not further considered. No action was taken. Can this be clarified?

Mr. GRAVEL. I believe that the Senator from Kansas (Mr. DOLE), who is now in the Chamber, was one of the Senators at that meeting, and he knows the facts. He knows that a fee was not reported to the committee, but there was a fee which was objected to by the ranking minority member, and I volunteered to pay the fee. Similarly, the ranking Republican member of that committee, the Senator from Connecticut (Mr. WEICKER), also offered to pay the fee. Those are the facts.

Mr. SAXBE. What I referred to was the full Committee on Public Works.

Mr. GRAVEL. That is exactly what I refer to. The Senator from Kansas (Mr. DOLE) was present at that meeting, and if there is any explanation that can be made, it can be made by Senator DOLE.

Mr. BROCK. Perhaps the Senator from Kansas would inform us of the facts surrounding the action by the full Public Works Committee.

Mr. DOLE. Mr. President, as I recall, the meeting was held in executive session on July 8 and there was much discussion; but the final outcome was basically as the Senator from Alaska has indicated, that the question of the reporting fee may have been raised but the transcript has never been accepted by the Public Works Committee. The Senator from Alaska did volunteer to pay the reporting fee, and I believe that the Senator from Connecticut (Mr. WEICKER), on his own, and not as a member of a minority on the committee, asked if he might be permitted to pay one-half the fee. Whether he has done that, I am not certain; but there was never any committee action to pay the fee, nor has the transcript of the hearings on June 29 and June 30 been received by the committee.

That is why I am concerned, too, about the language raised by the Senator from Tennessee, on the legislative activity. I wonder, as a Member, if the resolution would not ratify the conduct of any Senator, not try to judge a Senator's conduct, but would, in fact, ratify the conduct of having an unauthorized subcommittee meeting without notice or any minority member being present, and about a subject over which the subcommittee had no jurisdiction.

If that is the case, maybe I can have a committee meeting on whether the Democrat National Committee should pay its telephone bill of $1.5 million. Then we can go to the Supreme Court and I can ask that the Senate pay for my counsel fees. I do not believe that is the intent of the resolution. I do not believe that I have that right as a Senator to have any hearings anywhere and say: "We will have hearings tonight. Follow me to whatever room I might be able to find," and then have some kind of hearings. Maybe I can after the resolution is adopted.

Mr. MANSFIELD. Mr. President, if the Senator will yield, the Democratic National Committee is not an adjunct of the Senate. There is no Senator on that committee that I know of, and certainly there is no relation to this institution.

Mr. BROCK. Mr. President, what about the Beacon Press? They were very much involved in this case. Are we going to endorse this, and can a Senator by anointment grant immunity to anyone he designates?

Mr. MANSFIELD. Mr. President, may I say, to keep the record straight, that what the Democratic Policy Committee did unanimously, and only after calling in as a special guest the distinguishd senior Senator from North Carolina, was to recognize a proposition which did not affect the Senator from Alaska so much as it affected the Senate as an institution and all Senators as individuals, the GRAVEL incident aside.

We immediately got in contact with the distinguished minority leader the same day. They were having a luncheon. We sent word to Mr. Ferris or Mr. Leach so that any questions could be answered so as to indicate that what we were attempting to do would be subject to the approval of the Republicans.

As the distinguished Senator knows, this is not a Democratic proposal, although it is in the form of a resolution introduced by two Demorcats. It is a Senatorial proposition, and it affects the Senate as an institution and all Senators as individuals.

I hope we will not get down to the Democratic National Committee telephone bill and whether it is due the A.T. & T., the I.T. & T., or whatever it is, or to the Beacon Press. We are talking about the Senate. That is what counts, and that is the most important factor so far as we as individual Senators are concerned. We re trying to keep alove the greatness of this institution.

Mr. BROCK. I am making every effort to do that. I revere this body. However, there is a serious question as to whether by paying the counsel fees of the Senator from Alaska in this case we do not in fact endorse whatever brief is filed, and if a Senator could designate some attorney, whether he is on his staff or not, to receive immunity, he would be a party to that and the Senate would be a party to it because it is paying for it.

Mr. DOLE. Mr. President, I did not mean to use that as an example. It just came to my mind. However, it has been on my mind for some time.

Mr. MANSFIELD. It has been on our minds, too.

Mr. DOLE. In any event, I think it raises a very serious question. Do we ratify the conduct of the Senator from Colorado or the Senator from Ohio or the Senator from Kansas? We are not the majority party. I am using ourselves as an example. If we adopt this resolution, will anything prevent me from having a committee meeting tomorrow night?

Mr. ERVIN. The resolution does not deal with a committee meeting.

Mr. DOLE. Suppose I had one.

Mr. ERVIN. It says on lines 1, 2, and 3 of page 3:

Resolved, That these resolutions do not express any judgment of the action that precipitated these proceedings; . . .

I do not know how that could be expressed more clearly. It is not an expression of approval. It is not approval.

Mr. DOLE. We have not been in touch on that issue. However, if some other Senator did something that might be similar to what has been done, we might get in touch with that Senator and discipline him in some way.

Mr. ERVIN. The issue in which we are primarily interested is whether a Senator is to be called on to be questioned in some other place in a court by the executive branch for action taken by him in the execution of his duties.

Mr. BROCK. It is a lot more than that. It is whether he or his political appointees or hirelings or anyone else he selects should be called on.

Mr. ERVIN. The court has passed on the question as to whether Dr. Rodberg was, within the meaning of the law, an aide to Senator GRAVEL. That matter is not involved.

Mr. BROCK. The court has acted. However, has the Senate acted? If the Senate is going to stand up and say before the court: "Let us alone. Grant us total immunity. Give us the right to run our own affairs and police our interests," I think we have a right to do that, if we undertake this action.

Mr. ERVIN. When one gets into court, he has to go on the record whether he likes it or not. The Senator may not like it. However, it has been found that Dr. Rodberg was his aide. That question is immaterial.

A Senator has the right to seek the assistance of anyone in the performance and execution of the duties of his office. And he cannot be called upon to answer for the exercise of those duties by the examination of any of his assistants that he avails himself of.

Mr. BROCK. If the Senate, through this resolution, were to hire counsel for the Senator from Alaska it would be fair to say then: "You have condoned every action that has been taken." That is the question I was asking before, because we have taken no action of our own.

Mr. ERVIN. I have disagreed with people many times. I have made contributions of money to a man whose conduct I viewed as reprehensible in order to assure that he had a fair trial according to law. I did not endorse his conduct. I just assured him that he would have a fair trial.

Mr. BROCK. The Senator just got through saying that. So why do we pay the Senator's expenses?

Mr. ERVIN. Simply because another branch of the Government can impose on the separation of powers, are we going to sit supinely by and let some other branch of the Government exercise the power that the Constitution gives us to deal with our own Members and let them deal with those Members?

Mr. BROCK. We are sitting supinely by when actions are taken with which a number of Senators disagree and we take no action.

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

Mr. BROCK. I yield to the Senator from Colorado.

Mr. DOMINICK. Mr. President, I just want to point out in connection with what the Senator from North Carolina is saying that, yes, we are all willing to go in and say that the immunity of a Senator of the United States or maybe even of some of his staff members ought to be protected. However, if we are going to file a brief and if, as the Senator from Tennessee says, any Member can anoint somebody by talking to him or writing to him or asking him for an opinion that is set forth within the parameters of what the Supreme Court is looking at, I for one do not want any part of it.

I do not think the Senate ought to be involved in asking for immunity for themselves or for anyone else.

Mr. ERVIN. I do not think a Senator can anoint anyone under the debate and speech clause except to the extent that the man had been employed in the execution of his duties as a Senator. The question involved in this case is, How far can a Senator go?

Mr. BROCK. Mr. President, will the Senator deny that every voter in Tennessee who voted for me aided me in the performance of my duties by placing me here?

Mr. ERVIN. No. They put the Senator from Tennessee in a position where the Senator from Tennessee acquired the legal capacity to execute the duties of the office of a Senator. They did not aid him in the execution of his duties.

Mr. BROCK. Every time anyone writes me a letter, if I give him personal attention, I can then extend the immunity to him. I do not think there is any divine right.

Mr. ERVIN. If the Senator summons that resident from Tennessee and has him assist the Senator here in the performance of his duties, I think he would be clothed with the same immunity with which the court said Dr. Rodberg was clothed.

Mr. BROCK. Whether he is on the payroll or not?

Mr. ERVIN. Absolutely. That is my position. The question is whether the Senator avails himself of his assistance. The question is whether he aids the Senator in the execution of his office, and not whether he is on the payroll. The question is whether he aids the Senator.

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

Mr. ERVIN. I yield.

Mr. MATHIAS. Mr. President, I think it would be useful to get this question back within the perimeter of what is practical and what we are really concerned about.

The housekeeping questions within the Senate, I agree totally with the Senator from Tennessee, are the Senate's problems.

If the Senate has doubts and resolves those doubts by action, that is one thing. If it resolves them by inaction, that is the same thing because inaction can speak as loudly as action on occasion.

The point is that those are problems for the Senate to resolve, and neither the courts nor the executive should involve themselves in the internal workings of the Senate. That is essentially what the court in Massachusetts said over 100 years ago. The court will not look beyond the record.

But in this case we have something new, and that is to have the court consider the extent of the immunities conferred under the speech-and-debate clause. This was a subject the Senator from North Carolina will recall was discussed before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary. We had among witnesses before the committee the then Assistant Attorney General William Rehnquist, who is now Mr. Justice Rehnquist, and who at that time was in the Office of Legal Counsel. Mr. Rehnquist gave a succinct description of what we are talking about. He was speaking on behalf of the Justice Department in connection with the executive privilege and he said:

The President is entitled to undivided and faithful advice from his subordinates, just as Senators and Representatives are entitled to the same sort of advice from their legislative and administrative assistants, and judges to the same sort of advice from their law clerks. The notion that those engaged in directly advising members of any of the three branches of the government should have their work filtered through a process of analysis and criticism by columnists, newspaper reporters, or selected members of the public before that advice reaches their constitutional superior is entirely at odds with any system of responsible popular government.

I go back and read that statement

again because it is an interesting choice of words. Justice Rehnquist is noted for his careful choice of words:

The notion that those engaged in directly advising members of any of the three branches of the government should have their work filtered through a process of analysis and criticism by columnists, newspaper reporters, or selected members of the public before that advice reaches their constitutional superior is entirely at odds with any system of responsible popular government.

I think in commonsense language that that states the proposition. He is not talking exactly on the point here of bringing a matter before the grand jury, but it is the principle involved here and one about which there is not much dispute in the Senate.

Mr. SAXBE. I compliment the Senator for bringing that matter to the attention of the Senate and returning us to the area we have been discussing.

I started out by discussing our sincere regard for protecting the rights and immunities of the Senate. But the very nature of the acts which are brought into discussion here—and I might say that the full colloquy on this is excellent because it brings up the acts for scrutiny—just does not jibe with the conduct of this body in the procedure of orderly legislative action.

I might add, too, that the Senate itself has recognized this, because since that time the committee, including the Committee on Public Works, has adopted certain rules that obviously require adequate notice. The slipping of notes under doors in the middle of the night and giving the color of legality to an obvious rump meeting is no longer possible. So the Senate has recognized this, but it has recognized it belatedly.

The question of whether the Senate should or should not consider censure for such activity is something that is brought up here on the floor for the first time. In talking about the resolution, we should recognize there are a great many unanswered questions which I hope we can go to directly tomorrow in the matter of these amendments. Then we can take some action, which I feel in many areas the majority can concur with in putting some limits on fees and some control in narrowing the areas, and certainly in seeing to it that the short time remaining is fully taken advantage of.

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

Mr. SAXBE. I yield.

Mr. MANSFIELD. Any proposals to be offered tomorrow will be given every consideration by the majority.

I would point out that this is not a Democratic or a Republican matter. I would like to make a few observations, if I may, because the one thing we do not want to get involved in here is a political implication, because nothing could be further from the thoughts of the Senate, if it is the thinking of the Senate, than thoughts on politics. I assure the Senator that every proposal made tomorrow will be given every consideration by Members on this side of the aisle.

Mr. SAXBE. If the Senator will yield on that point, the attitude that is prevailing among Members on this side at present, and a great many other people, is that the Senate is unwilling to recognize the dereliction in this particular instance, and that the majority has collected in a protective shield around the Senator from Alaska to carry him through so that he will suffer no harm, no financial damage, and because of what we think was an unwarranted use of a then-existing committee facility he had available to him.

Mr. MANSFIELD. Mr. President, if the Senator will yield, the Senate is the judge of the propriety of the actions of the Senator from Alaska, and the Senate only; not the Supreme Court, not the executive branch, but the Senate, and the Senate only. If the Senate wishes to pay or not to pay the hearing transcript fees of Senator GRAVEL, or to sanction or censure the activities of any Senator, it is for the Senate, and the Senate alone, to decide. That is the issue before us.

Is the Senate as an institution going to be the judge of its own affairs? If any Senator's activities are going to be judged, let the Senate alone be the judge. That is the meaning of the resolution before the Senate.

I emphasize the role of the Senate, not a Democratic-controlled Senate but a Senate made up of Republicans and Democrats who have to make the decisions themselves, and not allow the executive branch or the judicial branch to take unto themselves that which is our responsibility.

Mr. SAXBE. Mr. President, I certainly agree with the basic statements that the Senator has made, but I do not believe the resolution as it stands at present is a fair statement of our attitude. There is a great deal of common ground in the resolution, common ground that both of us can agree on, and I think the whole legislative process at its best—which I hope will operate tomorrow—will shape the resolution in such a manner that we can go together into the Supreme Court to protect those things which we think are always subject to attack.

Mr. ERVIN. Mr. President, I should like to pay tribute to the majority leader. I just told him that the finest constitutional lawyer in America could not have made a better statement of the principle which is involved before us here.

A good many years ago we had turmoil here over the situation of Senator Joe McCarthy. At a later time there was a great deal in the press about the conduct of Senator Dodd. On those occasions the Senate recognized that the Senate alone has the right to judge a Senator for disorderly conduct in his office as a Senator, and nobody else. That is the principle that is involved here, as we see it.

Mr. SAXBE. I know the Senator sees it that way, and it is also obvious that Senators there see nothing wrong in the actions of the Senator from Alaska in what he did in his frustration after not being able to disclose these secret papers on the floor of the Senate. Therefore, we feel that this type of colloquy is extremely important in bringing the actions out, and we think we can better find the common interest in this.

We are talking about days and time, and the fact that the brief has to be printed and filed.

I might say that, on instructions of the Republican conference, we, with what lawyers we have available—I think they are excellent lawyers—have been working on a brief. We think we can do it in-house. In other words, we think we can, with the tremendous level of legal knowledge and experience we have in the Senate, prepare an in-house brief.

Many of us have appeared before the Supreme Court of the United States many times. We think that in this case the issues are clear, as set out in the circuit court of appeals. We want to sustain it. We question whether we can hire better counsel than we can lay hands on here.

Certainly, if we make the laws, we think that we can defend those same laws. However, this is something we can bring up tomorrow in the way of amendment. I truly hope that Senators will look over the amendments, that Senators will be provided with copies, in the hope that we can find a common ground and a common interest.

Mr. ERVIN. I think the Senator from Ohio has just taken a very sensible position. I shall be glad to examine the amendments overnight, if I have copies of them.

Mr. MANSFIELD. Mr. President, I will read this debate with a great deal of interest. It has been instructive as well as constructive. I am glad we spent so much time on this matter, in which the Senate is under consideration as an institution.

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

Mr. ERVIN. I yield.

Mr. DOMINICK. I wanted to tell the Senator from North Carolina and other Senators, as well, that I shall be preparing three more amendments, other than the ones that are here, but I will not need much time. I hope that when the amendments come up and we get them out of the way, we will not need these at all. I think they can be disposed of in a half hour or less.

Mr. MANSFIELD. I appreciate the remarks of the Senator from Ohio. This will speed up the consideration of the matter—not that we are rushing, but we do have other legislation which the leadership hopes to have completed before the recess begins a week from Thursday.

ORDER FOR RECOGNITION OF SENATOR TUNNEY TOMORROW

Mr. MANSFIELD. Mr. President, I ask unanimous consent that tomorrow, following the recognition of the distinguished Senator from Minnesota (Mr. MONDALE), the distinguished Senator from California (Mr. TUNNEY) be recognized for not to exceed 15 minutes.

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

ORDER TO PROCEED TO PENDING BUSINESS TOMORROW

Mr. MANSFIELD. Mr. President, I ask unanimous consent that at the conclusion of Senator TUNNEY'S remarks

there be no morning business or no morning hour and that the Senate proceed directly to the pending resolution.

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

PRECEDENTS FOR PAYING COUNSEL FEES

Mr. ERVIN. Mr. President, before we adjourn, I ask unanimous consent that a statement showing the precedents for the Senate to pay counsel fees be printed in the RECORD.

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

MEMORANDUM

The Republicans will propose amendments to the Gravel resolution which would prohibit the financing of Senator Gravel's legal expenses. However, there are a number of precedents for this provision of the resolution.

During recent history the Senate has, on two occasions, authorized the retention of private counsel to represent Members and staff aides who have been sued in their official capacities when the issues involved in the litigation relate to the privileges of the Congress. In the first case, *Dombrowski* v. *Eastland*, the Judiciary Committee voted to retain Roger Robb as counsel to represent Senator Eastland and Mr. Sourwine. Upon the request of Chairman Eastland, the Rules Committee authorized payment out of the Judiciary Committee's funds for attorney's fees, expenses and assessed court costs. In the second case, *McSourley* v. *McClellan* now pending in court, the Permanent Investigating Subcommittee has followed a similar procedure to retain H. Jack Miller to represent Chairman McClellan.

In the Eastland and McClellan cases, the plaintiffs sued because Senate Committee employees carried out the orders of their Committee Chairman to seize documents and records belonging to the plaintiffs. It was further alleged that the Senators and employees involved had used the Committee processes. In the Gravel case the Department of Justice is seeking to question an aide of the Senator's because that aide carried out the directions and orders of his Senator.

The Justice Department has also claimed that the Senator and his aide used the Committee process for an improper purpose. The only difference between the prior cases and the Gravel case is that Senator Gravel decided to intervene to protect the Senate and himself whereas Senators Eastland and McClellan were sued. However, it now seems reasonably clear that Senator Gravel acted wisely for at the time the subpoena was issued the Senate was not in session and he had only 36 hours within which to act. If he had not moved to intervene, the Senate's vital interests would have been totally unrepresented.

PROGRAM

Mr. BYRD of West Virginia. Mr. President, the program for tomorrow is as follows:

The Senate will convene at 9:30 a.m.

Senators GRAVEL, MONDALE, and TUNNEY will each be recognized for not to exceed 15 minutes, and in the order stated.

There will be no period for the transaction of routine morning business.

The Senate will then immediately resume its consideration of the Ervin-Mansfield resolution, on which there is an agreement of 1½ hours on the resolution and 1 hour on any amendment thereto.

When that resolution has been disposed of, the Senate will take up S. 3178, the suspension of section 315, equal broadcasting time. Final action is hoped for tomorrow on the equal broadcasting time bill.

The leadership also hopes to dispose of S. 2895, dealing with egg prices. Moreover, if cleared, the leadership hopes to dispose of Senate Joint Resolution 193, Cape Canaveral, and S. 3153, Gulf Islands National Seashore.

There will be rollcall votes tomorrow, and we may very well have a long day.

ADJOURNMENT UNTIL 9:30 A.M.

Mr. SAXBE. 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 9:30 a.m., tomorrow.

The motion was agreed to; and at 6:35 p.m. the Senate adjourned until tomorrow, Thursday, March 23, 1972, at 9:30 a.m.

NOMINATIONS

Executive nominations received by the Senate March 22, 1972:

AGENCY FOR INTERNATIONAL DEVELOPMENT

Jarold A. Kieffer, of Minnesota, to be an Assistant Administrator of the Agency for International Development, vice Herbert Salzman, resigned.

U.S. DISTRICT COURTS

Otto R. Skopil, Jr., of Oregon, to be a U.S. district judge for the district of Oregon, vice Alfred T. Goodwin, elevated.

James M. Burns, of Oregon, to be a U.S. district judge for the district of Oregon, vice Gus J. Solomon, retired.

U.S. COAST GUARD

The following named officer of the U.S. Coast Guard Reserve for promotion to the grade of rear admiral:

Charles J. Hanks.

HOUSE OF REPRESENTATIVES—*Wednesday, March 22, 1972*

The House met at 12 o'clock noon.

The Chaplain, Rev. Edward G. Latch, D.D., offered the following prayer:

Search me, O God, and know my heart: try me and know my thoughts: and see if there be any wicked way in me and lead me in the way everlasting.—Psalm 139: 23, 24.

Eternal Father, to whom the darkness and the light are both alike in the midst of the troubles of these trying times, worn and weary by worry and work, we turn to the quiet calm of Thy presence. For a moment we would be still and know that Thou art God.

Endow us with insight to understand the needs of our people and help us to work for greater justice in our land, for fuller freedom among the nations and for an enduring peace in our world. May we realize that Thou art our Father, our fellowmen are our brothers, and we are our brothers keepers. With this vision of Thy kingdom may we make our decisions, mold our laws and build our Nation. Thus may we walk from darkness to light, from weakness to strength, from fear to faith and from any ill will to an abiding good will. In the mood of the Master, we pray. 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. Sparrow, one of its clerks, announced that the Senate agrees to the amendment of the House to a bill of the Senate of the following title:

S. 904. An act to amend the Uniform Time Act to allow an option in the adoption of advanced time in certain cases.

The message also announced that the Senate disagrees to the amendment of the House to the bill (S. 3054) entitled "An act to amend the Manpower Development and Training Act of 1962," agrees to a conference requested by the House on the disagreeing votes of the two Houses thereon, and appoints Mr. NELSON, Mr. KENNEDY, Mr. MONDALE, Mr. CRANSTON, Mr. HUGHES, Mr. STEVENSON, Mr. RANDOLPH, Mr. TAFT, Mr. JAVITS, Mr. SCHWEIKER, Mr. DOMINICK, and Mr. BEALL to be the conferees on the part of the Senate.

The message also announced that the Senate had passed bills and a concurrent resolution of the following titles, in which the concurrence of the House is requested:

S. 764. An act to authorize the disposal of lead from the national stockpile and the supplemental stockpile;

S. 773. An act to authorize the disposal of metallurgical grade chromite from the national stockpile and the supplemental stockpile;

S. 1379. An act to authorize the Secretary of Agriculture to establish a volunteers in the national forests program, and for other purposes;

S. 3086. An act to authorize the disposal of nickel from the national stockpile; and

S. Con. Res. 55. Concurrent resolution providing for the recognition of Bangladesh.

HOUSING BOOM CONTINUES TO PACE OUR ECONOMIC EXPANSION

(Mr. WIDNALL asked and was given permission to address the House for 1