Based on the economic interests of his district, Alexander is the logical leader of any move to preserve the emergency loan program. Agriculture is the dominant economic factor among his constituents and farmers suffered severe losses last year from excessive rains during the harvest season.

Despite the need for emergency loans, Mr. Nixon terminated the program. The Alexander bill would make it possible for farmers to obtain credit with which to finance their next crop.

The bill, which contains seven major sections is not a giveaway. In fact, it repeals some of the abandoned features of the old law, but Alexander believes the real need is for a source of credit.

The bill provides farmers with sources of long-term financing which they need to cover their losses. Alexander said, "Farmers need to be able to get long-term credit on a realistic basis."

He emphasized that the availability of credit was considerably more important than "cheap" interest.

Here are the major provisions of the bill:

It repeals the $5,000 "forgiveness" clause and the 1 per cent interest provision established by the "Hurricane Agnes" legislation. (Part of the emergency relief provided for the victims of the hurricane made credit available at 1 per cent interest and permitted the write-off of some of the debt under extreme conditions.)

Sections of the Consolidated Farm and Rural Development Act would be clarified with an amendment which would provide for an insurance or a guarantee of the credit.

The Agriculture secretary would be "required" to make, insure or guarantee loans to eligible applicants in areas designated by him as natural disasters and in areas designated by the President as major disasters. There are provided for under the Disaster Relief Act of 1970. (Under terms of the amendment, the secretary would not have to duplicate a designation already made by the President before offering the loans since the area already would be qualified.)

Interest rates on the emergency loans, under the Consolidated Farm and Rural Development Act would be raised to "not more than 6 per cent." (Under the current arrangement, the interest rate can be as low as 1 per cent, which leaves the program open to criticism as the give-away. Alexander believes the pressing need is for ample credit rather than a drastically-subsidized interest rate.)

The "open money market" authority would be increased, from the existing $100 million limit to $500 million.

The Agriculture Department would be authorized to guarantee loans originated, held and serviced by commercial institutions such as banks or Production Credit Associations. (This is a key provision, since it "directs" the Agriculture secretary to make disaster declarations for areas that have been subjected to severe damage. The existing law has been interpreted to mean that the secretary has "an option" (in the matter.)

Finally, the bill would repeal parts of the Disaster Relief Act of 1970, which would cause the emergency loan program to revert to the permanent loan legislation. Alexander said the change would permit unlimited long-term loans to farmers victimized by disasters.

In its narrow interpretation, the proposed legislation simply was designed to make certain that farmers who suffered severe crop or property losses would be able to borrow money so that they could continue their business. The funds might come directly from the government or a private lending institution but they would not be a gift by any means.

In a broader sense, the measure is a challenge to President Nixon's assumed authority under which, in the name of fiscal conservatism, he limits or terminates programs that have been written by Congress and signed into law.

If Congress hopes to function in its traditional role as lawmaker and custodian of the nation's purse, it will have to reassert its authority and the Alexander bill might be a good place to start. As an alternative, the supply clerk might order a fresh supply of rubber stamps, although this would appear to be an unlikely course at a time when the Democrats are supposed to control Congress while a Republican resides at the White House—or at Key Biscayne or at Camp David or at San Clemente or some alternate seat of power.

PUBLIC SUPPORT NEEDED FOR NEWSMAN LEGISLATION

HON. JEROME R. WALDIE

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Wednesday, January 24, 1973

Mr. WALDIE. Mr. Speaker, I have introduced legislation to give unqualified protection to newsmen from compulsion by the courts or other governmental agencies to release names of sources or news materials gathered in pursuit of a news story.

Mr. Speaker, I would like to call the attention of my colleagues in the House of Representatives to a recent editorial in the Concord, Calif., Transcript, in which an eloquent appeal for public support for this legislation is made.

I would hope that such public support is generated and that the Congress responds with a no-qualification newsman's privilege bill.

The editorial follows:

PUBLIC SUPPORT NEEDED FOR NEWSMAN LEGISLATION

Public response—or lack of it—to the recent jailings of newsmen for refusing to reveal confidential sources of information has been puzzling. We would expect a great outcry over this obvious infringement on First Amendment guarantees, but this hasn't been the case. Except for the media itself and a few concerned lawmakers, the matter has failed to stir more than a ripple of concern.

The issue is the right of a free people to be informed about matters of vital interest to them. Simply put, if a newsman is unable to protect the identity of his sources, they will soon dry up. The ability of the media to serve as a check on governmental abuse will be severely crippled. Reporters will have to rely more on government press releases for information, and that is not good.

Perhaps we would all be more concerned about personal freedoms—freedom of the press among them—if we lived in a totalitarian dictatorship where there were none. You never know what a good thing you have until you lose it, as the old saying goes.

The gravity of the issue has been seen by Congressman Jerome Waldie and Senator Alan Cranston, who have introduced companion measures providing for total protection to newsmen from forcible disclosure of news sources.

"The need for enactment of this legislation is dramatized more each day that Los Angeles Times reporter Bill Farr is confined to his cell for refusing to buckle under to a court order to disclose his news source," Waldie said, after he had introduced his measure on the first day of the 93rd Congress.

The Transcript fully supports the Waldie and Cranston measures. We further urge everyone to write their representatives in support of this legislation.

SENATE—*Friday, January 26, 1973*

The Senate met at 12 o'clock meridian and was called to order by Hon. JOSEPH R. BIDEN, JR., a Senator from the State of Delaware.

PRAYER

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

Eternal Father, we lift our hearts to Thee, the giver of wisdom and strength, beseeching Thee to guide us through the deliberations of this day. Keep ever before us the vision of the better world that is yet to be. Enable us to strive for those plans and programs which bring nearer to completion the dreams of those who have gone ahead. Help us to work for that justice and peace which advances Thy kingdom on earth. Strengthen us this day and abide with us when evening comes and our work is done.

We pray in His name who went about doing good. Amen.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

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

The assistant legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, D.C., January 26, 1973.

To the Senate:

Being temporarily absent from the Senate on official duties, I appoint Hon. JOSEPH R. BIDEN, JR., a Senator from the State of Delaware, to perform the duties of the Chair during my absence.

JAMES O. EASTLAND,
President pro tempore.

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

MESSAGES FROM THE PRESIDENT

Messages in writing from the President of the United States were communicated to the Senate by Mr. Geisler, one of his secretaries.

REPORT ON CASH AWARDS MADE DURING 1972—MESSAGE FROM THE PRESIDENT

The ACTING PRESIDENT pro tempore (Mr. BIDEN) laid before the Senate

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

the following message from the President of the United States, which, with the accompanying papers, was referred to the Committee on Armed Services:

To the Congress of the United States:

Recognizing that our military forces must always maintain a high degree of preparedness, the Congress in 1965 authorized a cash incentive program to reward military personnel for imaginative suggestions, inventions and scientific achievements.

Today I am pleased to forward to the Congress the reports of the Secretary of Defense and the Secretary of Transportation on cash awards made during fiscal year 1972. Tangible benefits resulting from suggestions submitted by military personnel that were adopted during that year totalled more than $107 million, bringing the total first-year savings for taxpayers from this worthwhile program to $661 million.

Of the 157,195 suggestions which were submitted by military personnel during the reporting period, 24,580 were adopted. Cash awards totalling $1,822,762 were paid for these adopted suggestions. Enlisted personnel received $1,502,660 in awards, representing 82 percent of the total cash awards paid. The remaining 18 percent was received by officer personnel and amounted to $320,102.

The reports of the Secretary of Defense and the Secretary of Transportation contain more detailed statistical information on the military awards program and also include a few brief descriptions of some of the better ideas of our military personnel during fiscal year 1972. For example, two Air Force sergeants were awarded a total of $25,000 for suggesting a modification to the F–105 weapons control system. Their new idea improved the combat capability of the aircraft, enhanced the safety of aircrews in the Southeast Asia Theater of operations and saved more than $25 million of the taxpayers' money in the first year.

I commend these reports to the attention of the Congress.

RICHARD NIXON.

THE WHITE HOUSE, *January 26, 1973.*

REPORT ON ADMINISTRATION OF ALASKA RAILROAD—MESSAGE FROM THE PRESIDENT

The ACTING PRESIDENT pro tempore (Mr. BIDEN) laid before the Senate the following message from the President of the United States, which, with the accompanying report, was referred to the Committee on Commerce:

To the Congress of the United States:

In accordance with the requirement of Section 4 of the Alaska Railroad Act (43 U.S.C. 975g), I hereby transmit the annual report by the Department of Transportation on the administration of the Alaska Railroad.

RICHARD NIXON.

THE WHITE HOUSE, *January 26, 1973.*

REPORT ON AUTOMOTIVE PRODUCTS TRADE ACT—MESSAGE FROM THE PRESIDENT

The ACTING PRESIDENT pro tempore (Mr. BIDEN) laid before the Senate the following message from the President of the United States, which, with the accompanying report, was referred to the Committee on Finance:

To the Congress of the United States:

I hereby transmit the sixth annual report on the Automotive Products Trade Act of 1965. That act authorized United States implementation of an automotive products agreement with Canada designed to create a broader United States-Canadian market for automotive products. Included in this annual report is information on automotive trade, production, prices, employment and other information relating to activities under the act during 1971.

RICHARD NIXON.

THE WHITE HOUSE, *January 26, 1973.*

REPORT ON UNITED STATES-JAPAN COOPERATIVE MEDICAL SCIENCE PROGRAM—MESSAGE FROM THE PRESIDENT

The ACTING PRESIDENT pro tempore (Mr. BIDEN) laid before the Senate the following message from the President of the United States, which, with the accompanying report, was referred to the Committee on Labor and Public Welfare:

To the Congress of the United States:

I am pleased to send to the Congress the Sixth Annual Report of the United States-Japan Cooperative Medical Science Program.

This joint research effort in the medical sciences was undertaken in 1965 following a meeting between the Prime Minister of Japan and the President of the United States.

During 1972 it continued to concentrate on research in the prevention and cure of a number of diseases which are widespread in Asia.

In addition, during the past year, the scientific scope of this program was enlarged to include studies of methods to evaluate certain types of cancer which may be related to environmental pollution. A detailed review of the program's activities in leprosy and parasitic diseases was also completed, and a decision made to continue work in these areas.

The sustained success of this biomedical research program reflects its careful management, its continuously refined scientific focus, and the strong commitment to it by both of our countries. The increasingly effective research planning and communication between investigators in our two countries has intensified our scientific productivity and strengthened our determination to work together toward better health for all mankind.

RICHARD NIXON.

THE WHITE HOUSE, *January 26, 1973.*

REORGANIZATION PLAN NO. 1 OF 1973—MESSAGE FROM THE PRESIDENT

The ACTING PRESIDENT pro tempore (Mr. BIDEN) laid before the Senate the following message from the President of the United States, which, with the accompanying paper, was referred to the Committee on Government Operations:

To the Congress of the United States:

On January 5 I announced a three-part program to streamline the executive branch of the Federal Government. By concentrating less responsibility in the President's immediate staff and more in the hands of the departments and agencies, this program should significantly improve the services of the Government. I believe these reforms have become so urgently necessary that I intend, with the cooperation of the Congress, to pursue them with all of the resources of my office during the coming year.

The first part of this program is a renewed drive to achieve passage of my legislative proposals to overhaul the Cabinet departments. Secondly, I have appointed three Cabinet Secretaries as Counsellors to the President with coordinating responsibilities in the broad areas of human resources, natural resources, and community development, and five Assistants to the President with special responsibilities in the areas of domestic affairs, economic affairs, foreign affairs, executive management, and operations of the White House.

The third part of this program is a sharp reduction in the overall size of the Executive Office of the President and a reorientation of that office back to its original mission as a staff for top-level policy formation and monitoring of policy execution in broad functional areas. The Executive Office of the President should no longer be encumbered with the task of managing or administering programs which can be run more effectively by the departments and agencies. I have therefore concluded that a number of specialized operational and program functions should be shifted out of the Executive Office into the line departments and agencies of the Government. Reorganization Plan No. 1 of 1973, transmitted herewith, would effect such changes with respect to emergency preparedness functions and scientific and technological affairs.

STREAMLINING THE FEDERAL SCIENCE ESTABLISHMENT

When the National Science Foundation was established by an act of the Congress in 1950, its statutory responsibilities included evaluation of the Government's scientific research programs and development of basic science policy. In the late 1950's, however, with the effectiveness of the U.S. science effort under serious scrutiny as a result of Sputnik, the post of Science Adviser to the President was established. The White House became increasingly involved in the evaluation and coordination of research

and development programs and in science policy matters, and that involvement was institutionalized in 1962 when a reorganization plan established the Office of Science and Technology within the Executive Office of the President, through transfer of authorities formerly vested in the National Science Foundation.

With advice and assistance from OST during the past decade, the scientific and technological capability of the Government has been markedly strengthened. This Administration is firmly committed to a sustained, broad-based national effort in science and technology, as I made plain last year in the first special message on the subject ever sent by a President to the Congress. The research and development capability of the various executive departments and agencies, civilian as well as defense, has been upgraded. The National Science Foundation has broadened from its earlier concentration on basic research support to take on a significant role in applied research as well. It has matured in its ability to play a coordinating and evaluative role within the Government and between the public and private sectors.

I have therefore concluded that it is timely and appropriate to transfer to the Director of the National Science Foundation all functions presently vested in the Office of Space and Technology, and to abolish that office. Reorganization Plan No. 1 would effect these changes.

The multi-disciplinary staff resources of the Foundation will provide analytic capabilities for performance of the transferred functions. In addition, the Director of the Foundation will be able to draw on expertise from all of the Federal agencies, as well as from outside the Government, for assistance in carrying out his new responsibilities.

It is also my intention, after the transfer of responsibilities is effected, to ask Dr. H. Guyford Stever, the current Director of the Foundation, to take on the additional post of Science Adviser. In this capacity, he would advise and assist the White House, Office of Management and Budget, Domestic Council, and other entities within the Executive Office of the President on matters where scientific and technological expertise is called for, and would act as the President's representative in selected cooperative programs in international scientific affairs, including chairing such joint bodies as the U.S.-U.S.S.R. Joint Commission on Scientific and Technical Cooperation.

In the case of national security, the Department of Defense has strong capabilities for assessing weapons needs and for undertaking new weapons development, and the President will continue to draw primarily on this source for advice regarding military technology. The President in special situations also may seek independent studies or assessments concerning military technology from within or outside the Federal establishment using the machinery of the National Security Council for this purpose, as well as the Science Adviser when appropriate.

In one special area of technology—space and aeronautics—a coordinating council has existed within the Executive Office of the President since 1958. This body, the National Aeronautics and Space Council, met a major need during the evolution of our nation's space program. Vice President Agnew has served with distinction as its chairman for the past four years. At my request, beginning in 1969, the Vice President also chaired a special Space Task Group charged with developing strategy alternatives for a balanced U.S. space program in the coming years.

As a result of this work, basic policy issues in the United States space effort have been resolved, and the necessary interagency relationships have been established. I have therefore concluded, with the Vice President's concurrence, that the Council can be discontinued. Needed policy coordination can now be achieved through the resources of the executive departments and agencies, such as the National Aeronautics and Space Administration, augmented by some of the former Council staff. Accordingly, my reorganization plan proposes the abolition of the National Aeronautics and Space Council.

A NEW APPROACH TO EMERGENCY PREPAREDNESS

The organization within the Executive Office of the President which has been known in recent years as the Office of Emergency Preparedness dates back, through its numerous predecessor agencies, more than 20 years. It has performed valuable functions in developing plans for emergency preparedness, in administering Federal disaster relief, and in overseeing and assisting the agencies in this area.

OEP's work as a coordinating and supervisory authority in this field has in fact been so effective—particularly under the leadership of General George A. Lincoln, its director for the past four years, who retired earlier this month after an exceptional military and public service career—that the line departments and agencies which in the past have shared in the performance of the various preparedness functions now possess the capability to assume full responsibility for those functions. In the interest of efficiency and economy, we can now further streamline the Executive Office of the President by formally relocating those responsibilities and closing the Office of Emergency Preparedness.

I propose to accomplish this reform in two steps. First, Reorganization Plan No. 1 would transfer to the President all functions previously vested by law in the Office or its Director, except the Director's role as a member of the National Security Council, which would be abolished; and it would abolish the Office of Emergency Preparedness.

The functions to be transferred to the President from OEP are largely incidental to emergency authorities already vested in him. They include functions under the Disaster Relief Act of 1970; the function of determining whether a major disaster has occurred within the meaning of (1) Section 7 of the Act of September 30, 1950, as amended, 20 U.S.C. 241–1, or (2) Section 762(a) of the Higher Education Act of 1965, as added by Section 161(a) of the Education Amendments of 1972, Public Law 92–318, 86 Stat. 288 at 299 (relating to the furnishing by the Commissioner of Education of disaster relief assistance for educational purposes); and functions under Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862), with respect to the conduct of investigations to determine the effects on national security of the importation of certain articles.

The Civil Defense Advisory Council within OEP would also be abolished by this plan, as changes in domestic and international conditions since its establishment in 1950 have now obviated the need for a standing council of this type. Should advice of the kind the Council has provided be required again in the future, State and local officials and experts in the field can be consulted on an ad hoc basis.

Secondly, as soon as the plan became effective, I would delegate OEP's former functions as follows:

—All OEP responsibilities having to do with preparedness for and relief of civil emergencies and disasters would be transferred to the Department of Housing and Urban Development. This would provide greater field capabilities for coordination of Federal disaster assistance with that provided by States and local communities, and would be in keeping with the objective of creating a broad, new Department of Community Development.

—OEP's responsibilities for measures to ensure the continuity of civil government operations in the event of major military attack would be reassigned to the General Services Administration, as would responsibility for resource mobilization including the management of national security stockpiles, with policy guidance in both cases to be provided by the National Security Council, and with economic considerations relating to changes in stockpile levels to be coordinated by the Council on Economic Policy.

—Investigations of imports which might threaten the national security—assigned to OEP by Section 232 of the Trade Expansion Act of 1962—would be reassigned to the Treasury Department, whose other trade studies give it a ready-made capability in this field; the National Security Council would maintain its supervisory role over strategic imports.

Those disaster relief authorities which have been reserved to the President in the past, such as the authority to declare major disasters, will continue to be exercised by him under these new arrangements. In emergency situations calling for rapid interagency coordination, the Federal response will be coordinated by the Executive Office of the President under the general supervision of the Assistant to the President in charge of executive management.

The Oil Policy Committee will continue to function as in the past, unaffected by this reorganization, except that I will designate the Deputy Secretary of the Treasury as chairman in place of the Director of OEP. The Com-

mittee will operate under the general supervision of the Assistant to the President in charge of economic affairs.

DECLARATIONS

After investigation, I have found that each action included in the accompanying reorganization plan is necessary to accomplish one or more of the purposes set forth in Section 901(a) of title 5 of the United States Code. In particular, the plan is responsive to the intention of the Congress as expressed in Section 901(a)(1), "to promote better execution of the laws, more effective management of the executive branch and of its agencies and functions, and expeditious administration of the public business;" and in Section 901(a)(3), "to increase the efficiency of the operations of the Government to the fullest extent practicable;" and in Section 901(a)(5), "to reduce the number of agencies by consolidating those having similar functions under a single head, and to abolish such agencies or functions as may not be necessary for the efficient conduct of the Government."

While it is not practicable to specify all of the expenditure reductions and other economies which will result from the actions proposed, personnel and budget savings from abolition of the National Aeronautics and Space Council and the Office of Science and Technology alone will exceed $2 million annually, and additional savings should result from a reduction of Executive Pay Schedule positions now associated with other transferred and delegated functions.

The plan has as its one logically consistent subject matter the streamlining of the Executive Office of the President and the disposition of major responsibilities currently conducted in the Executive Office of the President, which can better be performed elsewhere or abolished.

The functions which would be abolished by this plan, and the statutory authorities for each, are:

(1) the functions of the Director of the Office of Emergency Preparedness with respect to being a member of the National Security Council (Sec. 101, National Security Act of 1947, as amended, 50 U.S.C. 402; and Sec. 4, Reorganization Plan No. 1 of 1958);

(2) the functions of the Civil Defense Advisory Council (Sec. 102(a) Federal Civil Defense Act of 1950; 50 U.S.C. App. 2272(a)); and

(3) the functions of the National Aeronautics and Space Council (Sec. 201, National Aeronautics and Space Act of 1958; 42 U.S.C. 2471).

The proposed reorganization is a necessary part of the restructuring of the Executive Office of the President. It would provide through the Director of the National Science Foundation a strong focus for Federal efforts to encourage the development and application of science and technology to meet national needs. It would mean better preparedness for and swifter response to civil emergencies, and more reliable precautions against threats to the national security. The leaner and less diffuse Presidential staff structure which would result would enhance the President's ability to do his job and would advance the interests of the Congress as well.

I am confident that this reorganization plan would significantly increase the overall efficiency and effectiveness of the Federal Government. I urge the Congress to allow it to become effective.

RICHARD NIXON.

THE WHITE HOUSE, *January 26, 1973.*

REPORT OF NATIONAL COUNCIL ON THE ARTS AND THE NATIONAL ENDOWMENT FOR THE ARTS—MESSAGE FROM THE PRESIDENT

The ACTING PRESIDENT pro tempore (Mr. BIDEN) laid before the Senate the following message from the President of the United States, which, with the accompanying report, was referred to the Committee on Labor and Public Welfare:

To the Congress of the United States:

It gives me great pleasure to transmit to the Congress the Annual Report of the National Council on the Arts and the National Endowment for the Arts for fiscal year 1972.

This Nation's cultural heritage is a source of enormous pride. It is also a source of communication, of ideas, of joy and beauty. And increasingly—and perhaps most important—it is a source of creative self-expression for countless millions of Americans.

As this Annual Report shows, the National Endowment for the Arts has an outstanding record of accomplishment in advancing the artistic development of the Nation. Its funds during the year under review, $29,750,000, were nearly double those of the previous year. Through its programs, the Endowment provides essential support for our famous cultural institutions—our opera, theatre, dance companies, our orchestras, our museums. The Endowment encourages our finest artists, providing new opportunities to gifted young creators and performers to expand their talent and to develop their careers. And the Endowment makes available to all of our people the very best our artists can do.

Under the guidance of the National Council on the Arts, the Endowment has effectively used its monies not only to support a wide range of cultural activities, but also to stimulate increased private support for the arts. I view this as essential, for if the arts are to flourish, the broad authority for cultural development must remain with the people of the Nation—not with government.

As our Bicentennial approaches, the cultural activities of America will take on even greater importance. Our art expresses the ideals, the history, the life of the Nation. The cultural heritages of all nations whose citizens came to this country are part of the American heritage. The richness and diversity that characterize the whole of art in the United States reflect both our history and the promise of our future.

I invite every Member of Congress to share my pleasure at the many fine achievements of the National Council on the Arts and the National Endowment for the Arts. And I urge the Congress to continue to make available to the Endowment the resources it needs to fulfill its hopeful task of bringing a more vital life to our Nation.

RICHARD NIXON.

THE WHITE HOUSE, *January 26, 1973.*

EXECUTIVE MESSAGES REFERRED

As in executive session, the Acting President pro tempore (Mr. BIDEN) 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.)

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 the following joint resolutions, in which it requested the concurrence of the Senate:

H.J. Res. 136. Joint resolution to provide for the designation of the week of February 11 to 17, 1973, as "National Vocational Education Week"; and

H.J. Res. 246. Joint resolution providing for a moment of prayer and thanksgiving and a National Day of Prayer and Thanksgiving.

HOUSE JOINT RESOLUTION REFERRED

The joint resolution (H.J. Res. 136) to provide for the designation of the week of February 11 to 17, 1973, as "National Vocational Education Week", was read twice by its title and referred to the Committee on the Judiciary.

THE JOURNAL

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the reading of the Journal of the proceedings of Wednesday, January 24, 1973, 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 may be authorized to meet during the session of the Senate today.

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

DEATH OF EUGENE L. WYMAN

Mr. MANSFIELD. Mr. President, a very dear friend, Eugene L. Wyman, passed away a few days ago. There are many in this Chamber, especially on this side of the aisle, who looked to Gene Wyman and his wife Rosalind for advice, counsel, and assistance through the years.

We will miss him, and miss him greatly.

Mr. President, I ask unanimous consent that a eulogy for Eugene Wyman delivered by Bess Myerson, the New York Commissioner of Consumer Affairs, on January 22, 1973, be printed in the RECORD.

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

EULOGY FOR EUGENE L. WYMAN

Our lives are poorer today, now that Gene is gone, but how much poorer we would be, each of us, if his life had never touched ours.

Whatever is best in us has part of Gene in it. His quiet strength renewed our own. His loyalty taught us the deeper meanings of friendship—his compassion drew us out of our own selves.

He cared—one of his friends once said, "When Gene says, 'How are you?', he really means it and he's ready to listen."

He invited other people's lives into his own. He was not reluctant to become involved. If *you* had a problem, *he* had a problem—and he brought the full force of his energy and his talent to those problems—small or large, as a friend, as a neighbor, as a citizen of this country he loved so strongly.

Whenever there was work to be done to try to make lives and conditions better, the word "No" was not in Gene's vocabulary.

For those who didn't care enough to get involved and who tried to mask their indifference by saying, "Well, what can you do, that's the way things are today." Gene had an answer, "Yes, but they don't have to be that way tomorrow." Tomorrow was always the spur of Gene's life because he was a planner of changes and a builder of futures. Gene could find the common denominators of the human condition and bring people together.

"Come on over, we'll talk," he would say—and somehow areas of confrontation would become areas of cooperation and frequently new friendships would be formed.

He always seemed able to handle any problems and rarely burdened his friends with his own.

That's why I was startled one day when he said to me on the telephone, "Something is bothering me and I would like to discuss it with you." He sounded tired and I was concerned—although I couldn't imagine what the problem might be but I was ready to help. I should have known Gene better.

"This is my problem," he said, "I'm worrying because I think you are working too hard on that job of yours and I want you to take it easy for a while—come on out and see Roz and me and the kids and have some fun."

That was his problem—as tired and overworked as he sounded at that moment. "Come on out to see Roz and me and the kids"—that's where Gene's life found its fullest expression.

He was a brilliant lawyer and a concerned and active citizen—but the solid foundations on which those careers were built were his family and his home.

That's where the love and compassion, which were evident in everything he did, had their deep roots—Roz and Betty and Brad and Bobby know better than anyone that this committed man had no greater commitment than as husband and father. No generation gap or human gaps of any kind ever came between the blessed members of this family circle.

Roz and Gene set high standards for their family—for themselves as parents and for their children. No ideas were strangers in their home—and all shared the joy, the excitement and stimulation, as a family and as individuals of the widest variety of learning experiences—learning about each other and about the world and all its people—learning to understand and respect the ideas and work of the great men and women who visited the Wyman home and the anonymous, also, who found friendship and respectful attention there.

It was Home with a capital "H"—one he was always reluctant to leave for an evening or business journey. And the healthiest kind of place in which children (and parents) can grow. One measure of Gene Wyman and Roz Wyman, is their children—minds open with a sense of curiosity and adventure about all ideas and all people with the strength and the courage to accept individual and social responsibility and with the self-reliance to get done what must be done for themselves and for others.

Gene will live in their lives—and in the lives of all of us who knew him and loved him and learned from him how to reach for a better world. There is no more meaningful legacy.

He will be painfully missed by both those who knew him well and by those whose path crossed his only briefly—he will be missed as Husband, as Father, as Son, as Companion, as Partner, as Neighbor, as Concerned Citizen—and always, as Friend.

And, when any of us in the future find ourselves in a rough spot, trying to choose the right way to go, and perhaps overwhelmed by the obstacles, I think we might hear again, inside our heads and our hearts, Gene saying what he said many times to each of us—"You can do it."

And as always, he'll convince us again, and we'll do it! That's his greatest legacy to us, also.

The poet Carl Sandburg wrote and spoke these words at the passing of a great man and friend—and we speak them today for Gene.

"A bell rings in the heart, telling it and the bell rings again and again, remembering what the first bell told, the going away, the great heart still—and they will go on remembering and they is you and you and me and me.

"Can a bell ring proud in the heart—over a voice yet lingering, over a face past any forgetting. Over a shadow alive and speaking, over echoes and lights come keener, come deeper?

"Dreamer, sleep deep, toiler, sleep long, fighter, be rested."

We will go on remembering, always.

TRIBUTE TO SECRETARY OF STATE ROGERS

Mr. MANSFIELD. Mr. President, I ask unanimous consent that an excellent article written by Nick Thimmesch, entitled "State Holds Steady Course with Rogers at Helm" be printed in the RECORD.

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

STATE HOLDS STEADY COURSE WITH ROGERS AT HELM

(By Nick Thimmesch)

WASHINGTON.—Greater loyalty hath no man than that William Pierce Rogers tenders Richard Milhous Nixon, both born in 1913 in small towns and of Republican auspices. They are friends forever, thus explaining why Rogers has bitten the bullet so many times in running the State Department just the way President Nixon wants.

Under the system whereby Rogers' department supplies most of the intelligence and staffing and Kissinger's operation much of the direct execution, the United States has achieved a desirable station, one protecting our interests and reducing prospects for serious conflict in the world.

The record shows greatly improved relations with the Communist world; the SALT agreements of 1972; improved accord with Western Europe; relative stability in the Middle East growing out of the Israeli-Egyptian cease-fire of 1970, initiated by Rogers; what looks like a highly finagled but still negotiated settlement of our role in the Vietnamese war, and maybe even civil dialogue between the United States and Fidel Castro's Cuba.

Rogers deserves some credit for reducing the anti-American feeling in much of the world over Vietnam, though it flared again during the recent heavy bombing. One effect of any Vietnamese cease-fire and truce is that political factions in some countries which pressured their governments to damn the hell out of the United States will be embarrassed. Another is that the reputation of the United States to stand by its allies will be reaffirmed, and that our hand is strengthened.

The calling card of the United States in the world is much different now from what it was in the mid-'60s. We remain No. 1 militarily, though our military forces have been cut by 40% and are far less evident around the world. The SALT agreement, in the eyes of virtually all nations, shows the United States displaying a high sense of responsibility; likewise the Soviet Union. Our military alliances continue, but our allies are less dependent on the United States. The image of "Pax Americana" and/or the ugly American has been substantially corrected. Yet we remain the dominant economic power in the world, with 60% of all foreign investment belonging to us.

Still, Washington's jackals yowl that morale at the State Department is at an all-time low (a charge dating to the '40s). Some of this feeling goes back to the late Sen. Joe McCarthy's time when State was a prime target. Some is associated with the frustration of the Vietnamese war. And some is from the crankiness of age of misanthropic old hands who have been through the cold war and then some.

State is the second smallest department in the Cabinet (12,690 employees), yet looks big in the government. It's been studied to death, the last being a huge in-house analysis. The sensitive souls who work there are given to hand wringing and doubt about the future. Our remedy was the establishment of a collective bargaining apparatus through the American Foreign Service Assn.; another is a grievance system ordered by Rogers.

State gets few kudos, but IBM recently described it as having the "most modern management system in the world," and Senate Democratic leader Mike Mansfield wrote President Nixon a letter after Rogers' reappointment, lauding Rogers as one of the most dedicated, proficient and underrated men in government. Indeed, Rogers has greatly improved State's relations with Congress, and even the Senate Foreign Relations Committee chairman, Bill Fulbright, will admit that.

THE CALENDAR

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of measures on the calendar to which there is no objection.

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

INCREASE IN FLOOD AUTHORIZATION

The joint resolution (S.J. Res. 26) to amend section 1319 of the Housing and Urban Development Act of 1968 to increase the limitation on the face amount of flood insurance coverage authorized to be outstanding was considered, ordered, to be engrossed for a third reading, read the third time, and passed, as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1319 of the Housing and Urban Development Act of

1968 is amended by striking out "$2,500,000,000" and inserting in lieu thereof "$4,000,000,000".

AUTHORIZATION FOR PRINTING ADDITIONAL COPIES OF "UNITED STATES GOVERMENT POLICY AND SUPPORTING POSITIONS"

The resolution (S. Res. 19) authorizing the printing for the use of the Committee on Post Office and Civil Service of additional copies of its committee print entitled "United States Government Policy and Supporting Positions" was considered and agreed to, as follows:

Resolved, That there be printed for the use of the Committee on Post Office and Civil Service one thousand seven hundred additional copies of its committee print of the current Congress entitled "United States Government Policy and Supporting Positions".

MARGARET L. HAMILTON

The resolution (S. Res. 32) to pay a gratuity to Margaret L. Hamilton was considered and agreed to, as follows:

Resolved, That the Secretary of the Senate hereby is authorized and directed to pay, from the contingent fund of the Senate, to Margaret L. Hamilton, widow of Douglas A. Hamilton, an employee of the Architect of the Capitol assigned to duty in the Senate Office Buildings at the time of his death, a sum equal to six months' compensation at the rate he was receiving by law at the time of his death, said sum to be considered inclusive of funeral expenses and all other allowances.

ETHEL E. CLEMMER

The resolution (S. Res. 31) to pay a gratuity to Ethel E. Clemmer was considered and agreed to, as follows:

Resolved, That the Secretary of the Senate hereby is authorized and directed to pay, from the contingent fund of the Senate, to Ethel E. Clemmer, widow of Kneale W. Clemmer, Senior, an employee of the Architect of the Capitol assigned to duty in the Senate Office Buildings at the time of his death, a sum equal to six months' compensation at the rate he was receiving by law at the time of his death, said sum to be considered inclusive of funeral expenses and all other allowances.

NORINNE B. BRATT

The resolution (S. Res. 30) to pay a gratuity to Norinne B. Bratt was considered and agreed to, as follows:

Resolved, That the Secretary of the Senate hereby is authorized and directed to pay, from the contingent fund of the Senate, to Norinne B. Bratt, widow of James L. Bratt, Junior, an employee of the Architect of the Capitol assigned to duty in the Senate Office Buildings at the time of his death, a sum equal to six months' compensation at the rate he was receiving by law at the time of his death, said sum to be considered inclusive of funeral expenses and all other allowances.

RICHARD E. BURGESS

The resolution (S. Res. 29) to pay a gratuity to Richard E. Burgess was considered and agreed to, as follows:

Resolved, That the Secretary of the Senate hereby is authorized and directed to pay, from the contingent fund of the Senate, to Richard E. Burgess, widower of Jeannette A. Burgess, an employee of the Senate at the time of her death, a sum equal to one year's compensation at the rate she was receiving by law at the time of her death, said sum to be considered inclusive of funeral expenses and all other allowances.

ROGER G. ANDERSON

The resolution (S. Res. 27) to pay a gratuity to Roger G. Anderson was considered and agreed to, as follows:

Resolved, That the Secretary of the Senate hereby is authorized and directed to pay, from the contingent fund of the Senate, to Roger G. Anderson, widower of Marilyn E. Anderson, an employee of the Senate at the time of her death, a sum equal to three months' compensation at the rate she was receiving by law at the time of her death, said sum to be considered inclusive of funeral expenses and all other allowances.

LEROY SPEARS, SR.

The resolution (S. Res. 28) to pay a gratuity to LeRoy Spears, Sr., was considered and agreed to, as follows:

Resolved, That the Secretary of the Senate hereby is authorized and directed to pay, from the contingent fund of the Senate, to LeRoy Spears, Senior, father of Joy M. Spears, an employee of the Senate at the time of her death, a sum equal to one year's compensation at the rate she was receiving by law at the time of her death, said sum to be considered inclusive of funeral expenses and all other allowances.

SENATE MEMBERS OF THE JOINT COMMITTEE ON PRINTING AND THE JOINT COMMITTEE OF CONGRESS ON THE LIBRARY

The resolution (S. Res. 26) providing for members on the part of the Senate of the Joint Committee on Printing and the Joint Committee of Congress on the Library was considered and agreed to, as follows:

Resolved, That the following-named Members be, and they are hereby, elected members of the following joint committees of Congress:

Joint Committee on Printing: Mr. Cannon of Nevada, Mr. Allen of Alabama, and Mr. Scott of Pennsylvania.

Joint Committee of Congress on the Library: Mr. Cannon of Nevada, Mr. Pell of Rhode Island, Mr. Williams of New Jersey, Mr. Cook of Kentucky, and Mr. Hatfield of Oregon.

REVISION AND PRINTING OF THE SENATE MANUAL FOR USE DURING THE 93D CONGRESS

The resolution (S. Res. 25) authorizing the revision and printing of the Senate Manual for use during the 93d Congress was considered and agreed to, as follows:

Resolved, That the Committee on Rules and Administration be, and it is hereby, directed to prepare a revised edition of the Senate Rules and Manual for the use of the Ninety-third Congress, that said Rules and Manual shall be printed as a Senate document, and that two thousand additional copies shall be printed and bound, of which one thousand copies shall be for the use of the Senate, five hundred and fifty copies shall be for the use of the Committee on Rules and Administration, and the remaining four hundred and fifty copies shall be bound in full morocco and tagged as to contents and delivered as may be directed by the Committee.

SOLID WASTE DISPOSAL ACT AND THE CLEAN AIR ACT EXTENSIONS

The bill (S. 498) to amend the Solid Waste Disposal Act, as amended, and the Clean Air Act, as amended, for 1 year, was considered, ordered to be engrossed for a third reading, read the third time, and passed, as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. (a) Paragraph (2) of subsection (a) of section 216 of the Solid Waste Disposal Act, as amended (84 Stat. 1234), is amended to read as follows:

"(2) There are authorized to be appropriated to the Administrator of the Environmental Protection Agency to carry out the provisions of this Act, other than section 208, not to exceed $72,000,000 for the fiscal year ending June 30, 1972, not to exceed $76,000,000 for the fiscal year ending June 30, 1973, and not to exceed $76,000,000 for the fiscal year ending June 30, 1974."

(b) Paragraph (3) of subsection (a) of section 216 of the Solid Waste Disposal Act, as amended (84 Stat. 1234), is amended to read as follows:

"(3) There are authorized to be appropriated to the Administrator of the Environmental Protection Agency to carry out section 208 of this Act not to exceed $80,000,000 for the fiscal year ending June 30, 1972, not to exceed $140,000,000 for the fiscal year ending June 30, 1973, and not to exceed $140,000,000 for the fiscal year ending June 30, 1974.".

(c) Subsection (b) of section 216 of the Solid Waste Disposal Act, as amended (84 Stat. 1234), is amended by striking "and not to exceed $22,500,000 for the fiscal year ending June 30, 1973." and inserting in lieu thereof ", not to exceed $22,500,000 for the fiscal year ending June 30, 1973, and not to exceed $22,500,000 for the fiscal year ending June 30, 1974.".

SEC. 2. (a) Subsection (c) of section 104 of the Clean Air Act, as amended (84 Stat. 1709), is amended by striking "and $150,000,000 for the fiscal year ending June 30, 1973." and inserting in lieu thereof ", $150,000,000 for the fiscal year ending June 30, 1973, and $150,000,000 for the fiscal year ending June 30, 1974.".

(b) Subsection (i) of section 212 of the Clean Air Act, as amended (84 Stat. 1703), is amended by striking "two succeeding fiscal years." and inserting in lieu thereof "three succeeding fiscal years.".

(c) Section 316 of the Clean Air Act, as amended (84 Stat. 1709), is amended by striking "and $300,000,000 for the fiscal year ending June 30, 1973." and inserting in lieu thereof ", $300,000,000 for the fiscal year ending June 30, 1973, and $300,000,000 for the fiscal year ending June 3, 1974.".

SENATE JOINT RESOLUTION 33— PROCLAIMING A MOMENT AND A DAY OF PRAYER AND THANKSGIVING FOR PEACE IN VIETNAM

Mr. GRIFFIN. Mr. President, regardless of our past differences about the war in Vietnam and the policies related thereto, all Americans rejoice in the fact that Secretary of State Rogers is on his way to sign an agreement which will bring to an end this war in Vietnam and which, hopefully, will bring peace to Indochina.

On behalf of the distinguished majority leader, the distinguished majority

whip, the distinguished Republican leader and myself, I send to the desk a joint resolution calling on the President of the United States to proclaim a moment of prayer and thanksgiving as of 7 p.m. eastern standard time on Saturday, January 27, 1973, and that the 24 hours beginning then be a national day of prayer and thanskiving.

I ask unanimous consent for the immediate consideration of this joint resolution.

The ACTING PRESIDENT pro tempore. The resolution with its preamble will be stated.

The assistant legislative clerk read as follows:

S.J. RES. 33

Joint resolution to authorize and request the President to proclaim a moment and day of prayer and thanksgiving

Whereas the American people have reason to rejoice at the news of a just and honorable end to the long and trying war in Vietnam; and

Whereas our deep and abiding faith as a people reminds us that no great work can be accomplished without the aid and inspiration of Almighty God: Now, therefore, be it

Resolved by the Senate and the House of Representatives of the United States of America, in Congress assembled, That the President of the United States is authorized and requested to issue a proclamation designating the moment of 7:00 P.M., EST, January 27, 1973, a National Moment of Prayer and Thanksgiving for the peaceful end to the Vietnam war, and the 24 hours beginning at the same time as a National Day of Prayer and Thanksgiving.

That the President authorize the flying of the American flag at the appointed hour;

That all men and women of good will be urged to join in prayer that this settlement marks not only the end of the war in Vietnam, but the beginning of a new era of world peace and understanding; and

That copies of this resolution be sent to the Governors of the several States.

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

There being no objection, the joint resolution was considered, ordered to a third reading, read the third time and passed.

The preamble was agreed to.

Mr. GRIFFIN. I thank the Chair.

VACATING OF ORDER FOR SENATOR McCLELLAN TO SPEAK TODAY

Mr. ROBERT C. BYRD. Mr. President, under the order previously entered, the distinguished Senator from Arkansas (Mr. McCLELLAN) was to be recognized today for not to exceed 15 minutes.

I have been informed by the Senator from Arkansas that he wishes to vacate the order and I therefore ask unanimous consent that the time allotted to the Senator from Arkansas under the order, or such portion thereof as he may desire to use, be allotted to the distinguished senior Senator from Missouri (Mr. SYMINGTON).

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

Mr. SYMINGTON. Mr. President, I appreciate the courtesy of the distinguished majority whip.

NOMINATION OF SECRETARY ELLIOT RICHARDSON FOR SECRETARY OF DEFENSE

Mr. SYMINGTON. Mr. President, on January 23, I inserted in the RECORD a series of questions submitted by me to Secretary Richardson with respect to his nomination to be Secretary of Defense. Also inserted were his answers to those questions, along with some additional questions based on those answers, this in an effort further to clarify the nominee's position and philosophy concerning matters that he will be dealing with in his new position.

At that time, I stated that the answers to my second set of questions had not yet been received, but that when they were, I planned to vote for his confirmation.

These answers have now been received; and I ask unanimous consent that they be printed in the RECORD.

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

THE SECRETARY OF HEALTH,
EDUCATION, AND WELFARE,
Washington, D.C., January 23, 1973.

Hon. STUART SYMINGTON,
U.S. Senate,
Washington, D.C.

DEAR SENATOR SYMINGTON: Thank you for your letter of January 18, with additional questions as to my views on certain national defense issues.

First as to the required level of adequacy for U.S. strategic forces, I am glad to restate my general position.

In my response to your earlier questions, I covered in one sentence the two meanings of "strategic sufficiency" which the President noted in his Foreign Policy Report last year: in a narrow military sense, sufficiency requires enough force to inflict a level of damage on a potential aggressor sufficient to deter him from attacking; and in a broader political sense, sufficiency requires forces adequate to prevent us and our allies from being coerced. My use of the term "clear sufficiency" is consonant with concepts spelled out by President Nixon.

I believe that to maintain "clear sufficiency" now and in the future, we must preserve a position of superiority over potential opponents in certain areas, such as in technology, because of the inherent nature of competition with a closed society. In other words, I would view "clear sufficiency" as an end point, with "superiority" in certain areas a requirement to achieve that end point.

Thus, "superiority," as I have discussed it above, does not equate with first-strike capability or with the attempt to obtain a position of first-strike capability. Indeed, I do not believe that a first-strike capability is a realistic, desirable, or responsible avenue for either side, given the strength, and diversity of each side's forces and given the U.S.'s and U.S.S.R.'s evident determination to maintain a credible deterrent. While I obviously do not have first-hand information about what the Soviet Union believes to be adequate for its own strategic forces in relation to ours, it seems to me reasonable to infer that the Soviet Union regards the strategic force levels agreed to in SALT I as "sufficient" to constitute such a deterrent.

With respect to the U.S. objectives in Vietnam, I did not state that any objectives should be achieved by renewed bombing. I said I supported all of the objectives underlying the President's proposal of May 8, 1972. I specifically pointed out that I was not prepared to hypothesize as to conditions or circumstances under which future U.S. military operations in Southeast Asia might be justified.

As I stated during the hearings, I have not been involved since I left the Department of State in the decision-making process with regard to either the negotiations in Paris or the military operations in Southeast Asia. My impressions of the inter-relationships of the many facets of these interrelated problems are derived largely from public sources of information. The minimum objectives of the President could not be secured through the negotiations in the fall of 1972; otherwise an agreement would have been signed. I am hopeful that the current negotiations will soon accomplish the return of our prisoners and an accounting of our missing in action as well as furthering the other objectives which I listed in my response to your earlier set of questions.

As I attempted to make clear in my earlier answers, the United States has targeted only military targets. As I am sure you are aware from the briefings provided to the Committee, some of these targets were in the cities of Haiphong and Hanoi.

As I stated in the hearing, I recognize that on a short-term basis our military operations in Southeast Asia could have an effect on our relationships with some of our allies. In general, however, we need to think in terms of a somewhat longer time span in evaluating the impact upon such relationships, which are based to a large extent on mutual security and other mutual benefits, and from this perspective I would be confident that the recent criticisms of our allies do not in themselves reflect and will not lead to a fundamental weakening of the ties between the United States and our allies.

It is difficult to speculate on the circumstances under which the interest of the United States would warrant involvement in local or regional disputes, and I can only restate for you the generally applicable policy.

This is the course the President has charted under the Nixon Doctrine, which has been implemented under the Strategy of Realistic Deterrence and the Vietnamization program. The President has made it clear that, until such time as they are modified, or abrogated under our constitutional process, we intend to keep our treaty commitments. The whole thrust of our Vietnamization program, however, has been to change the *manner* in which the United States would keep its commitments in future disputes of this nature. As has been said many times, Vietnamization was the first crucial step in implementing that aspect of the Nixon Doctrine, which calls upon the nation immediately threatened to bear responsibility for its own defense. While I obviously cannot rule out the possibility of future involvement by the United States in local conflicts where important United States interests are clearly involved, I do not foresee as either necessary or desirable a degree of involvement comparable to that in Vietnam in the 1960's.

I repeat what I said in response to your earlier question: it would not be appropriate for me to speculate as to what course of action would be appropriate in the event of hypothetical violations of a still-to-be consummated settlement agreement. As the President has stated, there are only two things that he has ruled out until satisfactory settlement of the Vietnam War: reintroduction of United States ground forces and use of nuclear weapons.

As I pointed out previously in response to your questions, the restraints on the President of the United States are many and varied, ranging across the spectrum of checks and balances flowing from provisions of our Constitution. Quite obviously, the President is limited to those resources provided by the Congress and is additionally limited by the many Congressional enactments with refer-

ence to the size, composition, and use of our military forces. Once these forces are committed to combat, however, the President, as Commander-in-Chief, acting within such statutory limitations as may be applicable, has personal and individual responsibility for directing the operations of the U.S. military forces.

I believe that the record of the military contributions to NATO of our NATO allies over the past several years has been reasonably good. I believe that the record will show that with minor exceptions, they have not reduced their contributions to the NATO defense forces. I believe, nevertheless, that we should continue to encourage still greater efforts on their part and I would expect to pursue the frank discussions on this subject with our allies which Secretary Laird conducted.

I agree that our forces, if they do serve as an adequate deterrent and can protect our people, both now and in the future, would enable us to negotiate from strength.

Turning to your next inquiry, I would like to point out that the term "massive" should refer to the reductions in United States military forces in Southeast Asia since 1969, rather than the forces currently remaining there. As you know, the size of United States military forces in Southeast Asia has been reduced by over 600,000 since 1969. Regardless of the size of United States forces remaining there, or in any other area of the world, I would not and could not support a position that United States military forces should not be committed to combat in the future under any and all circumstances. As I noted above, however, it would not be appropriate for me to speculate as to what conditions or circumstances might justify military operations by the United States.

As you know, any "NATO forces" cost estimate is very sensitive to the manner in which forces maintained in the continental United States for possible assignment to European, Asian, or other contingencies are allocated. It is possible to allocate these forces in different ways, thereby substantially raising or lowering the "cost" of these forces in support of NATO security. One way of making such an estimate is to include costs for the early forces in the U.S. formal commitment to NATO (i.e., those in Europe and those in CONUS ready for early deployment to Europe) and the support costs associated with these forces.

I am informed that the most recent DoD estimate of the costs for the forces and support programs earmarked for NATO is roughly $16 billion annually. This estimate is defined as the annual *savings* to the President's Defense Department budget for FY 1973 that would accrue if all of the following *did not exist*:

All of the U.S. general purpose forces and related support elements and headquarters in Europe.

Some of the U.S. general purpose forces (both active and reserve) that are formally committed to NATO but are not in Europe.

Variable costs of U.S.-based support including training, individual support and logistics for the above forces.

Military assistance for European countries (including Greece and Turkey) and the NATO Infrastructure program.

About $7 billion of the $16 billion is related to the cost of U.S. combat forces actually in Europe and their U.S.-based support—i.e., the cost of new equipment and a proportionate share of U.S. based training and logistics support. In order to save this $7 billion, all 300,000 men and associated units in Europe would have to be eliminated from total U.S. forces along with eliminating U.S.-based support units and cancelling of U.S.-based support programs.

The $16 billion estimate assumes that costs for strategic offensive and defensive forces, administration, research and development, and retired pay would be unchanged even if the forces and programs described above were eliminated.

I trust that these replies have adequately answered your questions.

Sincerely,

ELLIOT L. RICHARDSON.

A CRITICISM OF CONGRESSIONAL ACTION BY THE RETIRING SECRETARY OF HEALTH, EDUCATION, AND WELFARE WHICH DESERVES AN ANSWER

Mr. SYMINGTON. Mr. President, it is perhaps an understatement to recognize that this giant Federal bureaucracy is not an unknown target of reproach by Senators and Congressmen, who often describe it as an obstacle between the citizens and the programs Congress has devised for their benefit.

On the other hand, it is also rare for the Secretary of one of these giant bureaus, at the time of transferring to another major department of the Government, to provide Congress with candid comments which place much if not most of the blame for the inadequacies of that bureaucracy squarely on the shoulders of Congress.

Such an indictment is contained within a report issued by the departing Secretary of Health, Education, and Welfare. In an excerpt printed in the Washington Post of January 21, Secretary Richardson alludes to the authorization-appropriation gap and the political mileage sought by Congressmen and Senators by means of a number of relatively narrow categorical bills designed to control "problem of the month." He writes:

This process reaches an absurd extreme when Congress passes new laws which convey authority that already exists—again with flourishes of press releases and self-congratulation.

The competing claims, he states, make impossible the redemption of the "promissory notes of the authorizing committees" at full face value by the appropriations cashier. The net result, according to the Secretary of Health, Education, and Welfare, is not only underfunding, but also massive inequity, and a citizen-view of some Government institutions as unfair and inept.

Secretary Richardson estimates the cost of extending the present range of HEW programs to all those who are similarly situated, as well as those who, by luck, now participate in the benefits, at approximately one-fourth of a trillion dollars, roughly the equivalent of the entire Federal budget. Even so, he says, more than 85 percent of the HEW budget is now determined not by what the executive branch might request, or Congress might appropriate, but simply by expanding the number of eligible people who claim benefits.

The Secretary charges that:

The Congress is not organized to bring the process of budgeting under rational control. Expectations—inflated by a political shell game—rise faster than the capacity of the system to perform.

If what Secretary Richardson describes is accurate, when the point of reckoning is reached, it would appear wise to join him in hoping "that the troubled reaction toward the institutions held accountable would be reasoned and responsible."

The Secretary points to the powerful tradition of American idealism, balanced by the tradition of skepticism toward "do-good" efforts. In the words of Thoreau, he says:

If I knew for a certainty that a man was coming to my house with the conscious design of doing me good, I should run for my life.

As a Senator who has voted for many of these social programs in the belief they were designed to ameliorate some of the difficult problems now facing America, I am concerned by this criticism from the Secretary; and would hope that, on this floor, questions he has raised would be answered by those who have sponsored the legislation he has in mind.

Secretary Richardson suggests two prerequisites as a means for finding effective public answers for health, education, and welfare.

First, he believes we must level with each other about present approaches to the solution of social problems. Intended remediation of these problems through narrow categorical legislation, he believes, would be counterproductive, and might further squander our increasingly limited resources by spreading them too thinly, or by allocating them to areas for which the state of the art is inadequately developed.

Second, he believes that we must recognize, as we have with both foreign affairs and natural resources, that those resources we once thought boundless—human, financial, and intellectual resources—are actually now severely limited.

He concludes with this significant observation:

There is an unfortunate tendency, on the part of many, to view pragmatism and realism as somehow opposed to high promise and humanism. But we have reached a point at which high promise and humane concern can be responsibly expressed only through operational performance which is pragmatic and realistic.

I urge those Members of the Senate most informed on the matters brought under review to furnish answers to this criticism that has just been levelled at Congress by the outgoing Secretary of Health, Education, and Welfare. Before evaluation is given to the Secretary's criticisms, answers should be forthcoming.

I ask unanimous consent that the excerpt from Secretary Richardson's report printed in the Washington Post of Sunday, January 21, and to which I have previously referred, be printed at this point in the RECORD.

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

THE MAZE OF SOCIAL PROGRAMS

(By Elliot L. Richardson)

In the context of rapidly increasing budgets and even more rapidly increasing expectations, it is disheartening to observe the patterns of congressional behavior.

Historically, one set of committees in the House and Senate creates programs and another set actually provides the money for them. The political incentive for a member

of an authorizing committee is to pass bills with big price tags—and much publicity—to show he "cares about solving problems." Such an incentive does not apply to members of appropriating committees. Time after time, the figures on the price tag are higher than anything the executive branch can in good conscience request, and higher than anything that appropriations committees are willing to provide. There results, then, an "authorization-appropriation gap"—a gap which has grown by $3 billion in the last year alone and is now over $13 billion.

For the public, the authorization-appropriation process has become, in a sense, a shell game. Hopes are raised by attention to the authorizing hoopla, only to be dashed by the less flamboyant hand of the appropriations process.

The problem is compounded by the apparent political need for each congressman to get credit for authorship of a bill of his own—and if not for a bill of his own, for as many bills as possible. The result is a plethora of narrow categorical bills—maximizing the political benefit—where a more comprehensive bill might better promote the public benefit.

This process reaches an absurd extreme when Congress passes new laws which convey authority that already exists—again, with flourishes of press releases and self-congratulation. In the past three years, Congress has enacted at least 10 such laws affecting the Department of Health, Education and Welfare alone. Each ardently woos a particular constituency, addresses a specific problem. A striking example is the purportedly new authority to make grants for communicable-disease control. It so happens that HEW has had similar authority since 1878. Typically, the enactment misleads the public into believing that nothing has been done before and that something dramatic about to happen.

TOO LITTLE OF TOO MUCH

The problem is further compounded by the rampant fadism which seems to grip the Congress and the public. By an irrational process, some diseases are determined to be "in," others are not. In some cases, a disease which affects but a small percent of the population—and for which there is no known cure—becomes "in." But hypertension, for example—although it afflicts 23 million Americans, better than one in ten; although it directly causes more than 60,000 deaths a year (with a mortality rate 15 times higher among middle-aged blacks than whites); although it contributes to hundreds of thousands of additional deaths annually; and although we know how to control the disease—has not become "in."

We have, in effect, a system of periodic promotions of the disease or problem of the month—with the implicit suggestion that legislative action will effect a cure. And we have "impulse buying"—down the length of a virtually limitless shopping list.

There are, of course, too many competing claims for the promissory notes of the authorizing committees to be redeemed for full face value by the appropriations cashier. But in none of this is there a rational approach to priority-setting. The appropriation process is itself highly fragmented. HEW's resource allocation is determined piecemeal by 10 different subcommittees—with no coordination of any kind.

The net result is too little of too much—and unfulfilled expectations. The dynamic is perverse.

A MATTER OF EQUITY

Just as the proliferation of categorical programs ensures underfunding, a derivative effect is public subsidy and administration of a system which is massively inequitable.

The new nutrition program for older American—enacted in the last year—provides a case in point. The program is intended to provide nutrition services—including one hot meal a day—for older Americans who "cannot afford to eat adequately" or who have "limited capability to shop and cook" or who "lack skills and knowledge to select and prepare nourishing and well-balanced meals" or who experience "feelings of rejection and loneliness." There can be no doubt that the authorizing act reflects a worthy intent—to ensure that older Americans be properly nourished. It authorizes $100 million—a seemingly large sum—to serve this intent, and the President requested that the full $100 million be appropriated.

We can predict with complete confidence that this new program—launched with much fanfare—will not possibly succeed in fulfilling its implicit promise. In point of fact, $100 million represents but a small fraction of the resources needed to get the intended job done. It will allow approximately 250,000 older persons to be served—but we estimate that there are, at a minimum, 5 million older Americans eligible for service according to the definition of eligibility now prescribed by law. To serve that eligible population equitably would require at least $2 billion a year. In effect, for every older American who is served by this program, there will be at least 19 older Americans—eligible and similarly situated in need—who will not be served.

This example is not atypical. HEW now spends about $9 billion a year to finance service programs which provide special benefits to limited numbers of people who, for one reason or another, happen to have the good luck to be chosen to participate. Indeed, there is little cause for wonder that our governmental institutions are viewed as inept and unfair

To disguise the inequity problem, many programs are misleadingly labeled "demonstrations"—although it is clear that their intent is to serve, not to demonstrate in the conventional sense of the word. But this fundamentally inequitable system cannot long survive as such. It is all but certain—and rightly so—that the federal government will be faced with more and more law suits demanding equal opportunity and access to services for those who are similarly situated in need.

It is important to note that the cost of extending the present range of HEW services equitably—to all those who are similarly situated in need—is estimated to be approximately one quarter of a *trillion dollars*. That is, the additional cost would be roughly equivalent to the entire federal budget!

THE BUREAUCRATIC LABYRINTH

Since 1961, the number of different HEW programs has tripled, and now exceeds 300. Fifty-four of these programs overlap each other; 36 overlap programs of other departments. This almost random proliferation has fostered the development of a ridiculous labyrinth of bureaucracies, regulations and guidelines.

The average state now has between 80 and 100 separate service administrations, and the average middle-sized city has between 400 and 500 human service providers—each of which is more typically organized in relation to a federal program than in relation to a set of human problems.

In spite of our efforts at administrative simplification, there are 1,200 pages of regulations devoted to the administration of these programs, with an average of 10 pages of interpretative guidelines for each page of regulations. The regulations typically prescribe accounting requirements that necessitate separate sets of books for each grant; they require reports in different formats for reporting periods that do not mesh; eligibility is determined program by program, without reference to the possible relationship of one program to another; prescribed geographic boundaries for service areas lack congruity. In general, confusion and contradiction are maximized.

Although studies indicate that more than 85 per cent of all HEW clients have multiple problems, that single services provided independently of one another are unlikely to result in changes in clients' dependency status, and that chances are less than 1 in 5 that a client referred from one service to another will ever get there, the present maze encourages fragmentation.

As an administrative matter, the system is, at best, inefficient. As a creative matter, it is stifling. As an intellectual matter, it is almost incomprehensible. And as a human matter, it is downright cruel.

OUT OF CONTROL

The problem, in short, is that—in spite of the fact that the HEW "monster" is now moving toward a reasonably satisfactory condition of administrative control—the larger human resource development *system*, of which HEW is but a part, is a system out of control.

The HEW budget is spiraling upward—and more than 85 per cent of the budget is determined not by what the executive branch might request or the Congress might appropriate, but simply by the expanding number of eligible people who claim benefits. Pressures for greater equity threaten to force impossible quantum jumps in resource requirements.

The Congress is not organized to bring the process of budgeting under rational control. Expectations—inflated by a *political* shell game—rise faster than the capacity of the system to perform. Proliferating programs foster the development of a fragmented and ill-coordinated service delivery maze—in which clients are literally lost—a complex maze which defies the comprehension of administrators and citizens alike. Subsystems struggle to expand without regard to each other—promising only to compound inefficiency. Social problems remain unsolved. Intuitive tendencies to "do something" too easily follow a line of little resistance: the line to additional "programs." And the perverse dynamic is reinforced.

One can imagine a point of reckoning at which the magnitude of ill-treated problems is fully perceived—along with a profound sense of failure. And one can only hope that the troubled reaction toward the institutions held accountable would be reasoned and responsible.

A TRADITION OF SKEPTICISM

There is—along with a history of idealistic American efforts at organized beneficence—a powerful American tradition of skepticism toward such efforts. The latter strain of concern was succinctly articulated by Justice Brandeis: "Experience should teach us to be most on our guard when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

It was put more colloquially by Thoreau: "If I knew for a certainty that a man was coming to my house with the conscious design of doing me good, I should run for my life."

In many respects, our present "helping" systems provide empirical support for such skepticism. Yet the development of our society is beyond the point where it is possible—or desirable—to shrink from a major, organized, public responsibility for health, education and welfare objectives. The challenge is to find *means to pursue* these objectives in ways that "work" in a narrow sense—and in ways that also preserve and enrich the dignity and independence of the individual and the capacity of the system to continue to perform.

To begin to find such means, the following are prerequisite:

1. We must first level with each other about present approaches to social problem solving.

We must acknowledge that passing narrow categorical legislation does not in any way ensure the intended remediation of problems; that, indeed, it may be counterproductive; it may further squander limited resources by spreading them too thinly or by allocating them to areas for which the state of the art is inadequately developed; and it may further complicate a service delivery system already paralyzed by ill-organized complexity.

2. We must recognize, as we have with both foreign affairs and natural resources, that resources we once thought boundless—human, financial and intellectual resources—are indeed severely limited.

3. We must radically simplify our conception of the functions of HEW in order to make comprehensive analysis and administration manageable.

There is an unfortunate tendency, on the part of many, to view pragmatism and realism as somehow opposed to high promise and humanism. But we have reached a point at which high promise and humane concern can be responsibly expressed only through operational performance which is pragmatic and realistic. To continue to pretend otherwise would be irresponsible.

ORDER FOR RECOGNITION OF SENATOR JACKSON VACATED

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the previous order recognizing the distinguished Senator from Washington (Mr. JACKSON) at this time be vacated.

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

ORDER OF BUSINESS

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

(The remarks of Senator NUNN when he introduced S. 565 are printed in the RECORD under Statements on Introduced Bills and Joint Resolutions.)

ORDER VACATING ORDER FOR RECOGNITION OF SENATORS STENNIS AND ALLEN

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the orders previously entered for the recognition of the distinguished Senator from Mississippi (Mr. STENNIS) and the distinguished Senator from Alabama (Mr. ALLEN) be vacated.

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

ORDER OF BUSINESS

The ACTING PRESIDENT pro tempore. Under the previous order, the Senator from West Virginia is recognized for not to exceed 15 minutes.

(The remarks of Senator ROBERT C. BYRD on the introduction of the following measures are printed in the RECORD under "Statements on Introduced Bills and Joint Resolutions.")

S. 564, an amendment to the Social Security Act;

S. 570, on Federal financial disclosures;

Senate Joint Resolution 37, to name the Spacecraft Center as the Lyndon B. Johnson Space Center;

Senate Joint Resolution 39, to name the Washington National Airport as the Lyndon B. Johnson Airport.

REMOVAL OF INJUNCTION OF SECRECY (EXECUTIVE B, 93D CONGRESS, FIRST SESSION)

Mr. ROBERT C. BYRD. Mr. President, as in executive session, I ask unanimous consent that the injunction of secrecy be removed from a note of September 16, 1965, from the Government of Ethiopia and a reply note of October 20, 1972, from the Government of the United States which would terminate notes exchanged on September 7, 1951, concerning the administration of justice and constituting an integral part of the treaty of amity and economic relations between the United States and Ethiopia (Executive B, 93d Congress, first session), transmitted to the Senate today by the President of the United States, and that the notes, with accompanying papers, be referred to the Committee on Foreign Relations and ordered to be printed, and that the President's message be printed in the RECORD.

The ACTING PRESIDENT pro tempore. Without objection, as in executive session, it is so ordered.

The message from the President is as follows:

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith a note of September 16, 1965 from the Government of Ethiopia and a reply note of October 20, 1972 from the Government of the United States which would terminate notes exchanged on September 7, 1951 concerning the administration of justice and constituting an integral part of the treaty of amity and economic relations between the United States and Ethiopia.

I transmit also, for the information of the Senate, the report of the Department of State with respect to the proposed termination.

The notes which it is proposed be terminated set forth special provisions regarding the trial of cases involving American citizens and regarding the imprisonment of American citizens. The termination of the notes would be in conformity with this Government's policy of basing international agreements in general on the principles of equality and reciprocity.

I recommend that the Senate give early and favorable consideration to the notes submitted herewith and give its advice and consent to termination of the notes exchanged on September 7, 1951.

RICHARD NIXON.

THE WHITE HOUSE, *January 26, 1973.*

ORDER OF BUSINESS

Mr. ROBERT C. BYRD. Mr. President, how much time do I have remaining under the order?

The ACTING PRESIDENT pro tempore. The time of the Senator has expired.

Mr. ROBERT C. BYRD. I thank the Presiding Officer.

TRANSACTION OF ROUTINE MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Under the previous order there will now be a period for the transaction of routine morning business not to exceed 45 minutes with the statements made therein limited to 5 minutes each.

QUORUM CALL

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

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

The second assistant legislative clerk proceeded to call the roll.

Mr. ROBERT C. BYRD. 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.

AGREEMENT ON WITHDRAWAL OF OUR MILITARY FORCE FROM INDOCHINA

Mr. AIKEN. Mr. President, tomorrow night an agreement will be signed in Paris which will result in the complete withdrawal of our military forces from Indochina.

We have waited a long time for this agreement.

We have waited impatiently and have been blaming almost everyone but ourselves for the predicament which has involved us in Southeast Asia for the last 12 years.

The agreement reached in Paris will be signed by all four parties involved in the military controversy of Indochina—the South Vietnamese, the North Vietnamese, the Vietcong, and ourselves.

To reach this agreement has not been easy.

At times it seemed impossible and yet now, 5 years later, we have reached an agreement.

It is true that each of the four parties involved will claim that victory is theirs.

That does not matter.

What matters is that 60 days after the signing of the agreement tomorrow night, all American prisoners of war held by the erstwhile enemy will have been returned to us, and all the remaining military personnel—that is, our military personnel—some 20,000 which are still in South Vietnam, will have been evacuated.

Of course, the agreement is not perfect.

No agreement of this sort was ever perfect.

But, this agreement represents a new epoch in world history and must be made to work, as I am sure it will.

During the next 60 days our troops will be withdrawn and our POWs will be returned to us and missing in action accounted for as far as possible.

The various parties of Indochina will be given a free hand to settle their differences under the watchful eye of a four-nation commission.

And so I say, in quoting one of our famous New England poets: "Let the dead past bury its dead" and concentrate on the work which lies ahead.

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

Mr. AIKEN. I yield.

Mr. MANSFIELD. Mr. President, I am sorry I did not hear all of the remarks of the distinguished Senator from Vermont, but I do want to make a comment apropos to the settlement in Southeast Asia.

I recall vividly 6 years ago when the distinguished Senator from Vermont made a speech on the floor of the Senate—I repeat, 6 years ago—in which he said that what we ought to do was announce that we have achieved a victory and then withdraw.

Since the announcement of the settlement has become public, I note that all four sides involved, and maybe others, have indicated that they have won, and therefore peace is in hand and certain withdrawals will take place.

May I say that the distinguished Senator showed foresight 6 years ago, and that his formula seems to have been the happy medium by means of which an agreement, at least in part, has been reached or is almost reached, and hopefully will be reached when the various documents are signed tomorrow.

I would hope that once this is done and our troops withdrawn within a 60-day period, as the agreement calls for, and our POWs and recoverable missing in action are released during the same period and brought home, as is called for in the agreement, this would mark the beginning of the end of our participation, or I might say intervention, in the internal affairs of Southeast Asia, and that we would at last recognize that we are not the world's policemen, that we have a limited amount of resources, that our manpower is not unlimited, and that we have problems here at home as well as abroad.

And may I say that I would anticipate that the Nixon doctrine, which was promulgated almost 3 years ago by the President of the United States, would now go into effect. That means, as I interpret it, that we would gradually withdraw militarily from various countries throughout Asia and the world, that those countries would henceforth have to depend upon themselves primarily. As far as our allies are concerned, we would be willing to extend backup help of an economic nature, but would not intervene or interfere in any way in the affairs of any nation.

So I think that while a prophet is supposed to be without honor at home, the proposal made by the distinguished Senator from Vermont 6 years ago has now come through, and I wish to extend to him personally as much credit as I can for the sound suggestion he made at that time and the final promulgation of the Aiken proposal, which now seems to be embraced by every participant in this tragedy which is Indochina.

Mr. AIKEN. Well, Mr. President, I thank the Senator from Montana. I will only say that if I had anything to do with reaching the final agreement which will be signed tomorrow night, and any credit at all is due, it was worth while waiting for. But it was a little longer in coming than I had hoped for.

What I was trying to point out today is that instead of trying to recriminate and place the blame, which has belonged to all of us—we all had a share in it—let us get on with the business at hand.

Mr. MANSFIELD. Mr. President, I agree with the distinguished Senator. It does no good to look to the past, but we all ought to look to the present and prepare for the future, and hope a mistake of this nature will never, never occur again.

Mr. AIKEN. We learned a lesson. We learned it at high cost.

Mr. MANSFIELD. We did.

Mr. AIKEN. But I think we have learned it, and I think the agreement which will be signed tomorrow night will be of tremendous value.

THE REMARKABLE PROGRESS OF THE NORTHWEST NORTH CAROLINA DEVELOPMENT ASSOCIATION

Mr. ROBERT C. BYRD. Mr. President, recently I had the pleasure of being the guest of the Northwest North Carolina Development Association at the association's annual dinner in Winston-Salem.

I was shown great courtesy by the officers of the association, and I am particularly indebted to Mr. Dalton Ruffin, senior vice president of the Wachovia Bank & Trust Co. of Winston-Salem, who invited me to address the members of this 11-county group. This, it gave me much pleasure to do.

I believe my speech was well received by the audience, but if they were in any way impressed, it was nothing compared with the impression I received at first-hand of the truly remarkable progress that the Northwest North Carolina Development Association has made in that richly historical area of North Carolina.

At the risk of trespassing on his modesty, I might mention that northwest North Carolina deserves the gratitude of this body, and of the Nation, for having given us the distinguished senior Senator from North Carolina, whose outstanding service to his State and to his country needs no elaboration from me.

Nineteen years ago, the people of the counties of Alleghany, Alexander, Ashe, Caldwell, Davie, Forsyth, Stokes, Surry, Watauga, Wilkes, and Yadkin undertook a merciless self-analysis, and came to the decision that without positive action toward marked improvement in their economic and social conditions, the future was a bleak prospect.

Fifty percent of the young people growing up in the area left it in the quest for better opportunities elsewhere.

In 1954, the area's agricultural economy rested precariously on a single crop—tobacco. Farms were small and undercapitalized. The total agricultural income from the 11-county area was $116 million annually. In 1972, the total agricultural income had increased to $381 million annually. This has been accomplished by developing an agricultural economy based on a variety of crops and livestock, rather than depending on a static, relatively nonproductive, single-crop economy.

In 1953, northwest North Carolina had little or no industry. Even as recently as 1959, the number of people employed in industrial jobs in the area totaled 64,000. The average weekly wage was but $53. In 1972, with 110 national firms having been encouraged to establish plants in the 11-county area through the cooperative efforts of the development association, 87,000 local residents are now employed in industrial endeavors. The average weekly wage has risen to $102.

These tremendous improvements in the economic health of the area are impressive and important. But they have brought benefits other than those associated with overall economic income and cash flow to individuals and families. They have produced a strong sense of pride in their accomplishments, with a concomitant determination to continue improving the quality of community life. The success of the Northwest North Carolina Development Association in the economic field is obvious. But it has achieved something more, that might in the final analysis, be its most important contribution. It has changed the attitude of the people of the area from one of apathy and quiescent acceptance, to an attitude of vigorous involvement and interest in the possibilities of the future.

Time was in America when neighborliness and genuine interest in, and concern for, all the people of the hamlet, the village, the town or the county, were as natural to the American way of life as the family dinner at Thanksgiving. Today, in our vast urban and suburban reaches, this community spirit is, often virtually nonexistent. To my mind, this is a grievous loss. I am aware that in a highly industrialized society, and in a society where the standard of living offers so many other pleasurable diversions, it is difficult to maintain a strong community identity. I am aware that prosperity militates against the interdependency of people. But I cannot help hoping that some day, in some way, the fabric of our society will once again be interwoven with the threads of human understanding and human kindness.

I know we cannot turn the clock back. I know that the exigencies of the modern world dictate to us conditions and conduct of our everyday affairs that we wish were somewhat different from what they really are. But I like to think that Americans still have within them much of the basic faith and spirit that so characterized this Nation in its formative years when living was less frenetic.

Mr. Atwell Alexander, of Alexander County, a former president of the Northwest North Carolina Development Association, summed up the spirit of this most praiseworthy endeavor, when he said:

> There is no miracle in having an association, but the need for organized communities, with people working together toward common goals, is still as great as it ever was.

Some of the significant history of the very early days of this Republic was made by men and women from this beautiful northwestern corner of the State of North Carolina. If they could return to their birthplaces today, I am sure they would be proud of the way their descendants are honoring their great legacy.

HOUSE JOINT RESOLUTION 246—A JOINT RESOLUTION PROVIDING FOR A MOMENT OF PRAYER AND THANKSGIVING AND A NATIONAL DAY OF PRAYER AND THANKSGIVING

Mr. ROBERT C. BYRD. Mr. President, I ask that the Chair lay before the Senate a message from the House of Representatives on House Joint Resolution 246.

The ACTING PRESIDENT pro tempore (Mr. BIDEN) laid before the Senate a message from the House of Representatives on House Joint Resolution 246, providing for a moment of prayer and thanksgiving and a National Day of Prayer and Thanksgiving, which was read twice by its title.

Mr. ROBERT C. BYRD. I ask unanimous consent that the Senate proceed to the immediate consideration of the joint resolution.

The ACTING PRESIDENT pro tempore. Is there objection to the request of the Senator from West Virginia?

There being no objection, the joint resolution was considered, ordered to a third reading, read the third time, and passed.

The preamble was agreed to.

The joint resolution (H.J. Res. 246), with its preamble, reads as follows:

H.J. RES. 246

Joint resolution providing for a moment of Prayer and Thanksgiving and a National Day of Prayer and Thanksgiving

Whereas the American people have reason to rejoice at the news of a just and honorable end to the long and trying war in Vietnam; and

Whereas our deep and abiding faith as a people reminds us that no great work can be accomplished without the aid and inspiration of Almighty God: Now, therefore, be it

Resolved by the Senate and the House of Representatives of the United States of America, in Congress assembled, That the President of the United States is authorized and requested to issue a proclamation designating the moment of 7 p.m., e.s.t. January 27, 1973, a National Moment of Prayer and Thanksgiving for the peaceful end to the Vietnam War, and the 24 hours beginning at the same time as a National Day of Prayer and Thanksgiving.

That the President authorize the flying of the American flag at the appointed hour;

That all men and women of goodwill be urged to join in prayer that this settlement marks not only the end of the war in Vietnam, but the beginning of a new era of world peace and understanding; and

That copies of this resolution be sent to the Governors of the several States.

QUORUM CALL

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

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

The legislative clerk proceeded to call the roll.

Mr. ROBERT C. BYRD. 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.

COMMUNICATIONS FROM EXECUTIVE DEPARTMENTS, ETC.

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

REPORT ON OPERATIONS UNDER FOOD STAMP ACT

A letter from the Assistant Secretary of Agriculture, transmitting, pursuant to law, a report on operations under the Food Stamp Act of 1964 (with an accompanying report); to the Committee on Agriculture and Forestry.

DRAFTS OF PROPOSED LEGISLATION RELATING TO THE NAVY

A letter from the Secretary of the Navy, transmitting a draft of proposed legislation to amend title 10, United States Code, to increase below zone selection authorization of commissioned officers of the Regular Navy and Marine Corps and to authorize below zone selection of certain other commissioned officers of the Navy and Marine Corps, and for other purposes (with an accompanying paper); to the Committee on Armed Services.

A letter from the Secretary of the Navy, transmitting a draft of proposed legislation to amend title 37, United States Code, to provide entitlement to round trip transportation to the home port for a member of the uniformed services on permanent duty aboard a ship being inactivated away from home port whose dependents are residing at the home port (with an accompanying paper); to the Committee on Armed Services.

A letter from the Secretary of the Navy, transmitting a draft of proposed legislation to prevent the loss of pay and allowances by certain officers designated for the performance of duties of great importance and responsibility (with an accompanying paper); to the Committee on Armed Services.

A letter from the Secretary of the Navy, transmitting a draft of proposed legislation to amend title 10, United States Code, to permit the Secretary of the Navy to establish annually the total number of limited duty officers permitted on the active list of the Navy and Marine Corps, and for other purposes (with an accompanying paper); to the Committee on Armed Services.

A letter from the Secretary of the Navy, transmitting a draft of proposed legislation to amend title 10, United States Code, to make certain changes in selection board membership and composition, and for other purposes (with an accompanying paper); to the Committee on Armed Services.

A letter from the Secretary of the Navy, transmitting a draft of proposed legislation to amend title 10, United States Code, to authorize the Secretary of the Navy to establish the amount of compensation paid to members of the Naval Research Advisory Committee (with an accompanying paper); to the Committee on Armed Services.

A letter from the Secretary of the Navy, transmitting a draft of proposed legislation to amend titles 10, 18, and 37, United States Code, to revise the laws pertaining to conflicts of interest and related matters as they apply to members of the uniformed services, and for other purposes (with an accompanying paper); to the Committee on Armed Services.

PROPOSED LEGISLATION TO AMEND SECTION 2304 (A) OF TITLE 10, UNITED STATES CODE

A letter from the Assistant Secretary of the Air Force, transmitting a draft of proposed legislation to amend section 2304 (a) of title 10, United States Code, to increase from $2,500 to $10,000 the aggregate amount of a purchase or contract authorized to be negotiated (with accompanying papers); to the Committee on Armed Services.

REPORT ON REAL AND PERSONAL PROPERTY OF THE DEPARTMENT OF DEFENSE

A letter from the Secretary of Defense, transmitting, pursuant to law, a report on real and personal property of that Department, as of June 30, 1972 (with an accompanying report); to the Committee on Armed Services.

REPORT OF BALANCES OF FOREIGN CURRENCIES ACQUIRED WITHOUT PAYMENT OF DOLLARS

A letter from the Secretary of the Treasury, transmitting, pursuant to law, a consolidated report of balances of foreign currencies acquired without payment of dollars, as of June 30, 1972 (with an accompanying report); to the Committee on Foreign Relations.

REPORT ON MATTERS CONTAINED IN THE HELIUM ACT

A letter from the Secretary of the Interior, transmitting, pursuant to law, a report on matters contained in the Helium Act, for the fiscal year 1972 (with an accompanying report); to the Committee on Interior and Insular Affairs.

PROPOSED LEGISLATION RELATING TO IMMUNITY OF CERTAIN FOREIGN STATES

A letter from the Attorney General, and Secretary of State, transmitting a draft of proposed legislation to define the circumstances in which foreign states are immune from the jurisdiction of United States courts and in which execution may not be levied on their assets, and for other purposes (with accompanying papers); to the Committees on the Judiciary and Foreign Relations.

REPORT ON FINDINGS OF FACT IN A CERTAIN CASE

A letter from the Chief Commissioner, U.S. Court of Claims, transmitting, pursuant to law, copies of the opinion and findings of fact in the case of *Neva Vera Barnes McQuown, as Executrix of the Estate of Carleton R. McQuown* v. *The United States* (Cong. Ref. Case No. 2–70) (with accompanying papers); to the Committee on the Judiciary.

AUDIT REPORT OF FUTURE FARMERS OF AMERICA

A letter from the chairman, board of directors, Future Farmers of America, transmitting, pursuant to law, an audit report of that organization, for the fiscal year ended June 30, 1972 (with an accompanying report); to the Committee on the Judiciary.

REPORT OF CARE, INC.

A letter from the executive director, CARE, Inc., transmitting, pursuant to law, a report of that organization, for the fiscal year ended June 30, 1972 (with an accompanying report); to the Committee on the Judiciary.

PROPOSED LEGISLATION TO AMEND THE CIVIL SERVICE RETIREMENT LAW

A letter from the Director, Administrative Office of the U.S. Courts, transmitting a draft of proposed legislation to amend the civil service retirement law to increase the retirement benefits of referees in bankruptcy (with an accompanying paper); to the Committee on Post Office and Civil Service.

PROPOSED LEGISLATION RELATING TO U.S. NATIONALS EMPLOYED BY THE FEDERAL GOVERNMENT

A letter from the Chairman, U.S. Civil Service Commission, transmitting a draft of proposed legislation to extend civil service Federal employees group life insurance and Federal employees health benefits coverage to United States nationals employed by the Federal Government (with accompanying papers); to the Committee on Post Office and Civil Service.

PROPOSED LEGISLATION RELATING TO INCREASES IN CIVIL SERVICE RETIREMENT ANNUITIES

A letter from the Chairman, U.S. Civil Service Commission, transmitting a draft of proposed legislation to liberalize eligibility for cost-of-living increases in civil service retirement annuities (with an accompanying paper); to the Committee on Post Office and Civil Service.

PROSPECTUS RELATING TO RENEWAL OF LEASEHOLD INTEREST ON SPACE OCCUPIED BY THE DEFENSE SUPPLY AGENCY

A letter from the Acting Administrator, General Services Administration, transmitting, pursuant to law, a prospectus relating to renewal of the leasehold interest on space presently occupied by the Defense Supply Agency, New York, New York (with accompanying papers); to the Committee on Public Works.

PETITIONS

Petitions were laid before the Senate and referred as indicated:

By the ACTING PRESIDENT pro tempore (Mr. BIDEN):

The petition of the Lieutenant Governor of the State of California, praying for the enactment of legislation relating to drug traffic; to the Committee on the Judiciary.

A resolution adopted by the Township of Hazlet, N.J., protesting the location of any deep water port facility off the coast of New Jersey; to the Committee on Public Works.

EXECUTIVE REPORTS OF COMMITTEES

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

By Mr. SPARKMAN, from the Committee on Banking, Housing and Urban Affairs:

Frank C. Herringer, of Virginia, to be Urban Mass Transportation Administrator. (The witness has indicated his willingness to appear before Congressional Committees and testify when requested.)

INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

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

By Mr. SCOTT of Virginia:

S. 551. A bill to encourage truth in newscasting and public affairs broadcasting. Referred to the Committee on Commerce.

S. 552. A bill to amend title 5 of the United States Code with respect to the observance of Memorial Day and Veterans Day. Referred to the Committee on the Judiciary.

S. 553. A bill to establish nondiscriminatory school systems and to preserve the rights of elementary and secondary students to attend their neighborhood schools, and for other purposes;

S. 554. A bill to preserve and protect the free choice of individual employees to form, join, or assist labor organizations, or to refrain from such activities; and

S. 555. A bill to amend the Railroad Labor Act and the Labor Management Relations Act, 1947, to provide more effective means for protecting the public interest in national emergency disputes, and for other purposes. Referred to the Committee on Labor and Public Welfare.

By Mr. TOWER:

S. 556. A bill to amend title 13, United States Code, to provide for a mid-decade census of population in the year 1975 and every 10 years thereafter. Referred to the Committee on Post Office and Civil Service.

By Mr. SCHWEIKER:

S. 557. A bill to provide that U.S. Flag Day shall be a legal public holiday. Referred to the Committee on the Judiciary.

By Mr. HART:

S. 558. A bill to provide for the disposition of funds appropriated to pay a judgment in favor of the Grand River Band of Ottawa Indians in Indian Claims Commission docket numbered 40-K, and for other purposes. Referred to the Committee on Interior and Insular Affairs.

By Mr. EAGLETON:

S. 559. A bill for the relief of Carmen Valeriano;

S. 560. A bill for the relief of Victoria Vergel;

S. 561. A bill for the relief of Loy Shin Chong, Mui Eng Lim, and Erich Chong; and

S. 562. A bill for the relief of Sang Sup Ham, Koon-Ja Ham and Byung Kyun Ham. Referred to the Committee on the Judiciary.

By Mr. SCHWEIKER:

S. 563. A bill to amend the Internal Revenue Code of 1954 and title II of the Social Security Act so as to permit exclusion from social security coverage and refund of social security tax to members of certain religious groups who are opposed to insurance. Referred to the Committee on Finance.

By Mr. ROBERT C. BYRD (for Mr. RIBICOFF):

S. 564. A bill to amend title II of the Social Security Act so as to remove the limitation upon the amount of outside income which an individual may earn while receiving benefits thereunder. Referred to the Committee on Finance.

By Mr. NUNN (for himself and Mr. TALMADGE):

S. 565. A bill to require the Congress to prescribe a ceiling on expenditures for each fiscal year and to establish procedures to effectuate such ceilings. Referred to the Committee on Government Operations.

By Mr. HRUSKA (for himself and Mr. SCOTT of Pennsylvania):

S. 566. A bill to define the circumstances in which foreign states are immune from the jurisdiction of the U.S. courts and in which execution may not be levied on their assets, and for other purposes. Referred to the Committee on the Judiciary.

S. 567. A bill to revise title 28 of the United States Code. Referred to the Committee on the Judiciary.

By Mr. TOWER:

S. 568. A bill to amend the Outer Continental Shelf Lands Act by providing authority for the issuance of permits to construct, operate, and maintain port and terminal facilities. Referred to the Committee on Interior and Insular Affairs.

S. 569. A bill to provide that persons from whom lands are acquired by the Secretary of the Army for dam and reservoir purposes shall be given priority to lease such lands in any case where such lands are offered for lease for any purpose. Referred to the Committee on Public Works.

By Mr. ROBERT C. BYRD:

S. 570. A bill to promote public confidence in the legislative, executive, and judicial branches of the Government of the United States. Referred to the Committee on Rules and Administration.

By Mr. HANSEN (for himself, Mr. MANSFIELD, Mr. BENNETT, Mr. ALLEN, Mr. STEVENS, Mr. MCGEE, Mr. TOWER, Mr. YOUNG, Mr. CURTIS, Mr. THURMOND, Mr. HATFIELD, Mr. BIBLE, Mr. MCCLELLAN, Mr. ABOUREZK, Mr. FANNIN, Mr. DOMINICK, Mr. DOLE, and Mr. GURNEY):

S. 571. A bill to amend the Federal Meat Inspection Act to require that imported meat and meat food products made in whole or in part of imported meat be labeled "imported" at all stages of distribution until delivery to the ultimate consumer. Referred to the Committee on Agriculture and Forestry.

By Mr. COOK:

S. 572. A bill to waive the statute of limitations with regard to the tort claims of certain individuals against the United States. Referred to the Committee on the Judiciary.

By Mr. ERVIN:

S. 573. A bill for the relief of Elba Sonia Ozeki;

S. 574. A bill for the relief of Roy Ramon Solano Salas; and

S. 575. A bill for the relief of Anton Emil Kamar. Referred to the Committee on the Judiciary.

By Mr. DOMINICK (for himself, Mr. BROCK, Mr. CURTIS, Mr. GOLDWATER, Mr. SCHWEIKER, Mr. STEVENS, Mr. BIBLE, Mr. BUCKLEY, and Mr. BELLMON):

S. 576. A bill to amend the Gun Control Act of 1968 to provide for separate offense and consecutive sentencing in felonies involving the use of a firearm. Referred to the Committee on the Judiciary.

By Mr. JACKSON:

S. 577. A bill for the relief of Cmdr. Howard A. Weltner, U.S. Naval Reserve. Referred to the Committee on the Judiciary.

By Mr. CHURCH (for himself and Mr. CASE):

S. 578. A bill requiring congressional authorization for the reinvolvement of American Forces in further hostilities in Indochina. Referred to the Committee on Foreign Relations.

By Mr. MCCLURE:

S. 579. A bill for the relief of Mr. Arturo Manabat Amoranto, and his wife, Lourdes. Referred to the Committee on the Judiciary.

By Mr. PERCY (for himself, Mr. PASTORE, Mr. MOSS, Mr. WILLIAMS, Mr. STEVENSON, Mr. BROCK, Mr. STEVENS, Mr. MCGEE, Mr. NUNN, Mr. RANDOLPH, Mr. HATFIELD, Mr. BIBLE, Mr. HUMPHREY, and Mr. BAYH):

S. 580. A bill to amend title 18 of the United States Code by adding a new chapter 404 to establish an Institute for Continuing Studies of Juvenile Justice. Referred to the Committee on the Judiciary.

By Mr. GRIFFIN (for himself, Mr. MANSFIELD, Mr. SCOTT of Pennsylvania, and Mr. ROBERT C. BYRD):

S.J. Res. 33. A joint resolution to authorize and request the President to proclaim a moment and day of prayer and thanksgiving. Considered and passed.

By Mr. SCOTT of Virginia:

S.J. Res. 34. A joint resolution to direct the Federal Communications Commission to conduct a comprehensive study and investigation of the effects of the display of violence in television programs, and for other purposes. Referred to the Committee on Commerce.

S.J. Res. 35. A joint resolution proposing an amendment to the Constitution of the United States; and

S.J. Res. 36. A joint resolution proposing an amendment to the Constitution of the United States relative to freedom from forced assignment to schools or jobs because of race, creed, or color. Referred to the Committee on the Judiciary.

By Mr. ROBERT C. BYRD (for Mr. BENTSEN):

S.J. Res. 37. A joint resolution to designate the Manned Space Craft Center in Houston, Tex., as the Lyndon B. Johnson Space Center in honor of the late President. Referred to the Committee on Aeronautical and Space Sciences.

By Mr. COOK (for himself, Mr. CANNON, Mr. HATFIELD, Mr. RANDOLPH, Mr. STAFFORD, Mr. TALMADGE, Mr. THURMOND, and Mr. YOUNG):

S.J. Res. 38. A joint resolution proposing an amendment to the Constitution of the United States with respect to the attendance of Senators and Representatives at sessions of Congress. Referred to the Committee on the Judiciary.

By Mr. ROBERT C. BYRD:

S.J. Res. 39. A joint resolution to redesignate Washington National Airport as the Lyndon B. Johnson Airport. Referred to the Committee on Commerce.

By Mr. PELL:

S.J. Res. 40. A joint resolution to authorize and request the President to call a White House Conference on Library and Information Sciences in 1976. Referred to the Committee on Labor and Public Welfare.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. TOWER:

S. 556. A bill to amend title 13, United States Code, to provide for a mid-decade census of population in the year 1975 and every 10 years thereafter. Referred to the Committee on Post Office and Civil Service.

Mr. TOWER. Mr. President, today, I again would like to introduce a measure designed to authorize the Secretary of Commerce to conduct a census in the mid-decade. Under the terms of this legislation, beginning in 1975, and every 10 years thereafter, the Census Bureau would compile figures as of the first day of April of 1975 which would provide more current information than is now available in our present system of a decennial census.

In my opinion, there are two powerful reasons for the establishment of a mid-decade census. First, the amount of Federal funds a community or State receives is in a large part determined by its population. Eligibility for certain types of aid is triggered by population formulas. We are a highly mobile and ever-expanding society and oftentimes an 8- or 9-year-old census is not relevant to the current situation. Therefore, cities and States have a great need for funds and other services and find themselves deprived of such funds and services because the data upon which they are based are outdated. The necessity for more accurate information upon which to base legislation and upon which to distribute Federal funds and services should be readily apparent. Many of the cities and counties in Texas are among the fastest growing in the Nation. In 10 years the population in some areas can change as much as 50 percent. Such cases make it quite clear that there is a need for a mid-decade census.

Second, there is a need for a mid-decade census in order to assist in the area of population growth and control. It would assist in anticipating and guiding future urban growth and provide more current demographic statistics and information which would enable us to see if existing programs are successful or if statistics warrant stronger or different measures. It will allow us to see where this country is going in such related areas to population as environment, energy, and technology in these fields. A 10-year census is just not as relevant as a 5-year census to such a rapidly changing problem as population growth and distribution.

As to concern for the length of the census questionnaire, I have every reason to believe that the questionnaire would be kept as simple and short as possible. This measure does not contain a questionnaire limitation; however, it does state that in cities of over 100,000 there will be no full survey but sampling procedures and special surveys.

I was disappointed that no action was taken on this measure in the 92d Congress and I am certainly hopeful that the appropriate committee will see fit to expedite this most important measure.

By Mr. SCHWEIKER:

S. 557. A bill to provide that the United States Flag Day shall be a legal public holiday. Referred to the Committee on the Judiciary.

Mr. SCHWEIKER. Mr. President, I introduce a bill to provide that United States Flag Day shall be a legal public holiday.

It is noteworthy that, although the United States is one of the world's youngest, the U.S. flag is one of the oldest national emblems. It predates the present Union Jack of Great Britain and the French and Italian flags. Back in 1775, the Continental Congress named a committee composed of Benjamin Franklin, Thomas Lynch, and Benjamin Harrison to develop a design for a new national emblem. As a result, on June 14, 1777, the Continental Congress, sitting in Philadelphia, resolved:

> That the flag of the United States shall be of thirteen stripes of alternate red and white, with a union of thirteen stars of white in a blue field, representing the new constellation.

There is a tradition that the first flag was made by Mrs. John Ross, familiarly known as Betsy Ross, of 239 Arch Street, Philadelphia, at the request of Gen. George Washington. As a matter of fact, the Ross home is now a national shrine and may be visited by citizens interested in seeing where the Stars and Stripes originally came into being.

It is reported that George Washington described the makeup of the new flag as follows:

> We take the stars from heaven, the red from our mother country, separating it by white stripes, thus showing that we have separated from her, and the white stripes shall go down to posterity, representing liberty.

According to one story, General Washington himself had a hand in designing the flag. A star with six points had originally been suggested. General Washington, it is said, did not like this—perhaps because the British flag contained six-pointed stars—and he folded apiece of paper and cut across it with scissors, making a five-pointed star.

Throughout the years after the resolution, the observance of the anniversary of the original adoption of the flag grew slowly throughout the country. In 1893, the mayor of Philadelphia, after receiving a resolution of the Society of Colonial Dames of Pennsylvania, ordered the display of the flag on the public buildings in the city. A direct descendent of Benjamin Franklin, Mrs. Elizabeth Duane Gillespie, president of the Colonial Dames at the time, offered the resolution which proposed that the day be known thereafter as Flag Day and that the flag be displayed by all citizens on their residences and on all business places as well as on public buildings.

The anniversary, however, has never been designated as a legal holiday. It is customary to hold the celebration in the Betsy Ross house in Philadelphia and the Patriotic Order of the Sons of America place a wreath on the grave of Betsy Ross in Mount Moriah Cemetery in Philadelphia. Generally the Daughters of the American Revolution observe the day with ceremonies, as do the Sons of the American Revolution.

Mr. President, it is my feeling that it would be well for us to pause each year to commemorate the anniversary of our national flag. I propose that June 14 be designated as "United States Flag Day" to indicate very clearly that it is the flag of the United States of America which we are honoring. The establishment of U.S. Flag Day as a national holiday would give us the opportunity to reflect on the ideals of the Founding Fathers which have enabled this country to become the great and strong nation that it is.

By Mr. SCHWEIKER:

S. 563. A bill to amend the Internal Revenue Code of 1954 and title II of the Social Security Act so as to permit exclusion from social security coverage and refund of social security tax to members of certain religious groups who are opposed to insurance. Referred to the Committee on Finance.

Mr. SCHWEIKER. Mr. President, I am today introducing again a bill to provide an exemption from the social security employment tax on wages for religious groups opposed to insurance. I first introduced this legislation in the Senate as an amendment to the Social Security Amendments of 1970, H.R. 17550, and it was adopted by the Senate Finance Committee and passed by the Senate. It was dropped in conference with the House. Since then I have introduced the measure as a separate bill and as an amendment to H.R. 1. To date this provision has twice been passed by this body, and twice dropped in conference. Nevertheless, the issue incorporated in this bill is fundamental and I will continue my efforts to see it enacted into law.

I cite the Amish as an example of people who desire and should be offorded this social security exemption due to their religious objection to social security.

The Internal Revenue Code provides an exemption from self-employment tax, if a person can show he is a member of a recognized religious sect which follows the practice of making provisions for its dependent members. I now ask that this exemption be extended from self-employment tax to those who work for others and oppose for religious reasons, payment of social security employment tax on wages.

As part of their religion, the Amish refuse any form of relief or what they call Government handouts. They oppose all forms of social security, including old-age pensions. Regarding it not as a tax but rather as a policy premium in a national insurance system, the Amish are opposed to participation, because of their conscientious objection to all forms of insurance. This belief is embodied in the Dordrecht Confessions, which predates our Constitution. Its doctrine of the church as the visible communion of the saints may be taken as the implicit ground for rejection of insurance in the sense that the congregation of God's people are expected to live by faith and trust in providence. Otherwise it counsels obedience to the state, which is why the Amish have no objection to the payment of taxes.

Forcing people such as the Amish to pay a tax which is a form of insurance, directly opposed by the tenets of their faith, is an impingement on the religious

rights of any group, no matter how small.

It is difficult for me to understand why we have not been ready to permit religious groups to conscientiously object to economic regulations when we rightfully recognize their right to object to the military service.

I feel strongly that this Government must not ride roughshod over the religious rights of a minority. Such is the case under present law. In 1961, the Federal Government seized three horses belonging to an Amish farmer in Pennsylvania, and sold them at public auction to obtain money for social security payments which the man refused to make because of his religious convictions.

It was about this time that I began my effort to assist the Amish people to get relief from participating in the social security program to which they are opposed on religious grounds. In 1961 and again in 1963, I introduced a bill in the House which would have provided an exemption from participation in the Federal old-age and survivors insurance program for those whose religious doctrines forbid participation in such a program.

In 1964, there was social security legislation in Congress. Since the House was operating under a closed rule, I was unable to introduce an amendment to the 1964 social security law. However, the Senate version of the bill contained such an amendment. The House-Senate conference committee then had to decide whether to use the House-version of the bill, which had no provision for the Amish exemption, or the Senate version, which included the Senate amendment. I wrote letters to all Congressmen and personally talked to the House Members of the conference committee, urging them to accept the Senate version for the Amish. Fortunately, the Treasury Department, as well as the Justice Department rendered legal opinions saying that the old order Amish exemption met all constitutional requirements and was strictly a matter of legislative policy. Finally, the conferees agreed to accept the Senate Amish amendment, for which I was very pleased.

Unfortunately, the bill died in the conference committee because of the dispute over medicare. It did, however, lay the groundwork for the first relief granted to the Amish.

On July 30, 1965, Congress amended the Internal Revenue Code, allowing a person to apply for exemption from self-employment tax if he is a member of a recognized religious sect which follows the practice of making reasonable provision for its dependent members. We must now take this one step further, and provide an exemption from social security taxes on wages.

Specifically, my bill provides that any member of a recognized religious sect in existence since at least 1950, who can show that he is an adherent of established teachings which cause him to be conscientiously opposed to acceptance of social security benefits, may file an application to be entitled to a credit or refund of the amount of the tax.

The applicant would submit evidence to substantiate his membership in the sect and his adherence to its teachings, and would be asked to show that it has been the practice of the sect to make provision for the care of its elderly or dependent members.

In addition, the employer would continue to pay into the social security fund, thus eliminating any chance that such an amendment would make one employee more desirable than another. The objective here obviously is not to make one group of people more desirable employees than another, but instead to assist those who object to social security coverage because it directly opposed the basic religious tenets of their faith. Since the employer would continue to pay into the social security fund, the exempted employee would offer no financial advantage over the nonexempted employee.

The provisions of this bill are identical to those contained in H.R. 1, the Social Security Amendments of 1972, as reported by the Senate Finance Committee during the 92d Congress and passed by the Senate.

I ask unanimous consent that this bill, additional material regarding the beliefs of the Amish people on social security, and a letter I received in 1965 from the Treasury Department on the constitutionality of this exemption be inserted at this point in the RECORD.

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

S. 563

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a)(1) section 6413 of the Internal Revenue Code of 1954 (relating to special rules applicable to certain employment taxes) is amended by adding at the end thereof the following new subsection:

"(e) SPECIAL REFUNDS OF SOCIAL SECURITY TAX TO MEMBERS OF CERTAIN RELIGIOUS FAITHS.—

"(1) IN GENERAL.—An employee who receives wages with respect to which the tax imposed by section 3101 is deducted during a calendar year for which an authorization granted under this subsection applies shall be entitled (subject to the provisions of section 31(b)) to a credit or refund of the amount of tax so deducted.

"(2) AUTHORIZATION FOR CREDIT OR REFUND.—Any individual may file an application (in such form and manner, and with such official, as may be prescribed by regulations under this subsection) for an authorization for credit or refund of the tax imposed by section 3101 if he is a member of a recognized religious sect or division thereof described in section 1402(h)(1) and is an adherent of established tenets or teachings described in such section of such sect or division. Such authorization may be granted only if—

"(A) the application contains or is accompanied by evidence described in section 1402(h)(1)(A) and a waiver described in section 1402(h)(1)(B), and

"(B) the Secretary of Health, Education, and Welfare makes the findings described in section 1402(h)(1)(C), (D), and (E).

An authorization may not be granted to any individual if any benefit or other payment referred to in section 1402(h)(1)(B) became payable (or, but for section 203 or 222(b) of the Social Security Act, would have become payable) at or before the time of filing of such waiver.

"(3) EFFECTIVE PERIOD OF AUTHORIZATION.—An authorization granted to any individual under this subsection shall apply with respect to wages paid to such individual during the period—

"(A) commencing with the first day of the first calendar year after 1970 throughout which such individual meets the requirements specified in paragraph (2) and in which such individual files application for such authorization (except that if such application is filed on or before the date prescribed by law, including any extension thereof, for filing an income tax return for such individual's taxable year, such application may be treated as having been filed in the calendar year in which such taxable year begins), and

"(B) ending with the first day of the calendar year in which (i) such individual ceases to meet the requirements of the first sentence of paragraph (2), or (ii) the sect or division thereof which such individual is a member is found by the Secretary of Health, Education, and Welfare to have ceased to meet the requirements of subparagraph (B) of paragraph (2).

"(4) APPLICATION BY FIDUCIARIES OR SURVIVORS.—If an individual who has received wages with respect to which the tax imposed by section 3101 has been deducted during a calendar year dies without having filed an application under paragraph (2), an application may be filed with respect to such individual by a fiduciary acting for such individual's estate or by such individual's survivor (within the meaning of section 205(c)(1)(C) of the Social Security Act)."

(2) Section 31(b)(1) of such Code (relating to credit for special refunds of social security tax) is amended by striking out "section 6413(c)" and inserting in lieu thereof "section 6413 (c) or (e)".

(b)(1) Section 201(g)(2) and 1817(f)(1) of the Social Security Act are each amended by striking out "section 6413(c)" and inserting in lieu thereof "sections 6413(c) and (e)".

(2) Section 202(v) of the Social Security Act is amended—

(1) by inserting "(1)" after (v)"; and

(2) by adding at the end thereof the following new paragraph:

"(2) Notwithstanding any other provisions of this title, in the case of any individual who files a waiver pursuant to section 6413(e) of the Internal Revenue Code of 1954 and is granted an authorization for credit or refund thereunder, no benefits or other payments shall be payable under this title to him, no payments shall be made on his behalf under part A of title XVIII, and no benefits or other payments under this title shall be payable on the basis of his wages and self-employment income to any other person, after the filing of such waiver; except that, if thereafter such individual's authorization under such section 6413(e) ceases to be effective, such waiver shall cease to be applicable in the case of benefits and other payments under this title and part A of title XVIII to the extent based on his wages beginning with the first day of the calendar year for which such authorization ceases to apply and on his self-employment income for and after his taxable year which begins in or with the beginning of such calendar year."

BACKGROUND OF THE PROGRAM

The following background information indicates the basic nature of the social security program, the general character of religious objections to participation in social security, and the present situation of the Old Order Amish in relation to social security.

COMPULSORY NATURE OF SOCIAL SECURITY

The social security program is designed to provide old-age, survivors, and disability insurance protection for American families, regardless of family size, income, or other factors. Under this program workers (and their employers) and the self-employed contribute while working so that the contributor and his family may have a continuing in-

come when earnings cease or are greatly reduced because of retirement in old-age, long-term disability, or death. About 9 out of 10 working people and their families are covered under the program.

Social security can carry out its purpose only under conditions of compulsory coverage. Compulsory coverage assures that there will be a given distribution of what might be called poor risks—those who will get considerably more than they pay in—and good risks. Under a voluntary program, there would be an unduly high proportion of poor risks. Many people could predict with reasonable certainty whether or not they would get a large return on their contributions and those choosing coverage would generally be the ones who could expect to receive benefits bargains. This would increase the cost of the program for all who participate. Those given a choice as to coverage would have an unfair advantage over those workers and employers whose coverage would continue to be on a compulsory basis and who would have to help bear the increased cost arising from the individual voluntary coverage. Moreover, under individual voluntary coverage, many who need social security protection most would not participate. Many low income workers would choose not to pay the contributions because of the press of day-to-day financial problems, although in the long run social security protection would be especially valuable to such workers and their families.

Individual voluntary coverage is now provided under social security only in respect to services performed in the exercise of the ministry (including the performance of the duties of a Christian Science practitioner). The exclusion from coverage of such services (where coverage is not elected) is not a personal exclusion but an occupational exclusion. Thus, a minister who engages in any employment or self-employment other than the exercise of the ministry—whether or not he elects coverage of his ministerial services—is covered on the same basis as all other persons. Once a minister elects coverage of his services in the ministry, the election is irrevocable and once the time for election passes, a minister who has not elected coverage may no longer do so.

RELIGIOUS OBJECTIONS TO COVERAGE UNDER SOCIAL SECURITY

Representatives of those divisions of the Amish Mennonites generally classed as Old Order Amish (with some 19,000 adult members) have objected to social security taxes on grounds that social security is a form of insurance, and that their participation in an insurance program would show mistrust in the providence and care of God to meet future needs. This basis for objection is shared by the Old Order Mennonites (about 5,000 members) by at least some of the followers of Father Divine (some 300,000 members), and by an unknown number of small sects, such as the Hutterites (a Mennonite group with 2,300 members, who practice communal living) and the division of the Plymouth Brethren known as Exclusives.

Another religious basis for opposing participation in social security is adherence to a principle of separatism—the belief that one's sect or group should keep apart from all other persons. The Old Order Amish, for example, place great importance on the scriptural admonition: "Be ye not unequally yoked together with unbelievers; for what fellowship hath righteousness with unrighteousness? and what communion hath light with darkness?" Separatism is also a cardinal principle of some groups which have not indicated their attitudes toward social security; for example, the Black Muslims, perhaps the prime exponents of separatism, and Jehovah's Witnesses, with 287,000 members in the United States, all of whom are held by the sect to be ministers. There would seem to be considerable doubt that participation in social security is compatible with the belief of Jehovah's Witnesses that the end of the world is close at hand—1984, at latest—and objections to social security have been received from individual members from time to time.

Each of the above-mentioned groups has come into conflict with Federal or State law on questions other than social security. All oppose compulsory military service, and there have been various other conflicts with State or local laws, such as the refusal of the Old Order Amish to permit their children to attend school beyond the 8th grade, and the refusal of Jehovah's Witnesses and the Black Muslims to salute the flag.

The Christian Science Church opposed provision of disability benefits under social security on religious grounds.

OLD ORDER AMISH

The 19,000 Old Order Amish Mennonites live in about 270 communities in 19 States. The communities are known as church districts; however, there are no meeting houses and worship is conducted in private homes. Each community is headed by a bishop. There is no hierarchy above the bishops and no formal organization among the various communities. Thus each bishop is able to interpret doctrine independently of views held in other communities.

Amish who do not belong to old order groups—e.g., a category known as Beachy Amish—have adopted relatively modern ways of living, and are apparently not opposed to social security. There continue to be cleavages in which Old Order Amish communities, or segments of communities, split off to adopt more modern ways of living. One-third or more of the offspring of Old Order Amish parents do not continue in the sect. As in virtually any group there are marginal members, some of whom eventually become separated from the sect. The Amish strive continually to maintain their communities against worldly temptations; and effective means of maintaining has been their stand against high school education and their doctrine of shunning,[1] with its grave economic implications for individuals who are so ill equipped to prosper outside the community.

The Old Order Amish relate practically every detail of their way of living to religious beliefs, which in turn are based on literal interpretation of scriptural texts. The Old Order Amish attempt to pursue a life similar in its course to that of the German peasants of perhaps the 17th or 18th century. The farm way of life is justified on religious grounds because being "in the country" separates the group from more worldly, less firm followers of Scripture. Consideration has been given to the use of nonmechanized farming methods as one way of differentiating (in proposed legislation) the Old Order Amish from other religious objectors to social security. But even among the Old Order Amish there have been various concessions to the changing times. For example, though a tractor may not be used in the field, it is permissible to use a tractor to furnish belt power. The Old Order Amish farmer is generally allowed to have one- or two-cylinder gasoline motors for his farm operations. The Old Order Amish make a significant distinction between owning and merely using modern conveniences. For example, in some communities it is permissible to have electric current and appliances in a mortgaged home but not after the mortgage is paid off. A significant distinction is also made between members of the sect and those who are members of the Amish community but not members of the sect—for example, Amish youngsters, who do not become members of the Old Order Amish until they are baptized (which usually occurs in their later teens). A case has been described in which a young man deferred baptism for a period of time so as to enable continued ownership of an automobile and a tractor, with which he not only provides transportation for his numerous family and neighbors but also works his father's large farm and many of his neighbors.[2]

HISTORY OF THE PROBLEM

The problem of the Old Order Amish with social security dates mainly from 1955 when coverage of self-employed farm operators began. (However, some members of the sect who take employment in town have been covered as far back as 1937.) Although the law does not require that social security benefits must be accepted, the Old Order Amish bishops assert that required payment of social security taxes obliges their members to participate in the social security program—an insurance program—and thus to act contrary to their religious beliefs. Though the social security tax provisions are not included with the benefit provisions in the Social Security Act, but are part of the Internal Revenue Code, the bishops seem to look upon the social security taxes as in the nature of a personal premium paid for insurance. The bishops believe that their members should pay other types of taxes, pursuant to the scriptural admonition to "render unto Caesar the things that are Caesar's." In general, the creed of the sect (also held by some other groups) dictates that members should obey civil laws except where they "militate against the law, will, and commandments of God."[3]

The religious objection to the insurance principle is not clear cut. For example, the Older Order Amish make systematic arrangements for protection against property loss from fire, storm, and other causes, under which, after a loss occurs, members contribute labor and make a monetary contribution related to their net worth. One such group arrangement, known as the Amish Mutual Fire Insurance Association of Atglen, Pa., was organized by the Older Order Amish of Lancaster County in 1875 and was licensed as an insurance company in Maryland and Pennsylvania. The Old Order Amish do not consider this type of arrangement to be insurance because there is no advance funding. Liability insurance is apparently not considered to be contrary to their religious beliefs—a conclusion based on the view that liability insurance provides indemnity not to the insured but to the party suffering damages. It seems clear, however, that the Old Order Amish are strongly opposed to life insurance even though the survivors, not the insured, are protected under it.[4]

There is no question, of course, as to the sincerity of the assertion of the Old Order Amish bishops that participation in social security is contrary to their religious beliefs, and a number of the Amish farmers carry

[1] "Amish Society," by John A. Hostetler, p. 144.

[2] "Our Amish Neighbors," by William I. Schreiber, p. 77.

[3] "The Dordrecht Confession (1632)." In reference to civil government, this confession also directs believers "faithfully to pay it custom, tax, and tribute." One article of the confession forbids defense by force.

[4] The first reference to insurance in basic documents related to Amish religious background appears in "Christian Fundamentals," adopted by the Mennonite General Conference in 1921, which states that "life insurance is inconsistent with filial trust in the providence and care of our heavenly Father." A more recent commentary, in "The Mennonite Encyclopedia," explains: "This refers to commercial life insurance only. The (Mennonite) brotherhood has a growing awareness of its obligation to make systematic provision for the economic needs of its members including financial assistance for the widows and orphans in event of serious incapacity or death."

out this objection to the point of open refusal to pay social security taxes and active resistance to the execution by the Government of liens on their bank account to satisfy unpaid taxes. During many discussions with representatives of the Social Security Administration, the bishops have consistently refused to consider any compromise solution short of exclusion from social security coverage. On the other hand, a number of individual members of the sect have claimed old-age insurance benefits under social security when they became eligible for such benefits. It appears that at least some of the Old Order Amish—particularly, younger members—are undergoing a change in attitude toward social security and are coming to regard it as a good thing. This is quite consistent with their increasing acceptance of various innovations of the 20th century.

As noted, the problem of those Old Order Amish who actively resist social security coverage is related mainly (though not entirely) to the social security self-employment tax.[5] The enforcement problem was thrust on the national scene when one Amishman, Valentine Y. Byler, of New Wilmington, Pa., who had no bank account, could not be persuaded to pay his tax for the years 1956–59. In the spring of 1961 the Government seized three of his six plow horses, sold them at public auction, and applied the proceeds against his outstanding liability. After consultation with an attorney who had become interested in civil liberties cases, Mr. Byler brought suit on the grounds of infringement of the freedom of religion guaranteed under the first amendment.

Given assurance that the constitutionality of the tax would be tested in court, and that the statute of limitations on collection of taxes would be waived by the Amish, the Commissioner of Internal Revenue agreed in October 1961, to suspend all forceful collection of tax until the issue was resolved in court. On January 21, 1963, the suit was dismissed with prejudice on motion of the plaintiffs, Mr. and Mrs. Byler. (This action was apparently based on religious objections to participating in litigation, and was taken without consultation with the plaintiff's attorney.) As an alternative course, Old Order Amish bishops appealed to the Conress and bills were introduced during the 87th Congress to exempt them from the tax. The Treasury Department and the Department of Health, Education, and Welfare pointed out objections to these bills on administrative and precedent grounds. During consideration by the 87th Congress of H.R. 10606, the Public Welfare Amendments of 1962, one of these bills (S. 2301) was adopted as a Senate amendment but was dropped in conference. Appended is a list of bills which have been introduced in the 88th Congress for the purpose of permitting exclusion from social security on grounds of religion or conscience, or to make coverage voluntary for self-employed farmers.

Although the suit to test the constitutionality of the self-employment tax as it applies to the Old Order Amish was never tried, the moratorium on the collection of tax has not been terminated by the Internal Revenue Service. According to the most recent report of the Service, there are some 1,500 delinquent Amish accounts, the delinquencies ranging for the most part for periods from 1 to 3 years and involving nearly $250,000 in tax liabilities.

[5] The self-employment tax rate is now 5.4 percent, and is applicable to the first $4,800 of annual net earnings from self-employment. Virtually all self-employment, except self-employment as a doctor of medicine, is compulsorily covered under social security for any year in which an individual has annual net earnings of at least $400 from self-employment. The current social security tax rate for employers and employees is 3⅝ percent each.

The moratorium was intended as a temporary measure. Since tax liabilities are not satisfied but only postponed by this moratorium, it cannot be extended for too long a period of time. The 6-year period of limitation on collection of tax will expire this year in some cases. Some Old Order Amish have already indicated that they would not sign waivers to extend the collection period. The Government, therefore, in these cases soon will be forced to take action for the collection of taxes due from these individuals or else allow its collection rights to lapse.

TREASURY DEPARTMENT,
Washington, August 12, 1964.

Hon. RICHARD S. SCHWEIKER,
House of Representatives,
Washington, D.C.

DEAR MR. SCHWEIKER: I am enclosing herewith the opinion of Mr. Berlin, the General Counsel of the Treasury Department, relating to the constitutionality of optional exemption of members of a certain religious faith from the social security self-employment tax or optional recovery of the tax paid.

Sincerely yours,

STANLEY S. SURREY,
Assistant Secretary.

THE GENERAL COUNSEL
OF THE TREASURY,
Washington, D.C., August 6, 1964.

CONSTITUTIONALITY OF OFFICIAL EXEMPTION OF MEMBERS OF A CERTAIN RELIGIOUS FAITH FROM THE SOCIAL SECURITY SELF-EMPLOYMENT TAX OR OPTIONAL RECOVERY OF THE TAX PAID

Legislation has been proposed in the present and the previous Congress to provide optional exemption with the social security self-employment tax for "a member or adherent of a recognized religious faith whose established tenets or teachings are such that he cannot in good conscience without violating his faith accept the benefits of insurance," upon a finding by the Secretary of Health, Education, and Welfare that his application for exemption was made in good faith and that the members of such religious faith make adequate provision for elderly members to prevent their becoming public wards.[1] Senators CLARK and SCOTT, among the chief proponents of this legislation, have explained that the faith in question is that of those Amish Mennonites who are known as the plain people or Old Order Amish who live in relative independence and isolation in rural communities and adhere strictly to many literal biblical injunctions, including reliance on divine providence for their care. The consistency and sincerity of the sect is attested to by the refusal of most of their members to accept social security benefits or pay the self-employment tax.

In the consideration of these bills in Congress the question, was raised as to whether the proposed exemption would be constitutional and the views of the Treasury Department were requested. This opinion is in response to that request. Since then, additional legislative proposals, including an alternative proposal of relief for the Amish in the form of tax recovery in place of tax exemption, have been discussed in a joint statement by the Treasury Department and the Department of Health, Education and Welfare, entitled 'Request of the Old Order-Amish for Exemption from the Social Security Self-Employment Tax," which was transmitted to interested Members of Congress by a joint letter dated July 20, 1964. In connection with the earlier request, it is also appropriate to consider the constitutionality of these proposals as well as the constitutionality of the various limitations included, or suggested for inclusion in the definition of the faith whose members or adherents would be eligible for exemption. The joint statement referred to above reviews the religious tenets and modes of life of these Amish and provides an extended analysis of the social security system and the possible effects of an exemption. I will not, therefore, in this opinion cover any of this factual material. A copy of this joint statement is attached hereto.

[1] S. 294, 88th Cong., H.R. 10606, 87th Cong., among others.

CONCLUSION ON TAX EXEMPTION AND TAX RECOVERY

My conclusion, based upon a review of the principles of constitutional law, is that there is no valid constitutional objection to the proposed exemption and that the question of exemption is one of public policy for Congress to determine. After discussion of the grounds for this conclusion I will review in the latter part of this opinion the constitutionality of various proposed additional limitations upon the exemption.

This conclusion concerning tax exemption comprehends any provision by Congress for tax recovery, since tax exemption is the most complete relief that could be given. In the subsequent discussion, therefore, the constitutional conclusions with respect to the requirements of uniformity, of the first amendment, and of due process should be read as also extending to a provision for tax recovery.

Congress and the States have provided for the recovery of taxes in various situations where for reason of public policy the legislature has determined this to be appropriate. I have found no constitutional challenge of these provisions. For example, 26 U.S.C. 6420 provides for refund of the gasoline taxes paid for gasoline used for farming purposes. A similar provision in the Virginia Code, section 58-715 (Supp. 1964), includes refunds for gasoline used for public or nonsectarian school buses. Title 26 U.S.C. 6418 provides for refund of the Federal tax on sugar manufactured in the United States to those who use such sugar as livestock feed or in the distillation of alcohol.

If members of the designated religious faith were permitted to choose to recover in monthly installments the amount, and only the amount, of the social security taxes they have paid, they would be under a limitation which operated to their disadvantage as compared with other social security taxpayers to whom an indefinite amount of social security recovery would be available in the form of insurance. Consequently, it would seem that no other social security taxpayer would be in a position to claim that the tax recovery allowed to the Amish in any way discriminated against his or added to his tax burden.

1. The requirement of uniformity: The Constitution provides in article I, section 8, clause 1: "The Congress shall have power to lay and collect taxes, duties, imposts, and excise, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excise shall be uniform throughout the United States; * * *." This *canon of* uniformity has been long established to be a requirement of geographical uniformity only *Knowlton* v. *Moore,* 178 U.S. 41 (1900); *Brushaber* v. *Union P., Co.,* 240 U.S. 1 (1916); *Fernandez* v. *Weiner,* 326 U.S. 340 (1945). Insofar as uniformity may be required as an element of reasonableness under the due process clause, the problems are dealt with in my discussion of the application of that clause.

2. The first amendment: The proposed exemption, if allowed, would represent a determination by Congress that an accommodation of the self-employment tax law to prevent offense to religious scruples against insurance would not be contrary to public policy. The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *." The question is whether an exemption from the social se-

curity tax would be constitutional as an accommodation or mitigation of a general requirement in order to permit the free exercise of a religion or whether it would be an "aid" to the specified religion at the expense of other religions and therefore be an unconstitutional establishment of religion.

It is my conclusion that the proposed exemption would in all probability be held to be a valid accommodation of the general law to permit religious liberty under the free excise clause. The subsidiary question whether the definition of the persons exempted may be a reasonable classification under the due process clause is discussed in a subsequent part of this opinion. I base my conclusion on the following decisions of Federal and State course, particularly the Supreme Court, which interpret the first amendment to permit accommodations to religious beliefs. This discussion will be followed by an analysis of those cases which hold that certain government action is a violation of the establishment clause, in order to make clear that this exemption would not be an establishment of religion.

The classic example of the application of the free exercise clause is the series of cases which have upheld congressional exemption of conscientious objectors from military service. The validity of this exemption was first established by the *Selective Draft Law Cases*, 245 U.S. 366 (1919) upholding the exemption in the draft law of members of religious sects "whose tenets prohibited the moral right to engage in war." The Solicitor General had argued (p. 374) that this exemption did not establish such religions but simply aided their free exercise. The court considered that the Congressional authority to provide such exemption was so obvious that it need not argue the point (p. 389–390).

The present Universal Military Training and Service Act enacted June 24, 1948, c. 625, 62 Stat. 604, as amended, in section 6(j), 50 U.S.C. App. 456(j), exempts from combatant training and service in the Armed Forces a person "who by reason of religious training and belief, is conscientiously opposed to participation in war in any form." This exemption continues to be recognized as constitutional under the free exercise clause, *Clark* v. *United States*, 236 F. 2d 13 (9th Cir. 1956), cert. denied, 352 U.S. 882 409 (2d Cir. 1963), cert, granted 32 L.W. 3385, May 5, 1964. Certiorari was granted in the Jakobson case and in two other conscientious objector cases,[2] apparently in order to reconcile the conflict between the second and ninth circuits as to whether the statutory definition of "religious training and belief" as being a "belief in a relation to a Supreme Being" may constitutionally be applied to exclude a conscientious objector whose belief is based on humanistic principles. This conflict is one essentially concerned with reasonable classification of an exemption under the due process clause, discussed below. It does not concern the constitutional right of Congress to exempt conscientious objectors under the free exercise clause.

In the Jakobson case the second circuit faced the problem whether "making exemption from military service turn on religious training and belief as stated in section 6(j) aids religions, and more particularly religions based on a belief in the existence of God" (p. 414) and thereby conflicts with the holding in *Torcaso* v. *Watkins*, 367 U.S. 488 (1961). There it was determined that Maryland could not require an oath affirming a belief in God as a prerequisite to becoming a notary public. The Jakobson court concluded that "the important distinction seems to us to be that, in contrast to Maryland's notary public oath, Congress enacted this statute, in mitigation of what we assume to be the constitutionally permissible course of denying exemptions to all objectors, for the very purpose of protecting 'the free exercise' or religions by those whose religious beliefs were incompatible with military service which Congress had the right to require" (pp. 414–415).

An exemption identical with that in the 1948 military training act was specifically included in section 387(a) of the Immigration and Naturalization Act of June 27, 1952, c. 477, 66 Stat. 163, 258, 8 U.S.C. 1448(a). This statutory exemption followed the decision of the Supreme Court in *Girouard* v. *United States*, 328 U.S. 61 (1946) ruling that the naturalization law need not be, and should not be, interpreted to exclude an alien who would not promise to bear arms because of religious scruples. Justice Douglas, for the majority, reaffirming principles enunciated in early dissents by Justices Hughes and Holmes, said, "The struggle of religious liberty has through the centuries seen an effort to accommodate the demands of the state to the conscience of the individual" (p. 68).

The general exemption from taxation of religious groups, activities and property is another example of the exercise by legislatures of the constitutional authority to make exemptions to aid in the free exercise of religion, which continues to be upheld against contentions that the exemption operates to establish the religions this benefitted.[3] Under this exemption a unique religious doctrine may make an activity of one religious group exempt as having a religious purpose which would not be exempt when carried on by other groups not holding to the doctrine.[4] The exemption from taxation of religious activities and occupations is incorporated into the Social Security Act itself which provides optional exemptions for ministers, Christian Science practitioners, employees of religious organizations and members of religious orders (26 U.S.C. 1402 (c) and (e) and 3121(b)(8)).

A further illustration of the principle that a legislature may accommodate particular religious beliefs without violating the first amendment is the case of *Zorach* v. *Clauson*, 343 U.S. 306 (1952). Here the Supreme Court held that the New York Legislature did not violate the establishment clause by authorizing public schools to release children 1 hour early every week for religious instruction off the school grounds. It said:

"When the State encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs" (pp. 313–314).

The distinction between *Zorach and McCollum* v. *Board of Education*, 333 U.S. 203 (1948) well illustrates the distinction between the two first amendment clauses for in McCollum the released time plan was held unconstitutional as an establishment of religion as classrooms and the force of the school were used in that plan.

The most important case, for our purposes, is the recent Supreme Court decision in *Sherbert* v. *Verner*, 374 U.S. 398 (1963). In this case the Court required South Carolina to accommodate the requirements of its unemployment compensation law to the religious scruples of an adherent of a particular sect, the Seventh-day Adventists. In three separate opinions the members of the Court balanced the demands of the free exercise clause against the prohibitions of the establishment clause. The opinion and the concurring opinion determined that the denial of unemployment benefits to a person unavailable for suitable work on Saturday because, being an Adventist she could not for religious beliefs work on Saturday, was a restriction on the free exercise of her religion and, therefore, unconstitutional. The dissenting opinion contended that the accommodation of Adventists was a question of policy for the legislature and that while the legislature could constitutionally exempt the Adventist from the requirements for eligibility placed upon all other persons the legislature was not required to do so. Consequently, the full Court apparently would agree that Congress could constitutionally make an exception from the general requirements of taxation and compulsory insurance of persons who because of religious scruples are unwilling to accept social security insurance. It is solely the constitutional ability of Congress to make this exemption to which this opinion is addressed.

The reasoning in the Sherbert case needs to be examined as it bears upon the power of Congress in this area. The principle of accommodation of a general law to a particular religious scruple is the same in this situation as in Sherbert though the facts differ in that in the Sherbert case the accommodation was for the purpose of enabling the Adventist to receive welfare benefits and in the Amish situation the accommodation would be for the purpose of exempting the Amish from benefits as well as from taxation for these benefits.

First, the Court says that while "the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation" and that no criminal sanctions compel work on Saturday, the indirect discrimination is nevertheless a burden on the free exercise of the Adventist's religion. It requires her to abandon her religious precept or forgo a welfare benefit generally available (pp. 403, 404). In the social security situation the employment tax is supported by civil and criminal sanctions of assessed penalties and fine, imprisonment and forfeiture, so that the justification for congressional relief is even clearer.

Second, the court points out that while the State may not discriminate invidiously between religions the accommodations required to be allowed to the Adventist would not be discriminatory but rather would remove a discrimination based upon her religion, since the law does not disqualify persons who do not work on Sundays (at 406). An exemption for those sects which cannot in good conscience accept the insurance for which they are taxed would not be an invidious discrimination against other religions which have no such scruple and whose members are therefore able to accept the insurance for which they are taxed.

Third, the court pointed out that the administrative problems concerned and the possibility of spurious claims do not justify a restriction on the free exercise of religion (at 407).

Then the court concludes (at 409) that its holding does not foster the "establishment" of the Seventh-day Adventist religion in South Carolina for the extension of unemployment benefits to Adventists is not

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[2] *United States* v. *Seeger*, 326 F. 2d 846 (2d Cir. 1964), and the *Jakobson* case, compared with *Peter* v. *United States*, 324 F. 2d–173 (9th Cir. 1963). The *Peter* case followed *Etcheverry* v. *United States*, 320 F. 2d 873 (9th Cir. 1963) on which certiorari was denied, 375 U.S. 320 (1963). The influence of the 2d circuit against the definition is shown in *MacMurray* v. *United States*, 330, F. 2d 928 (9th Cir. 1964).

[3] *Swallow* v. *United States*, 325 F. 2d 97 (10th cir. 1963); *General Finance Corp.* v. *Archetto* (R.I. 1961) 176 A. 2d 73, appeal dismissed, 369 U.S. 423 (1962); *Fellowship of Humanity* v. *County of Alameda*, 315 P. 2d 394 (Cal. Dist. Ct. App. 1957); *Lundberg* v. *County of Alameda*, 298 P. 2d 1 (Cal. 1956), appeal dismissed, sub nom., *Heisey* v. *County of Alameda*, 352 U.S. 921 (1956).

[4] "Golden Rule Church Association," 41 T.C. 719 (1964), (Nonacq. May 19, 1964).

like the involvement of religions with secular institutions which the establishment clause is designed to forestall as shown in its decision announced the same day, *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (June 17, 1963). In fact the Sherbert ruling reversed the State court ruling that allowance for the religious obligation of the Adventist would be an unconstitutional discrimination in her favor. See *Sherbert* v. *Verner*, 240 S.C. 286, 125 S.E. 2d 737, 746 (1962).

In the Schempp and its companion case, *Murray* v. *Curlett*, decided with the same opinion, the court found that the States were establishing religion in their public schools by requiring Bible reading and the recitation of prayers therein. These decisions are developments of the prior term's opinion in *Engel* v. *Vitale*, 370 U.S. 421 (1962) holding that the requirement of recitation in the public schools of a State-authored prayer was a violation of the establishment clause which prohibits the Government from placing its "power, prestige, and financial support * * * behind a particular religious belief" (p. 431). In the Schempp case the court develops the idea that Government must remain "neutral," a term derived from the 5-to-4 decision in *Everson* v. *Board of Education*, 330 U.S. 1 (1947). In its context in the several Establishment cases this term means an inability of the State to use its powers to require religious observances or to use public funds for the support of religious institutions. None of the holdings applies the establishment clause to forbid the granting of an exemption from Government coercion of a secular action to accommodate religious scruples under the free exercise clause. The latter clause is predicated, says the Schempp court, on Government coercion which impinges on religious practice, 374 U.S. at 223. The distinction between these two historic lines of decisions has permitted the Schempp case to be decided consistently with the Sherbert case on the same day.

In sum, then, an exemption removes a handicap to the free exercise of a particular religion placed upon it by force of Government; it is not a requirement by the Government that the particular religion be practiced or observed or supported by nonadherents.

The meaning of the Sherbert case is made unmistakable in its application by the court in the recent case. *In re Jension*, 375 U.S. 14 (1933). Here the court "in the light of *Sherbert* v. *Verner*" vacated the judgment of the Minnesota Supreme Court in *In re Jenison*, 265 Minn. 96, 120 N.W. 2d 515 (1963). The Minnesota court had held a person selected for jury duty in contempt of court for refusing to serve on the jury because of a religious belief based upon the biblical injunction against judging other persons. The Minnesota court had reasoned that jury duty, being a primary duty of all citizens, was superior to a religious belief deemed by the court contrary to public order, citing *Reynolds* v. *United States*, 98 U.S. 145 (1878) which held that Congress could prohibit polygamy as a violation of the social order.

Since the Supreme Court has now held that Government must accommodate even the highest duties of citizens to sincere religious scruples, it is probable that it would hold that Congress may accommodate the religious scruple against insurance by allowing for such a scruple an optional exemption, or a lesser form of relief, from social security taxation and benefits.

3. The due process clause: Under the due process clause of the fifth amendment tax statutes must provide reasonable classifications of the subjects taxed or regulated and reasonable exemptions, if exemptions are provided. But, as has been firmly established by the Supreme Court, particularly in cases upholding the various exemptions provided in the Social Security Act and State unemployment compensation acts (*Carmichael* v. *Southern Coal Co.*, 301 U.S. 495 (1937); *Stewart Machine Company* v. *Davis*, 301 U.S. 543 (1937); *Helvering* v. *Davis*, 301 U.S. 619 (1937)), the outer bounds of what is a reasonable tax or exemption classification allow a wider play of legislative judgment than many other areas of the law where the "reasonable" standard is applied. In these cases the court assured legislatures that they had the widest powers of selection and classification in taxing some at one rate, others at another and exempting others altogether, where disinctions were based upon "considerations of policy and practical convenience."

Claims of discriminatory treatment under social security continue to be rejected as not "patently arbitrary." *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960). Recently, *Smart* v. *United States*, 222 F. Supp. 65 (S.D.N.Y. 1963), upheld a higher tax on (American) employees of the United Nations, as the means employed bore a substantial and logical relation to the objective; and *Lesson* v. *Celebreze*, 225 F. Supp. 527 (E.D.N.Y. 1963), accepted differences in dependency determination for children of a deceased mother from that for children of a deceased father, based on family support experience. See also *Cape Shore Fish Co.* v. *United States*, 303 F.2d 961 (Ct. Cl. 1964), and *Abney* v. *Campbell*, 206 F. 2d 836 (5th Cir. 1953) on fishing vessel employment differences and on domestic service differences respectively.

The requirement that exemptions have a reasonable basis applies as well to exemptions based upon religious scruples provided by Congress in conformity with the first amendment. In a nontax area this requirement has been recently reviewed in the second circuit decisions, pending review in the Supreme Court, on the reasonableness of the selective service definition of religious training and belief as being confined to belief in a Supreme Being. *United States* v. *Jakobson*, 325 F. 2d 409 (2d Cir. 1963) and *United States* v. *Seeger*, 326 F. 2d 846 (2d Cir. 1964); certiorari granted in both cases, 32 L.W. 3385, May 5, 1964. In these cases the court determined that an exemption from bearing arms based on religious belief was a constitutional accommodation of religion, but that a restriction of the definition of religion to a Supreme Being was too narrow in view of its conclusion that a conscience sincerely compelled to refrain from bearing arms because of a "mystical force of 'Godness'" or a "compulsion to follow the paths of 'goodness'" might be religious in nature (Seeger, p. 853). In other words, at least in the second circuit, the exemption on the grounds of religious objection must reach all who have sincere objections which could be interpreted as religious in nature.

In the social security situation, however, a classification may be as limited as circumstances require, as indicated in the Smart and other cases, supra.

In fact the Social Security Act and its amendments have characteristically carved out exemptions which are as narrow as required by the sociological facts, including differences among vocations and religious attitudes. Thus, for example, lawyers are covered by the self-employment tax, ministers, including Christian Science practitioners, are optionally covered, but doctors and persons who have taken the vow of poverty as a member of a religious order are completely exempted (26 U.S.C. 1402 (c) and (e), and 42 U.S.C. 411(c) (4) and (5)). When the self-employment tax was passed in 1950 the act excluded the performance of service by a minister of a church or a member of a religious order or by a Christian Science practitioner in the exercise of their callings, in order to avoid impairment of religious liberty (Senate Finance Committee hearings on H.R. 6000, 81st Cong., Jan. 17, 1950, pt. 1, pp. 1 and 3). The exemption was made optional in the 1954 amendment of the act for these classes of persons except the mendicant orders. These exemptions have not been challenged.

The reason for the present proposal to exempt members of religious sects, as such, is solely that they have a religious objection to receiving insurance. Accordingly, a classification of such sects, for exemption purposes, with appropriate safeguards, would reach all those whom Congress would have a reasonable ground to exempt and would, therefore, not be arbitrary nor violative of due process.

This conclusion is the basis of the opinion of the staff of the Joint Committee on Internal Revenue Taxation and that of the American Law Division of the Library of Congress provided to Senator CLARK under dates of November 9, 1962, and September 19, 1962, respectively. These opinions conclude that the proposed exemption would be constitutional as it would apply to all those who fall within the classification and that the classification is reasonable, 109 CONGRESSIONAL RECORD, 643, 464 (1963). A copy of these opinions as reproduced in the CONGRESSIONAL RECORD is attached.

Since, therefore, Congress may exempt those members of a religious faith who have scruples against receiving insurance, the next question is what practical safeguards Congress may designate to assure that only those who come within the policy of the exemption obtain the exemption, without imposing arbitrary limitations.

LIMITATIONS ON THE EXEMPTION

The joint statement by the Treasury Department and the Department of Health, Education, and Welfare reviewing the problems created by the proposed exemption for the Amish contains in section 3 suggested additional limitations upon the exemption. These limitations are proposed as possible means to protect the social security system from an unintended extension of exemptions from compulsory insurance which would weaken and dilute it. The extensions of the exception might occur, according to this joint statement, either through the formation of additional faiths claiming opposition to acceptance of benefits as one of their tenets or through the redefinition by various existing separatist groups of their tenets to include such opposition.

I shall consider each of these proposed additional limitations, designated "a" through "e," to determine whether the limitation may be considered by the courts to be a reasonable classification and consistent with the due process clause. I shall also suggest a limitation, designated "f," which was not among those proposed but which may be found to limit the exemption reasonably and realistically to the groups which Congress intends to accommodate by this exemption.

(a) An explicit limitation of the exemption to the old order Amish: This limitation would probably be considered arbitrary since the designation of one sect to the exclusion of other sects having the same scruple would be inconsistent with the congressional policy of removing the Government coercion of belief which constitutes the denial of the free exercise of religion. It would also probably constitute an invalid preference of one particular faith over those which were similarly situated. The facts presented to Congress indicate that they may be certain other sects of the Amish and possibly other religious groups who have the same religious scruple which is now being coerced. Furthermore, the exemption of a single named group will be held to be arbitrary[5] unless the relation to the public good is clearly demonstrable.[6]

[5] *Eyers Woolen Co.* v. *Gilsum*, 84 N.H. 1, 146 *Baltimore*, 289 U.S. 36 (1933).

[6] *William* v. *Mayor and City Council of* Atl. 511 (1929); *Baltimore* v. *Starr Methodist Protestant Church*, 106 Md. 281, 67 Atl. 261 (1907). Cf. *United States* v. *Department of Revenue of Illinois*, 191 F. Supp. 723 (N.D. Ill. 1961) invalidating a retail tax on sales to the Federal but not to the State government.

(b) Limitation to members of a sect, excluding adherents who are not members; and (c) limitation to members of sects who "take care of their own": These limitations are being considered together since at least some of the bills before Congress provide that a necessary condition of exemption is a finding by the Secretary of Health, Education, and Welfare that the sect makes provision for its elderly "members." This condition would probably be considered a necessary and proper public policy consideration and, therefore, a reasonable condition upon which to base eligibility for exemption. The purpose of Congress in this legislation would be to assure the fulfillment of the welfare purpose of social security while relaxing that feature of social security which impinges on the free exercise of religion. Moreover, since individuals can seldom guarantee their own future against deprivation and need, it would be reasonable for Congress to provide that to qualify for an exemption a person must be a member of a sect which shares the religious commitment, both with respect to refusing State insurance and providing for that sect's welfare. Consequently, since the sect aspect is essential, it would seem reasonable to limit the qualification for exemption to persons who are members of a qualifying sect. As said by Justices Black and Douglas in *Board of Education* v. *Barnette,* 319 U.S. 624, 643 (1943): "No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do."

(d) Limitation to sects which require members to follow the occupation of farming as a matter of religious principle: This limitation, as phrased, would not be appropriate on the basis of the facts given in the joint statement. It is there stated that "most old-order Amish communities permit members to make their living as self-employed carpenters or masons" (p. 9). The possibility of limiting the exemption to sects which are established in farming communities for religious reasons is suggested and discussed below.

(e) Limitation to religious groups which were established before 1935: Any limitation which designates a cutoff date would generally be less reasonable than one which on its face shows some relationship to the public purpose of the statute. For example, a requirement that the sect shall have demonstrated over a period of years its ability to take care of its own members would probably be more acceptable as a classification. The text of certain of the legislative proposals already contain this principle in that they refer to the sect to be exempted as one which is "established." I would see no reason why the extent or the test of establishment might not be specifically spelled out. There is some authority that a "classification which draws a line in favor of existing businesses as against those later entering the field will be upheld if any reasonable and substantial basis can be found to justify the classification." *Del Mar Canning Co.* v. *Payne,* 29 Cal. 2d 380, 175 P. 2d 231, 232 (1964). The circumstances justifying such a discrimination must provide substantial reasons. *Mayflower Farms* v. *Ten Eyck,* 297 U.S. 266 (1936). It is probable that the unusual situation of the Amish with respect to social security would be considered a substantial reason for a limitation of the classification to established sects.

(f) Limitation to sect established in farming communities for religious reasons: The faith, the members of which are to be exempted, might be described not only as one whose established tenets would be violated by the acceptance of insurance, and one which provides for elderly and dependent members, but as one which for religious reasons is established in farming communities. These limitations might be reasonable if Congress found after sufficient inquiry that they were necessary to assure that the exemption would be confined to sects which were religiously motivated and responsible, and to assure that the welfare purpose of social security would be fulfilled. Congress might reasonably find that the restriction of the exemption to those sects established in farming communities would be justified on the ground that such a sect could be more certainly relied upon to identify and provide for its dependent and elderly members than those in the mobile and transient urban environment. Conversely, the limitation would have the effect of excluding sects which subsequently organize for the purpose of exemption from social security, as it is unlikely that those would or could establish themselves in farming communities for religious or other reasons. The limitation would exclude other present separatist groups whose principles might, but do not specifically include refusal of social security benefits. Legislation which distinguishes farming situations from others because of sociological and economic differences and taken many forms and has been accepted by the courts. See, for example, *Tigner* v. *Texas,* 310 U.S. 141 (1940), rehearing denied, 310 U.S. 659 (1940).

G. D'ANDELOT, BELIN,
General Counsel.

By Mr. ROBERT C. BYRD (for Mr. RIBICOFF):

S. 564. A bill to amend title II of the Social Security Act so as to remove the limitation upon the amount of outside income which an individual may earn while receiving benefits thereunder. Referred to the Committee on Finance.

Mr. ROBERT C. BYRD. Mr. President, on behalf of the distinguished senior Senator from Connecticut (Mr. RIBICOFF), I introduce a bill and I ask unanimous consent that a statement prepared by him in connection with the bill be printed in the RECORD.

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

Mr. ROBERT C. BYRD. Mr. President, both the bill and the statement would have been introduced the day before yesterday but for the fact that that day was set aside for eulogies for the late President Johnson and no bills were to have been introduced on that date.

STATEMENT BY SENATOR RIBICOFF: SOCIAL SECURITY EARNINGS LIMITATION

Today I am introducing legislation to repeal the earnings limitation for all social security beneficiaries. This arbitrary limitation on the right of senior citizens aged 65–72 to work and earn money serves as a major work disincentive.

Social Security should not be a contract to quit work. Those penalized by the earnings limitation often have the greatest need for more income than social security benefits can provide. And the working man is penalized, since income from investments is not counted in determining whether benefits shall be reduced. A man earning thousands of dollars from investments receives his full social security check while the man who has labored for a salary all his life and needs to continue working as a matter of economic survival cannot do so without a penalty.

I have said many times that Social Security is one of the finest domestic programs the federal government administers. But the system is not perfect. And parts of it—the income limitation, for instance—are wrong. Here we take able-bodied men and women who want to work, who are good at their work and who would feel lost without their jobs, and we put pressure on them not to work and then we penalize them if they continue to work. This injustice must be corrected. It should have been corrected years ago.

The impact of eliminating the earnings limit would be widespread. As of January 1, 1972, an estimated 10 million persons aged 65–72 were eligible for social security cash benefits or were dependent on beneficiaries. At least 2.5 million of these people are directly affected by the earnings ceiling. Nearly a million earn enough that their social security benefits are eliminated entirely. Another million earn enough that their benefits are reduced. And a half million more earn amounts which are only $100 or $200 below the ceiling. They receive their full social security benefits only because, in many cases, they intentionally limit their earnings because of the earnings limitation. HEW studies have shown that the greatest deterrent to work occurs at just below the ceiling level.

The estimated additional cost of this proposal does not take into account the fact that the additional money that beneficiaries can earn will produce substantial tax revenues, thereby reducing the cost to the American taxpayer. In addition, the administrative expense of sending out forms, keeping records and collecting rebates from senior citizens who have "overearned" is a needless waste of money—money that would otherwise go directly to those in need.

For too long we have played an arbitrary numbers game with the earnings limitation. Prior to 1973, a beneficiary between the ages of 65 and 72 lost one dollar of benefits for each dollar he earned above $1680. Above $2880 he lost $1 for every dollar earned.

Last year the Finance Committee proposed raising the limitation to $2400. In the Senate, I supported raising this figure to $3000. The Conference Committee, however, lowered the figure to $2100 and provided that a beneficiary would lose a dollar in benefits for every $2 earned above $2100. The bill was enacted into law at the $2100 figure, effective January 1, 1973.

However, simply raising the limit does not remove the inherent inequity of the earnings test. Therefore I propose eliminating the test and allowing senior citizens to play a productive role in society as long as they wish, secure in the knowledge that their government is not penalizing them for working.

By Mr. NUNN (for himself and Mr. TALMADGE):

S. 565. A bill to require the Congress to prescribe a ceiling on expenditures for each fiscal year and to establish procedures to effectuate such ceilings. Referred to the Committee on Government Operations.

BUDGET AND EXPENDITURE CEILING

Mr. NUNN. Mr. President, the most crucial domestic problem facing our Nation today is the uncontrolled and seemingly uncontrollable Federal budget. The people of this Nation are fed up with wild Government spending and priorities which are determined many times by the pressures of the moment.

Appropriations and expenditures now appear to have little or no relevancy to sound fiscal planning. If we are to curb inflation and control the national debt, Congress must fulfill its duty. We must begin to control the appropriations and the expenditures of the Government, in practice as well as theory.

I am convinced that the people of this Nation want a budget which is not inflationary and which requires no tax increase, and I am certain that my colleagues share that opinion. I am also convinced that the vast majority of

Americans agree with the constitutional principle requiring that priorities of expenditure be set by the legislative branch. However, the people of this Nation recognize that Congress has in reality lost control of the budget, and I believe that most Americans prefer Executive control of expenditures rather than no control at all.

While this public mood may be dangerous from a constitutional point of view, I believe that it is a reality. Mr. President, the time has come for Congress to reassert its proper constitutional responsibility of controlling the budget and setting priorities of expenditures that will not be altered by Executive whim, which is the case today.

All of us have recently seen that the President has stepped forward and filled the vacuum left by our own inaction. The executive branch has impounded funds and set its own priorities, completely independent of legislative intent. America's budgetary affairs and priorities of expenditures are now being decided by faceless bureaucrats who are not elected or even known by the American people.

Most Members of the Senate agree that the tilt of power has shifted too far toward the executive branch. We hear every day many cries for Congress to again assert its constitutional powers. Mr. President, we have two clear choices, as I see them. We can place sole blame on the Executive and ignore our own failings, or we can reassert our own constitutional prerogatives by adopting methods and procedures leading to a rational budgetary process which will enjoy the confidence of the American people. The shift in the exercise of constitutional authority back to Congress can only take place with a renewed assertion by Congress of its constitutional responsibility over the budget.

Mr. President, toward these ends, I am today introducing a resolution which establishes a new rule of the Senate to make bills containing new obligational authority not in order until we in the Senate establish a limit on the amount of new obligational authority which the Senate will approve for the fiscal year. This resolution requires that the Committee on Appropriations and the Committee on Finance, acting jointly, report to the Senate for its approval a resolution setting forth an appropriation ceiling for the fiscal year.

We can by the adoption of this rule show to all concerned that the U.S. Senate will be responsible in the management of the fiscal affairs of our Nation. By taking this step, we will clearly demonstrate that we are capable of self-discipline, and the Senate can then, with a more creditable voice, call for others to follow our lead. By the passage of this resolution the Senate will clearly require a ceiling on new obligational authority.

Recognizing that the Congress must also establish an expenditure ceiling if there is to be any meaningful attempt by the Congress to regulate Government spending, I have also introduced today a bill to be cited as the "Expenditure Control Act of 1973." This bill creates a rule in both Houses of Congress requiring Congress, after the submission of the budget by the President each fiscal year, to prescribe a limit on the total amount of outlays to be made by the Government during such fiscal year. The consideration of any bill or joint resolution providing new obligational authority would not be in order until the Congress has prescribed by law the limit on total outlays to be made in the fiscal year.

In order to regulate expenditures, the Expenditure Control Act of 1973 also requires the President to regulate outlays in accordance with congressional priorities. If any expenditures would exceed the limit set by Congress, the President, in carrying out the provisions of this act, would be required to reserve amounts proportionately in each functional category of the budget. This bill would assure that the legislative priorities be adhered to by preventing the arbitrary impoundment of funds by the President and by requiring pro rata reductions by the executive branch.

Mr. President, I submit that the resolution and bill being introduced today would have the following positive and practical results:

First. The people of this Nation will know how each and every Senator votes each year on the most crucial of all domestic legislative decisions—the total dollars to be spent by the U.S. Government in each fiscal year.

Second. More meaningful priorities will necessarily result from an overall limit on appropriations. The proponents of various appropriation measures will have the burden not only of justifying the particular request for obligational authority, but also of presenting a case of its treatment as a budgetary priority when weighed against other requests.

Third. The Appropriations Committee and the Finance Committee will each contribute their expertise in recommending the limit to the Senate.

Fourth. The overall appropriations measures will by necessity have to be presented together rather than piecemeal, which is now the case, because of practical considerations. We will have in effect one appropriation bill which will be presented to this body.

Fifth. The legislative branch, rather than the executive branch, will be setting priorities for obligational authority as well as expenditure outlays, thus fulfilling the intent of the Constitution.

Mr. President, I ask my colleagues to favorably consider these two companion proposals which will result in a more responsible and responsive legislative branch.

Mr. ROBERT C. BYRD. Mr. President, I wish to congratulate the distinguished junior Senator from Georgia (Mr. NUNN) on the splendid speech he has just made. I think it reflects a great deal of consideration, thought, and preparation. I think that he has touched on a very important matter, one which is of great interest not only to those of us who serve here in the Senate, but also to all of the American people. I commend him for his foresight, vision, and for his constructive proposals.

Mr. NUNN. Mr. President I ask unanimous consent that a summary of the bill and the resolution, as well as the measures themselves, be printed in the RECORD immediately following my remarks.

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

S. 565

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 "Expenditure Control Act of 1973".

SEC. 2. After the submission of the Budget of the United States Government by the President for each fiscal year (beginning with the fiscal year ending June 30, 1974), the Congress shall, by law, prescribe a limit on the total amount of outlays (including net lending) to be made by the United States Government during such fiscal year.

SEC. 3. (a) Except as provided in subsection (b), it shall not be in order, in either the Senate or the House of Representatives, to consider any bill or joint resolution providing new obligational authority for any fiscal year (beginning with the fiscal year ending June 30, 1974) prior to the date of the enactment of a law prescribing, pursuant to section 2, a limit on the total amount of outlays to be made by the United States Government during such fiscal year.

(b) Subsection (a) shall not apply with respect to any new obligational authority requested by the President if, in submitting the request, the President certifies that a major disaster or other emergency requires the prompt enactment of legislation providing such new obligational authority.

(c) Subsection (a) shall not be construed to preclude the holding of hearings or other consideration by any committee of the Senate or the House of Representatives, or any Joint Committee of the two Houses, with respect to proposed new obligational authority, proposed outlays, and estimated revenues set forth in the Budget by the United States Government submitted by the President for any fiscal year.

(d) This section is enacted by the Congress—

(1) as an exercise of the rulemaking powers of the Senate and the House of Representatives, respectively, and as such they shall be considered as part of the rules of each House, respectively, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (so far as relating to the procedure in such House) at any time, in the same manner and to the same extent as in the case of any other rule of such House.

SEC. 4. (a) Notwithstanding the provisions of any other law, the President shall, in accordance with subsection (b), reserve from expenditure, from new obligational authority or other obligational authority otherwise available, such amounts as may be necessary to keep outlays during a fiscal year within the limit on the total amount of outlays prescribed by law for that fiscal year pursuant to section 2.

(b) In carrying out the provisions of subsection (a) for any fiscal year, the President shall reserve amounts proportionately from new obligational authority and other obligational authority available for such fiscal year for each functional category (as set forth in the Budget), except that obligational authority for outlays which, within the meaning of the Budget, are not controllable shall not be taken into account.

(c) In the administration of any program as to which—

(1) the amount of expenditures for any fiscal year is limited pursuant to subsection (a), and

(2) the allocation, grant, apportionment, or other distribution of funds among recipients is required to be determined by application of a formula involving the amount

appropriated or otherwise made available for distribution for such fiscal year,
the amount available for expenditure (as determined by the President pursuant to this section) shall be substituted for the amount appropriated or otherwise made available in the application of the formula.

SUMMARY OF S. BILL 565 PRESCRIBING A CEILING ON EXPENDITURES

Section 1. Title.

Section 2. After the President submits his budget the Congress shall, by law, establish a limit on the amount of outlays (including net lending) to be made by the government.

Section 3(a) No bill or resolution providing for new obligational authority shall be in order until the limit is fixed by law, as above.

(b) Notwithstanding subsection (a) the President may request new obligational authority if such additional funds are needed because of a major disaster or other emergency, and he so certifies the same to Congress.

(c) Subsection (a) shall not preclude any Senate or House committee or joint committee from holding hearings as to proposed outlays, proposed new obligational authority, or estimated revenues.

(d) Subsection 3 as enacted pursuant tc the rule making power of the Senate and House of Representatives and supersede any conflicting rules.

Section 4(a) Requires the President to establish a reserve from expenditures, new obligational authority or other obligational authority. The reserve is to prevent outlays from exceeding the ceiling established in Section 2.

(b) In establishing the above reserve the President shall reserve the same from each functional category on a pro rata basis (except that outlays which are not controllable shall not be considered.)

(c) Where a program requires that funds are to be distributed to recipients, according to a formula, the same formula ratio shall apply to the amount of funds available for distribution pursuant to the established limit.

By Mr. HRUSKA (for himself and Mr. SCOTT of Pennsylvania):

S. 566. A bill to define the circumstances in which foreign states are immune from the jurisdiction of the United States courts and in which execution may not be levied on their assets, and for other purposes. Referred to the Committee on the Judiciary.

SOVEREIGN IMMUNITY REFORM

Mr. HRUSKA. Mr. President, I am today introducing for myself and the senior Senator from Pennsylvania a bill, S. 566, to regulate the jurisdictional immunities of foreign states in U.S. courts. The bill establishes a comprehensive statutory regime for determining sovereign immunity issues and would transfer to the courts the task of determining when a foreign state is entitled to immunity.

At present the determination whether a foreign state which is sued in a court of the United States is entitled to immunity is largely governed by suggestions of the Department of State communicated to the courts through the Department of Justice. In making suggestions of immunity, the Department has been guided by the "restrictive theory of sovereign immunity" as set forth in the "Tate Letter" of May 19, 1952, from the Acting Legal Adviser of the Department of State, Jack B. Tate, to the Acting Attorney General. According to the "restrictive theory of immunity," the immunity of the sovereign is recognized with regard to public acts but not with regard to private or commercial acts.

Legal scholars have long urged that sovereign immunity issues should be decided by the courts. The new bill would accomplish this as well as further particularize the restrictive theory of immunity. In the process it would clear up a number of gaps and deficiencies in the existing law. One of the most important of these has been the lack of a clear method of service of process on foreign governments. One consequence of this defect has been a practice of attaching the assets of foreign governments simply as a method of obtaining jurisdiction over them. This practice has in turn sometimes resulted in serious hardships as foreign governments have had their assets tied up. The bill would provide a direct method of service of process on foreign states and would obviate this problem to the advantage of both plaintiffs and foreign states.

The bill also provides that foreign states would no longer be accorded absolute immunity from execution on judgments rendered against them, as is now the case, and their immunity from execution would conform more closely to the restrictive theory of immunity from jurisdiction.

The transfer of decisions concerning the jurisdictional immunities of foreign states to the courts will free the Department of State from pressures by foreign states to suggest immunity and from any adverse consequences resulting from the unwillingness of the Department to suggest immunity. Plaintiffs, the Department of State, and foreign states would thus benefit from the removal of the issue of immunity from the realm of discretion and making it a justiciable question.

The bill would give appropriate guidance, grounded in the restrictive theory of immunity, on the standards to be employed by the courts. These are consistent with those applied in other developed legal systems. In brief, foreign states would not be immune from the jurisdiction of U.S. courts when the foreign state has waived its immunity, when the action is based on a commercial activity, or concerns property present in the United States in connection with a commercial activity, when the action relates to immovables or to rights in property acquired by succession or gift, or when an action is brought against a foreign state for personal injury or death or damage to or loss of property occasioned by the tortious act in the United States of a foreign state. Special provisions would be made for counterclaims and for actions relating to the public debt of a foreign state.

Under the present law, a plaintiff who is able to bring his action against a foreign state because it relates to a commercial act of that state may be denied the fruits of his judgment against the foreign state. The immunity of a foreign state from execution has remained absolute. The draft bill would permit execution on the assets of a foreign state if the foreign state had waived its immunity from execution or if the assets were held for commercial purposes in the United States. The plaintiff could thus recover against commercial accounts, but not against those maintained for governmental purposes.

Finally, the bill would specify the respective jurisdictions of State and Federal courts in actions against foreign states and would specify venue requirements for selecting an appropriate court.

The ideal arrangement concerning the sovereign immunity of foreign states would be the regulation of the question through a general international agreement. The draft bill is looked upon as an arrangement to be applied until such time as a satisfactory convention is drawn up and the United States becomes a party.

This bill has been prepared jointly by the Departments of State and Justice on the basis of a careful study lasting more than 4 years. It is an immensely important reform in the foreign relations law of the United States. It is the hope of this Senator that it can receive prompt attention from the appropriate committee.

Mr. President, I am especially gratified with the cosponsorship of the senior Senator from Pennsylvania on this measure. Heretofore, his interest and concern in this subject stemmed from his membership on the Committee on the Judiciary. He now has the added responsibility of membership on the Foreign Relations Committee. From that vantage point, his assistance in processing this proposal will be more than doubly valuable.

Mr. President, at this point I request that the text of the bill, the transmittal letter from the Attorney General and the Secretary of State, and a section-by-section analysis of the proposal be printed in the RECORD.

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

S. 566

A bill to define the circumstances in which foreign states are immune from the jurisdiction of United States courts and in which execution may not be levied on their assets, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 28, United States Code, is amended—

(1) by inserting after Chapter 95 the following new Chapter:

"Chapter 97.—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

"Sec.
"1602. Findings and declaration of purpose.
"1603. Definitions.
"1604. Immunity of foreign states from jurisdiction.
"1605. General exceptions to the jurisdictional immunity of foreign states.
"1606. Immunity in cases relating to the public debt of a foreign state.
"1607. Counterclaims.
"1608. Service of process in United States district courts.
"1609. Immunity from execution and attachment of assets of foreign states.
"1610. Exceptions to the immunity from execution of assets of foreign states.
"1611. Certain types of assets immune from execution.

"§ 1602. Findings and declaration of purpose.

"The Congress finds that the determina-

tion by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts in so far as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by United States courts in conformity with these principles as set forth in this chapter and other principles of international law.

"§ 1603. Definitions.

"(a) For the purposes of this chapter, other than sections 1608 and 1610, a "foreign state" includes a political subdivision of that foreign state, or an agency or instrumentality of such a state or subdivision.

"(b) For the purposes of this chapter, a "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

"§ 1604. Immunity of foreign states from jurisdiction.

"Subject to existing and future international agreements to which the United States is a party, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in this chapter.

"§ 1605. General exceptions to the jurisdictional immunity of foreign states.

"A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

"(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect after the claim arose;

"(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act has a direct effect within the territory of the United States;

"(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state or of a political subdivision of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

"(4) in which rights in property in the United States, acquired by succession or gift, or rights in immovable property situated in the United States are in issue; or

"(5) in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, caused by the negligent or wrongful act or omission in the United States of that foreign state or of any official or employee thereof except that a foreign state shall be immune in any case under this paragraph in which a remedy is available under article VIII of the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces.

"§ 1606. Immunity in cases relating to the public debt of a foreign state.

"(a) A foreign state shall be immune from the jurisdiction of the courts of the United States and of the States in any case relating to its public debt, except if

"(1) the foreign state has waived its immunity explicitly, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect after the claim arose; or

"(2) the case, whether or not falling within the scope of section 1605, relates to the public debt of a political subdivision of a foreign state, or of an agency or instrumentality of such a state or subdivision.

"(b) Nothing in this chapter shall be construed as impairing any remedy afforded under sections 77(a) through 80(b) of title 15, United States Code, as amended, or any other statute which may hereafter be administered by the United States Securities and Exchange Commission.

"§ 1607. Counterclaims.

"In any action brought by a foreign state in a court of the United States or of any State, the foreign state shall not be accorded immunity with respect to

"(1) any counterclaim arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

"(2) any other counterclaim that does not claim relief exceeding in amount or differing in kind from that sought by the foreign state.

"§ 1608. Service of process in United States district courts.

"Service in the district courts shall be made upon a foreign state or a political subdivision of a foreign state and may be made upon an agency or instrumentality of such a state or subdivision, which agency or instrumentality is not a citizen of the United States as defined in section 1332 (c) and (d) of this title by delivering a copy of the summons and complaint by registered or certified mail, to be addressed and dispatched by the clerk of the court to the ambassador or chief of mission of the foreign state accredited to the Government of the United States, to the ambassador or chief of mission of another state then acting as protecting power for such foreign state, or in the case of service upon an agency or instrumentality of a foreign state or political subdivision, to such other officer or agent as is authorized under the law of the foreign state or of the United States to receive service of process in the particular case, and, in each case, by also sending two copies of the summons and of the complaint by registered or certified mail to the Secretary of State at Washington, District of Columbia, who in turn shall transmit one of these copies by a diplomatic note to the department of the government of the foreign state charged with the conduct of the foreign relations of that state.

"§ 1609. Immunity from execution and attachment of assets of foreign states.

"The assets in the United States of a foreign state shall be immune from attachment and from execution, except as provided in section 1610 of this chapter.

"§ 1610. Exceptions to the immunity from execution of assets of foreign states.

"(a) The assets in the United States of a foreign state or political subdivision of a foreign state, to the extent that they are used for a particular commercial activity in the United States, shall not be immune from attachment for purposes of execution or from execution of a judgment rendered against that foreign state or political subdivision if

"(1) such attachment or execution relates to a claim which is based on that commercial activity or on rights in property taken in violation of international law and present in the United States in connection with that activity, or

"(2) the foreign state or political subdivision has waived its immunity from attachment for purposes of execution or from execution of a judgment either explicitly or by implication, notwithstanding any purported withdrawal of the waiver after the claim arose.

"(b) The assets in the United States of an agency or instrumentality of a foreign state or of an agency or instrumentality of a political subdivision of a foreign state, which is engaged in a commercial activity in the United States, or does an act in the United States in connection with such a commercial activity elsewhere, or does an act outside the territory of the United States in connection with a commercial activity elsewhere and the act has a direct effect within the territory of the United States, shall not be immune from attachment for purposes of execution or from execution of a judgment rendered against that agency or instrumentality if

"(1) such attachment or execution relates to a claim which is based on a commercial activity in the United States or such an act, or on the rights in property taken in violation of international law and present in the United States in connection with such a commercial activity in the United States, or on rights in property taken in violation of international law and owned or operated by an agency or instrumentality which is engaged in a commercial activity in the United States; or

"(2) the agency or instrumentality or the foreign state or political subdivision has waived its immunity from attachment for purposes of execution or from execution of a judgment either explicitly or by implication, notwithstanding any purported withdrawal of the waiver after the claim arose.

"§ 1611. Certain types of assets immune from execution.

"Notwithstanding the provisions of section 1610 of this chapter, assets of a foreign state shall be immune from attachment and from execution, if

"(1) the assets are those of a foreign central bank or monetary authority held for its own account; or

"(2) the assets are, or are intended to be, used in connection with a military activity and

"(a) are of a military character, or

"(b) are under the control of a military authority or defense agency."; and

(2) by inserting in the analysis of Part IV, "Jurisdiction and Venue," of that title after

"95. Customs Court.",

the following new item:

"97. Jurisdictional Immunities of Foreign States.".

SEC. 2. Chapter 85 of title 28, United States Code, is amended—

(1) by inserting immediately before section 1331 the following *new section:*

"§ 1330. Actions against foreign states.

"(a) The district courts shall have original jurisdiction of all civil actions, regardless of the amount in controversy, against foreign states or political subdivisions of foreign states, or agencies or instrumentalities of such a state or subdivision, other than agencies or instrumentalities which are citizens of a State of the United States as defined in section 1332 (c) and (d) of this title.

"(b) This section does not affect the jurisdiction of the district courts of the United States with respect to civil actions against agencies or instrumentalities of a foreign state or political subdivision thereof which agencies or instrumentalities are citizens of a State of the United States, as defined in section 1332 (c) and (d) of this title."; and

(2) by inserting in the chapter analysis of that Chapter before—

"1331. Federal question: amount in controversy; costs."

the following new item:

"1330. Actions against foreign states.".

SEC. 3. Section 1391 of title 28, United States Code, is amended by adding a new subsection (f), to read as follows:

"(f) A civil action against a foreign state, or a political subdivision of a foreign state, or an agency or instrumentality of such a state or subdivision which agency or instrumentality is not a citizen of a State of the United States as defined in section 1332(c) and (d) of this title may, except as otherwise provided by law, be brought in a judicial district where: (1) a substantial part of the events or omissions giving rise to the claim occurred, or (2) a substantial part of the property that is the subject of the action is situated, or (3) the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality, or (4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision. Nothing in this subsection shall affect the venue of actions against agencies or instrumentalities of a foreign state or political subdivision thereof which agencies or instrumentalities are citizens of a State of the United States, as defined in section 1332(c) and (d) of this title."

SEC. 4. Section 1441 of title 28, United States Code, is amended by adding a new subsection (d), to read as follows:

"(d) Any civil action brought in a State court against a foreign state, or a political subdivision of a foreign state, or an agency or instrumentality of such a state or subdivision which agency or instrumentality is not a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, may be removed by the foreign state, subdivision, agency or instrumentality to the district court of the United States for the district and division embracing the place where such action is pending. Nothing in this subsection shall affect the removal of actions against agencies or instrumentalities of a foreign state or political subdivision thereof which agencies or instrumentalities are citizens of a State of the United States, as defined in section 1332(c) and (d) of this title."

SEC. 5. Section 1332 of title 28, United States Code, is amended by striking subsections (a) (2) and (3) and substituting in their place the following:

"(2) citizens of a State and citizens or subjects of a foreign state; and

"(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties."

THE SECRETARY OF STATE,
Washington, D.C., January 22, 1973.

THE PRESIDENT OF THE SENATE,
U.S. Senate, Washington, D.C.

DEAR MR. PRESIDENT: There is attached for your consideration and appropriate reference a draft bill, "To define the circumstances in which foreign states are immune from the jurisdiction of United States courts and in which execution may not be levied on their assets, and for other purposes," which is being submitted jointly by the Department of State and the Department of Justice.

At present the determination whether a foreign state which is sued in a court of the United States is entitled to sovereign immunity is made by the court in which the action is brought. However, the courts normally defer to the suggestion of the Department of State that immunity should be accorded and make their own determination of entitlement to immunity only when the Department of State makes no submission to the court.

The law which is applied both by the courts and by the Department of State is thus the result of the joint articulation of the law by the judiciary and the Department. The views expressed by the courts influence the Department of State, and the views expressed by the Department of State influence the courts. In the process of ascertaining and applying the law, both the Department and the courts rely on precedents and trends of decision in foreign as well as United States courts.

The policy of the Department of State, which has been given effect by the courts as well, was set forth in a letter of May 19, 1952 from the Acting Legal Adviser of the Department of State to the Acting Attorney General. The Department of State asserted that its policy would be thereafter "to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity." The letter stated:

"According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperti*) of a state, but not with respect to private acts (*jure gestionis*). There is agreement by proponents of both theories [i.e. of absolute and of restrictive immunity], supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted) or with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary."

The effect of the draft bill would be to accomplish four things:

1. The task of determining whether a foreign state is entitled to immunity would be transferred wholly to the courts, and the Department of State would no longer express itself on requests for immunity directed to it by the courts or by foreign states.

2. The restrictive theory of sovereign immunity would be further particularized in statutory form.

3. Foreign states would no longer be accorded absolute immunity from execution on judgments rendered against them, as is now the case, and their immunity from execution would conform more closely to the restrictive theory of immunity from jurisdiction.

4. The means whereby process may be served on foreign states would be specified.

The central principle of the draft bill is to make the question of a foreign state's entitlement to immunity an issue justifiable by the courts, without participation by the Department of State. As the situation now stands, the courts normally defer to the views of the Department of State, which puts the Department in the difficult position of effectively determining whether the plaintiff will have his day in court. If the Department suggests immunity, the court will normally honor the suggestion, and the case will be dismissed for want of jurisdiction. If the Department does not suggest immunity, the court may either take the silence of the Department as an indication that immunity is not appropriate or will determine the question itself, with due regard for the policy of the Department and the views expressed in the past by the courts. While the Department has attempted to provide internal procedures which will give both the plaintiff and the defendant foreign state a hearing, it is not satisfactory that a department, acting through administrative procedures, should in the generality of cases determine whether the plaintiff will or will not be permitted to pursue his cause of action. Questions of such moment appear particularly appropriate for resolution by the courts, rather than by an executive department.

The transfer of this function to the courts will also free the Department from pressures by foreign states to suggest immunity and from any adverse consequences resulting from the unwillingness of the Department to suggest immunity. The Department would be in a position to assert that the question of immunity is entirely one for the courts.

Plaintiffs, the Department of State, and foreign states would thus benefit from the removal of the issue of immunity from the realm of discretion and making it a justiciable question.

The draft bill would give appropriate guidance, grounded in the restrictive theory of immunity, on the standards to be employed. These are consistent with those applied in other developed legal systems. In brief, foreign states would not be immune from the jurisdiction of United States courts when the foreign state has waived its immunity, when the action is based on a commercial activity or concerns property present in the United States in connection with a commercial activity, when the action relates to immovables or to rights in property acquired by succession or gift, or when an action is brought against a foreign state for personal injury or death or damage to or loss of property occasioned by the tortious act in the United States of a foreign state. Special provisions would be made for counterclaims and for actions relating to the public debt of a foreign state.

Under the present law, a plaintiff who is able to bring his action against a foreign state because it relates to a commercial act (*jure gestionis*) of that state may be denied the fruits of his judgment against the foreign state. The immunity of a foreign state from execution has remained absolute. The draft bill would permit execution on the assets of a foreign state if the foreign state had waived its immunity from execution or if the assets were held for commercial purposes in the United States. The plaintiff could thus recover against commercial accounts, but not against those maintained for governmental purposes. The successful plaintiff would also be precluded from levying on funds deposited in the United States in connection with central banking activities and on military property.

Finally, the draft bill would, in addition to specifying the respective jurisdictions of State and Federal courts in actions against foreign states and venue requirements, clear up the question of how foreign states are to be served. Service would be made either on the ambassador or other person entitled to receive service, and a copy of the complaint, furnished to the Department of State, would in turn be transmitted to the department of the foreign state responsible for the conduct of foreign relations. The initiation of actions through attachment would thus no longer be appropriate.

The ideal arrangement concerning the sovereign immunity of foreign states would be the regulation of the question through a general international agreement. The draft bill is looked upon as an arrangement to be applied until such time as a satisfactory convention is drawn up and the United States becomes a party to it.

The Department of State contemplates that if the draft bill should be enacted, it would propose that the United States file a declaration accepting the compulsory jurisdiction of the International Court of Justice, on condition of reciprocity, with respect to disputes concerning the immunity of foreign states. The resolution of disputed questions of sovereign immunity by the World Court would have the beneficial effect of assuring that the law and practice of this and other countries conform with international law and of imparting further precision

to the law in areas where some measure of uncertainty now exists.

The Office of Management and Budget has advised that there is no objection to the enactment of this legislation from the standpoint of the Administration's program.

Sincerely,

RICHARD G. KLEINDIENST,
Attorney General,
WILLIAM P. ROGERS,
Secretary of State.

SECTION-BY-SECTION ANALYSIS

Sec. 1. adds a new Chapter 97 to title 28, United States Code. The new Chapter incorporates and codifies international law with respect to the immunities of foreign states. Together with a new 27 U.S.C. § 1330 (Sec. 2) establishing original jurisdiction in the federal district courts in civil actions against foreign states, and amendments to 28 U.S.C. § 1391 (Sec. 3) and 28 U.S.C. § 1441 (Sec. 4) concerning venue and removal jurisdiction, the new Chapter establishes a coordinated regime for civil actions against foreign states and their political subdivisions and agencies and instrumentalities. It was felt preferable to bring together the provisions dealing with the immunities of foreign states in a clearly identified Chapter except where, in dealing with jurisdiction, venue and removal it would be clearer if the new provisions for actions against foreign states appeared with related provisions of title 28.

The Act has been drafted as an amendment to the present title 28. It has been influenced, however, by the American Law Institute Draft of the Federal Court Jurisdiction Act of 1971 introduced in the 82d Congress as S. 1876, and is consistent with that bill. It would be relatively easy to integrate this Act into any new structure patterned after that bill.

Sec. 1602. Findings and declaration of purpose. This section incorporates the central premises of the new Act, which are that decisions concerning claims of foreign states to immunity are best made by the judiciary on the basis of a statutory regime which incorporates the restrictive theory of sovereign immunity. It has never been clear to what extent the principle of international law governing the sovereign immunity of foreign states in national courts is left to be spelled out by national legislation and by the decisions of national courts. The general immunity seems to be a creation of international law; its further refinement seems to have been left largely to national courts. There is, however, general acceptance of the restrictive principle of immunity. It is this principle that has been applied by the Department of State and by the courts since the "Tate Letter" of May 19, 1952, 26 *Department of State Bulletin* 984 (1952) and which is incorporated and codified in this Chapter.

The existing case law, both United States and foreign, could be drawn upon in aid of the interpretation and application of the provisions of this Act. As the law develops in other jurisdictions, that law may similarly be relied upon to elucidate the provisions of this Act.

Sec. 1603. Definitions. This section defines two terms that are used throughout the new Chapter 97, except as the term "foreign state" is used in Sections 1608 and 1610.

Section 1603 (a) defines "foreign state" in terms of all levels of government within that state. The term thus extends from the central government down to the level of municipalities. The traditional view has been that immunity attaches only to the central government of a state and that other subordinate entities, such as states of a federation, provinces, cantons, countries, and municipalities, are not sovereign and are not entitled to immunity. The practice has not been consistent, however, and some courts have found it difficult to contend that purely governmental acts of governmental subdivisions should be subject to scrutiny by foreign courts. In other areas of international law, the central government is responsible for the acts of political subdivisions and they are considered as its own acts. There is no reason to treat these acts differently for purposes of immunity. If those acts are not in fact commercial, then immunity should be granted to exactly the same extent as it would be extended to the central government in the event those acts were directly attributable to it.

An "agency or instrumentality" of a state or of its political subdivision could assume a variety of forms—a state trading corporation, a transport organization such as a shipping line or airline, or a banking activity. The traditional rule was that such agencies and instrumentalities of a foreign government were entitled to the same immunities as the government itself, especially if they engaged in clearly governmental activities.

When the principle of the absolute immunity of foreign governments was still dominant, the idea of the separability of certain governmental agencies or instrumentalities was used to exempt certain governmental activities from the rule of absolute immunity. If it could be proven that a particular activity was conducted by a separate entity, this enabled some courts to claim that this was not a governmental activity and that the entity in question was not entitled to immunity. When the trend shifted toward restricted immunity, some courts retained the old distinction as well, thus applying a double standard, namely that there is no immunity, if an activity is commercial or if it is conducted by a separate entity. In a third category of instances, immunity was abolished only when the transaction was commercial and the entity was a separate one. Thus, a series of treaties of friendship, commerce, and navigation concluded by the United States with the Federal Republic of Germany, Greece, Iran, Ireland, Israel, Italy, Japan, Korea, the Netherlands, and Nicaragua abolished immunity only for government owned or controlled "enterprises" of one state which are engaged in "commercial, manufacturing, processing, shipping or other business activities" in the territory of the other state (6 Whiteman, Digest of International Law 52 (1968)).

It would seem proper to extend the immunity rules applicable to central governments on an equal basis, and subject to the same exceptions, to political subdivisions of a foreign state and to all agencies and instrumentalities not only of the foreign state but also of its political subdivisions. It is not likely that this extension of the basic rule would result in a large number of immunity cases, as most foregn activities of such entities are likely to be commercial and will not be entitled to immunity.

Section 1603(b) defines a "commercial activity." If a foreign state, as defined in the Act (as including, for example, an agency or instrumentality of the state) carries on what is in effect a commercial enterprise—an airline or a trading corporation, for example—this constitutes a "regular course of commercial conduct" and therefore a "commercial activity." If activity is customarily carried on for profit, its commercial character readily could be assumed. On the other hand, a single contract if of the same character as a contract which might be made by private persons, can constitute a "particular commercial transaction or act." The fact that the goods or services to be procured through the contract are to be used for a public purpose is irrelevant. Such a contract should be considered to be a commercial contract, even if it object is to assist in a public function.

The courts will have a good deal of latitude in determining what is a "commercial activity." It seems unwise to attempt a precise definition in this Act, even if that were practicable. It would include, however, such diverse activities as a contract to manufacture army boots for a foreign government or the sale by a foreign government of a service or product.

Sec. 1604. Immunity of foreign states from jurisdiction. The new Chapter 97 starts from an assumption of immunity and then creates exceptions to the general principle. So long as the law develops in the form of stating when a foreign state is *not* immune in national courts, the codified law will have to be cast in this way. The articulation of the governing principle in terms of immunity will also protect foreign states in doubtful cases.

The immunity is extended to proceedings in both State and Federal courts. It lies within the powers of the Congress to stipulate that an immunity created under customary international law must be respected in State courts.

This Chapter is not intended to alter existing international agreements to which the United States is a party. The "existing . . . agreements to which the United States is a party" include treaties of friendship, commerce, and navigation and bilateral air transport agreements which contain provisions relating to the immunity of foreign states. If the agreement implicitly or explicitly establishes a higher or lower standard of immunity than that stipulated in this Act, or establishes a different basis for determining the liability of a foreign government, the treaty, whether prior to the enactment of the Act or subsequent to it, will prevail. The enactment of this Act might suggest renegotiation of certain of these provisions in order to bring them into conformity with the stipulations of this Act.

Nothing in this Act will in any way alter the rights or duties of the United States under the status of forces agreements for NATO or other countries having military forces in the United States or alter the provisions of commercial contracts calling for exclusive nonjudicial remedies through arbitration or other technique of dispute settlement.

Sec. 1605. General exceptions to the jurisdictional immunities of foreign states. This section sets forth the circumstances in which a foreign state, as defined in Section 1603(a) is not entitled to immunity in United States courts.

Section 1605(1) deals with the case in which the foreign state has waived its immunity. It is generally recognized that whatever rule is followed with respect to the granting of immunity to a foreign state, that state may waive its immunity in whole or in part, explicitly or implicitly. A state may renounce its immunity by treaty, as has been done by the United States with respect to commercial and other activities in a series of treaties of friendship, commerce, and navigation, or a state may waive its immunity in a contract with a private party. In the latter instance, some courts have allowed later unilateral recission of such a waiver, but the more widely accepted view seems to be that a state which has enticed a private person into a contract by promising not to invoke its immunity cannot, when a dispute arises, hide behind its immunity and claim the right to revoke the waiver. Courts have also found an implicit waiver in cases where a foreign state agreed to arbitration in another country or where it was agreed that the law of a particular country should govern the contract.

The language "notwithstanding any withdrawal of the waiver which the foreign state may purport to effect after the claim arose" is designed to deal, out of an abundance of caution, with the eventuality that a state may attempt to withdraw its waiver of immunity when a dispute arises. A waiver of immunity, once made by treaty or contract, cannot be withdrawn except within the terms of the treaty or contract.

Section 1605(2) deals with the most im-

portant instance in which immunity is denied to foreign states, that in which the foreign state engages in commercial activity. "Commercial activity" is defined in Section 1603(b). The "commercial activity carried on in the United States by the foreign state" may thus be a regular course of business or an individual contract of an ordinary commercial character. Thus a foreign state would not be immune from the jurisdiction of United States courts with respect to an alleged breach of a contract to make repairs on an embassy building.

An "act performed in the United States in connection with a commercial activity of the foreign state elsewhere" looks to any conduct of the foreign state in connection with a regular course of business conducted elsewhere or a particular commercial contract concluded elsewhere. Examples of the causes of action involved would be an action for restitution based on unjust enrichment, a violation of securities regulations, or the wrongful discharge in the United States of an employee of a commercial activity carried on in some third country.

The third category of cases, "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act has a direct effect within the territory of the United States," would embrace conduct falling within the scope of Section 18 of the Restatement of the Law Second, Restatement of the Foreign Relations Law of the United States (1965), dealing with extraterritorial conduct having effects within the United States. Examples of the causes of action involved would be an action for pollution of the air by a factory operated commercially by a foreign state, an action arising out of restrictive trade practices by an agency or instrumentality of a foreign state, or an action for infringement of copyright by a commercial activity of the foreign state.

In each of these instances the conduct, transaction, or act of the foreign state must have a sufficient connection with the United States to justify the jurisdiction of United States courts over the matter. In this respect the jurisdictional standard is the same for the activities of a foreign state as for the activities of a foreign private enterprise.

Section 1605(3) provides that the foreign state will not be immune from jurisdiction in any case "in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property, is present in the United States in connection with a commercial activity carried on in the United States by the foreign state or that property or any property exchanged for such property, is owned or operated by an agency or instrumentality of the foreign state or of a political subdivision of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." Thus, if property has been nationalized or expropriated without payment of compensation as required by international law it will not be immune when it or any property for which it is exchanged are brought into the United States for sale or otherwise in connection with a commercial activity. Similarly, an agency or instrumentality which owns or operates such property and which is engaged in a commercial activity in the United States will not be immune with respect to actions in which rights in such property are in issue. Since this draft bill deals solely with issues of immunity, it in no way affects existing law concerning the extent to which, if at all, the "act of state" doctrine may be applicable in similar circumstances.

Section 1605(4) deals with litigation relating to immovables and to the property of decedents.

It is well established that, as set forth in the "Tate Letter" of 1952, sovereign immunity should not be granted "in actions with respect to real property (diplomatic and perhaps consular property excepted)." It does not matter whether a particular piece of property is used for commercial or public purposes. It is maintainable that the exception mentioned in the "Tate Letter" with respect to diplomatic and consular property is limited to questions of attachment and execution and does not apply to an adjudication of rights in that property. Thus the Vienna Convention on Diplomatic Relations, concluded in 1961, provides in on and the means of transport of the mission their furnishings and other property thereon and the means of transport of the mission are immune from search, requisition, attachment or execution." Actions short of attachment or execution seem to be permitted under the Convention, and a foreign state cannot deny to the local state the right to adjudicate on questions of ownership, rent, servitudes, and other similar matters, as long as the foreign state's possession of the premises is not distributed.

There is general agreement that a foreign state may not claim immunity when the suit against it relates to rights in property, real or personal, obtained by gift or inherited by the state and situated or administered in the country where the suit is brought. As stated in the "Tate Letter," immunity should not be granted "with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary." The reason seems to be that in claiming rights in a decendent's estate or obtained by gift, the foreign state claims the same right which is enjoyed by private persons.

Section 1605(5) is directed primarily to the problem of traffic accidents but is cast in general terms as applying to all actions for damages (as distinguished from injunctive relief, for example) for personal injury or death or damage to or loss of property. The negligent or wrongful act must make take place in the United States and must not be one for which a remedy is already available under Article VIII of the NATO Status of Forces Agreement.

While the Vienna Convention on Consular Relations of 1963 expressly abolishes the immunity of consular officers with respect to civil actions brought by a third party for "damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft," there is no such provision in the Vienna Convention on Diplomatic Relations of 1961. Consequently no case relating to a traffic accident can be brought against a member of a diplomatic mission or against the mission itself.

The effect of Section 1605(5) would be to permit the victim of a traffic accident who has been injured through the wrongful or negligent act of an official or employee of a foreign state to have an action against the foreign state to the extent otherwise provided by law.

This section applies only to torts that are not connected with the commercial activities of a foreign state. Under section 1605(2), no act of a foreign state, tortious or not, which is connected with the commercial activities of a foreign state would give rise to immunity if the act takes place in the United States or has a direct effect within the United States.

Section 1606. Immunity in cases relating to the public debt of a foreign state. Public debts do not fall within the scope of Section 1605. The immunity of foreign states in this respect should be maintained by the United States, in its role as one of the principal capital markets of the world. Many national governments are unwilling to issue their securities in a foreign country which subjects them to actions based on such securities. Where the managing underwriters regard immunity as detrimental to the success of the issue, the foreign government may consent to suit by an express waiver.

While there is no clear definition of "public debt," this concept seems to embrace not only direct bank loans but also governmental bonds and securities sold to the general public through bond markets and stock exchanges.

Section 1606(a)(2) recognizes a distinction which has been made between the public debt of the central government and the public debt of "a political subdivision of a foreign state, or of an agency or instrumentality of such a state or subdivision." It is generally accepted that the immunity of the central government is not shared by subordinate political entities or agencies or instrumentalities. Immunity is denied in these cases, whether or not the activity engaged in is of a commercial character or otherwise falls within the scope of Section 1605.

Section 1606(b) preserves any remedies under the federal securities laws applicable to foreign states.

Sec. 1607. Counterclaims. This section deals with compulsory and permissive counterclaims within the meaning of Rule 13(a) and (b) of the Federal Rules of Civil Procedure.

It is in no way intended to create immunity with respect to counterclaims which, if originally brought as actions against a foreign state, would not entitle the foreign state to immunity. It deals instead only with claims which would be barred by immunity unless brought as counterclaims under the rule of § 1607.

The state of the law in the United States is that a foreign state which brings an action in a United States court may not assert the defense of sovereign immunity as to a counterclaim not arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state to the extent that the counterclaim does not exceed the amount claimed by the plaintiff foreign state (National City Bank of New York v. Republic of China, 348 U.S. 356 (1955)). There is no square precedent on a counterclaim that *does* arise out of the transaction or occurrence that is the subject matter of the claim of the foreign state. Section 1607(1) is, however, based on the rule laid down in Restatement of the Law Second, Foreign Relations Law of the United States § 70(2) (1965). A foreign state that brings an action grounded in a particular transaction or occurrence should not, on principle, be allowed to assert its immunity in such a way as to permit it to claim the benefit of the courts of the United States while denying that benefit to the defendant with respect to claims arising out of the same transaction or occurrence. In the words of National City Bank of New York v. Republic of China, supra, "It (the foreign government) wants our law, like any other litigant, but it wants our law free from the claims of justice" (at 361–2).

"[A]ny counterclaim arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state" is the same terminology as that used in Rule 13(a) of the Federal Rules of Civil Procedure.

Sec. 1608. Service of process in United States District Courts. This section is designed to give a foreign state prompt and adequate notice that an action has been brought against it and to provide a method of service of process on foreign states, political subdivisions of foreign states, and their agencies or instrumentalities which are not citizens of the United States.

Service under Section 1608 requires two methods of supplying notification. The first is that a copy of the summons and of the complaint be mailed by the clerk of the court to the ambassador (or if there be none at the time to the charge d'affaires or other chief of mission of that state). In the event of the suspension of diplomatic relations with a foreign state or their interruption in time

of war, service may be made in the same way on the ambassador or chief of mission of the state which is then acting as the protecting power for the defendant foreign state. If service is made upon an agency or instrumentality it may sometimes be more appropriate to serve the officer or agent who is authorized to receive service under the law of the foreign state concerned. Accordingly, this method is provided as an alternative way of satisfying the first notification requirement in actions brought against agencies or instrumentalities. Similarly, if a law of the United States or of a State specifies what persons may receive service, service may likewise be made upon such a person in actions brought against agencies or instrumentalities.

The second and concurrent method of providing notification to the foreign state is the sending to the Secretary of State of copies of the summons and complaint. The Secretary of State will then transmit one of these to the ministry of foreign affairs of the defendant state by diplomatic note. In cases where there are no diplomatic relations with the foreign state, a protecting power or other intermediary might be employed to convey the note to the defendant state. This second method of notification will assure that the foreign state is notified even if through some error—such as the receipt of the mailed copy of a summons and complaint by a minor official who fails to bring it to the attention of the ambassador—the foreign state itself does not receive actual notice through the mail.

While both international law and United States law prohibit service of process by a marshal on a foreign ambassador without his consent, it was generally accepted during the drafting of the Vienna Convention on Diplomatic Relations that this prohibition does not apply to service effected by mail.

There has in the past been great uncertainty about the proper mode of service of process on foreign states. The Federal Rules of Civil Procedure contain no stipulation on this subject.

In some cases service has been allowed when the suit was brought in fact against a separate government enterprise. In other cases attempts were made to equate government agencies to separate enterprises and to apply to them the methods of service applicable to foreign corporations. In at least one case the court admitted that there was a gap in the rules and proceeded to fill it under Rule 83, which allows the District Courts in "all cases not provided for by rule" to "regulate their practice in any manner not inconsistent with these rules." Alternatively a district court can authorize a special method of service, as long as the method chosen is consonant with due process. Consequently service by ordinary mail to an office maintained in the United States might be permissible.

It has also been suggested that the rules applicable to service abroad might by analogy be applied to foreign governments.

More recently, a number of plaintiffs have obtained jurisdiction over foreign states by attaching property of those states. The Department of State stated in 1959 (see *Stephen* v. *Zivnostenska Banka National Corp.*, 22 N.Y.S. 2d 128, 134 (App. Div. 1961)) that "where under international law a foreign government is not immune from suit, attachment of its property for the purpose of obtaining jurisdiction is not prohibited." The Department noted that in many cases "jurisdiction could probably not be obtained otherwise." It added, however, that property so attached cannot be retained to satisfy a judgment because "the property of a foreign sovereign is immune from execution even in a case where the foreign sovereign is not immune from suit."

This statement led in several cases to the attachment of various properties of foreign states such as vessels or bank accounts, and to the acquisition by the courts of *quasi in rem* jurisdiction. In other cases a distinction has been made between those assets which are deemed to be subject to attachment because they are used for a commercial activity, even if that particular activity is unrelated to the activity which led to the attachment, and other assets which have been held to be public assets free from attachment. Consequently, difficult questions have been posed with respect to the line between property subject to attachment and that which is not.

It has also been contended that this method of acquiring jurisdiction suffers from a fatal logical flaw, as the very basis of *quasi in rem* jurisdiction is to enable the plaintiff to apply the attached property to the satisfaction of his claim if he prevails on the merits. But the inherent condition of the permission of the Department of State to attach was that such attachment should not lead to execution. This condition destroyed the original premise of this method of acquiring jurisdiction and made it seem nothing more than a technical procedural device with no basis in substance.

In some cases, plaintiffs have attached large sums in many banks, causing confusion and inflicting hardship on the foreign government concerned. Its procedures for payment of its debts may thus have been disrupted, difficulties may have been placed in the way of the functioning of its offices, and in some cases its monetary reserves may have been put in danger. The proceedings relating to the claim of immunity are often prolonged, and during the whole period the financial position of the foreign government is put in jeopardy. Unless the proceeding could be restricted to a temporary attachment which would be dissolved once jurisdiction had been acquired—another negation of the original function of this method—foreign governments might be compelled to remove their funds to other countries where they would not be subject to attachment.

As this new procedure of attachment is not yet firmly embedded in practice, it should be brought to a halt. The procedure prescribed in this section is designed to replace the stopgaps and artificial devices that have been employed in the past.

The provision for service of process provided in section 1608 is mandatory for actions against foreign states or their political subdivisions and permissive for actions against agencies or instrumentalities of foreign states or political subdivisions which agencies or instrumentalities are not citizens of the United States as defined in section 1332(c) and (d) of title 28. Actions against foreign states and political subdivisions may be particularly sensitive and this sensitivity suggests a uniform procedure for service of process. With respect to actions against agencies and instrumentalities not citizens of the United States these provisions create an alternate method of service of process.

Agencies or instrumentalities of a foreign state or political subdivision which are incorporated in the United States or elsewhere may be served pursuant to Rule 4 of the Federal Rules of Civil Procedure. Rule 4 provides in pertinent part:

Service shall be made as follows: . . .

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

It is not wholly clear under Rule 4 whether an unincorporated agency or instrumentalities, particularly if they have their principal place of business in the United States and would thus be citizens of the United States under section 1332(c) or (d) of title 28. Such agencies or instrumentalities would not be covered by the provisions of section 1608 and as such should be brought under the existing Rule 4.

Section 1609. Immunity from execution and attachment of assets of foreign states. As in the case of Section 1604 with respect to jurisdiction, the matter of immunity is dealt with by an initial prohibition on execution and attachment in this section. The exceptions are then carved out in Section 1610.

SEC. 1610. Exception to the immunity from execution of assets of foreign states. The traditional view in the United States has been that the assets of foreign states are immune from execution (Dexter and Carpenter, Inc. v. Kunglig Jarnvagsstyvelsen, 43 F.2d 705 (2d Cir. 1930)). Even after the "Tate letter" of 1952, this continued to be the position of the Department of State and of the courts. The Department expressed the view "that under international law property of a foreign sovereign is immune from execution to satisfy even a judgment obtained in an action against a foreign sovereign where there is no immunity from suit" (Wellamann v. Chase Manhattan Bank, 21 Misc. 2d 1086, 192 N.Y.S. 2d 469–73 (Sup. Ct. 1959)). Thus, even after the Department of State and the courts espoused the restrictive theory of the immunity of foreign states from the jurisdiction of United States courts, a plaintiff who prevailed in his action against a foreign state could not levy execution on the assets of that state. This state of affairs led to assertions that the "Tate Letter," reflecting the changed position of the United States, was only an empty gesture.

Section 1610 is designed to meet this objection by partially lowering the barrier of immunity to execution of the assets of foreign states in order to make the law in this respect consistent with that on immunity from jurisdiction. The governing principle, broadly stated, is that property held for commercial purposes should be available for the satisfaction of judgments rendered in connection with commercial activities. There is thus no question of execution on embassies, warships, or other foreign government property used for non-commercial purposes.

A distinction is made between, on the one hand, a foreign state or political subdivision thereof, and on the other, "an agency or instrumentality of a foreign state or of . . . a . . . political subdivision of a foreign state."

Under Section 1610(a) assets used by a foreign state or political subdivision for a particular commercial activity would be available to satisfy judgments arising out of that activity. It would be inappropriate, and probably in violation of international law, to allow the successful litigant to levy on any assets of a foreign state because these may be used for strictly governmental and sovereign purposes as well as commercial ones. Thus, absent a waiver of immunity if a judgment had been rendered against a foreign state or a political subdivision of that state on a commercial contract signed by an agency or instrumentality of the foreign state or its political subdivision (e.g., a state trading corporation), only the assets of the agency or instrumentality would be considered to have been "used for a particular commercial activity" and thus subject to execution. The reason for limiting execution to assets employed in connection with the particular commercial activity out of which the claim arose is that states, especially those with most of the economy in the public sector, may engage in a great variety of commercial activities. It would not be consistent with Section 1610(b) or with the principles obtaining in the American legal system for assets used in connection with a foreign state's program of importation of machine tools to be available to satisfy a judgment arising out of the commercial telecommunications business

of that foreign state. All commercially used assets of a foreign state should no more be available for satisfaction of a judgment than all commercial assets of American firms operating in a foreign state should be available for satisfaction of a judgment against one American company. Indeed, allowing execution on assets of a foreign state attributable to an activity other than that out of which the claim arose could expose American enterprises abroad to like treatment.

There is no such problem in connection with assets of agencies or instrumentalities under Section 1610(b), as it can be expected that each such agency or instrumentality will have its own assets and will act as a separate entity, analogous to an American corporation. The standard of commercial activity in the United States which is used in Section 1610(b) is the same as that in Section 1605 (2). If the action is one arising out of the "commercial activity" in the United States of an agency or instrumentality, as defined in Section 1603(b)—whether as a course of conduct or an individual transaction or act—then any assets of that agency or instrumentality may be used to satisfy judgments arising out of that activity. The normal situation would be one in which a state trading corporation carries on business in the United States and the claim arises out of that activity. If a commercial agency or instrumentality outside the United States has assets in the United States, these may be used to satisfy judgments arising out of acts occurring or having their impact in the United States, provided the judgments are rendered on actions arising out of the commercial activity of the agency or instrumentality.

Under both sections 1610(a) and 1610(b) property taken in violation of international law and present in the United States in connection with a commercial activity would also be subject to execution.

Sections 1610(a) (2) and 1610(b) (2) concern waivers of immunity from execution. Waivers are governed by the same principles that apply to waivers of immunity from jurisdiction under Section 1605(1). A waiver may result from the provisions of a treaty, a contract, or an official statement, or it may be inferred from certain steps taken by a foreign government in the proceedings leading to execution. Such waiver might be more easily presumed when the assets are used for both public and private purposes but only an explicit waiver would allow execution on property that is clearly public, such as an embassy building. In case of doubt, the question whether a waiver has actually been made is a question to be decided by the court which has jurisdiction over the assets subject to execution.

A waiver on behalf of an agency or instrumentality may be made either by that agency or instrumentality or by the foreign state itself under its powers with respect to the conduct of foreign relations.

There is no clear line of practice in foreign courts on the question of immunity of foreign states from execution, but opinion is not unanimously or predominantly in favor of absolute immunity. A number of treaties of friendship, commerce, and navigation concluded by the United States permit execution of judgments against foreign publicly owned commercial enterprises (e.g. Treaty with Japan, April 2, 1953, art. 18(2), 4 U.S.T. 2063, T.I.A.S. No. 2863). There has been widespread departure from the principle of absolute immunity in connection with the activities of state-owned vessels engaged in commercial activity. The widely ratified Brussels Convention for the Unification Rules relating to the Immunity of State-Owned Vessels, April 10, 1926, 176 L.N.T.S. 199, allows execution of judgments against public vessels engaged in commercial service in the same way as against privately owned vessels. Although the United States is not a party to this treaty, it follows a policy of not claiming immunity for its publicly owned or operated merchant vessels (6 Whiteman, Digest of International Law 570 1968)). Articles 20 and 21 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958 (15 U.S.T. 1606, T.I.A.S. No. 5639), to which the United States is a party, recognize the liability to execution under appropriate circumstances of state-owned vessels used on commercial service.

Sec. 1611. Certain types of assets immune from execution. The purpose of Section 1611 (1) is to prevent in all circumstances attachment of or levy of execution upon two categories of property of foreign states, even if these relate to the commercial activities of a foreign state and would otherwise come within the scope of Section 1610.

Section 1611(1) deals with funds of foreign states which are deposited in the United States, not in connection with purchases by the foreign state or other commercial activities but in connection with central banking activity. The purpose of the provision is to encourage the holding of dollars in the United States by foreign states, particularly in times when the United States has an adverse balance of payments. If execution could be levied on such assets, deposits of foreign funds in the United States might be discouraged, thus adversely affecting our balance of payments.

Section 1611(2) provides immunity from execution for assets which are, or are intended to be, used in connection with a military activity and which fulfill either of two conditions; either they are of a military character or they are under the control of a military authority or defense agency. Under the first condition property is of a military character if it consists of munitions in the broad sense—weapons, ammunition, military transport, warships, tanks, communications equipment, etc. Both the character and the function of the property must be military. The purpose of this condition is to avoid embarrassment to the United States in connection with purchases of military equipment and supplies in the United States by foreign governments. The second condition is intended to protect other military property, such as food, clothing, fuel and office equipment which, although not of a military character, is essential to military operations. "Control" is intended to include authority over disposition and use in addition to physical control and a "defense agency" is intended to mean a civilian defense organization such as the Defense Supply Agency in the United States Government. Each condition is subject to the overall condition that property will be protected only if its present or future use is military (e.g., surplus military equipment withdrawn from military use would not be protected), and both conditions will avoid the possibility that a foreign state might permit execution on military property of the United States abroad under a reciprocal application of the Act.

Sec. 2. Original jurisdiction of the district courts. This section would amend title 28 to add a new § 1330 giving the Federal district courts original jurisdiction over civil actions against foreign states or their political subdivisions, agencies or instrumentalities which are not citizens of the United States as defined in section 1332(c) and (d), regardless of the amount in controversy. Original jurisdiction is accorded to the federal courts because certain actions against foreign states, no longer possessed of absolute immunity, may be politically sensitive and may impinge in an important way on the conduct of foreign relations. Moreover, original jurisdiction in the federal courts should be conducive to uniformity of decision, and the federal courts may be expected to have a greater familiarity with international law and with the trend of decision in foreign states than would be true of courts of the States. The plaintiff, however, will have an election whether to proceed in a federal court or in a court of a State.

The present position is that district courts have original jurisdiction in civil actions between citizens of different States "and in which foreign states . . . are additional parties," provided the matter in controversy exceeds the sum or value of $10,000 (28 U.S.C. § 1332). The Federal courts now also have jurisdiction on the basis of a Federal question ("the matter . . . arises under the Constitution, laws, or treaties of the United States") provided the matter in controversy exceeds the sum of value of $10,000. The amount in controversy or other restrictions of these provisions will no longer be applicable in civil actions against foreign states.

An exception is made in the case of "agencies or instrumentalities of foreign states or of constituent units or political subdivisions of foreign states which are citizens of a State." This citizenship of a State would arise out of incorporation in that State or the possession of a "principal place of business" in that State under 28 U.S.C. § 1332 (c). The sort of agency or instrumentality which might be expected to be locally incorporated in the United States would be a trading, banking, or transport corporation of a foreign state. If an agency or instrumentality has in effect been "naturalized" by local incorporation, it should be treated like any other citizen of the United States. It is a matter of accepting the burdens of local incorporation together with the benefits. If a foreign "agency or instrumentality" is incorporated in the United States, it is treated in exactly the same way as any other American corporation, incorporated or having its principal place of business in a State.

Section 1330(b) makes it clear that the section does not alter the existing law concerning such agencies or instrumentalities. Section 1330, of course, would also not alter the specialized jurisdictional regimes such as those established by § 1333 dealing with admiralty, maritime and prize cases or by § 1338 dealing with patent and copyright cases. Actions in such areas, even if against a foreign state, would continue to be governed by these special regimes.

It is contemplated that in actions brought in the federal district courts under this new § 1330 or removed to the federal courts under the new § 1391(f), whether state or federal law is to be applied will depend on the nature of the issue before the court. Under the *Erie* doctrine state substantive law, including choice of law rules, will be applied if the issue before the court is non-federal. On the other hand, federal law will be applied if the issue is a federal matter. Under the new Chapter 97 issues concerning sovereign immunity, of course, will be determined by federal law. Similarly, issues involving the foreign relations law of the United States, such as the act of state doctrine, should be determined by reference to federal law. Other issues which may arise in actions brought under the new §§ 1330 and 1391(f) may be determined by state law if the issue is one of state law. See IA *J. Moore, Moore's Federal Practice* 3052–57 (2d ed. 1972); Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 *Col. L. Rev.* 805, 820n.51 (1964). *Sec. 3. Venue.* This section would amend 28 U.S.C. § 1391, which deals with venue generally. As amended, venue would lie in any one of three districts in civil actions brought against foreign states, political subdivisions or their agencies or instrumentalities which are not citizens of the United States as defined in section 1332(c) and (d).

First, the action may be brought in the judicial district where "a substantial part of the events or omissions giving rise to the claim occurred." This provision is analogous to 28 U.S.C. § 1391(e), which allows an action against the United States to be brought,

inter alia, in any judicial district in which "the cause of action arose." The test adopted, however, is the newer test recommended by the ALI and incorporated in S. 1876, 92d Cong., which does not imply that there is only one such district applicable in each case.

Second, the action may be brought in the judicial district in which "a substantial part of the property that is the subject of the action is situated." No hardship would be caused to the foreign state if it is subject to suit where it has chosen to place the property that may be in dispute. As much of the property of foreign states is in New York, this provision would permit the submission of a large number of cases to the United States District Court for the Southern District of New York, where many immunity cases have arisen in the past and where a particular expertise in such cases is consequently to be found.

Third, if the action is brought against an agency or instrumentality which is not a citizen of the United States as defined in section 1332 (c) and (d) of this title, it may be brought in the judicial district where the agency or instrumentality is licensed to do business or is doing business. If, of course, an agency or instrumentality is incorporated in or has its principal place of business in the United States then it is a citizen of the United States and venue will be governed by other provisions of title 28. And if the action is brought against a foreign state or political subdivision it may be brought in the United States District Court for the District of Columbia. The District of Columbia provides a fallback venue for actions against foreign states and political subdivisions since it is difficult to say where they "reside" under the corporate standards of "incorporated or licensed to do business or is doing business" used in section 1391(c). Moreover, it is in the City of Washington that foreign states have diplomatic representatives and where it would be easiest for them to defend themselves.

Consistent with Section 2 on jurisdiction an exception is made as to foreign agencies or instrumentalities which are citizens of a State. Actions against such agencies or instrumentalities would, under the terms of the exception, be treated in the same way as actions against wholly domestic corporations.

Nothing in this provision is intended to in any way alter the statutory or common law doctrine of *forum non conveniens*. Thus, actions brought in a particular district under § 1391 could be moved to another district for the convenience of the parties and witnesses and in the interest of justice in accordance with § 1404 of Title 28. Similarly, if the convenience of the parties and witnesses or the interest of justice would be better served by dismissing the action subject to a court in a foreign State taking jurisdiction the doctrine of *forum non conveniens* would be available for that purpose.

See *Vanity Fair Mills* v. *T. Eaton Co.*, 234 F.2d 633 (Ct. App. 2d. Cir. 1956), *Prack* v. *Weissinger*, 276 F. 446 (Ct. App. 4th Cir. 1960), *Fitzgerald* v. *Westland Marine Corp.*, 369 F.2d. 499 (Ct. App. 2d. Cir. 1966) and I *J. Moore, Moore's Federal Practice* 1788 (2d. 1972). *Sec. 4.* This section amends section 28 U.S.C. § 1441 to provide for removal to a federal district court of civil actions brought against a foreign state in the courts of a State. In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is of great importance to give foreign states clear authority to remove to a federal forum actions brought against them in the State courts. This section provides such authority in any case which could have been brought originally in a federal district court under the new section 1330 (Sec. 2). It also makes clear that the election for removal may be exercised at the discretion of the foreign state even if there are multiple defendants and one chooses not to remove or is a citizen of the State in which such action is brought This section, like the new provisions for jurisdiction (Sec. 2) and venue (Sec. 3) would not affect existing removal jurisdiction with respect to agencies or instrumentalities which are citizens of a State of the United States as defined in section 1332 (c) and (d) of title 28.

Sec. 5 This section amends 28 U.S.C. § 1332 (a) (2) and (3) by striking the phrase "foreign states" from both subsections. Suits against foreign states are comprehensively treated by the new § 1330 and the other provisions of this bill. Accordingly there is no reason to retain the jurisdictional basis of § 1332 in actions against foreign states and to do so may entail confusion as to whether the jurisdictional amount requirement of § 1332 would be applicable. As such, § 1332 has been amended to conform to the structure of the draft bill for actions against foreign states. This change would not affect the applicability of § 1332 to agencies or instrumentalities of a foreign state or subdivision which agencies or instrumentalities are citizens of a state of the United States as defined in section 1332 (c) and (d) of title 28.

Mr. SCOTT of Pennsylvania. Mr. President, I am pleased to cosponsor the legislation introduced by the Senator from Nebraska (Mr. HRUSKA) "to define the circumstances in which foreign states are immune from the jurisdiction of U.S. courts and in which execution may not be levied on their assets, and for other purposes." This legislation has been jointly prepared by the Departments of State and Justice and is an important milestone in the foreign relations law of the United States. As our trade and other commercial arrangements with foreign governments increase, it will be increasingly important to have a modern regime for dealing with the sovereign immunity issues regulated by this bill.

The central principle of the bill is to make the question of a foreign state's entitlement to jurisdictional immunity an issue justiciable by the courts. As the situation now stands, the courts normally defer to the view of the Department of State on issues of sovereign immunity, which puts the Department in the difficult position of effectively determining whether the plaintiff will have his day in court. If the Department suggests immunity, the court will normally honor the suggestion, and the case will be dismissed for want of jurisdiction. If the Department does not suggest immunity, the court may either take the silence of the Department as an indication that immunity is not appropriate or will determine the question itself, with due regard for the policy of the Department and the views expressed in the past by the courts. While the Department has provided internal procedures which will give both the plaintiff and the defendant foreign state a hearing, it is not satisfactory that a department, acting through administrative procedures, should in the generality of cases determine whether the plaintiff will or will not be permitted to pursue his cause of action. Questions of such moment appear particularly appropriate for resolution by the courts, rather than by an executive department.

The bill also sets out a comprehensive regime for the courts to follow in making determinations of immunity. That regime is based largely on the restrictive theory of immunity which has been followed by the Department since the "Tate Letter" was promulgated in 1952. The bill does, however, make a number of changes intended to fill gaps in the existing law. Thus, it would provide a clear method of service of process on foreign states and end the unfortunate practice of attaching the assets of foreign states for purposes of obtaining jurisdiction. It would also enable recovery against foreign states in cases of personal injury or property damage and would permit execution against the assets of a foreign state in cases related to their commercial rather than their governmental activities.

Since the subject matter of this bill relates to our international legal obligations, the Department of State has indicated that when the bill is enacted it would propose, subject to Senate approval, that the United States file a declaration accepting the compulsory jurisdiction of the International Court of Justice, on condition of reciprocity, with respect to disputes concerning the immunity of foreign states. Such a declaration would recognize the common interest of all nations in reciprocally applicable rules concerning the immunity of foreign states.

By Mr. HRUSKA (for himself and Mr. SCOTT of Pennsylvania):

S. 567. A bill to revise title 28 of the United States Code. Referred to the Committee on the Judiciary.

HABEAS CORPUS ACT AMENDMENTS OF 1973

Mr. HRUSKA. Mr. President, for myself and for the senior Senator from Pennsylvania (Mr. SCOTT), I send to the desk a bill relating to Federal court review of habeas corpus petitions from State and Federal prisoners pursuant to sections 2253, 2254, and 2255 of title 28 of the United States Code. I ask that the bill be appropriately referred. I might add that this is the same bill I introduced as S. 3833 in the closing days of the 92d Congress. Hopefully, this proposal will be fully considered this session.

It should be stressed that this bill and its sponsors in no way seek to lessen the legitimate constitutionally required use of habeas corpus procedures to test the validity of criminal convictions. The purpose of this bill is to limit resort to this writ to traditional and proper cases only and to reduce the number of frivolous and dilatory petitions now being filed which unduly hamper the work of Federal courts and unnecessarily delay the finality of criminal actions. The bill is not designed to trespass upon the rights, limitations, and bases contained in the Constitution guaranteeing the applicability and availability of this form of legal relief. It is not a repeal of the great writ.

For our system of criminal justice to work effectively we must insure that those citizens charged with crimes are afforded a fair and prompt trial, that

the innocent are acquitted, that the guilty are convicted, and that the process for making this determination is one which begins and ends within a reasonable time frame. It is in this context that we must examine this and other proposals to reform our Federal habeas corpus procedures.

As Attorney General Kleindienst has said:

One of the chief factors that has slowed and frustrated the justice process has been the interminable collateral attacks made possible by the post-trial use of the Federal writ of habeas corpus. While I recognize the place of collateral attack in the justice process, I do deplore the abuse of it that has mushroomed in the last 20 years. I am told of instances in the Federal courts in which prisoners have filed as many as 40 or 50 petitions. It is no problem to cite cases in which the post-trial review has dragged on for a dozen years.

One result is that the State or Federal prisoner never reaches the point of accepting his own guilt so that he can begin the process of rehabilitation.

The other result has been to clog the trial system with a mountain of collateral attacks which drains the system's resources away from its regular work. Federal courts have become flooded with *habeas corpus* petitions. State prosecutors are staggered with the burden of answering these petitions, many of them frivolous. And as District Attorney Frank Hogan of New York has said, "Our old cases come back in a great wave, threatening to engulf the gasping trial courts, already up to their chins in current business."

Thus a devise originally intended to insure justice is now threatening a breakdown of justice.

The "mushrooming" in the last 20 years and the resulting draining of the trial "system's resources away from its regular work" are firmly and adequately demonstrated by the following statistics:

Prisoner petitions under U.S.C. 2254 and 2255: 1950, 672; 1960, 1,184; and 1970, 10, 792.

The increase from 1960 to 1970 represents a gain of nearly 1,000 percent.

It means that about 20 percent of the appeals to the circuit courts are from decisions on collateral attack petitions. A large expenditure of the circuit court's time is spent in this exercise which is not required by the Constitution. This added time is taken away from the court's ability to concern itself with the demands and needs of those accused but not yet tried. It is an exercise which undermines any effort toward rehabilitation.

The proposed legislation is based in part upon the suggestion of one of this country's most profound legal scholars and outstanding jurists, the Honorable Henry J. Friendly, chief judge of the U.S. Court of Appeals for the Second Circuit, as embodied in a law review article presented at the 1970 Ernest Freund lecture at the University of Chicago (38 Chicago L. Rev. 142 [1970]).

We must, of course, bear in mind the extraordinary prestige of the great writ in Anglo-American jurisprudence. Received into our own law in the colonial period, given explicit recognition in the Federal Constitution, article I, section 9, clause 2, incorporated in the first grant of Federal court jurisdiction, act of September 24, 1789, habeas corpus was early confirmed by Chief Justice John Marshall to be a "great constitutional privilege" (ex parte Bollman, 8 U.S. [4 cranch] 75 [1807]).

There has developed over the years two distinct schools of thought with regard to the power to award the writ by any of the courts of the United States. One doctrine urges that Congress, incident to its authority over the jurisdiction of the Federal courts, must provide legislative authorization. The competing view is that in the case of habeas corpus congressional authorization is not essential and that the Constitution's habeas corpus clause is a directive to all superior courts of record, State as well as Federal, to make the habeas privilege entirely available. (See Paschal, Francis, "The Constitution and Habeas Corpus," 1970 Duke Law Journal, 605–651.)

In 1968, the Senate debated this issue in the context of a crime control bill which would have denied Federal habeas corpus to State prisoners—section 702(a) of S. 917, the Omnibus Crime Control and Safe Streets Act. The Senate's decision to remove the habeas corpus section from the bill was largely the result of constitutional doubts. Indeed, our eloquent minority leader closed the debate by remarking that the proposal "would have about as much chance of being held constitutional as the celebrated celluloid dog chasing the asbestos cat through hell."

The effort in this bill is to extend to everyone convicted all of his constitutional rights but will at the same time deny him the opportunity to abuse the great writ to the detriment of the administration of justice and of the public good.

Through the cooperation of the National Association of Attorneys General—NAAG—representing the several States and the Department of Justice representing the Federal Government, a mutually satisfactory solution has been found to the problems outlined by the Attorney General.

The Habeas Corpus Committee of NAAG drafted legislation which would restrict collateral attacks in the Federal courts on State court proceedings. This proposal would require that collateral attacks be primarily presented in the State courts, rather than in the lower Federal courts, subject to review by the U.S. Supreme Court.

The Department of Justice, working independently on the habeas corpus question, drafted a proposal to restrict the use of collateral attacks to alleged violations of a constitutional right that involves the integrity of the factfinding process or of the appellate process. All other legal objections on behalf of the defendant were to be restricted to the time of the trial or to consideration on direct appeal following the trial. Under the Department's proposal, they could not be subject to collateral attack thereafter. That route would be limited to factors, such as perjured testimony, which show a flaw in the factfinding process.

These two approaches have now been brought together and are embodied in the bill we introduced today. It is my understanding that this measure has the full support of both National Association of Attorneys General and the Department of Justice.

This is an excellent proposal which I am pleased to support. The changes it proposes are necessary, workable, moderate, and legally sound. All who have had a hand in its development should be congratulated for the very real service they have rendered for justice and judicial effectiveness in this Nation.

Mr. President, the House Judiciary Committee has had the general subject of habeas corpus reform under consideration for some time. For this reason, when the drafting work on this bill was concluded, the Attorney General in June of last year had sent the bill and a covering letter to Chairman CELLER. Mr. Kleindienst's letter is an unusually scholarly and comprehensive review of the history and present status of Federal habeas corpus. It supplies well the information needed to understand this proposal. I believe it will be of great assistance and interest to my colleagues.

I ask that the text of the bill, the Attorney General's transmittal letter, and the two articles referred to in my remarks be printed at this point in the RECORD; namely Prof. Francis Paschal's "The Constitution and Habeas Corpus," Duke Law Journal, and Judge Henry J. Friendly's "Is Innocence Irrelevant?"

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

S. 567

A bill to revise title 28 of the United States Code

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 "Habeas Corpus Act Amendments of 1973".

SEC. 2. That chapter 153 of title 28 of the United States Code, is amended—

(a) by amending sections 2253 to 2255 to read as follows:

"§ 2253. Appeal; State and Federal custody

"In a habeas corpus proceeding or a proceeding under section 2255 of this title before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

"There shall be no right to appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

"An appeal may be taken to the court of appeals from the final order in a habeas corpus proceeding or a proceeding under section 2255 of this title only if the court of appeals issues a certificate of probable cause: *Provided, however,* That the certificate need not issue in order for a State or the Federal Government to appeal the final order.

"§ 2254. State custody; remedies in State courts

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the grounds that either:

"(1) (i) he is in custody in violation of the Constitution of the United States, and

"(ii) the claimed constitutional violation presents a substantial question—

"(aa) which was not theretofore raised and determined, and

"(bb) which there was no fair and adequate opportunity theretofore to raise and have determined, and

"(cc) which cannot thereafter be raised and determined in the State court, and

"(iii) the claimed constitutional violation is of a right which has as its primary purpose the protection of the reliability of either the factfinding process at the trial or the appellate process on appeal from the judgment of conviction: *Provided*, That insofar as any constitutional claim of incompetency of counsel is based on conduct of the counsel with respect to constitutional claims barred by the previous language of this subsection, the claim of incompetency of counsel shall to that extent be likewise barred, and

"(iv) the petitioner shows that a different result would probably have obtained if such constitutional violation had not occurred;

or

"(2) he is in custody in violation of the laws or treaties of the United States.

"(b) A copy of the official records of the State court duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing a factual determination by the State court, shall be admissible in the Federal court proceeding.

"§ 2255. Federal custody; remedies on motion attacking sentence.

"(a) A prisoner in custody under sentence of a court established by Act of Congress may move the court which imposed the sentence to vacate, set aside, or correct the sentence, if—

"(1) (A) he is in custody in violation of the Constitution of the United States, and

"(B) the claimed constitutional violation presents a substantial question—

"(i) which was not therefore raised and determined, and

"(ii) which there was no fair and adequate opportunity therefore to raise and have determined, and

"(C) the claimed constitutional violation is of a right which has as its primary purpose the protection of the reliability of either the factfinding process at the trial or the appellate process on appeal from the judgment of conviction: *Provided*, That insofar as any constitutional claim of incompetency of counsel is based on conduct of the counsel with respect to constitutional claims barred by the previous language of this subsection, the claim of incompetency of counsel shall to that extent be likewise barred, and

"(D) the petitioner shows that a different result would probably have obtained if such constitutional violation had not occurred; or

"(2) he is in custody in violation of the laws of the United States; or

"(3) the sentence was imposed in violation of the laws of the United States; or

"(4) the court was without jurisdiction to impose such sentence; or

"(5) the sentence was in excess of the maximum authorization by law; or

"(6) the sentence is otherwise subject to collateral attack.

"(b) A motion for such relief may be made at any time.

"(c) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been a denial or infringement of the constitutional rights of the prisoner as described in subsection (a) of this section, the court shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"(d) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"(e) The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"(f) An appeal may be taken to the court of appeals from the order entered on the motion in accordance with section 2253 of this title.

"(g) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

(b) by amending the analysis at the beginning of the chapter by deleting

"2253. Appeal."

and inserting in lieu thereof

"2253. Appeal; State and Federal custody.".

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., June 21, 1972.

HON. EMANUEL CELLER,
Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on H.R. 11441, a bill "To amend section 2254 of title 28, United States Code, with respect to Federal habeas corpus." This report will be addressed primarily to the provisions of H.R. 13722, which we understand is a substitute for H.R. 11441.

The Department of Justice recommends enactment of H.R. 13722, amended to include provisions relating to appeal from habeas corpus orders and to motions by prisoners attacking sentences of Federal courts. We have attached an appendix incorporating our proposed amendments with the provisions of H.R. 13722 (with some editorial changes in the provisions of H.R. 13722). A substantially similar draft bill was submitted to the Senate Judiciary Subcommittee on Constitutional Rights by letter from then Assistant Attorney General William H. Rehnquist to Senator Ervin dated October 19, 1971. Following is a discussion of the need for Federal habeas corpus reform, the constitutionality of such reform, and the specific provisions of H.R. 13722 and the recommended amendments of the Department of Justice. In using the term "habeas corpus" in this report, we refer to the concept of collateral attack in its broadest sense, to include all remedies under chapter 153 of title 28, United States Code, and also common law writs of collateral attack, such as *coram nobis*.

I. THE NEED FOR FEDERAL HABEAS CORPUS REFORM

"A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of the underlying substantive commands. Furthermore, we should at least tentatively inquire whether an endless reopening of convictions, with its continuing underlying implication that perhaps the defendant can escape from corrective sanctions after all, can be consistent with the aim of rehabilitating offenders." Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452 (1963).

Collateral attack in the Federal courts on State and Federal criminal judgments has become the ultimate outgrowth of the endless search for certitude in our criminal justice system. Americans, as a people, are well aware, and justly so, of the serious nature of an ultimate decision of a government, through its criminal justice system, to impose a final criminal sanction on a defendant. We hesitate, at that last instant before sending our convicted criminals to prison, and wonder if we have indeed "done justice." As a result of this laudable concern, however, we have countenanced a system of collateral attack on these final criminal judgments which literally staggers the imagination. Issues of law, issues of fact relating to people, places, and things may all be raised and relitigated time and time again through the mechanism of collateral attack. Concern for the search for ultimate justice, however, must nevertheless at some point be met with the realization that at some time, at some place, the decision of someone must be regarded as conclusive. We are hopefully not so uncomfortable with or unsure of our system of criminal justice that we cannot bring ourselves to tell a defendant that at some point his conviction is final and not thereafter open to attack. Nearly 200 years of experience with what, for all its imperfections, is surely the most equitable system of justice ever conceived teaches us that at some point the interest in finality must be regarded as paramount.

There are two reasons why the system of collateral attack that exists today seriously impairs the operation of our system of criminal justice. A system that allows an endless inquiry into the finality of criminal judgments cannot but undermine any effort it makes to rehabilitate its criminals. In addition, that system will also be forced, in allocating available judicial time, to choose between the demands of the accused but not yet tried, and the demands of those already convicted.

Penologists seem virtually unanimous in their conclusions that speed and certainty of punishment, even more than its severity, are crucial factors in its efficacy as a deterrent to crime. Professor Bator has examined the impact of the lack of finality upon the rehabilitation process. He concludes that what is needed is "a realization by the convict that he is justly subject to sanction, that he stands in need of rehabilitation; and a process of reeducation cannot, perhaps, even begin if we make sure that the cardinal moral predicate is missing, if society itself continuously tells the convict that he may not be justly subject to reeducation and treatment in the first place. The idea of just condemnation lies at the heart of the criminal law, and we should not lightly create processes which implicitly belie its possibility." Bator, *supra*, at 452.

The lack of finality under the present system of habeas corpus has also been decried by more than one member of the Supreme Court:

"No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved." *Mackey* v. *United States*, 401 U.S. 667, 691 (1971) (opinion of Harlan, J.). See also Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 30 U. Chi. L. Rev. 142 (1970).

Our present habeas corpus practice is unwise not merely *because it prevents* a final adjudication of criminal cases in either the State or Federal courts, but also because it must inevitably require the expenditure of valuable judge hours to dispose of its progeny. In 1950, the number of petitions for habeas corpus filed annually in the Federal courts was 672. By 1960 that number had reached 1184. By 1970 petitions had reached the stag-

gering number of 10,792. The following table will give some idea of the problem:

Years	Total civil filings	Motions to vacate sentence by State prisoners under 28 U.S.C. § 2254	Motions to vacate sentence by Federal prisoners under 28 U.S.C. § 2255	Total prisoner petitions
1950	(1)	560	112	672
1960	59,284	871	313	1,184
1970	87,321	9,063	1,729	10,792

[1] Unavailable.

These figures include only motions by State and Federal prisoners to vacate sentence under 28 U.S.C. §§ 2254 and 2255 respectively. They do not include habeas corpus petitions challenging such matters as the conduct of prison officials, or petitions seeking United States Parole Board review. Thus in 1960, petitions to vacate, by State and Federal prisoners, accounted for about 5 percent of the total civil filings. By 1970, the percentage had grown to about 13 percent. The increase in the number of petitions from 1960 (1,184) to 1970 (10,792) represents a gain of nearly 1,000 percent.

Eighteen years ago, Justice Jackson, in his concurring opinion in *Brown* v. *Allen*, 344 U.S. 443, 532, 536 and n. 8 (1953), expressed deep concern over the "floods of sale frivolous and repetitious petitions [for Federal habeas corpus by State prisoners which] inundate the docket of the lower courts and swell our own." The petitions at that time totaled 541. As Chief Judge Friendly of the Second Circuit has noted:

"If 541 annual petitions for federal habeas corpus by state prisoners were an 'inundation,' what is the right word for 7,500 (the 1968 figure)?" Friendly, *supra*, at 144.

Chief Judge Friendly also has raised various other problems thrust upon the criminal justice system by the glut of habeas petitions. He notes that approximately twenty percent of the appeals from Federal district courts are from decisions on collateral attack petitions. A petition may require a large expenditure of time by district and circuit judges even if no evidentiary hearing is held. Since the Federal courts in many cases can dispense with such a hearing only because of *State* post-conviction proceedings (due to the requirement in 28 U.S.C. § 2254 that a State prisoner exhaust available State collateral remedies before filing a Federal petition), the burden in terms of the whole system, State and Federal, is tremendous. See Friendly, *supra*, at 144 & nn. 9–10. Indeed, if such a volume of filings did *not* impose a severe burden on the Federal courts, it would be an indication that these petitions have acquired a status as "second-class" litigation which is not taken seriously—a fact which by itself would be strong evidence of the need for reform.

We do not, of course, advocate a complete abolition of habeas corpus relief, but we think an examination of the history and the aims of our criminal justice system strongly suggests that rational reform of existing Federal habeas corpus practice is both desirable and necessary.

II. CONGRESS CAN, WITHIN THE LIMITS OF THE SUSPENSION CLAUSE, AMEND THE HABEAS CORPUS STATUTES

It is only in the so-called "Suspension Clause" of the Constitution that the framers mention the privilege of habeas corpus:

"The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." U.S. Const. art. I, sect. 9, cl. 2.

Since this clause forms the entire constitutional basis for the exercise of the privilege, it is imperative that its exact implications be investigated.

It is clear that the writ protected by the Suspension Clause "is the writ as known to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did." Friendly, *supra*, at 170. Therefore, the nature of the writ at the time of the Constitution becomes extremely important in order to elicit the scope of the protected privilege as conceived by the framers.

A. The writ of habeas corpus at common law

The writ of habeas corpus originated as a mesne process by which the courts compelled the attendance of parties whose presence would facilitate the proceedings. The subsequent development of the writ as an independent remedy was along two classical lines.

First, habeas corpus was a weapon whereby the Court of King's Bench sought to establish its jurisdictional supremacy over the other courts. The writ became the appropriate process for checking illegal imprisonment by the inferior courts. Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 Cal. L. Rev. 335, 336 (1952); Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 459 (1964). This jurisdictional check was of an extremely limited nature, because of the principle of the "incontrovertibility of the return." At common law, a petitioner could not controvert a return filed in response to a writ of habeas corpus; it was sufficient that the return stated a valid explanation for the confinement, such as the judgment and sentence of a court. Oaks, *supra*, at 453. Thus, at common law, a person could not attack the final judgment of a court of competent jurisdiction. Second, habeas corpus functioned as a remedy "to assure the liberty of subjects against detention by the executive or the military without any court process at all." Bator, *supra*, at 475. See Collings, *supra*, at 336.

These principles were firmly embedded in the Habeas Corpus Act of 1679, which clarified, but did not enlarge, the types of confinement for which the writ could be issued. The Act specifically exempted from the benefits of the writ persons committed for "felony or treason plainly expressed in the warrant of commitment" and "persons convict[ed] or in execution by legal process." Bator, *supra*, at 466; Collings, *supra*, at 337; Oaks, *supra*, at 460–61. Subsequent interpretation of this Act by the English courts, until the time of ratification of the Constitution of the United States, did not expand the writ. Collings, *supra*, 337–38; Oaks, *supra*, at 461.

B. Habeas corpus in the early United States

Habeas corpus as above described, then, was the writ that existed at the time of the Constitutional Convention. The framers mandated that the privilege of that writ should not be "suspended." An examination of English laws shows that a suspension was conceived to be a legislative enactment which denied the privilege of habeas corpus, allowing confinement without bail, indictment, or other judicial process. Collings, *supra*, at 340. Similar views of suspension were taken by members of the House in 1807, when suspension was proposed by President Jefferson following exposure of the Burr conspiracy. 16 Annals of Congress 807–20 (1807):

"These historical incidents all lead to the conclusion that to suspend the privilege of habeas corpus in the constitutional sense is to deprive persons accused of crime of their right either to be speedily accused and tried or to be set free. Certainly nowhere is there any hint that it would be suspension to postpone the right of a convicted prisoner to habeas corpus. Suspension statutes were aimed at suspects, never at convicts." Collings, *supra*, at 340–41.

The original statutory authorization for the writ was contained in the Judiciary Act of 1789, which merely gave the courts of the United States the "power to issue writs" of habeas corpus. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81.

"It is thus not surprising that we soon find the Supreme Court accepting the black-letter principle of the common law that the writ was simply not available at all to one convicted of crime by a court of competent jurisdiction. Ex parte *Watkins* [28 U.S. (3 Pet.) 193 (1830)] is the great case. . . . The principle [of *Watkins*] is clear: substantive error on the part of a court of competent jurisdiction does not render a detention 'illegal' for purposes of habeas corpus, because, to use Chief Justice Marshall's striking phrase, 'the law trusts that court with the whole subject.'" Bator, *supra*, at 466.

This strict jurisdictional principle was overwhelmingly adhered to in the nineteenth century by the Supreme Court.[1]

The Habeas Corpus Act of 1867 (Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385) was the first legislative expansion of the traditional limits of habeas corpus as understood by the framers. It not only broadened the application of habeas corpus to Federal prisoners, but also made it applicable to State prisoners:

"[The Federal courts], in addition to the authority already conferred by law, shall have power to grant writs of habeas corups in all cases where *any person* may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States." *Id.* (Emphasis added.)

Congress thus decided that any constitutional violation could be the basis for the exercise by the Federal courts of habeas corpus jurisdiction.

C. Present status of habeas corpus

It was in construing the 1867 Act that the Supreme Court thereafter also began to broaden the concept of habeas corpus.[2] At no time did the Court, in interpreting the 1867 Act, indicate that its decisions resulted from any constitutional mandate. Collings, *supra*, at 356–57. The only constitutional basis for the decisions was that the Act specifically allowed relief to persons held in violation of their constitutional rights. While it is implicit in the due process clause that same

[1] There were two narrow exceptions: (1) where was an allegation that the conviction was had under an unconstitutional statute, *Ex parte Siebold*, 100 U.S. 371 (1879); this was a doctrine necessitated by the fact that Federal criminal convictions were not appealable throughout most of this period, and when appropriate statutory appeal routes were later given, the Supreme Court repudiated the doctrine of *Siebold*. See, *e.g.*, *In re Lincoln*, 202 U.S. 178 (1906); (2) where the court viewed the problem in terms of illegality of sentence rather than that of judgment, *e.g.*, *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873) (imposition of two sentences where statute authorized only one). See Bator, *supra*, at 467–74.

[2] It has been argued that it was not the purpose of the Act to give to the Federal courts jurisdiction to redetermine the merits of all Federal questions decided in State litigation, contrary to the feelings of Justice Frankfurter in *Brown* v. *Allen*, 344 U.S. 443, 488 (1952) (concurring opinion). Professor Bator says that to so reason would fly directly in the face of the "deeply embedded" principle that a detention pursuant to the judgment of a competent tribunal is not illegal or subject to attack even if error occurred. This principle retained its vitality into the 1870's, and indeed, it was not until the *Lange* case, *supra*, that its strictness began to be lessened. The sparseness of the legislative history of the Act lends credence to a likelihood that Congress did not intend such a drastic departure from the existing status of the writ. See Bator, *supra*, at 475–76.

corrective process should be supplied for such violations, nothing in the decisions indicated that the process need be habeas corpus.

Habeas corpus thus exists today in its expanded state primarily as a matter of statutory construction, and not as a matter of constitutional requirement. The limited common law writ was the one that the framers knew at the time of the drafting of the Constitution. As late as 1952, the Supreme Court in *United States.* v. *Hayman,* 342 U.S. 205, recognized that at common law a judgment of conviction rendered by a court of general criminal jurisdiction was conclusive proof of the legality of the confinement. Although the Court in *Fay* v. *Noia,* 372 U.S. 391, 405 (1963), said that at the time of the adoption of the Constitution, "there was respectable common-law authority for the proposition that habeas was available to remedy any kind of governmental restraint contrary to fundamental law," it has been convincingly argued by various commentators that this historical analysis was incorrect. *E.g.,* Friendly, *supra,* at 170–71; Oaks, *supra,* at 456–68. See also the dissenting opinion of Justice Harlan in *Noia,* 372 U.S. at 448. It is therefore Congress, through the Act of 1867, which gave the courts the opportunity to broaden the scope of habeas corpus. The writ is not constitutionally *required* to be any broader than it was in common law. Congress can amend the law dealing with habeas corpus if it so chooses.

The only intimation from the Court that constitutional problems are raised is found in a dictum, by Justice Brennan, in *Sanders* v. *United States* 373 U.S. 1, 11–12 (1963): "If construed to derogate from the traditional liberality of the writ . . . § 2244 [dealing with finality of determinations on prior applications] might raise serious constitutional questions." We do not believe that this tentative dictum in a case in which the Court even at that time was divided, should be regarded as an obstacle to amendment of the statute.

III. H.R. 13722 AND PROPOSED AMENDMENTS OF THE DEPARTMENT OF JUSTICE RELATING TO PETITIONS BY FEDERAL PRISONERS

H.R. 13722 would amend section 2254(a) of title 28, United States Code, to limit the constitutional claims which could be raised on collateral attack in Federal courts by State prisoners to those (1) which were not theretofore raised and determined in a State court, *and* (2) which there was no fair and adequate opportunity theretofore to have raised and determined in a State court, *and* (3) which could not thereafter be raised and determined in a State court. The effect of this provision would be to add a significant degree of finality to the determinations of State courts on the merits of constitutional claims, and to require the defendant to raise in the State proceedings all claims reasonably available to him at that time.

The effect of two Supreme Court cases in the habeas area would be limited by this provision. Neither case is based upon a constitutional interpretation, since both decisions involved statutory construction. Prior to the Court's decision in *Brown* v. *Allen, supra,* Federal district courts would not provide review on the merits of constitutional claims fully litigated in the State courts. Since the decision in *Brown,* however, Federal courts have routinely reviewed the merits of final State court decisions. Under H.R. 13722, final decisions on the merits by the State courts on Federal constitutional issues would be entitled to conclusive effect subject only to ultimate Supreme Court review. In *Fay* v. *Noia, supra,* the Court held that a State petitioner for Federal habeas corpus need only have exhausted the remedies available to him at the time he makes his petition. Prior procedural defaults, such as a failure to appeal, could not be regarded as constituting a waiver of the right to petition for habeas corpus, said the Court, unless they could be characterized as a "deliberate by-pass" of the State procedures. H.R. 13722 would compel the petitioner to raise in the State proceedings, at trial or on appeal, all claims reasonably available to him at that time. If a claim had not been raised and could not have been raised, H.R. 13722 would still preclude Federal habeas corpus if there was an adequate collateral remedy available in the State courts. This final requirement would, of course, encourage the States to continue to provide adequate collateral remedies in their courts.

H.R. 13722 would delete subsections (b) and (c) of present section 2254. These subsections deal with exhaustion of available State remedies (as interpreted by *Fay* v. *Noia, supra*) as a prelude to Federal habeas corpus for State prisoners. We favor deletion of these subsections for two reasons. First, proposed subsection (a)(1)(ii) of section 2254 would effectively state a new concept of exhaustion of remedies that would apply to State prisoners, *i.e.,* the only time the exhaustion of State remedies would be controlling would be if the claim were one which was not raised and could not have been raised. In this instance, the determination would still have to be made that the claim could not thereafter be raised and determined in State court before Federal habeas corpus may be obtained. Second, the elimination of the existing exhaustion provisions would also eliminate certain exceptions to those provisions which are stated in existing subsection (b) of section 2254, *i.e.,* that "there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." Proposed subsection (a)(1)(ii) of section 2254 would allow the use of Federal habeas corpus by State prisoners only if they are unable to raise collaterally in the State courts the constitutional issue involved.

Proposed section 2254 (a)(1)(iii) would limit the type of claim that could be raised on Federal habeas corpus to violations of the Constitution where the right violated "has as its primary purpose the protection of the reliability of either the factfinding process at the trial or the appellate process on appeal from the judgment of conviction." It would also provide that a claim of incompetency of counsel would be barred to the extent that it is based on conduct of counsel with respect to the type of constitutional claims barred by the previous language.

The concept of the "reliability" of trial and appellate processes, on which H.R. 13722 is based, is derived from principles developed by the Supreme Court of the United States in another context. In order to determine whether newly enunciated constitutional rights of criminal defendants should be applied retroactively, the Court has drawn a distinction between those constitutional rights which primarily protect the reliability of the trial and appellate processes, and those which do not.

The criteria that the Court has evolved to make the retroactivity decision have been stated as follows:

"(a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno,* 388 U.S. 293, 297 (1967).

It is in deciding what purpose the new standard is to serve that the Court looks to the reliability of the process used to convict the defendant. Since the Court has recognized that "whether a constitutional rule of criminal procedure does or does not enhance the reliability of the factfinding process at trial is necessarily a matter of degree," *Johnson* v. *New Jersey,* 384 U.S. 719, 728–29 (1966), it is the extent of the effect on the reliability that becomes important.

The impact of the criteria of reliance by law enforcement officials and of the burden on the administration of justice seems to be less crucial to the ultimate determination of the Court, with regard to retroactivity, than does the purpose criterion:

"It is to be noted also that we have relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity." *Desist* v. *United States,* 394 U.S. 244, 251–52 (1969) (footnote omitted).[3]

Thus the Court looks initially and primarily at the purpose criterion to decide retroactivity. The degree of the required effect on the factfinding process is perhaps best described in *Linkletter* v. *Walker,* where the Court indicated that retroactive application is justified where the new rule affects "the very integrity of the factfinding process." 381 U.S. 618, 639 (1965).

That the Court regards the purpose criterion as one of degree is further emphasized by the following language in *Johnson* v. *New Jersey, supra:*

"We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial. . . . The problem presented here is whether *Escobedo* and *Miranda* should be applied retroactively. . . . Thus while *Escobedo* and *Miranda* guard against the possibility of unreliable statements in every instance of in-custody interrogation, they encompass situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion." 384 U.S. at 729–30 (refusing retroactive application of *Escobeda* and *Miranda*).

In describing the types of constitutional violation for which the habeas corpus remedy would be available, therefore, the language, "one which as as its primary purpose the protection of the reliability of either the factfinding process at the trial or the appellate process on appeal from the judgment of conviction," has been used. This language makes it clear that the types of violations with which the bill is concerned are those which do not allow a fair trial or appeal, *i.e.,* those which cannot be corrected though these processes. We think that this language fairly reflects the approach of the Court to the retroactivity problem, and identifies the types of constitutional violation we believe should be excluded from habeas corpus.

The counsel limitation would preclude the use of an allegation of incompetent counsel as a vehicle to raise and have decided the very issues the bill seeks to bar on habeas corpus. To the extent that an allegation of incompetent counsel is based on either a failure to raise or an incompetent raising of a claim which does not have as its primary purpose the protection of the reliability of the trial or appellate process, it too would be barred.

Finally, H.R. 13722 would require, in proposed subsection (a)(1)(iv) of section 2254, that the petitioner show that a different result would probably have obtained if the violation of the constitutional right had not

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[3] See, *e.g.,* Haddad, *"Retroactivity Should be Rethought": A Call for the End of the Linkletter Doctrine,* 60 J. Crim. L.C. & P.S. 417, 436 (1969); Mallamud, *Prospective Limitation and the Rights of the Accused,* 56 Iowa L. Rev. 321, 347–54 (1970). Many opponents of prospective limitation argue that the only criterion should be the effect on the reliability of the factfinding process and not reliance and burden.

occurred. The petitioner would only have to show a probability of acquittal on the actual charge on which a verdict was returned, or that without the violation he would have been convicted only of a lesser included offense. He would not need to show that he would also have been acquitted of all lesser included offenses or that he was in fact innocent. This provision is a modification of the principle, as evolved by the Court, that some constitutional errors occurring at trial can be characterized as "harmless." See *e.g., Chapman* v. *California,* 386 U.S. 18 (1967); *Fahy* v. *Connecticut,* 375 U.S. 85 (1963). The requirement of some showing of prejudice to the petitioner would have the effect of eliminating frivolous petitions, in order that those of true merit might be more conscientiously reviewed.

The proposed amendments to section 2254 which would be made by H.R. 13722 are an alternative formulation of concepts originally proposed in H.R. 11441, which provides that a Federal judge could not issue a writ of habeas corpus on behalf of the State prisoner unless he found (1) that the applicant suffered a substantial deprivation of his constitutional rights at his trial, *and* (2) that this deprivation was not harmless, *and* (3) that there is substantial doubt as to the guilt of the applicant.

The language of H.R. 11441 requiring "substantial doubt of the guilt of the applicant" would introduce into habeas corpus a concept which should not be a focus of injury, and the Department of Justice therefore supports its omission from the language of H.R. 13722. The basic purpose of the factfinding process approach is to limit cognizable claims on habeas corpus to those which go to the basic fairness of the trial and appeal. The basic fairness of the procedures used to convict the defendant, without reference to his guilt or innocence, should remain the primary focus of Federal habeas corpus. Similarly, we think the replacement in H.R. 13722 of the language of H.R. 11441 requiring a "substantial deprivation" of constitutional rights with language requiring the petitioner to show that a "different result would probably have obtained if such constitutional violation had not occurred" is a considerable improvement.

We feel that H.R. 13722 in combining the "finality" and factfinding process approaches is a necessary and desirable reform of habeas corpus with regard to State prisoners. We suggest, however, that similar changes be made by H.R. 13722 in section 2255 of title 28, relating to collateral attacks on Federal convictions, the statutory substitute for Federal habeas corpus for Federal prisoners who seek to vacate a Federal court judgment and sentence pursuant to which they are in custody.[4] See *United States* v. *Hayman, supra.* Thus Federal prisoners would also not be able to raise claims on habeas corpus which were determined or could reasonably have been raised in the original proceedings. Additionally, the Federal prisoner would have to allege a violation of a constitutional right which has as its primary purpose the protection of the reliability of either the trial or appellate processes, and that, but for the alleged constitutional violation, a different result was probable.[5]

As outlined above, the Department supports the language of H.R. 13722 with regard to State prisoners (section 2254), and we recommend its combination with the Department's language with respect to Federal prisoners (section 2255) to accomplish a significant reform of Federal habeas corpus both by providing uniform treatment of State and Federal prisoners and by substantially alleviating the major problems caused by the present expansive system of Federal habeas corpus.

IV. EFFECT OF H.R. 13722 AND OF THE PROPOSED DEPARTMENT AMENDMENTS RELATING TO PETITIONS BY FEDERAL PRISONERS

While H.R. 13722, amended as we have suggested, seeks to substantially adopt for purposes of habeas corpus the decisions of the Court in the retroactivity area, we think a description of the types of constitutional claims that would be cognizable and those that would be barred only on collateral attack under the suggested approach would be helpful.

There are three principal types of claims that the "reliability" approach would bar on habeas corpus, following decisions of the Court that such claims would not be retroactively vindicated: First, claims objecting to the admissibility of voluntary confessions because of the lack of constitutionally prescribed warnings could not be alleged. The Supreme Court has held that the *Miranda* decision will not be given retroactive effect. *Johnson* v. *New Jersey, supra.* Second, claims objecting to the admissibility of evidence gained as a result of an alleged illegal search and seizure could not be raised collaterally. The Court has held that the exclusionary rules of *Mapp* and *Katz* will not be applied retroactively. *Linkletter* v. *Walker, supra; Desist* v. *United States, supra.*[6] Third, any claim objecting to the admissibility of identifications made in lineups conducted without counsel would also not be cognizable on habeas corpus. The Court has held that the *Wade* requirement of counsel at lineups does not apply retroactively. *Stovall* v. *Denno, supra.*

The endless relitigation of claims based on the decision in *Miranda, Mapp,* and *Wade* presents a poor image of our system of criminal justice. It is generally agreed by those who have studied the subject that the exclusionary rule, based on these and other cases, is designed not to insure the fairness of the trial, but rather to discipline police officers. The extent of the impact of the rule in such discipline is certainly open to question. Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. Chi. L. Rev. 665 (1970).

But assuming that the rule has some impact on the conduct of police officers when recently seized evidence is excluded, it is impossible to assume that the exclusion of evidence illegally obtained years earlier by a police officer will have any appreciable deterrent effect on present police conduct.

In addition, various other types of claims would not be cognizable on habeas corpus: (1) claims that there was a denial of a request for jury trial in serious criminal cases or that there was a right to jury trial in a trial for serious ciminal contempt, see *DeStefano* v. *Woods,* 392 U.S. 631 (1968) (per curiam); (2) although not a claim involving a constitutional rule, the new standards governing guilty pleas, as set forth in *McCarthy* v. *United States,* 394 U.S. 459 (1969), which have been held to be nonretroactive in *Halliday* v. *United States,* 394 U.S. 831 (1969) (per curiam). In addition, we note one other nonconstitutional claim that could not be alleged under this approach. The Court held in *Boykin* v. *Alabama,* 395 U.S. 238 (1969), that before State courts can accept a guilty plea of a defendant, there must be an affirmative showing that it was intelligently and voluntarily given. On the basis of the *Halliday* decision, we do not think the Court would apply this new standard retroactively to pleas accepted before the date of the decision in *Boykin.*

The legislation would not, however, tie habeas corpus inflexibility and invariably to retroactively. Unless a habeas corpus petitioner could show that a holding was designed to protect the reliability of the factfinding process at the trial or of the appellate process on appeal from the judgment of conviction, he would not be entitled to have a writ issue.

There are various constitutional claims that would continue to be available on habeas corpus. Claims that the Court was without jurisdiction to try the case and sentence the defendant are a traditional basis for habeas relief. Other classic claims requiring habeas corpus relief are those relating to prejudicial publicity or mob-dominated juries. Cognizable claims that relate to the "very integrity" of the trial and appellate process would be the right to counsel at trial for an indigent, and the right of an indigent to a transcript and to counsel for an appeal. The lack of appropriate confrontation rights at trial, or the use of perjured testimony by the prosecution would also be cognizable under our amendments. Similarly, a prisoner could claim that a confession was in fact coerced.

H.R. 13722, amended as we have suggested, would be a moderate solution to limiting the availability of collateral attack in the Federal courts. The more limited availability of habeas corpus relief in the Federal courts would aid in solving both court congestion and problems in rehabilitating convicted criminals. The result of H.R. 13722, amended as suggested, would be that the basic fairness of the trial and appellate process would remain subject to collateral attack. But claims of constitutional deprivation not related to the basic fairness of the trial or appellate process, which the defendant had already had an opportunity to litigate at trial or on appeal, would no longer be cognizable on Federal habeas corpus.

V. DEPARTMENT OF JUSTICE PROPOSED AMENDMENTS RELATING THE APPEAL OF HABEAS CORPUS ORDERS

We note finally that H.R. 13722 does not deal with the appeal of final orders in habeas corpus proceedings. In terms of effect on the resources of the entire criminal justice system, the impact of appeals of habeas corpus orders is significant.

The Department of Justice suggests that H.R. 13722 include amendments to section 2253 of title 28 to: (1) provide that Federal prisoners must obtain a certificate of probable cause to appeal a denial of habeas corpus by the Federal court, as is presently required only of State prisoners (see *In re Marmol,* 221 F.2d 565 (9th Cir. 1955)); (2)

[4] Our suggested amendments to section 2255 are not intended to limit the ability of a Federal prisoner to seek the actual writ of habeas corpus to challenge executive detentions or prison conditions, which is allowed by the last sentence of present section 2255. That sentence allows the Federal prisoner to seek the actual writ if it appears that the remedy by motion for section 2255 relief "is inadequate or ineffective to test the legality of his detention." It is intended that our suggested amendments to section 2255 preclude a Federal prisoner, who had sought by a 2255 motion to vacate his sentence, from thereafter again *attacking the sentence* by applying for a writ of habeas corpus, claiming the section 2255 relief was "inadequate" to test the legality of his detention.

[5] It should be noted here that one of the arguments that has been made in favor of the expanded state of habeas corpus today, as it relates to *State* prisoners, is that the vindication of Federal constitutional rights requires consideration in a Federal forum. Obviously, this argument does not apply to persons who are tried (and therefore appeal) in the Federal courts, and is questionable as it relates to State prisoners since ultimate Supreme Court review is available to them through a writ of certiorari.

[6] We note, of course, that the Supreme Court has held that claims of illegal search and seizure may be raised by both State and Federal prisoners on habeas corpus. See *Kaufman* v. *United States,* 394 U.S. 217 (1969); *Whiteley* v. *Warden,* 401 U.S. 560 (1971).

in order to achieve uniformity in the various circuits, provide that for the State or Federal government to appeal the issuance of the writ, no certificate need issue; and (3) provide that the certificate may only be issued by the court of appeals instead of by either the district judge or a single judge of the court of appeals, as is presently allowed.

Chief Judge Friendly's article, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 144 (1970), indicates that "despite the safeguard intended to be afforded by the requirement of a certificate of probable cause, there were over twice as many appeals by state prisoners in 1969 as there were *petitions* in 1952." (Emphasis original) in 1969, 20 percent of all appeals from district courts were from final orders in collateral attack proceedings by State and Federal prisoners. Most importantly, Chief Judge Friendly notes that:

"For most circuits the state prisoner figures do not include unsuccessful applications by state prisoners for the issuance of certificates of probable cause. On the other hand, they do include cases where the district court has issued a certificate and, under Nowakowski v. Maroney, 386 U.S. 542 (1967), the court of appeals has been obliged to hear the appeal although it believed the certificate was improvidently issued. See Garrison v. Patterson, 391 U.S. 464, 465–67 (1968)." *Id.* at 144 n.9.

While the affirmance rate is exceedingly high in all types of State prisoner cases, Chief Judge Friendly informs us that the experience of the Second Circuit is that it is particularly so in cases where the certificate has been issued by the district judge rather than by a panel of the court of appeals. He additionally points out that the time that will be spent by the panel of the court of appeals in deciding whether to issue the certificate is small "as compared to the time spent in hearing an appeal and the burden on assigned counsel of having to argue a hopeless case." *Id.*

There also exists an additional problem with the construction of the certificate requirement in 28 U.S.C. § 2253. The question is whether the certificate requirement applies to the State or to the warden of the prison against whom the writ is issued, if they seek to appeal the issuance of the writ, or only to the prisoner. While the language of the statute is ambiguous, and seems to require that the State or warden obtain the certificate, four circuits have held that the requirement does *not* apply to the State or warden, but only to the prisoner. *Texas* v. *Graves*, 352 F.2d 514 (5th Cir. 1965); *United States ex. rel. Calhoun* v. *Pate*, 341 F.2d 885 (7th Cir. 1965), *cert. denied*, 382 U.S. 1002 (1965); *Buder* v. *Bell*, 306 F.2d 71 (6th Cir. 1962); *United States ex. rel. Tillery* v. *Cavell*, 294 F.2d 12 (3d Cir. 1961), *cert. denied*, 370 U.S. 945 (1962). The *Tillery* case emphasizes that the legislative history of the provision clearly indicates that the purpose of the certificate requirement was to insure that State *prisoners* could not use appeals as a delaying tactic to avoid the execution of their sentence.

Only the Second Circuit requires that the State or warden obtain a certificate of probable cause in order to appeal. See *United States ex rel. Carrol* v. *LaVallee*, 342 F.2d 641 (2d Cir. 1965). Chief Judge Friendly informs us, however, that the certificate is almost always issued to the State or warden. We propose, therefore, to add a provision to the appeal provisions clarifying that neither the State (nor the warden) nor the Federal Government (under our suggested amendment that the certificate requirement apply to Federal prisoners also) be required to obtain a certificate of probable cause in order to appeal the granting of an application or motion for habeas corpus. This would insure uniformity in each of the circuits, and would adopt the approach of the *Tillery* case, *supra*.

The proposed amendatory language to section 2253 is also set forth in the attached draft bill.

* * * * *

The increasing volume of habeas corpus petitions is one of the causes of the overall problem of court congestion and trial delays in the Federal courts. Through habeas corpus reforms like those in H.R. 13722 and those suggested in this report, this problem can at least be partially alleviated. Our system of justice will thereby be advanced in its striving for fair and speedy adjudication of guilt or innocence.

The Department of Justice urges early consideration and approval of H.R. 13722, amended as we have suggested.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

RICHARD G. KLEINDIENST,
Attorney General.

[From the Duke Law Journal, August 1970]

THE CONSTITUTION AND HABEAS CORPUS

(By Francis Paschal*)

The Constitution declares:

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." [1]

In spite of the categorical character of this language, from the time of John Marshall's opinion in Ex parte *Bollman* [2] there has been a doctrine that Congress can suspend the privilege in the federal courts at its pleasure, whether or not there is a case of rebellion or invasion and whether or not the public safety requires it. The doctrine is derived from another: that the courts of the United States are, in respect to their power in habeas corpus cases, dependent on an Act of Congress. Marshall put the matter unequivocally: "[T]he power to award the writ by any of the courts of the United States, must be given by written law." [3] And, while conceding that Congress had an "obligation" to make the privilege available,[4] Marshall explicitly sanctioned a congressional power to deny the privilege to the most numerous class of those now in need of it—prisoners in state custody.[5]

Marshall's conclusions, I am convinced, are unsupportable. They have enjoyed an illusion of vitality [6] because they have, as a practical matter, been generally immune from challenge in the federal courts. The commonly accepted learning has it that, except perhaps for the brief period when the Judiciary Act of 1801 was in force, there have been since 1789 congressional enactments conferring on the federal courts jurisdiction to grant the writ.[7] Accordingly, the habeas applicant has rarely been driven to challenge Marshall's view that congressional authorization is necessary before the federal courts can award the writ.[8] The supposedly necessary authorization has usually been considered to be available.

In 1968 it appeared that an occasion might develop when the Marshall views of the habeas corpus clause would be subjected to challenge in the courts. The Senate had before it a crime control bill which was said to deny federal habeas corpus to state prisoners.[9] Debate was waged in terms of constitutionality,[10] and the Senate's decision to remove the habeas section from the bill was beyond peradventure largely the result of constitutional doubts.[11] Nevertheless, the question whether congressional authorization is a necessary predicate for habeas action by the federal courts remains. The thesis of this article is that in the case of habeas corpus congressional authorization is not essential. The thesis is broader yet. It is that the Constitution's habeas corpus clause is a directive to all superior courts of records, state as well as federal, to make the habeas privilege routinely available.

Let me be explicit in setting the limits of my thesis. I have nothing to do with any argument that article III by its own force vests in courts the entire judicial power known to the Constitution.[12] Nor am I concerned with whether article III is a mandate to Congress to vest this power in courts.[13] Similarly, I have nothing to do with any theory of a common law jurisdiction in the federal courts or elsewhere.[14] I am concerned only with habeas corpus and the habeas corpus clause of the Constitution. My thesis, once again, is that this clause is a direction to all superior courts of record, state as well as federal, to make the habeas privilege routinely available.

My principal reliance in establishing this thesis is what I believe to be the near certainty that the Congress of 1789 in enacting the Judiciary Act *not, contra* Marshall in Ex-parte *Bollman*, bother to confer on the federal courts jurisdiction to issue the Great Writ. My second reliance, although First presented, is the constitutional provision itself and the relevant history. Admittedly, I cannot here be so certain when only the bare language of the Constitution is considered or when the scanty record in the Philadelphia Convention is examined. Yet the language of the Constitution and the record of the Convention will be found to be altogether consistent with my thesis and somewhat suggestive of it. Moreover, the thesis will accommodate the known data from Philadelphia at least as well as any other. And, as the latter part of this article will explain, only a recognition of a habeas jurisdiction in the courts irrespective of statute can account for the actions of the Congress of 1789.

I

I shall not here undertake to retrace the work of others in delineating the history of habeas corpus in America before 1787.[15] For present purposes, it is sufficient to state that there is abundant evidence of an early and persisting attachment to "this darling privilege" in pre-1787 America.[16] Indeed, in the Philadelphia Convention and in the struggle for ratification, there was never the slightest objection to according a special preeminence to the Great Writ.[17] Rather, such controversy as there was centered exclusively on whether the writ was always to be available or whether, in some very restricted circumstances, some possibility of suspension should be admitted.[18] This concern with the suspension problem logically accounts for the peculiar structure of the habeas clause and particularly, the negative phraseology employed: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless . . ." [19] The Convention was chary of directly and affirmatively proclaiming a power to suspend.

This preoccupation with the suspension problem is plainly evident in Madison's abbreviated chronicle. According to Madison, the first mention of habeas corpus in the Convention came on August 20 when Charles Pinkney submitted to the Committee on Detail a proposition "securing the benefit of the writ of habeas corpus." The exact wording of Pinkney's proposal was:

"The privileges and benefit of the Writ of Habeas corpus shall be enjoyed in this Government in the most expeditious and ample manner, and shall not be suspended by the legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding —— months." [20]

The next mention of habeas corpus was on August 28 when the Convention was considering article XI of the plan presented by the Committee on Detail twenty-two days previously.[21] This article, it is important to

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note, was the judiciary article of the plan, and it was as an amendment to this judiciary article that the habeas corpus clause was approved by the Convention in virtually its present form. On habeas corpus, Madison's complete entry for August 28 states:

"Mr. Pinkney, urging the propriety of securing the benefit of the Habeas corpus in the most ample manner, moved "that it should not be suspended but on the most urgent occasions, & then only for a limited time not exceeding twelve months."

"Mr. Rutlidge was for declaring the Habeas Corpus inviolable—He did (not) conceive that a suspension could ever be necessary at the same time through all the States—

"Mr. Govr Morris moved that 'The privilege of the writ of Habeas Corpus shall not be suspended, unless where in cases of Rebellion or invasion the public safety may require it.'

"Mr. Wilson doubted whether in any case (a suspension) could be necessary, as the discretion now exists with Judges, in most important cases to keep in Gaol or admit to Bail.

"The first part of Mr. Govr Morris' (motion,) to the word 'unless' agreed to nem con:—on the remaining part; N.H. ay, Mas, ay, Ct. ay. Pa. ay Del. ay, Va. ay, N.C. no, S.C. no, Geo, no [Ayes——7; noes—3]." [2]

The foregoing record is obviously incomplete, but it is all that we have. Some light is afforded by a comparison of Pinkney's position on August 20 and his position eight days later. In his first submission, he combined an affirmative guarantee with a qualified prohibition of suspension. In his second, while he again stated his original purpose of an affirmative guarantee, he omitted this guarantee from his formal motion, relying altogether on the qualified prohibition. Clearly, as to Pinkney, reliance on the negative phraseology did not connote any retreat. On both occasions he sought to secure the benefits of the writ in the "most ample" manner.

But Pinkney did, after eight days, offer highly significant departures from his original proposition. In his second motion, he abandoned all reference to the "legislature," and he also abandoned the limiting words, "in this Government," which had qualified his first guarantee. Still, his proposal was unacceptable to the Convention, and we are not left in doubt as to the reasons. His rigid time limitation on suspension was rejected. His dangerously vague "urgent occasions" was rejected and the sharply refined phraseology of the eventual draft substituted. All this was accomplished with only a single disagreement, and that disagreement reveals a determination to have habeas corpus in any event. There were three states that insisted on eliminating the possibility of suspension.[23]

From this record, the Convention's overriding purpose is reasonably clear. Even as he proposed the negative phraseology, Pinkney gave voice to an affirmative purpose which all the evidence suggests was embraced by the Convention. John Rutledge was for *making* habeas corpus "inviolable", and three states joined him in a vote to that effect. No one dissented from the proposition that the writ should be routinely available. The negative phraseology was, it is safe to say, only a circumlocution to propose a suspending power in the least offensive way. And the changes wrought in Pinkney's original proposal were for the purpose of supplying an even stronger guarantee than he had at first in mind, the strongest guarantee consistent with a power of self-preservation.[24]

Madison's record also supplies a justification for holding the habeas clause to be a grant of power to suspend. Without definitely identifying the grantee, the clause grants power to suspend the privilege on certain occasions. Unless the clause be so regarded, the vote of the three states against any power to suspend loses all meaning. Why vote against the suspension member of the clause if suspension were to be permitted by some other provision of the Constitution irrespective of the outcome of the vote.[25]

The Madison record is suggestive in another particular. There is perhaps more significance than has yet been indicated in the clear picture it gives of the Convention's abandonment of Pinkney's specific reference to Congress.[26] Why was the reference to Congress abandoned? While one cannot be certain, arguably the Convention contemplated no necessary role for Congress in respect to habeas corpus. This argument gains force when the Convention's final conclusion concerning when suspension was to be permitted, "when in Cases of Rebellion or Invasion the Public Safety may require it," is compared to Pinkney's, "most urgent and pressing occasions." Pinkney's formula obviously required a very considerable, essentially legislative elaboration before it could be made effective; therefore, Congress was brought into the picture. The Convention in its formula had arguably done all that a legislature necessarily had to do, and therefore a reference to Congress was omitted. It had supplied all the detail which a legislature might supply; it had performed the essential tasks that a legislature was component to perform. The courts could do the rest.

Beguiled by a supposed analogy to the English practice of Parliamentary suspension, some writers have insisted that the suspension power lies with Congress.[27] The analogy is inapt, as Horace Binney showed.[28] Under the English Constitution, the only thing that can halt the operation of an act of Parliament is a subsequent act of Parliament. If England's Habeas Corpus Act is to be deprived of effect, the only possible recourse is to Parliament. But our Constitution proceeds on a different principle. There is no necessity for Congress to act when the Constitution itself has precisely laid down the occasions when a suspension is permissable. All that remains to be done is to execute the power that the Constitution has granted. And for this task, Congress lacks institutional capacity. All that it could ever do, had it been granted the power, is merely to *authorize* a suspension.

Citing the Convention's rejection of an explicitly mentioned role for Congress and the marked refinement of its final draft of the habeas clause, Binney theorized that the Constitution, rather than an act of Congress, supplied the apt analogy to the English practice of utilizing an act of Parliament in suspension cases. As he put it, "the Constitution . . . stands in the place of the English Act of Parliament. It ordains the suspension in the conditioned cases . . . as Parliament does from time to time. Neither is mandatory in suspending, but only authoritative." [29]

"Authoritative" of what? Binney's response was *suspension itself*, not the intermediate power of *authorizing* a suspension by somebody else. Parliament attempted no more in suspension cases, leaving it to the Crown to determine if the exigencies of the situation required the execution of the granted power. [30] A year after Binney wrote, the Act of March 3, 1863, appeared to confirm his analysis. It declared "[t]hat, during the present rebellion, the President of the United States, whenever, in his judgment the public safety may require it, is authorized to suspend the Privilege of the Writ of Habeas Corpus in any case throughout the United States or any part thereof. . . . " [31] If one asks what this sentence added beyond what the express words of the Constitution had already accomplished, it seems that the answer can only be; an identification of the suspending power. But Congress has nowhere been authorized to make such an identification. Indeed, one could contend that such an identification could appropriately be made only by the Constitution itself.

One further item from the record of the Convention requires examination if the habeas problem is to seen as the Convention saw it. On August 28, when the habeas clause assumed substantially its final form, the Convention had already firmly fixed on the notion that lower federal courts were to be optional with Congress. This notion had been embraced as early as June 5, affirmed on July 18, and reaffirmed in the report of the Committee on Detail on August 6.[32] Accordingly, the interpretation of the habeas clause must take full account of the Convention's advertence to the possibility that there would be no lower federal courts. Given this possibility, the contention that the habeas clause directly commands courts to make habeas available is not weakened by the thought that the cooperation of Congress in constituting federal courts was required in any event if habeas was to be available. This cooperation was not required, nor even clearly provided for, and the Convention cannot be held to have depended on Congress for the realization of its hopes in respect to habeas corpus. The simplest view is that the Convention dealt with the possibility of no lower federal courts by directly commanding the courts, federal and state alike, to make the privilege of the writ routinely available.[33]

This view was to some extent confirmed by Edmund Randolph, the only member of the Convention who ever spoke to the point. In 1792 Randolph argued before the Supreme Court the case of *Chisholm v. Georgia* [34] which determind the amenability of a state to suit brought against it in a federal court by a citizen of another state. In urging that jurisdiction be sustained, Randolph cited the Constitution and the "various action of *states* which are to be annulled." [35] His very first example of a *state* action to be annulled was a constitutionality impermissible suspension of the habeas privilege. Obviously considering the habeas clause as binding on the *states*, he treated it as being of the same genre as the bill of attainder clause, the ex post facto clause, the contract clause—indeed of the same genre as all the clauses in section 10 of article I, each of which is in terms directed to the states. His point was that while some impermissible state actions could be remedied without a suit against the state, others could not. His very first example of a remedy available (to the state's prisoner) not involving a suit against the state was the power of the courts, presumably state and federal alike, to issue the writ of habeas corpus.[36]

For present purposes, the argument to be drawn from the proceedings of the Philadelphia Convention comes to this: The Convention had the firm purpose of guaranteeing the routine availability of the privilege of the writ. Given such a purpose, the surest method of guaranteeing its achievement would be a recognition of a power in the only officials necessarily involved. Nothing from Philadelphia refutes the conclusion that this is exactly what the Convention did. It did so in a clause originating in the Convention's consideration of the judiciary—a clause complete in itself with reference to Congress carefully deleted. Again, the clause is in some respects a grant of power.[37] Moreover, the Convention had fully in mind the possibility that there would be no lower federal courts. Under the circumstances, a direct grant of power to whatever superior courts that might exist is the most reasonable explanation of the available data.[38]

II

My principal reliance in establishing my thesis is, as I have said, the near certainty that the Judiciary Act of 1789 [39] did *not* con-

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fer on the federal courts jurisdiction to award the writ of habeas corpus *ad subjiciendum*.[40] The uncritical acceptance of Marshall's conclusions in Ex parte *Bollman* that the act did confer this jurisdiction has enfeebled inquiry in respect to the habeas clause ever since Marshall spoke.[41] But once Marshall's conclusion is abandoned, as it must be, it can be seen that after 1789 the federal courts either had no habeas jurisdiction, or they had such a jurisdiction independent of statute. A contention that the first alternative should be accepted can be dismissed as frivolous, since it is abundantly clear that the jurisdiction was assumed by Congress [42] and exercised by the courts [43] in the years before 1807 when Ex parte *Bollman* was decided. The problem is the source of that jurisdiction.

Those who contend that a statute was the jurisdictional source confidently point to the act of 1789.[44] They argue that the 1789 Congress evidently thought that legislation was necessary, and they have drawn immense comfort from Marshall's assertion that the Constitution did no more than impose on Congress an "obligation" to make habeas corpus available.[45] Believing that their case is impregnable on the basis of the specifics of the 1789 legislation and its ensuing history, they point in particular to the provisions embraced in the Judiciary Act's section 14 which reads as follows:

"*And be it further enacted*, That all the beforementioned courts of the United States shall have power to issue writs of *scire facias, habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." [46]

The opponents of my thesis contend that not only did Congress legislate but also that it legislated restrictively, citing Congress' failure to provide nearly so broad a habeas jurisdiction as it might have. They argue that habeas was not to issue from either courts or judges, as a general rule, unless the prisoner was held in custody or under the authority of the United States. This was Marshall's reading of section 14 in Ex parte *Bollman*,[47] and it has scarcely been questioned since. Accordingly, those who have followed Marshall have easily argued that when Congress in 1833 wanted to make federal habeas available to federal officials entrapped by state law, new legislation was necessary.[48] A similar experience, they contend, came in 1842 when Congress desired to protect foreign nationals detained by a state in violation of a treaty. Again, there was a fresh resort to legislation.[49] And finally, as if to put the matter beyond all dispute, we are reminded that it was only in 1867 during Reconstruction that federal habeas corpus became generally available to state prisoners.[50] "But before that time," says Senator Ervin, "from the time of the morning star hanging in glory to 1867 [the federal courts] had no such jurisdiction." [51]

For all its surface plausibility, this restrictive view of habeas availability in the federal courts after 1789 must be rejected. Its central premise that section 14 is a habeas jurisdiction grant to courts is demonstrably false. All that Congress was doing in section 14 as to courts was ratifying a court's power to employ habeas corpus and other writs in aid of jurisdiction elsewhere conferred. For justices and judges acting individually the concern was different and more was done. Power to issue writs of habeas corpus was conferred on them, and then limitations applicable solely to powers of the individual justices and judges were added. And we shall see that Marshall's holding and dicta in Ex parte *Bollman* are unsupported by him, and are, indeed, unsupportable.

Whatever one's views on these problems, even a casual reading of section 14 raises at least two questions which do not today have obvious answers. First, why should there be specific mention, not only of habeas corpus, but also, and in prior position at that, of scire facias? [52] Neither the much-copied English Habeas Corpus Act of 1679 [53] nor any one of the state acts made any mention of scire facias.[54] While the most searching modern scholarship has discovered a tangential relationship between scire facias and habeas corpus in the 15th century,[55] any affinity between the two in the 18th century is not readily apparent. Blackstone does not connect the two, nor does Alexander Hamilton, although each discusses one writ or the other in considerable detail.[56] Second, why is there separate and markedly different treatment, under any reading of section 14, of courts on the one hand and individual justices and judges on the other?

When one considers section 14 in relation to its companion sections in the Judiciary Act of 1789, other questions arise. Side by side with section 14, section 13 also deals with writs. Section 13 declares that the Supreme Court "shall have power to issue writs of prohibition . . . and writs of *mandamus*." [57] Why this split treatment of the Supreme Court's writ power? Why talk in section 13 of the Supreme Court's power to issue writs of prohibition and mandamus and in section 14 of that same Court's power to issue the "writs of *scire facias, habeas corpus* and all other writs . . . ?"

Moreover, examining the 1789 Act in its entirety, what is the significance for the interpretation of section 14 of the arrangement of the Act's thirty-five sections? What meaning can be derived from their precise ordering and sequence? The first eight sections create, staff, and organize the various courts. Then, in ascending scale, the *jurisdiction* of the various courts is stipulated in the next five sections. With section 14, there is an abrupt change in terminology, and thereafter, in sections 15, 16, and 17, prescriptions are laid down for the courts to follow in the *exercise* of the jurisdiction previously conferred.[58] Section 15 states that it will be proper for courts to compel the production of documents; [59] section 16 explains that courts should not grant equitable relief when there is an adequate remedy at law;[60] and section 17 tells when it is proper for courts to grant new trials.[61] To use the terminology of the space age, which sectional grouping does section 14 more easily "dock" with, the jurisdictional group immediately preceding it or the prescriptive group immediately following it?

Finally, what insight can be gathered from prior and subsequent legislation, particularly the Habeas Corpus Act of 1679 [62] and the Judiciary Act of 1801? [63] The prestige of the 1679 Act was so high that several states enacted almost word-for-word copies and others almost certainly regarded it as a part of their common law.[64] It was provoked by a problem highly similar to that facing the Congress of 1789—settling the habeas power of individual justices and judges.[65] As for the Judiciary Act of 1801, its chief interest is that it treated in one section the Supreme Court's writ power and in an altogether separate section the habeas power of individual justices and judges.[66] Both of these historic enactments illumine the meaning of section 14.

III

The problems raised by section 14 did not receive anything approaching a full-scale judicial treatment until the case of Ex parte *Bollman* [67] in 1807. Eighteen eventful years had passed since its enactment. John Marshall had become Chief Justice; the political control of the Government had shifted from the Federalists to Jefferson and his Republicans; and *Marbury* v. *Madison* [68] had declared not only that an act of Congress unauthorized by the Court's reading of the Constitution would be treated as a nullity but also that Congress could not add to the original jurisdiction of the Supreme Court beyond the listing in article III, that is, cases involving Ambassadors and other public ministers and cases in which a state is a party.

The *Bollman* case grew out of Aaron Burr's strange doings in the West. On January 22, 1807, President Jefferson informed Congress that one of Burr's alleged conspirators had already been released on habeas corpus and that two more of his confederates were on their way to Washington in custody.[69] The Senate took the hint and the next day in secret session agreed to a bill purportedly suspending habeas corpus for a period of three months.[70] Moreover, the Senate adopted the unusual expedient of asking the House to go immediately into secret session and add its concurrence with all possible speed.[71] After heated debate, the House voted overwhelmingly on January 26, to "reject" the bill, that is, to treat it as one unworthy of consideration.[72]

When the prisoners reached Washington they sought their release in the circuit court but that court, in a partisan division and an atmophere of the most intense excitement, committed the prisoners for trial. [73] A writ of error from the Supreme Court to review the circuit court's action was plainly barred by the Judiciary Act. There could be no such writ in criminal cases. Accordingly, counsel for the prisoners invoked the Supreme Court's habeas corpus jurisdiction early in February. Immediately, Justices Johnson and Chase voiced doubts that the Supreme Court had any such jurisdiction. [74] As a result, the jurisdiction question was set for preliminary argument and determination.[75] Interest in the argument that followed was at fever pitch, almost the whole of Congress being in attendance. The intensity of feeling was reflected in the words of counsel. [76] The justices were unblushingly reminded that they were not to yield to the prevailing "passions and prejudices" or to "external influences." They were to recall *Hamilton's* case, [77] decided in 1795 "when little progress had been made in the growth of party passions and interests," and *Burford's* [78] as well, a case "wholly connected with political considerations or party feelings." [79]

The Supreme Court had indeed on the two prior occasions exercised a habeas jurisdiction. In *Hamilton*, [80] the prisoner had been arrested for high treason, a crime punishable by death, and thus an offense where bail was discretionary under section 33 of the Judiciary Act.[81] He had sought admission to bail by a district judge and had been denied. In the Supreme Court, Government counsel did not argue that the Court was without power to issue the writ but were content with a reminder to the Court that it had no review power in criminal cases, and, as for habeas, the Court should deny it because the Supreme Court, it was said, had only "concurrent" authority with the district judge. The Court and the judge alike were governed by a single phrase from section 33. One habeas authority should not revise the determination of another unless "new matter" was adduced. This was all. As for the Supreme Court's power to issue the writ, there was an easy assumption by counsel and Court alike that it did exist. [82]

By the time of *Burford's* case [83] in 1806, *Marbury v. Madison* [84] had been decided, and there was a recognition in argument that the *Marbury* holding, that Congress could not

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add to the original jurisdiction beyond that stipulated in article III of the Constitution, posed an embarrassing problem.[85] Habeas jurisdiction was certainly exercised in original proceedings. After all, the district court had habeas jurisdiction, and it surely was not in any sense an appellate court. Moreover, a court in habeas could not function as a reviewing court correcting an erroneous judgment but was limited to an inquiry into the legality of commitment.[86] In *Burford*, counsel informed the Court that he was well aware of the holding in *Marbury*, but *Marbury*, he said, involved only a prerogative writ, a writ which issued at the discretion of the court. It was one thing, he continued, to say as the Court had said in *Marbury* that the Supreme Court cannot issue a prerogative writ such as mandamus in its original jurisdiction. It was quite another to say that it cannot issue a writ commanded by the Constitution. Counsel maintained that habeas corpus was not a prerogative writ but by the Constitution was *"a writ of right and cannot be refused."* [87] The *Marbury* doctrine was thus confronted with the Constitution's habeas corpus clause. In the *Buford* opinion, there was no attempt at a resolution of the problem nor was any attention paid to a suggestion of counsel that the embarrassment of *Marbury* could be removed if only the Supreme Court's jurisdiction could somehow be termed appellate.[88] A divided Court sustained the jurisdiction. All that Marshall tells us is that

"[t]here is some obscurity in the act of Congress, and some doubts were entertained by the court as to the construction of the constitution. The court, however, in favor of liberty, was willing to grant the *habeas corpus*. But the case of *United States v. Hamilton*, 3 Dall. 17, is decisive. It was there determined, that this court could grant a habeas corpus.' . . .[89]

The major problem facing the Court in *Bollman* can now be seen to be the reconciliation of *Hamilton* and *Burford* on the one hand and *Marbury* on the other. *Hamilton* and *Burford* had established that the Supreme Court had jurisdiction to issue the writ. Indeed, they seemed to have established that the Court had original jurisdiction for there was for review in *Hamilton* no action by a court at all but only the ruling of a judge in chambers. Moreover, the Court had appeared to act just as any other habeas tribunal, where undeniably the jurisdiction exercised was original. But there was *Marbury*, and come what may, it must be left intact, especially in its holding that the Court could not exercise an original jurisdiction beyond that listed in article III. Marshall's opinion in *Bollman* sought a solution by characterizing the habeas jurisdiction not as original, but as appellate. He argued that the Court was being asked to revise "a decision of an inferior court, by which a citizen has been committed to gaol." "The decision," said Marshall, "that the individual shall be imprisoned, must always precede the application for a writ of *habeas corpus*, and this must always be for the purpose of revising that decision, and therefore, appellate in its nature." [90] To this, Marshall added the wholly reckless claim that "this point is also decided in *Hamilton's Case*. . . ." [91]

The other problems presented in *Bollman* were, with a single exception, disposed of in the same unargued, assertive, and summary fashion. Evidence of the haste with which the opinion was prepared is everywhere.[92] To the argument that all superior courts of record had a common law habeas jurisdiction, whether or not they had a criminal jurisdiction, Marshall curtly rejoined that there was a distinction between courts originating in the common law and courts created by statute, and that "as the reasoning has been repeatedly given by this court," the matter would not be pursued further.[93] Where this reasoning had been given Marshall was not able to say, not because he had no time to collect the citations, but because there were none to collect.[94] Marshall similarly declined to discuss the question whether one habeas court could properly revise the determination of another, saying that he could add nothing to what was said in the argument.[95] And as for the problems raised by the habeas corpus clause of the Constitution itself, quick, self-abasing deference to Congress was the style of the day. The suspending power, which later excited volumes of exegesis,[96] was handed to Congress in a single sentence.[97] Just as swiftly, Marshall reduced the positive force of the Constitutional command that "the privilege of the writ of habeas corpus shall not be suspended," to a hortatory preachment to Congress for that body to honor as it pleased. To sustain this conclusion, all that was necessary was a few words of tribute to the Great Writ and a decisive misquotation or rather amendment of the Constitution on the spot so that it read: "the privilege of the writ of habeas corpus should [*sic*] not be suspended. . . ." [98]

The only problem with which Marshall dealt in any depth in *Bollman* was whether section 14's "necessary for the exercise of their respective jurisdictions" language was a limitation on the power of *courts* to grant habeas corpus.[99] If it was, given Marshall's ruling assumption,[100] then the Supreme Court could have a habeas jurisdiction only in the rare case of original jurisdiction exercised in a criminal proceeding involving an ambassador.[101] But Marshall concluded that the limiting language did not apply to habeas corpus. Disdaining reliance on a strict grammatical construction although it tended to support his conclusion, Marshall's firt thrust was the sound observation that to read the limiting language as applicable to courts would result in the individual justices having greater power than the Court itself, as plainly this particular limiting language was not applicable to the individual justices. This, of course, would be "strange," not consistent with the genius of our legislation, nor with the course of our judicial proceedings." [102] Moreover, since the language had equal applicability to all courts, not merely the Supreme Court, all would be affected. A district judge would be in the curious position of having full power in the secrecy of his chambers but only a limited power once he ascended the bench. This interpretation was contrary to good sense and also contrary to the assumption of section 33 that the Supreme Court and circuit courts had jurisdiction to grant the writ. That section gave the courts discretion to admit to bail those charged with a capital crime. In the exercise of this authority, habeas corpus was the usual resort. The section, Marshall argued, obviously assumed that authority had already been granted to courts to issue the writ. Having already summarily dismissed the common law and the Constitution as possible sources for this authority, Marshall in equally summary fashion tells us that its source is section 14.[103]

Marshall did labor at some length to find a supposed absurdity in section 14 if not construed as an independent grant of habeas jurisdiction. If section 14 was merely ancillary for courts, said Marshall, then all that the section would have accomplished would have been to endow courts with the relatively trivial power of issuing that variety of the writ known as habeas corpus *ad testificandum*, the form employed when a prisoner was to be produced to give testimony. In his view, erroneous as I shall show, other ancillary uses of habeas corpus were for the federal courts impossible or irrelevant.[104]

We pass for the moment any account of how Marshall achieved this gigantic diminution in the possible ancillary uses of the writ in the federal courts to consider how he disposed of a question that he had gratuitously contrived: Even though the *ad testificandum* power is relatively trivial, might this not be all that Congress intended? Marshall's response is intricate, and here one must recall, as Marshall did, the proviso with which section 14 concludes: "That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody under or by colour of the authority of the United States, or are committed for trial before some court of the same, *or are necessary to be brought into court to testify.*" [105] The proviso, Marshall contended, limited *the first sentence* of section 14 dealing with courts as well as the second sentence dealing with individual justices and judges. Accordingly, since an ancillary use of habeas corpus would mean for the federal courts an increment only of the *ad testificandum* power, Marshall contended that the Court was being asked to construe the first sentence of section 14 as if in substance it read: "All the courts of the United States shall have power to grant the writ of habeas corpus *in order to bring a prisoner into court to testify*, provided that writs of habeas corpus shall in no case extend to prisoners in gaol, unless they are in custody under or by colour of the authority of the United States, or are committed for trial before some court of the same, *or are necessary to be brought into court to testify.*" It could not be contemplated, he argued, that the whole power granted—the power to order a prisoner brought in to testify—could be excepted from the operation of the proviso. Thus, the tendered restrictive construction of the habeas grant must be rejected.

The trouble with this argument is Marshall's joinder of the proviso, all of it, to the first sentence of section 14 as well as the second. In justification, he argued that the *ad testificandum* power had relevance "particularly" and only for courts; therefore, to give it any effect, the proviso must be applicable to the sentence that referred to courts.[106] His premise is hardly a logical one. *Ad testificandum* was obviously "particularly" useful to the *chambers judge* as he went about planning the work of a term. Not surprisingly, the cases and the text writers unanimously state that the proper practice was an application to a judge at chambers.[107] But the significant point for our purposes is not so much that Marshall's argument was factually groundless but rather that merely by way of that specious argument he denied the right to state prisoners to federal habeas corpus. His factitious answer to an altogether factitious question can hardly be accepted as a definitive resolution of this major problem in the law of our Constitution.[108]

IV

While one cannot accept as final Marshall's casual allocation to Congress of the suspending power or his unargued dismissal of the notion of a common law habeas jurisdiction, I pass these problems by to center on his determination that the habeas jurisdiction for courts involved in section 14 was independent and unrelated to any other statutory jurisdiction and his subsidiary and argumentative conclusion that section 14's proviso applied to courts as well as to justices and judges. Surely, Marshall was wrong on both counts. Although the vindication of this assertion lies outside the bounds of Marshall's opinion, in considerations that Marshall did not discuss, the opinion itself arouses suspicions in addition to those suggested earlier when the inordinate haste attending the decision was noted.[109] This is not to deny the opinion all force. Grammatically, on the ancillary jurisdiction point, section 14 did lend itself more easily to Marshall's reading than another. And, given Marshall's assumption that the Constitution by itself does not endow the federal courts with habeas power, he is persuasive when he

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points to the prospect of judges having more power than courts, and when he invokes the assumptions of section 33. It would indeed be a "strange" circumstance if judges were given greater power when they acted in secret rather than in open court. Section 33 clearly did premise, as Marshall said, habeas power in courts and judges alike. But these considerations can have no tendency to prove Marshall's basic assumption that a statute was necessary for the Court to exercise jurisdiction. Whatever persuasive force they may have in the interpretation of section 14 will dissolve when presently that section is examined.

Probably the most suspicious feature of Marshall's opinion is his wholly unconvincing effort to hew an ancillary habeas jurisdiction down to meaningless proportions. He takes the ancillary varieties of habeas corpus mentioned by Blackstone and holds them up as either superfluous or impossible in the federal courts. The example he gives in the latter connection is the habeas corpus *ad satisfaciendum*, "when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to *charge him with process of execution*." Marshall blithely asserts that "this case can *never* occur in the courts of the United States. One court never awards execution on the judgment of another. Our whole judicial system forbids it." [110] Nevertheless, section 1963 of our present Judicial Code provides for just such an award.[111] And if it be objected that this is belaboring Marshall with a weapon forged 150 years later and that all Marshall was talking about was the juridical system as it existed under the statutes of 1807, there is the Act approved by Congress on March 2, 1799.[112] Generally, this Act provided for the discharge of liability for those who had provided bail for a defendant sued in one district but later arrested and committed to jail in another district. The final section squarely contradicts Marshall on what was possible in 1807 in respect to execution in the federal courts. It provided "that in every case of commitment [in another district] as aforesaid, by virtue of such order as aforesaid, the person so committed shall, unless sooner discharged by law, be holden in gaol until final judgment be rendered in the suit in which he procured bail as aforesaid, and sixty days thereafter, if such judgment shall be rendered against him, that he may be *charged in execution, which may be directed to and served by the Marshal in whose custody he is.*" . . .[113]

Moving outside Marshall's opinion, we immediately come on considerations compelling the conclusion that he altogether misread section 14. Whatever jurisdiction section 14 granted to courts in respect to habeas corpus, it undeniably granted the same jurisdiction in respect to scire facias. Section 14 begins: "That all the beforementioned courts of the United States shall have power to issue writs of *scire facias, habeas corpus*. . . ." Scire facias, the first, and one of only two writs specifically mentioned, was not treated at all by Marshall, and yet it cannot be altogether ignored. A scire facias should have only ancillary uses, then merely as a matter of grammar the uses contemplated for habeas corpus in this context must likewise have been only ancillary. That scire facias was wholly an ancillary writ or, as Marshall put it, a writ to be employed by courts only in "causes which they are capable of finally deciding" can very nearly be demonstrated. Scire facias was, as the cases and text writers unvaryingly tell us, 'founded on some matter of record." [114] In all but one instance, which I shall presently discuss, the record involved was a judicial record—a record in a law suit—such as a judgment or a bail bond or a costs guarantee. Scire facias lay to "enforce the execution of them or to vacate or set them aside." [115] Furthermore, and this is decisive, it lay only in the court where the record was.[116] Thus, if one wished to enforce a bail bond, he sued out a scire facias in the court where the bond was taken. If one wished to revive a judgment, he sought scire facias in the court where the judgment was rendered. And the same was done for all the other records to be enforced or set aside. A circuit court was entirely correct in a costs bond case when, after a recital along the lines given above, it declared:

"It therefore follows that, as this particular writ cannot initiate litigation, it only marks a stage in the course of proceedings already commenced, in whatever terms that stage may be characterized. It follows, further, that proceedings by scire facias of the character which we are considering fall into the class commonly known in the language of the federal courts as ancillary." [117]

As indicated above, the matter of record on which scire facias would lie was always a judicial record, a record in a prior suit in the court issuing the scire facias, save in a single instance, that of revoking a patent. Even this exception was apparently denied by the Supreme Court in 1888 when it held that a bill in equity rather than a scire facias was the appropriate procedure to revoke either an invention or a land patent.[118] Unquestionably in pre-1789 England scire facias was the more usual method for revoking patents. It lay when "the King doth grant . . . one and the self same Thing to several Persons," or "when the King doth grant any Thing which by Law he cannot grant," or when a grant was made "upon a false suggestion." [119] Moreover, suit lay not only at the instance of the Crown but at that of the subject as well when he was prejudiced.[120]

In this country, examples of this use of scire facias are difficult to find. The reporter of an 1874 Pennsylvania case believed that it was one of only two where scire facias was used in the United States to repeal a land patent.[121] But such a use is reported in Maryland in 1678,[122] and Chancellor Kent, in 1813, could write:

"Letters-patent are matter of record, and the general rule is, that they can only be avoided in chancery, by a writ of *scire facias* sued out on the part of the government, or by some individual prosecuting in its name. This is the settled *English* course, sanctioned by numerous precedents; and we have no statute or precedent establishing a different course. . . .

"In addition to the remedy by *scire facias* which the younger patentee has in this case, there is another." . . .[123]

In addition to this recognition by Kent in 1813 of scire facias as a then existing remedy in land patent litigation, a 1798 North Carolina statute also expressly acknowledged a right to a scire facias in any person "aggrieved by any grant or patent issued." [124]

As to scire facias then, it is fair to conclude that while its predominant role in 1789 unquestionably related to a suit which the issuing court already had within its bosom, it would lie independently of any other suit in the case of a land patent. Here, there was in theory scope for the independent scire facias jurisdiction demanded by Marshall's reading of section 14. But the evidence is compelling that no such jurisdiction was contemplated by the drafters of the Judiciary Act of 1789.

That Act, when sanctioning jurisdiction, uniformly spoke in limited terms. Thus, jurisdiction was granted "of crimes and offenses that shall be cognizable under the authority of the United States;" [125] of "all civil causes of admiralty and maritime jurisdiction;" [126] of "all suits of a civil nature at common law where the United States sue;" [127] of "all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State." [128] In every instance, the jurisdiction granted is particularized with definite, if rather large, ends in view. On the other hand, if section 14 were an independent grant of scire facias jurisdiction, it was subject to no statutory bounds and was limited only by the Constitution. Thus, the farthest reaches of the "arising under" jurisdiction, of diversity jurisdiction, and of all the other provisions in article III could be exploited to gain access to the federal courts. The situation can be appreciated by the lawyer of today if he could imagine coming on a section of the United States Code that nakedly declares that "the courts of the United States shall have jurisdiction to issue the writ of certiorari." A comparable abandon *cannot* be attributed to the Congress of 1789. Even a casual reading of the Judiciary Act will reveal that a judicial power limited only by the restrictions of the Constitution was a result that Congress had guarded against with the most meticulous diligence. Congress was desirous in one instance, and in one instance alone, of making the federal courts available for the trial of land suits, irrespective of diversity. It therefore carefully provided, in addition to diversity jurisdiction, the right of removal, and removal only, where a land suit was begun in a state court and the parties relied on land grants from two different states, even though all the parties were of common citizenship.[129] To suppose that section 14 granted original jurisdiction as well in all federal courts whenever the requirements of scire facias and article III jurisdiction could be met borders on fantasy.

An additional circumstance further indicates that Marshall was in error in regarding section 14 as a grant of independent jurisdiction. It lies in the fact that section 14 makes no distinction in terms of original and appellate jurisdiction. Marshall holds that section 14 is a grant to the Supreme Court not only of independent jurisdiction but that it is a grant of appellate jurisdiction as well. And yet the grant to the district court, where the jurisdiction could be only original, is included in the very same words. While a highly specialized authorization for appellate use of habeas corpus by the Supreme Court was divined, the possible original use of habeas corpus by that Court in a case properly within its original jurisdiction was not denied nor could it be. Thus, as Marshall saw it, section 14 by the same words dealt with both original and appellate jurisdiction in the Supreme Court, and these same few words communicated vastly different powers to the district courts. This is a greater burden than the words can comfortably bear. There is no strain when section 14 is read as altogether ancillary for the courts.

That Marshall was grievously in error in his attribution to section 14 of something more than ancillary significance for courts is also strongly suggested when section 13 is considered along with it, and the relationship of the two sections is explored. Section 13, after dealing with the Supreme Court's original jurisdiction,[130] concludes with this sentence:

"The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases hereinafter specifically provided for, and shall have power to issue writs of prohibition to the district courts, where proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office, under the authority of the United States." [131]

Marshall assumed without discussion in *Marbury* that these words attempt to confer an original and also an independent

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jurisdiction on the Supreme Court. Following immediately on a grant of appellate jurisdiction to the Supreme Court and employing a change of phraseology from "jurisdiction" to "power," the words seem more likely merely to lay down rules to guide the Supreme Court in the exercise of its appellate jurisdiction. But accepting Marshall's reading in *Marbury* of section 13 as an independent grant, one must ask why when the section speaks of two writs, does it not speak of the other two writs of which the Supreme Court is to have independent jurisdiction? There is no sensible answer. But once section 14 is recognized as being for courts wholly ancillary, treatment of the Supreme Court's writ power in two sections does make sense. Section 13 concerns the independent writ power of the Supreme Court; section 14 takes care of the ancillary writ power of the Supreme Court and all other courts as well.[132]

Finally, a near airtight proof that section 14 was for courts altogether ancillary in purpose is furnished by section 2 of the short-lived Federalist Judiciary Act of 1801.[133] In that Act, the treatment of the Supreme Court's writ power was combined in a single section providing:

"And be it further enacted, That the said [Supreme Court] shall have power, and is hereby authorized, to issue writs of prohibition, mandamus, scire facias, habeas corpus, certiorari, procedendo and all other writs not specially provided for by statute which may be necessary for the exercise of its jurisdiction, and agreeable to the principles and usages of law." [134]

It will be observed that the restrictions on mandamus and prohibition contained in section 13 of the 1789 Act are abandoned. Nothing is said, as section 13 provided, about mandamus issuing only to courts or officers appointed by the authority of the United States or about prohibition issuing only to district courts when they sat as courts of admiralty.[135] But this can hardly mean that these writs will lie whenever the constitutional prerequisites to jurisdiction are satisfied. Since mandamus and prohibition are now spoken of in a section that has no other reference to the Supreme Court's jurisdiction and mention of the two writs does not immediately follow a sentence conferring jurisdiction the new section had a feature that the old one did not. Mandamus and prohibition, as well as other writs, may be employed when "necessary for the exercise of . . . jurisdiction." [136]

Inspection of the 1801 Act will also reveal that in addition to mandamus, prohibition, scire facias, and habeas corpus, two writs, certiorari and procedendo, are mentioned by name for the first time. Why specific mention of these six writs? What is the common nexus? If we could substitute for scire facias the writ of quo warranto, we would have the six prerogative writs of the common law.[137] But quo warranto was omitted for a very good reason. It had no ancillary function to serve but was altogether a substantive writ.[138] Scire facias, on the other hand, had an important role in 18th century appellate procedure. After a plaintiff in error had transferred a record to a reviewing court and assigned errors, he had to sue of a *scire facias ad audiendum errores* to compel his adversary to plead to the assignment. If the plaintiff in error took no action, with even-handed justice the common law supplied the defendant in error with a *scire facias quare executionem non* to effect the plaintiff's dismissal.[139] And with all the other writs mentioned, there was a similar situation. They were all important to appellate procedure as ancillary aids in disposing of cases otherwise before the court or, at least, of cases of which the court could eventually take cognizance.[140] And just as it is impossible to think that the Act of 1801, with all its careful limitations on the jurisdiction of the Supreme Court, authorized mandamus and prohibition wherever the Constitution might permit it, it is similarly impossible to think that the 1801 Act authorized any such use of the writ of certiorari, however minimally its review potential in the 18th century is regarded.[141] The same can be said for scire facias, procedendo, and habeas corpus. And if the Act of 1801, by section 2, contemplated only ancillary uses for the writs mentioned, it is impossible to see how the Act of 1789 was any different. It has never been suggested that the Federalists in 1801 were at pains to deprive the Supreme Court of powers it had theretofore possessed.

In summary, the considerations advanced persuade me that the most sensible and most likely reading of sections 13 and 14 together is one that regards section 13 as dealing with the writ power of the Supreme Court ancillary to its *appellate* jurisdiction and section 14 as dealing with the writ power of all courts ancillary to their *original* jurisdiction. In any event, when section 14 speaks of habeas corpus and courts, it is speaking only of an ancillary use of the writ.

V

Consideration must now be given to the proviso of section 14 of the 1789 Act and Marshall's argumentative conclusion that the proviso applied to courts as well as to individual justices and judges. The proviso's effect would be rather minimal if section 14 was concerned, in respect to courts, only with the ancillary uses of habeas corpus. The proviso could not then be held to limit their independent use of habeas corpus *ad subjiciendum*. But even as to ancillary uses by *courts* of habeas corpus, it is virtually certain that the proviso, properly read, was inapplicable. Marshall's contention that it was applicable to courts rests altogether on his spurious depreciation of the ancillary uses of habeas corpus to the point where, he said, the only significant use of habeas corpus for the federal courts was the *ad testificandum* writ. But Congress, he contended, surely meant to give more than the *ad testificandum* power, a fact attested to by the exception made for *ad testificandum* in the proviso. The whole power given, he argued, would not be the subject of an exception. And did the proviso and its exception apply to the courts? Yes, he answered, because judges in chambers have no interest in *ad testificandum*.[142]

This tortuous and false reasoning would seem to carry with it its own refutation. In addition, a number of countervailing considerations can be arrayed against it and Marshall's conclusion concerning the proviso. To begin with, there is the question of grammar and the grammatical structure of section 14. The first sentence speaks of power in courts; the second sentence speaks of power in individual justices and judges. Immediately following the second sentence—perhaps attached to it, perhaps not [143]—is a proviso in which is expressed a limitation of the habeas corpus privilege to those detained by the authority of the United States. Marshall would have us extend the reach of the proviso all the way back through the "judge" sentence immediately preceding it and further back yet through a most complex sentence to modify "courts." This is not impossible grammatically, but it does more credit, stylistically, to the drafters if we attribute to them a purpose to deal separately with two discrete objects, courts on the one hand and justices and judges on the other.[144] There would be no problem of construction at all if the second sentence along with the proviso had been incorporated, just as it was written, in a separate section. *This is precisely what Congress did in the Judiciary Act of 1801,*[145] a step that can only be regarded as explanatory of the Act of 1789.[146]

The second sentence, along with the proviso, yields simple, understandable results when brought singly into focus. The sentence and its proviso bear repeating:

"And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided,* That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." [147]

First, the individual justices and judges are given "power" to grant only one *writ* and that writ only for a single purpose, that of "inquiry into the cause of commitment" or habeas corpus *ad subjiciendum*. Second, the proviso lays down a general rule for the one variety of habeas corpus then being authorized. Habeas corpus is not to issue unless the prisoner is in jail "under or by colour of the authority of the United States." Third, there is an exception to the general rule just stated; a federal judge may grant habeas corpus, even though a prisoner has not been committed under federal authority, if he is nevertheless going to be handed over to federal authority for trial. Fourth, there is what *in form* appears to be a second exception to the limitation on the power of granting habeas corpus *ad subjiciendum*. If a prisoner must be brought into court to testify, the sentence and proviso together seem to allow habeas corpus *ad subjiciendum* to issue irrespective of the charter of the prisoner's custody. In one view, this produces a legal absurdity because the *ad subjiciendum* variety of habeas corpus was never used for the purpose of getting one who was merely a witness into court. The variety of writ serving that purpose was habeas corpus *ad testificandum*. But the explanation seized upon by the courts is a sensible one. The "evidence" clause is not an exception to a limitation on a power previously given but the rather inartful grant of an unencumbered second power—that of issuing a writ of habeas corpus *ad testificandum*.[148]

Perhaps more compelling than the grammatical consideration is the view of the legislative task facing the Congress of 1789 as the men of that day perceived it. In respect to habeas corpus, there were two main problems—one old and one altogether new. The old problem was the power of individual judges, out of term, to issue the writ. This problem was the immediate incitement for the most significant habeas corpus legislation ever enacted, the English Habeas Corpus Act of 1679.[149] In 1676 one Francis Jenkes was thrown into prison and charged with the offense of urging that a new Parliament be called. He sought habeas corpus from the Lord Chief Justice "but his lordship denied to grant it, alleging no other reason but that was vacation." When the contrary authority of Coke was later pressed on his lordship, that worthy made "light of the lord Coke's opinion, saying 'The Lord Coke was not infallible.' " [150] Even the reporter notes "that this case contributed to the passing of the Habeas Corpus Act." [151]

Thus in 1789 it appeared that a statute had been necessary to settle the question of the power of individual judges out of court "in vacation." The solution adopted in 1679 had been to grant power "to the lord chancellor or lord keeper, or any one of his majesty's justices, either of the one bench or of the other, or the barons of the exchequer of the degree of the coif," [152] that is, all the justices and judges of superior courts of record. But this grant of power had to be distinguished from the power of courts. Some things properly done in open court could not be permitted to a judge in chambers. Thus, if a prisoner neglected for two whole terms to

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present his petition, relief "in vacation time" was not available.[153] Or if an assize had already been proclaimed for a county, any habeas corpus must be considered by the assize judge in open court.[154] The grant to individual judges of specific powers accompanied by applicable restrictions was the pattern seen by the men of 1789 as they pondered the one overbrooding legislative precedent, the Act called by Blackstone "another *magna charta*." [155] They could not be sure that a common law power would attach to the various judges in the federal system. A statute had been necessary in England to settle the question. Perhaps a statute was necessary in America. Accordingly, Congress recognized the power in individual judges in specific terms. But just as the English Act made special regulations applicable only to individual judges as contrasted to courts, so Congress one hundred and ten years later made comparable special provisions for federal judges.

The *new* problem in respect to habeas corpus facing the Congress of 1789 grew out of the Philadelphia Convention's most creative contribution, the idea of a federal union. How could the workings of habeas corpus best be arranged in a federal union pervaded in all of its branches by an almost holy regard for the writ? The answer given in 1789 clearly was mistaken by Chief Justice Taney in *Ableman v. Booth*.[156] Faced with a *state's* claim that it could by habeas corpus liberate a federal prisoner, he stated

"[T]he powers of the General Government, and of the state . . . are . . . separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States, is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye." [157]

Presumably, the converse would also be valid. But the Act of 1789 made specific arrangements, at least in the instance of producing a prisoner to testify, for process reaching across Taney's "line of division." Under the Constitution as it existed in 1789, the states had nothing to fear from federal habeas corpus. The federal judicial power was for practical purposes limited to those cases arising under the Constitution, laws and treaties of the United States. In the entire Constitution, there were few provisions *directly* conferring benefits on state prisoners. They were not to be made subject to ex post facto laws,[158] and if a prisoner was a member of Congress, he could in some instances assert a privilege from arrest.[159] There was in these provisions certainly no portent of the massive use of federal habeas corpus by state prisoners, and these provisions furnish no provocation for nullifying as to state prisoners the commanding language of the habeas corpus clause. The occasions when federal habeas corpus could possibly lie were certain to be exceedingly rare, and the states could have had no legitimate fear.

There were reasons in 1789, and in 1787 as well, for apprehension on the part of those concerned for the national interest. The thwarting and frustrating of this interest by one state or another produced the impetus for the Constitution. And the Constitution deals with these state propensities. In particular, it sought to deny to the states opportunities to imperil the very existence of the national government.[160] But why undertake, for example, to assure attendance in Congress if no federal remedy is available for that purpose? Why leave the members of Congress altogether to the mercies of the state that arrested them? With its habeas corpus clause, the Constitution provided the federal remedy. The Congress of 1789 provided, in addition to the federal remedy, a federal tribunal where the remedy could be secured. Congress can fairly be held to have had in view another highly important objective. It knew that a state prisoner was likely to claim the benefit of federal habeas corpus, not when he was being denied some directly conferred constitutional right, but when he was responsible for or the beneficiary of a federal program. The tax collector harassed by state arrests,[161] the foreign diplomat denied the immunity from arrest which the federal government wished to accord him,[162] the foreign national arrested in violation of a treaty [163]—these were the typical instances where a state prisoner would seek federal habeas corpus. In the absence of habeas, damage to the federal programs could be enormous and irremediable.

This second purpose of the habeas clause as an instrument for assuring the supremacy of national law prescribed by article VI can hardly have been overlooked by the framers. It was not overlooked by Edmund Randolph in 1792 [164] or by the Congress of 1800 when it enacted the Bankruptcy Act. Section 38 of that Act announced that resort to habeas was proper whenever any bankrupt was detained in prison after obtaining his certificate of discharge in bankruptcy by reason of a judgment on a debt obtained before his discharge. The Act provided that "it shall be lawful for any of the judges of the court wherein judgment was so obtained, or for any court, judge, or justice, within the district in which such bankrupt shall be detained, having powers to award or allow the writ of habeas corpus, on such bankrupt producing his certificate . . ., to order any sheriff or gaoler who shall have such bankrupt in custody, to discharge such bankrupt." . . .[165]

Congress was here attempting fully to effectuate its purposes in passing the Bankruptcy Act. It was laying down a rule of law in respect to habeas corpus directed to courts and judges, state and federal alike. It was dealing with the case of the pre-discharge judgment on a prior debt; the post-discharge judgment on a prior debt presented no problem. Although the release of *state* prisoners was clearly contemplated, there was no reference whatsoever to section 14 of the Judiciary Act of 1789, nor is there any talk of jurisdiction beyond a reference to courts or judges "having powers to award or allow the writ of habeas corpus." The plain assumption is that courts, state and federal alike, did have jurisdiction as did individual justices and judges in some circumstances.

Thus grammar, the subsequent legislation of 1801, legislative precedent, the baselessness of altogether imaginary state apprehensions, and the federal government's potential gain combine to dictate the conclusion that section 14's proviso spoke only to justices and judges in their individual capacities. The section's answer to the novel problem of habeas corpus in a federal union was not the destructive, unreasoned one that has been imagined but one eminently sensible. Essentially, what the proviso said that before a prisoner could be taken from state authority even in a case indubitably arising under federal law, proceedings in open *court* were necessary. Such proceedings could be depended on to preclude removal except where there was a substantial federal interest, and then removal was desirable as well as required.

VI

On Ex parte *Bollman* one final and confessedly hazardous word—hazardous because it indulges in speculation as to a man's innermost motives. What could have moved John Marshall to impose on American law such a misconception? Some may say that the consideration of supreme moment with him was to smite his old adversaries, Thomas Jefferson and the Republicans, as the Jeffersonian Party was then known. Any old stick was good enough for that purpose. Some may be more fastidious and credit Marshall with a shrewd, dissembling, rear-guard action to serve a more compelling and a more noble end—avoidance of impeachment by making ingratiating bows to Congress and to the states, while at the same time preserving as much as possible of the national power. These explanations do not satisfy. The first is contradicted by Marshall's known behavior.[167] The second is based on a false premise. There is no escaping the fact that as long as Ex parte *Bollman* stands, the fundamental guarantee of American liberty is subject to total obliteration in the case of state prisoners.[168]

A sufficient answer to the conundrum posed is that Marshall was in flight from himself and his holding in the most important case ever adjudicated in the United States, *Marbury v. Madison*.[169] In *Marbury*, Marshall had simply forgotten the habeas corpus clause, which was not directly involved. Marshall had claimed for the courts the power to nullify acts of Congress unauthorized by the Court's reading of the Constitution. The occasion for this claim was the Court's discovery that section 13 of the Judiciary Act attempted to confer on the Supreme Court original jurisdiction to issue the writ of mandamus. Holding that the Congressional Act was a nullity, the Supreme Court announced that it could take original jurisdiction only of cases mentioned in article III, those "affecting Ambassadors, other public Ministers and Consuls, and those in which a state Shall be a Party . . ." [170] There could have been on Marshall's part *no* stronger commitment to the proposition that this listing in article III exhausted the possibilities of original jurisdiction. To acknowledge another original jurisdiction existing all the time was unthinkable, even though this jurisdiction was commanded by the Constitution and assumed by Congress in its first Judiciary Act.

But the exigencies of decision that produced Ex parte *Bollman* are no longer with us. We can now discard its sophistries and misrepresentations and accept Mr. Justice Black's simple statement:

"Habeas Corpus, as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by courts cannot . . . be constitutionally abridged by Executive or by Congress." [171]

FOOTNOTES

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[1] U.S. CONST. art. I, § 9.

[2] 8 U.S. (4 Cranch) 75 (1807).

[3] *Id.* at 94. In the context it is certain that Marshal was speaking of a statute.

[4] *Id.* at 95.

[5] *Id.* at 99.

[6] *See e.g.*, Carbo v. United States, 364 U.S. 611, 614 (1961).

[7] Revised Statutes of 1874, ch. 13, §§ 751-6, 18 Stat. 142; Act of February 5, 1867, ch. 27, 14 Stat. 385; Act of August 29, 1842, ch. 257, 5 Stat. 539; Act of March 2, 1833, ch. 57, § 7, 4 Stat. 634; Judiciary Act of 1801, ch. 4, §§ 2, 30, 2. Stat. 89, 98; Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81. For the situation prevailing during the brief period when the Judiciary Act of 1801, ch. 4, 2 Stat. 289, was in force, see the text at note 145 and note 146 *infra*. The habeas corpus provisions are currently codified in 28 U.S.C. §§ 2241–54 (1964).

[8] *Cf.* Eisentrager v. Forrestal, 174 F.2d 961 (D.C. Cir. 1949).

[9] For the complete text of the bill as it emerged from committee, see 114 CONG. REC. 11186 (1968). Section 702, dealing with habeas corpus, proposed to add to title 28 of the United States Code a new section 2256 reading as follows:

The judgment of a court of a State upon a plea or verdict of guilty in a criminal action shall be conclusive with respect to all questions of law or fact which were determined, or which could have been determined, in that action until such judgment is reversed,

vacated, or modified by a court having jurisdiction to review by appeal or certiorari such judgment; and neither the Supreme Court nor any inferior court ordained and established by Congress under article III of the Constitution of the United States shall have jurisdiction to reverse, vacate, or modify any such judgment of a State court except upon appeal from, or writ of certiorari granted to review, a determination made with respect to such judgment upon review thereof by the highest court of that State having jurisdiction to review such judgment. *Id.* at 11189.

It is perhaps not material that the proposed section does not in terms deprive the federal courts of *jurisdiction* to accord habeas corpus relief to state prisoners. The proposal speaks of jurisdiction "to reverse, vacate, or modify any such judgment . . . ." Of course, on habeas corpus a court does not purport to reverse, vacate, or modify a judgment. As the Court has explained:

The jurisdictional prerequisite is not the judgment of a state court but detention *simpliciter*. The entire course of decisions in this Court . . . is wholly incompatible with the proposition that a state court *judgment* is required to confer federal habeas jurisdiction. And the broad power of the federal courts under 28 U.S.C. § 2243 summarily to hear the application and to "determine the facts, and dispose of the matter as law and justice require," is hardly characteristic of an appellate jurisdiction. Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can only act on the body of the petitioner. Fay v. Noia, 372 U.S. 391, 430–31 (1963).

Compare id. with Peyton v. Rowe, 391 U.S. 54, 58 (1968) *and Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 101 (1807).

[10] *See, e.g.,* 114 CONG. REC. 13990 (1968). Senator Tydings, the leader of those opposing the section, resorted to an increasingly routine tactic in Senate debate. He sought and received expressions from the faculties of the law schools. The academicians uniformly denounced the proposal, either on constitutional or policy grounds. For their comments, see 114 CONG. REC. 13850 (1968).

[11] Senator Scott closed the debate by remarking: "Mr. President, it is my feeling . . . if Congress tampers with the great writ, its action would have about as much chance of being held constitutional as the celebrated celluloid dog chasing the asbestos cat through hell." 115 CONG. REC. 14183 (1968).

[12] See Eisentrager v. Forrestal, 174 F.2d 961 (D.C. Cir. 1949); 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION 610–20 (1953).

[13] *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

[14] I should not like to be understood as rejecting this theory, especially as to habeas corpus. For an express recognition of a common law habeas jurisdiction in the Supreme Court of North Carolina, *see In re* Bryan, 60 N.C. 1, 44(1863). The Supreme Court of the United States, while it has frequently disclaimed a common law jurisdiction for the federal courts, has never to my mind adequately explained why such a jurisdiction is lacking. In Ex parte *Bollman,* Marshall indicated that the lack of a common law jurisdiction in the federal courts results since these courts are created by written law. 8 U.S. (4 Cranch) at 93. But so were many other courts which do exercise a common law jurisdiction. The Supreme Court of North Carolina, for example, at the time of the *Bryan* decision, owed its existence entirely to a statute. Ch. 1, [1818] Laws of North Carolina 3.

[15] *See* R. WALKER, THE AMERICAN RECEPTION OF THE WRIT OF LIBERTY (Okla. State U. Political Science Monograph No. 1, 1961); Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?,* 40 CALIF. L. REV. 335 (1952); Oaks, *Habeas Corpus in the States, 1776-1865,* 32 U. CHI. L. REV. 243 (1965).

[16] The quoted phrase is taken from the remarks of Dr. John Taylor in the Massachusetts Convention. 2 ELLIOTT'S DEBATES 108 (2d ed. 1836).

A variety of habeas corpus was used in America at least as early as 1685 in New Jersey. JOURNAL OF THE COURTS OF COMMON RIGHT AND CHANCERY OF EAST NEW JERSEY 1683–1702 206 (P. Edsall ed. 1937). Professor Edsall's incomparable volume shows frequent resort to habeas corpus for the purposes of appellate procedure. *Id.* at 264–65, 304.

[17] For Madison's record of the Convention's consideration of the habeas corpus clause, see the text accompanying note 20 *infra.* The most thorough and searching examination of the genesis of the habeas corpus clause that I have seen is in the three pamphlets published by Horace Binney in support of Lincoln's Civil War suspensions. H. BINNY, THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION (1862); THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION (second part) (1862); THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION (third part) (1865) [hereinafter cited as BINNEY I, BINNEY II, & BINNEY III]. While Binney was principally concerned with the "suspension member" of the clause, he indicated that he, following Marshall and Story, subscribed to the "obligation" theory. But he stated the theory in the strongest possible terms, leaving Congress no discretion whatsoever to withhold jurisdiction of a remedy for arbitrary imprisonment. "If this be constitutional, Congress may constitutionally destroy the Constitution." BINNEY II 14.

Binney's arguments are directed to supporting a view of the habeas clause as including a grant of power to the President in respect to suspension. In so far as he establishes the nature of the clause as power-granting, he helps in establishing the thesis that the clause is a grant of power to courts as well as the President. Binney's rejection of this view is clear and, I must confess, forceful. He notes that the Constitution is not concerned with the "Writ of Habeas Corpus" or a "Habeas Corpus Act" but with the "privilege." From this, he reasons that when the Constitution declares that the "privilege . . . shall not be suspended . . ." it is doing no more than making a general statement of a right of immunity from arbitrary imprisonment. "The reference to the Writ," says Binney, "was to describe the privilege intelligibly, not to bind it to a certain form." BINNEY I 40.

[18] BINNEY I 24; 3 ELLIOT'S DEBATES 462 (2d ed. 1836) (Patrick Henry in the Virginia Convention); 3 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 at 213 (1911) (quoting Luther Martin in his "The Genuine Information" transmitted to the Maryland Convention).

[19] U.S. CONST. art. I, § 9, cl. 2.

[20] 2 M. FARRAND, *supra* note 18, at 341. I have omitted the mention of habeas corpus embodied in the Pinkney Plan allegedly presented to the Convention on May 29. *Id.* at 131. The judgment of a number of writers is that the Plan given in Madison's Notes cannot be representative of what Pinkney offered on May 29. *See* 31. BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 27–29 (1950) and authorities there cited.

[21] *See* 5 ELLIOT'S DEBATES 376–81 (2d ed. 1836).

[22] 2 M. FARRAND, *supra* note 18, at 438–39.

[23] In the ratifying conventions, the only serious complaint with the Convention's draft was that it admitted the possibility of suspension. See note 18 *supra.*

As to the effect of the habeas corpus clause there are cryptic, yet noteworthy, expressions in the conventions from James Wilson and Alexander Hamilton indicating their belief that the Constitution itself had provided for habeas corpus without any necessary resort to legislation. In the course of a speech of several days duration to the Pennsylvania Convention, Wilson undertook to explain why there was no bill of rights. His main point was that it was impractical:

Enumerate all the rights of men! I am sure, sir, that no gentleman in the late Convention would have attempted such a thing. . . .

. . . But this subject will be more properly discussed when we come to consider the FORM of government itself; [*i.e.,* its federal quality and the separation of powers?] and then I mean to show the reason why the right of *habeas corpus* WAS SECURED by a particular provision in its favor. 2 ELLIOTT'S DEBATES 454–55 (2d ed. 1836) (original in lower case).

Unfortunately, Wilson did not keep his promise.

In *The Federalist* Hamilton evidently considered that habeas corpus had been established as surely as ex post facto laws had been nullified. He wrote: "The establishment of the writ of *habeas corpus,* the prohibition of ex post facto laws . . . are perhaps greater securities to liberty and republicanism than any [the New York Constitution] contains." THE FEDERALIST No. 84. In another place he even speaks of "the *habeas corpus* act as if the Constitution was to continue it in operation. THE FEDERALIST No. 83. He was, of course, referring to the English Act of 1679, 31 Car. 2, c. 2. See the remark of Luther Martin quoted in note 25 *infra.*

[24] One commentator has suggested that the negative wording of the habeas clause implies a purpose in the Convention merely to give assurance that Congress would not prevent state courts from making the writ available. Collings, *supra* note 15, at 355, 351 (1952). Pondering and finally rejecting this view, the most recent commentary says that the clause "is apparently directed to federal government action somehow destructive of a judicial power neither defined nor in terms compelled." The commentary argues that the negative form was the result of the prevailing view among the framers rendering "superfluous positive guarantees of personal rights." This philosophy, it is said, moved the framers to "prevent the federal government from imposing severe restraints upon individuals without opportunity for collateral judicial review." Accordingly, the commentary concludes: "A purposive analysis, then supports a constitutional requirement that there be *some* court with habeas jurisdiction over federal prisoners." *Developments in the law—Federal Habeas Corpus,* 83 HARV. L. REV. 1038, 1267 (1970) [hereinafter cited as *Developments*].

[25] Edmund Randolph, in the Virginia Convention, attributed the suspension power to a power to "regulate courts," 3 ELLIOT'S DEBATES 464 (2d ed. 1836). But in Maryland, Luther Martin pointedly involved the habeas clause. "By the next paragraph, [indicating the habeas clause] the general government is to have a *power* of *susepnding the habeas corpus act,* in case of *rebellion or invasion"* 3 M. FARRAND, *supra note* 18, at 213.

Chief Justice Taney also attributed the suspending power to the habeas clause: "The clause in the Constitution which authorizes the suspension of the writ of habeas corpus, is in the 9th section of the first article." *Ex parte* Merryman, 17 F. Cas. 144, 148 (No. 9,487) (C.C.D. Md. 1861). Horace Binney argued the question exhaustively. BINNEY II 1–38. His principal reliance, other than Martin and the point made in the text concerning a meaningful interpretation of the vote against suspension, was that no other clause of the Constitution was a likely source.

Without regard to the witness of Martin or the authority of Taney, it has been ventured that the source of the suspension power "might not" be the habeas clause and that it "might" be derived from some un-

specified article I "war powers" and the necessary and proper clause. *Developments* 1267–68. Responding to a comparable if less timid suggestion, Horace Binney remarked:

It is impossible to treat this argument seriously. The writer has transcribed nearly half the express powers of Congress, and left his readers a perfectly uncontrolled liberty to select one or another, or half a dozen, without the least influence from himself, or an intimation of the slightest preference on his part for one more than for another. Nay, he does not give the least hint of the nature or mode of application of the incidental or implied power, which, according to his notion, arises from any one of these express powers, to suspend the Writ of Habeas Corpus. He names eight express powers, and there are but eighteen in the Eighth Section; and it is true to the very letter, that the member of the Philadelphia Bar neither makes a choice himself, nor writes a word to influence the choice, of one rather than another of them. He contents himself with saying, "that there are such grants of power, in language amply sufficient to vest discretion on the subject matter in Congress, we think may be safely asserted by any one reading the clauses conferring legislative power in the several particulars we have recited above." This is not argument, but dogmatism. BINNEY II 35.

[20] This becomes all the more striking when the habeas clause is compared to its immediate predecessor in section 9: "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the *Congress* prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person." U.S. CONST. art. 1, § 9, cl. 1 (emphasis added).

Examination of the remainder of section 9 shows that while most of its prohibitions are directed to Congress, one of the prohibitions is a restraint on the Executive: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." *Id.* cl. 7. Another is addressed to all branches of the government: "[N]o Person holding any Office of Profit or Trust . . . shall . . . accept of any present, Emolument, Office, or Title of any kind whatever, from any King, Prince, or foreign State." *Id.* cl. 8. One would think that the foregoing is sufficient to refute an argument, based merely on the position of the clause, that it is addressed only to Congress. For an expression of the position argument, see *Developments* 1264.

Of all the clauses in section 9, the habeas clause alone raises doubts as to the governmental branch immediately addressed. It could well have been the habeas clause that its author, Gouverneur Morris, had in mind when he wrote Timothy Pickering in 1814:

"But, my dear sir, what can a history of the Constitution avail, towards interpreting its provisions? This must be done by comparing the plain import of the words with the general tenor and object of the instrument. That instrument was written by the fingers which write this letter.

"Having rejected redundant and equivocal terms, I believe it to be as clear as our language would permit, *excepting, nevertheless, a part of what relates to the Judiciary.* On that subject, conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases, which, expressing my own notions, would not alarm others, nor shocking their self-love; and, to the best of my recollection, this was the only part which passed without cavil. *Quoted in* BINNEY III 21.

[27] J. BULLIT, A REVIEW OF MR. BINNEY'S PAMPHLET 47 (1862); *Developments* 1264. The latter also relies on the fact that suspension in Massachusetts during Shays' Rebellion was by legislative act, citing ch. 41, [1786] Mass. Acts & Laws 102. But this commentary neglects to explain that at that time, the Massachusetts Constitution stipulated, as the U.S. Constitution does not, that suspension was to be "by the legislature." MASS. CONST. ch. VI, art VII (1780). 1 B. POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 972 (1877).

[28] BINNEY I 1–24.

[29] *Id.* at 51–52.

[30] *Id.* Parliament, according to Binney, typically provided in suspension cases that "all or any persons that *are or shall* be in prison within that part of the United Kingdom called Great Britain, at or upon the day on which this Act shall receive his Majesty's Royal assent, *or after*, by warrant of his said Majesty's most honorable Privy Council . . . for high treason, suspicion of high treason, or treasonable practices . . . may be detained in safe custody without bail or mainprise . . ." BINNEY II, 17. *See, e.g.*, An Act to Empower His Majesty to Secure and detain such Persons as His Majesty shall suspect are conspiring against His Person and Government, 57 Geo. 3, c. (1817).

While I am not principally concerned with locating the suspending power, it may be useful to point out that it is fairly clear that the courts cannot be deprived of some part in the process: "The suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself." *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 130 (1866); BINNEY III 69; *Developments* 1265. Binney explains:

Supposing the power of suspending the privilege of the Writ of Habeas Corpus, to be what I have described it as being, and exercisable in the manner described, then it must follow, that the Judicial power cannot be altogether displaced or superseded by it, though it may be so far abridged as only to maintain the rights of persons under a limitation, which confines the Judiciary to the observation of the forms of things rather than of their substance. Nevertheless, those forms are of infinite value, as they exclude dangerous substances, though it may be uncertain what they precisely include; and they decidedly benefit the people at large, though they may not much benefit the prisoner himself. Within the more limited area, I am not able to perceive that the Judicial authorities are not as competent as in other cases, so far as to inquire if the power has been apparently pursued, and to relieve if it has not. On the contrary, I submit with some confidence, that the Judicial Department is competent to inquire into the exercise of the power, and to see that the power has *ostensibly* been exercised within its prescribed limits, if it has any; not indeed to examine into the particular grounds of the suspicion of treasonable design which may be charged, and to judge whether the imputation upon the party imprisoned be well or ill founded in fact or probability; nothing like this; but to know whether the limitations of the power have been ostensibly observed in the execution of the power. BINNEY III 69.

[31] Act of March 3, 1863, ch. 81, § 1, 12 Stat. 755. This statute was considered by Congress for nearly two years. For a full review of the legislative history. See Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by* Congress, 1 U. WIS. HIST. Y BULL. 213 (1970).

[32] ELLIOTT'S DEBATES 159–60, 331–32, 376–81 (2d ed. 1836). The notion is reflected in the Constitution. U.S. CONST. art. 3, § 1.

[33] My notion is that the "obligation" theory is demonstrably untenable if Congress is without power to impose a jurisdiction on the state courts. In the event of a congressional decision to have no lower federal courts, it could be contended by the advocates of the "obligation" theory that the Constitution then contemplates that Congress will discharge its obligation by commanding the state courts to make the writ available. Congressional authority to impose this jurisdiction on the state court could be argued to be a necessary implication of the choice left to Congress. It has also been suggested that the necessary and proper clause provides congressional power to impose jurisdiction on state courts. Sandalow, *Henry* v. *Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187, 207, *See also* Testa v. Katt, 330 U.S. 386, 393 (1947). But the congressional power to impose a jurisdiction on the state courts has often been denied. *See, e.g.*, Brown v. Gerdes, 321 U.S. 178, 188–89 (1944) (Frankfurter, J., concurring); Kendall v. United States, 37 U.S. (12 Pet.) 524, 645 (1838) (Barbour, J., dissenting); Houston v. Moore, 18 U.S. (5 Wheat.) 1, 27 (1820).

[34] 2 U.S. (2 Dall.) 419 (1973).

[35] *Id.* at 421 (emphasis added).

[36] "In our solicitude for a remedy, we meet with no difficulty, where the conduct of a state can be animadverted on, through the medium of an individual. For instance, without suing a state, a person arrested may be liberated by *habeas corpus* . . . ." *Id.* at 422.

[37] See note 25 *supra.*

[38] That the Convention did not speak with greater clarity may perhaps be explained by the Convention's preoccupation with the suspension problem toward which opaqueness may well have been deliberate. Two other contradictory explanations might be suggested. On the one hand, commanding the state courts to respect habeas corpus may have been a matter of too great delicacy to bear explicit statement. On the other, no superior court known to the framers had ever denied a habeas jurisdiction.

[39] Ch. 20, 1 Stat. 73.

[40] The term "habeas corpus" normally refers to the *adsubjiciendum* variety of the writ, that is, the writ "directed to the person detaining another, and commanding him to produce the body of the prisoner . . . ." 3 W. BLACKSTONE COMMENTARIES *131. For a discussion of the other types of the writ, see 8 U.S. (4 Cranch) at 95–97, *citing* 3 W. BLACKSTONE, COMMENTARIES *129.

[41] For perhaps the most recent example, see *Developments* 1263–74.

[42] Act of April 4, 1800, ch. 19 § 38, 2 Stat. 32. For a discussion of this statute, see the text at note 165 *infra.*

[43] *Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806); United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795).

[44] *See, e.g.*, W. CHURCH, WRIT OF HABEAS CORPUS 37 (1884); R. HURD, WRIT OF HABEAS CORPUS 149 (1858); 114 CONG. REC. 13996–97 (1968) (remarks of Senator Ervin).

[45] 8 U.S. (4 Cranch) at 95.

[46] Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81. I refer to this section so often that I would urge any reader who may be interested in finding out what this article has to say to arm himself with a copy of the section.

[47] 8 U.S. (4 Cranch) at 99.

[48] Act of March 2, 1833, ch. 57, § 7, 4 Stat. 634.

[49] Act of August 29, 1842, ch. 257, 5 Stat. 539.

[50] Act of February 5, 1867, ch. 27, 14 Stat. 385.

[51] 114 CONG. REC. 13997 (1968).

[52] For a discussion of scire facias, see the text accompanying notes 114–24 *infra.*

[53] The Habeas Corpus Act of 1679, 31 Car. 2, c. 2.

[54] On the early colonial and state statutory development, see Oaks, *supra* note 15, at 251–55.

[55] Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ—I*, 18 CAN. B. REV. 10, 15 (1940).

[56] 3 W. BLACKSTONE, COMMENTARIES *129–37 (habeas corpus); A. HAMILTON, PRACTICAL PROCEEDINGS IN THE SUPREME COURT OF THE STATE OF NEW YORK 99–103 [printed in 1 J. GOEBEL, THE LAW PRACTICE OF ALEXANDER HAMILTON 101–03 (1964)] (scire facias).

[57] Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 80.

[58] Actually, the change is first introduced in section 13 as I shall elaborate below. In provisions that are undoubtedly grants of power in the most elemental sense, the terminology employed, except in cases of removal where the meaning is unmistakable, is that specific courts shall have "cognizance" or "jurisdiction." Thus, the district courts are to have *"cognizance"* of crimes, "exclusive original *cognizance* of all civil causes of admiralty and maritime jurisdiction," exclusive original *cognizance* of all seizures on land," *"cognizance* . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States," *"cognizance* . . . of all suits at common law where the United States sue." "And shall also have *jurisdiction* exclusively of the courts of the several States, of all suits against consuls. . . ." *Id.* § 9 (emphasis added). The circuit courts are to have *"cognizance"* of diversity cases *"cognizance"* of certain crimes and offenses, and "appellate *jurisdiction* from the district courts" in certain instances. *Id.* § 11 (emphasis added). The Supreme Court is given "exclusive *jurisdiction*" in civil suits where a state is a party with certain exceptions; exclusive *"jurisdiction"* of suits against ambassadors and concurrent *"jurisdiction"* of suits brought by them; and "appellate jurisdiction" from the circuit courts. *Id.* § 13 (emphasis added). At this point comes the change. The terminology no longer is of "cognizance" or "jurisdiction" but of "power." And the "power" wording continues in sections where clearly the Act is speaking not of competence but of propriety. See especially § 15 reproduced at note 59 *infra*.

The use of the terms "jurisdiction," "cognizance," and "power" in the two early Judiciary Acts was the subject of inconclusive comment in all three opinions in Kendall v. United States, 37 U.S. (12 Pet.) 522 (1838). For the Court, Mr. Justice Thompson remarked:

Some criticisms have been made at the bar, between the use of the terms power and cognizance. . . . That there is a distinction, in some respects, cannot be doubted; and, generally speaking, the word "power" is used in reference to the means employed in carrying jurisdiction into execution. But it may well be doubted, whether any marked distinction is observed and kept up in our laws; so as in any measure to affect the construction of those laws. Power must include jurisdiction, which is generally used in reference to the exercise of that power in courts of justice . . . *Id.* at 622–23.

Dissenting, Chief Justice Taney remarked:

Much has been said about the meaning of the words "powers" and "cognisance" as used in these acts of Congress. These words are no doubt generally used in reference to courts of justice, as meaning the same thing. . . . But it is manifest, that they are not so used in the acts of Congress establishing the judicial system of the United States, and that the word "power" is employed to denote the process, the means, the modes of proceeding, which the *courts* are authorized to use in exercising their jurisdiction in the cases specially enumerated in the law as committed to their "cognisance." Thus, in the act of 1789, ch. 20, the 11th section specifically enumerates the cases, or subject-matter of which the circuit courts shall have "cognisance," and subsequent sections, under the name of "powers," describe the process, the means which the courts may employ in exercising their jurisdiction in the cases specified. *Id.* at 636.

Dissenting, Mr. Justice Barbour remarked:

Again, the act of 1789, after defining the jurisdiction of the different courts in different sections, viz., that of the district courts in the 9th, that of the circuit courts, in the 11th, and that of the supreme court, in the 13th, together with the power to issue writs of prohibition and *mandamus*, proceeds, in subsequent sections, to give certain powers to all the courts of the United States. Thus, in the 14th, to issue writs of *scire facias, habeas corpus, &* c.; in the 15th, to require the production of books and writings; in the 17th, to grant new trials, to administer oaths, punish contempts, & c. It is thus apparent, that congress used the terms, "jurisdiction," and "powers," as being of different import. The sections giving jurisdiction describe the subject-matter, and the parties of which the courts may take cognisance; the sections giving powers, import authority to issue certain writs, and do certain acts incidentally becoming necessary in, and being auxiliary to, the exercise of their jurisdiction. In regard to all the powers in the 15th and 17th sections, this is apparent beyond all doubt, as every power given in both those sections, necessarily presupposes that it is to be exercised in a suit actually before them, except the last in the 17th section, and that is clearly an incidental one, it being a power "to make and establish all necessary rules for the orderly conducting business in the said courts." & c. *Id.* at 648–49.

[59] Judiciary Act of 1789, ch. 20, § 15, 1 Stat. 82. The section in its entirety reads:

SEC. 15. *And be it further enacted,* That all the said courts of the United States, shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order, to produce books or writings, it shall be lawful for the courts respectively, on motion, to give the like judgment for the defendant as in cases of nonsuit; and if a defendant shall fail to comply with such order, to produce books or writings, it shall be lawful for the courts respectively on motion as aforesaid, to give judgment against him or her by default.

[60] *Id.* § 16. The section in its entirety reads:

SEC. 16. *And be it further enacted,* That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law.

[61] Id. § 17. The section in its entirety reads:

SEC. 17. *And be it further enacted.* That all the said courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law; and shall have power to impose and administer all necessary oaths or affirmations, and to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same; and to make and establish all necessary rules for the orderly conducting of business in the said courts, provided such rules are not repugnant to the laws of the United States.

[62] 31 Car. 2, c. 2.

[63] Ch. 4, 2 Stat. 89 (repealed by Act of April 29, 1801, ch. 31, 2 Stat. 122).

[64] In respect to statutory enactment, see Act of March 16, 1785, 1 LAWS OF MASS. 1780–1800, at 236(1801). In Georgia, art. LX of the Constitution of 1777 declared: "The principles of the *habeas-corpus* act shall be a part of this constitution." 1 B. POORE, *supra* note 27, at 383. The English Act was reproduced in its entirety in W. SCHLEY, A DIGEST OF THE ENGLISH STATUTES OF FORCE IN THE STATE OF GEORGIA 262 (1826). Apparently the only legislative enactment apart from the Constitution giving force to the English Act was the Act of February 25, 1784: "the common laws of England, and such of the statute laws as were usually in force in the said province (Georgia) on the fourteenth day of May, 1776 . . . shall be in force until repealed." *Id.* at xx–xxi.

[65] See the text at note 151 *infra*.

[66] Judiciary Act of 1801, ch. 4, §§ 2, 30, 2 Stat. 89, 98 (repealed by Act of April 29, 1801, ch. 31, 2 Stat. 122).

[67] 8 U.S. (4 Cranch) 75 (1807).

[68] 5 U.S. (1 Cranch) 137 (1803).

[69] 3 BENTON'S ABRIDGEMENT OF THE DEBATES OF CONGRESS FROM 1789 TO 1856 AT 490 (1857).

[70] *Id.* The proposed statute read:

That in all cases, where any person or persons, charged on oath with treason, misprision of treason, or other high crime or misdemeanor, endangering the peace, safety, or neutrality of the United States, have been or shall be arrested or imprisoned, by virtue of any warrant or authority of the President of the United States, or from the Chief Executive Magistrate of any State or Territorial Government, or from any person acting under the direction or authority of the President of the United States, the privilege of the writ of *habeas corpus* shall be, and the same hereby is suspended, for and during the term of three months from and after the passage of this act, and no longer. *Id.* at 504.

At least two comments are appropriate: (1) The draftsman of this extraordinary proposal did not seek to limit its effect to only the federal courts; (2) the draftsman, in so far as he considered the Constitution at all, evidently thought that a state prisoner, one held by the authority of a state's "Chief Executive Magistrate," would have habeas protection in the absence of the proposed statute.

[71] *Id.* at 504.

[72] *Id.* at 515. The vote was 113 to 19. Some weeks later, after the opinion in Ex parte *Bollman* came down, there was further debate in the House of Representatives on habeas corpus. It was provoked by a resolution declaring that it was "expedient to make further provision . . . for securing the privilege of the writ of habeas corpus . . ." 16 ANNALS OF CONGRESS 502 (1807). In the course of the debate, various theories were advanced in respect to the habeas clause. John G. Jackson, a Representative from Virginia and the brother-in-law of James Madison, advanced the thesis urged in this article. *Id.* at 558.

[73] United States v. Bollman, 24 F. Cas. 1189 (No. 14622) (C.C.D.C. 1807). For full accounts see 3 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL, 274–357 (1919); Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court,* 1962 SUP. CT. REV. 153, 159–61; 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 301–15 (1928).

[74] Chase, J., . . . wished the motion might lay [sic] over to the next day. He was not prepared to give an opinion. He doubted the jurisdiction of this court to issue a *habeas corpus* in any case.

Johnson, J., doubted whether the power given by the act of Congress . . . of issuing the writ of *habeas corpus,* was not intended as a mere auxiliary power to enable courts to exercise some other jurisdiction given by law. He intimated an opinion, that either of the judges, at his chambers might issue the writ, although the court collectively could not. 8 U.S. (4 Cranch) at 76.

[75] *Id.*

[76] *Id.* at 87. Counsel for the petitioners was Robert Goodloe Harper, assisted by Charles Lee and Luther Martin. Justice Johnson in his opinion took pointed exceptions to the "very unnecessary display of energy and pathos" in the argument, as well as to the "animated address calculated to enlist the passions or prejudices of an audience." *Id.* at 103, 107.

[77] United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795).

[78] *Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806).

[79] 8 U.S. (4 Cranch) at 88.

[80] 3 U.S. (3 Dall.) 17.

[81] Section 33 provided in part:

And be it further enacted, That for any crime or offence against the United States, the offender may, by any justice or judge

of the United States . . . be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offence. . . . And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme court or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 91.

[82] 3 U.S. (3 Dall.) at 17.

[83] *Exparte* Burford, 7 U.S. (3 Cranch) 448 (1806).

[84] 5 U.S. (1 Cranch) 137 (1803).

[85] 7 U.S. (3 Cranch) at 448.

[86] *In re* Metzger, 46 U.S. (5 How.) 176 (1847); Oaks, *supra* note 73, at 178.

[87] 7 U.S. (3 Cranch) at 448.

[88] *Id.* at 449.

[89] *Id.*

[90] 8 U.S. (4 Cranch) at 101.

[91] *Id.* In the *Hamilton* case there is, of course, not a single word indicating that the jurisdiction exercised was appellate. On the propriety of the jurisdiction in *Hamilton*, Marshall was repudiated by the Supreme Court in *In re* Metzger, 46 U.S. (5 How.) 176 (1847), where a district judge, at chambers, had committed Metzger to custody for extradition to France. The Court denied Metzger's habeas petition for want of appellate jurisdiction. *Id.* at 191. The Court in the *Metzger* case did attempt to reconcile *Bollman* and *Marbury* by pointing out that in *Bollman* a decision of the circuit court was considered for revision while in *Marbury*, there was no court decision for the Supreme Court to revise. The Court's own words show how uncomfortable it felt with Marshall's doctrine:

It may be admitted that there is some refinement in denominating that an appellate power which is exercised through the instrumentality of a writ of *habeas corpus*. In this form nothing more can be examined into than the legality of the commitment. However erroneous the judgment of the court may be, either in a civil or a criminal case, if it had jurisdiction, and the defendant had been duly committed, under an execution or sentence, he cannot be discharged by this writ. In criminal cases, this court have no revisory power over the decisions of the Circuit Court; and yet as appears from the cases cited [Ex parte *Bollman* and its compansion case, Ex parte *Swartwout*], "the cause of commitment" in that court may be examined in this, on a writ of *habeas corpus*. And this is done by the exercise of an appellate power,—a power to inquire merely into the legality of the imprisonment, but not to correct the errors of the judgment of the Circuit Court. This does not conflict with the principles laid down in *Marbury v. Madison*, 1 Cranch, 137. In that case, the court refused to exercise an original jurisdiction by issuing a mandamus to the Secretary of State; and they held that "Congress have not power to give original jurisdiction to the Supreme Court in other cases than those described in the constitution." *Id.* at 190–91.

[92] The opinion was announced on Friday, February 13, not forty-eight hours after the conclusion of a lengthy argument on Wednesday. We know that Marshall presided at a regular session of the Court on Thursday, National Intelligencer, Feb. 13, 1807, at 3, col. 3.

[93] 8 U.S. (4 Cranch) at 93.

[94] The fullest statement theretofore given was that of Mr. Justice Chase speaking only for himself in Turner v. Bank of North America, 4 U.S. (4 Dall.) 8 (1799). He remarked:

The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power (*except in a few specified instances*) belongs to congress. If congress has given the power to this court, we possess it, not otherwise: and if congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the constitution might warrant. *Id.* at 10 n. (a) (emphasis added).

For a case upholding a state supreme court's common law power to issue the writ, see *In re* Bryan, 60 N.C. 1 (1863).

[95] 8 U.S. (4 Cranch) 98, 100. Hurd indicates that it was somewhat uncertain just what effect one habeas court would accord the decision of another. R. HURD, *supra* note 44, at 568. *See* Fay v. Noia, 372 U.S. 391, 424 (1963); *Ex parte* Lawrence, 14 Pa. (5 Binn.) 304 (1812); 28 U.S.C. § 2244 (1964).

[96] *See, e.g.*, BINNEY I, II, & III; J RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (1926); Sellery, *supra* note 31.

[97] "If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so." 8 U.S. (4 Cranch) at 101. Marshall knew, of course, that Congress three weeks before had refused to suspend the privilege.

[98] *Id.* at 95. A comparable instance of the Court's decisively misquoting the Constitution with all the paraphernalia of quotation marks and citation is unknown to this writer. Perhaps the closest to it is Mr. Justice Day's interpolation of "expressly" into the 10th Amendment. Hammer v. Dagenhart, 247 U.S. 251, 275 (1918). But Mr. Justice Day did eschew quotation marks and citation to the Constitution.

[99] Marshall states the problem as follows:

The only doubt of which this section can be susceptible is, whether the restrictive words of the first sentence limit the power to the award of such writs of *habeas corpus* as are necessary to enable the courts of the United States to exercise their respective jurisdictions in some causes which they are capable of finally deciding. 8 U.S. (4 Cranch) at 95.

[100] That is, that there was no habeas corpus power in courts not confirmed by statute. *Id.* at 93–94.

[101] This was the limit of the power conceded to the Supreme Court by Justice Johnson in his dissent. 8 U.S. (4 Cranch) at 106.

[102] *Id.* at 96.

[103] *Id.* at 99–100. For the text of section 33, see note 81 *supra*. After quoting from the section, Marshall went on to remark:

The appropriate process of bringing up a prisoner, not committed by the court itself, to be bailed, is by the writ now applied for. Of consequence, a court possessing the power to bail prisoners, not committed by itself, may award a writ of *habeas corpus* for the exercise of that power. The clause under consideration obviously proceeds on the supposition that this power was previously given, and is explanatory of the 14th section. *Id.* at 100.

[104] *Id.* at 97–100.

[105] Ch. 20, § 14, 1 Stat. 81 (emphasis added).

[106] Marshall's entire discussion was comprised in this paragraph:

This proviso extends to the whole section. It limits the powers previously granted to the courts, *because it specifies a case in which it is particularly applicable to the use of power by courts*—where the person is necessary to be brought into court to testify. That construction cannot be a fair one, which would make the legislature except from the operation of a proviso, limiting the express grant of a power, the whole power intended to be granted. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 99 (1807) (emphasis added).

[107] *See In re* Thaw, 166 F. 71 (3d Cir. 1908); People v. Willard,, 92 Cal. 482, 483, 28 P. 585, 587 (1891); Geery v. Hopkins, 92 Eng. Rep. 69 (K.B. 1702) (semble); Gordon's Case, 105 Eng. Rep. 498 (K.B. 1814); Brown v. Gisborne, 2 Dowling (N.S.) 963 (Q.B. 1843); W. CHURCH, *supra* note 44, at 91.

I have been unable to find any unambiguous case authority previous to *Ex parte* Bollman. However, the preamble of an English statute of 1803 refers to the fact that *ad testificandum* writs had been "frequently awarded by the judges of his majesty's courts of record" to produce prisoners to give testimony before those courts. The statute went on to provide that the writ might be issued by these judges to produce a prisoner to give testimony before a court martial. Act of 1803, 43 Geo. 3, c. 140.

[108] In determining the reach of the habeas corpus, Gasquet v. Lapeyre, 242 U.S. 367 (1917), can hardly be authoritative. It is true that Mr. Justice Van Devanter did say that "Section 9 of article 1, as has long been settled, is not restrictive of state, but only of national, action." *Id.* at 369. But he cited only cases dealing with the 6th clause of section 9, prohibiting a preference for the ports of one state over those of another. More decisive is the fact that the person in the *Gasquet* case who invoked the protection of the habeas clause obtained in the state court not only the writ but his discharge. *Id.* at 368–69. A judgment of "interdiction," or guardianship had been entered in the Louisiana civil trial court on the basis that Gasquet was incompetent to handle his affairs. Contemporaneously, a Louisiana criminal court had ordered Gasquet confined because of his alleged incompetency. Gasquet appealed the civil court proceeding to the supreme court of Louisiana and, before his appeal was heard, sought and won his release on habeas corpus in the court of appeal of that state on the ground that he was competent. It was merely the failure of the Louisiana Supreme Court to give collateral effect to the court of appeal's decision *on* competency which Gasquet protested in the Supreme Court. The Louisiana Supreme Court said: "[I]*f* the court of appeal had authority to set aside the commitment of the criminal district court and release Mr. Gasquet . . . the judgment of the court of appeal would nevertheless have no effect upon the judgment of interdiction . . ." Interdiction of Gasquet, 136 La. 957, 962–63, 68 So. 89, 91 (1915).

[109] See text following note 91 *supra*.

[110] 8 U.S. (4 Cranch) at 98 (emphasis added).

[111] A judgment in an action for the recovery of money or property now or hereafter entered in any district court which has become final by appeal or expiration of time for appeal may be registered in any other district by filing therein a certified copy of such judgment. A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner. 28 U.S.C. § 1963 (1964).

[112] Ch. 32, 1 Stat. 727.

[113] Id. § (emphasis added). Marshall's depreciation of the ancillary uses *of* habeas corpus for the courts of the United States was shortly shown to be mistaken. In United States v. French, 25 F. Cas. 1217 (No. 15,165) (C.C.D.N.H. 1812), French on being arrested by United States authorities, was admitted to bail to appear at a later term. In the meantime, he was confined in state custody *on* civil process. His bail sought habeas corpus so that they might be discharged but were unsuccessful, presumably because of the force given the proviso *of section* 14. This attempted use of habeas corpus was extremely well-founded in precedent. *See* French's Case, 91 Eng. Rep. 308 (K.B. 1704).

[114] Winder v. Caldwell, 55 U.S. (14 How.) 434, 443 (1852); Holland's Heirs v. Crow, 27 N.C. 448 (1845); 4 M. BACON, A NEW ABRIDGEMENT OF THE LAW 409 (5th ed. 1786) [hereinafter cited as BACON]; T. FOSTER, A TREAT-

ISE ON THE WRIT OF SCIRE FACIAS 2 (1851); 2 W. TIDD, THE PRACTICE OF THE COURTS OF KING'S BENCH AND COMMON PLEAS 1090 (9th ed. 1828).

[115] 4 BACON 409.

[116] "A *scire facias* is a judicial writ, issued for the purpose of substantiating and carrying into effect an antecedent judgment; and ought therefore to issue from the court rendering such judgment, and where the records of it remain." Jarvis v. Rathburn, 1 Kirby (Conn.) 220 (1787). "These points are to be considered settled . . . That the proceedings on sci. fa. must be in the same court where the proceedings on the original action are kept of record." Grimske's Executor v. Mayrant, 2 Brev. (S.C.) 202, 209–10 (1807). "It is also a principle well settled, that a *scire facias* can issue from no court but one in possession of the record upon which it issues." Commonwealth v. Downey, 9 Mass. 520, 552 (1813). "A *scire facias* is a writ necessarily founded on some matter of record, and must issue out of the court where that record is." T. FOSTER, *supra* note 114, at 2.

[117] Pullman's Palace-Car Co. v. Washburn, 66 F. 790, 793 (C.C.D. Mass. 1895). Marshall himself in 1810 declared a scire facias to be "a continuance of the original action." M'Knight v. Craig's Adm'r, 10 U.S. (6 Cranch) 183, 187 (1810).

[118] United States v. American Bell Tel. Co., 128 U.S. 315 (1888).

[119] 4 BACON 415–16.

[120] *Id.*

[121] Pennsylvania *ex rel.* Attorney Gen. v. Boley, 1 Weekly Notes 303 (Pa. 1874). *See also* Holland's Heirs v. Crow, 27 N.C. 448 (1845).

[122] Carroll's Lessee v. Llewellin, 1 Md. 162, 165 (1750). This was an action of ejectment where one of the parties was relying on a scire facias obtained in 1678.

[123] Jackson *ex dem.* Manicus v. Lawton, 10 Johns, 23, 24–25 (N.Y. 1813). Kent here dealt with the problem of whether a second patentee could sue out a scire facias as well as the first. The English rule was that he could not. Kent, in explaining the English rule, remarked: "The *English* practice of suing out a *scire facias* by the first patentee may have grown out of the rights of the prerogative, and it ceases to be applicable with us." *Id.* at 25. In the *American Bell Telephone Co.* case Mr. Justice Miller misread this remark to mean that scire facias to cancel land patents had no application in America. United States v. American Bell Tel. Co., 128 U.S. 315, 364 (1888).

[124] Ch. 7, § 10, [1798] N.C. Laws.

[125] Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 76.

[126] *Id.*

[127] *Id.*

[128] *Id.* § 11, 1 Stat. 78.

[129] *Id.* § 12.

[130] The preceding part of the section is:

And be it further enacted, That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice-consul shall be a party. And the trial of issues of fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. *Id.* § 13.

[131] *Id.*

[132] This appears to have been the view of Mr. Justice Barbour, Kendall v. United States, 37 U.S. (12 Pet.) 524, 650–51 (1838).

[133] Judiciary Act of 1801, ch. 4, § 2, 2 Stat. 89 (repealed by Act of April 29, 1801, ch. 31, 2 Stat. 122).

[134] *Id.*

[135] See text accompanying note 131 *supra.*

[136] Judiciary Act of 1801, ch. 4, § 2, 2 Stat. 89. *Compare id. with* Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 80 (reproduced in note 130 *supra*).

[137] These writs were characterized as "prerogative" since they always marked an extraordinary royal intervention which, with the crown, was discretionary. The term "prerogative writ" therefore is used in contradistinction to the writ "of right." There is some confusion in applying this terminology to the various writs. Bacon says, for example, that habeas corpus "is deemed a Prerogative Writ, which the King may issue to any place as he has a Right to be informed of the State and Condition of the Prisoner, and for what Reasons he is confined. It is also in regard to the Subject deemed his Writ of Right. . . ." 3 BACON 2. *See also* Goodnow, *The Writ of Certiorari,* 6 POL. SCI. Q. 493, 497 (1891).

[138] A writ of quo warranto is in the nature of a writ of right for the King, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claims, in order to determine the right. It lies also in case of non-user or long neglect of a franchise, or misuser or abuse of it . . ." 3 W. BLACKSTONE, COMMENTARIES *262.

[139] 2. BACON 207–09; R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 54 (1941).

[140] Certiorari was used by a reviewing court to supply defects in a record. 2 BACON 204. Habeus corpus was used "where a person is sued, and in Gaol, in some inferior Jurisdiction, and is willing to have the Cause determined in some superior court, which hath Jurisdiction over the Matter; in this Case the body is to be removed by *Habeus Corpus,* but the Proceedings must be removed by *Certiorari.*" 3 BACON 2. Mandamus obviously had a variety of appellate uses. For example, it issued to compel a judge to sign a bill of exceptions. *Ex parte* Crane, 30 U.S. (5 Pet.) 190 (1831). Procedendo was used to remand when a case had been improvidently removed to a higher court. 3 W. BLACKSTONE, COMMENTARIES * 110. Prohibition was used to provide a sort of "anticipatory review." *Ex parte* Peru, 318 U.S. 578, 591 (1943) (Frankfurter, J., dissenting). *See also* Goddard, *The Prerogative Writs,* 32 N.Z.L.J. 199 (1956).

[141] Certiorari in the 18th century could not be used when a writ of error would lie. As an independent writ of review, it lay only to challenge jurisdictional errors. Goddard, *supra* note 140, at 214.

[142] I have here tried merely to restate the exposition given in the text following note 105 *supra.*

[143] I have not been able to determine if there is any special significance in the peculiar punctuation used—a period followed by a dash.

[144] In the argument in *In re Metzger,* 46 U.S. (5 How.) 176 (1847), Attorney General, later Justice, Nathan Clifford noticed the dual character of section 14. Metzger had sought habeas corpus in the Supreme Court after a district judge in chambers had remanded him for extradition to France. One of Clifford's arguments against the jurisdiction of the Supreme Court was that the only grant of the *ad subjiciendum* power in section 14 was to individual justices and judges:

There are two clauses in the section upon this subject which should be treated separately. The seeming inconsistency, if any exists, in the cases decided, has doubtless arisen by omitting to keep clearly in view the manifest distinction in the nature and character of the power conferred by these two clauses. The first provides, that "all the before mentioned courts of the United States shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." This clause undoubtedly authorizes the issuing of inferior writs of *habeas corpus* in aid of jurisdiction, which have been long known in the practice of courts, and are indispensable in the course of legal proceedings. Bac. Abr., *Habeas Corpus,* A; 2 Chitty's B. Com., 130. The second clause is in these words: "And that either of the justices of the Supreme Court, as well as the judges of the District Courts, shall have power to grant writs of *habeas corpus,* for the purpose of an inquiry into the cause of commitment." Undoubtedly this clause authorizes the issue of the great writ of *habeas corpus ad subjiciendum,* which is of general use to examine the legality of commitments in criminal cases. The power conferred by this clause is expressly delegated to either of the justices of the Supreme Court, and not to the whole, when convened for the trial of causes. If the question were one of new impression, it would seem to follow, that the authority to be derived from the law should be exercised according to the language of the act. *Id.* at 187.

[145] Judiciary Act of 1801, ch. 4, § 30, 2 Stat. 98. The section reads:

And be it further enacted, That every justice of the supreme court of the United States, and every judge of any circuit or district court shall be, and hereby is authorized and empowered, to grant writs of habeas corpus, for the purpose of inquiring into the cause of commitment, and thereupon to discharge from confinement, on bail or otherwise: *Provided always,* that no writ of habeas corpus, to be granted under this act, shall extend to any prisoner or prisoners in gaol, unless such prisoner or prisoners be in custody, under or by colour of the authority of the United States, or be committed for trial before some court of the same; or be necessary to be brought into court to give testimony.

[146] In making this statement, I have given due allowance to the fact that the proviso makes itself applicable to writs of habeas "granted under this *act.*" It is clear from the context that the only writs of habeas corpus that were referred to were those for the "purpose of inquiring into the cause of commitment," or *ad subjiciendum* writs, when issued by individual justices and judges. The Act of 1801 speaks in terms of habeas corpus in only one other place, in section 2 dealing with the writ power of the Supreme Court. See the text accompanying note 134 *supra.*

It is possible to argue that for habeas the prohibition of the proviso in the 1801 Act, ch. 4, 2 Stat. 89, applied, in addition to justices and judges, not only to the Supreme Court, but to the circuit courts; any argument that it applied to the district courts is impossible. The Act of 1801 gave to the circuit courts "all the powers heretofore granted by law to the circuit courts of the United States, unless where otherwise provided by this act." *Id.* § 10. It possibly could be contended that section 10 is a re-grant to the circuit court of the power given the circuit court by the 1789 Act's section 14. While section 2 of the 1801 Act clearly displaced section 14 as far as the Supreme Court is concerned, and while section 30 of the 1801 Act clearly displaced section 14 in respect to individual judges and the proviso, a small stub of section 14 remains—that part of its first sentence applicable to circuit and district courts. Thus, after the 1801 Act, section 14 of the 1789 Act is modified as if it read: "The circuit and district courts shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary in the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

[147] Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81.

[148] In another view, however, one might follow rigorously the formal organization of the

sentence and proviso and adhere to the notion that only habeas corpus *ad subjiciendum* was authorized. The "evidence" clause under this view is directed to the situation where the prisoner is needed to testify in his *own* habeas corpus hearing. What may have been involved was merely a matter of habeas corpus procedure. Before 1789, the usual practice was for habeas corpus to issue; then the prisoner was produced, thereby expending the force of the writ; then, the judge made an order for discharge or bail or remand. Toward the end of the 18th century a procedure developed whereby the prisoner was not always produced but rather the gaoler was called upon to show cause why the writ should not issue. Since permissible factual disputes were few (the return was not traversable), there would not ordinarily be any need to issue the writ, but the legality of the prisoner's detention could be adjudged in his absence. If it should be found that the prisoner was illegally detained, his discharge could be ordered. Thus, all that the proviso may have been trying to accomplish was to tell federal judges to resort to this "show cause" procedure in all cases where the prisoner was not held by federal authority. Considering only the face of the statute, this view is grammatically more tenable than that given in the text, and it of course renders the proviso insignificant. On the procedure in habeas corpus, see Goddard, *supra* note 140, at 214.

[149] 31 Car. 2, c.2.

[150] Jenkes Case [1676], 6 State Trials 1190, 1196 (T. Howell comp. 1816).

[151] *Id.* Another relevant purpose of the English Act was to deal with the problem of judges subservient to the crown. The solution was to impose heavy penalties on judges who improperly refused the writ. Habeas Corpus Act of 1679, 31 Car. 2, c.2, § 10. As in other respects, here too the Constitution with its provision for an independent judiciary legislation unnecessary.

[152] *Id.* § 3.

[153] *Id.* § 4.

[154] *Id.* § 18.

[155] 3 W. BLACKSTONE, COMMENTARIES *135.

[156] 62 U.S. (21 How.) 506 (1858). The sustained effort by the states in the teeth of the supremacy clause to make their habeas corpus remedies available to those in federal detention would seem proof enough that federalism does not *require* federal abstention in state prisoner habeas cases. The effort did not abate until Tarble's Case, 80 U.S. (13 Wall.) 397 (1872). Furthermore, in all the speculation spawned by the appearance of the Constitution there is no suggestion that federal habeas corpus should be unavailable to state prisoners. Indeed, the speculation points the other way. *The Federalist* preaches the doctrine of the usefulness of a federal judicial power to protect federal interests. THE FEDERALIST NOS. 80, 81 (A. Hamilton).

[157] 62 U.S. (21 How.) at 516.

[158] U.S. CONST. art. I, § 10.

[159] *Id.* § 6. This minimal projection of federal habeas corpus for state prisoners is not rendered invalid by the habeas corpus clause itself. Habeas corpus, of course, is preeminently remedial. Fay v. Noia, 372 U.S. 391, 427–28 (1963).

[160] *E.g.*, U.S. CONST. art. I, § 2 (providing for congressional action in respect to elections). In respect to this clause, Hamilton argued:

> Nothing can be more evident, than that an exclusive power of regulating elections for the National Government, in the hands of the State Legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs. It is to little purpose to say that a neglect or omission of this kind, would not be likely to take place. The constitutional possibility of the thing, without an equivalent for the risk is an unanswerable objection. THE FEDERALIST No. 59 (A. Hamilton).

[161] It was this problem, which I cannot believe that the Congress of 1789 thought that it had neglected, that inspired the habeas legislation of 1833. Act of March 2, 1833, ch. 57, § 7, 4 Stat. 634. This Act specifically vested only justices and judges with habeas power. One commentator has suggested that this represented a conscious choice by Congress to leave the *courts* out of habeas administration, and to rely altogether on the individually justices and judges. Oaks, *supra* note 73, at 176. The form of the congressional enactment, specifically empowering only justices and judges, may well have been a result of the lingering notion that for courts no legislation was necessary. The same can be said for the Act of August 29, 1842, ch. 257, 5 Stat. 539, securing habeas protection for foreign nationals held in violation of a treaty or the law of nations. Thus I agree with Marshall in at least this regard: It is not likely that Congress intended individual justices and judges to have powers beyond those of courts.

[162] This problem was presented in *Ex parte* Cabrera, 4 F. Cas. 964 (No. 2278) (C.C.D. Pa. 1805) where the State of Pennsylvania threw a Spanish consul in jail on a charge of passing bad checks. Justice Washington, speaking for the circuit court, denied habeas corpus by reading the proviso into the first sentence of section 14. He accomplished this by resort to misquotation albeit indirect: "The 14th section . . . declares that all the courts of the United States, as well as the justices thereof, shall have power to issue wits of habeas corpus provided that such writs shall in no case extend to prisoners in jail, unless where they are in custody under, or by colour of the authority of the United States. . . ." *Id.* at 966. Section 14's susceptibility to misquotation endures to the present day. *See Developments* 1045.

[163] See Elkison v. Delisseline, 8 F. Cas. 493 (No. 4366) (C.C.D.S.C. 1823). The State of South Carolina, fearing the subversive effect of a free Negro circulating among the slave population, provided without judicial proceedings for the incarceration of Negro members of the crew of a foreign ship while the ship was in port. This was plainly in violation of the treaty rights of British nationals. It was also in violation of the commerce clause of the Constitution. U.S. CONST. art. 1, § 8. The circuit court, speaking through Justice Johnson, deemed itself powerless to effect the release of a British sailor who happened to be black.

Justice Johnson denounced the state's action in no uncertain terms as violative of the treaty and unconstitutional as well. Further, he noted that no prospect of federal review existed even on the Supreme Court level since there was no judicial proceeding to review. 8 F. Cas. at 496. He condemned the "obvious mockery" that a party should have a right to his liberty but "no remedy to obtain it." *Id.* Nevertheless, he considered the proviso a bar to relief. But he went on to suggest that if someone brought for the prisoner the writ *de homine replegiando*, he might succeed. *Id.* at 497. *De homine replegiando*, used to "replevy a man," was "entirely antiquated" even in Blackstone's time. 3 W. BLACKSTONE, COMMENTARIES * 128–29.

Johnson's denunciation of the South Carolina statute involved him in a protracted controversy in the public press. *See* Morgan, *Justice William Johnson on the Treaty-Making Power*, 22 GEO. WASH. L. REV. 187 (1953).

[164] See the text at note 35 *supra*.

[165] Act of April 4, 1800, ch. 19, 1 Stat. 19.

[166] *Id.* § 38, 1 Stat. 32.

[167] In Livingston v. Jefferson, 15 F. Cas. 660 (No. 8411) (C.C.D. Va. 1811), Marshall dismissed a rather substantial suit for damages against Jefferson, paying obeisance to the highly vulnerable rule that an action for trespass to reality must be brought in the district where the land lies. Marshall's opinion is still the best criticism of the rule.

[168] A recent commentary suggests that the adoption of the fourteenth amendment in combination with the passage of two acts of Congress, the Judiciary Act of 1789 and the Act of February 5, 1867, "may have served to broaden the protection of the writ by the suspension clause" to the point that so long as there are lower federal courts, state prisoners have a constitutional right of access to them to press habeas claims. *Developments* 1272–73. Just how the passage of acts of Congress can modify the Constitution is not explained, and the commentary seems to admit that by itself the fourteenth amendment has no relation to habeas. *Id.* at 1273 n.56.

The authors' difficulty is entirely self-made. They vary between insisting that the habeas clause is addressed "exclusively to Congress," *id.* at 1264, or to the "federal government," *id.* at 1267, or to the state courts in the event Congress decided to have no lower federal courts *Id.* at 1271. But they are consistent, without citing a shred of evidence, in asserting that the original purpose of the habeas corpus was merely to provide protection for federal prisoners. *Id.* at 1267, 1271–72. Certainly, the testimony of Edmund Randolph points the other way. See the text at note 35 *supra*. More central to the authors' difficulty is their apparent supposition that it was only the adoption of the fourteenth amendment that gave state prisoners significant rights under the Constitution. *Id.* at 1273. But, of course, there were rights flowing from the supremacy clause important to the prisoner and essential to the preservation of the federal government as a going proposition. See the text at notes 159 and 161–62 *supra*. A "purposive analysis" of the habeas clause would include a purpose to supply a remedy to vindicate these rights.

By resort to a "purposive analysis," the commentary finds a "constitutional requirement that there be *some* court with habeas jurisdiction over federal prisoners." *Id* at 1267. So far as it goes, I find no difference in practical result between this approach and the one I have advocated. In the critical situation where Congress has provided federal courts but conferred no habeas jurisdiction, a habeas petition would have to be honored by the first court approached if the proposal is to have any effect.

[169] 5 U.S. (I Cranch) 137 (1803).

[170] U.S. CONST. art. III § 2.

[171] Johnson v. Eisentrager, 339 U.S. 763, 798 (1950) (Black, J. dissenting).

IS INNOCENCE IRRELEVANT? COLLATERAL ATTACK ON CRIMINAL JUDGMENTS

(By Henry J. Friendly) †

Legal history has many instances where a remedy initially serving a felt need has expanded bit by bit, without much thought being given to any single step, until it has assumed an aspect so different from its origin as to demand reappraisal—agonizing or not. That, in my view, is what has happened with respect to collateral attack on criminal convictions. After trial, conviction, sentence, appeal, affirmance, and denial of certiorari by the Supreme Court, in proceedings where the defendant had the assistance of counsel at every step, the criminal process, in Winston Churchill's phrase, has not reached the end, or even the beginning of the end, but only the end of the beginning. Any murmur of dissatisfaction with this situation provokes immediate incantation of the Great Writ, with the inevitable initial capitals, often accompanied by a suggestion that the objector is the sort of person who would

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cheerfully desecrate the Ark of the Covenant. My thesis is that, with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence.

If there be fear that merely listening to such a proposal may contaminate, let me attempt to establish respectability by quoting two statements of Mr. Justice Black:

". . . the defendant's guilt or innocence is at least one of the vital considerations in determining whether collateral relief should be available to a convicted defendant." [1]

And more strongly:

"In collateral attacks . . . I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of doubt on his guilt." [2]

Incredibly, these statements were made in dissent. Even more incredibly, the two other dissenting Justices expressed qualms about them.[3] I believe, with qualifications I will elaborate, that this position ought to be the law and that legislation can and should make it so. When I speak of legislation, I am thinking mainly of federal habeas corpus for state prisoners and its equivalent for federal prisoners, since no other course seems realistic in light of Supreme Court opinions. In many states it may still be possible to reach the proper result by judicial decision. Although, if past experience is any guide, I am sure I will be accused of proposing to abolish habeas corpus, my aim is rather to restore the Great Writ to its deservedly high estate and rescue it from the disrepute invited by current excesses.

Seventeen years ago, in his concurring opinion in *Brown* v. *Allen*,[4] Mr. Justice Jackson expressed deep concern over the "floods of stale, frivolous and repetitious petitions [for federal habeas corpus by state prisoners which] inundate the docket of the lower courts and swell our own." The inundation consisted of 541 such petitions. In 1969, state prisoners filed 7,359 petitions for habeas corpus in the federal district courts, a 100 per cent increase over 1964.[5] Federal prisoners filed 2,817 petitions challenging convictions or sentences, a 50 per cent increase over 1964.[6] Prisoner petitions, including those attacking the conduct of prison officials, totaled 12,924. These "comprise the largest single element in the civil caseload of the district courts" and "accounted for more than one-sixth of the civil filings." [7] There has been a corresponding increase in the load imposed by post-conviction petitions upon the federal courts of appeals. Despite the safeguard intended to be afforded by the requirement of a certificate of probable cause,[8] there were over twice as many *appeals* by state prisoners in 1969 as there were *petitions* in 1952.[9] A similar explosion of collateral attack has occurred in the courts of many of the states. If 541 annual petitions for federal habeas corpus by state prisoners were an "inundation," what is the right word for 7,500? [10]

The proverbial man from Mars would surely think we must consider our system of criminal justice terribly bad if we are willing to tolerate such efforts at undoing judgments of conviction. He would be surprised, I should suppose, to be told both that it never was really bad and that it has been steadily improving, particularly because of the Supreme Court's decision that an accused, whatever his financial means, is entitled to the assistance of counsel at every critical stage.[11] His astonishment would grow when we told him that the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime.[12] His surprise would mount when he learned that collateral attack on a criminal conviction by a court of general jurisdiction is almost unknown in the country that gave us the writ of habeas corpus and has been long admired for its fair treatment of accused persons.[13] With all this, and with the American Bar Association having proposed standards relating to post-conviction remedies [14] which, despite some kind words about finality, in effect largely repudiate it, the time is ripe for reflection on the right road for the future.

I wish to emphasize at the outset that my chief concern is about the basic principle of collateral attack, rather than with the special problem of federal relief for state prisoners which has absorbed so much attention since *Brown* v. *Allen*. I must therefore make my main analysis in the context of a unitary system. My model will be designed for our only pure example of a unitary structure, the federal system when dealing with federal convictions. Later I shall advocate adoption of the same model by the states for their much larger number of prisoners and of corresponding changes with respect to federal habeas for state prisoners. I shall conclude by showing that these proposals are wholly consistent with the Constitution.

I

For many reasons, collateral on criminal convictions carries a serious burden of justification.

First, as Professor Bator has written, "it is essential to the educational and deterrent functions of the criminal law that we be able to say that one violating that law will swiftly and certainly become subject to punishment, just punishment." [15] It is not an answer that a convicted defendant generally remains in prison while collateral attack is pending. Unbounded willingness to entertain attacks on convictions must interfere with at least one aim of punishment—"a realization by the convict that he is justly subject to sanction, that he stands in need of rehabilitation." This process can hardly begin "if society continuously tells the convict that he may not be justly subject to reeducation and treatment in the first place." [16] Neither is it an adequate answer that repentance and rehabilitation may be thought unlikely in many of today's prisons. That is a separate and serious problem, demanding our best thought [17] but irrelevant to the issue here.

A second set of difficulties arises from the fact that under our present system collateral attack may be long delayed—in *habeas corpus* as long as the custody endures,[18] in federal *coran nobis* forever.[19] The longer the delay, the less the reliability of the determination of any factual issue giving rise to the attack.[20] It is chimerical to suppose that police officers can remember what warnings they gave to a particular suspect ten years ago, although the prisoner will claim to remember very well. Moreover, although successful attack usually entitles the prisoner only to a retrial, a long delay makes this a matter of theory only.[21] Inability to try the prisoner is even more likely in the case of collateral attack on convictions after guilty pleas, since there will be no transcript of testimony of witnesses who are no longer available.[22] Although the longer the attack has been postponed, the larger the proportion of the sentence that will have been served, we must assume that the entire sentence was warranted.[23] The argument against this, that only a handful of prisoners gain release, whether absolute or conditional, by post-conviction remedies, is essentially self-defeating,[24] even if it is factually correct. To such extent as accurate figures might indicate the problem of release to have been exaggerated, they would also show what a gigantic waste of effort collateral attack has come to be. A remedy that produces no result in the overwhelming majority of cases, apparently well over ninety per cent, an unjust one to the state in much of the exceedingly small minority, and a truly good one only rarely,[25] would seem to need reconsideration with a view to caring for the unusual case of the innocent man without being burdened by so much dross in the process.

Indeed, the most serious single evil with today's proliferation of collateral attack is its drain upon the resources of the community—judges, prosecutors, and attorneys appointed to aid the accused, and even of that oft overlooked necessity, courtrooms. Today of all times we should be conscious of the falsity of the bland assumption that these are in endless supply.[26] Everyone concerned with the criminal process, whether his interest is with the prosecution, with the defense, or with neither, agrees that our greatest single problem is the long delay in bringing accused persons to trial.[27] The time of judges, prosecutors, and lawyers now devoted to collateral attacks, most of them frivolous, would be much better spent in trying cases. To say we must provide fully for both has a virtuous sound but ignores the finite amount of funds available in the face of competing demands.

A fourth consideration is Justice Jackson's never refuted observation that "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones." [28] The thought may be distasteful but no judge can honestly deny it is real.

Finally, there is the point which, as Professor Bator says, is "difficult to formulate because so easily twisted into an expression of mere complacency." [29] This is the human desire that things must sometime come to an end. Mr. Justice Harlan has put it as well as anyone:

"Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." [30]

Beyond this, it is difficult to urge public respect for the judgments of criminal courts in one breath and to countenance free reopening of them in the next. I say "free" because, as I will later show, the limitation of collateral attack to "constitutional" grounds has become almost meaningless.

These five objections are not at all answered by the Supreme Court's conclusory pronouncement: "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." [31] Why do they have *no* place? One will readily agree that "where life or liberty is at stake," different rules should govern the determination of guilt than when only property is at issue: The prosecution must establish guilt beyond a reasonable doubt, the jury must be unanimous, the defendant need not testify, and so on. The defendant must also have a full and fair opportunity to show an infringement of constitutional rights by the prosecution even though his guilt is clear. I would agree that even when he has had all this at trial and on appeal, "[t]he policy against incarcerating or executing an innocent man . . . should far outweigh the desired termination of litigation." [32] But this shows only that "conventional notions of finality" should not have *as much* place in criminal as in civil litigation, not that they should have *none*. A statement like that just quoted, entirely sound with respect to a man who is or may be innocent, is readily metamorphosed into broader ones, such as the Supreme Court's pronouncement mentioned above,[33] expansive enough to cover a man steeped in guilt who attacks his conviction years later because of some technical error by the police that was or could have been considered at his trial.

Admittedly, reforms such as I am about to propose might not immediately meet some of these points. Aside from the most drastic

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measures,[34] changes that would narrow the grounds available for collateral attack would not necessarily discourage prisoners from trying; they have everything to gain and nothing to lose. Indeed, collateral attack may have become so much a way of prison life as to have created its own self-generating force; it may now be considered merely something done as a matter of course during long incarceration. Today's growing number of prisoner petitions despite the minute percentage granted points that way. But I would hope that over a period of time the trend could be reversed, although the immediate response might be less than dramatic. Furthermore, a requirement that, with certain exceptions, an applicant for habeas corpus must make a colorable showing of innocence would enable courts of first instance to screen out rather rapidly a great multitude of applications not deserving their attention and devote their time to those few where injustice may have been done, and would effect an even greater reduction in the burden on appellate courts. In any event, if we are dissatisfied with the present efflorescence of collateral attack on criminal convictions and yet are as unwilling as I am to outlaw it and rely, as in England, solely on executive clemency,[35] it is important to consider reform. If mine is not the best mousetrap, perhaps it may lead others to develop a better one.

II

Broadly speaking, the original sphere for collateral attack on a conviction was where the tribunal lacked jurisdiction either in the usual sense [36] or because the statute under which the defendant had been prosecuted was unconstitutional [37] or because the sentence was one the court could not lawfully impose.[38] Thirty years ago, in approving the use of habeas corpus to invalidate a federal conviction where the defendant had lacked the assistance of counsel, Mr. Justice Black was careful to kiss the jurisdictional book.[39] He said that although the court may indeed have had "jurisdiction" at the beginning of the trial, this could be lost "due to failure to complete the court" as the sixth amendment was thought to require.[40]

Many of the most famous and salutary uses of habeas can be fitted under this rubric. *Moore v. Dempsey* [41] was clearly such a case, and insofar as *Brown v. Allen* and its companion case, *Speller v. Allen*,[42] dealt with racial discrimination in the selection of the jury, they also could be considered as such. Claims that a jury was subjected to improper influences by a court officer [43] or had been overcome by excessive publicity [44] are also of this sort. In such cases the criminal process itself has broken down; the defendant has not had the kind of trial the Constitution guarantees. To be sure, there remains a question why, if the issue could have been raised on appeal and either was not or was decided adversely, the defendant should have a further opportunity to air it.[45] Still, in these cases where the attack concerns the very basis of the criminal process, few would object to allowing collateral attack regardless of the defendant's probable guilt. These cases would include all those in which the defendant claims he was without counsel to whom he was constitutionally entitled. This need not rest on Justice Black's "jurisdictional" approach. For, as Justice Schaefer of Illinois has so wisely said, "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." [46]

Another area in which collateral attack is readily justified irrespective of any question of innocence is where a denial of constitutional rights is claimed on the basis of facts which "are *dehors* the record and their effect on the judgment was not open to consideration and review on appeal." [47] The original judgment is claimed to have been perverted, and collateral attack is the only avenue for the defendant to vindicate his rights. Examples are convictions on pleas of guilty obtained by improper means,[48] or on evidence known to the prosecution to be perjured,[49] or where it later appears that the defendant was incompetent to stand trial.[50]

A third justifiable area for collateral attack irrespective of innocence is where the state has failed to provide proper procedure for making a defense at trial and on appeal. The paradigm is *Jackson v. Denno*,[51] allowing collateral attack by federal habeas corpus on all New York convictions where the voluntariness of a confession had been submitted to the jury without a prior determination by the judge. Whether the case called for the retroactive remedy imposed may be debatable; in my view, the former New York procedure, although surely inferior to that prescribed by the Supreme Court, was a long way from being so shocking that it demanded the hundreds of state *coram nobis* and federal habeas corpus proceedings for past convictions which *Jackson* spawned.[52] Still, one can hardly quarrel with the proposition that if a state does not afford a proper way of raising a constitutional defense at trial, it must afford one thereafter, and this without a colorable showing of innocence by the defendant.

New constitutional developments relating to criminal procedure are another special case. The American Bar Association Report says that these produce a growing pressure for post-conviction remedies.[53] But here the Supreme Court itself has given us the lead. In only a few instances has it determined that its decisions shall be fully retroactive—the right to counsel, *Jackson v. Denno*, equal protection claims,[54] the sixth amendment right of confrontation,[55] and double jeopardy.[56] In most cases the Court has ruled that its new constitutional decisions concerning criminal procedure need not be made available for collateral attack on earlier convictions. These include the extension to the states of the exclusionary rule with respect to illegally seized evidence,[57] the prohibition of comment on a defendant's failure to take the stand,[58] the rules concerning interrogation of persons in custody,[59] the right to a jury trial in state criminal cases,[60] the requirement of counsel at line-ups,[61] and the application of the fourth amendment to non-trespassory wiretapping.[62] While neither a state nor the United States is bound to limit collateral attack on the basis of a new constitutional rule of criminal procedure to what the Supreme Court holds to be demanded, I see no occasion to be holier than the pope.

None of these four important but limited lines of decision supports the broad proposition that collateral attack should always be open for the asserted denial of a "constitutional" right, even though this was or could have been litigated in the criminal trial and on appeal. The belief that it should stems mainly from the Supreme Court's construction of the Habeas Corpus Act of 1876 [63] and its successor,[64] providing that the writ may issue "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Despite this language no one supposes that a person who is confined, after a proper trial, may mount a collateral attack because the court has misinterpreted a law of the United States;[65] indeed the Supreme Court has explicitly decided the contrary even where the error was as apparent as could be.[66] In such instances we are content that "conventional notions of finality" should keep an innocent man in prison unless, as one would hope, executive clemency releases him.

As a matter of the ordinary reading of language, it is hard to see how the result can be different when a constitutional claim has been rejected, allegedly in error, after thoroughly constitutional proceedings, and the history does not suggest that the statute was so intended.[67] The reason why the Supreme Court did so construe the Act in *Brown v. Allen* [68] was, I believe, its consciousness that, with the growth of the country and the attendant increase in the Court's business, it could no longer perform its historic function of correcting constitutional error in criminal cases by review of judgments of state courts and had to summon the inferior federal judges to its aid.[69] Once it was held that state prisoners could maintain proceedings in the federal courts to attack convictions for constitutional error after full and fair proceedings in the state courts, it was hard to read the same statutory words as meaning less for federal prisoners, even though the policy considerations were quite different.[70] And once all this was decided, it was easy to slide into the belief that the states should, or even must, similarly expand their own procedures for collateral attack.

With a commentator's ability to consider policy free from imprisonment by statutory language, I perceive no general principle mandating a second round of attacks simply because the alleged error is a "constitutional" one. We have been conclusorily told there is an institutional need for a separate proceeding—one insulated from inquiry into the guilt or innocence of the defendant and designed specifically to protect constitutional rights." [71] No empirical data is cited to support this, and so far as concerns proceeding within the same system, it seems fanciful. The supposition that the judge who has overlooked or disparaged constitutional contentions presented on pre-trial motions to suppress evidence or in the course of trial will avidly entertain claims of his own error after completion of the trial and a guilty verdict defies common sense.[72]

The dimensions of the problem of collateral attack today are a consequence of two developments.[73] One has been the Supreme Court's imposition of the rules of the fourth, fifth, sixth and eighth amendments concerning unreasonable searches and seizures, double jeopardy, speedy trial, compulsory self-incrimination, jury trial in criminal cases, confrontation of adverse witnesses, assistance of counsel, and cruel and unusual punishments, upon state criminal trials. The other has been a tendency to read these provisions with ever increasing breadth. The Bill of Rights, as I warned in 1965, has become a detailed Code of Criminal Procedure,[74] to which a new chapter is added every year. The result of these two developments has been a vast expansion of the claims of error in criminal cases for which a resourceful defense lawyer can find a constitutional basis.

Any claimed violation of the hearsay rule is now regularly presented not as a mere trial error but as an infringement of the sixth amendment right to confrontation.[75] Denial of adequate opportunity for impeachment would seem as much a violation of the confrontation clause as other restrictions on cross-examination have been held to be.[76] Refusal to give the name and address of an informer can be cast as a denial of the sixth amendment's guarantee of "compulsory process for obtaining witnesses." Inflammatory summations or an erroneous charge on the prosecution's burden of proof [77] become denials of due process. So are errors in identification procedures.[78] Instructing a deadlocked jury of its duty to attempt to reach a verdict [79] or undue participation by the judge in the examination of witnesses can be characterized as violations of the sixth amendment right to a jury trial. Examples could readily be multiplied. Today it is the rare criminal appeal that does *not* involve a "constitutional" claim.

Footnotes at end of article.

I am not now concerned with the merits of these decisions which, whether right or wrong, have become part of our way of life. What I do challenge is the assumption that simply because a claim can be characterized as "constitutional," it should necessarily constitute a basis for collateral attack when there has been fair opportunity to litigate it at trial and on appeal. Whatever may have been true when the Bill of Rights was read to protect a state criminal defendant only if the state had acted in a manner "repugnant to the conscience of mankind," [80] the rule prevailing when *Brown* v. *Allen* was decided, the "constitutional" label no longer assists in appraising how far society should go in permitting relitigation of criminal convictions. It carries a connotation of outrage—the mob-dominated jury, the confession extorted by the rack, the defendant deprived of counsel—which is wholly misplaced when, for example, the claim is a pardonable but allegedly mistaken belief that probable cause existed for an arrest or that a statement by a person not available for cross-examination came within an exception to the hearsay rule. A judge's overly broad construction of a penal statute can be much more harmful to a defendant than unwarranted refusal to compel a prosecution witness on some peripheral element of the case to reveal his address.[81] If a second round on the former is not permitted, and no one suggests it should be, I see no justification for one on the latter in the absence of a colorable showing of innocence.

It defies good sense to say that after government has afforded a defendant every means to avoid conviction, not only on the merits but by preventing the prosecution from utilizing probative evidence obtained in violation of his constitutional rights, he is entitled to repeat engagements directed to issues of the latter type even though his guilt is patent. A rule recognizing this would go a long way toward halting the "innundation;" it would permit the speedy elimination of most of the petitions that are hopeless on the facts and the law, themselves a great preponderance of the total, and of others where, because of previous opportunity to litigate the point. release of a guilty man is not required in the interest of justice even though he might have escaped deserved punishment in the first instance with a brighter lawyer or a different judge.

III

This is an appropriate place to consider how far the recent ABA Report on Post-Conviction Review helps toward achieving what I think is the proper result. I submit it works in exactly the wrong direction.

A reader taking only a casual look at the Report might regard it as going a long way in the direction of promoting finality. The Introduction proclaims:

"A general principle underlying these standards is that once an issue of fact or law has been finaly determined that adjudication ought to be final and binding." [82]

Section 6.1 states: "Unless otherwise required in the interest of justice, any grounds for post-conviction relief as set forth in section 2.1 which have been fully and finally litigated in the proceedings leading to the judgment of conviction should not be relitigated in post-conviction proceedings." [83] However, what would otherwise be the salutary effect of this is largely destroyed by the definition, § 6.1(a)(ii), that a question has been "fully and finally litigated" only "when the highest court of the state to which a defendant can appeal as of right has ruled on the merits of the question." If, for example, the defendant did not appeal because his lawyer thought that the trial court was correct or that any error would be found immaterial or that he would be convicted on a retrial, the issue remains open for collateral attack under the ABA draft unless there has been what is called an "abuse of process." Moreover, absent "abuse of process," claims that might have been put were not raised even in the trial court also remain open. The "abuse of process" exception, § 6.1(c), is put in terms of "deliberately and inexcusably" failing to pursue the point. While we are not told exactly what these adverbs mean, they clearly refer to something considerably beyond a negligent or even a considered decision not to utilize an available remedy; the state does not bring itself within them even by showing a deliberate failure *simpliciter* but must demonstrate "a deliberate failure to present an issue *with an intention to present it later*." [84]

Save for the rare instance when the state is known to have evidence to refute a claim which it may not have later, it is exceedingly hard to visualize a case where a defendant or his lawyer would deliberately lay aside a meritorious claim so as to raise it after the defendant was jailed. It is even more difficult to imagine how the state could ever prove this. But if these are the only cases in which collateral attack is precluded by failure to raise a claim or to appeal from its denial, the ABA Report, while professing devotion to finality, would in fact work a wholesale repudiation of it.[85] The explanation, in a somewhat different context, that "since the inquiry required to establish abuse of process is far more burdensome than that required to determine the validity of the claim, and since most applications do not present valid claims, it is simpler and more expeditious to reach the merits of claims before consideration of any suggestions of abuse of process," [86] does not explain at all. The high proportion of invalid claims would seem rather to be a reason for imposing measures to protect the courts from the heavy burden of considering them,[87] and "the inquiry required to establish abuse of process" is "burdensome" only because the Report gives the term a meaning all its own.

Meaningful discussion of the preclusive effect of failing to raise a point at trial or pursue an appeal has been bedevilled by the concept of waiver. "Waiver" has been well said to be "a troublesome term in the law." [88] The ABA Report concedes that "[t]he term is subject to multiple meanings or shades of meanings which can result in confusion in communication and, perhaps, in thought." [89] Not only they can, they do. The initial and still the most cited use of this concept in the field with which we are here concerned, that by Mr. Justice Black in *Johnson v. Zerbst*,[90] was wholly appropriate. The sixth amendment, as he read it, required the provision of counsel; none had been provided; therefore the writ should issue unless the defendant had waived his right. Similar considerations are applicable to coercive interrogation or illegal search. The Constitution protects against compelled self-incrimination; thus an incriminating statement made under compulsion cannot be used over timely objection unless before answering the defendant had waived his privilege not to speak. It protects also against unreasonable searches; if there has been a search of a home without a warrant, the fruits thus cannot be used over objection unless the defendant has consented to the search. But it is a serious confusion of thought to transpose this doctrine of substantive law into the courtroom.[91] At that stage the defendant's constitutional right is to have a full and fair opportunity to raise his claims on trial and appeal and the assistantance of counsel in doing so. There is no need to find a "waiver" when the defendant or his counsel has simply failed to raise a point in court, since the state has not deprived him of anything to which he is constitutionally entitled.[92]

If the only available choices were to preclude collateral attack in all cases where the issue was or could have been raised at trial and on appeal except in the four special situations heretofore enumerated, or to allow it under the scant limitations provided in the ABA Report, the former would be preferable. But, as indicated, I would also allow an exception to the concept of finality where a convicted defendant makes a colorable showing that an error, whether "constitutional" or not,[93] may be producing the continued punishment of an innocent man.

IV

Before going further I should clarify what I mean by a colorable showing of innocence. I can begin with a negative. A defendant would not bring himself within this criterion by showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been unconstitutionally obtained. Many offenders, for example, could not be convicted within the introduction of property seized from their persons, homes or offices. On the other hand, except for the unusual case where there is an issue with respect to the defendant's connection with the property, such evidence is the clearest proof of guilt, and a defendant would not come within the criterion simply because the jury might not, or even probably would not, have convicted without the seized property being in evidence. Perhaps as good a formulation of the criterion as any is that the petitioner for collateral attack must show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.[94]

As indicated, my proposal would almost always preclude collateral attack on claims of illegal search and seizure. This is in sharp contrast to the decision in *Kaufman v. United States*,[95] where the Supreme Court adopted the view of a minority of the courts of appeals.[96] Here I am merely following a trail blazed some years ago by Professor Amsterdam,[97] who surely cannot be accused of lack of sympathy for the criminal defendant He urged that, subject to certain minor qualifications,[98] society not only has no interest in the collateral enforcement of a claim to suppression of illegally obtained evidence but "has the strongest sort of interest against its enforcement." [99] So far as the defendant is concerned, the exclusionary rule is a bonanza conferring a benefit altogether disproportionate to any damage suffered, not so much in his own interest as in that of society.[100] I cannot do better than to quote: "The rule is unsupportable as reparation or compensatory dispensation to the injured criminal; its sole rational justification is the experience of its indispensability in 'exert [ing] general legal pressures to secure obedience to the Fourth Amendment on the part of . . . law enforcing officers' " [101] "As the exclusionary rule is applied time after time, it seems that its deterrent efficacy at some stage reaches a point of diminishing returns, and beyond that point its continued application is a public nuisance." [102] And "if there is one class of cases that I would hazard to say is very probably beyond the point of diminishing returns, it is the class of search and seizure claims raised collaterally. For, so far as the law enforcement officer or the prosecutor is concerned, the incidence of such cases is as unforeseeable as the flip of a coin, the option to raise the claim directly lies solely with the defense." [103]

I find no adequate answer in the majority opinion in *Kaufman v. United States* to these arguments, which Mr. Justice Black recounted in dissent with characteristic vigor and persuasiveness.[104] The majority compendiously tells us that "adequate protection of constitutional rights relating to the criminal trial process requires the continuing

Footnotes at end of article.

availability of a mechanism for relief." [106] This gives everything but the why. If a defendant represented by counsel has had one full and fair opportunity to raise a search and seizure claim, why is there any more need for continuing possibility to litigate this issue than any other? We are instructed that "[t]he availability of post-conviction relief serves significantly to secure the integrity of proceedings at or before trial and on appeal." [106] If "integrity" is being used in its sense of a "quality or state of being complete or undivided," just the opposite is true. I suppose the word is being used in its other sense of "utter sincerity, honesty, and candor," but even so the conclusion is hard to accept. As Mr. Justice Harlan has observed, *Kaufman* seems to rest on the idea that "the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." [107] This is an exceedingly serious indictment of the lower federal courts, for which I perceive no adequate factual basis. With today's awareness of constitutional rights, flagrant cases of police misconduct in search and seizure will rarely escape detection and correction in the trial or appellate process, even with the most slothful of defense counsel and the most careless of judges. The non-frivolous fourth amendment cases likely to give rise to collateral attack are those near the borderline, presenting hard questions of the meaning or application of Supreme Court decisions. Yet these are the cases where the deterrent function of the exclusionary rule is least important,[108] and the argument for limiting collateral attack to instances, almost never present in search and seizure, where constitutional error may have led to the conviction of an innocent man is the strongest.[109]

Another type of claim, certain to be a prodigious litigation breeder, concerning which I would forbid collateral attack in the absence of a colorable showing of innocence, consists of cases arising under *Miranda v. Arizona*.[110] Consider, for example, one of the knottiest problems in the application of that case, namely, whether questioning by law enforcement officers without the *Miranda* warnings took place "after a person had been taken into custody or otherwise deprived of his freedom of action in any significant way." [111] Almost all defense lawyers, indeed many defendants themselves, must be aware of the Supreme Court's new requirements about questioning in the station house. But suppose the lawyer does not know that *Miranda* may apply prior to the defendant's arrival there, or that he does not correctly understand what the field of application is, or that a court properly seized of the problem has held *Miranda* to be inapplicable and this is arguably wrong under existing or later decisions. This is generally not "the kind of constitutional claim that casts some shadow of doubt" upon the defendant's guilt.[112] The mere failure to administer *Miranda* warnings in on-the-scene questioning creates little risk of unreliability, and the deterrent value of permitting collateral attack goes beyond the point of diminishing returns for the same reasons developed in Professor Amsterdam's discussion of search and seizure. I would take the same view of collateral attack based on claims of lack of full warnings or voluntary waiver with respect to station-house questioning where there is no indication of the use of methods that might cast doubt on the reliability of the answers.

The confession involuntary in the pre-*Miranda* sense helps to illustrate where I would draw the line. In a case where the prosecution had no other substantial evidence, as, for example, when identification testimony was weak or conflicting and there was nothing else, I would allow collateral attack regardless of what happened in the original proceedings. Such a case fits the formula that considerations of finality should not keep a possibly innocent man in jail. I would take a contrary view where the state had so much other evidence, even though some of this was obtained as a result of the confession,[113] as to eliminate any reasonable doubt of guilt.

Neither your patience nor mine would tolerate similar examination of the application of my proposal to all constitutional claims. Such soundings as I have taken convince me that in other contexts as well the proposal would fully protect the innocent, while relieving the courts of most of the collateral challenges with which they are now unnecessarily burdened.

V

Assuming that collateral attack by federal prisoners should be restricted as I have suggested, what should be done with respect to the far more numerous prisoners held by the states, in whose hands the maintenance of public order largely rests? [114] The subject has two aspects: The first is whether any changes be made with respect to federal habeas corpus for state prisoners. The second is whether, in formulating their own procedures, the states should do what they would deem appropriate in the absence of the likelihood of a federal proceeding or should allow collateral attack in every case where the eyes of the federal big brother may penetrate.

At first blush it might seem that to whatever extent collateral attack on criminal judgments should be restricted within a unitary system, it ought to be even more so when one system operates on the judgments of another. The case to the contrary rests primarily on the practical inability of the Supreme Court to correct "constitutional" errors in state criminal proceedings through the appellate process.[115] There is, of course, no such impediment when the issue is an important rule of criminal procedure as contrasted to its application in a particular case. The attack on the New York procedure concerning confessions is a good illustration,[116] although the decision chanced to be made in federal habeas corpus, it could have been made just as well when the issue had been presented eleven years earlier on direct review,[117] and the problem would surely again arisen in that form if the *Jackson* case had not come along. Almost all the Court's most important decisions on criminal procedure, for example, those relating to equal protection for indigent defendants,[118] comment on a defendant's failure to testify,[119] the extension to the states of the exclusionary rule with respect to illegally seized evidence,[120] confrontation,[121] and custodial interrogation,[122] have been made on direct review of state judgments.[123]

The argument for federal habeas corpus with respect to prisoners who have had a full and fair hearing and determination of their constitutional claims in the state courts thus must relate to two other categories of constitutional claims—disputed determinations of fact and the application of recognized legal standards. The contention is that only federal judges, with the protection of life tenure and supposedly greater knowledge of any sympathy for the Supreme Court's interpretations of the Constitution, can be trusted with the "final say" in such matters, although great deference to state factual determinations is required.[124] While, if I were to rely solely on my own limited experience, I would think the case for the final federal say has been considerably exaggerated,[125] I do not wish to add to the large amount of literature on this point.[126]

Assuming the final federal say is here to stay, is there any way to accelerate it and thereby avoid the upsetting of a conviction by a federal court when the state can no longer conduct a retrial? One way would be to route appeals from state criminal decisions, whether on direct or on collateral attack, to a federal appellate tribunal—either the appropriate court of appeals or a newly created court [127]—and preclude federal habeas corpus as to issues for which that remedy is available. Although a number of different models could be visualized, one possibility would be this: After a state conviction or denial of post-conviction attack had become final, in those cases where the attack was not upon the constitutionality of a state rule but upon state fact-finding or application of a federal constitutional rule,[128] a petition for review would lie not to the Supreme Court but to the federal appellate court.[129] The standard for granting such review would be quite different from he Supreme Court's on certiorari. It would be more like what the courts of appeals now apply with respect to certificates of probable cause in state prisoner cases—not whether the issue was important to the law but whether the appeal raised a substantial claim of violation of constitutional rights. The criterion for such *appellate* review would thus be considerably more liberal than I have proposed with respect to *collateral attack* within a unitary system. When a prisoner had failed to seek such review, or the appellate court had declined to grant it or had decided adversely, federal habeas corpus with respect to any issue that could have been so presented would be foreclosed, except for those cases where I would preserve collateral attack within a unitary system, and for them only if the state had not provided a means for collateral attack in its own courts. Where it did, the prisoner must use it, and final state decisions would be reviewable in the same manner as proposed for state decisions on direct appeal.

Such a scheme would preserve the original understanding that judgments of the highest courts of the states are to be re-examined only by a federal appellate court rather than at nisi prius.[130] More important, it would force the prisoner to use his federal remedy while the record is reasonably fresh and a retrial is practical. While the proposal depends on the state court's having made an adequate record and findings, the court of appeals could remand where it had not. Perhaps the most serious objection is that unless review by the Supreme Court were severely restricted, or stays in non-capital cases pending application for such review were forbidden, insertion of an appeal to a lower federal appellate tribunal would further postpone the date when a convicted state prisoner begins to serve his sentence. I advance the suggestion only as one warranting discussion, to take place in the larger context of whether the time has not come when the Supreme Court should be relieved of some of its burdens.

Whether there is merit in this proposal or not, I would subject federal habeas for state prisoners to the same limitations that I have proposed for federal prisoners. With the four exceptions noted at the outset, I see no sufficient reason for federal intervention on behalf of a state prisoner who raised or had an opportunity to raise his constitutional claim in the state courts, in the absence of a colorable showing of innocence. It is sufficient if the benefit of fact-finding and the application of constitutional standards by a federal judge is available in cases of that sort.

Assuming that nothing happens on the federal scene, whether through congressional inertia or otherwise, what should the states do with respect to their own systems for collateral attack on convictions? In my view, if a state considers that its system of post-conviction remedies should take the lines I have proposed, it should feel no obligation to go further [131] simply because this will leave some cases whether the only post-conviction review will be in a federal court.

I realize this may seem to run counter to

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what has become the received wisdom, even among many state judges and prosecutors. One part of the angry reaction of the Conference of State Chief Justices to *Brown* v. *Allen* [132] was the recommendation that:

"State statutes should provide a post-conviction process at least as broad in scope as existing Federal statutes under which claims of violation of constitutional right asserted by State prisoners are determined in Federal courts under Federal habeas corpus statutes." [133]

The recommendation for broadening state post-conviction remedies was doubtless salutary in 1954 when many states had few or none.[134] As my remarks have made evident, I recognize a considerable area for collateral attack; indeed, I think there are circumstances, such as post-trial discovery of the knowing use of material perjured evidence by the prosecutor or claims of coercion to plead guilty, where failure to provide this would deny due process of law.[135] My submission here is simply that when a state has done what it considers right and has met due process standards, it should not feel oblige to do more *merely* because federal habeas may be available in some cases where it declines to allow state collateral attack.

The argument against this is that making the state post-conviction remedy fully congruent with federal habeas for state prisoners (1) will economize judicial time, (2) will reduce state-federal conflict, and (3) will provide a record on which the federal judge can act. Except for the few cases where pursuit of the state remedy will result in a release, absolute or conditional, the first argument rests on the premise that many state prisoners will accept the state's adverse judgment. I know of no solid evidence to support this,[136] my impression is that prisoners unsuccessful in their post-conviction applications through the state hierarchy almost inevitably have a go at federal habeas, save when their sentences have expired. In the great majority of cases the job simply has to be done twice. Pleasant though it is for federal judges to have the task initially performed by their state brethren, the overall result is to increase the claims on judicial and prosecutorial time. The conflict that would otherwise exist is avoided only in the rare instances where the state itself grants release and, more important, in cases where it finds the facts more favorably to the prosecution than a federal judge would do independently, but the latter respects the state determination.[137] This last is also the real bite in the point about record making.[138] It is, of course, somewhat ironic that after federal habeas has been justified in part on the basis of the superiority of fact determinations by the federal judge, the states should be urged to elaborate their post-conviction remedies so as to enable him to avoid the task. Moreover, conflict is even more acrid when a federal judge rejects not simply a state determination after trial and appeal but also its denial of post-conviction.[139] It should be remembered also that my proposal contemplates state post-conviction record making when *there is new* evidence that was not available at trial, and that the state trial or pre-trial proceedings will contain a record whenever the point was then raised. The problem areas would thus largely be cases where the point could have been but was not raised at the state trial.[140] Be all this as it may, such considerations are for the state to weigh against what it may well consider an excessive expenditure of effort in dealing with collateral attack. While the immediate result of a state's failure to provide the full panoply of post-conviction remedies now available in federal habeas would be an increase in the burdens on the federal courts, this might afford the impetus necessary to prod Congress into action.

VI

The final question is whether this or any other proposal for reform is vain imagining since any change in the Supreme Court's construction of the Habeas Corpus Act of 1867 would be unconstitutional.

Taking federal prisoners first, I recognize the existence of some cases where, quite apart from the suspension clause, refusal to provide post-conviction relief would be a denial of due process. My proposal goes well beyond these; it takes care of all challenges to the validity of the criminal process itself including lack of counsel, of all cases where the defendant poses constitutional claims he could not practically have advanced before conviction or where proper procedures were not provided for doing this, of constitutional claims resulting from changes in the rules of the game to whatever extent the Supreme Court indicates, and, finally, of all other constitutional claims subject only to a colorable showing of innocence. The question is whether limitation of habeas for federal prisoners to these cases, plainly consistent with due process as I consider it to be, runs afoul of the framers' mandate that:

"The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." [141]

It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did.[142] The argument against such a moderate turning back from these decisons as I have proposed thus must rest on the extended historical exercise in *Fay v. Noia*, culminating in the statement:

"Thus, at the time that the Suspension Clause was written into our Federal Constitution and the first Judiciary Act was passed conferring habeas corpus jurisdiction upon the federal judiciary, there was respectable common-law authority for the proposition that habeas was available to remedy any kind of governmental restraint contrary to fundamental law." [143]

It has now been shown with as close to certainty as can ever be expected in such matters [144] that, despite the "prodigious research" evidenced by the *Noia* opinion, the assertion that habeas as known at common law permitted going behind a conviction by a court of general jurisdiction is simply wrong. The very historians cited in the opinion disagree with any such conclusion.[145] *Bushell's Case*,[146] the only authority cited that gives even slight support to the thesis espounded in the elaborate dictum, is wholly inadequate to sustain the view that English courts used the writ to penetrate convictions of felony and treason and seek out violations of Magna Carta.[147]

While I do not share the anticipation of some that the Burger Court will indulge in wholesale overrulings in the field of criminal procedure, it should not feel bound by an historical essay, that now appears to have been clearly erroneous, on a point not in issue and as to which the Court consequently did not have the benefit of an adversary presentation.[148] It is quite unrealistic to suppose that the other Justices had the time or, in view of the irrelevance of the discussion, the incentive to subject this historical essay to critical analysis, and one would hope that even its distinguished author might be willing to reconsider it in the light of what disinterested research has shown. Indeed, the last relevant pronouncement of the Warren Court on the subject seemed to recognize that the Act of 1867 "expanded" the writ *beyond* its status at common law, and that it is Congress that "has determined that the full protection of their [federal and state prisoners'] constitutional rights requires the availability of a mechanism for collateral attack." [149] What Congress has given, Congress can partially take away.

I likewise do not quail before another statement [150] that if the provision in 28 U.S.C. § 2255 (1964) with respect to repetitive applications by federal prisoners were "construed to derogate from the traditional liberality of the writ of habeas corpus," it "might raise serious constitutional questions." For the reason just indicated I do not regard the questions as serious, but even if they were, Congress has not merely the right but sometimes the duty to raise such questions. To seek legislative consideration of a proposal to cut back on the Supreme Court's expansive construction of the Act of 1867 but leave the Great Writ with a much broader scope than anything of which the framers could have dreamed would not be asking nearly so much as President Roosevelt did in his famous statement that Congress should not "permit doubts as to constitutionality, however reasonable, to block the suggested legislation." [151] It is surely not irrelevant in this context that the valiant champion of every syllable of the Constitution would confine collateral attack to a claim by a defendant which "casts some shadow of doubt upon his guilt." [152]

If my proposal with regard to federal prisoners is thus constitutional, the same is a fortiori true concerning federal habeas for state prisoners.[153] And the suggestion that the states need go no further with respect to their own post-conviction procedures is even more clearly so. The suspension clause applies only to the federal government and, while complete denial of post-conviction remedies by a state would violate the due process clause of the fourteenth amendment in some cases, nothing in the Constitution requires a state to allow collateral attack simply because Congress has authorized federal habeas corpus to challenge the state conviction.[154] Although the state is bound by the supremacy clause to honor all constitutional guarantees, it is not bound to honor them more than once.

My submission, therefore, is that innocence should not be irrelevant on collateral attack even though it may continue to be largely so on direct appeal. To such extent as we have gone beyond this, and it is an enormous extent, the system needs revision to prevent abuse by prisoners, a waste of the precious and limited resources available for the criminal process, and public disrespect for the judgments of criminal courts.

FOOTNOTES

† Judge, United States Court of Appeals for the Second Circuit. This article was presented as the 1970 Ernst Freund lecture at the University of Chicago Law School. It constituted a revision of the Gifford lecture given in April, 1970, at the Syracuse University Law School.

[1] Kaufman v. United States, 394 U.S. 217, 235–36 (1969) (dissenting opinion).

[2] *Id.* at 242.

[3] *Id.* at 242 (dissenting opinion of Harlan, J., speaking also for Stewart, J.).

The conflict between Justice Black and his brethren on this score surfaced again in Wade v. Wilson, 396 U.S. 282 (1970). The majority was there concerned with "a question of first impression," namely, whether the Constitution requires a state to provide an indigent prisoner with a transcript of his eight-year-old trial so that he may "comb the record in the hope of discovering some flaw," 390 F.2d 632, 634 (9th Cir. 1968), although he had previously had access to a transcript and his request for a new one made no claim that any error actually existed. Reversing a decision of the court of appeals directing denial of the petition, the majority instructed the district court to hold the case in the hope that somehow a transcript might become available and the supposedly serious constitutional issue might thus be avoided. Justice Black thought the writ should be dismissed as improvidently granted, stating:

"This case is but another of the multitudinous instances in which courts are asked

interminably to hash and rehash points that have already been determined after full deliberation and review. One considered appeal is enough, in the absence of factors which show a possibility that a substantial injustice has been inflicted on the defendant."

396 U.S. at 289.

[4] 344 U.S. 443, 532, 536 & n.8 (1953).

[5] 1969 ANN. REP. OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 144 [hereinafter cited as 1969 ANNUAL REPORT]. The most recent figures available, those for the third quarter of fiscal 1970, show a 19% increase over the same quarter of 1969, 1969 ANNUAL REPORT Fig. O.

[6] *Id.* The increase is to be contrasted with the declining number of federal convictions and the rather static number of incarcerations in substantially the same period. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL OFFENDERS IN THE UNITED STATES DISTRICT COURTS 5–8, 30–37 (1970). There was a further increase of 20% in the third quarter of 1970 over the corresponding quarter of 1969, 1969 ANNUAL REPORT Fig. D.

[7] 1969 ANNUAL REPORT 141.

[8] 28 U.S.C. § 2253 (1964).

[9] In 1969, collateral attacks by state prisoners accounted for 1197 appeals and by federal prisoners for 591. These comprised more than 20% of all appeals from district courts. *See* 1969 ANNUAL REPORT 196–97. It is not generally realized to what extent the courts of appeals are becoming criminal courts. The combination of the two categories cited and direct criminal appeals amounted to 50% of all appeals from the district courts.

For most circuits the state prisoner figures do not include unsuccessful applications by state prisoners for the issuance of certificates of probable cause. On the other hand, they do include cases where the district court has issued a certificate and, under Nowakowski v. Maroney, 386 U.S. 542 (1967), the court of appeals has been obliged to hear the appeal although it believed the certificate was improvidently issued. *See* Garrison v. Patterson, 391 U.S. 464, 465–67 (1968). In view of the staggering growth in the case loads of the courts of appeals and prospective further increases as the ratio of criminal appeals to convictions after trial approaches 100% (*see* Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 578 (1969)), Congress should move promptly to amend 28 U.S.C. § 2253 (1964) so as to place the authority to issue certificates of probable cause solely in the courts of appeals and require similar authorization for appeals by federal prisoners in cases under 28 U.S.C. § 2255 (1964) and FED. R. CRIM. P. 35. This is the opposite of the solution proposed in an elaborate 240-page note, *Development in the Law—Federal Habeas* Corpus, 83 HARV. L. REV. 1038, 1195 (1970) [hereinafter cited as *Developments Note*]. While the authors profess concern over "the time spent on deciding whether to issue a certificate," any judge could have told them how small this is as compared to the time spent in hearing an appeal and the burden on assigned counsel of having to argue a hopeless case. The Note suggests that "appeals courts can institute summary procedures if the burden of petitions is too great." Why not the existing "summary procedure" for screening out hopeless cases by requiring applications for a certificate, which are carefully processed for the judges by well-trained clerks assigned for the purpose?

[10] The *Developments Note*, *supra* note 9, at 1041 seeks to minimize the burden on the basis that in 1968 "[m]ost of the petitions were quickly dismissed" since less than 500 "reached the hearing stage"—meaning a trial of the petition. The conclusion does not follow at all: a petition may require large expenditure of time by district and circuit judges even though no evidentiary hearing is held. Furthermore, the ability of the *federal* courts to dispense with evidentiary hearings in a large proportion of the state prisoner petitions is due in considerable measure to *state* post-conviction trials, and my concern is with the *total* burden.

[11] Gideon v. Wainwright, 372 U.S. 335 (1962) (trials); Doughty v. Maxwell, 376 U.S. 202 (1964) (guilty pleas); Douglas v. California, 372 U.S. 353 (1963) (appeals).

[12] Chief Justice Burger has recently spoken to this point:

"In some of these multiple trial and appeal cases the accused continued his warfare with society for eight, nine, ten years and more. In one case more than sixty jurors and alternates were involved in five trials, a dozen trial judges heard an array of motions and presided over these trials; more than thirty different lawyers participated either as court-appointed counsel or prosecutors and in all more than fifty appellate judges reviewed the case on appeals.

"I tried to calculate the costs of all this for one criminal act and the ultimate conviction. The best estimates could not be very accurate, but they added up to *a quarter of a million dollars*. The tragic aspect was the waste and futility, since every lawyer, every judge and every juror was fully convinced of defendant's guilt from the beginning to the end."

Address before the Association of the Bar of the City of New York, N.Y.L.J., Feb. 19, 1970, at 1; 25 RECORD of N.Y.C.B.A. 14, 15–16 (Supp. 1970). Along the same lines Justice Schaefer of Illinois remarked at a conference of the Center for the Study of Democratic Institutions in June, 1968:

"What bothers me is that almost never do we have a genuine issue of guilt or innocence today. The system has so changed that what we are doing in the courtroom is trying the conduct of the police and that of the prosecutor all along the line. Has there been a misstep at this point? At that point? You know very well that the man is guilty; there is no doubt about the proof. But you must ask, for example: Was there something technicaly wrong, with the arrest? You're always trying something irrelevant. The case is determined on something that really hasn't anything to do with guilt or innocence. To the extent you are doing that to perserve other significant values, I think it is unobjectionable and must be accepted. But with a great many derailing factors there is either no moral justification or only a very minimal justification."

[13] Three cases a century apart, *Ex parte* Lees, 120 Eng. Rep. 718 (Q.B. 1860); *Re* Featherstone, [1953] 37 Crim. App. 146; and *Re* Corke, [1954] 1 W.L.R. 899, sufficiently illustrate the unawareness by the English courts of the extensive "common-law powers of the habeaus judge," discovered in the extensive obiter in Fay v. Noia, 372 U.. 391, 416 n.27 (1963). *See* Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451, 452–56, 461–68 (1966). The safeguard lies in exercise of royal prerogative by the Home Secretary, who can at any time refer a petition to the Court of Appeal if he wishes judicial aid. *See* Criminal Appeal Act 1968, c. 19, § 17.

[14] ABA STANDARDS RELATING TO POST-CONVICTION REMEDIES [hereinafter cited as ABA REPORT]. The Tentative Draft, issued in January, 1967, was approved by the House of Delegates in February, 1968.

[15] Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963) [hereinafter cited as Bator], an article from which I have drawn heavily. *See also* Amsterdam, *Search, Seizure and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 387 (1964) [hereinafter cited as Amsterdam]; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 45–47 (1967).

[16] Bator, *supra* note 15, at 452.

[17] See the address of Chief Justice Burger referred to in note 12 *supra*.

[18] This is an understatement. The Supreme Court has held that if habeas corpus is begun during custody, subsequent release does not moot the case. Carafas v. LaVallee, 391 U.S. 234 (1968). *See also* Jones v. Cunningham, 371 U.S. 236 (1963), allowing a petition to be brought by a prisoner released on parole, and United States *ex rel.* Di Rienzo v. New Jersey, 423 F.2d 224 (3rd Cir. 1970), allowing habeas corpus when the sentence had been completed but it was possible that time could be credited on a second sentence being served.

[19] United States v. Morgan, 346 U.S. 502 (1954).

[20] Note Mr. Justice Douglas' recent statement in Illinois v. Allen, 397 U.S. 337, 351 (1970) (concurring opinion), that while "elapse of time is not necessarily a barrier to a challenge of the constitutionality of a criminal conviction . . . in this case it should be."

[21] *See* Peyton v. Rowe, 391 U.S. 59, 62–63 (1968), and Judge Wyzanski's comment in Geagan v. Gavin, 181 F. Supp. 466, 469 (D. Mass. 1960), *aff'd* 292, F.2d 244 (1st Cir. 1961), *cert. denied*, 370 U.S. 903 (1962).

[22] Although the decision in McMann v. Richardson, 397 U.S. 759 (1970), wards off the worst threats with respect to collateral attack on convictions after guilty pleas, others remain. The Court expressly did not decide whether federal habeas will lie where state statutes, such as N.Y. CODE CRIM. PROC. §§ 813a and 813g, allow appeals from convictions on pleas of guilty following adverse decisions on motions to suppress evidence alleged to have been illegally seized or a confession claimed to have been unlawfully obtained, as held in United States *ex. rel.* Rogers v. Warden, 381 F.2d 209 (2d Cir. 1967), and United States *ex rel.* Molloy v. Follette, 391 F.2d 231 (2d Cir.), *cert. denied*, 391 U.S. 917 (1968). At the very least there should be a requirement that federal mabeas be instituted promptly after conclusion *of the state* appeal.

[23] When the sentence has been fully served, it is almost certain that the state will not bother with a retrial. *See* United States v. Keogh, 391 F.2d 138, 148 (2d Cir. 1968). Successful collateral attack, very likely on a ground having no bearing on guilt, thus will mean wiping out the conviction of a guilty man. *See, e.g.*, United States *ex rel.* Scanlon v. LaValle, 2d Cir. 1970, in which a prisoner who had admitted guilt sought habeas corpus after completing his sentence because his lawyers allegedly had misinformed him of how long this might be. Such cases pointedly raise the question whether the only goal served by post-sentence collateral attack, namely, eradicating civil disabilities and social stigma, warrants the effort expended on the many attacks that fail and the likelihood of an essential unjust result in the few that succeed. *See* Hewett v. North Carolina, 415 F.2d 1316, 1325–26 (4th Cir. 1969) (Haynsworth, C.J., concurring). Certainly these would be prime cases for requiring a colorable showing of innocence save in most exceptional instances.

[24] *Developments Note*, *supra*, note 9, at 1041. The basis for this assertion is that the federal courts released only 125 state prisoners in fiscal 1964 as against 3220 petitions filed, and that 350 *reported* district court decisions in 1968 showed outright releases of only 14 and remands of 25 to state courts for retrial or release. These figures do not take account of prisoners released by the states or under 28 U.S.C. § 2255 (1964). Wright and Sofaer regard the federal figures as showing a number of releases of state prisoners, about 4% of the cases, that is "surprisingly high." They cite a few examples where federal habeas unquestionably served a good purpose. Wright

& Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 899 & nn.15 & 16 (1966).

[25] Accepting the figure of 4% absolute or conditional release in federal habeas for state prisoners, we lack information as to what happened on a retrial. On the assumption that half were again convicted, this leaves only 2% of the petitioners who benefited. Here again we do not know how many of these cases represented prisoners "whom society has grievously wronged and for whom belated liberation is little enough compensation," Fay v. Noia, 372 U.S. 391, 440–41 (1963), or how many were black with guilt. The assumption that many of them fall in the former category is wholly unsupported.

[26] The Supreme Court in another context has recently adverted to "scarce judicial and prosecutorial resources" and has emphasized the desirability of conserving these "for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof." Brady v. United States, 397 U.S. 742, 752 (1970).

[27] *See* REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 255–56 (1966); REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 154 (1967). Excluding cases involving defendants who are fugitives or in the armed forces, 16.9% of all criminal cases in the United States district courts have been pending for more than a year—in many districts the figure is much higher. 1969 ANNUAL REPORT, *supra* note 5, at 270–72. At the end of 1953, New York City had a non-traffic criminal backlog of more than 520,000 cases, 177,000 of which involved defendants who could no longer be located. NEW YORK CITY CRIMINAL JUSTICE INFORMATION BUREAU, THE NEW YORK CITY CRIMINAL COURT: CASE FLOW AND CONGESTION FROM 1959 TO 1968, 12–13. It seems likely that the *average* delay between indictment and trial is at least a year.

[28] Brown v. Allen, 344 U.S. 443, 537 (1953).

[29] Bator, *supra* note 15, at 452.

[30] Sanders v. United States, 373 U.S. 1, 24–25 (1963) (dissenting opinion).

[31] *Id.* at 8.

[32] Note, *Federal Habeas Corpus Review of State Convictions: An Interplay of Appellate Ambiguity and District Court Discretion*, 68 YALE L.J. 98, 101 n. 13 (1958).

[33] Another example is Professor Pollak's statement that "where personal liberty is involved, a democratic society employs a different arithmetic and insists that it is less important to reach and unshakable decision than to do justice." Pollak, *Proposals to Curtail Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 65 (1956). Valid though this is when there is some question of an innocent man languishing in prison, why does "justice" require repeated opportunities to litigate issues of police or prosecutorial misconduct having no bearing on guilt? Does not Chief Justice Ellsworth's statement, "But, surely, it cannot be deemed a denial of justice, that a man shall not be permitted to try his case two or three times over," Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 320, 328 (1796), have *some* application in criminal cases?

[34] For example, a statute of limitations in the availability of collateral attack.

[35] However, it is amazing how far current discussions ignore this possibility of relief. One wonders whether some lawyers assigned to represent habeas petitioners may not be this connection, the comment in Fortas, in getting their clients out of jail. See, in more interested in establishing a point than *Thurman Arnold and the Theatre of the Law*, 79 YALE L.J. 988, 995 (1970). On the other side, I am always surprised at the willingness of prosecutors to let hard cases get to the Supreme Court rather than prevent the making of bad law by recommending clemency at an early stage. *See* Fay v. Noia, 372 U.S. 391, 476 n.28 (1963) (Harlan, J., dissenting).

[36] *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830).

[37] *Ex parte* Siebold, 100 U.S. 371 (1879). *See* Amsterdam, *supra* note 15, at 384 & n.30. This, of course, is quite consistent with a view that the prime objective of collateral attack should be to protect the innocent.

[38] *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

[39] Johnson v. Zerbst, 304 U.S. 458 (1938).

[40] *Id.* at 468.

[41] 261 U.S. 86 (1923).

[42] 344 U.S. 443 (1953).

[43] Parker v. Gladden, 385 U.S. 363 (1966).

[44] Sheppard v. Maxwell, 384 U.S. 333 (1966).

[45] *See* Bator, *supra* note 15, at 457.

[46] Schaefer, *Federalism and State Criminal Trials*, 70 HARV. L. REV. 1, 8 (1956).

I would not be inclined to apply the same rule of automatic entitlement to collateral attack to *all* cases where the claim is lack of effective assistance of counsel—a claim that is bound to be raised ever more frequently as claims of total lack of counsel diminish in the course of time. I would assimilate cases where the state is alleged to have *prevented* counsel from doing his job—for example, by forcing him to trial without adequate opportunity for preparation, as in Powell v. Alabama, 287 U.S. 45 (1932)—to those where counsel was not provided at all. It is tempting to extend this principle to other cases where the ineffectiveness of counsel is flagrant and apparent. But the difficulty of drawing a line between such cases and the more frequent claims of ineffectiveness by hindsight would lead me to place all these in the category where a colorable showing of innocence should be required.

[47] Waley v. Johnston, 316 U.S. 101, 104-05 (1942) (coerced plea of guilty).

[48] *Id.*; Herman v. Claudy, 350 U.S. 116 (1956).

[49] Mooney v. Holohan, 294 U.S. 103 (1935), where, however, the Court declined to issue the writ because it was not convinced of the absence of corrective process in the California state courts, Miller v. Pate, 386 U.S. 1 (1967). It should be clear that a case like the last, one of the glories of federal habeas corpus for state prisoners, remains wholly untouched by my proposal.

[50] Pate v. Robinson, 383 U.S. 375 (1966).

[51] 378 U. S. 368 (1964).

[52] Some such second thoughts may be detected in the majority opinion in McMann v. Richardson, 397 U.S. 759, 771–74 (1970), by the writer of *Jackson v. Denno*.

[53] ABA REPORT, *supra note* 14, at 1. Professor Bator's 1963 belief that "[i]t is not fanciful to suppose that the law of due process for criminal defendants will, in the foreseeable future, reach a resting point, will become stabilized,'" proved an exceedingly poor prediction. Bator, *supra* note 15, at 523–24.

[54] Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958), *with respect to* Griffin v. Illinois, 351 U.S. 12 (1956) (free transcript on appeal); Daegele v. Kansas, 375 U.S. 1 (1963), *with respect to* Douglas v. California, 372 U.S. 353 (1963) (right to counsel on appeal).

[55] Roberts v. Russell, 392 U.S. 293 (1968), *with respect to* Bruton v. United States, 391 U.S. 123 (1968); Berger v. California, 393 U.S. 314 (1969), *with respect to* Barber v. Page, 390 U.S. 719 (1969).

[56] North Carolina v. Pearce, 395 U.S. 711 (1969), *with respect to* Benton v. Maryland, 395 U.S. 784 (1969).

[57] Linkletter v. Walker, 381 U.S. 618 (1965), *with respect to* Mapp v. Ohio, 367 U.S. 643 (1961).

[58] Tehan v. Schott, 382 U.S. 406 (1966), *with respect to* Griffin v. California, 380 U.S. 609 (1965).

[59] Johnson v. New Jersey, 384 U.S .719 (1966), *with respect to* Escobedo v. Illinois, 378 U.S. 478 (1964), *and* Miranda v. Arizona, 384 U.S. 436 (1966).

[60] DeStefano v. Woods, 392 U.S. 631 (1968), *with respect to* Duncan v. Louisiana, 391 U.S. 145 (1968).

[61] Stovall v. Denno, 388 U.S. 293 (1967), *with respect to* United States v. Wade, 388 U.S. 218 (1967), *and* Gilbert v. California, 388 U.S. 263 (1967).

[62] Desist v. United States, 394 U.S. 244 (1969), *with respect to* Katz v. United States, 389 U.S. 347 (1967).

[63] 14 Stat. 385 (1867).

[64] 28 U.S.C. §§ 2241, 2254, 2255 (1964).

[65] *See* H. M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1238 (1953); "There is a sense, therefore, in which is a prisoner is legally detained if he is held pursuant to the judgment or decision of a competent tribunal or authority, even though the decision to detain rested on an error of law or fact."

[66] Sunal v. Large, 332 U.S. 174 (1947).

[67] *See* Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI L. REV. 31 (1965); Geagan v. Gavin, 181 F. Supp. 466, 468 (1960).

[68] 344 U.S. 443 (1953).

[69] See the excellent statement of this point of view by Judge Wyzanski in Geagan v. Gavin, 181 F. Supp. 466, 469 (1960). *See also* Wright & Sofaer, *supra* note 24, at 897–99.

[70] See the discussion in Kaufman v. United States, 394 U.S. 217, 224–26 (1969). The *Kaufman* decision, although not the opinion, can be defended on this basis.

[71] *Developments Note, supra* note 9, at 1057.

[72] *See* Kitch, *The Supreme Court's Code of Criminal Procedure: 1968–1969 Edition*, 1969 SUP. CT. REV. 155, 182–83. The *Developments Note* later concedes, at 1059 that "[i]n many cases, the interests described above in a second proceeding can be filled by appellate review" and "[p]erhaps, then, only when appellate review is inadequate—for example because the appeals court cannot look beyond the record—should collateral attack be available." Why not, indeed?

[73] This was forecast by Judge Wyzanski a decade ago in Geagan v. Gavin, 181 F. Supp. 466, 469 (1960).

[74] H. J. FRIENDLY, *The Bill of Rights as a Code of Criminal Procedure, in* BENCHMARKS 235 (1967).

[75] This is true despite the holding in California v. Green, 399 U.S. 149 (1970), that the confrontation clause and the hearsay rule are not wholly congruent in scope.

[76] Smith v. Illinois, 390 U.S. 129 (1968).

[77] *Cf. In re* Winship, 397 U.S. 358 (1970).

[78] Stovall v. Denno, 388 U.S. 293 (1967); Simmons v. United States, 390 U.S. 377 (1968); Foster v. California, 394 U.S. 440 (1969).

[79] Allen v. United States, 164 U.S. 492, 501 (1896).

[80] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[81] While the "harmless error" rule of Chapman v. California, 386 U.S. 18 (1967), and Harrington v. California, 395 U.S. 250 (1969), affords relief against constitutional claims on immaterial points, the test on collateral attack generally should be not whether the error could have affected the result but whether it could have caused the punishment of an innocent man. Note, *Harmless Constitutional Error: A Reappraisal*, 83 HARV. L. REV. 814 (1970) fails to distinguish between the problem on direct appeal and on collateral attack.

[82] ABA REPORT, *supra* note 14, at 3.

[83] *Id.* at 85.

[84] *Id.* at 88 (emphasis added).

[85] This is hardly surprising since the Reporter, Professor Curtis Reitz, has long been an enthusiastic advocate of collateral attack. *See* the articles cited in the note 126 *infra*.

[86] ABA REPORT, *supra* note 14, at 36.

[87] One item in the ABA Report which I applaud is the inclusion as a ground of collateral attack "that there exists evidence of material facts, not theretofore presented and heard, which require vacation of the conviction or sentence in the interest of justice," id. § 2.1(a)(iv), at 32, if this were limited, as it obviously should be, to facts which could not have been presented in the exercise of due diligence. This would end the anomaly that newly discovered evidence proving or strongly tending to prove the defendant's innocence is not generally a ground for obtaining a new trial unless the evidence is discovered within a stated short period or was deliberately suppressed by the state, whereas, for example, a defendant who has voluntarily confessed guilt can obtain collateral relief on a plea that the court erred in finding full compliance with *Miranda*. *See* Bator, *supra* note 15, at 509. In this way the ABA Report recognizes how invalid the obeisance to "constitutional" claims has become.

[88] 5 WILLISTON, CONTRACTS § 678, at 239 (3d ed. 1961).

[89] ABA REPORT, *supra* note 14, at 88.

[90] 304 U.S. 464 (1938).

[91] The fountainhead of this error in Fay v. Noia, 372 U.S. 391, 439–40 (1963).

[92] Sunal v. Large, 332 U.S. 174, 177–78 (1947).

[93] *See* note 87 *supra*.

[94] For an example that would have met this criterion if it had arisen by way of collateral attack, see United States v. Miller, 411 F.2d 825 (2d Cir. 1969)—one of the half dozen cases where, in eleven years of judicial experience, I entertained real doubt about a defendant's guilt. On the new trial the defendant testified (as he had not on the first) and was acquitted.

[95] 394 U.S. 217 (1969).

[96] *Id.* at 220–21 nn. 3 & 4.

[97] Amsterdam, *supra* note 15, at 378.

[98] These are considered in an elaborate footnote, *id.* at 391–92. I would add the rare case where the defendant's connection with the seized evidence was tenuous and the other evidence was thin.

[99] *Id.* at 388.

[100] *See* United States v. Dunnings, 425 F.2d 836, 840 (2d Cir. 1969). While "guilty defendants . . . are entitled to have the integrity of their persons and homes protected," Griffiths, *Ideology in Criminal Procedure, or a Third Model of the Criminal Process*, 79 YALE L.J. 359, 385 (1970), in Hohfeldian theory the consequence of this should be an action against the transgressor, not immunity from effective prosecution. The Supreme Court has consistently stressed that "the exclusionary rule . . . is calculated to prevent, not to repair" Elkins v. United States, 364 U.S. 206, 217 (1960). *See also* Linkletter v. Walker, 381 U.S. 618, 636–37 (1965).

[101] Amsterdam, *supra* note 15, at 388–89. The inner quotation is from Mr. Justice Frankfurter's dissent in Elkins v. United States, 364 U.S. 206, 235 (1960). The efficacy of the exclusionary rule as a deterrent has been questioned in a remarkable article in this *Review*. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

[102] Amsterdam, *supra* note 15, at 389.

[103] *Id.* at 390.

[104] 394 U.S. at 231–42.

[105] *Id.* at 226.

[106] *Id.* at 229.

[107] Desist v. United States, 394 U.S. 244, 262–63 (1969) (dissenting opinion).

[108] *See* H.J. FRIENDLY, BENCHMARKS 260–61 (1967), suggesting that even at trial the exclusionary rule should be limited to exclusion of "the fruit of activity intentionally or flagrantly illegal."

[109] The *Developments Note*, *supra* note 9, at 1064–66, would justify *Kaufman* on the basis that the petitioner had not succeeded in having his claim considered on his appeal, and would limit the decision accordingly. Although appellate counsel had evidently thought the point too lacking in merit to raise, Kaufman himself had brought the matter to the attention of the court of appeals, 394 U.S. at 220 n.3, but the court did not discuss it. *See* 350 F.2d 408 (8th Cir. 1965) and 394 U.S. at 220 n.3. There is reason to think that Mr. Justice Brennan would accept the proposed limitation. *See* 394 U.S. at 227 n.8 and the quotation from Judge Wright's dissent in Thornton v. United States, 368 F.2d 822, 831 (D.C. Cir. 1966), at 394 U.S. 230–31. *Cf.* Kapatos v. United States, — F2d— (2d Cir. 1970). My position is that opportunity to appeal should be enough.

[110] 384 U.S. 436 (1966). I am not here considering the effect of 18 U.S.C. § 3501 (1964).

[111] 384 U.S. at 444.

[112] Kaufman v. United States, 394 U.S. 217, 242 (1969). *See* Johnson v. New Jersey, 384 U.S. 719, 730 (1966).

[113] The paradigm is where a confession of homicide leads to the discovery of a body bearing pieces of the defendant's hair, nails or clothing, or of weapons covered with defendant's fingerprints.

[114] *See* H.J. FRIENDLY, BENCHMARKS 243 & n.40 (1967).

[115] *See* text at note 68 *supra*.

[116] Jackson v. Denno, 378 U.S. (1964).

[117] Stein v. New York, 346 U.S. 156 (1953).

[118] Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963).

[119] Griffin v. California, 380 U.S. 609 (1965).

[120] Mapp v. Ohio, 367 U.S. 643 (1961).

[121] Pointer v. Texas, 380 U.S. 400 (1965).

[122] Miranda v. Arizona 384 U.S. 436 (1966).

[123] Others, such as Gideon v. Wainwright, 372 U.S. 335 (1963), applying the requirement of appointed counsel to the states, and Malloy v. Hogan, 378 U.S. 1 (1964), applying the fifth amendment privilege against self-incrimination to them, have been made on review of state post-conviction attacks. The only significant decisions setting out new rules of criminal porcedure (other than procedure in habeas itself) which were made on federal habeas for state prisoners appear to have been Jackson v. Denno, 378 U.S. 368 (1964), and Sheppard v. Maxwell, 384 U.S. 333 (1966).

[124] 28 U.S.C. § 2254(d) (1964).

[125] My observation of the work of the excellent state courts of New York, Connecticut and Vermont does not suggest that federal determination of such questions is notably better. In the vast majority of cases we agree with the state courts, after a large expenditure of judges' and lawyers' time. In the few where we disagree, I feel no assurance that the federal determination is superior. When I am confident that the issue has received real attention and the state trial and appellate judges have been in accord among themselves, I see no sufficient reason to elevate my views over theirs in a close case. *See* United States *ex rel.* Romeo v. McMann, 418 F.2d 860, 866 (2d Cir. 1969) (concurring opinion). The main difficulty is when one cannot be sure that the state courts, or at any rate the state appellate courts, have focused on the issue. Greater writing of opinions, however brief and informal, would alleviate the problem.

[126] *See, e.g.*, Bator, *supra* note 15; Brennan, *Some Aspects of Federalism*, 39 N.Y.U.L. REV. 945 (1964); Hart, *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 104 (1959); Reitz, *Federal Hebeas Corpus Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961); Reitz, *Federal Habeas Corpus: Post-conviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960); Wright & Sofaer, *supra* note 24; *Developments Note*, *supra* note 9.

[127] One argument against utilizing the existing courts of appeals is that they are already overburdened. But many of the cases that would come to them under this proposal reach them now in federal habeas, either on applications for certificates of probable cause or for full-dress argument when such certificates have been granted. Considerations in favor of utilizing the existing courts are their geographical convenience, their greater knowledge of relevant state procedures and the quality of particular state judges, the difficulty in manning a specialized court, and the historic prejudice against tribunals of specialized jurisdiction. On the other side are the possibly greater acceptability of review by a "super court" to the highest courts of the states, *see* note 130 *infra*, and the uniformity that would result from review by such a court.

[128] Alternatively, a petition to review in the federal appellate court would be required whenever the attack was based on procedural due process, including the selectively incorporated provisions of the Bill of Rights, as distinguished from substantive attack on a state criminal statute, *e.g.*, as violating the first amendment.

[129] Any legislation would include familiar procedures for transfer where application had been made to the wrong court.

[130] On the other hand, some judges with whom I have discussed this believe that the highest state courts would find it even more offensive to have their constitutional decisions reviewed by the existing federal courts of appeals; if so, this might argue that a new "super court" would be preferable if this procedure is to be used at all. *See* note 127 *supra*.

[131] This is recognized in the ABA REPORT, *supra* note 14, at 86.

[132] 344 U.S. 443 (1953).

[133] H.R. REP. No. 1293, 85th Cong., 2d Sess. 7 (1958).

[134] *See* the 1958 report of the Burton Committee, quoted in part in Case v. Nebraska, 381 U.S. 336, 339 (1965) (Clark, J., concurring).

[135] *Cf.* Mooney v. Holohan, 294 U.S. 103 (1934); Young v. Ragen, 337 U.S. 235 (1949).

[136] Mr. Justice Clark said in Case 1. Nebbraska, 381 U.S. 336, 340 (1945) (concurring opinion), that it was reported that federal applications from state prisoners in Illinois "dropped considerably after its [post-conviction] Act was adopted." One would expect that to happen while the new state remedies were being exhausted; whether the decrease was other than temporary is another matter. The district courts for Illinois had 286 state prisoner petitions in the year ended June 30, 1969, 1969 ANNUAL REPORT, *supra* note 5, at 211. The nationwide figures cited above, *see* text and note at note 5 *supra*, show constant increases despite greatly expanded state post-conviction remedies.

[137] Presumably this is what Mr. Justice Brennan meant in saying, in Case v. Nebraska, 381 U.S. 336, 345 (1945) (concurring opinion), "Greater finality would inevitably attach to state court determinations of federal constitutional questions, because further evidentiary hearings on federal habeas corpus would, if the conditions of Townsend v. Sain were met, prove unnecessary."

[138] Note Mr. Justice Brennan's statement in Case v. Nebraska, 381 U.S. 336, 345 (1945), that, "nonmeritorious claims would be fully ventilated, making easier the task of the federal judge if the state prisoner pursued his cause further."

[139] For an example see United States *ex rel.* Stephen J. B. v. Shelly, 430 F.2d 215 (2d Cir. 1970), where a district judge, without hearing any further evidence, annulled the unanimous holdings of 13 New York judges, culminating in an opinion by the Court of Appeals, People v. Stephen J.B., N.Y.2d 611, 246 N.E.2d 344, 298 N.Y.S.2d 489 (1969), on a close question relating to *Miranda*—and this in a case where the defendant had been placed on probation and, because he was a juvenile, his conviction had no civil consequences!

[140] As to these I would favor an amendment to 28 U.S.C. § 2254 (1964) which would make

it clear that the rule of Henry v. Mississippi, 379 U.S. 443 (1965), applies to federal habeas for state prisoners, without any of the doubts now existing, either there or on direct appeal, in regard to the need of personal participation by the defendant in feasance or nonfeasance by his attorney. *See* Sandalow, Henry v. Mississippi *and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187.

[141] U.S. CONST. art. I, § 9, cl. 2.

[142] A contrary view is taken, quite unconvincingly, in *Developments Note, supra* note 9, at 1269.

[143] 372 U.S. at 405.

[144] Oaks, *supra* note 13., at 456–68.

[145] *Id.* at 459 In. 47. *See also* Rubinstein, *Habeas Corpus as a Means of Review*, 27 MOD. L. Rev. 322, 326 (1964): "Superior and other common law courts enjoy, therefore, an almost complete immunity from review on habeas corpus."

[146] 124 Eng. Rep. 1006 (C.P. 1670).

[147] As Professor Oaks has pointed out, any such reading of the opinion in *Bushell's Case* would bring it into conflict with three fundamental principles of seventeenth and eighteenth century habeas corpus law—that a general return that the prisoner had been committed for treason or felony was sufficient; that petitioners were forbidden to challenge the truth of particulars set out in the return; and that once a person had been convicted by a superior court of general jurisdiction, a court seized of a habeas petition could not go behind the conviction for any purpose other than to verify the jurisdiction of the convicting courts. Oaks, *supra* note 13, at 468.

[148] *Id.* at 458.

[149] Kaufman v. United States, 394 U.S. 217, 221, 228 (1969).

[150] Sanders v. United States, 373 U.S. 1, 11–12 (1963).

[151] 79 CONG. REC. 13449 (1935), *cited in* D. MORGAN, CONGRESS AND THE CONSTITUTION 6 (1966).

[152] Kaufman v. United States, 394 U.S. 217, 235 (Black, J., dissenting).

[153] *See* Pollack, *Supra* note 33, at 63 & n. 73, *But see Developments Note, supra* note 9, at 1272–74. I indicate no view on the current status of *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807), discussed in Paschel, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605.

[154] Case v. Nebraska, 381 U.S. 336 (1965), does not decide otherwise, although on the facts—a claim of a coerced guilty plea—denial of a post-conviction remedy could well have violated due process. *See* Sandalow, *supra* note 140, at 210–15.

By Mr. TOWER:

S. 568. A bill to amend the Outer Continental Shelf Lands Act by providing authority for the issuance of permits to construct, operate, and maintain port and terminal facilities. Referred to the Committee on Interior and Insular Affairs.

Mr. TOWER. Mr. President, over the past several years the United States has experienced a decline in exploration activities for new reserves of oil and gas. I will not examine the causes of this decline at this time as I have discussed them many times before in this Chamber. I would only reiterate that this trend must be reversed. Rather, I would like to focus attention on one ramification of the decline in domestic exploration activity—our urgent need for superports.

There is necessarily a long leadtime required to reverse the declining trend in domestic activity and to find and produce significant quantities of petroleum products from newly discovered domestic petroleum reservoirs.

Since the U.S. petroleum industry is producing at virtually maximum capacity, we will be forced to import petroleum from foreign sources in order to meet increased consumer demand for energy supplies. If current economic, political, and environmental factors remain unchanged, these imports have been projected by the National Petroleum Council to increase from a level of 3.4 million barrels per day imported during 1970, to some 9.7 million barrels per day in 1975, to 11.4 million barrels per day in 1980, and to 19.2 million barrels per day in 1985. Compared with projected demand, the level of our petroleum imports can be expected to increase from 26 percent of our total petroleum supply in 1970 to some 65 percent in 1985. The National Petroleum Council, from which I obtained these facts, is an official advisory body to the Department of the Interior.

The Secretary of the Interior recently commented before the Senate Interior and Insular Affairs Committee on the inevitability of petroleum importation. He said:

In the short term, little can be done to augment domestic production of clean energy sources. The only major short-term alternatives are to restrict energy use, which may impair personal comfort and continued economic progress, or to increase imports.

There are many alarming implications inherent in these projections. Not only will we be depending upon a petroleum source which might compromise future foreign policy positions, but we also face a major logistical problem in handling the large quantities of imports that we have little choice but to purchase.

The logical question arises: Do we possess the facilities to handle the huge tankers which must transport the millions of barrels of oil each day to our shores? The answer is no, not now. In November, 1971, the National Petroleum Council reported:

The prospect of having to increase waterborne imports into the United States at 6 to 7 times the rate experienced in the past decade adds a completely new dimension to U.S. external petroleum logistics, particularly with respect to tank ships and port facilities to accommodate them.

The optimal sized tanker in international petroleum trade during the 1971–1985 period may range from 300,000 to 400,000 DWT (dead weight tons) in long-haul trades, and 70,000 to 120,000 DWT in short-haul coastal service. . . .

. . . Most of the increase in U.S. oil import requirements will have to originate in the Eastern Hemisphere . . .

Vessels of 300,000 DWT and over draw a minimum of 72 feet of water when laden, but there are no ports in the United States presently capable of handling vessels of this size."

Mr. President, the U.S. port capabilities for handling huge tankers has not improved since that statement. The United States is facing an inevitable demand for imported petroleum. The petroleum can be brought to this country most economically in tankers so large that our port facilities cannot handle them. So, a solution to this problem is the construction of offshore superport facilities. And since a significant concentration of our petroleum refining and petrochemical industries is located on the coast of Texas, I hope that we can begin the construction of an offshore deep water terminal there soon.

Last year, I introduced in the Congress legislation to authorize the Secretary of the Interior to issue permits for the construction of such offshore superports. Now, I again introduce the bill in the hopes that the Congress will be able to act expeditiously to specifically authorize the Secretary of the Interior to allow the construction of the huge offshore port facilities we need. Of course, this authorization must be in strict compliance with all environmental laws.

I ask that a text of my bill appear in the RECORD at this point.

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

S. 568

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 "Outer Continental Shelf Ports and Facilities Amendments of 1972".

SEC. 2. Section 5(c) of the Outer Continental Shelf Lands Act (67 Stat. 464; 43 U.S.C. 1334(c)) is amended by striking the words "produced from said submerged lands in the vicinity of the pipeline".

SEC. 3. Section 5 of the Outer Continental Shelf Lands Act is amended by adding at the end thereof the following new subsection (d):

"(d) Permits for the construction, operation, and maintenance of port and terminal facilities on the submerged lands of the Outer Continental Shelf may be granted by the Secretary under such regulations and upon such conditions as may be prescribed by the Secretary: *Provided however*, That in the issuance of any such permit and the promulgation of such regulations and conditions, the Secretary shall:

"(1) take into account the need for such port or terminal facility as a means of supplying the energy needs of the Nation;

"(2) consider the environmental impact of any such port or terminal facility;

"(3) consider the availability of alternative sites and methods of construction;

"(4) provide for such public hearings as he deems necessary to assure thorough consideration of the factors herein identified."

By Mr. TOWER:

S. 569. A bill to provide that persons from whom lands are acquired by the Secretary of the Army for dam and reservoir purposes shall be given priority to lease such lands in any case where such lands are offered for lease for any purpose. Referred to the Committee on Public Works.

Mr. TOWER. Mr. President, today, I am reintroducing a bill to give prior owners the right of first refusal when their lands are acquired by the Corps of Engineers for the building of dams or reservoirs. The interest in the passage of this legislation has not in the least abated since the last session of Congress.

Granted, the Corps of Engineers will lease the land back to prior owners for the first 5 years but, at that time, if the land is still available, the property is advertised and a lease granted on the basis of competitive bids.

The prior owners many times have a great interest in continuing to lease these lands because of their uses or the facili-

ties located on them. The passage of this legislation will help prevent an inequity that now exists and will encourage continuous, productive use of land under Corps of Engineers control.

Mr. President, at this time, I ask unanimous consent that the text of this bill be printed at this point in the RECORD.

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

S. 569

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any case where land is acquired by the Secretary of the Army for the purpose of any dam and reservoir project being carried out through the Corps of Engineers and thereafter offered for lease for any purpose the person or persons from whom such land was acquired shall during their lifetime be given priority to enter into such lease upon reasonable terms determined by the Secretary.

SEC. 2 The term "person" as used in this Act includes a corporation, company, association, firm, partnership, society, joint stock company, or other such organization as well as an individual but in any case where such term is used to apply to such an organization the term "lifetime" as used in this first section shall not exceed fifty years.

By Mr. ROBERT C. BYRD:

S. 570. A bill to promote public confidence in the legislative, executive, and judicial branches of the Government of the United States. Referred to the Committee on Rules and Administration.

FEDERAL FINANCIAL DISCLOSURE

Mr. ROBERT C. BYRD. Mr. President, I am today introducing a Federal financial disclosure bill which I believe will help to restore public confidence in the legislative, executive, and judicial branches of our Government. Today, more than ever, I am convinced that the public interest requires a clearly defined, enforceable disclosure statute for all three branches of our Government. The existing diverse standards of conduct and requirements for financial disclosure which have developed through the years make the passage of this legislation necessary, I believe.

It is my conviction that there are few issues more crucial to the future of our democratic system than the crisis of public confidence in the honesty and accountability of elected public officials. No one doubts that ethical standards have come a long way since the days of the Credit Mobilier, the Teapot Dome scandals, the Whisky Ring, and the "Ohio Gang." The vast majority of elected officials—including Members of Congress—are honorable, hard-working, dedicated public servants. Yet, we cannot afford to ignore the growing belief that many or most elected representatives use their public positions for private gain or the increasing tendency of the average citizen to view all participants in the governmental process with suspicion and even contempt.

In 1958, Congress adopted a code of ethics covering all persons engaged in Government service. Yet, this code consists of language too general to provide real standards and means of enforcement, much less the fact that there were no provisions for financial disclosure.

In May of 1965, President Lyndon Johnson issued an Executive order requiring the head of each agency, each Presidential appointee in the Executive Office of the President who is not subordinate to the head of an agency in that Office, and each full-time member of a committee, board, or commission appointed by the President to submit to the Chairman of the Civil Service Commission, on a quarterly basis, a statement containing:

First. A list of the names of all corporations, companies, firms, or other business enterprises, partnerships, nonprofit organizations, and educational or other institutions with which he is connected as an employee, officer, owner, director, trustee, partner, adviser, or consultant; or in which he has any continuing financial interests, through a pension or retirement plan, shared income, or otherwise, as a result of any current or prior employment or business or professional association; or in which he has any financial interests through the ownership of stocks, bonds, or other securities.

Second. A list of the names of his creditors, other than those involving a mortgage on property which he occupies as a personal residence or current and ordinary household and living expenses.

Third. A list of his interests in real property or rights in lands, other than property used as a personal residence.

This information is held in confidence, and no information as to its content can be disclosed except as the Chairman of the Civil Service Commission or the head of the agency concerned may determine, for good cause shown. Any changes in the statement are to be reported at the end of each quarter in which an alteration occurs.

In June of 1966, an addition was made to title 3 of the Code of Federal Regulations. It required each employee listed in the Federal Executive Salary Schedule, except a Presidential appointee falling under the stipulations of the 1965 Executive order and employees in classified positions of grade GS–13 or above, or the equivalent thereof, to submit a statement of financial holdings to his agency head by June 30 each year.

This information is basically the same as that required in the earlier Executive order, and any changes that occur are also to be reported quarterly.

Each agency head holds the statement in confidence. An agency may not disclose information from a statement except as the Civil Service Commission or the agency head may determine and for good cause shown. In addition, many executive agencies, as a matter of administrative or agency policy, have regulations calling for financial disclosures by their employees. However, the present situation of diverse regulations and uneven requirements points to a wholly inadequate system of disclosure for Federal employees. Legislation to redress this situation should be of immediate concern to the Congress.

Federal judges, with the exception of Supreme Court members, are required to report every 3 months any extrajudicial earnings to a panel of Federal judges. In the wake of the 1969 controversies surrounding former Supreme Court Justices Abe Fortas and William O. Douglas, bills were introduced in both Houses of the Congress proposing that Federal judges and Supreme Court Justices be required to make public statements of their financial circumstances and sources of income.

A special session of the U.S. Judicial Conference, the administrative policy body of the Federal judiciary, was called by former Chief Justice Earl Warren. The Conference adopted resolutions forbidding Federal judges to accept any compensation other than their judicial salary and requiring each judge to file an annual financial statement with the Conference. The Judicial Council of the circuit was permitted to approve the acceptance of compensation for certain outside services.

The new resolution did not apply to the Supreme Court Justices because they are beyond the Conference as established by Congress.

The members of the High Court refused to adopt the rules approved by the Conference and it later rescinded the rules, replacing them with the requirement of a quarterly report of extrajudicial earnings. The Conference also adopted a resolution which permitted judges to perform extrajudicial work without prior approval.

In August 1972, the American Bar Association endorsed a new code of judicial conduct which would require State and Federal judges to stay out of most commercial activities and file reports of income from off-the-bench work and gifts of $100 or more. This code includes provisions that would disqualify a judge from adjudicating a case in which he had only the slightest financial interests. State legislatures and State supreme courts would have the responsibilities for implementing the code. Federally, the canons would be imposed by the Judicial Conference, which will announce its acceptance or rejection of them by April. Mr. President, the immunity of the Supreme Court Justices from these disclosure regulations continues to substantiate my plea for a Federal financial disclosure act which would encompass the entire judicial branch.

Both Houses of Congress adopted rules in 1968 for annual disclosure of certain financial interests, with the House making certain additional requirements in 1970. The House requirement covers Members, officers, principal assistants to Members and officers, and professional committee staff members, while the Senate rule includes Senators, candidates for that office, and officers or employees of the Senate who are compensated at a rate in excess of $15,000 a year. The House code requires some measure of disclosure of investments and business connections to the public, although the Senate counterpart adds nothing to the public knowledge in this area since its public disclosure rules apply only to contributions and honoraria.

Presently, the House requires a two-part disclosure report to be filed annually with the Committee on Standards of Official Conduct. The information

contained in part A, which is made available for "responsible public inquiry," requires each House Member to report the following:

First. The name, instrument of ownership, and any position of management held in any business entity doing a substantial business with the Federal Government or subject to Federal regulatory agencies in which the ownership is in excess of $5,000 fair market value as of the date of filing or from which income of $1,000 or more was derived during the preceding calendar year.

Second. The name, address, and type of practice of any professional organization in which the person reporting, or his spouse, is an officer or director, or partner, or serves in any advisory capacity, from which income of $1,000 or more was derived during the preceding calendar year.

Third. The source of each of the following items received during the preceding calendar year:

Any income for services rendered—other than from the U.S. Government—exceeding $5,000 and not reported in section 2.

Any capital gain from a single source exceeding $5,000 other than from the sale of a residence occupied by the person reporting—as reportable to Internal Revenue Service.

Reimbursement for expenditures—other than from the U.S. Government—exceeding $1,000 in each instance.

Sources of honoraria aggregating $300 or more from a single source.

Fourth. Each creditor to whom the person reporting was indebted for a period of 90 consecutive days or more in the preceding calendar year in an aggregate amount in excess of $10,000 excluding any indebtedness specifically secured by the pledge of assets of the person reporting the appropriate value.

Part B of the disclosure report requires more detail, but this part is sealed and held to be confidential unless the Committee on Standards of Official Conduct determines the information is essential to an official investigation. It includes the fair market value of the business holdings and the amount of income from each source reported publicly.

The majority of the Senate information is filed with the Comptroller General, although those parts of the report accessible to the public are filed with the Secretary of the Senate. Included in the sealed envelope of information held by the Comptroller General are the following items:

First. A copy of the individual's income tax returns.

Second. The amount and source of each fee of $1,000 or more received from a client.

Third. The name and address of each business or professional enterprise in which he is an officer or employee, and the amount of compensation received.

Fourth. The identity of real or personal property he owns worth $10,000 or more.

Fifth. The identity of each trust or fiduciary relation in which he holds a beneficial interest worth $10,000 or more and the identity, if known, of any interest the trust holds in real or personal property over $10,000.

Sixth. The identity of each liability of $5,000 or more owed by him or by him and his spouse jointly.

Seventh. The source and value of all gifts worth $50 or more received from a single source.

The Senate Select Committee on Standards and Conduct, by a majority vote, may examine this confidential information and make it available for a staff investigation. Otherwise, it is held by the Comptroller General for 7 years unless returned earlier when an individual dies or retires.

The disclosure information open to the public and filed with the Secretary of the Senate includes those gifts as specified in Senate rule 42 and the amount, value, and source of any honorarium worth $300 or more as required in Senate rule 44.

Mr. President, enumeration of these varied disclosure regulations in our Federal Government, underscores the need for a uniform measure which would encompass the legislative, executive, and judicial branches.

I joined in cosponsoring the Federal Financial Disclosure Act when it was introduced in the 92d Congress. And, as a member of the Subcommittee on Privileges and Elections, I voted with the majority to report that bill to the full Senate Rules Committee on August 9, 1972. On September 20, 1972, I made a motion in the full committee to report the bill to the floor. Unfortunately, that motion failed; but I am hopeful that, since time is on our side now, the 93d Congress will enact a comprehensive uniform financial disclosure law.

Establishment of such a law would offer a most effective way to protect the integrity of our governmental process. There is no denying the fact that the American people are losing confidence in the Government to govern and the leaders to lead. It is clear that this disillusionment pervades our entire society and is one of the most serious problems facing this Nation and this Congress. Evidence can be presented by examining some recent polls.

A 1967 Gallup survey revealed that six out of 10 Americans believed that shady conduct among Congressmen was fairly common. A Harris poll conducted during the same period noted that over half of the Nation's population felt that at least some Congressmen were personally receiving money for voting a certain way. Moreover, a survey published by Harris in 1971 indicated that during the period 1965–71, the percentage of the public which gave Congress a positive rating, declined from 64 to 26 percent.

Further evidence of this continuing decline of public confidence is manifested by another Harris survey, taken in November 1971, which revealed that 63 percent of all Americans felt that politicians are out to make money. This reflected a dramatic increase since 1967 when the same question was asked and only a close plurality registered the same viewpoint. This same survey also found that 59 percent of those polled held the opinion that "most politicians take graft."

In October 1972 a Harris poll revealed that public confidence in the leaders of both public and private institutions in this country continues at an all-time low. Not one of the three branches of the Federal Government could generate as much as 30 percent of the public to express a "great deal of confidence" in those in charge.

The current financial disclosure laws are not sufficiently far-reaching to eliminate the public climate of skepticism respecting the integrity and public performance of our national leaders and to rehabilitate their public image. Disclosure is hardly a sanction and certainly not a penalty.

Mr. President, passage of the bill I am proposing would set aside all speculation and enable the press and the public to make their own sound judgments about the financial status of the individuals in the three branches of Government. It affects not only the President and the Vice President, but also each Member of Congress, each delegate or resident commissioner, each officer and employee of the United States—including members in uniformed service—who is compensated at the rates of $24,000 or more per year or occupying grade GS–16 or higher of the General Schedule, and each individual who is a candidate for the office of Member of the House of Representatives. Presently, only candidates for the Senate and prospective appointees to the Supreme Court have to disclose their financial holdings and professional connections. The information filed by the candidates is not for public consumption; and once an individual attains a seat on the High Court, this type of disclosure is not required.

The Federal Financial Disclosure Act which I am proposing would cure the ills of existing law by bringing members of the Supreme Court within the scope of financial disclosure and requiring public disclosure by all candidates running for Congress as well as incumbents. Finally, it would hold the financial transactions of the President and Vice President accountable to the electorate.

If enacted, this legislation would require each of these individuals to file annually with the Comptroller General the following data:

First. The amount and source of each item of income, reimbursement for any expenditure, and each gift or aggregate of gifts from one source—other than gifts received from his spouse or other member of his immediate family—received by him or jointly with his wife which exceeds $100 in amount or value. It includes any fee or other honorarium received or in connection with the preparation of delivery of any speech or address, attendance at any convention or other assembly of individuals, or the preparation of any article or other composition for publication, and the monetary value of subsistance, entertainment, travel, and other facilities received by him in kind.

Second. The value of each asset held and the amount of each liability owed singularly or jointly with his spouse which has a value of or is in excess of $1,000 or more.

Third. Any transactions in securities of any business entity and all transactions in commodities by him, or by him and his spouse, jointly, or by any person acting in his behalf or pursuant to his direction if the aggregate amount involved exceeds $1,000.

Fourth, any purchase or sale, of real property or any interest by him, jointly with his spouse, or by any person acting on his behalf or following his direction, if the value of property involved exceeds $1,000.

Fifth. Any position held in any public or private organization, any service rendered to any person, and any employment other than employment by the United States, during the preceding calendar year, without regard to whether compensation was received for holding the position, rendering the service, or on account of that employment.

The Civil Service Commission estimates that if my bill is enacted, 42,000 civilian workers would have to file under its provisions, and the Department of Defense estimates that 24,000 members of the uniformed services would be covered, making a total of 66,000 statements which would be required under the disclosure act which I am proposing.

Mr. President, a public office is a public trust, and so must public disclosure be the responsibility of any public official. The disclosure idea, it has been said, comes as close as anything to being the all-purpose cleanser of the Federal Government. It attaches no moral overtones to the financial situation of a public servant. Rather it recognizes the final arbiter in any controversy to be the American public, which must have the knowledge of all such facts in order to assess the activities of those who control our great Nation and in order to express sound opinions as to the course being taken. It is one of the best means available to us to help restore confidence in Government.

If we are to require public financial disclosure, we should see that it is adequate for the purposes intended. Therefore, I urge prompt consideration by the Senate Committee on Rules and Administration of my bill, so that we may enact a Federal Financial Disclosure Act during this Congress.

Mr. President, I ask unanimous consent that the bill be printed in the RECORD.

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

S. 570

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 "Federal Financial Disclosure Act of 1973".

SEC. 2. (a) The President, the Vice President, each Member of Congress, each officer and employee of the United States (including any member of a uniformed service) who is compensated at a rate in excess of $24,000 per annum, and any individual occupying the position of an officer or employee of the United States who performs duties of the type generally performed by an individual occupying grade GS–16 of the General Schedule or any higher grade or position, as determined by the Comptroller General, regardless of the rate of compensation of such individual, shall file annually, and each individual who is a candidate of a political party in a general election for the office of a Member of Congress but who, at the time he becomes a candidate, does not occupy any such office, shall file within one month after he becomes a candidate for such office, with the Comptroller General a report containing a full and complete statement of—

(1) the amount and source of each item of income, each item of reimbursement for any expenditure, and each gift or aggregate of gifts from one source (other than gifts received from his spouse or any member of his immediate family) received by him or by him and his spouse jointly during the preceding calendar year which exceeds $100 in amount or value, including any fee or other honorarium received by him for or in connection with the preparation or delivery of any speech or address, attendance at any convention or other assembly of individuals, or the preparation of any article or other composition for publication, and the monetary value of subsistence, entertainment, travel, and other facilities received by him in kind;

(2) the value of each asset held by him, or by him and his spouse jointly which has a value in excess of $1,000, and the amount of each liability owed by him, or by him and his spouse jointly, which is in excess of $1,000 as of the close of the preceding calendar year;

(3) any transactions in securities of any business entity by him, or by him and his spouse jointly, or by any person acting on his behalf or pursuant to his direction during the preceding calendar year if the aggregate amount involved in transactions in the securities of such business entity exceeds $1,000 during such year;

(4) all transactions in commodities by him, or by him and his spouse jointly, or by any person acting on his behalf or pursuant to his direction during the preceding calendar year if the aggregate amount involved in such transactions exceeds $1,000;

(5) any purchase or sale of real property or any interest therein by him, or by him and his spouse jointly, or by any person acting on his behalf or pursuant to his direction, during the preceding calendar year if the value of property involved in such purchase or sale exceeds $1,000; and

(6) any position held in any public or private organization, any service rendered to any person, and any employment other than employment by the United States, during the preceding calendar year, without regard to whether compensation was received for holding the position, rendering the service, or on account of that employment.

(b) Reports required by this section (other than reports so required by candidates of political parties) shall be filed not later than May 15 of each year. In the case of any person who ceases, prior to such date in any year, to occupy the office or position the occupancy of which imposes upon him the reporting requirements contained in subsection (a) shall file such report on the last day he occupies such office or position, or on such later date, not more than three months after such last day, as the Comptroller General may prescribe.

(c) Reports required by this section shall be in such form and detail as the Comptroller General may prescribe. The Comptroller General may provide for the grouping of items of income, sources of income, assets, liabilities, dealings in securities or commodities, and purchases and sales of real property, when separate itemization is not feasible or is not necessary for an accurate disclosure of the income, net worth, dealing in securities and commodities, or purchases and sales of real property of any individual.

(d) Any person who willfully fails to file a report required by this section, or who knowingly and willfully files a false report under this section, shall be fined $2,000, or imprisoned for not more than five years, or both.

(e) All reports filed under this section shall be maintained by the Comptroller General as public records which, under such reasonable regulations as he shall prescribe, shall be available for inspection by members of the public.

(f) For the purposes of any report required by this section, an individual shall be considered to have been President, Vice President, a Member of Congress, an officer or employee of the United States, or a member of a uniformed service, during any calendar year if he served in any such position for more than six months during such calendar year.

(g) As used in this section—

(1) the term "income" means gross income as defined in section 61 of the Internal Revenue Code of 1954.

(2) the term "security" means security as defined in section 2 of the Securities Act of 1933, as amended (15 U.S.C. 77b).

(3) the term "commodity" means commodity as defined in section 2 of the Commodity Exchange Act, as amended (7 U.S.C. 2).

(4) the term "transactions in securities or commodities" means any acquisition, holding, withholding, use, transfer, or other disposition involving any security or commodity.

(5) the term "Member of Congress" means a Senator, a Representative, a Resident Commissioner, or a Delegate.

(6) the term "officer" has the same meaning as in section 2104 of title 5, United States Code.

(7) the term "employee" has the same meaning as in section 2105 of such title.

(8) the term "uniformed service" means any of the Armed Forces, the commissioned corps of the Public Health Service, or the commissioned corps of the National Oceanic and Atmospheric Administration.

(9) the term "immediate family" means the child, parent, grandparent, brother, or sister of an individual, and the spouses of such person.

SEC. 3. Section 554 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

"(f) All written communications and memorandums stating the circumstances, source, and substance of all oral communications made to the agency, or any officer or employee thereof, with respect to any case which is subject to the provisions of this section by any person who is not an officer or employee of the agency shall be made a part of the public record of such case. This subsection shall not apply to communications to any officer, employee, or agent of the agency engaged in the performance of investigative or prosecuting functions for the agency with respect to such case."

EFFECTIVE DATE

SEC. 4. The first report required under this Act shall be due on the 15th day of May occurring at least thirty days after the date of enactment.

By Mr. HANSEN (for himself, Mr. MANSFIELD, Mr. BENNETT, Mr. ALLEN, Mr. STEVENS, Mr. MCGEE, Mr. TOWER, Mr. YOUNG, Mr. CURTIS, Mr. THURMOND, Mr. HATFIELD, Mr. BIBLE, Mr. MCCLELLAN, Mr. ABOUREZK, Mr. FANNIN, Mr. DOMINICK, Mr. DOLE, and Mr. GURNEY):

S. 571. A bill to amend the Federal Meat Inspection Act to require that imported meat and meat food products made in whole or in part of imported

meat be labeled "imported" at all stages of distribution until delivery to the ultimate consumer. Referred to the Committee on Agriculture and Forestry.

Mr. HANSEN. Mr. President, today I am introducing a bill for myself and several cosponsors which would amend the Federal Meat Inspection Act to require that imported meat and meat products made in whole or in part of imported meat be labeled "imported" at all stages of distributions until delivery to the ultimate consumer.

The cosponsors are Mr. MANSFIELD of Montana; Mr. BENNETT of Utah; Mr. ALLEN of Alabama; Mr. STEVENS of Alaska; Mr. McGEE of Wyoming; Mr. TOWER of Texas; Mr. YOUNG of North Dakota; Mr. CURTIS of Nebraska; Mr. THURMOND of South Carolina; Mr. DOLE of Kansas; Mr. HATFIELD of Oregon; Mr. BIBLE of Nevada; Mr. McCLELLAN of Arkansas; Mr. ABOUREZK of South Dakota; Mr. FANNIN of Arizona; Mr. DOMINICK of Colorado; and Mr. GURNEY of Florida.

This legislation would enable the consumer in the food store to recognize and choose between foreign and domestically produced meat. I am sure there are many Americans who, if they had their choice, would prefer to purchase meat which has been raised and processed here in the United States. To the housewife who demands top quality in wholesomeness and cleanliness in the products which she serves to her family, there is much to be said for the domestically produced meat which passes through the strict inspection system we have here in the United States.

Aside from this, there is another very valid reason why the American consumer should be told whether the meat he is buying is domestic or foreign.

Under existing laws and regulations which control the Department of Agriculture's meat inspection system, foreign meat imported for manufacturing or processing purposes is normally shipped in frozen blocks of 50 to 60 pounds. These blocks are labeled as to origin. However, after processing in this country, the product is not further identified as being of foreign origin.

In other words, the processor, packer, canner, or distributor who purchases the meat at port of entry is considered the "ultimate consumer" and no further labeling of the origin of the meat is required.

In this situation, a problem develops from the fact that the greatest part of the total red meat imported is frozen boned beef which is thawed, ground, blended with fat trimmings from domestic beef, and then sold as hamburger. A housewife has no way of knowing when she purchases a package of hamburger at the retail outlet whether it is all or part imported beef, or, more significantly, whether it has been previously frozen.

The freezing, thawing, and possible refreezing of imported meat seems inconsequential until we realize that Department of Agriculture bulletins warn:

> Cook thawed meat immediately or keep only a short time in a refrigerator. Avoid refreezing thawed meat.

Despite this clear instruction from the Department, there is no way for the housewife to know whether she should freeze the hamburger she buys at the retail outlet. If the hamburger is made of imported meat, it has already been frozen and thawed once.

Mr. President, this is a fraud on the consumer, and I believe we are justified in taking steps to see that the consumer realizes the problems which could result from purchasing meat which has already been frozen.

This is good legislation, and I hope it will receive favorable consideration by Congress.

Mr. ABOUREZK. Mr. President, I am pleased to join the distinguished Senator from Wyoming (Mr. HANSEN) in cosponsoring this needed legislation. I have long been concerned about the adequacy of inspection of meat imported into this country.

Sixty-seven years ago Upton Sinclair alerted the American public to the outrageous conditions that then prevailed in American meatpacking plants. The public outcry that followed the publication of "The Jungle" resulted in the establishment of an inspection system of domestic meatpacking plants that has enabled the American public to assume that all meat products meet the highest standards.

Fortunately, that assumption is generally valid in terms of the 1,062 meatpacking plants in the United States. These are monitored by nearly 7,000 Federal meat inspectors who assure that our domestically produced meat products meet the highest standards of quality. But the quality of imported meat is another story.

There are nearly 1,100 plants which pack meat for import into this country. These are inspected by an equivalent of 75 inspectors. As a result, only 1 percent of the 1.6 billion pounds, and I would point out that that figure is increasing because of the change in import policy implemented by the administration, of imported meat brought into this country is ever inspected.

The sad fact is that this kind of hit-or-miss inspection of imported meat is simply inadequate. This system cannot get us clean and sanitary meat from abroad. At best we are getting relatively clean meat but we are still accepting meat with an allowable number of defects ranging from dirt and blood clots on up to and including manure.

There is absolutely no reason why the American consumer cannot expect that meat that is imported should meet the same standards as that produced domestically. Much of the imported meat ends up in hamburger, or weiners or bologna. This is an additional convenient way to disguise the dirt, blood clots and other foreign matter that is in imported meats. There is no identification at the meat counter to separate the fresh, clean and thoroughly inspected meat from our American farms and ranches and the meat from foreign sources.

I strongly feel that we should strengthen our inspection of imported meats. While a Member of the House of Representatives I cosponsored a measure introduced by Congressman JOHN MELCHER that would do this. I hope that Congressman MELCHER will continue his efforts for this measure. I feel that this measure by Senator HANSEN also directs itself to this problem.

The American consumer has the right to know the story of meat imports in this country. It is time that we had a version of "The Jungle" to alert the public to this situation. And it is time that we had some means of identifying foreign meat from domestic meat.

That is the purpose of this bill and I again commend Mr. HANSEN for his foresight in identifying this problem and seeking a means of solving it.

Mr. TOWER. Mr. President, I am pleased today to join my colleague from Wyoming (Mr. HANSEN) in sponsoring a measure to require the labeling of all imported meat products.

In a time when the price of meat products is being widely discussed, and when import markets have been opened to increase the supply, I feel it is only fair to our domestic producers and to the Nation's consumers to provide for the labeling of all meat and meat products, which enter market channels through importation, to be labeled as "imported." In some instances, only a portion of a particular product contains imported meat. Much meat is sold over the counter as processed meat and is many times blended with domestically-produced meat. This fact should be available to the consumer when he makes his selection.

Certainly I am pleased that the demand for meat today is so great. I am pleased too that the income of Americans is such that it allows for a good diet. Nevertheless, with the new import markets, American cattlemen are forced to compete with products produced in other countries. Because I feel many consumers would prefer to purchase domestically produced beef. I feel this option should be open to them. This measure would provide for labeling procedures indicating the origin of all meat other than domestic products.

I urge the Congress to act on this measure at the earliest possible date.

By Mr. DOMINICK (for himself, Mr. BROCK, Mr. CURTIS, Mr. GOLDWATER, Mr. SCHWEIKER, Mr. STEVENS, Mr. BIBLE, Mr. BUCKLEY, and Mr. BELLMON):

S. 576. A bill to amend the Gun Control Act of 1968 to provide for separate offense and consecutive sentencing in felonies involving the use of a firearm. Referred to the Committee on the Judiciary.

Mr. DOMINICK. Mr. President, 1971 was a banner year for crime with almost 6 million crimes occurring, an increase of almost 6 percent over the previous years. The preliminary figure for the first 9 months of 1972 indicate a further increase. While the national rate of violent crimes in 1971 was 392 per 100,000 people, Colorado had a State rate of 373 per 100,000 people, and the Denver Standard Metropolitan Statistical Area—Adams, Arapahoe, Boulder, Denver, and Jefferson Counties—had a rate of 514 per 100,000 citizens. One of the

saddest statistics for 1972 was the killing, with firearms, of 108 Americans who were employed as police officers. One of the most telling statistics is that the risk of being a victim of a crime has increased 74 percent since 1966.

I have long subscribed to the belief that the most effective method of deterring crime is to deal swiftly and sternly with criminals. I am also of the opinion that violent crime is deterred by dealing most harshly with criminals who use firearms in the commission of their offenses.

I have consistently opposed Federal efforts with regard to registration of firearms. The wiser strategy is to reach the criminals rather than just dealing with the gun. I offer this bill as an alternative to registration and I am firmly of the opinion that strict criminal penalties will do far more good than will strict registration requirements.

I introduce today a bill to amend title 18, section 924(c) of the United States Code, and ask unanimous consent that the bill be printed at the conclusion of my remarks. This section is more commonly known as the Mansfield amendment to the Omnibus Crime Control Act of 1970.

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

(See exhibit A.)

Mr. DOMINICK. Mr. President, the Senate has focused its attention on this section on at least four prior occasions—most recently adopting this legislation by a vote of 84 to 11 as an amendment to the Handgun Control Act of 1972 last August. On each occasion, the Senate has intended to create a separate and distinct crime of carrying or using a firearm in the commission of a felony and to require that upon conviction, sentences imposed must be served consecutively. This bill is designed to insure congressional intent as expressed in section 924(c) which provides that—

(c) Whoever—(1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States, shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than 25 years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence.

The necessity for this bill, Mr. President, springs from a recent Colorado case, and I ask unanimous consent that the official reports of this case be printed at this point in the RECORD. (*U.S.* v. *Sudduth*, 330 F. Supp. 285 (1971) and 457 F. 2d 1198 (10 Cir. 1972)).

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

(See exhibits 1 and 2.)

Mr. DOMINICK. Mr. President, in this case the defendant was charged with one count of selling heroin and one count of carrying a firearm during the commission of a felony under section 924(c) or the Mansfield amendment. To the best of my knowledge, this is the first reported case involving this new legislation. At a pretrial hearing, the district court dismissed the count under section 924(c) on the grounds that the section did not and was not intended by Congress to create a substantive offense. The defendant was convicted of selling heroin; and the court imposed an additional 1-year concurrent sentence under section 924(c) on the theory that this section, like habitual criminal statutes, is directed to punishment, rather than defining substantive offenses.

On appeal to the 10th Circuit Court of Appeals, the district court was reversed and it was ruled that section 924(c) did create a separate chargeable offense, but the consecutive sentence imposed by the district court could not stand because the second count under section 924(c) was dismissed. The appeals court also ruled that the section's consecutive sentencing provisions apply only to second or subsequent convictions so that a first offender under this section could receive a concurrent sentence.

Mr. President, I bespeak the obvious in indicating that one circuit court of appeals decision, while it may be persuasive, is not binding on the other circuits. This issue might be litigated in each circuit. My bill clarifies this situation and only gives effect to congressional intent as manifested on at least four prior occasions.

My bill, in addition, would drop the present requirement that the carrying of a firearm be "unlawful" during the commission of a felony. Prosecutors would only have to prove an actual or constructive—within easy reach—carrying of the firearm during the crime.

Mr. President, this legislation clearly states that use of or carrying a firearm during the commission of a felony creates a separate and distinct chargeable felony, sentencing for which must be imposed consecutively with the sentence imposed for the underlying felony. The terms of imprisonment remain the same as are presently embodied in section 924(c). This bill does, however, give forceful expression of our abhorrence of violence in crime by providing that upon imposition or execution of the terms of punishment imposed by the courts, the sentence may not be suspended nor may probation be granted.

Mr. President, it is my earnest belief that enactment of this legislation, when compared with other gun control proposals, will operate as a more effective deterrent to the use of firearms by criminals. I urge expeditious action by the Congress in fulfillment of our responsibility to protect law-abiding Americans from injury or death at the hands of criminals who would use firearms. This is a just demand by Americans on their Government.

Mr. President, in conclusion, I would just like to say that I am most pleased that a number of my colleagues have joined me in sponsoring this measure. They are the Senator from Tennessee (Mr. BROCK), the Senator from New York (Mr. BUCKLEY), the Senator from Nebraska (Mr. CURTIS), the Senator from Arizona (Mr. GOLDWATER), the Senator from Pennsylvania (Mr. SCHWEIKER), the Senator from Alaska (Mr. STEVENS), the Senator from Nevada (Mr. BIBLE), and the Senator from Oklahoma (Mr. BELLMON).

Mr. President, I have here a statement by the Senator from Pennsylvania (Mr. SCHWEIKER) and one by the Senator from Alaska (Mr. STEVENS), who are cosponsors, also reporting on the validity and the necessity of this bill. I ask unanimous consent that these statements also be printed in the RECORD, following the court proceedings and the bill.

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

(See exhibits 3 and 4.)

EXHIBIT A

S. 576

A bill to amend the Gun Control Act of 1968 to provide for separate offense and consecutive sentencing in felonies involving the use of a firearm

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 924(c) of the Gun Control Act of 1968 (Public Law 90 618; 18 U.S.C. 924(c)) read as follows:

"(c) Whoever—

"(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States; or

"(2) carries a firearm during the commission of any felony for which he may be prosecuted in a court of the United States, shall, in addition to the punishment provided for the commission of such felony, be sentenced for the additional offense defined in this subsection to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years.

"The execution or imposition of any term of imprisonment imposed under this subsection may not be suspended, and probation may not be granted. Any term or imprisonment imposed under this subsection may not be imposed to run concurrently with any term or imprisonment imposed for the commission of such felony."

EXHIBIT 1

UNITED STATES OF AMERICA, PLAINTIFF, v. DALE EDWARD SUDDUTH, DEFENDANT

(Crim. A. No. 71–CR–82, U.S. District Court, D. Colorado, July 22, 1971)

Prosecution on a two-count indictment including a count for the sale of heroin and a count for knowingly carrying a firearm unlawfully during the commission of such felony. The District Court, Winner, J., held that the federal statute providing for additional sentence if a defendant is convicted of a felony prosecutable in a court of the United States and is shown to have used or to have been unlawfully carrying a firearm in the commission of such offense does not and was not intended to create any substantive offense.

Second count dismissed.

Richard J. Spelts, Asst. U.S. Atty., Denver, Colo., for plaintiff.

William R. Young, Theodore B. Isaacson, Denver, Colo., for defendant.

MEMORANDUM OPINION

WINNER, District Judge.

Defendant was charged in a two-count indictment. Count I charged a sale of heroin

in violation of 26 U.S.C. §§ 4705(a) and 7237. A jury convicted him of this offense. Count II of the indictment charged:

"That on or about January 27, 1971, in the vicinity of Denver, State and District of Colorado, Dale Edward Sudduth willfully and knowingly carried a firearm unlawfully during the commission of a felony prosecutable in a court of the United States, that is, the said Dale Edward Sudduth carried a small caliber revolver during the time when he did sell, barter, exchange and give away to Ronald L. Wilson a narcotic drug (approximately 77.4 grams of heroin) not in pursuance of a written order of the said Ronald L. Wilson on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate as required by Section 4705(a), Title 26, United States Code; all of the foregoing in violation of Section 924(c), Title 18, United States Code, as amended January 2, 1971."

Count II of the indictment was dismissed by the Court at time of trial for failure to state an offense since 18 U.S.C. § 924(c) does not create an offense. Instead, 18 U.S.C. § 924(c) provides only for an additional sentence if a defendant is convicted of a felony prosecutable in a court of the United States and is shown to have used or to have been unlawfully carrying a firearm in the commission of that offense. The statute is new, and no reported case has been called to our attention, nor have we found a case interpreting the particular subsection of the statute here considered. However, an analysis of that subsection's language and the legislative history leads inevitably to the conclusion that this particular subsection of the statute does not and was not intended by Congress to create a substantive offense.

We start with the Omnibus Crime Control and Safe Streets Act of 1968, and more particularly with Title IV of that Act, 1968 U.S. Code Cong. and Adm. News p. 2163 has to do with "Title IV—Firearms Control and Assistance." At page 2216 et seq., the scope of the Act's coverage is discussed, and it appears that Congress wished to control (a) the interstate traffic in mail-order firearms, other than rifles and shotguns, (b) acquisition of firearms by juveniles and minors, (c) out-of-state purchase of concealable firearms, (d) importation of nonsporting and military surplus firearms, (e) highly destructive weapons, (f) licensing of importers, manufacturers and dealers, and (g) certain record keeping procedures. The sectional analysis of Title IV commences on page 2197 of 1968 U.S. Code Cong. and Adm. News, and it is there said that Sec. 922 sets forth the prohibitions of the Act. Sec. 923 is said to contain the licensing provisions, while Sec. 924 is described as the penalty and forfeitures provisions of the Act. Nothing comparable to present Sec. 924(c) was contained in the original Act, [P.L. 90-351—82 Stat. 197] but, rather, Sec. 924(c) of that Act is Sec. 924(d) of the present law.

Section 924 was first amended in 1968 by P.L. 90-618, 82 Stat. 1223, the Gun Control Act of 1968, and that year's U.S. Code Cong. and Adm. News p. 4411 says that the principal purpose of the amended Act "is to strengthen Federal controls over interstate and foreign commerce in firearms and to assist the States effectively to regulate firearms traffic within their borders." With this amendment, a subsection approximating present subsection (c) was added, and effective October 22, 1968, U.S.C. § 924(c) provided:

"(c) Whoever—

"(1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or

"(2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,

"shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than 25 years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence."

1968 U.S. Code Cong. and Adm. News p. 4431 comments with reference to the Conference Report on the new subsection as follows:

"Use of firearms in commission of crimes.—The House bill provided—in a provision added to chapter 44 of title 18—for a sentence of from 1 to 10 years for a first offense, and a sentence of from 5 to 25 years for a subsequent offense, where a person uses a firearm to commit, or carries a firearm unlawfully during the commission of, a Federal felony. The House bill further provided that such sentence could not be suspended, that probation could not be granted, and that such sentence could not be imposed to run concurrently with any sentence imposed for such Federal felony committed.

"The Senate amendment provided—in a new chapter 116 added to title 18—for the imposition of an additional sentence of an indeterminate number of years up to life upon any person armed with a firearm while engaged in the commission of certain enumerated Federal felonies. The Senate amendment further provided that in the case of a subsequent conviction, the court could not suspend the sentence or grant probation.

"The conference substitute is identical to the House bill, except that the prohibitions on suspension of sentence and probation are applicable only to second and subsequent convictions and that concurrent sentencing under the section is not prohibited."

As background to the 1968 amendment, in the July 19, 1968, Congressional Record—House, p. 22229 et seq. we find that Mr. Casey offered an amendment seemingly making the use or carrying of any firearm in the commission of specified major offenses separated punishable. Mr. Poff then offered a substitute amendment which later became § 924(c). It is true that Mr. Poff said (p. 22231), "My substitute makes it a separate Federal crime to use a firearm in the commission of another Federal crime and invokes separate and supplemental penalties." However, on the next page of the Congressional Record the following exchange appears:

"Mr. ICHORD. * * * Are you contemplating—the gentleman makes it a Federal offense, another separate Federal offense to use a firearm to commit any felony which may be committed. If during the commission of any felony wherein such firearm is used the party may be prosecuted in any court of the United States? Does the gentleman contemplate the second criminal proceeding or can this man be tried in the original proceeding where he was first tried?

"Mr. POFF. * * * The answer (to Mr. ICHORD's) question is in the affirmative; namely, it would be expected that the prosecution for the basic felony and the prosecution under my substitute would constitute one proceeding out of which two separate penalties may grow."

In the September 16, 1968, Congressional Record—Senate, p. 26896, we find that Senator Hruska said:

"Penalty Provisions. Section 924 of title I of the committee bill contains an amendment offered by this Senator to increase the maximum penalties for violation of the law * * * *This amendment substantially increases the maximum penalties for violation of the act* but retains flexibility in the hands of appropriate Federal correctional officials to deal with those who show a substantial potential for rehabilitation * * *"

In the next day's Senate Congressional Record it appears that Senator Dominick offered an amendment entitled "Use of Firearms in the Commission of Certain Crimes of Violence." That amendment provided:

"Whoever, while engaged in the commission of any offense which is a crime of violence punishable under this title, is armed with any firearm, may in addition to the punishment provided for the crime be punished by imprisonment for an indeterminate term of years up to life, as determined by the court * * *"

As to his proposed amendment, Senator Dominick said:

"No new crime would be created. Penalties have just been increased when one particular element—a gun—is presented in the perpetration of the enumerated crimes. As a result, there would be no additional strain on already overburdened courts."

This, then, is most of the legislative history of 18 U.S.C. § 924(c) as it was amended in 1968. It is difficult, indeed to spell out of this legislative history any Congressional intent to create a separate substantive crime, and it is even more difficult to read into the language of the subsection a meaning which would in fact create such a crime.

As has been noted, the indictment here lies under a still later amendment—P.L. 91-644, Title II, § 13, 84 Stat. 1889, effective January 2, 1971. A study of that law discloses that Sec. 924(c) was the only section of 18 U.S.C. Chapter 44—Firearms—which was amended by the 1970 Act, and that study lends no support to the government's argument. The definitions (§ 921), the unlawful acts (§ 922) and the licensing provisions (§ 923) all remain unchanged. The amendment in question appears in Laws of 91st Congress, 2nd Session, at page 2216. The full amendment was:

"Title II—Stricter Sentences.

"Sec. 13. Section 924(c) of title 18, United States Code, is amended to read as follows:

"(c) Whoever—

"(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

"(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,

"shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years, and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, *nor shall the term of imprisonment imposed under this subsection run concurrently* with any term of imprisonment imposed for the commission of such felony."

To us, it is impossible to read this section as creating a separate substantive offense. The statute says only that a person who uses a firearm in the commission of a felony or who carries a firearm unlawfully during the commission of a felony, "shall, *in addition to the punishment provided for the commission of such felony, be sentenced.* * * *" The statute does not say that use or possession of a gun is a separate crime. It deals only with punishment to be imposed upon conviction of "the commission of such felony," i.e., a felony prosecutable in the Federal Court. No other reading could be grammatical.

Admittedly, the Congressional Record underlying the 1970 amendment is somewhat self-contradictory. Senator Scott said as to the amendment [Congressional Record, vol. 116, pt. 26, p. 35734] that the Act "was to provide stricter sentences for criminals using firearms in the commission of Federal felonies." On the same page, Senator Mansfield described the amendment:

"* * * what this does is to make it a

crime itself the mere carrying of a gun in the commission of a crime. The sentence imposed will be in addition to and not concurrent, with the sentence for the underlying crime."

However, on December 17, 1970, [Congressional Record, vol. 116, pt. 31, p. 42150] Senator Mansfield said:

"It was for this reason as well that I introduced S. 849, the stricter sentencing bill and am gratified to know that the bill—having passed the Senate unanimously—has become Title II of the pending measure * * * With this stricter gun sentencing provision we have taken an effective step in the right direction."

The same page of the Congressional Record discloses that Senator McClellan said:

"It is quite simple. It means that the gun offender will be required to serve a separate and additional sentence for his act of using a gun. There is no discretion given. There is no way this additional sentence can be avoided."

1970 U.S. Code Cong. and Adm. News p. 5848 describes the amendment as being an amendment of the 1968 Gun Control Act and says:

"AMENDMENT TO THE GUN CONTROL ACT OF 1968

"The Senate amendment contained a provision not in the House bill *amending a section of the Gun Control Act of 1968 that imposes additional penalties for the use of a firearm to commit, or for carriage of a firearm unlawfully during the commission of a Federal felony.* The Senate amendment reduced the minimum sentence for a second or subsequent offense from five to two years, and also provided that a sentence could not run concurrently with any sentence imposed for the underlying Federal felony. The conference substitute adopts the Senate amendment."

With all of this, the argument of the United States Attorney that 18 U.S.C. § 924 (c) creates a separate substantive offense just does not jell. When Congress devoted several pages to phrasing Sec. 922 which creates the unlawful acts, it is difficult to accept an argument that Congress impliedly intended to create an offense under the section of the Act headed "Penalties." It may well be that from a defendant's standpoint, it doesn't make a whole lot of difference, because, if convicted, and if the factual requirements of Sec. 924(c) are established, he is going to get the same sentence anyway. But, this fact doesn't justify or permit the Government to charge a separate substantive offense, and a defendant can't be required to have a separate count of an indictment submitted to a jury. Also, whether the offense is separate could be of vital importance under some habitual criminal laws.

It is elementary that there are no constructive criminal offenses. United States v. Alpers, 338 U.S. 680, 70 S.Ct. 352, 94 L.Ed. 457. Nothing is better settled than is the proposition that criminal statutes are to be strictly construed. United States v. Gaskin, 320 U.S. 527, 64 S.Ct. 318, 88 L.Ed. 287. We are not here directly concerned with the myriad of cases involving vagueness in a statute; rather, we are confronted with a statute which by its terms does not create an offense, although another section of the same Act spells out in careful detail the acts made unlawful by the statute, but omits from its coverage any suggestion that the act charged in Count II of this indictment is, in and of itself, a separate crime.

Sec. 924(c) is not a true recidivist statute, but it has many similarities. It is more nearly a "second offender's" statute, quite similar in impact with 26 U.S.C. § 7237(c), and under that section, counts charging a second substantive offense merely because of a prior conviction are not recognized—rather, the section is treated as one requiring stricter and additional punishment. United States v. Bell, (7 Cir.) (1965) 345 F.2d 354; Munich v. United States, (9 Cir.) (1964) 337 F.2d 356; Sorey v. United States, (5 Cir.) (1961) 291 F.2d 826; United States v. Wilson, (2 Cir.) (1968) 404 F.2d 531; United States v. Beltram, (2 Cir.) (1968) 388 F.2d 449.

In Gryger v. Burke, (1947) 334 U.S. 728, 68 S.Ct. 1256, 92 L.Ed. 1683, under consideration was Pennsylvania's habitual criminal law. The Court there said:

"The sentence as a fourth offender or habitual criminal is not to be viewed as either a jeopardy or additional penalty for the earlier crimes. *It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.*"

Here, Congress has directed that where a man is unlawfully carrying a gun in the commission of an offense which is subject to prosecution in a Federal Court, a stiffer penalty must be imposed, and the evidence showed that defendant's possession of a gun was unlawful because of a prior state court conviction.[1] Under that evidence, the stricter penalty demanded by 18 U.S.C. § 924(c) must be imposed, but it is to be imposed after and as a result of defendant's conviction under Count I—not on the basis of an attempt to charge in Count II that defendant violated the sentencing provisions of Section 924(c).

It is for these reasons that Count II of the indictment was dismissed.

EXHIBIT 2

UNITED STATES OF AMERICA v. DALE EDWARD SUDDUTH

(Appeal from the U.S. District Court for the District of Colorado (D.G. #71–CR–82))

Richard J. Spelts, Assistant United States Attorney (James L. Treece, United States Attorney, with him on the Brief), for Appellant.

Tom W. Lamm, Denver, Colorado, for Appellee.

Before Seth and Barrett, Circuit Judges, and Mechem, District Judge.

Seth, Circuit Judge.

The defendant was charged in a two count indictment, Count I thereof being for the sale of heroin in violation of 26 U.S.C. § 4705(a). Count II charged that the defendant carried a firearm "unlawfully" during the commission of the felony charged in Count I in violation of 18 U.S.C. § 924(c). At the pretrial of the case the trial court dismissed Count II. The trial was had on Count I and the defendant was convicted by a jury and the court imposed a sentence of five years. The trial court also imposed a sentence of one year to run consecutively with the five-year term. This one-year sentence was imposed under 18 U.S.C. § 924(c), the trial court thereby treating the subsection as relating to the matter of the penalty to be imposed. It thereby held that the subsection did not create a separate crime. The trial court also construed the wording of the subsection to require that the one-year term under section 924(c) was required to be a consecutive sentence on the first "offense."

The principal issue on the appeal is whether or not the construction of 18 U.S.C. § 924(c) by the trial court was correct. The Government here urges that the subsection creates a separate crime rather than an enhancement of the penalty as found by the trial court. The issue is also presented as to whether or not the subsection requires the sentence, whether it be an enhancement in penalty or a separate offense, to be consecutive to the confinement imposed under Count I, or whether for a "first offense." 18 U.S.C. § 924(c) reads as follows:

"(c) Whoever—

(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States.

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony."

Some examination of the legislative procedure which was followed in the enactment of section 924(c) and its predecessor is necessary in order to properly construe the section. This present subsection to Title 18 was part of the original Omnibus Crime Control and Safe Streets Act of 1968. The section originally contained penalties in subsection (a) thereof which related to Chapter 44 as a whole. These penalties thus related directly to the recitation of "unlawful acts" in the body of the Act. Section 924(c) was added and the original section 924(c) was redesignated (d) as a House Floor Amendment during the course of the debates on the Gun Control Act (H.R. 17735). Apparently no public hearings were held on this Bill. The floor debate in the House was extensive and several amendments were there considered. Finally the amendment which became the basis of section 924(c) in the 1968 Omnibus Crime Control Act was passed by the House. Some of the amendments considered during the course of the floor debate presented somewhat different methods of handling the use of guns during the commission of a felony. It should be pointed out that the use of a gun during the commission of a felony constituted an entirely different subject than had theretofore been considered during the course of the debates on the original Omnibus Crime Control Act of 1968. The penalties in the original Act related to the acts which were declared unlawful in the Omnibus Bill, and which acts were for the most part related to the sale, importation and transportation of firearms.

The Senate considered its Gun Control Bill which was S. 3633, after the House had passed its Gun Control Act considered above. During the course of the Senate debate various methods to increase the penalty under the Omnibus Crime Control Act of 1968 were discussed on the floor and amendments were then offered. Among these amendments was the first by the Senate directly related to the possession and use of a gun while committing a felony. The Dominick amendment to the Gun Control Act was passed by the Senate and the matter went to the House Senate Conference Committee which adopted the House version of section 924 but with some reduction in the penalties originally proposed. The committee report was adopted and the Bill became the Gun Control Act of 1968, P.L. 90–618. It was an amendment to Chapter 44, Title 18 of the United States Code.

In 1970, the matter of the use of firearms during the commission of a felony was again considered, and again it arose by way of floor amendments. This was during the course of debate on the Omnibus Crime Control Act of 1970. The provisions were suggested as a "rider" to the Bill. The subject matter thereof had been formerly contained in a separate Senate Bill. The floor debate centered on the matter of increasing the severity of the punishment and the debate was directed to this point. The Omnibus Bill of 1970 with the "rider" referred to was passed by the

Senate, went to the House Senate Conference Committee and the Senate version was adopted by the committee and the committee report was adopted by both houses and became the present 18 U.S.C. § 924(c).

The manner in which section 924(c) was adopted by Congress and the fact that it originated in both 1963 and 1970 versions by way of floor amendment helps in understanding why the subsection was placed in the Act where it was. This legislative procedure shows why the subject matter of the subsection is somewhat foreign to the balance of section 924. The subject matter was in fact not related to the basic provisions of the Act which relate primarily as we have indicated to restrictions and control in the sale and transportation of firearms. The Act started with the general penalty provisions relating to such matter and can be related directly to the substance of the Act We have seen how the present subsection (c) was added to meet a somewhat different problem and one which was not covered in the substance of the Act. It was a new subject which was added and its placement and wording give rise to the doubts which prompted the appeal in this case. This general placement of the subsection obviously causes much of the present concern as to the intention of Congress. The penalty section of the Act was probably the best place to insert such a rider, but as we have seen, it has to stand on its own feet since it cannot be related to any recitations in the body of the Act.

In addition to the placement of the subsection, the construction is complicated and is by no means free from doubt by reason of the fact that it refers to and is dependent upon the basic felony. Its placement and the initial wording thereby gives the appearance that the matter relates to the enhancement of the penalty and not to the creation of a separate crime.

As might be expected, the record of the debates of the floor amendments are not particularly helpful in determining the intention of Congress as the attention of the members was directed to the severity of the penalty rather than how the penalty was to be imposed. The several Senators and Congressmen referred to the subsection as "an offense," or as "a penalty," or as "a crime," or as "a felony." Since the emphasis was otherwise directed, it appears that no unanimity should be expected from such references to the subsection and are not of assistance to us in determining the intention of Congress. The severity and the need for severity of the penalty was debated at length.

An examination of the events surrounding the enactment of section 924(c) and an evaluation of its wording leads us to the conclusion that it was intended to create a separate crime. It is obvious, however, that the matter is by no means free of doubt and we have given careful consideration to the views of the trial judge in this respect, but are led to a contrary result.

If the subsection 924(c) is considered as a separate Act taken out of the context in which it was placed, it takes on the appearance of an ordinary provision defining a crime. As the wording is typical of such a definition, it is perhaps unusual to take such a subsection out of context, but we think it should be done because it is in fact a stranger where it is placed. It is apparent also that the language in the subsection making the crime dependent upon the proof of another crime is unusual, but again it does not necessarily convert it into merely an increase in the penalty for the basic crime. This aspect does not overcome the other indications of the construction of the subsection as an independent crime.

Perhaps the strongest single phrase in the subsection to indicate it as a separate crime is the reference to ". . . subsequent convictions under this subsection. . ." This, of course, is typical of a definition of a separate crime and provisions relating to the increase in punishment upon the second or third conviction thereof.

In construction of the Act, we must consider the acts sought to be punished as something done which must be demonstrated to have taken place or to have existed during the commission of the basic felony. This showing can in some instances become a relatively uncomplicated matter. Provisions relating to the use of a firearm during the commission of a crime are not unusual in the criminal statutes but for the most part they are facts to be proved by the prosecution during the course of the proof and as part of the basic crime, and not as a separate felony. Under the statutory provision we are considering, the basic crime and the use of firearms are separated into two felonies, otherwise the matter is much the same as under statutes where both are combined. The issue will frequently involve a group of facts or inferences which will be disputed or contested and from which different inferences may be drawn. We are of the opinion that these possibilities make the matter properly to be demonstrated to the satisfaction of the jury rather than to be handled, for example, in the manner in which prior convictions are presently demonstrated under most recidivist statutes, as would be done if a penalty only was intended. The proof here used by the trial judge in sentencing the defendant demonstrates the point to a limited extent. The proof on the implementation of the penalty before the trial judge included the testimony relating to certain Denver city records by a witness who apparently handled for the city the matter of issuance or recordkeeping for permits to carry firearms in the city. There was also proof introduced that the defendant was not eligible for a permit, or that he could not lawfully carry a gun in Denver or Colorado by reason of previous convictions. The proof was thus of a relatively simple fact situation, but it is apparent that complications can arise by reason of the place where the felony may have been committed or by reason of the delays in arrest after the commission of the felony and many other situations. We thus conclude that the subject matter of the subsection persuades us to hold that it was intended and should be proved as a separate crime. See United States of America v. Chick, et al. U.S.D.C., District of Arizona, No. CR-71-381-Tuc., which reaches the same result.

As to the question of first offenses, we hold that the limitations on concurrent sentences and suspended sentences in 18 U.S.C. § 924(c) refer only to second and subsequent offenses.

We have considered only the construction of the statute concerned as it relates to the issue of a separate crime or an enhancement of penalty and express no opinion as to whether the "unlawful" carrying of a firearm refers to state or municipal regulations, and if so whether it creates a federal offense for the violation of a state law, and if it does, so whether this may properly be done.

We thus conclude that the statute was intended to create a separate offense, and that Count II of the indictment here concerned should not have been dismissed. The dismissal of and the sentence on Count II therefore are vacated, the case is remanded to the trial court for further proceedings in conformance herewith.

EXHIBIT 3

STATEMENT BY SENATOR SCHWEIKER

Mr. President, I am pleased to join with my distinguished colleague from Colorado as a cosponsor of this legislation, which will create a separate crime for using or carrying a firearm during the commission of a crime, and will require that the sentencing for the two felonies run consecutively.

I strongly supported a similar amendment offered by Senator Dominick to the Handgun Control Act last year. The amendment passed by the overwhelming vote of 84 to 11. The Senate has passed other similar amendments on at least three separate occasions, and the distinguished Majority Leader, Senator Mansfield, has strongly supported these provisions for years.

The bill introduced today provides for a mandatory sentence for using or carrying a firearm during the commission of any felony punishable under the laws of the United States. It seems to me that this makes great sense. When a person chooses to arm himself with a gun before he sets out to commit a crime, there is a considerable degree of "malice aforethought" in his actions. Criminals do not choose to carry guns unless they intend to use them if the need arises. That is why an additional sentence is warranted in these cases. If a criminal knows he will be required to serve an additional term for having a gun with him, he will think twice about carrying it.

In addition, this bill provides that any prison term imposed under these provisions may not be suspended, and probation may not be granted. In other words, if you commit a felony with a gun, you are going to get an additional, separate sentence for it, and you are going to have to serve the full sentence. No discretion is left to the courts. No judge can decide on his own that he'll let a gun-toting criminal out on the streets before his full, separate sentence is served.

This is the kind of legislation we urgently need. It protects the rights of law-abiding citizens, but cracks down hard on dangerous criminals. I think when this bill becomes law, we will see an immediate decline in the use of guns in the commission of crimes. I strongly support it, and hope that it will be acted on swiftly by the Senate.

EXHIBIT 4

STATEMENT BY SENATOR STEVENS

Mr. President, the bill which I am cosponsoring today presents a viable alternative to the onerous provisions of the Gun Control Act of 1968.

This bill would punish those who misuse firearms while preserving the constitutional right of law-abiding citizens to purchase and own guns and ammunition. Specifically this measure would impose mandatory penalties on those who use a firearm in the commission of a federal felony or unlawfully carry a firearm during the commission of such a felony. The penalty assessed under this legislation would be in addition to the punishment provided for committing the felony itself. Under this bill, first offenders would be subject to a prison sentence of not less than one year nor more than ten years. Upon conviction of a second or subsequent offense they would be subject to a sentence of not less than two nor more than 25 years. Notwithstanding any other provision of law, the term of sentence would be mandatory and the trial court would not be permitted to suspend a sentence nor impose a probationary or concurrent sentence.

The bill which I have just outlined preserves the right of law abiding citizens to purchase and own guns and ammunition. Moreover, it takes cognizance of the fact that regulatory legislation, such as the Gun Control Act of 1968, has failed to accomplish its intended purpose. Law abiding citizens have been unduly burdened and harassed; yet criminals have been able with great ease to acquire unregistered firearms. Thus, in the period since the enactment of the Gun Control Act, the incidence of crimes involving the use of firearms has significantly increased.

Some people have used these statistics to argue that more stringent regulatory controls should be enacted. I oppose this well meaning but misguided philosophy. More restrictive legislation would do nothing more than create a more lucrative black market in the sale of guns and ammunition. The end result would be to enlarge the already swollen coffers of organized criminal syndicates. Furthermore, the enactment of more stringent legislation would leave peaceful citizens at the mercy of gun brandishing hoodlums.

If restrictions on the purchase of guns and ammunition are ever necessary, such controls should emanate from state and local governments, which are uniquely capable of responding to local needs and problems. The gun control problems in my state of Alaska, where many people rely on firearms for their subsistence, are different in nature and scope from those of a highly populous, urban state. Hence, a uniform Federal law is not capable of meeting the problems which do exist, and results in the unnecessary imposition of a burden on many citizens. The most graphic example of the latter observation is in rural Alaska, where the provisions of the Gun Control Act have resulted in great hardship for many citizens living in areas which are not easily accessible to sellers of firearms and ammunition. For these reasons, I have strongly opposed the onerous provisions of the 1968 Act.

On August 9, 1972, the Senate passed S. 2507, otherwise known as the "Saturday night special" bill. The bill primarily applied to short, or snub-nosed, concealable handguns and did not affect the sale of rifles, shotguns, or larger handguns. It only applied to future sales of importers, dealers, and manufacturers, and would leave unaffected guns presently in private possession. At the close of the 92d Congress, the measure was pending before the House of Representatives and no further action was taken on the bill. The passage of legislation providing for the exemption of rifle and shotgun ammunition sales from the record-keeping requirements of the Gun Control Act is reasonable and positive, as is the elimination of record-keeping requirements for .22-caliber rimfire ammunition, since this ammunition is used almost exclusively for sporting purposes. We should also re-examine the advisability of using the interstate commerce clause of the U.S. Constitution to regulate the sale of firearms, a subject which traditionally has been under the exclusive jurisdiction of state and local governments. I am confident that such a re-examination would reveal the dangerous precedent inherent in using the interstate commerce clause to regulate activities of this kind.

Mr. President, for the reasons outlined above, I am hopeful that we shall soon adopt the alternative approach which is exemplified by legislation which would impose mandatory penalties on those who abuse their constitutional right to keep and bear firearms, and am therefore pleased to cosponsor this bill. I request unanimous consent that my remarks be printed in the CONGRESSIONAL RECORD at this point.

By Mr. CHURCH (for himself and Mr. CASE):

S. 578. A bill requiring congressional authorization for the reinvolvement of American forces in further hostilities in Indochina. Referred to the Committee on Foreign Relations.

Mr. CHURCH. Mr. President, today the senior Senator from New Jersey (Mr. CASE) and I are introducing legislation—and this is our joint statement—that both welcomes President Nixon's achievement in reaching a negotiated peace settlement in Vietnam and involves Congress in any decisions concerning the reentry of U.S. military forces in hostilities in that part of the world.

Our bill provides that no U.S. Government funds may be used to finance the reinvolvement of U.S. military forces in hostilities in, over, or from off the shores of North or South Vietnam, Laos, or Cambodia, without prior, specific congressional authorization. The bill would take effect at the end of the 60-day period, starting tomorrow, during which the prisoners will be released, the missing in action will be accounted for, and American forces still remaining in Indochina will be withdrawn. If the bill is enacted after the end of that 60-day period, then it will become effective forthwith.

When our Secretary of State and the foreign ministers of the other parties sign the agreement in Paris tomorrow, it is to be hoped that the killing will cease throughout Indochina, and that the cease-fire will endure.

But, having fought the war with so many illusions, let us not have any illusions about the peace. Congress must recognize the possibility of a breakdown of what President Nixon has described as a "fragile" peace. It should be Congress' role to assure that the United States does not become reinvolved in military activities in Indochina—except by prior and specific authorization of Congress, in accordance with the requirements of the Constitution.

The point is that having come at last to the end of American military involvement, everyone must recognize that it is the end and that any reinvolvement of American military forces would be a new war—one not to be undertaken, if at all, except by the considered decision of Congress and, through it, the American people. The Congress, not the President, not the military, nor anyone else, has the power to declare war.

It is not our purpose in this legislation to prejudge the question of whether or not the United States should intervene if the agreements break down. It is our purpose to make it clear that this question is one to be decided by Congress.

Among others, we want to make this clear to the Thieu regime so that it will not count on the United States automatically bailing it out in case of future trouble.

Over the past 10 years, the Vietnamese have let Americans do their job. From now on, the Thieu regime must survive or fall on its own strengths or weaknesses. Even today, before the Paris Accords are signed, news accounts from Saigon are sufficiently negative to give us pause.

America will still have vast air armadas in Thailand, on Guam, on offshore aircraft carriers in the Tonkin Gulf and South China Sea. They must not be reengaged except pursuant to action by Congress as the Constitution requires. And so our bill provides that no funds can be spent for the purpose of resuming the war without the prior authorization of Congress.

Since the repeal of the Gulf of Tonkin resolution, the only color of authority for the President's conduct of military operations in Indochina has been whatever authority he may possess under the Constitution as commander in chief of the Armed Forces to protect U.S. forces in the field.

Now all American military forces will be withdrawn. There can be no question that this will terminate any claim of right to engage in further military operations in Vietnam. The President's power as commander in chief does not extend to his unilateral decision to protect another government by military action. If it were otherwise, the President would be free to engage our military forces whenever and wherever he pleases. Denying any such unfettered executive authority, our Founding Fathers carefully counterposed against the President's power as commander in chief of our military forces the Congress' power to declare war and control the purse-strings. We must restore this vital part to our constitutional system of checks and balances.

Accordingly, Mr. President, I send the bill to the desk for appropriate reference, and ask unanimous consent that the text of the bill be printed in the RECORD at this point.

The PRESIDING OFFICER. The bill will be received and appropriately referred and, without objection, will be printed in the RECORD in accordance with the Senator's request.

The bill is as follows:

S. 578

A bill requiring congressional authorization for the reinvolvement of American Forces in Further Hostilities in Indochina

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. Congress welcomes the President's achievement in reaching an agreement with the Democratic Republic of Vietnam and its allies, signed in Paris on January 27, 1973, designed to bring about an end to military hostilities in Indochina, to secure the return of United States prisoners of war, to obtain an accounting of United States personnel missing in action, and to complete the withdrawal of United States military forces from Indochina.

In order to prevent further American involvement in hostilities in Indochina, Congress directs that no funds heretofore or hereafter appropriated may be expended to finance the reinvolvement of United States military forces in hostilities in or over or from off the shores of North and South Vietnam, Laos, or Cambodia, without prior, specific authorization by Congress.

SEC. 2. The provisions of Section 1 shall take effect 60 days after the agreement is signed in Paris on January 27, 1973, or upon the release of all United States prisoners of war held by the Democratic Republic of Vietnam and its allies and an accounting of United States personnel missing in action, or upon the enactment of the Act, whichever is later.

Mr. CASE. Mr. President, will the Senator from Idaho yield?

Mr. CHURCH. I am happy to yield to the distinguished sponsor of the bill.

Mr. CASE. I have asked the Senator to yield only to underscore the fact that not only is the introduction of this bill a joint venture but the statement the

Senator has just read is a statement by both of us.

Mr. CHURCH. I thank the Senator. This is a joint statement and is to accompany the introduction of the bill. It speaks for the Senator from New Jersey (Mr. CASE) as well as for myself.

Mr. GRIFFIN. Mr. President, I shall be brief, but I cannot help expressing regret that this bill has been introduced today.

Whatever the powers of the President are under the Constitution, it should be obvious that they cannot be changed by legislation of this sort.

The President in the White House now did not involve us in the war which he is bringing to an end, after a long struggle and great difficulty, with the exercise of skill and patience.

Surely, there must be few in this country or in the world who really believe that this President would now want to reinvolve us after finally succeeding in bringing the hostilities to an end.

But, it would be foolhardy in the extreme for Congress to pass a bill of the nature now proposed and say to the enemy, "You can disregard and ignore the peace agreement being signed with the assurance in advance that you can do so with impunity."

I realize that many are skeptical about the effectiveness of the peace agreement and whether it will actually be observed by the parties after it is signed.

But I say this: A great deal depends on whether we expect the other parties to observe it and to comply with its terms.

After being briefed at the White House along with other leaders the other day, this Senator came away with much higher hopes and confidence that the agreement is meaningful, and that the parties signing it really do intend to comply with its terms. But if we should deliberately convey the impression to the other side that they are not expected to comply with the agreement, or that they can violate its terms with impunity, then we shall ourselves destroy the agreement we have worked so hard to achieve.

I could understand advocacy of a general war powers bill—of the kind which has been debated before and which will surely be debated again in the Senate. Incidentally, even that general war powers bill, as I recall, recognizes a limited 30-day power in the President which the bill introduced today presumably would not acknowledge.

Whatever may be the will of the Senate in connection with an effort to delineate and to define in general terms the relative powers as between the President and Congress with regard to war, surely it ought to be done that way. We might not consider specific legislation of the nature introduced today which can be easily misunderstood and misinterpreted as interference with the success, observance, and fulfillment of the peace agreement.

Of course, I realize that the sponsors introduced this legislation with the best of motives. I do not question their motives. I do disagree with them, very vigorously, regarding the possible effect of what they do.

To some extent, this bill is reminiscent of the so-called end-the-war amendments which were offered over and over again in the Senate.

History will have to judge as to whether, and for how long, peace was delayed because of those repeated and continued debates in the Senate—debates which could have led the enemy to believe that it was not necessary to negotiate seriously. The amendments held out a false hope to the enemy that Congress would by legislation hand to the enemy on a silver platter what he could not win on the battlefield and what he would not then agree to at the negotiating table.

But, despite all the obstacles all difficulties, President Nixon has finally been able to achieve this peace settlement.

I implore the Senate, and pray to God, that the parties will at least be given a chance to carry out the terms of this peace agreement and bring peace to Southeast Asia.

Mr. CASE. Mr. President, the distinguished Senator from Michigan and I often agree about matters, but we disagree in this instance. As I have suggested, the disagreement is one of judgment and in no sense a disagreement as to motivation. That does not, however, negate the fact that our disagreement is clear and sharp.

I repudiate entirely any suggestion that this action is irresponsible. The Senator from Michigan did not use that word—I probably should not be using it—but the suggestion was that this legislation might interfere with the peace outcome.

I disagree with that suggestion entirely.

If the realization of peace depends on the United States standing by to intervene again with bombs, troops, or other military activity, then indeed the settlement is more fragile than the President, I believe, had in mind or suggested.

In my very considered judgment, the basic question always has been, and still is, whether the North Vietnamese think they can make a better peace now or if they wait; and that, finally, the reason they were willing to come to the negotiating table was that they began to think that possibly South Vietnam, if they waited, would become stronger in relation to themselves and that time had come to make the peace. That is about it. It still is so.

No matter how convenient it may be for people who describe the current scene to talk about some of us as doves or hawks, that is an inadequate way of looking at the situation. I have never been a dove. I have never wanted the North Vietnamese to win. I have never thought we got into this war in either stupidity or for any unworthy motive, but quite the reverse. I never felt that the war was a useless exercise on our part until the time came a few years ago when it became clear that we would indeed, by continuing, be doing more harm than good.

I think that much good was done by those who served in the war and died if their serving and dying in a great cause established a measure of stability in that part of the world which would not have come without American efforts. I do not think this was unworthy or stupid. It became unprofitable, and therefore it became wrong to continue. That is the whole thing, so far as I am concerned.

I do not accept the suggestion that the only way the peace settlement is going to work is if the North Vietnamese think we are going to intervene, if they violate the agreement. But even if that were so, we have a Constitution; and the question that the Senator from Idaho and I have raised by this bill is not whether we should or should not intervene in particular hypothetical circumstances. The question is: Who should make that decision? That is the question. Should the President be allowed to make it? Should Congress insist upon not only its right but also its duty to declare or refuse to declare war? That is the question.

I do not think the situation in that respect has become obsolete. I do not think we must accept it as obsolete.

The Founding Fathers, as Abraham Lincoln pointed out to his partner, Herndon, in a letter written around 1848, made it very clear that they regarded as the most pernicious authority of kings the authority to declare war and to make war against a foreign power. The Founding Fathers not only gave Congress the constitutional authority of parliaments to withhold funds from particular ventures, they gave Congress the power to declare war and to start war, whether the President happened to have money on hand or not.

The Senator from Michigan and I are at one in our pride and our satisfaction that a President of our party has brought matters to the point where they are. It was a great achievement. I am not now going to urge the question or discuss the question of whether it could have happened sooner if certain other courses had been followed. But I do repudiate any suggestion that activity in this body to bring an end to the war in any sense delayed its end. But that is another question.

The question here, as I want to emphasize again—and we raise it and insist that it be looked at sharply and clearly by the Senate of the United States—is whether, in the event things break down, and we pray that they will not, the United States will reenter the war.

This is a matter for Congress to decide—not the President, not the military, and not any other person or agency at all.

Congress has the power to declare war. Congress, therefore, has the power not to declare war, and it must exercise that power if it is to be responsible in fulfilling its obligation under the Constitution.

Mr. CHURCH. Mr. President, I commend the distinguished senior Senator from New Jersey for the excellent statement he has made.

We often decry the low estate into which Congress has fallen. If it is so—and I think it is so—the reason is the weakness of this body and the men in it. In saying that, I must include myself and all other Members who, during their period of service here, have permitted the powers of Congress to atrophy and the concentration of power to move ever increasingly into the hands of the Executive. Historians, I believe, will record this as the most significant change occurring

in our system of constitutional Government over this period of time.

I have opposed the American involvement in Vietnam for 8 years. I have tried to do what I could to persuade Congress to assert its own power to limit and to shorten our part in this war. Yet every time a peace proposal was put forward in this body, many rose to say that this was not the time. Of course, the truth was that, in the judgment of those men who so protested, there was never an appropriate time for Congress to act.

For years, the convenient argument has been made that for Congress to assert its constitutional role would somehow jeopardize the negotiations for peace or, even worse, tie the President's hands in his conduct of the war. Now that a settlement has been achieved and those negotiations have been consummated, the argument is that action on the part of Congress will somehow jeopardize the settlement or, to use the old rhubarb, that it will in some way prove of comfort to those whom we opposed in Indochina. I strongly disagree with such argumentation now, as I have in years past.

This settlement, by the President's own admission, is a fragile one. The surest way, in my opinion, that we can weaken whatever prospect the Paris Accords may have for success is to leave the Thieu regime with the impression that we will readily come to its rescue if the settlement is not fulfilled.

Now, the junior Senator from Michigan has said that the effect of this bill would be to give notice to Hanoi that it could violate the terms of the settlement with impunity. Nothing, I suggest, could be further from the truth or constitute a greater distortion of the provisions of the bill. If the truce should break down—and who knows under what circumstances this might happen; who on this floor is wise enough to forecast the guilt that might be involved on one side or another—and if a renewal of the fighting should occur, this bill would prescribe that the question of our reentry in the war should be taker. in accord with the constitutional processes, that the executive and the legislative branches would share in making national policy.

How one can argue with that proposition, unless one wants to put the role of Congress aside, the role it is supposed to play in passing on questions of war or peace under the supreme law of the land. I, for one, think we have had too much presidential war. In my time, we have twice been involved in war in Asia on the decision of the President and his generals—without the prior authorization of Congress.

I do not lay the blame exclusively at the feet of President Nixon. It is quite preposterous, I think, to make such a charge or to entertain such a belief. President Nixon was not in the White House at the time we first became involved in Vietnam. Four American presidents are accountable.

The Case-Church bill has no partisan coloration; that is why it has been sponsored by a senior Republican and a senior Democrat. The bill's objective is to restore the Constitution and the role of Congress in determining questions of war or peace in the future. Have we not had enough experience in leaving such fateful decisions to the President alone? Have we not decried the atrophying role of Congress, its abdication of responsibility long enough now to take action to make certain that, in the future, if this fragile peace should crumble, Congress would play its rightful constitutional role in determining what course of action the United States should take?

I hope this broader and less partisan view would be taken of the proposal that we have submitted this afternoon. I think it will stand up under a constitutional test, and the test of history, considering the long agony through which we have passed as a Nation.

(Mr. CASE assumed the Chair.)

Mr. GRIFFIN. Mr. President, I do not intend to respond further concerning the particular bill which the distinguished Senator from Idaho and the distinguished Senator from New Jersey have today introduced. But I do not intend to remain silent while the Senator from Idaho refers to Congress, and particularly the Senate, in the light that he did.

I suppose, as a member of the minority party, I might take another view. After all, the Congress and the Senate are now controlled by the opposite political party.

I have read statements in the press from time to time which reflect on Congress and the Senate, but at least up until now I have not heard another Member of the Senate make such statements. I disagree with the Senator from Idaho, I say most respectfully.

I am not going to review the matter of the war powers. It has been debated and debated; and it will be debated again. But the Senator from Idaho surely knows, as others know, that Vietnam was not the first occasion when a President has involved the country in hostilities without benefit of a declaration of war by Congress. It has happened not just once or twice before, but many times before throughout our history. The point I make now relates only to the relative strength or power of this Congress—of this Senate in these times.

We might do well to look to some other areas as well in judging whether the Senate in this day and age has allowed itself to become the "sapless branch"—to become weaker, as the Senator from Idaho has put it.

I recall that in 1968 the Senate rejected the nomination by a President for Chief Justice of the Supreme Court. With that assertion by the Senate, after decades of neglect of its constitutional advise and consent power, the Senate became stronger, not weaker, vis-a-vis the executive branch of Government.

Since then, the Senate has played an active, coequal role in the appointment of Justices to the Supreme Court of the United States. Each and every nomination to the High Court since then has been scrutinized carefully by this body, to its great credit; and I am confident that the Supreme Court and the Nation are much better for it.

No, this Senate is not a weak institution nor is it a body made up of weak men. It is true that we do now have an active and a strong President in the White House—and the people of the country are glad of it.

I cannot help but observe that many of the critics who are so concerned now about the powers of this President were not nearly so concerned when equally strong Presidents of the recent past espoused policies which coincided more closely to the critics' philosophy.

I do not recall the same critics then using Congress as a "whipping boy" or claiming that the Congress is no longer a coequal branch of the Government.

Oh, do not misunderstand me—I am keenly jealous of the powers of the Senate, and I stand with the Members of the Senate who seek to preserve and to exercise every constitutional power and responsibility that is ours. But I believe we can do that and continue to be proud of the Senate in which we serve.

Mr. CASE. I do not think anyone should seriously accept the suggestion that when the Senate is asked to exercise a constitutional function, it is being used as a whipping boy. I do not accept that. It would perhaps be a little closer to the mark to class the Senate as an instrument, but an instrument that is supposed to be used for the purpose for which I think we would like to use it.

I was glad the Senator from Michigan raised the question of confirmation of appointments to high position. He has a distinguished record of involvement in that, himself. This was only one of many occasions in which the Senator from New Jersey was happy to associate himself with the Senator from Michigan.

I have never accepted the designation of this body as a sapless branch. We are, I think, vigorous men, and the body can rise on occasion to strong action. I think this is an occasion in which we should demonstrate the truth of that suggestion.

By Mr. PERCY (for himself, Mr. PASTORE, Mr. MOSS, Mr. WILLIAMS, Mr. STEVENSON, Mr. BROCK, Mr. STEVENS, Mr. MCGEE, Mr. NUNN, Mr. RANDOLPH, Mr. HATFIELD, Mr. BIBLE, Mr. HUMPHREY, and Mr. BAYH):

S. 560. A bill to amend title 18 of the United States Code by adding a new chapter 404 to establish an Institute for Continuing Studies of Juvenile Justice. Referred to the Committee on the Judiciary.

Mr. PERCY. Mr. President, today I am reintroducing, along with Senators PASTORE, MOSS, WILLIAMS, STEVENSON, BROCK, STEVENS, MCGEE, NUNN, RANDOLPH, HATFIELD, BIBLE, HUMPHREY, and BAYH, a bill to establish an Institute for the Continuing Studies of Juvenile Justice. This is the same bill as S. 1428 which I introduced last year and which Congressman TOM RAILSBACK introduced as H.R. 45. Though this bill passed the House on April 18, 1972, it was never considered by the full Senate.

Congressman RAILSBACK, who first introduced this legislation in the 91st Congress, has again reintroduced H.R. 45 in the House, along with over 80 cosponsors. I am pleased to be able to offer this legislation for the consideration of the Senate.

Congressman RAILSBACK is to be com-

plimented for the outstanding leadership that he has shown in connection with this bill. Not only does the bill address a very serious problem in our modern society—that of crime committed by juveniles—but it also has received the overwhelming support of almost every major group in the country concerned with juvenile justice. Endorsements of this bill have come from the National Council on Crime and Delinquency, the American Bar Association, the National Council of Juvenile Court Judges, the American Parents Committee, the American Civil Liberties Union, the National Council of Parents and Teachers, and many more individuals who have been grappling with this problem. They see this bill as a way to begin to look for the answers to the questions presented by criminal activity on the part of the children of this Nation.

The subject of juvenile crime has been thoroughly studied and documented in the last few years. Yet, if the reiteration of the statistical facts helps us focus our attention toward constructive action, then they do bear repeating.

Juvenile court statistics for 1969, published by the National Center for Social Sciences of the Department of Health, Education, and Welfare, reveal that almost 1 million juvenile delinquency cases were handled by juvenile courts in 1969, representing a 10-percent increase over the previous year. Young people involved in court action constitute 2.7 percent of all children between the ages of 10 and 17.

For the period 1960–69, juvenile arrests increased by 90 percent, compared to an overall 71-percent increase in total arrests. Even more alarming is the fact that juvenile arrests for violent crimes rose by 148 percent during the same period, according to FBI accounts. Not only are youths becoming increasingly involved in all antisocial behavior, but they are participating to greater degrees in the serious crimes of murder, forcible rape, robbery, and aggravated assault. When serious crimes are considered, persons under the age of 15 make up 22 percent of all arrests and those under 18 almost one-half. We are forced to ask ourselves what conditions in our society and judicial system give rise to such increases and cause more than 75 percent of those juveniles in detentions to one day reenter the correction process.

What chance does a juvenile have to be rehabilitated, when over 39 percent of our Nation's juvenile courts have no provisions for separate juvenile facilities? Young people are often tossed into jails and prisons along with derilicts and hardened criminals. Of those States that do have juvenile detention homes, more than half of them do not offer any diagnostic services or studies. Only a few States have gone so far as to develop regional detention faciltities that can provide more direct attention to the juvenile's personal reasons for being there. I am pleased to say that Illinois is currently moving toward a regionalization of correctional treatment centers and improving its facilities along the goal of community-based institutions.

There is no question but that the special problems of youth and the techniques and procedures we utilize for handling delinquents in juvenile courts require flexibility, significantly more understanding, and greater expertise by all personnel who work with juvenile offenders. The ultimate goal of our juvenile program must be to prevent youths from establishing a pattern of deviant behavior and serious crime that will eventually bring them back into our prisons and jails. Such a goal requires community support, for our institutions must be community based for optimum effectiveness. These programs will require a new leadership and coordination from the Federal level, both of which have been seriously lacking.

In the annual report of the Youth Development and Delinquency Prevention Administration, submitted to Congress by the President in March of 1971, the case for national leadership and coordination was well presented. The summary of major findings reports the following:

> There is little coherent national planning or established priority structure among the major programs dealing with the problems of youth development and delinquency prevention. . . . There is a strong indication that although bits and pieces of the Federal response to the problems of youth and delinquency may be achieving their discrete objectives, the whole, in terms of the overall effectiveness of Federal efforts, may be less than the sum of its parts. . . . There is a lack of effective national leadership dealing with all youth including delinquents. . . . State planning has been spasmodic and ineffective. . . . No model systems for the prevention of delinquency or the rehabilitation of delinquent youth that have been developed or implemented.

The report recommends a new national program strategy and a concentration of emphasis on new knowledge and techniques into a model system for guiding State and local agencies.

The Institute for the Continuing Studies of Juvenile Justice which would be created under the legislation I am proposing today offers the unification and Federal leadership that is called for. The purpose of the Institute is to serve as an information bank for the systematic collection of data obtained from studies and research by public and private agencies on juvenile delinquency, including, but not limited to, programs for the prevention of juvenile delinquency, training of youth corrections personnel, and rehabilitation and treatment of juvenile offenders. Aside from the packaging of a vast amount of data on delinquent behavior, the center would provide short-term training for corrections personnel and would assist State and local agencies in developing technical training programs within the States.

The Institute is to function independently of any other Federal agency, although it will coordinate its efforts with those of the Department of Justice and the Department of Health, Education, and Welfare. A director is to be appointed by the President with the consent of the Senate and will serve as administrator and coordinator of the Institute's personnel for a term of 4 years. Policy and planning for the Institute will be the responsibility of an advisory commission, consisting of the Attorney General, the Secretary of Health, Education, and Welfare, the Director of the U.S. Judicial Center, the Director of the National Institute of Mental Health, and 14 other members who have training and experience in the area of juvenile delinquency.

The value of a national institute for juvenile justice has been clearly pointed out in the hearings held in the House by both the Judiciary Committee and the Select Committee on Crime in 1970 and in testimony before the Senate Subcommittee To Investigate Juvenile Delinquency.

The cost of our continued inaction may be greater than we think. We can no longer afford to ignore one of the most serious social problems confronting our society.

I believe that our juvenile corrections personnel should be fully prepared to handle the special problems of the young offender, and that they should have the latest, most comprehensive information and training possible. To deny this would mean an agreement to let yet another generation of our youth experience a further increase in delinquent behavior. This can only mean wasted and useless lives. I do not believe that we should tolerate this further human destruction. Why should we willingly accept the fact of juvenile crime when passage of the legislation I am introducing today would mean a difference that we could all see within our own time?

Mr. President, I am hopeful that the Senate will not delay in considering this legislation. As I pointed out earlier, it has already passed the House once. It deserves to be passed by the 93d Congress.

Mr. BROCK. Mr. President, there are few more perplexing problems in the Nation today than the problem of providing a workable system of justice for juveniles.

This is an area plagued with uncertainties and controversy. Some say we must stop "coddling" offenders, and provide a deterrent to crime through a harsh system of punishment. Others believe that only by turning our corrections facilities into true rehabilitative centers will we ever solve the problem. Between and within these positions are countless shades of gray, and countless disputes.

Like the fabled Officer Krupke in "West Side Story," most authorities are not sure what the problem is, but very sure indeed that our present approach is wrong:

> The trouble is he's lazy.
> The trouble is he drinks.
> The trouble is he's crazy.
> The trouble is he stinks.
> The trouble is he's growing.
> The trouble is he's grown.
> Krupke, we've got troubles of our own.

What we desperately need is to cut through all the noise and really come to grips with the problem of how to promote juvenile justice. We desperately need to find the best way to turn youthful offenders into responsible adults, and to prevent other youths from becoming offenders. This much we know: the present system is self-defeating.

The distinguished Senator from Illinois (Mr. PERCY) has introduced a bill providing for an Institute for the Continuing Studies of Juvenile Justice.

The bill would provide for a three-part program aimed at improving our system of juvenile justice. The first would provide training for personnel involved in the juvenile justice system, aimed at improving their ability to deal with the very heavy responsibilities with which they are charged. The second provision would provide a center for the collection and dissemination of useful data on treatment and control of juvenile offenders and the juvenile system in general. This should allow us to see to it that new developments and concepts in the fields are given wide currency quickly.

The third provision will set up a system for indepth studies of the whole system, including comparative analysis of various State and Federal laws, thereby giving us a chance to examine various systems to see how they are working.

This is an area where action is urgently needed, and this particular bill is an excellent step in the right direction. For that reason, I am pleased to join with the Senator from Illinois as a cosponsor, and I urge Senators to give it their most earnest consideration.

By Mr. ROBERT C. BYRD (for Mr. BENTSEN):

S.J. Res. 37. A joint resolution to designate the Manned Spacecraft Center in Houston, Tex., as the Lyndon B. Johnson Space Center in honor of the late President. Referred to the Committee on Aeronautical and Space Sciences.

Mr. ROBERT C. BYRD. Mr. President, on behalf of the Senator from Texas (Mr. BENTSEN) I ask unanimous consent to introduce a joint resolution for appropriate referral to designate the Manned Spacecraft Center at Houston, Tex., as the Lyndon B. Johnson Space Center, in honor of our late President. I ask unanimous consent that the joint resolution be printed in the RECORD, and I ask unanimous consent to insert in the RECORD a statement by the distinguished Senator from Texas in connection with the joint resolution which is being offered.

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

S.J. RES. 37

Joint resolution to designate the Manned Space Craft Center in Houston, Texas, as the Lyndon B. Johnson Space Center in honor of the late President

Whereas President Lyndon B. Johnson was one of the first of our National leaders to recognize the long-range benefits of an intensive space exploration effort;

Whereas President Johnson as Senate Majority Leader, established and served as Chairman of the Special Committee on Science and Astronautics which gave the initial direction to the U.S. space effort;

Whereas President Johnson as Vice President of the United States, served as Chairman of the National Aeronautics and Space Council which recommended the goals for the manned space program;

Whereas President Johnson for five years as President of the United States, bore ultimate responsibility for the development of the Gemini and Apollo programs which resulted in man's first landing on the moon;

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Manned Space Craft Center, located in Houston, Texas, shall hereafter be known and designated as the Lyndon B. Johnson Space Center. Any reference to such facility in any law, or other paper of the United States shall be deemed a reference to it as the Lyndon B. Johnson Space Center.

STATEMENT BY SENATOR BENTSEN

Mr. President, I am today introducing a joint resolution to change the name of the Manned Spacecraft Center in Houston, Texas to the Lyndon B. Johnson Space Center.

No President has been more closely identified with the creation and the operation of American's space program than Lyndon Johnson.

His interest in space started during his years in the Senate, long before America put its first satellite in orbit.

As Chairman of the Senate Armed Services Preparedness Subcommittee in the late fifties, he chaired hearings on the appropriate American response to the Russian sputnik. As a result of these hearings, the Senate Special Committee on Science and Astronautics was established. Lyndon Johnson served as Chairman of that Committee from January 1958 through August, 1958 and conducted hearings which led to the establishment of the permanent Senate Committee on Aeronautical and Space Sciences.

He served as Chairman of that Committee from August of 1958 until he left the Senate to become Vice President in January of 1961.

John F. Kennedy recognized the Vice President's long association with the space program and appointed him the Chairman of the National Aeronautics and Space Council, a creature of the Executive Branch, which was responsible for coordinating all of the aeronautical and space activities of our executive agencies.

President Kennedy also asked his Vice President to be in charge of a panel to determine what could be done to close the "missile gap", a major issue during the campaign of 1960.

From the studies on this issue came a recommendation from the Vice President that the United States should make an effort to go to the moon in the 1960's. And, of course, the Apollo Program, which landed an American on the moon, led to the establishment of the Manned Spacecraft Center in Houston.

During his Presidency, Lyndon Johnson continued his keen interest in the space program. The entire series of Gemini flights was flown during the Johnson years, and the Apollo program, through Apollo 8 was successfully completed.

When Lyndon Johnson left the White House, Frank Borman and his crew had already completed their flight around the moon, setting the stage for the manned landing in July, 1969.

Mr. President, Lyndon Johnson knew the space program from its early beginnings and he lived to see his vision of that program accomplished.

I believe that his interest in space grew from his sense of challenge and his absolute belief in Ameria's destiny. He believed that this country could do anything it set out to do, and, with his support America marshalled the greatest scientific team the world has ever known and harnessed its talents to achieve one of mankind's greatest adventures.

But he did not see space as something "out there", unrelated to life on this planet. As with most men of vision, he had the ability to see beyond the spectacular, momentary achievements of space exploration to the time when the knowledge we gain from space can be put to use in improving the quality of life on Earth.

Mr. President, Lyndon Johnson is one of the Fathers of our space program. The legislation I introduce today seeks to honor him for his role in that great effort.

By Mr. ROBERT C. BYRD:

S.J. Res. 39. A joint resolution to redesignate Washington National Airport as the Lyndon B. Johnson Airport. Referred to the Committee on Commerce.

Mr. ROBERT C. BYRD. Mr. President, I am today introducing a joint resolution for appropriate reference to name Lyndon Johnson Airport.

Lyndon Baines Johnson, 36th President of the United States, spent almost four decades of his life in this Capital City on the Potomac River. His love for Washington, for its institutions and for its people, was very close to his love for the Pedernales River in the rugged hill country of east Texas, and for the people he knew in his boyhood and in his youth.

History will write its verdict on Lyndon Johnson's stewardship in the affairs of this great Nation, and it is my sincere belief that history will deal with this dynamic man a great deal more kindly than have some of his contemporaries.

The 13th Chapter of the Book of Matthew tells us:

A prophet is not without honour, save in his own country.

Lyndon Johnson would never have claimed to be a prophet. All he ever claimed was that he was an American who loved his country, and who devoted every moment of his public service to the often thankless task of improving the quality of life for his fellow men.

Lyndon Johnson's life was seldom calm, and often tempestuous. He was a man of immense strengths, and immense compassions.

He could summon the thunder. But when the storm had subsided, he could bathe the mountain in soothing gentleness.

He was strong and sure in times of crisis. He was warm and human in times of calm. In the dark and tragic days of November 1963, he rallied a shaken nation and led us from the abyss of despair to the high ground of confidence and rededication to the ideals and destiny of this Republic—50,000 Americans died in the devastating war in Southeast Asia, which God willing, is now ended. On land, at sea, and in the air, all of those who gave their lives took with them a minute, or an hour of the life of the man who fought for the same cause on a different battlefield. For courage of the heart and of the spirit was the dominant quality in both places.

Lyndon Johnson did not die in the rice paddies or the jungles of South Vietnam. But he just as surely gave his life to the cause of freedom. He, like the soldiers, the sailors and the airmen, is one of the fallen.

They shall not grow old, as we that are left grow old:
Age shall not weary them, nor the years condemn.
At the going down of the sun and in the morning
We will remember them.

Mr. President, to what committee will this joint resolution be referred?

The ACTING PRESIDENT pro tempore. The Parliamentarian is not quite

sure whether it should go to the Committee on Public Works or to the Committee on Commerce. It is still being decided.

Mr. ROBERT C. BYRD. I thank the Chair.

Mr. WEICKER. Mr. President, will the Senator from West Virginia yield relative to an observation on his statement, the import of which I commend.

Mr. ROBERT C. BYRD. Yes, I yield.

Mr. WEICKER. In the direction of his request for reference to a committee, and also the measure offered by the Senator from Texas which preceded it, one thing becomes very clear. That is that in a very short space of time—three great former Presidents of the United States have passed on—Presidents Eisenhower, Truman, and now Johnson.

And I would hope, whichever committee hears the request of the Senator from West Virginia, would give cognizance to this fact, that we might have before us, at some time in the very near future, a recommendation which would allow us to do appropriate honor to all three men. The naming of a Federal facility is equally deserved on the basis of three distinguished careers.

Mr. ROBERT C. BYRD. I thank the distinguished Senator, and I share his hope that this will be done.

Mr. President, I ask unanimous consent that the joint resolution changing the name of National Airport to that of Lyndon B. Johnson Airport be printed in the RECORD.

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

S.J. RES. 39

Joint resolution to redesignate Washington National Airport as the Lyndon B. Johnson Airport

Whereas Lyndon B. Johnson served his country with distinction and honor as Representative, Senator, Vice President, and President;

Whereas he guided the destinies of this Nation throughout some of the most searing years in our history;

Whereas his compassion for his fellow-Americans, and his deep love for his country, characterized every moment of his 37 years of service in the capital of the United States; and

Whereas his life was devoted to the fulfillment of the promise of a better life for all the people of this Nation, whatever their origin or their circumstances: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Washington National Airport, as described in subsection (b) of the first section of the Act of June 29, 1940 (54 Stat. 686), is redesignated as the Lyndon B. Johnson Airport, and any law, regulation, document, or record of the United States or the District of Columbia in which such airport is designated or referred to shall be held to refer to such airport under and by the name of the "Lyndon B. Johnson Airport".

By Mr. PELL:

S.J. Res. 40. A joint resolution to authorize and request the President to call a White House Conference on Library and Information Sciences in 1976. Referred to the Committee on Labor and Public Welfare.

Mr. PELL. Mr. President, I introduce a Senate joint resolution to express the sense of Congress in support of a White House Conference on Library and Information Services in 1976, and ask that it be referred to the appropriate committee.

Examintion of our Nation's needs for library and information services from a national perspective is an ongoing function of the National Commission on Libraries and Information Science established by Public Law 91-345. Concomitant with that effort, the Library Services and Construction Act, most recently reauthorized in 1971, has provided for long-range and annual planning in every State in order to achieve cooperation among all types of libraries and to extend their services to communities and individuals denied access to them.

However, missing from this process is a forum in which representatives of the general public can contribute to the determination of priorities as the Nation prepares to realize the potential of the new technologies for our more than 7,000 public libraries, our 50,000 school libraries, over 2,000 academic libraries, and tens of thousands of special libraries and information centers. Many think that this new technology confronts libraries with a crisis. This does not seem to me to be the case. Rather, I believe they are being represented with an unprecedented challenge and opportunity. It is now possible, through technology developed in recent decades, to link together, in very productive and economical ways, libraries of many kinds located throughout the Nation. Already there are some library networks of this kind. Many operate within the borders of one State or a portion of a State. Others are nationwide in scope but limited to particular fields of knowledge. Those in the library profession and others interested in greater access to information and ideas are working toward expansion of the flow of knowledge and culture among our people. A White House conference is needed to give impetus to this work.

The proposed White House Conference on Library and Information Services would consider the manifold services now provided by libraries, assess their resources, indicate the services needed from libraries, appraise the opportunities for greater cooperation among them, and evaluate the costs and benefits to the Nation of expanding access to information and understanding by all our people, from the youngest child learning to read, to the scholar or professional of the highest intellectual stature.

The bill I have introduced will authorize the President to convene a White House Conference on Library and Information Services and provide that the conference be planned by the National Commission on Libraries and Information Science. This format will permit preparation of background documents outlining the problems and prospects of various segments of the field from the broadest viewpoint.

One could ask, "Why is such a White House Conference needed, since the law already provides for Library Services and Construction, as well as the National Commission on Libraries and Information Science?" What is now needed is a public forum to bring together a body of interested citizens to consider the recommendations of the Commission and the proposals of other organizations and institutions, public and private. A White House Conference would provide an efficient way of arriving at a truly national consensus regarding the further development of our libraries and information services, and their coordination through greater cooperation and interconnection, making use of the technological resources we now have.

It is my hope also that conferences will be held in each State in conjunction with the White House Conference. It may also prove fruitful to hold specific conferences dealing with the special needs of certain kinds of libraries and information services. For example, there are in the Nation about 15 independent research libraries, standing apart from institutions, solely self-supporting.

Nowhere in Federal legislation is there any mention made of these libraries, the valuable works of scholarship they support, and, of course, the extensive collections they hold. Indeed, not more than two blocks from this Chamber there is situated the most valuable and extensive collection of Shakespearean and Shakespearean-related literature in the world. Yet the Folger Library which also contains a massive collection of original literature about our own colonial experience, can in no way benefit from present Federal programs of continuing support.

It is common to decry White House conferences and to assert that they are merely public relations exercises, devoid of lasting impact. I do not share this view. Indeed, the bipartisan support for education legislation so evident in Congress today is to no small degree the result of the two White House Conferences on Education, the first convened by President Eisenhower and the second by President Johnson. Similarly, there was an increase in programs benefitting older people after the first White House Conference on Aging in 1961, and another increase in congressional as well as State and local support for these programs after the White House Conference on Aging held last year. White House Conferences serve to educate many members of the general public and to enlist their support for constructive new programs.

I am confident that a White House Conference on Library and Information Services—held during our Nation's bicentennial year, which is also the centennial of the American Library Association—will evoke renewed appreciation and support for our libraries and specialized information services. It will call to the attention of legislators, public officials, the news media, and the public the concerns of library trustees, the governing boards of school systems and institutions of higher education, educators, and librarians. It will take stock of the accomplishments, the shortcomings and above all, the potentialities of our libraries and information services, and, given the facts, I am confident that the

people will find it feasible and desirable to increase their support of these vital educational resources.

I ask unanimous consent that the text of the proposed resolution be printed at this point in the RECORD.

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

S. J. RES. 40

Joint resolution to authorize and request the President to call a White House Conference on Library and Information Sciences in 1976

Whereas access to information and ideas is indispensable to the development of human potential, the advancement of civilization, and the continuance of enlightened self-government; and

Whereas the preservation and dissemination of information and ideas is the primary purpose and function of libraries and information centers;

Whereas the growth and augmentation of the Nation's libraries and information centers are essential if all Americans are to have reasonable access to adequate services of libraries and information centers; and

Whereas new achievements in technology offer a potential for enabling libraries and information centers to serve the public more fully, expeditiously, and economically; and

Whereass maximum realization of the potential inherent in the use of advanced technology by libraries and information centers requires cooperation through planning for, and coordination of, the services of libaries and information centers; and

Whereas the National Commission on Libraries and Information Science is developing plans for meeting national needs for library and information services and for coordinating activities to meet those needs; and

Whereas productive recommendations for expanding access to libraries and information services will require public understanding and support as well as that of public and private libraries and information centers: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the President of the United States is authorized to call a White House Conference on Library and Information Services in 1976.

(b)(1) The purpose of the White House Conference on Library and Information Services (hereinafter referred to as the "Conference") shall be to develop recommendations for the further improvement of the Nation's libraries and information centers, in accordance with the policies set forth in the preamble to this joint resolution.

(2) The conference shall be composed of, and bring together,

(A) representatives of local, State-wide, and national institutions, agencies, organizations, and associations which provide library and information services to the public;

(B) representatives of educational institutions, agencies, organizations, and associations (including professional and scholarly associations for the advancement of education and research);

(C) persons with special knowledge of, and special competence with, technology as it may be used for the improvement of library and information services; and

(D) representatives of the general public.

(c)(1) The Conference shall be planned and conducted under the direction of the National Commission on Libraries and Information Science (hereinafter referred to as the "Commission"). All Federal departments and agencies shall cooperate with and give assistance to the Commission in order to enable it to carry out its responsibilities under this joint resolution.

(2) In administering this joint resolution, the Commission shall—

(A) when appropriate, request the cooperation and assistance of other Federal departments and agencies in order to carry out its responsibilities;

(B) make technical and financial assistance (by grant, contract or otherwise) available to the States to enable them to organize and conduct conferences and other meetings in order to prepare for the Conference; and

(C) prepare and make available background materials for the use of delegates to the Conference and associated State conferences, and prepare and distribute such reports of the Conference as may be appropriate.

(d) A final report of the Conference, containing such findings and recommendations as may be made by the Conference, shall be submitted to the President not later than one hundred and twenty days following the close of the Conference. Such report shall be submitted to the Congress not later than one hundred twenty days after the date of the adjournment of the Conference, which final report shall be made public and, within ninety days after its receipt by the President, transmitted to the Congress together with a statement of the President containing the President's recommendations with respect to such report.

(e)(1) There is hereby established an advisory committee to the Conference composed of twenty-eight members, appointed by the President, which shall advise and assist the National Commission in planning and conducting the Conference.

(2) The President is authorized to establish such other advisory and technical committees as may be necessary to assist the Conference in carrying out its functions.

(3) Members of any committee established under this subsection who are not regular full-time officers or employees of the United States shall, while attending to the business of the Conference, be entitled to receive compensation therefor at a rate fixed by the President but not exceeding $100 per diem, including travel time. Such members may, while away from their homes or regular places of business, be allowed travel expenses, including per diem in lieu of subsistence, as may be authorized under section 5703 of title 5, United States Code, for persons in the Government intermittently.

(f) For the purpose of this joint resolution, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(g) There is authorized to be appropriated such sums as may be necessary to carry out this joint resolution.

ADDITIONAL COSPONSORS OF BILLS AND JOINT RESOLUTIONS

S. 7

At his own request, the Senator from Texas (Mr. TOWER) was added as a cosponsor of S. 7, the Vocational Rehabilitation Act of 1973.

S. 254

At the request of Mr. SCHWEIKER, the Senator from South Carolina (Mr. HOLLINGS) was added as a cosponsor of S. 254, a bill to prohibit assaults on State and local law enforcement officers, firemen, and judicial officers.

S. 268

At the request of Mr. ROBERT C. BYRD (on behalf of Mr. JACKSON), the Senator from California (Mr. CRANSTON) was added as a cosponsor of S. 268, to establish a national land use policy, to authorize the Secretary of the Interior to make grants to assist the States to develop and implement State land use programs, to coordinate Federal programs and policies which have a land use impact, to coordinate planning and management of Federal lands and planning and management of adjacent non-Federal lands, and to establish an Office of Land Use Policy Administration in the Department of the Interior.

S. 272

At the request of Mr. CANNON, the Senator from Georgia (Mr. TALMADGE) was added as a cosponsor of S. 272, a bill to amend the Communications Act of 1934 with respect to the consideration of applications for renewal of station licenses.

S. 316

Mr. HUDDLESTON. Mr. President, on behalf of the distinguished Senator from Washington. I ask unanimous consent that at the next printing of S. 316, a bill to further the purposes of the Wilderness Act of 1964 by designating certain lands for inclusion in the wilderness preservation system, and for other purposes, the names of the following Senators be added as cosponsors: Senators WILLIAMS and MCCLELLAN.

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

S. 359

At the request of Mr. MCCLURE, the Senator from Idaho (Mr. CHURCH) was added as a cosponsor of S. 359, to permit American citizens to hold gold.

S. 371

At the request of Mr. TOWER, the Senator from Kansas (Mr. DOLE) was added as a cosponsor of S. 371, a bill to provide that certain provisions of the Natural Gas Act relating to rates and charges shall not apply to persons engaged in the production or gathering and sale but not in the transmission of natural gas.

S. 414

At the request of Mr. TOWER, the Senator from Nevada (Mr. CANNON), the Senator from New Jersey (Mr. CASE), and the Senator from Kansas (Mr. DOLE), were added as cosponsors of S. 414, the Bilingual Job Training Act of 1973.

S. 416

At the request of Mr. ALLEN, the Senator from Georgia (Mr. NUNN) was added as a cosponsor of S. 416, the Equal Educational Opportunities Act of 1973.

S. 516

Mr. HUDDLESTON. Mr. President, on behalf of the distinguished assistant majority leader, the Senator from West Virginia (Mr. ROBERT C. BYRD), I ask unanimous consent that the names of the following Senators be added as cosponsors of S. 516, a bill requiring Senate confirmation of the Director of the Federal Bureau of Investigation every 4 years: Senators RANDOLPH, MAGNUSON, SPARKMAN, WILLIAMS, CANNON, MCGEE, HARTKE, MCCLELLAN, and EAGLETON.

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

S. 518

At the request of Mr. MANSFIELD, the Senator from Mississippi (Mr. EASTLAND), the Senator from Montana (Mr. MANSFIELD), the Senator from West Virginia (Mr. ROBERT C. BYRD), the Senator from Arkansas (Mr. MCCLELLAN), the Senator from Mississippi (Mr. STENNIS), the Senator from Louisiana (Mr. LONG), the Senator from Georgia (Mr. TALMADGE), the Senator from Alabama (Mr. SPARKMAN), the Senator from Washington (Mr. MAGNUSON), the Senator from Missouri (Mr. EAGLETON), the Senator from Arkansas (Mr. FULBRIGHT), the Senator from Washington (Mr. JACKSON), the Senator from New Jersey (Mr. WILLIAMS), the Senator from Wyoming (Mr. MCGEE), the Senator from West Virginia, (Mr. RANDOLPH), the Senator from Nevada (Mr. CANNON), the Senator from Indiana (Mr. HARTKE), the Senator from Utah (Mr. MOSS), the Senator from Montana (Mr. METCALF), the Senator from Florida (Mr. CHILES), the Senator from Maine (Mr. MUSKIE), the Senator from Kentucky (Mr. HUDDLESTON), the Senator from Georgia (Mr. NUNN), the Senator from Connecticut (Mr. RIBICOFF), the Senator from New York (Mr. JAVITS), the Senator from Florida (Mr. GURNEY), and the Senator from Illinois (Mr. PERCY) were added as cosponsors of S. 518, a bill to provide that appointments to the offices of Director and Deputy Director of the Office of Management and Budget shall be subject to confirmation by the Senate.

S. 521

At the request of Mr. BELLMON, the Senator from Oklahoma (Mr. BARTLETT) was added as a cosponsor of S. 521, to declare that certain land of the United States is held by the United States in trust for the Cheyenne-Arapaho Tribes of Oklahoma.

S. 548

At the request of Mr. HUMPHREY, the Senator from Arkansas (Mr. FULBRIGHT) was added as a cosponsor of S. 548, a bill to provide price support for milk at not less than 85 percent of the parity price therefor.

SENATE CONCURRENT RESOLUTION 7—SUBMISSION OF A CONCURRENT RESOLUTION RELATING TO ARMED ATTACKS ON AIRCRAFT

(Referred to the Committee on Foreign Relations.)

Mr. SCOTT of Virginia submitted the following concurrent resolution:

S. CON. RES. 7

Whereas the number of attacks with firearms and bombs against aircraft and passengers engaged in international travel has been increasing; and

Whereas such attacks have resulted in the death and wounding of passengers and in the damage or destruction of aircraft by attacks in the air and on the ground; and

Whereas such attacks seriously impair the operation of international air service and undermine the confidence of people of the world in civil aviation; and

Whereas such attacks are a matter of grave concern to the people of the United States of America and of every country seeking to foster international air travel; and

Whereas it is necessary and desirable that such attacks be recognized as an international crime and that means be found whereby appropriate punishment can be administered to persons who engage in such attacks; and

Whereas any country which approve or endorses such attacks by sheltering or protecting individuals or organizations responsible for perpetrating such attacks should be subject to punishment by the imposition of appropriate sanctions: Now, therefore, be it

Resolved by the Senate (the House of Representatives concurring), That it is the sense of Congress that the President should immediately undertake—

(1) to seek international arrangements and agreements with other nations desiring to foster international air service (including the use of an international tribunal with appropriate jurisdiction) for the purpose of finding ways and means to prohibit and punish effectively armed attacks on aircraft and passengers engaged in international commerce;

(2) to seek international arrangements and agreements for the imposition of sanctions (including but not limited to suspension or repeal of air landing rights) against any nation which approves or condones such attacks by sheltering or protecting individuals or organizations responsible for perpetrating such attacks; and

(3) to report to the Congress within six months from the day of enactment of this resolution of the results of the efforts undertaken in accordance with paragraphs (1) and (2) above.

SENATE RESOLUTION 35—ORIGINAL RESOLUTION REPORTED AUTHORIZING ADDITIONAL EXPENDITURES BY THE COMMITTEE ON FOREIGN RELATIONS

(Referred to the Committee on Rules and Administration.)

Mr. MANSFIELD, for Mr. FULBRIGHT, from the Committee on Foreign Relations, reported the following original resolution:

S. RES. 35

Resolution authorizing additional expenditures by the Committee on Foreign Relations for a study of matters pertaining to the foreign policy of the United States

Resolved, That, in holding hearings, reporting such hearings, and making investigations as authorized by sections 134(a) and 136 of the Legislative Reorganization Act of 1946, as amended, in accordance with its jurisdiction under rule XXV of the Standing Rules of the Senate, the Committee on Foreign Relations, or any subcommittee thereof, is authorized from March 1, 1973, through February 28, 1974, in its discretion (1) to make expenditures from the contingent fund of the Senate, (2) to employ personnel, and (3) with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, to use on a reimbursable basis the services of personnel of any such department or agency.

SEC. 2. The expenses of the committee under this resolution shall not exceed $725,000, of which amount not to exceed $75,000 shall be available for the procurement of the services of individual consultants, or organizations thereof (as authorized by section 202(1) of the Legislative Reorganization Act of 1946, as amended).

SEC. 3. For the purpose of this resolution the committee, or any duly authorized subcommittee thereof, or its chairman, or any other member of the committee or subcommittee designated by the chairman, from March 1, 1973, through February 28, 1974, is authorized, in its, his, or their discretion, (1) to require by subpena or otherwise the attendance of witnesses and production of correspondence, books, papers, and documents; (2) to hold hearings; (3) to sit and act at any time or place during the sessions, recesses, and adjournment periods of the Senate; (4) to administer oaths; and (5) take testimony, either orally or by sworn statement.

SEC. 4. The committee shall report its findings, together with such recommendations for legislation as it deems advisable, to the Senate at the earliest practicable date, but not later than February 28, 1974.

SEC. 5. Expenses of the committee under this resolution shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman of the committee.

SENATE RESOLUTION 36—SUBMISSION OF A RESOLUTION PRESCRIBING CERTAIN PROCEDURES FOR THE SENATE

(Referred to the Committee on Rules and Administration.)

Mr. NUNN. Mr. President, on behalf of myself and my colleague, the senior Senator from Georgia (Mr. TALMADGE) I submit a resolution prescribing procedures for the Senate to establish a limit on the amount of new obligational authority which it will approve for each fiscal year. I ask unanimous consent that a summary of the resolution and the resolution be printed in the RECORD.

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

S. RES. 36

Resolution prescribing procedures for the Senate to establish a limit on the amount of new obligational authority which it will approve for each fiscal year

Resolved, That (a) upon the submission of the Budget of the United States Government by the President for each fiscal year (beginning with the fiscal year ending June 30, 1974), the Committee on Appropriations and the Committee on Finance, acting jointly, shall promptly review the Budget, and, in particular, shall review requests for new obligational authority, taking into account proposed outlays and estimated revenues for that fiscal year. As soon as possible thereafter, the two Committees, acting jointly, shall report to the Senate a resolution in substantially the following form (the blanks being appropriately filled):

"*Resolved*, That the total amount of new obligational authority to be approved by the Senate in all bills and joint resolutions making appropriations for the fiscal year ending June 30, ——, shall not exceed $———."

(b)(1) A resolution reported pursuant to subsection (a) shall be highly privileged. It shall be in order at any time after the third day following the day on which such a resolution is reported to move to proceed to the consideration of the resolution (even though a previous motion to the same effect has been disagreed to). Such a motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(2) Debate on the resolution, and all amendments thereto, shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate shall not be debatable. A motion to recommit the resolution shall not be in order, and it shall not be in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

(3) Motions to postpone, made with re-

spect to the consideration of the resolution and motions to proceed to the consideration of other business, shall be decided without debate.

(4) Appeals from the decisions of the Chair relating to the application of the rules of the Senate (including this subsection) to the procedure relating to the resolution shall be decided without debate.

SEC. 2. (a) For purposes of this section, the term "new obligational authority limit" means, with respect to any fiscal year—

(1) the total amount of new obligational authority specified in a resolution reported with respect to that fiscal year pursuant to the first section, as such resolution is agreed to by the Senate, or

(2) in the event that no such resolution is reported, or if reported is not agreed to by the Senate, the total amount of new obligational authority requested in the Budget submitted by the President for that fiscal year.

(b) (1) It shall not be in order to consider any bill or joint resolution providing new obligational authority for any fiscal year which is reported by the Committee on Appropriations (or if such bill or joint resolution is not referred to such Committee, which is passed by the House of Representatives), if the amount of new obligational authority provided in such bill or joint resolution, as reported (or as passed by the House, as the case may be), when added to the amounts of new obligational authority provided for that fiscal year in bills and joint resolutions previously passed by the Senate, exceeds the new obligational authority limit for that fiscal year.

(2) It shall not be in order to consider any amendment to a bill or joint resolution providing new obligational authority for any fiscal year if the amount of new obligational authority provided by such amendment, when added to—

(A) the amount of new obligational authority provided in such bill or joint resolution immediately prior to the offering of such amendment, and

(B) the amount of new obligational authority provided for that fiscal year in bills and joint resolutions previously passed by the Senate,

exceeds the new obligational authority limit for that fiscal year.

(3) For purposes of paragraphs (1) and (2), the amount of new obligational authority for a fiscal year provided in a bill or joint resolution previously passed by the Senate is—

(A) if such bill or joint resolution has been enacted into law, the amount of new obligational authority provided in such law,

(B) if such bill or joint resolution has been passed by the Senate and the House of Representatives and has neither been approved nor vetoed by the President, the amount of new obligational authority provided in such bill or joint resolution as passed by the two Houses, and

(C) in the case of any other bill or joint resolution, the amount of new obligational authority provided in such bill or joint resolution as passed by the Senate.

For purposes of this paragraph, any bill or joint resolution which has been vetoed by the President shall not be taken into account.

SEC. 3. The report of the Committee on Appropriations accompanying any bill or joint resolution providing new obligational authority for any fiscal year shall contain an analysis of the amount of new obligational authority provided in such bill or joint resolution, as reported, in view of the new obligational authority limit for that fiscal year prescribed pursuant to the first section. Such analysis shall take into account—

(1) the relation of (A) the new obligational authority limit for that fiscal year to (B) the total amount of new obligational authority requested in the Budget submitted by the President for that fiscal year, and

(2) the relation of (A) the amount of new obligational authority provided in such bill or joint resolution, as reported, to (B) the amount of new obligational authority requested for inclusion in such bill or joint resolution in Budget requests submitted by the President.

SUMMARY OF SENATE RESOLUTION 36 ESTABLISHING A LIMIT ON THE AMOUNT ON NEW OBLIGATIONAL AUTHORITY—AMENDING THE SENATE RULES

Section 1. After the President has submitted his annual budget to Congress, the Committee on Appropriations and the Committee on Finance, acting jointly, shall report a resolution to the Senate setting a limit for new obligational authority.

Section 2. (a) New obligational authority means the amount set out in the above resolution or, in the absence of a resolution being passed, the amount contained in the President's budget.

(b) (1) A bill or resolution providing new obligational authority is out of order if the amount of new obligational authority contained in said bill or resolution when added to the amounts of new obligational authority previously passed by the Senate exceeds the limit established in the above resolution.

(2) An amendment to a bill or resolution is out of order if it creates new obligational authority above the amount set by the resolution.

(3) New obligational authority previously passed by the Senate means

(a) The said amount as contained in a bill or resolution enacted into law,

(b) The said amount as contained in a bill or resolution passed by Congress and awaiting the President's approval,

(c) The said amount as contained in a bill or resolution passed by the Senate and awaiting House action,

(d) It does not contain the said amount as contained in a vetoed bill or resolution.

Section 3. Every bill or resolution providing for new obligational authority shall contain an analysis of the same by the Appropriations Committee. The analysis shall show the relationship of the new obligational authority to the ceiling for all new obligational authority, and to the amount of new obligational authority contained in the President's budget, generally and by function.

SENATE RESOLUTION 37—ORIGINAL RESOLUTION REPORTED AUTHORIZING ADDITIONAL EXPENDITURES BY THE COMMITTEE ON THE DISTRICT OF COLUMBIA

(Referred to the Committee on Rules and Administration.)

Mr. EAGLETON, from the Committee on the District of Columbia, reported the following original resolution:

S. RES. 37

RESOLUTION AUTHORIZING ADDITIONAL EXPENDITURES BY THE COMMITTEE ON THE DISTRICT OF COLUMBIA FOR INQUIRIES AND INVESTIGATIONS

Resolved, That, in holding hearings, reporting such hearings, and making investigations as authorized by sections 134(a) and 136 of the Legislative Reorganization Act of 1946, as amended, in accordance with its jurisdiction under rule XXV of the Standing Rules of the Senate, the Committee on the District of Columbia, or any subcommittee thereof, is authorized from March 1, 1973, through February 28, 1974, in its discretion (1) to make expenditures from the contingent fund of the Senate, (2) to employ personnel, and (3) with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, to use on a reimbursable basis the services of personnel of any such department or agency.

SEC. 2. The expenses of the committee under this resolution shall not exceed $185,000, of which amount not to exceed $20,000 shall be available for the procurement of the services of individual consultants, or organizations thereof (as authorized by section 202(i) of the Legislative Reorganization Act of 1946, as amended.

SEC. 3. The committee shall report its findings, together with such recommendations for legislation as it deems advisable, to the Senate at the earliest practicable date, but not later than February 28, 1974.

SEC. 4. Expenses of the committee under this resolution shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman of the committee.

SENATE RESOLUTION 38—SUBMISSION OF A RESOLUTION RELATING TO SELECT COMMITTEE ON SMALL BUSINESS

(Referred to the Committee on Rules and Administration.)

Mr. STEVENS. Mr. President on behalf of myself and Senators MCGEE, RANDOLPH, YOUNG, SCOTT of Virginia, JAVITS, HANSEN, PELL, GURNEY, BEALL, CASE, and GRAVEL, I submit for appropriate reference a resolution designed to give to the Select Committee on Small Business the authority necessary for it to receive bills and resolutions relating to the problems of small business and to report bills and resolutions to the Senate for its consideration.

Mr. President, as a Senator from a small State, I know firsthand the importance that small business has to millions of Americans. In thousands of small communities throughout this country, small business constitutes the very backbone of community existence.

On the other hand, Mr. President, small business also constitutes the economic backbone for our larger urban areas.

In our highly technologically advanced society, we sometimes think of business only in terms of General Motors, General Electric, or other large well-known corporations. Big business certainly is important to the Nation's economic well-being, but small business continues to be the most important factor in our overall economy. There are nearly 5 million small businesses in this country. These small businesses, which constitute 95 percent of the total number of businesses in the country, provide employment for over 30 million Americans. Both in rural and urban areas, small businesses furnish a livelihood for nearly 60 percent of the population and provide direct employment for 40 percent of the population.

Mr. President, at the present time most of the small business legislation offered in the Senate is considered by the Small Business Subcommittee of the Committee on Banking, Housing and Urban Affairs. Over the years that committee has had a distinguished record of protecting the interests of small business. The resolution I am introducing today is in no way intended to diminish or criticize the hard work and dedication

of the Small Business Subcommittee of that committee.

However, Mr. President, if we in this 93d Congress are to be dedicated to streamlining the legislative process on a more functional basis, we must realize that the problems of small business have little relationship to the problems of banking, housing or urban affairs. All of us want our country to grow and prosper without the source of inflation. Such growth and prosperity depends in large measure on the health, effectiveness, and responsiveness of the nearly 5 million small businesses which form the backbone of our economy.

Now is the time, Mr. President, for we in the Senate to give a higher priority to the small businesses in this Nation. I sincerely hope that in organizing this 93d Congress we in the Senate will adopt the resolution I am introducing today. This resolution does not establish a new standing committee, but it does give a higher priority to the needs of small business and greatly increases the efficiency of the Senate.

The resolution is as follows:

S. RES. 38

Resolved, That S. Res. 58, Eighty-first Congress, agreed to February 20, 1950, as amended is amended to read as follows:

"That there is hereby created a select committee to be known as the Committee on Small Business, to consist of seventeen Senators to be appointed in the same manner and at the same time as the chairman and members of the standing committees of the Senate at the beginning of each Congress, and to which shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the problems of American small business enterprises.

"It shall be the duty of such committee to study and survey by means of research and investigation all problems of American small business enterprises, and to obtain all facts possible in relation thereto which would not only be of public interest, but which would aid the Congress in enacting remedial legislation.

"Such committee shall from time to time report to the Senate, by bill or otherwise, its recommendations with respect to matters referred to the committee or otherwise within its jurisdiction."

SEC. 2. Subsection (e) of rule XXV of the Standing Rules of the Senate is amended by striking out in paragraph 2 the words "under this rule".

SENATE RESOLUTION 39—SUBMISSION OF A SENATE RESOLUTION TO ESTABLISH A SENATE OVERSIGHT COMMITTEE ON THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE, THE CONFERENCE ON MUTUAL AND BALANCED FORCE REDUCTION, AND THE STRATEGIC ARMS LIMITATION TALKS II

(Referred to the Committee on Armed Services.)

Mr. BELLMON. Mr. President, in its desire to ease tension, the United States has entered into negotiations that could dramatically affect the common defensive posture and the military security of this country; discussions that could significantly alter the composition of our Army, Navy, and Air Force, and discussions that will undoubtedly place a heavy burden upon the Congress to reevaluate our entire Military Establishment.

These negotiations, such as the Conference on Security and Cooperation in Europe, the Strategic Arms Limitation Talks II, and the upcoming Conference on Mutual and Balanced Force Reduction, require that the Congress and the American people achieve a higher degree of understanding and awareness of the substance of these discussions than ever before in order to assess for themselves the impact of these deliberations upon the defensive capability of the United States.

Only through the Congress focusing specifically upon these talks via congressional oversight can its Members keep abreast of changing military requirements and be responsive to future military security needs, an oversight capability that in my opinion was severely lacking in the Congress during the SALT I deliberations. For this reason, Mr. President, I submit for myself and on behalf of Senators BAKER, BARTLETT, BEALL, BROCK, CANNON, CURTIS, GRAVEL, HELMS, HRUSKA, MCCLURE, MOSS, SCOTT of Virginia, STEVENS, and THURMOND, a resolution that calls for the establishment of a Senate Oversight Committee on the Conference on Security and Cooperation in Europe and the Conference on Mutual and Balanced Force Reduction, and the Strategic Arms Limitation Talks II.

I ask unanimous consent that this resolution be printed in full in the RECORD at the conclusion of my remarks.

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

S. RES. 39

Resolved, That an eight-member Ad Hoc Senate Committee on Military Oversight be established for the purpose of keeping abreast of changing military requirements resulting from developments of the Conference on Security and Cooperation in Europe and the Conference on Mutual and Balanced Force Reduction, and the Strategic Arms Limitation Talks II in order to ascertain the proper level of our future military security posture, with two members, including the Chairman, to be selected by the Majority Leader of the Senate, two members to be selected by the Minority Leader of the Senate, and four members appointed by the Chairman of the Armed Services Committee.

There is hereby authorized to be paid from the contingent fund of the Senate upon vouchers approved by the chairman of the committee a sum not to exceed $250,000.

SENATE RESOLUTION 40—SUBMISSION OF A RESOLUTION PROVIDING ADDITIONAL STAFF MEMBERS

(Referred to the Committee on Finance.)

Mr. LONG submitted the following resolution:

S. RES. 40

Resolution to provide four additional professional staff members and four additional clerical assistants for the Committee on Finance

Resolved, That the Committee on Finance is authorized, until otherwise provided by law, to employ four additional professional staff members and four additional clerical assistants, to be paid from the contingent fund of the Senate at rates of compensation to be fixed by the chairman in accordance with the provisions of section 105(e) of the Legislative Branch Appropriation Act, 1968, as amended.

SENATE RESOLUTION 41—ORIGINAL RESOLUTION REPORTED AUTHORIZING ADDITIONAL EXPENDITURES BY THE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS

(Referred to the Committee on Rules and Administration.)

Mr. SPARKMAN, from the Committee on Banking, Housing and Urban Affairs, reported the following resolution:

S. RES. 41

Resolution authorizing additional expenditures by the Committee on Banking, Housing and Urban Affairs for inquiries and investigations

Resolved, That, in holding hearings, reporting such hearings, and making investigations as authorized by sections 134(a) and 136 of the Legislative Reorganization Act of 1946, as amended, in accordance with its jurisdiction under rule XXV of the Standing Rules of the Senate, the Committee on Banking, Housing and Urban Affairs, or any subcommittee thereof, is authorized from March 1, 1973, through February 28, 1974, for the purposes stated and within the limitations imposed by the following sections, in its discretion (1) to make expenditures from the contingent fund of the Senate, (2) to employ personnel, and (3) with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, to use on a reimbursable basis the services of personnel of any such department or agency.

SEC. 2. The Committee on Banking, Housing and Urban Affairs, or any subcommittee thereof, is authorized from March 1, 1973, through February 28, 1974, to expend not to exceed $660,000 to examine, investigate, and make a complete study of any and all matters pertaining to each of the subjects set forth below in succeeding sections of this resolution, said funds to be allocated to the respective specific inquiries in accordance with such succeeding sections of this resolution.

SEC. 3. Not to exceed $320,000 shall be available for a study or investigation of—

(1) banking and currency generally;

(2) financial aid to commerce and industry;

(3) deposit insurance;

(4) the Federal Reserve System, including monetary and credit policies;

(5) economic stabilization, production, and mobilization;

(6) valuation and revaluation of the dollar;

(7) prices of commodities, rents, and services;

(8) securities and exchange regulations;

(9) credit problems of small business; and

(10) international finance through agencies within legislative jurisdiction of the committee.

SEC. 4. Not to exceed $210,000 shall be available for a study or investigation of public and private housing and urban affairs generally.

SEC. 5. Not to exceed $130,000 shall be available for an inquiry and investigation pertaining to the securities industry.

SEC. 6. The committee shall report its findings, together with such recommendations for legislation as it deems advisable with respect to each study or investigation for which expenditure is authorized by this resolution, to the Senate at the earliest practicable date, but not later than February 28, 1974.

SEC. 7. Expenses of the committee under this resolution shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman of the committee.

ADDITIONAL COSPONSOR OF A RESOLUTION

SENATE RESOLUTION 14

At the request of Mr. SCHWEIKER, the Senator from Rhode Island (Mr. PELL) was added as a cosponsor of Senate Resolution 14, to amend rule XXVII of the standing rules to provide for the appointment of Senate conferees.

SENATE JOINT RESOLUTION 28—CORRECTION OF COSPONSOR AND ORDER FOR STAR PRINT

Mr. ROBERT C. BYRD. Mr. President, on behalf of the distinguished Senator from Alabama (Mr. ALLEN) I make the following statement:

Mr. President, by mistake the name of the distinguished Senator from Washington (Mr. JACKSON) was listed as a cosponsor of Senate Joint Resolution 28 while the name of my distinguished senior colleague (Mr. SPARKMAN) was omitted. I ask unanimous consent that Mr. JACKSON's name be removed and that Mr. SPARKMAN's name be added as a cosponsor; also that there be a star print of the measure; and that the RECORD, page 1925, first column, be corrected accordingly in the two places where Mr. JACKSON's name appears. Mr. JACKSON did not ask to be a cosponsor of the resolution and his name was listed by mistake. Mr. SPARKMAN had asked to be a cosponsor and his name was omitted by mistake. To both of these distinguished Senators, I offer my sincerest apologies for the mistake.

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

EXTENSION OF ECONOMIC STABILIZATION ACT OF 1970—AMENDMENT

AMENDMENT NO. 93–2

(Referred to the Committee on Banking, Housing and Urban Affairs and ordered to be printed.)

ESTABLISHING AN UNEMPLOYMENT RATE GOAL

Mr. PROXMIRE. Mr. President, I send to the desk an amendment establishing a national goal for reducing the rate of unemployment to 4 percent by the end of 1973. The current unemployment rate was 5.2 percent at the end of 1972.

My amendment is in the form of an amendment to the Economic Stabilization Act which expires on April 30. The Senate Banking Committee has scheduled hearings on extending the act beginning on January 29, and I expect my amendment will be discussed during these hearings.

My amendment declares as a matter of national policy that it is feasible to reduce the rate of unemployment to 4 percent by the end of 1973 while maintaining reasonable price stability. The amendment directs the President to undertake the policies needed to bring the rate of unemployment down by the end of the year and to recommend any legislation needed to achieve this goal.

A declaration of congressional policy on the unemployment situation is necessary because the President's phase III economic program fails to set a specific goal for reducing the rate of unemployment. The phase III program is quite specific in establishing a target for reducing the rate of inflation, but it is completely silent on reducing the rate of unemployment. I believe we should have specific targets for both.

In passing the Economic Stabilization Act authorizing price and wage controls, Congress specifically determined that one of the major purposes of the act was to minimize unemployment. The administration has also mentioned the need to reduce unemployment as a justification for seeking price and wage control authority. By controlling prices and wages, it is possible to stimulate the economy more through fiscal and monetary policy without adding to inflation.

If we are going to give the President the authority to control prices and wages for another year, the Congress should insist that the administration do more than it is doing to bring down the rate of unemployment.

I believe the administration has given up on making further reductions in the rate of unemployment and is willing to tolerate a rate of 5 percent for the indefinite future. If the administration fails to set an appropriate target for itself, then the Congress must step in and set the goal.

The difference between an unemployment rate of 5 percent and 4 percent is 800,000 more jobs, $35 billion more in GNP, $12 billion more in Federal tax revenues and reduced expenditures for welfare, unemployment compensation, and the like.

Congress cannot force the President to pursue a full employment policy if he does not want to. Nonetheless Congress can set a goal and hold the President accountable. We have set specific goals in other areas such as housing, highways and the space program, and there is no reason we cannot apply the same approach to unemployment. In the event the unemployment rate is not reduced to 4 percent or less by the end of the year, the President is required to explain why in the economic report for 1973 and to propose a specific program for coming down to 4 percent as early as possible in 1974.

NOTICE OF HEARINGS BY THE SUBCOMMITTEE ON THE HANDICAPPED

Mr. MANSFIELD. Mr. President, on behalf of the distinguished senior Senator from Massachusetts (Mr. KENNEDY), it is announced that he will chair hearings of the Senate Subcommittee on the Handicapped on S. 427 and S. 458 on Friday, February 2, and Monday, February 5. Anyone wishing to testify should contact room 4226, Dirksen Building, Washington, D.C., 202–225–8937.

NOTICE OF HEARINGS ON CRITICAL DOMESTIC FUEL SHORTAGES

Mr. JACKSON. Mr. President, I wish to announce for the benefit of Senators that the Committee on Interior and Insular Affairs will open hearings next Thursday, February 1, to examine the nature, extent, and causes of the fuel shortages experienced by consumers across the Nation in recent weeks. These hearings, which will begin at 10 a.m. in room 3110 of the New Senate Office Building, are a part of the national fuels and energy policy study authorized by the 92d Congress.

Many Senators are aware that significant shortages of jet fuel, diesel oil, and fuel oil—as well as shortages of natural gas—have occurred in recent weeks. These shortages have already caused serious economic disruptions and public inconvenience. They have led to the closing of factories and schools, and to the disruption of trucking and airline transportation. If reports received by the committee are correct, more of the same is yet to come.

In light of these circumstances, Mr. President, it is imperative that Congress understand the dimensions of the shortage and what has caused this apparent breakdown in our energy distribution system. In particular, we need to know what action or inaction by the Federal Government, if any, has contributed to the problem. If congressional action is required to forestall future shortages, the sooner we have the facts the better. Hopefully, the hearings by the Senate Interior Committee will lay the foundation for whatever action is required to prevent a repetition of the current shortages.

Mr. President, I ask unanimous consent that a series of recent newspaper articles reporting on fuel shortages be printed in the RECORD.

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

[From the Washington Post, Jan. 9, 1973]

OIL QUOTAS LIFTED TO EASE LACK OF FUEL

(By Thomas O'Toole)

The White House yesterday authorized more than a four-fold increase in heating oil imports to erase the fuel shortages threatening a six-state region of the Midwest.

The Office of Emergency Preparedness said that the lifting of the import quotas means some 252 million additional gallons of No. 2 heating oil would become available to most of the nation over the next 90 days, which covers the remainder of the winter.

Easing the quotas will raise heating oil imports from 630,000 gallons to 2,730,000 gallons a day, all of it to be funneled into the United States through the Amerada-Hess refineries in the U.S. Virgin Islands. The new quotas will allow the issuance of new import licenses to distributors selling heating oil in all areas east of the Rocky Mountains.

The more liberal quotas will release heating oils to most of the country, but they are designed to loosen fuel supplies to six Midwestern states going through their second week of a fuel shortage.

"The new quotas will bring heating oils from the Virgin Islands into East Coast ports," said a spokesman for the Office of Emergency Preparedness. "Some of this fuel will make its way to the Midwest, but its primary purpose will be to divert Gulf Coast shipments of heating oils to the Midwest that had previously been committed to Eastern customers."

The Midwest shortage was triggered by a cold wave that has shown no signs of abating, although by yesterday it had turned into a dry cold that allowed some harvesting of corn and grains in Nebraska and Iowa.

The OEP estimated yesterday that only 10 percent of the corn and grain crops were still in the fields in those two states.

Drier weather also allowed more barge and truck shipments of heating oil into the Midwest, though a shortage of diesel fuel tied up barges of the Mississippi and Ohio rivers that had been contracted to carry heating oils into the Midwest.

"These same barges were to be used to transport wheat out of the Midwest for sale to the Soviet Union," an OEP spokesman declared. "We don't know when these barges will begin to move freely, a lot depends on the weather."

The Federal Power Commission told the OEP that shortages of natural gas has spread from the Midwest into parts of New Mexico, Arizona and California as the cold wave spread into those Southwestern regions.

El Paso Natural Gas is cutting back on customers in this region that can use alternate fuels, an FPC official said. "It's all due to unusually cold weather," he said.

While the weather took its share of the blame, the OEP laid at least part of the responsibility on Midwest refineries it said persisted in producing gasoline at a time when heating oils began to run short.

The OEP said some 70 refineries in nine states have been producing twice as much gasoline as heating oil every week of the last three months. A glut of gasoline led to gas wars in Michigan and Wisconsin that have resulted in prices about seven cents a gallon lower than surrounding states, the OEP said.

[From the Wall Street Journal, Jan. 9, 1973]

FUEL-OIL SHORTAGE NEARS THE CRITICAL STAGE IN PARTS OF NATION AS TEMPERATURES DROP

Low temperatures are depleting already-short fuel oil supplies to near-critical levels in parts of the nation.

In Denver, where temperatures have been hovering around zero at night, some schools are open only part-time and the Gardner-Denver Co. plant is closed because of a lack of fuel. On Midwest waterways, grain shipments are stalled because not enough fuel is available to move them. And in the Boston area, fuel-oil suppliers and terminal operators report they're in desperate straits.

"We're living from ship-to-ship delivery," Herbert Sostek, executive vice president of Gibbs Oil Co., Revere, Mass., said. "If this weather keeps up, there will be a real clamoring for oil in about seven days."

So far, at least, suppliers have been able to keep up with home-heating requirements for fuel oil. But much depends on the weather. And in Washington, government officials were pessimistic on the outlook for the next several days.

The Office of Emergency Preparedness, which is coordinating federal fuel-supply efforts, cautioned that weather predictions indicate temperatures for the next five days in the Midwest will average 10 degrees below normal. Nationwide the five-day forecast is for temperatures five to 10 degrees below normal. "That means a lot more fuel consumption; nothing could be plainer," a spokesman for the OEP, said.

ANOTHER DARK FACTOR

Government officials also see another dark factor in the fuel outlook. They fear a Penn Central Railroad strike may be inevitable and that it will compound the tightening fuel supply problem, particularly in the Midwest, where shortages and cutbacks have already developed.

The OEP spokesman said it has been advised by the Interstate Commerce Commission that a settlement of the conflict between the carrier and the United Transportation Union before the 12:01 a.m. Friday deadline is unlikely. (The UTU called for the strike after Penn Central announced plans for a unilateral cut in train crew size.) The OEP spokesman added that the railroad carries some fuels and large amounts of coal for utilities. If the utilities couldn't get coal, they'd have to run on fuel oil, the spokesman said.

The Nixon administration is proceeding with previously announced plans to expand the oil import program so that more fuel oil—specifically No. 2, the main home-heating oil—can be brought into the U.S. Federal agencies also are trying to round up emergency supplies of fuel for the hardest-hit areas.

Over the weekend, the OEP, the Interior Department and the Colorado Public Utilities Commission collected 258,000 gallons of fuel oil so Denver's public schools could open, if only part-time, this week.

Last night, the Interior Department ordered the release of imported jet fuel held in bond in New York to prevent a threatened closedown of some airline operations at Kennedy, LaGuardia and Newark airports.

OTHER CUTBACKS

Airlines as well as railroads and other transporters face cutbacks in parts of the Midwest. Standard Oil Co. (Indiana) announced yesterday that it is reducing fuel oil deliveries to commercial customers by 25% in the central Midwest states, excluding Wisconsin and Illinois.

An Indiana Standard spokesman said commercial customers including rail, airline, trucking and utility companies will receive deliveries cut to 75% of those of January 1972.

Several other oil companies also have recently rationed fuel oil to their customers, generally giving them as much, but not more, than they received a year ago. Shell Oil Co. has notified its regular customers they can count on supplies only equal to what they ordered last year. Shell also is declining to take on new fuel oil customers.

Exxon Corp., formerly Standard Oil Co. (New Jersey), said it has asked heating oil distributors in the Carolinas to temporarily reduce their inventories to alleviate what the company calls a "temporary supply problem" in that area.

Exxon and other major oil companies said they are producing more heating oil this winter than last. Latest refining statistics support their point. In the week ended Dec. 29, the nation's refiners processed nearly 21 million barrels of No. 2 fuel, up from 18.9 million barrels in the year-earlier period.

HARDLY ENOUGH

This is hardly enough, however, to keep pace with the increasing demand for No. 2 fuel. Home-heating oils are being consumed at a rate nearly 7% higher than last winter, and No. 2 fuel is being burned at a weekly rate of 28 million barrels while the refiners are turning out 21 million barrels weekly.

As a result, stocks of No. 2 fuel have plummeted to less than 160 million barrels, over 34 million barrels below the level of a year ago when inventories were considered satisfactory for only a "normal" winter.

Petroleum refiners say they are operating at capacity. But government officials monitoring supplies aren't convinced the oil industry is doing all it should to prevent shortages. OEP Director George A. Lincoln has been urging refiners to increase their No. 2 output even more.

INEXCO GAS SALES PACT SET AT A STEEP 52-CENT RATE

(By a Wall Street Journal Staff Reporter)

HOUSTON.—Inexco Oil Co. said it contracted to sell New Mexico natural gas to Southern Union Gas Co., Dallas, at a price "believed to be the highest ever paid" in New Mexico.

Inexco said the 10-year contract initially calls for Southern Union to pay 52 cents per thousand cubic feet of gas. An Inexco spokesman said he expects Southern Union to buy between three million and four million cubic feet of gas daily from each of two wells in the Catclaw Draw field in Eddy County, N.M.

Inexco said the contract provides for a one-cent-a-year price escalation and a price redetermination every two years, at Inexco's option.

Inexco said that under the contract, production from 1,876 net acres in the field has been dedicated to Southern Union by a group that includes Inexco Oil, Inexco Northern Exploration Co. and Inexco Oil & Gas Funds Ltd., No. 71-2.

Inexco said the gas would be resold by Southern Union to users within New Mexico.

JET-FUEL SHORTAGE AT NEW YORK AIRPORTS DISRUPTS OPERATIONS OF SEVERAL AIRLINES

NEW YORK.—The nation's long forecast "energy crisis" has become a reality in the airline industry.

This became evident early this week when operations of several major airlines were disrupted because of a critical shortage of jet fuel—kerosene—at the New York area's three major airports.

But inquiries disclosed that the New York situation had been developing for about a month and that spot shortages of plane fuel are being monitored closely by airlines at several other locations around the nation. Even more significant are worries of several airline officials that the current troubles are symptoms of a critical problem that will be around for some time.

Airlines apparently haven't been forced to cancel flights because of a lack of fuel. But at least two major airlines, Trans World and American, said they've been forced this week to make unscheduled landings at such cities as Pittsburgh and Washington to take on fuel before coming into New York where fuel temporarily was unavailable from their supplier, Texaco Inc.

A TWA spokesman said the airline began making unscheduled intermediate landings for fuel on Monday and did so 13 times Tuesday, primarily with transcontinental flights from the West Coast. American Airlines, which consumes about 610,000 gallons of jet fuel daily at the three New York airports, said yesterday it had made unscheduled landings this week but hadn't cancelled any flights due to fuel shortage, "although the situation could change hour by hour."

Both airlines, and several others, said they've also been forced extensively to load up on fuel at scheduled departure points and intermediate stops outside New York to compensate for the shortage there. The practice, known as "fuel ferrying," is costly and inefficient, partly because the weight of additional fuel increases fuel consumption.

Further, the effect of fuel ferrying over the last few weeks has contributed to tight supplies at other airports, such as Chicago's O'Hare International, which had a temporary problem last month because of excess airline demands there, an official of the Air Transport Association said.

The nation's largest airline, United, a unit of UAL Inc., said it doesn't anticipate schedule disruptions and has received guarantees from its major suppliers that they'll meet contract commitments covering United's needs—over 1.6 billion gallons annually.

However, United recently had temporary fuel supply disruptions in several cities, including Denver, Omaha and Salt Lake City, and currently is monitoring a tight supply situation in Buffalo, Rochester and Hartford, one official said. United is supplied by Texaco at the latter three cities but uses fuel from Exxon Co. U.S.A. (formerly Humble Oil & Refining Co.), a unit of Exxon Corp., at the New York airports.

"Although the problem right now is limited to the New York area and one major supplier in particular (Texaco), we're concerned that this is quite possibly the begin-

ning of a pattern of fuel shortages elsewhere," said Michael Strok, director of materials management for the Air Transport Association, the airline industry group. Mr. Strok said the association was having difficulty finding why supplies are short.

Mr. Strok and other airline industry sources said fuel suppliers in New York had followed the usual practice of borrowing or trading jet fuel with each other to alleviate the growing shortage in recent weeks but the practice had to be halted because the companies loaning fuel began to run low, endangering supplies for their regular customers.

Some airline sources said the New York fuel shortage was partly caused by mechanical difficulties at certain refineries producing jet fuel and by storing, at federal government urging, heating oil in facilities normally used for jet fuel. Because of the unusually mild winter temperatures this season in the New York area, heating oil supplies haven't been depleted as fast as expected to make room for jet fuel, one airline source said.

Airline officials said the one available immediaate solution to the New York problem would be the release for use on domestic flights of bonded fuel being held for use on international flights. Several airlines have urged the Office of Emergency Preparedness to take such action. Recently the Interior Department ordered the release of some bonded fuel at New York's Kennedy Airport at Texaco's request.

The ATA's Mr. Strok said commercial jet fuel needs are estimated this year at 10.5 billion gallons, up from about 9.7 billion last year. "We're beginning to get some fuzzy indications from oil companies to the effect that we shouldn't expect a big increase in the supply this year," he said. "It's a real concern because the airlines already are running so close to the line."

One airline executive, expressing concern over jet fuel supplies over the next few years, said he believes the major factor for the shortage is the pressure on utilities to switch from burning coal and heavy fuel oils to cleaner distillates, like kerosene. Opening the import door is the short term solution but in the long run "the only obvious solution" to the airline fuel problem will be the relaxation of these ecological restraints on utilities, he said.

FUEL OIL PINCH TIGHTENS; TEXACO SETS RATIONING BELOW YEAR-AGO LEVELS

NEW YORK.—The nation's fuel oil supplies continued to shrink, and another major oil company began rationing deliveries.

Stocks of light fuels, or distillates used largely for home heating and industrial purposes, declined nearly 4.8 million barrels to 154.4 million barrels in the week ended last Friday, the American Petroleum Institute reported. That is less than six weeks' supply at present rates of consumption and 36 million barrels below year-earlier inventories.

Citing the general tightness in supply, Texaco, Inc. said it had begun allocating supplies of distillate fuels to customers. Included in the allocations, the company said, are some heating oils, kerosene, diesel fuel and aviation jet fuel.

Texaco, which is the nation's biggest gasoline marketer, also ranks among the largest suppliers of distillates. It declined to say how much it was cutting back deliveries or what fuels might be reduced the most.

Most other major oil companies that have gone on an allocation basis in recent days are holding deliveries to established customers at year-ago levels. Texaco indicated, however, that it was reducing deliveries on some fuels below year-earlier amounts.

HARDSHIP CASES CITED

"Because of varied supply-and-demand patterns," the company said, "allocations will vary, depending upon the type of fuel used and the supply location involved." Texaco added, however, that it will attempt, "to the best of our ability," to maintain essential supplies to schools, hospitals and other places where lack of fuels would create unusually severe hardships.

"The allocation program results from a general shortage of middle distillate fuels and is in the face of dwindling domestic crude oil production, unreasonable import restrictions on major refiners and other factors beyond our control," Texaco said.

The company contended that a solution to "this current crisis in middle distillate supply" was being hampered by "inequitable oil import regulations, by unrealistic environmental restrictions and by restrictive price controls on heating oils, natural gas and crude oil."

"OTHER FACTORS" BLAMED

Texaco said its refineries had been producing as much of distillates as possible since early fall. "But other factors," the company asserted, "have restricted production of middle distillates and prevented us from keeping pace with unusually strong increases in demand."

Other major oil companies that have gone to allocations of distillates include Shell Oil Co. and Mobil Oil Corp. This week, Standard Oil Co. (Indiana) announced it was reducing fuel oil deliveries to commercial customers 25% in some Midwest areas.

According to the American Petroleum Institute report, the nation's refineries, operating at 89.4% of capacity, produced 21.5 million barrels of light fuels in the Jan. 5 week, 507,000 barrels more than the preceding week and 3.1 million barrels more than a year earlier.

This has been hardly enough, however, to keep up with distillate demand, which has been increased sharply by cold weather over much of the country.

[From the Dallas (Tex.) Morning News, Jan. 19, 1973]

FUEL SHORTAGE TURNING INTO CRISIS

(By John Cranfill)

The energy crisis has arrived in Dallas.

It is here, if you consider that one of the largest truck stops in Dallas has had its diesel fuel supply cut by 43 per cent and will run out next week.

It is here, if you consider that Dallas-based REA Express truck rigs will run out of fuel Monday and will come to a halt if diesel fuel is not found.

And if trucking in Dallas comes to a halt, or even slows down, not many residents will be able to escape the effects, especially if the diesel fuel shortage continues through the winter heating season, as it is almost certain to do.

The situation is serious, perhaps more serious than gas curtailments experienced recently. Almost all supplies brought to Dallas arrive by truck, including food. And many hospitals and generating plants use diesel power as back-up.

"Two days ago Texaco representatives came by and told me I was being cut on the amount of diesel fuel I could buy," said A. S. Crosby, operator of Dick Price Truck Stop on Industrial Boulevard.

"They said my January allotment is 75,000 gallons, and 80,000 gallons for February. After that, I don't know. Already I've sold 65,900 gallons in January and I'll run out next week," Crosby said.

"American Oil Co. cut me off last Friday," said A. E. Brandon, manager of fleet maintenance for REA Express in Dallas, which operates 24 trucks in Texas and Louisiana.

"I bought some fuel from an independent that will last until Monday. After that, I do not know what I'll do. It's this way all over the country, I understand. I went to Texaco, Shell and Mobil, but they're not taking any new customers," Brandon said.

A spokesman for Texaco in Houston said the company is doing what it said it would do last week—rationing supplies of middle distillates (fuel oil, diesel fuel, jet fuel, kerosene), but doing it by regions with no specific standard applying across the nation. The Associated Press had previously said Texaco's move applied mainly to wholesalers, not retailers like A. S. Crosby here.

The Texaco spokesman would not comment on any other aspect of the cutbacks.

A Shell spokesman said Thursday the company, effective Jan. 1, had placed all its diesel customers on an allocation system—they can get the same amount of fuel they ordered from Shell at this time last year.

American Petrofina in Dallas said all of its 451 suppliers in 26 states have been allocated 85 per cent of their normal diesel supplies, until further notice.

The diesel fuel shortage is nationwide says Lloyd Golding, executive vice-president of the National Association of Truck Stop Operators in Washington.

Golding said his group and representatives from all the transportation industry, including rails and water, were meeting Thursday with George Lincoln, director of the Office of Emergency Preparedness, "to ask for help."

Golding said "there are several truck stops that are completely out of diesel fuel. And that means they are out of business until they can get more.

"At least 25 stops have called saying fuel will last until the middle of next week. Maybe 100 more truck stops will be out of fuel before the end of the month. That's serious," Golding said.

The problem of shortages at truck stops is compounded by the fact that several oil companies have cut off trucking companies, he explained, putting them on the open market to compete with trucks passing through.

"Many truck stops are rationing, and they won't take on any new customers," Golding said.

The reason for the shortage?

"I know, but I won't say," Golding said.

"When an oil company cuts back 40 percent, they're the one's doing it," he said. "But when you start making statements about oil companies, you're in the hot seat."

The Mid-Continent Truck Stop on Big Town Boulevard has had no problems supplying its customers with Gulf diesel fuel.

"Right now, we're not hurting for fuel, but we know there's a shortage. We have a contract for over 300,000 gallons of diesel fuel a month and Gulf's meeting it."

"Every truck stop in the United States has been cut," said Charles Safley, co-owner of a truck stop in West Memphis, Ark., and a partner in Mid-Continent Inc., a nationwide network of over 300 credit affiliated truck stops, including some in Alaska and Canada.

"We found this out from truck stops calling us from all over the country. We've been cut on our allotment from Shell and its' not enough to last the month.

"When we're out, we'll try to buy from independent suppliers, but we haven't had any luck yet," Safley said.

"Texaco told me the dealers who didn't have a fuel contract with them will be cut off completely. One man here called me who doesn't have a contract with Texaco and he's out of fuel," Crosby said. "Some of my customers are leasing gasoline burning rigs for local pick-up and delivery runs.

"I haven't really known what to do. I don't have a plan yet. I'm gonna make a lot of people mad whichever way I go.

"If I ration, it means a trucker who needs 300 gallons of fuel will get 25 or 50—just enough to get him down the road. And those rigs don't get but 5 miles to a gallon. What will a driver do out in West Texas or New Mexico, where stations are 200 to 300 miles apart?

"What do I tell the driver of a diesel refrigeration unit, hauling fresh produce and per-

ishables from the Valley or California? They need fuel for their truck and the refrigerator unit. Those boys can't afford to run out. They've got to keep frozen food at 15 to 20 degrees below zero.

"Suppose a guy is carrying 45,000 pounds of shrimp that's worth $1.25 a pound wholesale? We've got to work with these boys. Even cold weather won't keep their load cool enough," he said.

"Then there's all the construction work going on around here. It'll all come to a stop, if they have to use the big machines and there's no fuel.

"I'm on the spot," Crosby said.

[From the Washington Star, Jan. 19, 1973]

UNITED STATES IS ASKED TO ALLEVIATE FUEL SHORTAGE

(By John Holusha)

Representatives of the transportation industry, contending that there is a critical shortage of diesel and other fuels, have asked the administration to step in and allocate supplies on a priority basis.

"If something is none done soon, there are going to be cutbacks and curtailments of essential services" says Gerald C. Collins, executive vice president of the National Defense Transportation Association.

The NDTA and associations representing the truck, intercity bus, mass transit, barge, airline and railroad industries presented their pleas for allocation—they shy away from the word "rationing"—to Office of Emergency Planning Chief George A. Lincoln yesterday.

PRIORITIES URGED

They say President Nixon's decision to lift oil import quotas for the next four months will be of no help to transport because all the extra fuel will go for home heating.

Lincoln was asked to press the White House on priority allocation and to investigate other methods of increasing the supply of fuel. Alternatives that have been suggested include dipping into military stocks and relaxing air-quality standards enough to divert clean-burning oil from industrial and power plants to transport.

"All modes of transport are reporting 20 to 25 percent reduction in fuel supplies and in some areas the situation is critical.

Mass transit systems appear to be the hardest hit. All transit operations in Des Moines, Iowa, will stop on Sunday and those in Minneapolis on Monday unless fuel can be found, the American Transit Association says.

SITUATION ASSESSED

Industry associations gave this summary of their fuel situations:

Mass transit: Most Midwestern and Southeastern systems are reporting cutbacks from suppliers and shortages. The cities of St. Louis, Detroit, Cincinnati and Birmingham are anticipating 10 to 30 percent cutbacks in service within weeks. Plans have been made in some cities to eliminate Sunday, Saturday and after 6 p.m. service to reduce fuel consumption 15 to 17 percent. Suppliers are pressing to mix heavier No. 2 diesel fuel with the usual No. 1, despite potential engine damage.

(Jackson Graham, general manager of the 1,200-bus Metro system here, says "I know we've got a potential problem," but says there have been no cutbacks so far. Exxon Corp,. which supplies the D.C. Transit and WV&M bus companies taken over by Metro, says the shortage has not yet affected the Washington area.

(However, the Suburban AB&W line, which carries about 18 percent of areas bus passengers, was told early this month by its supplier, Texaco, it would be cut back 25 percent. Executive Vice President Richard Lawson said the company managed to secure enough fuel to last until its planned takeover by Metro at the end of January. "It's Metro's problem then." Lawson said.)

Airlines. Critical shortages at the three New York airports, due mainly to heavy cutbacks by Texaco. The Air Transport Association said flights may be canceled unless more fuel reaches New York "within the next several days."

Railroads. The Association of American Railroads says many suppliers have reduced commitments by 25 percent and others will deliver only at the 1972 level, despite increased demand.

Trucks. Situation varies from city to city, but general theme is 25 to 30 percent reduction in deliveries, according to the American Trucking Associations.

Inter-city buses. The trade group said some major, but unidentified, bus lines were down to a few days' supply of fuel. Companies going to independent suppliers have been forced to pay 2.5 to 6 cents more a gallon, it added.

PARCEL SERVICE HIT

The giant United Parcel Service organization reported it faces a "total shutdown of operations" in 12 Eastern states and the District of Columbia after Feb. 14. UPS said Texaco declined to renew its diesel fuel contract after the Feb. 14 expiration date. Other companies, it added, said they were unable to take on any new customers.

Industry sources said the shortage is a result of a combination of factors, none subject to easy solution. The cold weather in many parts of the country increased demand for heating fuel (which is No. 2) diesel and refineries emphasized gasoline production over lower grade fuels.

The officials say they'll press for White House action, but see few courses of action open. One executive who did not want to be identified said: "I'm sure we're going to end up with some kind of rationing."

[From the Washington Post, Jan. 23, 1973]

DELIVERIES CUT BY SHORTAGE OF DIESEL FUEL

(By Thomas O'Toole)

The shortage of diesel fuel worsened yesterday in the Midwest, where truckers began to cut back on deliveries in an eight-state region from Colorado to Illinois.

"We haven't gotten a drop of diesel since last Thursday, which means we have nothing left," said Milton Lambert, owner of General Gas & Oil Co., the leading distributor of Texaco products in the Chicago region. "There are trucks all over Chicago with dry tanks."

The first signs emerged yesterday that the diesel shortage had spread to the West Coast, which had gone through the current crisis unscathed. The American Trucking Association said that truckers in Los Angeles were notified for the first time that they would not get the diesel fuel they've requested.

"We have no idea what it means yet," an American Trucking Association spokesman said, "but some West Coast truckers were told that they won't even get as much fuel as they got last year."

The situation was far more serious in parts of the Midwest, where a storm aggravated the problem by dumping up to 10 inches of snow on Kansas, Nebraska, Iowa, Minnesota and Wisconsin.

Nine inches of snow fell before noon on Des Moines, where the airport was closed until mid-morning and United Air Lines cancelled all flights until at least afternoon. Airport crews said snow blew back onto the runways as fast as they could remove it, and the Iowa Highway Patrol reported numerous traffic jams and pileups.

One reason the diesel shortage is hitting truckers so hard is that it is being substituted for heating oil, making it scarce as a transport fuel. Some truckers were mixing diesel fuel with water and with heavier oil, a practice that's more wearing on engine parts and makes more fumes.

"We have to do this to keep operating," said an official of United Parcel Service. "Even at that, we're living from day to day with this fuel pinch."

Minnesota's Metropolitan Transit Co. averted a shutdown of bus service in Minneapolis and St. Paul by buying a cache of 270,000 gallons of diesel fuel from a distributor in Winnipeg, 340 miles away in Canada. Even then, the bus company had to lend fuel to its local supplier so it could move its trucks to Canada to get the oil.

Truckers throughout the Midwest said the shortage was at its worst in Denver, Minneapolis and Chicago and impossible on the numerous truck stops between the three cities. The Bee Jay Truck Stop outside Chicago said 86 trucks stopped there for oil last Friday, and it had no fuel to fill them.

"I had to use the couple of hundred gallons left in my tanks to keep their refrigerators running," owner Benedetto J. Massarella said. "I finally had to go to the black market for some bootleg fuel, which cost me as much as 30 cents a gallon." The market price is 12 cents.

Meanwhile, top Pentagon officials told the Senate Interior Committee they faced no immediate shortage of fuel. They said they had a 60- to 90-day supply of fuel in storage, enough to release as much as 140 million gallons to the civilian population if the fuel shortage reached emergency proportions.

[From the Washington Star, Jan. 24, 1973]

IMPORTS FALL SHORT, FUEL DEALERS SAY

(By John Fialka)

An organization representing the nation's independent oil dealers complained on Capitol Hill today that recent changes made in the oil import program by President Nixon will not prevent further heating oil shortages and a possible gasoline shortage this spring.

The group, the National Oil Jobbers Council, which represents 1,300 dealers, also introduced a parade of local and state officials from the Midwest and New England who warned of further shortages.

Speaking at a meeting of congressmen and oil dealers held at the Cannon House Office Building, Jim Erchul, director of civil defense for Minnesota, said that last week the state ran out of extra supplies of oil. Unless it is able to locate oil in Canada that can be brought down by truck, the state will have a shortage of at least 10 million barrels by the end of February, he said.

Other state officials had a similar message. Col. John Plants, head of Michigan's civil defense unit, said "I don't care who caused it, I just wish people in Washington could figure out some way to solve it," he said, referring to a threat of shortage in his state next month.

In a statement released by the jobbers' group, it charged that dealers have been unable to get extra heating oil into the northern Midwest through existing pipelines.

Amerada Hess, a U.S. oil firm which was recently granted permission to bring in additional heating oil from its refinery in the Virgin Islands, the statement asserted, has so far refused to sell any of the extra oil to Midwest dealers.

John G. Buckley, head of the jobbers' oil supply committee, said that many dealers have been unable to get supplies of heating oil from Europe because European oil refiners are requiring one-year supply contracts and the President's recent action only lifted heating oil import controls for four months.

Buckley suggested that Congress should take the oil import controls away from the President and amend the program to bring in enough oil to prevent further shortages.

He said the jobbers expect "a substantial gasoline shortage in the spring and summer and an even more critical shortage of heating fuels next winter."

"Emergency measures, emergency allocations, last minute stop-gap measures, increasingly will fall short there by creating chaotic marketing conditions and shortages," he added.

[From the Evening Star and Daily News, Jan. 25, 1973]

REFINERY CLOSES AS UNITED STATES CONTINUES TO FEEL OIL PINCH

(By John Fialka)

As the nation continues to feel the impact of a growing shortage of heating and diesel fuels, a major oil company has closed a refinery in the oil-starved Midwest, claiming it is obsolete. An Oklahoma refinery, which also supplies the Midwest, faces the prospect of a shutdown because it can't get any crude oil.

Meanwhile, in Washington, the spokesman for the National Association of Food Chains has asked Congress to legislate a system of rationing that would keep food delivery trucks supplied with fuel.

The Mobil Oil Co. shut down its refinery at Woodhaven, Mich., last week, according to a spokesman. The closing of the refinery, which has the capability of processing 46,600 barrels of crude oil a day, the spokesman said, "has no effect" on the company's ability to supply its customers.

SHORTAGE IN FEBRUARY

The spokesman described the Woodhaven facility as a "small, obsolete refinery." It was capable of processing only 20 percent of each barrel of crude into heating oil, he explained, while the company's more modern refineries can make up to 50 percent of each barrel into heating oil.

Mobil, he added, is refining all the domestic and Canadian crude it can get in its other refineries. Asked why the company could not rearrange its supply system with other imported crude oil to make domestic or Canadian supplies available at Woodhaven, the spokesman said he could have no immediate answer to such a "technical" question.

Col. John Plants, director of Michigan's Civil Defense system, has warned that the state faces a severe oil shortage in February unless additional supplies are found.

NO "TRADES" AVAILABLE

At Cushing, Okla., the Midland Cooperatives, Inc. refinery, located in the middle of a series of oil fields which it does not own, may have to shut down next month unless it can find a way to trade its oil import allocation to get domestic oil from a major refinery company.

So far, according to Forrest S. Fuqua, the refinery's manager, the company has not been able to find a major refiner willing to part with any domestic crude.

(Under the nation's Mandatory Oil Import Program, refiners that do not import oil get import allocation "tickets" which are normally traded with major oil companies for domestic supplies.)

According to Fuqua, uncertainties in the oil supply picture have given the major companies "no incentive" to trade with small independent companies.

Fuqua said that his refinery, which can process 19,000 barrels of crude a day, is down to 9,000 barrels and may have to shut down next month because existing supplies will be used up.

A 25 PERCENT REDUCTION

The refinery, owned by a cooperative, sends 80 percent of its output into the northern Midwest in the form of gasoline and heating oil, he said.

According to Clarence Adamy, Washington representative of the National Association of Food Chains, which represents about 200 retail food corporations, some food delivery truck fleets have had this year's fuel allotment cut by as much as 25 percent by oil suppliers.

The resulting slowdown in deliveries may show up on some Midwest supermarket shelves in three weeks in the form of shortages in such fast-moving items as salt, sugar, coffee and flour, Adamy said.

He said he has asked Senate Interior Committee Chairman Sen. Henry M. Jackson, D-Wash., to introduce a bill that would allow the President's Office of Emergency Preparedness to ration fuel, giving priority to such vital services as food distribution, hospitals and mass transit.

RAILROAD EXPERIMENT

Currently, under the Defense Procurement Act of 1950, OEP cannot ration unless the President declares a major defense-related emergency.

According to various sources on Capitol Hill, at least a half-dozen subcommittees are preparing to explore various aspects of the country's faltering oil supply system.

Sen. Edward M. Kennedy, D-Mass., reportedly is about to introduce a bill that would give the government more knowledge of and control over company supply systems.

[From the New York Times, Jan. 25, 1973]

SOME OIL DEALERS SAID TO SHIFT DELIVERIES TO GET HIGHER PRICES

(By Edward Cowan)

WASHINGTON, Jan. 24—Reports on the oil shortage that have been reaching the Government indicate that some diesel and fuel-oil dealers have been reducing deliveries to regular customers and selling the oil at premium prices through other channels.

Various industry sources said that they had heard of such switching or that they believed it was going on.

There is no violation of Federal law in such actions, officials said, although they could provoke Congressional investigations.

The Exxon Corporation, formerly called Standard Oil of New Jersey, put into effect today a price rise of 1.05 cents, bringing the shipload price of heating oil delivered in New York harbor to 11.95 cents a gallon. The Mobil Oil Corporation made a similar increase last week.

European refineries were said by the Oil Buyers Guide to be quoting substantially higher prices. The weekly publication's editor, Vincent C. Sgro, said the higher prices had discouraged large-scale importation of European fuel oil even though Washington has suspended import quotas until April 30. One shipload was sold last week at 15.2 cents a gallon, Mr. Sgro said.

OPTIMISM ON SHORTAGE

With the weather continuing relatively mild in the East and Midwest, hopes rose that the shortage of fuels would not become acute again this winter.

"It's still very tight," said Charles Mason, a spokesman for the American Oil Company in Chicago, "but we're more optimistic than a week or two ago."

Mr. Mason reported that Amoco, a subsidiary of the Standard Oil Company of Indiana, expected delivery of additional supplies of foreign heating oil within a week.

Mr. Mason said that some increases should be regarded as restoring oil prices to "normal," he said "there were spots in our system where the price was artificially low" because of competition for customers or because of the Government's mandatory price controls, now ended.

In New Jersey, Leon Hess, chairman of the Amerada Hess Corporation, confirmed industry reports that his company had contracted to deliver 1.3 million barrels of oil from its Virgin Islands refinery between Jan. 16 and Feb. 15 at 11.5 cents a gallon.

REPORTS OF SPECULATION

Mr. Hess said that 15 to 18 buyers would include six major oil companies and that they, like Amoco, would be able to divert domestic supplies to the Midwest as imports arrived for East Coast markets.

Mr. Hess also reported that when the Government suspended the quota for imports from the Virgin Islands in December, among those besieging his company were "oil brokers."

"Some of them figured they'd just get on the band wagon," Mr. Hess commented. He said he was selling only to major oil companies and terminal operators.

There have been other accounts, chiefly from the Midwest, of "brokers" and other speculators buying oil and reoffering it at premium prices. Senator Dick Clark, a freshman Democrat from Iowa, was told of such offerings by Iowa fuel-oil dealers two weeks ago.

OIL DIVERTED FROM CARRIERS

In Chicago, Terry Vangen, the assistant regional director of the Federal Office of Emergency Preparedness, said he had heard that trucking companies "are getting some other fuels from other sources at higher prices."

Mr. Vangen and his counterpart in New York City, Thomas R. Casey, said they knew of no outright shutdown by trucking or bus companies.

Diesel fuel is essentially the same as heating oil. The industry evidently has been diverting to heating customers, especially residences, fuel normally delivered to operators of diesel trucks and buses and to railroads. Retail heating oil sales are more profitable than other sales because home owners usually pay the top price for fuel.

Both officials and their colleagues in Washington said that under existing law the Office of Emergency Preparedness was powerless to allocate scarce supplies unless there was a threat to national security, and that is not deemed to be the case.

"We don't have any authority insofar as what major suppliers are doing in their business," Mr. Casey commented.

"We have not heard of homes without oil," he added.

Mr. Mason of Amoco said that his company had told retail dealers throughout the country to keep household tanks only half filled, to stretch available supplies.

Other conservation measures were said by Federal emergency planners to be helping trucks and railroads minimize interruptions to service. Railroads were said to be running fewer and longer trains at reduced speeds. Trucks were said to have adjusted their engines to burn a leaner fuel mixture, to have reduced highway speeds and to have become more careful about shutting off their engines at delivery stops.

Like the railroads, the trucks have curtailed some services. The latest railroads to have reported to Washington the possibility of reduced services because of diesel fuel shortages were the Seaboard Coast Line and the Lehigh Valley.

One complaint from truckers was that they must supplement their reduced bulk diesel deliveries by "topping up" their vehicles at roadside pumps at higher prices. "Buying fuel on route," said an official of Consolidated Freightways in Menlo Park, Calif., can cost up to twice the usual price of 11 to 12 cents a gallon.

JUDICIARY SUBCOMMITTEE ON SEPARATION OF POWERS AND GOVERNMENT OPERATIONS COMMITTEE JOIN IN HOLDING HEARINGS ON IMPOUNDMENT OF APPROPRIATED FUNDS

Mr. ERVIN. Mr. President, on January 30 and 31 and February 1 and 6, 1973, the Judiciary Subcommittee on Separation of Powers, jointly with an ad hoc subcommittee of the Committee on Government Operations, will conduct hearings on the impoundment of funds

by the executive branch of the Government.

The hearings will consider S. 373, the impoundment control bill as well as the constitutional principle of separation of powers, which has been brought into focus by the impoundment practice. I hope that these hearings will alert the Congress and the American people that we face a constitutional crisis and that some redress must be found if our form of government is to survive.

Aiding the two subcommittees in this inquiry will be Senators HUBERT H. HUMPHREY, HARRISON A. WILLIAMS, JR., FRANK CHURCH, THOMAS F. EAGLETON, ROBERT C. BYRD, BILL BROCK, J. W. FULBRIGHT, EDWARD M. KENNEDY, GEORGE S. MCGOVERN, and HENRY M. JACKSON.

Also presenting statements will be Congressmen SILVIO O. CONTE, CHARLES E. BENNETT, MICHAEL HARRINGTON, J. J. PICKLE, PAUL S. SARBANES, and JOE L. EVINS.

Mr. Ralph Nader of the Center for Responsive Law; Prof. Barry Commoner of Washington University, St. Louis; and Mr. Brooks Hays, former Member of Congress from Arkansas, will be among the witnesses.

The Comptroller General of the United States, Mr. Elmer B. Staats, will review the role and responsibilities of the Congress and other aspects of the impoundment problem.

Representatives of various citizen groups and organizations will testify on the effects that impoundment actions have had on education, highway construction, the environment, rural electrification and development, municipal improvements, home building, Indian health programs, housing and redevelopment, construction, telephone cooperatives, and other projects and programs that are vital to the Nation. Already we have seen the termination of several agricultural programs, including the rural environmental assistance program and emergency disaster loans to farmers, and we are all aware of the President's recent action in cutting $6 billion in funds for water pollution control which Congress had authorized over the Chief Executive's veto.

Included among these witnesses will be Mr. Charles A. Robinson, Jr., general counsel, National Rural Electric Cooperative Association; Mr. Nello L. Teer, Jr., senior vice president of the Associated General Contractors of America; Mr. Birgil Kills Straight, representing the Coalition of Indian-Controlled School Boards; Mr. Robert M. Koch, president, National Limestone Institute; Mr. Henrik Stafseth, executive director, American Association of State Highway Officials; Mr. George C. Martin, president, National Association of Home Builders; Mr. Robert W. Massin, representing the National Association of Housing and Redevelopment; Mr. David C. Fullerton, executive vice president of the National Telephone Cooperative Association; and Mr. Jack T. Nix, superintendent of the Georgia Public Schools, representing the Council of Chief State School Officers.

The administration has been given an opportunity to present its views. Testimony is expected to be received from Mr. Roy L. Ash, incoming Director of the Office of Management and Budget; Secretary of Agriculture Earl L. Butz; Mr. Joseph T. Sneed, Deputy Attorney General, Department of Justice; and Mr. William D. Ruckelshaus, Administrator, Environmental Protection Agency.

Members of the Judiciary Subcommittee on Separation of Powers, of which I serve as chairman, are Senators JOHN L. MCCLELLAN, QUENTIN N. BURDICK, CHARLES MCC. MATHIAS, and EDWARD J. GURNEY. The ad hoc subcommittee of the Committee on Government Operations is chaired by Senator LAWTON CHILES, and other members are Senators LEE METCALF, EDMUND S. MUSKIE, CHARLES H. PERCY, and JACOB K. JAVITS.

Prof. Arthur S. Miller of the National Law Center, George Washington University, consultant to the Subcommittee on Separation of Powers, will assist during the hearings. Other consultants who may be present are Prof. Philip B. Kurland of the University of Chicago and Prof. Alexander M. Bickel and Prof. Ralph K. Winter, Jr., of Yale University.

The hearings will be held in room 3302 Dirksen Building, and will begin at 9:30 a.m on January 30 and 31 and February 1 and 6.

Those desiring additional information are requested to contact the Subcommittee on Separation of Powers, room 1418, Dirksen Building, telephone 225–4434.

ADDITIONAL STATEMENTS

RETIREMENT OF ACTING PUBLIC PRINTER HARRY J. HUMPHREY

Mr. ALLEN. Mr. President, Harry J. Humphrey is retiring soon as Acting Public Printer of the United States. He has had a remarkable and an impressive career in the Federal service. He was born March 18, 1910, in Washington, D.C., and began a lifelong association with the Government Printing Office in 1928 when he was appointed printer/apprentice. Completing a 4-year apprenticeship in 1932, he graduated first in his class. Throughout his apprentice years he attended Benjamin Franklin University, earning his bachelor's degree in 1933, again placing first in his class.

Shortly after this, he was promoted to printing cost technician in the Finance and Accounts Division. While this was almost unprecedented recognition for one so young, his flair for both accounting and printing perfectly qualified him for this post. His rise in a field combining both printing and financial management was steady and he filled increasingly more responsible jobs and was selected as Deputy Comptroller of the Government Printing Office in 1961.

Mr. President, in 1965, he was honored by a sustained superior performance award and a year later was promoted to Administrative Assistant to the Public Printer, with direct responsibility for the Public Documents Division, the Engineering Division, the Finance and Accounts Division, the Personnel Division, the Purchasing Division, and the Division of Tests and Technical Control. In 1970, Mr. Humphrey was presented the Government Printing Office's Distinguished Service Award and was promoted to the post of Deputy Public Printer. Upon the untimely death of Public Printer A. N. Spence in January 1972, Mr. Humphrey became the Acting Public Printer of the United States and head of one of the largest printing offices in existence.

The period following Mr. Spence's death was a difficult one and Mr. Humphrey's long service and varied experience served him well in maintaining both the production impetus and administrative balance of the Government Printing Office.

Mr. Humphrey, aside from an abundant grasp of fiscal matters in an agency responsible for $260 million worth of printing and binding annually, contributed significantly to modernizing efforts and to employee development and training. He assumed a role of leadership in clarifying and implementing the expanded participation of commercial printers in the Government Printing Office's regional printing procurement program, more than doubling the number of regional offices.

Mr. President, in his nearly 45 years of service at the Government Printing Office, Mr. Humphrey compiled a record of achievement virtually unparalleled in this agency's history. At every stage of his career, from apprentice to Acting Public Printer, he distinguished himself by his ability, his foresight, and his dedication to the interests of this Office and the people who work there.

The loss of this experienced and skilled Federal executive will be felt throughout the Government graphic arts community. His contributions to the operation of the Government Printing Office spanning more than a generation have earned him a place of distinction in the annals of this agency.

Mr. President, I know the entire Senate wishes for Mr. Humphrey a long and enjoyable retirement. He has certainly earned it after many years of faithful service.

ADDRESS BY ALF LANDON—PRESIDENT NIXON'S DESIGN FOR PEACE

Mr. PEARSON. Mr. President, last October Alf Landon delivered a very significant address at Hesston College, Hesston, Kans., in which he outlined, with great insight, present world conditions and President Nixon's initiatives in reshaping our relations with Russia and China. This is an extremely well done assessment of international conditions. As I did not have the opportunity to call this to the attention of Senators before the adjournment of the 92d Congress, I ask unanimous consent that it be printed in the RECORD.

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

PRESIDENT NIXON'S DESIGN FOR PEACE

(Address by Alf Landon)

The American voters never have faced a more momentous decision than in the coming election in just 18 days.

That may sound trite. I submit, however, that never before has the fate of civilization rested in the hands of a trio of tough traders—cool and bold first-class fighting men—

Nixon, Brezhnev and Chou En Lai—who are engaged in reversing the basically militant long-term military, political and foreign policies of their respective mighty governments. How that ultimately works out will determine the destiny of all mankind, even babes born this minute.

Never before in all history have three men had such power in their hands because of the spread of nuclear weapons and the development of ways to enhance air power. Never before has the threat of world war been dealt with as realistically and as vigorously and—so far—successfully as President Nixon's proposals designed for peace, stability and prosperity.

Let us look briefly where this monumental change could be upset and then at its amazing set-up in three and a half years.

The first question obviously is, will this trio or their successors be able to continue their realistic and constructive leadership long enough to establish the new philosophy and new international policies involved in working out the details of implementing their goals?

China today cannot match either the United States of America or Russia in either nuclear or air power weapons. They will, however, catch up in a few years.

That is a key issue that confronts Russia. The military and the politburo are evidently divided whether to strike before China can build up greater nuclear power and bigger and more effective air power.

Russia has the air power quickly to knock out China's infant nuclear power. However, the fallout from even a short nuclear war would cause infinite damage for Russia's and the rest of the world's people. Furthermore, at the best, there would probably be one or more Chinese nuclear bombs hit Russia. And Russian armies would be engaged in a long drawn out guerrilla war in China and would have to sustain the enormous expense of administering occupied areas. Moreover, Russia—by attacking China—would give fresh fuel to attacks from Communists elsewhere questioning Russia's ideological faithfulness.

On top of this is the short food crop in Russia. It is still true, despite all the new weapons, that an army marches on its belly.

Going on three months, there has been a steady build-up of troops by Russia and China on each side of their long border.

There also has been a steady flow of vituperative attacks on China by Chairman Brezhnev and other top Russian government spokesmen. China, of late, has almost become the devil's devil of Russian propaganda, in place of the U.S.A.

In China, Russia has swapped places with the U.S.A. in Chinese rhetoric. All this is of substantial benefit for the foreign policies sponsored by President Nixon. That clears a lot of underbrush away in the long, tedious conversations now going on between governments preparing for agreement on the details of how to organize simply the preparatory committees.

Chairman Brezhnev is facing tough internal economic and political problems and, recently, two very hard and serious jolts. The food shortage from crop failures has hit Russia right in the belly. Egypt—built up by Russia—but still a third-rate power—kicking out the Russian military—some 15 thousand—and, even more important, denying three harbors for the use of Russia's built-up big Mediterranean fleet.

So far, Brezhnev has ridden them out successfully and continues in the saddle, carrying out his normalization of relations not only with the United States of America, but with Japan and Europe, with India in a special orbit.

Of particular concern to the American people is the nature of Russia's goals in Europe.

The leaders of the drive to pull U.S. troops out of Europe—men like Senator McGovern and Senate Majority Leader Mike Mansfield—advance the argument that it is time for the Western European democracies to assume more of the burden of their own defense. But statistics and the experts alike argue that it is all but impossible for Europe alone to provide an effective military deterrent to the Soviet Union and its allies.

Moscow and the Communist nations of Eastern Europe have 91 divisions in Europe and the Kremlin maintains another 80 divisions in the westernmost districts of the Soviet Union. Against that mass of military power, NATO has only 24 divisions—four and a half of them American.

Such an imbalance of power was clearly in the mind of West German Chancellor Willy Brandt when he unprecedentedly flew to Harvard in June to donate $45 million to finance studies aimed at keeping the U.S.-European relations firm. Without a strong U.S. military presence, Brandt warned, Europe may once again become "a volcanic terrain of crisis, anxiety and confusion. An actual U.S. disengagement would cancel out the basis of our peace."

It is generally overlooked that France has become more and more dependent on Russia economically and its friends, the Arab states. This is especially true for that most vital commodity, crude petroleum.

France has already disengaged from its commitment with NATO. That, coupled with the U.S.A. possibly withdrawing its troops from West Germany, will allow Russia to become dominant in Europe.

West Germany's official defense policy statement for 1972 put the facts bluntly: "The West European nations are not capable of taking the place—politically, militarily and psychologically—of the American commitment in Europe." This, as a leading British military commentator sees it, "will in the end lead to Russia encroaching on vital Western interests—at which point we are all too likely, from habit and from inadequate military capability, to surrender."

The only power that can prevent that ultimate surrender is the U.S. and the only way it can do so is to maintain a strong and determined military and political presence in Europe.

Because European countries have failed to keep all of their commitments to NATO and have been content to leave their national existence in the hands of Uncle Sam, they have eroded—for the time being, at least—their will to fight for their own existence. They have almost failed to maintain their own identity.

Just as Japan and China lost no time in getting together so that they will occupy a more influential position in Asia, so is Russia, under Chairman Brezhnev's policies, in that position with Europe. That will strengthen Russia in the Middle East.

Russia has more than enough armed forces to perpetuate its military position in Europe.

It is interesting to note that President Nixon had barely left Moscow when Russia's No. 1 ideological watchdog, Mikhail Suslov, delivered a jingoistic harangue reminiscent of the Stalinist years. The West, he said, is trying to "implant in our society poisonous seeds of political indifference, anarchist wilfullness, petty bourgeois money grubbing, chauvinism and nationalism." That's why our position . . . "must be active, offensive, concrete and uncompromising."

There are two pragmatic reasons for Russia's tough act. Without the presence of some kind of external bogeyman, it would be difficult to keep controls tight—and controls are the bedrock of Soviet society—and of Chinese society, for that matter. Furthermore, the Soviets must preserve the facade of unrelenting peoples revolution or lose ground to China.

George W. Ball, former Under Secretary of State and a Russian expert, said recently: "For more than two decades, the maintenance of a precarious balance with the Soviet Union has been the central unifying principle in American foreign policy. But many now regard that as an outmoded concept. To them, the Soviet leaders no longer have expansionist intentions; the ideological drive for revolution has, they insist, dried up, while the Soviet state has recognized the futility of its imperialist ambitions.

"It is a comforting belief, strongly reinforced by the deceptive theatricals of the recent summit meeting. Who can believe that a smiling Leonid Brezhnev and all those nice children on the Moscow streets hold any malign purpose in their hearts?

"Yet against all this, there is powerful evidence that the Kremlin has not changed its objectives, merely its tactics. Though we may be in an era of negotiations as President Nixon calls it, it can still remain an era of confrontation."

Up to now, the administration has *not* tried to answer that question in a categorical manner, since the Soviet Union's commitment to benign co-existence is not yet a safe working hypothesis. Thus, though we have now made a modest initial breakthrough toward a turning down of arms race through the preliminary SALT agreement, the President still asks for a larger defense budget; and though there is much facile talk of detente between East and West, he quite properly insists on maintaining our troop deployment in Europe.

It seems to me that all this tends to indicate that Senator McGovern does not have the facts he should have when he talks about cutting American troop strength in Europe and that he is once again willing to shoot from the hip rather than from reality.

On top of that, the Democrat presidential candidate would cut our military appropriations 32 billion dollars over three years.

The authoritative Jane's "All the World's Aircraft" reported three weeks ago that "The Soviet Union is flying a swing wing bomber the United States cannot match and a fighter plane the Americans cannot catch."

I have heretofore supported cutting down our troop strength in West Germany. Now I think that is a terrible mistake.

When urging normal relations with China and Russia for twenty years, I have repeatedly said I was not willing to sleep in the same room with the late Premier Nikita Khrushchev, for instance, and leave my wallet in my pants over the back of a chair. Undoubtedly Chairman Brezhnev and Premier Chou En Lai feel the same way about us.

That is reason for our President's opposition to cutting our European troop strength—in his cautious and prudent feeling his way toward the sweeping vista in sight of a world of normal relations between the big powers for the first time in three quarters of a century. Who dreamed when Mr. Nixon initiated his Design for Peace in February, 1969, only 60 days after his inauguration, that exciting prospect was in sight?

In other words, he is carrying out his momentous policies as Theodore Roosevelt long ago advocated—"Speak softly but carry a big stick." Let us now look at that amazing prospect.

President Nixon's record is plain to see, whether you agree with it or not. More than any other president, he has kept America's citizens informed of international developments and of his foreign policy goals.

Senator McGovern's foreign policy, thus far, centers only on the abandonment of Viet Nam and the withdrawal of American troops from West Germany. That does not add up to a positive and constructive overall foreign policy. It does not begin to compare with the sweep and scope of President Nixon's global policies realistically designed for stability, peace and their corollary, prosperity, for our great and beloved country and indeed for all people. In fact, it is counterproductive.

There are many revolutionary possibilities in the foreign affairs policies initiated by our President.

The Prime Minister of Japan—with a large official party—spent several days in Peking renewing, after thirty-five years—diplomatic relations with China. Taiwan and Japan broke their existing diplomatic relations.

Prime Minister Tanaka is about to visit Moscow to renew Russo-Japanese diplomatic relations after over twenty-five years.

Thirty governments have renewed or established diplomatic relations with China since President Nixon's visit last February.

The two Koreas are talking. The two Germanys have just ratified a traffic agreement pact—a milestone in mutual accommodation. The first start, after long delays, of the SALT talks has been signed by both Russia and the U.S.A.

The change in the international atmosphere involves and affects all lines of trade, science and health. A group of Chinese doctors—welcomed by President Nixon personally at the White House—is exchanging very beneficial information with their counterparts in America. We are exchanging exciting information on the mysteries of space and oceans and planning a joint exploration in these areas with a Russian scientist delegation.

Of great importance is the joint agreement by and between the AP and the Chinese official news agency for the exchange of news and information. A veteran AP reporter in Asia said last Sunday in a dispatch from Shanghai, the cities "are the same but the people are different. They are freer—more relaxed . . . None of this means that China has overnight become a free country. It is more open than it was 18 months ago."

There is a general atmosphere of amity in the present era unfolding and stretching ahead for the youth of this generation.

The problems facing the world we are living in are not confined to war or peace. They are of peaceful existence itself. There is the rapidly mounting energy crisis and the ecological crisis that must be solved before they reach a climax, if we are to face our responsibilities to the next generation. "One generation passeth away and another generation cometh, but the earth abideth forever" is no longer a reasonable prospect.

If President Nixon's policies fail in realization, we are plunged back into the cold war once again with the corollary arms race that will divert more of our national resources from legitimate domestic democratic processes and concerns.

Thanks to President Nixon's foreign policy, the world will never quite be the same again. He came into office with the purpose of changing the rigid policy of containment of Communism by force. He has done that by introducing the policy of containment by negotiation and cooperation, based on the firm understanding that neither expediency nor bull-headedness will permit the world's powers to solve or accommodate their individual and mutual problems.

It is a new era into which we have entered. It is an era that gives us and all the world's peoples a fresh chance, by talking out their problems and making concessions instead of continually hurling invectives and rattling sabres. What a rewarding life that is, compared to one under war or the threat of war.

Premier Chou—in conference with a group of visiting American newspaper editors last week—said, "China's contacts with the outside world have been dramatically accelerated since President Nixon's visit."

He added a fascinating detail, which I believe we should all think about, in his comment on how "a little ping-pong ball changed the world."

RESOLUTION OF ALASKA NATIVE BROTHERHOOD

Mr. GRAVEL. Mr. President, it is the policy of this Government to assist Indian tribes and villages across the country. It has been brought to my attention that the Tlingit villages of Sitka and Juneau receive relatively little assistance. Their only fault is that they are within an urbanized area and, therefore, are considered ineligible for many BIA programs.

I have received a resolution from the Alaska Native Brotherhood that, in a beautiful and creative way, expresses their feelings.

I ask unanimous consent that the resolution be printed in the RECORD.

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

SITKA AND JUNEAU INDIAN VILLAGES—LOOK TO THE FUTURE

Resolution No. 60-91-72, Grand Camp, Alaska Native Brotherhood

Whereas according to the Tlingit legend, in the whole world, there was only silence, all around the land, there was darkness, and everyone whispered and moved about carefully because in the sky above, there was no sun, no moon, and no stars. They were in safekeeping by a man who kept them locked in a special wooden box, and

Whereas when the great raven found out about the sun, moon and the stars, he went from house to house trying to find the man who owns the boxes so that he may get at them. As time went on, he came upon the man, and

Whereas due to the great ravens complete ability and versatility, he was able to be born to the man's daughter, and

Whereas as the boy (raven) grew older, he cried and cried for the boxes one by one until he accomplished his mission by securing for all mankind, the sun that gives light, warmth; the moon and stars that shine in the night for people to see and go by in order not to get lost, and

Whereas the story gives us strong evidence that the Tlingits were on this land since Tlingit Indian time began, and

Whereas there still exist Indian villages today from that first day light, and

Whereas after countless generations from the first through the time when the world flooded on through today, the tlingit lived in peace and harmony with each other, respecting the different boundary lines of each tribal land. That is, until the people from beyond the sea where the clouds end came among us with their desire for more land, more furs, more fish, and everything else you can think of, and

Whereas after settling among us, and since they couldn't eliminate the Tlingit nation through the traditional means, there sprang up the urban sprawls and engulfed old villages such as Juneau and Sitka, and

Whereas today, even though the villages of Sitka and Juneau still exist despite of urbanization, they are not recognized or eligible for assistance from BIA, and other agencies that assist villages because of their unfortunate situation, and

Whereas the two urban villages are today like the raven crying for the sun, the moon and the stars, for they are wandering around in the dark due to policies, regulations and laws that neglect the people because they became urbanized.

Therefore be it resolved by the 60th Grand Camp Convention, assembled in Ketchikan, Alaska that the Grand Camp Alaska Native Brotherhood and Sisterhood being the parent of all camps secure for Sitka and Juneau Indian villages, the boxes that contain the sun, moon, and the stars by advising all camps to be aware of the two Indian villages engulfed by the people from beyond the sea where the clouds disappear and that other villages be careful in order that they may not suffer the same fate as Juneau and Sitka Indian villages. To be sure that your villages be forever under the control of the original people and fight for all rights under the guiding light of the ANB and ANS.

Therefore be it further resolved look to the future!! Realize that today is the future for some of us. Tomorrow is the future of our children. Day after tomorrow is the future for our grandchildren and their children's children. What we do in our villages today will affect the future of our land.

VOCATIONAL REHABILITATION

Mr. TOWER. Mr. President, the Smith-Fess Act, signed into law in 1920, is an historic piece of legislation. It is the origin of one of the Nation's oldest, most successful, and most respected grant-in-aid programs—the vocational rehabilitation program.

The vocational rehabilitation program has grown tremendously—its growth has been responsible and deliberate—certainly not growth for the sake of growth. The program initially offered limited services for the physically handicapped. Each client was eligible for training, counseling, and placement services. During World War II, the vocational rehabilitation program was significantly expanded to include, for the first time, provisions for medical, surgical, and other physical restorative services to eliminate or reduce an individual's disability, and expanded beyond physical disability to provide services for mentally ill and mentally retarded individuals. Furthermore, the concept of rehabilitation was expanded to include "any services necessary to render a disabled individual fit to engage in a remunerative occupation."

In 1954, the program was amended further to provide for reseach, demonstation, and taining activities. In 1965, Fedeal finanrcing was libealized to encourage State agencies to expand their programs and to offer services to new groups of handicapped individuals. Further amendments have provided for a National Center for Deaf-Blind Youth and Adults, services for migrant workers, recruitment and training of handicapped persons in public service employment, services to families of clients and establishment and construction of rehabilitation centers.

Since its beginnings over 50 years ago, the vocational rehabilitation program has rehabilitated over 3 million people. In fiscal year 1971, for the first time, over 1 million handicapped individuals were provided services during a single year. Over 300,000 of these individuals were rehabilitated to productive, meaningful lives. New knowledge is being used to help victims of cerebral palsy, epilepsy, aphasia, arthritis, and other disabling diseases.

As if the social benefits were not sufficient justification for the program, the cost-to-benefit ratio demonstrates the value of the program. A number of benefit-cost analyses of the rehabilitation program have been completed. Although the analyses have differed as to their methods and assumptions, the result has been inevitably a finding that the benefits derived from the program are many times its costs. The ratio ranges from

8–1 to 35–1. The vocational rehabilitation program is a sound investment in the future of our Nation—it represents our belief in the worth of the disabled.

As of June, 1972, the Vocational Rehabilitation Act expired. The 92d Congress worked diligently, and prior to adjournment, passed the Rehabilitation Act of 1972.

The Rehabilitation Act of 1972 was drafted to enable the vocational rehabilitation program to more fully realize its goals. Conservative estimates indicated that over 7 million Americans who suffer from a disability could benefit from rehabilitation services. Last year, the vocational rehabilitation agencies only reached slightly over 1 million of these individuals and of these, only a fourth were successfully rehabilitated. One of the primary intentions of the act is to provide more services for more individuals.

A second major provision of the act is to emphasize the treatment of individuals with the most severe handicaps. Less than one-fourth of those successfully rehabilitated in fiscal year 1971 could be classified as "severely handicapped." The severely handicapped are, however, the ones most in need of rehabilitative services. Because their disability is so acute, they are less likely to find help anywhere else. This provision of the Rehabilitation Act will enable State agencies to provide more services to more severely handicapped persons.

Third, the Rehabilitation Act authorizes increased technical and scientific research. All indications point to immediate benefits from research. Furthermore, the act promotes the dissemination and utilization of recent technological breakthroughs.

Fourth, the vocational rehabilitation program was expanded to specifically address the needs of special groups—such as those suffering from a spinal cord injury and those suffering from end-stage renal disease. Too often, the future of a person suffering from a spinal cord injury is a long life in a nursing home—totally dependent upon others. His very existence drains the resources of his family and the public. This situation can be—and must be—changed.

Mr. Scott Duncan, of Houston, Tex., a most remarkable young man, visited me last week. He suffered a spinal cord injury at the age of 16. Today he is participating in a unique program called Life Styles, Inc., which is designed to help young men and women learn to live independently—to minimize their dependence upon others. Many of the participants are currently attending college. Regretfully, such programs are rare. The Rehabilitation Centers for Spinal Cord Injuries authorized by the act would correct this situation.

The resources available to end-stage renal patients—persons suffering from kidney disease—are limited presently. I have toured hemodialysis centers and visited with patients who have successfully undergone a kidney transplant. We possess the means to have these lives. Treatment can restore many kidney patients to an active and fulfilling life. The Rehabilitation Act authorizes State programs to provide the treatment, equipment, counseling, and training necessary to rehabilitate kidney patients.

Finally, the Rehabilitation Act creates an Office of the Handicapped. At last count, there were over 38 different programs for the handicapped. The Office of the Handicapped will operate in an advisory capacity to evaluate and coordinate the various programs. Furthermore, it will perform the vital function of a national information center, directing inquiries to the most appropriate programs.

The Rehabilitation Act (S. 7) was reintroduced in the 93d Congress by the Senator from West Virginia (Mr. RANDOLPH), chairman of the Subcommittee on the Handicapped. Today I join Senator RANDOLPH and the members of his subcommittee as a cosponsor of this most important legislation.

MANAGING SOCIAL CONFLICT

Mr. GRAVEL. Mr. President, the phenomenon popularly called "crime in the streets" has increasingly received our attention in recent years. The increase in violent crime is very real and very serious. The trouble is that those resisting necessary social change have tried to cloak their opposition to it by hiding behind this label. This served the double purpose of justifying social denials while refusing to correct them.

But it did not do anything toward solving the real crime problem. This policy, at best, could only fight a holding action. In the words of Albert Seedman, chief of detectives of the New York City Police Department:

> Robbery grows out of social unrest, out of poverty and out of a society that is in flux. We can't do much about these root causes of robbery, but we can arrest more of the robbers.

That may have been an answer. It is not a solution.

"Solution," indeed, took the form of a "law and order" campaign for the Presidency by Richard Nixon in 1968, with its strong racial overtones and the implication that more cops, more guns, more toughness, no more coddling, and—presto—no crime.

It did not work out that way. Something else must be tried. One man with a different idea of how it should be done is Dr. Kenn Rogers, who has recently established in Cleveland a program for applied social research in managing community conflicts. This program will address itself to critical social conflict areas in business, industry, civic, and Government institutions; in urban development, racial tensions, law enforcement, education, health, and welfare. It will concern itself particularly with the destructive and self-perpetuating effects of the social disorders that all too often mark ghetto life with depression, hopelessness, and violence.

Dr. Rogers believes that as a person becomes aware of the dynamics of social conflicts, he no longer views them from a narrow, parochial level, but in terms of the entire community. It is this broadened perception that his program proposes to bring to its participants. As a community achieves this perspective, its members and its institutions will be able to deal more effectively with changing social conditions and the events that affect their lives, hopefully reducing conflicts.

This approach to "crime in the streets" is, I believe, much more realistic than what we have been offered these past 4 years. It seeks to build on cooperation and communication rather than on dissention and misunderstanding.

As a sample of the constructive approach Dr. Rogers will be using in his Cleveland program, I ask unanimous consent that there be printed in the RECORD his article entitled "Group Processes in Police—Community Relations," which appeared in the September 1972 bulletin of the Menninger Clinic.

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

GROUP PROCESSES IN POLICE-COMMUNITY RELATIONS*

By Kenn Rogers, Ph. D.)†

INTRODUCTION

Across the country of America, there is a large gap between police and inner city residents. On the establishment side there is an opinion that police are justified by performing their duties by virtually whatever means necessary—on the nonestablishment side it is very widely understood that some police will do anything necessary whether justified or not. Washington, D.C., a city of 70 per cent Blacks, the capital of the nation, the place where Congress and the President dwell, is no exception to the rule of police-citizen misunderstanding and alienation on both sides.

To this end there are two sides with no bridge between them—Where do we go from here? (The Pilot District Project Newsletter, Vol. 1, No. 1)

This paper describes efforts to build such a bridge and in the process to develop data pointing to where to go from there. It is an analysis and evaluation of four four-day intensive working seminars conducted by the District of Columbia Government Pilot District Project (PDP). Designed to enable participants to explore the nature of authority and the problems encountered in its exercise, each seminar was attended by police officers working and civilian citizens living in Washington D.C.'s Third Police District. I served as consultant for each of the seminars.

It was accepted at the outset that the increasingly high density of population, the rapid and often uneven pace of social, technical and economic changes in America's urban communities fosters alienation, distrust, fear and even hatred between police and community. Minority groups—Blacks, Chicanos, Puerto Ricans, Mexican-Americans and others—in their struggle to share more equitably the opportunities of American life

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often look upon police as enforcers of a middle-class morality which they themselves see as difficult, if not impossible to live by.[1] Police, on the other hand, experience taunts, curses and even physical attacks from those whom they are professionally charged to protect. As a result, there prevails all too often an atmosphere of mutual distrust and even hatred which demands analysis and most likely alternative approaches for dealing with the suspicions and uncertainties rampant in police-community relations.[2]

Police academy training programs generally address themselves to the technical knowledge necessary for police work and tend to disregard the emotionally-affected uncertainties inherent in this work and their ensuing anxieties. Police-community relations programs more often than not rely rather heavily on traditional approaches, e.g., inspirational lectures, dissemination of so-called scientific principles and exhortative recommendations, stressing the "professionalization of the police." Many of these efforts seem to be designed to convey "improved" public images but, alas, essentially of a cosmetic nature.

Seminars such as those described here are based on the realization that technical knowledge of police work cannot be seen as adequate preparation for the effective discharge of the police force's professional responsibility, let alone for the development of good police-community relations. Participants meet not only as individuals but also on behalf of the institutions in which they work. This fact makes interpersonal and institutional dynamics a subject of major importance, especially when organizational authority structures and their roles are examined in terms of facilitating or hindering police-community efforts toward achieving declared goals and tasks. Therefore participants should have an intellectual grasp of management and related concepts about organizational and personality development. These seminars provide opportunities for learning these concepts and testing their validity in direct application. This kind of learning can enhance the ways people discharge their responsibilities and thereby improve police-community relations.

Understanding group processes and their effects on human behavior has in recent years become of increasing interest to professionals—therapeutic, educational and organizational—as well as to laymen. The application of these techniques has a potentially wide range. Communication within the group generally focuses on efforts to change the group participants' behavior. The techniques of communicating this understanding vary widely in their terminology and application, e.g., Sensitivity Training, T-Groups, Laboratory Training, Group Psychotherapy, Encounter Groups, Sensory Awareness Groups, Yoga Meditation, Body Movement Groups, Alcoholics Anonymous, Weight Watchers and many others.

The seminars described here employed the so-called "Tavistock Model" developed by Rice [3] to focus on learning about group processes. Based on a body of concepts developed by Bion [4] in his psychotherapeutic work, and on "open systems theory" [5, 6] as applied to social and organizational systems,[7] this process is designed as a framework for facilitating the study of group behavior and its underlying dynamics. Certain assumptions about this process need to be stressed:

1. Although society has authority over individuals and groups in a number of ways, particular sanctions are exercised by the police. Therefore, it is important for this public service institution to have its members understand the impact of their *exercise of* authority as fully as possible.

Footnotes at end of article.

2. Social learning of mature adults can be enhanced by their need to make decisions in new and unfamiliar situations. The seminar's self-study exercises, therefore, were stripped of conventional institutional structures such as agenda, external tasks, name tags, chairmen, secretaries, etc. Making decisions in the resulting unfamiliar situations aroused anxiety and discomfort among the participants. Yet it is unlikely that one can learn about anxiety in decision-making and in situations involving uncertainty in a meaningful way unless this anxiety is actually experienced.

3. In all working relationships there are various levels of behavior going on at the same time, some overt and conscious, others less so. Many persons are familiar with hidden processes in themselves and between two persons. It is, however, far more difficult to think of such processes and to be aware of them in larger working groups or in tense situations such as frequently occur in police-community relations. Increased awareness, therefore, of covert and unconscious group processes potentially enhances the understanding of group behavior including its irrationality.

4. Important roles within groups are those of leader and follower. Each of these roles may be embodied in more than one person, and in different persons at different times. Moreover, neither function can exist without the other. Therefore, it becomes important to learn about the forces which affect a person who assumes the role of a leader and what forces a leader can bring to bear on those he attempts to lead. In the process of experiencing what it feels like to be a leader or a follower, conflicts are likely to arise and can then be studied as they affect the group's task performance.

STRUCTURE OF THE SEMINARS

The seminars consisted of lecture-discussions, self-study group exercises, an application session, and a final review session. The first day was given to *lecture-discussions* with emphasis on the following topics: (a) practical applications of system concept in organizations concerned with police-community work; (b) psychological and social implications of work and work contracts; (c) organizational structures and role relationships; (d) authority, power, and responsibility; (e) manager-subordinate and leader-follower relationships; and (f) personal growth and maturation from infancy through adolescence to adulthood.

The second and third days and the morning of the fourth were given to *self-study group exercises*. Each participant had opportunities to examine group processes as they unfolded, to study the effects of his behavior upon others in the group, and to explore the effects of the behavior of the group upon himself. In the process, members tried out different ways of establishing relationships and various problem-solving techniques in work settings. Treating the seminar room as an institution, they were able to learn from each other the effects of their attitudes towards police work and the community and the dynamics influencing effective functioning, innovative changes, resistance and dysfunction in organizational structures.

The consultant's task in this exercise was to help the group examine its own behavior. He intervened only when he believed he could facilitate the learning of the group. Indeed, there was no advocacy of beliefs or values on his part.

Having no set agenda, the members generated their own topics of discussion and thus explored their developing interpersonal relations in the "here and now." In the afternoon of the fourth day, a one-and-one-half hour *application session* was held in which the members, assisted by the consultant, considered the relevance of the seminar's learning to their own work settings.

A one-hour *review session* concluded the seminar. Here members examined the entire seminar in terms of content, the prevailing dynamics of the group, and the techniques used in this kind of learning process.

PRIMARY TASK AND PHILOSOPHY OF THE SEMINARS

The primary task of the seminars was to educate mid-management officials of the Third Police District and other participants about group processes, particularly authority relations. The seminars, therefore, were designed to provide participants with a frame of reference in which they could experience the effects of authority upon themselves and others and, in the process, examine their own role behavior, perceptions and attitudes as they manifested themselves within the different groups. Special attention was paid to understanding the influence of irrational on rational and of unconscious on conscious elements in decision-making while at work.

The seminars' underlying philosophy assumed that intelligent individuals, whether acting alone or in groups, do not behave irresponsibly or against their declared interests without cause. Therefore they can be held responsible for the consequences of exercising their authority, i.e., doing their work. This responsibility however, extends itself to actions and decisions that arise not only from overt and conscious processes but also covert and unconscious factors, which may include irrational and destructive expressions of frustration and aggressions. Thus, it is assumed that insight into one's own motivations will enable one to redirect his or her energies into more constructive behavior in line with the avowed mission of one's institution.

RESISTANCE OF POLICE OFFICERS TO PDP

Throughout the seminars most officers expressed verbally and behaviorally a strong resistance to the PDP. There were specific complaints about compulsory attendance at seminars; about having civilian riders in patrol cars; about PDP members lounging around the station houses—all culminating in a bitter resentment against the PDP's very existence, at times scatologically expressed.

The dynamic matrix from which their attitudes evolved can be seen in the police officers' fear that PDP's Civilian Board (CB) would turn into a civilian control board of the Metropolitan Police, if PDP should become effective in establishing good police-community relations. During one session, this apprehension rose to the surface and, when it was interpreted as such by the consultant, some officers "lost their cool," in which they generally take great professional pride. It was the only occasion when more than one person spoke at a time and when nervous shouting occurred. Expressions such as "That'll be the day!" "It will never happen," and "Not while we are around," poured forth, and one officer suddenly found himself in the grip of apparently uncontrollable giggles.

Data from the various seminar sessions showed that while the police officers claimed they were not familiar with the aims and mission of the PDP, nevertheless, some "ventured guesses" as to what those aims might have been originally and how they might have changed since the advent of the CB. Curiously, these guesses and surmises reflected reasonably accurately the official mission of PDP as stated in the original Office of Economic Opportunity grant and as subsequently reworded by the CB. PDP's original mission was seen as an effort to break the vicious circle where on the one hand the police were perceived as an occupation army in enemy territory, displaying attitudes of hostility and brutality toward the ghetto black, even harassing black militants in a cold and vicious way while, on the other hand, they were trying to exert honest and concerned efforts at enforcing the law. These opposing views created serious blocks in police attempts to maintain peace and order,

and called for a rehabilitation of good will and cooperation between community and police. However, for reasons they could not understand, the police officers and not the members of the community were expected to make the adjustments. The policeman was branded as the villain, while the community, left alone, appeared to be awarded "the seal of good and responsible citizenship." In the eyes of the officers, this rank discrimination represented a distortion of reality, since "a goodly portion of the population consists of criminals and those supporting them," with only the small remainder being viewed as "citizens," i.e., noncriminals. To make things worse, the officers recalled an election in the precincts to decide where the PDP was to be located. Although the Third Precinct had the lowest number of votes for PDP, it was, nevertheless, located there. These recollections brought back strong feelings of betrayal expressed in statements of "sell-out" and "political deals" between the PDP's director, the "politicians," specifically "the Mayor," and the top echelons of the Metropolitan Police. The latter reaped special bitterness as they were seen to have "shirked their responsibility of protecting their men."

When the CB was subsequently elected, it rephrased PDP's mission. To the best of the seminar participants knowledge, the CB sees itself as "representative of the community to the police and as a mediator of police action. By pointing to the low voting participation in the community, the men roundly denied that the CB is representative of the community. Indeed, the large number of abstaining eligible voters were seen as "the real citizens," while those who did vote were depicted to be largely rabble. The mediator role of the CB was attacked on the grounds that the CB was not invited by the police officers, but rather brought in as a result of political collusion. Officers felt the CB had neither the approval of the community nor of the police, and that it is not qualified to mediate judgments since it is biased in favor of "the criminal element" and is "without knowledge of police work." One factor underlying these arguments is the clannishness and secretiveness of the police culture. It was stated in varying forms that "it is impossible to work by the book," that "rules are probably broken a hundred times a day." There were thinly veiled allusions to "pimps and dope pushers on the force" and to "goldbricking on disability examinations." There was also some brief mention of brutality.

In this context, PDP's citizen riders were seen as spies who write secret reports on the men, most likely distorting actual events and "accusing some of us of being corrupt when we get a cup of coffee." Moreover, not only are those civilian riders "slovenly," "ill-behaved," "illiterate liars," "often with a police record," but their conduct in the station house is especially objectionable because they frequenlty interfere with regular police work. When in one seminar a photograph was passed showing a PDP member asleep in the station house with his feet on a desk, the officers agreed that the employment of the PDP staff was nothing but a form of "dignified welfare," i.e., the PDP misuses Federal OEO funds for welfare payment to unemployables under the guise of doing police-community work. In another group the same theme arose and CB members in this group expressed surprise at such occurrences as shown in the photo and the feeling of others that OEO funds were used for "rehabilitation of dudes."

In addition, the statement quoted from one of the PDP leaflets, that "police should not be afraid of anyone observing normal operations unless something is sly, slick or wicked. If nothing is improper then there is nothing to hide . . ." was felt by the officers to be "rubbing salt into open wounds." One higher-ranking officer resolved the anxiety caused by this statement to the satisfaction of the men by pointing out that here *was* "something sly, slick, or wicked," but that it was on the part of the citizen riders and the PDP in general and not on the part of the officers.

CAUSES FOR OFFICERS' RESISTANCE TO INSIGHT INTO THEIR BEHAVIORAL DYNAMICS

Resistance to the seminars is embedded in the officers' perception of their work roles. In the course of the seminars the civilian participants, the consultant, and occasionally some of the officers themselves, indicated how much a police officer's perception of his role was affected by personal fantasies. Indeed, the particular fantasied image of the police officer as a tight-lipped, heroic, two-gun frontier marshall arose time and again in the course of the discussions. The two-gun facet of this image seemed particularly real to police officers who, in addition to their service revolvers, had also carried a second private gun. This fact was discussed at length and defended as a survival aid in cases when an officer is held up and stripped of his service revolver. It emerged, however, that departmental regulations have effectively disposed of this two-gun phenomenon, although the recollection evoked considerable nostalgia among some officers in the group. During one such discussion a particular insight emerged, although initially at an unconscious level. It started with one of the men describing his job as "maintaining tranquility." Some of his colleagues added that "any person out of the ordinary is suspicious to an officer" and, "if he is deviant, he is potentially a threat to good order." Although prodded by the CB members, the officers never specified criteria for being either "deviant" or a "threat to good order." In fact, one officer strongly implied the question was a stupid one. He stated emphatically, "You know it when you see it. What's more, it is a challenge to the officer's authority." The considerable anger among the officers of this group was then released through their discussion of the charges on which "such a deviant threatening good order" might be arrested. These charges were: disorderly conduct, assault, and resisting arrest.

Since throughout the discussion no reference was made to any actual incident, one was left with the impression that these charges existed only in the officers' fantasies. Fear of physical danger could not be admitted overtly by the officers; instead they deflected this fear of personal attack as an attack on their authority. At this impersonal level they permitted themselves to deal with their fears through verbal belligerence which they then "acted out" in the "here and now." In the process they reassured themselves they would bravely do their duty.

When the consultant interpretatively linked the material developed by the group, i.e., the references to "sly, slick, or wicked," to the fear of being personally attacked, and the thinly veiled allusions to arrests and charges for offenses which had not actually occurred, most officers in this group became furious. At this point in this and the other three groups, a ranking officer stepped in and advised the consultant "not to stir up dirt," "not to set the men against one another," and finally, resorting to secretiveness, stated that "we do not wish to talk about such things." When the consultant reminded the participants that they themselves had selected the topics to talk about, and that it was his task to interpret the meaning of their comments, the police officers expressed feelings of being "trapped." The consultant's knowledge represented "a theft of their private thoughts," "helped to create an atmosphere of hostility" and "was aimed at proving a theory other than making the seminar productive."

In one group, making the participants aware of the embarrassment and pain caused by an assertion they clearly knew to be untrue caused a ranking officer to instruct the consultant to "make the men stop that." Realizing that this "instruction conferred upon the consultant" implied that the consultant had authority superior to his own, he suddenly rose and left the room. Although the session was not finished, the officers followed him in rapid succession, thus indicating loyalty to their leader and the department. This dramatic incident was the only occasion in 48 sessions where the men did not adhere to schedule. This particular resistance to insight into their own behavior can be attributed to the officers' need to protect self-esteem, their own perception of their working environments and making their roles fit into personal needs for self-defense. However, the more one learns about his own fantasies regarding individual and organizational authority, the better he can check them against reality and be responsible for his work. Consequently, if these police officers were to recognize that their exercise of authority had been often characterized, for example, by unnecessary use of physical power, it would represent to them a degree of failure in their performance. Moreover, it would subject the entire police force to accusations of police brutality. This kind of situation, of course, is too painful for an individual to admit. Such pain was exacerbated by the presence of superiors, colleagues, subordinates and civilians in the seminars. Telling members of the force to "wash out your mouth with loyalty," i.e., to adhere to solidarity and secrecy, was ineffective. The group process revealed some characteristics of the police culture which it seemed the men would prefer to keep to themselves.

SUBGROUPS AND THEIR CHARACTERISTICS

In the course of the seminars, four identifiable subgroups emerged. The police officers formed three subgroups, the civilian participants the fourth. On a surface level manifest attitudes differentiating the police subgroups were well expressed when the consultant, during a relaxed lunch-break conversation, asked the police officers at the table why they were on the force. One said, "It's a living"; another stated, more eloquently, that he saw himself "providing important services to the community and maintaining order and peace"; a third spoke, with considerable fervor, of his "mission as a crime fighter." All three were sergeants working in the same geographic area, at the same time, and with the same population of citizens. Each, however, perceived his work and emphasized his authority substantially differently from the others. A valid profile for each of the subgroups can be drawn from the seminars' "data."

The *"It's a Living" Subgroup* was reluctant to communicate about itself. Many of its members managed to remain silent during most of the sessions; reading newspapers; dozing off; and indicating in varying ways they had come to the seminars only because they were ordered to do so. They considered the exercises "a waste of the taxpayers' money"—which could be given usefully to them instead. They made it quite clear they "could not be bothered with relearning their ways and values" and "if change is necessary, let society change." Their view of the consultant's work was as "an attempt to rape their minds."

The main concern for this subgroup was "How do I survive until I am eligible for my pension?" There were discussions of their generous but nontransferable pension rights which made them captives of the department and unable to seek a job elsewhere without foregoing this pension. They acknowledged the possible need for change in the police force—"but not while I am around."

The *"Crime-Fighter" Subgroup* came to the

police force in the main from the Deep South or from abandoned coal-mining towns in West Virginia, Kentucky or Pennsylvania. Their formal education did not extend beyond high school, if that far. Overtly, they saw themselves as "undereducated" and "inadequately prepared for their work." Invariably they gave the impression of being shrewd and capable of learning to adapt to changing conditions although impeded by a distrust of large sectors of the community seen as the "enemy." This perception at times seemed to border on group paranoia.

They seemed to have chosen police work largely for two reasons. Their education, both formal and informal, did not provide them with skills for earning a livelihood at the same level of pay in other professions. Moreover, police work afforded them a socially accepted authority position superior to that of a siable portion of the total population—the blacks. Having an available underdog in the blacks served to bolster a self-esteem which apparently had been shattered seriously during their own personality development.

Of course, they could have also chosen to lift up "the underdog" by providing helping services with a sense of sympathy. Whenever the discussions touched on this subject, the men presented well-formulated statements about being "policemen and not social workers," although upon further thought, whenever it occurred, there was a realization that police work is in fact providing social services. This point was then quickly dismissed. The attitudes of these officers suggest at least two reasons for denying the validity of the social service concept by this subgroup: (1) the culture of the police force, as they perceive it, is such that it looks upon "helping little old ladies across the street," "soothing a family quarrel," "having compassion with an addict who in the throes of withdrawal requires paraprofessional help" as "sissy stuff" and offensive to the masculine mystique of the law enforcer. (2) Having empathy with the unfortunate tends to vitiate the policeman's unconscious need to force the less fortunate in our society into the role of the underdog and thus inferior to himself.

They deplored their inadequate contact with "good citizens"; instead they were exposed to blacks spouting their hatred, malice, and hostility; to militants calling them "pigs" and accusing them of brutality and corruptions; to courts and politicians, both within the police and outside, who make their work even more difficult than it is already. They stressed that "the ideal police system is the Gestapo," but then "it could not be done here." There was repeated mention of an occasional need for martial law.

Again and again they termed themselves as "creatures of habit." Their values were neatly arranged in simple dichotomies of good and bad, right and wrong. They saw parents in our society as irresponsible and, elaborating on this theme, they told tales of their own parents being rather irresponsible and of being viciously whipped by their fathers. In two instances, there were systematic expressions of unconscious and strongly suppressed homosexuality, always followed by verbalized idealization of womanhood.

Their request was for the consulant to provide them with a "bag of tricks" for dealing with street people and with higher-ups in the department. They became angry when they were frustrated in this wish but rationalized their disappointment by terming the consultant a "do-gooder wanting to bring about a social system for which the American people are not yet ready." The more manifest hostility was expressed when one officer wondered "how some people escaped the gas chambers," only to tell the consultant later on that he "did not realize he was Jewish." Most officers of these two subgroups were white.

The third subgroup, *Oriented to Community Service*, was about evenly divided between whites and blacks, the former generally holding higher ranks, the latter being patrolmen or sergeants. They felt strongly that crime is not inherent in ghetto populations but most likely is the result of a "crazy-quilt of causes; social, psychological, economic, political, and many others." This problem makes it necessary for more and different kinds of police education than that offered by either the Police Academy or the "practical college of the street," not to mention most of the training offered by PDP. This group acknowledged that "much crime was neither solved nor even investigated." The officers also spoke of the difficulty of "doing effective police work without the cooperation of broad groups in the community" and without "occasionally bending some rules."

The group seemed firm in expressing the need to eliminate corruption and arbitrary acts adversely affecting the rights of citizens. They stressed the importance of noncrime-related service functions and pointed to the flaws in a policy that favors generalization and abolishes specialization in officers' roles.

The black police officers of this subgroup frequently consented to these views but in the main remained silent, displaying poker-faced expressions and, occasionally, turned sullen. Replying to their colleagues who teasingly invited them to express themselves more actively, they seemed to say: "Don't mock us! We are hep to it. We have watched your spiel too often. We have trusted some of you in the past and were tricked."

When other police officers deplored the entrance of "unqualified new recruits," obviously black, the black members of this third subgroup sat in stony silence which could have been either a confident "We shall overcome," or a menacing "Just you wait." However, it clearly was *not* passive indifference.

The entire subgroup made repeated efforts to use the consultant's interpretive comments in spite of the resentful attitude this effort evoked in many of their fellow officers. The consultant was also asked repeatedly to convey the gist of their complaints to higher echelon officers in the department.

The *Civilian Subgroup*, except for two members, displayed a common intent—selling PDP to the police officers. Members differed in their approach. Some lectured at the men, often overbearingly talking down to them or arguing legalistically, proving them "wrong." Others tried to persuade them to cooperate with PDP, since they were "reasonable men of good will." Only two members straightforwardly addressed themselves to the issues discussed, inquiring, approving, or criticizing. Apparently they felt able to justify their beliefs and values.

All members of this subgroup, however, were frequently late or absent which the police officers felt expressed a belittling attitude. This impression was enhanced further when on occasions CB members tried to explain their absences or tardiness. Their reasons were "busy with the Mayor," other "important matters," or "seeing someone important in the Federal Government." The implication was clear—by comparison, police-community relations and the police officers themselves were less important. Generally, this subgroup suffered from a credibility gap; their rhetoric deviated sharply from the "reality of the street" as daily experienced by the police officers.

SOME DYNAMICS COMMON TO ALL SEMINARS

The early stages of the seminars were characterized generally by an attempt on the part of the officers to maintain a solid organizational front with most of the talking left to the senior officers who conveyed a tolerant party-line acquiesence in a matter of potential importance while at the same time condemning the exercise for its irrelevance when compared to the other important things they had to do, e.g., catching criminals. Lower rank officers did little talking. The presence of two CB members served only to unite the police officers in another common purpose: to attack PDP, to show its wastefulness, uselessness, and "support of the criminal element in the community."

At this time, hostility against the consultant and the exercise, both linked to the PDP, emerged. Expressions of anger were directed toward the police hierarchy, although the intensity and frequency was different in each of the seminars.

Frequently, the self-study exercise was initiated by officers in a series of ethnic jokes, indicating thereby that examination of police authority could be carried out successfully only via scapegoating, although with an overcast of jocularity, thereby removing the sting and avoiding any serious rifts within the department. When the consultant interpreted this approach, he and the CB members were generally met with attacks. Splits in the ranks of the police officers recurred when discussion turned to the tendency of white officers to live outside the city while the blacks stayed in the ghetto, or when it was mentioned that the white officers have "their friends among the white shopkeepers." If an officer sided with the consultant or with one of the CB members, the other officers in the group attacked his loyalty.

One approach for covering these overt rifts was initiated, often by the ranking officer, with a discussion of the police as a deprived minority—deprived of civil rights in not being allowed to engage actively in politics, in having to wear their guns at all times, and in being seriously hampered in developing an effective trade-union organization of their own. One example of such a difficulty was cited in the "real possibility" that the Policemen's Benevolent Association's telephone was tapped.

When dealing with the CB members the police officers frequently used the same tactic. The police officers never directed their critical questions at both CB members simultaneously, but only at one or the other. In fact, they used a proven police tactic in splitting the civilian crowd and dealing with each individual separately. In this approach they found the CB members' behavior playing right into their hands by letting themselves be split from one another. Although this maneuver was called to the attention of the entire seminar on several occasions, nevertheless it persisted without change.

There seemed to be at least two dynamics underlying this phenomenon. First, board members wanted to show their individual superiority by demonstrating they could stave off police attacks singlehandedly; and second, they obviously did not care to support one another. However, there is also persuasive evidence that the CB members "acted out" the prevailing atmosphere at their own CB meetings: a disunity expressed in squabbles, which can hardly be seen as task-oriented but which apparently satisfies the personal needs of individuals. Some of the more determined personalities will finally come through as dominant and the others then sit back in apathy, manifesting the defense of pretended noninvolvement, barely hiding their rage.

SELF-IMAGE OF METROPOLITAN POLICE OFFICERS

The officers themselves, at various levels of consciousness, suffer a hurt self-esteem, in some instances almost to the degree of lacking self-respect. They work for low wages, especially when considering the high personal risks they take. They see themselves inadequately educated and prepared for fighting or preventing crime, which is growing in frequency, intensity, and complexity. The causes of this increase are largely un-

known or not understood by them. Moreover, there is no clearly or operationally defined task description for a police officer's role. The result is they depend more and more on higher-level management whom they believe to be neither competent nor dedicated to police work or to the men themselves. They see the police department forced into a "shot-gun marriage with the PDP," a mismating of the disciplined with undisciplined, incompetent "street people" who interfere with professional work of vital importance to the community. It is this lack of operational clarity about the primary tasks of the police—tasks the department must fulfill to justify its existence—they believe to be the main cause of the system creaking along without much sign of change.

Another serious constraint is an unsatisfied need for approval from "the good citizens." The officers are disturbed about being alienated from "the good citizens," who themselves, in turn, are subjected to an atmosphere of violence, drug abuse, crime and mistrust and thus have become resentful of the police for failing to provide protection and security. Indeed, when police officers, directly or otherwise, examined their contacts with other people, these seemed to be the criminal element; their "friends" were "the bootleggers on the corner who inform on the dope pushers." Resentment toward the community is then linked to the police officers' poor pay and the circle seems locked.

Yet it is worse than that. Locked in a tight hierarchical authority system they have become dependent for promotion on higher level management's evaluation of their task performance. However, the men regard these higher level managers as rather thin-skinned bureaucrats, and any mention of their incompetence or any appeal to them to allow lower echelon officers to make major decisions is likely to end in unpleasant results. In cases where appeals had been made, the men cited experiences in which "the papers have been held up for six to 12 months" and "by then the matter got cold and everybody lost interest in it." The reason for these delays was given by the men as simply: "Neither the Chief nor his immediate assistants like complaints. Who, then, will show appeals to them?"

They suggested with varying directness that improved training is withheld from the lower ranking officers because "if they were to become more competent, then some of the superiors would be shown up." This problem took bizarre dimensions when a CB member earnestly inquired about the city's illegal heroin traffic. He was given a lengthy defensive lecture laying the blame on the doorsteps of the law, the Supreme Court, the bail system, and Turkey. However, in the end, he was told the department suffered from a lack of personnel and "officers are needed to write traffic tickets and cannot be spared for other work," presumably the heroin traffic. The CB member found this incredible, and the police officers were suddenly considerably embarrassed but they had made their point—they had nailed bureaucratically motivated disorganization.

An additional complaint came almost as an afterthought—police officers are all too frequently shifted in their assignments "shortly after they get the hang of things"—a condition not contributing to efficiency.

The middle-level police officers saw themselves more often than not "between two millstones": one, higher level management, with an image as described before; the other, an increasing number of new recruits, black, less than qualified initially, inadequately trained, and vaguely suspected of political militancy.

Viewed on the surface level, the image of police officers may be quite impressive, especially when looking at uniforms, shiny buttons, silver shields, guns, and "the traditional image of the respected cop." At a deeper level, however, they see themselves as "niggers," poorly rewarded, facing high risks against survival, lonely, oppressed. To change this image requires, they believe, effective higher level leadership, but they have little hope it will emerge. In short, the policeman's job could be a good one. However, caught in the double bind of insufficient basic skills for other types of work and being captives of a good pension, they have lost their mobility; all they can look forward to is survival and retirement.

THE VALIDITY OF THE REPORT'S FINDINGS

The origin of the data and the method of their evaluation has been described. However, when examining the validity of the report at least three caveats should be entered here.

1. It is clearly impossible to claim any general validity for judging the attitudes of these police officers outside this specific sample of 52 men. Both the size of the sample and its selection—nonrandom—would militate against it. However, it is not likely that the data from these seminars are the result of pure chance and that they do not reflect in some way actual conditions as perceived by these police officers and by some of their colleagues who were not present.

2. In terms of the description of group personality profiles, a report like this one is inevitably a simplification since it selects those criteria and motivations seen as relevant to the understanding of the institution's problems. Clearly the complexity of human nature embraces a multitude and hopes and fears and attitudes. In selecting those relevant to this particular institution is not to deny the existence of others.

3. Quite often, perhaps in this instance, when behavior of groups within an institution is examined and compared, there is the danger that the comparison will appear as a simple contrast of right and wrong, or competence and incompetence, and that one course of action or pattern of behavior and its motivation is recommended and others are not. I wish to deny explicitly any intention to make such value judgments. My task in this instance was to describe, to understand, and to explain the material provided by the participants, so the involved institutions could derive suitable problem solutions. Moreover, the detection by one person of particular causes underlying an organizational situation does not mean others are expected to think likewise. Consequently, it should be stressed that I do not intend to press the invulnerability of my diagnostic hypotheses. Rather, my intent is to present observations and explanations for critical examinations.[8]

RECOMMENDATIONS FOR FURTHER WORK ON POLICE-COMMUNITY RELATIONS

The need for more intensive study of ways to improve police-community relations seems rather obvious. Yet simply to leave it at that seems not only unsatisfactory but also unnecessary and some recommendations can be suggested here. Indeed, this study produced insights which may be potentially useful for improving police-community relations not only in Washington, D.C., but perhaps even nationally.

First, it seems necessary to define in clear- and operational terms the specific tasks and policies of programs designed to effect healthy and constructive police-community relations. Such specifications will provide not only a basis for assessing their feasibility when planned, but criteria for judging their accomplishment or failure, as the case might be, when instituted.

The lack of such clarity enables, perhaps even forces individuals to exert pressures in determining policies for such programs and for their implementation. Moreover, this absence of clarity nurtures a rigidity of operations that results, for example, in forcing officers to attend training sessions whether they want to or not in the hope they might become "better motivated." However, in the process, no attention is paid to their capacity to change their behavior and their underlying attitudes. As a result, police and broad sections of the community frequently become further polarized and alienated from one another. Indeed, this study indicates a great deal of looseness and individually-determined role behavior among civilians and police regardless of the potential consequences. Frequently, unnecessary conflicts arose, obviously satisfying individual or parochial desires, but in themselves destructive to either or both institutions (the police and the community), and even to the individuals themselves. Important areas of joint interest were neglected and vitally important changes in these relationships were difficult, even impossible, to achieve because they conflicted with individual interests.

Second, it seems useful, even essential for the task of improving police-community relations to define operationally the organizational authority structure of the police force in terms of its statutory contracted service to the total community, and then subject it to close scrutiny in its application. How effective is it, for example, in facilitating police work desired by the community? To the best of my knowledge, this task has not been undertaken anywhere in the country. Police manuals offer detailed descriptions about how to do police work. However, there is a marked lack of operationally defined aims and tasks, something in itself worth pondering.

FOOTNOTES

[1] Liebow, Elliott: *Tally's Corner*. Boston: Little, Brown, 1966.

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[4] Bion, W. F.: *Experiences in Groups*. New York: Basic Books, 1961.

[5] Bertalanffy, Ludwig von: The Theory of Open Systems in Physics and Biology. *Science* 3:23–29, 1950.

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GORDON METCALF AND SEARS, ROEBUCK

Mr. PERCY. Mr. President, on January 31 Gordon M. Metcalf, of Chicago, will retire as chairman of the board and chief executive officer of Sears, Roebuck & Co., a post he has held for the past 6 years.

Mr. Metcalf, who has been with Sears for almost 40 years and who recently turned 65, is stepping aside in accord with the company's retirement policy.

In his distinguished career, Mr. Metcalf has achieved success not only as a businessman but as a citizen. That is evident from a review of his career.

A native of Sioux City, Iowa, he was graduated from Morningside College in that city, later completing graduate study at Northwestern University's School of Commerce.

In 1933, Mr. Metcalf joined Sears at its Bay City, Mich., store. He moved up to several other positions, then came to Chicago in 1948 as general manager of retail stores in the Chicago area.

In 1957 he was elected vice president

for the firm's Midwest territory. On February 1, 1967, he became the eighth board chairman since the firm was incorporated in 1893.

In that capacity, he has guided the growth of a vast organization that includes more than 800 stores and does business throughout the length and breadth of the United States and overseas.

Mr. Metcalf's concern for his organization has extended even beyond his own connection with it. A prime responsibility of management is to provide for succession within the organization. The test of management is the quality of that succession. In this case, Sears and its former chairman and chief executive officer, Gordon Metcalf, are to be commended for the outstanding qualities of Arthur Wood, who has assumed these positions. An able businessman and one of the most respected and civic minded citizens of Chicago, Mr. Wood's new responsibilities not only bring credit to him but also to Mr. Metcalf and the Sears board of directors on providing for this very able succession.

But Mr. Metcalf's interests extend beyond the confines of the retailing industry. He is concerned as well with the progress of our society.

Mr. Metcalf's citizen interests have led him to positions as chairman of the National Alliance of Businessmen, chairman of the U.S. Industrial Payroll Savings Committee, member of the Business Council, and member of the President's Committee on International Trade and Investment.

He is a trustee of the conference board and a director of Radio Free Europe. In Chicago, he is a trustee of the Museum of Science and Industry, a director of the Chicago Boys Clubs and past chairman of the State Street Council and the Chicago Better Business Bureau.

On January 10, Mr. Metcalf made a speech to the National Retail Merchants Association which provides an example of his broad range of interests. I ask unanimous consent that the speech be printed in the RECORD.

I also ask unanimous consent to have printed in the RECORD a congratulatory telegram to Mr. Metcalf from President Nixon and a speech about Gordon Metcalf given by Mr. Ralph Lazarus on the occasion of Mr. Metcalf receiving the National Retail Merchants Association's Gold Medal.

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

GORDON M. METCALF:

As the members of the National Retail Merchants Association honor your conspicuous accomplishments, they applaud the highest ideals of our free enterprise system. Your civic conscience and humanitarian concern add to your career a dimension that makes it an example for all your fellow citizens, and that has justly earned you this special tribute. My warmest congratulations to you on this occasion.

RICHARD NIXON.

COMMENTS BY GORDON M. METCALF

It is a great experience to receive the National Retail Merchants Gold Medal.

What merchant would not be honored to have such an award from an association representing so many of his colleagues.

One is expected to be modest at times like this, but frankly, ladies and gentlemen, I am very pleased and proud—thank you all.

The merchandise business has been my life for 40 years. They have been exciting years, filled with the challenges that go with a high risk business.

Since the end of World War II, our industry has grown and prospered with our country, and contributed greatly to that prosperity.

With the single exception of 1961, retail sales have shown an increase over the prior year—and in 1961, the industry missed maintaining that trend by only three-tenths of one per cent.

In the 22 years since 1950, retail sales per capita have more than doubled. The volume of general merchandisers, apparel, furniture and appliance stores has tripled. Department store sales have multiplied almost five times.

As you well know, this growth has not been automatic or accidental.

This record has been achieved by adapting to changing conditions and offering the goods and services that appealed to consumer habits, tastes, and life styles.

As the population shifted dramatically to the suburbs, retailers developed shopping centers and stepped up branch store expansion.

Rapidly rising family incomes caused retailers to offer wider selections of better merchandise and new products and services.

The changing patterns of living were met by providing broader assortments, longer shopping hours—including Sunday shopping in many areas—and new types of specialty stores or shops within the conventional store.

So, major changes have been made in the past, but problems already on the horizon, inviting our interest and solutions, are as great or greater than any problems of the past.

For example, in the technical-economic vein, the whole new phenomenon of limited energy supplies is to be faced. This energy crisis, as our scientists explain, comes about because most of our energy is produced by burning various materials—oil, gas, coal, etc. All of these materials in turn are being consumed at an ever-increasing rate, and at least two major scientific groups concur that the supply of these materials is in danger. What is needed are new concepts in energy production not based upon the combustion process—such as. . . . nuclear fusion or solar energy.

At first glance this problem may seem somewhat remote from the merchandising industry. However, the very system used to influence the character of merchandise to meet the consumer's wishes relates directly to the energy crisis.

I am thinking here of the trade-offs made in order to properly balance product attributes to consumer needs. The consumer tells us, for example, that she wants a vacuum cleaner that cleans with maximum efficiency. The manufacturer may decide to add 25 per cent more power to a vacuum cleaner to get a five per cent improvement in cleaning. Or, in responding to the consumer's wish for a small air conditioner. It may be determined to trade off efficiency in energy consumption for a smaller size.

Still another example may be the small gasoline engine in which trade-offs have been made in the direction of emphasizing low costs, safety and performance, rather than efficient energy conversion. We can see that seemingly remote national problems like the energy crisis relate directly to the merchandising business.

In a very similar manner, retailers could well analyze their total distribution system from the standpoint of energy conversion. This study would show that the system is not designed for minimum use of energy, simply because it was *not planned* that way.

In the area of ecology, scientists predict serious deterioration of our thin layer of air and earth surface unless major changes are made in our industry processes.

Is this problem remote from the merchandising industry? We have been producing products for the consumer in fantastic quantities, with their design being almost totally influenced by *product function*. It is predictable that the manufacturer will be required to consider *product disposability* at the *point of design*. Tires, appliances, packaging materials—all of these will be studied in the future from the standpoint of their effect upon our ecology, and these studies will have an impact on our industry.

In a similar fashion, there are social, or life style changes which we must prepare for in the future. For example, manufacturing and service industries are showing a greater interest in the four-day work week. A four-day work week would generate significant increases in leisure time.

Obviously, there is nothing sacred about the five-day work week. Certainly we all remember, and many of us are still involved in, the six or seven-day work week. But, the change from five to four working days could have an obvious effect upon our industry. We must be ready for this change.

The increasing mobility of our consumers continues to astound me even though I recognize, in my experience, the reasons for some of this mobility. People just don't stay at the old homestead any more. It is hard to believe, but 20 per cent of our families move every year. There is increasing evidence that the concept of spending one's working life in one endeavor could very well be a thing of the past for a significant number of people.

We can look to the future with a sense of excitement—in the products we sell and in the way we operate our businesses.

On the product side, we can expect to see manufacturers speed up the shift from metals to plastic materials.

Plastics are becoming known for their inherent characteristics and will lose their identity as a substitute material. The tremendous investment in this country in metal working plants and equipment has in some ways slowed the acceptance of plastics. But now real growth seems assured.

Engineers see an increase in the use of plastic parts and components in the manufacture of furniture. It will be used for the load bearing structure instead of just decoration.

Plastics combined with aircraft production techniques, should also play an important part in the future home construction to form structural elements, such as floors and walls.

Plastics have moved into the textile industry—in the U.S., cotton now accounts for less than 50 per cent of all fibers used and within the next ten years, will diminish to 25 to 30 per cent.

The conservative estimate is that by the end of the 1970's, over 70 per cent of textiles will be all or in part man-made fibers. These fibers have given the textile industry new life. Their properties have also given tremendous stimulus to soft line retailing.

On the operating side, we will unquestionably be faced with increasing costs of doing business.

Personnel benefits, both those directed by the government and those we institute ourselves are sure to increase.

In the 20 years between 1950 and 1970, total fringe benefits more than doubled.

From an internal standpoint, the big challange today and for the foreseeable future will be the costs associated with the *distribution of merchandise*.

We are going to have to examine closely transportation, handling, storage and delivery costs.

The financial costs of *holding inventory*

are a factor that will give great impetus to experimentation.

Holding costs are primarily interest—and interest equals time—there must be faster movement and fewer interruptions in the flow of merchandise from the factory to the consumer. The cost of air transportation for many commodities is decreasing and this favorable trend is resulting in more movement of goods by air.

It seems to me that greater emphasis on centralization of inventory is a possible move in the direction of lowering costs.

Despite the effort on the floor to separate merchandise for specialized selling, the requirements of efficiency will force the emphasis to be put on centralized inventories.

With labor and building costs continuing to escalate, more and more merchants will come to the realization that the *"Cube is Cheaper."*

More sophisticated materials handling equipment will be a major help in moderating warehousing costs.

The trend seems to be in the direction of less and less package delivery. Shopping centers have made a contribution to this trend but to develop it further, we will need to design packaging for customer take-with convenience—and certainly provide more adequate pickup facilities.

In my opinion, the future of the retail industry has never been brighter. Our mass middle-income market is broadening into a mass high-income market. This is revolutionary when you consider that throughout history, and still today, in most countries of the world the mass market is the low-income market.

The median family income level is expected to rise from $10,290 in 1971 to more than $17,000 in 1980.

The percentage of families in the $25,000 and over income group is expected to increase four-fold in the decade of the seventies. By 1980, 14 per cent of all families are expected to be in the category.

Even on the basis of constant (inflation-free) dollars, the number of families earning $15,000 and more annually will more than double between now and 1980.

All of this means much greater purchasing potential for many American families. Higher income levels will allow these families to substantially increase their discretionary purchases. The market for discretionary goods and services will more than double in this decade, according to forecasts prepared by The Conference Board.

Changes in the age composition and spending power segments of the population are highly favorable.

Young families (those with heads under 35 years old) will be by far the fastest growing family group. A family in this age group needs a broad range of merchandise and services and they have a growing income. By 1980 these young families will account for one out of every three dollars of total consumer spending.

Changing attitudes toward "work and play" has been a factor in the explosive growth of recreational goods and services.

Fashion styling has finally caught on in men's apparel. Bold new colors and fabrics have finally made this an exciting business.

Growing interest in travel and in "second" or "country" homes will offer challenges and new potential.

The *market for services* is growing even faster than the market for goods and will continue to expand rapidly in the years ahead. This offers new areas of growth for retailers, such as:

1. Home care and maintenance services.
2. Equipment rental services.
3. Educational services.
4. Financial services, etc.

Retailers generally are now completing a record year, and the national economy continues to pick up momentum. Total retail sales should double in this decade to about $735 billion by 1980. Sometime before 1985, we can look forward to a trillion dollars in retail trade.

General merchandise, apparel, furniture and appliance sales are expected to grow even faster—more than doubling in this decade to a record $205 billion by 1980.

As we take advantage of this bright outlook, we retailers must do a better job of communicating with the public, and do a better job of serving them. One area of vital importance is to help the public understand the facts of business profits.

Public opinion polls show that the average adult believes that business makes an average of 28 per cent profit after taxes on each sales dollar.

The business community has done little to correct this erroneous impression. If we stand silent and allow this kind of misconception to continue, the public is likely to favor higher corporate taxes and believe that we can afford higher costs without raising prices.

The place to start is in the schools and greatly increased emphasis must be put on teacher education in the basics of business economics.

On the consumerism issue, we need to let the public know. . . .

1. that we are aware that our performance sometimes falls below their expectations.
2. that we are concerned about improving service, products and satisfactions; and
3. that we're trying to be responsible corporate citizens.

This must be more than public relations—our genuine concern must be apparent from the ethical and moral manner in which we conduct our businesses.

The American Public enjoys the benefits of the most responsive and most efficient distribution system ever developed.

We must do a better job of responding positively to criticisms and to making the public more aware of the benefits they take for granted.

The future, like the past, is a mixture of promises and problems, but never in my 40 years as a merchant has the outlook been so exciting, nor the responsibilities of leadership so great.

Thank you.

REMARKS OF RALPH LAZARUS, NRMA LUNCHEON

Today, on behalf of NRMA's board, it's my pleasure to present our industry's highest award to Gordon Metcalf. As he receives the NRMA Gold Medal, he joins a retailing Hall of Fame which has only 32 previous members. He is the first Gold Medalist from Sears, so it is truly a singular award this year. It's also a fitting time to honor him since he's stepping down from the chairmanship of Sears at the end of the month, having reached their mandatry retirement age.

Gordon, I'm not sure how the NRMA has been able to overlook you and Sears for so long. However, those of us who are your competitors, as well as your friends, sometimes wish that Sears had been able to overlook some of our trading areas.

According to the inscription on the Gold Medal, it's awarded for "Distinguished Service to the Craft".

One hallmark of distinguished craftsmanship in our industry is *minding the store.* In Gordon's case, he not only has to mind the store, but also the insurance company, the savings and loan association, the catalog outlets, the manufacturing plants, the overseas operations, the real estate development company, the mutual fund and, most recently, the building of the world's tallest and largest skyscraper.

The numbers tell just how well Gordon has minded the store. In 1933 when he joined Sears, their sales were $269 million. By the time he had become their chief executive officer in 1967, sales had gone up to seven billion, two hundred and sixty nine million dollars, an increase of $7 billion in 34 years.

In 1971 after Gordon had minded the store for only 4 years, sales at Sears had increased by $3 billion more, to over $10 billion and they also had tacked on an *additional* $181 million in earnings, almost to the dollar the total of Federated earnings in that same year. These sales equal just about 1% of the gross national product—not bad for a little farm boy from Iowa. Our records show it was Sioux City, but I have a good friend who says it was Merrill, Iowa. Incidently, he grew to hate Gordon because every time my friend got into trouble, his mother told him—"why can't you be like Gordon—he's such a nice boy."

Another hallmark of distinguished craftsmanship in retailing is *minding the community*—being actively concerned with the well-being of our employees, our customers and their neighbors. Here, the record of Gordon and Sears is also an outstanding one.

Sears started by serving a largely rural America. Later, they were perhaps the first major retailer to discover the full potential of the suburbs. Yet, throughout they have always remembered their responsibilities to the communities they serve. Long before many companies, particularly national chains, were fulfilling local responsibilities, Sears had pioneering programs underway in the neighborhoods surrounding their stores, including their main Chicago installation. Personally, Gordon's primary interest has been the Boys' Club who honored him just this past fall with a special award. Currently, he is helping many communities throughout the country as he serves as this year's chairman of the National Alliance of Businessmen.

A final important characteristic of true craftsmanship in our industry is *minding the marketplace*—making certain that it's clean, safe, fair and competitive. Under Gordon and his predecessors, Sears has constantly worked to insure that the marketplace is a better one for all of us. They have extensive merchandise testing laboratories. They consult closely with manufacturers on product design. They include an informational buying guide in their catalog and they pay extra attention to service follow-up after sale. In short, they compete very hard in fulfilling the Sears motto of, "Satisfaction Guaranteed Or Your Money Back". Their kind of good competition gives greater consumer protection than a whole gamut of government regulations.

Thus, today we honor a distinguished craftsman in retailing who has done a superb job of minding the store, the community and the marketplace.

It is a real pleasure to present to you today 1973's NRMA Gold Medal Awardee—Gordon Metcalf—a man with ideas sold only at Sears.

PRESIDENT RICHARD NIXON COMMENDED FOR SETTLEMENT OF VIETNAMESE WAR

Mr. RANDOLPH. Mr. President, on January 24, I released a statement to the citizens of West Virginia, on the conclusion of the war in Vietnam. I ask unanimous consent that that statement be printed in the RECORD.

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

STATEMENT BY SENATOR RANDOLPH

I share with the concerned citizens of our Nation and the world a profound sense of relief and gratification over the agreement for the termination of our involvement in Vietnam. It is my hope and prayer that the settlement negotiated with the Vietnamese will result in an enduring peace in Southeast Asia.

There have been many disagreements and much violent national debate on the course of our participation in this war. But all citizens, I hope and believe, welcome the agreement announced by Richard Nixon.

I commend the President of the United States on achieving what appears to be a workable program to bring to an end the Vietnam conflict.

LYNDON BAINES JOHNSON

Mr. PEARSON. Mr. President, our Nation has been blessed with able, perhaps extraordinary, men who were capable of stepping into the Nation's highest office in times of crisis and guiding us through troubled times. President Lyndon Baines Johnson was such a man. His courage and leadership were an inspiration to us all in those tragic days of November 1963.

But more importantly, President Johnson may be remembered as a strong leader, a man with a vision of a Great Society and the courage to seek it when many thought the challenge overwhelming. As majority leader of the Senate, he left his mark on this body and led it to the passage of vital legislation. As a Commander in Chief, he bore the awesome burdens of the Presidency through difficult years.

His quest for a Great Society brought some of the most far-reaching legislation of our time. The Civil Rights Act, Voting Rights Act, aid to education, open housing, are only the beginning of a long list of legislation enacted during the early years of his administration. Through those laws, he is part of our lives today and for generations to come.

For his strength and consummate political skill, we stood in awe of Lyndon Johnson, half fearing, always respecting, his ability to use the powers of his office. His grasp of the political arts and his vast reservoir of energy set the pace for us all during the 5 years of his Presidency. He was a giant of American politics with few equals in this century.

Now is not the time to judge the Presidency of Lyndon Johnson. That is a task for the future generations. But let us remind them that Lyndon Johnson was a complex man. He was tough, and compassionate. He was willing to hear, but often stubborn. He was a man of his region transformed into a national leader. He was a man of his time leading a new generation. Let the future judge him for all his qualities, and let it judge him kindly.

Mr. President, Lyndon Johnson was the first President I knew well and, like all who came into personal contact with him, I shall never forget him. I respected him as a man, as a politician, and as our national leader. I sincerely regret that he passed from this earth on the eve of the end of the war which was the tragedy of his Presidency and our Nation. We shall miss his wise counsel and vision in the years ahead.

REPRESENTATIVE NICK BEGICH, OF ALASKA

Mr. GRAVEL. Mr. President, I wish to pay tribute to our missing Representative from Alaska. On October 16, 1972, an orange and white Cessna 310 disappeared somewhere in Alaska. On board, along with the distinguished House majority leader, Representative Hale Boggs, was Alaska's only Representative, Representative Nick Begich.

When news first reached my wife and me late in the evening of October 16, we along with all of Alaska were very hopeful that he and the other three occupants of the plane would be found safe. As the hours stretched into days and the days into weeks, it became more and more obvious that Alaska's beloved Representative would never return. Recently, hearings were held, and he was declared missing and presumed dead. Alaska has suffered one of its greatest losses.

Nick Begich worked tirelessly for his State. He had dedicated himself to better conditions for us all. Though he was a freshman Representative, Nick made the friends necessary within the House of Representatives to finally pass the Native Land Claims Settlement Act. "When you're one person out of 435," he had said, "you've got to make friends. You've got to have people in key positions helping Alaska. I have those associations." Not only did he have the associations, but he was recognized by the leadership of the House as one of the finest freshmen legislators of the 92d Congress. He received a standing ovation after the victorious floor fight covering the Native Claims Settlement Act.

Nick also was instrumental in passing other important legislation for Alaska, such as the Fairbanks flood control project. He served with dedication and distinction on the same committees in the House that I served on in the Senate: the Public Works Committee and the Interior and Insular Affairs Committee. On many occasions we conferred and adopted strategy to get key amendments and legislation for Alaska passed in committee. On one occasion, I testified at his request before the House Public Works Committee, on projects necessary to Alaska.

Nick Begich took his job as U.S. Representative seriously, and his devotion to Alaska and the Nation were repaid in kind. He won a warm spot in the hearts of all Alaskans and earned the admiration of his colleagues and supporters everywhere. Like Alaska, he was a man of rich spirit and unlimited resources. We will all miss him.

SPECIAL BONUS PAY

Mr. TOWER. Mr. President, I am pleased to join several Senators in sponsoring legislation designed to implement a system of bonuses for certain members of the Armed Forces. Called the Uniformed Services Special Pay Act of 1973, the bill contains provisions dealing with special pay for:

First. Physicians and dentists.

Second. Sea duty and for duty at certain hardship locations.

Third. Reenlistment and enlistment.

Fourth. Officers who execute active duty commitments.

Fifth. Judge advocates and law specialists.

Sixth. Participation in the Selected Reserve—an enlistment and reenlistment bonus for the Reserves.

I ask unanimous consent that a sectional analysis of this bill be printed at the conclusion of my remarks.

President Nixon has moved the Nation toward an all-volunteer armed force. He had reduced draft calls most significantly since the height of the Vietnam conflict. In order to do this, several changes were made to make service life more attractive. There were cosmetic changes which received much public attention, such as hair-length regulation changes, beer in the barracks, and elimination of much trivial harassment. There have been improvements in the environment, including better quarters and recreational facilities. Basic to all of these changes, however, are the increases in pay which have occurred over the past few years and which must continue.

The 92d Congress passed legislation that removed the inequity of poverty-level pay scales for our lower enlisted ranks. In addition, substantial pay raises were given lower officer grades. These across-the-board raises were necessary to induce men to volunteer for active duty service, and they have, together with the other changes outlined above, succeeded in raising the level of recruitment to nearly the point where an all-volunteer force of the size we require to defend American interests can be achieved.

Nevertheless, one last step is required. Rather than another across-the-board increase that would marginally increase the number of accessions, the Secretary of Defense needs authority for special pay. This special pay can be used as an inducement for enlistment in certain critical skills where there is difficulty in recruiting. It will, in effect, give us the quality of men we need for a modern Armed Forces. This bill will stimulate volunteerism in medical and legal specialties and will encourage sea duty for naval personnel. The bill further provides authority to grant enlistment bonuses for any specialty skill required to meet all-volunteer force objectives.

Section 315 provides for enlistment bonuses for men in the Selected Reserve. While it appears at this point that Active Duty accessions will be sufficient to maintain an all-volunteer force, it appears equally likely that without remedy, the Reserves and Guard will fall dangerously short of the required manpower. In an era when Army strength has been cut nearly in half from its Vietnam peak, we shall obviously need to place increased reliance on the Reserves. We will need not only sufficient numbers of men but also quality, motivated personnel. Bonuses, together with other improvements in Reserve life and in recruiting should provide an increased incentive for this participation.

President Nixon has set an all-volunteer force as a national goal. I believe the majority of Americans support the President in his efforts. But in order for the Nation to have a quality all-volunteer force, Congress must act, and it must act before expiration of the draft in mid-year.

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

SECTIONAL ANALYSIS

Section 1 provides that the Act may be cited as the "Uniformed Services Special Pay Act of 1973."

Section 2 amends chapter 5 (Special and Incentive Pays) of title 37, United States Code.

Clause (1) restates section 302 (special pay for physicians and dentists) to make the provisions of this special pay permanent. At present, it expires with respect to such officers who are ordered to active duty after June 30, 1973, which date was established to coincide with the experiation of the Military Selective Service Act. It also increases the rate of special pay for physicians and dentists of the armed forces or Public Health Service with at least two years' active duty from $150 to $350 per month. Under present law, a physician or dentist does not receive special pay at the $350 rate until he has completed at least 10 years of active duty. Finally, it restates the substance of existing subsection (c) without change.

Clause (2) amends section 305 (special pay for sea duty or duty at certain places) to omit all reference to sea pay and restates the provisions to restrict applicability to special pay for members serving in certain places outside the 48 contiguous states and the District of Columbia.

Clause (3) adds a new section 305a (sea pay) which provides increased rates of special pay for members on sea duty based on continuous assignment to sea duty instead of enlisted grades, as is presently the case. In addition, the entitlement to sea pay is extended to officers in pay grades 0–3 and below at the same rates.

Clause (4) restates section 308 (reenlistment bonus) as follows:

(1) Subsection (a) substitutes a new reenlistment bonus for the existing reenlistment bonus and variable reenlistment bonus. The new bonus is payable to members who have completed 21 months of service and who reenlist or extend their enlistment for at least three years. Bonus computation will be based on monthly increments of basic pay, not to exceed six, multiplied by the number of years of additional obligated service. Maximum bonus payable is $15,000 per reenlistment.

(2) Subsection (b) authorizes the bonus to be paid either in a lump sum or through installments.

(3) Subsection (c) provides a method for bonus computation in the cases of officers with prior enlisted service who reenlist.

(4) Subsection (d) contains the standard provision for a refund from a member who voluntarily or through misconduct fails to complete the contracted period of service. The amount refunded is in proportion to the unfilled service commitment.

(5) Subsection (e) authorizes the Secretary of Defense, and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, to prescribe regulations for the administration of this section.

Clause (5) restates section 308a (enlistment bonus) as follows:

(1) Subsection (a) broadens the authority for payment of the enlistment bonus. It removes the restriction limiting payment to enlistees or extendees in the combat elements only and permits the Secretary of Defense to offer the bonus to enlistees or extendees in any speciality considered critical in meeting all-volunteer force objectives. It further authorizes the Secretary of Transportation to offer this bonus to enlistees or extendees in the Coast Guard.

(2) Subsection (b) restates, without change except for the inclusion of the Coast Guard, the existing provisions of current subsection (b) containing the standard refund provision as described in Clause (4) above.

(3) As restated, subsection (c) is eliminated. The eliminated subsection provided that no payments could be made with respect to any enlistment or extension of enlistment made after June 30, 1973.

Clause (6) amends section 311 (continuation pay for physicians and dentists) to delete continuation pay for physicians and dentists of the uniformed services and substitutes an improved variable incentive pay as follows:

(1) Subsection (a) authorizes the Secretary of Defense or the Secretary of Health, Education, and Welfare with respect to the Public Health Service, as appropriate, to offer a variable incentive pay of up to $15,000 per year to officers of the uniformed services qualified in critical health professions who execute a written agreement to remain on active duty for a specified number of years. The incentive pay is payable in annual, semiannual, or monthly installments or in a lump sum after completion of the length service specified in the agreement.

(2) Subsection (b) authorizes the Secretary of Defense or the Secretary of Health, Education, and Welfare with respect to the Public Health Service, as appropriate, to terminate an officer's entitlement to the incentive pay at any time. If this should occur the member will receive a proportionate part of that pay based on the amount of the agreement completed.

(3) Subsection (c) establishes the authority to issue regulations specifying that an officer who receives payment under this section but who fails to complete the total number of years specified in the agreement may be required to refund the amount received that exceeds his entitlement under those regulations. An officer who has received less than he is entitled to, on the other hand, shall be entitled to receive the additional amount due him at the time of his separation from active duty.

(4) Subsection (d) specifies that this section does not alter or modify any other service agreement or obligation made for some other purpose.

(5) Subsection (e) requires the Secretary of Defense and the Secretary of Health, Education, and Welfare with respect to the Public Health Service to submit an annual report regarding the operation of the program authorized by this section. The report must include a review of the program conducted during the fiscal year for which the report is submitted, and a plan for the program for the succeeding fiscal year. The report is due annually beginning on April 30, 1974.

Clause (7) adds three new sections as follows:

(A) Section 313 (special pay for officers of armed forces who execute active-duty agreements) provides as follows:

(1) Subsection (a) authorizes payment of a variable incentive, not to exceed $4,000 per year, to officers of the armed forces, who (a) are entitled to basic pay; (b) have completed at least two, but not more than 11 years, of active duty; (c) possess skills in a critical shortage specialty; (d) are not entitled to special pay under sections 302 (physicians and dentists), 302a (optometrists), 303 (veterinarians), 311 (health professions), and 312 (nuclear-qualified officers); and (e) execute a written agreement to remain on active duty for at least one year, but not more than six years.

(2) Subsection (b) authorizes payment in either a lump sum or in installments.

(3) Subsection (c) contains the standard refund provision, as described in Clause (4), above.

(4) Subsection (d) specifies that this section does not alter or modify any other service agreement or obligation made for some other purpose.

(B) Section 314 (special pay for judge advocates and law specialists) provides as follows:

(1) Subsection (a) authorizes special pay to each (a) judge advocate of the Army, Navy, Air Force, or Marine Corps; (b) law specialist of the Coast Guard, as defined in section 801 of title 10; and (c) officer who is detailed to the Judge Advocate General's Corps and who has the professional qualifications to act as detailed counsel for general courts-martial under section 827(b) of title 10. The purpose of the latter category is to include officers in the Women's Army Corps who do not belong to the Judge Advocate General's Corps but who are fully qualified attorneys and as such are "detailed" to the Judge Advocate General's Corps. The special pay is not authorized for an officer ordered to active duty for less than one year.

(2) Subsection (b) authorizes a member entitled to special pay under subsection (a) of this section to receive special pay at the following rates while he is performing judge advocate duties: (a) $100 a month for each month of active duty if he is in pay grade 0–1, 0–2, or 0–3; (b) $150 a month for each month of active duty if he is in pay grade 0–4 or 0–5; or (c) $200 a month for each month of active duty if he is in a pay grade above 0–5.

(3) Subsection (c) forbids the amounts set forth in subsection (b) to be included in the computation of the amount of an increase in pay authorized by any other provision of this title or in computing retired pay or severance pay.

(C) Section 315 (special pay for participation in the Selected Reserve) provides as follows:

(1) Subsection (a) authorizes payment of an enlistment or reenlistment incentive to certain described persons who enlist or reenlist in the Selected Reserve of the Ready Reserve of an armed force.

(2) Subsection (b) establishes $2,200 as the maximum amount payable to certain described persons who possess critical military skills and who enlist or reenlist for a period of six years. Persons not possessing critical military skills may be paid in amount not to exceed $1,100 for a six-year enlistment or reenlistment. A percentage formula provides lesser annual amounts for shorter enlistments or reenlistments.

(3) Subsection (c) establishes six years as the maximum period of enlistment or reenlistment.

(4) Subsection (d) authorizes payment of special pay in lump sum or installments. It further establishes $3,300 as a maximum amount payable to an individual. Finally, it prohibits payment to members who have 12 or more years of service under section 1332 (computation of years of service in determining entitlement to retired pay) of title 10, United States Code.

(5) Subsection (e) contains the standard refund provision, as described in Clause (4), above.

(6) Subsection (f) authorizes the Secretary of Defense, and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, to prescribe regulations for the administration of this section. The subsection qualifies the authority by making it mandatory that the regulations prohibit discrimination in the amount of payments authorized based on geographic location.

Section 3 provides that in determining the rate of special pay for sea duty under the amendments made by section 2(8) of this bill, the length of time a member has been on continuous sea duty on the effective date of the bill shall be counted in determining his rate of special pay.

Section 4 preserves the present authority, now contained in current 37 U.S.C. 305(a)(1) (special pay while on sea duty), to pay the special pay for sea duty authorized in that subsection to those members who were on active duty on the date of enactment of the

bill, but who are not entitled to the special pay for sea duty under the new 37 U.S.C. 305a, as inserted by section 2(3) of the bill. This section also provides that if a member is entitled to special pay under both the current 37 U.S.C. 305 (a) (1), and under the new 37 U.S.C. 305a as inserted by section 2(3) of the bill, he may at his option choose under which provision he wishes to receive payment. Once a decision is made it may not be revoked.

Section 5 preserves the present authority, now contained in current 37 U.S.C. 308(a) and (d) (reenlistment bonus), to pay the reenlistment bonus authorized in those subsections to those members who were on active duty on the date of enactment of the bill, but who are not entitled to a reenlistment bonus under amended 37 U.S.C. 308, as restated by section 2(4) of the bill. If a member is eligible for both the bonus under current 37 U.S.C. 308(a) and (d), and the bonus authorized by amended 37 U.S.C. 308 as restated by section 2(4) of the bill, he may elect to receive either one of those reenlistment bonuses. However, a member's eligibility under 37 U.S.C. 308(a) and (d), as it existed on the day before the effective date of this Act, terminates when he has received a total of $2,000 in reenlistment bonus payments.

Section 6 makes the bill effective July 1, 1973. It further stipulates that except for 37 U.S.C. 302 (special pay for physicians and dentists) as restated by section 2(1) of the bill, the special pays and bonuses authorized by the bill will expire on June 30, 1977, unless otherwise extended by Congress.

TRIBUTE TO LYNDON JOHNSON

Mr. McGOVERN. Mr. President, for the last time yesterday Lyndon Johnson was back in the place where his life in politics began and the triumphs of his Presidency were written into law. Now we try as we must and as best we can to write his epitaph.

The war in Vietnam led to differences between Lyndon Johnson and some of us, even within his own party, just as it diminished the hopes and dreams within his own heart. Yet even in the midst of tragedy and division, none of us doubted his overwhelming love for this land. And all of us marveled at the progress he made possible and the programs he passed, without precedent in our time or perhaps any time in American history.

So let us remember the good he did, which was so great.

He told us: "We shall overcome."

And in the beginning, after that moment of crushing loss in Dallas, he helped all of us to overcome our doubts and our despair, so we could move on to finish the work we were in.

He helped America to overcome the bondage of bigotry and prejudice, so all of us could see as he did that the only race that counts is the human race.

He sought to overcome man's ancient and mortal enemies—poverty, ignorance, and disease—not by words, but by the remarkable works he did with us and left to us.

Lyndon Johnson was President of the United States, but he was at the same time so much more. He was a healer to the sick, a servant to the deprived, an educator of children, and the second Great Emancipator.

His advances at home may have been dimmed by war abroad, but they were so bright that they still shine forth as an example to the weary and the faint-hearted of how Government may use its power to serve its people. He always called himself a "can do" man; now his memory calls those of us in Government to believe that we can do what compassion and justice command.

The rites yesterday were ordained by tradition. Yet the real measure of this man should be taken not from the praises of the powerful and the famous, but from the feelings of so many ordinary people who are unpracticed in the forms of public mourning.

Who grieves for Lyndon Johnson?

Not just Senators, but citizens—the Job Corps graduate who has had and used his chance; the elderly who need no longer choose between their health and their savings; the young children who have been fed and taught because he cared and acted.

Lyndon Johnson may not have reached his Great Society, but he left our society greater. Now he has left us. Now it is for us, the living, to hear and heed the message he gave us in the early hours of his national leadership: "Let us continue."

CEASE-FIRE IN VIETNAM

Mr. SCOTT of Virginia. Mr. President, all people are pleased with the announcement by the President that peace has been negotiated. Certainly we hope that it will last, that it will heal as the President suggests.

Congress could have legislated the unilateral withdrawal of our troops or the cutoff of funds for Southeast Asia, but peace is brought about by negotiations by the parties involved.

I certainly hope that the world has had enough of war and that our generation will now enjoy peace throughout the world.

Judging from the overall content of the announcement, I am generally optimistic and certainly most grateful that our support of the President, especially during the recent most critical negotiating stages, has apparently been well founded.

Throughout these long years of doubt and turmoil, the preeminently agonizing concern of all Americans has been over the killing—thank God, it has been stopped.

IS THE PRESS BEING HOBBLED?

Mr. ERVIN. Mr. President, on the 19th of January, I was privileged to participate in a panel discussion in Chapel Hill N.C., sponsored by the North Carolina Press Association. The discussion focused upon the problems facing members of the press and broadcasting media—a matter of timely and vital concern, not only to newsmen, but to the public as well, for the problems of the media may well be problems for us all. Our right to be fully informed is at stake.

I ask unanimous consent that the text of my remarks on this subject be printed in the RECORD.

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

IS THE PRESS BEING HOBBLED?

(By SAM J. ERVIN, JR., U.S. Senator)

It is my belief that the First Amendment was adopted by our Founding Fathers for two basic reasons. One reason was to insure that Americans would be politically, intellectually, and spiritually free. The other was to make certain that our system of government, a system designed to be responsive to the will of an informed public, would function effectively.

The scope of First Amendment freedoms, including freedom of press, is broad and was intended to be so. The First Amendment is impartial and inclusive. It bestows its freedoms on all persons within our land, regardless of whether they are wise or foolish, learned or ignorant, profound or shallow, and regardless of whether they love or hate our country and its institutions.

For this reason, of course, First Amendment freedoms are often grossly abused. Society is sorely tempted at times to demand or countenance their curtailment by government to prevent abuse. Our country must steadfastly spurn this temptation if it is to remain the land of the free. This is so because the only way to prevent the abuse of freedom is to abolish freedom.

The quest for the truth that makes men free is not easy. As John Charles McNeill, a North Carolina poet, said, "teasing truth a thousand faces claims as in a broken mirror." The Founding Fathers believed—and I think rightly—that the best test of truth is its ability to get itself accepted when conflicting ideas compete for the minds of men.

And, so, the Founding Fathers staked the very existence of America as a free society upon their faith that it has nothing to fear from the exercise of First Amendment freedoms, no matter how much they may be abused, as long as truth is free to combat error.

Representatives of the press have been recently claiming that they are not free, that in effect the Nixon administration has shackled them with threats and restrictions that do not permit them to fulfill the role which the Constitution gives them. There is substance, I feel, to their claims. *Newsweek* magazine goes so far as to say that the recent clashes between the administration and the media are "without precedent in the history of the United States."

To some, this may be overstating the significance of the conflict. The press has typically played a critical role of government, and government has often responded with intemperate condemnation or simply with charges of irresponsibility. I cannot say that such responses have always been unjustified.

But the actions of the present administration appear to go beyond simple reactions to incidents of irresponsible or biased reporting, to efforts at wholesale intimidation of the press and broadcast media.

I point to a few examples.

Recently, we saw Clay Whitehead, director of the White House office of Telecommunications Policy, explaining a new administration proposal which would condition the renewal of broadcast licenses by the FCC on whether the local station management is "substantially attuned to the needs and interests of the communities he serves." He later made clear that what was really sought was control of network news: "Station managers and network officials," he said, "who fail to act to correct imbalance or consistent bias from the networks—or who acquiesce by silence—can only be considered willing participants, to be held fully accountable by the broadcaster's community at license renewal time."

In a rather interesting sidelight which indicates how this plan might work, it was recently reported that the finance chairman of Mr. Nixon's campaign in Florida, George

Champion, Jr., has challenged the license of WJXT in Jacksonville. WJXT was the station whose reporters discovered some controversial statements of Nixon Supreme Court nominee G. Harold Carswell, which contributed to his failure to receive Senate confirmation. To make matters worse, the station is owned by the *Washington Post*, which is a frequent administration critic.

We also see significant inroads being made into public broadcasting. Under administration pressure, funds for the Public Broadcasting Corporation, which in turn provides funds for the Public Broadcasting Service, were slashed in the last Congress. As a result, the corporation board, a majority of which are administration appointees, has decided to withhold funds, but only for certain public affairs programming which had often included comment critical to the Executive. Programs such as William Buckley's "Firing Lines," "The Advocates," "Bill Moyer's Journal," "Wall Street Week," and "Washington Week in Review" will not be seen after this season unless the corporation agrees to release these funds.

It was the intent of the Congress in enacting the Public Broadcasting Act of 1967 which created an intermediary corporation to receive funds for public television, to insulate control of programming from those who appropriated the dollars for it. It now appears that the intermediate agency is asserting the sort of political control which the Congress wisely denied itself.

There are other examples of administration intimidation which come to mind: the early speeches of the Vice President harshly criticizing the press; the investigation of CBS newsman Daniel Schorr who had been critical of the administration in 1971; the recent exclusion of the *Washington Post*, particularly critical of the President's war policies, from coverage of White House social events; and, of course, the controversial Pentagon Papers case, which, whatever one may think of the circumstances, was the first time that the government sought to enjoin the publication of a news story.

How many editorials have not been written, or critical comments not made, because of these incidents is not something which can easily be proved—I do recall the "instant analyses" which followed presidential addresses. Following considerable administration objection, we no longer have them. Decisions not to critize are decisions which people keep to themselves. But the fact that intimidation cannot often be readily shown does not mean it it is not present.

So we come to what was the announced subject of my presentation: the newsmen's privilege proposals. I wanted to give you this background because I believe that the threat of a subpena to testify before a governmental tribunal is yet another means of governmental intimidation of the press. A newsman who publishes a story obtained from confidential sources which is critical or accusatory of public officials or programs now faces the threat of subpena and a possible jail sentence if he refuses to reveal his source. If he decides to back off a controversial story, it is the public which has lost information which could lead to political and social improvement.

The administration's stance with regard to a statutory testimonial privilege has been one of rather passive resistance. Assistant Attorney General Roger Cramton, testifying before a House Committee last fall, said that while the administration favored a qualified privilege in principle, it felt that such a privilege was unnecessary. He furthermore endorsed the Supreme Court's ruling in last June's *Caldwell* decsion that the First Amendment's guarantee of a free press does not entitle newsmen to refuse to reveal confidential sources of information.

I myself critized the *Caldwell* opinion as failing to take into account the practical effect of such a ruling upon reporters and their sources of information. If sources of information cannot be assured of anonymity, chances are they will not come forward. If the reporter is willing to assure confidentiality, he must accept the fact that he may have to serve a jail sentence in order to fulfill his promise. It is rather ironic, I think, that the reporters themselves are the ones who ultimately are jailed for refusal to reveal sources of stories which the public would never have been aware of, had not the reporter himself decided to publish.

An example recently came to my attention which I feel illustrates the necessity of some type of privilege. It involves a reporter for the *Memphis Commercial Appeal* in Memphis, Tennessee—Joseph Weiler. An informant had contacted the paper with the information that children confined to the state-owned hospital for the mentally-retarded in Memphis were being beaten and otherwise mistreated by supervisory personnel. After some investigating, Mr. Weiler wrote a story which corroborated these reports. An investigation by a committee of the state senate ensued, but curiously enough, the focus was upon who the state employee was who had tipped off the newspaper rather than the charges themselves. Mr. Weiler was supenaed and requested to bring whatever notes and correspondence he had concerning the case. He appeared before the committee but refused to identify his source. He was unanimously cited for contempt of the committee.

I submit to you that the losers here are not Mr. Weiler and his newspaper, but rather the people of Tennessee whose tax dollars support that institution, and the children of that hospital who are helpless to improve their lot.

It is this sort of case—where confidential information leads to the discovery of flaws and shortcomings in our social and political processes—which makes the passage of some type of statutory privilege particularly compelling. Without the protection of anonymity, inside sources may simply "dry up." The stories will not be written. We all will be the losers. And nobody—culprit or reporter—will go to jail.

I am aware of the criticism that has been levelled at these proposals. A testimonial privilege will act as a shield behind which biased, or otherwise irresponsible, reporters will hide. Newsmen will be able to criticize unjustly and not be held accountable for it. I would answer by first having you note that most of the proposals creating a newsmen's privilege now provide that a newsman may not claim the privilege in a suit for defamation, which includes libel and slander. This means that the protection which we now have against irresponsible reporting, namely, a civil suit for defamation, would retain its vitality as a check.

Undoubtedly there are legitimate interests to be served by having newsmen testify as other citizens. Certainly it is desirable to have all the evidence possible before a court when a man's freedom or livelihood is at stake, or when society attempts to identify and punish an offender. The newsmen's privilege, as any testimonial privilege, must necessarily impede this search for truth to a degree. The question is whether, considering the effects on the flow of information to the public, it is worth it; and if so, can it still be drafted to accommodate the competing interests.

There are now three newsmen's privilege bills and one resolution pending in the Senate, and a multitude of bills introduced in the House. The Subcommittee on Constitutional Rights will hold hearings on the subject beginning February 20th.

The bills all concern themselves with four basic questions: First, should the privilege be a qualified or an absolute one. Those which provide a qualified privilege attempt to set standards which must be met by the person seeking the newsman's testimony in order for the privilege to be divested. The qualifications in all of the proposals, although differing in specifics, are intended to reconcile the competing interests involved. Those favoring an absolute privilege argue that it is impossible to accommodate the competing interests without critically limiting the newsmen's protection.

The second question is whether the privilege should apply to only federal tribunals or whether it should also apply to the states. While it is true that many of the recent cases involving a newsmen's privilege have come before state tribunals, one also must realize that to make the privilege applicable to the states, the Congress will be legislating a rule of evidence for use in state courts, and this would be an intrusion into an area of state responsibility which the Congress has not engaged in previously. It raises serious problems of federalism. No one, certainly not Congress, can assert an exclusive claim on wisdom. Here, as in so many cases, it is highly important to let all states make their own judgment on the balance of interests involved.

A third area addressed by these proposals is the matter of who is a newsman. Who should be entitled to claim the privilege? The First Amendment applies to all citizens, and protects their right to publish information for the public. But the testimonial privilege can of course not be available for all. Thus, a serious problem of definition is posed. It must be broad enough to offer protection to those responsible for news reporting, and yet not so broad to shield the occasional writer from his responsibility as a citizen. Any attempt at defining the scope of the privilege is in effect a limitation on the First Amendment. It will confer First Amendment protection on some who deserve it and deny it to others with powerful claims to its mantle. Do we include scholars as well as reporters? The weekly and monthly press as well as the daily? Free lance or just the regularly employed? TV cameramen? Underground papers? The radical press?

So difficult is this question that I would much have preferred the Supreme Court to adopt the wise and balanced approach of the 9th circuit in *Caldwell*. Some of these issues, if not the whole question of the newsmen's privilege, would be better left to a case-by-case development in the courts. Unfortunately that avenue is now closed for all practical purposes, and Congress must attempt to be as wise as the drafters of the First Amendment 200 years ago.

Finally, there is the question of the procedural mechanism through which the privilege is claimed. As is often the case, the effectiveness of the substantive provisions may well depend on the method by which they are employed. In the case of the newsman, should the party who is seeking his testimony be required to show in advance of the issuance of a subpena that the newsman is not entitled to protection under the statute? Should the newsman be required to answer a subpena before he can claim the protection of the statute? And, if so, should he have the burden of showing that he is entitled to protection or should the party seeking the testimony have the burden of proving he is not entitled? The means by which the privilege is claimed or divested may, for all practical purposes, determine its effectiveness.

These then are the basic questions facing the Congress with respect to this legislation. The Subcommittee on Constitutional Rights, as I have mentioned, will receive testimony on the proposals during the last two weeks in February, and I am hopeful that the Subcommittee will be able to favorably report some sort of bill shortly thereafter.

A free press is vital to the democratic process. A press which is not free to gather news without threat of ultimate incarceration cannot play its role meaningfully. The people as a whole must suffer. For to make thoughtful and efficacious decisions—whether it be at the local school board meeting or in the voting booth—the people need information. If the sources of that information are limited to official spokesmen within government bodies, the people have no means of evaluating the worth of their promises and assurances. The search for truth among competing ideas, which the First Amendment comtemplates, would become a matter of reading official news releases. It is the responsibility of the press to insure that competing views are presented, and it is our responsibility as citizens to object to actions of the government which prevent the press from fulfilling this constitutional role.

GREAT DISMAL SWAMP

Mr. CASE. Mr. President, the Union Camp Corp., which is headquartered in Wayne, N.J., has donated nearly 50,000 acres in the Great Dismal Swamp to the Nature Conservancy, a nonprofit land conservation organization.

Although the land is valued at $12.6 million, Union Camp President Samuel M. Kinney, Jr., said:

A refuge is the right thing for this land—the only right thing.

We in New Jersey are proud of the action taken by this New Jersey firm. We are proud of the recognition given to this action by an editorial in the Washington Post, January 22, 1973.

I ask unanimous consent that the editorial be printed in the RECORD.

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

[From the Washington Post, Jan. 22, 1973]

"THE RIGHT THING" FOR GREAT DISMAL SWAMP

The Union Camp Corporation has set a superb example for other land-owning companies by donating its vast holdings in Great Dismal Swamp to the Interior Department, through the Nature Conservancy, for preservation as national wildlife refuge. This remarkable corporate gift, encompassing some 49,000 acres valued at $12.6 million, should ensure the survival of one of the greatest and most intriguing reaches of wilderness in the eastern United States.

The Dismal Swamp has been a place of mystery and fascination since colonial times. Col. William Byrd II, who surveyed the Virginia-North Carolina boundary through the swamp in 1728, saw only its dark, melancholy side: He called it a "vast body of dirt and nastiness" where "the foul damps ascend without ceasing, corrupt the air, and render it unfit for respiration."

Another early surveyor, George Washington, found the marshes more appealing. He pronounced it a "glorious paradise" for wildfowl and game, and in 1763 acquired some 40,000 acres of "the finest cypress, juniper and other lofty wood" under the aegis of a company styled as "Adventurers for Draining the Great Dismal Swamp." Since then, generations of entrepreneurs have gradually reduced the peat bog by draining its edges for logging and farming, and by diverting the wine-colored waters of Lake Drummond to the Dismal Swamp Canal which links Norfolk and Albemarle Sound. What remains today is a unique wild area, diminished in size but enhanced by a rich body of legend about early canallers, fugitive slaves, moonshiners and ghostly lights.

Union Camp's significant donation—embracing both Lake Drummond and the acreage once owned by Washington's band of adventurers—puts the future of the swamp squarely in the hands of the federal government. The deeds in fact contains a key reverter clause which would void the transfer if the government should fail to protect and preserve the area. New, perceptive federal policies will be required to carry out this trust, for the Corps of Engineers has controlled water rights to Lake Drummond for years without doing enough to curb drainage and maintain the necessary levels of ground water to sustain the lake. This may also be time to close the Dismal Swamp Canal, or at least severely restrict its use. An alternate intercoastal route is provided by the nearby Chesapeake & Albemarle Canal, and every opening of a lock on the swamp channel for a single pleasure boat drains 3 million gallons of water from Lake Drummond, which can ill afford the loss.

"A refuge is the right thing for this land, the only right thing," Union Camp President Samuel M. Kinney Jr. said recently. He is absolutely right. His firm is not the first to use provisions of the federal tax code which encourage such corporate donations, nor the first to employ the services of the Nature Conservancy. But this is by far the largest single tract ever received by that non-profit organization. The transaction deserves close study by the many other private firms which own properties of singular natural worth.

CONFIRMATION OF NOMINATIONS OF DIRECTOR AND DEPUTY DIRECTOR OF OFFICE OF MANAGEMENT AND BUDGET

Mr. METCALF. Mr. President, this morning the Government Operations Committee favorably reported to the Senate S. 518, a bill requiring Senate confirmation of the nominations of the Director and Deputy Director of the Office of Management and Budget.

I prepared a memorandum on this subject that I submitted to the committee. I believe that it will be of interest to Senators in determining the merits of this legislation.

I ask unanimous consent to have the memorandum printed in the RECORD.

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

MEMORANDUM

I. PURPOSE

The purpose of legislation before our committee is to provide for Senate confirmation of appointments to the offices of Director and Deputy Director of the Office of Management and Budget. This would assure the Senate an opportunity to inquire into the qualifications, fitness and background of these officials which now exercise vast policy-making and managerial powers in the Federal Government. It would also provide the Congress with a greater opportunity to examine the policy-thinking of these officials and become more informed about the operations of the Office of Management and Budget, in the same manner as any other agency whose head is subject to Senate confirmation.

II. HISTORY OF THE OMB: FROM BUDGET ADVISOR TO MANAGEMENT CONTROL

Prior to 1921, no provisions existed in the national government for the formulation by any agency of a single, consolidated statement of the prospective revenues and the estimated expenditure needs of the government in order to guide the Congress in determining what policies and programs should be adopted.

Congress sought to resolve this problem by passing the Budgeting and Accounting Act of 1921 which, among other things, established a national budget system and created a Bureau of the Budget to advise and assist the President in developing a unified budget for submission to the Congress. The Senate felt that the director of this Bureau and his assistant should be subject to Senate confirmation. The House disagreed. The conference Committee reported the bill, which was adopted, without the requirement of confirmation based on the theory that the President should be allowed to "appoint the men whom he believed he could trust to do his will in the preparation of the budget."

However, vast changes have occurred in both the structure and the responsibilities of the Bureau since its establishment as a small, personal budgetary staff for the President. It has become a super department with life and death control over all of the Executive branch departments and agencies, as well as over all of the policies and programs enacted by the Congress.

In the name of the President, this Bureau, now known as the Office of Management and Budget, with a staff of nearly 700, has become the chief administrative office of the Federal Government. It determines line by line budget limitations for each agency, including the regulatory commissions which are supposed to be the "arms of Congress." After Congress appropriates the money and determines its own priorities, it is the OMB that puts together the program of impounding those funds in accord with the President's priorities. Under Section 3679 of the Revised Statutes (31 U.S.C. 665), the Congress extended powers to the Director of OMB to apportion appropriations, to approve agency systems for the control of funds, and to establish reserves as to Congressionally approved funding.

After Congress passes a law, it is the OMB that writes the general guidelines and regulations for the agencies to be following in the enforcement of the Congressional mandate. While the Congress is considering legislation, it is the OMB that coordinates the Executive's legislative recommendations and controls the flow of Executive Branch information which is sought by Congress in making its judgment.

When agencies disagree with each other, the OMB resolves the conflicts, whether they be over programs or management. When agency heads strike out on their own, or assert policies inconsistent with Executive policy, it is the OMB which puts pressure on the divisions and bureaus of the agencies to bring the agency heads back into line.

Since 1921, both Congress and the Chief Executive have conveyed additional powers on the Bureau (OMB) and its Director which have extended and shifted its primary role to that of a management agency with line operating authority.

The Budgeting and Accounting Procedures Act of 1950 gave the Director sweeping powers over agency accounting and budget systems and classifications, over statistical, performance and cost information systems, and the preparation of cost-based budgets. These fiscal management powers were strengthened by the Congress in 1956.

Fiscal and policy control over automatic data processing equipment for the Federal Government is lodged with the OMB. The Director issues the rules and regulations for coordinating Federal aid programs in metropolitan areas under the Model Cities legislation. Under the Intergovernmental Cooperation Act of 1968, the President delegated to the Director authority to issue rules with respect to the administration of grant-in-aid funds, special and technical services to State

and local governments and the formulation, evaluation and review of Federal programs having a significant impact on area community development (known as the A–95, federal aid clearinghouse procedures).

The Director, along with the Chairman of the Civil Service Commission, determines federal pay comparability adjustments. He issues regulations with regard to Government employee training programs with regard to the absorption of costs. Under the Federal Reports Act, he holds the ultimate power to determine vital questionaires, surveys, reports and other investigational inquiries will be promulgated by the agencies, including the regulatory commissions, and what specific information will be sought.

The Director is authorized by Congress to manage and monitor through investigation and regulation the hundreds of public advisory committees to the Federal agencies including making the determination to to which shall be closed or open to the public.

In addition, the Director and his staff oversee the management and expenditures of national security programs, international programs, defense expenditures, natural resource programs and many other matters directly affecting the economy and security of the country. Furthermore, the OMB manages for the President transfers of funds between classes of appropriations, as authorized by Congress; reprogramming of appropriated funds which involves the shifting of funds within an account after Congressional committee clearance; and the transfer of funds from one year to the next, involving the determination and management of carryover balances. These are subtle and complicated areas of fiscal mangement, but nonetheless important in areas of national policy.

The main point to be emphasized in the consideration of this legislation is that the Office of Management and Budget today is an operating, decision-making, administrative agency, just as surely as the various departments and agencies are operating, decision-making units in their respective areas, and as such its Director and Deputy Director should be appointed with Senate advise and consent.

The best description for this expanded management role for the Budget Bureau can be found in the President's Message and Reorganization Plan No. 2, which he sent to the Congress in 1970, and which was approved. The very name change—from Budget Bureau to Office of Management and Budget—indicated the shifting role and priorities. President Nixon said, in part:

"Creation of the Office of Management and Budget represents far more than a mere change of name for the Bureau of the Budget. It represents a basic change in concept and emphasis, reflecting the broader management needs of the Office of the President.

"The new Office will still perform the key function of assisting the President in the preparation of the annual Federal budget and overseeing its execution. It will draw upon the skills and experience of the extraordinarily able and dedicated career staff developed by the Bureau of the Budget. But preparation of the budget as such will no longer be its dominant, overriding concern.

"While the budget function remains a vital tool of management, it will be strengthened by the greater emphasis the new office will place on fiscal analysis. The budget function is only one of several important management tools that the President must now have. He must also have a substantially enhanced institutional staff capability in other areas of executive management—particularly in program evaluation and coordination, improvement of Executive Branch organization, information and management systems, and development of executive talent. Under this plan, strengthened capability in these areas will be provided partly through internal reorganization, and it will also require additional staff resources."

III. PRECEDENTS FOR SENATE CONFIRMATION OF DIRECTORS IN THE EXECUTIVE OFFICE OF THE PRESIDENT

The argument in favor of continuing the special immunity from Senate confirmation to the Director and Deputy Director of the OMB is further diminished when we examine the status and appointment authority as to other directors in the Executive Office of the President.

The Director of the Office of Emergency Preparedness is a key adviser to the President on a variety of civilian defense matters, from mobilization to oil import quotas. Its Director, Deputy Director and two assistant directors are all subject to Senate confirmation.

The Office of Science and Technology provides advice and staff assistance to the President in developing and evaluating scientific programs in the interest of national security. It does not have the "power of the purse" that OMB does. But its Director, who is also the President's science adviser, and its Deputy Director come before the Senate for confirmation and are responsive to Congress.

The Office of Telecommunications Policy was recently created by a reorganization plan to advise the President on national communication policies and to evaluate and coordinate telecommunication activities. Both its director and deputy director are appointed by and with the advise and consent of the Senate.

The Council of Economic Advisers analyzes the national economy and advises the President as to policies for economic growth and stability. The Council on Environmental Quality analyzes environmental conditions and trends; reviews and assesses Federal programs; and recommends policies for improving the quality of our environment. All members of these two important councils in the Executive Office of the President are subject to confirmation by the Senate, and all testify as to how they arrive at their analyses and recommendations.

The Office of Economic Opportunity has been in the President's office for more than 8 years. Again, like the OMB, it assesses the impact of Federal programs and provides administrative resources and support in the poverty area. From the beginning, its director, deputy director and five assistant directors have been appointed by the President, by and with the advice and consent of the Senate.

In addition, the appointments of the executive director of the National Aeronautics and Space Council; the Special and Deputy Special Representatives of the Office of Special Representative for Trade Negotiations; the Director and Deputy Director of the Special Action Office for Drug Abuse Prevention; the Chairman and six Commissioners of the Price Commission; and the Chairman and six Members of the Pay Board are all subject to Senate confirmation.

It should be noted that Section 904(2) of the Reorganization Act (5 U.S.C. 904(2)) requires that officers authorized by Reorganization Plans be either confirmed by the Senate or be in the competitive civil service. Reorganization Plan No. 2 of 1970 authorized the transfer of all existing statutory functions of the Bureau of the Budget, or its Director, to the President with the provisions that he could then redelegate them. The Plan further provides that the OMB and the Director "shall perform such functions as the President may from time to time delegate or assign thereto"; that the Director, "under the direction of the President, shall supervise and direct the administration of the Office of Management and Budget"; and that the Deputy Director and Assistant Directors and other officers designated by the Plan "shall perform such functions as the Director may from time to time direct".

By Executive Order No. 11541, the President delegated to the newly titled Director of the Office of Management and Budget all the functions which were transferred to the President under the Plan with the further injunction that "such functions shall be carried out by the Director under the direction of the President and pursuant to such further instructions as the President from time to time may issue."

A question is raised as to whether the status and functions and duties of the Director and Deputy Director of the Bureau of the Budget remained the same (that is only the titles were changed in accord with Section 904(1) of the Reorganization Act) or whether the Plan extended or modified those functions and duties. It could be argued that the broad authority of further delegation of functions by the President and the Director in the Plan incorporated statutory authority beyond that found in the Budgeting and Accounting Act of 1921, as amended, which established the Bureau and the Director and the functions thereof.

In short, it might be argued that the Plan and the Executive Order had the effect of a new "appointment" of the Director and Deputy Director to the new agency, and thus under Section 904(2), they would have to be confirmed by the Senate. This argument becomes more serious when we find the President making the point that the creation of the new OMB "represents far more than a mere change in name" but rather "a basic change in concept and emphasis reflecting the broader management needs of the Office of the President."

Although this may be viewed as a legal technicality, or a question of interpretation and intent, it nevertheless provides just another reason why the appointments of Director and Deputy Director of the OMB should by subject to the advise and consent of the Senate.

Thus, from a review of the statutes establishing those major offices which are supposed to be close to the President in his Executive Office, we have found that all but the directors of the National Security Council, the Domestic Council and the office of Management and Budget require confirmation.

The necessity for the President having "his own man" handling national security matters on domestic policy and planning may be argued with some justification, but there is no reason in this modern day of big government, big budgets, and big obligations and expenditures to insulate the Director and Deputy Director of OMB from Senate and Congressional scrutiny.

V. GOVERNMENT OPERATIONS COMMITTEE ACTION WITH RESPECT TO THE BUREAU OF THE BUDGET AND OTHER BUDGETING AND ACCOUNTING MATTERS

The Office of Management and Budget and the functions and duties of its Director and Deputy Director are generally well known to the Congress, and particularly to the Government Operations Committee.

One of the principal areas of legislative jurisdiction of the Committee on Government Operations, as set forth in Rule XXV (j)(1)(A) of the Standing Rules of the Senate, is "**Budget and accounting measures, other than appropriations."

Since 1921, when the Congress enacted the Budget and Accounting Act, 1921, this committee has processed all legislation relating to budget and accounting. Since the first session of the 80th Congress, when the Legislation Reorganization Act of 1946 became effective, a substantial portion of all legislation processed by this Committee has involved various aspects of budgeting and accounting. In addition to processing the Budget and Accounting Act, 1950, this Com-

mittee has handled numerous amendments to the 1921 and 1950 Acts, as well as a variety of collateral legislation, and prepared major studies and reports on the subject.

The work of the Committee on Government Operations in this area is fully detailed and documented in a document entitled, *Financial Management in the Federal Government*, issued in the 87th Congress as Senate Document No. 11. This work was subsequently updated and issued in the 92nd Congress as Senate Document 92–50. A convenient summary of the Committee's activities in this area is found in Senate Document No. 31, issued in the 92nd Congress, containing a history of 50 years of the work of the committee (1921–1971).

A list of all reports, staff memoranda and hearings, together with legislation under consideration by the Government Operations Committee with respect to budgeting and accounting, and hearing on the Budget Bureau, is attached. It will show that the committee has been conducting a continuing inquiry and study of Budget Bureau issues, functions and responsibilities and accordingly it is my view that the committee is sufficiently informed in order to report out the subject legislation.

UKRAINIAN INDEPENDENCE DAY

Mr. PROXMIRE. Mr. President, January 22 marked the 55th anniversary of Ukrainian Independence. On that day 47 million Ukrainians in their country and thousands of those now living in Wisconsin celebrated the founding of an independent nation.

On January 22, 1918, thousands gathered in Kiev, the capital of the entire Ukrainian region, to proclaim that the Ukraine would now be independent. It was a great day for the freedom loving people of the Ukraine. They had finally achieved the dream of being the master of their own destiny.

Just 1 year later, on January 22, 1919, the independent Ukraine proclaimed the Act of Union at Kiev. The act served notice to all that the Ukraine would be united into a sovereign state with all the lands of the region coming together as one nation.

The life of the democratic republic of the Ukraine did not last long. In 1920 the country became part of the newly proclaimed Soviet Russia. Since that time Ukrainians throughout the United States and the world have again been trying to gain freedom and national independence for their fatherland. Here in the United States groups such as the Ukrainian Congress Committee of America, Inc. and the Ukrainian National Association, Inc. have been trying to educate and inform the public about their goal of an independent Ukraine.

Ukrainians have long struggled for freedom. Therefore I ask that Americans everywhere join with their fellow citizens of Ukrainian heritage to honor Ukrainian Independence Day.

THE SECOND INCOME PLAN

Mr. FANNIN. Mr. President, our national well-being and our ability to compete in world trade is being threatened by the erosion of America's work ethic. Too many workers are not only willing to strike, but seem eager to strike. Absenteeism is very high on some assembly lines, and workers sabotage has created serious problems. Unhappily, many workers have no pride in the product they are helping to manufacture or the service they are performing.

There is a real need for the leaders of industry and government to explore every means of encouraging working people to take an interest in and a pride in their jobs.

One possibility which may have merit is "The Second Income Plan," proposed by Louis O. Kelso, an attorney from San Francisco. Kelso says that what our country needs is more capitalism. He contends that ownership of capital is concentrated in 5 percent of our population. The other 95 percent of the population either owns no stock, or such a small amount as to have no significant income from it or stake in capitalism.

Kelso proposes that systems be established to insure corporate employees a chance to gain enough stock so that larger numbers will have a stake in the system, and will have a significant second income.

He also makes the interesting suggestion that this can be accomplished with very little government action, at no cost to the workers who will benefit, and with virtually no damage to those people who now have large amounts of stock.

Mr. President, an article concerning the Kelso plan appeared in Industry Week magazine on September 4, 1972. I ask unanimous consent that it be printed in the RECORD.

Mr. President, the Kelso plan also was discussed last December 13 on Edward P. Morgan's news commentary program on ABC News. I ask unanimous consent that the transcript of this program also be printed in the RECORD.

There being no objection, the article and news commentary were ordered to be printed in the RECORD, as follows:

UNUSUAL ROUTE TO EMPLOYEE OWNERSHIP GAINS SOME GROUND

Broad employee ownership of a company's stock is the answer to many of industry's ills such as public alienation, foreign competition, and strikes, says San Francisco attorney Louis O. Kelso. He advocates planned employee ownership of a company through a sophisticated trust arrangement.

The idea, expounded for years by Mr. Kelso, is catching on. Some 18 companies have adopted it, four more are about to implement it, and 50 others are in various stages of negotiation, Mr. Kelso says. One large corporation forced to divest itself of a subsidiary may sell it to its employees.

Two international unions have approached Mr. Kelso about possibly introducing the idea into contract negotiations. He also has designed a plan for Puerto Rico for its private industry.

Two of the firms that may adopt the idea are in the top 500 in the nation and one is in the top 100, Mr. Kelso says. One firm has 44,000 employees and the other 30,000. He maintains the idea also is catching on in Sweden, Canada, and Guatemala.

Companies which have adopted the idea or are considering it include Brooks Camera Inc., San Francisco; Katz Agency Inc., New York; Statesman's Group Inc., Des Moines; Watts Mfg. Co., Los Angeles; Congaree Steel Co., Columbia, S.C.; First California Co., San Francisco; Valley Nitrogen Producers Inc., Fresno, Calif.; and Peninsula Newspapers Inc., Palo Alto, Calif.

A trust—Employee stock ownership is built into a firm's financial structure through a trust under this plan. The trust allocates stock to employees in proportion to their income, he says, without reducing their take-home pay or savings. And they participate to a greater extent in ownership of capital without taking away from the capital of existing owners.

Mr. Kelso's approach differs from traditional employee deferred compensation plans and trusts; in effect, it "plugs" the employee into the pretax dollar stream. Under conventional corporate growth financing, interest is deductible for corporate income tax purposes. Under Mr. Kelso's plan, interest is also deductible for corporate income tax purposes as a contribution to a qualified trust.

However, using conventional corporate growth financing methods, repayment of principal is not deductible for corporate income tax purposes. Under Mr. Kelso's plan, repayment of principal is deductible for corporate income tax purposes and would require only $1 million pretax to obtain a $1 million loan.

Instead of the corporation borrowing money from a lending institution and repaying it with interest, the money is loaned by the institution to the employee stock ownership trust, which then loans it to the corporation. The loan is secured by the company issuing new stock to the trust, which repays the loan.

Mr. Kelso says there is no dilution of the existing stock held by other shareholders and contends that the company is actually in a better financial position in using the trust because it has to pay less for the loan and because of the tax breaks involved.

Broad benefits—He asserts the program also is of economic benefit because it would replace conventional retirement plans which the company has to finance.

He further contends that by instituting the plan in foreign subsidiaries of U.S. companies, nationalization of the companies could be staved off.

Besides financing corporate growth on pretax dollars and refunding outstanding debt so it can be repayable with pretax dollars, the plan also enables management to increase employee incomes without raising the costs of doing business and strengthens employee motivation and loyalty, contends Mr. Kelso.

Mr. Kelso even maintains that his plan is the answer to many of industry's woes and the nation's economic problems, including welfare, but in that case he says he's thinking about a broad application of his idea which may take two or more decades to develop.

If more capital ownership could be placed in the hands of that 95% of U.S. families who presently own no significant amount of productive capital, there could be a tremendous increase in purchasing power as well as in the growth of corporations, he says.

EDWARD P. MORGAN'S NEWS COMMENTARY ON EMPLOYEE STOCK OWNERSHIP FINANCING, ABC NEWS, WASHINGTON, DECEMBER 13, 1972

This is Edward P. Morgan, ABC News, Washington, with the Shape of One Man's Opinion. A look at the moon and taxes after this word.

How much is the moon worth? No figure would have precise meaning, of course. We reached it because it was there. Now a NASA spokesman says the United States has spent more than $26.5 billion on the manned space program, nearly all of it—$25 billion—on the Apollo series to the moon, now spectacularly ending.

It's a waste of time to argue, as some people do, that we would have been better if that

tidy sum had been spent on schools, mass transit, the rescue of the rotting inner cities and like down-to-earth projects. Congress simply doesn't reorder its priorities that sensibly or swiftly. This is not to say that our investment in the moon was nonsense. It gave us immense prestige abroad, for whatever that is worth, and the scientific revelations will continue, no doubt, to shower down for years to come.

But domestic needs are going to demand more and more revenue and this brings us to the problem of where it's going to come from and how it's going to be raised. Some revolutionary measures are called for. Ready with one solution, which might be called a revolution of common sense, is an engaging, pleasant-faced attorney and economist from San Francisco, named Louis O. Kelso. His book, "The Capitalist Manifesto," co-authored with philosopher Mortimer Adler, created something of a stir some years ago. Kelso, unaided, created something of a stir within the House Ways and Means Committee last spring when he testified that the American economy was insanely contradictory.

Kelso pointed out that it was official policy—based on the Full Employment Act of 1964—to solve the nation's income distribution problem, "sharing the wealth," solely by jobs. "Yet," he quickly added, "management (science and engineering) spend their time destroying employment."

"This is how you make a profit in the business world," Kelso testified, "This is how you free men from toil. There is lots of talk . . . about the dignity of the worker. We all know that there is no dignity in work that can be done by a machine and there is no dignity in make work. Not a trace."

That may erode President Nixon's glorification of the work ethic but it is testimony of an export. He went on to smash the ikon of the "rising productivity of labor." It is a myth, he insisted; it does not exist. Machines become more productive and in the process eliminate jobs.

The answer? The essence of the American dream, Kelso says, is possession of enough productive capital to yield an adequate private income. And he would fulfill it by affording workers stock in their companies, on credit, a "planned ownership" process. This opens a new source of capital, with tax advantages, increases the purchasing power of the stockholding worker and promises him stability in retirement he might not otherwise have.

I'll have a footnote in 30 seconds.

Economist Louis Kelso has persuaded 15 corporations to try his system, which he calls Employee Stock Ownership Trust financing. He's even got some politicians and union leaders interested, but changes—especially sensible changes—take time.

This is Edward P. Morgan, ABC News, Washington, with the shape of one man's opinion.

GENOCIDE CONVENTION DOES NOT NULLIFY THE FIRST AMENDMENT

Mr. PROXMIRE. Mr. President, some opponents of the Genocide Convention have objected that the treaty would usurp our constitutional guarantee of freedom of speech.

The Genocide Convention states in articles II and III that the direct and public incitement to commit genocide shall be punishable. The definition of genocide is given to include the act of causing serious bodily or mental harm to members of a national, ethnic, racial or religious group with intent to destroy the group as such in whole or in part.

The Committee on Foreign Relations—Executive Report No. 92–6—in a report delivered to the Senate May 4, 1971, emphasizes the importance of the word "intent" in the definition of genocide. The committee's report is a forceful refutation of the aforementioned objections to the Genocide Convention:

Basic to any charge of genocide must be the *intent* to destroy an entire group because of the fact that it is a certain national, ethnical, racial, or religious group, in such a manner as to affect a substantial part of the group. There have been allegations that school busing, birth control clinics, lynchings, police actions with respect to the Black Panthers, and the incidents at My Lai constitute genocide. The committee wants to make clear that under the terms of Article II none of these and similar acts is genocide unless the *intent* to destroy the group as a group is proven. Harassment of minority groups and racial and religious intolerance generally, no matter how much to be deplored, are not outlawing discrimination, Article II is so written as to make it, in fact, difficult to prove the "intent" element necessary to sustain a charge of genocide against anyone. (Ex. Rept. 92–6, p. 6.)

In further refutation of the charges advanced against the convention, the United States is prohibited by the Constitution from becoming party to any treaty which would supercede the highest law of the land. The Genocide Treaty would usurp no such law.

Mr. President, the United States must act on the Genocide Convention as soon as possible.

NUTRITIONAL LABELING—FDA PUBLISHES REGULATIONS

Mr. SCHWEIKER. Mr. President, on January 17 the Food and Drug Administration announced a major new program of food labeling. The new regulations include not only nutritional labeling, but also the labeling of vitamins and minerals, identification of fats and cholesterol content, standards for vitamins and minerals sold as dietary supplements and new rules for the labeling of imitation food products.

For some time, I have been particularly interested in nutritional labeling. Just a few days ago, on January 11, I introduced the Nutritional Labeling Act of 1973, S. 322. This bill is identical to a bill—S. 2734—I first introduced in the 92d Congress on October 21, 1971.

Like my bill, the nutritional labeling proposal of FDA is based on recommended daily allowance—RDA—rather than minimum daily requirement—MDR. I strongly support this because it is much more realistic and helpful to the consumer.

Unlike my legislation, however, the FDA nutritional labeling regulation is for the most part voluntary. There are exceptions, in that if a food is fortified or enriched, or a nutritional claim is made in the labeling or advertising of the product, it must have full nutritional labeling. For example, "enriched" bread and "fortified" milk would have to meet the FDA requirements on nutritional labeling.

I have serious reservations about making the labeling voluntary. I would rather see a mandatory approach. However, I am willing to wait to see whether the food industries back this proposal and label voluntarily. If a substantial segment does not adopt nutritional labeling so that consumers will have it available to use, legislation may be necessary.

I want to encourage all of those who are interested in the FDA proposals to comment on them.

Mr. President, I ask that the complete text of the FDA news release, the statement of Commissioner Charles C. Edwards and a description of the regulations, be printed in the RECORD.

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

FOOD LABELING

(Food and Drug news release, Jan. 17, 1973)

The Food and Drug Administration today announced a 12-part program expected to bring about basic and far reaching changes in the labeling and promotion of food products in the United States.

Culminating several years of study and preparation, the new program is designed to provide the American consumer with specific and meaningful new information on the identity, quality and nutritional value of a wide variety of general and special foods available in the nation's marketplace.

In addition to nutrient and vitamin-mineral labeling, the program provides for identification of fats and cholesterol content, sets standards for vitamins and minerals sold as dietary supplements and sets new rules for the definition and labeling of imitation food products. The program also consolidates and clarifies existing but piecemeal FDA regulations, affecting food labeling practices.

"The actions we are announcing today will result in the most significant change in food labeling practices since food labeling began," said Charles C. Edwards, M.D., Commissioner of Food and Drugs. "They mark the beginning of a new era in providing consumers with complete, concise and informative food labeling."

"The regulations will put into practice virtually all of the labeling recommendations of the White House Conference on Food, Nutrition, and Health. They are the result of years of work by FDA, nutritionists, scientists, industry and consumer representatives. No action in FDA's history has had more broadly-based input or been more carefully considered" Dr. Edwards added.

Dr. Edwards stressed the importance of a continuing and major effort by FDA, industry, professional and consumer groups to help consumers understand and utilize the new labeling information.

"As the program gets underway, labels will begin routinely bearing information never before seen by the average consumer. It is important for all of us to make every effort to inform consumers on how to use this new labeling to the benefit of themselves and their families," he concluded.

Four of today's actions are final orders with a 30-day period for technical comments: two provide for filing of legal exceptions; one is a clarification of a statement of policy; and five are proposals which allow public comment.

All of the actions announced today will appear in the Federal Register of January 19, 1973. All actions are scheduled to be finalized within six months. Affected manufacturers will then be required to make all appropriate labeling changes for printing of new labels by the end of this year. All foods shipped in interstate commerce after December 31, 1974 must be in full compliance.

Public comment on the five proposed regulations should be sent within 60 days to the Hearing Clerk, Department of Health, Education, and Welfare, Room 6–88, 5600 Fishers Lane, Rockville, Maryland 20852.

NOTE.—Reprints of the Federal Register documents are available to the press. Please

contact FDA Press Office, Room 3807, FOB–8, 200 'C' Street, S.W., Washington, D.C., telephone 202 962–4171.)

STATEMENT OF CHARLES C. EDWARDS, M.D.

The Food and Drug Administration today announces a major new program which we believe will make food labeling a vastly more effective aid to better nutrition for the people of this country.

This program provides an information system that American consumers will be able to use with ease and confidence to identify and select nutritious foods for themselves and their families.

I think that after you have had a chance to study the program fully you will agree that it will in fact bring about the most significant change in food labeling since food labeling began.

The new FDA program is in 12 parts. All 12 are interrelated. Some parts are final regulatory orders that signal unprecedented new initiatives in the label identification of nutrients, essential vitamins and minerals, fats, fatty acids and cholesterol.

Others are technical changes that update and improve existing FDA programs already in effect.

Together these changes will extend a regulatory umbrella over important new areas of the food labeling system and at the same time "codify" many FDA food labeling regulations into a single, coordinated, and more understandable and enforceable regulatory program.

The overall result will offer direct and significant benefits to consumers, and some of them will be apparent within the year. They include:

First, improvements in the amount of nutritional information on food labels in the retail stores where the consumer chooses food for himself and his family; and

Second, improvements in the presentation and usefulness of this information to the average shopper.

The nutrition labeling section of the new program is the basic instrument for implementing the first purpose—more and better information to the public. Fundamental to the second purpose—information more meaningful to the average consumer—is the setting of standards for identification of essential vitamins and minerals and the replacement of an outmoded system of measuring nutritional intake. The new measurement system is based not on "minimum" nutritional needs as in the past but on "recommended" daily allowances of vital nutrients.

I want to emphasize that it has taken a long time and a great deal of work to develop a sound and beneficial nutrition labeling system. The 12 documents you have in your hands are the result of years of effort by FDA, by top nutritionists and other scientists, and by industry and consumer representatives.

No effort I can think of in FDA history has had more broadly based input or been more carefully considered.

Nevertheless, we are not marking an end to our efforts here today, but a beginning. We now have a program on paper. It is scientifically sound and practically feasible. Whether it actually works to improve the nutritional well being of Americans now depends, as I see it, on three vital points:

First, the reason and the responsibility with which we in FDA implement the program that has been developed;

Second, the degree to which industry accepts the program as an opportunity to be seized rather than a change to be opposed.

And, finally—and perhaps most important—the willingness of the American people to use the new information on the nutritional value of foods that this program will make available to them.

We recognize that consumer response will take time. We in FDA accept as an immediate responsibility the need to conduct, encourage, and support a continuing and massive program to help consumers understand the new information that will appear on the labels of many hundreds of food items.

But clearly, we cannot succeed by ourselves, and we do not bear the responsibility alone.

Industry and the professions, as well as a rapidly maturing consumer leadership, must join with us to provide the public with both understanding and incentive to use improved nutrition labeling for their own health and welfare.

Just as it will take time for the consumer to respond it will also take time for industry to make necessary changes. We cannot expect that the new labeling will show up in the grocery stores tomorrow morning. It may take about two years for some parts of the food industry to make the rather extensive preparations needed to get this new program in full operation.

On the other hand, I am pleased to report that a number of major firms have already begun to tool up, and some products will reflect the new labeling in the next few months.

As you can see, I have not tried in this brief statement to go into the specifics of this program. In addition to the technical documents, you have also been given an 8-page summary which I think will be useful for orientation. In addition, we have available a number of persons here today who can provide more detailed answers to your questions.

Let me just say in closing that I believe we have taken a significant step toward enabling the people of this country to act wisely in their own best interests as consumers and as guardians of their own health.

I am confident that this program will succeed. And the benefits of success will be visible in the health and vitality of the American people for generations to come.

Thank you very much.

FOOD LABELING

In the Federal Register of Friday, January 19, 1973, FDA will publish regulations on 12 food labeling actions. The following is a brief description of each of the actions:

1. Nutrition labeling:

This is the umbrella regulation to govern when and how nutrition labeling will be used for food products. It is designed to provide the consumer with specific and meaningful information to help him determine the nutritional quality of the food he buys. Essentially it establishes these criteria:

1. Nutrition labeling for most foods is voluntary. However, if a product is fortified by the addition of a nutrient or a nutritional claim is made in the labeling or advertising, that product label must then have full nutrition labeling. Examples of nutritional claims include any reference to protein, fat, carbohydrates, calories, vitamins, minerals, or use in dieting. Any such reference will trigger full nutrition labeling. Examples of products which are normally marketed as "enriched" or "fortified" and thus would require full labeling include enriched bread or flour, fortified milk, fortified fruit juices, and diet foods.

2. The following standard format and headings are esstablished:

"NUTRITION LABELING"

1. "Serving Size."
2. "Serving per container."
3. "Caloric content."
4. "Protein content."
5. "Carbohydrate content."
6. "Fat content."
7. "Percentage of U.S. Recommended Daily Allowances of protein, vitamins, and minerals."

This format is required whenever nutrition labeling is used, to allow consumers to easily find pertinent information.

3. Levels of vitamins and minerals will be listed as a percentage of U.S. Recommended Daily Allowances (U.S. RDA). These levels have been established on the basis of two years of special dietary hearings and extensive scientific review. They replace the outdated FDA Minimum Daily Requirements (MDR) values.

4. A listing of seven important vitamins and minerals must ordinarily be included in the standard format. If a food contains less than 2% of the RDA for four or more of the seven nutrients, the manufacturer may list only those present at more than 2% of the RDA for four or more of the seven nutrients, the manufacturer may list only those present at more than 2% of the RDA, together with an appropriate disclaimer for the nutrients not listed.

5. Protein content shall be listed on all products which contain significant amounts of protein. FDA has developed a method to determine protein quality and protect the consumer from misrepresentation.

6. Because there can be unavoidable variation in the nutrient quantity of natural or raw foods, FDA's regulation allows for a statistically valid sampling plan to determine compliance of labeling with the regulations.

Although this order is a final regulation, the Agency will accept comments during the next 30 days.

2. Food label information panel:

This regulation is designed to make labeling more consistent and easier for the consumer to understand. It standardizes the location and spells out the technical details of food label information panels.

As with the nutrition labeling action, the order is a final regulation but comments will be accepted for 30 days.

3. Labeling for cholesterol, fats and fatty acids:

Labeling of cholesterol and fat is designed to help consumers who want to limit their intake of these substances. In taking this action FDA is not taking a position on the scientific debate surrounding the role of fat consumption in heart disease. Consumers, however, should be able to identify foods for inclusion in physician-recommended fat-modified diets. This regulation will accomplish that objective by:

1. Allowing use on the label of cholesterol content of the food, stated in number of milligrams per serving and in milligrams per 100 grams of food.

2. Allowing the listing of the amounts of fatty acids in grams per serving in the following three categories:

Polyunsaturated fatty acids.

Saturated fatty acids.

Other fatty acids.

The total fat content as a percentage of the total calories in the food will also be listed.

3. If cholesterol or fatty acid information is used, the following statement must also be included on the label.

"Information on fat (and/or cholesterol, where appropriate) content is provided for individual's who, on the advice of a physician, are modifying their total dietary intake of fat (and/or cholesterol, where appropriate)."

Comments will also be accepted on this final regulation during the next 30 days.

4. Special dietary use label statements:

This regulation defines the term "special dietary use". It establishes the U.S. Recommended Daily Allowance (U.S. RDA) which replaces the Minimum Daily Requirement (MDR) as the official measurement of nutritional intake. It specifies the U.S. RDA for various vitamins and minerals for infants, adults and pregnant or lactating women. The regulation is based upon the Special Dietary Food Hearings conducted by FDA during 1968–1970.

The regulation specifically sets forth five prohibitions:

1. With certain exceptions it prohibits any claim or promotional suggestion that products intended to supplement diets are sufficient in themselves to prevent, treat or cure disease.

2. It prohibits any implication that a diet of ordinary foods cannot supply adequate nutrients.

3. It prohibits all claims that inadequate or insufficient diet is due to the soil in which a food is grown.

4. It prohibits all claims that transportation, storage or cooking of foods may result in inadequate or deficient diet.

5. It prohibits nutritional claims for non-nutritive ingredients such as rutin, other bioflavonoids, para-aminobenzoic acid, inositol, and similar ingredients, and prohibits their combination with essential nutrients.

Finally, the regulation sets specific methods and formats to be followed in the labeling of products intended for special dietary use.

Hearing participants have 60 days to submit written exceptions to this order.

5. Definition, identity and labeling of vitamins and minerals:

This section establishes a standard of identity for dietary supplements of vitamins and minerals. It sets forth ground rules for a product to qualify for marketing as a dietary supplement. This regulation was also the product of the 1968–1970 Hearings.

The regulation draws a clear distinction between ordinary foods, special dietary foods intended for diet supplementation, and drugs intended for the treatment of diseases. In general, if a food contains less than 50% of the U.S. RDA it is not a dietary supplement and only nutrition labeling is potentially pertinent. If it contains 50%–150% of the U.S. RDA it is a dietary supplement and must meet the standard. If it exceeds 150% of the RDA then it can not be sold as a food or a dietary supplement, but must be labeled and marketed as a drug.

The document establishes both upper and lower limits for each vitamin and mineral which may be in a special dietary product.

Products such as highly fortified breakfast cereals which contain over 50% of the U.S. RDA will have to comply with the standards of identity for dietary supplements. The labeling of these and other such foods must comply with requirements of the nutritional labeling regulation.

Hearing participants have 60 days to submit written exception to this order.

6. Certain standardized foods, proposed nutrition labeling:

This is a technical change. The result will be that all standardized foods to which nutrients are now added will be governed under nutrition labeling, rather than under special dietary food labeling. A standardized food is one for which FDA has established a "recipe" which must be followed by anyone wishing to call the food by that name.

Thirty days are allowed for public comment on this proposed regulation.

7. Labeling of flavor, spices, and food containing added flavor:

Although FDA regulations require label declaration of "spices", "flavorings" and "colorings" when used as food ingredients, the Agency has never provided clear guidance on labeling of flavors. The result is inconsistent labeling of these constituents in finished products. The purpose of this regulation is to clarify FDA's policy and develop a labeling pattern for flavorings in foods which will be clear, consistent and informative to consumers. This will be done by specifically defining conditions of labeling, and by consolidating in one regulation all requirements for such labeling. For example, if vanilla pudding contains no artificial flavor it would be called simply "vanilla pudding." If it contains a natural flavor which predominates, with an added artificial flavor it would be called simply "vanilla flavored pudding." If both natural and artificial flavoring are used, and the artificial flavoring predominates, the name would be "artificially flavored vanilla pudding." If only artificial flavor is used, it would also be "artificially flavored vanilla pudding."

Sixty days are allowed for public comment on this proposal.

8. Exemption from food labeling requirements:

This is a consolidation and clarification of existing regulations governing exemptions from label declaration for incidental food additives.

Sixty days will be allowed for comment on this proposed regulation.

9. Imitation foods:

These proposed regulations would clarify use of the term "imitation" for food products. The White House Conference on Food Nutrition and Health, recommended that "oversimplified and inaccurate terms such as 'imitation' should be abandoned as uninformative to the public."

This proposal would require use of 'imitation' only when a food is nutritionally inferior to an imitated food product. It would set up a mechanism so that a new product which is similar to an established food product and at least nutritionally equivalent to that product, could be marketed without the use of the word imitation. This would be done by establishing a different common or usual name for the new product that is fully descriptive and informative to the consumer.

Sixty days are allowed for public comment.

10. Mellorine, parevine:

Standards of identity for two frozen desserts—mellorine and parevine—would be established by this proposal. These are the first proposed standards under the "Imitation Foods" regulation. The two products resemble ice cream, and will be required to be fortified so they are nutritionally equivalent to ice cream. They would be sold under the names "mellorine" and "parevine" with no reference on the label to either ice cream or imitation. Full nutrition labeling will be required for these products.

Sixty days are allowed for public comment.

11. Label declaration of ingredients in standardized foods:

In this statement of policy, FDA clarifies its position on ingredient labeling for standardized foods. The Agency points out that although it does not have statutory authority to require disclosure of mandatory ingredients, it urges manufacturers, producers and distributors to make such disclosure in the interest of providing more informative labeling for the consumer. FDA also reiterates its position that it has authority to require label declaration of optional ingredients of standardized foods. The Agency is amending its regulations to require such listing.

12. Prospective requirements for manufacturers, packers, and distributors of foods:

The January 19 actions on food labeling will require extensive labeling changes by the food industry. To assure that these changes are made expeditiously, and yet cause as little economic hardship to industry and consumers as possible, FDA is proposing uniform mandatory dates for the new labeling. FDA's proposal would require any labeling ordered after December 31, 1973, to be in compliance, and would set December 31, 1974, as the date on which products shipped would be required to conform to all new requirements.

Thirty days are allowed for public comment.

CIVIL SERVICE COMMISSION TO HEAR TESTIMONY ON DISMISSAL OF A. ERNEST FITZGERALD

Mr. PROXMIRE. Mr. President, at long last, A. Ernest Fitzgerald will have a public hearing this week before the Civil Service Commission on his illegal dismissal from the Air Force.

This case goes back to the fall of 1968 when the Joint Economic Committee invited Mr. Fitzgerald, who was then a civilian employee of the Air Force, to testify on military procurement. In response to a question, Mr. Fitzgerald acknowledged that the cost overrun on the C–5A program could reach as high as $2 billion.

The witness did not volunteer that information. He did not pass secret documents to the committee or commit indiscretions or improprieties of any kind. He simply told the truth when asked a straightforward question. The cost overrun on the C–5A did reach an estimated $2 billion, a fact that was consciously and wrongfully concealed from Congress and the public for many months.

FITZGERALD PENALIZED FOR COMMITTING TRUTH BEFORE CONGRESS

But Mr. Fitzgerald's problems began at the moment he "committed truth." Shortly afterward, his civil service tenure was taken away. Within weeks his responsibilities for examining costs on major weapons systems were removed. His new assignments included examining the overruns on bowling alleys in Thailand and in Air Force mess halls. The disciplining and punishment of a Government employee for the sin of talking candidly to a committee of Congress was in process.

In 1969, Mr. Fitzgerald was fired from the Air Force. The explanation given was that his job had been eliminated in an economy move.

It is clear to me that the firing of Ernest Fitzgerald was intended as a reprisal for the testimony he gave to the Joint Economic Committee. The interest in this case has been heightened recently by a similar situation now unfolding in the Navy. Gordon Rule, a civilian official in the Navy, was invited to testify before the Joint Economic Committee on December 19, 1972. Mr. Rule testified, with the express permission of his superiors, and responded in a candid fashion to the questions that were put to him. Mr. Rule is now suffering the consequences of the retaliatory actions taken by the Navy as a direct result of his congressional testimony.

These instances are of course personal tragedies for the individuals involved who must fight the powerful apparatus of the bureaucracy or acquiesce in the loss of their jobs and of their careers.

The damage done to the integrity and authority of Congress is much greater. Congressional prerogatives are under attack and being questioned in a variety of areas. Nothing undermines the role and function of Congress more than the arrogant and contemptuous behavior of agency heads and bureau chiefs who intimidate and penalize their subordinates for exercising their responsibility as Government employees and their constitutional freedom of speech by giving testimony to committees of Congress.

FEDERAL LAW PROTECTS CONGRESSIONAL WITNESSES

The law is supposed to protect individuals who are invited to appear before a congressional committee. Title 18, section 1505, of the United States Code provides in part as follows:

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any Joint Committee of the Congress; or,

Whoever corruptly, or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House, or any Joint Committee of the Congress

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

JUSTICE DEPARTMENT FAILS TO ENFORCE LAW

The most notable thing, perhaps, about this law is that the Government has failed so far to enforce it. I asked the Justice Department to act to protect Mr. Fitzgerald's rights, and it has refused to act. Clearly, Mr. Fitzgerald was disciplined and fired as a result of his congressional testimony, in violation of the law. The Justice Department and the Attorney General have taken no steps to investigate or bring before the bar of justice the wrongdoers in the Fitzgerald case.

CIVIL SERVICE COMMISSION DELAYS HEARING

The failure of the Civil Service Commission to act swiftly in this matter is also notable. Mr. Fitzgerald promptly filed his appeal before the Civil Service Commission and asked for a public hearing. The Commission refused to hold the hearings in public. The Commission wanted a closed door, secret session. Mr. Fitzgerald objected and insisted that the hearings be open to the public.

Mr. Fitzgerald was entirely correct in demanding a public hearing, and I fail to understand what motivated the Civil Service Commission in the denial of that request. Mr. Fitzgerald had to pursue his case before the courts and it was only recently that the U.S. Court of Appeals ruled in Mr. Fitzgerald's favor. The Court of Appeals, in other words, found that the Civil Service Commission was wrong in denying a public hearing to Mr. Fitzgerald.

COURT SUPPORTS FITZGERALD'S DEMAND FOR PUBLIC HEARING

The U.S. Court of Appeals stated in its opinion:

That we regard an open or public hearing to be a fundamental principle of fair play inherent in our judicial process cannot be seriously challenged.

And—

In administrative hearings, the rule of the open forum is prevailing.

The court went on to say:

Due process requires that the Fitzgerald hearing be open to the press and public.

The court of appeals clearly admonished the Civil Service Commission for taking the unreasonable and arbitrary position that the Government was entitled to wrap a shroud of secrecy around the Fitzgerald hearing. The Commission's insistence that the hearing be secret was calculated to conceal the facts surrounding the Fitzgerald affair from the public. Thanks to the U.S. Court of Appeals, the Commission is now required to hold the hearing openly. But the Commission has obstructed Fitzgerald in his search for justice in several other respects. It has dragged its feet to insure an agonizing, slow administrative review. For example, the court of appeals issued its opinion vindicating Fitzgerald's request for public hearing on September 15, 1972. The Civil Service Commission had an option to either appeal the ruling to the Supreme Court within 30 days or commence public hearings. Instead of promptly holding the hearing that Fitzgerald had waited so long and worked so hard to obtain, the Commission waited until about the middle of October to obtain an extension from the court of appeals so that it could have more time to decide whether or not it was going to appeal the decision. The extension was granted, and in the middle of November, the Commission requested a second extension so that it could further deliberate over its decision to appeal or hold hearings. At that time the court of appeals informed the Commission that it would not grant further extensions to the Commission.

CIVIL SERVICE COMMISSION FURTHER DELAYS HEARING

Undaunted, the Civil Service Commission in mid-December applied to the Supreme Court for yet a third extension of the time within which to appeal the September decree. The extension was granted. Finally, earlier this month, the Civil Service Commission decided not to appeal the September decree and to hold the hearings that will begin this Friday.

CIVIL SERVICE COMMISSION IMPEDES INVESTIGATION

The Commission has impeded Mr. Fitzgerald in other ways. It has not helped Mr. Fitzgerald or his attorney to obtain documents and information from the Government. It has refused to require Government officials outside of the Air Force to appear as witnesses in the hearings, despite the fact that several officials have actual knowledge of some of the circumstances surrounding the decision to fire Fitzgerald. The Commission has even refused to require some Air Force officials, whose presence was requested by Fitzgerald, to appear as witnesses.

The Commission has taken no steps to permit Mr. Fitzgerald or his attorney to interview or confer with any of the Government officials who will appear as witnesses in the case or who have actual knowledge about it. No provision has been made to allow Mr. Fitzgerald to take prehearing depositions of witnesses or to direct questions in writing to them. As a result, Mr. Fitzgerald's first opportunity to talk to the persons familiar with the facts will be when they appear as witnesses.

In short, the Civil Service Commission has failed to enable Mr. Fitzgerald and his attorney to properly investigate the case, has obstructed the investigation by not requiring a number of Government officials to appear as witnesses, and has caused lengthy delays to occur.

The refusal of the Commission to hold the hearings in public has resulted in years of delay. It is now 1973. Mr. Fitzgerald was fired, as I mentioned earlier, in 1969. The delay in this case, in my judgment, is inexcusable. It raises serious questions about the capacity or willingness of the Civil Service Commission to act quickly and effectively to protect the rights of Government employees who come under attack because they testify candidly before committees of Congress.

The Civil Service Commission was wrong in refusing to hold open and public hearings as requested by Mr. Fitzgerald, and I hope that it will not attempt to hold hearings in secret in the future when Government employees request that they be open.

The injury done to Mr. Fitzgerald by the Commission's unwarranted position is incalculable. First, there is the delay and the burden imposed upon Mr. Fitzgerald to seek other work and to somehow pick up the pieces of his career.

Second, as the facts grow cold with age and officials leave Government service, it becomes more and more difficult for Mr. Fitzgerald to reconstruct the events that led up to his dismissal and to obtain testimony from individuals with actual knowledge.

We will all be watching the hearing scheduled to commence on Friday, January 26, 1973, with great interest to see whether the wrongs committed against Mr. Fitzgerald are righted.

I ask unanimous consent to have printed in the RECORD a column written by Mike Causey, which appeared in the Washington Post, of January 17, 1973.

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

FIRED PENTAGON AIDE WINS HEARING

A. Ernest Fitzgerald will get his long-sought open hearing on charges that he was fired illegally from a top Pentagon job for blowing the whistle on an alleged $2 billion cost overrun in an Air Force contract. The decision to open up the controversial case before the Civil Service Commission could affect hundreds of pending and future job-action cases in government.

Fitzgerald fell into disfavor with the Air Force shortly after he told Sen. William Proxmire (D-Wis.) at a hearing that the Air Force had blown the taxpayers money by improperly monitoring a contract.

Within a brief time, Air Force decided to cut costs with a one-man layoff, with Fitzgerald the one man laid off.

Fitzgerald appealed the dismissal to the Civil Service Commission on grounds it was a punitive firing, and demanded his accusers face him in an open hearing. CSC at the urging of the Justice Department, said its practice was to continue hearing adverse action appeals in private, to protect witnesses and reputations on both sides.

The former Air Force executive took his case to the U.S. Court of Appeals, which gave the government until Jan. 13 to order the open hearing, or appeal the case to the Supreme Court. The government has decided not to make the appeal, and so will stand by the lower court ruling.

This means that Fitzgerald's still unscheduled hearing before a CSC appeals examiner will be open to the public and press.

Meanwhile, the Civil Service Commission is re-examining its rules on hearings to determine if the Court of Appeals order was limited to the Fitzgerald case, or if it means

any federal worker hit by an adverse action can also demand an open hearing.

CSC's appeals examiner, after hearing both sides, may rule against Fitzgerald, saying the firing was legal, or against the Air Force, ordering the one-time employee reinstated. Either party may then go to the Board of Appeals and Review, and finally, if they will hear the case, to CSC's three commissioners.

Fitzgerald has been a critic of CSC while working as a consultant to the House Health Benefit Subcommittee. It charged that CSC had, in effect, its own cost-overrun with Blue Cross-Blue Shield, granting the giant health insurance organization big premium increases in 1972 in the federal health program.

The Blues won the big increase by projecting a loss in the federal program. As it turned out, the carrier had a multimillion dollar surplus and this year was ordered to cut premiums.

If Fitzgerald's hearing goes all the way to the top of CSC, its three commissioners would be hard-pressed to rule against him because it would open them to charges that they, like Air Force, were persecuting a worker who pointed out some warts.

INTERNATIONAL TRADE

Mr. BROCK. Mr. President, the State of Tennessee has shown considerable leadership in recent years in the area of international trade. A recent article in the Journal of Commerce points out some of the efforts underway on this front.

I commend both the public and private sector leadership in Tennessee which has made possible these programs.

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:

[From the Journal of Commerce and Commercial, Jan. 15, 1973]

TENNESSEE STEPPING UP INTERNATIONAL ACTIVITY

NASHVILLE.—Tennessee, among the nation's top 10 in international trade, plans to bring its big guns into play this year in an effort to move up a notch.

These big guns, state officials said, are its growing international banking setup, a developing river navigation system and its ports, and a trade-conscious administration that wants to see the state increase its international trade activities.

WATER TRANSPORT POTENTIAL

Although still possibly 10 years away, Tennessee, nevertheless, is going to point up to foreign investors, during the months ahead, the water transportation potential of the soon-to-be-started Tennessee-Tombigbee waterway that, when completed, will cut short by several hundred miles the present water route for exports and imports to and from the Gulf.

Long before the waterway has been completed, Tennessee officials predict that foreign investors, seeking to utilize the waterways for movement of raw materials and finished products, will have the use of some new ports to move their goods.

In recent months, Tennessee's international activity has been strengthened by the growth of its foreign banking activity which now amounts to almost 20 per cent of the banking operations in Nashville and Memphis, and which is expected to climb by another 5 per cent this year.

"WE ARE VERY ENCOURAGED"

Officials of these banks claim that they are handling more financial transactions for foreign and domestic firms than ever before, and they are fielding dozens of important inquiries from potential investors from many countries on how to invest in the state.

"We are very encouraged by this development," said state International Director, Stephen McLean. "Our banks have done a tremendous job for us, and, combining their effort with the state's international development program, we are reasonably confident that we will come up with an excellent investment year in 1973."

Mr. McLean also cited the role of the banks in helping to sponsor the state's mission to Russia and to several other Eastern European nations last year, which turned up some promising markets for Tennessee goods, as well as for future investment by some of these countries in Tennessee.

GROWING INTEREST

Tennessee also has a growing interest in the African nations, and sees good reverse investment potential in this area. The state plans to send a mission to that part of the world in order to explore the situation, and to make recommendations to the state on how Tennessee can work out some profitable transactions there.

Presently, Tennessee has no permanent offices abroad, mainly because the state is not yet convinced that the setting up of such offices is the best way to develop international markets or investment possibilities.

"We still feel that the personal contact with our prospects via trade missions may be the best approach," said Mr. McLean. "However, we have not closed our eyes to the matter. We are looking at the whole picture, and we will make our decision later."

Mr. McLean feels that completion of the Tennessee-Tombigbee will boost the state's international trade prospects.

Meanwhile, the Port of Memphis, gaining on St. Louis as the major port on the Mississippi, is handling an ever-increasing flow of foreign commerce by seabarge.

ADDRESS TO JAYCEES' BOSSES NIGHT BANQUET AT SPARTANBURG, S.C., ON CEASE-FIRE AGREEMENT IN VIETNAM

Mr. THURMOND. Mr. President, tonight I will make an address in Spartanburg, S.C., at the annual Jaycees' Bosses Night Banquet, at which I will speak on the Vietnam cease-fire agreement. I ask unanimous consent that excerpts from the text of that speech be printed in the RECORD.

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

EXCERPTS OF REMARKS BY SENATOR STROM THURMOND

In less than 24 hours, the United States' costly involvement in Vietnam will be history. President Nixon's ultimate goal of peace with honor, so elusive to his predecessors, has been realized. No longer will our brave young men be asked to fight—and perhaps give their lives—in Vietnam. When the President made the fateful anouncement Tuesday night, people of all political persuasions breathed a long sigh of relief. Thank God it's over.

The most immediate and most gratifying aspect of the peace agreements is the return of our prisoners-of-war and an accounting of the missing-in-action. We have all shared in the grief of families who have been deprived of their husbands, fathers, and sons. We will rejoice when they are reunited. We will weep with those who are not so fortunate.

I commend the President for having the courage to insist on peace with honor under trying circumstances. There were those who demanded peace at any price. I regret to say that some of my colleagues tried to undercut his sincere and wise course of action. Some who command national attention likened the President to Hitler and charges of dictatorship reverberated from the Senate chamber.

But President Nixon refused to be sidetracked from his chartered course. The agreements to be signed tomorrow will put these critics to shame. Once again, prudence and wisdom have triumphed!

I spent over two hours Wednesday at the White House going over the details of the agreement. There has already been and will continue to be debated over the propriety of the complex document.

I admit that there are some ambiguities. There are some generalities. But taken as a whole, the meaning is clear: South Vietnam's government will remain intact. Internationally-supervised forces will oversee free elections in which all participants will be involved. An International Control Commission made up of four neutral nations will make sure complex military stipulations are honored. The agreements make gradual military slowdown inevitable.

These are goals the President has insisted on all along. We have enabled the South Vietnamese to stand by themselves. The letter of the agreements is clear. The spirit of the agreements is the unknown factor.

We have known the Communists to break agreements before the ink was dry. We have learned the hard way that they cannot be trusted. In order for these agreements to work, the North Vietnamese, the Viet Cong and their allies must abide by their signed pledge. We will do our share. They must do their share.

Just as we fulfilled our responsibilities in war, we must now turn to responsibilities of peace. There are those who would have sold this nation down the river by demanding peace at any price. They would have divided us. But the great majority of our people stood behind our leaders and their patience has been rewarded.

As the President has said, it is now a time for reconciliation. Let us stop shouting at one another. Let us respect the other's belief—however different they may be from our own. Let us solve our differences with reason rather than in the street.

When the war was raging, this nation was tested. Despite the conflict and turmoil, we met our commitment. Today, it is my sincere hope that we stand on the threshold of peace, as the President has said. We must seize this opportunity remembering the lessons of the past and the goals of the future.

HARRY S TRUMAN

Mr. McGEE. Mr. President, I wish to express my sadness over the recent death of President Truman, a man of great strength and courage.

Harry S Truman was a very uncomplicated man who demonstrated a remarkable capacity and ability to deal with complex problems facing the world and this Nation in the post-war era. He served his Nation in war, but was the architect of peace. Considerable controversy still centers around his decision to go into Korea with American troops. Yet, one can hardly disagree that it was his vigorous leadership and decisive action which has resulted in unheralded economic prosperity in Europe and rapprochement with Soviet Russia.

The aftermath of World War II left the old balance of power completely destroyed. The war had ruined several great powers, and left a vast political vacuum. In addition, two of the victorious nations—England and France—were so

weakened by the conflict that they could no longer continue their historic roles in the balance of power. Perhaps never before in history had so much violence been done to the infrastructure of world stability.

It was within this chaotic setting that the United States was forced to assume a world leadership position, a decision that Harry Truman never hesistated to make. For, as President Truman realized, unless the world's power balance is restored following a war, few—if any—meaningful strides can be taken toward an improved world community. The realization of the need for a power balance led President Truman to accept the commitments necessary to counteract the enormous power of the Soviet Union. This he did quickly and decisively. He broke the Soviet blockade of Berlin. He laid out the Truman doctrine to confront the Soviet threat in the Middle East. He formed NATO to block Soviet expansion into Western Europe. And through the Marshall plan, he prevented the economic collapse of Europe. Under his administration, the United Nations was born.

On the domestic front, Harry Truman demonstrated an intense compassion for the people of this country. His domestic program included major civil rights, labor, and social welfare legislation. Yet, President Truman remained ahead of his time. It was not until the 1960's that this Nation enacted legislation to meet these human needs.

Harry S Truman acted with strong conviction and accepted full responsibility for his actions. Throughout his life of public service he exhibited honesty, compassion, and fairmindedness. But, above all, Harry S Truman was a man of the people who never forgot the people. We will surely miss this great man.

THE NATION'S FOREIGN POLICY

Mr. FANNIN. Mr. President, important decisions must be made in the near future concerning our Nation's foreign economic policy. Hard decisions and hard bargaining lie ahead.

In the years just after World War II the United States was so dominant in world trade that we could virtually ignore foreign economic relations. Political relations were foremost in the minds of our Government leaders, and we could afford to be generous in trade agreements.

That situation began to change by the mid-1950's and it should have been evident by the 1960's that trouble was ahead. The Kennedy round of trade negotiations was supposed to ease trade problems, but it only compounded them as far as the United States is concerned. We demolished our barriers to imports but got nothing in return.

In 1971 we had our first trade deficit of the century. This was not an aberation, but the obvious start of a trend. In 1972 our trade deficit plunged even deeper. Now we are faced with the necessity of importing large quantities of fuel to meet the energy crisis. This will multiply our trade problems.

The time has come when we must put trade and economic policy on the front burner in international relations. We have squandered the great advantages that we had in the late 1940's, and our foreign economic policy must now take precedence over foreign political policy.

One of the most knowledgeable men concerning the problems facing American business is Fred J. Borch, chairman of the Board of General Electric Co.

In the January issue of Nation's Business he discusses some of the reasons why foreign industry has been able to gain such a great advantage over U.S. industry. Mr. Borch points out how the laws, taxes and attitudes of the governments in other major trading nations work to expand corporations and to encourage exports. In the United States, we have laws which prevent the growth of efficient trading companies, our tax system puts us at a disadvantage in world trade, and there is an attitude of antagonism that is encouraged against business.

Mr. Borch suggests that the United States negotiate tough but fair new trade agreements which will tackle the problems of border taxes and other trade barriers now putting our industry at a disadvantage.

Mr. President, the article by Mr. Borch has abundant food for thought on the trade problem. For the benefit of my colleagues who will be helping make decisions on this serious issue, 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:

WE MUST HAVE EQUAL RIGHTS IN INTERNATIONAL TRADE

(By Fred J. Borch)

Today, we in effect have no foreign economic policy worthy of the name—only foreign economic relations. Unless we evolve one—independent of political policy, and very quickly—tomorrow's international economic problems will make today's look like high school textbook exercises.

Our starting point must be a realistic recognition that other industrialized and advanced nations of the non-communist world have long since put trade and offshore investment at the very center of their policies, as we have not.

One striking effect of this is the way our trading partners are able to insulate their export prices from inflation. Between 1964 and last year's first quarter, our domestic price index rose 33 percent while the average rise in prices of our exports was 26 percent—a spread of only seven points. But in Japan, for example, the spread was 28 points. Her domestic inflation was 52 percent but her export prices—even after upvaluation of the yen—rose only 24 percent.

It is important to note that about one job in eight in our production industries depends on exports—and that in other countries, the employment dependency is substantially greater.

How much real output from each country goes into exports? What might the answer suggest to us about the importance of trade expansion (or contraction) to a national economy and employment levels?

In the production sector, from 1964—when our foreign trade was healthy—up to now, exports have accounted for about 15 percent of increased U.S. economic activity and creation of production jobs.

But our trading partners have done better.

All, or almost all, such growth in Canada, Italy and Britain came from export expansion. In Japan, one third of production improvement was similarly based; in Germany, about 60 percent; and in France, over 50 percent.

Without a growing world trade, these countries' strong domestic growth could not have occurred—and, in some cases their economies might well have moved backward.

How did they do it? And what corrective policy can the U.S. follow to keep itself afloat and get the international order into a semblance of long-term parity and balance?

Let us look at some differences in attitudes between these other countries and the U.S.

We might well begin with a "psycho-political" illustration.

Far from regarding large manufacturing and financial corporations as natural antagonists of government or the public, most of our trading partners view them as engines for pulling the national economy forward. They work from the fundamental premise that the bigger and more diversified the corporation, the more likely its continuing contribution to national growth objectives.

This view of the corporation as politically "neutral" but economically and socially "positive" is shared in these countries by most government administrators, legislators, union leaders and members of the general public. So long as corporations carry out their growth function—increasing employment, raising the general living standard and expanding the economy—they are encouraged to expand and assisted to secure added resources on relatively favorable terms.

A second point of difference which follows logically is the encouragement of a larger scale of operation and mergers in order to have corporations that are big enough to be internationally competitive or even dominant.

Most interesting, this urge to merge is beginning to cross international boundaries in highly sophisticated industries. Integration in computer technology is now taking place between the French government-owned CU, Philips of Holland, and Siemens of Germany. In time, these integrated businesses will probably be merged into a single corporation—and later on, it's quite possible that Britain's government-controlled ICL will join the same team.

Contrast this creation of large-scale worldwide competitive units with the present effort of our Justice Department to dismember one of the world's most effective international competitors, IBM, not to mention the Hart bill in Congress to break up the larger companies in seven major industries deeply involved in international competition.

The greatest boon imaginable for our major foreign competitors and their governments' trade policies would be breaking up successful U.S. companies which have demonstrated their ability to compete offshore while holding onto the American market.

Further contrast: All of us who participate in manufacturing businesses in Europe and Japan are well aware of long-term tax deferral through use of long-term reserves and provisions accounts, not to mention complete forgiveness of taxes in foreign subsidiaries.

These governments, with their high budgets and expensive social policies, are of course just as anxious for revenue as our own. But so long as the reserves and provisions are demonstrably reinvested in corporate, i.e., national growth, nobody would consider regarding them as loopholes. The necessary tax revenues are secured, not from corporate resources, but from levies on the consumer and, in lesser degree, high personal income taxes.

Our contrary tax policy—depending so heavily on taxing income the moment it's earned and so little on taxing consumption—brings with it contrary effects. It makes our would-be exporting companies significantly less competitive. It inhibits

modernization of plant and facilities because our relatively low recovery rates on depreciation offer much less incentive to investment.

These incentives will be still further reduced if, in the closure of so-called tax loopholes, our investment credit, the present depreciation schedules, and the DISC all disappear. The result will simply be a still less competitive U.S.

There is contrast in another area: Anyone who has recently watched the Japanese must be impressed by their determination to get such low-wage, mass production industries as consumer electronics assembly and textiles out of their homeland. And also by their drive, with powerful governmental encouragement, to expand new and promising markets by building plants in Latin America, Asia and even the Soviet Union. Germany is doing much the same thing.

They are doing it for returned earnings to the home country; for export markets for higher-value components and materials produced at home; and for efficiently produced finished goods as imports to the home market.

What a difference from Burke-Hartke and kindred legislative proposals!

This country's corporations, already limited since 1965 in their foreign direct investments, are under threat of much more severe curbs that can only lose us export markets (costing U.S. jobs in the process); fuel the fires of cost-push inflation; keep the national genius and labor bottled up; and phase down our own foreign earnings, which—right now—are the major bright spot in this nation's balance-of-payments situation.

And here's still more contrast: protection and encouragement of so-called "critical" industries through nontariff barriers.

One of the most prevalent is allocation of nonmilitary purchases by foreign government procurement agencies to their domestic manufacturers at prices that guarantee an acceptable return on investment. Among the favorites are products and equipment that go into government-owned public utilities, transportation systems and government-owned manufacturing plants. Under this system, outside competitors find themselves simply unable to bid.

The result is high prices for such equipment—well above competitive levels—in the home country. This enables the manufacturers to quote export prices in other markets such as the United States that are significantly lower (10 per cent to 50 per cent) than those paid by their own governments. If carried on by American manufacturers, this practice would drive the General Accounting Office into immediate corrective action, and the government's legal arm into the courts.

Another favorite barrier is the import quota—voluntary or otherwise. We have them, and so do they. But theirs—especially Japan's—are imposed to protect products of high technical skill and advancement which will contribute to accelerated national growth and ultimate export promise.

Let me refer to three other facets of policy that put trade at the center, and the "neutral" corporation into trade.

First are the large numbers of export aids and incentives offered by central governments.

Second, the inexorable buildup of domestic industries that have fallen under government ownership in Western Europe when private enterprise couldn't cut it. The government provides these with subsidies and with capital; it dusts them off when they fall flat on their faces. It also directs their planning, where normal industries must rough it as best they can.

Third, we must include the rapid spread of preferential agreements which effectively block out nonparticipating countries, like the U.S. Let's face it, the European Economic Community is intrinsically preferential. And what about the system of preferential trade agreements which the EEC is putting together with nonmember European and Mediterranean nations?

Thus the other industrial countries have evolved a set of rules quite divergent from ours, under which the international economic competition of the Seventies is now operating. If we are to stay in the game—indeed, if the game itself is to continue effectively—the divergences must be modified and a harmonization of rules speedily negotiated.

We cannot rely on drift. We need a policy.

That policy cannot be closing down our borders. We cannot live within ourselves. Should we try, our economy and our employment will come up short.

For all the noise we hear about imports, the bulk of what we bring in today—and henceforth—cannot be naturally or economically supplied inside our borders. Furthermore, we face an energy crisis—which will substantially increase our importing needs during this decade.

What is required is recognition that until tho U.S. gets a foreign economic policy that is much more trade-centered, most things will continue to be going in the wrong direction—and more so if some of the currently espoused ideas prevail.

Let me make it perfectly clear that the "current ideas" I am talking about are the kind embodied in the Burke-Hartke bill, and similar pullbacks of our involvement in world trade. I am in sympathy with the goals expressed by many in Congress, the Administration and industry. I applaud their efforts in bringing home that the United States' economic position has changed.

So where do we go from here?

1. The U.S. must face up to the fact that the world's increasing economic disequilibrium is forcing this country—like it or not—to place foreign trade and economic policy in a very prominent place in our political and economic life—comparable to Europe and Japan.

2. Our government must recognize—as other governments have, long ago—that business and its employees are practically the sole source of the national income and tax revenue needed to provide employment and a better standard of living. This recognition will bring about a change in attitude toward business and industry, from philosophically and politically negative—at least to "neutral"; from economically inhibiting—to positive in terms of those things that promote the corporation's ability to grow, increase employment, raise the general living standard and thereby promote the general welfare.

3. Congress and the Administration must screen every domestic legislative proposal in terms of its impact in U.S. international competitiveness.

This includes social measures—safety, pollution, consumer protection, Social Security taxes, minimum wage, welfare, unemployment compensation to strikers, etc.—all of which must eventually be reflected in the cost of products. Other countries through their tax structures—especially border taxes—forgive a major part of such costs on exports but recover them by forcing imports to bear their share of domestic social costs. Not so, the U.S.

If our corporations are denied adequate resources, the net effect is to shift the whole thrust of our economy from the high end to the low end of the scale—from high-technology to low-technology, from capital-intensive to labor-intensive, where our pay structures make effective competition most difficult. And these high-technology areas are the very ones in which American ingenuity and skilled labor have enabled us to prosper and lead.

4. The U.S. must recognize that her private industries, however large, are seriously disadvantaged in competing with government-sponsored industries abroad. The U.S. government has to meet this problem in head to head negotiations with other nations.

5. The U.S. government must accept as a basic premise that the philosophy of other countries will be to shield exports as much as possible from their domestic adjustment problems, and to impose on imports as much of the cost of their socio-economic policies as they can. The easiest, most effective and most pervasive method of "exporting" these problems is via the high-rate border-tax route. That is, make goods produced elsewhere pay a tax burden of social costs that is equal to (or a trifle higher than) the burden they would carry if they had been produced domestically.

Countries which rely heavily on unrebatable personal and corporate income taxes and other direct taxes—the U.S. is the prime example—find their goods carrying a full load of social costs on domestic and export sales alike. When shipped into a border-taxing country, our goods pick up another burden of heavy indirect taxation at full rate—in the form of an across-the-board value-added tax in Europe or specific high commodity taxes in Japan—just as if their manufacture in the importing country had imposed costs on the importing society.

Turning the coin over, goods manufactured in these countries are relieved at their countries' borders of the social costs incurred in their production by straight-out rebate of indirect taxes. When these goods are imported here, since we don't go in for border taxation, they bear no imposition for our social costs, either.

It's time that the inequities in border adjustment be stopped.

The desirable way is to get agreement that discontinues the border adjustment process. If our trading partners will agree to this, we'll all bear our own social costs without passing that burden onto the shoulders of others.

But realistically, I cannot be optimistic that our trading partners will voluntarily negotiate away a *major element* of their national economic policy. And time is of the essence.

The only other way to get at equity is for the U.S. to play the same game with countries that play by border tax rules.

We also should forgive social costs on export goods, and we should impose social costs on imported goods. Realistically, the U.S. will have to make this move unilaterally. And we can call the system by its proper name—not an import surtax or a border tax, but a "social-sharing" or "social equalization" tax.

Such a tax, obviously, should not be imposed across the board, but only against those imports from and exports to those countries that place our products at disadvantage. The aim must always be a set of actions designed to ensure that all countries participate fairly in the general expansion of production and trade.

Border adjustment is one of those important nontariff barriers in need of immediate correction; but it is by no means the long-term solution to our trade problems. A true solution is one that solves the basic disequilibria in world-wide trade—particularly the U.S. trade deficit.

The other industrial nations await our initiative. As well as we, they are aware that better solutions are needed. They are still prepared to follow a U.S. lead that does not penalize their own economic accomplishments to date and promises simultaneous progress.

Our Congress must recognize this and pass legislation enabling our government to negotiate with those abroad. Then, as policy and as negotiating strategy for the U.S., I propose recognition that solutions to equity and balance in world trade can come only through expansion—perhaps a massive expansion.

From that expansion, the U.S. trade and investment balance must move in a short time to equilibrium and then, depending on the extent of our political commitments in behalf of other nations, go into surplus.

Unlike past trade expansions, the arrangements negotiated must assure that the U.S. share of the growth of international trade will rise dramatically. Now, in such a theoretical framework, what is basic for U.S. negotiators?

In the first place, we'll need an emphatic understanding in the Executive branch and Congress that our foreign economic policy will not be subordinated to international political policy or undercut by vagaries in new domestic legislation.

In the second place, it is vital that we secure agreement from our major trading partners on the targets—in volume and in time—for the new shape of world trade, and how much of it will be included in America's improving trade balance and/or returns on offshore investment. Without such an understanding I don't see how we can come to a solution.

In the third place, there is the nitty-gritty of tangible agreements. What products should our trading partners take in trade (or, for dividends and royalties remissions) that we can efficiently provide? And, what on our side can we offer as the quid pro quo so necessary to securing any mutually beneficial agreement?

For our negotiators, the challenge is to enunciate clearly and hold to an American policy committed to goals in which the U.S. will no longer lag. It is an extension of that challenge that they secure a removal of trade barriers—such as nationalistic procurement—and a forswearing of nationalistic vanities that pyramid inefficient, parochial industrial capacities under the delusion of a domestic trademark.

For our negotiators, therefore, there is still opportunity—but the opportunity will be hard-won.

For our trading partners, there is also opportunity—the kind that comes from stability, equilibrium and equity, as well as a sharing in growth and progress instead of constriction and economic warfare.

The opportunity is there—although I am far from sanguine about its possibilities of accomplishment.

The first order of America's business is to begin the formulation of an innovative, goal-directed trade policy of undisputed first priority and actionable alternatives. It must be a policy that conforms not only to the precepts of expanding trade, but also those of intelligent management. END.

WILL PRESIDENT'S INAUGURAL ADMONITIONS APPLY TO THE POWERFUL AS WELL AS TO THE POOR?

Mr. PROXMIRE. Mr. President, as we in Congress await the new budget, what many of us are wondering is if the President's inaugural admonitions will apply to the powerful as well as the poor?

Because of our financial plight the President has frozen funds for public housing, section 235 housing, and disaster loans for farmers, among others.

Now the question is, Will he do the same for the Lockheed Aircraft loan, the bail-out money for the F–14 aircraft, the stock purchase for the Gap Co., subsidies for the big farmers, interest-free deposits which the Government has in the major banks, the failure of over 100 citizens with incomes of $200,000 per year to pay any Federal income taxes at all, the bonanza's furnished the gas and oil companies, the cheap and subsidized loans provided by the Export-Import Bank, and hundreds of other privileges and subsidies in addition to welfare or housing which go out the back door?

Art Buchwald has written a column on this theme which appeared in the Milwaukee Sentinel on January 25.

Will those who receive the lion's share of Federal subsidies really be willing to substitute work for welfare, seek responsibility instead of shirking it, and ask not what can the Government do for me, but what I can do for myself?

Mr. President, I ask unanimous consent that the Buchwald column be printed in the RECORD.

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

BELT TIGHTENING REALLY NOT SO BAD

(By Art Buchwald)

I was sitting with Helmut Strudel, president of Strudel Industries, at President Nixon's inauguration last Saturday. Strudel had donated $1 million to the Committee for the Re-election of the President and had flown all the way to Washington in his private plane to see what he had gotten for his money.

As the president spoke about international affairs Strudel applauded loudly. But when Nixon started to talk about domestic matters my friend became quite upset. The president said:

"Let each of us remember that America was built not by government, but by people—not by welfare but by work—not by shirking responsibility, but by seeking responsibility."

Strudel began to perspire. "It sounds like he's not going to bail my company out of bankruptcy," he said worriedly.

"Don't be silly," I told Strudel. "When he speaks of people on welfare, the president's talking about the little guy who's freeloading on the government. He is not talking about companies that get large government subsidies."

The president said, "In the challenges we face together let each of us ask not just how the government can help, but how can I help?"

"You know, of course," Strudel whispered to me, "that my company has a contract to build 4,000 Gazebos for the U.S. Air Force at $8 million each, Well, since we got the order, Gazebos have gone up to $10 million, and unless the government helps us we won't be able to deliver them."

"Of course the government will help you," I assured Strudel. "When the president said, 'Ask not what the government will do for me but what can I do for myself,' he was talking about teachers and farmers and old people on Social Security who are always at the government trough. Contractors are not in that category."

"I hope not," Strudel said, "because I bought a $1,000 box at the inaugural ball tonight, and I'd hate for it to be empty."

The president seemed to look at us as he said, "I pledge to you that where this government should act, we will act boldly and lead boldly. But just as important is the role that each and every one of us must play as an individual and member of the community."

Strudel said, "They promised me when I made my political contribution that the White House would personally pay for the overruns on my Gazebos. But now the president seems to be hedging on it."

"That's just for the public," I assured Strudel. "Everyone knows big business is dependent on Washington, and no administration is going to turn its back on you just because you're losing money on your Gazebos."

The president read on, "Let us pledge together to make these next four years the best four years in America's history, so that on its two hundredth birthday, America will be as young and vital as when it began, and as bright a beacon of hope for all the world."

Strudel applauded as the president finished. Then he recognized Klaus Engelfinger of the National Milk Producers League "What did you think of it?" Strudel asked him.

"I think he could have exempted dairymen when he was talking about people doing more for themselves," Engelfinger said.

'And Grumman Aircraft," the man behind us yelled.

"And Penn Central," a man in a Homburg shouted.

"Why leave out Lockheed?" another distinguished guest yield.

"Or Litton Industries," a guest chimed in.

Strudel seemed to feel better. "See all you guys at the ball."

ADDRESS BY DR. WERNER

Mr. BROCK. Mr. President, last fall, Dr. Werner, chairman and president of GAF Corp., made a speech in New York City on the occasion of an award to him for contributions to and achievements in the field of chemistry.

He is concerned about the relationship of science and government and in the New York speech proposes the establishment of a technical council which would work with the Government for a better understanding and use of scientific knowledge and needs in decisions made in many major fields.

I do not know whether the council proposed by Dr. Werner is the way to solve some of the problems he raises. I do know that his speech is most thoughtful and informative and comes from a man who is not only a scientist but is an able business leader.

As some of you may know, GAF was formerly known as the General Analine Film Corp. and is now a diversified establishment which has plants in many States, several of them being in my home State of Tennessee.

Mr. President, I ask unanimous consent that Dr. Werner's address be printed in the RECORD.

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

SCIENCE, BUSINESS, AND GOVERNMENT—THE CHEMISTRY CAN BE RIGHT

Mr. Chairman, Honored Guests, Members of the Society, Ladies and Gentlemen:

I accept this honor with a deep sense of gratitude and a deep sense of humility. No man reaches this stage without the help of a great many others. This award, then, also honors the many men and women who have played a significant part in helping me attain it. Having achieved a small share of honors from various organizations throughout the years, I can attest that none are more satisfying than those awarded by one's peers. To me, this is the most important aspect of this particular award and I accept it with deep and sincere appreciation.

And I am also very grateful for the opportunity to address so august an audience. It has forced me to develop several thoughts that have been rolling around in my mind for a number of years and to forge them into a suggestion which I hope is worthy of consideration by both industry and government.

The topic I have chosen is not easy to discuss. It means acknowledging some major failings by our industry, by business in general, and by our government. To put it simply,

there is a desperate need for government and business to put science to work more effectively and more productively in determining priorities and formulating solutions for the vast problems facing the nation and the world. Although the experiences between our government and business in the past have often culminated in frustration and failure, I firmly believe that where this relationship involves technology—the chemistry can be right!

In the short space of time since by entrance into the business world, the increasing sophistication of the physical and biological sciences has reflected the characteristics of a true revolution. It has basically altered the society out of which it emerged. Its manifestation occurred in less than one working generation and the abruptness of it caught us all by surprise. And this abruptness has brought with it many unsolved problems. We have all learned that these cannot be ignored, for they simply will not vanish. Moreover, society often acts as if science can be controlled by the same old techniques and devices which it has already made obsolete. This, too, is a fallacy.

In times past, the only nations which accumulated a disproportionate share of worldly goods were those fortunate enough to be blessed with a wealth of natural resources, good harbors, and military strength. Science has made radical changes in this equation. It has become the great leveler among nations. I know of no clearer proof of this than the rise of Japan from a handcraft civilization to the third major industrial power of the world in well under one hundred years. In spite of a dearth of raw materials, the Japanese have achieved this unparalleled transformation.

Their major instrument was the immense body of know-how which science has accumulated. Intelligent use of this knowledge, laboriously developed by the United States and Western Europe, has catapulted not only Japan but also Russia into the twentieth century, and is being utilized for the same purposes in Israel, China, and Brazil. The interesting point to contemplate is that there is no basic reason why other nations, such as those of the Middle East, couldn't do the same. Moreover, when countries start to approach our technological level, they begin to add to the pool of technology and thus help to speed the revolution onward relentlessly.

Our job is to control this revolution, not by slowing it down or by inhibiting it, but by using the results wisely for the good of our country and the good of the world.

In all of the newly developed nations I have mentioned, the basic impetus for modernization by the intelligent use of scientific knowledge came from the government.

We have all envied the support and help received by Japanese, German, Swiss and French businessmen when they compete with us. At least, in my travels, I have. But I am not too sure that any of us would like the watchful eye and political and bureaucratic control into which this type of help and support ultimately develop.

One recent example that has dampened my enthusiasm for this kind of help has been the wondrous way that the Price Commission has undergone parthenogenic metamorphosis within a few short months and emerged as the Profit Commission. I keep telling myself and any government official who will listen that there are better ways to control inflation than to limit companies' profits by the sole parameters of their own historical statistics. But bureaucrats, I suppose like the rest of us, tend to become enmeshed in their own rules and in their own rhetoric.

For the problems arising from the impingement of business, technology and government, we must find a better solution than just another Presidential Commission, a kind of Japanese MITI, or central "indicative" planning as practiced by the French.

There are many who believe that technology has become a great deterrent to progress. Except in private, very few of us question the faulty logic of the many critics whose only credentials are exhibitionism and the ability to sensationalize. We are all aware of the pseudo-intellectual advocates of counter culture and the publicity-seeking, self-styled experts who have used news media, books, radio and TV talk shows and even Congressional hearing rooms to disparage all that science has brought and to urge a return to the "good old days." I wonder if they really mean what they preach and just how much they would have enjoyed the life of a peasant in the seventeenth century or a factory worker in the early years of the industrial revolution, to pick two examples of the "good old days" at random.

Having spent over thirty years in developing technology, both as a working research chemist and as a manager of a scientifically based company, trying to make a profit by satisfying the needs of man and enhancing his well-being, I find the often times enthusiastic reception of these critics highly disturbing. But I can understand it. Lack of comprehension of a field of endeavor results either in worship or in grave suspicion—worship where the commentary is always positive, as with medicine, and suspicion where the commentary is often negative. When criticism is unabated and adequate explanation and defense are weak, suspicion turns to antagonism.

But the fact of the matter is that technology, which I define as the totality of applied science, when employed to improve the quality of life, is a most important key to the future. Science and technology can provide us with the power to untangle the many knotty problems challenging us today. Let me be quick to point out that they alone will not save us. But without them we simply will not be able to resolve such urgent questions as those concerning environmental life support systems in ecology, the depletion of material and energy resources, the use of nuclear power, housing and urban planning, mass transit and transportation, overpopulation, world trade, disease control and therapy, new food and agricultural resources and so many others.

There are many sociologists who feel that science cannot contribute to the solution of the world's social ills. In fact, some feel that the onrushing developments of science are only adding to our packet of problems. Jacques Ellul in "The Technological Society" devotes an entire book to this thesis.

But if we examine history critically, we find that the advancement of science has brought with it great social benefits. It has ameliorated suffering, has lengthened our life span by orders of magnitude, has added creature comforts, has added measures of enjoyment to our lives and has spread them not only to the high and mighty, but to the lowly as well. It has provided new standards of life and freedom and independence to the entire populations of entire nations. The Cassandras to the contrary, we must continue to move ahead.

To do this, we must simply find a way to bring all of the resources available to us to work on these problems intelligently and productively. I submit that there has been a vacuum in this area, and as a vacuum tends to be filled, this one has been filled by government bureaucracy.

Government has grown in proportion to the technological revolution. As man's innovations brought radical changes in transportation, power and communications, an enormous expansion of government followed, Much of this was predicated on the need, whether real or imagined, to protect the public weal.

At the outset, our founding federal government was a modest, uncomplicated system. With the introduction of the railroad and steamboat, the sturcture of government was modified and extended to regulate new inter-state transport systems. The growth of federal power soon became apparent. Later, the telegraph, the internal combustion engine, aeronautics, radio and television each brought complicated governmental regulations, thus further swelling the burgeoning bureaucracy. Modern chemistry and pharmaceutical creative genius added new fields of food and drug controls.

The single most vigorous acceleration of government growth resulted from the exploration of the atom. When science found a major key to the secret, no one else could afford to finance its exploitation. Science and technology have not stopped finding keys—those to space and communications, for example—and so the scope of government involvement continues to grow.

There is no denying the rightful role of government in science and technology. But whether one believes the government's job is to control science to best serve the public interest or to promote the advancement of the scientific front, or both, there is no question but that it must understand the phenomena with which it deals.

The people who have the decision-making responsibilities should ideally have enough basic understanding of the scientific background of the problems they are deciding to be able to make independent judgments of both cause and effect. It is probably too much to expect that politicians, *elected* or appointed, have the kind of background, by training, experience or osmosis, that would enable them to judge the worth of evidence and the results of the varying decisions that are possible.

Yet, if somehow this does not happen, it will be just as disastrous for our nation as it has been for companies where the chief executive listened only to the most articulate partisan or to the most persistent proponent, rather than to the soundest. Somehow, we must help provide our nation's management with this kind of sound understanding of the scientific aspects of the gamut of recommendations they receive and the gamut of decisions they must make.

There have been many cases in the last decade where such sound understanding has not been too apparent, at least to many of us in industry. One might mention the Kennedy Round, the Clean Air and Clean Waters Acts, the bans of DDT, cyclamates, and hexachloraphene, the problems of phosphates and synthetic detergents, the energy problem, the Alaska pipeline, and a great many other problems of this magnitude.

In many of these instances, uninformed public opinion and politics have played too large a role. Industry has been fragmented and in many cases has been totally rebuffed and disregarded.

The easy way out is to go off into a corner and sulk. And to too great an extent, this has happened. I have heard some of my fellow executives say, "What do you expect us to do? You can't fight City Hall." I don't think we can afford this attitude. I don't think the country can afford it.

But the question is how can business work productively and effectively with government in resolving problems arising from technology? It's something akin to the couple who were having marital difficulties. They were finally persuaded to go to a marriage counselor. "Isn't there anything that you two have in common?" he asked them. After thinking a while, the wife finally said, "Yes, there is—neither of us can stand the other."

The relationship between business and government is not really as bad as that. As a matter of fact, there are many areas of mutual concern where good, sound, harmonious working relationships do exist now. And in the special area of science and technol-

ogy, a new government attitude is beginning to evolve. From my personal experience I know how much three Secretaries of Commerce, Jack Connor, Maury Stans and Pete Peterson, have helped to bring this about.

Work has begun on a completely new governmental philosophy relating to the investment of national resources in research and development as well as the processes of technological innovation. And well it must, for this most advanced of societies, powered as it is by technological achievements, cannot remain static. Otherwise, as with companies, we will begin to drop back, first slowly and then precipitously.

So much for the problem and its many ramifications. What do we do to try to solve it? At present there is no one place for either government or industry to turn in order to obtain a reasoned, rational analysis of overall science-oriented problems, let alone recommendations and alternatives with their advantages and disadvantages, in the form that a corporate Board of Directors would expect before making a major decision. As a result, universities, "think tanks" and consultants become involved. The culmination is generally ill-prepared, free-for-all, public hearings, the results of which show anything but logic or clarity.

I believe the time is ripe for a new force to enter this picture. What I would like to propose is the formation of a Technical Council which would operate at the interface of government and industry. It should be independent, politically and in all other ways, but should be available to supply sound advice to the President, to the Cabinet, and to the Congress on major problems with a scientific aspect and impact.

I would further suggest that its membership consists of chief executives of technology-based companies, those people who are perforce familiar with the larger aspects of technology through their day in and day out need to administer it for their companies. This would, in my opinion, bring a sense of reality to the decision-making process for our country and would utilize the most pragmatic group whose talents have not yet been tapped for this purpose. When I think of the resources of this group, I am not unmindful of the vast scientific capabilities of the companies that would be represented. All of this would be available to the country. It would place at the disposal of the government and the public sector a body of talent that has thus far been used primarily for private purposes.

Had such a body been available before the Kennedy Round, things might have been different. There was a diffuse Public Advisory Committee, but its main purpose seems to have been window dressing. It appears that our negotiators all but ignored it. Unfortunately, the people on the other side did their homework far more thoroughly, with far more concern for economics and the resultant effect on the advancement of their technological level in the important area of benzenoid chemicals. As a result, they got a far better deal. In the five-year period since then, imports of cyclic intermediates, dyes and organic pigments have increased 142% while exports have gone up only 55%. Last year we had a negative trade balance in dyes alone of almost thirty million dollars.

Had there been a Technical Council of the kind I am proposing, the results could have been far different. For one, our negotiators might have been able to take a totally different posture, with far more background knowledge than they had. For another, the need for strengthening our technological interests in these areas would have been considered at the highest levels. One recommendation might have been to bend our anti-trust policy slightly and allow the formation of combined facilities for the production of dyestuffs, as was done for synthetic rubber during World War II. In any event, the long-range technological interests of our country would have been considered. As it was, I am afraid they were not.

Such a Council could be a most effective instrument in helping to design workable policies that avoid many of the other pitfalls of the past. At the very least, it would analyze alternative solutions to complex problems where such alternatives are at present not even considered. It would work closely with the Office of Science and Technology and with the President's Science Advisory Committee, which are devoted to government research and government science policy.

I would visualize one basic preoccupation of such a Council to be the preservation and continued enhancement of our technological standing in the world. As we all know, this of necessity impinges on foreign policy, economic policy, anti-trust policy, policy of every kind, and so I can see far-reaching benefits in areas which on the surface appear to be far removed from science. In a way it would do for science and technology what the Business Council does in the field of economics.

There might even be some other ancillary benefits stemming from the creation of such a Technical Council. For one, it would give industry a sense of belonging. For another, it might help to reestablish industry and technology in their rightful place in society as fountainheads of progress and hope for our democracy, and not as the sinister forces about which I read continually, and where I certainly do not recognize my industry, my colleagues or myself.

In closing, I would like to thank you again for the great honor you have bestowed upon me tonight. I shall remember and treasure it always.

KIRK LEHMAN McGEE

Mr. McGEE. Mr. President, I would like to take this opportunity to announce that Wyoming's senior Senator has now become a senior citizen.

This morning at breakfast my wife Loraine and I were interrupted by a call from our No. 2 son announcing the arrival of Kirk Lehman McGee, weighing in at 6 pounds 3¾ ounces. If my memory serves me correctly, it was the first time in my life that I had ever kissed a grandmother over breakfast.

The parents, Bob and Mary McGee, are doing very well, as are the recent initiates to the Geritol set. However, in the "Spirit of '76," I would like to request of my colleagues that they send donations rather than flowers.

Mr. ROBERT C. BYRD. Mr. President, I wish to compliment my congenial and able friend, the senior Senator from Wyoming, on his having reached this new plateau in life. I speak as a grandfather of experience—my wife and I having already been blessed with six grandchildren. Senator McGEE and his lovely wife, Loraine, have now had their first taste of immortality, and life's past blessings will be as nothing compared to the future days with Kirk Lehman McGee. I might as well utter a warning for my friend from Wyoming—there is absolutely no defense against these grandchildren. They come, they see, and they conquer, and the grandparents are the first to fall under their magic spell. My congratulations to the Senator from Wyoming and his wife, and to their "No. 2" son and his wife and, of course, to this fine 6-pound boy who has just today discovered America.

CONCLUSION OF MORNING BUSINESS

Mr. ROBERT C. BYRD. Mr. President, I ask that morning business be closed.

The ACTING PRESIDENT pro tempore. Is there any further morning business? If not, morning business is concluded.

EXECUTIVE SESSION

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Senate go into executive session to consider the nomination of Elliot L. Richardson, of Massachusetts, to be Secretary of Defense.

There being no objection, the Senate proceeded to the consideration of executive business.

The ACTING PRESIDENT pro tempore. The nomination on the Executive Calendar will be stated.

DEPARTMENT OF DEFENSE

The legislative clerk read the nomination of Elliot L. Richardson, of Massachusetts, to be Secretary of Defense.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent, at the request of the distinguished Senator from Mississippi (Mr. STENNIS), to have printed in the RECORD a statement by Senator STENNIS with respect to the nomination of Mr. Richardson; a biography of Mr. Richardson; and an excerpt from the committee report on Mr. Richardson's nomination.

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

There being no objection, the statement, biography, and excerpts were ordered to be printed in the RECORD, as follows:

ELLIOT L. RICHARDSON

Mr. Elliot Richardson has twice been nominated to positions of high responsibility in government and twice confirmed by this body in those posts. I urge that his nomination, to serve as Secretary of Defense, be now approved.

In terms of responsibilities—in terms of taxpayers' money spent—the job of the Secretary of Defense is one of the most difficult in our government—perhaps in the world. However, Mr. Richardson has been serving as Secretary of Health, Education and Welfare, and has then demonstrated his ability to manage a federal bureaucracy which spends even more money.

The Senate Armed Services Committee has held hearings on Mr. Richardson's nomination. Thirteen of the Committee's 15 members were recorded in favor of the nomination and there were *no* dissenting votes. One member, who voted present, explained that he found no fault with Mr. Richardson but felt such nominations should be delayed.

CONGRESS AND PUBLIC

For his part, Mr. Richardson has expressed a desire to work closely with the Senate Armed Services Committee. He has stated his willingness to appear and testify, and he has stated that he believes candor and forthrightness are indispensable in such appearances.

Further, Mr. Richardson told our Committee that he foresees a period in which a full public understanding of the need for a strong national defense will be more important than ever before. I am confident that he will work to achieve that public understanding.

In his testimony before our Committee, Mr. Richardson has also demonstrated an understanding of the rising costs of military hardware and military manpower. He is an experienced government manager, and I hope he will be able to curb those rising costs.

NO CONFLICT OF INTEREST

As is the custom of the Armed Services Committee, Mr. President, we have attained detailed information from Mr. Richardson with respect to his financial holdings and the possibility of a conflict of interest. As a subcabinet and cabinet official, he has, of course, faced this question before.

Mr. President, it is not the custom of our Committee to publicize in great detail the financial holdings of nominees to positions within our Committee's jurisdiction. It is hard enough to find able top-level executives who are willing to serve in government without such a baring of private financial records.

I believe I can assure the Senate, however, that Mr. Richardson, by a pair of blind trusts, has effectively removed himself and his family from a position where he could serve his own financial interests as Secretary, even if he should wish to do so.

I invite the attention of the Senate to the Committee's Report on the Richardson nomination, at the middle of page 2, where this matter of financial holdings is discussed.

QUALIFICATIONS

Some of us in the Senate have been acquainted with Mr. Richardson since he served here in the early 1950's as an aide to our old friend were Leverett Saltonstall, then Senator from Massachusetts. Since that time he has demonstrated his competence at the state and federal levels of government.

I ask that a biography of Mr. Richardson be printed at this point in the RECORD for the information of Senators, and I urge that the nomination be approved.

ELLIOT LEE RICHARDSON, SECRETARY OF DEFENSE

Elliot Lee Richardson was nominated as the 11th Secretary of Defense by President Nixon on January 4, 1973.

Secretary Richardson has served as Secretary of Health, Education, and Welfare since June 24, 1970. He previously had served the Nixon Administration as Under Secretary of State from January 24, 1969 until assuming the leadership of the Department of Health, Education, and Welfare.

Secretary Richardson was born in Boston, Massachusetts, on July 20, 1920. He was graduated cum laude from Harvard College in 1941 and received his law degree, also cum laude, from Harvard Law School in 1947.

He enlisted in the U.S. Army in 1942 as a private and was a first lieutenant at the time of his honorable discharge in 1945. He served in the European Theater of Operations as a litter-bearer platoon leader with the 4th Infantry Division and landed with that Division on D-Day in Normandy. Secretary Richardson was awarded the Bronze Star Medal for Heroic Service and the Purple Heart with Oak Leaf Cluster. He is entitled to wear the Combat Medical Badge and the European Theater ribbon with arrowhead and five battle stars.

Upon graduation from the Harvard Law School, where he was president of the Law Review, Secretary Richardson served for a year as law clerk to Judge Learned Hand of the U.S. Court of Appeals for the Second Circuit. The next year (1948–1949) he was law clerk for Supreme Court Justice Felix Frankfurter.

From 1949 to 1953 and from 1955 to 1956, he was an associate in the Boston law firm of Ropes, Gray, Best, Coolidge & Rugg. In 1953 and 1954, Secretary Richardson served in Washington as assistant to Massachusetts Senator Leverett Saltonstall, who was then Chairman of the Senate Armed Services Committee. He served by appointment of President Eisenhower as Assistant Secretary of HEW for Legislation from 1957 to 1959; and as Acting Secretary of HEW from April to July 1958.

Secretary Richardson was United States Attorney for Massachusetts from 1959 to 1961, and in 1961 served as Special Assistant to the Attorney General of the United States.

From September 1961 to January 1962 and from January 1963 to December 1964 he was a partner in the law firm of Ropes & Gray. In 1963 he headed the Greater Boston United Fund Campaign.

Elected Lieutenant Governor of Massachusetts in 1964, Secretary Richardson coordinated the State's human resources programs. In 1966 he was elected Attorney General of Massachusetts and established the Nation's first State-level organized crime section.

As the Under Secretary of State from January 24, 1969 until June 24, 1970, Secretary Richardson participated in meetings of the National Security Council and was Chairman of the NSC Under Secretaries Committee. He also served as Chairman of the Board of the Foreign Service.

Secretary Richardson is the author of numerous articles on law and public policy.

Secretary Richardson has received honorary degrees from Massachusetts College of Optometry, Springfield College, Emerson College, the University of New Hampshire, Lowell Technological Institute, Harvard University, the University of Pittsburgh, Yeshiva University, Brandeis University, Ohio State University, Lincoln University, Temple University, Whittier College and Michigan State University.

He is a member of the National 4th (IVY) Infantry Division Association, Disabled American Veterans, and the American Legion.

Additionally, he is a member of the American Law Institute, the American Bar Foundation, Council on Foreign Relations, and the American Academy of Arts and Sciences. He has served as a Member of the Board of Overseers of Harvard, University and chairman of the Overseers Committee to Visit the John F. Kennedy School of Government; and as a member of the Overseers Committees to Visit the Law School, the Medical School and School of Dental Medicine, the Department of Government, and the Harvard University Press. He was also a Director of the Harvard Alumni Association, 1957–60.

Further, Secretary Richardson is a former trustee of Radcliffe College and the Massachusetts General Hospital; President of the World Affairs Council of Boston; Director of the Salzburg Seminar in American Studies, the Massachusetts Bay United Fund, and United Community Services of Metropolitan Boston; and member of the Advisory Committee, Massachusetts Council for Public Schools, and the Executive Board, Boston Council, Boy Scouts of America.

Secretary and Mrs. Richardson, the former Anne F. Hazard of Peace Dale, Rhode Island, were married on August 2, 1952. They have three children: Henry Nancy and Michael.

NOMINATION OF ELLIOT LEE RICHARDSON

COMMITTEE ACTION

Mr. Richardson's nomination was forwarded to the Senate on January 4, 1973, and referred to the Committee on Armed Services on January 8, 1973. The committee conducted hearings on January 9, 10, 11, and 15, 1973, in public session, during which the committee carefully scrutinized the nominee's credentials and qualifications. After full consideration, the committee found the nominee eminently qualified for the position of Secretary of Defense. In executive session on January 16, 1973, the committee voted to report favorably on the nomination of Mr. Richardson. Thirteen members voted in the affirmative. One voted present. There were no negative votes.

QUALIFICATIONS

Mr. Richardson is currently serving as Secretary of the Department of Health, Education, and Welfare, a Cabinet position for which he was confirmed by the Senate on June 23, 1970. He had previously served as Under Secretary of State, a position for which he was confirmed by the Senate on January 23, 1969.

Mr. Richardson's record of management of the Department of Health, Education, and Welfare is outstanding. The committee was particularly impressed with his demonstrated administrative skills in managing a large Department with budget authority currently exceeding that of the Department of Defense. That experience which involved the administration of many separate agencies will be of extreme value in managing the Department of Defense.

The committee is convinced of the nominee's integrity, his outstanding ability, and competence.

Mr. Richardson's biographical sketch as provided to the committee is contained on pages 2 and 3 of the published hearings.

WILLINGNESS TO TESTIFY

On January 15, 1973, the nominee again appeared before a special hearing of the committee and was interrogated at length on his willingness to appear and testify before Senate committees. He pledged emphatic compliance with the resolution of the Senate Democratic conference which requires nominees to make, as a prerequisite to confirmation, a commitment to appear before Senate committees, when requested. The testimony of the nominee is contained in the record of hearings wherein he expresses his willingness and cooperation when called.

FINANCIAL HOLDINGS

The committee has determined that if the nominee is confirmed as Secretary of Defense, his financial holdings will not conflict with his performance of duties in that office. The committee would observe that in early 1969 when Mr. Richardson assumed the duties of Under Secretary of State under his agreement with the Foreign Relations Committee, his investments were placed in a "blind" trust. Mr. Richardson's proposal, which the committee finds completely acceptable for handling of his financial holdings upon assuming the duties of Secretary of Defense, is set forth in detail in a letter to the chairman of the committee and is printed on pages 98 and 99 of the hearings on his nomination.

Under this arrangement, Mr. Richardson has directed the trustees of the "blind" trust to sell within 90 days after assuming office all of the stocks with one exception which are contained on the so-called statistical list of the Department of Defense, which sets forth all companies doing business with the Department of Defense in an annual volume of $10,000 or more. There is one stock which the trustees made known to the committee but not to Mr. Richardson for which permission was requested for his retention of this stock on the basis of its extreme remoteness of producing any conflict even though it is technically on the master list. The committee, after examining in detail the circumstances, agreed that there would be no objection to the retention of this particular stock.

It should be noted that in December 1972, Mr. Richardson established an irrevocable trust with his wife and children as beneficiaries. He has no reversionary interest in the income or corpus of his family trust. Mr. Richardson directed that the trustees of his own "blind" trust transfer to the family trust securities of a certain total amount. Mr. Richardson does not know the names of the securities which have been transferred to the family trust. Neither does Mrs. Richardson or the children know the identity of the stocks in the family trust. There are certain

stocks that are on the so-called Defense statistical list. The trustees have been directed not to invest for the family trust in any companies on the list, during the period he may serve as Secretary of Defense.

The committee has concluded that this arrangement complies with committee rules on this matter.

CONCLUSION

The committee agrees that Mr. Richardson is fully qualified in all respects to serve as Secretary of Defense and favorably reports this nomination recommending the nominee's confirmation by the U.S. Senate.

LEGISLATIVE SESSION

Mr. ROBERT C. BYRD. Mr. President, I move that the Senate resume the consideration of legislative business.

The motion was agreed to, and the Senate resumed the consideration of legislative business.

ORDER FOR RECOGNITION OF SENATORS McCLELLAN, JACKSON, AND ROBERT C. BYRD ON MONDAY NEXT

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent, on Monday next, following the recognition of the two leaders or their designees under the standing order, that the distinguished Senator from Arkansas (Mr. McCLELLAN) be recognized for not to exceed 15 minutes; that he be followed by the distinguished Senator from Washington (Mr. JACKSON) for not to exceed 15 minutes; and that he be followed by the junior Senator from West Virginia (Mr. ROBERT C. BYRD) for not to exceed 10 minutes.

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

ORDER FOR TRANSACTION OF ROUTINE MORNING BUSINESS ON MONDAY NEXT

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent, following the recognition of the aforesaid Senators under orders previously entered, that there be a period for the transaction of routine morning business on Monday next, not to extend beyond the hour of 1 p.m., with statements therein limited to 3 minutes.

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

AUTHORITY FOR CERTAIN ACTION TO BE TAKEN DURING THE ADJOURNMENT OF THE SENATE

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Vice President, the President pro tempore and the Acting President pro tempore may be authorized to sign all duly enrolled bills and joint resolutions during the adjournment of the Senate over until Monday.

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

RESUMPTION OF THE PERIOD FOR THE TRANSACTION OF ROUTINE MORNING BUSINESS

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that there now be a resumption of the period for the transaction of routine morning business, for not to exceed 15 minutes, with statements therein limited to 5 minutes.

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

SENATOR BIDEN'S SERVICE AS PRESIDING OFFICER

Mr. ROBERT C. BYRD. Mr. President, I wish to invite attention to the fact that the distinguished junior Senator from Delaware (Mr. BIDEN), who is 100th in juniority in the Senate, is presiding over the Senate today with a degree of dignity and skill which is as rare as a day in June.

This young man who came to the Senate falls into the category of Henry Clay and the late Rush D. Holt, of West Virginia, each of whom, I believe, was elected to the Senate at the age of 29. He has assumed important duties on the Steering Committee and on the Public Works and Banking, Housing and Urban Affairs Committees. He has been present and has been giving of his time and efforts and talents; and I predict that, at his age, he can be proud of having been 100th in juniority and, God willing, that the time can come, may come, and hopefully will come when he will someday be No. 1 in seniority.

I congratulate him on the effectiveness with which he is presiding over this body. This is one of the tasks that we all have to perform from time to time. Senator BIDEN has very willingly and graciously accepted this task, is eagerly performing it, and he is doing it well.

EXECUTIVE SESSION

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Senate return to executive session.

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

NOMINATION OF ELLIOT RICHARDSON TO BE SECRETARY OF DEFENSE

Mr. THURMOND. Mr. President, it is my hope that the nomination of Mr. Elliot L. Richardson for the position as Secretary of Defense will be confirmed with dispatch.

The Armed Services Committee held comprehensive hearings and determined that he is eminently qualified for this very important position. As a participant in those hearings, I think it important to note that at no time was any question raised about the integrity, ability, or character of the nominee.

Mr. Richardson has served as Undersecretary of State and thereafter as Secretary of Health, Education, and Welfare. His appointments for these two important positions required the advice and consent of the Senate. I would emphasize, Mr. President, that the Senate did confirm him on these two previous occasions.

As Under Secretary of State, Mr. Richardson gained valuable experience in U.S. foreign policy and in matters affecting our national security interests. Such background is extremely valuable for anyone who assumes the responsibilities of the defense establishment.

As Secretary of Health, Education, and Welfare the nominee has broadened his knowledge to include our domestic needs and priorities. He has provided able leadership through the Department of Health, Education, and Welfare which is composed of many separate agencies. This background too, will prove a valuable asset if he is confirmed as Secretary of Defense.

During the course of the hearings, Mr. Richardson assured our committee that he has no preconceived blueprint for administering the Department of Defense. The testimony in the record of hearings indicate to me that he will study the problems carefully before making important decisions. The record shows that Mr. Richardson will consult with the Joint Chiefs of Staff on military matters.

The nominee has a keen awareness of our fundamental concept of civilian control over the military, as provided in the Constitution. Mr. President, the record also indicates that the nominee is prepared and willing to testify and cooperate with the Congress when requested to do so. More importantly, the nominee has testified that it is his expectation to work very closely with the Senate Armed Services Committee and that he will seek its advice and judgment.

Finally, Mr. President, the testimony of the nominee expressing concern for the morale of our people in uniform is reassuring. I agree with him that without proper discipline we cannot have an effective military force.

In conclusion, I would like to quote a statement during the hearings with which I wholeheartedly agree:

"It is, I think, fair to say that a strong and effective military posture has never been more critical to the security of the Nation than it is right now."

Mr. President, I ask unanimous consent that the statement on behalf of Mr. Richardson which appears in the Senate hearings of January 9, 10, 11, and 12, 1973, by the distinguished Senator from Massachusetts (Mr. BROOKE), which appeared at page 103 of the hearings, be printed in the RECORD.

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

STATEMENT OF HON. EDWARD W. BROOKE, U.S. SENATOR FROM MASSACHUSETTS

Senator BROOKE. Mr. Chairman, and members of the committee, I thank you for your courtesy and for giving me this opportunity to introduce Mr. Richardson. It gives me profound pleasure to introduce him, the nominee of the President-elect, for the position of Under Secretary of State.

Elliot Richardson is no stranger to Washington. He served President Eisenhower as Assistant Secretary of Health, Education, and Welfare and as U.S. attorney for Massachusetts. He was a valued assistant to my distinguished predecessor, Senator Leverett Saltonstall. He has twice been elected by the people of Massachusetts to serve as Lieutenant Governor and attorney general.

In his capacity as Lieutenant Governor, Elliot Richardson drafted special messages to the legislature. His ideas in many instances became public policy.

Elliot Richardson is an avid and understanding student of foreign affairs. He brings to his new duties an inquiring mind, good judgment and, perhaps most important of all,

fresh perspectives and a receptivity to new solutions for old and vexing problems.

I might add, Mr. Chairman, that he received his training at Harvard University Law School, where he was the distinguished editor-in-chief of the Harvard Law Review.

I would like to commend both the man and his record to you and urge you to grant prompt and hearty confirmation to an able and effective public servant.

Mr. THURMOND. Mr. President, I urge my colleagues to support prompt and favorable action on the confirmation of Mr. Elliot L. Richardson as Secretary of Defense.

STATEMENT ON NOMINATION OF ELLIOT RICHARDSON TO BE SECRETARY OF DEFENSE

Mr. PASTORE. Mr. President, I should like to associate myself with all of the favorable statements that have been made about Elliot Richardson to become the Secretary of Defense. Mr. Richardson has had a wide range of experience; there is no question about it. He is conversant with the Federal Government and parochial problems, as well having served in the State government of his own beloved State of Massachusetts. Also, as indicated here time and time again, he has been associated with the State Department, and lastly, of course, with the Department of Health, Education, and Welfare. There is no doubt at all about the intgerity and the ability of Elliot Richardson, and I do not think anyone on this floor would dare to impugn it in any way.

But I want to make this statement. There have been a lot of wild rumors about what is going to happen to some of the naval and other military installations throughout this country.

There is no quesion in my mind that with the cessation of hostilities in Vietnam some changes will be made, and there will be some cuts in the defense budget. But I call upon the sense of fairness of Mr. Richardson and this administration to go deeply into what the repercussions will be if their actions becomes too drastic.

Many of our States are in fiscal trouble, so much so that we had to have a revenue-sharing program in order to alleviate the burden that rests upon the backs of local taxpayers. Unemployment is higher in this country than we really desire it to be.

So my appeal this afternoon to Elliot Richardson is that when he does become, and he will become Secretary of Defense, that he intensely scrutinize some of the parochial situations that will result not only in my State, but in his State and in many other States; and I hope whatever changes we make we do not make them merely because so-and-so is chairman of such-and-such committee. I hope we begin to take into account the welfare of the American people; and that we will conserve some of these military installations, because of the tremendous technology and efficiency that prevails there.

I hope also that we will study very carefully the economic impact on the local communities involved before any changes are made.

I make this appeal today without any incrimination, recrimination, without any venom or criticism on my part against anyone. I am only appealing this afternoon for fairness because our people are disturbed; rumors are running wild. I hope whatever we do we do in such a fashion as not to hurt the people or the families too much; that we do this in such a way that the pain will be the least.

As I said, I second everything the Senator from South Carolina said about Elliot Richardson, because I know he is a qualified man, an honest man, and I trust he will be a very fair man when it comes to meting out these changes to be made.

LEGISLATIVE SESSION

Mr. ROBERT C. BYRD. Mr. President, are there further statements to be made on the nomination at this time? If not, I ask unanimous consent that the Senate return to legislative business.

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

RESUMPTION OF PERIOD FOR TRANSACTION OF ROUTINE MORNING BUSINESS

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that there now be a resumption of the period for the transaction of routine morning business with statements therein limited to 10 minutes.

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

OUR DISTINGUISHED MAJORITY WHIP VIEWS THE SENATE

Mr. HUMPHREY. Mr. President, our colleagues will enjoy reading an interesting and perceptive address on the workings of the Senate, by the distinguished Senator from West Virginia, ROBERT C. BYRD.

This address was given at the National Limestone Institute's 27th annual convention. Accustomed as we are to reading academic and journalistic analyses of how the Senate functions, it is indeed refreshing to read such a scholarly and revealing analysis by its majority whip. It is a forthright and honest statement, reflecting the views of a forthright and honest man. I commend it to my colleagues.

Mr. President, I ask unanimous consent that the text of Senator BYRD's address, from the fall 1972 issue of Limestone, be printed in the text of the RECORD.

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

THE SENATE—AS SEEN BY THE MAJORITY WHIP

My script begins as follows: "Mr. Chairman and Gentlemen." Walt Whitman said that "man is a great thing upon the earth and throughout eternity, but every jot of the greatness of man is unfolded out of woman." Woodrow Wilson said that he wouldn't give the snap of his finger for any young man who was not surrounded by a bevy of admiring females. So let me express my pleasure—and I know that you share it—in saying, "Mr. Chairman, Ladies and Gentlemen." And especially am I pleased to see a fellow West Virginian, Dyke Raese, and his lovely wife, Mrs. Raese, in attendance. This is an unexpected pleasure and one which I am very, very happy to have. I also want to express appreciation, Mr. Chairman, for the invitation to appear here today, and I express my gratitude also for your courtesy in allowing me to have accompanying me a member of my staff, Mr. John Gonella, who is seated at the right at the end of the table.

It is always satisfying and a great deal less frightening to a speaker to be asked to address himself to a subject with which he is familiar and in which he possesses at least a modicum of knowledge. When your President suggested as the title of this brief talk "The Senate as Seen by the Majority Whip" and told me that this luncheon would be held in the Congressional Room, I knew I would feel somewhat at home.

I'm delighted to be the guest of the National Limestone Institute, Incorporated, and to be with men who represent their Industry in many parts of the United States. As a member of the Senate Democratic leadership and as the Majority Whip, I would like to talk with you for a little while about the inner workings of the Senate and how we conduct our everyday business. Vice President Aaron Burr referred to the Senate as "a citadel of law, of order, and of liberty." Webster, in his reply to Haines in 1830 referred to the Senate as "a Senate of equals, of men of individual honor and personal character and of absolute independence." Legion and varied are the characterizations of the Senate in its near 200 year history and there never was a Golden Age of the Senate unless it was, perhaps, during the period of Webster, prestigious Great Triumvirate when Webster, Calhoun and Clay were leaders in the great debates over States' Rights, Slavery, and Separation of Powers; or during the years of the late '70's when it consisted of men who, in the opinion of Senator Hoar, when they went to the White House, it was to give advice and not to receive it.

Whatever the period in Senate history, the role of that body has unquestionably been one of *prime importance to the Nation*—of such vital importance that it can be called, in Gladstone's words, "that remarkable Body—the most remarkable of all the inventions of modern politics."

Perhaps I should make a brief comment about the Office of Whip. What is a Whip in the Parliamentary sense? It derives from the British Parliamentary System. The earliest Whips appear to have been sent to the King's friends in the House of Commons in 1621. At first these messages were referred to as "circular letters." The circular letter was a secret letter. Later they became better known as "whips". By the 1760's the British procedure of the circular letter, or whip, was firmly established. The business of whipping was, in the very early days, kept as secret as possible—at least this kind of whipping, if I may be facetious. The term "whip" later came to be applied to the officers or deputies who dispatched the message. Consequently, not only the message itself is today known as the whip, but also there are Chief Whips and Deputy Whips in the British Parliament. Edmund Burke in the late 1700's compared the messengers who were sent out to bring supporters of the King from the north of England to the whipper-in employed by fox hunters to look after the hounds and to keep them from straying in the field.

The Whip System in the United States Senate is less well-structured than that which exists in the Mother Country of England. The first Democratic Whip in the United States Senate was chosen in 1913, and there have been, in all, 14 Democratic Whips in the Senate. The first Senate Republican Whip was chosen in 1915, and there has been a total of 11 Republican Whips since that time. My functions as Senate Majority Whip are, as I see them:

1. To assist the Majority Leader in carrying

out the Party's Program as determined by the Democratic Policy Committee and the Democratic Conference, or Caucus as it is sometimes called.

2. To stay on the floor at all times, enforce the rules, and keep the legislation moving.

3. To assist in the scheduling of legislation for floor action.

4. To keep Democratic Members informed of impending votes. And

5. To assist in the polling of Senators, if the Majority Leader desires, and in the marshalling of votes if he desires.

In the Senate, the official leadership includes the Majority and the Minority Leaders, the Majority and the Minority Whips, the Democratic and Republican Policy Committees, and the Chairmen of the various Standing Committees. Of course legislative leadership in the broader sense is not limited to the formal leaders. Some members give the Congress outstanding leadership in certain areas although they are not official party leaders. I will concern myself here mainly with the role of the formal leadership. Although the official leaders are responsible for legislative programs and procedures, their duties extend far beyond the scheduling of legislation and calling it up for consideration on the Senate floor. The exact duties of the Majority and the Minority Leaders and the Whips are not set forth in any law. The powers and the responsibilities of these officials have evolved and changed with the times, with the character, composition and traditions of the Senate, and with the abilities and the personalities of the occupants of the leadership offices.

The principal function of the majority leadership is to attract a majority vote within the Senate for all legislative measures important to the country and bearing the stamp of the Majority Party. The Majority Leader, working with the Party Whip and the Democratic Policy Committee and various committee chairmen, plot the strategy which will hopefully result in victory. Legislative strategy has many important aspects. To be reasonably successful, the leadership must look at the total potential of a given session. Timing is of the utmost importance. For example, a vote on a bill or on an amendment which might be in jeopardy if brought up one day may shift if delayed for 24 hours or 48 hours, or just enough time for absent Senators—who may be out of town and running for President—to return, or for votes to change, which they sometimes do for a variety of reasons. Balance is also important. For example, if a program is too ambitious it will bog down. The leadership cannot go for the kill on every bill. It must work out a comprehensive legislative program as early in the Session as possible and then drive for its enactment.

The first step in the successful disposition of a bill is in the committee to which it is assigned. Committees and committee chairmen who do their work well, naturally, are the most successful. First of all, they are better able to explain the legislation. Secondly, they earn the respect of their colleagues. If they habitually report well-considered legislation, their colleagues will find it out. And all of this helps immensely.

The job of promoting legislation after it has been reported from committee begins long before it is called up for floor action. The Whip, as I say, should poll members to determine just where they stand. In other words, how many are for the bill, how many are against the bill, and how many are undecided. When the Whip report is in, the Leaders should go to work checking, double checking, talking to members whose votes they must have to win. They must keep on until they feel that they have a hard count of members sufficient to give the bill a better than average chance on the floor. They have in this endeavor from the committee that reported the bill and from other members strongly interested in its enactment. They often get assistance from the Administration, especially when it is of the same political faith. They also get help at times from organizations favorable to the legislation, and from citizens generally who happen to be interested.

The job of selling legislation is indispensable to the whole legislative process. A Leader has no more important role. Various techniques, of course, are used. The Majority Leader may prefer to talk the matter over with members one at a time—or sometimes in small groups. Where a detailed explanation is required, he may call on the committee chairman or on one of his members, or on one of his staff.

Ultimately every bill, of course, before enactment comes to the floor of the Senate for debate, amendment and passage. This is the most written-up part of the legislative process. It is generally the most dramatic. But I have a feeling that the most important part of the process is the least understood. The Senate is a workshop as well as a debating society—as well as a springboard to the Presidency! I should think that ten votes are won by hard work and planning to every vote that is won by oratory. The most important thing in the process of passing a bill is having the members who are favorable to the bill on the floor when the vote comes. Otherwise all planning and groundwork, all committee hearings, all lobbying and pressure will come to naught.

Whenever it is inevitable that a vote is going to be tight, the leadership exerts great effort to make sure that members will be in the Capitol on the day that the vote is taken. No stone is left unturned to see that this is done. And my experience convinces me that in all highly controversial bills this is the most critical step in the legislative process. This is the time, this is the place to save legislation, to kill crippling amendments, and above all to pass desirable amendments. The leadership must have the right members at the right place and at the right time.

Indispensable to the leadership's role is knowledge of our workshop and of the Senators who work in it. As I indicated earlier, the principal job of party leaders is to implement the legislative programs of their parties. They are responsible at every procedural step from the moment a bill is introduced until it passes or is otherwise disposed of by the Senate. They are responsible to the Senate and to the country for legislative failure at any stage. They must step in, formally or informally, whenever and wherever difficulty occurs. The job of bringing together the various programs of a whole legislative session to a successful conclusion and of driving them forward to the President's desk falls primarily on the elected leadership. The work must be planned well in advance. And in the last three or four Congresses, on bill after bill, timing has been the difference between victory and defeat.

Legislative leadership requires the stubbornness of a mule and the patience of a Job. A bill should never be programmed unless, and until, the bill is ready for the Senate and the Senate is ready for the bill. Many examples could be cited. Early in the Administration of President Kennedy the President lost his bill to create a Department of Urban Affairs because he insisted, in spite of the contrary advice of the leadership, that it be brought to a vote before the groundwork essential to its passage had been done. Time and time again my experience has shown that when the leadership programs a bill whose time has not yet come, the results are disastrous. This is the responsibility of the leadership, and the leadership cannot escape it. The leader must know the issues and he must know the members. His is the hardest and the most important lobbying job in the country. Every major controversial bill in LBJ's Great Society Program required days and days, sometimes weeks and weeks, of patient work: contacting members one by one; getting other members to contact members; getting the President, the White House Staff and Departmental personnel to contact members; getting organizations at the grass roots level to contact members, until the majority of votes in the affirmative could be counted. Sometimes even this fails.

Then the legislative leader must know how and when to compromise, for compromise is an essential ingredient of the legislative process. Had the leaders of the 89th Congress, for example, not been willing to compromise, the Housing Bill, the Aid to Elementary and Secondary Education Bill, the Medicare Bill, the Farm Bill, and the Water Pollution Bill, to name only a few of the big ones, would never have been passed.

You may be wondering as to how legislative policy is made. Policy is determined largely by events, by circumstances, and by the needs and the moods of the people. But in the final shaping of legislative policy by the Executive Branch plays a tremendous part, as you know, and so does party politics. In the Senate the Democratic Policy Committee, together with the Majority Leader, Committee Chairmen and other leading Senators, will determine party policy as to the scheduling of legislation and as to the form which that legislation will have when it reaches the floor. For example, with regard to tax policy the Democratic Policy Committee may ask the Chairman of the Finance Committee, Senator Long of Louisiana, to appear at a Policy Committee meeting at which time the tax legislation will be discussed. Other financial experts such as Senator Proxmire, tax experts in the present Administration or in a former Administration, may be asked to appear before the Policy Committee. As a result of these discussions the Democratic Policy Committee may then decide on a particular course of action.

Unanimous consent agreements play a very important part in the legislative process in the Senate. Without such agreements, and with the Senate rules allowing free and quite unlimited debate, much more time would be consumed in the passage of major legislation than is often the case. As the Majority Whip, I work out many of these agreements, after consulting with the Majority Leader, the Minority Leader, the manager of the given bill, the ranking minority committee member, and the various Senators who have amendments to propose. A unanimous consent agreement is an agreement placing a limitation on time for debate on the bill and a time limitation on all amendments and motions regarding the same. Moreover, practically all legislation of a noncontroversial nature is called up by unanimous consent and enacted without debate, thus saving the time of the Senate. In this regard, I have reference to private bills, most nominations on the Executive Calendar—which run into the thousands—and bills that are not of general interest.

"What is the role of associations and lobbyists in the inner workings of Congress?" you may ask. Someone in an English class once asked, "What is the difference between the words 'misfortune' and 'calamity'?" The professor answered, "If a Washington Lobbyist falls off the Roosevelt Bridge and drowns, that is a misfortune. If, on the other hand, someone jumps in and rescues him, that is a calamity."

Which organized group or association has the most powerful lobby and the most effective lobby in Washington? Would it surprise you after this presentation to hear me say that it is not the National Coal Association? Well, neither is it the American Legion, nor is it the American Farm Bureau Federation.

It is not the Association of Real Estate Boards. It is not the American Medical Association or the National Limestone Institute, Incorporated. It is not the United Federation of Postal Clerks or the Association of American Railroads. It is not even the AFL–CIO, or the National Association of Manufacturers, or the NAACP. But they're all powerful, aggressive and effective lobbies. The turth is: the foremost lobbying group, the most effective lobbying group, the most effective shaper of legislative opinion is the Federal Government. Regardless of what party is in power, the White House and the Administration are hands down, the most effective lobby in Washington.

One thing is certain. Most lobbies have recognized the truth of the contention that legislative victories are not always won on the playing field of the Senate floor. Rather they are usually won behind the scenes through legislative education of Senators and staffs by way of the telephone, or by personal visits to see Senators, or by testimony in the Committee Hearing Rooms, even if they are not smoke-filled. Perhaps the words "legislative educators" or legislative architects" would be a far better descriptive term for the job than is the word "lobbyists". The fact is, the principal role of a lobbyist is to educate and to supply information in the field in which he is a specialist, and to bring to the attention of legislators facts that probably otherwise would never be brought to bear on a particular legislative function or situation. This role contemplates bridge building between industry, or union members, and their legislators; crystalization of industry or labor, or other points of view; the transmission and the communication of such views in general; and hard spade work with the professional staffs of Members of Congress and the many committees thereof. Without such supplementary professional assistance and the aid of educating legislators, our democratic system of representative government probably would not work as well as it does.

"What part," you may ask, "does arm-twisting and pressure from special interest groups play in the inner workings of the Legislative Branch?" When Lyndon Johnson was Majority Leader of the Senate, arm-twisting perhaps reached its highest perfection. As the Majority Leader he did not hesitate to use every power at his command to persuade, cajole, threaten, and, if necessary, intimidate where possible, Members who did not move with alacrity to support the leadership position. Mr. Johnson was a superb Majority Leader in many ways. On the other hand, Mr. Mansfield is the exact opposite of Mr. Johnson with respect to arm-twisting and pressure techniques. Mr. Mansfield never makes any attempt whatsoever to pressure any Member. He uses the technique of persuasion, but he makes it perfectly clear that every Member is expected to vote his own conscience and go his own way without any fear of retribution. There is something to be said for each of the two types of leaders.

As to pressure from special interest groups, it is often quite effective, especially when a particular pressure group has supported an incoming Senator in his first race for the Senate. For example, if the AFL–CIO should contribute, let us say $10,000 or $20,000 to an individual who is making his race for the first time for the Senate, that individual, if elected, will probably in later years never forget the help he received when he needed it most; and from then on, following that initial election, the chances are that he will be somewhat influenced in his votes by the position of the AFL–CIO. Also I think it can be said that many groups wield influence that is greatly out of proportion to the number of votes they can actually deliver in an election. But, nevertheless, there are some Members of Congress who undoubtedly follow the directions of such pressure groups rather than take any chances of alienating that particular organized block vote in their States.

Speaking of Lyndon Johnson and arm-twisting, I would like to cite a little example of the techniques as he used it so expertly, even after ascending to the Presidency. During the debate on the 1964 Civil Rights Act, I was opposed to some provisions in the bill and I made my decision to vote against the bill in view of the fact that it was not possible to amend it in ways that would make it conform to my own point of view. A lengthy filibuster developed, and the Administration put forth a major effort to invoke cloture and to break the filibuster—an effort which ultimately met with success. I was interested at the time in having the Administration send up to the Senate the name of a certain West Virginian for appointment to a Federal District Judgeship. My recommendation had languished at the Justice Department and at the White House for a considerable length of time. One day the telephone rang and President Johnson said to me, "How bad do you want this Judgeship?" I replied, naturally, that I was very interested in it and wanted it. The very next thing he said was, "How are you going to vote on the Civil Rights Bill?" My answer was that I could vote for certain sections of the Act, but, in view of the bleak possibilities for cutting out the objectionable features, I would have to vote against the Bill.

He then suggested that I go ahead and vote against the Bill if I wished, but that I first vote for cloture so that a vote could be reached on the Bill, I responded by saying. "Well, Mr. President, if a thief breaks into your home and you can only find a stick of stove wood, you'll use that stick of stove wood. It's your last resort. And the last resort of those of us who oppose this Bill in its entirety is the so-called filibuster. Therefore I will be there when the vote on cloture occurs. I would not vote for shutting off the filibuster."

He then suggested he could send me on a trip somewhere in the world to carry out some special function which, of course, would be expected to get me a lot of favorable publicity back home, at the time the cloture vote occurred so that I could be absent and miss the vote. Whereupon I stated that I would be present when the cloture vote occurred even if I had to be carried into the Senate on a cot. I said, "I will not let Dick Russell down." "Well," he said, "you love me as well as you do Dick Russell, don't you?" I said, "I certainly do, but I can't be on both sides of this question at the same time, so I'll have to be there and I'll vote against cloture and, of course, against the Bill." He said—after a good half hour of the most expert application of this kind of arm-twisting torture and torment—"Well, Bob, I still love you and your Judgeship will be sent up to the Senate the first of next week."

But there is no gainsaying that arm-twisting has had its reward when applied in the right place and at the right time. It has also been known to backfire. Sometimes an entirely incidental thing will cause a Senator to change his vote at the last minute on a controversial matter. For example, several years ago when the controversial nomination of Mr. Lewis Strauss for a Cabinet post was before the Senate, I fully intended to support the nomination until one morning when it was called to my attention that a syndicated columnist, whose column was widely read throughout the country, had stated that John L. Lewis, the late UMWA chieftain, had my vote, as a coal state Senator, in his pocket and that I would vote for Mr. Strauss. Immediately, I made up my mind to vote against the confirmation. I naturally did not want anyone to believe that the famous labor leader could control my vote.

Votes occur from time to time which cause a member considerable anguish in the process of making up his mind. For instance, when Thurgood Marshall was nominated to the office of Associate Justice of the U.S. Supreme Court, I wanted very much to vote for Mr. Marshall, especially in view of the fact that he would be the first Negro to be appointed to the highest tribunal. I had voted against the 1964 Civil Rights Act, I had voted against the 1965 so-called Voting Rights Act, and I felt—among other things—that it would be politically wise, from the standpoint of the Negro vote, for me to balance things up, make things even, and support the Marshall nomination. Consequently, I asked my staff to prepare a Senate floor speech supporting the nomination. I had conflicting emotions about Mr. Marshall's nomination, however, in view of his quarter of a century of service with the NAACP. Realizing that many civil rights cases would be coming before the Court, I felt that Mr. Marshall's 25 years of activities—and that is a long time—as Chief Legal Officer for the NAACP would influence his decisions in civil rights cases. Additionally—and probably more importantly—I did not like what I considered to be his overly liberal record as a Federal Judge in the Second Circuit Court of Appeals, for which position I had supported him in the Senate. But, as I say, I had made up my mind—partly for political reasons—to support his nomination.

On the night before the vote, however, after I'd gone to bed I lay awake thinking about the nomination. Suddenly the thought dawned upon me—and I don't know why it had not occurred prior thereto—but the thought dawned upon me that if Mr. Marshall were a white man I would not support his nomination because of his record as a Judge. I then made up my mind, and without any difficulty, that that being the case I would not vote for him just because he was a black man. The next day I came to the Senate, personally wrote a different speech explaining my opposition to Mr. Marshall, and voted against him. And, incidentally, his record as a member of the United States Supreme Court, I think, has substantiated my concerns prior to that vote—and I could say the same about some others.

Perhaps I should say a few words about the legislative drafting of bills. Most of the drafting is done through the Office of Legislative Counsel at the request of Senators, that office being composed of professional legal specialists in the art of legislative drafting. The Senator or a member of his staff informs the specialist regarding the type of bill the Senator wishes to introduce, what he wishes to accomplish, and the Legislative Counsel then proceeds to draw up the bill. Of course many bills are developed and written in the committee which has jurisdiction over the subject on which the legislation is desired.

Any discussion of the inner workings of the Congress would be incomplete without some reference to the Conference Committee. Sometimes referred to as the Third House, this is one of the most important and vital links in the legislative process. It is made up of conferees who are named by the Presiding Officers of both Houses, and its purpose is to resolve differences between the two Houses with respect to any bill or joint resolution. Often when I was a Member of the House of Representatives, I would say, "Thank God for the Senate." Often while serving in the Senate, however, I have been given cause to say, "Thank God for the Conference Committee." Because it is in the Conference Committee where politically-motivated, unwise, and unsound amendments are often stripped from bills. The Conference Committee meets behind closed doors, there is no transcript of what is said, and no record to show how conferees vote. Here is where the art of com-

promise is at its apogee—but without it, more bad legislation would reach the President's desk for signature than is now the case.

In this limited time, I hope that I have been able to give you an additional insight into the inner workings of the Congress. And if some of you have a few questions I'll take a few minutes in an attempt to answer them.

I would offer one caveat: the true measure of a Congress is not so much in the number of laws that are enacted as in the quality of the work that is done. Voltaire stated the case quite succinctly: "A multitude of laws in a country is like a great number of physicians: a sign of weakness and malady." Tacitus put it this way: "When the State is most corrupt, the laws are most multiplied."

I'd be glad to try to answer your questions for a few minutes.

Q. Senator, would you please explain pairing to us?

A. There is nothing in the Senate rules which provides for pairs; but as a result of practice, custom, tradition, the pairing procedure is utilized. A "live pair"—and of course all pairs are live—we do refer to "live pairs" and "dead pairs", but the live pair is all that counts. The dead pair is simply a stating in the record of "Mr. Jones, who would have voted 'Aye' if present, paired with Mr. Smith, who would have voted 'No' if present." It doesn't have any effect on the votes at all. It simply states for the record what positions Mr. Jones and Mr. Smith would have taken had they been present. That's for the record, and I think it serves a good purpose.

The live pair involves two Senators in connection with a vote that requires only a bare majority vote; it requires three Senators in connection with a vote that requires a two-thirds majority. And for our purposes, the explanation will suffice to say that a Senator who is going to be absent may reach an agreement with a Senator who is going to be present—but who stands on the opposite side of the question—to withhold his vote and not let the vote be counted, but to announce when his name is called that he has a pair with the absent Senator. The Senator who is present would say, "Mr. President, on this vote I have a live pair with the distinguished Senator from West Virginia, Mr. So-and-So. If he were present and voting he would vote 'Aye'. If I were permitted to vote, I would vote 'No'. I, therefore, withhold my vote." Both positions are stated in the record, and the absent Senator can claim to his constituents that his vote, in effect, counted—which it did, because he kept the Senator in attendance from voting. This is the pairing procedure.

Incidentally, may I say that pairs may be counted for the establishment of a quorum. In other words, if 49 Senators vote on the question and two Senators who were present paired, a quorum is present. And even if there's a division vote—let's say three Senators are on the floor and there's a division. Two Senators stand in favor of the question and one Senator stands in opposition to it. The "Ayes" have it and it is adopted by a vote of 2 to 1. If only three Senators were present—not a majority by any means—from the standpoint of the validity of the action it is not necessary that a quorum be present. Of course if the point of no quorum is made, then it becomes vital that there be a quorum.

Q. I assume in the pairing where the absent Senator cannot be there and the one who is present can be, it's rather understood that in a reverse circumstance this Senator who could not be present would return the favor, let's put it, to the other man if possible.

A. Well, the Senator who is present, naturally, has a check which he might wish to cash at a later time and he would go to the Senator who he accommodated on the first occasion and expect to be accommodated likewise.

Q. Senator, can you tell us what time interval is for alerting Senators for a roll call?

A. There may be no time for alert. For example, a Senator may rise at any time, if he can get recognition, and move to table an amendment or a bill. The tabling motion is nondebatable. The vote will occur immediately unless a Senator suggests the absence of a quorum, which every Senator has the right to do. A Senator could suggest the absence of a quorum. The Chair, under the rules, asks the Clerk to call the roll forthwith. And while the quorum is on, Senators may be alerted. A motion to adjourn may be made by the Majority Leader, and thus give Senators an overnight chance to prepare. But there is not necessarily any alert, as I have stated.

In many instances, when the debate has run its course and the "Yeas" and "Nays" have been ordered, the Clerk will call the roll. In the case of a unanimous consent agreement, Senators are given an opportunity to know ahead of time when the vote will occur, if that is a part of the unanimous consent agreement. For example, the vote on an amendment by Mr. Saxbe to the impending Economic Opportunities Bill will occur at 3:00 o'clock this afternoon. They'll recess the Senate at about 1:00 until 2:00, and then 2:00 o'clock debate will begin on that amendment. But the vote will not occur until 3:00. And Senators are notified by the Cloakrooms—their respective Cloakrooms, Republican and Democrat—that a vote will occur at 3:00 o'clock this afternoon on the amendment by Mr. Saxbe. So, in that situation we have time.

Fifteen minutes is allowed for each roll call vote. Formerly there was no set time allowed. There have been situations in which the roll call vote would be occurring and a Senator would be brought from Baltimore, or Mr. Johnson might be downtown at the White House and come back before the vote would be announced. But last year we instituted a practice whereby there would be only 20 minutes allowed for roll call. Having tried 20 minutes last year, we decided we could do it in 15, so this year we are allotting only 15 minutes for roll call votes. So when the one bell rings, which is an indication that a roll call vote is occurring, a Senator knows he has 15 minutes. At midpoint a warning bell will ring five times. When that bell rings he knows he has 7½ minutes. If his name has been called when he reaches the floor, and as long as the vote has not been announced, he may get the recognition of the Presiding Officer and then cast his vote. But after the vote is announced by the Chair, a Senator cannot vote—not even by unanimous consent. The Chair cannot even entertain a unanimous consent request to allow a Senator to vote after the vote has been announced. By unanimous consent he can change his vote, or by unanimous consent he can withdraw his vote, but if he has not voted he cannot vote once the vote is announced.

Q. Senator, what brought this action about?

A. Well, we were taking too long to vote. Last year we had 423 roll call votes, and if we had saved five minutes on each vote that would have been 2,115 minutes, which would be something over 35 hours saved just by having 15 minutes instead of 20, so we decided we'd try to save that five minutes. Senators can get to the floor in 15 minutes.

Q. On the subject of pairing, how widely is this practice used?

A. It's used a good bit in the Senate. It's been a long time since I was in the House. I don't recall what situation governs there. But it's used quite frequently in the Senate.

Q. Is this good?

A. Well, it benefits Senators. It accommodates them. I would like to see the pairing procedure done away with. I'll tell you why I would—and I have said this—because if a Senator is absent I don't think that he should call upon one of his colleagues who happens to be present and ask him to sacrifice his vote just to accommodate the man who is absent. If I'm absent, I'll take my chances. I will not ask another Senator to pair with me. I don't like to be asked to pair. I do pair occasionally simply because I am Majority Whip. I pair to accommodate fellow Democrats, but I try to talk them into letting us position them in the record. We can indicate in the record how they would have voted had they been present, and as far as the Senator who is missing is concerned, that's the only benefit that accrues to him anyhow, even with a pair, except when there is a very, very controversial vote—as was the case in the 1964 Civil Rights Bill. If a Senator is absent, if he could say to his constituents that although he was absent he accounted for the loss of one vote to the other side, why, he is in the clear. But I personally don't like the practice. I don't like to give pairs. Each time I give a pair the *Weirton Daily Times* states that I'm absent. I'm not absent. I'm there. I'm on the floor perhaps more than any other Senator is on the floor. But if I pair—and I don't say this as any reflection against the *Weirton Daily Times*. I just used that paper as an example. Other papers will say the same thing. "Senator Randolph voted for. Senator Byrd, absent." So with a 98.3 percent voting record last year and a 95.4 percent voting record for the 13 years I've been in the Senate, I don't do much pairing. And I don't like to be charged absent when I'm not absent, but present.

Q. If it were put up to a vote to the entire Senate either to keep or do away with pairing, what do you suppose would be the outcome?

A. I think they would probably keep it. I've never seen it done, but I imagine they would keep it. Because it has prevailed a long, long time and based on experience and custom, I suppose it has worked pretty well. A Senator doesn't have to give a pair if he doesn't want to.

May I say in closing that it has been good to be with you. I've enjoyed my visit. And for you and your wives, gentlemen, and your families, and you, Mr. Chairman, and the Officers of the Organization, I wish these things: Work for your hands, a straight path for your feet, a coin for your purse, sunshine on your windowpane at morning, a song in your treetop at evening, soft rains for your garden, the hand of a friend on your latch string, love at your firesides, happiness in your hearts, and God's blessings always.

Mr. ROBERT C. BYRD. Mr. President, will the Senator yield?

Mr. HUMPHREY. I am delighted to yield.

Mr. ROBERT C. BYRD. Mr. President, the distinguished Senator takes me by surprise. He flatters me by his kind remarks, overly generous as they are, with respect to the article. Plato thanked the gods that he had lived in the age of Socrates. I thank the benign hand of destiny for permitting me to live in the age of HUBERT HUMPHREY, and to serve in this august body with this exceedingly distinguished man, the former Vice President of the United States. I am greatly proud and flattered that he would call to mind this humble dissertation which I made some time ago with respect to the workings of the Senate.

Mr. HUMPHREY. I thank my friend from West Virginia. That is the most flattering comment I have had, and I accept it.

I might suggest to my colleagues, after having read the address, that it would

be very well to consider it for personal reprints for their constituents as they ask them how the Senate operates. If I were now teaching school—which I would not want to be doing—I would use it for my students.

Mr. ROBERT C. BYRD. May I call attention to the fact—which I need not do—that the speech of the Senator from Minnesota—which so flatters me—is not a nominating speech for 1976.

Mr. HUMPHREY. Do not be too sure—for the Senator, anyway.

MINNESOTA FARMERS AND RURAL CITIZENS WILL FIGHT NIXON CUTBACKS

Mr. HUMPHREY. Mr. President, on January 13, 1973, over 4,000 Minnesota farmers and rural citizens met in Morris, Minn. to protest the Nixon administration's termination and sharp cutback of many vital Federal programs that directly affect their lives and economic welfare, particularly the abrupt termination of the emergency loan program of the Farmers Home Administration.

Mr. President, the people of Minnesota are angry and embittered over these decisions. And, as was made abundantly clear at this meeting, they have no intention of taking these decisions lying down. They intend to fight, and I intend to be right in there fighting with them.

The decision of the President to abruptly terminate the FHA disaster loan program was not only an act of contempt against the U.S. Congress and a violation of the law itself, but also was an act of callousness and indifference toward citizens of this Nation who are victims of natural disaster. Furthermore, the manner in which the administration went about handling this matter further illustrates their disregard for people and their problems. Prior to the announcement terminating the disaster loan program, local FHA offices were advising farmers and other rural citizens in designated disaster areas to take their time in filing their emergency loan applications. This was done in an effort to permit these offices an opportunity to process applications in an orderly manner. They did not want to be inundated with applications.

Many, if not most of these citizens, in a spirit of wanting to cooperate with their Government in this regard, delayed filing their applications. Their reward? The program was discontinued without advance notice.

And, even in the case of presidentially designated areas, where applicants were given 2 weeks to file their applications, no instructions were given to local FHA offices to notify the people who had not yet filed their applications. Was this an oversight or a deliberate attempt to minimize the number of applications that might be submitted during those remaining days? Such action, of course, does little to insure any degree of trust or confidence by people in the Government.

Mr. President, the January 18, 1973, issue of Minnesota Agriculture, the weekly publication of the Minnesota Farmers Union, contains a list of the estimated losses suffered by farmers in designated disaster counties.

I request unanimous consent to have this list placed in the RECORD following the completion of my statement.

I also ask unanimous consent to place in the RECORD a copy of a resolution adopted by our Minnesota State Legislature demanding restoration of the FHA emergency loan program, a copy of the remarks made by Mrs. David Klanges at the Morris meeting on January 13, and two other brief articles relating to actions launched by Minnesotans to restore this vitally important program.

Mr. President, beginning on next Thursday, February 1, the Senate Committee on Agriculture and Forestry will open 4 days of public hearings on all the recently announced terminations and cutbacks in farm and rural development programs. Secretary Butz is scheduled to be the lead-off witness. I would like to encourage all the members of the Senate to participate in these hearings as well as to notify their constituents about them. The administration refuses to consult in advance either with the Congress or the citizens of this Nation about these program decisions, but our committee will consult with the Congress and the people.

I ask unanimous consent that certain material with respect to the deliberations of this group be printed at this point in the RECORD.

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

LOSS REPORT BY FARMERS WHO SUFFERED CROP DAMAGE IN DISASTER COUNTIES

(EDITOR'S NOTE.—Following are loss estimates cited by farmers in Minnesota counties, designated by USDA as disaster counties. These are some of the reports sent to MFU by farmers who were deprived of applying for FHA disaster emergency loans by the early closing of applications.)

[Estimated loss in dollars]

BIG STONE COUNTY

1. Ortonville, 8,000.
2. Correll, 8,000-10,000.
3. Graceville, 5,129.
4. Ortonville, 8,000.
5. Ortonville, 8,800.
6. Ortonville, 6,260.
7. Ortonville, 8,000-10,000.
8. Ortonville, 4,500.
9. Ortonville, 14,000.
10. Ortonville, 12,800.
11. Clinton, 5,000.
12. Clinton, 4,800.
13. Ortonville, 5,000.
14. Johnson, 24,000.
15. Graceville, 23,000.
16. Ortonville, 6,800.
17. Johnson, 6,500.
18. Ortonville, 20,000.
19. Beardsley, 7,000.
20. Beardsley, 7,500.
21. Beardsley, 5,600.
22. Beardsley, 5,500.
23. Beardsley, 6,500.
24. Clinton, 6,000.
25. Clinton, 7,500.
26. Clinton, 10,000.
27. Ortonville, 15,000.
28. Ortonville, 15,000.
29. Correll, 14,000.
30. Correll, 3,800.
31. Ortonville, 13,500.
32. Graceville, 3,500.
33. Clinton, 7,088.
34. Ortonville, 20,000.
35. Correll, 5,000.
36. Ortonville, 7,400.
37. Graceville, 13,560.
38. Graceville, 3,600.
39. Clinton, 5,000.
40. Correll, 2,550.
41. Ortonville, 20,000.
42. Ortonville, 8,000-10,000.
43. Ortonville, 6,500.
44. Correll, 4,000.
45. Clinton, 2,000.
46. Ortonville, 10,000.
47. Clinton, 8,000.
48. Clinton, 6,000.
49. Big Stone, 6,275.
50. Clinton, 6,000.
51. Ortonville, 11,730.

CHIPPEWA COUNTY

1. Montevideo, 16,467.48.
2. Montevideo, 8,220.
3. Maynard, 3,220.
4. Milan, 3,100.
5. Clara City, 17,000.
6. Montevideo, 8,000.
7. Kerkhoven, 8,000.
8. Kerkhoven, 6,200.80.
9. Montevideo, 6,000.
10. Clara City, 12,000.
11. Clara City, 13,200.
12. Kerkhoven, 12,000.
13. Montevideo, 8,500.
14. Montevideo, 6,500.
15. Montevideo, 8,500.
16. Clara City, 7,100.
17. Montevideo, 5,000.
18. Montevideo, 8,000.
19. Montevideo, 12,000.
20. Montevideo, 10,500.
21. Maynard, 15,000.
22. Maynard, 17,000.
23. Kerkhoven, 12,000.
24. Clara City, 4,000.
25. Maynard, 23,000.
26. Maynard, 16,000.
27. Clara City, 12,000.
28. Kerkhoven, 11,000.
29. Clara City, 17,000.
30. Montevideo, 30,000.
31. Kerkhoven, 12,400.
32. Maynard, 8,474.

DOUGLAS COUNTY

1. Hoffman, 4,100.

GRANT COUNTY

1. Norcross, 11,800.
2. Elbow Lake, 10,000.
3. Herman, 9,000.
4. Hoffman, 17,000.
5. Herman, 6,000.
6. Herman, 7,000.
7. Wendell, 23,000.
8. Wendell, 12,000–15,000.
9. Barrett, 3,000.
10. Norcross, 15,000.
11. Herman, 12,000.
12. Herman, 9,850.
13. Herman, 6,200.
14. Herman, 6,500.
15. Wendell, 5,400.
16. Herman, 3,500.
17. Herman, 6,470.
18. Herman, 15,000.
19. Herman, 7,000.
20. Herman, 5,000.
21. Barrett, 4,500.
22. Herman, 15,000.
23. Elbow Lake, 4,700.
24. Herman, 15,000.
25. Barrett, 3,000.
26. Herman, 6,500.
27. Norcross, 13,000.
28. Herman, 8,500.
29. Elbow Lake, 7,000.
30. Herman, 18,000.
31. Elbow Lake, 5,200.
32. Elbow Lake, 4,000.
33. Barrett, 20,000.
34. Ashby, 15,000.
35. Barret, 15,000.

36. Herman, 18,000.
37. Norcross, 11,000.
38. Elbow Lake, 2,500.
39. Herman, 8,000.
40. Herman, 2,200.
41. Herman, 3,700.
42. Hoffman, 3,000.
43. Herman, 7,000.
44. Elbow Lake, 7,000.
45. Herman, 5,000.
46. Herman, 12,000.
47. Norcross, 18,000.
48. Elbow Lake, 11,000.
49. Herman, 1,000.
50. Elbow Lake, 2,000.
51. Herman, 20,000.
52. Herman, 20,000.
53. Herman, 11,000.
54. Barrett, 4,500.
55. Norcross, 30,000.
56. Barrett, 10,000.
57. Kensington, 7,000.
58. Norcross, 6,000.
59. Herman, 3,800.
60. Elbow Lake, 23,000.
61. Barrett, 6,400.
62. Wendell, 12,500.
63. Wendell, 7,000.
64. Wendell, 49,000.
65. Elbow Lake, 15,000.
66. Hoffman, 8,000.
67. Herman, 7,400.
68. Hoffman, 8,100..
69. Hoffman, 4,030.
70. Barrett, 8,000.
71. Barrett, 7,000.
72. Hoffman, 10,000.
73. Barrett, 6,390.
74. Elbow Lake, 4,500.
75. Wendell, 6,500.
76. Hoffman, 10,000.
77. Herman, 7,000.
78. Herman, 5,000.
79. Kensington, 20,000.
80. Elbow Lake, 9,652.
81. Elbow Lake, 7,915.
82. Elbow Lake, 4,000.
83. Barrett, 11,000.
84. Herman, 18,500.
85. Norcross, 6,000.
86. Norcross, 12,284.
87. Herman, 5,100.

KANDIYOHI COUNTY

1. Willmar, 4,800.
2. Willmar, 5,000.
3. Willmar, 7,000.
4. Kandiyohi, 28,022.
5. Lake Lillian, 2,700.
6. Regal, 15,000.
7. Raymond, 14,000.

LAC QUI PARLE COUNTY

1. Louisburg, 10,000.
2. Gary, 7,500.
3. Marietta, 9,000.
4. Bellingham, 2,400.
5. Odessa, 6,700.
6. Dawson, 6,000.
7. Louisburg, 15,250.
8. Madison, 15,000.
9. Appleton, 5,000.
10. Madison, 12,000.

LINCOLN COUNTY

1. Minneota, 12,000.
2. Hedricks, 30,000.
3. Hendricks, 5,000.

MEEKER COUNTY

1. Grove City, 7,000.

OTTER TAIL COUNTY

1. Dora, 15,000.

POPE COUNTY

1. Glenwood, 4,500.
2. Glenwood, 4,500.
3. Starbuck, 2,660.
4. Starbuck, 3,500.
5. Starbuck, 15,000.
6. Clontarf, 12,000.
7. Belgrade, 2,000.
8. Farwell, 5,500.
9. Starbuck, 5,500.
10. Starbuck, 6,100.
11. Starbuck, 5,000.
12. Clontarf, 5,000.
13. Starbuck, 10,000.
14. Starbuck, 4,000.
15. Starbuck, 15,000.
16. Villard, 6,500.
17. Glenwood, 3,000.
18. Villard, 6,500.
19. Glenwood, 5,500.
20. Starbuck, 8,000.
21. Lowry, 6,200.
22. Villard, 6,800.

RENVILLE COUNTY

1. Sacred Heart, 4,500.
2. Hector, 15,000.
3. Sacred Heart, 17,000.
4. Sacred Heart, 30,000.

STEARNS COUNTY

1. Belgrade, 5,000.
2. Paynesville, 18,500.
3. Belgrade, 2,500.
4. Villard, 6,800.
5. Sauk Centre, 11,600.
6. Sauk Centre, 6,500.
7. Sauk Centre, 24,000.
8. Sauk Centre, 3,000.
9. Sauk Centre, 3,000.
10. Morris, 13,000.
11. Belgrade, 12,000.
12. Paynesville, 17,750.
13. Sauk Centre, 2,330.
14. Osakis, 4,600.
15. Sauk Centre, 3,000.
16. Sauk Centre, 8,645.35.
17. Sauk Centre, 2,500.
18. Sauk Centre, 11,000.
19. Sauk Centre, 7,000.
20. Sauk Centre, 15,000.
21. Sauk Centre, 15,000.
22. Paynesville, 8,593.
23. Paynesville, 4,500.

STEVENS COUNTY

1. Alberta, 3,000.
2. Donnelly, 5,000.
3. Chokio, 8,500.
4. Alberta, 7,000.
5. Donnelly, 7,800.
6. Herman, 9,000.
7. Morris, 1,000.
8. Donnelly, 8,000.
9. Hoffman, 9,800.
10. Morris, 4,000.
11. Morris, 4,000.
11. Chokio, 4,900.
12. Chokio, 8,500.
13. Morris, 29,836.
14. Morris, 20,000.
15. Morris, 4,000.
16. Hancock, 18,000.
17. Morris, 2,000.
18. Morris, 6,000.
19. Chokio, 6,000.
20. Chokio, 7,500.
21. Chokio, 6,900.
22. Hancock, 7,000.
23. Morris, 6,000.
24. Herman, 13,000.
25. Morris, 15,000.
26. Morris, 6,000–10,000.
27. Donnelly, 4,000.
28. Morris, 15,000.
29. Donnelly, 10,000.
30. Chokio, 7,500.
31. Morris, 11,000.
32. Morris, 7,267.
33. Chokio, 8,200.
34. Morris, 5,000.
35. Morris, 5,000.
36. Chokio, 3,200.
37. Herman, 8,000.
38. Holloway, 21,000.
39. Morris, 10,000.
40. Chokio, 5,300.
41. Chokio, 10,000.
42. Herman, 6,000.
43. Alberta, 10,000.
44. Alberta, 10,000.
45. Chokio, 6,500.
46. Donnelly, 18,000.
47. Alberta, 4,480.
48. Morris, 13,000.
49. Donnelly, 16,800.
50. Chokio, 31,000.
51. Alberta, 9,000.
52. Morris, 5,000.
53. Morris, 4,500.
54. Hancock, 15,000.
55. Chokio, 8,400.
56. Hancock, 5,000.
57. Morris, 1,950.
58. Chokio, 6,500.
59. Herman, 4,000.
60. Chokio, 3,700.
61. Hancock, 6,250.
62. Morris, 4,000.
63. Herman, 4,000.
64. Chokio, 25,000.
65. Morris, 4,770.
66. Morris, 8,000.
67. Hancock, 8,300.
68. Herman, 5,000.
69. Morris, 11,000.
70. Donnelly, 2,400.
71. Morris, 10,000.
72. Chokio, 2,500.
73. Morris, 6,000.
74. Herman, 6,000.
75. Morris, 6,500.
76. Morris, 8,000.
77. Chokio, 20,000.
78. Morris, 9,000.
79. Chokio, 15,000.
80. Chokio, 8,000.
81. Donnelly, 7,000.
82. Chokio, 11,000.
83. Alberta, 15,000.
84. Alberta, 5,000.
85. Chokio, 13,000.
86. Donnelly, 4,000.
87. Morris, 10,000.
88. Chokio, 11,000.
89. Morris, 3,564.
90. Chokio, 6,500.
91. Morris, 11,480.
92. Chokio, 12,000.
93. Morris, 10,000.
94. Alberta, 15,000.
95. Donnelly, 9,000.
96. Morris, 6,000–7,500.
97. Chokio, 6,700.
98. Chokio, 7,000.
99. Chokio, 8,000.
100. Morris, 6,000.
101. Morris, 14,000.
102. Chokio, 7,000.
103. Donnelly, 7,803.40.

SWIFT COUNTY

1. Murdock, 10,000.
2. Benson, 8,920.
3. Appleton, 6,000.
4. Benson, 10,000.
5. Benson, 8,000.
6. Murdock, 6,500.
7. Danvers, 10,000.
8. Murdock, 8,000.
9. Appleton, 5,000.
10. Appleton, 5,000.
11. Appleton, 4,000.
12. Benson, 8,000.
13. Holloway, 17,000.
14. Appleton, 5,000.
15. Murdock, 4,200.
16. Holloway, 4,500.
17. Appleton, 4,400.
18. Benson, 8,00–10,000.
19. Appleton, 5,000.
20. Benson, 30,000.
21. Appleton, 2,500.
22. Benson, 6,500.
23. Kerkhoven, 4,000.
24. Murdock, 5,000.
25. Danvers, 60,000.
26. Milan, 8,500.
27. Minneapolis, 7,000.
28. Benson, 8,000.
29. Danvers, 14,000.
30. Danvers, 10,470.
31. Danvers, 4,000.
32. Danvers, 20,000.

33. Murdock, 1,600.
34. Benson, 10,000.
35. Murdock, 20,000.
36. Sunburg, 8,000.
37. Benson, 8,350.
38. Appleton, 20,000.
39. Holloway, 20,000.
40. Sauk Centre, 14,000.
41. Appleton, 4,700.
42. Appleton, 5,000.
43. Murdock, 10,000.
44. Danvers, 61,000.
45. Danvers, 9,200.
46. Benson, 5,000.
47. Appleton, 15,000.
48. Benson, 60,000.
49. Holloway, 6,000.
50. Holloway, 6,000.
51. Appleton, 6,000.
52. Hancock, 9,750.
53. Holloway, 14,750.
54. Danvers, 6,300.
55. Benson, 5,120.
56. Danvers, 7,000.
57. Holloway, 5,667.
58. Correll, 6,040.

TRAVERSE COUNTY

1. Graceville, 13,500.
2. Beardsley, 825.
3. Wheaton, 7,700
4. Wheaton, 7,000.
5. Dumont, 4,800.
6. Herman, 12,000.
7. Beardsley, 1,901.
8. Dumont, 7,700.
9. Dumont, 14,000.
10. Dumont, 20,000.
11. Dumont, 12,000.
12. Tenney, 10,000.
13. Dumont, 9,000.
14. Dumont, 7,250.
15. Wheaton, 6,500.
16. Johnson, 6,000.
17. Johnson, 39,000.
18. Dumont, 9,000.
19. Wheaton, 7,000.
20. Wheaton, 6,500.
21. Wheaton, 6,000.
22. Johnson, 5,250.
23. Norcross, 7,000.
24. Dumont, 8,500.
25. Johnson, 5,250.
26. Tenney, 25,000.
27. Wheaton, 11,000.
28. Norcross, 6,500.
29. Tintah, 4,500.
30. Dumont, 10,000.
31. Dumont, 37,000.
32. Dumont, 6,000.
33. Dumont, 7,500.
34. Graceville, 5,146.
35. Norcross, 11,000.
36. Dumont, 10,000.
37. Graceville, 7,300.
38. Graceville, 13,000.
39. Tenney, 5,000.
40. Wheaton, 6,500.
41. Graceville, 3,000.
42. Dumont, 8,000.
43. Tenney, 5,000.
44. Dumont, 4,950.
45. Dumont, 8,000.
46. Tintah, 17,900.
47. Dumont, 8,000.
48. Wheaton, 6,000.
49. Dumont, 6,500.
50. Beardsley, 9,000.
51. Wheaton, 5,000.
52. Dumont, 8,000.

WILKIN COUNTY

1. Nashua, 8,000.
2. Foxhome, 16,000.
3. Campbell, 7,829.
4. Fairmount, 6,500.
5. Tenney, 7,000.
6. Foxhome, 30,000.
7. Breckenridge, 6,500.
8. Doran, 30,000.
9. Dumont, 7,000.
10. Campbell, 4,864.
11. Kent, 10,000.

YELLOW MEDICINE COUNTY

1. Clarkfield, 7,600.
2. Canby, 3,824.
3. Clarkfield, 4,000.
4. Hanley Falls, 15,000.
5. Clarkfield, 35,000.
6. Hanley Falls, 9,000.
7. Hanley Falls, 10,000.
8. Clarkfield, 10,000.
9. Canby, 8,000.
10. Canby, 6,000.
11. Hanley Falls, 48,000.
12. Canby, 3,000.

[From the Minnesota Agriculture, Jan. 18, 1973]

LAWSUIT NEAR ON EMERGENCY LOANS: UNCLAIMED LOSSES MAY BE AS HIGH AS $40 MILLION

ST. PAUL, MINN., January 17, 1973.—Legal action will be initiated Friday in the names of several West Central Minnesota farmers deprived of the opportunity to apply for disaster emergency loans or grants by the sudden termination of the emergency loan program by the White House.

The suit, handled by the St. Paul law firm of Doherty, Rumble and Butler, legal counsel for Minnesota Farmers Union and several major Minnesota farm cooperatives, will seek a restraining order to prevent termination of the loan program and a court order to stipulate full reinstatement to June 30, 1973.

The idea of legal action on the disaster loan issue was unanimously approved by the audience at the Morris protest meeting when a resolution was offered.

Cy Carpenter, MFU president, Monday gave the go ahead for the legal action to be taken.

"We are seeking and welcome the full and active participation of the Farm Bureau and the NFO in the lawsuit," Carpenter said.

Carpenter explained that it is estimated that about $19 millions in loan applications had been processed before the Dec. 27 cut-off and that this was thought to be about one-third of the potential claims.

"It is apparent that the losses of those who were prevented from applying by the arbitrary closing of applications without advance notice may be as high as $40 millions," Carpenter said.

Carpenter said that a legal fund has been established and that it was hoped that interested businessmen and bankers, civic and commerce associations, cooperatives and individuals would contribute to the effort.

He noted that the state AFL–CIO had already pledged $2,000 towards the legal expense.

Carpenter said that contributions could be made out to "Disaster Loan Legal Fund," and mailed to Paul Gandrud, at the Swift County Bank, Benson, Minnesota. Gandrud is acting as custodian for the contributions to the legal fund.

REMARKS OF MRS. DAVE KLANGES, FUSE RALLY, JANUARY 13, 1973, MORRIS, MINN.

I am a Farm wife and we are one of the many Farmers that took President Nixon at his word and believed that we had until June 30th to get our Emergency Disaster Loan. Yes, we had started the application, way back in October. But like many of others, we were told to wait until we had all the crops harvested and would know how much of a loss we would have. So we took our partly filled application back home and lay it in a drawer. That is where the papers were the night of December 27th.

When the announcement came over T.V. that President Nixon had ordered the Farmers Home Administration to cut off all Emergency Disaster Loans as of that day, I found it very hard to believe. I must say it was a very sleepless and restless night. Many questions came to my mind and a lot of them haven't been answered yet.

I find it very hard to accept the reasons that have been given to us for cutting these loans off with no warning. They tell us it was getting out of hand, it would just take too much money. Well really, doesn't the Defense Program cost more than they had planned. I sure don't remember any funds being cut off for that program, instead more money was given. Aren't we as Farmers entitled to the same Considerations as the Defense Program and Foreign Countries that the U.S. gave their word to also?

They are making it sound like this program was a give-away Program, all to the Benefits of the Farmer. Mr. Farmer, *Tell me* were you going to pocket this money or were you going to your local town and buy seed, fertilizer, spray, gas, fuel oil, and pay interest on notes so you could farm one more year. There has been a saying that $1.00 a Farmer spends will yield $7.00. Now just using the amount that has been said would be the Grants, $800,000,000. Multiply that by $7.00 and you have $5,600 million that will be turned over in Rural America. Isn't that going to increase jobs and income, which in turn will produce tax money.

Rural America has been and still is in trouble. The Farmers in these Disaster Areas are threatened with bankruptcy without these loans. The Government rescued Penn Central, Lockheed Aircraft, and right now they are in the process of rescuing another Aircraft Company. Don't we as farmers deserve the same considerations as these companies. I say we do. I think Congress and President Nixon agreed in August when this bill was passed that the Farmers had been hurt by Disasters and they were in need of help. Things have not changed since then.

Yes, we as farmers are finding that our programs are being drastically cut. But did you know that the Ship Building Industry has a Government Subsidy of 50% of the cost of building a ship. This goes to private businesses. That has not been cut. This is just one example. I am sure there are many more that they won't cut at all. Why do we as farmers have to take the biggest cut in our programs.

Yes, they tell us prices are high. 84% parity. But have you tried to sell your products. It is very difficult to move any grain now and they just don't seem to want to buy. So we aren't really getting these big market prices. Yet, our cost of operating goes higher and higher each year. Income is higher but there is less net income when everything is paid.

We farm families have dreams and hopes just like other people. I have seen our dreams and hopes put off from year to year and you begin to wonder if they will ever come true. But yet, we all stay with farming, telling ourselves next year will be better. We would like an income increase that would cover the rising cost of living each year like the executive branch recently received. But if that was for the farmers it would be inflationary. Don't you wonder why it wasn't called inflationary for them?

Farmers, farmwives, businessmen and rural America, it is time to unite and stand up to what is being done to us today. We urge President Nixon and Secretary Butz to reverse their decision of December 27th and open up the F. H. A. Emergency Disaster Loan Program and be fair to all the farmers.

STATE LEGISLATIVE RESOLUTION DEMANDS FHA RESTORATION

H.F. 124, a resolution demanding the reinstatement of the FHA emergency loan program was introduced Jan. 11 by State Rep. Glen Anderson and was scheduled to be heard in the House agriculture committee today (Thursday, Jan. 18).

The resolution declares:

Whereas, thousands of Minnesota farmers suffered severe crop losses in 1972 caused by flooding in fields which meant an economic loss to many areas of rural Minnesota; and

Whereas, over one million acres of crop lands were damaged and declared eligible for Farmers Home Administration grants and low interest loans in these disaster areas; and

Whereas, farmers in the stricken area were advised by the FHA to withhold their applications for loans until final determination of losses; and

Whereas, the President's decision to now halt the loan program is unconscionable and unjustified; and

Whereas, this decision will mean to many farmers and rural businessmen possible bankruptcy; now, therefore,

Be it resolved, by the Legislature of the State of Minnesota that the President is urgently demanded to restore a disaster relief program with full funding and that Congress act to insure that victims of this bureaucratic deceit are not unjustly treated.

Be it further resolved, that the Secretary of the State of Minnesota transmit copies of this resolution to the President of the United States, the United States Office of Management and Budget, and the Minnesota Senators and Representatives in Congress.

[From the St. Paul (Minn.) Dispatch, Jan. 11, 1973]

FARMERS NEED LOANS

The political power of the American farmer will be severely tested during the next few months as Congress seeks to restore some of the money that has been slashed from farm programs by the Nixon administration.

Apparently the administration feels that the farmers' political power has dwindled to the point where the farm bloc can no longer be effective. Secretary of Agriculture Earl Butz would not have dared to announce such cuts a few years ago, but the number of farmers has been decreasing steadily and the farm vote is no longer the major force it was in past decades.

Still there is considerable sentiment in favor of family farms in Congress and a major battle seems to be shaping up over the junking of some longstanding and popular farm programs. Butz says that increasing prices for farm products will offset cuts in federal assistance, but his argument is not convincing.

For example, how can a higher price for feed grains help the Minnesota farmers whose crops were washed out by floods last year? They have nothing to sell, hence the higher prices do nothing for them. What they need are cash loans to get them going on this year's crop.

If Butz's order holds, many of those farmers won't be getting the emergency government loans they were promised last summer when their counties were declared disaster areas by President Nixon. The emergency loan program was called off on Dec. 27, and farmers who originally were told they had until June 30, 1973, to file for assistance have had this deadline advanced to Jan. 15.

The Minnesota situation is not isolated. Severe weather caused problems all over the country in the growing and harvest seasons of 1972. Crops were either lost to summer storms or have been left unharvested because of fall and winter storms in many states.

Large farms and corporations may be able to secure loans from other sources, but many small farmers have no place to turn except to the federal government.

It seems incongruous that a government that can provide loans to defense contractors to save them from bankruptcy no longer can provide low-cost loans to the people who grow the nation's food. The Nixon administration has picked an unfortunate place to start its economy drive.

STATE AFL–CIO OFFERS HELP

The Minnesota AFL–CIO Federation of Labor has offered to make a $2,000 contribution to the legal fund for a lawsuit seeking to restore the disaster emergency loan program.

David K. Roe, president of the labor organization, speaking at the Morris protest meeting, told the gathering that if they decided to proceed with a lawsuit the AFL–CIO would pledge $2,000 to assist with the expense.

"What they are doing to you is both immoral and illegal," Roe insisted in a fiery speech, "I'd take them to court."

Aware that Minnesota Farmers Union had already done the groundwork for a legal battle, Roe warned that "if you take this lying down, they'll just run right over you."

NEED FOR EMERGENCY ADJUSTMENTS IN AGRICULTURE PROGRAMS

Mr. HUMPHREY. Finally, Mr. President, since I have served on the Committee on Agriculture and Forestry for approximately 14 years, I want to alert this body to what I think is going to be an impending crisis, namely, adequate production of food and fiber for this country and for a world that is in short supply. From time to time I am going to bring to the attention of the Senate, and hopefully to the people of the country, what I believe could be a very serious matter. Weather conditions in the United States today are not conducive to a good crop. Weather conditions in the Soviet Union are again very bad in terms of a Soviet harvest. Australia has just suffered a major crop disaster. Food supplies in this country are low, whether they are dairy, wheat, soybeans, or other products that are desperately needed for our type of economy, the growing population of this country, the rising income of this country. Those supplies are growing short.

When I first came here we used to talk about the unbelievable burden of the surpluses in our commodity credit reserves. Today we are facing the possibility of critical shortages—I repeat, critical shortages. I wish to say to every person present in this body today, citizen and Senator, that unless we look ahead and make appropriate plans, the price of food will go right through the sky. I have already introduced legislation relating to dairy production. Farmers are not going to produce below cost. They are selling off their cattle. They are selling off their milk cows. The price of milk is going up. The price of beef is going up. The farmers are going to take advantage, like anyone else, of prices. If the price of beef is better than the price of milk, they are going to sell off the beef. We are going to be in trouble.

Anyone who comes from an agricultural section knows we are short of soybeans. The price of soybeans is at an unprecedented high. Prices are going to continue to go up. There is no indication that our wheat reserves are adequate. I have reason to believe that countries that were in the American market last year are going to come back into the American market in the hope of buying up wheat supplies. There are no wheat surpluses. Canada is committed to China. Australia has had a wheat crop failure. The Argentine crop is already committed. The only reserve in the world is in this country. The reserve is down to about 500 million bushels, which is inadequate. It is below our domestic needs and meets none of our export needs.

On top of that, newspaper articles pointed out that we had the worst trade deficit in our history, running between $6 and $7 billion.

Mr. ROBERT C. BYRD. Mr. President, will the Senator yield?

Mr. HUMPHREY. I yield.

Mr. ROBERT C. BYRD. And that is three times what the deficit was in 1971, which was the first trade deficit for any year since 1888.

Mr. HUMPHREY. The Senator is so right. The first trade deficit we had in some 90 years was last year. The trade deficit this year was an appalling $6.5 billion.

I know agriculture is not an important subject in Washington, D.C. The press, understandably, is basically urban. There are few people here who produce troubles in petunias. There is not much agriculture around here. But there is in the neighboring States. However, the great food basket in this country is that area between the Appalachians and the Rockies, and deep into the South. That is where this country is going to have to rely on in the next few years for trade and to curb the fires of inflation.

Therefore, I have today asked the Secretary of Agriculture, Earl L. Butz, to give serious and immediate attention to making emergency adjustments in the 1973 feed grains set-aside program to prevent excessive surpluses and assure adequate supplies of soybeans which are presently in short supply and heavy demand. Unless changes are made, there will be serious consequences.

I have asked the Committee on Agriculture and Forestry staff, along with Dr. Wilcox, senior agricultural specialist with the Library of Congress, to do an in-depth study of the current departmental program for 1973. The program as projected and announced is inadequate. I have spoken privately with Secretary Butz about it. I am not seeking an argument; I am seeking results.

I ask unanimous consent that a copy of my letter to Secretary Butz of January 25 be printed in the RECORD, along with a copy of the staff memorandum dated January 25, the topic being "Prospective Plantings of Wheat, Feed Grains, and Soybeans."

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

COMMITTEE ON AGRICULTURE AND FORESTRY,
Washington, D.C., January 25, 1973.

Hon. EARL L. BUTZ,
Secretary, U.S. Department of Agriculture, Washington, D.C.

DEAR MR. SECRETARY: I wish to share with you a copy of an analysis I had conducted concerning the implications of your Department's January 19 report on 1973 prospective crop plantings, particularly as it relates to prospective plantings of wheat, feed grains and soybeans.

You will note that this analysis suggests that farmers will produce more feed grains and fewer soybeans than needed to supply prospective market demands. It further contains several suggested alternatives that might be considered with respect to achieving a better balance of feed grain and soybean production in 1973 than is now provided

for under the announced 1973 feed grains set-aside program.

I am extremely concerned over the prospects of our not having enough soybean production this year as well as having more feed grains than is needed to supply prospective markets.

Therefore, I would like to respectfully request that you give serious and immediate attention to making some emergency adjustments in the 1973 feed grains set-aside program along the lines of the changes suggested in the attached memorandum.

I also would appreciate getting your comments on these suggested alternatives and what, if any, action you contemplate taking with respect to them.

With every best wish.

Sincerely,

HUBERT H. HUMPHREY.

JANUARY 25, 1973.

STAFF MEMORANDUM—COMMITTEE ON AGRICULTURE AND FORESTRY

To: Senator Humphrey.

Topic: Prospective Plantings of Wheat, Feed Grains, and Soybeans.

Pursuant to your request, we have conducted an analysis of the January 19 USDA Planting Intentions Report in cooperation with Dr. Walter Wilcox, Senior Agricultural Specialist of the Library of Congress.

Prospective plantings for 1973, as revealed by this report, indicate that with normal weather farmers will produce more feed grains and fewer soybeans than needed to supply prospective market demands. Furthermore, the planted acreage of duram wheat and other spring wheat is expected to be 9 and 17 percent respectively larger than in 1972. However, in spite of these larger increases, total wheat production in 1973 of about 1,800,000,000 bushels is not equal to the 1972–73 domestic utilization and exports of over 1,900,000,000 bushels. These wheat figures, of course, underscore the importance of carefully assessing anticipated export demand during the forthcoming wheat marketing year.

With respect to the announced 1973 feed grain set-aside program, unless emergency adjustments are made, it is probable that feed grain supplies will be so large at harvest time that feed grain prices will be at or below the government loan level; and soybean prices will likely continue to be at or near recently established record highs.

Taking into account the recent release of 15 million wheat set-aside acres as well as the January 19 report on prospective plantings, unless changes are made in the 1973 feed grain program, it is probable that feed grain production in 1973 will be 5 to 12 percent or 11 to 25 million tons larger than the 198 million tons crop harvested in 1972.

It should be noted that even though 1972–73 exports of feed grains are at record levels the expected reduction in carryover stocks this year probably will not exceed 4 to 5 million tons.

Similarly, unless further changes are made in announced set-aside programs and/or market price support levels, soybean production will be only from 2 to 8 percent larger than the 1,280,000,000 bushels harvested this year.

POSSIBLE CHANGES THAT MIGHT BE CONSIDERED WITH RESPECT TO THE 1973 FEED GRAINS SET-ASIDE PROGRAM TO ACHIEVE A BETTER BALANCE OF FEED GRAIN AND SOYBEAN PRODUCTION IN 1973

If government programs are to be adjusted to encourage the planting of a larger acreage of soybeans and a smaller acreage of feed grains than is now indicated, several alternatives are still available at this late date:

A. The simplest change would be to announce a substantial increase in the market price support level of soybeans. This would probably encourage a small further increase in soybean plantings in 1973.

B. If legally permissible, without a further reduction in the preliminary payment, another alternative would be to announce that if feed grain producers did not exceed their 1972 plantings of feed grains they would be eligible for price support loans and a price support payment of 24 cents a bushel for corn and other feed grains in proportion, on 50 percent of the feed grain base. This alternative would be the same as alternative II of the announced 1973 feed grain set-aside program, except for elimination of the 15 percent set-aside requirement. This gives feed grains producers an alternative comparable to the 1973 cotton and recently modified 1973 wheat set-aside programs where payments are made without requiring any acreage to be "set-aside".

This alternative would result in a larger acreage of soybeans and a smaller acreage of feed grains because participation would be increased, with feed grain acreage held to the 1972 level, and the released set-aside acreage would be available for soybean or any other non-feed grain crop. With recent prices, it can be assumed that soybeans would be favored.

Should the above alternative be determined not legally permissible, without a further reduction in the preliminary payment, then the possibility of authorizing the planting of soybeans on set-aside acres, without a further reduction in the preliminary payment, might be considered.

C. Another alternative would be to cancel alternative I of the 1973 feed grain set-aside program which requires a 30 percent "set-aside" of the feed grain base. This 30 percent set-aside is probably fully as restrictive or even more restrictive on soybeans than on feed grain plantings. After a producer has set-aside 30 percent of his feed grain base he may plant the balance of his cropland, not in conserving base, to feed grains if he wishes. Since feed grains are a more attractive crop than soybeans for most producers the 30 percent set-aside probably restricts soybean plantings more than feed grain plantings.

The requirement in alternative II of the 1973 feed grain program that a cooperator may not plant more than his 1972 acreage of feed grains is probably fully as effective in restricting 1973 planting of feed grains as the 30 percent set-aside.

From the standpoint of equity in sharing the economic risk of producing an abundance of feed grains for domestic requirements and exports, a good case can be made for raising 1973 feed grain market price supports. The probabilities at this time appear to be 50–50 that the 1973 harvest of feed grains will be large in relation to market demands and that prices will decline substantially, even down to current support levels which are increasingly unrealistic in terms of cost of production.

D. Various combinations of the above alternatives might also be considered. If adjustments in the announced program are made, it would likely result in a more balanced production of feed grains and soybeans, in relation to probable domestic and foreign demands, than is otherwise in prospect.

Mr. HUMPHREY. Mr. President, this subject may be of more importance to us right now than almost anything that affects our national life, because the great margin of strength America has had is the productivity of its agriculture. The Soviet Union produces atom bombs, planes, surface-to-air missiles, nuclear submarines. It produces heavy machinery. It produces many things that give it power, but it cannot make its agricultural system function, and until a country has a functioning agricultural system, it is not a real world power, and they know it.

I hope that we will understand the importance of food and fiber as a part of the total economic structure and strength of this country. That is why I stayed on the Committee on Agriculture and Forestry. There are many more attractive committees in this body, but I have stayed there because I realize that, for the sake of my children and their children, America must extend and improve its agricultural structure. If we do not, we will live to rue the day.

I thank the Senator from West Virginia.

Mr. ROBERT C. BYRD. I thank the Senator from Minnesota.

AUTHORIZATION FOR SECRETARY OF THE SENATE TO RECEIVE MESSAGES DURING ADJOURNMENT

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Secretary of the Senate be authorized, during the adjournment of the Senate from today to Monday, to receive messages from the House of Representatives.

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

Mr. ROBERT C. BYRD. Mr. President, I suggest the absence of a quorum.

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

The legislative clerk proceeded to call the roll.

Mr. ROBERT C. BYRD. 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.

ORDER FOR RECOGNITION OF SENATOR EAGLETON, MONDAY, JANUARY 29

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that on Monday, at the conclusion of the 15-minute orders previously entered, the distinguished junior Senator from Missouri (Mr. EAGLETON) be recognized for not to exceed 15 minutes.

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

ORDER TO PRINT EULOGIES ON THE LATE FORMER PRESIDENT LYNDON B. JOHNSON AS A SENATE DOCUMENT

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the eulogies expressed with respect to the late former President Lyndon B. Johnson—and it is my understanding that the CONGRESSIONAL RECORD will remain open for 15 days from this past Wednesday for the reception of such eulogies—be collected and printed as a Senate document.

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

ORDER OF BUSINESS

The PRESIDING OFFICER. The Senator from Colorado is recognized.

(The remarks Senator DOMINICK made at this point when he introduced S. 576, dealing with the carrying of a firearm during the commission of a crime, and related statements by other Senators, are printed earlier in the RECORD under Statements on Introduced Bills and Joint Resolutions.)

QUORUM CALL

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

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

(The remarks Senator CHURCH made at this point on the introduction of S. 578, dealing with U.S. Military Forces in Southeast Asia, and the ensuing debate are printed earlier in the RECORD under Statements on Introduced Bills and Joint Resolutions.)

A PEACE THAT CAN WORK IF ALL PARTIES ACT IN THE SPIRIT TO MAKE IT WORK

Mr. ROBERT C. BYRD. Mr. President, as we convene in this Chamber today, with our hearts still heavy from the sadness of Lyndon Baines Johnson's passing, we may temper our grief with the knowledge that even as we mourn him, the peace in Indochina for which he strove so mightily, can be, at last, a hoped-for reality.

Four times in this century, America has spent blood and treasure in foreign wars against aggression. For her costly efforts in Vietnam, our country has been often criticized by nations whose own very existence would have been precarious but for the fact that there is a United States of America.

Now the long miserable years have at last come to an end, and I thank God that our prisoners of war can be reunited with their families, and the missing in action accounted for.

Four American presidents felt that Vietnam was worth the sacrifice. Only the dispassionate judgment of history will tell.

President Nixon and the late former President Johnson are entitled to be commended for their efforts to secure an honorable agreement which provides for American withdrawal, offers an ally—that our country did not choose to forsake—a reasonable chance for survival, and creates an internationally supervised cease-fire that opens the way for peace in all of Indochina, if North Vietnam will desist from further aggression.

It is an agreement that at least offers the hope that 46,000 American fighting men did not die in vain.

I regret that our country has gone through this tragic war, which was entered at a time when most free world countries, the press, and our own leaders were saying that we could not afford to let Vietnam go down the drain. We will always be in the debt of the 300,000 Americans who were wounded, and I am grateful to the two and a half million fighting men who answered our country's call. I hope that we will never again become involved in such a conflict. It is to America's credit, however, that, even in the face of criticism at home and abroad, she did not abandon an ally, and it is to the President's credit and to the credit of the late former President Johnson that they persisted in the pursuit of an honorable agreement. It is devoutly to be hoped that with the cessation of hostilities in Southeast Asia, mankind will have learned the lesson that aggression does not pay and that the devastation and death of war leave no victor. We got into this war, little by little, unable to see, from the beginning, where day-to-day and week-to-week events would ultimately lead us. But we became involved in behalf of an ally, and our country kept the promise of its leaders—Presidents Eisenhowever, Kennedy, Johnson, and Nixon—that we would not desert South Vietnam.

I hope I do not live to see the day when this Nation, forged in the crucible of courage, will ever forsake the pursuit of national honor. For the honor of a nation is the sum of the honor of its sons and daughters. If honor ever ceases to be part of the American character, there can be no future for our country.

Mr. President, I ask unanimous consent to insert in the RECORD a transcript of the agreement on ending the war and achieving peace in Vietnam.

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

AGREEMENT ON ENDING THE WAR AND RESTORING PEACE IN VIETNAM

The Parties participating in the Paris Conference on Vietnam.

With a view to ending the war and restoring peace in Vietnam on the basis of respect for the Vietnamese people's fundamental national rights and the South Vietnamese people's right to self-determination, and to contributing to the consolidation of peace in Asia and the world,

Have agreed on the following provisions and undertake to respect and to implement them:

CHAPTER I—THE VIETNAMESE PEOPLE'S FUNDAMENTAL NATIONAL RIGHTS

Article 1

The United States and all other countries respect the independence, sovereignty, unity, and territorial integrity of Vietnam as recognized by the 1954 Geneva Agreements on Vietnam.

CHAPTER II—CESSATION OF HOSTILITIES—WITHDRAWAL OF TROOPS

Article 2

A cease-fire shall be observed throughout South Vietnam as of 2400 hours G.M.T., on January 27, 1973.

At the same hour, the United States will stop all its military activities against the territory of the Democratic Republic of Vietnam by ground, air and naval forces, wherever they may be based, and end the mining of the territorial waters, ports, harbors, and waterways of the Democratic Republic of Vietnam. The United States will remove, permanently deactivate or destroy all the mines in the territorial waters, ports, harbors, and waterways of North Vietnam as soon as this Agreement goes into effect.

The complete cessation of hostilities mentioned in this Article shall be durable and without limit of time.

Article 3

The parties undertake to maintain the cease-fire and to ensure a lasting and stable peace.

As soon as the cease-fire goes into effect:

(a) The United States forces and those of the other foreign countries allied with the United States and the Republic of Vietnam shall remain in-place pending the implementation of the plan of troop withdrawal. The Four-Party Joint Military Commission described in Article 16 shall determine the modalities.

(b) The armed forces of the two South Vietnamese parties shall remain in-place. The Two-Party Joint Military Commission described in Article 17 shall determine the areas controlled by each party and the modalities of stationing.

(c) The regular forces of all services and arms and the irregular forces of the parties in South Vietnam shall stop all offensive activities against each other and shall strictly abide by the following stipulations:

All acts of force on the ground, in the air, and on the sea shall be prohibited;

All hostile acts, terrorism and reprisals by both sides will be banned.

Article 4

The United States will not continue its military involvement or intervene in the internal affairs of South Vietnam.

Article 5

Within sixty days of the signing of this Agreement, there will be a total withdrawal from South Vietnam of troops, military advisers, and military personnel, including technical military personnel and military personnel associated with the pacification program, armaments, munitions, and war material of the United States and those of the other foreign countries mentioned in Article 3(a). Advisers from the above-mentioned countries to all paramilitary organizations and the police force will also be withdrawn within the same period of time.

Article 6

The dismantlement of all military bases in South Vietnam of the United States and of the other foreign countries mentioned in Article 3(a) shall be completed within sixty days of the signing of this Agreement.

Article 7

From the enforcement of the cease-fire to the formation of the government provided for in Articles 9(b) and 14 of this Agreement, the two South Vietnamese parties shall not accept the introduction of troops, military advisers, and military personnel including technical military personnel, armaments, munitions, and war material into South Vietnam.

The two South Vietnamese parties shall be permitted to make periodic replacement of armaments, munitions and war material which have been destroyed, damaged, worn out or used up after the cease-fire, on the basis of piece-for-piece, of the same characteristics and properties, under the supervision of the Joint Military Commission of the two South Vietnamese parties and of the International Commission of Control and Supervision.

CHAPTER III—THE RETURN OF CAPTURED MILITARY PERSONNEL AND FOREIGN CIVILIANS, AND CAPTURED AND DETAINED VIETNAMESE CIVILIAN PERSONNEL

Article 8

(a) The return of captured military personnel and foreign civilians of the parties shall be carried out simultaneously with and completed not later than the same day as the troop withdrawal mentioned in Article 5. The parties shall exchange complete lists of the above-mentioned captured military personnel and foreign civilians on the day of the signing of this Agreement.

(b) The parties shall help each other to

get information about those military personnel and foreign civilians of the parties missing in action, to determine the location and take care of the graves of the dead so as to facilitate the exhumation and repatriation of the remains, and to take any such other measures as may be required to get information about those still considered missing in action.

(c) The question of the return of Vietnamese civilian personnel captured and detained in South Vietnam will be resolved by the two South Vietnamese parties on the basis of the principles of Article 21(b) of the Agreement on the Cessation of Hostilities in Vietnam of July 20, 1954. The two South Vietnamese parties will do so in a spirit of national reconciliation and concord, with a view to ending hatred and enmity, in order to ease suffering and to reunite families. The two South Vietnamese parties will do their utmost to resolve this question within ninety days after the cease-fire comes into effect.

CHAPTER IV—THE EXERCISE OF THE SOUTH VIETNAMESE PEOPLE'S RIGHT TO SELF-DETERMINATION

Article 9

The Government of the United States of America and the Government of the Democratic Republic of Vietnam undertake to respect the following principles for the exercise of the South Vietnamese people's right to self-determination:

(a) The South Vietnamese people's right to self-determination is sacred, inalienable, and shall be respected by all countries.

(b) The South Vietnamese people shall decide themselves the political future of South Vietnam through genuinely free and democratic general elections under international supervision.

(c) Foreign countries shall not impose any political tendency or personality on the South Vietnamese people.

Article 10

The two South Vietnamese parties undertake to respect the cease-fire and maintain peace in South Vietnam, settle all matters of contention through negotiations, and avoid all armed conflict.

Article 11

Immediately after the cease-fire, the two South Vietnamese parties will:

Achieve national reconciliation and concord, end hatred and enmity, prohibit all acts of reprisal and discrimination against individual or organizations that have collaborated with one side or the other;

Ensure the Democratic liberties of the people: personal freedom, freedom of speech, freedom of the press, freedom of meeting, freedom of organization, freedom of political activities, freedom of belief, freedom of movement, freedom of residence, freedom of work, right to property ownership, and right to free enterprise.

Article 12

(a) Immediately after the cease-fire, the two South Vietnamese parties shall hold consultations in a spirit of national reconciliation and concord, mutual respect, and mutual non-elimination to set up a National Council of National Reconciliation and Concord of three equal segments. The Council shall operate on the principle of unanimity. After the National Council of National Reconciliation and Concord has assumed its functions, the two South Vietnamese parties will consult about the formation of councils at lower levels. The two South Vietnamese parties shall sign an agreement on the internal matters of South Vietnam as soon as possible and do their utmost to accomplish this within ninety days after the cease-fire comes into effect, in keeping with the South Vietnamese people's aspirations for peace, independence and democracy.

(b) The National Council of National Reconciliation and Concord shall have the task of promoting the two South Vietnamese parties' implementation of this Agreement, achievement of national reconciliation and concord and ensurance of democratic liberties. The National Council of National Reconciliation and Concord will organize the free and democratic general elections provided for in Article 9(b) and decide the procedures and modalities of these general elections. The institutions for which the general elections are to be held will be agreed upon through consultations between the two South Vietnamese parties. The National Council of National Reconciliation and Concord will also decide the procedures and modalities of such local elections as the two South Vietnamese parties agree upon.

Article 13

The question of Vietnamese armed forces in South Vietnam shall be settled by the two South Vietnamese parties in a spirit of national reconciliation and concord, equality and mutual respect, without foreign interference, in accordance with the postwar situation. Among the questions to be discussed by the two South Vietnamese parties are steps to reduce their military effectives and to demobilize the troops being reduced. The two South Vietnamese parties will accomplish this as soon as possible.

Article 14

South Vietnam will pursue a foreign policy of peace and independence. It will be prepared to establish relations with all countries irrespective of their political and social systems on the basis of mutual respect for independence and sovereignty and accept economic and technical aid from any country with no political conditions attached. The acceptance of military aid by South Vietnam in the future shall come under the authority of the government set up after the general elections in South Vietnam provided for in Article 9(b).

CHAPTER V—THE REUNIFICATION OF VIETNAM AND THE RELATIONSHIP BETWEEN NORTH AND SOUTH VIETNAM

Article 15

The reunification of Vietnam shall be carried out step by step through peaceful means on the basis of discussions and agreements between North and South Vietnam, without coercion or annexation by either party, and without foreign interference. The time for reunification will be agreed upon by North and South Vietnam.

Pending reunification:

(a) The military demarcation line between the two zones at the 17th parallel is only provisional and not a political or territorial boundary, as provided for in paragraph 6 of the Final Declaration of the 1954 Geneva Conference.

(b) North and South Vietnam shall respect the Demilitarized Zone on either side of the Provisional Military Demarcation Line.

(c) North and South Vietnam shall promptly start negotiations with a view to reestablishing normal relations in various fields. Among the questions to be negotiated are the modalities of civilian movement across the Provisional Military Demarcation Line.

(d) North and South Vietnam shall not join any military alliance or military bloc and shall not allow foreign powers to maintain military bases, troops, military advisers, and military personnel on their respective territories, as stipulated in the 1954 Geneva Agreements on Vietnam.

CHAPTER VI—THE JOINT MILITARY COMMISSIONS, THE INTERNATIONAL COMMISSION OF CONTROL AND SUPERVISION, THE INTERNATIONAL CONFERENCE

Article 16

(a) The Parties participating in the Paris Conference on Vietnam shall immediately designate representatives to form a Four-Party Joint Military Commission with the task of ensuring joint action by the parties in implementing the following provisions of this Agreement:

The first paragraph of Article 2, regarding the enforcement of the cease-fire throughout South Vietnam;

Article 3(a), regarding the cease-fire by U.S. forces and those of the other foreign countries referred to in that Article;

Article 3(c), regarding the cease-fire between all parties in South Vietnam;

Article 5, regarding the withdrawal from South Vietnam of U.S. troops and those of the other foreign countries mentioned in Article 3(a);

Article 6, regarding the dismantlement of military bases in South Vietnam of the United States and those of the other foreign countries mentioned in Article 3(a);

Article 8(a), regarding the return of captured military personnel and foreign civilians of the parties;

Article 8(b), regarding the mutual assistance of the parties in getting information about those military personnel and foreign civilians of the parties missing in action.

(b) The Four-Party Joint Military Commission shall operate in accordance with the principle of consultations and unanimity. Disagreements shall be referred to the International Commission of Control and Supervision.

(c) The Four-Party Joint Military Commission shall begin operating immediately after the signing of this Agreement and end its activities in sixty days, after the completion of the withdrawal of U.S. troops and those of the other foreign countries mentioned in Article 3(a) and the completion of the return of captured military personnel and foreign civilians of the parties.

(d) The four parties shall agree immediately on the organization, the working procedure, means of activity, and expenditures of the Four-Party Joint Military Commission.

Article 17

(a) The two South Vietnamese parties shall immediately designate representatives to form a Two-Party Joint Military Commission with the task of ensuring joint action by the two South Vietnamese parties in implementing the following provisions of this Agreement:

The first paragraph of Article 2, regarding the enforcement of the cease-fire throughout South Vietnam, when the Four-Party Joint Military Commission has ended its activities;

Article 3(b), regarding the cease-fire between the two South Vietnamese parties;

Article 3(c), regarding the cease-fire between all parties in South Vietnam, when the Four-Party Joint Military Commission has ended its activities;

Article 7, regarding the prohibition of the introduction of troops into South Vietnam and all other provisions of this article;

Article 8(c), regarding the question of the return of Vietnamese civilian personnel captured and detained in South Vietnam;

Article 13, regarding the reduction of the military effectiveness of the two South Vietnamese parties and the demobilization of the troops being reduced.

(b) Disagreements shall be referred to the International Commission of Control and Supervision.

(c) After the signing of this Agreement, the Two-Party Joint Military Commission shall agree immediately on the measures and organization aimed at enforcing the cease-fire and preserving peace in South Vietnam.

Article 18

(a) After the signing of this Agreement, an International Commission of Control and Supervision shall be established immediately.

(b) Until the International Conference provided for in Article 19 makes definitive arrangements, the International Commission

of Control and Supervision will report to the four parties on matters concerning the control and supervision of the implementation of the following provisions of this Agreement.

The first paragraph of Article 2, regarding the enforcement of the cease-fire throughout South Vietnam;

Article 3(a), regarding the cease-fire by U.S. forces and those of the other foreign countries referred to in that Article;

Article 3(c) regarding the cease-fire between all the parties in South Vietnam;

Article 5, regarding the withdrawal from South Vietnam of U.S. troops and those of the other foreign countries mentioned in Article 3(a);

Article 6, regarding the dismantlement of military bases in South Vietnam of the United States and those of the other foreign countries mentioned in Article 3(a);

Article 8(a), regarding the return of captured military personnel and foreign civilians of the parties.

The International Commission of Control and Supervision shall form control teams for carrying out its tasks. The four parties shall agree immediately on the location and operation of these teams. The parties will facilitate their operation.

(c) Until the International Conference makes definitive arrangements, the International Commission of Control and Supervision will report to the two South Vietnamese parties on matters concerning the control and supervision of the implementation of the following provisions of this Agreement;

The first paragraph of Article 2, regarding the enforcement of the cease-fire throughout South Vietnam, when the Four-Party Joint Military Commission has ended its activities;

Article 3(b), regarding the cease-fire between the two South Vietnamese parties;

Article 3(c), regarding the cease-fire between all parties in South Vietnam, when the Four-Party Joint Military Commission has ended its activities;

Article 7, regarding the prohibition of the introduction of troops into South Vietnam and all other provisions of this Article;

Article 8(c), regarding the question of the return of Vietnamese civilian personnel captured and detained in South Vietnam;

Article 9(b), regarding the free and democratic general elections in South Vietnam;

Article 13, regarding the reduction of the military effectives of the two South Vietnamese parties and the demobilization of the troops being reduced.

The International Commission of Control and Supervision shall form control teams for carrying out its tasks. The two South Vietnamese parties shall agree immediately on the location and operation of these teams. The two South Vietnamese parties will facilitate their operation.

(d) The International Commission of Control and Supervision shall be composed of representatives of four countries: Canada, Hungary, Indonesia and Poland. The chairmanship of this Commission will rotate among the members for specific periods to be determined by the Commission.

(e) The International Commission of Control and Supervision shall carry out its tasks in accordance with the principle of respect for the sovereignty of South Vietnam.

(f) The International Commission of Control and Supervision shall operate in accordance with the principle of consultations and unanimity.

(g) The International Commission of Control and Supervision shall begin operating when a cease-fire comes into force in Vietnam. As regards the provisions in Article 18 (b) concerning the four parties, the International Commission of Control and Supervision shall end its activities when the Commission's tasks of control and supervision regarding these provisions have been fulfilled. As regards the provisions in Article 18(c) concerning the two South Vietnamese parties, the International Commission of Control and Supervision shall end its activities on the request of the government formed after the general elections in South Vietnam provided for in Article 9(b).

(h) The four parties shall agree immediately on the organization, means of activity, and expenditures of the International Commission of Control and Supervision. The relationship between the International Commission and the International Conference will be agreed upon by the International Commission and the International Conference.

Article 19

The parties agree on the convening of an International Conference within thirty days of the signing of this Agreement to acknowledge the signed agreements; to guarantee the ending of the war, the maintenance of peace in Vietnam, the respect of the Vietnamese people's fundamental national rights, and the South Vietnamese people's right to self-determination; and to contribute to and guarantee peace in Indochina.

The United States and the Democratic Republic of Vietnam, on behalf of the parties participating in the Paris Conference on Vietnam, will propose to the following parties that they participate in this International Conference: the People's Republic of China, the Republic of France, the Union of Soviet Socialist Republics, the United Kingdom, the four countries of the International Commission of Control and Supervision, and the Secretary General of the United Nations, together with the parties participating in the Paris Conference on Vietnam.

CHAPTER VII—REGARDING CAMBODIA AND LAOS

Article 20

(a) The parties participating in the Paris Conference on Vietnam shall strictly respect the 1954 Geneva Agreements on Cambodia and the 1962 Geneva Agreements on Laos, which recognized the Cambodian and the Lao peoples' fundamental national rights, i.e., the independence, sovereignty, unity, and territorial integrity of these countries. The parties shall respect the neutrality of Cambodia and Laos.

The parties participating in the Paris Conference on Vietnam undertake to refrain from using the territory of Cambodia and the territory of Laos to encroach on the sovereignty and security of one another and of other countries.

(b) Foreign countries shall put an end to all military activities in Cambodia and Laos, totally withdraw from and refrain from reintroducing into these two countries troops, military advisers and military personnel, armaments, munitions and war material.

(c) The internal affairs of Cambodia and Laos shall be settled by the people of each of these countries without foreign interference.

(d) The problems existing between the Indochinese countries shall be settled by the Indochinese parties on the basis of respect for each other's independence, sovereignty, and territorial integrity, and non-interference in each other's internal affairs.

CHAPTER VIII—THE RELATIONSHIP BETWEEN THE UNITED STATES AND THE DEMOCRATIC REPUBLIC OF VIETNAM

Article 21

The United States anticipates that this Agreement will usher in an era of reconciliation with the Democratic Republic of Vietnam as with all the peoples of Indochina. In pursuance of its traditional policy, the United States will contribute to healing the wounds of war and to postwar reconstruction of the Democratic Republic of Vietnam and throughout Indochina.

Article 22

The ending of the war, the restoration of peace in Vietnam, and the strict implementation of this Agreement will create conditions for establishing a new, equal and mutually beneficial relationship between the United States and the Democratic Republic of Vietnam on the basis of respect for each other's independence and sovereignty, and non-interference in each other's internal affairs. At the same time this will ensure stable peace in Vietnam and contribute to the preservation of lasting peace in Indochina and Southeast Asia.

CHAPTER IX—OTHER PROVISIONS

Article 23

This Agreement shall enter into force upon signature by plenipotentiary representatives of the parties participating in the Paris Conference on Vietnam. All the parties concerned shall strictly implement this Agreement and its Protocols.

Done in Paris this twenty-seventh day of January, One Thousand Nine Hundred and Seventy-Three, in Vietnamese and English. The Vietnamese and English texts are official and equally authentic.

[Separate Numbered Page]

For the Government of the United States of America: William P. Rogers, Secretary of State.

For the Government of the Republic of Vietnam: Tran Van Lam, Minister for Foreign Affairs.

[Separate Numbered Page]

For the Government of the Democratic Republic of Vietnam: Nguyen Duy Trinh, Minister for Foreign Affairs.

For the Provisional Revolutionary Government of the Republic of South Vietnam: Nguyen Thi Binh, Minister for Foreign Affairs.

[To be signed at the International Conference Center, Paris, Saturday afternoon, Paris time, January 27, 1973]

AGREEMENT ON ENDING THE WAR AND RESTORING PEACE IN VIETNAM

The Government of the United States of America, with the concurrence of the Government of the Republic of Vietnam,

The Government of the Democratic Republic of Vietnam, with the concurrence of the Provisional Revolutionary Government of the Republic of South Vietnam,

With a view to ending the war and restoring peace in Vietnam on the basis of respect for the Vietnamese people's fundamental national rights and the South Vietnamese people's right to self-determination, and to contributing to the consolidation of peace in Asia and the world,

Have agreed on the following provisions and undertake to respect and to implement them:

[Text of Agreement Chapters I–VIII Same As Above]

CHAPTER IX—OTHER PROVISIONS

Article 23

The Paris Agreement on Ending the War and Restoring Peace in Vietnam shall enter into force upon signature of this document by the Secretary of State of the Government of the United States of America and the Minister for Foreign Affairs of the Government of the Democratic Republic of Vietnam, and upon signature of a document in the same terms by the Secretary of State of the Government of the United States of America, the Minister for Foreign Affairs of the Government of the Republic of Vietnam, the Minister for Foreign Affairs of the Government of the Democratic Republic of Vietnam, and the Minister for Foreign Affairs of the Provisional Revolutionary Government of the Republic of South Vietnam. The Agree-

ment and the protocols to it shall be strictly implemented by all the parties concerned.

Done in Paris this twenty-seventh day of January, One Thousand Nine Hundred and Seventy-Three, in Vietnamese and English. The Vietnamese and English texts are official and equally authentic.

For the Government of the United States of America: William P. Rogers, Secretary of State.

For the Government of the Democratic Republic of Vietnam: Nguyen Duy Trinh, Minister for Foreign Affairs.

ORDER FOR COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS TO HAVE UNTIL MIDNIGHT TONIGHT TO FILE BUDGET PROPOSALS, AND FOR REFERRAL TO THE COMMITTEE ON RULES AND ADMINISTRATION

Mr. SPARKMAN. Mr. President, I ask unanimous consent that the Committee on Banking, Housing and Urban Affairs have until midnight tonight to file a resolution with its budget proposals for the upcoming year and that such be referred to the Committee on Rules and Administration.

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

QUORUM CALL

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

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

PROGRAM FOR NEXT WEEK

Mr. GRIFFIN. Mr. President, will the Senator from West Virginia yield?

Mr. ROBERT C. BYRD. I yield.

Mr. GRIFFIN. As he always does, the distinguished majority whip, I know, will outline the program for Monday, which is pretty well lined up. I should like to inquire of the distinguished majority whip whether he can give the Members of the Senate any indication beyond Monday as to what the business might be for next week, particularly with reference to other nominations besides the nomination of Elliot Richardson.

Mr. ROBERT C. BYRD. Mr. President, there is not really a great deal I can say in response to the question that has been asked by the distinguished assistant Republican leader.

I have discussed this matter with the distinguished majority leader. It is the present plan of the leadership to adjourn from Monday over until Wednesday of next week.

I would anticipate that there is a possibility that there could be some discussion with reference to the confirmation of the nomination of Mr. Lynn, possibly even on Monday—some discussion—but I am not too sure about that. There may be some discussion on Wednesday. I cannot anticipate at this moment just when final action on that nomination will occur.

As to the nomination of Mr. Weinberger, I would imagine that the confirmation of that nomination possibly would be even a bit farther down the road.

I should like to say, in further response to the question, that it is hoped that all committees will act expeditiously to report any legislation that can be sent to the Senate floor, so that debate can be had thereon and action taken before the Lincoln Day recess. I speak with reference especially to the hijacking bill, which I think will be coming along pretty soon, the Federal-aid highway bill, and the public works bill. If so, the Senate then can perhaps hope to take some action by Wednesday of next week on some of these legislative measures, for which the groundwork has been laid in the last Congress, and which, hopefully, can be reported to the floor by the committees in the very near future.

Mr. GRIFFIN. I thank the distinguished majority whip for giving us such information as he is able to give.

I cannot help but express disappointment that the Senate is not proceeding more expeditiously to consider and to vote—if a vote is necessary—on the several other nominations that have been reported and are on the Executive Calendar.

It goes without saying that until the nominations of the President's Cabinet members have been confirmed so they can take the oath of office, the executive branch of Government is severely handicapped—handicapped in terms of presenting its program, handicapped in terms of appearing before the committees of Congress and contributing to the legislative process.

So, while I thank the majority whip—and I know he is giving us all the information now available—I certainly hope we can soon look forward to a schedule that moves a little faster, particularly with regard to such important nominations.

I thank the distinguished Senator for yielding.

PROGRAM FOR MONDAY

Mr. ROBERT C. BYRD. Mr. President, the program for Monday is as follows:

The Senate will convene at 12 o'clock meridian. Immediately after the two leaders or their designees have been recognized under the standing order, Senator McCLELLAN will be recognized for not to exceed 15 minutes, Senator JACKSON will be recognized for not to exceed 15 minutes, Senator ROBERT C. BYRD will be recognized for not to exceed 10 minutes, and Senator EAGLETON will be recognized for not to exceed 15 minutes. There will then be routine morning business, not to extend beyond 1 o'clock p.m., with the usual limitation of 3 minutes on statements. At 1 o'clock p.m., the Senate will go into executive session to debate the nomination of Elliot Richardson to be Secretary of Defense. A yea-and nay vote will occur on the nomination at 2:30 p.m.

This is about as far as I can see for Monday, as of now.

ADJOURNMENT TO MONDAY, JANUARY 29, 1973

Mr. HUDDLESTON. Mr. President, if there is no further business to come before the Senate, I move, in accordance with the previous order, that the Senate stand in adjournment until 12 o'clock meridian on Monday next.

The motion was agreed to; and at 2:45 p.m., the Senate adjourned until Monday, January 29, 1973, at 12 o'clock meridian.

NOMINATIONS

Executive nominations received by the Senate January 26, 1973:

FEDERAL TRADE COMMISSION

Lewis A. Engman, of Michigan, to be a Federal Trade Commissioner for the unexpired term of 7 years from September 26, 1969, vice Miles W. Kilpatrick, resigned.

IN THE AIR FORCE

The following officer for confirmation of recess appointment to the grade of lieutenant general. He has been assigned to a position of importance and responsibility under subsection (a) of section 8066, title 10, United States Code.

To be lieutenant general

Lt. Gen. Robert E. Pursley [redacted] FR (colonel, Regular Air Force) U.S. Air Force.

IN THE ARMY

The following-named officer to be placed on the retired list in grade indicated under the provisions of title 10, United States Code, section 3962:

To be lieutenant general

Lt. Gen. John Jarvis Tolson III, [redacted] Army of the United States (major general, U.S. Army).

The following-named officer under the provisions of title 10, United States Code, section 3066, to be assigned to a position of importance and responsibility designated by the President under subsection (a) of section 3066, in grade as follows:

To be lieutenant general

Maj. Gen. James George Kalergis, [redacted] Army of the United States (brigadier general, U.S. Army).

The following-named officer to be placed on the retired list in grade indicated under the provisions of title 10, United States Code, section 3962:

To be lieutenant general

Lt. Gen. Frederick James Clarke, [redacted] Army of the United States (major general, U.S. Army).

Lt. Gen. William Charles Gribble, Jr., [redacted] Army of the United States (major general, U.S. Army) for appointment as Chief of Engineers, U.S. Army, under the provisions of title 10, United States Code, section 3036.

IN THE NAVY

Rear Adm. Donald L. Custis, Medical Corps, U.S. Navy, for appointment as Chief of the Bureau of Medicine and Surgery with the

grade of vice admiral for a term of 4 years in accordance with the provisions of title 10, United States Code, section 5137(a).

The following named officers of the Naval Reserve for temporary promotion to the grade of rear admiral subject to qualification therefor as provided by law:

LINE

James Grealish
Philip C. Koelsch
Robert N. Pitner
Frank B. Guest, Jr.
Richard G. Altman
John R. Rohleder
Robert M. Garrick

MEDICAL CORPS

William J. Mills

SUPPLY CORPS

Lee E. Landes

CIVIL ENGINEER CORPS

Philip V. King

JUDGE ADVOCATE GENERAL'S CORPS

Hugh H. Howell, Jr.

HOUSE OF REPRESENTATIVES—*Friday, January 26, 1973*

The House met at 12 o'clock noon.

The Chaplain, Rev. Edward G. Latch, D.D., offered the following prayer:

The Lord will give strength unto His people; the Lord will bless His people with peace.—Psalm 29: 11.

Almighty God, our Father, without whom life has no meaning or mission, but with whom there is strength for the soul, love for life, and hope for the future, we lift our hearts unto Thee in gratitude for Thy goodness and for the leading of Thy gracious spirit.

As a Nation refresh our faith in the power of peace, renew our courage to persist in pursuing the paths that keep the peace, restore in our minds the blessing of brotherhood, and by Thy spirit may we extend the hand of helpfulness to those in need. Amid the troubles of these times keep us strong in Thee and steadfast in purpose to serve our fellow men.

Bless our homes, our churches, our schools, our leaders in State and country that the opportunities now presented to us may be worthily accepted and wisely used; that our Nation through humble obedience to Thy holy will may walk the ways of peace keeping the lights of freedom and justice aglow in our world.

God bless America and make her a blessing to all mankind.

We pray in the spirit of Christ. 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.

MESSAGES FROM THE PRESIDENT

Sundry messages in writing from the President of the United States were communicated to the House by Mr. Marks, one of his secretaries, who also informed the House that on January 19, 1973, the President approved and signed a joint resolution of the House of the following title:

H.J. Res. 1. Joint resolution extending the time within which the President may transmit the budget message and the economic report to the Congress and extending the time within which the Joint Economic Committee shall *file its report.*

APPOINTMENT OF MEMBERS TO JOINT COMMITTEE ON ATOMIC ENERGY

The SPEAKER. Pursuant to the provisions of 42 U.S.C. 2251, the Chair appoints as members of the Joint Committee on Atomic Energy the following members on the part of the House: Mr. HOLIFIELD of California; Mr. PRICE of Illinois; Mr. YOUNG of Texas; Mr. RONCALIO of Wyoming; Mr. MCCORMACK of Washington; Mr. HOSMER of California; Mr. ANDERSON of Illinois; Mr. HANSEN of Idaho; Mr. LUJAN of New Mexico.

ADJOURMENT OVER TO MONDAY, JANUARY 29, 1973

Mr. McFALL. Mr. Speaker, I ask unanimous consent that when the House adjourns today it adjourns to meet on Monday next.

The SPEAKER. Is there objection to the request of the gentleman from California?

There was no objection.

DISPENSING WITH CALENDAR WEDNESDAY BUSINESS ON WEDNESDAY NEXT

Mr. McFALL. Mr. Speaker, I ask unanimous consent that the business in order under the Calendar Wednesday rule on Wednesday of next week be dispensed with.

The SPEAKER. Is there objection to the request of the gentleman from California?

There was no objection.

DESIGNATING A NATIONAL MOMENT AND NATIONAL DAY OF PRAYER AND THANKSGIVING

Mr. McFALL. Mr. Speaker, I ask unanimous consent for the immediate consideration of the joint resolution (H.J. Res. 246), providing for a moment of prayer and thanksgiving and a national day of prayer and thanksgiving.

The Clerk read the title of the joint resolution.

The SPEAKER. Is there objection to the request of the gentleman from California?

There was no objection.

The Clerk read the joint resolution as follows:

H.J. RES. 246

Whereas the American people have reason to rejoice at the news of a just and honorable end to the long and trying war in Vietnam; and

Whereas our deep and abiding faith as a people reminds us that no great work can be accomplished without the aid and inspiration of Almighty God: Now, therefore, be it

Resolved by the Senate and the House of Representatives of the United States of America, in Congress assembled, That the President of the United States is authorized and requested to issue a proclamation designating the moment of 7:00 P.M., EST, January 27, 1973 a National Moment of Prayer and Thanksgiving for the peaceful end to the Vietnam War, and the 24 hours beginning at the same time as a National Day of Prayer and Thanksgiving.

That the President authorize the flying of the American flag at the appointed hour;

That all men and women of goodwill be urged to join in prayer that this settlement marks not only the end of the war in Vietnam, but the beginning of a new era of world peace and understanding; and

That copies of this resolution be sent to the Governors of the several States.

The joint resolution was ordered to be engrossed and read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table.

VACATING PROCEEDINGS ON AND RECONSIDERATION OF HOUSE RESOLUTION 99, ELECTION OF MEMBERS TO COMMITTEE ON RULES

Mr. GERALD R. FORD. Mr. Speaker, I ask unanimous consent to vacate the proceedings whereby the House agreed to House Resolution 99 on January 6, 1973, and ask for its immediate consideration.

The SPEAKER. Is there objection to the request of the gentleman from Michigan?

There was no objection.

The Clerk read the resolution, as follows:

H. RES. 99

Resolved, That the following named Members be, and they are hereby elected members of the standing committee of the House of Representatives on Rules:

John B. Anderson, Illinois; Dave Martin, Nebraska; James H. Quillen, Tennessee; Delbert L. Latta, Ohio.

AMENDMENT OFFERED BY MR. GERALD R. FORD

Mr. GERALD R. FORD. Mr. Speaker, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. GERALD R. FORD: On line 4, strike out "John B. Anderson, Illinois; Dave Martin, Nebraska;" and insert "Dave Martin, Nebraska; John B. Anderson, Illinois;"

The amendment was agreed to.

The resolution was agreed to.

A motion to reconsider was laid on the table.

WORST TRADE DEFICIT IN HISTORY DEMANDS ACTION

(Mr. BURKE of Massachusetts asked and was given permission to address the House for 1 minute, to revise and extend his remarks and include extraneous matter.)

Mr. BURKE of Massachusetts. Mr. Speaker, I would like to call attention