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Congressional Record

PROCEEDINGS AND DEBATES OF THE 93d CONGRESS, FIRST SESSION

SENATE—*Thursday, October 18, 1973*

The Senate met at 12 o'clock noon and was called to order by the President pro tempore (Mr. EASTLAND).

PRAYER

Pastor Raymond Shaheen, St. Luke Lutheran Church, Silver Spring, Md., offered the following prayer:

Eternal God, Heavenly Father: Mercifully look upon us as we turn in Your direction. Hear us as we tell You what we have found out about You:

You are to be honored because of Your goodness; respected because of Your truth; trusted because of Your love; feared because of Your wrath; and obeyed because of Your wisdom.

Hear us now, Heavenly Father, as we pray for these Your servants in this Senate of our land. As they are called upon to deliberate and to decide regarding persons and principles, programs and policies, let them do so only as they honor You in Your goodness, respect You in Your truth, trust You in Your love, fear You in Your wrath, and obey You in Your wisdom.

Then let them be assured that how they deliberate and what they decide may be acceptable in Your sight, Judge Eternal and Father of all nations.

Through Jesus Christ. Amen.

MESSAGES FROM THE PRESIDENT RECEIVED DURING ADJOURNMENT

Under authority of the order of the Senate of October 16, 1973, the Secretary of the Senate, on October 17, 1973, received a message from the President of the United States, which, on today, October 18, 1973, together with the accompanying report, was referred to the Committee on Finance. The message is as follows:

To the Congress of the United States:

In accordance with section 402(a) of the Trade Expansion Act of 1962 (TEA), I transmit herewith the Seventeenth Annual Report of the President on the Trade Agreements Program. This report covers developments in the year ending December 31, 1972.

In the period since I last reported to the Congress on our trade agreements program, we have taken major new initiatives to give strong momentum to closer multilateral cooperation and to develop a fairer and more efficient framework for the conduct of international economic relations. As a result of intense preparatory work throughout 1972, nations accounting for the bulk of world trade, meeting in Tokyo last month, opened a major round of new negotiations to reduce tariff and nontariff barriers to trade and to reform the rules by which all can gain from expanded trade. In the related field of monetary affairs, encouraging progress has been achieved on reform of the international monetary system to provide sound underpinnings for a fairer, more open trading system.

Concurrently with work on these basic longer term objectives, U.S. negotiators also pressed actively in bilateral consultations for the early removal of foreign nontariff barriers which have distorted normal trade patterns and restricted U.S. exports. The success of these efforts has, in some cases, opened markets where U.S. exporters have competed at a disadvantage for over two decades. In other instances, prompt U.S. assertion of our rights under the General Agreement on Tariffs and Trade has either deterred the institution of proposed restrictions or resulted in their early termination.

As a result of U.S. representations, our traders are already realizing tangible benefits from the major liberalization of quotas and licensing by Japan and the virtual elimination of Japanese export incentives. Compensatory taxes affecting some $40 million of U.S. agricultural exports were terminated on 98 percent of the products involved. The reduction or removal of these and other trade distortions demonstrates that sound trade policy and vigorous negotiation can create new and better opportunities for American businesses, farms, and workers.

Consistent with our efforts to strengthen the fabric of common interests between this country and the Soviet Union, we concluded a major agreement last year which lays the basis for the normalization of relations in the trade field. Important initial steps also have been taken to reduce barriers to commercial relations with the People's Republic of China. These developments open vast opportunities for long-term mutual economic benefit and for the advancement of world peace through the reduction of political tensions. I again urge the Congress, in considering my request for authority to grant normal tariff treatment to these countries, to work with me in framing an authority which preserves these gains.

While we may justifiably be encouraged by our achievements in trade and monetary negotiations since 1971 and by the reversal of the downward trend in our merchandise trade balance, we must not underestimate the magnitude and complexity of the tasks ahead. The multilateral trade negotiations which have just been opened are a fundamental building block in the foundation of a new world politico-economic structure. The stakes are thus high and the bargaining will be intense.

To realize our objectives in the trade field, I sent to the Congress last April proposals for new legislation entitled the Trade Reform Act of 1973. In my statement of October 4, I expressed my views on the bill which was approved by the House Ways and Means Committee. As legislative deliberation continues, I look forward to working with the Congress on this bill in a spirit of constructive partnership.

The profound changes which have taken place in the world economy and the impact of growing economic interdependence on political relations among nations is now clearly recognized. While formidable problems exist in the trade area and while countries still differ widely on some of the important issues, the will now exists to negotiate the necessary far-reaching changes instead of resorting to confrontation or retaliatory measures which generate political frictions. We, like other nations, will be hard bargainers, but with a shared spirit of mutual commitment to a more open and equitable trading system, the entire world can progress toward a new era of economic well-being and peaceful international relations.

RICHARD NIXON.

THE WHITE HOUSE, *October 17, 1973.*

Under authority of the order of the Senate of October 16, 1973, the Secretary of the Senate, on October 17, 1973, received messages from the President of the United States submitting sundry nominations.

On today, October 18, 1973, the nominations were referred to the appropriate committees.

(For nominations received October 17, 1973, see the end of Senate proceedings of today.)

REPORT OF A COMMITTEE SUBMITTED DURING ADJOURNMENT

Under authority of the order of the Senate of October 12, 1973, Mr. MAGNUSON, from the Committee on Commerce, today submitted its report (No. 93-470) to accompany the bill (S. 1769) establishing a U.S. Fire Administration and a National Fire Academy in the Department of Housing and Urban Development, to assist State and local govern-

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ments in reducing the incidence of death, personal injury, and property damage from fire, to increase the effectiveness and coordination of fire prevention and control agencies at all levels of government.

MESSAGE FROM THE HOUSE

A message from the House of Representatives, by Mr. Hackney, one of its reading clerks, informed the Senate that, pursuant to the provisions of section 1, Public Law 689, 84th Congress, as amended, the Speaker had appointed Mr. LATTA, vice Mr. DEVINE, resigned, as a member of the U.S. Group of the North Atlantic Assembly.

The message announced that the House insisted upon its amendments to the bill (S. 1435) to provide an elected Mayor and City Council for the District of Columbia, and for other purposes, disagreed to by the Senate; agreed to the conference asked by the Senate on the disagreeing votes of the two Houses thereon, and that Mr. DIGGS, Mr. FRASER, Mr. REES, Mr. ADAMS, Mr. MANN, Mr. BRECKINRIDGE, Mr. NELSEN, Mr. HARSHA, Mr. BROYHILL of Virginia, and Mr. LANDGREBE were appointed managers on the part of the House at the conference.

The message also announced that the House had passed the bill (S. 1570) to authorize the President of the United States to allocate crude oil and refined petroleum products to deal with existing or imminent shortages and dislocations in the national distribution system which jeopardize the public health, safety, or welfare; to provide for the delegation of authority to the Secretary of the Interior; and for other purposes, with amendments, in which it requested the concurrence of the Senate.

The message further announced that the House had agreed to the report of the committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2016) to amend the Rail Passenger Service Act of 1970 to provide financial assistance to the National Railroad Passenger Corp., and for other purposes.

The message also announced that the House insisted upon its amendment to the bill (S. 2408) to authorize certain construction at military installations, and for other purposes, disagreed to by the Senate; agreed to the conference asked by the Senate on the disagreeing votes of the two Houses thereon, and that Mr. HÉBERT, Mr. PIKE, Mr. BENNETT, Mr. STRATTON, Mr. BRAY, Mr. KING, and Mr. WHITEHURST were appointed managers on the part of the House at the conference.

The message further announced that the House had agreed to the report of the committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 6691) making appropriations for the legislative branch for the fiscal year ending June 30, 1974, and for other purposes; that the House receded from its disagreement to the amendments of the Senate numbered 1 to 33, inclusive, 35, 39, 47, 48, and 49 to the bill and concurred therein, and that the House receded from its disagreement to the amendment of the Senate numbered 34 to the bill and concurred therein, with an amendment, in which it requested the concurrence of the Senate.

The message also announced that the House had agreed to the concurrent resolution (S. Con. Res. 51) expressing the appreciation of Congress to Vietnam veterans on Veterans Day, 1973.

The message further announced that the House had agreed to the concurrent resolution (S. Con. Res. 54) providing for adjournment of the Senate from Thursday, October 18, 1973, to Tuesday, October 23, 1973, with an amendment, in which it requested the concurrence of the Senate.

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

H.R. 3544. An act for the relief of Robert J. Beas;

H.R. 3758. An act for the relief of Isabel Eugenia Serrane Macias Ferrier;

H.R. 5450. An act to amend the Marine Protection, Research, and Sanctuaries Act of 1972, in order to implement the provisions of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, and for other purposes;

H.R. 6119. An act for the relief of Arturo Robles;

H.R. 6979. An act for the relief of Monroe A. Lucas;

H.R. 7210. An act for the relief of George Downer and Victor L. Jones;

H.R. 9276. An act for the relief of Luther V. Winstead;

H.R. 9450. An act to authorize the Secretary of Commerce to transfer the N.S. *Savannah* to the city of Savannah, Ga.; and

H.R. 10717. An act to repeal the act terminating Federal supervision over the property and members of the Menominee Indian tribe of Wisconsin as a federally recognized, sovereign Indian tribe; and to restore to the Menominee tribe of Wisconsin those Federal services furnished to American Indians, because of their status as American Indians; and for other purposes.

ENROLLED BILL SIGNED

The message further announced that the Speaker had affixed his signature to the enrolled bill (H.R. 9590) making appropriations for the Treasury Department, the U.S. Postal Service, the Executive Office of the President, and certain independent agenices, for the fiscal year ending June 30, 1974, and for other purposes.

The enrolled bill was subsequently signed by the President pro tempore.

HOUSE BILLS REFERRED

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

H.R. 3544. An act for the relief of Robert J. Beas;

H.R. 3758. An act for the relief of Isabel Eugenia Serrane Macias Ferrier;

H.R. 6119. An act for the relief of Arturo Robles;

H.R. 6979. An act for the relief of Monroe A. Lucas;

H.R. 7210. An act for the relief of George Downer and Victor L. Jones; and

H.R. 9276. An act for the relief of Luther V. Winstead. Referred to the Committee on the Judiciary.

H.R. 5450. An act to amend the Marine Protection, Research, and Sanctuaries Act of 1972, in order to implement the provisions of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, and for other purposes; and

H.R. 9450. An act to authorize the Secretary of Commerce to transfer the N.S. *Savannah* to the city of Savannah, Ga. Referred to the Committee on Commerce.

H.R. 10717. An act to repeal the act terminating Federal supervision over the property and members of the Menominee Indian tribe of Wisconsin as a federally recognized, sovereign Indian tribe; and to restore to the Menominee tribe of Wisconsin those Federal services furnished to American Indians, because of their status as American Indians; and for other purposes. Referred to the Committee on Interior and Insular Affairs.

THE JOURNAL

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the reading of the Journal of the proceedings of Tuesday, October 16, 1973, be dispensed with.

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

COMMITTEE MEETINGS DURING SENATE SESSION

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

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

MISUSE OF NAMES, WORDS, EMBLEMS, OR INSIGNIA

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 441, H.R. 689.

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

The assistant legislative clerk read as follows:

H.R. 689, to amend section 712 of title 18 of the United States Code, to prohibit persons attempting to collect their own debts from misusing names in order to convey the false impression that any agency of the Federal Government is involved in such collections.

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

There being no objection, the Senate proceeded to consider the bill, and it was ordered to a third reading, read the third time, and passed.

THE SITUATION IN THE MIDDLE EAST

Mr. MANSFIELD. Mr. President, a very interesting editorial on the situation which has been developing in the Middle East was published in the Missoulan of Missoula, Mont., on October 12, 1973, entitled "Ominous Sight."

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

There being no objection, the editorial

was ordered to be printed in the RECORD, as follows:

OMINOUS SIGHT

Who started it? Why did it start? Who's winning? Answers to these questions about renewed fighting in the Middle East are in dispute. But one thing which can be said with certainty about the war between Israel and the Arab countries, Syria and Egypt, is that it gravely endangers world peace.

Not that the world is all that peaceful. A military takeover in Chile, violent reaction to the repressive apartheid society in South Africa, and continued fighting in Indochina are just a few of the current reminders that peace on earth is a hope, not a reality.

What makes the Middle East war more threatening than these other disturbances is the potential line-up of the world's super powers. China made its position clear immediately by denouncing the Israelis and calling for their return to boundaries held before the 1967 Six-Day War. Russia, which at first appeared to be cooperating with the United States in trying to maintain a low profile in the affair, is now moving visibly toward the Arab ranks. The United States, traditionally a friend of Israel, may be forced into maintaining that position—with arms—even though interests in Arab oil could cause some wavering.

Interest in Arab oil is likely to determine the position of European countries also. Other nations are less indecisive. India has endorsed the Arab cause, and many African countries have done the same. One by one the countries of the world are taking sides, and it is an ominous sight.

We do not know what is the best way, the most effective way to bring peace to the beleagured Middle East. If we did, we'd ask to trade places with Henry Kissinger. But one thing we do know—we are weary of war. We are weary from World War I, World War II, the Korean War, the Vietnam War, and we are weary of asking, will it never end?

TROOP COMMITMENTS OVERSEAS

Mr. MANSFIELD. Mr. President, I ask unanimous consent to have printed in the RECORD a very interesting article published in the New Republic for October 20, 1973, entitled "Rethinking U.S. Commitments—Troops Overseas."

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

RETHINKING U.S. COMMITMENTS: TROOPS OVERSEAS

The United States has 500,000 servicemen stationed on foreign soil and another 100,000 assigned to fleets overseas; 360,000 dependents accompanying them. More than 2,000 American bases dot the globe, and every continent, including Antarctica, is covered. To support this widespread network some 200,000 foreign citizens are employed. The annual cost is estimated at $30 billion.

The largest US commitment is to the North Atlantic Treaty Organization. Some 300,000 American troops are based in Europe, about two-thirds of them in the "American zone of occupation" in Southern Germany. If blocking the most likely Soviet invasion route were their principal purpose, they would be better situated across the northern plains of Germany. Instead for the most part they are tucked away in the mountains of Bavaria. That's because they are a tripwire rather than a barrier and a psychological deterrent more than a physical impediment to the Russians.

US nuclear power has been, and remains, the key military deterrent to a Soviet invasion. The submarines, missiles and bombers of our strategic forces carry 6000 nuclear weapons, and there are also 7000 "tactical" nuclear weapons under US control in Europe. In terms of conventional power, the four and one-third US army divisions are a poor match for the 31 Soviet divisions in Eastern Europe. In addition to being outnumbered American troops are inadequately prepared. It is not uncommon, for example, for an infantry company to experience an almost complete personnel turnover in a year. Asked in January 1972 about the readiness of the third armored division in Frankfurt, the commander, Major General William Kraft, remarked: "If you take 75 as a passing score, of 23 battalions in the division, 5 or 6 are above passing. The rest would be below 75 in various degrees; none would be real low."

If US forces on the East-West frontier were the key to European defense, the general's statistics would have prompted major congressional investigations, but his number simply confirmed a widely held impression. With 134 admirals and generals assigned to NATO and four or five technicians and paper-shufflers for each combat soldier, the purpose of our European garrison is not to fight so much as to symbolize the American commitment to NATO: a commitment only as good as our willingness to back it up with nuclear weapons. The purpose is also to provide a "good post" for many officers and higher-grade enlisted men.

In June Secretary of Defense James Schlesinger spoke to the NATO defense ministers about the need for a "stalwart" conventional defense. The European reaction was summed up by Britain's Lord Chalfont. Writing in the *Times* of London, the bemused former minister of state said, "the Pentagon still believes that the alliance is strong enough to defend itself against an attack in Europe without recourse to nuclear weapons. . . . If anything more was needed to concentrate the minds of West European statesmen on the need for a fundamental reassessment of their foreign and defense policies, this surely was it."

The size of the American garrison now is 307,000, but it has been as high as 463,000 (1962) and as low as 296,000 (1969). President Nixon argues that he needs to maintain the present level as a "bargaining chip" to win reciprocal Soviet force reductions in Central Europe. That has been a White House argument for many years, but the chip has never been cashed, partly because the Russians have not been eager to risk a diminished Soviet military presence in Eastern Europe. In 1971 Senator Majority Leader Mansfield's proposal to cut our European garrison in half was defeated, 36 to 61. This year Mansfield took a different approach, offering an amendment to the military research and procurement bill to reduce by 40 percent the number of overseas troops *worldwide* over a three-year period. Although that could be carried out without a single soldier being withdrawn from Europe, it was still too big a cut for most of the Senate. It approved the amendment in the morning, but after some heavy Pentagon lobbying (including phone calls from the NATO commander, General Andrew Goodpaster), voted it down in the afternoon, 47 to 51.

The Senate did, however, take two smaller steps. The first was its endorsement of an amendment introduced by Senators Jackson (D, Wash.) and Nunn (D, Ga.) to encourage "a more equitable sharing of the costs and expenses arising from commitments and obligations under the North Atlantic Treaty." The combined defense budgets (1972) of NATO Europe were $33 billion, whereas the Pentagon's budget was $79 billion. The West Europeans spend 4.2 percent of their gross national product on defense; the American percentage is 7.5. The direct cost of the American garrison in Europe is about $4 billion, and while our NATO allies have offset some of these costs through purchases of American weapons, the net balance-of-payments deficit for 1972 was $1.7 billion. The Jackson-Nunn amendment stipulates that the United States will withdraw a percentage of its forces equal to the percentage of the balance of payments not offset by our NATO allies. For example if only 60 percent of the deficit were offset, 40 percent of the US garrison would be withdrawn.

The amendment makes little military or monetary sense. If the present level of US troops in Europe is necessary to keep the peace, then the United States ought to be prepared to bear the costs irrespective of equity; forces that are superfluous to military needs should be withdrawn. From a fiscal point of view, withdrawing, say, 40 percent of the American forces would generate a fixed balance-of-payments gain considerably less than 40 percent of the deficit. Moreover if the forces withdrawn were not deactivated, there would be no real savings. Transferring troops from Europe to new US bases and maintaining them on active duty would cost more, though it would help the balance of payments situation.

Yet the Jackson-Nunn amendment, which passed by 84 to 5, does express, as Mansfield put it, "a sentiment of dissatisfaction with the status quo in Europe." For some that dissatisfaction is rooted in the size of the American garrison 28 years after World War II. For others it is based on Western Europe's declining contribution to the common defense (down 20 percent in relation to GNP since 1965).

Of greater significance was Senator Humphrey's move, approved 48 to 36, to cut 110,000 overseas troops by the end of 1975. The House has voted no similar cut, so the matter will not have to be resolved by a House-Senate conference committee. Because the Humphrey amendment does not specify where the cuts should be made, the entire reduction could be made in Asia; President Nixon's "sensitive negotiations" on mutual troop withdrawals from Central Europe would not be affected. We can expect to hear from the White House or Mr. Kissinger, however, that any such unilateral cut in Asia will deny the US a valuable "bargaining chip" in discussions with Peking.

When four American divisions were assigned to NATO in 1951 Secretary of State George Marshall stated there was nothing magical about the number; the decision was based on military requirements. In 1963 General Eisenhower suggested that one US division in Europe backed by US nuclear power would be sufficient to prove our commitment In other areas, such as Japan and the Western Pacific where 164,000 Americans are now stationed, raising the number deployed would no more prove our commitment than a modest reduction would disprove it. The Pentagon, however, resists troop cuts for the same reason any bureaucracy resists retrenchment. The executive obsession with "bargaining chips" similarly militates against any significant cuts. And although Congress is empowered by the Constitution to "raise and support armies," the Senate's passage of the Humphrey amendment showed only that that power has not been unconditionally surrendered.

THE MIDDLE EAST

Mr. MANSFIELD. Mr. President, I have given some thought to the situation which has been developing in the Middle East. It becomes more dangerous by the day, it spreads far beyond the area of the Middle East itself. At the present time, it seems that it stretches from the Atlantic coast clear across the Magreb and the rest of Northern Africa, over into Syria, Jordan, Iraq, possibly Saudia Arabia, and the Lord or Allah

only knows where it is going to end. It is a most serious situation in that area, which we cannot avoid paying attention to.

With that in mind, Mr. President, I would like to state to the Senate some of my feelings on this subject as they were put down this morning.

First, my feeling is that we should operate on a policy that tries to achieve a balance of sorts in the Middle East.

Second, insofar as the shipment of United States arms is concerned, it must be said that Secretary Kissinger first tried to find a diplomatic solution based on no arms shipments to either side. Finding that impossible because of continuing and increased Soviet shipments to Syria and Egypt, on Sunday last, 9 days after the war started, he—Secretary Kissinger—announced that the United States would replenish the losses of Israel in certain categories. This was done, in my opinion, to achieve a semblance of an arms balance in the area.

Third, I do not believe that we should become involved with American forces anywhere except as our national interest and security are at a vital stake. One Vietnam is one Vietnam too many.

Fourth, the United States and the Soviet Union, the two major outside powers, obviously have been unable to prevent the conflict or to bring about its termination. In view of the increasingly dangerous situation which has been developing, therefore, I would suggest that the President of the United States issue an urgent invitation to Chairman Brezhnev of the U.S.S.R., President Pompidou of France, Prime Minister Heath of the United Kingdom, Chancellor Willy Brandt of West Germany, and Prime Minister Tanaka of Japan for an immediate summit conference for the purpose of bringing about a cease-fire and using their collective efforts toward the Middle East to have the parties enter into negotiations as expeditiously as possible.

Fifth, if a summit cannot be accomplished expeditiously, then I would suggest as an alternative that the Foreign Ministers of the countries mentioned convene in conference at a mutually convenient place and as rapidly as possible.

The time, Mr. President, is short.

ORDER OF BUSINESS

The PRESIDENT pro tempore. Does the assistant minority leader desire recognition at this time?

NOMINATION OF GERALD R. FORD TO BE VICE PRESIDENT OF THE UNITED STATES

Mr. GRIFFIN. Mr. President, as a Senator from the home State of the Vice-Presidential nominee and also as a member of the Committee on Rules and Administration, I am very pleased that the chairman of the Committee on Rules and Administration, the distinguished Senator from Nevada (Mr. CANNON), has tentatively indicated that the committee may be ready to begin hearings on the nomination by the 30th or the 31st of this month.

That does not meet the timetable which the distinguished majority leader (Mr. MANSFIELD) suggested the morning after the President announced the name of Representative GERALD R. FORD. At that time Senator MANSFIELD said he was hopeful that the Senate would be able to pass on the nomination by the end of the month. In any event, the chairman's statement concerning the Rules Commitee's schedule does indicate that the committee is moving with dispatch, recognizing that there are some limitations on the speed with which the committee can move. I refer, for example, to the delay necessarily involved in awaiting the FBI report of a full field investigation.

Incidentally, it was at first estimated that it would take 2 weeks for the FBI to make that investigation and report. However, it is my understanding now that the number of agents working on this investigation has been increased, so that the time required should be less than the 2 weeks originally estimated.

Certainly, so far as the committees and those in positions of direct responsibility for the investigation are concerned, I think it can be said that they are moving with dispatch and with appropriate regard for the importance of this matter.

Now, Mr. President, I regret that it is necessary to take note of a few voices which, according to the press, have been heard to suggest that confirmation of Representative GERALD R. FORD should be held up until the President releases the so-called Watergate tapes.

I believe that kind of suggestion ought to be met head on and recognized now for just what it is. Surely, it would be an unconscionable frustration of the constitutional process if Congress were to stoop so low—to play political hanky-panky by holding the Ford nomination hostage.

I have an idea what the Supreme Court will ultimately decide with regard to the tapes. I do not know whether the Supreme Court will even grant certiorari to hear the case. Furthermore, I do not know what the President will do. But I do know—and the American people know—that the qualifications of GERALD R. FORD to be Vice President of the United States is a separate and unrelated issue which ought to be dealt with responsibly by the Congress.

The country needs—the country wants—a qualified Vice President in office, one who is ready to take over the duties and responsibilities of the high office of President if that should become necessary.

Accordingly, I believe we ought to label and nail that outrageous suggestion for just what it is. I am glad that such a suggestion has come from only a very small number.

I know that the American people will be watching Congress very carefully—for Congress in a real sense is on trial right now in this situation. I hope and I trust that Congress will act quickly and responsibly.

ORDER FOR RECOGNITION OF SENATOR PELL VACATED

The PRESIDENT pro tempore. Under the previous order, the Senator from Rhode Island (Mr. PELL) is recognized for not to exceed 15 minutes.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the order for the recognition of Senator PELL at this time be vacated.

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

TRANSACTION OF ROUTINE MORNING BUSINESS

The PRESIDING OFFICER. Under the previous order, there will now be a period for the transaction of routine morning business, for not to exceed 30 minutes, with statements therein limited to 5 minutes.

AN ALTERNATIVE SOLUTION TO OUR ENERGY PROBLEMS

Mr. COOK. Mr. President, on September 5, I expressed grave concern over the action taken by Libya concerning the increased price of their crude oil and their decision to reject dollars as payment for this commodity.

Today we receive additional news from the Middle East which places in considerable doubt the exact volumes of petroleum and petroleum products we can expect to receive from this area. As I have stated to my colleagues many times on this floor, as well as in committee hearings, we have an alternative solution to our energy problems, and we can no longer afford to be dependent on foreign oil to meet our energy requirements. I again call attention to a bill I introduced, S. 2167, to establish a trust fund for a dynamic research and development program. I was joined in the introduction of this bill by Senator BAKER, Senator ROBERT C. BYRD, Senator RANDOLPH, and Senator Moss, and I again solicit the support of my colleagues and urge that hearings be held at an early date so that we can move ahead on this vital program.

Mr. President, we cannot develop our domestic fuels without a dynamic research and development program. I just cannot understand why we continue to take a "business as usual" approach to a problem which should have been solved yesterday.

We have sufficient coal reserves in this Nation to meet our requirements for several generations. We also have oil shale, tar sands and other natural resources which can be converted to energy fuels. If this Nation wishes to retain its status as a great power, if it wishes to preserve the ideals handed down from our Founding Fathers, and if we choose to develop and defend these ideals and continue to enjoy a standard of living never before present on this globe, then we cannot be dependent on a foreign power for our energy fuel. The choice is ours, and there is an answer. I urge my colleagues to join with me in support of S. 2167 to create a Federal energy research and development trust fund. It would act as a repository for funds of a prescribed amount and from which expenditure could be made to meet research and development requirements as they occur over a continuing period of time. It is only through a pro-

gram of assured and continuous funding of our research and development program that we can hope to reach our goal and provide this Nation with a domestic source of energy for many years to come.

Other Members of this body including the chairman of the powerful Senate committees have in the past and are again proposing that we adopt stopgap measures to meet our problem today and tomorrow, but what concerns me is the fact that we cannot seem to grasp the gravity of this situation and initiative programs which will provide us with comprehensive and long-range solutions to our energy problems. While I agree that there may well be some measures we must take which are of a stopgap nature, this body has a greater responsibility to the people of this Nation to provide for real solutions to real problems.

We all know that Congress is a fickle force. That programs which are adopted by our Congress may well go unfunded by its successor. Why then is it we are continually plugging away at proposals which even if adopted would be of short duration and would not solve the long-range problem?

I have sat through hearings on these proposals. There are dozens now before the various committees. We have labored mightily, we have developed proposals, we have held hearings on these short-run proposals, but we have come up with a dry hole. Let me correct that statement. Sometimes these holes are not dry. We find them filled with hot air, which unfortunately is not natural gas, and will not burn, and cannot be used as energy fuel.

Mr. President, last night Howard K. Smith, distinguished news commentator, presented an editorial in which he portrayed considerable foresight as to the requirement to develop a long-range solution to our problem. He stated as follows:

It sounds perverse, but I found myself half hoping today the Arabs would cut off, not 5 percent, but all oil to the U.S.

When it has to, this nation is capable of miracles. In World War Two, when natural rubber was scarce, we invented and mass produced synthetic rubber in a single year.

When we thought Hitler was inventing an atomic bomb, we invented it in five years, only to find out he hadn't thought of it.

When we thought the Russians were going to the moon, we created a fantastic technology and got there ourselves in six years. They haven't made it yet.

Well, we have got to stop using fossil fuels. The world supply will simply run out before long. Meanwhile, we have to stop wasting what we possess, and we have to find a replacement for Arab oil.

It so happens we have it—we have more oil than there is in all Arabia, locked up in shale rock in our western states. The easy part, if we felt urgency about it, is creating a technology to extract it without ruining the land.

Five or ten years from now our dependence on Arab oil will be so huge that a cutoff then would cripple us.

But a cutoff now would merely provide us with a miserable winter, and the incentive we obviously lack on our own and our leaders seem incapable of providing, to do what is, eventually, inevitable.

Mr. President, I do not want to burden my colleagues with another copy of a letter I distributed to all Members explaining this bill and requesting support, but should they be interested—and I certainly hope they are—my office would be very happy to supply them with an additional copy.

VISIT TO THE SENATE BY THE HONORABLE FRANZ JOSEPH STRAUSS, MEMBER, WEST GERMAN PARLIAMENT

Mr. THURMOND. Mr. President, we are very fortunate indeed to have with us today a member of the West German Parliament. This gentleman is one of the free world's great leaders and we are proud of him. We welcome him to the United States.

At this time I would like to present to the Members of the Senate Dr. Franz Joseph Strauss, who is chairman of the Christian Social Union Party in Germany, and the financial speaker of the opposition party. He has been a member of Parliament ever since Free Germany was founded 24 years ago. He has been cabinet minister for 12 years. He would be the head of government in Germany if his party were in power today. Dr. Strauss is an expert in nuclear matters, and he is an expert in defense and financial matters.

So it is a great pleasure for me to present him to the U.S. Senate.

[Applause, Senators rising.]

TWO-MINUTE RECESS

Mr. ROBERT C. BYRD. Mr. President, I move that the Senate stand in recess for 2 minutes in order that Senators may greet our distinguished visitor.

The motion was agreed; and at 12:31 p.m. the Senate took a recess until 12:33 p.m.; whereup, the Senate reassembled when called to order by the Presiding Officer (Mr. HATHAWAY).

AMENDMENT OF RAIL PASSENGER SERVICE ACT OF 1970—CONFERENCE REPORT

Mr. MANSFIELD. Mr. President, I ask the Chair to lay before the Senate the conference report on the Rail Passenger Service Act.

The PRESIDING OFFICER laid before the Senate the conference report which was stated as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2016) to amend the Rail Passenger Service Act of 1970 to provide financial assistance to the National Railroad Passenger Corporation, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses this report, signed by all conferees on the part of both Houses.

Mr. MANSFIELD. Mr. President, I move the adoption of the conference report.

Mr. GRIFFIN. Mr. President, reserving the right to object, the Senator from Kentucky, one of the conferees, is very close to the floor and wanted to be here.

Mr. MANSFIELD. Mr. President, I withdraw my request. We will bring it up later.

EXECUTIVE SESSION

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senate go into executive session to consider the nomination of Mr. Warren Clay Wood to be Federal Cochairman of the Old West Regional Commission, which was previously reported unanimously by the Committee on Public Works.

There being no objection, the Senate proceeded to consider executive business.

OLD WEST REGIONAL COMMISSION

The PRESIDING OFFICER. The nomination will be read.

The second assistant legislative clerk read the nomination of Warren Clay Wood, of Nebraska, to be Federal Cochairman of the Old West Regional Commission.

The PRESIDING OFFICER. Without objection, the nomination is considered and confirmed.

Mr. MANSFIELD. Mr. President, I request that the President be immediately notified of the confirmation of the nomination.

The PRESIDING OFFICER. Without objection, the President will be so notified.

LEGISLATIVE SESSION

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senate return to legislative session.

There being no objection, the Senate resumed the consideration of legislative business.

ORDER OF BUSINESS

Mr. MANSFIELD. Mr. President, are we still in the morning hour?

The PRESIDING OFFICER. We are still in the morning hour.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that I be allowed to proceed for not to exceed 6 minutes.

Mr. ROBERT C. BYRD. Mr. President, will the Senator allow me to get my 5 minutes and yield them to the Senator?

Mr. MANSFIELD. Fine.

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

THE MIDDLE EAST CONFLICT

Mr. MANSFIELD. Mr. President, in the Middle East, the conflict grows sharper, more devastating, more bloody. The Israelis and the Arabs bear directly and immediately the heavy human burdens of war, but repercussions of the most serious kind are also beginning to spread beyond the battlegrounds.

First, all nations importing Mideast petroleum face a 17-percent increase in the price of crude and, on top of that, the Arab nations announced that they will cut production 5 percent at once and announced, in addition, a 5 percent reduction each month thereafter.

Second, the United States and U.S.S.R. are now engaged in the competitive resupply of weapons to the two sides in the war.

Third, the United States and the U.S.S.R. have stepped up the reinforcement of their respective fleets in the Mediterranean, a sea already seething with a surfeit of naval power.

Where is the end of this chain of interrelated development? Is it to be found in a "military solution" in the Middle East? How long will it take to run that course? A week? A month? A year? Not how many days, Mr. President, but how many generations. Even if a military solution were "just around the corner" and, apparently that is not the case, it is not a permissive course for any responsible government.

It is impermissible in terms of the future well-being of Israel and the Arab countries. How many corpses must be counted on both sides before a military solution is achieved? How much destruction? Must Cairo be flattened and Tel Aviv? Damascus? Jerusalem? Has nothing at all been learned from the tragedy of Vietnam and others before it?

To await a military solution is also impermissible on economic grounds. What will happen to the economies of the Arab countries when, 20 months from now, on their own announced schedule, the last drop of crude flows through the pipelines of the Mideast and the last well is capped or the price of petroleum is upped and upped until there are no more buyers? In the meantime, what will happen to the economies of the great importers of Arab oil—notably Western Europe and Japan?

Finally, the course of military solution is impermissible as an intolerable risk not only to the security but the survival of the Soviet Union and the United States which, together, hold a great share—perhaps too great a share—of responsibility for the entire world's destiny in this situation.

In these circumstances, I would call the attention of the Senate to a statement by French Foreign Minister Michel Jobert in the French National Assembly on yesterday. Mr. Jobert exhorted the United States and the Soviet Union to stop the resupply of arms to the Mideast and to seek to end the war "before it is too late and the consequences become intolerable." He pledged that France, with the support of the Common Market powers, would make contributions to finding a solution to the conflict.

The initiative of Foreign Minister Jobert comes at a most opportune time.

I would urge the administration to give it every attention and I would again express the hope that both the Soviet Union and the United States would seek, in addition to that of France, the immediate diplomatic cooperation of Western Germany, the United Kingdom, and Japan in finding an acceptable cease-fire and negotiations among the parties.

The economic stake of these nations in a restoration of peace is no less than our own. So, too, is their stake along with that of all other nations in human survival.

Mr. President, I repeat the remarks which I made on Tuesday last relative to the Mideast situation:

Mr. President, I have given some thought to the situation which has been developing in the Middle East. It becomes more dangerous by the day, it spreads far beyond the area of the Middle East itself. At the present time, it seems that it stretches from the Atlantic coast clear across the Magreb and the rest of northern Africa, over into Syria, Jordan, Iraq, possibly Saudi Arabia, and the Lord or Allah only knows where it is going to end. It is a most serious situation in that area, which we cannot avoid paying attention to.

With that in mind, Mr. President, I would like to state to the Senate some of my feelings on this subject as they were put down this morning.

First, my feeling is that we should operate on a policy that tries to achieve a balance of sorts in the Middle East.

Second, insofar as the shipment of United States arms is concerned, it must be said that Secretary Kissinger first tried to find a diplomatic solution based on no arms shipments to either side. Finding that impossible because of continuing and increased Soviet shipments to Syria and Egypt, on Sunday last, 9 days after the war started, he—Secretary Kissinger—announced that the United States would replenish the losses of Israel in certain categories. This was done, in my opinion, to achieve a semblance of an arms balance in the area.

Third, I do not believe that we should become involved with American forces anywhere except as our national interest and security are at a vital stake. One Vietnam is one Vietnam too many.

Fourth, the United States and the Soviet Union, the two major outside powers, obviously have been unable to prevent the conflict or to bring about its termination. In view of the increasingly dangerous situation which has been developing, therefore, I would suggest that the President of the United States issue an urgent invitation to Chairman Brezhnev of the U.S.S.R., President Pompidou of France, Prime Minister Heath of the United Kingdom, Chancellor Willy Brandt of West Germany, and Prime Minister Tanaka of Japan for an immediate summit conference for the purpose of bringing about a cease-fire and using their collective efforts toward the Middle East to have the parties enter into negotiations as expeditiously as possible.

Fifth, if a summit cannot be accomplished expeditiously, then I would suggest as an alternative that the Foreign Ministers of the countries mentioned convene in conference at a mutually convenient place and as rapidly as possible.

The time, Mr. President, is short.

ORDER OF BUSINESS

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

Mr. ROBERT C. BYRD. Mr. President, would the Senator yield for a question?

The ACTING PRESIDENT pro tempore. The time for morning business has expired.

Mr. ROBERT C. BYRD. Mr. President, that was my question. I ask unanimous consent that there be an extension of the period for routine morning business not to exceed 15 minutes with statements made therein limited to 3 minutes.

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

DEATH OF EMIL H. PRAEGER, PRAEGER REPORT AUTHOR

Mr. HOLLINGS. Mr. President, I ask unanimous consent to have printed in the RECORD the notice, published in today's issue of the Washington Post, of the passing of Emil H. Praeger, the Captain Praeger who authored the Praeger report with reference to the Capitol Building, particularly with respect to the durability and restoration of the west front. Captain Praeger passed away yesterday.

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

[From the Washington Post, Oct. 18, 1973]

EMIL H. PRAEGER, 81, NOTED CIVIL ENGINEER

MANHASSET, N.Y., Oct. 17—Emil H. Praeger, a civil engineer who designed special floating concrete breakwaters used during the Allied invasion of Normandy in World War II, is dead at the age of 81.

Mr. Praeger, who also served as a consulting engineer in the renovation of the White House, died Tuesday at North Shore Hospital here. He had been residing in Douglaston, Queens.

Mr. Praeger was responsible for structural engineering in construction of the General Assembly, Meeting Hall and underground parking garage of the United Nations headquarters in New York.

During World War II, Mr. Praeger was design manager of the Navy's Bureau of Yards and Docks and served on a committee named to implement British Prime Minister Winston Churchill's idea of protected harbors for the invasion of Europe.

The committee accepted Mr. Praeger's design of rectangular floating concrete breakwaters, with the code name "Phoenix." They were built in England and floated across the English Channel to form a harbor for the landing and supply operations in Normandy.

After the war, Mr. Praeger served as a senior member of the Navy group studying the effects of atomic bombs and other aerial weapons on Japan. He was awarded the Legion of Merit.

He is survived by his wife, the former Edna Quinn; a son, Richard Q.; a daughter, Elizabeth Branigan, and 13 grandchildren.

LEGISLATIVE APPROPRIATION BILL, 1974—CONFERENCE REPORT

Mr. HOLLINGS. Mr. President, I submit a report of the committee of conference on H.R. 6691, and ask for its immediate consideration.

The ACTING PRESIDENT pro tempore (Mr. METCALF). The report will be stated by title.

The assistant legislative clerk read as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 6691) making appropriations for the legislative branch for the fiscal year ending June 30, 1974, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses this report, signed by all the conferees.

The ACTING PRESIDENT pro tempore. Is there objection to the consideration of the conference report?

There being no objection, the Senate proceeded to consider the report.

(The conference report is printed in the House proceedings of the CONGRESSIONAL RECORD of October 11, 1973, on page 33768.)

Mr. HOLLINGS. Mr. President, the final agreement has been reached in the Conference Committee on Senate amendments, and the conference report has been adopted by the House of Representatives. This bill passed the Senate on July 19, 1973, on which day the Senate requested a conference with the House of Representatives. The bill was sent to conference by the House on October 2, and final accord has been reached on all amendments. The most controversial amendments in the bill were numbers 45, 50, and 51. On amendment number 45, the House had provided in the first paragraph for an appropriation of $58,000,000 for extension of the Capitol. The Senate had deleted this paragraph and in lieu thereof had proposed language and an appropriation of $18,000,000 for restoration of the west central front of the Capitol. In conference, there was a complete impasse with respect to the proposals of the respective bodies and consequently the House conferees agreed to delete the House proposal and the Senate conferees agreed to delete the Senate proposal for restoration. What this rally amounts to is that the proposal is deferred for another year. In the meantime, under the provisions in the Legislative Branch Act for fiscal year 1972, none of the funds available to the Architect of the Capitol may be used for plans for extension of the west front of the Capitol.

On amendment No. 50, the Senate had proposed an appropriation of $15,000,000 and authority for the construction of an additional House office building. It was the view of the Senate that this building could be constructed just south of the Capitol on the Capitol grounds, underground. The Senate had also proposed an appropriation of $300,000 and authority to conduct a master plan for future development of the Capitol grounds or related areas. These two proposals, amendments Nos. 50 and 51 were deleted by the Conference Committee. In deleting these amendments for extension, restoration, an additional House office building and comprehensive plans, the conferees realized that full consideration could not be given these amendments at this time in that the House held no hearings on the proposal for an underground building next to the House wing of the Capitol. The Senate conferees are hopeful that the House will look into this matter further and this may be a desirable way to solve the problem for the House of Representatives for additional office space rather than the extension of the Capitol for this purpose.

In most instances in the other proposals of the Senate, the House accepted our amendments since they dealt mostly with housekeeping matters of the two bodies.

Mr. President, I would like to also at this point express my gratitude for the support and assistance of all the witnesses, particularly working with this committee of conference, and the distinguished senior Senator from New Hampshire (Mr. COTTON). He could not be with us today, but I have checked with him, and this conference report presentation meets with his approval. We have with us his sidekick and my distinguished friend the Senator from Pennsylvania (Mr. SCHWEIKER), who also worked daily with this committee, and with his assistance and that of the conferees on the House side, we were able to come to an agreement which I think will be satisfactory to both Houses. I thank the Senator from Pennsylvania for his wonderful help, and yield to him at this time.

Mr. SCHWEIKER. I thank the Senator.

Mr. President, as a member of the minority side of the Legislative Branch Appropriations Subcommittee, and the floor manager of this bill when it was originally before the Senate, I rise to endorse the conference report that was so ably summarized by our chairman, the distinguished Senator from South Carolina (Mr. HOLLINGS). I want to compliment the chairman on the excellent and thorough manner in which he has handled the bill since we first began our hearings back on May 2d.

While I do not want to delay the Senate I do want to associate myself with the remarks of the chairman regarding the west front of the Capitol. I, too, am keenly disappointed that we were not able to persuade the managers of the bill from the House of Representatives to accept the Senate position of restoration over extension. Even the most cursory examination of the massive evidence the subcommittee assembled during our extensive hearings on this matter should convince everyone of the soundness of restoring the last remaining original wall of this building and going underground in a less expensive way to meet the additional space requirements of the other body.

As a fellow member of the Board of the Office of Technology Assessment I am sure I join our chairman in the satisfaction that this long-needed congressional organization can now get started. This initial appropriation of $2 million is a modest amount to let us begin to form the capability the Congress needs in this era of rapid change in technology.

Before closing my remarks I also want to extend my best wishes to the clerk of our subcommittee, and the chief clerk of the Appropriations Committee, Mr. Thomas J. Scott, who will soon begin a well-deserved retirement. Tom has been with the committee for 30 years and is universally respected for his expert knowledge and judgment of the appropriations process as well as his fairness to all members of the committee and the Senate.

Mr. President, I ask unanimous consent to submit for the RECORD a statement on behalf of the Senator from New Hampshire (Mr. COTTON), the ranking Republican member on this conference committee. He is detained on committee business elsewhere at this time.

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

STATEMENT OF SENATOR COTTON

During our deliberations on this bill, Mr. Donald E. Vincent, the Librarian of the University of New Hampshire brought to my attention the urgent need to add $133,000 for the National Serials Data Program of the Library of Congress. This program, which is responsible for the assigning and maintaining of the International Standard Serial Number is vital to the library community in order to avoid costly duplication of materials and proper maintenance of the inter-library loan of periodicals and other serial materials. I am happy to note that the Conference accepted the full amount of my amendment for this program and that the expanded program can now go forward.

Mr. SCHWEIKER. I would just like to say that I have enjoyed working with our chairman, the distinguished Senator from South Carolina (Mr. HOLLINGS), because I think he has provided able and effective leadership in resolving several of the controversies that confronted this committee of conference. I think they were fairly, ably, and effectively ironed out, and I strongly support the conference report.

Mr. HOLLINGS. Mr. President, I move the adoption of the conference report.

The ACTING PRESIDENT pro tempore. The question is on agreeing to the conference report.

The report was agreed to.

The ACTING PRESIDENT pro tempore. The clerk will report the amendment in disagreement.

The assistant legislative clerk read as follows:

Resolved, That the House recede from its disagreement to the amendment of the Senate numbered 34 to the aforesaid bill, and concur therein with an amendment as follows:

In lieu of the matter proposed by said amendment, insert:

Effective January 1, 1974, section 105(d)(1) of the Legislative Branch Appropriation Act, 1968, as amended by the preceding paragraph, is amended to read as follows:

"(1)(A) Commencing January 1, 1974, the aggregate of gross compensation paid employees in the office of a Senator shall not exceed during each calendar year the following:

"$352,240 if the population of his State is less than 2,000,000;

"$362,848 if such population is 2,000,000 but less than 3,000,000;

"$388,416 if such population is 3,000,000 but less than 4,000,000;

"$421,328 if such population is 4,000,000 but less than 5,000,000;

"$448,256 if such population is 5,000,000 but less than 7,000,000;

"$476,544 if such population is 7,000,000 but less than 9,000,000;

"$507,280 if such population is 9,000,000 but less than 10,000,000;

"$530,944 if such population is 10,000,000 but less than 11,000,000;

"$561,952 if such population is 11,000,000 but less than 12,000,000;

"$585,616 if such population is 12,000,000 but less than 13,000,000;

"$615,808 if such population is 13,000,000 but less than 15,000,000;

"$646,000 if such population is 15,000,000 but less than 17,000,000;

"$676,192 if such population is 17,000,000 or more.

In any calendar year in which a Senator does not hold the office of Senator at least part of each month of that year, the aggregate amount available for gross compensation of employees in the office of that Senator shall be the applicable amount contained in the table included in this subparagraph, divided by 12, and multiplied by the number of months the Senator holds such office during that calendar year, counting any fraction of a month as a full month.

"(B) The aggregate of payments of gross compensation made to employees in the office of a Senator during each calendar year shall not exceed at any time during such calendar year one-twelfth of the applicable amount contained in the table included in subparagraph (A) of this paragraph multiplied by the number of months (counting a fraction of a month as a month) elapsing from the first month in that calendar year in which the Senator holds the office of Senator through the end of the current month for which the payment of gross compensation is to be made."

Effective October 1, 1973, any rate of compensation increased or established under the headings "Office of the Chaplain", "Office of the Secretary", and "Office of Sergeant at Arms and Doorkeeper", and any new dollar limitation contained in amendments made by the sixth and seventh full unnumbered paragraphs under the heading "ADMINISTRATIVE PROVISIONS", are increased in accordance with the Order of the President pro tempore of the Senate of October 4, 1973. Effective January 1, 1974, the dollar limitations contained in the amendment made by the eighth full unnumbered paragraph under this heading "ADMINISTRATIVE PROVISIONS" are increased in accordance with the applicable dollar limitations contained in such order.

Mr. HOLLINGS. Mr. President, I move that the Senate concur in the amendment of the House of Representatives to amendment of the Senate No. 34.

The motion was agreed to.

THE WATERGATE TAPES AND THE VICE-PRESIDENTIAL CONFIRMATION

Mr. KENNEDY. Mr. President, as I have stated on previous occasions in recent weeks, one of the most critical emerging developments in the Nation is the ominous constitutional confrontation looming between the President and the courts over the tapes in the Watergate case. Inexorably, the case has now reached the threshold of the Supreme Court, and there is good reason to anticipate that the Court will hear and decide the case before it recesses for the Christmas holidays in December.

The nature of the potential confrontation is clear. Two lower Federal courts—the district court on August 29 and the court of appeals on October 12—have already ruled that President Nixon may be ordered to disclose the tapes. The President and his White House staff have left the clear impression that the President may decide to defy the Supreme Court if the final order of the Court requires the tapes to be disclosed.

My hope is that the confrontation will not materialize. Perhaps the Supreme Court will rule in favor of the President. Or, perhaps the President and the special prosecutor may yet find a way to resolve their differences, as the court of appeals has so strongly suggested, and thereby spare the country the further constitutional crisis that now appears so close.

But if a solution is not found, there can be no question of the President's obligation to abide by the Supreme Court's decision interpreting the law. There can be no question of his obligation to produce the tapes if that is the Court's command.

If the President defies the Supreme Court on the tapes, then he defies the Constitution. He defies 200 years of American history. He defies the rule of law under which all of us must live. In that event, as I said last month, a responsible Congress would have no recourse but to exercise its power of impeachment.

As the time for decision draws near, I hope that each Senator and Representative will weigh his obligation to the Supreme Court and to the Nation's highest law. I do not share the view of those who say that Congress is too weak or too timid to act. We have taken our oath to support and defend the Constitution. It cannot be for naught that Congress stopped the bombing in Indochina last August, or that Congress has begun to reassert its own long-neglected prerogatives in important legislative areas like war powers and impoundment. If the President is so unwise as to put Congress in a position on the tapes in which Congress must choose between the Constitution or the President, I have no doubt that Congress will choose the Constitution.

But there is another issue as well, a related issue that we in Congress must also face, and face earlier than the question of the tapes. Because the cloud of Watergate and the tapes hangs so clearly over the President, the Senate and the House have a special obligation to give the closest possible examination to the qualifications of the man who has been nominated to be our new Vice President, the man who may well become our President if Mr. Nixon resigns or is impeached.

The ACTING PRESIDENT pro tempore. The Senator's time has expired and the extended period for the transaction of routine morning business has also expired.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the period for the transaction of routine morning business be extended for a period of not to exceed 10 minutes, with a limitation of 5 minutes on statements therein, that I may be recognized, and that I may yield my 5 minutes to the Senator from Massachusetts.

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

Mr. KENNEDY. Mr. President, whatever other investigations Congress may undertake on the nomination of Mr. FORD, the Senate and the House have a paramount obligation to ask him whether he believes the President must comply with an order of the Supreme Court to disclose the tapes. We have the right and duty to demand a Vice President who unequivocally acknowledges the supremacy of the rule of the law. However distinguished his career may be, however acceptable his other qualifications may be, if Mr. FORD refuses to acknowledge the obligation of the President to obey the Supreme Court, then Congress has the right and duty to refuse his confirmation.

Mr. President, because of the extraordinary significance of the tapes case, I ask unanimous consent that the decision of the court of appeals, issued last Friday, be printed in the RECORD, so that it may be widely available to all who share our deep concern over this difficult question.

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

[U.S. Court of Appeals for the District of Columbia Circuit]

PETITIONS FOR WRITS OF MANDAMUS AND APPEALS

No. 73-1962: Richard M. Nixon, President of the United States, Petitioner v. the Honorable John J. Sirica, United States District Judge, Respondent and Archibald Cox, Special Prosecutor, Watergate Special Prosecution Force, Party in Interest.

No. 73-1967: United States of America, Petitioner v. the Honorable John J. Sirica, Chief Judge, United States District Court for the District of Columbia, Respondent and Richard M. Nixon, President of the United States, Party in Interest.

No. 73-1989: In re: Grand Jury Proceedings.

Decided October 12, 1973—*Charles Alan Wright*, with whom *Douglas M. Parker* and *Robert T. Anderson*, were on the brief, for petitioner in No. 73-1962.

Archibald Cox, with whom *Philip A. Lacovara* and *Peter M. Kreindler* were on the brief, for petitioner in Nos. 73-1967 and 73-1989.

Anthony C. Morella and *George D. Horning, Jr.* for respondent.

Before Bazelon, *Chief Judge*, and Wright McGowan, Leventhal, Robinson, MacKinnon and Wilkey, Circuit Judges, sitting en banc.

Opinion *Per Curiam*.

Opinion by *Circuit Judge* MacKinnon, concurring in part and dissenting in part.

Opinion by *Circuit Judge* Wilkey, concurring in part and dissenting in part.

Per Curiam: This controversy concerns an order of the District Court for the District of Columbia entered on August 29, 1973, by Chief Judge John J. Sirica as a means of enforcing a grand jury subpoena *duces tecum* issued to and served on President Richard M. Nixon. The order commands the President, or any subordinate official, to produce certain items identified in the subpoena so that the Court can determine, by *in camera* inspection, whether the items are exempted from disclosure by evidentiary privilege.[1]

Both the President and Special Prosecutor Archibald Cox, acting on behalf of the grand jury empanelled by the District Court in June, 1972,[2] challenge the legality of this order. All members of this Court agree that the District Court had, and this Court has, jurisdiction to consider the President's claim of privilege.[3] The majority of the Court approves the District Court's order, as clarified and modified in part, and otherwise denies the relief requested.

I

We deem it essential to emphasize the narrow contours of the problem that compels the Court to address the issues raised by this case. The central question before us is, in essence, whether the President may, in his sole discretion, withhold from a grand jury evidence in his possession that is relevant to the grand jury's investigations. It is our duty to respond to this question, but we limit our decision strictly to that required by the precise and entirely unique circumstances of the case.

Footnotes at end of article.

On July 23 of this year, Special Prosecutor Cox caused to be issued a subpoena *duces tecum* directed to the President.[4] The subpoena called upon the President to produce before the grand jury certain documents and objects in his possession—specifically, tape recordings of certain identified meetings and telephone conversations that had taken place between the President and his advisers in the period from June 20, 1972 to April 15, 1973.[5] In a letter dated July 25, 1973, addressed to the Chief Judge of the District Court, the President declined to produce the subpoenaed recordings. The President informed the Court that he had concluded "that it would be inconsistent with the public interest and with the Constitutional position of the Presidency to make available recordings of meetings and telephone conversations in which [he] was a participant. . . ." [6]

On July 26, at the instruction of the grand jury, the Special Prosecutor applied to the District Court for an order requiring production of the evidence. Having determined by poll in open court the grand jury's desire for the evidence, the District Judge ordered the President, or any appropriate subordinate official, to show cause "why the documents and objects described in [the subpoena] should not be produced. . . ." On August 7, in answer to the order, the President filed a Special Appearance and Brief in Opposition, stating that the letter of July 25 constituted a "valid and formal claim of executive privilege" and that, therefore, the District Court "lack[ed] jurisdiction to enter an enforceable order compelling compliance with the subpoena. . . ." [7]

The District Court then allowed the Special Prosecutor to submit a memorandum in response to that of the President and in support of the Court's order. This memorandum contains a particularized showing of the grand jury's need for each of the several subpoenaed tapes [8]—a need that the District Court subsequently and, we think, correctly termed "well-documented and imposing." [9]

The strength and particularity of this showing were made possible by a unique intermeshing of events unlikely soon, if ever, to recur. The President had previously declared his intention to decline to assert any privilege with respect to testimony by his present and former aides, whether before the grand jury or the Select Committee of the Senate on Presidential Campaign Activities, concerning what has come to be known as the "Watergate" affair.[10] As a result, detailed testimony by these aides before the Senate Committee enabled the Special Prosecutor to show a significant likelihood that there existed conspiracies among persons other than those already convicted of the Watergate break-in and wiretapping, not only to commit those offenses, but to conceal the identities of the persons involved. Moreover, the Special Prosecutor was able to show from the public testimony that important evidence relevant to the existence and scope of the purported conspiracy was contained in statements made by the President's advisers during certain conversations that took place in his office. Most importantly, perhaps, significant inconsistencies in the sworn testimony of these advisers relating to the content of the conversations raised a distinct possibility that perjury had been committed before the Committee and, perhaps, before the grand jury itself.

Thus, the Special Prosecutor was able to show that the tape recordings of the disputed conversations—conversations specifically identified as to time, place, and content—were each directly relevant to the grand jury's task. Indeed, the Memorandum demonstrates, particularly with respect to the possible perjury offenses, that the subpoenaed recordings contain evidence critical to the grand jury's decisions as to whether and whom to indict.

On August 29th, the Chief Judge of the District Court entered the order at issue in this case. In the accompanying opinion, he rejected the President's challenge to the Court's jurisdiction and to its authority to enter orders necessary to the enforcement of the subpoena. The President, petitioner in No. 73–1962, asks this Court for a writ of mandamus commanding the District Court to vacate its August 29th order. In No. 73–1967, the United States, through the Special Prosecutor and on behalf of the grand jury, petitions for a writ commanding the District Court to order full and immediate disclosure of the tapes to the grand jury and, in the alternative, for instructions to govern any *in camera* inspection that takes place. The United States has, in addition, filed an appeal from the order below.[11]

Because of the public interest in their prompt resolution, we consolidated the cases and ordered briefing on an expedited schedule. For the reasons stated herein, we decline to command the District Court to vacate its order, and dismiss both the petition and appeal of the United States. We direct, however, that the District Court modify its order in certain respects, and that it conduct further proceedings in this case in a manner consistent with the criteria and procedures defined in this opinion.

II

In their petitions for relief, both the President and the Special Prosecutor invoke this court's statutory authority to issue "all writs necessary or appropriate in aid of" its jurisdiction.[12] As the Supreme Court has noted, the peremptory writ of mandamus, one of the group authorized by the All Writs Act, "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' " [13] And although jurisdiction, for purposes of the writ, need not be defined in its narrow, technical sense, "it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." [14] Beyond these considerations, the writ may not be used as a substitute for an appeal, nor to subvert the general congressional policy against appeals from interlocutory orders,[15] a policy that is particularly strong in criminal cases.[16]

With these general parameters in mind, we turn first to the President's petition, which seeks to accommodate a well settled limitation on direct appeals challenging subpoenas. As recently restated by the Supreme Court, ordinarily "one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey." [17] Contrary to the argument of the respondent Chief Judge, we see no basis for broadly differentiating an order to produce evidence for an *in camera* inspection to determine whether it is privileged from disclosure to a grand jury.

From the viewpoint of mandamus, however, the central question that the President raises—whether the District Court exceeded its authority in ordering an *in camera* inspection of the tapes—is essentially jurisdictional.[18] It is, too, a jurisdictional problem of "first impression" involving a "basic, undecided question." [19] And if indeed the only avenue of direct appellate review open to the President requires that he first disobey the court's order, appeal seems to be "a clearly inadequate remedy." [20] These circumstances, we think, warrant the exercise, at the instance of the President, of our review power under the All Writs Act,[21] particularly in light of the great public interest in prompt resolution of the issues that his petition presents.[22]

We find the Special Prosecutor's petition much more problematic.[23] The Supreme Court "has never approved the use of the writ to review"—at the instance of the Government—"an interlocutory procedural order in a criminal case which did not have the effect of a dismissal." [24] And while the Court has not decided "under what circumstances, if any, such a use of mandamus would be appropriate," [25] we have grave doubt that it would be appropriate in this case. It is by no means clear that a writ directing the District Court to dispense with *in camera* inspection and order immediate production to the grand jury could fairly be characterized as aiding this court's jurisdiction, however non-technically jurisdiction might be defined.

Moreover, any resolution of the President's petition necessitates consideration of the validity of the projected *in camera* inspection—the object of the Special Prosecutor's sole objection—and of the need for instructions governing any such inspection—the subject of his sole request in the alternative. In *Schlagenhauf* v. *Holder*,[26] the Supreme Court sustained the inherent power of the courts of appeals in special circumstances to review by mandamus a "basic, undecided question." [27] and "to settle new and important problems." [28] Although one of the problems raised in that case would not normally have justified an exercise of mandamus authority, the Court recognized the propriety of avoiding piecemeal litigation by resolving all issues arising out of the same set of operative facts.[29] Surely the extraordinary importance of the issues that the Special Prosecutor tenders demands no less.

Mandamus is generally withheld when relief is available in another manner.[30] Our review of the President's contentions will necessarily subsume the Special Prosecutor's present concerns. Since we do not consider the question of jurisdiction of his petition essential to a full disposition of this consolidated proceeding, we exercise our discretion [31] to dismiss the petition without deciding it.

III

We turn, then, to the merits of the President's petition. Counsel for the President contend on two grounds that Judge Sirica lacked jurisdiction to order submission of the tapes for inspection. Counsel argue, first, that, so long as he remains in office, the President is absolutely immune from the compulsory process of a court; and, second, that Executive privilege is absolute with respect to presidential communications, so that disclosure is at the sole discretion of the President. This immunity and this absolute privilege are said to arise from the doctrine of separation of powers and by implication from the Constitution itself. It is conceded that neither the immunity nor the privilege is express in the Constitution.

A.

It is clear that the want of physical power to enforce its judgments does not prevent a court from deciding an otherwise justiciable case.[32] Nevertheless, if it is true that the President is legally immune from court process, this case is at an end. The judiciary will not, indeed cannot, indulge in rendering an opinon to which the President has no legal duty to conform. We must, therefore, determine whether the President is *legally* bound to comply with an order enforcing a subpoena.[33]

We note first that courts have assumed that they have the power to enter mandatory orders to Executive officials to compel production of evidence.[34] While a claim of an absolute Executive immunity may not have been raised directly before these courts, there is no indication that they entertained any doubts of their power. Only last term in *Environmental Protection Agency* v. *Mink*,[35] the Supreme Court stated that a District Court "may order" *in camera* inspections of certain materials to determine whether they

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must be disclosed to the public pursuant to the Freedom of Information Act.[36]

The courts' assumption of legal power to compel production of evidence within the possession of the Executive surely stands on firm footing. *Youngstown Sheet & Tube* v. *Sawyer*,[37] in which an injunction running against the Secretary of Commerce was affirmed, is only the most celebrated instance of the issuance of compulsory process against Executive officials. See, e.g., *United States* v. *United States District Court*, 407 U.S. 297 (1972) (affirming an order requiring the Government to make full disclosure of illegally wiretapped conversations); *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1828) (issuing a mandamus to Postmaster General, commanding him fully to comply with an act of Congress); *State Highway Commission* v. *Volpe*, —— F. 2d ——, No. 72-1512 (8th Cir., filed April 2, 1973) (enjoining the Secretary of Transportation).

It is true that, because the President has taken personal custody of the tapes and is thus himself a party to the present action, these cases can be formally distinguished. As Judge Sirica noted, however, to rule that this case turns on such a distinction would be to exalt the form of *Youngstown Sheet and Tube* over its substance. Justice Black, writing for the *Youngstown* majority, made it clear that the Court understood its affirmance effectively to restrain the President. There is not the slightest hint in any of the *Youngstown* opinions that the case would have been viewed differently if President Truman rather than Secretary Sawyer had been the named party.[38] If *Youngstown* still stands, it must stand for the case where the President has himself taken possession and control of the property unconstitutionally seized, and the injunction would be framed accordingly. The practice of judicial review would be rendered capricious—and very likely impotent—if jurisdiction vanished whenever the President personally denoted an Executive action or omission as his own. This is not to say that the President should lightly be named as a party defendant. As a matter of comity, courts should normally direct legal process to a lower Executive official even though the effect of the process is to restrain or compel the President. Here, unfortunately, the court's order must run directly to the President, because he has taken the unusual step of assuming personal custody of the Government property sought by the subpoena.

The President also attempts to distinguish *United States* v. *Burr*,[39] in which Chief Justice Marshall squarely ruled that a subpoena may be directed to the President. It is true that *Burr* recognized a distinction between the issuance of a subpoena and the ordering of compliance with that subpoena, but the distinction did not concern judicial power or jurisdiction. A subpoena *duces tecum* is an order to produce documents or to show cause why they need not be produced. An order to comply does not make the subpoena more compulsory; it simply maintains its original force. The Chief Justice's words merit close attention. His statement:

"Whatever difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen there exists no difference with respect to the right to obtain it [,]"

is immediately followed by the statement:

"The guard, furnished to this high officer, to protect him from being harassed by *vexatious and unnecessary* subpoenas, is to be looked for in the conduct of the court after those subpoenas have issued; not in any circumstances which is to precede their being issued." [40]

The clear implication is that the President's special interests may warrant a careful judicial screening of subpoenas after the President interposes an objection, but that some subpoenas will nevertheless be properly sustained by judicial orders of compliance. This implication is borne out by a later opinion by the great Chief Justice in the same case. When President Jefferson did not fully respond to the subpoena issued to him, Colonel Burr inquired why the President should not comply. The Chief Justice's answer should put to rest any argument that he felt the President absolutely immune from orders of compliance:

"The President, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives *may be* such as to restrain the court from enforcing its production. * * * I can readily conceive that the President might receive a letter which it would be improper to exhibit in public * * *. The occasion for *demanding* it ought, in such a case, to be very strong, and to be fully shown to the court before its production could be *insisted* on. * * * Such a letter, though it be a private one seems to partake of the character of an official paper, and to be such as ought not on *light ground* to be forced into public view." [41]

A compliance order was, for Marshall, distinct from an order to show cause simply because compliance was not to be ordered before weighing the President's particular reasons for wishing the subpoenaed documents to remain secret. The court was to show respect for the President in weighing those reasons, but the ultimate decision remained with the court.[42]

Thus, to find the President immune from judicial process, we must read out of *Burr* and *Youngstown* the underlying principles that the eminent jurists in each case thought they were establishing. The Constitution makes no mention of special presidential immunities. Indeed, the Executive Branch generally is afforded none. This silence cannot be ascribed to oversight. James Madison raised the question of Executive privileges during the Constitutional Convention,[43] and Senators and Representatives enjoy an express, if limited, immunity from arrest, and an express privilege from inquiry concerning "Speech and Debate" on the floors of Congress.[44] Lacking textual support, counsel for the President nonetheless would have us infer immunity from the President's political mandate or from his vulnerability to impeachment, or from his broad discretionary powers. These are invitations to refashion the Constitution, and we reject them.

Though the President is elected by nationwide ballot, and is often said to represent all the people,[45] he does not embody the nation's sovereignty.[46] He is not above the law's commands: "With all its defects, delays and inconveniences men have discovered no technique for long preserving free government except that the Executive be under the law. . . ." [47] Sovereignty remains at all times with the people, and they do not forfeit through elections the right to have the law construed against and applied to every citizen.

Nor does the Impeachment Clause imply immunity from routine court process.[48] While the President argues that the Clause means that impeachability precludes criminal prosecution of an incumbent, we see no need to explore this question except to note its irrelevance to the case before us. The order entered below, and approved here in modified form, is not a form of criminal process. Nor does it compete with the impeachment device by working a constructive removal of the President from office. The subpoena names in the alternate "any subordinate officer," and the tasks of compliance may obviously be delegated in whole or in part so as not to interfere with the President's official responsibilities.[49] By contemplating the possibility of post-impeachment trials for violations of law committed in office, the Impeachment Clause itself reveals that incumbency does not relieve the President of the routine legal obligations that confine all citizens. That the Impeachment Clause may qualify the court's power to sanction noncompliance with judicial orders is immaterial. Whatever the qualifications, they were equally present in *Youngstown:* Commerce Secretary Sawyer, the defendant there, was an impeachable "civil officer," [50] but the injunction against him was nonetheless affirmed. The legality of judicial orders should not be confused with the legal consequences of their breach; for the courts in this country always assume that their orders will be obeyed, especially when addressed to responsible government officials. Indeed, the President has, in this case, expressly abjured the course of setting himself above the law.

Finally, the President reminds us that the landmark decisions recognizing judicial power to mandamus Executive compliance with "ministerial" duties also acknowledged that the Executive Branch enjoys an unreviewable discretion in many areas of "political" or "executive" administration.[51] While true, this is irrelevant to the issue of presidential immunity from judicial process. The discretionary-ministerial distinction concerns the nature of the act or omission under review, not the official title of the defendant.[52] No case holds that an act is discretionary merely because the President is the actor.[53] If the Constitution or the laws of evidence confer upon the President the absolute discretion to withhold material subpoenaed by a grand jury, then of course we would vacate, rather than approve with modification, the order entered below. However, this would be because the order touched upon matters within the President's sole discretion, not because the President is immune from process generally. We thus turn to an examination of the President's claim of an absolute discretion to withhold evidence from a grand jury.

B.

There is, as the Supreme Court has said, a "longstanding principle" that the grand jury "has a right to every man's evidence" except that "protected by a constitutional, common law, or statutory privilege." [54] The President concedes the validity of this principle. He concedes that he, like every other citizen, is under a legal duty to produce relevant, non-privileged evidence when called upon to do so.[55] The President contends, however, that whenever, in response to a grand jury subpoena, he interposes a formal claim of privilege, that claim without more disables the courts from inquiring by any means into whether the privilege is applicable to the subpoenaed evidence. The President agrees that, in theory, the privilege attached to his office has limits; for example, he explicitly states that it "cannot be claimed to shield executive officers from prosecution for crime." [56] Nonetheless, he argues that it is his responsibility, and his alone, to determine whether particular information falls beyond the scope of the privilege. In effect, then, the President claims that, at least with respect to conversations with his advisers, the privilege is absolute, since he, rather than the courts, has final authority to decide whether it applies in the circumstances.

We of course acknowledge the longstanding judicial recognition of Executive privilege. Courts have appreciated that the public interest in maintaining the secrecy of military and diplomatic plans may override private interests in litigation.[57] They have further responded to Executive pleas to protect from the light of litigation "intragovernmental documents reflecting * * * deliberations comprising part of a process by which governmental decisions and policies are

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formulated." [58] In so doing, the Judiciary has been sensitive to the considerations upon which the President seems to rest his claim of absolute privilege: the candor of Executive aides and functionaries would be impaired if they were persistently worried that their advice and deliberations were later to be made public.[59] However, counsel for the President can point to no case in which a court has accepted the Executive's mere assertion of privilege as sufficient to overcome the need of the party subpoenaing the documents. To the contrary, the courts have repeatedly asserted that the applicability of the privilege is in the end for them and not the Executive to decide.[60] They have, moreover, frequently ordered *in camera* inspection of documents for which a privilege was asserted in order to determine the privilege's applicability.[61]

It is true, as counsel for the President stress, that Presidents and Attorneys General have often said that the President's final and absolute assertion of Executive privilege is conclusive on the courts.[62] The Supreme Court in *United States* v. *Reynolds*, however, went a long way toward putting this view to rest. The *Reynolds* Court, considering a claim based on military secrets, strongly asserted: "The Court itself must determine whether the circumstances are appropriate for claim of privilege;" [63] "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." [64] It is true that, somewhat inconsistently with this sweeping language, the Court formally reserved decision on the Government's claim that the Executive has an absolute discretion constitutionally founded in separation of powers to withhold documents.[65] However, last term in *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*,[66] we confronted directly a claim of absolute privilege and rejected it: "Any claim to executive absolutism cannot override the duty of the court to assure that an official has not exceeded his charter or flouted the legislative will." [67]

We adhere to the *Seaborg* decision. To do otherwise would be effectively to ignore the clear words of *Marbury* v. *Madison*,[68] that "[i]t is emphatically the province and duty of the judicial department to say what the law is." [69]

Seaborg is not only consistent with, but dictated by, separation of powers doctrine. Whenever a privilege is asserted, even one expressed in the Constitution, such as the Speech and Debate privilege, it is the courts that determine the validity of the assertion and the scope of the privilege.[70] That the privilege is being asserted by the President against a grand jury subpoena does not make the task of resolving the conflicting claims any less judicial in nature. Throughout our history, there have frequently been conflicts between independent organs of the federal government, as well as between the state and federal governments. When such conflicts arise in justiciable cases, our constitutional system provides a means for resolving them—one Supreme Court. To leave the proper scope and application of Executive privilege to the President's sole discretion would represent a mixing, rather than a separation, of Executive and Judicial functions. A breach in the separation of powers must be explicitly authorized by the Constitution,[71] or be shown necessary to the harmonious operation of "workable government." [72] Neither condition is met here. The Constitution mentions no Executive privileges, much less any absolute Executive privileges. Nor is an absolute privilege required for workable government. We acknowledge that wholesale public access to Executive deliberations and documents would cripple the Executive as a co-equal branch. But this is an argument for recognizing Executive privilege and for according it great weight, not for making the Executive the judge of its own privilege.

If the claim of absolute privilege was recognized, its mere invocation by the President or his surrogates could deny access to all documents in all the Executive departments to all citizens and ther representatives, including Congress, the courts as well as grand juries, state governments, state officials and all state subdivisions. The Freedom of Information Act could become nothing more than a legislative statement of unenforceable rights. Support for this kind of mischief simply cannot be spun from incantation of the doctrine of separation of powers.[73]

Any contention of the President that records of his personal conversations are not covered by the *Seaborg* holding must be rejected. As our prior discussion of *United States* v. *Burr* makes clear, Chief Justice Marshall's position supports this proposition. At issue in *Burr* was a subpoena to President Jefferson to produce private letters sent to him—communications whose status must be considered equal to that of private oral conversations. We follow the Chief Justice and hold today that, although the views of the Chief Executive on whether his Executive privilege should obtain are properly given the greatest weight and deference, they cannot be conclusive.

IV

The President's privilege cannot, therefore, be deemed absolute. We think the *Burr* case makes clear that application of Executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case.[74] We direct our attention, however, solely to the circumstances here. With the possible exception of material on one tape, the President does not assert that the subpoenaed items involve military or state secrets; [75] nor is the asserted privilege directed to the particular kinds of information that the tapes contain. Instead, the President asserts that the tapes should be deemed privileged because of the great public interest in maintaining the confidentiality of conversations that take place in the President's performance of his official duties. This privilege, intended to protect the effectiveness of the executive decision-making process, is analogous to that between a congressman and his aides under the Speech and Debate Clause; to that among judges, and between judges and their law clerks; [76] and similar to that contained in the fifth exemption to the Freedom of Information Act.[77]

We recognize this great public interest, and agree with the District Court that such conversations are presumptively privileged.[78] But we think that this presumption of privilege premised on the public interest in confidentiality must fall in the face of the uniquely powerful showing made by the Special Prosecutor in this case. The function of the grand jury, mandated by the Fifth Amendment for the institution of federal criminal prosecutions for capital or other serious crimes, is not only to indict persons when there is probable cause to believe they have committed crime, but also to protect persons from prosecution when probable cause does not exist.[79] As we have noted, the Special Prosecutor has made a strong showing that the subpoenaed tapes contain evidence peculiarly necessary to the carrying out of this vital function—evidence for which no effective substitute is available. The grand jury here is not engaged in a general fishing expedition, nor does it seek in any way to investigate the wisdom of the President's discharge of his discretionary duties. On the contrary, the grand jury seeks evidence that may well be conclusive to its decisions in on-going investigations that are entirely within the proper scope of its authority. In these circumstances, what we said in *Committee for Nuclear Responsibility* v. *Seaborg* becomes, we think, particularly appropriate:

"But no executive or agency can be given absolute authority to determine what documents in his possession may be considered by the court in its task. Otherwise the head of an executive department would have the power on his own say so to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law." [80]

Our conclusion that the general confidentiality privilege must recede before the grand jury's showing of need, is established by the unique circumstances that made this showing possible. In his public statement of May 22, 1973, the President said: "Executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation, including the Watergate affair and the alleged cover-up." [81] We think that this statement and its consequences may properly be considered as at least one factor in striking the balance in this case. Indeed, it affects the weight we give to factors on both sides of the scale. On the one hand, the President's action presumably reflects a judgment by him that the interest in the confidentiality of White House discussions in general is outweighed by such matters as the public interest, stressed by the Special Prosecutor, in the integrity of the level of the Executive Branch closest to the President, and the public interest in the integrity of the electoral process—an interest stressed in such cases as *Civil Service Commission* v. *National Association of Letter Carriers* [82] and *United States* v. *United Automobile Workers*.[83] Although this judgment in no way controls our decision, we think it supports our estimation of the great public interest that attaches to the effective functioning of the present grand jury. As *Burr* makes clear, the courts approach their function by considering the President's reasons and determinations concerning confidentiality.

At the same time, the public testimony given consequent to the President's decision substantially diminishes the interest in maintaining the confidentiality of conversations pertinent to Watergate. The simple fact is that the conversations are no longer confidential. Where it is proper to testify about oral conversations, taped recordings of those conversations are admissible as probative and corroborative of the truth concerning the testimony.[84] There is no "constitutional right to rely on possible flaws in the [witness's] memory. * * * [N]o other argument can justify excluding an accurate version of a conversation that the [witness] could testify to from memory." [85] In short, we see no justification, on confidentiality grounds, for depriving the grand jury of the best evidence of the conversations available.[86]

The District Court stated that, in determining the applicability of privilege, it was not controlled by the President's assurance that the conversations in question occurred pursuant to an exercise of his constitutional duty to "take care that the laws be faithfully executed." The District Court further stated that while the President's claim would not be rejected on any but the strongest possible evidence, the Court was unable to decide the question of privilege without inspecting the tapes.[87] This passage of the District Court's opinion is not entirely clear. If, however, the District Judge meant that rejection of the claim of privilege requires a finding that the President was not engaged in the performance of his constitutional duty, we cannot agree. We emphasize that the grand jury's showing of need in no sense relied on any evidence that the President was involved in, or even aware of, any alleged criminal activity. We freely assume, for purposes of this opinion, that the President was engaged

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in performance of his constitutional duty. Nonetheless, we hold that the District Court may order disclosure of all portions of the tapes relevant to matters within the proper scope of the grand jury's investigations, unless the Court judges that the public interest served by nondisclosure of *particular* statements or information outweighs the need for that information demonstrated by the grand jury.

V

The question remains whether, in the circumstances of this case, the District Court was correct in ordering the tapes produced for *in camera* inspection, so that it could determine whether and to what extent the privilege was properly claimed. Since the question of privilege must be resolved by the Court, there must be devised some procedure or series of procedures that will, at once, allow resolution of the question and, at the same time, not harm the interests that the privilege is intended to protect.

Two days after oral argument, this Court issued a Memorandum calling on the parties and counsel to hold conversations toward the objective of avoiding a needless constitutional adjudication. Counsel reported that their sincere efforts had not been fruitful.[88] It is our hope that our action in providing what has become an unavoidable constitutional ruling, and in approving, as modified, the order of the District Court, will be followed by maximum cooperation among the parties. Perhaps the President will find it possible to reach some agreement with the Special Prosecutor as to what portions of the subpoenaed evidence are necessary to the grand jury's task.

Should our hope prove unavailing, we think that *in camera* inspection is a necessary and appropriate method of protecting the grand jury's interest in securing relevant evidence. The exception that we have delineated to the President's confidentiality privilege depends entirely on the grand jury's showing that the evidence is directly relevant to its decisions. The residual problem of this case derives from the possibility that there are elements of the subpoenaed recordings that do not lie within the range of the exception that we have defined.

This may be due, in part, to the fact that parts of the tape recordings do not relate to Watergate matters at all. What is apparently more stressed by the President's counsel is that there are items in the tape recordings that should be held confidential yet are inextricably interspersed with the portions that relate to Watergate. They say, concerning the President's decision to permit testimony about possible criminal conduct or discussions thereof, that

"testimony can be confined to the relevant portions of the conversations and can be limited to matters that do not endanger national security. Recordings cannot be so confined and limited, and thus the President has concluded that to produce the recordings would do serious damage to Presidential privacy and to the ability of that office to function." [89]

The argument is not confined to matters of national security, for the underlying importance of preserving candor of discussion and Presidential privacy pertains to all conversations that involve discussion or making of policy, ordinary domestic policies as well as matters of national security, and even to personal discussion with friends and advisers on seemingly trivial matters.[90] Concerning the inextricability problem, the President's counsel say:

"Recordings are the raw material of life. By their very nature they contain spontaneous, informal, tentative and frequently pungent comments on a variety of subjects inextricably intertwined into one conversation. * * * The nature of informal, private conversations is such that it is not practical to separate what is arguably relevant from what is clearly irrelevant." [91]

The "inextricable intermingling" issue may be potentially significant. The District Court correctly discerned that *in camera* inspection is permissible, even though it involved what the President's counsel agree is a "limited infraction" of confidentiality, in order to determine whether there is inextricable intermingling. In *EPA* v. *Mink*, the Supreme Court declared that *in camera* inspection was an appropriate means of determining whether and to what extent documents sought in litigation were disclosable as factual information even though the Government argued that the documents "submitted directly to the President by top-level Government officials" were, by their very nature, a blending of factual presentation and policy recommendations that are necessarily "inextricably intertwined with policymaking processes." [92] The Supreme Court stated that it had no reason to believe that the District Judge directed to make *in camera* inspection would go beyond the limits of the remand and in any way compromise the confidentiality of deliberative information." The Court acknowledged that "the encouragement of open expression of opinion as to governmental policy is somewhat impaired by a requirement to submit the evidence even [*in camera*]." Yet the Court stated: "Plainly, in some situations, *in camera* inspection will be necessary and appropriate." [93] It further noted: "A representative document of those sought may be selected for *in camera* inspection." And it suggested that the agency may disclose portions of the contested documents and attempt to show, by circumstances, "that the excised portions constitute the barebones of protected matter." [94]

In this case, the line of permissible disclosure is different from that in *Mink*, since even policy and decisional discussions are disclosable if they relate to Watergate and the alleged coverup. But *Mink* confirms that courts appropriately examine a disputed item *in camera*, even though this necessarily involves a limited intrusion upon what ultimately may be held confidential, where it appears with reasonable clarity that some access is appropriate, and *in camera* inspection is needed to determine what should and what should not be revealed.[95]

Mink noted that the case might proceed by the Government's disclosing portions of the contested documents.[96] and also noted an instance in which the "United States offered to file an abstract of factual information contained in the contested documents [FBI reports]." [97] We think that the District Judge and counsel can illuminate the key issue of what is "inextricable" by cultivating the partial excision and "factual abstract" approaches noted in *Mink*.

The District Court contemplated that "privileged portions may be excised so that only unprivileged matter goes before the grand jury." Even in a case of such intermingling as, for example, comment on Watergate matters that is "pungent," once counsel, or the District Judge, has listened to the tape recording of a conversation, he has an ability to present only its relevant portions, much like a bystander who heard the conversation and is called to testify. He may give the grand jury portions relevant to Watergate, by using excerpts in part and summaries in part, in such a way as not to divulge aspects that reflect the pungency of candor or are otherwise entitled to confidential treatment. It is not so long ago that appellate courts routinely decided cases without an exact transcript, but on an order of the trial judge settling what was given as evidence.

VI

We contemplate a procedure in the District Court, following the issuance of our mandate, that follows the path delineated in *Reynolds*, *Mink*, and by this Court in *Vaughn* v. *Rosen*.[98] With the rejection of his all-embracing claim of prerogative, the President will have an opportunity to present more particular claims of privilege, if accompanied by an analysis in manageable segments.

Without compromising the confidentiality of the information, the analysis should contain descriptions specific enough to identify the basis of the particular claim or claims.

1. In so far as the President makes a claim that certain material may not be disclosed because the subject matter relates to national defense or foreign relations, he may decline to transmit that portion of the material and ask the District Court to reconsider whether *in camera* inspection of the material is necessary. The Special Prosecutor is entitled to inspect the claim and showing and may be heard thereon, in chambers. If the judge sustains the privilege, the text of the government's statement will be preserved in the Court's record under seal.

2. The President will present to the District Court all other items covered by the order, with specification of which segments he believes may be disclosed and which not. This can be accomplished by itemizing and indexing the material, and correlating indexed items with particular claims of privilege.[99] On request of either counsel, the District Court shall hold a hearing in chambers on the claims. Thereafter the Court shall itself inspect the disputed items.

Given the nature of the inquiry that this inspection involves, the District Court may give the Special Prosecutor access to the material for the limited purpose of aiding the Court in determining the relevance of the material to the grand jury's investigations. Counsels' arguments directed to the specifics of the portions of material in dispute may help the District Court immeasurably in making its difficult and necessarily detailed decisions. Moreover, the preliminary indexing will have eliminated any danger of disclosing peculiarly sensitive national security matters. And, here, any concern over confidentiality is minimized by the Attorney General's designation of a distinguished and reflective counsel as Special Prosecutor. If, however, the Court decides to allow access to the Special Prosecutor, it should, upon request, stay its action in order to allow sufficient time for application for a stay to this Court.

Following the *in camera* hearing and inspection, the District Court may determine as to any items (a) to allow the particular claim of privilege in full; (b) to order disclosure to the grand jury of all or a segment of the item or items; or, when segmentation is impossible, (c) to fashion a complete statement for the grand jury of those portions of an item that bear on possible criminality. The District Court shall provide a reasonable stay to allow the President an opportunity to appeal.[100] In case of an appeal to this Court of an order either allowing or refusing disclosure, this Court will provide for sealed records and confidentiality in presentation.

VII

We end, as we began, by emphasizing the extraordinary nature of this case. We have attempted to decide no more than the problem before us—a problem that takes its unique shape from the grand jury's compelling showing of need.[101] The procedures we have provided require thorough deliberation by the District Court before even this need may be satisfied. Opportunity for appeal, on a sealed record, is assured.

We cannot, therefore, agree with the assertion of the President that the District Court's order threatens "the continued existence of the Presidency as a functioning institution.[102] As we view the case, the order represents an unusual and limited requirement that the President produce material evidence. We think this required by law, and by the rule

Footnotes at end of article.

that even the Chief Executive is subject to the mandate of the law when he has no valid claim of privilege.

The petition and appeal of the United States are dismissed. The President's petition is denied, except in so far as we direct the District Court to modify its order and to conduct further proceedings in a manner not inconsistent with this opinion.

The issuance of our mandate is stayed for five days to permit the seeking of Supreme Court review of the issues with which we have dealt in making our decision.

So ordered.

FOOTNOTES

[1] The District Court's order is reproduced here in its entirety:

"This matter having come before the Court on motion of the Watergate Special Prosecutor made on behalf of the June, 1972 grand jury of this district for an order to show cause, and the Court being advised in the premises, it is by the Court this 29th day of August, 1973, for the reasons stated in the attached opinion,

"Ordered that respondent, President Richard M. Nixon, or any subordinate officer, official or employee with custody or control of the documents or objects listed in the grand jury subpoena *duces tecum* of July 23, 1973, served on respondent in this district, is hereby commanded to produce, forthwith for the Court's examination *in camera*, the subpoenaed documents or objects which have not heretofore been produced to the grand jury; and it is

"Further ordered that the ruling herein be stayed for a period of five days in which time respondent may perfect an appeal from the ruling; and it is

"Further ordered that should respondent appeal from the ruling herein, the above stay will be extended indefinitely pending the completion of such appeal or appeals."

[2] By Order of the Attorney General No. 517–73, 38 Fed. Reg. 14, 688 (June 4, 1973), the Special Prosecutor is designated as the attorney for the United States to conduct proceedings before the grand jury investigating the unauthorized entry into the Democratic National Committee Headquarters and related offenses. He is specifically authorized "to contest the assertion of 'executive privilege.'" *See also Hearings before the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 159, 180–81 (1973). The Special Prosecutor, as Attorney for the United States, appears in this Court and the court below as counsel to the grand jury and an officer of the court.

[3] This, of course, does not signify agreement on the scope of the President's privilege, the proper content of any judgment by the Court, or the District Court's constitutional authority to issue an order to the President. Circuit Judges MacKinnon and Wilkey concur in part II of the Court's opinion and otherwise dissent for the reasons stated in their separate opinions.

[4] The subpoena, issued by the clerk under seal of the District Court pursuant to F.R. Crim. P. 17 (a) and (c), was addressed to the President or "any subordinate officer, official or employee with custody or control" of the documents and objects specified in the attached schedule.

[5] For the Special Prosecutor's explanation of the relevance of those discussions, see Appendix II, *infra*. The subpoena also required production of two memoranda that had been written by and sent to certain of the President's advisers. The President has complied with the subpoena in so far as it concerned these items.

[6] Appendix to the Supplemental Brief for the United States (Special Prosecutor), at 30–31.

[7] Special Appearance at ¶¶ 3 and 6, *In re Grand Jury Subpoena Duces Tecum to Nixon*, 360 F. Supp. 1 (D.D.C. 1973).

[8] Memorandum in Support at 3–11, *id.*

[9] *In re Subpoena to Nixon*, *supra* note 7, 360 F. Supp. at 11.

[10] *See* text at note 81, *infra*.

[11] No. 73–1989.

[12] "The Supreme Court and all courts established by Act of Congress may issue writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651 (a) (1970).

[13] *Will* v. *United States*, 389 U.S. 90, 95 (1967), *quoting Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). For a full discussion of the general rules governing our authority to issue the writ, *see Donnelly* v. *Parker*, Slip Opinion No. 73–1259, at 5–6, 9–13 (D.C. Cir. August 21, 1973).

[14] *Will* v. *United States*, *supra* note 13, 389 U.S. at 95, *quoting De Beers Consol. Mines* v. *United States*, 325 U.S. 212, 217 (1945).

[15] *Parr* v. *United States*, 351 U.S. 513, 520–21 (1956).

[16] *Will* v. *United States*, *supra* note 13, 389 U.S. at 96–98.

[17] *United States* v. *Ryan*, 402 U.S. 530, 532 (1971). *See also Cobbledick* v. *United States*, 309 U.S. 323 (1940). *But see Carr* v. *Monroe Mfg. Co.*, 431 F.2d 384 (5th Cir. 1970).

[18] *Compare Schlagenhauf* v. *Holder*, 379 U.S. 104, 110–11 (1964).

[19] *Id.*

[20] *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 385 (1953), *quoting Ex parte Fahey*, 332 U.S. 258, 260 (1947).

[21] In so concluding, we do not discard the direct appeal as an alternative basis for review in the particular situation before us. The final-order doctrine, as a normal prerequisite to a federal appeal, is not a barrier where it operates to leave the suitor "powerless to avert the mischief of the order." *Perlman* v. *United States*, 247 U.S. 7, 13 (1918). In the case of the President, contempt of a judicial order—even for the purpose of enabling a constitutional test of the order—would be a course unseemly at best. To safeguard against any possible miscarriage of justice, we make known our view that our jurisdiction exists by way of appeal if for any reason the President's application is not properly before us on the jurisdictional predicate he invokes.

[22] *See United States* v. *United States District Court*, 444 F.2d 651, 655–56 (6th Cir. 1971), *aff'd*, 407 U.S. 297, 301, n.3 (1972).

[23] We think it clear, in any event, that the District Court's August 29th order is unappealable at the instance of the Special Prosecutor, either under 28 U.S.C. § 1291 or § 1292 (1970). In addition, since the order in no way finally decides that any of the subpoenaed material must be denied the grand jury, it cannot be deemed an order "suppressing or excluding evidence," or otherwise within the contemplation of the Criminal Appeals Act, 18 U.S.C. § 3731 (1970). *But see* note 100, *infra*.

[24] *Will* v. *United States*, *supra* note 13, 389 U.S. at 98.

[25] *Id.*

[26] *Supra* note 18.

[27] *Supra* note 18, 379 U.S. at 110.

[28] *Id.* at 111.

[29] *Id.*

[30] *See Ex parte Republic of Peru*, 318 U.S. 578, 584 (1943).

[31] *See, e.g., Ex parte Skinner & Eddy Corp.*, 265 U.S. 86, 95–96 (1924).

[32] *Glidden* v. *Zdanok*, 370 U.S. 530, 568–571 (1962); *Baker* v. *Carr*, 369 U.S. 186, 208–237 (1962). *See also South Dakota* v. *North Carolina*, 192 U.S. 286, 318–321 (1904); *La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423, 461–462 (1898).

[33] If the judiciary's want of *de facto* power to enforce its judgment has any relevance, it is that the third branch of government, posing little physical threat to coordinate branches, need not hesitate to reject sweeping claims to *legal* immunity by those coordinate branches. *See United States* v. *Lee*, 106 U.S. (16 Otto) 196, 223 (1882).

[34] *See, e.g., United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462, 465–466, 472 (1951) (Frankfurter, J., concuring); *Westinghouse Electric Corp.* v. *City of Burlington, Vermont*, 122 U.S. App. D.C. 65, 351 F.2d 762 (1965); *Boeing Airplane Co.* v. *Coggeshall*, 108 U.S. App. D.C. 106, 280 F.2d 654 (1960).

[35] 410 U.S. 73, 93 (1973).

[36] *See* text at notes 92–97 *infra*.

[37] 343 U.S. 579 (1952).

[38] In *Land* v. *Dollar*, 89 U.S. App. D.C. 38, 190 F. 2d 623 (1951), *vacated as moot*, 344 U.S. 806 (1952), as well, it was clear that the court realized that its order countered the executive will of the President. The *Land* court acknowledged that the President had directed the cabinet officials to disregard the initial judicial decision. *Id.* at 54, 190 F. 2d at 639.

[39] 25 Fed. Cas. 30 (Case No. 14,692d) (1807).

[40] *Id.* at 34 (Emphasis supplied.)

[41] *United States* v. *Burr*, 25 Fed. Cas. 190, 191–192 (Case No. 14,694) (1807). (Emphasis supplied.)

[42] In 1818, several years after the *Burr* case, a subpoena was also issued to President James Monroe. It summoned the President to appear as a defense witness in the court martial of Dr. William Burton, naming a specific date and time. A copy of the summons is in Attorney General's Papers: Letters received from State Department, Record Group 60, National Archives Building. Attorney General Wirt advised Monroe, through Secretary of State John Quincy Adams, that a subpoena could "properly be awarded to the President of the United States," but suggested that the President indicate on the return that his official duties precluded a personal appearance at the court martial. William Wirt to John Quincy Adams, Jan. 13, 1818, Records of the Office of the Judge Advocate General (Navy), Record Group 125, (Records of General Courts Martial and Courts of Inquiry, Microcopy M–272, case 282), National Archives Building. In conformance with this advice, Monroe wrote on the back of the summons that he would "be ready and willing to communicate, in the form of a deposition any information I may possess, relating to the subject matter in question." President James Monroe to George M. Dallas, Jan. 21, 1818, *id.* Subsequently, President Monroe did in fact submit answers to the interrogatories forwarded to him by the court. President James Monroe to George M. Dallas, Feb. 14, 1818, *id.*

[43] FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 502–503 (1967).

[44] U.S. Const., art. I, § 6, ¶ 1.

[45] *Myers* v. *United States*, 272 U.S. 52, 123 (1926).

[46] *See, e.g., United States* v. *Burr*, *supra* note 39, 25 Fed Cas. at 34.

[47] *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra* note 37, 343 U.S. at 655 (1952) (Jackson, J., concurring).

[48] U.S. Const., art. I, § 3, ¶ 7: Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

[49] On this point, too, Chief Justice Marshall was instructive: If, upon any principle, the President could be construed to stand exempt from the general provisions of the constitution, it would be, because his duties as chief magistrate demand his whole time for national objects. But it is apparent that this demand is not unremitting. *United States* v. *Burr*, *supra* note 39, 25 Fed. Cas. at 34.

[50] Because impeachment is available against all "civil Officers of the United States," not merely against the President, U.S. Const. art. II, § 4, it is difficult to understand how any

immunities peculiar to the President can emanate by implication from the fact of impeachability.

[51] *See, e.g., Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 165 (1803); *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838).

[52] [T]he question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act.

Marbury v. *Madison*, *supra* note 51, at 165. The mandamus does not seek to direct or control the postmaster general in the discharge of any official duty, partaking in any respect of any executive character; but to enforce the performance of a mere ministerial act, which neither he *nor the President* had any authority to deny or control. *Kendall* v. *United States ex rel. Stokes*, *supra* note 51, at 610. (Emphasis supplied.)

[53] In this regard, the President's reliance on *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475 (1866), is misplaced. In that case, the State of Mississippi sought to enjoin President Johnson from enforcing the Reconstruction Acts. Though Attorney General Stanbery argued that the President was immune from judicial process, the Court declined to found its decision on this ground, choosing instead to deny the bill of injunction as an attempt to coerce a discretionary, as opposed to ministerial, act of the Executive. The Attorney General rehearsed many of the arguments made by the President in this case, claiming that the President's dignity as Chief of State placed him above the reach of routine judicial process and that the President was subject only to that law which might be fashioned in a court of impeachment. *Id.* at 484. We deem it significant that the Supreme Court declined to ratify these views. *Compare Georgia* v. *Stanton*, 71 U.S. (6 Wall.) 50 (1867), where the Court declined jurisdiction of a similar bill of injunction even though sub-presidential Executive Branch officials were named as defendants.

[54] *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). We reject the contention, pressed by counsel for the President, that the Executive's prosecutorial discretion implies an unreviewable power to withhold evidence relevant to a grand jury's criminal investigation. The federal grand jury is a constitutional fixture in its own right, legally independent of the Executive. *See United States* v. *Johnson*, 319 U.S. 503, 510 (1943). A grand jury may, with the aid of judicial process, *Brown* v. *United States*, 359 U.S. 41, 49–50 (1959), call witnesses and demand evidence without the Executive's impetus. *Hale* v. *Henkel*, 201 U.S. 43, 60–65 (1906). If the grand jury were a legal appendage of the Executive, it could hardly serve its historic functions as a shield for the innocent and a sword against corruption in high places. In his eloquent affirmation of unfettered prosecutorial discretion in *United States* v. *Cox*, 342 F.2d 167, 189 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965), Judge Wisdom recognized the grand jury's independent and "plenary power to inquire, to summon and interrogate witnesses, and to present either findings and a report or an accusation in open court by presentment." As a *practical*, as opposed to legal, matter, the Executive may, of course, cripple a grand jury investigation by denying staff assistance to the jury. And the Executive may refuse to sign an indictment, thus precluding prosecution and, presumably, effecting a permanent sealing of the grand jury minutes. *United States* v. *Cox*, *supra*. These choices remain open to the President. But it is he who must exercise them. The court will not assume that burden by eviscerating the grand jury's independent legal authority.

[55] Brief of Petitioner Nixon at 84; Reply Brief of Petitioner Nixon, at 30 n.6.

[56] Brief of Petitioner Nixon at 69, citing *Gravel* v. *United States*, 408 U.S. 606, 627 (1972).

[57] *Totten* v. *United States*, 92 U.S. 105 (1875); *United States* v. *Reynolds*, 345 U.S. 1 (1953); *United States* v. *Burr*, *supra* note 39.

[58] *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff'd on opinion below*, 128 U.S. App. D.C. 10, 384 F.2d 979, *cert. denied*, 389 U.S. 952 (1967).

[59] *See, e.g., id.* at 329–335; *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939 (Ct.Cl. 1958).

[60] *See, e.g., United States* v. *Reynolds*, *supra* note 57; *Olson Rug Co.* v. *NLRB*, 291 F.2d 655 (7th Cir. 1961); *Timken Roller Bearing Co.* v. *United States*, 38 F.R.D. 57 (N.D. Ohio 1964); *United States* v. *Proctor & Gamble Co.*, 25 F.R.D. 485 (D. N.J. 1960); *Kaiser Aluminum & Chemical Corp.* v. *United States*, *supra* note 59; *see also* the cases cited at 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE 167–173 (1970). Despite our peculiar constitutional tradition of judicial review, American law is not in fact unusual in subjecting claims of Executive privilege to court scrutiny. Indeed, no common law country follows the rule, urged by the President in this case, that mere executive assertions of privilege are conclusive on the courts. In *Conway* v. *Rimmer*, [1968] 1 All E.R. 874, the House of Lords explicitly reversed its long held view, as expressed in *Duncan* v. *Cammell Laird & Co.*, [1842] 1 All E.R. 587, that executive privilege is absolute. *Conway* held that proper adjudication of a privilege claim may require *in camera* inspection of documents over which the privilege is asserted. [1968] 1 All E.R. at 888 (opinion of Lord Reid), and 896 (opinion of Lord Morris of Borth-y-Gest). Similar recognition of judicial power to scrutinize claims of privilege may be found in almost every common law jurisdiction. *See, e.g., Robinson* v. *South Australia* (No. 2), [1931] All E.R. 333 (P.C.); *Gagnon* v. *Quebec Securities Comm'n*, [1965] 50 D.L.R.2d 329 (1964); *Bruce* v. *Waldron*, [1963] Vict. L.R. 3; *Corbett* v. *Social Security Comm'n*, [1962] N.Z.L.R. 878; *Amar Chand Butail* v. *Union of India*, [1965] 1 India S. Ct. 243.

[61] In *Environmental Protection Agency* v. *Mink*, supra note 35, the Supreme Court relied on cases in which claims of Executive privilege were reviewed by the court, often *in camera*, in interpreting how the judiciary should apply the intragovernmental communication exemption to the public disclosure mandate of the Freedom of Information Act. *Id.* at 88 & cases cited at notes 14 & 15.

[62] *See, e.g.*, 40 Op. Atty Gen. 45, 49 (1941) (Attorney General Jackson); 100 Cong. Rec. 6621 (1954) (President Eisenhower).

[63] *Supra* note 57, 345 U.S. at 8.

[64] *Id.* at 9–10.

[65] *Ib.* at 6 & note 9.

[66] 149 U.S. App. D.C. 385, 463 (F.2d 788 (1971).

[67] *Id.* at 390, 463 F.2d at 793.

[68] *Supra* note 51, 5 U.S. (1 Cranch) at 157.

[69] The purpose of the explicit constitutional privilege against self-incrimination, like that of Executive privilege, is defeated by too much judicial inquiry into the legitimacy of its use, *see United States* v. *Reynolds*, *supra* note 57, 345 U.S. at 3–9, but the courts have never held the mere invocation of the privilege to be sufficient to free the invoker from questioning. The judge must first determine whether the privilege is properly invoked. *See, e.g., Hoffman* v. *United States*, 341 U.S. 479, 486–487 (1951).

[70] The Supreme Court has repeatedly made clear that it is for the courts to determine the reach of the Speech and Debate Clause, U.S. Const., Art. I, § 6, ¶ 1. *See, e.g., Gravel* v. *United States*, *supra* note 56; *United States* v. *Brewster*, 408 U.S. 501 (1972); *United States* v. *Johnson*, *supra* note 54. Indeed, very close judical review is needed to determine whether the activities concerning which questioning or prosecution is sought are: integral part[s] of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matter which the Constitution places within the jurisdiction of either House. *Gravel* v. *United States*, *supra* note 56, 408 U.S. at 625. If separation of powers doctrine countenances such a close review of assertions of an express constitutional privilege, the doctrine must also comprehend judicial scrutiny of assertions of Executive privilege, which is *at most* implicit in the Constitution. *Gravel* deals on its facts only with an assertion of privilege by an individual legislator. As collective bodies, the Houses of Congress have frequently made unilateral declarations of an absolute privilege to withhold documents in their custody from court process. *See, eg.*, Senate Resolution, Oct. 4, 1972, 92nd Cong., 2 Sess. These claims have never been pressed to a judicial resolution, and we have no occasion here to decide them. It is sufficient to note that they rest on a footing different from the President's claim of absolute privilege in this case. The President's claim has been previously litigated, and repudiated, in *United States* v. *Burr*, *supra* note 39. Further, Congress' claims draw upon two express constitutional privileges unavailable to the President, the aforementioned Speech and Debate Clause, and the Secrecy Clause in Art. I, § 5, ¶ 3. Even so, we note that *Gravel* states that the scope of the Speech and Debate privilege cannot be unilaterally "established by the Legislative Branch," *Gravel* v. *United States*, *supra*, 408 U.S. at 624 n. 15.

[71] *See Myers* v. *United States*, 272 U.S. 52, 116 (1926).

[72] *See Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra* note 37, 343 U.S. at 635 (Jackson, J., concurring).

[73] The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental power among three departments, to save the people from autocracy.

Myers v. *United States*, *supra* note 71, 272 U.S. at 293 (Brandeis, J., dissenting).

[74] Chief Justice Marshall wrote two opinions concerning the production of the letters. In the first of these opinions, the Chief Justice ruled that a subpoena to produce the letters could be issued to the President and that the Chief Justice himself would consider and weigh any specific objections interposed by the President that the letters contained matter "which ought not to be disclosed." *United States* v. *Burr*, *supra* note 39, at 37; *see* pages 15–16 *supra*. Statements of the Chief Justice in the first *Burr* opinion suggest that he contemplated that he would actually inspect the letters *in camera*. If it contain matter not essential to the defense, and the disclosure be unpleasant to the executive, it certainly ought not to be disclosed. This is a point which will appear *on the return*. * * * If they contain matter interesting to the nation, the concealment of which is required by the public safety, that matter will appear *upon the return*. *United States* v. *Burr*, *supra* note 39, at 37. The United States Attorney Hay seems to have read the Chief Justice's first opinion to contemplate inspection by the court. As Judge Wilkey notes in his dissent, after Burr had renewed his request for the letters, Hay offered to submit them to the court for copying of "those parts which had relation to the cause." Hay further expressed his willingness to transmit the letters to Burr's counsel so that they could form their own opinions on what portions should be kept confidential from Burr and the public. Hay anticipated that differences between the opinions of Burr's counsel and himself would be arbitrated by the court. *United States* v. *Burr*, *supra* note 41, at 190.

The prosecution in the *Burr* case thus seems to have read Chief Justice Marshall's first opinion to support a procedure analogous to *in camera* inspection by Judge Sirica and Special Prosecutor Cox.

It was only after Burr's counsel rejected Hay's position and demanded direct submission of the entire letters to Burr himself that Marshall found it necessary to issue his second opinion. In this opinion the Chief Justice addressed the remaining question of whether the President should be ordered to release the letters directly to Burr or whether the court should first inspect the documents to screen out privileged portions. Marshall made clear that before frustrating Burr's efforts to obtain the letters, the court would have to balance the opposing interests: The president may himself state the particular reasons which may have induced him to withhold a paper, and the court would unquestionably allow their full force to those reasons. At the same time, the court could not refuse to pay proper attention to the affidavit of the accused. *Id.* at 192.

[75] See *United States* v. *Reynolds, supra* note 57.

[76] *Soucie* v. *David,* 144 U.S. App. D.C. 144, 158, 448 F.2d 1067, 1081 (1971) (Wilkey, Jr., concurring).

[77] 5 U.S.C. § 552(b)(5) (1970); *see Environmental Protection Agency* v. *Mink, supra* note 35.

[78] *See Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena, Supra* note 58, 40 F.R.D. at 324–25.

[79] *E.g., Branzburg* v. *Hayes, supra* note 54, 408 U.S. at 687–88.

[80] *Supra* note 66, 149 U.S. App. D.C. at 391, 463 F.2d at 794. *(per curiam); see Gravel* v. *United States, supra* note 56, 408 U.S. at 627.

[81] Statement by the President, May 22, 1973, *quoted* in Appendix to the Brief for the United States (Special Prosecutor), at 14, 24.

[82] 41 U.S.L.W. 5122 (U.S. June 25, 1973).

[83] 352 U.S. 567, 575 (1957).

[84] *Lopez* v. *United States,* 373 U.S. 427, 437–40 (1963; *Osborn* v. *United States,* 385 U.S. 323, 326–31 (1966).

[85] *Lopez* v. *United States, supra* note 84, 373 U.S. at 439.

[86] Where, as here, a conversation attended by the President, Mr. Dean and Mr. Haldeman has been the subject of divergent accounts by Mr. Dean and by Mr. Haldeman, without any restriction by the President on their testifying on the ground of confidentiality, there is no objection to presentation by the tape recorder of that part of the conversation that relates to Watergate, any more than to testimony on this point by another witness who had perfect auditory memory.

[87] *In re Subpoena to Nixon, supra* note 7, 360 F.Supp. at 21–22.

[88] The Memorandum and replies of counsel are set forth in Appendix I, *infra.*

[89] Brief of Petitioner Nixon at 69.

[90] *Id.* at 41–43.

[91] *Id.* at 61.

[92] *Supra* note 35, 410 U.S. at 92.

[93] *Id.* at 93.

[94] *Id.*

[95] *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena, supra* note 58, 40 F.R.D. at 331.

[96] *Supra* note 35, 410 U.S. at 93.

[97] *Id.* at 88, *citing United States* v. *Cotton Valley Comm.,* 9 F.R.D. 719, 720 (W.D. La. 1949), *aff'd by equally divided court,* 339 U.S. 940 (1950).

[98] Slip Opinion No. 73–1039 (D.C. Cir. August 20, 1973).

[99] *See id.* at 17.

[100] Since the subpoenaed recordings will already have been submitted to the District Court, the opportunity to test the court's ruling in contempt proceedings would be foreclosed. And any ruling adverse to the Special Prosecutor would clearly be a pretrial "decision or order . . . suppressing or excluding evidence . . . in a criminal proceeding . . ." Thus the District Court's ruling on particularized claims would be appealable by the President as final judgments under 28 U.S.C. § 1291 (1970), and by the Special Prosecutor under 18 U.S.C. § 3731 (1970). *See United States* v. *Ryan,* 402 U.S. 530, 533 (1971); *Perlman* v. *United States,* 247 U.S. 7, 12–13 (1918); *United States* v. *Calandra,* 455 F.2d 750, 751–53 (6th Cir. 1972).

[101] Judge Wilkey, in dissent, adheres to the abstract in his discussion of who has the right to decide; he makes no reference to the facts before us framing that issue. John Marshall addressed it in the context of President Jefferson's decision to reveal the contents of a private letter to the extent of characterizing it, in a message to Congress, as containing overwhelming evidence of Burr's treason. So here, we must deal with that issue not in a void but against the background of a decision by the President, made and announced before the existence of the tapes was publicly known, to permit participants in private conversations with him to testify publicly as to what was said about Watergate and its aftermath. That decision—and the resulting testimony containing conflicts as to both fact and inference—has made it possible for the Special Prosecutor to make a powerful showing of the relevance and importance of the tapes to the grand jury's discharge of its responsibilities. What the courts are now called upon primarily to decide, as distinct from what the President has already decided with respect to the relative importance of preserving the confidentiality of these particular conversations, is how to reconcile the need of the United States, by its grand jury, with the legitimate interest of the President in not disclosing those portions of the tapes that may deal with unrelated matters.

[102] Brief of Petitioner Nixon at 94.

[U.S. Court of Appeals for the District of Columbia Circuit]

APPENDIX I—MEMORANDUM AND REPLIES

September Term, 1973—Filed Sep. 13, 1973, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk.

No. 73–1962: Richard M. Nixon, President of the United States, Petitioner v. the Honorable John J. Sirica, United States District Judge, Respondent and Archibald Cox, Special Prosecutor, Watergate Special Prosecution Force, Party in Interest.

No. 73–1967—United States of America, Petitioner v. the Honorable John J. Sirica, Chief Judge, United States District Court for the District of Columbia, Respondent and Richard M. Nixon, President of the United States, Party in Interest.

Before: Bazelon, *Chief Judge;* Wright, McGowan, Leventhal, Robinson, MacKinnon, and Wiley, *Circuit Judges.*

MEMORANDUM

From the able exposition by counsel in the unusually full oral argument allowed by the Court in this case, it appeared to the Court that the issues dividing the parties might be susceptible of resolution by procedures other than those set forth in either District Judge Sirica's opinion or the briefs of the parties. The Court has been, and is, conscious of the public importance of this matter and the public interest in the earliest possible resolution of it.

The doctrine under which courts seek resolution of a controversy without a constitutional ruling is particularly applicable here. The possibility of a resolution of this controversy without the need for a constitutional ruling is enhanced by the stature and character of the two counsel charged with representation of each side in this cause, and by the circumstance that each was selected for his position, directly or indirectly, by the Chief Executive himself.

Whereas Judge Sirica contemplated an *in camera* examination of the subpoenaed tapes, which would have necessitated the presence of the Judiciary, we contemplate an examination of the tapes by the Chief Executive or his delegate, assisted by both his own counsel, Professor Wright, and the Special Prosecutor, Professor Cox.

We say this without intimating a decision on any question of jurisdiction or privilege advanced by any party. Apart from noting that the likelihood of successful settlement along the lines indicated contemplates a voluntary submission of such portions of the tapes to the two counsel as satisfies them, we do not presume to prescribe the details of how the Chief Executive will work with the two counsel.

This procedure may permit the different approaches of the parties to converge. The President has maintained that he alone should decide what is necessarily privileged and should not be furnished the grand jury. The Special Prosecutor has maintained that he should have the opportunity of examining the material and asserting its relevance and importance to the grand jury investigation. If the President and the Special Prosecutor agree as to the material needed for the grand jury's functioning, the national interest will be served. At the same time, neither the President nor the Special Prosecutor would in any way have surrendered or subverted the principles for which they have contended.

If, after the most diligent efforts of all three concerned, there appear to be matters the President deems privileged and the Special Prosecutor believes necessary and not privileged, then this Court will discharge its duty of determining the controversy with the knowledge that it has not hesitated to explore the possibility of avoiding constitutional adjudication. Even if this were to occur, the issues remaining for resolution might be substantially narrowed and clarified.

We have issued this Memorandum without interrupting the schedule for post-argument memoranda by the parties. The overriding public interest in this case demands our best and most expeditious efforts in the meantime. The Court asks that it be advised, by both counsel, no later than September 20, 1973, whether the approach indicated in this memorandum has been fruitful.

The Clerk is directed to transmit this Memorandum to all parties to the instant proceedings and to file it in the record.

Per Curiam.

THE WHITE HOUSE,
Washington, D.C., September 20, 1973.

Filed Sep. 20, 1973, United States Court of Appeals for the District of Columbia Circuit Hugh E. Cline, Clerk.

In re Grand Jury Subpoena, Nos. 73–1962, 73–1967.

Mr. HUGH E. KLINE,
Clerk, United States Court of Appeals, Washington, D.C.

DEAR MR. KLINE: This is to advise you that counsel in the above-entitled matter have had lengthy meetings, pursuant to the suggestion in the Court's memorandum of September 13th. Mr. Cox and Mr. Buzhardt met on September 17th and 18th and today Mr. Cox and Mr. Lacovara of his office met with Mr. Buzhardt, Mr. Garment, and myself. I regret to advise the Court that these sincere efforts were not fruitful.

All participants in these conversations have agreed that we shall say nothing about them except to make this report to the Court.

I understand that Mr. Cox will similarly advise you of these meetings and of their unsuccessful outcome.

Respectfully,

CHARLES ALAN WRIGHT,
An Attorney for the President.

WATERGATE SPECIAL
PROSECUTION FORCE,
Washington, D.C., September 20, 1973.

Filed Sep. 20, 1973, United States Court of Appeals for the District of Columbia Circuit Hugh E. Kline, Clerk.

Re: *Nixon* v. *Sirica* et al. (Nos. 73-1962, 73-1967).

Hon. HUGH E. KLINE,
Clerk, United States Court of Appeals for the District of Columbia Circuit, Washington, D.C.

DEAR MR. KLINE: This is to advise you that counsel in the above entitled matter have had lengthy meetings pursuant to the suggestion in the Court's memorandum of September 13. Mr. Buzhardt and I met on September 17 and 18 and today Mr. Lacovara of my office and I met with Messrs. Wright, Buzhardt, and Garment. I regret to advise the Court that these sincere efforts were not fruitful.

All participants in these conversations have agreed that we shall say nothing about them except to make this report to the Court.

I understand that Mr. Wright will similarly advise you of these meetings and of their unsuccessful outcome.

Sincerely,

ARCHIBALD COX,
Special Prosecutor.

APPENDIX II

In a "Memorandum in Support of an Order to Produce Documents or Objects in Response to the Subpoena" (pp. 5-10), filed with the court below on August 13, 1973, the Special Prosecutor provided the following description of the nine communications, tapes of which are sought by the grand jury. (The transcript references throughout are to the transcript of the hearings of the Senate Select Committee on Presidential Campaign Activities.)

1. *Meeting of June 20, 1972.* Respondent met with John D. Ehrlichman and H. R. Haldeman in his Old Executive Office Building (OEOB) office on June 20, 1972, from 10:30 a.m. until approximately 12:45 p.m. There is every reason to infer that the meeting included discussion of the Watergate incident. The break-in had occurred on June 17—just three days earlier. Dean did not return to Washington until June 18 (S. Tr. 2166). Mitchell, Haldeman and LaRue had also been out of town and did not return until late on June 19 (S. Tr. 3305, 3307, 6195). Early on the morning of June 20, Haldeman, Ehrlichman, Mitchell, Dean and Attorney General Kleindienst met in the White House. This was their first opportunity for full discussion of how to handle the Watergate incident, and Ehrlichman has testified that Watergate was indeed the primary subject of the meeting (S. Tr. 5923-5924). From there,* Ehrlichman and then Haldeman went to see the President. The inference that they reported on Watergate and may well have received instructions, is almost irresistible. The inference is confirmed by Ehrlichman's public testimony that the discussion with respondent included both Watergate and government wiretapping (S. Tr. 5924-25). The contemporary evidence of that meeting should show the extent of the knowledge of the illegal activity by the participants or any effort to conceal the truth from the respondent.

2. *Telephone call of June 20, 1972.* Respondent and John Mitchell, the director of respondent's campaign for re-election, spoke by telephone from 6:08 to 6:12 p.m. on June 20, 1972. Mitchell has testified that the sole subject was the Watergate break-in and investigation (S. Tr. 3407-08). This apparently was the first direct contact after the break-in between respondent and Mitchell, so that what Mitchell reported may be highly material. Indeed, although Mitchell already may have been briefed at this time by Robert C. Mardian and LaRue about Liddy's involvement in the break-in (S. Tr. 3629-32, 4590, 4595), Mitchell maintains that he told the President that only the five arrested at Watergate—not including Liddy—were involved. (S. Tr. 3407-08, 3632). Evidence of this conversation with a man who had no public office at the time and was concerned solely with respondent's political interests will either tend to confirm Mitchell's version or show a more candid report to respondent.

3. *Meeting of June 30, 1972.* Respondent met with Mitchell and Haldeman for an hour and 15 minutes in his EOB office, apparently the first meeting between respondent and Mitchell since June 17, 1972. The topic of conversation, according to Mitchell, was his impending resignation as Chairman of the Committee for the Re-Election of the President (S. Tr. 3442-43), which in fact was announced the next day. This is a meeting most of which almost surely did not involve any official duties of the President. It also strains credulity to suppose that Watergate and how Watergate affected Mitchell and the campaign were not topics of conversation. The records of the meeting are clearly the most direct evidence of the knowledge and intentions of the participants as of a date shortly after the grand jury began its investigation.

4. *Meeting of September 15, 1972.* On September 15, 1972, the grand jury returned an indictment charging seven individuals with conspiracy and other offenses relating to the break-in. Respondent met the same day with Dean and Haldeman in his Oval Office from 5:27 to 6:17 p.m. Both Dean and Haldeman have given lengthy but contradictory accounts of what was said (S. Tr. 2229-33, 6090-93).

According to Dean, the purpose of the meeting was to brief respondent on the status of the investigation and related matters. Dean said that respondent then congratulated him on the "good job" he had done and was pleased that the case had "stopped with Liddy." Dean said that he then told respondent that all he had been able to do was "contain" the case and "assist in keeping it out of the White House." (S. Tr. 2230.) If this testimony is corroborated, it will tend to establish that a conspiracy to obstruct justice reached the highest level of government.

Haldeman, after reviewing a tape recording of the meeting, has agreed that there was discussion of the Watergate indictments, of the civil cases arising out of the break-in, of the possibility of a continuing grand jury investigation, of internal policies at the Committee for the Re-Election of the President, and of other matters. He denies, however, that respondent congratulated Dean on Dean's efforts to thwart the investigation. (S. Tr. 6090-93, 6456.)

If Haldeman's innocuous version of the meeting can be sustained, it is because the meeting only involved an innocent discussion of political interests. The question of Dean's perjury would then arise. Resolution of this conflict between two of the three persons present and an accurate knowledge of plans or admissions made on this occasion would be of obvious aid to the grand jury's investigation.

5. *Meeting of March 13, 1973.* Respondent again met with Dean and Haldeman on March 13, 1973, from 12:42 to 2:00 p.m. Dean testified at length about the meeting (S. Tr. 2323-2325.) Haldeman gave evidence that he has no independent recollection of what was said (S. Tr. 6100).*

The White House briefing for the Senate Committee suggests that the meeting related primarily to Watergate and that respondent asked Dean for a report on the involvement of Haldeman and others.** Dean, on the other hand, testified that respondent told Dean that respondent had approved executive clemency for defendant Hunt and that there would be no problem about raising $1 million to buy all defendants' silence (S. Tr. 2324). Unquestionably, confirmation of Dean's testimony would aid the grand jury in determining the existence, membership, and scope of a cover-up conspiracy. Conclusive disproof, on the other hand, would raise a question of perjury by Dean before the Senate Committee, a matter directly within the grand jury's jurisdiction.

6, 7. *Meetings of March 21, 1973.* On March 21, 1973, respondent met with Dean and Haldeman from 10:12 to 11:55 a.m. and with Dean, Haldeman, Ehrlichman and Ronald Ziegler from 5:20 to 6:01 p.m. (Not all parties were present all of the time.)

Both Dean and Haldeman (who reviewed the recording of the morning meeting) have testified extensively about that meeting (S. Tr. 2329-34, 6112-15, 6273-95, 6394-6400), and it is also discussed in the White House briefing for the Senate Committee. All accounts confirm that the sole subject was the Watergate break-in and wiretapping and the subsequent cover-up. All agree that Dean talked about a "cancer" affecting the Presidency and revealed a theory of the cover-up and the possible liability of White House and Committee officials, including Magruder, Mitchell, Strachan, Colson, Ehrlichman, Haldeman, and himself. (S. Tr. 2330-31, 6112-15, 6286-94, 6640-41.) All agree that there was discussion of Hunt's threat to expose his "seamy" work for the White House unless he received a considerable sum of money. Haldeman testified that it was at this meeting that respondent indicated that $1 million easily could be raised; according to Haldeman however, respondent went on to say that it would not be right to pay the money. This discrepancy, which can be resolved by a contemporary recording, is manifestly significant.

Haldeman, Ehrlichman and Dean each have testified about the afternoon meeting as well, and the White House briefing gives a separate account. Again, the sole topic of conversation was Watergate. The participants discussed the possibility of present and former White House officials, as well as employees of the Committee, testifying before the grand jury. (S. Tr. 2334-35, 5650, 5710, 6118.) Dean has testified that it was clear to him after this meeting that the cover-up would continue (S. Tr. 2335). Evidence of this meeting is pertinent to determining the existence of a cover-up, its thrust, and its membership.

8. *Meeting of March 22, 1973.* Respondent met with Dean, Ehrlichman, Haldeman and Mitchell from 2:00 p.m. to 3:43 p.m. on March 22, 1973. (Mitchell, of course, was a private citizen at this time.) Dean, Mitchell, Ehrlichman, and Haldeman each have testified that the meeting centered in general on Watergate and in particular on the problems that would be presented by the upcoming Senate Select Committee hearings (S. Tr. 2337-40, 3413-15, 5720, 5128, 619-22). This meeting was apparently concerned, at least in major part, with political assessments and operations, not exclusively with establishing "government" policy, and is likely to reveal the knowledge and motives of the participants.

9. *Meeting of April 15, 1973.* Respondent met with Dean from 9.17 to 10:12 p.m. on April 15, 1973. Dean has testified in detail about the substance of this hour-long con-

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*It is interesting that Haldeman, who had reviewed recordings of other meetings, did not review the recording of this meeting in view of the serious nature of the allegations by Dean.

**_New York Times_, June 21, 1973, p. 28 (notes of Minority Counsel of Senate Select Committee of oral briefing by Counsel to the President).

versation, allegedly telling respondent of his meetings with the United States Attorney's Office. Dean also testified that respondent said that he had been "joking" when respondent approved raising $1 million for the Watergate defendants and acknowledged that he had been "foolish" to discuss executive clemency with Charles Colson. (S. Tr. 2371–75.) If true and accurate, this testimony would indicate an important dimension to the cover-up conspiracy. If false and misleading, a perjurious injustice has been done for which the grand jury can return an indictment.

OPINION OF CIRCUIT JUDGE MACKINNON

MACKINNON, *Circuit Judge*, concurring in part and dissenting in part: I concur in the decision on the jurisdiction of this court as expressed in part II of the Per Curiam opinion, but I respectfully dissent from its conclusion on the principal issue. I also concur in the result reached by Judge Wilkey's dissent and concur generally in his reasoning. However, I rely on some points not discussed by Judge Wilkey and as to points that are common to our two dissenting opinions there are at times differences in emphasis.

I. INTRODUCTION

This case presents for consideration an important constitutional question which has not confronted the courts in the 186 years since the Constitution was written. While the issues involved here have arisen many times in the relations between the Congress and the President, there are no controlling judicial precedents. The immediate issue involves the requested disclosure of confidential discussions between the President and his close advisers, but the ultimate issue is the effect that our decision will have upon the constitutional independence of the Presidency for all time.

Justice Frankfurter prefaced his concurring opinion in *Youngstown Sheet & Tube Co.*[1] with the following admonition, which is peculiarly appropriate to the present case:

"Rigorous adherence to the narrow scope of the judicial function is especially demanded in controversies that arose appeals to the Constitution. The attitude with which this Court must approach its duty when confronted with such issues is precisely the opposite of that normally manifested by the general public. So-called constitutional questions seem to exercise a mesmeric influence over the popular mind. This eagerness to settle—preferably forever—a specific problem on the basis of the broadest possible constitutional pronouncements may not unfairly be called one of our minor national traits. An English observer of our scene has acutely described it: 'At the first sound of a new argument over the United States Constitution and its interpretation the hearts of Americans leap with a fearful joy. The blood stirs powerfully in their veins and a new luster brightens their eyes. Like King Harry's men before Harfleur, they stand like greyhounds in the slips, straining upon the start.' " The Economist, May 10, 1952, p. 370.

* * * * *

[W]ith the utmost unwillingness, with every desire to avoid judicial inquiry into the powers and duties of the other two branches of the government, I cannot escape consideration of the legality of [the President's order.] [2]

Like Justice Frankfurter in *Youngstown*, it is my view that a constitutional decision in this case is unavoidable.

It is my opinion that the preservation of the confidentiality of the Presidential decision-making process is of overwhelming importance to the effective functioning of our three branches of government. Therefore, I would recognize an absolute privilege for confidential Presidential communications. The privilege is grounded upon an historically consistent interpretation of the constitutional structure of our government, and derives support from common law principles of evidentiary privileges. Since the privilege is designed to enhance a President's ability to perform the duties of his office, it only protects Presidential communications related to the performance of Article II duties. It is unnecessary to define the parameters of the privilege beyond the precise facts of this case, but at the least the privilege must protect the recordings subpoenaed here. To compel disclosure of these tapes, which contain communications between a President and his most intimate advisers, would endanger seriously the continued efficacy of the Presidential decision-making process.

II. THE HISTORICAL PERSPECTIVE

The established usage and custom between the executive, legislative and judicial branches warrant the most respectful consideration, especially in view of its consistency over such an extended period of time. Usage and custom are a source of law in all governments [3] and have particular force where, as is the case here, the applicable written law is ambiguous or unclear. "Even constitutional power, when the text is doubtful, may be established by usage." [4] Early in our nation's history, the Supreme Court relied upon usage and custom to establish firmly its own constitutional authority to review decision of the highest appellate courts of a state.[5] More recently, the Supreme Court explained the importance of custom and usage as follows:

It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.[6]

A. Presidential refusals to comply with congressional subpoenas

Throughout our nation's history, the greatest number of the important instances where information has been requested or demanded of the executive department by Congress have involved the President himself. The precedents created by these confrontations are vital here, because Congress and the courts have similar subpoena powers.[7] These precedents gain additional vitality from the fact that they involved highly critical issues, issues that caused Congress to demand, and the President to resist, disclosure based on the strongest national interest grounds. As Professor Corwin wrote with respect to these instances:

"The point at issue, however, has generally been no justice to the official involved but the right of the Executive Department to keep its own secrets."

CORWIN, THE PRESIDENT—OFFICE AND POWERS 1787–1957 111 (1957) Mindful of the tremendous forces that shaped these precedents, we turn to a few of the most important.

In 1948, following an abortive attempt by a Republican-controlled Congress to obtain certain information and papers from the Executive department, a bill was prepared to produce confidential information even though he considered that compliance would be contrary to the public interest. President Truman thought that such a law would be unconstitutional and in preparation for the 1948 presidential election campaign he had a lengthy memorandum prepared [8] (hereinafter referred to as the "Truman Memorandum"). The Truman Memorandum recites all the principal instances, beginning in 1796, where Presidents have refused to furnish information or papers to Congress. A resumé of the refusals by seventeen of our Presidents and their heads of departments, as set out in the Truman Memorandum, is printed in the margin.[9]

We can profit from these examples of presidential refusals and the precedents they created.

The March 1792 resolution of the House of Representatives empowering the committee investigating the military expedition under Major General St. Clair to call for "such persons, papers, and records, as may be necessary to assist their inquiries" [10] was the first such request ever made by Congress. It met with the rebuke by President Washington, after consulting his cabinet, that the "House was an inquest" and "might call for papers generally," but that the Executive should "exercise a discretion . . . to communicate such papers as the public good will would permit." [11] Washington also refused the request of the House for confidential papers which related to the negotiation of the Jay Treaty with Great Britain, notwithstanding a threat by the House that it would not appropriate the required funds unless its request for information and papers was satisfied.[12] The extortive demand by Congress was not successful.

President Jefferson asserted a similar position in refusing to expose the names of those involved in the alleged Burr conspiracy, except that of the principal actor.[13] This apparently is the first instance where a President refused to divulge confidential information involving an alleged substantial criminal offense. President Jackson followed suit in 1835 when he refused to comply with a Senate resolution requesting information in aid of its investigation of frauds in the sale of public lands.[14] In refusing to produce papers to the House, which was investigating the integrity and efficiency of the Executive departments in 1837, President Jackson stated in part:

"I shall repel all such attempts as an invasion of the principles of justice, as well as of the Constitution, and I shall esteem it my sacred duty to the people of the United States to resist them as I would the establishment of a Spanish Inquisition." [15]

President Tyler's refusal in 1842 to furnish to the House certain requested information established the principle that papers and documents relating to applications for office are of a confidential nature. President Tyler vigorously asserted that the House of Representatives could not exercise a right to call upon the Executive for information, even though it related to a subject under deliberation by the House if, by so doing, it attempted to interfere with the discretion of the Executive.[16] He further stated:

"It is certainly no new doctrine in the halls of judicature or of legislation that certain communications and papers are privileged, and that the general authority to compel testimony must give way in certain cases to the paramount rights of individuals or of the Government. Thus, no man can be compelled to accuse himself, to answer any question that tends to render him infamous, or to produce his own private papers on any occasion. The communication of a client to his counsel and the admissions made at the confessional in the course of religious discipline are privileged communications. In the courts of that country from which we derive our great principles of individual liberty and the rules of evidence, it is well settled, and the doctrine has been fully recognized in this country, that a minister of the Crown or the head of a department cannot be compelled to produce any papers,

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Footnotes at end of article.

or to disclose any transactions relating to the executive functions of the Government which he declares are confidential, or such as the public interest requires should not be divulged; and the persons who have been the channels of communication to officers of the State are in like manner protected from the disclosure of their names. Other instances of privileged communication might be enumerated, if it were deemed necessary. These principles are as applicable to evidence sought by legislature as to that required by a court".[17]

President Polk and Buchanan subscribed to similar positions in opposition to congressional demands for information. Polk refused to turn over information that his predecessor as President had considered to be confidential and ought not to be made public.[18] Buchanan refused to comply with a request for information as to whether "money, patronage or other improper means" had been used in influence Congress.[19] Again, this information related to a possible crime.

The request made of President Grant, which he refused, is too political and trivial to discuss,[20] but not so in Grover Cleveland's administration. There, the "Relations between the Senate and the Executive Departments" amounted to a major confrontation and the issues were debated in the Senate for almost two weeks. They dealt with the removal of substantial numbers of office holders by the incoming President; Congress requested the papers and reasons related to the dismissals. Such requests were refused for the usual reasons and one result was the passage of a separate resolution condemning the Attorney General's refusal.[21] President Cleveland pointed out that the Senate was assuming "the right . . . to sit in judgment upon the exercise of my exclusive discretion and Executive function, for which I am solely responsible to the people from whom I have so lately received the sacred trust of office." [22]

On January 4, 1909, the Senate passed a resolution directing the Attorney General to inform the Senate whether legal proceedings had been instituted by him against the United States Steel Corporation because of a certain merger, and if not, they required him to state the reasons. President Theodore Roosevelt took up the cudgel and delivered a special message to the Senate, stating that there were insufficient grounds for legal proceedings against the company. He additionally instructed the Attorney General not to state reasons for his nonaction.[23] Thereafter, when the Senate attempted to get certain papers on this subject from the Commissioner of Corporations, the papers were turned over to the President upon the advice of the Attorney General, and the Senate then introduced a strong resolution:

"*Resolved by the Senate,* That any and every public document, paper, or record, or copy thereof, on the files of any department of the Government relating to any subject whatever over which Congress has any grant of power, jurisdiction, or control, under the Constitution, and any information relative thereto within the possession of the officers of the department, is subject to the call or inspection of the Senate for its use in the exercise of its constitutional powers and jurisdiction."

43 CONG. REC. 839 (1909). This resolution is remindful of the bill introduced to compel President Truman to turn over papers and of some of the statements being currently made in connection with this general controversy. The resolution was debated extensively but never came to a final vote.

In 1924, during the administration of President Coolidge, information relating to his Secretary of the Treasury was sought in a Senate resolution strongly supported by Senator Couzens. President Coolidge termed it an "unwarranted intrusion" and asserted it was the duty of the Executive to resist it. Other Senators then stated that they never sought "confidential records" and thereafter the committee operated with voluntary witnesses and through departmental courtesy.[24]

Next came President Hoover's refusal in 1930 to furnish the Senate Foreign Relations Committee with confidential telegrams, letters and other papers leading up to the London Conference and the London Treaty.[25]

And President Franklin D. Roosevelt received the same treatment at the hands of Congress in 1941 some months prior to Pearl Harbor, when the House requested the FBI to furnish detailed reports and correspondence in connection with investigations arising out of strikes, subversive activities in connection with labor disputes and labor disturbances in industrial establishments with Naval contracts. Attorney General Jackson replied:

"It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to 'take care that the laws be faithfully executed,' and that congressional or public access to them would not be in the public interest." [26]

The Attorney General further pointed out, *inter alia,* that:

". . . disclosure would seriously prejudice the future usefulness of the Federal Bureau of Investigation, for keeping faith with confidential informants was an indispensable condition of future efficiency. . . ." [27]

Later during the same administration, FBI Director Hoover refused to disclose to a House committee the directive he had received from President Roosevelt in 1944 directing him not to testify as to any correspondence relating to internal security.[28] There were other similar requests during the Roosevelt administration, some of which related to national security, while others were resisted merely because they were "confidential." [29]

President Truman refused to surrender to Congress information and papers relating to loyalty investigations of Government employees, personnel files and FBI files.[30] Subsequently, on the advice of Attorney General Brownell, President Eisenhower made his famous decision refusing to turn over certain information requested in the McCarthy-Stevens investigation.[31]

In each of these instances the Congress sought information from the President or the executive branch in order to enable it to legislate upon subjects within its constitutional power, and in each instance cited the request was refused by the President, who determined that to furnish the information would be an unconstitutional intrusion into the functioning of the executive branch and contrary to the public interest. The numerous confrontations between Congress and prior Presidents over the confidentiality of presidential information firmly establish a custom and usage that a President need not produce information which he considers would be contrary to the public interest.

B. The similarity between congressional and judicial subpoenas

The Special Prosecutor contends that custom and usage between the executive and legislative branches are not controlling because the subpoena in this case was not issued by Congress, but by a federal court pursuant to a grand jury investigation. However, a congressional subpoena issued for the purpose of obtaining facts upon which to legislate carries at least as much weight as a judicial subpoena issued for the purpose of obtaining evidence of criminal offenses. The only differences between these two types of subpoenas occur in the subject matter to which the subpoena power may be directed. Congressional subpoenas seek information in aid of the power to legislate for the entire nation while judicial subpoenas seek information in aid of the power to adjudicate controversies between individual litigants in a single civil or criminal case. A grand jury subpoena seeks facts to determine whether there is probable cause that a criminal law has been violated by a few people in a particular instance. A congressional subpoena seeks facts which become the basis for legislation that directly affects over 200 million people. Thus, both congressional and judicial subpoenas serve vital interests, and one interest is no more vital than the other.

Furthermore, both congressional and judicial subpoenas are compulsory documents enforceable with criminal sanctions. Congress always has possessed the inherent power to punish witnesses who refuse to disclose information. And since the enactment in 1857 of a statute making it a misdemeanor to refuse to answer or to produce papers before Congress,[32] the power of the courts has been an additional sanction available to enforce a congressional request or subpoena.[33] In *Kilbourn v. Thompson,*[34] the Court remarked that Congress has "the right to compel the attendance of witnesses and their answers to proper questions, in the same manner and by the use of the same means, that courts of justice can in like cases." [35] Congress and the courts stand equal in their power to issue subpoenas and equal in their power to enforce them with criminal sanctions.

For these reasons, a judicial subpoena cannot be exalted over a Congressional subpoena, and the historic precedents involving congressional requests to the executive department are persuasive authority in the present dispute over a judicial subpoena to a President. However, it is unnecessary to rely entirely on instances of presidential assertions of privilege. The other branches of government have been no less disposed to recognize an absolute privilege on their own behalf.

C. Congressional privilege

Congress has asserted a privilege with respect to subpoenas addressed to members of Congress for documents in its possession and for the testimony of its employees. The practice which has been consistently followed is that no documents can be taken from the possession of either House except by the express consent of such House.

In 1876 a Representative from Indiana was subpoenaed to appear before the grand jury of the District of Columbia. Congress asserted the "well settled" privilege which protects a member who is subpoenaed to testify before a grand jury or in court:

"Inasmuch as it seemed to be well settled that the privilege of the Member was the privilege of the House and that privilege could not be waived except with the consent of the House, they had thought it their duty to submit the matter to the House." [36]

Whereupon a resolution was offered and the member was "authorized to appear and testify under the said summons." [37]

Upon service of a subpoena duces tecum by a court-martial, Congress asserted with respect to the documents:

"They belong to the House, and are under its absolute and unqualified control. It can at any time take them from the custody of the Clerk, refuse to allow them to be inspected by anyone, order them to be destroyed, or dismiss the Clerk for permitting any of them to be removed from the files without its expressed consent." [38]

Whereupon the resolution asserted the House privilege and consented to the parties to a general court-martial making copies of documents in the possession of the House.[39]

Usually, when personal attendance or doc-

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uments are requested of members of Congress, Congress permits compliance with such request; but not always. In 1876 the House refused to permit its committee investigating William W. Belknap, late Secretary of War, who had been impeached by the House, to produce before the Supreme Court of the District of Columbia in response to process certain documents relating to the acceptance of bribes.[40] In 1926, Mr. Fiorello LaGuardia of New York rose to a question of personal privilege in the House of Representatives, reported he had been subpoenaed before a federal grand jury in Indianapolis, that he could "not obey that subpoena without the permission of the House" and that if any member of the House introduced a resolution granting him "permission to go (he would) not resist it. No resolution was offered and no further record appears." [41]

Essentially the same practice exists in Congress at this time. On October 13, 1970, in a case which subsequently came before this court entitled *United States Servicemen's Fund (USSF) v. Eastland*,[42] the Senate subpoenaed certain documents in aid of its power of investigation for legislative purposes. The subject (the USSF) of the documents intervened and in aid of a deposition had a subpoena issued to the Chief Counsel of the Internal Security Subcommittee of the Committee on the Judiciary calling for his personal "testimony regarding activities of the Subcommittee, and calling also for production of certain records and other papers in the Subcommittee." [43] The Senate thereupon passed the usual resolution with respect to its documents and the requested appearance of the Chief Counsel. It provided, *inter alia*:

"*Resolved*, That the Chief Counsel, Julen [*sic*] G. Sourwine, of the Senate Internal Security Subcommittee of the Committee on the Judiciary, is authorized to comply with an appropriate notice of deposition in the case aforesaid, but *shall not testify respecting matters of which he obtained knowledge by virtue of his position or activities as Chief Counsel of the Subcommittee, which are not matters of public record* and shall not without further action by the Senate surrender any papers or documents on file in his office or under his control or in his possession as Chief Counsel of the Senate Internal Security Subcommittee of the Committee on the Judiciary".[44]

Later, when the Chief Counsel appeared for the deposition, he refused to give evidence in violation of the "Senate's mandate" [45] as to matters "which were not at a public hearing." [46]

The common thread throughout these proceedings is that the House or the Senate itself judges and controls the extent to which its members and documents should be produced in courts and before grand juries in response to subpoenas. Congress since 1787 has claimed that it has the absolute privilege to decide itself whether its members or employees should respond to subpoenas and to determine the extent of their response. As far as I have been able to discover, that practice has never been successfully challenged.

D. Judicial privilege

The judicial branch of our government claims a similar privilege, grounded on an assertion of independence from the other branches. Express authorities sustaining this position are minimal, undoubtedly because its existence and validity has been so universally recognized. Its source is rooted in history and gains added force from the constitutional separation of powers of the three departments of government. Chief Justice Burger has asserted that this privilege is grounded in the courts' "inherent power" to protect the confidentiality of its internal proceedings:

"With respect to the question of inherent power of the Executive to classify papers, records, and documents as secret, or otherwise unavailable for public exposure, and to secure aid of the courts for enforcement, there may be an analogy with respect to this Court. No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required." [47]

In his concurring opinion in *Soucie v. David*, involving the exemptions from disclosure of certain information in the executive department under the Freedom of Information Act,[48] Judge Wilkey based the privilege upon the common law and the Constitution:

"To put this question in perspective, it must be understood that the privilege against disclosure of the decision-making process is a tripartite privilege, because precisely the same privilege in conducting certain aspects of public business exists for the legislative and judicial branches as well as for the executive. It arises from two sources, one common law and the other constitutional." [49]

Counsel for the President in their brief cites additional support for the judicial claim of confidentiality:

"It has always been recognized that judges must be able to confer with their colleagues, and with their law clerks, in circumstances of absolute confidentiality. Justice Brennan has written that Supreme Court conferences are held in "absolute secrecy" for "obvious reasons." Brennan, *Working at Justice*, in *An Autobiography of the Supreme Court* 300 (Westin ed. 1963). Justice Frankfurter has said that the "secrecy that envelops the Court's work" is "essential to the effective functioning of the Court." Frankfurter, *Mr. Justice Roberts*, 105 U.Pa.L.Rev 311, 313 (1955)."

* * * * *

"The Judiciary works in conditions of confidentiality and it claims a privilege against giving testimony about the official conduct of judges. *Statement of the Judges*, 14 F.R.D. 335 (N.D.Cal. 1953). See also the letter of Justice Tom C. Clark, refusing to respond to a subpoena to appear before the House Un-American Activities Committee, on the ground that the "complete independence of the judiciary is necessary to the proper administration of justice." N. Y. Times, Nov. 14, 1953, p. 9." [50]

The *Statement of the Judges*,[51] to which counsel for petitioner refers, asserted that the separation of powers prohibits any branch of government from unlawfully interfering with the others, to the extent that Congress had no authority to summon a United States District Judge to appear before a House subcommittee investigating the Department of Justice. The *Statement* went on to say:

"[W]e know of no instance, in our history where a committee such as yours, has summoned a member of the Federal judiciary." [52] Thus, the judicial branch asserts the same immunity from being compelled to respond to congressional subpoenas that past Presidents have asserted.

Further assertions of judicial independence surfaced in the aftermath of Justice Fortas' resignation.[53] At that time a special story by Max Frankel reported the reaction among some of the other Justices of the Supreme Court to their suggestion that they should compose a code of conduct to assure their objectivity and probity:

"[I]f drawn, they are not likely to diminish the *absolute independence traditionally asserted by the high court for itself and by each of its nine members as individuals.*

"In fact, the Justices are said to be determined to resist any effort by Congress or other outside authority to impose ethical standards or enforcement methods upon them. Above all, they remain committed to the principle that *each Justice must be free to work beyond the control or censure even of his colleagues, and they were careful to protect that principle* while concerning themselves with the Fortas case over the last two weeks."

* * * * *

"[T]he Justices are believed to have turned their thoughts to the ways in which they could create a body of standards without compromising the great tradition of professional independence."

* * * * *

"It will be a long exercise, in any case, the Justice expect, and the 'standards' that emerge may be no more than each Justice's interpretation of the informal discussions that began around the Court with the Fortas revelations."

* * * * *

"Some members of Congress now believe that they have a duty to impose some standards on the entire Federal judiciary, including the Supreme Court, and after the Fortas affair some Justices appear to understand this impulse."

"But since they refuse to wield to the control of their own Chief Justice or their colleagues, the Justices will plainly resent and resist Congressional supervision if they possibly can."

* * * * *

"It is the conclusion of most Justices, therefore, that they must observe the very highest standards but that *they must be their own final judges*. Whether they can combine these two doctrines into a reassuring public body of Supreme Court ethics will not be evident for some time.[54]"

The above excerpts express the judiciary's conception of its own privileges as it so far has been made public.

A recent example of the exercise of the judiciary's privilege to protect the confidentiality of its internal decision-making process occurred in this court in February of this year. It arose in the very important case involving the validity of the right of way and permits granted by the Department of the Interior for the construction of the 789-mile Alaska Pipeline. The estimated cost of this pipeline was upwards of $3½ billion. Following the argument of the case on appeal and while the case was under advisement by the judges of this court, a United States Senator wired the Chief Judge of this court as follows:

"I have been told one or more judges have disqualified themselves in the trans-Alaska pipeline case currently under advisement. Kindly advise me of their identities and reasons if this is the case. I would, appreciate a reply in writing as soon as possible. Thank you very much."

In the reply for the court by Chief Judge Bazelon, this court exercised its privilege to protect the confidentiality of its deliberations, stating:

"In re your telegram of February 5, 1973 inquiring as to whether 1 or more judges have disqualified themselves in the trans Atlantic [*sic*] pipeline cases currently under advisement and in which you request their identities and reasons if this is the case. The opinion, when issued, will reveal the names of the judges who have participated therein. With great respect, we believe that further reply to your inquiry would not be appropriate with cordial wishes."

It thus appears that the judiciary, as well as the Congress and past Presidents, believes that a protected independence is vital to the proper performance of its specified constitutional duties. It is my conclusion that the deliberative functions of the Presidents office should be afforded the same essential protection that has been recognized for, and

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asserted and enjoyed by, the legislative and judicial branches of our government since 1787.

III. THE PRESIDENTIAL COMMUNICATIONS PRIVILEGE

The Per Curiam opinion recognizes the "great public interest" in maintaining the confidentiality of the presidential decision-making process, but concludes that the national interest in presidential confidentiality may be subordinated in particular situations to a strong countervailing need for disclosure.[55] Thus, the majority recognizes only a qualified privilege for presidential communications.

The focus of my disagreement with this conclusion is that in my opinion an absolute privilege exists for presidential communications. At least where a President discusses matters of official concern with his most intimate advisers, strict confidentiality is so essential to the deliberative process that it should not be jeopardized by any possibility of disclosure.

A. The importance of confidentiality

By recognizing an absolute privilege, my opinion places the presidential communications privilege on an equal footing with that recognized for military or state secrets in *United States* v. *Reynolds*.[56] Military or state secrets are never subject to disclosure regardless of the weight of countervailing interests.[57] Once the court is satisfied that military or state secrets are at stake, its inquiry is at an end. The court cannot balance the importance of secrecy in a particular case against the necessity demonstrated by the party seeking disclosure.[58]

The rationale underlying the absolute privilege for military or state secrets is the policy judgment that the nation's interest in keeping this information secret always outweighs any particularized need for disclosure. A similar policy judgment supports an absolute privilege for communications between a President and his advisers on matters of official concern.

The interest supporting an absolute privilege for presidential communications is the confidentiality essential to insure thorough and unfettered discussion between a President and his advisers. This widely recognized necessity for confidentiality in any decision-making process [59] is especially important in the office of the Presidency.

Confidentiality is indispensable to encourage frankness and to allow a President's advisers to advance possibly unpopular arguments without fear of public criticism. Working at the highest level of government, a President and his advisers must be free to explore all aspects of an issue so that final decisions are based upon completely thorough analysis. Their discussions must be informal, candid and blunt. If there is a danger that the words spoken at these discussions will be disclosed to the public, the participants inevitably will speak more guardedly, they will hesitate to suggest possibly unpopular opinions, and the discussions will lose their spontaneity. This loss of spontaneity and freedom would severely restrict a President's ability to conduct thorough and frank discussions on issues of national and world-wide importance.

An essential attribute of the presidential communications privilege is that the President must have absolute discretion in its exercise. To the majority's fear that it would be dangerous to vest absolute discretion in the President because of possible abuse in the future,[60] we need only refer to Justice Story's telling refutation of that argument in *Martin* v. *Hunter's Lessee:*

"It is always a doubtful course to argue against the use or existence of a power, from the possibility of its abuse. It is still more difficult, by such an argument, to ingraft upon a general power a restriction which is not to be found in the terms in which it is given. From the very nature of things, the absolute right to decision, in the last restort, must rest somewhere—wherever it may be vested it is susceptible of abuse." [61]

To allow the courts to breach presidential confidentiality whenever one of 400 federal trial judges considers that the circumstances of the moment demonstrate a compelling need for disclosure would frustrate the privilege's underlying policy of encouraging frank and candid presidential deliberations. If it is possible to convince a court to compel the disclosure of presidential conversations, then a President cannot guarantee confidentiality to his advisers and they must operate always under the hazard that their conversations might be publicly exposed at the behest of some trial court in the future.

By enacting the Presidential Libraries Act of 1955,[62] Congress recognized the importance of maintaining presidential confidentiality. The Act bestows an absolute privilege upon papers and sound recordings [63] deposited with the Government-administered presidential libraries by providing that presidential papers and recordings may be accepted "subject to restrictions agreeable to the administrator [of General Services] as to their use." [64] The presidential papers of Presidents Eisenhower, Kennedy and Johnson are subject to the restriction that "materials containing statements made by or to" the President are to be kept in confidence and held under seal and not revealed to anyone except the donors or archival personnel until "the passage of time or the circumstances no longer require such materials being kept under restriction." Restrictions imposed by letters from President Eisenhower and from President Johnson additionally prohibit disclosure to "public officials" on the ground that "the President of the United States is the recipient of many confidences from others, and . . . the inviolability of such confidence is essential to the office of the presidency . . . " [65] Thus Congress by statute has recognized the confidential nature of presidential papers and recordings, and has subjected them to restrictions against disclosure. It would be incongruous to accord a greater confidence to the materials of a deceased President than to the materials of a living, incumbent President.

The Special Prosecutor contends that in view of the unique circumstances in the present case, disclosure would not infringe seriously upon the confidentiality of the presidential deliberative process. However, the ultimate decision in this case will have repercussions far beyond the narrow factual confines of the present events. The decision here will be the first definitive judicial statement on the issue of presidential privilege. To recognize only a qualified privilege is to invite every litigant, both civil and criminal, to demonstrate his or her own particularized need for evidence contained in presidential deliberations. Already several claims of this nature are pending.[66] The lessons of legal history teach that it will be impossible to contain this breach of presidential confidentiality if numerous federal judges may rummage through presidential papers to determine whether a President's or a litigant's contentions should prevail in a particular case. Furthermore, the decision in this case inevitably will be precedent for assaults on the presently asserted absolute privileges of Congress and the Judiciary.[67]

B. The Executive Privilege Cases

The majority relies on a line of cases which recognize a qualified "executive privilege" where a civil litigant seeks disclosure of relevant government documents.[68] In formulating this qualified privilege, the courts concluded that the interest in confidentiality to insure a free deliberative process is weaker than that recognized as necessary to protect military or state secrets.[69] Consequently, the courts have recognized only a qualified, not an absolute, privilege where the government has resisted disclosure solely on the ground of protecting the confidentiality of the deliberative process.

However, none of the "executive privilege" cases involved personal communications between a President and his closest advisers. There is a great distinction between the office of the President and the myriad other agencies and departments that comprise the executive branch.[70] Virtually every decision emanating from a President's office has a direct and immediate effect on the entire, or a substantial part of, the nation. Lesser executive departments and agencies do not hold such awesome responsibility and power. Each has responsibility for and operates upon only a small segment of the nation. As important as the lesser executive departments and agencies are, their decisions do not have the sweeping and immediate impact which characterizes the decisions and policies of a President.

The national interest in maintaining presidential confidentiality to insure that a President's deliberative process remains completely unfettered is at least as strong as the national interest in protecting military or state secrets. As explained earlier, secrecy is not the ultimate goal of the presidential communications privilege. The ultimate goal is to guarantee that Presidents will remain comprehensively informed throughout their decision-making processes. The importance of the military or state secrets privilege is most apparent when, for example, it prevents disclosure of emergency defense or invasion plans, foreign espionage programs or summit meeting strategy. But if a President is unable to conduct thorough and unfettered deliberations with his advisers, these plans, programs and strategies may never be formulated. Furthermore, whereas the confidentiality of military or state secrets is important primarily with respect to this country's international relations, the presidential privilege promotes informed decisions in both the international and domestic spheres. In view of the immediate national and world-wide impact which accompanies presidential decisions, the need to protect the presidential deliberative process is at least as great as the need to protect military and state secrets. If military and state secrets are absolutely privileged based on the need for confidentiality, then conferences between a President and his close advisers should enjoy a similar absolute privilege based on the need for confidentiality.

C. Presidential privilege against a grand jury

The foregoing discussion demonstrates that the courts should afford presidential communications the same absolute privilege which protects military and state secrets. However, the *Reynolds* decision, as well as the "executive privilege" cases, arose from civil litigation and did not discuss the assertion of privilege against a grand jury subpoena. The final issue which must be resolved before recognizing an absolute presidential communications privilege in this case is whether the policy supporting the privilege prevails over the competing interests which arise from a court order to produce information for a grand jury investigation.

Common law evidentiary privileges based on encouraging frank and candid communication apply equally in criminal and civil cases. For example, the husband-wife and attorney-client privileges may be invoked by a witness for either the prosecution or defense in a criminal trial, regardless of the claimed necessity for disclosing the evidence.

Nevertheless, an interest which supports the existence of a privilege in a civil context might be outweighed by stronger countervailing interests which arise in the adminis-

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tration of criminal justice. In *Gravel v. United States*[71] the court of appeals had fashioned a nonconstitutional testimonial privilege which protected a Congressman's aide from the questioning by a grand jury regarding allegedly criminal activity committed in the course of his duties.[72] The court analogized the privilege to that which protects executive officials from civil liability. Since government officers are immune from civil liability, the court of appeals reasoned, a similar doctrine should immunize government officers from criminal prosecution. Carrying this reasoning one step further, the court concluded that a grand jury could not question government officers about crimes for which they could not be prosecuted. The Supreme Court disagreed, explaining:

"But we cannot carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress or to frustrate the grand jury's inquiry into whether publication of these classified documents violated a federal criminal statute. The so called executive privilege has never been applied to shield executive officers from prosecution for crime." [73]

It is important to recognize that the "executive privilege" referred to in *Gravel* is the doctrine also known as official immunity.[74] It is not the evidentiary "executive privilege" upon which the majority in this case relies.[75] The quoted language from the *Gravel* decision recognizes that the underlying purpose of official immunity,[76] while supporting immunity from civil liability, does not support total immunity from criminal prosecution.

The only relevance of the *Gravel* dictum to the present case is to suggest that the interest in protecting the confidentiality of the deliberative process may not support absolute immunity from criminal prosecution for executive officers. But the presidential communications privilege, as here outlined, does not immunize executive officers from criminal prosecution. This evidentiary privilege, which protects the presidential deliberative process by preventing disclosure of the exact details of that process, is not premised on any notions of immunity from civil or criminal liability. It is unnecessary in this case to decide the issue touched upon by *Gravel*, which is whether the interest in confidentiality that supports the evidentiary privilege would also preclude the indictment of participants in the deliberative process.

The possibility that an occasional criminal prosecution may be hampered by the privilege does not justify abandoning the compelling long-range necessity for presidential confidentiality. The inability of a prosecutor or grand jury to obtain specific privileged information will seldom prevent a successful criminal prosecution. Understandably, a prosecutor desires to obtain all evidence relevant to a case. But particular evidence frequently is unavailable because of commonly recognized privileges, such as the husband-wife, attorney-client or self-incrimination privileges. In such instances, non-privileged information remains available and convictions routinely are obtained despite various claims of privilege by witnesses.

The 1807 decision in *United States v. Burr*,[77] upon which the majority relies,[78] does not preclude recognition of an absolute privilege in the present case. In that case, the accused sought to obtain allegedly exculpatory evidence contained in a letter which had been written to President Jefferson by General Wilkinson, an essential witness against the accused.[79] Chief Justice Marshall, sitting alone as the trial judge in the case, issued a subpoena to the President for production of the letter, but the President, through his attorney, refused to disclose certain passages. The Chief Justice appreciated the weight which attaches to a presidential assertion of privilege:

"The President, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production."

* * * * *

"Had the president, when he transmitted it, subjected it to certain restrictions, and stated that in his judgment the public interest required certain parts of it to be kept secret, and had accordingly made a reservation of them, all proper respect would have been paid to it. . . ." [80]

However, since the President had relied upon his attorney's discretion and had not communicated directly with the court,[81] the Chief Justice allowed the attorney time to consult with the President. Several days later, the Chief Justice accepted "a certificate from the President, annexed to a copy of General Wilkinson's letter, excepting such parts as he deemed he ought not to permit to be made public." [82] From all that appears these excisions were not contested.[83]

The *Burr* case involved a subpoena by a defendant in a criminal trial, and the defendant's demand for the letter was an exercise of his sixth amendment right "to have compulsory process for obtaining witnesses in his favor." [84]

Although Chief Justice Marshall was never called upon to enforce the subpoena against the President,[85] and therefore never was required to resolve the ultimate conflict between the President's privilege and the sixth amendment right to compulsory process, he took the opportunity in dicta to discuss whether a President's claim of privilege should be upheld in the face of a criminal defendant's demand for possible exculpatory evidence. Recognizing that he could not "precisely lay down any general rule for such a case," [86] the Chief Justice suggested that "perhaps" a presidential claim of privilege could be overridden in a criminal trial where the defendant demonstrates a particularly compelling need for the evidence.[87] Quite clearly, this suggestion was not a final disposition of the issue, nor even a holding of the case.

The case before this court involves a grand jury proceeding, not a criminal trial of an accused. A grand jury, of course, is an accuser, not an accused, and has no sixth amendment right to compulsory process for obtaining witnesses. Thus, the express guarantee of the sixth amendment which was present in *Burr* is not applicable to the present case. Moreover, although the grand jury's authority to subpoena witnesses is essential to its task, grand juries always have operated under the constraints of evidentiary privileges.[88] Any conflict between the presidential communication privilege and the sixth amendment rights of a criminal defendant is better resolved in the future when a court has before it an indicted defendant who is able to demonstrate the materiality of the evidence to his particular defense.[89]

D. *Constitutional Dimensions of the Privilege*

The foregoing discussion has demonstrated the soundnes of an absolute, evidentiary privilege for conversations and deliberations of a President with his close advisers. But the privilege also has constitutional dimensions which derive both from the separation of powers doctrine and from the logical principle that inherent in any constitutional right are the means requisite to its effective discharge.

The effective discharge of the presidential duty faithfully to execute the laws requires a privilege that preserves the integrity of the deliberative processes of the executive office. It would be meaningless to commit to the President a constitutional duty and then fail to protect and preserve that which is essential to its effective discharge. Thus the term "effective" is the sine qua non that imbues the presidential decisional process with a constitutional shield. The genius of our Constitution lies, perhaps as much as anywhere, in the generality of its principles which makes it susceptible to adaptation to the changing times and the needs of the country. But this much is explicit: "[The President] shall take Care that the Laws be faithfully executed. . . ." U.S. CONST. art. II, § 3. Is it plausible that the Framers should have charged the President with so basic a responsibility, one upon which every ordered society is premised, and yet left him without the ability effectively to satisfy that high charge? Emphatically, the answer must be, "No." The duty and the means of its discharge coalesce and each, the one explicit and the other implicit, finds its source in the Constitution.

The constitutional nature of the presidential communications privilege is reenforced by the doctrine of separation of powers. It is clear, of course, that our constitutional system of checks and balances makes each branch dependent upon the other branches in some instances. The trial court and the majority of this court rely in part on this interdependency to decide that the courts have both the power to compel a President to comply with the subpoena and the right to obtain recordings of conversations that were part of the presidential decision-making process. The flaw in their analysis becomes apparent upon closer examination of the nature of both separation of powers and checks and balances. James Wilson [90] in his "Lectures on the Law" accurately stated both concepts:

"[E]ach of the great powers of government should be independent as well as distinct. When we say this; it is necessary—since the subject is of primary consequence in the science of government—that our meaning be fully understood, and accurately defined. For this position, like every other, has its limitations; and it is important to ascertain them.

"The independence of each power consists in this, that *its proceedings, and the motives, views, and principles, which produce those proceedings, should be free from the remotest influence, direct or indirect, of either of the other two powers.* But further than this, the independency of each power ought not to extend. Its proceedings should be formed without restraint, but when they are once formed, they should be subject to control.

"We are now led to discover, that between these three great powers of government, there ought to be a mutual dependency, as well as a mutual independency. We have described their independency: let us now describe their dependency. It consists in this, that *the proceedings of each, when they come forth into action and are ready to affect the whole,* are liable to be examined and controlled by one or both of the others." (Emphasis added). 2 WILSON, WORKS 409–10 (1804).

Thus the system of checks and balances begins to operate only at the point "when [the proceedings of any branch] come forth into action and are ready to affect the whole." It is only necessary to cite several examples. The executive may veto acts of Congress and Congress may override such a veto.[91] The executive nominates, and the Senate confirms, ambassadors, justices of the Supreme Court and all other officers of the United States.[92] The courts may declare acts of Congress unconstitutional,[93] or constitutional and the executive faithfully executes the laws in conformance with such decisions. That these principles establish the mutual dependency of the three branches is obvious, but it is equally obvious that each of the above instances involves a restraint by one branch on a final action of a coordinate branch.[94]

The doctrine of separation of powers, by

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contrast, requires that each branch's "proceedings, and the motives, views, and principles, which produce those proceedings, should be free from the remotest influence, direct or indirect, of either of the other two powers." *Id.* This doctrine, then, prohibits intrusion in any form by one branch into the decisional processes of an equal and coordinate branch. And it is clear, of course, that "[t]he grand jury is an arm of the court and its *in camera* proceedings constitute 'a judicial inquiry.'" [95] Thus, recordings of presidential deliberations cannot be the subject of a judicial subpoena if it would even remotely influence the conduct of such deliberations or their final outcome. Enforcement of the subpoena demonstrably would have just such an effect in this case. The conversations that are the subject of the subpoena presumptively occurred as part of the ongoing decisional process involved in the President's constitutional duty faithfully to execute the laws.[96] The end product of this process would be the decision whether crimes had been committed and whether to prosecute such crimes, and whether to discharge or retain certain government employees. These decisions would be the "final action" comparable to the seizure of the steel mills in *Youngstown Sheet & Tube Co.*[97] The conversations themselves, however, were an integral part of the deliberative process and thus not subject to judicial intrusion by means of enforcement of the subpoena. Moreover, it appears insignificant that such a judicial intrusion into that process is for the purpose of laying open those presidential conferences before the grand jury. To hold otherwise would, to paraphrase the district court, exalt the form of the intrusion over its substance,[98] since the pervasively adverse effect on the candor of the deliberations and the soundness of the decisions reached there flows from the breach of confidentiality itself, whatever the purpose of the intrusion.

But the greatest vice of the decision sought by the Special Prosecutor is that it would establish a precedent that would subject every presidential conference to the hazard of eventually being publicly exposed at the behest of some trial judge trying a civil or criminal case. It is this presidential effect which transforms this case from one solely related to the recordings sought here, to one which decides whether this President, and all future Presidents, shall continue to enjoy the independency of executive action contemplated by the Constitution and fully exercised by all their predecessors.

IV. THE PRIVILEGE IN THIS CASE

A. The privilege was properly invoked

For the foregoing reasons, my opinion recognizes an absolute privilege for presidential communications. To be privileged, the communications must occur under an aura of confidentiality, and, because the privilege is designed to protect a President's ability to perform his duties, the communications must relate to the performance of Article II duties.

The presidential communication privilege was properly invoked by the President under the circumstances of this case. In *Reynolds* v. *United States*[99] the Supreme Court discussed the procedures and formalities necessary for a proper invocation of the absolute privilege for military or state secrets.[100] Since the presidential communications privilege resembles the military or state secrets privilege, the *Reynolds* procedures are instructive in the present case.[101]

Initially, there must be "a formal claim of privilege lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." [102] Although an earlier statement by the President indicated that he did not intend to invoke executive privilege with regard to the investigation,[103] the President's letter in response to the subpoena from the District Court expressed a clear intent to claim his constitutional privilege to withhold recordings of conversations with his advisers.[104]

After the President has claimed the privilege, the court must satisfy itself that "the circumstances are appropriate for the claim of privilege." [105] In determining whether the privilege is appropriate in a particular case, the only injury is whether there is a "reasonable danger" that disclosure of the evidence would expose matters which the privilege is designed to protect.[106] Since the presidential communications privilege is an absolute rather than a qualified privilege, there is no occasion to balance the particularized need for the evidence against the governmental interest in confidentiality. The balance between these competing interests was examined and resolved when the absolute presidential communications privilege was formulated.[107] Having concluded that the privilege is available, the only inquiry is whether the President's invocation of the privilege promotes the policy which the privilege was designed to protect. Regarding the absolute privilege for military or state secrets, the *Reynolds* Court stated:

"Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but *even the most compelling necessity* cannot overcome the claim of privilege if the Court is ultimately satisfied that military secrets are at stake." [108]

The presidential communications privilege protects the confidentiality of communications between the President and his close advisers which are related to his Article II duties. Since the subpoena covers recordings of confidential communications between the President and his closest advisers, the privilege is appropriate in this case if the recorded conversations related to the President's Article II duties. Our starting point is the presumption, in the absence of clear evidence to the contrary, that as a government official the President was discharging his constitutional duties.[109] The nature of the Presidency often makes it difficult to distinguish private from official concerns of the President. Because of his position in the nation, actions which might be commonplace if performed by a private individual assume national importance when performed by the President. As Chief Justice Marshall stated in the *Burr* decision: "Letters to the president in his private character, are often written to him in consequence of his public character, and may relate to public concerns." [110]

From the circumstances already in the public record, it is reasonable to conclude that the conversations at issue related to the President's Article II duty to "take Care that the Laws be faithfully executed." [111] The break-in at the Democratic Party headquarters soon became a pervasive topic of conversation throughout the country. There occurred constant and widespread speculation concerning the possible involvement of high public officials, and some suspected that the Justice Department was not investigating the matter thoroughly. There is evidence that the President, like other citizens, was concerned that the laws were not being fully enforced.

Especially in view of allegations linking the burglary to the White House staff, it was appropriate for the President, as the nation's chief law enforcement officer, to discuss these matters with his advisers.[112] Thus, it is reasonable to conclude that the discussions covered by the subpena related to the President's Article II duty to execute the laws. The possibility that the President also may have been concerned about the political effect of the offenses on the Republican Party is not inconsistent with the performance of his Article II duties.

Since the subpoenaed tapes are recordings of the President's confidential conversations and there is a reasonable probability that the discussions related to the President's Article II duties, there exists at least a "reasonable danger" that disclosing the tapes would jeopardize the very interest which the presidential communication privilege is designed to protect. Just as the *Reynolds* Court found only a "reasonable danger" that disclosure would jeopardize protected interests,[113] it is not necesary in this case to conclude with absolute certainty that disclosure would violate presidential confidentiality in matters of official concern. *Reynolds* only requires a "reasonable danger," and that standard is satsified here.

Since there exists a reasonable danger that disclosing the recordings would infringe upon protected presidential confidentiality, an examination of the tapes by a judge even in chambers would be improper. Once a President asserts his privilege, a court's only function is to determine whether the circumstances are appropriate for the claim of privilege.[114] Yet the court must make this determination without forcing disclosure of the very communication which the privilege protects.[115] Thus an *in camera* inspection is proper only if the court cannot otherwise satisfy itself that the privilege should be sustained. In the present case, we are satisfied that appropriate circumstances do exist and, therefore, would hold that even *in camera* inspection is improper.

B. Privilege not destroyed by possibility of criminal conspiracy by advisers

The Special Prosecutor also argues that the privilege disappears upon a *prima facie* showing that the conversations occurred as part of a criminal conspiracy by certain of the President's advisers.[116] He strenuously argues that abuse of the privileged relationship vitiates any otherwise valid privilege possessed by the President. The argument is fatally defective, however, since the President alone holds the privilege which is designed to ensure the integrity of his decisional processes. The possibility that those close to him may have perverted the relationship cannot destroy the privilege held in the public interest exclusively by the President.

The Special Prosecutor relies heavily upon *Clark v. United States*, 289 U.S. 1 (1933), to sustain his position, but that case is not to the contrary. *Clark* involved a prospective juror who on *voir dire* concealed facts and falsely swore in order to be accepted as a juror. Whatever privilege she might have possessed as a juror could "not apply where the relation giving birth to it was fraudulently begun or fraudulently continued. *Id.* at 14. It is questionable, of course, whether the privilege of a jury is at all comparable to the presidential communications privilege. In any event, the privilege discussed in *Clark* is designed to protect the deliberations of the entire jury and thus belongs to the jury as an entity. A single juror cannot waive the privilege for all other jurors and make public against their wishes the discussions that occurred in the secrecy of the jury room. A corollary of this principle is that, although a nonculpable juror properly may invoke the privilege, a juror who has abused the privileged relationship cannot assert the privilege to shield himself from criminal sanction if the remaining jurors wish to testify. There is not the slightest indication in *Clark* that the nonculpable jurors attempted to interpose their privilege to keep the jury deliberations secret. Thus *Clark* only decided that a juror who abuses the relationship which creates the privilege loses any privilege he otherwise might have possessed; such a juror may not validly interpose a privilege retained by nonculpable jurors who are willing to testify.

Footnotes at end of article.

Indeed, the analogy of the attorney-client privilege referred to in *Clark*[117] supports the view that an innocent holder of a privilege does not lose it because of misconduct by another. The client, not the attorney, is the holder of that privilege and thus, as *Clark* states, "the loss of the privilege [does not] depend upon the showing of a conspiracy, upon proof that client and attorney are involved in equal guilt. The attorney may be innocent, and still the guilty client must let the truth come out." *Id.* at 15. By contrast, where the client is innocent, his privilege does not fail because of any misconduct by his attorney. The client cannot control the use to which his attorney puts information confided to him during the course of their relationship, but relies simply upon the attorney's sense of professional integrity. It would be manifestly unjust to penalize the ordinary client by exposing to public scrutiny the intimate details of his personal and financial life upon a *prima facie* showing that his attorney had utilized such information in an illegal enterprise. Similarly, possible abuse of the privileged relationship by advisers to the President cannot vitiate the privilege help by him alone to protect the integrity of the presidential deliberative process.

C. The impeachment clause and the possibility of presidential misconduct

Thus the Special Prosecutor's case finally rests upon a showing of probable cause to believe that the President himself was guilty of misconduct. However, the Special Prosecutor has never strongly urged the point, preferring to rest his case upon the showing of criminal involvement by those close to the President. Although we would be reluctant to consider a contention never directly pressed, our greater reluctance is premised more fundamentally upon the ground that such a determination at this stage of the proceedings is constitutionally inhibited. We state here not a firm conclusion, but one of sufficient merit to circumscribe judicial inquiry. The constitutional inhibition essentially derives from implications inherent in the Impeachment Clause:

"Juudgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." U.S. CONST. art. I, § 3 ¶ 7. And, of course, a President may be removed from office only upon impeachment. *Id.*, art. II, § 4.

Our starting point is the proposition that a President is subject to the criminal laws, but only after he has been impeached by the House and convicted by the Senate and thus removed from office. The contemporaneous views of the Framers clearly supports the view that all aspects of criminal prosecution of a President must follow impeachment. For example, Gouveneur Morris stated during the debates on impeachment that:

"A conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachments, was that the latter was to try the President *after* the trial of the impeachment." 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION 500 (rev. ed. 1966) (emphasis added). And Alexander Hamilton in the Federalist Papers twice reiterated the proposition that removal from office must precede any form of criminal process against an incumbent President:

"The punishment which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. *After* having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law." The FEDERALIST No. 65, at 426 (Modern Library ed. 1937).

"The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would *afterwards* be liable to prosecution and punishment in the ordinary course of law." THE FEDERALIST No. 69, at 446 (Modern Library ed. 1937).

A modern commentator similarly argues that the Impeachment Clause "sharply separates removal from office from subsequent punishment after indictment. . . . Removal would enable the government to replace an unfit officer with a proper person, leaving 'punishment' to a later and separate proceeding, if indeed the impeachable offense were thus punishable." BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 79 (1973). *See generally* authorities collected in Brief for Petitioner at 17–26.

Sound policy reasons preclude criminal prosecution until after a President has been impeached and convicted. To indict and prosecute a President, or to arrest him before trial, would be constructively and effectively to remove him from office, an action prohibited by the Impeachment Clause. A President must remain free to travel, to meet, confer and act on a continual basis and be unimpeded in the discharge of his constitutional duties. The real intent of the Impeachment Clause, then, is to guarantee that the President always will be available to fulfill his constitutional duties.

Finally, having established that criminal prosecution of an incumbent President must follow impeachment, we come to the reasons this court cannot consider questions of presidential guilt, at least at this stage of the proceedings. Counsel for the President seem to place their argument upon the irrelevance of presidential guilt to the grand jury because of its inability to indict the President:[118]

". . . there seems to be a suggestion at pages 19–22 of the Opinion [below] that an otherwise valid claim of privilege by the President would be overridden if the evidence sought would show that the President himself had been guilty of a crime. But if there were such evidence of crime against an incumbent President—and there is none in this case—it could not be relevant to the work of a grand jury or of the District Court because of the inability to indict a President prior to impeachment."

This is an insufficient reason, however, since evidence of presidential involvement in a criminal conspiracy might be relevant to establish the case against his advisors.[119] We prefer to rely upon a discrete, but closely related proposition. That is, that a judicial determination of a *prima facie* case against the President and a grand jury determination of whether or not to indict are sufficiently comparable in the impeachment context so that if one is constitutionally prohibited, the other must be also, for each is a finding that it is probable that the President has committed a crime. There is a distinction, of course, in that an indictment initiates actual criminal prosecution, but this is not a dispositive distinction; a judicial determination that it is more probable than not that the President himself is guilty of criminal activity would just as effectively disable a President in the discharge of his constitutional duties. The courts cannot properly, in effect, *ex cathedra* stamp their own imprimatur of guilt upon an incumbent President, if to do so would vitiate the sound judgment of the Framers that a President must possess the continuous and undiminished capacity to fulfill his constitutional obligations. In my opinion such a judicial determination of the probability of presidential guilt would have just such an effect. For these reasons, a court should not directly confront an only obliquely urged assertion of a *prima facie* case against an incumbent President.

D. Prior testimony by presidential advisors does not require disclosure of the tape recordings

The Special Prosecutor contends that whatever privilege the President may have possessed has been waived by the President's statement on May 22, 1973 allowing testimony by his counsel and aides.[120] He argues that a distinction between tape recodings and testimony would be "an intolerable distinction [because] [c]onfidentiality no longer exists in any real sense."[121]

As a starting point, the privilege has not been waived at least as to any matters not already testified to by his advisers. The confidentiality surrounding as yet undisclosed conversations has not been impaired. As to those portions of the tape recordings that have been the subject of testimony before the Senate Investigating Committee, the resolution of the waiver issue is more complex, but the answer appears equally clear. There has been no waiver. This conclusion rests upon three factors: the strict standards applied to privileges of this nature to determine waiver; the distinction between oral testimony and tape recordings; and, most important, considerations of public policy that argue persuasively for a privilege that permits the Chief Executive to disclose information on topics of national concern without decimating entirely his right and duty to withhold that which properly ought to be withheld in the public interest.

The determination of whether the President has waived his privilege does not depend upon whether it is purely one of constitutional dimensions, only an evidentiary privilege or one that partakes of attributes of both. For, whatever its source, the privilege is sufficiently essential to the effective functioning of the Presidency to require that the standards employed to determine its waiver be as rigorous as those applied to protect constitutional rights generally.

This simply recognizes that the present and future ability of Presidents effectively to discharge their constitutional duties is as fundamental to our democratic form of government as are the rights guaranteed by the Constitution to each individual. It is well established in the law that the presumption is against waiver of fundamental or constitutional rights. Indeed, "courts indulge every reasonable presumption against waiver" of such rights. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Aetna Inc. Co. v. Kennedy*, 301 U.S. 389 (1937); *Hodges v. Easton*, 106 U.S. 408 (1882). Thus a heavy burden must be met by the Special Prosecutor to establish waiver in this case.

In *Reynolds* the Supreme Court indicated that at least some of the significance attached to the fifth amendment privilege against self-incrimination applied as well to the military or state secrets privilege. The adoption in *Reynolds* of similarly stringent procedures to establish a valid invocation of the privilege implicitly recognized that the two privileges are of equal significance in our governmental system.[122] While counsel for the President are not entirely correct in their assertion that *Reynolds* is dispositive of the waiver issue here,[123] that case nonetheless suggests a helpful framework for analysis. Suppose in that case the Government was willing to permit testimony not only as to non-classified matters, but also as to general descriptions of classified matters. Such an offer could not be construed as a waiver of the Government's privilege to refuse to produce the specifications and blueprints of the secret military technology there in question.[124]

Similarly, in this case there exists a valid and tenable distinction between testimony and tape recordings. Confidentiality is composed of many elements and the difference in degree between allowing generalized, selec-

Footnotes at end of article.

tive testimony and the recordings themselves is sufficiently great to constitute a difference in kind. Counsel for the President have well stated that distinction:

"Recordings are the raw material of life. By their very nature they contain spontaneous, informal tentative, and frequently pungent comments on a variety of subjects inextricably intertwined into one conversation." [125]

The distinction between testimony and tape recordings is not drawn for the purpose of preserving the right, in itself, of public officials to speak pungently and bluntly. Rather, what is sought to be preserved are the qualities of directness and candor that flow from discussions where it is unnecessary for the participants to dissemble, to seek the felicitous phrase or to be concerned about interpretations that may be skewed if heard by an unfriendly audience. Failure to recognize the distinction between testimony and recordings here would impede, rather than promote, open and frank discussions. Thus a waiver as to testimony cannot be construed as a waiver of the right to withhold the tape recordings.[126]

The proper resolution of the waiver issue depends more fundamentally, however, upon a reasoned compromise between two clear and well-established principles that sustain the efficacy of democratic government in modern times. That is, the general right and need of the public to be well informed, and the imperative need of government to maintain secrecy and confidentiality in certain situations.[127] Although seemingly antagonistic, both principles emerge from, and are but the recognized end result of, that determination ever present in the law: "Where lies the public interest?" The continued vitality of these two principles perforce demands that any rule on waiver of presidential privilege be formulated to, at once, preserve the privilege to the greatest extent consistent with the public interest and promote as full disclosure by high public officers as possible. In this case that goal would best be achieved by holding that the privilege has not been waived. The policy favoring openness of government dictates that a President should be able to disclose certain selected information relevant to topics of national concern and to permit testimony by subordinate executive officers on such topics, without being compelled to make a complete disclosure of that which is essential properly to maintain the confidentiality and integrity of advice and information furnished to the Presidency.[128]

The majority prefers not to confront this problem directly, but merges what is essentially a question of waiver into its initial balancing process to determine that the need to preserve confidentiality in this case is lessened. Having done this, the majority then strikes the balance against presidential privilege. But this does not resolve the dilemma posed. Whether future Presidents perceive the question of partial disclosure to enter at the balancing stage or as a waiver determination, they will be reluctant partially to disclose information if such disclosure would, under either mode of analysis, increase the probability of compelled full disclosure. The strong public interest in preserving this latitude for future Presidents requires a finding that on the facts presented in this case executive privilege has not been waived.

V. CONCLUSION

For the reasons above stated it is my conclusion that the presidential communications privilege may be exercised to decline to produce the recordings, and that this privilege has not been waived. I would thus enter judgment accordingly in all cases.

If this rule were recognized, the President would then be free voluntarily to type up a transcript of the recordings that are the subject of this litigation and present it to the grand jury with the material deleted that he considers confidential. He could explain the deleted matter.[129] As to the deleted material the President's action would be submitted to the test of public opinion and eventually, when the tapes are released for posterity, to the test of history.

FOOTNOTES

[1] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[2] *Id.* at 594–96 (Frankfurter, J., concurring).

[3] United States v. Arredondo, 31 U.S. (6 Pet.) 691, 714 (1832).

[4] Inland Waterways v. Young, 309 U.S. 517, 525 (1940).

[5] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418–19 (1821); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 350 (1816). *Martin v. Hunter's Lessee, supra,* established the power of the Supreme Court to review state court decisions in civil cases. Later, in the decision upholding the court's power to review state criminal decisions, Chief Justice Marshall pointedly remarked:

"This concurrence of statesmen, of legislators and judges, in the same construction of the Constitution, may justly inspire some confidence in that construction." Cohens v. Virginia, *supra,* at 419.

Other important constitutional decisions evidence Supreme Court reliance upon custom and usage. *Cooley v. Board of Wardens,* 53 U.S. (12 How.) 298 (1851), involved the constitutionality of a state law which required vessels to take a pilot in certain waters. In finding that the law did not violate the Constitution, the Court relied upon the existence of such state laws since the adoption of the Constitution and the fact that "similar laws have existed and been practiced in the states since the adoption of the federal Constitution," and that Congress in its legislative acts had recognized the existence of such laws. This contemporaneous construction was held to be entitled to great weight. *Id.* at 315.

In *Stuart v. Laird,* 5 U.S. (1 Cranch) 299 (1803), the court relied upon contemporaneous construction of the Constitution, followed by practice and acquiescence, in affirming Congress' power to authorize Supreme Court Justices to sit as circuit judges without receiving additional commissions. This usage was held to be of the "most forcible nature" and "too strong and obstinate to be shaken or controlled." *Id.* at 309.

[6] United States v. Midwest Oil Co., 236 U.S. 459, 472–73 (1915).

[7] *See* pp. 15–17 *infra.*

[8] N.Y. Times, Sept. 3, 1948, at 5. The Truman Memorandum consists of 102 pages and the original now rests in the Harry S. Truman Library at Independence, Missouri.

[9] *Résumé and Conclusions*

A bird's-eye view of the refusals by seventeen of our Presidents, and their heads of departments, to comply with congressional requests for information and papers from the Executive, beginning with 1796 to the present time, follows (In the bird's-eye picture, reference is made to the refusals of Presidents Monroe, Fillmore, Lincoln, and Hayes [;] Monroe's refusal may be found in a message dated January 10, 1825, 2 Richardson, Messages and Papers of Presidents, p. 278' [*sic*] Fillmore's in 5 Richardson, p. 159; Lincoln's in 6 Richardson, p. 12, and the refusal in Hayes' administration is dealt with in 17 Cong. Rec. 2332 and 2618.):

President, Date, and Type of Information Refused.

George Washington, 1796, Instruction to U.S. Minister concerning Jay Treaty.

Thomas Jefferson, 1807, Confidential information and letters relating to Burr's conspiracy.

James Monroe, 1825, Documents relating to conduct of naval officers.

Andrew Jackson, 1833, Copy of paper read by President to heads of departments relating to removal of bank deposits.

1835, Copies of charges against removed public official.

List of all appointments made without Senate's consent, since 1829, and those receiving salaries, without holding office.

John Tyler, 1842, Names of Members of 26th and 27th Congresses who applied for office.

1843, Report to War Department dealing with alleged frauds practiced on Indians, and Col. Hitchcock's views of personal characters of Indian delegates.

James K. Polk, 1846, Evidence of payments made through State Department, on President's certificates, by prior administration.

Millard Fillmore, 1852, Official information concerning proposition made by King of Sandwich Islands to transfer islands to U.S.

James Buchanan 1860, Message of Protest to House against Resolution to investigate attempts by Executive to influence legislation.

Abraham Lincoln, 1861, Dispatches of Major Anderson to the War Department concerning defense of Fort Sumter.

Ulysses S. Grant, 1876, Information concerning executive acts performed away from Capitol.

Rutherford B. Hayes, 1877, Secretary of Treasury refused to answer questions and to produce papers concerning reasons for nomination of Theodore Roosevelt as Collector of Port of New York.

Grover Cleveland, 1886. Documents relating to suspension and removal of Federal officials.

Theodore Roosevelt, 1909, Attorney General's reasons for failure to prosecute U.S. Steel Corporation.

Documents of Bureau of Corporations, Department of Commerce.

Calvin Coolidge, 1924, List of companies in which Secretary of Treasury Mellon was interested.

Herbert Hoover, 1930, Telegrams and letters leading up to London Naval Treaty.

1932, Testimony and documents concerning investigation made by Treasury Department.

Franklin D. Roosevelt, 1941, Federal Bureau of Investigation reports.

1943, Director, Bureau of the Budget, refused to testify and to produce files.

1943, Chairman, Federal Communications Commission, and Board of War Communications refused records.

1943, General Counsel, Federal Communications Commission, refused to produce records.

1943, Secretaries of War and Navy refused to furnish documents, and permission for Army and Naval officers to testify.

1944, J. Edgar Hoover refused to give testimony and to produce President's directive.

President Truman, 1945, Issued directions to heads of executive departments to permit officers and employees to give information to Pearl Harbor Committee.

President's directive did not include any files or written material.

1947, Civil Service Commission records concerning applicants for positions. Truman Memorandum at 44a, b, c (1948).

[10] 3 ANNALS OF CONGRESS 493.

[11] 1 WRITINGS OF THOMAS JEFFERSON 303–04 (1905).

[12] BRINKLEY, PRESIDENT AND CONGRESS 441 (1947), in Truman Memorandum at 6.

[13] 1 RICHARDSON, "MESSAGES AND PAPERS OF THE PRESIDENTS" 412 (1807); in Truman Memorandum at 8.

[14] Truman Memorandum at 9.

[15] C. Warren, *Presidential Declaration Of Independence,* 10 B.U.L.REV. 11, 12 (1930); 13 CONG. DEB. Part 2, App. at 202 (1837).

[16] 3 HIND'S PRECEDENTS 181 (1907).

[17] *Id.* at 182.

[18] IV RICHARDSON, *supra* note 13, at 433.

[19] *Id.,* Vol. V, at 618–19.

[20] *Id.,* Vol. VII, at 362.

[21] *See* Senate Miscellaneous Documents,

Vol. 7, 52nd Cong., 2d Sess. 232–72; Truman Memorandum at 21.

[22] GROVER CLEVELAND, PRESIDENTIAL PROBLEMS 63–64.

[23] 43 CONG. REC. 527–28 (1909).

[24] 65 CONG. REC. 6087, 6108 (1924).

[25] 72 CONG. REC. 12029 (1930).

[26] 40 OPS. ATT'Y GEN. No. 8, April 30, 1941.

[27] Truman Memorandum at 33.

[28] Letter of January 22, 1944, Francis Biddle, Attorney General.

[29] Truman Memorandum at 39–40.

[30] N.Y. Times, May 18, 1954, at 24 (Attorney General Brownell's Memorandum).

[31] N.Y. Times, May 18, 1954, at 1, 24. An extensive memorandum by Attorney General Herbert Brownell recites numerous instances where outstanding Presidents had refused congressional demands for confidential information and papers. These included Presidents Washington, Jefferson, Jackson, Tyler, Buchanan, Grant, Cleveland, Theodore Roosevelt, Coolidge, Hoover, Franklin D. Roosevelt and Truman. N.Y. Times, May 18, 1954, at 24.

[32] The Act of Jan. 24, 1857 provided:

CHAP. XIX.—*An Act more effectually to enforce the Attendance of Witnesses on the Summons of either House of Congress, and to compel them to discover Testimony.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That any person summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter before either House, or any committee of either House of Congress, who shall wilfully make default, or who, appearing, shall refuse to answer any question pertinent to the matter of inquiry in consideration before the House or committee by which he shall be examined, shall in addition to the pains and penalties now existing, be liable to indictment as and for a misdemeanor, in any court of the United States having jurisdiction thereof, and on conviction, shall pay a fine not exceeding one thousand dollars and not less than one hundred dollars, and suffer imprisonment in the common jail not less than one month nor more than twelve months.

* * * * *

SEC. 3. *And be it further enacted,* That when a witness shall fail to testify, as provided in the previous sections of this act, and the facts shall be reported to the House, it shall be the duty of the Speaker of the House or the President of the Senate to certify the fact under the seal of the House or Senate to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action.

APPROVED, January 24, 1857. 11 STAT. 155.

[33] *See* Jurney v. McCracken, 294 U.S. 125, 151 (1935). 2 U.S.C. § 192 (1970) provides the present authority:

§ 192. Refusal of witness to testify or produce papers.

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months. (R. S. § 102; June 22, 1938, ch. 594, 52 Stat. 942.)

[34] 103 U.S. 168 (1880).

[35] *Id.* at 190.

[36] 3 HINDS' PRECEDENTS § 2663, at 1112 (1907).

[37] *Id.*

[38] *Id.* § 2663, at 1113.

[39] *Id.* at 1112–14.

[40] 14 CONG. REC. 1525 (1876).

[41] 6 CANNON'S PRECEDENTS § 586, at 825 (1936).

[42] — U.S.App.D.C. —, — F.2d — (Nos. 24,-279, 24,412 & 71–2034, August 30, 1973).

[43] 116 CONG. REC. 36481 (1970) (emphasis added).

[44] Transcript of testimony of Julien G. Sourwine, Nov. 18, 1970, at 16, United States Servicemen's Fund v. Eastland, Civil Action No. 1474070 (D.D.C., Oct. 21, 1971).

[45] *Id.*

[46] *Id.*

[47] New York Times v. United States, 403 U.S. 713, 752 n.3 (1971) (Burger, C.J., dissenting).

[48] 5 U.S.C. § 552(b), (c) (1970).

[49] Soucie v. David, 145 U.S.App.D.C. 144, 157, 448 F.2d 1067, 1080 (1971) (Wilkey, J., concurring). Writing for the court in *Soucie,* Chief Judge Bazelon recognized that disclosure of information under the Freedom of Information Act was not to harm specific governmental interests:

"The touchstone of any proceeding under the Act must be the clear legislative intent to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests." Soucie v. David, *supra* at 157, 448 F.2d at 1080.

[50] Brief for Petitioner at 32–33.

[51] 14 F.R.D. 335 (1953).

[52] *Id.* at 336.

[53] It is an interesting footnote to history that the Justice Department, headed by then Attorney General John N. Mitchell, furnished the investigatory material in its possession to Chief Justice Earl Warren but resisted congressional demands for full disclosure of its information in the Fortas controversy. N.Y. Times, May 18, 1969, at 1, col. 2.

[54] N.Y. Times, May 18, 1969, at 1, col. 3 (emphasis added).

[55] Per Curiam opinion at 30.

[56] 345 U.S. 1 (1953).

[57] *Id.* at 11.

[58] *Id.*

[59] *See, e.g.,* EPA v. Mink, 410 U.S. 73, 87 (1973); New York Times Co. v. United States, 403 U.S. 713, 752 n.3 (1971) (Burger, C.J., dissenting); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324–26 (D.D.C. 1966), *aff'd on the opinion below,* 128 U.S. App. D.C. 10, 384 F. 2d 979, *cert. denied,* 389 U.S. 952 (1967); 5 U.S.C. § 552(b)(5) (1970) (Freedom of Information Act); Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question,* 66 Yale L.J. 477, 487 (1957).

[60] Per Curiam opinion at 30–31, *quoting* Committee for Nuclear Responsibility, Inc. v. Seaborg, 149 U.S. App. D.C. 385, 391, 463 F. 2d 788, 794 (1971).

[61] 14 U.S. (1 Wheat.) 304, 344–45 (1816). *See also* Bishop, *supra* note 59, at 488.

"The plain and short answer to this is that neither can there be a menace to constitutional government by an executive which has to go to Congress for every cent it spends, which has no power by itself to raise and maintain armed forces and which cannot jail its citizens except under a law passed by Congress and after proceedings presided over by an independent judiciary. These are the factors that make the essential difference between an American President and Big Brother. . . ." *Id.*

EPA v. Mink, 410 U.S. 73 (1973), involved nine documents whose production was sought under the Freedom of Information Act of 1966. 5 U.S.C. § 552 (1970). Six of those documents were held absolutely privileged and were exempt even from *in camera* inspection under Exemption 1 of the Act simply upon their classification by Executive order as military or state secrets.

Thus the vesting of absolute discretion in the President is nothing new. The Congress had sufficient faith in the Presidency to do so under Exemption 1:

"[The legislative history] makes wholly untenable any claim that the Act intended to subject the soundness of executive security classifications to judicial review at the insistence of any objecting citizen. It also negates the proposition that Exemption 1 authorizes or permits *in camera* inspection of a contested document bearing a single classification so that the court may separate the secret from the supposedly nonsecret and order disclosure of the latter." 410 U.S. at 84. Indeed, that faith was redeemed when the President instituted new procedures more consistent with the policy underlying the FOIA to insure that only specific documents or portions thereof were classified Secret or Top Secret. *Id.* at 102–03.

The three documents not within Exemption 1 apparently were not even direct communications to the President, as is the case here, but were actually transmitted to a Mr. Irwin, Chairman of the "Under Secretaries Committee." *Id.* at 76 n. 3. *Mink* also held that the deliberative portions of the documents, as distinguished from the purely factual portions, were privileged and that if the privileged were inextricably intermixed with the unprivileged materials, then neither was to be produced. *Id.* at 91.

[62] Pub. L. No. 373, 69 Stat. 695 (Aug. 12, 1955) (now 44 U.S.C. §§ 2101, 2107, 2108).

[63] 44 U.S.C. § 2101 (1970).

[64] *Id.* § 2107(1).

[65] Letter from President Eisenhower to Administrator of General Services, April 13, 1960; Agreement of February 25, 1965, between Mrs. Jacqueline B. Kennedy and the United States; Letter from President Johnson to the Administrator of General Services, August 13, 1965.

[66] *See e.g.,* Nader v. Butz, Civil Action No. 148–72 (D.D.C., Aug. 1, 1973), *appeal docketed,* No. 73–1935, D.C. Cir., Aug. 15, 1973.

[67] *See* pp. 17–25 *supra.*

Concurring in *Youngstown Sheet & Tube Co.,* Justice Frankfurter opined:

It ought to be, but apparently is not, a matter of common understanding that clashes between different branches of the government should be avoided if a legal ground of less explosive potentialities is properly available. Constitutional adjudications are apt by exposing differences to exacerbate them.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 595 (1952) (Frankfurter, J., concurring). This was the result in the recent Pentagon Papers case. New York Times v. United States, 403 U.S. 713 (1971). There both sides lost. The newspaper lost in its attempt to have a wider privilege upheld for the press, and the Government lost in its attempt to block the publication of most of the papers. If the President's claim here is denied, the Congress and the Judiciary may find that such precedent will be used as the authority for each of them at the behest of the other to lose substantial portions of their presently asserted independence.

[68] *E.g.,* Committee for Nuclear Responsibility, Inc. v. Seaborg, 149 U.S. App. D.C. 385, 463 F. 2d 788 (1971); Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958); *see* 8 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2019, at 167–75 (1970).

[69] *E.g.,* Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939, 947 (Ct. Cl. 1958); *see* PROPOSED FED. RULES OF EVIDENCE, Rule 509, Comment (a)(2) (Feb. 1973).

[70] *See generally* Kendall v. United States, 37 U.S. (12 Pet.) 524, 610 (1838).

Distinguishing the Presidency from lesser executive agencies does not establish a "Fourth Branch" of government. This distinction merely recognizes the practical realities of the government's operation. Our "living Constitution" and the general separation of powers concept it embodies do not mandate a decision which blindly applies the

same privilege to the entire executive branch. It is unnecessary at this time to decide whether the absolute privilege should extend beyond the President to protect cabinet officers and other high executive officials.

[71] 408 U.S. 606 (1972).

[72] *Id.* at 627; *see* United States v. Doe, 455 F. 2d 753, 760–61 (1st Cir. 1972), *vacated & remanded sub nom.* Gravel v. United States, 408 U.S. 606 (1972).

[73] 408 U.S. at 627.

[74] *See* Barr v. Matteo, 360 U.S. 564 (1959); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949).

[75] *See* notes 68–69 *supra* and accompanying text.

[76] The official immunity doctrine . . . confers immunity on government officials of suitable rank for reason that "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect to acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." Doe v. McMillan, 93 S. Ct. 2018, 2028 (1973), *quoting* Barr v. Matteo, 360 U.S. 564, 571 (1959).

[77] 25 F. Cas. 30 (No. 14,692d) (Marshall, Circuit Justice, 1807); *id.* at 187 (No. 14,694).

[78] The Per Curiam opinion states, "We think the *Burr* case makes clear that application of Executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case." Per Curiam opinion at 28.

[79] 25 F. Cas. at 36 (No. 14,692d).

[80] 25 F. Cas. at 191, 192 (No. 14,694).

Other important decisions also recognize the strength of assertions of privilege by Presidents and cabinet officers. In *United States* v. *Cooper*, a prosecution charging the publication of a libel against the President, Justice Chase, a colleague of Chief Justice Marshall, "refused to permit a subpoena to issue directed to the president of the United States." 25 F. Cas. 631, 633 (No. 14,865) (Chase, Circuit Justice, 1800).

Later, during the trial in *Marbury* v. *Madison*, when a question arose as to whether the Attorney General, who had been acting as Secretary of State during the period relevant to the trial, should answer as to facts which came to his knowledge through his official capacity, Chief Justice Marshall stated:

"There was nothing confidential required to be disclosed. If there has been he was not obliged to answer it; and if he thought that any thing was communicated to him in confidence he was not bound to disclose it." 5 U.S. (1 Cranch) 137, 144 (1803).

[81] It does not even appear to the court that the President does object to the production of any part of this letter. The objection, and the reasons in support of the objection, proceed from the attorney himself, and are not understood to emanate from the president. 25 F. Cas. at 192 (No. 14,694).

[82] *Id.* at 193.

[83] The incident had other overtones of interest to historians, some of whom appear to have different versions. *See* 3 BEVERIDGE, THE LIFE OF JOHN MARSHALL 518–22 (1919); ROSSITER, THE AMERICAN PRESIDENCY 70 (1956); Berger, *Executive Privilege* v. *Congressional* Inquiry, 12 U.C.L.A.L. REC. 1043, 1107 (1965).

The case presently under discussion was the misdemeanor trial of Aaron Burr. There are conflicting claims as to whether President Jefferson ever complied with a subpoena in the earlier treason case against Burr. Professor Corwin states that "Jefferson when President [refused] to respond to Chief Justice Marshall's subpoena in Aaron Burr's trial for treason." CORWIN, THE PRESIDENT—OFFICE AND POWERS, 1787–1957, at 113 (1957).

[84] U.S. CONST. amend. VI.

The eighth amendment [*sic*] to the constitution gives to the accused, "in all criminal prosecutions, a right to a speedy and public trial, and to compulsory process for obtaining witnesses in his favor." 25 F. Cas. at 33 (No 14,692d). This right includes the right to compel production of papers in a witness' possession. *Id.* at 34.

[85] Chief Justice Marshall distinguished the power to issue a subpoena from the power to compel obedience to it:

"If, then, as is admitted by the counsel for the United States, a subpoena may issue to the president, the accused is entitled to it of course; and whatever difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it. The guard, furnished to this high officer, to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstance which may precede their being issued." 25 F. Cas. at 34 (No. 11,692d). This passage reflects Marshall's understanding that the mere issuance of a subpoena to a person does not necessarily mean that the isssuance is proper or that the individual to whom it is directed is required to comply in all circumstances. However, the "guard" to which Marshall refers in the quoted passage is never definitively explained in the opinion.

[86] 25 F. Cas. at 192 (No. 14,694).

[87] Perhaps the court ought to consider the reasons which would induce the President to refuse to exhibit such a letter as conclusive on it, unless such letter could be shown to be absolutely necessary in the defense. The President may himself state the particular reasons which may have induced him to withhold a paper, and the court would unquestionably allow their full force to those reasons. At the same time, the court could not refuse to pay proper attention to the affidavit of the accused. But on objections being made by the President to the production of a paper, the court would not proceed further in the case without such an affidavit as would clearly shew the paper to be essential to the justice of the case. On the present occasion the court would willingly hear further testimony on the materiality of the paper required, but that is not offered. *Id.*

[88] Branzburg v. Hayes, 408 U.S. 665, 688 (1972).

It can be argued that the fifth amendment guarantee of indictment by a grand jury presents considerations of fairness that are comparable to the sixth amendment right involved in the *Burr* case. The function of a grand jury is not only to indict the guilty, but also to shield innocent persons from prosecution, *id.* at 686–87, and the inability of a grand jury to obtain privileged information might result in the indictment of innocent persons. But in my opinion the inherent strength of the grand jury process affords sufficient protection against indictment of innocent persons where the grand jury believes that exculpatory evidence has been wrongfully withheld.

[89] Under certain circumstances, the Government's unwillingness to disclose relevant evidence may result in dismissal of the indictment. *See, e.g.,* Alderman v. United States, 394 U.S. 165, 184 (1969) (illegal electronic surveillance); Brady v. Maryland, 373 U.S. 83, 87 (1963) (favorable and material evidence); Roviaro v. United States, 353 U.S. 53, 61 (1957) (identity of material witness); 18 U.S.C. § 3500 (1970) (Jencks Act). Although the Chief Executive ordinarily retains ultimate control over criminal prosecutions by the United States, a Special Prosecutor has been appointed to conduct the prosecutions related to this case. This unique division of authority within the executive branch may distinguish the cases cited above. *See generally* United States v. Eley, 335 F. Supp. 353, 358 (N.D. Ga. 1972). Since the issue is not squarely presented in the present case, I express no view on its proper resolution.

[90] James Wilson was an advocate of a strong executive. Early in the Constitutional Convention on June 1, 1787, "Mr. Wilson moved that the Executive consist of a single person. . . . Mr. Wilson preferred a single magistrate, as giving most energy, dispatch and responsibility to the office." 1 FARRAND, RECORDS OF THE FEDERAL CONVENTION 67 (1966). He was a member of the Continental Congress, a signer of the Declartion of Independence, and an associate justice of the United States Supreme Court, appointed by Washington in 1789.

As a constructive statesman Wilson had no superior in the Federal Convention of 1787. He favored the independence of the executive, legislative and judicial departments, the supremacy of the Federal Government over the State Governments, and the election of senators as well as representatives by the people, and was opposed to the election of the President or the judges by Congress. His political philosophy was based upon implicit confidence in the people, and he strove for such provisions as he thought would best guarantee a government by the people. Together with Gouverneur Morris he wrote the final draft of the Constitution and afterwards pronounced it "the best form of government which has ever been offered to the world." In the Pennsylvania ratification convention (November 21 to December 15, 1787) he was the constitution's principal defender. 23 ENCYLOPEDIA BRITANNICA 632 (1954).

[91] U.S. CONST. art. I, § 7.

[92] *Id.*, art. II, § 2.

[93] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[94] Indeed, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), stands for nothing more than this. There, the seizure of the steel mills constituted the "final action" which the Supreme Court held unconstitutional and ordered undone. The Court, however, did not inquire into the decisional process or the wisdom of the decision in terms of military necessity—it simply held that the act of seizure was unconstitutional. We fully agree that this was a legitimate check on an unconstitutional final action.

[95] Levine v. United States, 362 U.S. 610, 617 (1960).

A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses. It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing, he refuses to do so. Brown v. United States, 359 U.S. 41, 49 (1959).

[96] *See* note 109 *infra*. *See generally* notes 109–112 *infra* and accompanying text.

[97] *See* note 94, *supra*. The fact that the final decision to prosecute or not to prosecute is not ministerial, but purely discretionary and thus not subject to judicial review is, at the least, irrelevant, and at the most, a factor that further strengthens the separation of powers argument in this particular case.

[98] In re Grand Jury Subpoena Duces Tecum issued to Richard Nixon, etc., Misc. No. 47–73, at 11 (D.D.C., Aug. 29, 1973).

[99] 345 U.S. 1 (1953).

[100] *Id.* at 7–11.

[101] The courts frequently have applied the *Reynolds* procedures to the Government's claims or privilege. E.g., Carter v. Carlson, 56 F.R.D. 9, 10 (D.D.C. 1972); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 326–27 n.33 (D.D.C. 1966), *aff'd on the opinion below*, 128 U.S. App. D.C. 10. 384 F.2d. 979, *cert. denied*, 389 U.S. U.S. 952 (1967).

[102] 345 U.S. at 7–8.

[103] On May 22, 1973, the President stated:

"Considering the number of persons involved in this case whose testimony might be subject to a claim of Executive privilege, I recognize that a clear definition of that claim has become central to the effort to arrive at the truth. Accordingly, Executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation, including the Watergate affair and the alleged cover-up."

[104] Letter from President Nixon to Chief Judge Sirica, July 25, 1973:

THE WHITE HOUSE,
Washington, D.C., July 25, 1973.

DEAR JUDGE SIRICA: White House Counsel have received on my behalf a subpoena duces tecum issued out of the United States District Court for the District of Columbia on July 23rd at the request of Archibald Cox. The subpoena calls for me to produce for a Grand Jury certain tape recordings as well as certain specified documents. With the utmost respect for the court of which you are Chief Judge, and for the branch of government of which it is a part, I must decline to obey the command of that subpoena. In doing so I follow the example of a long line of my predecessors as President of the United States who have consistently adhered to the position that the President is not subject to compulsory process from the courts.

The independence of the three branches of our government is at the very heart of our Constitutional system. It would be wholly inadmissible for the President to seek to compel some particular action by the courts. It is equally inadmissible for the courts to seek to compel some particular action from the President.

That the President is not subject to compulsory process from the other branches of government does not mean, of course, that all information in the custody of the President must forever remain unavailable to the courts. Like all of my predecessors, I have always made relevant material available to the courts except in those rare instances when to do so would be inconsistent with the public interest. The principle that guides my actions in this regard was well stated by Attorney General Speed in 1865:

"Upon principles of public policy there are some kinds of evidence which the law excludes or dispenses with. * * * The official transactions between the heads of departments of the Government and their subordinate officers are, in general, treated as "privileged communications." The President of the United States, the heads of the great departments of the Government, and the Governors of the several States, it has been decided, are not bound to produce papers or disclose information communicated to them where, in their own judgment, the disclosures would, on public consideration, be inexpedient. These are familiar rules laid down by every author on the law of evidence."

A similar principle has been stated by many other Attorneys General, it has been recognized by the courts, and it has been acted upon by many Presidents.

In the light of that principle, I am voluntarily transmitting for the use of the Grand Jury the memorandum from W. Richard Howard to Bruce Kehrli in which they are interested as well as the described memoranda from Gordon Strachan to H. R. Haldeman. I have concluded, however, that it would be inconsistent with the public interest and with the Constitutional position of the Presidency to make available recordings of meetings and telephone conversations in which I was a participant and I must respectfully decline to do so.

Sincerely,

RICHARD NIXON.

[105] 345 U.S. at 8.

[106] *Id.* at 10.

[107] *See* notes 71–89 *supra* and accompanying text.

[108] 345 U.S. at 11 (emphasis added).

[109] United States v. Chemical Foundation, Inc., 272 U.S. 1, 14–15 (1926); *see* United States v. Crussell, 81 U.S. (14 Wall.) 1, 4 (1872); *cf.* NLRB v. Shawnee Industries, Inc., 333 F.2d 221, 225 (10th Cir. 1964); United States v. Washington, 233 F.2d 811, 816 (9th Cir. 1956).

[110] United States v. Burr, 25 F. Cas. 187, 192 (No. 14,694) (Marshall, Circuit Justice, 1807).

[111] U.S. CONST. art. II, § 3.

[112] The fact that some participants in the conversations were not Government officials does not divest the conversations of their official character. A President must be free to receive advice from both within and without the Government. Soucie v. David, 145 U.S. App. D.C. 144, 155 n.44, 448 F. 2d 1067, 1078 n.44 (1971).

[113] 345 U.S. at 10–11.

[114] *Id.* at 8.

[115] *Id.*

[116] Supplemental Brief of the United States at 19–30.

[117] 289 U.S. at 15.

[118] Brief of Petitioner at 20–21.

[119] For example, if only one adviser had conspired with the President to obstruct justice, it would be necessary to show presidential involvement to prosecute that adviser, since conspiracy requires at least two conspirators. Rogers v. United States, 340 U.S. 367, 375 (1951); United States v. Thomas, 468 F.2d 422, 424 (10th Cir. 1972); *see* 18 U.S.C. § 371 (1970).

The fact that an incumbent President may not be prosecuted because of the Impeachment Clause, however, might not preclude criminal prosecution of any co-conspirators. *Cf.* Rogers v. United States, *supra;* Feldstein v. United States, 429 F.2d 1092 (9th Cir.), *cert. denied,* 400 U.S. 920 (1970); Cross v. United States, 392 F.2d 360 (8th Cir. 1968).

[120] [E]xecutive privilege will not be invoked as to any *testimony* concerning possible criminal conduct or discussions of possible criminal conduct, in matters presently under investigation, including the Watergate affair and the alleged cover-up. Brief of United States, app. at 24 (emphasis added).

[121] Supplemental Brief of United States at 33.

[122] *See* notes 99–115 *supra* and accompanying text.

[123] Counsel for the President argue:

Indeed, the short answer to any claim of waiver with regard to the materials now sought may be found in *United States v. Reynolds,* 345 U.S. 1 (1953). In that case the United States refused to produce an Air Force investigation report of an airplane crash as well as written statements by the survivors of the crash. It offered to allow the survivors to give depositions and to testify as to all matters except those of a "classified nature." The Supreme Court sustained the claim of privilege with regard to the documents sought. The offer to allow the witnesses to testify, far from being a waiver of privilege as to the documents, was expressly relied on by the Supreme Court as a reason for upholding the claim of privilege. 345 U.S. at 11. Brief in Opposition in the District Court at 20.

The military secrets privilege asserted in *Reynolds* applied only to classified, non-privileged matter and thus the offer could not effect a waiver as to classified, privileged matter. The more interesting point, however, is that *Reynolds* held the entire document privileged, apparently recognizing the distinction between selective testimony and production of the document itself, and refused even to permit *in camera* inspection.

[124] Indeed, *Machin v. Zuchert,* 114 U.S. App. D.C. 335, 316 F.2d 336, *cert. denied,* 375 U.S. 896 (1963), extends beyond the limits of the suggested hypothetical. There, a private litigant, against a claim of executive privilege, sought an investigative report of an aircraft accident. He already had been permitted to see it briefly, although he could not copy it or make notes from it. In addition, the Secretary of the Air Force offered to provide a list of the names of witnesses and sent a "releasable summary" of the report to the litigant. *Id.* at 336, 337. There was never any speculation in the *Machin* decision that waiver of privilege resulted from such actions.

[125] Brief of Petitioner at 61.

[126] The Per Curiam opinion at 32 quotes *Lopez v. United States,* 373 U.S. 427, 439 (1963), for the proposition that "[t]here is 'no constitutional right to rely on possible flaws in the [witness's] memory. * * * [N]o other argument can justify excluding an accurate version of a conversation that the [witness] could testify to from memory.'" While this language nicely phrases their point, *Lopez* is unpersuasive in the context of this case. *Lopez* involved an Internal Revenue Agent who on the invitation of the defendant discussed defendant's tax return with him, during the course of which an attempt was made to bribe the agent. The agent then testified to this bribe at trial and the recordings of their conversations were introduced as corroborative evidence. The Court held that since the conduct of the conversations themselves did not violate the fourth amendment, neither did the "surreptitious seizure" of the conversations by recording them. Thus *Lopez* simply involved a question of the admissibility of certain corroborative evidence against a fourth amendment objection. Whether certain evidence is admissible and whether such evidence is in the first instance privileged and thus not subject to compulsory process are two different questions. A criminal confession is admissible but it may not be compelled absent waiver. Thus the question in the last analysis depends upon whether the President has waived his privilege and we conclude that he has not, principally on the policy grounds discussed at pp. 63–64 of this opinion.

[127] Of course, military and state secrets are only the most celebrated of these instances.

[128] On this point, Professor Alexander Bikel is persuasive:

"Again, the issue is not whether the President has waived his privilege to keep the tapes secret. To the extent that it exists and with respect to matter that it covers, I do not see how the privilege can be waived. Naturally, if a document or a tape is no longer confidential because it has been made public, it would be nonsense to claim that it is privileged, and nobody would trouble to subpoena it either, since it would be available.

"But nature and reason of the privilege are rather to repose in the President and in him alone the subjective judgment whether to maintain privacy or release information—and which, and how much, and when, and to whom. Far from being waived, the privilege, it seems to me, is as much exercised when information is released as when it is withheld." Bickel, *Wretched Tapes (cont.),* N.Y. Times, August 15, 1973, at 33.

[129] This would accord with President Jefferson's action in the *Burr* case, *supra* note 82 and accompanying text, and with the following colloquy between Judge Wilkey and Professor Wright (Counsel for the President) at oral argument before this court:

Judge WILKEY. * * *

You recall, of course, that President Jefferson took the document, the Wilkinson letter, called for by the subpoena. He then deleted from the document those matters which he felt that needed to be confidential, shall we say secrets of State, and then with the deleted version sent an affidavit to the

Prosecutor for lodging in the court as to what in summary, without revealing any secrets, the President had deleted and why. And then the exerpted [*sic*] letter was given with the affidavit to the court in answer to the subpoena.

President Jefferson never furnished the full letter.

Mr. WRIGHT. That's right.

Judge WILKEY. Now, why should not the President here exercise his privilege in regard to the tapes, deleting State secrets in the same way, but forwarding everything else, in the same way as President Jefferson?

* * * * *

[L]et's add to that not only State secrets, but other matters of confidentiality, which neither of the parties concerned nor the public have any right to know, that would be dangerous to know at this time, in the President's own judgment.

And then why should he not send the rest of it for such use as the Prosecutor in [*sic*] the defense and the trial judge may deem relevant?

Mr. WRIGHT. That would seem to me not an untenable possibility.

Transcript of Proceedings, Sept. 11, 1973, at 102–03.

DISSENTING OPINION OF CIRCUIT JUDGE WILKEY

WILKEY, *Circuit Judge, dissenting.** * * The critical issue on which I part company with my five colleagues is, in the shortest terms,

Who Decides?

There is no issue as to the existence of Executive Branch privilege, and questions as to its scope and applicability to a given set of facts will be relatively easy to determine once the principal question is settled. The basic issue is *who decides* the scope and applicability of the Executive Branch privilege, the Judicial Branch or Executive Branch?

Throughout the *Per Curiam* this issue appears obfuscated; there is an effort to slide away from the square confrontation produced by the Judicial Branch ordering the Executive Branch to turn over records of private conversations in the Chief Executive's own office. The reluctance of my colleagues is understandable; no court has ever done this before. Even the great Chief Justice Marshall shied away from making a final order to the Chief Executive to produce the full text of correspondence, a final order which, if it had ever been issued, President Jefferson was fully prepared to ignore.[1]

The *Per Curiam* here never confronts the fundamental Constitutional question of separation of powers, but instead prefers to treat the case as if all were involved was a weighing and balancing of conflicting public interests. There *are* conflicting public interests involved, they must be carefully weighed, balanced, and appraised; the President says he has done just that. Therefore, the most fundamental, necessarily decisive issue is, Who Does the weighing and balancing of conflicting public interests? The District Judge or the President? The answer to this question necessarily involves the Constitutional question of separation of powers. But the whole line of reasoning, the whole line of authorities, relied on by the *Per Curiam* does not deal with the separation of powers issue at all.

I. THE DUAL ORIGIN OF THE PRIVILEGE ASSERTED

I respectfully submit that the errors in the *Per Curiam's* analysis stem from a frequent source of confusion, the failure to recognize and separate the two origins of the Executive Branch privilege: on the one hand, the common sense-common law privilege of confidentiality necessary in government administration, which has been partly codified in statutes such as the Freedom of Information Act; on the other hand, the origin of the privilege in the Constitutional principle of separation of powers. The answer to the overriding issue, Who Decides, and answers to all the subsidiary questions hinge upon the correct analysis of the nature and source of the privilege. Historical practice, by the Judiciary, the Congress, and the Executive, reflects implicitly the dual origin of the privilege of confidentiality asserted at one time or another by each Branch.

To understand the legal principles on which the *Per Curiam* relies, and why they cannot be decisive of this case, I propose first to discuss the nature of the common sense-common law origin of governmental privilege. To understand the legal principles on which this case, in my opinion, necessarily turns, the remainder of the opinion is devoted to the Constitutional principle of separation of powers as applied to the case at bar.

A. THE COMMON SENSE-COMMON LAW, STATUTORY ORIGIN OF PRIVILEGE

1. Historically

The oldest source of Executive Branch privilege, the common sense-common law privilege of confidentiality, existed long before the Constitution of 1789, and might be deemed an inherent power of any government. As President Thomas Jefferson wrote to George Hay, United Stats Attorney for Virginia, on 17 June 1807:

"With respect to papers, there is certainly a public and a private side to our offices. To the former belong grants of land, patents for inventions, certain commissions, proclamations, and other papers patent in their nature. To the other belong mere executive proceedings. *All nations have found it necessary, that for the advantageous conduct of their affairs, some of these proceedings, at least, should remain known to their executive functionary only.* He, of course, from the nature of the case, must be the sole judge of which of them the public interests will permit publication. [2]"

Historically, apart from and prior to the Constitution, the privilege against disclosure to the public, the press, or to other co-equal branches of the Government arises from the undisputed principle that not all public business can be transacted completely in the open, that public officials are entitled to the private advice of their subordinates and to confer among themselves freely and frankly, without fear of disclosure, otherwise the advice received and the exchange of views may not be as frank and honest as the public good requires.

"No doubt all of us at times have wished that we might have been able to sit in and listen to the deliberation of judges in conference, to an executive session of a Congressional committee or to a Cabinet meeting in order to find out the basis for a particular action or decision. However, Government could not function if it was permissible to go behind judicial, legislative or executive action and to demand a full accounting from all subordinates who may have been called upon to make a recommendation in the matter. Such a process would be self-defeating. It is the President, not the White House staff, the heads of departments and agencies, not their subordinates, the judges, not their law clerks, and members of Congress, not their executive assistants, who are accountable to the people for official public actions within their jurisdiction. Thus, whether the advice they receive and act on is good or bad there can be no shifting of ultimate responsibility." [3]

The Framers of the Constitution itself understood this principle very well. One of the first acts of the Constitutional Convention, 29 May 1787, was to resolve "that nothing spoken in the House be printed, or otherwise published, or communicated without leave." [4] In that historic summer in Philadelphia the Framers produced "the most wonderful work ever struck off at a given time by the brain and purpose of man." [5] But at the conclusion of their historic labors they thought it wise to preserve the confidentiality of exactly how they had done it. On 17 September 1787, as one of their final acts, they directed that all their records on the Convention be turned over to George Washington, not only their presiding officer but one whose complete discretion and probity had long been established.[6] As late as 1831, forty-four years after the Convention, Madison thought it was not yet appropriate for his *Notes* to be published.[7] He thought "no Constitution would ever have been adopted by the Convention if the debates had been public." [8]

2. Litigation in which the Government is a Party

Passing from the Constitutional Convention of 1787 to the most recent Supreme Court case on this point in 1973, *Environmental Protection Agency* v. *Mink*,[9] the Court quoted with approval the earlier statement of Mr. Justice Reed, "There is a public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief concerning administrative action. . . ." [10] Mr. Justice Reed also pointed out that discussions of this kind are regarded as privileged and are "granted by *custom or statute* for the benefit of the public, not of executives who may happen to then hold office." [11] Observe that Mr. Justice Reed referred to the privilege as being "granted by custom or statute," and not derived from a Constitutional source. This is accurate when we are dealing with this age-old, common sense-common law privilege, which has been codified in statutes from time to time, the latest being the Freedom of Information Act.[12]

Judge Robinson of this court, when sitting as a District Judge, discussed the source of the Executive Branch privilege in these terms, "This privilege, as do all evidentiary privileges, effects an adjustment between important but competing interests . . . in striking the balance in favor of nondisclosure of intra-governmental advisory and deliberative communications. . . ." [13]

United States v. *Reynolds* [14] illustrates the application of this common sense, common law privilege to a situation in which the sought evidence contained military secrets. It was stated, and has been often quoted, that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." [15] This language may lead to confusion if it is not recognized that in *Reynolds* the Supreme Court dealt only with this long established (custom or statute, according to Mr. Justice Reed) privilege of confidentiality in government in the format of a Tort Claim Act suit against the Government. It specifically did not decide any Constitutional claim of Executive discretion based on separation of powers.[16] Though the Court contrived a "balancing" or "necessity" formula, the Court held that "even the most compelling necessity cannot overcome the claim of privilege if the Court is ultimately satisfied that military secrets are at stake." [17] It further held that military secrets *were* at stake, and even *in camera* inspection would not be permitted.

Reynolds, like innumerable other cases in which a court has pronounced that it is up to the Judiciary to decide the existence and applicability of a privilege, represents civil litigation, in which either the United States or some Government agency *as a party* is opposed to some private individual or corporation. Cases under the Jencks Act [18] are examples illustrating the same situation in the criminal field. In *none* of these cases has the Government ever been *required to disclose* the matter which it desired to retain confidential. Whether the action is civil or criminal, the Government always has had the

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Footnotes at end of article.

option of disclosure or dismissing the action and retaining the confidentiality of the material.

More relevant to the immediate point under discussion, in these cases the courts did engage in a *balancing* of conflicting public interests, *i.e.*, the public interest in seeing justice done between litigants in the court, and the public interest in seeing Governmental matters of the highest importance kept confidential. Observe that in this typical litigation situation, in which the court balanced conflicting public interests, the ancient common sense-common law Government administrative privilege of confidentiality is all that is ever involved. There is no question of the principle of separation of powers derived from our Constitution, as the Supreme Court specifically said in *Reynolds*.

3. Individual inquiry of a governmental official or agency

Another example of the same ancient governmental privilege of confidentiality is involved when a private individual or corporation requests information from a Government official or agency, and such is denied. For many years the Government bureaucracy engaged in a self-protective exercise of claiming "Executive privilege," sometimes based on ordinry "housekeeping" statutes,[19] sometimes invoking the Constitutional principle of separation of powers, although what that could have to do with rejection of a request when ordinary members of the public, not another branch of the Government, were seeking information, was never made clear. In order to assure the American public the necessary access to Governmental information, and to prohibit the abuse of so-called "Executive privilege," the Congress finally passed the Freedom of Information Act.[20]

In so doing, the *Congress itself did the balancing in advance* between the competing public interests represented by the right of the people to know how their Government conducts its business, and the recognized necessity of keeping certain types of information strictly confidential. The Freedom of Information Act contains seven categories of documents or information which are exempt from disclosure. In other words, the Congress has judged that, if the material sought falls within one of these seven exemptions, the public interest in maintaining confidentiality outweighs the public interest in the right to know Governmental affairs. The first exemption deals with secrets of state or national security, the others represent categories perhaps of lesser importance, but all are kept confidential, once it is determined the material sought falls within one of the seven exempt categories.

If the member of the public does not accept the denial by the Governmental agency, he can go to court to seek the information. If litigation results in the typical Freedom of Information Act case, the court properly does not balance the public interest represented on both sides; the court merely determines into which category, exempt or nonexempt from dislosure, the material sought belongs. Once this is determined, then the Congress has already given the answer in the Freedom of Information Act itself. If the court determines the material falls outside one of the claimed exempt categories, then the private individual is granted access. There is no Constitutionally derived privilege involved at all; the rights are purely statutory, a codification of many categories of information previously swept within the vague penumbra of "Executive privilege," and many known to the common law and to the jurisprudence of other nations in which separation of powers is unknown.[21]

4. The first amendment

I am aware of, and impressed by, the strong argument which can be made that the Executive (as well as the Congressional and Judicial) right to privacy is likewise found in the First Amendment, but I resist going into it at length here. Certainly the Chief Executive's right to be fully, frankly, and confidentially informed is equal to that of any other citizen in the land; his need is undeniably greater. To breach his privacy would unquestionably have a "chilling effect" on those who otherwise would counsel and confide in the President with complete candor and honesty.[22]

Legal support for the relevance of the First Amendment here is found in such decisions as *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*,[23] and *NAACP* v. *Alabama*.[24] In *Noerr* the Supreme Court relied at least in part on the First Amendment to legitimatize joint efforts by businessmen to influence legislative or executive action, even if designed to injure their competitors.

Rather than consider the First Amendment as a *separate* ground for sustaining the Executive's right to privacy, I find it easier to say that the First Amendment in 1789 provided a Constitutional underpinning for the long recognized customary Governmental privilege of privacy. Such a First Amendment right in the Executive would apply, as does the ancient common sense-common law privilege now partly codified in statute, in the Executive's relations with the public and the press, as well as other branches of the Government.

5. The Chief Executive

In theory, if only the ancient customary Governmental confidentiality privilege is involved, whether the Chief Executive should disclose the information should be decided no differently from the case of any other Government official Even though the President represents the repository of information of the highest confidentiality it would be permissible for the courts to talk in terms of balancing the public interest of those seeking disclosure versus the public interest of the President in retaining confidentiality, while recognizing that any President's assertion of the confidential nature of documents or communications must be accorded the greatest deference by the courts.

As a practical matter, as history shows, the theory breaks down. Not only is the grist of the Presidential mill of a higher quality than that processed by the average bureaucrat, but the institutions or individuals daring to confront the Chief Executive directly have been of a character and power to invoke immediately the other source of the Chief Executive's privilege, the Constitutional doctrine of separation of powers. In the only instances in history of which I am aware, in which demand for documents was made directly upon the President, the demand come from one of the other two co-equal Branches, the Congress or the Judiciary. Beginning with Washington's administration, the Congress has made repeated demands on the Chief Executive for documents, demands which have never been adjudicated by any court employing a balancing test of the public interests involved. The trial of Aaron Burr is the only instance[25] in which demand by subpoena on the President himself was ordered by a court, and this by the Chief Justice himself at the behest of a former Vice President of the United States, then on trial for his life on a charge of treason. In other words, the men and issues were large.

We have read and heard eloquent language on the unique nature of the American presidency from both counsel, who agree as to the overriding importance of "preserving the integrity of the Executive Office of the President."[26] We are cautioned that "[n]o substitute offers itself for the American presidency, either domestically or in the world. It will be easier to tear down than to build back."[27] This argument in itself may be good and sufficient reason to sustain the President's assertion of privilege in the circumstances of this case, yet this appears to necessitate a Constitutional value judgment not specifically made in the Constitution itself. Further, analytically it may be that such argument on the unique nature and supreme importance of the presidency in our system is but the long established Governmental privilege of confidentiality raised to the Nth power.

In summary of the common sense-common law privilege of Governmental confidentiality, codified in statute as in the Freedom of Information Act, the *courts do decide* whether the privilege exists and the *courts do decide* as to its scope and applicability to a given state of facts. In so doing, the *courts do balance* one public interest versus another. If custom, common law, and statute were the only sources of the Chief Executive's privilege, he, too, might find his view of the public interest overridden by the "balancing" of competing public interests done by a court. But the President has another source of power.

B. SEPARATION OF POWERS—THE TRIPARTITE PRIVILEGE

1. Judicial versus Executive

We now turn to the second source of the Executive Branch privilege, the principle of separation of powers in our Constitution. Congressional legislation, *e.g.*, the Freedom of Information Act, merely redefined the common sense-common law privilege of confidentiality in the conduct of Government business. It is not unreasonable that the Congress should define how much of Governmental business can safely be made public. But none of this legislation, not even the Freedom of Information Act, touches the Constitutional basis of Executive Branch privilege derived from the principle of separation of powers—nor could it.

My colleagues in the *Per Curiam* reject separation of powers, and concentrate entirely on the common sense-common law, statutorily defined source of the privilege, which is part of the story; but this part, as is made clear in the *Per Curiam* opinion and in the Briefs of the Special Prosecutor, is subject to balancing, weighing, showing of need, and in general a comparative evaluation of conflicting "public interests" *by the courts*.

Not so the Executive Branch privilege which arises from the principle of the separation of powers among the Legislative, Executive, and Judicial Branches of our Government. We must recognize that this Constitutional privilege, if derived from the separation of powers, as it is, is *tripartite*. Chief Justice Taft was keenly aware of this when he wrote: "Montesquieu's view that the maintenance of independence as between the legislative, the executive and the judicial branches, was a security for the people had [the Framers'] full approval. . . . From this devision on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires. Madison, 1 Annals of Congress, 497. This rule of construction has been confirmed by this Court. . . ."[28]

Observe that it is the Judicial Branch, according to District Judge Sirica's opinion, to whom the tapes are to be handed over for examination *in camera*. Likewise, it is the grand jury to whom the Special Prosecutor wishes to present the tapes with or without the intervention of the District Judge. The grand jury, as is shown by an analysis developed later, is nothing but an appendage of the Judicial Branch, and has always been recognized as such. The Supreme Court

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unanimously expressed the principle applicable to this situation:

"The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there." [29]

If the Chief Executive can be "coerced" by the Judicial Branch into furnishing records hitherto throughout our history resting within the exclusive control of the Executive, then the Chief Executive is no longer "master in his own house."

This is not a matter of "coercing" the Executive to "obey the law"; there has never before in 184 years been any such law that the Executive could be compelled by the Judiciary to surrender Executive records to the Judiciary. This is an assertion of privilege by the Executive, not a refusal to obey a court's interpretation of the law. This the Executive has *always* done, even when the Executive's interpretation of the law was different from the court's, *e.g., Youngstown Sheet & Tube Co.* v. *Sawyer*.[30] But also, the Executive has *always* been the one who decided whether the Executive Branch privilege of confidentiality of its records should be asserted, and to what extent, when confronted with demand of another Branch for such records.

In the case at bar we have an assertion of privilege by the Executive Branch in response to a demand by the Judicial Branch for the records of the Executive Branch. This is the first time that this precise situation has occurred since the famous trials of Aaron Burr,[31] but whereas this confrontation between the Judicial Branch and the Executive Branch is almost unique, the tripartite privilege has been asserted innumerable times in various alignments of conflict among the three Branches.

2. Legislative versus executive

The most highly publicized conflicts have been, of course, the demands by Congress on the Executive for Executive papers and information. The first two examples occurred in Washington's administration, the call for the papers relative to General St. Clair's military expedition and later the Jay Treaty.[32] The historical evidence shows that Washington rejected the demands of Congress squarely on the ground of separation of powers. Numerous other examples occurred. Never in 184 years, until Senator Ervin's committee filed the pending action in Judge Sirica's court for these same Watergate tapes, has the Congress desired to take the Constitutional separation of powers issue to a court for adjudication. The reasons are obvious: (1) if the Constitutional principle of separation of powers was valid and effective as a barrier, Congress would lose; (2) acutely aware of its own assertions of privilege, even if Congress won and established that the separation of powers was no barrier to a demand of one Branch for the papers of another, on a reciprocal basis Congress would have to abandon its equally time-honored practice of refusing the demands of the Judicial Branch for its papers; and (3) submitting a dispute between two co-equal Branches to the third Branch would recognize that the Judiciary is "more equal" than the other two.

To see the relevance of the Congressional demands on the Executive to the Judicial subpoena on the Executive in the case at bar, it is helpful to note that a Legislative and Judicial subpoena have precisely the same coercive effect on the recipient, and both Congress and the courts have independent power to punish for contempt. Under 2 U.S.C. § 190b(a) standing committees of Congress and their subcommittees are authorized "to require by subpena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents . . . as it deems advisable." [33]

Wilful noncompliance with a Congressional subpoena constitutes contempt of Congress, a misdemeanor.[34] In such instances, the Speaker of the House or President of the Senate certifies a statement of the facts to the appropriate United States Attorney, whose duty is to bring the matter before a grand jury.[35] However, these provisions do not impair Congress' power to punish for contempt by its own action.[36] In *Jurney v. MacCracken* the Supreme Court noted "[t]he power to punish a private citizen for a past and completed act [of contempt] was exerted by Congress as early as 1795 [footnote omitted]; and since then it has been exercised on several occasions." [37] Here the Court was concerned "with vindication of the established and essential privilege of requiring the production of evidence. For this purpose, the power to punish for a past contempt is an appropriate means." [38]

Years ago a distinguished scholar attempted to visualize how an authoritative determination of the Executive's assertedly *Constitutional* right to privacy might be brought about. After pointing out that while "the President and the heads of executive departments have repeatedly, and sometimes brusquely, rejected such congressional demands," and Congress had never sought the aid of the Attorney General or the courts, nor exercised its "power to punish contempts without invoking the aid of the executive and the judiciary," Professor Joseph Bishop concluded:

"Such an episode . . . would furnish the courts an admirable occasion to decide the precise question of the constitutional authority of the executive to withhold the desired data. But it is not likely to arise. . . .

"It is, however, conceivable that the Supreme Court may yet be called upon to face *the closely related and logically indistinguishable question of the executive's power to reject a judicial subpoena.* If, in litigation to which the government is not a party, a court becomes convinced that a document in the possession of the government is relevant, and if it somehow manages to satisfy itself that that information is unprivileged, . . . the courts may yet have to decide the ultimate reach of the executive's discretion to grant or withhold information." [39]

Professor Bishop's hypothetical of 1957 is not precisely with us, but almost. Instead of "litigation to which the government is not a party," we have "litigation in which the government is on both sides" (the President and the Special Prosecutor), which gives us the same Constitutional confrontation and question foreseen by Profesor Bishop, *i.e.*, "the executive's power to reject a judicial subpoena."

The critical points to be understood from the hypothetical situation, which Professor Bishop foresaw would pose the ultimate Constitutional issue, are these:

(1) The Congressional demand for Executive papers (tapes) is "logically indistinguishable" from the demand on the Executive by Judicial subpoena, *i.e.*, both test the Constitutional separation of powers basis of Executive privilege; and

(2) Both the Congressional and the Judicial demands on the Executive are to be distinguished from the false confrontation found in innumerable examples of litigation (*e.g., Reynolds*) in which the Government (Executive) is a party, because the Executive always has an out (abandon the litigation), and thus is never confronted with a true unavoidable demand for the papers or information.

3. Judicial versus Legislative

Turning to the other type of repeated conflict, the Legislative Branch has never acceded to a demand of the Judicial Branch for papers in any case without an assertion and preservation of Congressional privilege. The latest example of Congressional refusal to furnish to a court papers relevant to a criminal prosecution was in *United States* v. *Brewster*.[40] There the Senate, in accord with ancient and invariable precedent, on 4 October 1972 resolved:

"Whereas in the case of the United States of America against Daniel B. Brewster, et al. (criminal action numbered 1872–69), pending in the United States District Court for the District of Columbia, a subpena ad testificandum and duces tecum was issued by such court addressed to David Minton, staff director and counsel of the Committee. . . .

"*Resolved*, That by the privileges of the Senate of the United States *no evidence in the possession and under the control of the Senate* of the United States *can*, by the mandate of process of ordinary courts of justice, *be taken* from such possession or control *but by its permission;* be it further

"*Resolved*, That David Minton . . . *be authorized to appear* at the time and place and before the court named in such subpena, *but shall not take with him any papers*, documents, or evidence on file in his office, under his control, or in his possession as staff director and counsel. . . ." [41]

The comparison with the case at bar is striking. Here we have a Judicial subpoena duces tecum directed to the Executive for documents and tapes. The President has said his individual aides who were present at the times the tapes were recorded may testify as to all matters relevant to any criminality which is the subject of the Watergate grand jury inquiry, but may not furnish the tapes.[42] In *Brewster* we had a Judicial subpoena duces tecum directed to the Senate for documents. The Senate permitted the individual aide to testify personally (as did the President) but forbade him to produce any of the documents (as did the President with regard to the tapes). The responses of the President and the Senate to the Judicial subpoenas are precisely equal, and equally justified (or unjustified) on the same Constitutional ground of separation of powers.

One further point of comparison: with reference to the Judicial subpoena issued for the Senate papers in the criminal prosecution of Senator Brewster, *Who Decided* how much, if any, of the subpoenaed papers would be produced? The United States court? Not in *Brewster*, and not in any case for 184 years. The Senate, a Branch of the Government co-equal under our Constitution, decided what would be furnished the court and what retained as confidential, precisely as has the Chief Executive in the case at bar.

To cite but two of the best known recent examples, similar assertions of Legislative privilege took place with reference to criminal prosecution in *United States* v. *Calley* [43] and *United States* v. *Hoffa*.[44] Other similar precedents in both Houses are ancient, numerous, and established beyond question in the Legislative Branch.[45]

The principle of separation of powers, with a resulting Judicial privilege, works reciprocally when the demand is made by the Congress instead of to the Congress. In 1953 Mr. Justice Tom Clark refused to respond to a subpoena to appear before the House Un-American Activities Committee, on the ground that the "complete independence of the Judiciary is necessary to the proper administration of justice." [46]

Senator Stennis once summed up the Congressional privilege and its origin very well:

"We now come face to face and are in direct conflict with the established doctrine of separation of powers. . . . I know of no case where the court has ever made the Senate

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or the House surrender records from its files, or where the Executive has made the Legislative Branch surrender records from its files—and I do not think either one of them could. So the rule works three ways. Each is *supreme* within its field, and each is *responsible* within its field.[47]"

4. Who Decides?

I thus reach the conclusion, differing from the majority of my colleagues, that the privilege asserted by the President here derives *both* from the Constitutional principle of separation of powers and from the common sense-common law, statutory privilege of confidentiality of Governmental decision-making, whatever the Branch. The latter may be subject to weighing and balancing of conflicting public interests, as many of the cases have done, but never in a case involving the President as a party. But where the privilege of the Chief Executive is derived from the *Constitutional principle* of separation of powers, it is no more subject to weighing and balancing than any other Constitutional privilege can be weighed and balanced by extraneous third parties.

Every President, beginning with Washington and Jefferson, has asserted that the privilege and the scope and applicability are for him alone to decide. This is precisely what Congress does when it either grants or withholds documents in response to the request of a court for evidence in a criminal case. This is what no doubt *this court* would do if confronted with a demand by a Congressional committee for any of our internal documents. *We* would weigh and decide and assert the privilege as *we* saw it, not as a Congressional committee would see it. We would do so on the Constitutional ground of separation of powers. And this is what the President has done here.

We all know that when a Constitutional privilege under the Fifth Amendment is asserted by the humblest individual, the court does not weigh and balance the public interest in having the individual's testimony. All the court can do is make a preliminary inquiry as to a prima facie justification for the individual to decide whether he will the assertion of the privilege. It is up to assert the privilege. Other privileges, such as husband-wife, lawyer-client, priest-penitent, when recognized by the law, come into being on a showing that the relationship exists. There is no weighing of the public interest in having the testimony compared to the public interest in the particular individual maintaining his privileged communication or document. Nor does the court invite the holder of the privilege to disclose the privileged information *in camera* so that the court may weigh the "conflicting public interests" involved in disclosure or confidentiality. Even to hint at such a procedure in regard to these privileges is to demonstrate the inherent incongruity of positing the existence of the privilege and yet asserting that someone other than the holder of the privilege will decide by a balancing of interests test whether it can be exercised.

Nor is logical analysis advanced by a parade of examples in which the public interest in disclosure is heavily exaggerated. Of course one can imagine innumerable instances in which a court, Congress, or the Executive, *ought* to disclose he documents in the public interest, and probably *would*. The more exaggerated the example, the more certain it is that a court would decide to disclose to the Attorney General or a Congressional committee, or the Executive would decide to disclose to a court or Congressional committee, internal documents which otherwise would be kept confidential. But the more certain it is that the holder of the documents—the holder of the privilege—will decide to disclose does not alter the fact that *it is the holder of the Constitutional privilege Who Decides.*

In conclusion, I find the suggested procedure by the *Per Curiam* (supra at 37–40) a very logical exercise in determining what evidence should be made available. But going back to the fundamental question of *Who Decides,* this procedure is one which might be gone through by the President, but not by the Judicial Branch. If the Constitutional privilege has been asserted, then no court has the right to determine what the President will or will not produce.

The *Per Curiam* completely ignores the Constitutional principle of separation of powers as the source of the President's privilege asserted here. The *Per Curiam* treats the privilege as being *solely* derived from the age-old common sense-common law recognition that Government business cannot be conducted without *some degree* of confidentiality, and therefore the Judiciary should "weigh" and "balance" the degree of confidentiality permitted in light of "conflicting public interests" in that confidentiality compared to disclosure, just as if the Executive were engaged in litigation with another party and could be compelled to disclose on pain of losing the litigaton if the court's view of the public interest were not accepted by the Executive. But this is no such case, and everything else in the *Per Curiam* opinion logically hinges on the validity of this analysis. But neither we nor any other court can so easily discard the Constitution, including the tripartite privilege universally derived from that principle of separation of powers.

II. DEVELOPMENT OF THE TRIPARTITE PRIVILEGE WITH REFERENCE TO EXECUTIVE DOCUMENTS

A. The Legislative Decision of 1789

In 1789 the First Congress faced the issue of the proper relationship between the Executive and the Legislature. Specifically, the Congress considered the questions of who should have custody of Executive papers and who should have power of removal of Executive officers subordinate to the President. The First Congress' deliberation on these matters is especially significant because many members of the Congress had also actively participated in the drafting of the Constitution.[48]

The background for the Legislative decision of 1789 lay in the earlier decision of the Continental Congress to establish a Department of Foreign Affairs. The Continental Congress passed a resolution providing that the Foreign Affairs department would be headed by an officer appointed by the Congress, who would hold office "during the pleasure of Congress."[49] The resolution further required that the officer take custody of the books, records, and papers relating to his department, *and that any member of Congress should have access to any of these papers.*[50] Thus, the Department of Foreign Affairs as envisioned by the Continental Congress was under the control of the Congress.[51]

After the enactment of the Constitution, the First Congress considered the proper position of the Department of Foreign Affairs and its Secretary. The Act finally passed by the Congress changed the status of the Secretary and his department significantly. The Act specifically made the department an Executive department, and the Secretary subject to the direction of the President.[52] The Secretary was to take charge and custody of all papers relating to the department, except that "whenever the [Secretary] shall be removed from office by the President of the United States, or in any other case of vacancy,"[53] the Chief Clerk, appointed by the Secretary, was to take custody. *Nothing* was said in the Act *concerning either the Congress' right to access to the papers, nor the Congress' right to determine removal* of the Secretary.

The omission of the provision granting the Continental Congress access to the papers of the department is a glaring omission with no illumination provided by the debate in the First Congress. The reports of the debates do not indicate that the question was even discussed.[54] This omission is explained only by the fact that the Department was to be an arm of the Executive, unlike the predecessor department which was an arm of the Continental Congress, an explanation which is not only inherently persuasive, but demonstrated by the rationale in the debate and action on the allied removal provision. The omission could not have been other than a conscious one, as many members of the First Congress had participated in the Continental Congress.[55]

On the other hand, however, there was strenuous controversy and debate in the First Congress over the question of removal of the Secretary. The first draft of the bill before the House, as proposed by James Madison, had provided specifically that the Secretary was to "be appointed by the President, by and with the advice and consent of the Senate; and to be removable from office by the President,"[56] During more than a month's discussion,[57] the House considered various aspects of removal of the Secretary, including the question of how the removal power fit within the Constitutional division into three governmental branches.

Some members of the House feared that the original wording in the Madison bill suggested that the legislature was granting to the President the power of removal, and that this power might be taken from the President by a later Congress.[58] These men felt that the Constitution had already provided the President the power to remove his subordinates, and no statute was necessary. Consequently Mr. Benson of the House suggested an amendment to the bill to delete the clause "to be removable by the President" and to put that phrase in a position in the bill where it would not appear as a legislative grant but merely a statement of legislative construction of the Constitution.[59]

After lengthy debate, Mr. Benson moved to insert the clause concerning removal in the description of the duties of the clerk, where it now appears. Madison, who had been persuaded by the wisdom of Benson's suggestions, seconded the motion, and it carried by a vote of 30 to 18.[60] Subsequently the House voted on the second part of Benson's motion, to delete the clause concerning removal which appeared in the first section of the bill. This, too, was supported by Madison, who felt that Congress did not have power to grant the removal power to the President.[61] The amendment passed, 31 to 19.[62] The full bill later passed in the House and was sent to the Senate.

Chief Justice Taft believed that James Madison's "arguments in support of the President's Constitutional power of removal independently of Congressional provision, and without the consent of the Senate, were masterly, and he carried the House."[63] Among those voting with Madison in support of the final bill were Carroll, Clymer, Fitzsimons, and Gilman; of the opposite view were Gerry and Sherman; all had been in the Constitutional Convention two years before.[64]

Since the bill enacted at the same session establishing the Department of the Treasury contained somewhat different language, it is illuminating to see how that came about. The original bill contained a clause making it the duty of the Secretary "to digest and report plans for the improvement and management of the revenue . . . ."[65] This had been drafted by Hamilton, the Secretary-designate in the Washington administration, as a device to establish his liaison and influence with the Congressional branch. Hamilton's motives did not go long undetected. Significantly, the revulsion of and opposition in the House was based on the Constitutional principle of separation of powers. A motion was made to strike the offending words, on

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the ground "that to permit the secretary to go further than to prepare estimates would be a dangerous innovation on the constitutional privilege of that house." [66] It was noted that "the authority contained in the bill to prepare and report plans would create an interference of the executive with the legislative powers, and would abridge the particular privilege of that house to originate all bills for raising a revenue." [67] Madison observed that "the words of the bill were precisely those used by the former [continental] congress on two occasions." [69]

This was not to be acceptable here, for the First Congress realized it was structuring a government in accordance with a new Constitutional principle, the separation of powers, and the members were resolved to be faithful to that hitherto untried principle. Finally, in this debate on the Treasury, an amendment was adopted. The word "prepare" was substituted for "report" in order that "[t]he secretary would then only report his plans if requested by the house." [69] Thus was the Constitutional principle of separation of powers scrupulously adhered to by the First Congress.

It is significant that the bill establishing the War Department [70] was on the Foreign Affairs Department model, not that of the Treasury. The same held true of other subsequent established departments. The Treasury statute remained unique in its specific reference to the Secretary's duty "to make report . . . as he may be required"; this is in part explainable perhaps by the House's Constitutional duty to originate revenue bills (although the statute refers to "either branch"), but certainly because the draft statute originated with Hamilton, who put in the clause for his own purposes, only to see it modified (but not eliminated) in a manner to reflect the House's preoccupation with the principle of separation of powers.

The Legislative decision of 1789, in establishing the Departments of Foreign Affairs (State), Treasury, and War, made by the First Congress, guided by the men who had drafted the Constitution only two years before, vividly demonstrates their understanding of separation of powers as established by the Constituion.[71]

B. Congressional demands for executive papers

Throughout this nation's 184-year Constitutional history, Congress and the Executive have succeeded in avoiding any near-fatal confrontation over attempts by Congress to procure documents in the Executive's possession. In recognition of the delicate balance created by the doctrine of separation of powers the two Branches have generally succeeded in fashioning a *modus vivendi* through mutual deference and cooperation. Thus, when a Congressional committee calls on an Executive official to produce documents or other needed material, "the call is usually qualified by the softening phrase 'if the public interest permits.'" [72] Similarly, as one commentator observed:

"It is obvious that in a large majority of cases it is greatly to the advantage of the executive to cooperate with Congress, and in a large majority of cases it does so. Congressional control over appropriations and legislation is an excellent guarantee that the executive will not lightly reject a congressional request for information, for it is well aware that such a rejection increases the chance of getting either no legislation or undesired legislation." [73]

In certain instances, however, the Chief Executive has asserted a privilege to withhold information from Congress, and such assertions have often been grounded on a Constitutional separation of powers rationale. When made, the Executive assertion of privilege has always prevailed.[74]

Historically, the first time Congress attempted to probe into documents under the Executive's custody was in March 1792, when the House of Representatives passed a resolution providing:

"*Resolved*, That a committee be appointed to inquire into the causes of the failure of the late expedition under Major General St. Clair; and that the said committee be empowered to call for such persons, papers and records, as may be necessary to assist their inquiries." [75]

When the committee asked President Washington for the papers relevant to General St. Clair's campaign, the President called a meeting of his Cabinet. Washington reasoned that since the committee's request was the first of its kind, his response would set a precedent and therefore should be well considered. Secretary of State Jefferson, Treasury Secretary Hamilton, Secretary of War Knox, and Attorney General Randolph attended the meeting. The unanimous conclusion reached by Washington and his Cabinet was, as described by Jefferson:

"First, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to *exercise a discretion*. Fourth, that neither the committee nor House had a right to call on the Head of a Department, who and whose papers were under the President alone, but that the committee should instruct their chairman to move the House to address the President.[76]

The Washington administration thus expressed the view that it is in the *President's* discretion to determine whether disclosure of Executive documents would be consistent with the public interest.

In 1796 the House made its second attempt to procure documents from the Washington administration when it passed a resolution asking the President to give the House a copy of papers and correspondence pertaining to the negotiation of the Jay Treaty with Great Britain. The House contended that it could not appropriate funds to implement the treaty until it was allowed access to the papers that it sought. On 30 March 1796 President Washington responded in part as follows:

"As therefore it is perfectly clear to my understanding that the assent of the house of representatives is not necessary to the validity of a treaty; . . . and as it is essential to the administration of the government that the boundaries fixed by the constitution between the different departments should be preserved; a just regard to the constitution, and to the duty of my office, under all the circumstances of this case, forbid a compliance with your request." [77]

Clearly, the President was asserting a Constitutional basis for withholding evidence from Congress.

President Jackson forcefully claimed Executive privilege in 1835 when the Senate requested that he hand over copies of the allegations that resulted in the discharge of Gideon Fitz from the office of Surveyor-General. The President refused to furnish the information requested on the ground that it related to subjects exclusively committed to the Executive Branch. The President's message to the Senate referred to similar requests in the past, all of which he regarded as unconstitutional:

"Their continued repetition imposes on me, as the representative and trustee of the American people, the painful but imperious duty of resisting to the utmost any further encroachment on the rights of the Executive." [78]

During the administration of President Tyler, the House directed the Secretary of War to disclose to the House reports made to the Department of War by Lieutenant Colonel Hitchcock regarding the affairs of the Cherokee Indians and alleged frauds that he had been commissioned to investigate. In a message dated 31 January 1843 President Tyler refused to turn over much of the requested information, with the following observations which bear a particular relevance to the case at bar:

"The injunction of the Constitution that the President 'shall take care that the laws be faithfully executed,' necessarily confers an authority, commensurate with the obligation imposed, to inquire into the manner in which all public agents perform the duties assigned to them by law. To be effective, these inquiries must often be confidential. They may result in the collection of truth or of falsehood; or they may be incomplete, and may require further prosecution. To maintain that the President can exercise no discretion after the time in which the matters thus collected shall be promulgated, or in respect to the character of the information obtained, would deprive him at once of the means of performing one of the most salutary duties of his office. An inquiry might be arrested at its first stage, and the officers whose conduct demanded investigation may be enabled to elude or defeat it. To require from the Executive the transfer of this discretion to a coordinate branch of the Government is equivalent to the denial of its possession by him and *would render him dependent upon that branch in the performance of a duty purely executive.*" [79]

The President further stated that "[t]he practice of the Government since its foundation has sanctioned the principle that there must necessarily be a discretionary authority in reference to the nature of the information called for by either House of Congress," [80] and showed through historical precedent that that authority had always been exercised by the President. So again separation of powers was invoked as a barrier to disclosure of documents in the custody of the Executive.

President Cleveland delivered a famous message to the Senate on 1 March 1886 in which he responded to frequent Senate demands for papers from heads of Executive departments which had been created by Congress. He stated:

"The requests and demands which by the score have for nearly three months been presented to the different departments of the Government, whatever may be their form, have but one complexion. They assume the right of the Senate to sit in judgment upon the exercise of my exclusive discretion and Executive function, for which I am solely responsible to the people from whom I have so lately received the sacred trust of office. My oath to support and defend the Constitution, my duty to the people who have chosen me to execute the powers of their great office and not relinquish them, and my duty to the chief magistracy which I must preserve unimpaired in all its dignity and vigor, compel me to refuse compliance with these demands.[81] "

In 1909 the Senate attempted to obtain from Theodore Roosevelt's Attorney General papers relating to the administration's decision not to proceed against United States Steel Corporation for its absorption of Tennessee Valley Coal & Iron Company. In a message to Congress on 6 January 1909, President Roosevelt described his response to the Senate's demands and cited his reasons therefor:

"I have thus given to the Senate all the information in the possession of the executive department *which appears to me to be material or relevant*, on the sub-

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ject of the resolution. I feel bound, however, to add that I have instructed the Attorney General not to respond to that portion of the resolution which calls for a statement of his reasons for nonaction. I have done so because I do not conceive it to be within the authority of the Senate to give directions of this character to the head of an executive department, or to demand from him reasons for his action. Heads of the executive departments are subject to the Constitution, and to the laws passed by the Congress in pursuance of the Constitution, and to the directions of the President of the United States, but to no other direction whatever.[82]

On 20 January 1944, FBI Director J. Edgar Hoover appeared in answer to a subpoena before the House Select Committee to Investigate the Federal Communications Commission. Mr. Hoover was asked to produce a copy of the directive to him from the President ordering him not to testify before the committee with respect to certain matters. Hoover refused, for reasons stated in a letter from the Attorney General to the chairman of the committee:

"It is my view that as a matter of law and of *long-established constitutional practice,* communications between the President and the Attorney General are confidential and privileged and not subject to inquiry by a committee of one of the Houses of Congress. In this instance, it seems to me that the privilege should not be waived; to do so would be to establish an unfortunate precedent, inconsistent with the position taken by my predecessors." [83]

Another forceful assertion of a Constitutionally-based Executive privilege occurred in 1954 during the McCarthy subcommittee probe into the affairs of the Army. In a letter dated 17 May 1954 President Eisenhower instructed the Secretary of Defense to forbid Department of Defense employees to testify or produce documents regarding internal consultations or communications within the Department. The President cited as reasons for his directive the following:

"[I]t is essential to the successful working of our system that the persons entrusted with power in any one of the three great branches of Government shall not encroach upon the authority confided to the others. The ultimate responsibility for the conduct of the executive branch rests with the President.

"Within this constitutional framework each branch should cooperate fully with each other for the common good. However, throughout our history the President has withheld information whenever he found that what was sought was confidential or its disclosure would be incompatible with the public interest or jeopardizing the safety of the Nation." [84]

As this survey demonstrates, history abounds of instances in which a Presidential claim, that the Constitutional system gives the President discretion to withhold documents from Congress, has prevailed against Congressional demands for Executive papers. These 184 years of Constitutional practice in the context of Congressional-Presidential relations cannot be ignored when, as in this case, the Judiciary confronts the President with a demand for documents "logically indistinguishable" [85] from a Congressional demand in the Constitutional issue raised.

C. Judicial Demands for Executive Papers—the Trials of Aaron Burr

Congressional demands for Executive papers are as numerous as autumn leaves, and frequently fall due to a frost between the two ends of Pennsylvania Avenue. In contrast, Judicial demands for Executive documents can be summarized in the drama and legal intricacies of one *cause celebre,* the two trials of Aaron Burr in 1807, the major historical example of the issuance by a federal court of a subpoena *duces tecum* directing the President to produce documents.[86] Although the United States Circuit Court for Virginia, per Chief Justice Marshall,[87] issued the subpoena *duces tecum* to President Jefferson, the court never directly decided the question of the scope of the President's asserted privilege to withhold documents or portions thereof, nor did it determine who should decide the scope of the privilege.[88]

In the first trial on the charge of treason, the defendant Burr requested the aid of the court in obtaining a letter written by General Wilkinson to President Jefferson on 21 October 1806, the President's response to the letter, and supporting documents.[89] The Wilkinson letter, Burr alleged in an affidavit,[90] would be of great importance in his proof of his innocence, for Wilkinson was an essential witness against him.[91] "Great importance" was hardly an over-statement of Burr's need for the letter; it had been mentioned in President Jefferson's message to Congress on the horrendous conspiracy, it probably formed the foundation of the Executive's charges against Burr, and Jefferson's message to Congress summed up his opinion—Burr's "guilt is placed beyond question." [92]

The United States Attorney, however, contended that it would be improper to require the President to produce the letter, that the letter was a private, confidential communication, and that it might contain vital state secrets.[93] This contention reflected the views of President Jefferson, who forcefully wrote United States Attorney Hay on 12 June 1807 that

"Reserving *the necessary right of the President of the U.S. to decide, independently of all other authority,* what papers, coming to him as President the public interests permit to be communicated, & to whom, I assure you of my readiness under that restriction, voluntarily to furnish on all occasions, whatever the purposes of justice may require . . . I . . . devolve on you the exercise of that discretion which it would be my right & duty to exercise, by withholding the communication of any parts of the letter which are not directly material for the purposes of justice." [94]

The accused, however, argued that a subpoena should issue notwithstanding the possibility of confidential communications not relating to the case or state secrets, but suggested that the President might point out the confidential passages, which need not be read in open court.[95]

After consideration of these arguments, Marshall held that a subpoena *duces tecum* could issue to the President. He reasoned that an accused has a right to the compulsory process of the court, notwithstanding the position of the person to whom the subpoena was directed, so long as the document or paper itself was proper for production. Chief Justice Marshall wrote,

"The propriety of introducing any paper into a case, as testimony, must depend on the character of the paper, not on the character of the person who holds it." [96]

and further stated that any exception to this rule of general obligation to compulsory process must be sought in the law of evidence.[97] Marshall thus seemed to rely on the evidentiary nature of the asserted privilege, and did not refer to a possible Constitutional basis.

Thus, considering the question on customary rules of evidence, Marshall found no exception therein for the President, "The court [could] perceive no legal objection to issuing a subpoena duces tecum to any person whatever, provided the case be such as to justify the process," although he carefully distinguished the issuance of a subpoena from the subsequent step of compelling compliance with the subpoena (a distinction made validly in the case at bar):

"Whatever difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it." [98]

The court anticipated that objections of the President to compliance with the subpoena could and should be shown on the return of the subpoena, but should not be taken into account in the decision to issue the subpoena.[99]

Marshall admittedly was troubled by the possibility that the letter might contain "matter which ought not be disclosed." [100] He acknowledged that this was a "delicate question," but stated that

"At the present it need only be said that the question does not occur at this time. There is certainly nothing before the court which shows that the letter in question contains any matter the disclosure of which would endanger the public safety. If it does contain such matter, the fact may appear before the disclosure is made. If it does contain any matter which it would be imprudent to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed. . . . Everything of this kind, however, will have its due consideration on the return of the subpena." [101]

Later in the opinion the court reiterated this point, with respect to the written response of the President to the Wilkinson letter.[102]

The court noted that it had great respect for the President. Yet it felt that the reputation of the court would be tarnished if it refused to aid an accused in procuring papers which he deemed essential for his defense.[103]

President Jefferson attacked this decision as violating the Constitutional principle of independence of the Branches of Government, a point to which Marshall nowhere directly adverted at any time in his opinions in the Burr trials.[104] In a letter to Hay on 20 June 1807 Jefferson wrote,

"The leading principle of our Constitution is the indepedence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the commands of the latter, & to imprisonment for disobedience. . . .?" [105]

It is highly significant that President Jefferson, himself a lawyer with more formal legal training than Marshall,[106] had, at the very outset of the matter, gone to the very root of the Constitutional question from the point of view of the Executive. Anticipating that at some point in the great drama, taking place in the Richmond courtroom ninety miles to the south of the White House, there would be a confrontation between the Executive and Judicial powers, on 2 June 1807 Jefferson had written to Hay:

"*The Constitution intended* that the three great branches of the government should be co-ordinate, and independent of each other." [107]

When notified of the issuance of the subpoena, Jefferson on 12 June immediately replied: "Sir,—Your letter of the 9th is this moment received. Reserving the necessary right of the President of the U.S. to decide, independently of all other authority, what papers, coming to him as President, the public interests permit to be communicated, & to whom, . . ." (As quoted at p. 43, *supra.*) The acquittal of Burr for treason came many weeks later, but the battle over the subpoena was to go on.

In the second part of the Burr litigation, when Burr was on trial for a misdemeanor (beginning a military expedition against the territory of Spain), the Burr request for the

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Wilkinson letter of 21 October 1806 again drew the attention of the court.[108] In the course of argument Burr referred to the letter and noted that it had not yet been produced.[109] The U.S. District Attorney Hay indicated that he could produce a copy of the letter, but not the original.[110] The court, per Justice Marshall, then stated that a copy would not be admissible unless the loss of the original were proved.[111]

During later argument the same day, 3 September 1807, Burr made a new request, for a letter from General Wilkinson to President Jefferson written on 12 November 1806, which he also felt was material to his defense.[112] Hay then proposed to produce the 12 November letter and let the clerk of the court in confidence copy those parts of the letters which were relevant and which could be made public. Burr's counsel, however, demanded the whole of the letters. Hay next suggested that Burr's counsel should examine the letters; Hay would rely on their integrity not to disclose confidential passages, and if any disagreement arose, Hay would let the court decide.[113] Burr's counsel refused to inspect anything which Burr himself could not inspect.

Hay finally responded to the Burr demands by asserting the ultimate position that the President had kept for himself the power to decide what portions of the letter should be made public, but that he wished to make all but the most confidential sections public,[114] as the President had specifically stated in his letters to Hay.[115] President Jefferson maintained that he found the source of his powers in both the common practice of all nations' executives and in the Constitution.[116]

While Jefferson had been willing earlier to comply substantially with the subpoena,[117] he now felt that Burr had converted the trial into a contest between the Executive and the Judiciary. He was disappointed that Justice Marshall had allowed this, but he hoped that Marshall would not press on with the conflict. If Marshall did continue, however, Jefferson noted that the powers given the Executive by the Constitution would enable him to prevail.[118] Jefferson was determined to resist the execution of the process and was willing to use force if necessary, although he hoped that Marshall would not push the issue to a head.

On 4 September 1807 Burr again demanded the letters of General Wilkinson written to President Jefferson on 21 October and on 12 November 1806. Burr stated in court that the President was in contempt for failure to comply with the subpoena issued for the 21 October letter, but he hoped that the President would produce the letters without the necessity of resorting to contempt proceedings.[119] Burr indicated he might accept a copy of the 21 October letter, the original of which had apparently been mislaid, but only if the copy were properly authenticated.[120]

After lengthy debate, the court issued a second subpoena *duces tecum*, to the United States Attorney, which was returned with a copy of the 12 November 1806 letter, the copy excepting the parts not material or relevant in Hay's opinion. Hay indicated that this power of selection of the passages to be made public had been delegated to him by the President.[121] However, the United States Attorney was willing to submit the original letter to the court so that it could test the accuracy of his opinion, and he also certified that the deleted parts contained opinions about certain persons which would not be admissible in court.[122] Burr still was not satisfied, and the court apparently would be required to resolve the issue.

Chief Justice Marshall recognized that while the President was subject to the general rule requiring compliance with a subpoena, nevertheless the President may have "sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production." [123] He continued by stating that

"The occasion for demanding it ought, in such a case, to be very strong, and to be fully shown to the court before its production could be insisted on. I admit, that in such a case, much reliance must be placed on the declaration of the president; and I do think that a privilege does exist to withhold private letters of a certain description." [124]

This expression of acknowledgement of some kind of Executive privilege for confidential communications, made by Marshall on September 1807, is reminiscent of Marshall's statement four years earlier in *Marbury* v. *Madison*, that Attorney General Lincoln need not disclose anything which had been communicated to him in confidence.[125]

Marshall was troubled, however, by the possibility of denying the accused information which might be of aid in his defense. He indicated that the court would give great deference to the reasons of the President for withholding the information, and would require the accused to show that the material was essential to the defense.[126] Here, however, it had been Hay, rather than the President, who had decided which specific passages should be withheld. This gave Marshall still another opportunity to avoid the direct Constitutional clash:

"Had the president, when he transmitted it, subjected it to certain restrictions, and stated that in his judgment the public interest required certain parts of it to be kept secret, and had accordingly made a reservation of them, *all proper respect would have been paid to it; but he has made no such reservation.* . . . In regard to the secrecy of these parts which it is stated are improper to give out to the world, the court will take any order that may be necessary. I do not think that the accused ought to be prohibited from seeing the letter; but, if it should be thought proper, I will order that no copy of it be taken for public exhibition, and that no use shall be made of it but what is necessarily attached to the case." [127]

The great Chief Justice had finessed the issue.

Hay immediately sought instructions from the President, and on 9 September he presented the court with "a certificate from the President, annexed to *a copy of General Wilkinson's letter, excepting such parts as he deemed he ought not permit to be made public.*" [128] The President's certificate, dated 7 September 1807, noted that

"On re-examination of a letter of Nov. 12, 1806, from Genl. Wilkinson to myself, . . . I find in it some passages entirely confidential, given for my information in the discharge of my executive functions, and which my duties & the public interest forbid me to make public. I have therefore given above a correct copy of all those parts which I ought to permit to be made public. *Those not communicated are in nowise material for the purposes of justice* on the charges of treason or misdemeanor depending against Aaron Burr; *they are on subjects irrelevant to any issues which can arise out of those charges, & could contribute nothing towards his acquittal or conviction.*" [129]

The trial proceeded, and Burr was found by the jury to be not guilty.[130] The full Wilkinson to Jefferson letter of 12 November 1806 was never produced.

My colleagues "think the *Burr* case makes clear that application of Executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case." (*Per Curiam, supra* at 28.) Not so, not by a long shot, not by the difference between a United States Attorney and a President.

Marshall *might* have been willing to pit the Judiciary versus the Executive by a final order to produce the whole letter or else, when only the excerpted letter was furnished and the deletions were done by the judgment of the U.S. Attorney. But when the *President himself* later came forth with his excerpted version and certificate as to what had been deleted and why, Marshall said nothing and he did nothing.

The full 12 November letter was never produced; the 21 October letter was never produced in the first trial for treason, and there is no record that even a copy was produced in the second trial for misdemeanor.

If we go on *what was actually done*, the *Burr* trials prove that final "weighing of the public interest" is done by the Chief Executive. If we go on what was *said* by Marshall, the *Burr* trials leave the ultimate issue of Who finally decides the public interest completely undecided, for Marshall never faced up, even verbally, to a confrontation with the President himself with the issue drawn on the question of separation of powers.[131]

These two great Constitutional and political antagonists—Marshall and Jefferson, Chief Justice and President—had circled each other warily, each maintaining his position, each, out of respect for the other and for the delicate fabric of the Constitution, not forcing the ultimate issue. Who *should* decide the scope and applicability of the Chief Executive's privilege? The *Burr* trials give no definite answer. Who *did* decide the Chief Executive's privilege? The portions of the letter determined by the President to be confidential remained confidential; the full letter was never produced to the court.

III. Relationship of the Grand Jury to the Judiciary and to the Executive

In my view, the case at bar presents the same conflict between the Judiciary and the Executive which faced Chief Justice Marshall in the *Burr* trials. I would decide the question the same way Marshall actually left it; my colleagues would decide the question by asserting a Judicial supremacy over the Chief Executive, which Marshall may have hinted he preferred, but which he was too prudent finally to assert.

There is a third position which is argued by the Special Prosecutor, and indeed is relied on by the District Judge, hence must be addressed briefly here. The Special Prosecutor contends, ". . . it is a false conflict to see the present controversy as a struggle between the powers of the Judiciary and the prerogatives of the President. Rather, what is involved is the respondent's refusal to respond to a demand from the people, speaking through their organ, the grand jury." [132] And, ". . . the grand jury's 'authority is derived from none of the three basic divisions of our government, but rather directly from the people themselves.' (Citation omitted.)" [133] Judge Sirica held, "[t]he grand jury derives its authority directly from the people, . . ." [134]

In the first place, it is undeniable that, under the very terms of Judge Sirica's Order and Opinion, the nine tapes are to be turned over to the District *Court*, and the grand jury may never see or hear any of them after the District Judge's review *in camera*. So the Judiciary-Executive confrontation is there at the outset, whatever the character of the grand jury. In the second place, the grand jury is only an appendage of the court under whose direction it operates. When the grand jury functions, it functions within the recognized tripartite division of powers as an arm of the Judicial Branch.

A. Background

The Supreme Court has described the grand jury as "brought to this county by the early colonists and incorporated in the Constitution by the Founders. There is every

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reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor." [135] In its formative stages in England, the jury [136] was "a body of neighbors summoned by some public officer to give, upon oath, a true answer to some question." [137] In the twelfth century Henry II made extensive use of the jury as a source of general information necessary for the administration of his centralized government. The jury's role as a source of general information for the Crown diminished when Parliament became the grand inquest of the nation.[138] "So gradually, in the course of the fourteenth century, the use of the jury in connection with the central government came to be chiefly confined to *judicial functions.*" [139]

In the thirteenth century and early part of the fourteenth, members of the grand jury that accused a person of crime often served on the petit jury that tried him.[140] However, by 1351–52 no indictor could serve on the trial jury if he were challenged for cause by the accused.[141]

It seems clear that in early England the grand jury was as much a part of the judicial machinery as the petit jury.

From a tool of the Crown for ferreting out criminals, the grand jury later evolved into a protector of the citizenry against arbitrary prosecution. The grand jury's role as a shield dates from the 1681 case of the Earl of Shaftesbury, in which the grand jury wrote "Ignoramus" ("we ignore it") on the bill of indictment presented by the Crown against Shaftesbury.[142] The protective function of the grand jury was recognized by the drafters of the Bill of Rights when they provided in the Fifth Amendment that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." [143] In *Wood* v. *Georgia* the Court emphasized the protective role of the grand jury:

"Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.[144]"

In addition to its historical roles as an accusatory body and as a shield of the innocent, the grand jury has traditionally been accorded broad powers to investigate possible wrongdoing.[145] Thus, a grand jury may initiate an independent investigation and request that charges be made against those whose wrongdoing was discovered.[146]

B. Relationship of the Grand Jury to the Judiciary

From the above survey of the history and traditional functions of the grand jury, it should be clear that the grand jury operates within the judicial sphere of Government. The Supreme Court has so treated it: "The grand jury is an arm of the court and its *in camera* proceedings constitute 'a judicial inquiry.' " [147] Perhaps the fullest exposition of the judicial nature of the grand jury's activities is contained in *In re National Window Glass Workers:*

"A grand jury has no existence aside from the court which calls it into existence and upon which it is attending. A grand jury does not become, after it is summoned, impaneled, and sworn, an independent planet, as it were, in the judicial system, but still remains an appendage of the court on which it is attending. No grand jury shall be summoned to attend any District Court unless the judge thereof, in his own discretion or upon a notification by the district attorney that such jury will be needed, orders a venire to issue therefor. [Citation omitted.] The District Court may discharge a grand jury whenever in its judgment it deems a continuance of the sessions of such a jury unnecessary. [Citation omited.] All indictments or presentments of a grand jury become effective only when presented in court and a record is made of such action. A grand jury is not, therefore, and cannot become, an independent, self-functioning, uncontrollable agency. It is and remains a grand jury attending on the court, and does not, after it is organized, become an independent body, functioning at its uncontrolled will, or the will of the district attorney or special assistant." [148]

Although a court has no authority to order the grand jury to return an indictment (or to refuse to do so),[149] it may exercise control over the grand jury in several significant respects.[150] The court summons and empanels the grand jury [151] and apparently has broad discretion to discharge it for any reason.[152] The grand jury's jurisdiction to investigate is limited to that of the presiding court.[153] In making its inquiries, the grand jury must rely on the process of the court to procure evidence and summon witnesses and must look to the power of the court to enforce its subpoenas.[154] "Unreasonable or oppressive" subpoenas may be quashed or modified by the court on motion.[155] The court has considerable discretion to instruct the grand jury and to prescribe rules for the conduct of its proceedings.[156] In summary, the court has broad supervisory authority with respect to the activities of the grand jury.

The nature of the grand jury's functions and its subordination to the supervisory authority of the court place it squarely within the Judicial Branch. Moreover, in order to perform its protective function,[157] the grand jury must remain detached from and independent of the Executive Branch. Therefore, the grand jury is under no compulsion to follow the orders of the prosecutor.[158] Its power to investigate and return a presentment based on its findings is not impaired by the prosecutor's discretion to decide whether or not to proceed with a prosecution.[159]

Thus, for purposes of applying the doctrine of separation of powers, the grand jury must be aligned with the Judicial Branch. As one court stated in *Hammond* v. *Brown,*

"The grand jury in its inquest of crimes and offenses is part of the judicial branch of government. Like other branches of government the judicial branch is subject to the doctrine of separation of powers. [Citation omitted.] The grand jury is part of the judicial branch of government and is separate and distinct from the legislative and executive branches of government; and the grand jury, therefore, may not "impinge upon the authority or rights of the others" . . . [Citation omitted.][160]

IV. Amenability of the President to judicial process—An illusory issue in the instant case

My colleagues have decided an "immunity" issue, which, in my humble judgment, is a non-issue in this case—both from the majority view and my own.

A. If the President has the power and responsibility to decide where lies the public interest in disclosure or non-disclosure, as I believe, what business does any court have issuing any "Order"? Apparently none, for the *Per Curiam* opinion states: "If the Constitution or the laws of evidence confer upon President Nixon the absolute discretion to withhold material subpoenaed by a grand jury, then of course we would vacate, rather than approve with modification, the order entered below." (*Per Curiam, supra* at 20.)

B. If the court has the power to weigh and balance the public interest in the confidentiality of Executive records, but the court has no physical power to enforce its subpoena should the President refuse to comply—as my colleagues apparently recognize full well (*Per Curiam, supra* at 12 and notes 32–33)—then what purpose is served by determining whether the President is "immune" from process?

It can hardly be questioned that in any direct confrontation between the Judiciary and the Executive, the latter must prevail. Therefore, the "issue" of whether the President is amenable to court process is an illusory one. No one questions that the court can issue to the President a piece of paper captioned "Subpoena" and that the President owes some obligation at least to inform the court of how he intends to respond. But our history is full of examples of situations in which direct confrontations between two or more of the co-equal Branches were avoided by one of the Branches deciding not to push its position to the limit.

It should be crystal clear from the detailed account of the trials of Aaron Burr (II.C. *supra*) that *Burr* provides no support for my colleagues' deciding this "issue" as they do, for Chief Judge Marshall never came to the final confrontation with President Jefferson. Since the Burr trials represent the sole [161] example in our history of a court subpoena duces tecum to an incumbent President, it is with some astonishment that I read the majority's confident assertion: "The courts' assumption of legal *power to compel production of evidence* within the possession of the Executive surely stands on firm footing. *Youngstown Sheet & Tube* v. *Sawyer,* . . ." (*Per Curiam, supra* at 13) (emphasis supplied).

Youngstown [162] involved no documents, no tapes, no Presidential conservations—no assertion of a Constitution privilege of any kind. *Youngstown* represents the Judicial power, by compulsory process or otherwise, to prohibit the Executive from engaging in actions contrary to law. *Youngstown* represents the principle that no man, cabinet minister or Chief Executive himself,[163] is above the law; *Youngstown* says nothing about *Which Branch Decides* a Constitutional privilege based on separation of powers.

Nor are the other authorities cited by the majority opinion to decide the unnecessary question of Presidential "immunity" any more relevant. *United States* v. *United States District Court* [164] involved a Fourth Amendment violation by wiretapping, and the consequent required disclosure or dismissal in the well-known adversary litigation situation. *Kendall* v. *United States ex rel. Stokes* [165] was a mandamus to a cabinet officer to comply with an act of Congress, with no privileged communications whatsoever involved. *State Highway Commission* v. *Volpe* [166] involved an injunction against a cabinet officer, with no privileged communications asserted.

Thus, the real issue, even by the analysis in other parts of the *Per Curiam* opinion, is whether it is appropriate for the court to determine the legal validity of a claim of privilege by the President, or whether the Constitutional principle of separation of powers requires the court to yield to the President's judgment as to where the public interest lies. My answer would be the latter. But taking the answer given by the *Per Curiam* as correct and at the broadest, the proper role of the court is to decide the legal issue of the nature and extent of the President's privilege, and, given the court's admitted lack of physical power to enforce compliance, express such conclusions in a declaratory judgment form. The court need not issue any process to be served on the President, so the question of "immunity" need never arise. If the court's decision is adverse to the President, he must decide whether to comply or risk adverse political consequences.

Whatever the court's decision here, whichever rationale is followed, it seems clear that any issue of Presidential "immunity" or amenability to court process is totally illusory.

Footnotes at end of article.

V. APPLICATION OF THE CONSTITUTIONAL TRIPARTITE PRIVILEGE

A. Procedures and practicalities—statutes and the Constitution

Parts V and VI of the *Per Curiam* opinion suggest certain procedures to be followed by the District Court on remand, derived from *Environmental Protection Agency* v. *Mink* [167] and our own opinions in *Vaughn* v. *Rosen* [168] and *Cuneo* v. *Schlesinger*.[169] The procedures themselves are irreproachable, and might well be workable, if we were dealing with a usual statutory privilege and the ordinary papers of the bureaucracy.

We are not; whence arise two great objections to the *Per Curiam* recommended solution: (1) the Constitutional barrier of separation of powers, which means that neither the authorities nor the techniques relied on are applicable here; and (2) certain practical problems inherent in the Judiciary dealing with the most confidential communications of the Chief Executive.

1. The Authorities

Mink, Vaughn, and *Cuneo* all dealt with statutory exemptions from disclosure specifically defined in the Freedom of Information Act.[170] No Constitutional privilege was ever invoked. The same can be said of *Carl Zeiss* [171] and *Soucie* v. *David,* [172] In these cases the "courts appropriately examine[d] a disputed item *in camera*" (*Per Curiam, supra* at 36), because the statute provided the indispensable *guidelines* for District Court examination and decision; i.e., the statute specifically defined and described the *categories* of information which were to be exempt from disclosure.

In this situation the task of the District Judge is clear and definite; he is to look at the confidential material (properly segmented for intelligent decision-making) *in camera,* and make a *factual* determination [173] as to whether the subject matter fits within or without the statutorily exempted categories. If within any defined exemption, the information is kept confidential; if not within any of seven categories, the information is disclosed to the demanding party.

The District Judge does no "balancing" or "weighing of conflicting public interests"; the balancing and weighing has already been done by the Congress in the statute itself. In category "(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," the undisputed fact of an Executive order categorizing a document as secret precludes even *in camera* inspection by the District Judge, as the Supreme Court held in *Mink.* There is no *factual* question left for the judge to determine, so no inspection violating Executive secrecy is permissible. With regard to other claimed categories of exemption in *Mink,* as in *Vaughn* and *Cuneo, in camera* inspection was needed to determine the *fact* of the proper classification.

This is comparable to *United States* v. *Reynolds,*[174] which antedates the Freedom of Information Act. There the Supreme Court, after determining as a fact from the showing made by the Government that the material related to important national defense secrets, forbade even *in camera* inspection. And, as my colleagues correctly point out, ". . . the Court explicitly reserved decision on the Government's claim that the Executive has an absolute discretion constitutionally founded in separation of powers to withhold documents." (*Per Curiam, supra* at 24.[175])

If we look at Part VI of the *Per curiam* spelling out the procedure prescribed for the District Judge, aside from the category of national defense or foreign relations (*supra* at 38), by what criteria, by what guidelines, with reference to what categories of information communicated to or in the presence of the President will the District Judge decide what is to be disclosed to and what kept from the Special Prosecutor and grand jury? By what standards is the District Judge to weigh or balance the conflicting claims of the Chief Executive and the Special Prosecutor? By the amorphous standard of "the public interest"? With all due respect to Chief Judge Sirica why is any one of 400 District Judges better equipped than the Chief Executive of the Nation to determine "the public interest"?

There is missing completely from the situation here the absolutely indispensable ingredient which made the techniques of classification and *in camera* inspection feasible in *Mink, Vaughn,* and *Cuneo, i.e.,* categories of information previously specifically defined by statute as disclosable or confidential. In the situation here, what the District Judge must do is to make the value judgment as to disclosure or confidentiality, which was made by Congress on material subject to statutory mandate, and which here constitutionally belongs to the Chief Executive himself, not to a District Judge, under the doctrine of separation of powers.

2. Pragmatic considerations

The first problem is that of security, an omnipresent consideration when the office of the President is concerned. If *in camera* examination involved only *one* United States District Judge, the violation of Executive privacy might be tolerable. Such restricted access is remote as a practical prospect. There is the process of assembling, classifying, and furnishing the tapes to the court, necessarily involving counsel and other persons who previously have had no access to this stored information. There is the legal and clerical assistance the District Judge must require. There are the probable demands of prospective defendants to be confronted, which may call for access by the Special Prosecutor beyond what he originally required.[176]

After the District Court's decision, then will arise the question of appeal. It is too much to expect any decree of the District Court to have either the wisdom or finality of Solomon's. A *non*-appealable Order of a District Judge, either suppressing or exposing the most confidential recorded conversations of the President, will satisfy no one. The alternative is equally unattractive. Appeal will involve three to nine (in some Circuits, more) judges in the Court of Appeals, with a minimum of clerical and legal staff assistance. Then will come the nine members of the Supreme Court with appropriate supporting personnel.

As a member of the Federal Judiciary, the writer means no disrespect to its members or staff assistants. As the circle of "secrecy" widens, it will dissolve and vanish. All human experience teaches this—particularly in Washington, D.C.

Nor is *in camera* inspection of Presidential material without danger to the Judiciary. The judge who suppresses eagerly sought information can never adequately justify his decision by a public explanation of his rationale in the usual opinion. The judge's decision may in truth be unjustifiable, grossly in error, because federal judges are not necessarily equipped with the type of information on which to base an intelligent decision on confidentiality. By the nature of the problem, the places the judge can turn for assistance are limited or nonexistent. The needed background information may be political in nature, as may the sought-after information, and willy-nilly, whatever his decision, the judge may have injected himself and the whole Judiciary into what is basically part of the political process.

B. A healthy tension

Many speak as if all answers to all conceivable problems of our Government are to be found in specific Constitutional provisions. They imagine that somewhere in that magnificent document there must be the answer to how a conflict between the Executive and the Judiciary (or Executive and Legislative), each claiming to act within the powers of its Branch, should be resolved. I suggest that this is one of several major areas in which the Constitutional Convention deliberately provided no specific answer.

I suggest that the best (and historically only) answer is that judgment on the proper exercise of the Executive and Judicial powers ultimately rests, and was intended to rest, with the American people. Having created three co-equal separate Branches, the Constitutional Convention did not foul up the grand design by providing that one Branch was to be superior and prevail over another, nor did the grand scheme entrust the decision between two conflicting Branches to the third Branch. This was graphically demonstrated by the Constitutional theory on which Washington and his cabinet first acted, that the Executive himself should determine what papers in the public interest could be furnished to another Branch.

It was and is the President's right to make that decision initially, and it is the American people who will be the judge as to whether the President has made the right decision, *i.e.,* whether it is or is not in the public interest that the papers (tapes) in question be furnished or retained. If his decision is made on visibly sound grounds, the people will approve the action of the Executive as being in the public interest. If the decision is not visibly on sound grounds of national public interest, in political terms the decision may be ruinous for the President, but it is his to make. The grand design has worked; the separate, independent Branch remains in charge of and responsible for its own papers, processes and decisions, not to a second or third Branch, but it remains *responsible* to the American people.

This may seemingly frustrate the role of the Special Prosecutor in part of his work, it may frustrate what a Congressional investigative committee conceives to be its role, but in my judgment this was the way the Constitution was intended to work. The Constitution was not designed as an all-powerful efficient instrument of government. The primary concern in the minds of the Founding Fathers of 1787 was to devise a reasonably efficient method of government that above all did not have the in-built capacity to become oppressive.[177] And to that end they first designed the separation of powers, making each Branch independent, and then left inherent in the structure they had designed the possibility of irreconcilable conflict.[178] But in their view, the possibility of irreconcilable conflict was not necessarily bad, because above all this would guarantee that the National Government could never become an efficient instrument of oppression of the people.

The Founding Fathers were not looking for the *most efficient* government design. After all, they had been subject to and rebelled against one of the most efficient governments then existing.[179] What the Founding Fathers designed was *not efficiency, but protection against oppression.*[180] Leaving the three Branches in an equilibrium of tension was just one of their devices to guard against oppression.[181]

This healthy equilibrium of tension will be destroyed if the result reached by the *Per Curiam* is allowed to stand. My colleagues cannot confine the effect of their decision to Richard M. Nixon. The precedent set will inevitably have far-reaching implications on the vulnerability of any Chief Executive to judicial process, not merely at the behest of the Special Prosecutor in the extraordinary circumstances of Watergate, but at the behest of Congress. Congress may have equally plausible needs for similar information. The fact that Congress is usually or fre-

Footnotes at end of article.

quently locked in political battle with the Chief Executive cannot mean that Congress' need or right to information in the hands of the Chief Executive is any less than it otherwise would be. The courts will have been enlisted on one side of what would be even more undeniably and fundamentally a political question.

The *Per Curiam* notes (at 40) that "[w]hat the courts are now called upon primarily to decide, . . . is how to reconcile the need of the United States, by its grand jury, with the legitimate interest of the President in not disclosing those portions of the tapes that may deal with unrelated matters." This is indeed revelatory. One would have thought that the President, not a Special Prosecutor or grand jury, should best determine "the need of the United States." One would have thought that when "the need of the United States" was to be evaluated, the President, not one of 400 District Judges, would be the most fitted to determine where the overall public interest lies. It is thus all too clear that, to reach the result achieved by the *Per Curiam*, somehow, subconsciously, it is essential to assume implicitly that the President no longer represents the United States or is qualified to determine where the overall public interest lies. Without that implicit assumption, the majority here would be powerless to reach the result it does.

At an earlier point the *Per Curiam* defines the position of the Chief Executive here as "The President claims that, at least with respect to conversations with his advisers, the privilege is absolute, since he, rather than the courts, has final authority to decide. . . ." (*Per Curiam, supra* at 22.) My colleagues reject this claim on the basis that "The President's privilege cannot, therefore, be deemed absolute. . . . [A]pplication of Executive privilege depends on a weighing of the public interest. . . ." (*Per Curiam, supra* at 28.)

In the first place, that answer represents the balancing test applicable to the ancient common sense-common law source of all Governmental privilege; it ignores totally the Constitutional source of the Chief Executive's privilege, separation of powers, which creates the basic question in this case: Under the Constitution, Who Decides?

In the second place, the Constitutional principle also means this: with "absolute" privilege goes *absolute responsibility*. When we reach the level of the Chief Executive, this can only mean responsibility to the American people. I think the Framers meant it that way.

Yet, my colleagues' answer doubtless has appeal to those who theoretically would reject a theoretical absolute. So, in the third place, whatever our answer in theory should be, we must realize both the question and the answer also ignore history. If the same question is phrased in regard to the holder of office in Congress, or the holder of office in the Judiciary, where privilege in regard to the private papers, documents, and deliberations of the Congress and the Judiciary are concerned, the answer is clear—the holder of the office has *always* been the absolute determinant of the privilege.

Has a court ever refused to accept the determination of one House of Congress that its papers were privileged from judicial subpoena, and insisted on compliance with a subpoena duces tecum? *Never. (E.g., Brewster, Calley, Hoffa,* etc., etc.)[182] Has Congress ever refused to accept the determination of the Chief Executive that his papers were privileged from a Congressional committee demand, and sought to enforce it either by its own process or by judicial process? *Never. (E.g.,* the Jay Treaty in Washington's administration, corporate bureau antitrust papers in Theodore Roosevelt's administration, etc., etc.)[183]

To put the theoretical situation and possibilities in terms of "absolute" privilege sounds somewhat terrifying—*until one realizes that this is exactly the way matters have been for 184 years of our history,* and the Republic still stands. The practical capacity of the three independent Branches to adjust to each other, their sensitivity to the approval or disapproval of the American people, have been sufficient guides to responsible action, without imposing the authority of one co-equal Branch over another.[184] The American Constitutional design may look like sloppy craftsmanship, it may upset tidy theoreticians, but it has worked—a lot better than other more symmetrical models.

At the least, this is a point in favor of its continuance unchanged; at the most, this may be all the answer we need.

FOOTNOTES

* For the convenience of the reader, an outline of this dissenting opinion is herewith appended.

I. *The Dual Origin of the Privilege Asserted*
A. *The Common Sense-Common Law, Statutory Origin of Privilege*
1. Historically
2. Litigation in Which the Government Is a Party
3. Individual Inquiry of a Governmental Official or Agency
4. The First Amendment
5. The Chief Executive
B. *Separation of Powers—the Tripartite Privilege*
1. Judicial versus Executive
2. Legislative versus Executive
3. Judicial versus Legislative
4. Who Decides?
II. *Development of the Tripartite Privilege with Reference to Executive Documents*
A. *The Legislative Decision of 1789*
B. *Congressional Demands for Executive Papers*
C. *Judicial Demands for Executive Papers—The Trials of Aaron Burr*
III. *Relationship of the Grand Jury to the Judiciary and to the Executive*
A. *Background*
B. *Relationship of the Grand Jury to the Judiciary*
IV. *Amenability of the President to Judicial Process—An Illusory Issue in the Instant Case*
V. *Application of the Constitutional Tripartite Privilege*
A. *Procedures and Practicalities—Statutes and the Constitution*
1. The Authorities
2. Pragmatic Considerations
B. *A Healthy Tension*

** Judge MacKinnon has stated his general concurrence in the result reached in this dissent and that differences in the two dissenting opinions are mainly matters of emphasis. That is my position also in regard to Judge MacKinnon's dissent. Given the compressed time frame in which we must write, it has seemed better to write separate opinions rather than to seek specific concurrent language on the important and delicate matters at issue here.

[1] See Part II.C. *infra,* for the full discussion of the trials of Aaron Burr in 1807. President Jefferson was prepared to instruct the U.S. marshal, an employee then and now of the Executive Branch, not to serve any such order on the President. 9 P. Ford, The Writings of Thomas Jefferson 62 (1898) [hereinafter Writings of Jefferson]. *See* note 118 *infra.*

[2] *Id.* at 57 (emphasis supplied). It is significant that President Jefferson had twice earlier in writing Hay, on 2 June and 12 June, cited the Constitutional separation of powers as the ground for his privilege. *Id.* at 53, 55.

[3] Rogers, *The Right to Know Government Business From the Viewpoint of the Government Official,* 40 MARQ. L. REV. 83, 89 (1956). *See generally* Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question,* 66 YALE L. J. 477 (1957); Kramer and Marcuse, *Executive Privilege—A Study of the Period 1953–1960,* 29 GEO. WASH. L. REV. 623 (1961); Hardin, *Executive Privilege in the Federal Courts,* 71 YALE L. J. 879 (1962).

[4] FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 15 (rev. ed. 1966) [hereinafter FARRAND].

[5] Gladstone, *Kin Beyond the Sea* (in THE NORTH AMERICAN REVIEW, September 1878).

[6] 2 FARRAND 648.

[7] 3 FARRAND 497. Although by resolution of Congress in 1818 (3 Stat. 475) the Journal of the Convention, the bare record of motions and votes, but not the speeches of the delegates, was made public, it was not until 1840, four years after Madison's death that his *Notes* of the Convention were made public. 1 FARRAND XV.

[8] 3 FARRAND 479.

[9] 410 U.S. 73.

[10] *Id.* at 87. Mr. Justice Reed was sitting by designation in the Court of Claims in *Kaiser Aluminum and Chemical Corp.* v. *United States,* 157 F. Supp. 939, 946 (Ct. Cl. 1958).

[11] 157 F. Supp. at 944 (emphasis added).

[12] U.S.C. § 552 (1970).

[13] *Carl Zeiss Stiftung* v. *V. E. B. Carl Zeiss, Jena,* 40 F.R.D. 318, 324–25 (D.D.C. 1966), *aff'd on the opinion below,* 128 U.S. App. D.C. 10, 384 F.2d 979, *cert. denied,* 389 U.S. 952 (1967).

[14] 345 U.S. 1 (1953).

[15] *Id.* at 9–10.

[16] *Id.* at 9.

[17] *Id.* at 11. See Hardin, *supra* note 3, at 892–95, for a well-reasoned critique of the rationale of *Reynolds.*

[18] The Jencks Act is codified at 18 U.S.C. § 3500(d) (1970).

[19] Among those commonly referred to as "housekeeping statutes" are Rev. Stat. 161 (1878), now codified at 5 U.S.C. § 301 (1970), revised in 1958, and the Administrative Procedure Act, 60 Stat. 237 (1946) (now codified in scattered sections of 5 U.S.C.), which was revised by the addition of the Freedom of Information Act, 5 U.S.C. § 552 (1970). Revisions of both statutes were made to prevent citation as authority for withholding information from Congress and the public.

[20] U.S.C. § 552 (1970).

[21] *Vaughn* v. *Rosen,* No. 73–1039 (D.C. Cir., 20 Aug. 1973); *Cuneo* v. *Schlesinger,* No. 72–1328 (D.C. Cir., 5 Sept. 1973); *Soucie* v. *David,* 448 F.2d 1067 (D.C. Cir. 1971).

[22] "There are serious weaknesses in the assumption, popular among liberals who happen at the moment not to be thinking about Senator McCarthy, that public policy ought to draw a sharp distinction between 'military and diplomatic secrets' on the one hand and all other types of official information on the other, giving Congress free access to the latter. In the first place, the line is by no means easy to draw, even when the best of faith is used . . . . More fundamentally, however, the executive's interest in the privacy of certain other types of information is not less than its interest in preserving its military and diplomatic secrets. One obvious example is the data, derogatory or otherwise, in the security files of individuals. Another, perhaps still more important, is the record of deliberations incidental to the making of policy decisions." Bishop, *supra* note 3, at 488.

[23] 365 U.S. 127 (1961).

[24] 357 U.S. 449 (1958).

[25] We were informed by counsel at oral argument that in the court-martial of Dr. William Burton a subpoena was issued to President Monroe for the President's testimony. It was complied with by a deposition. No documents were involved. *See Per Curiam, supra* at 16 n. 42.

[26] Special Prosecutor's Supplemental Brief at 22.

[27] President's Reply Brief at 37, *quoting from* Professor Charles Black's letter to the *Washington Post*, 12 September 1973.

[28] *Myers* v. *United States*, 272 U.S. 52, 116 (1926).

[29] *Humphrey's Executor* v. *United States*, 295 U.S. 602, 629–30 (1935).

[30] 343 U.S. 579 (1952).

[31] *See* note 25 *supra*. "There seems to be no case which presents the question of whether a court would attempt to compel actual production of information in the possession of the executive." Bishop, *supra* note 3, at 482 n. 19.

[32] Discussed in detail in text accompanying notes 75–77 *infra*.

[33] The effect of a Congressional subpoena is described in *Watkins* v. *United States*, 354 U.S. 178 (1957):

It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation. This, of course, assumes that the constitutional rights of witnesses will be respected by the Congress as they are in a court of justice. 354 U.S. at 187–88.

The primary limitation on the Congressional subpoena power is that its exercise must relate to a valid legislative function. Usually, Congressional committees issue subpoenas pursuant to some investigation. The limits on Congress' investigative powers were described by this court in *Shelton* v. *United States*, 131 U.S. App. D.C. 315, 319–20, 404 F.2d 1292, 1296–97 (1968).

[34] 2 U.S.C. § 192 (1970).

[35] 2 U.S.C. § 194 (1970).

[36] *Jurney* v. *MacCracken*, 294 U.S. 125, 151 (1935).

[37] *Id.* at 148. For a discussion of Congress' contempt power, see *id.* at 147–50. *See also Emspak* v. *United States*, 91 U.S. App. D.C. 378, 381, 203 F.2d 54, 57 (1953).

[38] *Jurney* v. *MacCracken*, 294 U.S. at 149–50.

[39] Bishop, *supra* note 3, at 484–85 (emphasis supplied).

[40] 408 U.S. 501 (1972).

[41] 118 CONG. REC. S. 16,766, 92nd Cong., 2d Sess. (emphasis supplied).

[42] The President has also permitted two subpoenaed documents to be furnished.

[43] CM 426402, 1 MILITARY L. REP. 2077 (ACMR, 16 Feb. 1973); 116 CONG. REC. 37,652 (17 Nov. 1970).

[44] 205 F. Supp. 710 (S.D. Fla.), *cert. denied sub nom. Hoffa* v. *Lieb*, 371 U.S. 892 (1962); 108 CONG. REC. 3626, 3627 (1962).

[45] *See* 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 2661, 7 March 1876; § 2662, 21 March 1876; § 2663, 22 April 1879; § 2664, 9 February 1886 (1907); *Soucie* v. *David*, 145 U.S. App. D.C. 144, 159 n. 4, 448 F.2d 1067, 1082 n. 4 (1971) (Wilkey, J., concurring).

My colleagues rely upon *Gravel* v. *United States*, 408 U.S. 606 (1972), for the assertion that "'[w]henever a privilege is asserted, even one expressed in the Constitution, such as the Speech and Debate privilege, it is the courts that determine the validity of the assertion and the scope of the privilege.'" (*Per Curiam*, *supra* at 25.) *Gravel* was a far different question. First, there was never any issue as to Who Decides the scope of the privilege; Senator Gravel himself invoked the jurisdiction of the courts.

Second, the issue to be determined was "whether the activities concerning which questioning or prosecution is sought are: 'integral part[s] of the deliberative and communicative processes by which Members participate in committee and House proceedings . . .'" (*Per Curiam*, *supra* at 25 n. 70), *i.e.*, the nature of the actions involved. This is reminiscent of the factual categorizing to be done in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73 (1973), *Vaughn* v. *Rosen*, No. 73–1039 (D.C. Cir., 20 Aug. 1973), *Cuneo* v. *Schlesinger*, No. 72–1328 (D.C. Cir., 5 Sept. 1973), all discussed in text accompanying notes 167–75 *infra*. Once the nature of the action or category of information is determined, the applicablerule of law is clear. The vital question here is Who Decides this.

Thirdly, even if *Gravel* had involved questions of a demand for documents similar to the case at bar, and the Senator himself had not invoked the aid of the courts, yet the basic distinction of *Gravel* from the case at bar may be that, even though Senator Gravel was protected by the specific Constitutional privilege of the Speech and Debate Clause applicable only to the Congress, yet Gravel is only a *single* member, *not the whole independent Branch of Government*, as is the President. If we were dealing with a grand jury demand for the records of the *Senate* as a *whole* resisted by the Senate as a whole, far different considerations would come into play.

[46] *New York Times*, 14 November 1953, p. 9.

[47] Committee on Armed Services, U.S. Senate Military Cold War Escalation and Speech Review Policies, 87th Cong., 2d Sess. 512 (1962) (emphasis supplied).

[48] *See generally Myers* v. *United States*, 272 U.S. 52, 111–136 (1926); Wolkinson, *Demands of Congressional Committees for Executive Papers (Part III)*, 10 FED. BAR J. 319, 328–30 (1949).

[49] The resolution of the Continental Congress is printed at 1 Stat. 28–29 (1789).

[50] The resolution provided that the books, records, and other papers of the United States, that relate to this department, be committed to his custody, to which, and all other papers of his office, any member of Congress shall have access: Provided, That no copy shall be taken of matters of a secret nature, without the special leave of Congress.

Id. at 28.

[51] Other provisions of the resolution which indicate the relationship between the Congress and the Department include sections requiring the Secretary to "report on all cases expressly referred to him for that purpose by Congress, and on all others touching his department, in which he may conceive it necessary," requiring him to "answer such inquiries respecting his department as may be put from the chair by order of Congress," etc. *Ibid.*

[52] Section 1 of the Act provides:

That there shall be an Executive department, to be denominated the Department of Foreign Affairs, and that there shall be a principal officer therein, to be called the Secretary for the Department of Foreign Affairs, who shall perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President of the United States, agreeable to the Constitution, . . . respecting foreign affairs . . .; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct.

Act of 27 July 1789, ch. 4, § 1, 1 Stat. 28.

[53] The full text of Section 2 is:

That there shall be in the said department, an interior officer, to be appointed by the said principal officer, and to be employed therein as he shall deem proper, and to be called the Chief Clerk in the Department of Foreign Affairs, and who, whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy, shall during such vacancy have the charge and custody of all records, books and papers appertaining to the said department.

Act of 27 July 1789, ch. 4, § 2, 1 Stat. 28.

[54] Wolkinson, *supra* note 48, at 329–30.

[55] *See* Wolkinson, *supra* note 48, at 330.

[56] 1 ANNALS OF CONGRESS 285 (1789).

[57] The discussion ran from 19 May 1789 to 24 June 1789.

See 1 ANNALS 385–614.

[58] The Congress after the Civil War attempted to do just that with the Tenure of Office Act, Act of 2 March 1867, 14 Stat. 430, ch. 154, which was eventually held invalid "in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate." *Myers* v. *United States*, 272 U.S. 52, 176 (1926).

[59] 1 ANNALS 525–527.

[60] *See* 1 ANNALS 601–603.

[61] *Id.* at 604.

[62] *Id.* at 608.

[63] *Myers* v. *United States*, 272 U.S. 52, 115 (1926).

[64] 1 ANNALS 614. *See Myers* v. *United States*, 272 U.S. 52, 114 (1926).

[65] 5 J. MARSHALL, THE LIFE OF GEORGE WASHINGTON 200 (1807).

[66] *Ibid.*

[67] *Id.* at 201.

[68] *Id.* at 204.

[69] *Id.* at 205.

[70] 1 Stat. 49 (1789). Brief debate occurred at 1 ANNALS 615.

[71] As William P. Rogers wrote when he was Attorney General, the Legislative decision of 1789 established the principle that the reasonable construction of the Constitution must be that the three branches of the Federal Government should be kept separate in all cases in which they were not expressly blended, and that no legislation should be enacted by the Congress which would tend to obscure the dividing lines between the three great branches or cast doubt upon the prerogatives properly belonging by the Constitution to any one.

Letter from Attorney General William P. Rogers to Senator Thomas C. Hennings, Jr., 13 March 1958, in *Hearing on S. 921 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 2nd Sess., pt. 1, at 53 (1958).

[72] E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1957, at 113 (4th rev. ed. 1957). For examples of Congressional recognition of Executive privilege see Kramer & Marcuse, *supra* note 3, at 900–02.

[73] Bishop, *supra* note 3, at 486.

[74] It has prevailed without any attempt by Congress to secure adjudication of its claim versus the Executive. Nothing so illustrates the extent to which heat may have replaced light in the appraisal of this entire Watergate affair than the fact that the United States Senate has reversed the strategy of 184 years, and put the question of its right to obtain papers from the Executive into the hands of the Judiciary to determine. Reciprocally, of course, this means that the Executive at some future date would be able to put the same "logically indistinguishable" issue for the Judiciary to determine in regard to access to Congressional papers. No longer would the Senate be able to withstand the demands of a prosecutor, operating through the process of a court just as in the case at bar, for the records of Senate committees, which were denied by resolution of the Senate in the case of *United States* v. *Brewster* and many others. *See* notes 40–45 *supra* and accompanying text.

[75] SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 85TH CONG., 2D SESS., THE POWER OF THE PRESIDENT TO WITHHOLD INFORMATION FROM THE CONGRESS, MEMORANDUMS OF THE ATTORNEY GENERAL 4 (Comm. Print 1958) [hereinafter POWER OF THE PRESIDENT], *quoting from* 3 ANNALS OF CONGRESS 493.

[76] 1 WRITINGS OF JEFFERSON, *supra* note 1, at 189–90 (emphasis supplied).

[77] 5 J. MARSHALL, *supra* note 65, at 658.

[78] POWER OF THE PRESIDENT, *supra* note 75,

at 7, *quoting from* 1 RICHARDSON'S MESSAGES AND PAPERS OF THE PRESIDENT 133.

[79] 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 181 (1907) (emphasis supplied).

[80] *Id.* at 182.

[81] POWER OF THE PRESIDENT, *supra* note 75, at 15–16.

[82] 43 CONG. REC. 527–28 (1909) (emphasis supplied).

[83] POWER OF THE PRESIDENT, *supra* note 75, at 23–24, *quoting from Hearings of the House Select Comm. to Investigate the Federal Communications Commn.*, 78th Cong., vol. 2, at 2338–39 (1949) (emphasis supplied).

[84] Letter from Dwight D. Eisenhower to the Secretary of Defense, 17 May 1954, *reproduced in* POWER OF THE PRESIDENT, *supra* note 75, at 73–74.

[85] Bishop, *supra* note 3, at 485.

[86] *United States* v. *Burr*, 25 Fed. Cas. 30 (No. 14692d) (C.C.D. Va. 1807).

[87] The United States Chief Justice and a District Judge Griffin comprised the court hearing the case. District Judge Griffin appears to have made few recorded comments.

[88] Also at issue was the question whether the President could be compelled to testify in person, but this was not decided either.

[89] *See* 3 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 433 (1919).

[90] 25 Fed. Cas. at 31.

[91] *Id.* at 36.

[92] 3 A. BEVERIDGE, *supra* note 89, at 341.

[93] 25 Fed. Cas. at 31. Mac Rae, one of the prosecutors assisting Hay, argued on 10 June 1807 that a subpoena might issue against the President as any other, but that he was not bound to disclose "confidential communications." Marshall himself had ruled on that very point in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, at 143–45, when he had so advised Attorney General Lincoln, 3 A. BEVERIDGE, *supra* note 89, at 437–38; E. CORWIN, *supra* note 72, at 111–12.

[94] 9 WRITINGS OF JEFFERSON, *supra* note 1 at 44 (emphasis supplied).

[95] 25 Fed. Cas. at 31.

[96] *Id.* at 34.

[97] *Ibid.* Marshall wrote,

In the provisions of the constitution, and of the statute, which gives to the accused a right to the compulsory process of the court, there is no exception whatever.

[98] *Ibid.*

[99] *Ibid.*

[100] *Id.* at 37.

[101] *Ibid.*

[102] "If it contain matter not essential to the defence, and the disclosure be unpleasant to the executive, it certainly ought not to be disclosed. This is a point which will appear on the return. . . . If they contain matter interesting to the nation, the concealment of which is required by the public safety, the matter will appear upon the return. If they do not, and are material, they may be exhibited." *Ibid.*

[103] *Ibid.*

[104] The closest which Marshall came to recognizing any separation of powers issue was at the end of his opinion allowing the issuance of the subpoena for the 21 October letter. 25 Fed. Cas. at 37. Here Marshall discussed the problem of disrespect for the President which might be thought to arise from the decision. Marshall simply stated that his respect for the President was as great as it could be, given his duties on the Court. Even here, however, he did not deal directly with any Constitutional principle of the independence of Executive and Judiciary.

[105] 9 WRITINGS OF JEFFERSON, *supra* note 1, at 60 (emphasis original).

[106] Both Jefferson and Marshall received their formal legal training under George Wythe. Jefferson studied for five years in Wythe's law office and was admitted to the bar in 1767. 12 ENCYCLOPEDIA BRITANNICA 985 (1968). Marshall, on the other hand, simply attended a short series of lectures given by Wythe at William and Mary College in 1780, and he was licensed to practice in August 1780. 14 ENCYCLOPEDIA BRITANNICA 959 (1968).

[107] 9 WRITINGS OF JEFFERSON, *supra* note 1, at 53 (emphasis supplied).

[108] *United States* v. *Burr*, 25 Fed. Cas. 187 (No. 14694) (C.C.D. Va. 1807).

[109] *Id.* at 189.

[110] President Jefferson had written on 23 June 1807 to Hay, indicating that Wilkinson probably had copies of his letters, and that the General had expressed a willingness to furnish them to the court. 9 WRITINGS OF JEFFERSON, *supra* note 1, at 61.

[111] 25 Fed. Cas. at 189.

[112] *Id.* at 190.

[113] *Ibid.*

[114] *Ibid.*

[115] Jefferson's letter to Hay of 12 June 1807 had so indicated. *See* text accompanying note 94 *supra*.

[116] Letter of President Jefferson to Hay of 17 June 1807, in 9 WRITINGS OF JEFFERSON, *supra* note 1, at 57.

[117] *Id.* at 56.

[118] Draft letter of President Jefferson to Hay in 9 WRITINGS OF JEFFERSON, *supra* note 1, at 62. Ford, and others, are not sure if this letter was ever received by Hay. Nonetheless, the draft is important as an expression of Jefferson's views:

That Burr & his counsel should wish to . . . convert his Trial into a contest between the Judiciary & Exve Authorities was to be expected. But that the Ch. Justice should lend himself to it, and take the first step to bring it on, was not expected. Nor can it be now believed that his prudence or good sense will permit him to press it. But should he contrary to expectation, proceed to issue any process which should involve any act of force to be committed on the persons of the Exve or heads of depmts, I must desire you to give me instant notice, & by express if you find that can be quicker done than by post; and that moreover you will advise the marshal on his conduct, as he will be critically placed between us. His safest way will be to take no part in the exercise of any act of force ordered in this case. The powers given to the Exve by the constn are sufficient to protect the other branches from Judiciary usurpation of preeminence, & every individual also from judiciary vengeance, and the marshal may be assured of its effective exercise to cover him. I hope however that the discretion of the C.J. will suffer this question to lie over for the present, and at the ensuing session of the legislature he may have means provided for giving to individuals the benefit of the testimony of the Exve functionaries in proper cases, without breaking up the government.

See note 1 *supra*.

[119] 25 Fed. Cas. at 190.

[120] The record of the case reveals no further action taken concerning the 21 October letter. Nor do the histories which we have consulted indicate whether Burr ever received a full copy of the letter.

[121] *See* text accompanying note 94 *supra*. President Jefferson later wrote Hay on 7 September 1807 on this subject:

I received, late last night, your favor of the day before, and now re-enclose you the subpoena. As I do not believe that the district courts have a power of *commanding* the executive government to abandon superior duties & attend on them, at whatever distance, I am unwilling, by any notice of the subpoena, to set a precedent which might sanction a proceeding so preposterous. I enclose you, therefore, a letter, public & for the court, covering substantially all they ought to desire. If the papers which were enclosed in Wilkinson's letter may, in your judgment, be communicated without injury, you will be pleased to communicate them. I return you the original letter.

9 WRITINGS OF JEFFERSON, *supra* note 1, at 63.

This letter was thought by Beveridge to indicate that the President had received a second subpoena. 3 A. BEVERIDGE, *supra* note 89, at 522. The record of the case does not show that another subpoena was issued to *Jefferson* himself.

[122] 25 Fed. Cas. at 190.

[123] *Id.* at 191.

[124] *Id.* at 192.

[125] *Marbury* v. *Madison* 5 U.S. (Cranch) 137, 144–45 (1803).

[126] Marshall wrote,

I cannot precisely lay down any general rule for such a case. Perhaps the court ought to consider the reasons which would induce the president to refuse to exhibit such a letter as conclusive on it, unless such letter could be shown to be absolutely necessary in the defence. The president may himself state the particular reasons which may have induced him to withhold a paper, and the court would unquestionably allow their full force to those reasons. At the same time, the court could not refuse to pay proper attention to the affidavit of the accused. But on objections being made by the president to the production of a paper, the court would not proceed further in the case without such an affidavit as would clearly shew the paper to be essential to the justice of the case. . . . *In no case of this kind would a court be required to proceed against the president as against an ordinary individual.* (Emphasis supplied.)

25 Fed. Cas. at 192.

[127] *Ibid.* (emphasis supplied).

This is as far as my colleagues discuss the *Burr* trials (*Per Curiam*, *supra* at 28 n. 74). They rest with Marshall's language re the United States Attorney's assertion of privilege; they do not discuss *President Jefferson's final assertion* of 7 September 1807—and neither did Marshall.

[128] *Id.* at 193 (emphasis supplied).

[129] 9 WRITINGS OF JEFFERSON, *supra* note 1, at 64 (emphasis supplied).

[130] 25 Fed. Cas. at 201.

[131] Professor Paul Hardin summarizes the *Burr* case in his article on Executive privilege by stating:

Chief Justice Marshall, sitting as trial judge in the trial of Aaron Burr, subpoenaed information in the hands of President Jefferson. Marshall asserted the power of the court to subpoena the President, examine him as a witness, and require him to produce "any paper in his possession," but later in the same opinion seemed to recognize a restricted legitimate area in which executive discretion might operate. For his part Jefferson avowed that he had the absolute power to withhold documents sought by subpoena, but his eventual cooperation avoided a decisive conflict. This entire paper footnotes the proposition that the *Burr* trial did not provide a final answer to the vexing questions of executive privilege. The case did provide, however, a remarkable example of executive cooperation, considering Jefferson's personal feelings toward Burr, his distaste for the judiciary, and his firm belief that he could resist disclosure if he chose to do so.

Hardin, *supra* note 3, at 899–90 (citations omitted).

[132] Special Prosecutor's Memorandum in Support at 44, *In re Subpoena to Nixon*, 360 F. Supp. 1 (D.D.C. 1973).

[133] *Ibid.*

[134] *In re Subpoena to Nixon*, 360 F. Supp. 1, 11 (D.D.C. 1973).

[135] *Costello* v. *United States*, 350 U.S. 359, 362 (1956).

[136] A clear distinction between the grand and petit jury did not develop until the fourteenth century. See notes 140–41 *infra* and accompanying text.

[137] 1 F. POLLOCK and F. MAITLAND, HISTORY OF ENGLISH LAW 138 (2d ed. 1923).

[135] 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 313–14 (6th rev. ed. 1938).

[139] *Id.* at 314. (Emphasis supplied.)

[140] *Id.* at 322.

[141] *Ibid.*

[142] 8 Howell's State Trials 751.

[143] This provision has been held not to apply to the states through the due process clause of the Fourteenth Amendment. *Hurtado* v. *California*, 110 U.S. 516 (1884).

[144] 370 U.S. 375, 390 (1962).

[145] *See generally* Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590 (1961); Note, *The Grand Jury—Its Investigatory Powers and Limitations*, 37 MINN. L. REV. 586 (1953).

The Supreme Court described the inquisitorial function of the grand jury in *Blair* v. *United States*, 250 U.S. 273, 282 (1919):

[The grand jury] is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.

See also Hale v. *Henkel*, 201 U.S. 43 (1906).

[146] *United States* v. *Smyth*, 104 F. Supp. 283, 295 (N.D. Cal. 1952).

[147] *Levine* v. *United States*, 362 U.S. 610, 617 (1960).

[148] 287 F. 219, 225 (N.D. Ohio 1922). *See also Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972) ("the powers of the grand jury are not unlimited and are subject to the supervision of the judge."); *Brown* v. *United States*, 359 U.S. 41, 49 (1959) ("A grand jury is clothed with great independence in many areas, but it remains an appendage of the court . . ."); *Hammond* v. *Brown*, 323 F. Supp. 326, 344–45 (N.D. Ohio), *aff'd*, 450 F.2d 480 (6th Cir. 1971); *United States* v. *Smyth*, 104 F. Supp. 283 (N.D. Cal. 1952); 1 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES 475 (1966).

[149] *United States* v. *United States District Court*, 238 F.2d 713, 722 (4th Cir. 1956), *cert. denied*, 352 U.S. 981 (1957). But note that the court can prevent indictment by summary discharge. *United States* v. *Smyth*, 104 F. Supp. 283, 292 (N.D. Cal. 1952).

[150] *See generally United States* v. *Smyth*, 104 F. Supp. 283, 289, 292, 293; 1 L. ORFIELD, *supra* note 148, at 476–77.

[151] FED. R. CRIM. P. 6(a). However, "the tenure and powers of the grand jury are not affected by the beginning or expiration of a term of court." FED. R. CRIM. P. 6(g).

[152] FED. R. CRIM. P. 6(g); *United States* v. *Smyth*, 104 F. Supp. 283, 292 (N.D. Cal. 1952).

[153] *In re United Electrical, Radio & Machine Workers of America*, 111 F. Supp. 858, 864 (S.D. N.Y. 1953); 1 L. ORFIELD, *supra* note 148, at 472, 483.

[154] *Brown* v. *United States*, 359 U.S. 41, 49 (1959). Apparently, however, the court has no discretion to refuse the grand jury process on the ground that the evidence sought is immaterial to its investigation. *United States* v. *United States District Court*, 238 F. 2d 713 (4th Cir. 1956), *cert. denied*, 352 U.S. 981 (1957).

[155] FED. R. CRIM. P. 17(c).

[156] *United States* v. *Smyth*, 104 F. Supp. 292 (N.D. Cal. 1952). For examples of instructions to grand juries see *Charge to the Grand Jury*, 12 F.R.D. 495 (N.D. Cal. 1952); *Charge to the Grand Jury*, 30 Fed. Cas. 992, No. 18,255 (C.C. D. Cal. 1872) (Field, J.).

[157] See notes 142–44 *supra* and accompanying text.

[158] *United States* v. *Smyth*, 104 F. Supp. 283, 294 (N.D. Cal. 1952). *See generally* Note, 37 MINN. L. REV., *supra* note 145, at 599–600.

[159] *United States* v. *Cox*, 342 F. 2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965), is not to the contrary. In *Cox* the court reversed a contempt order against a United State Attorney who had refused to sign an indictment tendered by a grand jury despite an order by the supervising court that he do so. A majority of the appeals court held that the prosecutor must help the grand jury draw up the indictment papers, but that he need not give the indictment effect by signing it. The four dissenting judges argued that signing the indictment was a mere ministerial function of the United States Attorney, whose only vehicle for termination of a prosecution is a motion to dismiss the indictment under FED. R. CRIM. P. 48(a). Thus, *Cox* does establish that the Executive branch has complete control over the indictment process; the prosecutor can prevent the grand jury from returning an effective indictment by refusing to sign the indictment papers as required by FED. R. CRIM. P. 7(c).

However, *Cox* is relevant only to the accusatorial function of the grand jury. As Judge Wisdom pointed out in his concurring opinion:

The decision of the majority does not affect the inquisitorial power of the grand jury. No one questions the jury's plenary power to inquire, to summon and interrogate witnesses, and to present either findings and a report or an accusation in open court by presentment.

342 F. 2d at 189. Judge Wisdom's distinction between the grand jury's "presentment" function, see notes 145–46 *supra* and accompanying text, and its "indictment" function is supported by the cases. In *In re Miller*, 17 Fed. Cas. 295, No. 9,552 (C.C. Ind. 1878), the President ordered the district attorney to terminate an embezzlement prosecution under investigation by the grand jury. The supervising court instructed the jury as follows:

"If you believe the president's instructions to the district attorney were intended to prevent you from making the fullest investigation into the matter now before you, and from returning an indictment against the accused if the evidence should warrant it, you should be inspired with additional determination to do your duty. The moment the executive is allowed to control the action of the courts in the administration of criminal justice their independence is gone."

In Sullivan v. *United States*, 348 U.S. 170 (1954), the Court held that an Executive Order fixing responsibility for bringing tax law prosecutions with the Attorney General's office could not affect the power of the grand jury to investigate, even on the basis of evidence presented by the United States Attorney without the Attorney General's approval. These cases illustrate that the Executive cannot control the scope and nature of a grand jury's investigation, even if the Executive has no intention of going forward with any indictment returned by the grand jury as a result of its inquiries.

[160] 323 F. Supp. 326, 344–45 (N.D. Ohio), *aff'd*, 450 F.2d 480 (6th Cir. 1971).

[161] In 1818 a subpoena was issued to President James Monroe, but it summoned him merely to appear personally, not to produce any documents. The subpoena was satisfied when the President answered the court's interrogatories. *See Per Curiam*, *supra* at 16 n. 42; *supra* note 25. In *United States* v. *Cooper*, 25 Fed. Cas. 631 (No. 14,865, C.C. D. Pa. 1800), Justice Chase refused to permit "a subpoena to issue directed to the president of the United States." 25 Fed. Cas. at 633. No reasons for his refusal are recorded. In a related case, No. 14,861, Justice Chase stated:

"The constitution gives to every man, charged with an offense, the benefit of compulsory process, to secure the attendance of his witnesses. I do not know of any privilege to exempt members of *congress* from the service, or the obligations, of a subpoena, in such cases. (25 Fed. Cas. at 626)."

Thus, Justice Chase seemed to be establishing a different standard for members of Congress than for the President. For an interpretation of the *Cooper* case favorable to the President, see POWER OF THE PRESIDENT, *supra* note 75, at 36–37.

[163] 343 U.S. 579 (1952).

[163] That the President has taken personal custody of the tapes and is himself a party to the action is, in my view as well as the majority's, immaterial. "There is not the slightest hint in any of the *Youngstown* opinions that the case would have been viewed differently if President Truman rather than Secretary Sawyer had been the named party," as Justice Black made clear. The authorities relied on by my colleagues here are simply not applicable because no Constitutional privilege of the Executive regarding documents was involved.

It is arguable that judicial process may issue ordering the President to perform a *purely ministerial* act. The basis for such an argument is language contained in *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475 (1867):

"A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law."

71 U.S. (4 Wall.) at 498. *Johnson* held that a court could not order the President to cease enforcement of the Reconstruction Acts on the ground that enforcement of Congressional enactments is purely discretionary with the President and thus not subject to judicial process. Therefore, even if a court could order the President to perform a "ministerial" act, the issue is whether the Presidential action sought is ministerial or discretionary.

In the case at bar, that issue turns on whether the privilege asserted by the President is a mere evidentiary one, as the *Per Curiam* contends, or is grounded on the Constitutional doctrine of separation of powers, as I believe. If the privilege were a qualified, evidentiary one, the President arguably would have a ministerial duty to turn over evidence in his possession when ordered to do so by a judicial subpoena. However, I have endeavored to show that the President has an *unqualified, Constitutional privilege* to decide whether it is in the public interest to disclose records in his possession to a co-equal Branch of Government. The decision whether to disclose or not to disclose the evidence sought in this case is thus a *discretionary* one for the President and not subject to judicial process under *Mississippi* v. *Johnson*. As with many of the other subsidiary issues in the case at bar, resolution of the ministerial versus discretionary question rests on the basic Constitutional issue, *Who Decides?*

[164] 407 U.S 297 (1972).

[165] 37 U.S. (12 Pet.) 524 (1828).

[166] No. 72–1512 (8th Cir., 2 April 1973).

[167] 410 U.S. 73 (1973).

[168] No. 73–1039 (D.C. Cir., 20 Aug. 1973).

[169] No. 72–1328 (D.C. Cir., 5 Sept. 1973).

[170] 5 U.S.C. § 552 (1970).

[171] *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd on opinion below*, 128 U.S. App. D.C. 10, 384 F. 2d 979, *cert. dismissed*, 389 U.S. 952 (1967).

[172] 145 U.S. App. D.C. 144, 448 F. 2d 1067 (1971).

[173] *Vaughn* v. *Rosen*, No. 73–1039 (D.C. Cir., 20 Aug. 1973).

[174] 345 U.S. 1 (1953).

[175] *Citing id.*, at 6 & n. 9.

[176] Indeed, the interest in and impact of the court's decision in this case already extend well beyond the parties and legal rights directly involved. Several third parties have sought to assert their interests and views by moving to file briefs as *amici curiae*:

1. *The Senate Select Committee on Presi-*

dential Campaign Activities. The Committee is seeking to enforce its own subpoena duces tecum against the President in the District Court for the District of Columbia. *Select Commitee on Presidential Campaign Activities, et al.* v. *Nixon,* Civil Action No. 1693–73. In its brief, the Committee takes the position that its case "like the one at bar, presents important constitutional issues relating to the refusal of Richard M. Nixon, President of the United States, to comply with lawfully issued subpenas for vital evidence relating to possible criminal conduct by high executive officials. In both cases, the President's noncompliance with the subpenas is grounded on the claim that material requested is protected by the doctrine of executive privilege." (Brief of Amicus Curiae at 3.)

2. *American Civil Liberties Union.* The ACLU sought leave to file as *amicus curiae* in order to vindicate "the public's right to know how the government is discharging its duties." The ACLU also raised doubts about whether the Special Prosecutor should have access to the tapes for use against persons who did not consent to the recording of their conversations with the President.

3. *Louis Schroeder, et al.* These movants are plaintiffs-appellants in *Schroeder, et al.* v. *Richardson,* No. 73–1265, currently pending in this court. The plaintiffs-appellants allege that they have an interest in this case because one of the issues raised by the briefs is to what extent officials of the Executive Branch can control the investigative functions of federal grand juries.

4–5. Two other amicus motions were made that might be characterized as frivolous, charitably speaking.

6. In addition to these *amicus curiae* motions, the appellees in *Nader* v. *Butz,* No. 73–1935 (D.C. Cir.), moved to schedule the oral arguments on their motion for summary affirmance at the same time as the oral arguments in this case (11 Sept 1973). In *Nader* v. *Butz,* District Judge Jones ordered *in camera* inspection of White House records in the face of a claim of Executive privilege similar to the claim made here. Thus, appellees in Nader asserted that the decision in this case would be dispositive of *Nader.*

[177] This was their concern, but the Framers were not confident they had completely achieved it: ". . . . a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which led to a tyrannical concentration of all the powers of government in the same hands." THE FEDERALIST No. 47 (J. Madison). *Cf.* Mr. Justice Frankfurter: "[T]he doctrine of separation of powers was not mere theory; it was a felt necessity." *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 593 (1952) (concurring opinion).

[178] "The same rule which teaches the propriety of a partition between the various branches of power, teaches us likewise that this partition ought to be so contrived as to render the one independent of the other." THE FEDERALIST No. 70 (A. Hamilton).

[179] From Queen Anne's reign in the early 1700's, the time of Marborough and Godolphin, the English had enjoyed the most efficient government in the western world, with the possible exception of France for a time under Louis XIV or Prussia under Frederick the Great.

[180] Compare the devices enumerated by Hamilton in THE FEDERALIST No. 50, "On Maintaining a Just Partition of Power Among the Necessary Department."

[181] The reason for the separation of powers was well put by Mr. Justice Brandeis:

The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.

Myers v. *United States,* 272 U.S. 53, 292 (1926) (dissenting opinion).

[182] *See* notes 40–45 *supra* and accompanying text.

[183] *See* notes 75–85 *supra* and accompanying text.

[184] Hamilton began his essay "On Maintaining a Just Partition of Power Among the Necessary Departments" by posing the question:

"To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."

He then first referred to that

"due foundation for that separate and distinct exercise of the different powers of government which to a certain extent is admitted on all hands to be essential to the preservation of liberty, . . ."

THE FEDERALIST No. 50.

AMENDMENT OF RAIL PASSENGER SERVICE ACT OF 1970—CONFERENCE REPORT

Mr. MANSFIELD. Mr. President, I submit a report of the committee of conference on S. 2016 and ask for its immediate consideration.

The ACTING PRESIDENT pro tempore (Mr. METCALF). The report will be stated by title.

The legislative clerk read as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2016) to amend the Rail Passenger Service Act of 1970 to provide financial assistance to the National Railroad Passenger Corporation, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses this report, signed by all the conferees.

The ACTING PRESIDENT pro tempore. Is there objection to the consideration of the conference report?

There being no objection, the Senate proceeded to consider the report.

(The conference report is printed in the House proceedings of the CONGRESSIONAL RECORD of Oct. 12, 1973, at pp. 33850–33852.)

Mr. MAGNUSON. Mr. President, I want to take the opportunity to congratulate the conferees of the House and Senate for doing an excellent job in resolving the differences in the Amtrak bills passed by both Houses. It is a product all the conferees can be proud of, and makes several substantive reforms in the Rail Passenger Service Act of 1970 which should do much to improve rail passenger service in the United States.

One substantive change in the Rail Passenger Service Act of importance is made by the House passed provisions which restructure the Board of Directors. Probably the most important thing accomplished by this amendment is the addition of two additional consumer representatives to the Board.

The conferees considered defining the requisite qualities of a consumer representative, but decided that the Senate confirmation process would adequately fulfill this function. It is expected that the President will send up nominees who have demonstrated by education, training, or experience and interest their commitment to the provisions of high quality rail passenger service. The conferees felt that such a commitment was especially desirable when dealing with a corporation such as Amtrak, the major function of which is to provide service to the public.

The conferees were quite concerned about apparent conflicts of interest which have appeared on the presently existing Board of Directors. Well-publicized instances of the representatives of the common stockholders—the railroad presidents—demonstrating their lack of commitment to Amtrak's success, if continued, will lead to legislative reform. It is expected that every Board member will be committed to the success of the Corporation and will not allow any employment position with a railroad to interfere with that commitment. If the commitment of the railroad representatives on the Board to the success of Amtrak remains in doubt, the House and Senate Commerce Committees will eliminate this conflict by legislation.

The conferees accepted the provision in the House-passed bill which defined "just and reasonable compensation" in section 402 of the Rail Passenger Service Act of 1970. Acceptance of this definition legislatively reverses the Interstate Commerce Commission's recent decision in Finance Docket 27353 (sub. No. 1), "Determination of Compensation under section 402(a) of the Rail Passenger Service Act, as Amended,". The conferees inserted report language which specifically spells out the way in which railroads are to be compensated for operating trains for Amtrak. The conferees specified no level of maximum payment, but made clear that payments in excess of short-run available costs are to be based on quality of service. It is anticipated that quantity of service would also enter into these calculations, but quality of service is to be the major determinant of any payments in excess of short-run avoidable costs. In this connection, I would like to refer my colleagues to the colloquy that occurred yesterday on the floor of the House of Representatives, which appears in the CONGRESSIONAL RECORD of October 17 at pages 34479 to 34484.

Section 801 of the conference substitute, under which the Commission is to promulgate regulations necessary to provide adequate service, equipment, tracks, and other necessary facilities for quality intercity rail passenger service is intended to relate to section 402. If Amtrak and the railroads cannot agree on compensation, quality of service would at least be partially determined by compliance with Commission standards issued under section 801. It is anticipated that the railroads and Amtrak would agree to a compensation formula. Only in the event of a failure to agree would the Commission determine compensation,

based largely on the quality of service rendered.

Section 801 is designed to assure that the quality of rail passenger service will improve. It is anticipated that the railroads and Amtrak could contract for quality of service which exceeds the rules and regulations issued by the Commission under this section. For instance, if Amtrak and a railroad wanted to improve roadbed quality over what it was in May of 1971—to which standard the railroads are already contractually obligated to maintain—the railroad and Amtrak could contract for the improvements which meet or exceed the regulations promulgated by the Commission. If the parties could not agree on the allocation of costs for such improvements, the Commission would be empowered under section 801(a) to allocate such costs. Commission allocation could occur whether the improvements were necessary to meet Commission issued regulations or whether the improvements exceeded the requirements imposed by those regulations.

Section 801 is not to be confused with the operation of the new section 402(f), which permits the corporation to apply to the Secretary of Transportation for an order requiring a railroad to permit accelerated speeds. This provision was included to insure that intercity passenger trains operated by or on behalf of the corporation will be permitted to operate at the maximum permissible safe speeds under the Federal Railroad Safety Act of 1970. The provision is also designed to require the Secretary to make findings as to whether accelerated speeds are unsafe or otherwise impracticable, and to ascertain what improvements are necessary to make such accelerated speeds safe and practicable. Amtrak and the railroad could then contract for such improvements, and in the absence of agreement regarding the allocation of costs for such improvements, the Commission could allocate such costs under the authority of section 801. If the improvements were required to meet regulations issued by the Commission under section 801, they could be ordered in the absence of contractual arrangements.

It is anticipated that the rules and regulations issued by the Commission under the new section 801 will define with great specificity the requisite elements necessary to provide high-quality rail passenger service. Since the Commission's powers and duties have been expanded under this provision, it is possible that the Commission may want to organize a new unit internally to fulfill its obligations under section 801.

Mr. President, I again want to congratulate the conferees for their efforts in helping to assure that the United States will improve intercity rail passenger service. Recent energy shortages and environmental concerns underscore this need. Every major industrialized country except the United States is vigorously pursuing the development of rail passenger service. The legislation will help to foster high-quality rail passenger service in the United States.

Mr. HARTKE. Mr. President, the committee of conference has agreed to several substitute provisions which resolve differences between House and Senate passed Amtrak legislation. While generally I am in full agreement and completely support the actions of the conference committee, there are a few items that should be further explained so as to eliminate any possibility of their being misunderstood.

The Senate bill amended section 305 of the Rail Passenger Service Act of 1970 by deleting the second sentence of subsection (a), which relates to railroad employees. This was done both to remove an inconsistency which presently exists in the act as a result of amendments made in 1972, and as a further expression of the intent of Congress which is expressed in the 1972 amendments—Public Law 92–316—that "insofar as practicable, the Corporation shall directly operate and control all aspects of its rail passenger service." It is the consensus of the members of the Surface Transportation Subcommittee, that Amtrak should directly employ all persons dealing with the public and all persons whose full-time occupation is solely related to the provision of intercity passenger services provided by Amtrak.

Mr. President, my subcommittee has received a substantial amount of testimony indicating that railroad employees may not always be as responsive to Amtrak policies and goals as are those who are employed directly by the Corporation. One of the major problems faced by the Corporation in attempting to provide high quality rail passenger service is poor maintenance and a lack of control over the execution of corporate policies. It is my opinion that only by directly employing more of those persons engaged in intercity rail pasenger service will the necessary control and responsibility over the quality of services be achieved. While Amtrak may, for economic reasons, still want to rely on the railroads to provide employees for such things as operating personnel, every effort should be made by the Corporation to insure that all employees having contact with the public are employed directly by Amtrak.

Of course, this provision was not intended to have any relationship to the labor organizations representing employees, whether they work for Amtrak or for the railroads. It is designed solely as a further expression of congressional intent regarding the need to directly control employees having contact with the public and to exercise more effective control over those critical areas of maintenance and the like that relate directly to the quality of service.

Mr. President, if there is any theme which runs throughout the Amtrak Act of 1973, it is a consistent emphasis on the need for quality of service. Almost every provision in this act springs from the desire to see higher quality rail passenger service in the United States. This concern is especially evident in section 801, which for the first time assigns responsibility for adequacy of service to a regulatory agency. Section 801 provides the Interstate Commerce Commission with considerable new power and responsibility, and my subcommittee will be closely monitoring the Commission's performance in carrying out the mandate contained in this section. It may well be that the Commission will want to reorganize itself in such a way as to be responsive to the obvious needs here. My subcommittee will be expecting quick and vigorous action from the Commission under section 801, and full cooperation from officials of the National Railroad Passenger Corporation in meeting or exceeding the requirements imposed by the Commission under section 801.

Mr. TOWER. Mr. President, I want to lend my support to the conference report on S. 2016, the Amtrak Improvement Act of 1973. This legislation makes a number of substantive improvements in the Rail Passenger Service Act of 1970 and gives the National Railroad Passenger Corporation the power it needs to institute the long-awaited service between the cities of Dallas and Houston, Tex.

The citizens of Texas, along with officials of Amtrak, have been attempting to start service between Dallas and Houston for some time now, and their efforts so far have been frustrated by the Southern Pacific Railroad over whose tracks the service would operate. The Southern Pacific has contended that the tracks over this route are in such bad condition that they are unfit for the operation of passenger trains, although there have been reports that freight trains operate over the same line at faster speeds than the Southern Pacific has proposed for Amtrak's passenger trains.

The Amtrak Improvement Act of 1973 has two provisions designed to deal with the sort of problem we have been facing in Texas. The first provision is contained in an amendment to section 402 of the Rail Passenger Service Act. This amendment adds a new section (f) which permits Amtrak to apply to the Secretary of Transportation for an order requiring a railroad to permit accelerated speeds by Amtrak trains if that railroad had refused to permit such accelerated speeds at Amtrak's request. The Secretary is required to enter an order, after a hearing held pursuant to section 553 of title 5 of the United States Code, which fixes the maximum permissible speeds of Amtrak trains on such terms and conditions as he deems reasonable. The Secretary is also required to make findings as to what improvements are necessary to track, roadbed, signalling systems, or other facilities to permit the accelerated speeds requested by Amtrak. These improvements would relate to the requirements of rules and regulations issued pursuant to the Federal Railroad Safety Act.

The second provision of the Amtrak Improvement Act of 1973 which might be relevant to the problems faced in the Dallas to Houston run is section 801. This provision, in addition to requiring the ICC to promulgate adequacy of service regulations, directs the Commission to allocate any costs required for improvement necessary to improve rail passenger service. On the Dallas to Houston run, for instance, the Southern Pacific has claimed that $7 million is need-

ed to upgrade the tracks for passenger service. The Secretary's order under section 402(f) would set out exactly what improvements are necessary, and then Amtrak and the railroad could agree on the division of costs to effectuate these necessary improvements. In the absence of agreement, the Commission is directed, under section 801, to allocate these costs between Amtrak and the railroads. Thus, the allocation of cost provision of section 801 can be used either to meet the adequacy of service regulations issued by the Commission or to pay the cost of other improvements in rail passenger service either in conjunction with rules and regulations issued by the Interstate Commerce Commission or independently exceeding the requirements promulgated by the Commission.

Mr. President, it is my hope that the provisions of the Amtrak Improvement Act of 1973 which I have referred to are sufficient to assure high quality rail service. It is my opinion that this legislation will give the National Railroad Passenger Corporation the tools it needs to both upgrade service throughout its system and to break the deadlock that has prevented the institution of much needed service betweeen Dallas and Houston.

Mr. MANSFIELD. Mr. President, I move the adoption of the conference report.

The report was agreed to.

APPEARANCE OF SENATOR ROBERT C. BYRD AND SENATOR GRIFFIN ON ABC'S "ISSUES AND ANSWERS"

Mr. MANSFIELD. Mr. President, on Sunday, October 14, 1973, the distinguished assistant majority leader, the Senator from West Virginia (Mr. ROBERT C. BYRD), and the distinguished assistant Republican leader, the Senator from Michigan (Mr. GRIFFIN) were interviewed by Sam Donaldson and Herbert Kaplow, ABC news correspondents, on "Issues and Answers."

I think that the viewpoints of these two distinguished Senators are worth much as far as the information of the Senate and the knowledge of the people are concerned, and I ask unanimous consent that the interview be printed in the RECORD at this point in its entirety.

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

"'ISSUES AND ANSWERS"

Guests: Senator ROBERT BYRD (D. W.Va.), Senate Majority Whip.

Senator ROBERT GRIFFIN (R. Mich.), Senate Minority Whip.

Interviewed by: Sam Donaldson—ABC News Corrersponden and, Herbert Kaplow—ABC News Correspondent.

Mr. KAPLOW. Gentlemen, we are pleased you can be with us today, particularly so in view of the unique circumstances in which we find ourselves today.

Senator Byrd, do you foresee any problems in the swift confirmation of Congressman Ford for the vice presidency?

Senator BYRD. I do not at the moment foresee any problems. I think that the Committee on Rules of the Senate will and should make very careful preparation for the hearings and, having done that, I think that the hearings should be as thorough as the circumstances indicate at the time. I think that the nomination of Mr. Ford has been very well received on the Hill, but, having said that, it seems to me that the Congress has to share the mandate under the Constitution provided for by the 25th Amendment to nominate a Vice President. This being the case, it seems to me that we have a very solemn responsibility and I think that we ought to conduct ourselves accordingly.

Mr. KAPLOW. Do either of you gentlemen know anything in the Ford record that might be a problem?

Senator GRIFFIN. Let me answer that, Herb. I have known Gerry Ford for at least 20 years, during the whole period of my service in the Congress, which is 18 years, and he has been one of my closest friends. I know him very well.

I don't know anyone who you could describe as a person with higher standards in terms of integrity, honesty. He has won the respect, obviously, of his colleagues both on the Democratic side of the aisle and the Republican aisle by his performance and leadership in the House; earned his election and re-election as leader. I would think that it would be a reflection on the Congress itself if it didn't move speedily to confirm a nominee like Gerald Ford.

Former Justice Goldberg has said as much over the weekend, that the nation really can't stand the trauma of any indication or suggestion of playing politics with this nomination.

Mr. DONALDSON. Well now, Senator Griffin, of course, the Democrats do control Congress and they will control the timetable. At what point do you think you would start to accuse them of dragging their feet? Three weeks, four weeks, five weeks?

Senator GRIFFIN. Well, yesterday the Majority Leader, Mike Mansfield, said a nominee like Gerald Ford ought to be confirmed by the end of the month and I think that Mike states the situation very well. That would give the Congress time, the committees time to make their investigation and to get an FBI report back. Perhaps it would take another week beyond that. I think Mike was a little bit shy in his estimate. But certainly when you get into 3, 4, 5 weeks, I think that is much too long for a nominee like Gerald Ford, unless there is some real substantial reason that develops.

Mr. DONALDSON. May I go forward and just about the general process? Gerald Ford will, if I am correct, be the first person who is a nominee for Vice President to undergo a full field FBI check in that capacity. But maybe it makes good sense in the light of what has happened. Is there any way either one of you can think of that we might in the future avoid a Spiro T. Agnew type situation, or an Eagleton situation?

Senator BYRD. May I say this with respect to what my colleague says here about dragging the feet, I share his viewpoint at the moment that Gerry Ford is a clean candidate, but I don't think that—while we should act with dispatch, I don't think we should act with haste. I think the important thing here is to assure the American people that Gerry Ford has the character, integrity and the honesty which are so needed in government these days in order to rebuild the confidence of the people in the American political system. I think it is necessary that we take whatever time is adequate in preparing for the hearings and in the conduct of the hearings, and I also share with him the viewpoint that there should not be partisan politics involved. This is a political question, but we should not be partisan in our approach. I think it is our duty under the Constitution to approach this seriously, solemnly and to attempt in every way to fully explore the credentials and the qualifications of this candidate.

Now, this is the first time that a Vice Presidential candidate will have received such scrutiny. I think it is ironic that this is the case, that only after a tragedy has occurred in American politics does the Vice Presidential candidate undergo careful scrutiny. Gerry Ford will be the first Vice Presidential candidate in American history to undergo such scrutiny.

Mr. DONALDSON. Ought he to be the last?

Senator BYRD. No. I think both parties ought to create a mechanism whereby the number two man will be selected not on the basis of his charisma, not on the basis of how he will balance out the ticket geographically or philosophically, not on the basis of whether or not he is a good campaigner, but there ought to be this mechanism and I think it can be provided, whereby the number two man will undergo the kind of scrutiny that he ought to undergo in order to assure the American people in both parties that the number two man is the correct man.

Senator GRIFFIN. If I could address myself to the question, I think after the experience that both parties have had in this past election with their nominees for Vice President, we really ought to take a whole new look at the process for selecting Vice Presidential nominees. The very least should be reform at the conventions and to provide more time for consideration. But I'd like to suggest that the 25th Amendment as it is being implemented in this particular case could well lead the way toward another constitutional amendment to provide that the Vice President should be selected after the election of the President and in somewhat the same manner that we are now selecting a Vice President. I think that it would be altogether appropriate that the Congress would play a role in this selection as it is taking place at the present time.

I think what is going on right now is good for the country, it is good for Congress to be involved. The Vice President is the presiding officer of the Senate. I would suggest that after the President has been elected, he could submit a name for Vice President to the Congress to be confirmed before the inauguration date, or if there were concern about that working, perhaps the President could submit three names to the Congress during that interim period and let the Congress select the Vice President.

I think that ought to be seriously studied and I have my staff working on a possible constitutional amendment at the present time.

Mr. KAPLOW. Senator Griffin, did the punishment that was meted out to former Vice President Agnew fit the crime?

Senator GRIFFIN. Herb, that is a very difficult question to answer, as I am sure most people would recognize. I think that Attorney General Elliot Richardson did a very remarkable job in bringing this crisis to some kind of a logical and rational conclusion. I know there are many people who will feel that if someone else had done the same thing, they, of course, would have been sitting in jail and here this person is getting off by merely resigning and paying a fine, and yet I think it has got to be taken into account what it would have done to the national interest to have a long-drawnout crisis with a cloud hanging over a Vice President for a long period of time, and also the fact that this man has suffered a great deal as a result of the humiliation involved in resigning. Also, we should keep in mind that he is still subject to civil liability, perhaps, or a tax payment and that the State of Maryland hasn't decided yet at least whether they are going to pursue the possibility of criminal punishment.

Mr. KAPLOW. But is not the ultimate test of whether our system is functioning is that the highest plan in this country gets no preferential treatment and the lowest, economically, socially, politically?

Senator GRIFFIN. I think that is a consideration and I believe you have to crank into the equation, however, that if any other person in the United States of either party were the Vice President under these circumstances, he would have been treated the same way.

Mr. DONALDSON. Senator Byrd, I would like to have you answer that question. Do you think the punishment fits the crime?

Senator BYRD. From the standpoint of just common perception, I think a $10,000 fine and three years on probation would appear to be a rather minor punishment for the crime.

Yet, on the other hand, I think we have to remember this man's political career is completely demolished. Economically, he is ruined. His family is shamed, and through no fault of themselves. He is disgraced nationally. He is subject to possible disbarment in the State of Maryland. He is subject to further tax penalties plus the interest on the back taxes, and so I think this man is crushed politically, economically and personally. And to add to that, as Senator Griffin has said—it is repetitious—for him to have stayed in office, to have undergone a long, brutal trial, would have been very damaging to the national interest.

Mr. DONALDSON. I don't pretend to know what Mr. Agnew intends to say to the American people on Monday, as I understand he is going to speak, at least on one television network. But would it be helpful or hurtful if he chooses to say that he is innocent of all of the other allegations that were contained in that Justice Department summary of the potential evidence, and if he asserts, as he did once in Los Angeles not long ago, that the Justice Department was really framing him; what would that accomplish, if that is in fact the tenor of his speech?

Senator GRIFFIN. Well, Sam, I think it would be highly inappropriate to try to sit here and decide or speculate on what Mr. Agnew might say tomorrow night. I am frankly a little bit disappointed that he is going on television at all, but I will just have to wait and see what he will say. I couldn't speculate on that.

Mr. DONALDSON. Do you think it is a good idea for him to speak? It certainly is right, Senator Byrd, but what is your thought?

Senator BYRD. He has to make that decision. I don't know what he is going to say. It depends on what he is going to say. I, at the moment, can't attempt to second guess him.

Mr. KAPLOW. What would you tell the next man who is convicted of income tax evasion whose family is disgraced, who loses his position, who is economically broken and who goes to jail and says, "All right, Vice President Agnew suffered three-quarters of these indignities but he is not in jail." What are you going to tell him?

Senator GRIFFIN. Herb, I don't think I can add to the answer I have already given. I realize it perhaps doesn't satisfy you, but I don't think you can have a satisfying answer in the dilemma that the Attorney General faced in this particular situation. I think he came out with the best answer possible in terms of the national interest.

Mr. KAPLOW. Is not this country supposed to have the fiber to be able to stand a protracted pursuit of justice to the very end?

Senator GRIFFIN. Oh, I think we could have survived. I think it would have been a very traumatic and difficult, divisive experience; one that we don't really need at the present time, and I don't think it would have been a good thing. We probably could have survived it.

Mr. DONALDSON. Let me pick up on Herb's question and move it forward to perhaps the next crisis in this extraordinary year of ours.

The Appellate Court ruled on Friday in its words that he, meaning President Richard Nixon, is not above the law's commands and he must give up the tapes. Now, the President, of course, has the right to appeal that to the Supreme Court and most people believe he will, but if the Supreme Court rules against the President and if the President refuses to obey, Senator Byrd, would you expect impeachment proceedings to be brought against him?

Senator BYRD. I think it would raise a serious prospect of impeachment proceedings which, of course, would have to be initiated by the House of Representatives.

(Announcements).

Mr. DONALDSON. Senator Byrd, we were talking about the tape issue and you had said if the President refused a Supreme Court decision to turn over the tapes you thought impeachment proceedings might be brought by the House. Why do you think that?

Senator BYRD. Well, because I think that for any branch of the government to set itself up as being above the law is very detrimental to the very foundations of our political system and if the court makes the decision in support of the Circuit Court, and of the District Court, the President ought to release at least the relevant portions of the tapes.

I think the American people are going to expect the President to do that. I don't happen to agree with Mr. Connally in what he said in this respect, or was reported to have said.

I would hope though that the President would, in the meantime, negotiate with Professor Cox and with Judge Sirica, a process whereby the relevant portions of these tapes would be made available and thus avoid another very traumatic crisis.

Senator GRIFFIN. I really can't disagree with anything that Bob Byrd has said other than to add and be sure we do not forget that President Nixon said that he would comply with and follow the direction of a definitive decision by the United States Supreme Court.

Mr. DONALDSON. What do you call "definitive?"

Senator GRIFFIN. I think clearly if there would be a unanimous court that would order him to turn over the tapes by a certain date, there wouldn't be any question about it. If you ended up with five to four decisions with opinions going in all directions that were fuzzy and not definitive, that would be the other extreme. In between I think we could have a long discussion of what would be definitive, but I think the American people will make that judgment and of course the House of Representatives will make it too.

Senator BYRD. May I respond to that just briefly? I agree with Bob that it ought to be—I would hope it would be a decision which would not be a very narrowly cut decision and I think if it should turn out to be a five-four decision, the President might feel that is not a definitive decision. I happen to disagree with that. I think a five to four decision is a majority decision and therefore it is a definitive decision.

I think that the President, however, in using the word "definitive" might have been talking about a decision that is not rendered on the merits, but on the procedural aspects. If that is the case, then I would agree with him that it would not be definitive.

Mr. KAPLOW. Do the rest of us not live by five to four decisions?

Senator BYRD. Yes.

Senator GRIFFIN. Just remember sometimes these five to four decisions involve opinions of justices going off in all directions. If there are five members who have agreed on a course of action, then I don't think there is any question that he should comply with that order.

Mr. DONALDSON. Do you think Gerald Ford's nomination—and let us assume he is confirmed and he becomes the Vice President—will in any way affect a decision by the House of Representatives in the future to perhaps move against Mr. Nixon, if in fact we have this situation of a court decision and the President refusing to obey it? Would it help him, would it hurt him? Just a neutral thing?

Senator GRIFFIN. If you are asking me, I would say that it shouldn't, and I think we will be watching to see whether or not such political considerations would get into the way. I think that the question of Mr. Ford's nomination being confirmed is one matter under our constitutional process. The question of what the House might do in the event, unlikely event I would say, that the President wouldn't comply with an order of the Supreme Court is another event and the two should not be confused or related.

Mr. KAPLOW. Senator Griffin, you have been close to the White House. Do you have any reason to believe that the President will negotiate some sort of arrangement short of the Supreme Court making its ultimate ruling?

Senator GRIFFIN. No, I can't say on any particular authority that I know of any special information in that regard. I would remind you of an answer that the President gave in one of his press conferences when he was asked whether or not if the Supreme Court upheld his view, saying that he didn't have to turn over the tapes, would he nevertheless make them available voluntarily? I was very interested in the fact that he didn't say No. He said: "Would you come back and ask me that question at a later time if it is an appropriate question?"

I have personally been encouraging the release of those tapes on a voluntary basis, at the same time recognizing that he has a strong, legal case, in my view, for the position he has taken in terms of the legal questions involved.

Mr. KAPLOW. If I understood you correctly, you agreed with Senator Byrd a few moments ago when you said that if the court renders a "definitive" decision and the President does not abide by it, you would agree that impeachment proceedings would be—take it up from there.

Senator GRIFFIN. As I understand Senator Byrd, he said there would be a likelihood that the House would move toward impeachment proceedings, or words to that effect, and I wouldn't disagree.

Senator BYRD. I said that it would raise the prospect.

Senator GRIFFIN. Raise the prospect. Now let me just head you off a little bit, Herb, and I think Bob would agree with me. We are Senators. In the event there would be an impeachment proceeding and it would come over to the Senate for trial, we would sit in judgment and have to decide the very question that you are asking, or trying to get to and that is, should a President be removed from office under those circumstances. I don't think that we should make that judgment now. That is a judgment we would have to make later if the circumstances arose.

Mr. KAPLOW. What I am asking both of you is, do you agree that the prospects are likely, or do you agree that the House should therefore start impeachment proceedings?

Senator BYRD. I don't think I could say that they are likely, nor can I say that it should. I think I would have to await the Supreme Court's decision, try to analyze that in my own mind and then see what the President does in reaction to that decision, but I would say this, that if he should refuse what is clearly to most of us a definitive ruling by the Supreme Court that he should release those tapes, I should think that we would have a very serious problem on our hands.

Senator GRIFFIN. This is all based on speculation because he said he would comply with the court.

Mr. KAPLOW. You tend to agree essentially with Senator Byrd?

Senator GRIFFIN. That it would raise the prospects, yes.

Mr. DONALDSON. Let me move you out of the speculative to the action.

There is a war on in the Mideast, and there are reports today that the United States is going to resupply Israel with Phantom jet bombers. These reports have not been confirmed to the best of my knowledge, publicly, by U.S. officials. Is it a good idea, should we give Israel jet planes now?

Senator BYRD. I think in view of the fact that the Soviet Union is airlifting equipment to the Arab countries, even though our country is, I think, on a fairly friendly basis with the Arab countries, I think we have no alternative but to help to maintain the balance of power in the Middle East and we do that by resupplying Israel.

Mr. KAPLOW. Senator Byrd, you are on the Foreign Relations Committee. I don't know whether that gives you more information than the rest of us have, but are we sending something? Has the balance been disturbed?

Senator BYRD. I am not on the Foreign Relations Committee. Senator Griffin is.

Senator GRIFFIN. I can say I talked with Secretary Kissinger this morning to get an update on the situation. It is serious. It is particularly disturbing that Jordan has now moved a brigade into Syria. There are some indications of the possible cut-off of oil, at least in the wind.

I think in terms of our past relationships and commitments in effect to Israel that the least that we can do is to provide them with a balance of arms. I think that the key to this whole situation is our relations with the Soviet Union. So far a detente hasn't broken down as a result of what has happened over there, even though it has been strained, and the hope I think is that working with the Soviet Union we are going to somehow bring this war to an end with some kind of a cease fire that can be implemented.

Mr. DONALDSON. First, a quick question, then a longer one. You talked to Dr. Kissinger this morning. Are we going to resupply Israel with planes?

Senator GRIFFIN. I think that there isn't any question that we will be supplying Israel with planes and equipment.

Mr. DONALDSON. Second question: How can you say the detente has not broken down if on one hand the Soviet Union is pouring material into the Arab countries; on the other hand, we are pouring materials into Israel.

Senator GRIFFIN. It hasn't broken down because we are in close communication with the leaders of the Soviet Union. I think we understand each other's position and the clients that we have on either side. It is not surprising to either side that there would be the resupply.

It hasn't broken down because we are working together still trying to figure out a way to bring this thing to an end.

Mr. KAPLOW. Did Kissinger tell you what the Russians were sending Egypt and Syria?

Senator GRIFFIN. No.

Mr. KAPLOW. Was it your impression these were supplies that did not go into the critical equipment area?

Senator GRIFFIN. I must say, Herb, we didn't go into that.

Mr. KAPLOW. He left you with the impression he is still working with the Soviets and the Soviets are still interested in not letting the battle escalate or in ending the fighting.

Senator GRIFFIN. I can't get into the discussion to that extent and it wouldn't be fair. Dr. Kissinger is the one leading our diplomatic effort in a very serious and a vigorous way and I think the best attitude at the present time is to let him proceed.

Mr. DONALDSON. But you mentioned the word "oil." Let's look at that question. There is a strong indication that the Arabs are threatening, at least, to cut off the oil supply in retaliation. Blackmail, if you will, of the United States policy.

If they do that, Senator Byrd, how should we reply?

Senator BYRD. I think we have got to remember that the Arab countries are pretty realistic too. They are going always to act in their own best interests. There are several of the Arab countries that are conservative and are pro-Western.

I think what we have go* to do here is two or three things. One, we have got to continue to maintain this balance of power in the Middle East and that means we will have to do some resupplying of Israel with equipment.

Two, we have got to impress upon the Soviet Union that it is the responsibility a solemn one of both of these great world powers, to bring this fighting to a halt. This may mean a cease fire in place. In any event, the two warring sides ought to get together and negotiate a political settlement. That is the only way it is going to be brought to a permanent solution.

Mr. DONALDSON. Could either of you see the United * * * going to war to save their oil?

Senator GRIFFIN. No, I don't see that as a prospect, no.

Mr. KAPLOW. Thank you, Senator Byrd, Senator Griffin, for being with us on "Issues and Answers."

INVOLVEMENT IN ISRAEL

Mr. WILLIAM L. SCOTT. Mr. President, it does not take any great amount of wisdom to know that a very serious situation is developing in the Middle East which could result in the direct involvement of our own country. This comes just a few months after the termination of our involvement in the longest war in our history. We know that there was no declaration of war in Vietnam, no instant involvement but a situation in which we first sent equipment, then advisers, then a few troops, later more troops, until more than one-half million of our young men were involved. It was a conflict that resulted in great division within our country, with demonstrations in the streets, with some of our young people going to Canada or other parts of the world to escape their military obligations. It was an unpopular and costly war that most Americans would have avoided if they had known how it was going to develop. We should have learned a lesson.

What happened in Vietnam should serve as a guide for what could happen in the Middle East and I am concerned about the position we are taking. In my opinion the overwhelming majority of the American people want to avoid another involvement regardless of where their sympathy may be. We cannot presume to settle every conflict that develops. There is a great deal of difference between cooperating with other major nations within the free world to maintain peace and attempting to be the policeman for the entire world.

It is my understanding that this country is the only Nation furnishing material and equipment to Israel at this time. It is also my understanding that the Soviet Union is supplying the Arab nations. Not only does the possibility exist of us becoming involved in a regional war, but with the two great powers airlifting and shipping supplies to opposite sides, a global conflict could result. Therefore, I want to indicate opposition to the President's action in sending warships, marines, or other military personnel to the Mediterranean area. I believe our President and Secretary of State should exercise great caution in their decisions and encourage a negotiated settlement rather than to practice what might be called "gunboat diplomacy."

Mr. President, I am concerned about Americans flying airplanes to Israel with war materials of all kinds. Apparently, the purpose is to replenish the supply of equipment and material Israel has lost in the war so far. But it is also my understanding that no other nation will even permit our planes to land to refuel and that, except for a field in the Azores, we have to fly nonstop to Israel. This reinforces the belief that whatever action we are taking is being done without any support from other nations within the free world.

All of us were pleased with the termination of our involvement in Vietnam and we were more happy to have our prisoners of war returned, although there is a continuing concern about men still missing and unaccounted for. Our national security is not involved; yet, we are going it alone, much as we did in Vietnam. In my opinion, our national security rests in having military forces second to none, in exercising restraint and caution, determining what is right, and then taking joint action with other major nations of the free world to preserve peace.

We have much to lose by involvement in Israel. Of course, it would mean an increase in military spending, more inflation, and scarcity of material of all kinds. It could result in the loss of oil that we now obtain from some of the oil-producing nations of the Middle East. But, most important, Mr. President, it could also result in the loss of the lives of many of our young men, and this is my primary concern. If we become involved in the Middle East, the demonstrations on our streets and college campuses during the Vietnam conflict might be mild compared with the internal difficulties we would experience by such a course of action. And the fury of the mob might well be directed against those people who are now agitating for our involvement. There are limits to what our free institutions can withstand.

Let me conclude, Mr. President, by saying that as a member of the Armed Services Committee and a Member of the U.S. Senate, I cannot support any action of the President or the administration which tends to involve us in this conflict but will work with other like-minded Senators in opposing our involvement in every reasonable way. I hope that the American people will let their Representatives and Senators, as well as the administration, know that they do not want us to become involved in a war in the Middle East and that they do not want us to continue to risk involvement in this conflict by having our men fly supplies to Israel or by sending our naval fleet, our marines, or other military personnel into the Mediter-

ranean area as a threat to the Arab nations. It is an explosive situation which I know is of concern to all Senators and all of the American people.

ENROLLED BILLS AND JOINT RESOLUTION PRESENTED

The Secretary of the Senate reported that on October 16, 1973, he presented to the President of the United States the following enrolled bills and joint resolution:

S. 2282. An act to change the name of the New Hope Dam and Lake;

S. 2486. An act to provide that the project referred to as the Trotters Shoals Dam and Lake on the Savannah River, Georgia and South Carolina, shall hereafter be known and designated as the "Richard B. Russell Dam and Lake"; and

S.J. Res. 164. Joint resolution to permit the Secretary of the Senate to use his franked mail privilege for a limited period to send certain matters on behalf of former Vice President Spiro T. Agnew.

REPORTS OF COMMITTEES

The following reports of committees were submitted:

By Mr. MANSFIELD (for Mr. FULBRIGHT), from the Committee on Foreign Relations, without amendment:

S. 1526. A bill to amend the International Organization Immunities Act to authorize the President to extend certain privileges and immunities to the Organization of African Unity; and

H.R. 5943. An act to amend the law authorizing the President to extend certain privileges to representatives of member states on the Council of the Organization of American States (Rept. No. 93–471).

By Mr. CANNON, from the Committee on Rules and Administration without amendment:

S. Res. 178. Resolution authorizing additional expenditures by the Committee on Interior and Insular Affairs for routine purposes (Rept. No. 93–472).

S. Res. 188. Resolution authorizing the printing of additional copies of Senate hearings on copyright law revision (Rept. No. 93–473).

H. Con. Res. 275. Concurrent Resolution providing for the printing of 1,000 additional copies of the hearings before the Subcommittee on the Near East of the Committee on Foreign Affairs entitled "U.S. Interests in and Policy Toward the Persian Gulf" (Rept. No. 93–474).

H. Con. Res. 322. Concurrent resolution to reprint and print the corrected Report of the Commission on the Bankruptcy Laws of the United States (Rept. 93–475).

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

S. Res. 170. Resolution authorizing supplemental expenditures by the Committee on Veterans' Affairs for inquiries and investigation (Rept. No. 93–476).

S. Res. 183. Resolution authorizing the printing of a compilation of materials on the 25th amendment as a Senate document (Rept. No. 93–477).

H. Con. Res. 184. Concurrent resolution to print as a House document the Constitution of the United States (Rept. No. 93–478).

EXECUTIVE REPORTS OF COMMITTEES

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

By Mr. RANDOLPH, from the Committee on Public Works:

Warren Clay Wood, of Nebraska, to be Federal Cochairman of the Old West Regional Commission.

The above nomination was approved subject to the nominee's commitment to respond to requests to appear and testify before any duly constituted committee of the Senate.

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

Executive S, 92d Congress, second session, Patent Cooperation Treaty and Annexed Regulations (Exec. Rept. No. 93–20).

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

Executive F, 93d Congress, first session, Convention Concerning the Protection of the World Cultural and Natural Heritage (Exec. Rept. No. 93–23).

By Mr. FULBRIGHT, from the Committee on Foreign Relations, without reservation:

Executive E, 93d Congress, first session, Strasbourg Agreement Concerning the International Patent Classification (Exec. Rept. No. 93–21); and

Executive R, 93d Congress, first session, Statutes of the World Tourism Organization (Exec. Rept. No. 93–22).

COMMUNICATIONS FROM EXECUTIVE DEPARTMENTS, ETC.

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

REPORT OF NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

A letter from the Administrator, National Aeronautics and Space Administration, transmitting, pursuant to law, a report concerning transfer through the General Services Administration, to the U.S. Postal Service 12 acres of land at the Michoud Assembly Facility, New Orleans, La. (with an accompanying report). Referred to the Committee on Aeronautical and Space Sciences.

PROPOSED LEGISLATION FROM THE SECRETARY OF THE TREASURY

A letter from the Secretary of Treasury, transmitting a draft of proposed legislation to improve the efficiency and flexibility of the financial system of the United States in order to promote sound economic growth, including the provisions of adequate funds for housing (with accompanying papers). Referred to the Committee on Banking, Housing and Urban Affairs.

REPORT OF EXPORT-IMPORT BANK OF THE UNITED STATES

A letter from the President and Chairman, Export-Import Bank of the United States, transmitting, pursuant to law, a report for the quarter ended March 31, 1973 (with an accompanying report). Referred to the Committee on Banking, Housing and Urban Affairs.

REPORT OF NATIONAL RAILROAD PASSENGER CORP.

A letter from the vice president, Public and Government Affairs, transmitting, pursuant to law, a report on average number of passengers per day on board each train and on-time performance at final destination of each train, for the month of August 1973 (with an accompanying report.) Referred to the Committee on Commerce.

REPORT OF THE NATIONAL RAILROAD PASSENGER CORP.

A letter from the vice president for Public and Government Affairs transmitting, pursuant to law, the report for the month of June 1973 of the National Railroad Passenger Corp. (with an accompanying report). Referred to the Committee on Commerce.

REPORT OF THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

A letter from the Secretary of Health, Education, and Welfare transmitting, pursuant to law, his annual report concerning the committees which advise and consult with him or his designees in carrying out his functions (with an accompanying report). Referred to the Committee on Finance.

REPORT OF FOREIGN CLAIMS SETTLEMENT COMMISSION

A letter from the Chairman, Foreign Claims Settlement Commission, transmitting, pursuant to law, the annual report of the Commission (with an accompanying report). Referred to the Committee on Foreign Relations.

INTERNATIONAL AGREEMENTS OTHER THAN TREATIES

A letter from the assistant legal adviser for treaty affairs of the Department of State transmitting, pursuant to law, copies of international agreements other than treaties entered into between the United States and certain other countries (with accompanying papers). Referred to the Committee on Foreign Relations.

REPORT OF OFFICE OF MANAGEMENT AND BUDGET

A letter from the Director, Office of Management and Budget, transmitting, pursuant to law, a report on budgetary reserves as of September 30, 1973 (with an accompanying report). Referred to the Committee on Government Operations.

PROPOSED LEGISLATION BY THE U.S. INFORMATION AGENCY

A letter from the Director of the U.S. Information Agency transmitting a draft of proposed legislation to authorize appropriations for U.S. participation in the International Ocean Exposition (with accompanying papers). Referred to the Committee on Foreign Relations.

REPORT OF THE COMPTROLLER GENERAL

A letter from the Comptroller General of the United States transmitting, pursuant to law, a report entitled "U.S. Assistance to the Khmer Republic (Cambodia)" (with an accompanying report). Referred to the Committee on Government Operations.

REPORT OF DEPARTMENT OF THE INTERIOR

A letter from the Assistant Secretary of the Interior, reporting, pursuant to law, on receipts and expenditures of the Department in connection with the administration of the Outer Continental Shelf Lands Act of 1953. Referred to the Committee on Interior and Insular Affairs.

DESIGNATION OF CHATTOOGA RIVER AS AN ADDITION TO THE NATIONAL WILD AND SCENIC RIVERS SYSTEM

A letter from the Under Secretary of Agriculture, reporting, pursuant to law, on the designation of the Chattooga River and its immediate environs as an addition to the national wild and scenic rivers system (with accompanying papers). Referred to the Committee on Interior and Insular Affairs, and pursuant to Public Law 90–542, ordered printed as a Senate document.

THIRD PREFERENCE AND SIXTH PREFERENCE CLASSIFICATION FOR CERTAIN ALIENS

A letter from the Acting Commissioner, Immigration and Naturalization Service, Department of Justice, transmitting, pursuant to law, reports concerning third preference and sixth preference classification to certain aliens (with accompanying papers). Referred to the Committee on the Judiciary.

REPORT OF U.S. ENVIRONMENTAL PROTECTION AGENCY

A letter from the Secretary, U.S. Environmental Protection Agency, transmitting, pursuant to law a report on the estimated costs of construction of needed publicly

owned wastewater treatment facilities (with an accompanying report). Referred to the Committee on Public Works.

FINANCIAL REPORT OF ATOMIC ENERGY COMMISSION

A letter from the Assistant General Manager, Controller, Atomic Energy Commission, transmitting, pursuant to law, the financial report of the Commission, for fiscal year 1973 (with an accompanying report). Referred to the Joint Committee on Atomic Energy.

PETITIONS

Petitions were laid before the Senate and referred as indicated:

By the PRESIDENT pro tempore:

A joint resolution from the Legislature of the State of California. Referred to the Committee on Commerce:

"ASSEMBLY JOINT RESOLUTION No. 54

"Relative to airline fares

"Whereas, The Legislature of the State of California recognizes the desirability of reinstituting reduced air fares for youth and senior citizens; and

"Whereas, The Congress of the United States is presently considering legislation, S. 181 and H.R. 2698, which would permit the airlines to establish reduced air fares for young people between the ages of 12 and 22 and senior citizens over 65; and

"Whereas, In view of the fact that presently many airplanes are flying with empty seats, the present fare structure constitutes a wasteful expenditure of a great national resource and further contributes to the financial deficit which many commercial air carriers are currently experiencing; now, therefore, be it

"Resolved by the Assembly and Senate of the State of California, jointly, That the Legislature of the State of California respectfully memorializes the President and the Congress of the United States to enact S. 181 or H.R. 2698 so as to reinstitute reduced air fares for young people and senior citizens; and be it further

"Resolved, That the Chief Clerk of the Assembly transmit copies of this resolution to the President and Vice President of the United States, to the Speaker of the House of Representatives, and to each Senator and Representative from California in the Congress of the United States."

A resolution of the House of Representatives of the Legislature of the Commonwealth of Massachusetts. Referred to the Committee on Foreign Relations.

"RESOLUTIONS

"Memoralizing the Congress of the United States to seek a true and lasting peace in the Middle East

"Whereas, All thougthful people are extremely concerned about the war and bloodshed in the Middle East; and

"Whereas, In the past twenty-five years a Middle Eastern truce, armistice and ceasefire have proven meaningless; and

"Whereas, Peace in the Middle East can only be achieved through free and untrammelled negotiations between the parties directly concerned in the conflict; therefore be it

"Resolved, That the Massachusetts House of Representatives hereby memorializes the Congress of the United States to insist upon secure, recognized and defensible borders in the Middle East and to accelerate the flow of arms and economic aid to Israel, especially to replace immediately the equipment lost in the current fighting, and to reject an imposed solution to the Middle East conflict; and be it further

"Resolved, That copies of these resolutions be transmitted forthwith by the Secretary of the Commonwealth to the President of the United States, to the Secretary of State, to the presiding officer of each branch of Congress and to the members from this Commonwealth.

"House of Representatives, adopted, October 9, 1973."

A resolution of the Military Order of the World Wars setting forth national security as our No. 1 priority. Referred to the Committee on Armed Services.

A resolution of the Military Order of the World Wars regarding the Uniformed Services Special Pay Act. Referred to the Committee on Armed Services.

A resolution of the Military Order of the World Wars urging funds to be appropriated for research, development, technology and engineering. Referred to the Committee on Armed Services.

A resolution of the Ukrainian American Republic Association of the State of New Jersey, Inc., denouncing the U.S.S.R. for its treatment of certain people. Referred to the Committee on Finance.

A resolution of the City Council of the City of Philadelphia, Pa., urging the continuance of a policy in support of the State of Israel. Referred to the Committee on Foreign Relations.

A resolution of the Military Order of the World Wars urging the refusal of ratification of the Genocide Convention. Referred to the Committee on Foreign Relations.

A resolution of the Military Order of the World Wars in opposition to aid for North Vietnam. Referred to the Committee on Foreign Relations.

A resolution of the Military Order of the World Wars regarding the balance of power to the three branches of national Government. Referred to the Committee on the Judiciary.

A resolution of the Southeastern Association of Community Action Agencies, Inc., urging the continuance of the Office of Economic Opportunity. Referred to the Committee on Labor and Public Welfare.

A resolution of the Military Order of the World Wars urging the establishment of an effective civilian personnel security program. Referred to the Committee on Post Office and Civil Service.

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. JACKSON (for himself, Mr. RANDOLPH, and Mr. MAGNUSON):

S. 2589. A bill to authorize and direct the President and State and local governments to develop contingency plans for reducing petroleum consumption, and assuring the continuation of vital public services in the event of emergency fuel shortages or severe dislocations in the Nation's fuel distribution system, and for other purposes. Referred to the Committee on Interior and Insular Affairs.

By Mr. GRIFFIN (for Mr. GOLDWATER):

S. 2590. A bill to increase the rights of the surface owners of private lands where the United States retains the reserved mineral interests. Referred to the Committee on Interior and Insular Affairs.

By Mr. BENNETT (for Mr. SPARKMAN) (for himself and Mr. TOWER):

S. 2591. A bill to improve the efficiency and flexibility of the financial system of the United States in order to promote sound economic growth, including the provision of adequate funds for housing. Referred to the Committee on Banking, Housing, and Urban Affairs.

By Mr. PROXMIRE:

S. 2592. A bill to amend the Federal Credit Union Act with respect to the termination of insured status under the act of credit unions other than Federal credit unions. Referred to the Committee on Banking, Housing, and Urban Affairs.

By Mr. EASTLAND (by request):

S. 2593. A bill for the relief of Ioan Gheorghe Iacob; and

S. 2594. A bill for the relief of Jan Sejna. Referred to the Committee on the Judiciary.

By Mr. DOMINICK:

S. 2595. A bill to amend the Internal Revenue Code of 1954 to provide for a tax on every new automobile with respect to its fuel consumption rate, and for other purposes. Referred to the Committee on Finance.

By Mr. COOK:

S. 2596. A bill to provide relief to units of local government from liability for repayment of excessive payments made due to an error by the United States under the State and Local Fiscal Assistance Act of 1972. Referred to the Committee on Finance.

By Mr. STENNIS:

S. 2597. A bill to amend section 102 of the National Security Act of 1947 to clarify the authority of the Central Intelligence Agency with respect to certain intelligence operations. Referred to the Committee on Armed Services.

By Mr. DOMENICI (for himself, Mr. EASTLAND, Mr. RANDOLPH, Mr. NELSON, Mr. FANNIN, Mr. PERCY, Mr. BAKER, Mr. MATHIAS, Mr. GRAVEL, Mr. HUMPHREY, Mr. BUCKLEY, Mr. BARTLETT, Mr. DOMINICK, and Mr. MUSKIE):

S. 2598. A bill entitled "Car Pool Incentives Act of 1973". Referred to Committee on Public Works.

By Mr. HATFIELD:

S. 2599. A bill to repeal the Economic Stabilization Act of 1970. Referred to the Committee on Banking, Housing and Urban Affairs.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. JACKSON (for himself, Mr. RANDOLPH, and Mr. MAGNUSON):

S. 2589. A bill to authorize and direct the President and State and local governments to develop contingency plans for reducing petroleum consumption, and assuring the continuation of vital public services in the event of emergency fuel shortages or severe dislocations in the Nation's fuel distribution system, and for other purposes. Referred to the Committee on Interior and Insular Affairs.

EMERGENCY MEASURES NEEDED TO PROTECT THE NATION'S ENERGY SYSTEM AND ECONOMY

Mr. JACKSON. Mr. President, yesterday, Arab producing nations meeting in Kuwait vowed to reduce Mideast oil production by 5 percent each month until Israel retreats to pre-1967 boundaries.

This threat from abroad to the security of the Nation's oil supply comes at a time when we already face serious shortages of home heating oil, propane, jet fuel, diesel, residual oil, and gasoline. Domestic production of crude oil has peaked; refineries are operating at the limits of capacity; stocks of crude oil and refined products stand at the lowest levels of the past 3 years; and our energy distribution system is seriously malfunctioning.

I am, therefore, now introducing a measure in the Senate that will establish an emergency program of rationing and contingency planning to deal with these severe shortages.

Emergency legislation is needed be-

cause of the imminence of serious shortages as a result of the imposition of export restrictions for political purposes.

This Nation has to prepare for the eventual possibility of being denied up to 1.2-million barrels a day of crude oil and petroleum products from the Mideast and Arab countries.

This loss of imports would consist of:

First, 800,000 barrels a day of crude oil and 100,000 barrels a day of refined product imported directly from Arab nations, and

Second, 300,000 barrels a day of refined product from Western Europe which is produced from Arabian crude oil.

The threat posed by this use of oil as a political weapon is compounded by a number of existing factors.

First, we have been projecting a shortage of 100,000 to 250,000 barrels a day of heating oil and other refined products this winter in the Northeast for over a month.

Second, following the outbreak of aggression in the Middle East, military action reduced crude oil supplies to Europe by 1 million barrels a day. These events have an indirect but immediate impact on U.S. supplies. Even if hostilities were to end tomorrow, and Mideastern oil production resumed normal levels, the refined product we have been importing from Western Europe is now drying up. As a result, we will experience shortages this winter. Some Western European nations—Italy and Spain—have already imposed export controls. Others will soon follow suit.

The Nation faces a genuine emergency, one that is likely to worsen, and one which we are not equipped to counter at this time. Although we have faced shortages in varying degrees now for 2 years, the administration has consistently failed to act to deal with these shortages, or to prevent their occurrence in the future.

The administration delayed in implementing mandatory allocation of scarce fuel supplies, until any allocation program introduced will be a case of too little and too late. They delayed throughout 1972 a badly needed increase in petroleum imports. And they have developed no contingency plans for dealing with the really severe fuel shortages we now face.

Leadership in these areas has come from the Congress. Legislation is moving toward enactment which would establish a mandatory fuel allocation program, to provide a national system of strategic reserves, mandate the conservation of energy, develop alternate sources of energy, undertake a massive energy research and development program, and otherwise address in detail the longer range aspects of the energy crisis with which the Nation is faced.

By and large, the administration has opposed these measures. These bills are critically needed, but they are of little assistance in addressing the immediate and urgent problems of next month, and this winter.

The bill I am proposing will establish an emergency program of rationing and contingency planning to deal with critical shortage conditions that cannot be adequately dealt with under existing law. This measure will mandate a program of energy conservation, contingency planning, rationing if necessary, and new initiatives to increase domestic energy supplies.

This will not be the first time that a Federal emergency petroleum production and distribution system is established. During World War II, and again during the Truman administration, the Congress passed legislation providing for Federal intervention in fuel production and distribution to insure maximum public benefit in times of emergency.

This bill does not require immediate implementation of rationing and other emergency measures. It does provide for a contingency plan to do these things if and when an emergency energy shortage should be declared. This bill is an anticipatory and precautionary measure, to insure that, in the event of a major shortage, we will not be caught unaware.

The bill authorizes the President to declare fuel shortage emergencies when requirements for energy or petroleum exceed available supply by 5 percent or more. State and local governments are required to develop emergency fuel shortage contingency programs to be implemented in the event such an emergency is declared.

These contingency programs must devise a priority system for fuel rationing, should it become necessary, and must provide the capability of reducing energy consumption by 10 percent within 10 days from the date of program implementation, and by 25 percent within 4 weeks of implementation. Discretion is left to the State or local government to determine suitable measures for attaining this goal. However, in the event that a State or local government fails to develop or implement a program, the Federal Government is directed to implement a mandatory energy conservation and contingency program.

The Federal program would require mandatory:

First, reduction in speed limits to 50 mph or less;

Second, programs to provide for regular engine tune ups on all automotive vehicles;

Third, an end to all advertising to induce increased energy consumption;

Fourth, promotional and educational programs on improved conservation practices in space heating and electrical consumption; and

Fifth, increased use of car pools and mass transit.

Notwithstanding any other State or Federal action, the bill also requires the President to expand available supplies of petroleum by:

First, requiring oil- or gas-burning powerplants with coal-burning capabilities to reconvert to burning coal, and granting temporary variances from air quality emission standards to allow such conversions, if necessary;

Second, authorizing the CAB to grant variances in scheduling of airplane flights, and the ICC in scheduling and routing of trucks and other interstate vehicles, to increase load factors or decrease distances traveled, in order to conserve fuel; and

Third, implementing Federal incentives and subsidies to largely increase the use of public transportation.

In a declared emergency, additional domestic supplies are required to be produced from certain designated oil fields technologically capable of producing above their assigned "maximum efficient rate" for sustained periods of time—90 to 180 days. The Office of Oil and Gas is authorized to initiate mandatory allocation of crude oil supplies to refineries to assure maximum production capacity and is also authorized to project future product requirements and to mandate adjustments in refinery product runs accordingly.

The final major provision of the bill provides for the expansion of useful domestic energy supplies by allowing production on the naval petroleum reserves, providing Federal incentives to further expand domestic production and refinery capacity, and, in the longer run, requiring all new stationary power plants to be equipped for burning coal as well as oil and gas.

It is estimated that the program outlined in this proposed legislation, when implemented, will save the equivalent of about 3-million barrels of oil a day. These savings would be more than adequate to counter the loss of all imports from Mideast and Arab countries. These imports now account for about 5 percent of total U.S. petroleum consumption, but in certain areas of the country the dependence on these sources of supply is far greater. Because we have lost a great deal of flexibility in energy supply and distribution in the last few years, certain sectors of the economy and certain regions will be especially hard hit by a reduction in imports. The Northeast and the Atlantic Coast, for example, are heavily dependent on imported petroleum products for space heating, and electric power generation as well as transport. The South Central oil producing States are considerably less dependent on imported oil, but would nevertheless be seriously affected by a loss of imports through increased competition for available domestic fuels.

Our current situation will require some belt-tightening on the part of the American people. We may have to learn to do more with less. But I am confident that we can overcome our present problems, and develop better habits of energy consumption. I believe the legislation I am proposing is a step toward both these goals.

Mr. President, I ask unanimous consent that the bill and a summary of the bill be printed in the RECORD.

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

S. 2589

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 "National Emergency Petroleum Act of 1973."

TITLE I—STATEMENT OF FINDINGS AND PURPOSES

FINDINGS

SEC. 101. The Congress hereby determines that—

(a) shortages of crude oil, residual fuel oil, and refined petroleum products caused by inadequate domestic production, environmental constraints, and the unavailability of imports sufficient to satisfy domestic demand, now exist or are imminent;

(b) such shortages have created or will create severe economic dislocations and hardships, including loss of jobs, closing of factories and businesses, reduction of crop plantings and harvesting, and curtailment of vital public services, including the transportation of food and other essential goods;

(c) such hardships and dislocations jeopardize the normal flow of commerce and constitute a critical national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized most efficiently and effectively through prompt action by the executive branch of Government;

(d) political disruptions in the world petroleum supply and distribution system can be expected to cause supply interruptions of imports from foreign sources;

(e) such supply interruptions will result in shortages far greater than any previously anticipated, and could create extremely critical shortage conditions as a result of unduly cold weather, reductions in refinery operations for mechanical or other reasons, and intensified world-wide competition for scarce petroleum;

(f) because of the diversity of conditions, climate, and available fuel mix in different areas of the nation, the primary governmental responsibility for developing and enforcing emergency fuel shortage contingency plans lies with the States and with the local governments of major metropolitan areas.

PURPOSES

SEC. 102. The purpose of this Act is to—

(a) grant to the President of the United States, and direct him to exercise, specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products, or dislocations in their national distribution system. The authority granted under this Act shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy;

(b) protect the public health, safety and welfare and the national security, and to assure the continuation of vital public services and full employment in the face of critical energy shortages;

(c) provide a national program to conserve scarce energy resources, through mandatory and voluntary rationing and conservation measures, implemented by Federal, State and local governments;

(d) direct the President and State and local governments to develop and demonstrate contingency plans which shall have the practical capability of reducing U.S. petroleum consumption by 10 percent within 10 days, and by 25 percent within 4 weeks of any interruption of normal supply.

TITLE II. EMERGENCY FUEL SHORTAGE CONTINGENCY PROGRAMS

PRESIDENTIAL AUTHORIZATION

SEC. 201. (a) The President is hereby authorized to declare a national or regional emergency requiring implementation of emergency fuel shortage contingency programs as provided for in this title. For the purposes of this Act, the term "emergency fuel shortage" means a disparity of 5 percent or more between energy requirements and energy supply, or between the available supply of petroleum and petroleum products and requirements for such fuels.

(b) The President may, at his discretion, extend or renew the declared emergency fuel shortage as long as the shortage conditions, described in subsection (a) above, continue to exist.

EMERGENCY FUEL SHORTAGE CONTINGENCY PLANS

SEC. 202. (a) Not later than 30 days after the date of enactment of this Act, the President shall promulgate requirements for emergency rationing, conservation, and contingency programs to be developed by each State and major metropolitan government, and to be implemented for the President by such State and local governments in the event the President determines there is an emergency fuel shortage. Such programs, which must be developed within 90 days after the date of enactment of this Act, shall assure that all vital services will be maintained and that unnecessary energy consumption will be curtailed.

(b) The rationing and conservation programs provided for in subsection (a) above shall include the following conservation measures:

(1) an established priority system and plan for rationing of scarce fuels among distributors and consumers during periods of critical shortages, and

(2) measures to reduce energy consumption in the affected area by 10 percent within 10 days, and by 25 percent within 4 weeks after implementation.

(c) In the event that a State or major metropolitan area fails to design and implement a contingency program as provided, for in subsection (a), the President shall implement for such State or metropolitan area a Federal rationing and energy conservation program which will include the following mandatory measures:

(1) reduction in maximum speed limits on all roads to 50 miles per hour or less;

(2) a program to require regular engine tune-ups for all automotive vehicles;

(3) discontinuation of all advertising encouraging increased energy consumption;

(4) regular inspection and maintenance of commercial and industrial heating and air-conditioning units;

(5) maximum winter thermostat settings of not more than sixty-five degrees Fahrenheit and minimum summer settings of not less than eighty degrees Fahrenheit in all buildings owned or leased by the Federal Government;

(6) increased average occupancy of private automobiles through the use of car pools. During commuter rush hours and at other specified times, parking and access in certain critical areas may be limited to cars with three or more occupants;

(7) a program of public education to encourage energy conservation measures in private homes and in the private sector, including:

(A) regular inspection and maintenance of home heating and air-conditioning units, and

(B) reductions in heating, hot water and electricity consumption.

MANDATORY FEDERAL ACTION FOR FUEL CONSERVATION

SEC. 203. Notwithstanding any action taken on the part of State or local governments pursuant to Section 202, the President shall in time of actual or impending emergency fuel shortage:

(a) require that existing electrical powerplants which now burn petroleum or natural gas and which have the capability to reconvert to coal shall convert the necessary plant equipment and revert to burning coal as their primary energy source. If necessary, the President may grant temporary variances from air quality emissions standards on a plant-by-plant basis, for the duration of the emergency fuel shortage only, to permit the burning of coal if the only available coal, when burned, will exceed established air quality standards.

(b) authorize independent regulatory authorities, such as the Civil Aeronautics Board and the Interstate Commerce Commission, to permit variances from existing schedules and routings to increased load factors, reduce the number of scheduled trips, or shorten distances traveled, in order to conserve fuel. In particular, airlines shall be required to operate at maximum capacity wherever possible.

(c) develop and implement Federally sponsored incentives for the use of public transportation, including priority rationing of fuel for mass transit systems, and Federal subsidies for reduced fare and additional expenses incurred because of increased service, for the duration of the emergency fuel shortage.

MANDATORY FEDERAL ACTIONS TO INCREASE AVAILABLE DOMESTIC PETROLEUM SUPPLIES

SEC. 204. In the event an emergency fuel shortage is declared pursuant to Section 201, the President shall also initiate the following measures to supplement domestic energy supplies for the duration of the emergency:

(a) Require production of certain designated existing domestic oil fields at rates in excess of their current established Maximum Efficient Rates (MER). Fields to be so designated by the appropriate State governments or by the Office of Oil and Gas, shall be those where the types and quality of reservoirs are such as to permit production at rates in excess of the currently assigned sustainable MER for periods of 90 days or more without excessive risk of losses in recovery.

(b) Authorize the Office of Oil and Gas to require:

(1) a program of mandatory allocation of crude supplies to ensure that all refineries are operating at maximum possible capacity, and

(2) the adjustment of processing operations of domestic refineries to produce refined products in proportions commensurate with national needs and consistent with the priorities established in accordance with Section 202. The Office of Oil and Gas shall make projections of anticipated product requirements and mandate the necessary adjustments in domestic refinery runs accordingly.

EXTENSION AND DEVELOPMENT OF CONTINGENCY SUPPLIES

SEC. 205. The President is hereby authorized to:

(a)(1) require production of oil and gas from currently developed resources of the Naval Petroleum Reserves No. 1, 2, 3 and 4; and

(2) require expeditious exploration and further development of these reserves to:

(A) determine the full extent of the oil and gas reserves located thereon; and

(B) make possible the production of oil and gas from the reserves at or in excess of their maximum efficient rate.

(b) require electric powerplants in the planning process or under construction, which are designed to burn oil or gas, to be designed and constructed with the ready capability to burn coal as well as oil and gas as a primary fuel.

(c) develop and implement such plans and programs as may be necessary to facilitate and expedite the greatest possible expansion of existing domestic production and refinery capacity.

TITLE III. ADMINISTRATION AND AUTHORIZATIONS

CONGRESSIONAL APPROVAL

SEC. 301. Within 30 days after the date of enactment of this Act, the President shall submit to Congress requirements for the emergency fuel shortage contingency programs provided for in Title II of this Act. These requirements will be approved by Congress unless, within 15 days of such submission, 7 of which must have been in legislative session, the Congress specifically disap-

proves of all or part of the program, and concurrently offers specific alternative provisions for those portions disapproved.

ECONOMIC INCENTIVES

SEC. 302. The Cost of Living Council is hereby authorized and directed to develop incentives to encourage private industry and individual persons to subscribe to the goals of this Act and to comply with the requirements to programs developed and implemented pursuant to this Act.

STATE LAWS

SEC. 303. (a) No State law or program in effect on the date of enactment of this Act, or which may become effective thereafter, shall be superseded by any provision of this Act or any program issued pursuant thereto except insofar as such State law or program is inconsistent with the provisions of this Act.

(b) Any provision of any State law or program in effect upon the date of enactment of this Act, or which may become effective thereafter, which provides for more stringent energy conservation and more efficient allocation than do the provisions of this Act or any program implemented pursuant thereto shall not be construed to be inconsistent with this Act. Any provision of any State law or program in effect on the date of enactment of this Act, or which may become effective thereafter, which provides for the conservation or allocation of energy for which no provision is contained in this Act shall not be construed to be inconsistent with this Act.

GRANTS TO STATES

SEC. 304. The President is hereby authorized to make grants to any State or major metropolitan government, for the purpose of assisting such State or local government in developing, administering and enforcing emergency fuel shortage contingency plans under this Act.

AUTHORIZATIONS

SEC. 305. There are hereby authorized to be appropriated $150,000,000 for the purposes of this Act.

SEPARABILITY

SEC. 306. If any provision of this Act or the applicability thereof is held invalid, the remainder of this Act shall not be affected thereby.

SUMMARY

TITLE I

Section 101—Findings

(a) Shortages exist and are imminent:

(b) Shortages will create severe economic dislocation and hardship;

(c) Action by the Executive Branch can minimize or avert hardship;

(d) Political disruptions can cause interruptions in imports;

(e) Such supply interruptions will create shortages far worse than those for which we have planned; and

(f) Primary responsibility for emergency fuel shortage contingency plans lies with state and local government.

Section 102—Purpose

(a) to grant and direct the exercise of Presidential Authority needed to minimize adverse impact of shortages;

(b) to protect public health and safety;

(c) to provide a national program to conserve scarce energy;

(d) to direct the development and demonstration of government contingency plans

TITLE II—EMERGENCY FUEL SHORTAGE CONTINGENCY PROGRAMS

Section 201—Presidential authorization

Authorizes President to declare national or regional emergency; and

Defines emergency as disparity of 5% between energy requirements and supplies.

Section 202—Emergency fuel shortage contingency plans

(a) Within 30 days the President shall promulgate requirements for 90 day emergency contingency programs to be designed by state and local governments and implemented by them for the President in the event of emergency shortages;

(b) Conservation Programs will include:

(1) a priority system and rationing plan; and

(2) measures capable of reducing petroleum consumption by 10 percent within 10 days and 25 percent within 4 weeks.

(c) Should a state fail to design and implement a program, one will be implemented by the President which will include provisions for:

(1) reduction of maximum speed limits to 50 MPH would make 250,000 barrels per day equivalent saving and 27.8% saving as a percent of Arab imports;

(2) require periodic auto engine tuneups would make 140,000 barrels per day equivalent saving and 15.5% saving as a percent of Arab imports;

(3) end advertising encouraging increased energy consumption;

(4) maintenance and inspection of heating units;

(5) reduce heating and cooling energy consumption in Federal buildings;

(6) use of car pools would make 750,000 barrels per day equivalent saving and 83.3% saving as a percent of Arab imports;

(7) homeowner energy conservation education would make 730,000 barrels per day equivalent saving and 81.1% savings as a percent of Arab imports;

Section 203—Mandatory Federal action for fuel conservation

The President shall in time of actual or pending emergency—

(a) require existing electrical power plants that are capable of doing so to convert to the burning of coal. Where necessary emergency variances to the air quality laws are authorized would make 258,000 barrels per day equivalent saving and 28.6% saving as a percent of Arab imports;

(b) authorize Federal regulatory agencies to permit variances from existing schedules to conserve fuel use by public transport would make 120,000 barrels per day equivalent saving and 13.3% savings as a percent of Arab imports;

(c) develop and implement Federal incentives for the use of public transportation.

Section 204—Mandatory Federal action to increase domestic petroleum supplies

In time of emergency the President shall cause the increase of domestic supplies by—

(a) requiring production of designated oil fields in excess of legally established MER (Maximum efficient rate of production) which would increase supply of 292,000 barrels a day and 32.4% of Arab imports.

(b) authorizing the Office of Oil and Gas to—

(1) so allocate crude oil supplies as to insure full refinery utilization;

(2) require adjustment of refinery balances to insure an output of refined product consistent with established priorities.

Section 205—Development of new contingency supplies

Authorizes the President to—

(a) (1) require production of oil and gas from the Naval Petroleum Reserves which would increase supply of 160,000 barrels a day and 17.7% of Arab imports.

(2) require expeditious exploration and development of the Naval Petroleum Reserves.

(b) require future electric power plants to be so designed as to use coal as a primary energy source;

(c) implement programs to expedite expansion of existing domestic production and refining capacity.

TITLE III—ADMINISTRATION AND AUTHORIZATION

Section 301—Congressional approval

Within 30 days the President shall submit to Congress a plan for the emergency fuel shortage programs provided for in Title II;

Within 15 days of receipt, the Congress will approve this plan or offer an alternative.

Section 302—Economic incentives

The Cost of Living Council will develop incentives to encourage compliance with the Act.

Section 303—State laws

Provides for the preemption of State laws wherein they may be in conflict with this act.

Section 304—Grants to States

Authorizes Federal grants to states and cities to assist in the implementing of the act.

Section 305—Appropriation authorization

$150,000,000 is authorized.

Mr. HANSEN. Mr. President, the distinguished chairman of the Interior Committee announced Wednesday his intent to introduce today a bill he feels would be an appropriate response to the announcement in Kuwait that Middle East oil production will be reduced at the rate of a 5 percent per month cutback, beginning implementation immediately.

Granting that the chairman has termed his proposal "emergency legislation," I am hopeful that he has not missed the point emphasized by the Kuwait announcement—that Middle East energy sources have been and will continue to be insecure, and that we must develop the domestic energy sources of the United States rather than continue to look overseas for help, if we are to enjoy national security.

A part of the thrust of the chairman's legislation is aimed at conservation through emergency rationing. We must eliminate waste and unnecessary use. But I suggest to the distinguished chairman that the price increase announced Tuesday by Persian Gulf producers, and Iran, will help accomplish that. That announcement constituted a 17-percent price increase from $3.12 to $3.65 a barrel. That means that such oil delivered on the east coast of the United States would cost $6 or more. That is $2 a barrel more than U.S. producers get for oil at the wellhead in Wyoming, Louisiana, Texas, Oklahoma, California and other producing States. When the price gets high enough, Americans and consumers all over the world are going to see to it that unnecessary use is eliminated.

Another part of the chairman's thrust urges reconversion to coal burning capabilities at power plants. Ironically, little more than a week ago, a majority of the Senate voted, while the surface mining bill was being considered, to withdraw from mining some of the most accessible coal resources in the United States. Today, we are being asked to convert back to coal. I agree that we should, even though emission standards required by the National Environmental Protection Act may have to be modified.

A third point made by the chairman has to do with expansion of domestic petroleum supplies. He calls for produc-

ing fields to produce at rates above maximum efficiency for the short term, and for use of the naval reserves for the longer term. The former action may have to be taken, although as the chairman recognizes it could at best serve as a partial short term answer. I doubt that the Congress would approve depletion of the naval reserves for other than reaction to immediate or near threat to the national security of the United States.

Any way you look at it, the four naval petroleum reserves are not an adequate immediate answer even should Congress order use at this time. According to page 17 of the General Accounting Office report to Congress Oct. 5, 1972, on "Capability of the Naval Petroleum and Oil Shale Reserves to Meet Emergency Oil Needs," these reserves "could produce only an additional 95,500 barrels per day in an emergency."

The report states:

Only Petroleum Reserves numbers one and three are currently capable of additional production without further development. Petroleum Reserve number two is producing at capacity under leases to private contractors and is of minimal value as a reserve. Petroleum reserve number four is essentially unexplored and undeveloped and has no current production capability.

"The Navy estimates that it would cost a minimum of $2 billion (b)over a 10-year period to develop petroleum Reserves numbers one, three and four to their maximum deliverable production rates.

The present daily production capability as of last October was 108,900 barrels daily, with 13,400 barrels already in use. This is present production from reserves one, two and three.

The Geological Survey estimates that reserve No. 4 contains from 10 to 33 billion barrels of oil. Assuming the 10 billion barrels estimate is accurate, maximum production for a 5-year period is estimated at 3,280,540 barrels per day. Given the time required to develop the reserves, this figure would more than replace present imports from the Middle East assuming there is not further decline in domestic production. But we need to know what we would use for reserves should we face a national emergency.

After the 6-day war in the Middle East in 1967, the Secretary of the Navy established an initial operational readiness requirement for Petroleum Reserve No. 1. This stipulated that a 5-year average oil production rate be 160,000 barrels per day. Officials of Reserve No. 1 stated that the No. 1 reserve, already in production, is capable of producing a maximum of 100,000 barrels per day within 60 days, given sufficient emergency funds and manpower.

According to the GAO report, No. 1's oil pipeline system can transport 90,000 barrels per day—but only to the boundaries of the reserve. The best estimates are that adequate means of transporting the oil from the reserve could be constructed in from 1 to 2 years. During World War II, Reserve No. 1 had an emergency production status, and produced at a level of 62,000 barrels per day.

The present situation does not constitute an immediate threat to the national security of the United States, nor does it constitute an acute national emergency for the United States. The impact of the Kuwait action upon the United States, though severe, will be exceeded by the effects it will have upon the rest of the free world, unless the Middle East nations have an implementation plan as yet unannounced.

The answer to the Nation's energy shortages and to the threat of energy blackmail by any foreign nation or group of nations is for this Nation to achieve energy self-sufficiency. We can do it and we must do it.

Because of our real desire to clean up our environment, we have placed unbelievable roadblocks, impeding our efforts to become more energy self-sufficient within the United States by using all of our available energy resources.

First of all, we must eliminate waste and unnecessary use. The price increase the Arabs announced will help do that. We must intensify efforts to increase drilling within the continental United States and on the Outer Continental Shelf, including the Atlantic seaboard. We must pull all the stops in building the Alaskan pipeline. We must make far greater use of coal for the production of heat and electricity. Wherever National Environmental Protection Act laws or State laws prevent this reconversion back to coal, they must be changed or suspended. The Kuwait announcement leaves us with no alternative.

Further, in regard to the naval petroleum reserves, we are aware that the administration has proposed release of No. 1.

The House Armed Services Committee is conducting hearings on this matter, and I offer for consideration by this body, Chairman HÉBERT's opening statement urging careful and cautious consideration of such a concept.

In his message to Congress on September 10, the President stated, in part, that in view of the "scarcity of fuels, it is important that we act now to draw upon the oil available in the Naval Petroleum Reserve No. 1 (Elk Hills)." This indicated that the Congress would be asked to approve a new policy which would be in direct opposition to the statutory provisions which, for a half century, have successfully prevented the use of our naval petroleum reserves for other than the purpose for which they were intended—national defense.

Therefore, on September 12th I announced that I had directed the Investigating Subcommittee staff to make an immediate inquiry into this matter so that necessary hearings could be held at an early date. I pointed out at that time that under the Rules of the House of Representatives primary legislative jurisdiction over naval petroleum reserves is assigned to the Committee on Armed Services.

The preliminary staff work having been completed, the Subcommittee is now ready to hear from witnesses representing the General Accounting Office, the Department of Defense and the Department of the Navy. I have also issued invitations to Secretary Morton and to Governor Love to appear. But, before beginning the testimony I would like to touch briefly on the background of the naval petroleum reserves. I will not pursue it in detail because this will be done by appropriate witnesses.

Shortly after the turn of the century private oil interests were staking out large claims in our public lands at such a rapid pace it became apparent that the Government would have to stake out claims of its own in order to insure an adequate supply of oil for future national defense purposes. This was accomplished by withdrawing from public lands certain potential petroleum producing areas and designating them as naval reserves. We now have four such areas.

These reserves are protected by the provisions of law set forth in Chapter 641 of Title 10 of the United States Code. These provisions were basically established by that great former chairman of the Armed Services Committee, Mr. Carl Vinson. He left no doubt in anyone's mind that these reserves were to be used *only* in the defense of our country. And during a House debate in the 78th Congress in 1944, he made the following four points with respect to the objectives to be achieved by the law:

1. "The amount of oil initially produced from the reserve would be fixed by joint resolution of Congress, at such an amount as was clearly demonstrated, after a hearing on the question, as being absolutely necessary to an expeditious prosecution of the war."

2. "The amount of oil initially authorized to be produced would be decreased as soon as the requirements of the war permitted and the field would eventually be shut down."

3. "No amounts of oil in excess of the amount initially authorized by joint resolution of Congress would be produced from the reserve unless the increase was authorized by a further joint resolution upon a showing that the additional amounts were also necessary for the prosecution of the war. Thus the final control over production from the reserve would be kept where it always has been, namely, in the hands of Congress."

4. "The oil in the reserve would not be used to finance the operation of the reserve. Thus Navy would not be permitted to bypass Congress, but instead would periodically come to Congress with requests for appropriations to carry on the necessary operations."

Since its inception the naval petroleum reserve has been considered by those charged with its safekeeping as a national asset to be held in trust—an asset which should not be frittered away.

The oil which is protected in the four naval petroleum reserves is worth hundreds of millions of dollars and, therefore, it should not be surprising that unceasing efforts have been made, and will probably continue to be made, to get at them by various interests to whom they represent huge potential dollar profits. But while I recognize that the profit motive is basic and necessary to the growth and strength of our free enterprise system, I am equally convinced that there are certain areas in which "dollar value" is not a true measure of worth. For example, how do you place a dollar tag on the ability of our country to remain free, or on the safety of our families and homes? And how much is it worth to have a government which is strong enough to be a positive influence for peace throughout the world? These and other such questions must be considered when we seek to establish priorities for the distribution and utilization of our finite national resources.

With these thoughts in mind, I suggest that we begin with the testimony of our witnesses.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent, on behalf of my distinguished colleague (Mr. RANDOLPH), that a statement by him be printed in the RECORD.

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

STATEMENT BY SENATOR RANDOLPH

Mr. President, it is a privilege to join the able Senator from Washington (Mr. Jackson) as a cosponsor of the National Energy Emergency Contingency Act.

It is my belief that this legislation, which

will establish the authority for an emergency program of rationing and contingency planning to deal wtih severe fuel shortages, is an absolutely essential move on the part of the Congress.

As a Member of the National Fuels and Energy Policy Study, I have worked closely with the distinguished Senator from Washington on the energy situation for many months. We are aware of the continuing energy shortages confronting our Nation. Without any special situation of aggravating circumstances, these shortages are with us and we must be prepared to live with them in the years ahead. During our Study investigations, we have stressed both the depth and intensity of our problems, and the lack of effective Administration action to forestall the more serious effects of the shortages of energy supplies.

The Congress, however, has moved forward despite the Administration's delay in formulating energy policy decisions. On June 5, 1973, the Senate passed S. 1570, the Mandatory Petroleum Allocation Act; the House followed suit, and passed a similar bill, H.R. 9681 yesterday. The Senate's energy conservation bill, S. 2176, should be ready for Senate action soon. The energy research and development bill, S. 1283, is being finalized. In the House, similar measures are being moved ahead.

Regrettably, the Administration's measures have not been so expeditious. During the summer months when gasoline shortages became so serious, no mandatory petroleum allocation program was established. During these same summer months, a shortage in home heating fuel for the winter was foreseen and the Administration was urged to take action. The announcement of a mandatory program for heating fuel did not come until October 12, when temperatures in many areas of the Nation had already dropped below the 70's. Yet even this mandatory program is not adequate for this problem—it merely states that such a mandatory program is being established and does not set up priorities for allocation.

The delays in establishing necessary energy programs have seriously lessened our ability to meet the Arab pressure tactics. The United States has come to the point at which it *must* conserve energy or face an economic crisis unrivaled in many, many years.

The decision, yesterday, of the Arab oil-producing nations to reduce Mideast oil production by five percent each month until Israel retreats to pre-1967 boundaries has placed before us another critical threat. The Senator from Washington has outlined in detail the impact of yesterday's action on our energy supply. Certainly, this decision makes the need for affirmative programs even more urgent.

Our Nation, with the cooperation of all levels of Government and all citizens, must prepare to meet this emergency situation. As I have stated, it is my belief that the Administration, even before yesterday's announcement, was not moving forward with the necessary urgency and positive action to resolve the energy crisis. The significant activities and program proposals to secure a system under which fuel shortages at the very least can be alleviated have come from the Congress.

I firmly believe that it will be up to the Congress to continue action if we are to meet the current energy shortages and the threat encompassed in yesterday's announcement by the Arab oil-producing nations. For this reason, I strongly support the effort undertaken in the National Energy Emergency Contingency Act to provide for a contingency plan of rationing and other emergency measures, if and when it is necessary for the President to declare an emergency energy shortage.

Under this measure, the President is authorized to declare fuel shortage emergencies when requirements for energy or petroleum exceed available supply by five percent or more. Further, State and local governments are required to develop emergency fuel shortage contingency programs which would be implemented when such an emergency is declared.

Mr. President, the proposed legislation directs that Federal programs, when implemented, include these actions:

(1) Reduce speed limits nationwide to 50 mph or less;

(2) Provide for regular automotive tune-ups;

(3) End all advertising to induce increased energy consumption;

(4) Improve conservation practices in space hearing and electrical consumption; and

(5) Increase the use of car pools and mass transit.

In addition, regardless of any other State or Federal actions, this bill would require the President to expand available supplies of petroleum by:

(1) Requiring oil- or gas-burning power plants with coal-burning capabilities to reconvert to burning coal, and grant temporary variances from air quality emission standards to allow such conversions, if necessary;

(2) Authorizing the CAB to grant variances in scheduling of airplane flights, and the ICC in scheduling and routing of trucks and other interstate vehicles, to increase load factors or decrease distances traveled, in order to conserve fuel; and

(3) Implementing Federal incentives and subsidies to largely increase the use of public transportation.

These are only some of the provisions this measure would direct in the case of emergency. Certainly, there may be many worthy proposals to modify this measure. However, it is very clear that this type of legislation is necessary, and even vital, to our Nation's survival. It must be considered by the Congress in an expeditious manner.

The Congress must act quickly in the National interests.

By Mr. GRIFFIN (for Mr. GOLDWATER):

S. 2590. A bill to increase the rights of the surface owners of private lands where the United States retains the reserved mineral interests. Referred to the Committee on Interior and Insular Affairs.

Mr. GRIFFIN. Mr. President, for the Senator from Arizona (Mr. GOLDWATER), I introduced, for appropriate reference, a bill to increase the rights of the surface owners of private lands where the United States retains the reserved mineral interests. I ask unanimous consent that a statement by Senator GOLDWATER, together with the text of the proposed bill, be printed in the RECORD.

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

INCREASING THE RIGHTS OF LANDOWNERS OF PRIVATE LANDS IN WHICH THE MINERAL INTERESTS ARE RESERVED TO THE UNITED STATES

(By Senator BARRY GOLDWATER)

Mr. President, I am introducing legislation today to strengthen the property rights and bargaining power of the surface owners of private lands where the United States retains the reserved mineral interests. The bill has two primary aims. First, it provides immediate protection to the homeowner now living in developed residential communities against damage to their homesites and land values caused by the actual or threatened occurrence of mineral exploration or drilling on their property without their consent. Second, the bill will discourage indiscriminate damage being caused to now undeveloped private lands by irresponsible persons or fly-by-night companies abusing federal laws which leave these lands open to mining claims and removal of mineral deposits. Hereafter, when explorers or mining companies seek to prospect and locate claims on undeveloped private lands or lands which are developed in the future, they must post a bond before entry and stand liable for one and a half times the damage which might be caused to all surface improvements, values and uses.

Mr. President, this bill attacks a very old problem which is acute in the western states but exists elsewhere to some degree, as well. I am speaking of instances in which the private surface owner of land is not the owner of the mineral rights because of some law under which the mineral estate has been reserved to the United States and which lands remain open to location or claim under the mining laws just as if the lands were still federally-owned.

In all there have been approximately 70 million acres of land patented to private ownership with a reservation of the minerals to the United States. The vast majority of these lands was patented under the Stock Raising Homestead Act of 1916. Under the terms of this Act prospectors may enter onto the land to search for and claim mineral deposits without any need to obtain the consent of or even to notify the surface land owner. The prospector is supposed to avoid injuring the permanent improvements of the surface owner and should pay compensation for any damages to crops and agricultural improvements, but this does not discourage widespread abuses of the surface owners' interests. The mineral developer need not post a bond to prospect and locate; nor does it appear that he has to compensate the surface owner for residential-type improvements or the value of the land for residential use.

It is argued by many lawyers in this field that the only kind of permanent improvements for which compensation must be paid are "agricultural" improvements and that there is no Federal statutory right to compensation for damages to non-agricultural improvements. The origin of the Stock Raising Homestead Act and its protections to surface owners are said to be obviously designed to provide relief where private lands are being used for agricultural or grazing purposes and not meant to be tailored to urban area lands. Therefore, we have a situation in which individuals who have purchased land to build homes and raise their families are badly lacking in any clear legal rights that would enable them to forestall residential mining on their property or even to be confident of obtaining fair compensation for injury to their residential improvements.

Now, the actual developed areas in which the mining interests are reserved to the United States constitute only a very small part of the 70 million acres of private lands which are affected by this split ownership of the surface and minerals. For this reason, my legislation treats differently the case of the surface owners of lands on which there are actual residential, industrial or commercial structures and the surface owners of undeveloped private lands. Since there is a situation occurring right now where mining is under way on private land in a residential area west of the city limits of Tucson at the south boundary of the Tucson Mountains, I will describe the features of my bill as it will affect this problem and then describe the relief which the bill provides for the owners of presently undeveloped lands.

What we have going on in the residential Tucson area is exploratory drilling by a ma-

jor company which has staked out some 175 claims on 3,500 acres of private land. Many of these claims are in Tucson Estates, which is an established mobile home park with at least 1200 families, while other claims cover Millstone Manor, an established residential area with approximately 400 families inside the claimed area. It does not appear that drilling has intercepted any commercial ore to date and the company has not asserted to my knowledge that a valid mining claim has been discovered. Theoretically, in these circumstances, a surface owner can bring a private law suit contesting allegedly invalid mining claims which threaten to destroy the value of the surface of their lands, but even if these land owners should win their case tomorrow somebody else could come right back in and start prospecting all over again.

Mr. President, I propose today to protect the interests and dreams of land owners who have built their homes in this area and other existing communities with the same problem, by allowing them to acquire the mineral interests by an easy process of notification to the Secretary of the Interior. If any one of these homeowners wants to unite the mineral interests with his surface title, my bill authorizes him to so notify the Secretary of the Interior within one year after the bill should become law. His notification in itself shall provide immediate termination of the reservation to the United States of minerals in each person's land and in due course he will obtain a patent or other instrument from the Secretary conveying to him the reserved title which the United States had held in these minerals. Because the immediate problem concerns locatable minerals, that is the hard rock minerals such as copper, and because locatable minerals are not subject to the leasing authority of the Secretary which would offer discretion against allowing mining on developed lands, I have limited the bill to locatable minerals and do not get into the question, which is not applicable here, of leasable minerals, such as oil and gas resources.

This technique, Mr. President, will give the private surface owner of developed lands an immediate recourse for acquiring title to the reserved, locatable minerals merely by providing notification of his wish. As a result, he will be placed in a position where any mining company desiring to locate minerals in this particular land would have to deal with him, the surface owner, personally. The homeowner's notification to the Secretary would immediately terminate the privilege of the mining claimant to commence or continue any entry on his land for prospecting or other mining activities. However, these lands are not withdrawn from the mining laws and the option of mining is still open so long as the mineral developer negotiates with the surface owners and obtains their consent. In other words, the law of the market place will take effect depending on which is more valuable, the use of the land for residential purposes or the prospect of commercial mining. I should mention that as a practical matter each surface owner will be protected in a development unless the great majority should agree to permit mining operations because of the economic fact of life that mining would not be economically feasible unless the mineral developer could use sizable and contiguous parcels of land. I do believe this would protect, for example, the interests of the owner of a developed homesite whose land abuts an undeveloped parcel in the same neighborhood.

If there is any situation where a person or company has discovered a valid mining claim, the bill provides a means for the Secretary of the Interior to acquire this claim through any means available to the United States Government and, of course, requires that adequate and just compensation be paid to the owner of such existing mining claims.

Mr. President, in order that the bill shall not constitute a windfall to the private surface owners at the expense of the American public who now holds the reserved mineral rights we are talking about, I have specifically retained for the United States a royalty right in the event that these developed lands might subsequently be opened to mining by the surface owner. I can foresee situations where mineral development could take place without any damage to the surface values due to modern technology and it may not become necessary for the surface developer to move out in order to permit mining. I feel that in this type of situation, the American public should receive some fair compensation in the form of a return to the Federal Treasury and, for this reason, I have provided that any mining done on these developed lands subsequent to the release of the reserved United States mineral rights shall be subject to the payment to the United States of a royalty of two percent of the fair market value of the minerals so mined. I have chosen this approach instead of providing for the sale of the subsurface rights to the surface owner because a great many of these persons could not afford the expense of acquiring these rights. I do not want to penalize them because of their lack of affluence.

Mr. President, this leaves the question of how we shall treat undeveloped lands, which after all constitute the vast majority of lands with a reservation of minerals to the United States. Here I propose to strengthen the rights of the private surface owner by a different means. With respect to undeveloped lands and lands developed hereafter, my bill is meant to nail down for once and all the right of the surface owner to obtain compensation for the value of residential improvements which he places on his land and the value of the land for this purpose. Not only is the law intended to specifically include compensation for damage caused to residential surface improvements and uses, but I propose to amend the existing law to require that the mineral explorer or developer compensate the surface owner for one and one-half times the full damage to surface developments and uses which may be caused by mineral activities. In the event the homeowner has to move away, this provision would more fairly compensate him for the great trauma and actual expenses of having to move his home elsewhere. This provision alone should do much to discourage disreputable mineral explorers or developers from ever entering the land, but to further enhance the rights of the surface owner the bill requires that before proceeding with any mineral activity, including prospecting, the mineral explorer or developer shall be required to post a bond for the full damages for which he might be liable before any of those damages are actually caused.

Mr. President, I believe this approach would allow the millions of acres of undeveloped private lands to remain open to prospecting and mining by legitimate and serious persons and companies while at the same time providing much greater assurance to the surface owner that his land will not be abused or occupied by fly-by-night miners or squatters seeking free living. In the event a legitimate mining operation is commenced, the surface owner can be assured that the money is available almost immediately to pay for any damages occurring and that if he is forced to pack up and leave he will at least be adequately compensated for his loss. If there are any disputes with respect to the values of any damages caused by mineral activities it can be settled under the bill by court action in the appropriate United States district court where the lands affected are located.

Mr. President, the bill attacks a troublesome problem which has been with us for many, many years. I think we can solve the difficulties in a way that preserves the bulk of opportunities for development of the important mineral resources on which the country's economy and security may depend in future years, while increasing the protection given by law to the private surface owner of land who may have his home, business or industry situated there or have tied up his personal savings in as yet undeveloped land. I have introduced a bill that will handle the immediate problems which I think can be ignored no longer. I look forward to the opportunity for hearings on the proposal and hope that Congress will begin attacking this problem without delay.

Mr. President, I ask unanimous consent to have a copy of the complete text of the bill which I am introducing printed in the RECORD.

S. 2590

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any case in which a person holds title to the surface of any developed lands on the basis of a patent or other instrument issued in accordance with the provisions of the Act of December 29, 1916 (43 U.S.C. 291–302), or any other Act which contains a reservation to the United States of all the minerals in the lands covered by such patent or instrument, including the right to prospect for, mine, and remove the same, that portion of such reservation so includes therein, to the extent that it relates to locatable minerals and the right to prospect for, mine, and remove the same, shall be terminated or otherwise cancelled in the manner and to the extent provided for in section 2 of this Act.

SEC. 2. (a) In any case in which a person holding title on the basis of a patent or other instrument referred to in the first section of this Act, desires to have terminated that portion of the reservation contained therein relating to a reservation of locatable minerals in the developed lands so covered by such patent or instrument, including the right to prospect for, mine, and remove the same therefrom, such person is authorized, within the twelve-month period following the date of the enactment of this Act, to so notify the Secretary of the Interior to that effect.. Such notification shall contain a description of the developed lands covered by such patent or instrument with respect to which such termination or cancellation shall be effective. Immediately upon the receipt of such notification by the Secretary, such portion of the aforementioned reservation to be terminated shall be deemed terminated and of no longer any effect insofar as it involves locatable minerals on or within the developed lands described therein in accordance with the provisions of this section.

(b) Upon timely receipt of such notification, the Secretary of the Interior shall convey, by patent or other appropriate instrument, all right, title, and interest of the United States in and to such developed lands to the extent necessary to reflect the termination effected under subsection (a) of this section.

SEC. 3. (a) The Secretary of the Interior shall consider each such notification given by any person pursuant to section 2 with a view to determining whether, as of the date of the termination of a portion of a reservation involving developed lands described in such notification, any valid mining claim involving locatable minerals existed with respect to such developed lands, or any part thereof. If the Secretary determines the existence of any such claim, he shall acquire, by any appropriate means, any and all interests of the claimant with respect thereto and such interests so acquired shall be deemed terminated and of no effect.

(b) For the purpose of carrying out the provisions of this section, the Secretary of the Interior, during the fifteen-month period following the date of enactment of this Act, shall, not less than three times within five-month intervals, notify by publication in the Federal Register and other appropriate means (such as newspapers or other periodicals), all appropriate parties to the effect that any person having a mining claim to locatable minerals on any developed lands covered by a notification given by any person pursuant to section 2 shall, within the twenty-four-month period following the date of the enactment of this Act, notify the Secretary of that claim, and that the failure to so notify the Secretary within such period shall be deemed an abandonment of that claim. Each such publication shall contain a current list of all notifications received by the Secretary pursuant to section 2 prior to such publication, including a general description of the developed lands affected.

(c) Upon the expiration of the twenty-four month period following the date of the enactment of this Act any such mining claim referred to in subsection (b) of this section with respect to which the Secretary failed to receive notice in accordance therewith shall, as of such date of expiration, be deemed to be an abandoned and forfeited claim.

SEC. 4. Each person holding any such patent or other instrument referred to in the first section of this Act, and with respect to which a notification is submitted pursuant to section 2, shall, by reason of such notification, be deemed to have agreed to, and such patent or instrument shall thereafter be deemed to include, a provision whereby such person, his heirs, assigns, and other successors in interests, shall be required to pay to the Secretary of the Interior, with respect to any locatable minerals mined from developed lands covered by such patent or instrument and described in such notification, an amount equal to two per centum of the fair market value of the minerals so mined after the termination of such reservation in accordance with such section.

SEC. 5. (a) Notwithstanding the provisions of the Act of December 29, 1916 (43 U.S.C. 291–302), or any other provision of law, whoever, on or after the date of enactment of this Act, prospects for, develop, mines, or removes, any locatable minerals from any land included in a patent or other instrument from which such minerals were reserved to the United States shall be liable to the person holding title to the surface of such land in an amount equal to one and one-half the damages to all surface improvements on such land, and surface values and uses of such land, by reason of such prospecting, developing, mining, or removal of such minerals, except that nothing in this section shall be construed to impair any vested legal right existing on the date of the enactment of this Act.

(b) Any United States district court having jurisdiction over the district within which any such affected lands are located shall have jurisdiction to receive, consider, and render judgment with respect to any action for damages arising out of the provisions of subsection (a) of this section.

(c) Notwithstanding the provisions of such Act of December 29, 1916, or any other law, on and after the date of the enactment of this Act, no person or governmental entity shall prospect for, develop, mine, or remove, any locatable minerals from any lands within the purview of subsection (a) of this section unless such party has first executed a bond or undertaking to the United States, for the use and benefit of the surface owner or owners of such lands, to secure the payment of any damages referred to in subsection (a) of this section as may be determined by the parties involved or as determined and fixed in any action brought pursuant to subsection (b) of this section or upon the bond or undertaking in an appropriate United States district court against the principal and sureties thereon, such bond or undertaking to be in such form and in accordance with such rules and regulations as may be prescribed by the Secretary of the Interior.

(d) The Secretary of the Interior is authorized to issue such regulations as he may determine necessary to carry out the provisions of subsection (c) of this section.

SEC. 6. As used in this Act, the term—

(1) "developed lands" means any land title to which was acquired on the basis of a patent or other instrument issued in accordance with the Act of December 29, 1916 (43 U.S.C. 291), or any other Act which contains a reservation to the United States of all the minerals in the lands covered by such patent or instrument, and on which there is situated a residential dwelling or commercial or industrial structure (which dwelling or structure was constructed, or with respect to which construction was commenced, prior to October 18, 1973), together with all lands and water adjacent or contiguous to, or surrounding, such dwelling or structure, and covered by such patent or instrument; and

(2) "person" means any private individual, corporation, or other private entity.

SEC. 7. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

By Mr. BENNETT (for Mr. SPARKMAN) (for himself and Mr. TOWER):

S. 2591. A bill to improve the efficiency and flexibility of the financial system of the United States in order to promote sound economic growth, including the provision of adequate funds for housing. Referred to the Committee on Banking, Housing and Urban Affairs.

Mr. BENNETT. Mr. President, acting for and in behalf of the Senator from Alabama (Mr. SPARKMAN), chairman of the Committee on Banking, Housing and Urban Affairs, and the Senator from Texas (Mr. TOWER), the ranking minority member of the committee, I introduce a bill to improve the efficiency and flexibility of the financial system of the United States in order to promote sound economic growth and to help stabilize the flow of funds into the housing market.

Mr. President, the bill itself is lengthy, running into some 75 pages. For that reason, the Senator from Alabama does not wish to burden the Congress with the expense of printing the bill in the RECORD. The bill when printed will be available through regular Senate distribution sources.

Mr. President, I ask unanimous consent that statements by the Senator from Alabama and the Senator from Texas may be printed in the RECORD.

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

The statements are as follows:

STATEMENT BY SENATOR SPARKMAN

I am pleased to be introducing with Senator Tower a bill to improve the efficiency and flexibility of the financial system of the United States in order to promote sound economic growth and to help stabilize the flow of funds into the housing market.

The bill we introduce is proposed by the Executive based upon the recommendations of the President's Commission on Financial Structure and regulation—more commonly known as the Hunt Commission. Members of this body are generally aware of the far-reaching impact of the Administration's proposals on the financial structure of this country. Because of the great importance of these proposals we will study this matter in great depth in the Banking Committee over coming months, and testimony and comments will be taken over a period of months from spokesmen from all concerned private parties, from all relevant governmental agencies, and from interested academic and business financial experts.

As with all major legislation, there are already widely differing viewpoints on provisions of the bill among different groups and individuals, and many members of Congress do not yet feel sufficiently informed about the pros and cons of this complex measure to be either in favor of it or against it at this early point in its legislative history. I myself wish to study the matter most thoroughly before concluding what aspects of the legislation I will ultimately support, and merely seek by introduction of the bill at this time to provide an appropriate forum for consideration of the Administration's proposals.

I should point out that the Subcommittee on Financial Institutions of our Committee has scheduled so-called "educational hearings" on the proposal for November 6–8, 1973. At that time Treasury and the other governmental agencies affected by the proposal will present their views to the Committee in some detail.

STATEMENT BY SENATOR TOWER

I am pleased to be introducing with the distinguished Chairman of the Committee on Banking, Housing and Urban Affairs today the Administration's bill to improve the functioning of our system of regulated financial institutions. This bill, an outgrowth of several years of careful consideration by a Presidential Commission and spurred by several credit crunches that have demonstrated the structural weaknesses of the present arrangements for depository institutions, is one of the more important measures we will have before the Congress in the foreseeable future. It is no exaggeration to say that the economic health of this country depends in substantial part upon the healthy functioning of the commercial banking system and the system of thrift institutions, which mobilize much of the financial resources of the country and channel them into productive investments. We have seen evidence of malfunctioning in this system in recent years, which will require some statutory action to cure.

Our economic potential is strong, and the financial talent in our institutions is plentiful, but we are preventing these people from making the most of this potential by leaving an outdated statutory structure in place which ties their hands in attempting to perform rational intermediary functions. Financial experts indicate that the present structure is undesirable because of the uneconomic, required differentiation of institutions into special-purpose categories, with only limited powers available to each category. When you place this structure in a complex, constantly changing economy, and have it try to operate with a commodity as fundible and transferable as money, what you find is that money will easily find a better home than these institutions when credit is tight, and even to some extent when credit is easy.

When we rigidify these institutions with well-meaning but overly restrictive rules about where and how they can raise their funds and what they can do with them, all we are doing is penalizing the special purposes for which we design them in the first place. This has been obvious in the housing field, where the restrictions on the activities of savings institutions have prevented them from competing for scarce funds, to

the detriment of our housing needs and the one-quarter of our economy dependent upon the level of housing activity. The Administration proposes that if we are going to subsidize housing finance, we should do it through the tax system rather than through interference with the rational market conduct of intermediaries; our return per dollar of subsidy would be substantially improved, and the system of credit allocation generaly would be greatly rationalized, I applaud the forward-looking proposals of the Administration in this area, and look forward to investigating them in depth in our Committee over the coming months.

Mr. BENNETT. Mr. President, I ask unanimous consent to have printed in the RECORD the message from the Secretary of the Treasury transmitting the proposals to the Senate, and a short summary of the bill.

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

THE SECRETARY OF THE TREASURY,
Washington, D.C., October 12, 1973.

Hon. JAMES O. EASTLAND,
President of the Senate pro tempore,
Washington, D.C.

DEAR MR. PRESIDENT: There is transmitted herewith a draft bill, "The Financial Institutions Act of 1973,"

This bill is designed to eliminate the defects in the operation of the country's financial institutions which have been revealed over the last decade. We have for too long merely patched up our existing laws relating to financial institutions. The country deserves a thorough and punctual review leading to a renovation of the services which banks and thrift institutions can offer to their customers. The President's proposals will eliminate government regulation which has impeded the efficiency of our financial system, while retaining those safeguards which are vital to solvency and liquidity.

Consumers and small savers will benefit by freer competition among financial institutions, which will offer the public a fair return on their savings when government ceilings are allowed to be removed. Moreover, these savers will be informed on the benefits of their savings because of the truth-in-savings disclosure requirements included in the bill. There will also be a choice of more financial institutions offering consumer related services such as checking accounts, consumer loans, and housing loans.

The proposals to strengthen and revitalize our financial institutions may be divided into seven major areas:

(1) Interest ceilings on time and savings deposits will be removed over a 5½-year period, and truth-in-savings disclosure will be required.

(2) Expanded deposit services for consumers by federally chartered thrift institutions and banks will be permitted.

(3) Investment and lending alternatives for federally chartered thrift institutions and banks will be expanded.

(4) Federal charters for stock savings and loan institutions and mutual savings banks will be permitted.

(5) Credit union services will be expanded while remaining consistent with their status as tax-exempt institutions.

(6) FHA and VA interest ceilings will be removed.

(7) The tax structure of banks and thrift institutions will be modified.

The modernization of our financial institutions is a matter which touches each and every American and is one where I am looking forward to a close cooperation between the Executive Branch and the Congress to insure that our country is provided the finest financial system possible.

There are also enclosed copies of a section-by-section analysis which explains the provisions of this draft bill.

It will be appreciated if you will lay the enclosed draft bill before the Senate. A similar proposal has been transmitted to the House of Representatives.

Sincerely yours,

GEORGE P. SHULTZ.

SHORT SUMMARY OF FINANCIAL INSTITUTIONS ACT OF 1973

TITLE I.—PAYMENT OF INTEREST ON DEPOSIT ACCOUNTS

This title adds the Secretary of the Treasury to the present consultative committee which will continue to prescribe rate ceilings only for five years and six months after enactment of this Act. The appropriate supervisory agencies will prescribe ceilings which will, eighteen months after enactment of this Act, begin to eliminate differentials between commercial banks and thrift institutions by four annual increases, not necessarily equal, and not necessarily on the same day each year, in rates of interest which commercial banks may pay on deposits.

Interest rate ceilings on negotiable order of withdrawal accounts (N.O.W.) may differ from ceiling on other accounts but may be no greater than the ceilings on passbook accounts at commercial banks. N.O.W. ceilings will be uniform for banks and thrift institutions.

Demand deposit accounts, negotiable order of withdrawal accounts and savings accounts may be offered at all banks and thrift institutions to all customers.

The payment of interest on demand deposits will remain prohibited for all institutions.

In addition, this title adds truth-in-savings provisions which will require disclosure by commercial banks and thrift institutions to all depositors.

TITLE II.—EXPANDED DEPOSIT LIABILITY POWERS AND RESERVES

This title provides federal thrift associations with third party payment authority, including negotiable order of withdrawal accounts (N.O.W.), with access to the check clearing process, and with authority to engage in credit card operations. These new powers of thrift associations would be similar to powers of commercial banks.

Banks will be empowered to offer savings accounts and N.O.W. accounts to all customers. individual and corporate. Commercial banks may presently offer savings accounts only to individuals.

All federally chartered institutions and all state chartered institutions which are members of the Federal Reserve System or the Federal Home Loan Bank System will be required to maintain reserves against deposits in demand and N.O.W. accounts in a form and amount prescribed by the Federal Reserve Board after consultation with the Federal Home Loan Bank Board. State chartered savings and loan associations insured by the Federal Savings and Loan Insurance Corporation need not be members of the Federal Home Loan Bank System, just as state chartered banks need not be members of the Federal Reserve System.

TITLE III.—LENDING AND INVESTMENT POWERS

This title would permit increased income and liquidity for thrift institutions through portfolio diversification and the acquisiton of shorter term assets. Liberalization of restrictions would be made in the areas of consumer loans, real estate loans, construction loans, community welfare and development investments, and commercial paper and corporate debt securities investments.

National banks would have liberalized powers with respect to real estate loans and a leeway authority for community welfare and development investments.

In addition, the Federal Reserve Board would be granted more flexible authority to define assets eligible for discount, and the Federal Home Loan Bank Board would have expanded authority to define the types of assets eligible as collateral for Federal Home Loan Bank advances to thrift institutions.

TITLE IV.—CHARTER AND THRIFT INSTITUTIONS

This title strengthens the dual banking system by authorizing stock thrift institutions at the federal level, just as stock institutions are now permitted at the state level. The Federal Home Loan Bank Board will be empowered to charter stock thrift institutions, which will have powers identical to those possessed by mutual savings and loan institutions. These thrift institutions will be called either Federal Savings and Loan Associations or Federal Savings Banks.

Federally chartered and state chartered mutual institutions may convert to federal stock institutions and federally chartered mutual institutions may convert to state stock institutions, subject to approval of the Federal Home Loan Bank Board pursuant to its regulations. State institutions which convert to federal institutions may retain their life insurance, equity investments and corporate bond investments.

TITLE V.—CREDIT UNIONS

This title modernizes the federal law dealing with credit unions. In addition to technical amendments, the title liberalizes certain credit union powers and facilitates credit union operations in different economic periods, e.g., by permitting, with the approval of the Administrator of the National Credit Union Administration, loan rates to be more than the present statutory 1 percent per month.

To deal with periods of severe credit restraint or emergency events, such as a plant closing, a Central Discount Fund is established for federally- or state-insured credit unions. The Fund is created solely to provide funds to meet emergency and temporary liquidity problems. The Fund will be administered by the Administrator of the National Credit Union Administration.

TITLE VI.—GOVERNMENT INSURED AND GUARANTEED MORTGAGE LOANS

This title corrects the situation, which has existed for some time, of restricted funds for housing because of governmental attempts to keep interest costs artificially low. The administrative interest ceilings placed upon Federal Housing Administration—insured and Veterans Administration—guaranteed mortgage loans have resulted in the widespread use of "points" and the general unavailability of funds through these mediums. The removal of interest rate ceilings on FHA and VA loans should result in more adequate funds to solve the nation's housing problem.

TITLE VII.—UNIFORM TAX TREATMENT OF FINANCIAL INSTITUTIONS

In light of the expanded powers to be granted thrift institutions and the overall goal of reducing the degree of functional specialization among financial institutions, the objective of Title VII is a uniform tax formula for all financial institutions. A tax neutrality is sought, such that a given investment or activity will be subject to the same income tax provisions regardless of the functional type of financial institution making the investment or engaging in the activity. Differences in tax treatment and thus, overall tax burden and effective rates of taxation among financial institutions will continue to exist. These differences will result from a combination of three factors: (1) the form of the institution, i.e., mutual bank versus capital stock corporation; (2) federal and state regulations which will grant certain types of institutions the power to make certain investments and engage in certain activities which are denied to other

institutions; and (3) the extent of utilization by an individual institution of the powers granted to it.

Under current law a subsidy is provided for the residential mortgage market through special bad debt reserve deductions for thrift institutions. Consistent with the objective of a "uniform tax formula," this subsidy should be eliminated. If the current subsidy for the residential mortgage market and hence for the housing industry is eliminated, an alternative incentive to insure a continued flow of capital from the private sector into the residential mortgage market could be provided for all taxpayers, not just thrift institutions. In addition, such an incentive would provide a mechanism whereby thrift institutions could be compensated for the tax benefit which would be lost via elimination of the current special bad debt reserve provisions.

In providing a "uniform tax formula" for financial institutions the principal area of current law which would be affected is those provisions relating to deductions for additions to a reserve for losses on loans. Currently, thrift institutions under section 593 of the Internal Revenue Code are allowed to compute reserve additions for qualifying real property loans on the basis of a percentage of taxable income. The 1969 Tax Reform Act reduced the applicable percentage over a ten-year period from 60 percent to 40 percent. In addition, deductions are limited by an overall limitation on the size of the reserve (6 percent of outstanding loans). If more than 18 percent of a thrift institution's total assets (28 percent in the case of a mutual savings bank) are invested in nonqualifying assets (principally cash, government obligations, real property loans, and student loans), the applicable percentage is reduced and if less than 60 percent of the assets are invested in qualifying assets the percentage of taxable income method may not be used. In the case of nonqualifying loans, reserve additions are based on the actual loss experience of the institution in a manner consistent with provisions applicable to commercial banks.

Prior to 1969, commercial banks computed reserve additions on the basis of a percentage of outstanding eligible loans or on the basis of the actual loss experience of the individual institution. The Tax Reform Act of 1969 eliminated the percentage of outstanding eligible loan method subject to an 18 year transition period. Under the transition rules, reserve additions may not increase the balance of the reserve to an amount in excess of 1.8 percent of eligible loans outstanding in the case of taxable years before 1976; 1.2 percent for taxable years between 1976 and 1982; and 0.6 percent for years before 1988 after which time all commercial banks will be required to compute reserve additions on the basis of actual loss experience. In addition, the reserve addition in any one year may not exceed 0.6 percent of eligible loans outstanding. Under the experience method, reserve additions are computed on the basis of actual loss experience for the current taxable year and the preceeding five taxable years. If the balance of the reserve as of the close of the last taxable year beginning on or before July 11, 1969 exceeded the amount allowable on the basis of the specified percentage of eligible loans or on the basis of the six-year actual loss experience, the bank, nevertheless, is allowed to deduct amounts necessary to maintain the dollar balance of the reserve (assuming the level of outstanding loans does not decrease). This insures that a commercial bank will receive a deduction for the amount of loans which are written off as wholly or partially worthless during the taxable year.

By Mr. DOMINICK:

S. 2595. A bill to amend the Internal Revenue Code of 1954 to provide for a tax on every new automobile with respect to its fuel consumption rate, and for other purposes. Referred to the Committee on Finance.

Mr. DOMINICK. Mr. President, the perils of the energy crisis, especially our growing reliance on imported oil, is becoming clearer day by day. Amid threats of oil cutoffs from the Mideast, we are now hearing increasingly the motto of conservation. All of us are aware of and searching for ways to conserve the supplies which we have left while preserving our environment.

Earlier this year I called on the Department of Defense for a 10-percent cutback in its consumption of energy in introducing Senate Concurrent Resolution 34, where such cutbacks would not jeopardize our national security. I am gratified by the fact that we were able to add that resolution in the form of an amendment to the recently passed armed services authorization bill.

Subsequently, I introduced S. 2236 in order to require EPA to issue new standards for emissions from automobiles at altitudes above 3,000 feet. Evidence was growing that automobiles in fact issue 150 to 200 percent more emissions above that level than at sea level. I am pleased to note that EPA on last Friday issued proposed regulations to acomplish that which I sought to accomplish through legislation.

Mr. President, as I think many of our colleagues know, I am a pilot. Any time we go higher, we have to cut back on our mixture controls in order to be able to get more efficient use of the engine. The same thing is true of an automobile, but the EPA standards were all done at sea level, and did not take into account the fact that you needed a change at higher altitudes. In fact, regulations prohibited any change of emission controls, so that you could not do anything about it, and we were in fact using twice as much gasoline as we needed, emitting about twice as much emissions as we wanted to have, and not increasing the efficiency of the engines.

Mr. President, today, I introduce for appropriate reference a bill designed to combat part of our energy crisis in this country—the amount of gasoline consumed by the automobiles traveling on our Nation's highways. All of us by now are familiar with the gasoline shortages which erupted around the country this summer, and certainly no city was beset with more problems than the city of Denver in my own State.

I might add that this situation will probably get worse over the next few years.

In reviewing the statistics of energy consumption in this country, I was struck by the fact that 6 million barrels of oil a day now go into the production of gasoline. By 1983 that figure may rise to 10 million barrels a day at our current rates of consumption. In order to cut back on fuel consumption in this area, numerous proposals have been advanced ranging from a tax increase on gasoline itself to a tax on the horsepower of engines. However, in reviewing these proposals and from other studies, I am convinced that the best approach is a tax on the fuel consumption rate of the automobile.

Mr. President, as I see it, the primary purpose of this type of tax must be the production of more efficient fuel consuming vehicles. The figures of gasoline consumption in this country, I believe, are enormous, but even more disturbing is the fact that studies indicate that by use of available technology right now, it would be possible for U.S. auto manufacturers to redesign U.S. cars to effect an average increase in miles per gallon of up to 75 percent.

I have been suggesting to my colleagues here and my constituents at home that the time has come for us to push on with development of our own fossil fuels as well as carrying on a broad research program into other potential energy sources such as solar energy. We cannot afford the luxury of reliance on foreign sources, for that path could put this country in trouble if those sources are seriously reduced or cut off completely. I might add that in addition it could have very, very harmful effects on the value of the dollar and our trade balances. At the same time, however, we need to look toward conservation and cutting back of our uses of energy. My bill is another step in that direction.

Briefly, my bill imposes a tax on the production of automobiles related to the amount of fuel consumed by the auto as determined by Environmental Protection Agency testing procedures. The tax is computed based on a standard of 20 miles per gallon. For amounts of fuel consumed over a base of 5 gallons for every 100 miles, there is assessed a tax derived from a multiple of $235. It is this rate which has been projected to be the minimum tax needed to bring about changes necessary to produce better fuel consumption.

Just as an example, I bought a 1972 Chevrolet Nova for use in Colorado last year, and I still have it. I have still got it. On a recent trip which I took, the car averaged 8.4 miles per gallon. For a small car of that kind, it seems to me that is totally ridiculous. Obviously, the bigger the car the less efficient the engine and the more the gasoline consumption is.

I recognize that automobile manufacturers are tied to long leadtimes in designing automobiles and have, therefore, implemented this tax over a 3-year period. It is my hope that auto manufacturers will in fact respond to this phase-in period by implementing changes so that fuel consumption rates will improve immediately. Included in such changes can be expanded use of low friction tires, lighter weights, overdrive, body shell design, smaller engines, and fuel injection engines as opposed to carburetor engines. This is already being done in many European and Japanese cars.

This is one tax which I hope will produce less revenue in future years, because of the response we will get from the automobile manufacturers. Once the 3-year phase-in period is completed and if the anticipated response does in fact materialize, the tax revenues should be decreasing. I am well aware, of course, that those who prefer to drive cars which are big fuel consumers will be paying more for that privilege. That is their op-

tion. On the other hand, the savings that all of us will share in if this legislation is enacted are beyond measurement in dollars and cents. By 1980 this tax could result in savings of better than 1 million barrels of oil per day, approximately one-half of the projected supply from the Alaskan pipeline.

Mr. President, I want to take this opportunity to urge prompt action on this legislation. We cannot afford delays in legislation such as this or other energy-related matters. The time has arrived when the dangers of our energy use are clear, and we must act now to preserve our own premium fuels while at the same time protecting our environment. The crisis is here now and all of us must participate in finding solutions.

Mr. President, I ask unanimous consent to have printed in the RECORD the text of the bill I am introducing today.

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

S. 2595

A bill to amend the Internal Revenue Code of 1954 to provide for a tax on every new automobile with respect to its fuel consumption rate, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the purposes of this Act are to encourage the development, manufacture, and importation of automobiles which efficiently consume fuel, to increase revenues which could be devoted to energy research or other vital national needs, and to stimulate the conservation of energy.

SEC. 2. (a) Part I of subchapter A of chapter 36 of the Internal Revenue Code of 1954 (relating to motor vehicle excise taxes) is amended by adding at the end thereof the following new section:

"SEC. 4064. AUTOMOBILE FUEL CONSUMPTION TAX.

"(a) IMPOSITION OF TAX.—There is hereby imposed upon every new automobile manufactured, produced, or imported a tax at whichever of the following rates is applicable with respect to the fuel consumption rate (as determined under subsection (b)) of such automobile:

"(1) for the period beginning July 1, 1975, and ending June 30, 1976:

"If the consumption rate (in miles per gallon) is:	The tax is:
Over 20	0
Over 19 but not over 20	$32
Over 18 but not over 19	43
Over 17 but not over 18	70
Over 16 but not over 17	98
Over 15 but not over 16	133
Over 14 but not over 15	164
Over 13 but not over 14	211
Over 12 but not over 13	274
Over 11 but not over 12	313
Over 10 but not over 11	392
Over 9 but not over 10	478
Over 8 but not over 9	587
Over 7 but not over 8	728
Over 6 but not over 7	913
Over 5 but not over 6	1,175
Not over 5	1,568

"(2) for the period beginning July 1, 1976, and ending June 30, 1977:

"If the consumption rate (in miles per gallon) is:	The tax is:
Over 20	0
Over 19 but not over 20	$47
Over 18 but not over 19	86
Over 17 but not over 18	141
Over 16 but not over 17	196
Over 15 but not over 16	266
Over 14 but not over 15	329
Over 13 but not over 14	$423
Over 12 but not over 13	548
Over 11 but not over 12	627
Over 10 but not over 11	783
Over 9 but not over 10	956
Over 8 but not over 9	1,175
Over 7 but not over 8	1,457
Over 6 but not over 7	1,827
Over 5 but not over 6	2,350
None over 5	3,133

"(3) for the period after July 1, 1977:

"If the consumption rate (in miles per gallon) is:	The tax is:
Over 20	0
Over 19 but not 20	$70
Over 18 but not over 19	129
Over 17 but not over 18	211
Over 16 but not over 17	294
Over 15 but not over 16	399
Over 14 but not over 15	493
Over 13 but not over 14	634
Over 12 but not over 13	822
Over 11 but not over 12	940
Over 10 but not over 11	1,175
Over 9 but not over 10	1,433
Over 8 but not over 9	1,762
Over 7 but not over 8	2,185
Over 6 but not over 7	2,740
Over 5 but not over 6	3,525
Not over 5	4,700

"(b) DETERMINATION OF FUEL CONSUMPTION RATE.—The fuel consumption rate of new automobiles taxable under subsection (a) will apply only to gasoline-powered automobiles and shall be determined solely on the basis of the Automobile Fuel Consumption Schedule prepared by the Administrator of the Environmental Protection Agency.

"(c) LIABILITY FOR PAYMENT.—The tax imposed by this section shall be paid by the manufacturer, producer, or importer at such time and in such manner as the Secretary of the Treasury shall prescribe.

"(d) DEFINITIONS.—For the purposes of this section—

"(1) the term 'new automobile' means every internal combustion engine powered vehicle designed for use on the highway which has never been transferred to the ultimate purchaser, and

"(2) the term 'ultimate purchaser' means, with respect to any new automobile, the first person who in good faith purchases such automobile for purposes other than resale.".

(b) The table of sections for such part I is amended by adding at the end thereof the following new item:

"Sec. 4064. Automobile fuel consumption tax.".

(c) The amendments made by this section shall take effect on July 1, 1975.

SEC. 3. (a) The Administrator of the Environmental Protection Agency shall, from time to time, study and investigate the fuel consumption rates of automobiles which are subject, or may be subject, to the tax imposed by section 4064 of the Internal Revenue Code of 1954 (relating to automobile fuel consumption taxes).

(b) The studies and investigations conducted under subsection (a) shall include tests—

(1) of each automobile model subject to such tax equipped—

(A) with each available engine size (measured by horsepower); and

(B) without optional accessories;

(2) which shall be conducted—

(A) under driving conditions representative of an average composite of urban and nonurban driving speeds and circumstances,

(B) with the fuel used being of the quality normally recommended for use in such automobile; and

(C) with such automobile carrying the average weight load for which it was designed.

(c) Based upon the studies and investigations conducted under subsection (b), the Administrator shall determine the fuel consumption rate of each such automobile model without optional accessories and with each available engine size. The Administrator shall, not later than June 1, 1975, and each year thereafter, prepare and transmit to the Secretary of the Treasury schedule of all such rates to be known as the Automobile Fuel Consumption Schedule (interim revisions of as he deems appropriate). The Automobile as he deems appropriate. The Automobile Fuel Consumption Schedule shall be made available for sale as a public document.

SEC. 4. Section 3 of the Automobile Information Disclosure Act (15 U.S.C. 1232) is amended by inserting "(a)" after "SEC. 3." and by adding at the end thereof the following:

"(b) Every label required to be affixed under subsection (a) shall include, in the case of any automobile on which a tax was imposed by section 4064 of the Internal Revenue Code of 1954 (relating to automobile fuel economy taxes)—

"(1) the fuel consumption rate determined to be applicable for such automobile, and

"(2) the tax paid under such section 4064.".

By Mr. COOK:

S. 2596. A bill to provide relief to units of local government from liability for repayment of excessive payments made due to an error by the United States under the State and Local Fiscal Assistance Act of 1972. Referred to the Committee on Finance.

Mr. COOK. Mr. President, today I am introducing legislation which I am hopeful will be considered promptly by the appropriate committee. My bill would amend the State and Local Fiscal Assistance Act of 1972 to forgive liability for repayment for those units of local government which received excessive revenue-sharing payments from the Federal Government through this date, October 18, 1973.

In an effort to quickly allot the payments of revenue-sharing funds to local and State officials who were clamoring for Federal assistance, the Department of the Treasury speedily, and with the aid of the Bureau of the Census, determined eligibility based upon the revenue-sharing formula, and mailed out checks. As more accurate data became available to the Office of Revenue Sharing, it revised and updated its entitlements for the local governments accordingly. What has resulted across the Nation is an absolute budgetary crisis for particularly small towns which were greatly overpaid or were not eligible for funds in the first place.

One specific example of this disastrous fiscal error is the city of St. Charles in Hopkins County, Ky. St. Charles received a total of $2,984 over a period of its first three entitlement periods while it should have only been paid $564. This amounts to a negative adjustment of $2,420 which St. Charles, on August 20, was notified it must repay. The total allocation due to St. Charles for fiscal year 1974 is $460 and at this annual rate it will take St. Charles approximately 5 years to repay. This will extend beyond the 5-year life of the program. Meanwhile, St. Charles engaged in a binding contract to rebuild its city hall which was destroyed in 1971. They are under obligation to meet the

financial agreement of this contract, but are in a quandry as to how it will be done.

I can cite other examples for you within my own State of Kentucky. The city of Hiseville in Barren County received $1,727 and was not entitled to any revenue-sharing funds. They spent approximately $1,000 of their allocation to remodel city hall and have already returned $727. The town budget ordinarily is raised through cake sales and other community activities. The Wall Street Journal learned of this most unfortunate error and on October 9, 1973, carried an editorial urging the Federal Government to forgive the amount of overpaid funds. I ask unanimous consent that this editorial appear at this point in the RECORD.

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

DESERVING ENCOURAGEMENT

The Associated Press reports that Federal largesse has put Hiseville, Ky., in a jam. Washington gave the town a revenue-sharing payment of $1,727. This comes to about $727 more than the annual budget, but Hiseville spent about half of the windfall remodeling city hall.

Now the government says Hiseville isn't entitled to the money and has to pay it back. It seems the revenue-sharing allotments are supposed to be based on local tax effort, and Hiseville has only a small utility tax. The town budget, says AP, is "raised mainly through cake sales and other community activities."

Mayor William C. Phillips sent back $727 in unspent money and is asking the revenue-shares to be patient about the rest. But it seems to us that any town that can raise its budget by bake sales and remodel city hall for $900 deserves to be encouraged. Maybe the Feds could settle for two cakes and a dozen donuts.

Mr. COOK. The city of Camargo in Montgomery County was also overpaid by the Office of Revenue Sharing to the tune of $1,721 and has been ordered to repay the entire amount for it is entitled to no more revenue-sharing funds. I would also like to point out at this time that many of the officials for these small towns—and they are indeed small—received three entitlement payments before filling out any forms or being notified of the eligibility requirements. Acting on good faith that they deserved the money and could trust the Federal Government, they committed the money to deserving public needs, such as fire engines, street lights, and city streets. Those of you who have urged the Bureau of the Census to accept utility taxes within the definition of taxes for the purposes of the revenue-sharing formula will understand when I tell you that two of the cities who must repay the money and will not be entitled to future payments were apparently originally allocated funds because they had a utility tax. This is clearly the fault of the Office of Revenue Sharing and not those city officials who faithfully believed, because it is considered so within their own towns, that utility taxes qualify as taxes.

At this point I ask unanimous consent that an article which appeared in the Courier-Journal and Times of October 7 relating to this entire problem in Kentucky be printed in the RECORD at this point.

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

RETURN OF REVENUE-SHARING MONEY ASKED: $3,687 BILL FROM UNITED STATES LOOKS OVERWHELMING TO TWO SMALL TOWNS

(By Bill Peterson)

WASHINGTON.—Pity tiny Hiseville. Pity little St. Charles.

Uncle Sam, in the form of the U.S. Office of Revenue Sharing, sent them each a bill recently, and they don't have the money to pay it. Or know how to come up with the cash fast.

Both are crossroad communities that traditionally have supplemented meager tax revenues with bake sales, gospel sings, tractor-pulling contests and pancake suppers.

Their budgets, however, mushroomed with the advent of revenue sharing last year. Each received four checks. But now both towns have been told they were overpaid, and must pay back the money—most of which has been spent.

Hiseville owes $1,727 and St. Charles $1,900—a total of a $3,687.

Thirty-five other Kentucky governmental units also were overpaid.

And another 178 local governments, including Jefferson County and 36 suburban Louisville communities, won't get the latest round of revenue-sharing checks tomorrow when other governments around the country do, because they failed to fill out proper forms on time. A spokesman for the Office of Revenue Sharing said the governments will be entitled to their checks after completing the required forms, including ones on how they plan to spend the money.

But these jurisdictions eventually should get additional checks and have overpayments repaid by deductions from future allotments.

No such easy solution for Hiseville, population 160. The Office of Revenue Sharing has ruled the Barren County town won't get any more checks because it has no city property tax and revenue sharing allotments are conditional on the local tax effort.

Baffled Hiseville Mayor William C. Phillips claims federal officials have never explained why they sent the money in the first place.

The town, he said in a telephone interview, spent $1,000 of the $1,727 it received to remodel city hall.

It spent the funds carefully, filling out all the forms and ensuring the aid was spent legally.

"It's a simple story," Phillips said, "They sent us some money, and we spent it in good faith.

"We've complied with everything we were supposed to and now they say they want their money back. I don't know what to think. Something like this happening to a small community like us seems just ridiculous."

His shock was heightened when he found Hiseville would be denied further funds. This week he wrote to Washington, protesting the action and asking that if Hiseville has to repay the money, it be given time to do it. He enclosed a $727 check—what remained unspent.

Hiseville, about 15 miles northeast of Glasgow, has an annual budget of about $1,000, he said. It has no city property tax and doesn't want one. The town raises funds from a small utility tax and community activities.

The mayor said, "We try to do what's right and help someone out when they're in trouble. What I'm saying is, we're not a bunch of crooks."

When Gilbert W. Dunbar, chairman of the board of trustees of St. Charles in Western Kentucky's Hopkins County, heard the Office of Revenue Sharing wanted $1,960 back he wrote a straight forward letter to Washington.

"We are sorry to inform you that it is impossible to send a check to you," he said. "St. Charles is a small and indigent community. The revenue sharing funds which we received were like a godsend to us.

"We accepted these funds in good faith, believing they were intended for the betterment of our community. There was no indication that any portion of this money would have to be refunded or repaid.

"In short, the money has been spent as we believed it was intended to be."

COAL-MINING TOWN

St. Charles, population 400, is an old coal-mining town, whose residents are largely pensioners, Dunbar said in a telephone review. It used revenue sharing to rebuild city hall, pay an overdue light bill, repair streets and do ditchwork.

Unlike Hiseville, St. Charles is entitled to additional revenue sharing because it has city taxes. "But it's in a bad situation because it was overpaid so much that it will take years to repay the money," said Mary McAuliffe, an aide to Kentucky Sen. Marlow Cook, who specializes in revenue sharing problems.

Problems like those faced by Hiseville and St. Charles, she said, have made many small towns "uneasy" about using revenue sharing.

"I've worked with so many places that are hesitant to spend their money," she said. "They've never dealt with the federal government before and they are very leary."

Jack Eversole, executive director of the Barren River Area Development District which serves 10 counties in Western Kentucky, said:

"There's a considerable credibility gap. Most small towns don't believe it's going to be a permanent program. Many of them are scared to death that someone is going to come and want the money back after they've spent it."

OTHERS MUST REPAY AID

Nine other small communities in his development district, have been told they must repay revenue sharing funds. "The program was a good idea, but the way it's administered, the small towns that needed help the most are being gradually phased out by bureaucratic red tape," he added. "They don't have anyone to serve as their advocates, they can't afford lawyer fees, and they don't have sophisticated staffs to carry their protests to Washington when something like this happens."

Yesterday 29,000 local and state governments were mailed quarterly checks.

But Jefferson County's $1.4 million quarterly check is being held as are the checks for these 36 suburban Louisville communities that missed last month's filing deadline:

Anchorage, $1,902; Brownsboro, $957; Druid Hills, $567; Fairmeade, $328; Indian Hills, $623; Lincolnshire, $263; Lynnview, $1,476; Meadowville Estates, $269; Parkway Village, $861; St. Regis Park, $1,586; Seneca Gardens, $845; Springlee, $606; Strathmoor Manor, $647; Wellington, $755; Windy Hills, $1,758; Briarwood, $353; Hollyville, $1,002; Houston Acres, $711; Keeneland, $640; Forest Hills, $551; Graymoor, $1,474; Minor Lane Heights, $2,183; Moorland, $658; Maryhill Estates, $479; Blue Ridge Manor, $599; Barbourmeade, $918; Crossgate, $557; Glenview Manor, $497; Goose Creek, $494; Westwood, $886; Whipps Millgate, $675; Bancroft, $1,457; Glenview Hills, $435; Hollow Creek, $519; Manor Creek, $1,054; and Riverwood, $290.

In addition, officials said these other Kentuckey counties and communities will not receive revenues sharing checks tomorrow.

Adair County, $42,240; Columbia, $8,807; Kevil, $309; La Center, $2,010; Wickliffe, $1,455; Barren County, $74,786; Walton, $3,327; Union, 125; Cattlettsburg, $23,357; Junction, $2,131; Perryville, $2,868; Foster, $92; Breathitt County, $47,749; Bullitt County, $85,417; Lebanon Junction, $1,139; Mount Washington, $3,140; California, $89;

Crestview, $564; Dayton, $22,906; Woodlawn, $549; Mentor, $260; Arlington, $1,418; Bardwell, $2,091; Carrollton, $16,649; Casey County, $27,802, and LaFayette, $163.

Also, Clay County, $50,274; Clinton County, $15,761; Dycusburg, $163; Edmonson County, $11,352; Elliott County, $10,692; Estill County, $42,406; Floyd County, $53,041; Allen, $183; Frankfort, $102,654; Hickman, $8,055; Gallatin County, $16,093; Sparta, $356; Warsaw, $2,518; Glencoe, $601; Garrard County, $42,308; Corinth, $418; Dry Ridge, $4,260; Water Valley, $16; Greenup County, $63,603; Greenup, $2,279; Worthington, $2,082, and Lewisport, $1,934.

Also, West Point, $1,535; Harlan County, $69,502; Cumberland, $11,970; Berry, $491; Cynthiana, $65,512; Hart County, $38,095; Henderson County, $63,886; Henry County, $27,756; Clinton, $5,224; Columbus, $153; Nebo, $75; Jackson County, $34,169; Wilmore, $9,497; Johnson County, $110,629; Crestview Hills, $1,157; Indpendence, $1,998; Crescent Springs, $1,649; Crescent Park, $513; Taylor Mill, $4,233; Ridgeview Heights, $206 and Knott County, $39,365.

Also, Barbourville, $3,810; Knox County, $47,556; Laurel County, $59,047; Lawrence County, $41,624; Hyden, $3,518; Whitesburg, $5,356; Lincoln County, $51,834; Crab Orchard, $643; Hustonville, $421; Smithland, $630; Salem, $28; Russellville, $45,825; Island, $439; Sacramento, $931; Magoffin County, $28,380; Salyersville, $11,115; Gilbertsville, $70; Briensburg, $227; Dover, $477; Washington, $365; Ekron, $71; Frenchburg, $2,837; Harrodsburg, $26,696; Edmontson, $1,320; Fountain, $594; and Drakesboro, $879.

Also, Bremen, $547; South Carrollton, $398; Fairfield, $366; Ohio County, $62,177; Fordsville, $675; Rockport, $152; Oldham County, $31,200; Crestwood, $403; Monterey, $126; Owenton, $3,198; Owsley, $23,622; Falmouth, $6,402; Perry County, $84,520; Cedarville, $256; Coal Run Village, $214; Pleasant Valley, $459; Clay City, $587; Burnside, $2,690; Science Hill, $2,279; Robertson County, $9,649; Rockcastle County, $28,767; Rowan County, $53,191; Shelbyville, $21,269; Simpsonville, $844; Franklin, $38,411; Taylorsville, $2,670; Taylor County $43,319; Trimble County, $22,457; Bedford, $951; Union County, $48,973; Waverly, $113; Plum Springs, $138; Oakland, $238; Washington County, $38,994; Mackville, $11; Wayne County, $47,707; Clay, $1,797; Dixon, $533; Providence, $1,432, and Woodford, $52,068.

BEG YOUR PARDON

Due to a typographical error, the amount the U.S. Office of Revenue Sharing is attempting to recover from St. Charles, Ky., was incorrectly reported as $1,900 in one place in some editions of yesterday's Courier-Journal & Times. The correct figure is $1,960.

Mr. COOK. There are other errors which we are slowly uncovering daily. Some well-meaning citizens have urged the city officials in such affected towns to withhold the money and let the Office of Revenue Sharing sue them for it, which would probably not be done because of the relatively small amounts of overpayments. Court costs would be considerably more, I suspect. However, all of the city officials with whom this office has spoken do not want to jeopardize in any way their future relationship with the Federal Government. The situation has other ramifications in that now I have city officials in small towns all over Kentucky who refuse to spend their money. They are afraid they will wake up some morning with a mailgram from Uncle Sam stating that there was a big mistake and they must send all of the money back. I might also mention here that $1,000 is a lot of money and goes a long way in a small town.

My bill provides that all of those localities throughout the United States which have been overpaid in the amount of five times what they are due up to October 18, 1973, will be forgiven the amount. I believe that this bill is quite sensible and fiscally responsible. These cities will still have to find ways of completing and paying for projects that have already been begun through their own resources. My proposal is primarily aimed at small towns which have been done the most injustice and really do not have the means of repaying the funds without great sacrifice to their own budgets and citizens. Further, I have provided in the bill for the total indebtedness brought about by these overpayments, to be spread out over a period of the next 3 years. This will lessen the economic impact on the budget which is of concern to me. The Office of Revenue Sharing has been instructed to provide me with an impact statement which I hope to have soon.

I have no doubt that my colleagues in the Senate and House have been faced with identical situations in their respective States and I hope to have much support for my bill. At this time I would offer only one admonition to both my fellow Members of Congress and departments of the Federal Government: Next time let us not be so impatient about putting a program into effect involving Federal moneys until we are prepared to see that it can be administered properly and without financial error.

By Mr. STENNIS:

S. 2597. A bill to amend section 102 of the National Security Act of 1947 to clarify the authority of the Central Intelligence Agency with respect to certain intelligence operations. Referred to the Committee on Armed Services.

Mr. STENNIS. Mr. President, I am introducing today, a bill to amend section 102 of the National Security Act of 1947. This is the basic charter for the Central Intelligence Agency. The purpose of the bill is to clarify the authority of the Central Intelligence Agency with respect to two important issues: First, the proper scope of its activities within the United States; second, reporting procedures regarding overseas intelligence operations.

I ask unanimous consent that, at the end of my remarks, the bill be inserted in the RECORD.

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

(See exhibit 1.)

Mr. STENNIS. Mr. President, I think a few words are in order to indicate my reasons for introducing a bill at this time.

Last spring, while I was in the hospital, the committee, under the able chairmanship of Senator SYMINGTON, held detailed hearings in executive session on the allegations involving the CIA's involvement in certain activities during the Watergate affair. In addition, this summer, the committee held detailed hearings on the nomination of Mr. William Colby to be Director of Central Intelligence. The material in all of these hearings raised issues about the precision of the 1947 act—the basic charter of the CIA.

In addition, it has been over 25 years since that law was passed. Any basic statute of this type should be reexamined periodically to insure that it meets the needs of the times.

On July 19, during the debate in the Senate on the war powers bill, of which I am a cosponsor, an amendment was proposed by the distinguished Senator from Missouri (Mr. EAGLETON) which relate to the CIA. With these general points in mind, as well as Senator EAGLETON'S amendment, I commented in a letter to the floor manager of the bill, the distinguished Senator from Maine (Mr. MUSKIE), as follows:

> The experience of the C.I.A. in Laos, as well as more recent disclosures of matters here at home have cauesd me to definitely conclude that the entire C.I.A. Act should be fully reviewed.
>
> Accordingly, I already have in mind plans for such a review of the C.I.A. Act by the Senate Armed Services Committee and have already started some staff work thereon. All proposed changes, additions or deletions can be fully developed and hearings held thereon at that time. I have already completed, but have not yet introduced some amendments of my own.

During the 3 months which have followed my letter to Senator MUSKIE I have further reviewed the hearings and the issues relating to the CIA's basic charter. I have concluded that it would be useful, at this time, for me to introduce a draft bill, and to share with the Members of the Senate my tentative views on some of these important issues. I want to emphasize that I introduce this bill primarily as a vehicle for hearings later in this Congress. It is an invitation for constructive suggestions from other Senators, not a firm position. I not only reserve my right to propose, or agree to, more, fewer, or different changes in the 1947 act, but I would expect that my thinking, and the thinking of other Senators, will change and develop as we hold hearings and study these important issues further. Many may dream, and I would dream with them, of a world in which we did not need the CIA. But the tensions of the modern world, so clearly illustrated these last few weeks, bring home to all of us that such an organization is badly needed. In fact, we cannot do so. Our challenge is to strengthen it in order to enable it to perform effectively its proper functions and it is as obvious as any point can be that the proper functioning of all intelligence organizations requires secrecy in many matters.

At the same time, we must satisfy ourselves that the basic charter of the CIA, and the procedure under which it operates, insure that this important agency will never become the private tool of unscrupulous men, whatever position they may hold. It is my hope that we will be able to make clear and codify limitations which will meet these objectives of which I have spoken. This will involve active recognition by the appropriate committees of the Congress, particularly the Armed Services Committee of both Houses, of their duties of legislative

oversight and surveillance of this important agency.

The bill I introduce today, as a vehicle for hearings, makes changes in two areas.

First, it proposes certain clarifications and limitations to insure that any activities undertaken in this country by the CIA are solely those which are necessary and appropriate to its foreign intelligence mission.

The word "foreign" is inserted before the word "intelligence" wherever the word "intelligence" appears in appropriate places in the existing law.

The role of the Director of Central Intelligence in protecting intelligence sources and methods is limited to the development of plans, policies, and regulations for that purpose. Further, he is required to report violations of such plans, policy, or regulations to the Attorney General of the United States for action. This change would help insure that no one should misunderstand the role of the Director of Central Intelligence and assume that the CIA should take an active role, for example, in stopping security leaks in other agencies.

To clarify this matter even further, it is provided that the CIA is not to engage, directly or indirectly, within the United States, either on its own, or in cooperation or conjunction with anyone else, in any law enforcement operation or activity. The bill explicitly limits the CIA's activities within this country to four situations: first protecting its own installations; second, conducting personnel investigations on all employees, applicants, or others carrying out Agency responsibilities; third, supporting its own foreign intelligence activities, and fourth, providing intelligence to other appropriate departments and agencies.

The second area in which the bill includes proposals is the field of CIA's overseas activities. In the sections of the act which relates to the CIA's foreign intelligence activities, the phrase "relating to foreign intelligence activities" is inserted to help clarify the purpose of one of those sections. The other section relevant to this subject is tightened by the establishment of procedures for reporting such activities to the Congress.

The bill indicates with respect to these procedures two objectives: first, insuring effective legislative oversight, and second recognizing essential security requirements. I would expect much debate and discussion over legislation affecting this area. This is obviously a difficult area in which to legislate, and I believe we should tread carefully, but I believe that we will be able to establish procedures which permit effective legislative oversight, which give Congress and the public confidence that such oversight is being performed, and recognize that such oversight must be somewhat different in character than that for an organization whose activities can be fully made public.

Mr. President, these are difficult times. The events of the last few weeks, and the headlines of the last several days, should give pause to anyone who believes that we can afford to let down our guard, to rely on the good will of our adversaries, or to share publicly with all nations of the world our most secret and important plans and information. We must insure that, in legislating in this area, we continue to provide the flexibility which is needed by the President to respond to emergencies, and to obtain effective intelligence. We must also remember that we are drafting, or redrafting, a basic charter for an institution, not a detailed set of regulations. I believe that, with good will by all of those who have strong convictions on the many issues involved in this important subject, we will be able to adopt sensible and necessary reforms without damage to our Nation's security.

Let me add, by way of emphasis, that which is repetition in part, Mr. President. I think the longer one is here in the Senate and the more in depth he gets into our worldwide operations of security, as well as our worldwide obligations through mutual treaties and agreements, as well as gets further and deeper knowledge of the many unusual happenings and events that are going on throughout the world in this day of so many changes, where the world itself has been changed, for instance, since the original CIA Act was written, changes, say, as to communications and visibility and changes as to methods of detection—all these things combine to convince us of the absolute need and necessity of an agency of this type.

At the same time, an agency of this type is somewhat contrary to the old American ideals. I came here a few months after the act was passed in 1947, and I did not like a lot about it. I was not convinced that we needed it in many respects. But, as I say, time unfolds, conditions unfold, and time brings these tremendous changes. And no one here now could be stronger of the opinion than I am that the need is great and that it is a necessity.

At the same time I believe that it is within our power and our capacity now, in view of the experience we have had, to write an even better act and provide for an even better administration than we have had heretofore. At the same time, as a whole—and I have been connected with this matter for several years—we have had a very fine administration of the Central Intelligence Act.

So, Mr. President, with the printing of the bill in the RECORD, I again thank the Chair and the floor leadership for yielding. I yield the floor.

EXHIBIT 1

S. 2597

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 102 of the National Security Act of 1947, as amended (50 U.S.C. 403), is amended as follows—

(1) Subsection (d) is amended by inserting "foreign" immediately before "intelligence" the first time the latter term appears in such subsection.

(2) Clauses (1) and (2) of subsection (d) are amended by inserting "foreign" immediately before "intelligence" each time the latter term appears in such clauses.

(3) Clause (3) of subsection (d) is amended by inserting "foreign" immediately before "intelligence" the first time the latter term appears in such clause.

(4) The last proviso of clause (3) of subsection (d) is amended to read as follows: "*And provided further,* That the Director of Central Intelligence shall (A) be responsible for developing appropriate plans, policies, and regulations for the protection of intelligence sources and methods from unauthorized disclosure, but such responsibility shall not be construed as authorizing the Agency to engage in any activity prohibited by the first proviso of this clause, and (B) report to the Attorney General of the United States for appropriate action any violation of such plans, policies, or regulations;".

(5) Clause (4) of subsection (d) is amended by inserting "relating to foreign intelligence activities" immediately after "of common concern".

(6) Clause (5) of subsection (d) is amended to read as follows:

"(5) to perform such other functions and duties related to foreign intelligence affecting the national security as may be specifically directed from time to time by the Council and reported to the Congress in such manner and in accordance with such procedures as the Congress may establish to insure effective legislative oversight with due recognition of essential security requirements.".

(7) Add at the end of such section a new subsection as follows:

"(g) Nothing in this or any other Act shall be construed as authorizing the Central Intelligence Agency to engage, directly or indirectly, within the United States, either on its own or in cooperation or conjunction with any other department, agency, organization, or individual in any police or police-type operation or activity, any law enforcement operation or activity, or any internal security operation or activity: *Provided, however,* that nothing in this Act shall be construed to prohibit the Central Intelligence Agency from (1) protecting its installations, (2) conducting personnel investigations of Agency employees and applicants or employees of contractors and other requiring access to sensitive Agency information in carrying out Agency responsibilities, (3) carrying on within the United States activities necessary to support its foreign intelligence responsibilities, or (4) providing information resulting from foreign intelligence activities to other appropriate departments and agencies."

By Mr. DOMENICI (for himself, Mr. EASTLAND, Mr. RANDOLPH, Mr. NELSON, Mr. FANNIN, Mr. PERCY, Mr. BAKER, Mr. MATHIAS, Mr. GRAVEL, Mr. HUMPHREY, Mr. BUCKLEY, Mr. BARTLETT, Mr. DOMINICK, and Mr. MUSKIE):

S. 2598. A bill entitled "Car Pool Incentives Act of 1973." Referred to the Committee on Public Works.

Mr. DOMENICI. Mr. President, I rise for two reasons first, to compliment the distinguished Senator from Colorado (Mr. DOMINICK) on the bill he has just introduced. I do not think there is any more serious crisis than the one he has just described and I certainly compliment him on the approach he is taking in the Senate looking toward a solution.

Quite by coincidence, I have a bill which I will introduce today and which I think the Senator from Colorado will be interested in, called the Car Pool Incentives Act of 1973, which would establish a program of demonstration projects and indepth study to increase the use of car pools in urban areas during rush hours as a means of attacking our grave national problems of air pollution, energy demands exceeding available

energy sources, traffic congestion, and overuse of land for highways and parking facilities.

I am pleased to be joined in introducing this legislation by 11 of my distinguished colleagues. They are the Senator from Mississippi (Mr. EASTLAND), the Senator from West Virginia (Mr. RANDOLPH), the Senator from Wisconsin (Mr. NELSON), the Senator from Arizona (Mr. FANNIN), the Senator from Illinois (Mr. PERCY), the Senator from Tennessee (Mr. BAKER), the Senator from Maryland (Mr. MATHIAS), the Senator from Alaska (Mr. GRAVEL), the Senator from Minnesota (Mr. HUMPHREY), the Senator from New York (Mr. BUCKLEY), and the Senator from Oklahoma (Mr. BARTLETT). It should be obvious that the bipartisan support from Members of this body indicates an awareness of the problems this Nation faces which this legislation is intended to help solve.

It should be obvious from the kind of support from Members of this body, that they are all aware of the problem our Nation faces in trying to deal with the American people in their concept that the automobile is their sole and singular possession and that they should be allowed to ride along the highways and the byways, consuming energy and polluting the air.

My bill is aimed at trying to help the cities find comprehensive programs to entice the American people to move away from this one-person-in-one-car concept, driving 22 miles to work, or 12 or even 40, and put together a package which will be administered by the Department of Transportation where they will be permitted to select up to 10 cities in the United States and grant them, on a 90 to 10 matching basis, up to $1 million to implement comprehensive programs including such things as equipment, and so forth, to be able to tell an individual who lives in a certain neighborhood or who may request where he might find a prospective ride or where he might find a prospective rider, where he might find someone that will go to work close to where he is going, or where he might find how many of those people exist within the radius of his house.

I would like to see some cities experiment with either the use of social security information, or the use of drivers licenses information, thereby tapping this great resource of data processing and the like where this information could be made available.

The bill would also ask the cities to consider anything they can think of that would entice the car pooler and to estimate its cost on an experimental basis.

Further, the bill would ask that the Department of Transportation, the Environmental Protection Agency, and the IRS, during an 18-month period after it has selected the cities, try this demonstration of the 90 to 10 program, that they compile statistics with respect to a tax incentive that might cause more people to use car pools, and that they find out how much it will cost the Treasury Department if they permitted the car pooler to deduct depreciation on his car instead of being prohibited from doing that and perhaps give him some kind of advantage with reference to a gasoline tax which we do not now give him.

There are those who say, "How can we do this? How can we define them and police them?" Until we try, we are never going to be able to do so.

I submit that when our country has statistics indicating that during the rush hours in most of our urban communities, if we just added 0.4 of a person, as an average, to the front seat of that car driving down the highway, this country would save almost 600 million gallons of gasoline a year. That is not even by adding the average of one person but adding 0.4 of a person, on a national average, to a car as it goes through the bulk of the commuter time.

My bill, as it gets to committee, might even be expanded so that the Department of Transportation would do this for every city that would come up with a comprehensive plan, to entice them to come up with a program to implement car pooling in their particular community—whether it is a new kind of off-street parking for pooling cars, whether to match up a better kind of parking facility with a car pooler. Numerous things of a physical nature can be done, coupled with today's technology.

In my opinion, this can be accomplished if we emphasize it and help the cities in a way which would cause the typical American commuter to realize that he has been very foolish and wasteful, that this would save him money, that it would save the country some problems, an dthat, hopefully, over the long run, it would save some taxes for him.

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

Mr. DOMENICI. I yield.

Mr. DOMINICK. Mr. President, I congratulate the Senator from New Mexico on a very innovative idea. Everybody has been wondering about how to get people to carpool, and this is a real experiment in getting it done.

I should like to join the Senator, as a part of the whole program I am trying to use so far as conservation of energy is concerned. I think the Senator has a very innovative idea.

Mr. DOMENICI. I thank the distinguished Senator for his support. I think those on the floor understand what I am talking about.

Does the Senator from Colorado desire that his name be added as a cosponsor of the bill?

Mr. DOMINICK. Yes.

Mr. DOMENICI. Mr. President, I ask unanimous consent that the name of the distinguished Senator from Colorado be added as a cosponsor.

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

Mr. DOMENICI. This bill would establish a modest program of comprehensive demonstration projects by the Department of Transportation; the projects, chosen for their potential effectiveness in States and municipalities, would demonstrate the benefits to be realized if applied on a nationwide basis. To date there have been various less comprehensive projects and studies in metropolitan areas such as Boston, Los Angeles, and Washington, D.C., but to my knowledge, none has employed all of the presently recognized measures to increase and encourage carpooling in urban areas. This bill would provide demonstration projects utilizing new and innovative approaches, particularly economic and tax incentives and would require a thorough measurement of the impact of these programs on the problems of energy shortage, air pollution, and traffic congestion. The projects would include such measures as systems for locating potential riders and informing them of convenient carpool opportunities, preferential carpool highway lanes or shared bus and carpool lanes, preferential parking for carpools, and the use of economic incentives for commuters participating in carpools.

The direct result of carpooling, of course, would be that of reducing the number of vehicles on urban highways and streets during peak traffic periods. For example, if automobile occupancy could be increased from the present average of 1.6 persons per vehicle to 2 per vehicle, approximately 20 percent of the motor vehicles would be removed from rush hour traffic.

Thus, because of fewer vehicles on the road, air pollution would be decreased—there would be fewer automobiles emitting pollutants and those vehicles on the road would operate more efficiently due to less stopping, starting, and idling. Energy conservation would result since fewer vehicles would mean less demand for fuel, as demonstrated by the fact that if among public employees alone the automobile occupancy were increased to 2 persons per car, almost 600 million gallons of gasoline would be saved per year. And, traffic congestion and parking problems would be alleviated substantially. In addition to relieving national problems to such a degree, each individual commuter would benefit by saving wear and tear on his automobile, and by saving money normally spent on gasoline and parking.

Because carpooling would not require vast outlays of public funds and long periods of costly construction for new transportation facilities, demonstration projects this bill proposes, could be provided at a cost not exceeding $10 million. Due to the greater effectiveness of metropolitan highways to be achieved by this bill, I feel that funding from the highway trust fund is justified and is consistent with past expenditures from that fund. Rather than requiring great amounts of public funding, this measure would be primarily self-supporting by encouraging individual commuters to participate in carpools; they would be motivated by the personal advantages of time and financial savings, by additional economic incentives, such as reduced tolls, free parking spaces for carpools closer to their place of employment, tax incentives, and so forth. In short, it is my opinion, Mr. President, that carpooling is a means to address several of this Nation's most pressing problems without the tremendous outlays traditionally associated with government-assisted efforts to deal with national problems.

While this bill would provide for

demonstration projects, there may be good reason to proceed even further at this time. It would ordinarily be prudent to test and demonstrate the effectiveness of various measures and combination of measures to increase car pooling. However, there can be no doubt that greater car pooling is required, that greater car pooling will reduce the traffic load with the resultant benefits I have previously mentioned, and that these benefits can be realized in a relatively short time. The unknown factors are related to the best combination of measures to achieve maximum car pooling in different metropolitan situations. Perhaps, in view of these facts, it would be better to move rapidly ahead into an accelerated grant-in-aid program for all cities where a transportation control plan is required to meet standards imposed by the Clean Air Act. This is a possibility that merits attention and I will ask that it be considered during committee action on this bill.

I am aware that the Department of Transportation and the Environmental Protection Agency are keenly interested in pursuing all possible means to more effectively utilize our urban highway and reduce vehicular air pollution by increased car pooling. I have also spoken personally with Mr. John Love, head of the President's Office of Energy Policy, and he has indicated his strong support for programs such as the ones which would be created by this bill as a means to help reduce the tremendous demand by automobiles on our available fuel resources. Mr. Love indicated that he will investigate the possibility of implementing programs similar to those proposed by this bill through coordination of the various Federal agencies which have involvement in energy conservation, highway programs, and air pollution control. However, I am of the opinion that the problems are so urgent that we should initiate the legislative process to establish these programs in the event that administrative efforts should not bear fruit.

In conclusion, Mr. President, I feel that this measure is worthy of our strong support for a number of good reasons, particularly because of its timely contribution to the relief of our national problems of energy resource shortage, or congested highways, of air pollution, and of costly highway and parking areas necessitated by the present number of vehicles. As an additional bonus, it does not require another huge drain on public funds, but rather encourages a savings of money by commuters. It promotes the idea of individual commuters cooperating with each other to deal with severe national problems at a grass roots level—and with visible results. In short, it can immediately and relatively inexpensively provide significant progress toward relieving many of our problems which are generated by having too many vehicles on the roads during commuter hours with too few passengers per car.

I ask unanimous consent that the 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. 2598

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 "Car Pool Incentives Act of 1973"

SEC. 2. Title 23 of the United States Code ("Highways") is hereby amended to add the following new section 323:

DEMONSTRATION PROJECTS—CAR POOL INCENTIVES

SEC. 323(a)(1) In order to decrease traffic congestion during rush hours, improve air quality, conserve fuel, and enhance land use by limiting highway and parking requirements, the Secretary shall carry out demonstration projects designed to encourage the use of car pools in urban areas throughout the country while not adversely affecting bus and other mass transportation ridership in such areas.

(2) From proposals submitted by the States to the Secretary within six months after enactment of this amendment, the Secretary shall, not later than one year after enactment, approve for funding those projects which, in his judgment, offer the best prospects of achieving the objectives stated in subsection (a)(1) and which provide a reasonable balance among cities of various population sizes, traffic patterns, and geographical locations.

(3) A project may include, but not be limited to, such measures as systems for locating potential riders and informing them of convenient car pool opportunities; preferential car pool highway lanes or shared bus and car pool lanes; and preferential parking for car pools.

(4) The Federal share of the cost of such work shall be 90 per centum, except that the Federal share shall not exceed $1,000,000 for any single project.

(5) The Secretary shall give permits to demonstration projects proposed for cities or areas in air quality control regions as designated under the Clean Air Act after consultation with the Administrator of the Environmental Protection Agency as to the value of such projects as a part of a transportation control plan for such region.

(b) The Secretary shall conduct a full investigation of the effectiveness of measures employed in the demonstration projects authorized by subsection (a) of this section. In addition, he shall in cooperation with the Internal Revenue Service, the Environmental Protection Agency, and other appropriate Federal and State agencies, study other measures, including but not limited to tax and other economic incentives, which might lead to significant increases in car pool ridership in urban areas throughout the country, any institutional or legal barriers to such measures and the costs and benefits of such measures. He shall report to the Congress not later than December 31, 1974, his findings, conclusions and recommendations resulting from such investigation and study. Funds authorized to carry out Section 307 of this title are authorized to be used to carry out the investigation and study authorized by this subsection.

(c) There is authorized to be appropriated not to exceed $10,000,000 from the Highway Trust fund to carry out subsection (a) of this section.

By Mr. HATFIELD:

S. 2599. A bill to repeal the Economic Stabilization Act of 1970. Referred to the Committee on Banking, Housing and Urban Affairs.

Mr. HATFIELD. Mr. President, it is a simple truth that wage and price controls, in all their phases, have not worked. The economy has not been bolstered by administration controls, but has instead been thrown off course by their effects.

On August 15, 1971, President Nixon imposed a wage-price freeze, acting on the basis of authority granted the President under a 1970 act that the President neither sought nor wanted.

In approving this grant of power, Congress was taunting the President to take steps. This push from Congress, coupled with a favorable attitude of the public, combined to produce an executive policy that today has resulted in failure. Senator COOK and I were the only two Senators opposing extension of these powers when the Senate voted on this issue recently, although I would note I voted for the original grant of this power.

Congress has begun to grasp the magnitude of its abdication to the executive branch. We struggle to reassert ourselves in the budgetary process, in confirmation powers and as initiators, not reactors, to legislation. Yet, here in one sweeping gesture, by giving the President the authority to impose wage and price controls, Congress gave away its responsibility and power over much of American life. In traveling throughout Oregon on recent visits, it is the cost of everything that is repeated wherever I go. The economy and people's pocketbook dominate the concerns of Oregonians.

The heart of the problem lies in whether the objectives of the wage-price controls have been met. They have not. After 2 years of economic controls under the various phases of the administration's economic program, inflation is still with us. In fact, even the administration has admitted that the controls, particularly the price freeze imposed on June 13 and lifted for most products on August 12, may have contributed to inflation by creating shortages. Since August 1971, the wholesale price index has increased by 9.7 percent for all commodities. The biggest jump has been in farm products and feeds, with an increase of 20.7 percent, and foods, with a WPI increase of 12.5 percent. The consumer price index has not increased as sharply, with an increase in the CPI for all items of 4.5 percent, and an 8.8-percent increase for food.

The disparity between the WPI and CPI increases reveal a price bulge building in the wholesale sector that will eventually result in further increases in consumer prices. This is usually what happens when price controls such as those under phase IV are imposed—consumer prices are stabilized temporarily, but inflationary pressures continue, and price increases are only delayed. In short, trying to control inflation with price controls is like trying to lower the temperature of a room by forcing down the mercury in a thermometer—the indexes may reflect a "cooling off" of the economy, but inflation is still there.

I believe we must repeal the Economic Stabilization Act and find other ways to approach the economic problems facing us. The AFL–CIO, the U.S. Chamber of Commerce, and the National Association of Manufacturers have all asked for termination of controls. The Wall Street

Journal had an editorial on October 10 which stated:

The sooner we recognize that controls are doomed . . . the sooner we will be able to start rebuilding a healthy economy.

Therefore, I am introducing a bill that would repeal the Economic Stabilization Act of 1970. The corollary of this action is that Congress then would carry a substantial part of the burden to stabilize the economic conditions in the country.

Certainly the Federal responsibility, both in Congress and in the executive branch, to control inflation is great and urgent. This can be accomplished in two ways: increased taxes, or reduced spending. President Nixon has urged the latter, and Congress has responded reasonably well. In fact, the budget ceiling for fiscal year 1974 set by the Senate is below that recommended by President Nixon. Nonetheless, the budget deficit for fiscal year 1973 is now estimated at $14.4 billion, down from $23.3 billion in fiscal year 1972.

There are other areas where cuts can be made, particularly in military spending. This remains the area where the most substantial savings in the cost of government can be made. My own efforts will continue to be devoted toward eliminating needless expenditures in our massive military budget in order to bring government spending into line with revenues, thereby strengthening our whole economy. Useless domestic programs, government subsidies, and other areas of waste must be curtailed.

There are ways to deal with the economy other than through the authority of the Economic Stabilization Act. Perhaps the most compelling reasons to abolish this legislation are found in a simple recital of what has happened under its aegis. We could look at the irrational picture of beef producers withholding cattle from the market thereby turning hungry consumers to horsemeat markets which in turn sets off cries of outrage in certain animal protectionist groups. We see gasoline stations closed and people buying gas in takehome containers.

There is a projected fuel shortage that will certainly take a toll in life and property. U.S. fertilizer has been snatched up at low prices by the world market leaving a shortage in this country. Angry consumers who refused to pay supermarket prices turned to canning their food thereby creating a shortage in canning jars and lids. The endless cycle of pay raises and price increases was dramatized here in Washington when the Federal pay raise prompted increases throughout the District, starting in the Senate cafeteria where the day the raise went into effect, the price of toast doubled and all other costs went up as well. The ramifications of each new control become absurd, and still the problem is not understood or under control.

Mr. President, I urge the abolishment of the Economic Stabilization Act, and am today submitting legislation to do just that. I ask that the text appear at the end of these remarks. I also ask unanimous consent that the Wall Street Journal editorial on this subject be printed at the end of the text of my bill.

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

S. 2599

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the Economic Stabilization Act of 1970, as amended, is repealed.

(b) Whoever, prior to the date of enactment of this section, willfully violates any provision of law repealed by subsection (a) of this section, shall be punished in accordance with such provision as in effect on the date such violation occurred.

(c) The repeal made by subsection (a) of this section shall not affect any suit, action, or other proceeding lawfully commenced prior to the date of enactment of this section, or any suit, action, or other proceeding based upon any act committed prior to such date, and all such suits, actions, and proceedings, shall be continued, proceedings therein had, appeals therein taken, and judgments therein rendered, in the same manner and with the same effect as if this section had not been enacted. No suit, action, or other proceeding lawfully commenced by or against any agency or officer of the United States in relation to the discharge of official duties under any provision of law repealed by subsection (a) of this section shall abate by reason of such repeal, but the court, upon motion or supplemental petition filed at any time within 12 months after the date of enacment of this section showing the necessity for the survival of such suit, action, or other proceeding to obtain a settlement of the questions involved, may allow the same to be maintained.

RETROSPECTIVE ON CONTROLS

We suppose that anyone who still believes price controls can stop inflation is beyond help, but it won't hurt to glance at the accompanying chart for a visual confirmation of our experience. Since the imposition of controls, inflation has turned not better but worse.

The six-month moving average of the consumer price index turned down in early 1970, and continued down until controls were imposed in August 1971. It turned back up in mid-1972, in the midst of "tough" Phase 2 controls. Since then it has ascended to heights far above those reached in any recent noncontrols atmosphere. Little wonder that the U.S. Chamber of Commerce and the National Association of Manufacturers have—somewhat belatedly it seems to us—joined the AFL–CIO in calling for prompt and complete termination of controls.

Purely on the basis of the record, one would have to conclude that far fom extinguishing inflation, price controls fuel it. That conclusion is overly simple, of course, because since mid-1972 many other powerful inflationary pressures have been at work. The government budget has been in deficit, and economic growth has been straining the economy's capacity.

Even at that, though, the inflation has been more rapid than any usual economic view would predict. In trying to explain it, economists are looking toward international economic developments. Perhaps the impact of the dollar's devaluation was more inflationary than most theories predict. Or perhaps as First National City Bank and Argus Research Corp. argue, attempts by European central banks to maintain fixed exchange rates by buying dollars swelled European banking reserves and money supplies, leading to a world-wide inflation that spills back into the U.S. economy.

Price controls presumably were intended to stop the increase in prices in the face of these powerful domestic and international forces. This was a pipe dream, as nearly everyone now recognizes. We would go a bit further, to argue that in a couple of respects controls did indeed cause higher prices.

For one thing, there is the effect on the psychology of the Federal Reserve Board. Even those skeptical about the real effect of controls—and it is by no means clear that this description applies to everyone at the Fed—would probably feel some influence from the announcement that some other part of government was going to take over the inflation problem. So if there had been no controls the money supply probably would not have expanded as rapidly, and prices would not have risen quite so sharply.

Beyond that is the problem of shortages. The diehard supporters of controls ignore this problem when they contend that their policies have not failed but were never tried. It is of course quite true that the biggest price jumps have occurred during the more relaxed phases of the controls program. Usually these apologists blame the relaxation on George Shultz' association with the University of Chicago, but those who look not at personalities but events will find the following cycle:

Tight controls are imposed. Shortages and dislocations start to develop. Because of the shortages and dislocations, controls have to be relaxed. Then you get all the price increases you would have had during the tight-controls period, plus those caused by the controls-induced shortages, and probably some more by businesses trying to get ahead of the next period of tight controls.

No group of controllers will be able to avoid this cycle, for none of them can possibly be smart enugh to foresee the secondary and tertiary effects of their actions, especially in an increasingly integrated global economy. They learn too late that if they fiddle with gasoline prices and supplies they may end up with a fuel oil shortage. After setting U.S. prices for fertilizer or cotton they suddenly learn that world prices are higher and foreigners are buying so much of the supply there isn't enough left for Americans. And if they achieve really efficient enforcement with an army of bureaucrats, they will drive down investment and plant expansion and end up with shortages of everything.

So we very much doubt that the dismal record of controls have much to do with any particular set of men or philosophy of controls. The problem is something far more basic, the limits of human intelligence. And the sooner we recognize that controls are doomed by facts of simple physiology the sooner we will be able to start rebuilding a healthy economy.

ADDITIONAL COSPONSORS OF BILLS

S. 1929

At the request of Mr. KENNEDY, the Senator from Pennsylvania (Mr. SCHWEIKER) was added as a cosponsor of S. 1929, the Nantucket Sound Islands trust bill.

S. 2538

At the request of Mr. PROXMIRE, the Senator from New Mexico (Mr. MONTOYA) was added as a cosponsor of S. 2538, to provide for the establishment of construction and safety standards for mobile homes, and for other purposes.

Mr. WILLIAM L. SCOTT. Mr. President, I ask unanimous consent that the names of Senators BENNETT, FANNIN, HANSEN, HELMS, STEVENS, THURMOND, and GRIFFIN be added as cosponsors at the next printing of S. 2539, a bill to amend the Clean Air Act to establish a limitation on certain air quality standards established pursuant to such act and to authorize postponement of certain transportation reductions or con-

trols of standards relating to motor vehicle emissions.

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

Mr. WILLIAM L. SCOTT. Mr. President, with regard to this measure, I was pleased to learn that our chairman of the Committee on Public Works, the distinguished Senator from West Virginia (Mr. RANDOLPH) has scheduled 3 days of hearings November 5–6–7 on the automotive emission question, which is of importance to the Members of this body because of the energy problem and the huge costs that may be involved in meeting the mandated standards in the Clean Air Act under present technology. I understand these hearings may consider legislation introduced in the Senate on the auto emissions problem, including my proposal to postpone the timetable for meeting the standards in the law an additional 2 years to reconsider auto emissions technology and new scientific developments in the emissions field. Certainly I welcome any additional support from my colleagues in cosponsoring S. 2539 and hope you will see fit to join me on this measure.

SENATE RESOLUTION 189—SUBMISSION OF A RESOLUTION TO URGE THE CONTINUED TRANSFER TO ISRAEL OF PHANTOM AIRCRAFT AND OTHER EQUIPMENT

(Ordered held at the desk by unanimous consent.)

Mr. HUMPHREY. Mr. President, I submit a resolution on behalf of myself, Senators JACKSON, RIBICOFF, and JAVITS, and 63 other Senators, making a total of 67 Senators. I ask unanimous consent that the resolution be assigned a number, printed, and held at the desk without being referred.

Mr. GRIFFIN. Mr. President, reserving the right to object, and I do not intend to object, for the purposes of clarifying the parliamentary situation, may I ask: If the request of the distinguished Senator from Minnesota is agreed to, what would be the status of the resolution tomorrow and the next day?

The PRESIDING OFFICER. Technically it would not have any status. It would have a number and be held at the desk.

Mr. GRIFFIN. It would take some further action by unanimous consent or otherwise for the resolution hereafter to go to a committee, and it would take unanimous consent to have immediate consideration?

The PRESIDING OFFICER. The Senator is correct.

Mr. GRIFFIN. I thank the Presiding Officer.

The PRESIDING OFFICER. Upon objection, it would go over.

Mr. GRIFFIN. I have no objection.

Mr. HUMPHREY. I thank the Senator.

The PRESIDING OFFICER. The resolution will be received and printed in the RECORD only.

(See exhibit 1.)

Mr. HUMPHREY. I thank the acting minority leader.

Mr. President, the purpose of this parliamentary procedure was to give the sponsors and cosponsors the option at a time when the Senate is in full session to either call up the resolution under unanimous consent or to have it referred for normal legislative routine procedure to appropriate committee. That is the sum total purpose.

Mr. President, I ask unanimous consent to have printed in the RECORD immediately following the text of the resolution the cosponsorship letter circulated by the 15 original cosponsors.

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

(See exhibit 2.)

Mr. HUMPHREY. Mr. President, so that Senators at this hour may know what this resolution states and its purpose, it is a Senate resolution to urge the continued transfer to Israel of Phantom aircraft and other equipment.

Mr. President, the purpose of the resolution is to urge the continued transfer to Israel of Phantom aircraft and other equipment.

Mr. President, two-thirds of the Senate is joining with Senators JACKSON, RIBICOFF, JAVITS, and myself in the introduction of a resolution urging the administration to continue the flow of Phantom jets and other equipment to Israel.

I believe that if the United States continues to supply Israel with the weapons it needs for its defense against the attack by Egypt and Syria, peace can and will come to the Middle East. The President and Secretary Kissinger have recognized this fact and have moved expeditiously to meet Israel's needs after it suffered heavy losses as a result of the Egyptian and Syrian attack.

The resolution we are offering today endorses the announced policy of our Government as well as calling upon a continuation of the transfer to Israel of aircraft and other equipment in response to the massive Soviet resupply of war materials to Egypt and Syria. It is imperative that the balance of power be maintained and that the aggression launched by the Soviet supplied Arab forces be halted. Once this is accomplished then the negotiations leading to a cease-fire can be productive.

It is important to note that Israel refrained from a preemptive first strike in order to preserve the cease-fire initiated by our Government. In exercising self-restraint the Israelis suffered losses of men and materiel which threatened their capability to further deter the advance of the Egyptian and Syrian Armies. Our resupply of aircraft and other military equipment lost in the early hours of the conflict is correct; it is just and it will enable Israel to defend itself and hopefully bring the war to a speedy conclusion.

Mr. President, the conflict in the Middle East is placing severe strains on the progress toward Soviet-American détente. I have long supported a normalization of relations with the Soviet Union. This is in the interest of both peoples. But the Soviet Union must recognize that it cannot pursue a policy of détente with the United States while it encourages Arab nations to continue their aggression in the Middle East.

If détente is to have significance beyond rhetorical statement of friendship and goodwill, then the Soviet Union must be willing to take an active role in bringing about peace in the Middle East and in other areas of tension. It is my fervent hope that Premier Kosygin's presence in Cairo means that he is there to convince Egypt and Syria that it is not in their best interest to continue the hostilities. The world awaits the result of his mission. Peace in the Middle East will enable the policy of détente to continue. The Congress which is soon to vote on credits and other commercial concessions for the Soviet Union is closely watching the Soviet role in the Middle East.

Finally, Mr. President, I want to state in very strong terms that I condemn the recent action taken by 11 oil producing states to reduce the supply of oil to this country or any other nation which is friendly to Israel.

This is blackmail pure and simple. It will not work because the American people will not tolerate international blackmail. We reject such action just as we reject and abhor such acts as planes being hijacked and terrorists threatening innocent civilians with bombs and kidnapings.

The action by these oil producing nations will only earn them the enmity of millions of Americans who refuse to tolerate international blackmail. I am sure that the peace-loving members of the international community of nations will condemn this action despite heavy economic pressure.

Mr. President, the wide support this resolution is receiving is significant of the united and bipartisan stand being taken by the Congress. This should serve as a warning to all those who believe that the Congress does not fully endorse the President's policy of maintaining Israel's deterrent capability. We do support this policy because it is in the best interests of peace in the Middle East. It has as its purpose achieving a cease-fire, the opening of negotiations, and the establishment of genuine peace between Israel and her neighbors.

Mr. President, as important as it is for there to be the defensive capability in the hands of the people of Israel so as to maintain their security and independence and also, hopefully, to restore the cease-fire under the conditions of 1967. I would add, as I know other Senators would want, that we encourage the continued efforts of our Government, the President, the Secretary of State, and others, to obtain a cease-fire and to obtain ultimate peace.

I know that this is the objective of our Government, and I commend the President, the Secretary of State, and others, who are giving of their efforts to achieve a peaceful settlement in the Middle East.

It is my judgment that this peace can only come through direct negotiations between Israel and her neighbors. It is my judgment that that peace will only come when a cease-fire can be achieved. It is my judgment that that cease-fire will not come until Israel has been able to repel those who have attacked her and at that time all of the good offices of

the United States, and hopefully of the Soviet Union and other countries, including the International Organization of the United Nations, must be brought to bear. I hope that our Government is speaking very firmly to the Soviet Union in reminding this Government that détente requires cooperation, that détente is not permitting the Soviet Union to do as it wishes, and to complain if the United States fulfills its commitments; détente requires that the Soviet Union and the United States accept mutual responsibilities and duties.

We have tended to permit the Soviet Union to take actions that we know are contrary to our national interests and yet not resist those actions lest it tend to break the spirit of détente or understanding. The Soviet Union will respect us when we speak not in a sense of belligerency but firmly; it will respect us when we speak not in the sense of being a bellicose nation, but one that has principle and it is willing to stand by it.

Therefore, this resolution is not directed toward expanding the war, but rather to provide the means to bring an end to the war and hopefully direct negotiations for a peaceful settlement in the critical area of the world.

EXHIBIT 1

LIST OF COSPONSORS

Mr. HUMPHREY (for himself, Mr. JACKSON, Mr. RIBICOFF, Mr. JAVITS, Mr. DOLE, Mr. CHURCH, Mr. TALMADGE, Mr. BROCK, Mr. GURNEY, Mr. MONDALE, Mr. MCGEE, Mr. BROOKE, Mr. NELSON, Mr. NUNN, Mr. BUCKLEY, Mr. BAKER, Mr. BAYH, Mr. BENTSEN, Mr. BIDEN, Mr. BIBLE, Mr. CANNON, Mr. CASE, Mr. CHILES, Mr. CLARK, Mr. COTTON, Mr. CRANSTON, Mr. DOMENICI, Mr. DOMINICK, Mr. EAGLETON, Mr. FONG, Mr. GRAVEL, Mr. HART, Mr. HASKELL, Mr. HOLLINGS, Mr. HUGHES, Mr. INOUYE, Mr. KENNEDY, Mr. MAGNUSON, Mr. MCGOVERN, Mr. MCINTYRE, Mr. METCALF, Mr. PACKWOOD, Mr. PASTORE, Mr. PELL, Mr. PERCY, Mr. PROXMIRE, Mr. RANDOLPH, Mr. ROTH, Mr. SCHWEIKER, Mr. SCOTT of Pennsylvania, Mr. STEVENS, Mr. STEVENSON, Mr. SYMINGTON, Mr. TAFT, Mr. THURMOND, Mr. TUNNEY, Mr. WEICKER, Mr. WILLIAMS, Mr. YOUNG, Mr. MATHIAS, Mr. MOSS, Mr. MONTOYA, Mr. HUDDLESTON, Mr. MUSKIE, Mr. PEARSON, and Mr. BEALL)

S. RES. 189

Resolution to urge the continued transfer to Israel of Phantom aircraft and other equipment.

Whereas the President is supporting a strong and secure Israel as essential to the interests of the United States; and

Whereas the armed forces of Egypt and Syria launched an unprovoked attack against Israel shattering the 1967 cease-fire; and

Whereas Israel refrained from acting preemptively in its own defense; and

Whereas the Soviet Union, having heavily armed the Arab countries with the equipment needed to start this war, is continuing a massive airlift of sophisticated military equipment to Egypt and Syria; and

Whereas Public Law 91-441, as extended, authorizes the President to transfer to Israel by credit sale whatever arms may be needed to enable Israel to defend itself: Now, therefore, be it

Resolved, That it is the sense of the Senate that the announced policy of the United States Government to maintain Israel's deterrent strength be implemented by continuing to transfer to Israel, by whatever means necessary, Phantom aircraft and other equipment in the quantities needed by Israel to repel the aggressors.

EXHIBIT 2

U.S. SENATE,
Washington, D.C., October 16, 1973.

DEAR COLLEAGUE: We know you are following the current conflict in the Middle East as closely as we are. It is a great tragedy, and we hope that peace is restored to this region quickly.

By now you are aware that Israel refrained from a first strike in order to preserve the cease-fire initiated by our own government. Partially because of this restraint, Israel has suffered heavy losses in weapons, most significantly aircraft.

The Soviet Union is now engaged in a massive airlift of sophisticated arms, utilizing huge transport aircraft, to Egypt and Syria. While resupply of Israeli forces is underway, it is important that crucial weapons, including Phantom aircraft in adequate numbers, continue to be sent.

We, therefore, urge you to cosponsor the following resolution expressing the sense of the Senate that the flow of essential military equipment to Israel continue. Congress has already provided the President with the authority to make the necessary weapons available by credit sales. We are confident that, with timely and adequate resupply, Israel can defend itself and bring this war to a speedy conclusion.

Sincerely,

Hubert H. Humphrey, Abraham Ribicoff, Herman E. Talmadge, Walter F. Mondale, Gaylord Nelson, Henry M. Jackson, Robert Dole, Bill Brock, Gale W. McGee, Sam Nunn, Jacob K. Javits, Frank Church, Edward J. Gurney, Edward W. Brooke, James L. Buckley.

Mr. JACKSON. Mr. President, the resolution that we are today introducing places the Senate on record in support of decisive action to assure that essential military equipment be transferred to Israel on a time scale and in whatever quantities are required to enable Israel to repel Syrian and Egyptian aggression.

It is the judgment of more than two-thirds of the Senate that this war arose from an unprovoked attack against Israel by the armed forces of Egypt and Syria—forces that have since been aided by the armed forces of other Arab countries. Moreover, as the resolution indicates, it is the judgment of the Senate that the Soviet Union, which has been conducting a massive airlift to resupply the Arab armies, heavily armed the Arab countries "with the equipment needed to start this war."

Let us be clear about that. Since the Six Day War, the Soviet Union has engaged in one of the largest military build-ups in its history, supplying guns, tanks, aircraft, and missiles to Egypt and Syria in huge quantities and under the cover of the cease-fire. We, for our part, limited the Israelis to piecemeal supplies of aircraft and armor—despite the fact that the Congress, in 1970, adopted my amendment to the Defense Procurement Act authorizing the President to transfer to Israel by credit sale whatever was needed in aircraft and other equipment to offset equipment furnished to the Arab armies.

In recent months the flow of Soviet arms into Syria reached flood-like proportions. More than half of the jet aircraft in the Syrian Air Force and nearly all of the surface-to-air missiles that have claimed the lives of so many Israeli pilots have been delivered by the Soviet Union to Syria since the beginning of this year. We now know that a substantial fraction of the Syrian force of SA-6 missiles that have been used with deadly effect against Israel's Phantoms were delivered in the weeks just preceding the outbreak of war.

For 6 years following the 6-day war, American restraint in supplying Israel with the means to provide for her own defense was met, not by equal restraint on the Soviet side, but by a most mischievous and irresponsible program of training and arming Egypt, Iraq and Syria for the war that is now being fought.

Soviet irresponsibility did not stop last week with the outbreak of war. Secretary Brezhnev, violating the letter as well as the spirit of agreements reached with the United States in Moscow last year, did his best to urge other Arab states to join the attack against Israel. Then the Soviets undertook a massive airlift of weapons into Syria and Egypt, resupplying the Egyptian and Syrian armies with sophisticated military hardware.

Mr. President, our resolution makes it clear that the necessary transfer of weapons to Israel should be accomplished "by whatever means are necessary" to enable Israel to repel the aggressors.

Our purpose is to see that the current fighting is halted as quickly as possible. As this war drags on, so does the danger of the direct involvement of the great powers. The prudent course, the safest course is to carry on the effort to resupply Israel with a view to ending this war decisively and by supporting a return to the cease-fire lines and positions held before the current hostilities.

The lesson of this war is already beginning to emerge: in the interests of containing the scale and the scope of conflict, firm and decisive and timely action is essential. Today that action is one of resupply—and the position of the Senate is one of overwhelming support for doing it quickly and decisively.

Mr. HOLLINGS. Mr. President, I rise today to urge swift passage of the Jackson-Humphrey Resolution on the Middle East.

Since that day over 25 years ago when we accorded diplomatic recognition to Israel—only minutes after the birth of that new nation—the United States has dedicated itself to the survival of Israel. Indeed, we are dedicated not only to its survival, but to its genuine security and well-being.

Today, Israel faces one of the greatest threats ever to its existence—an existence that has never been without threat for a quarter of a century. And today we are asked to manifest the depth of our friendship and commitment to the brave people of that fighting nation.

It is not a question of steeling the resolve of the Israelis, for no people are braver or more committed than they. It is a question of their having the implements of war, in face of the gigantic Soviet airlift and sealift of arms to the Middle East.

It is important that American supplies continue to be sent to Israel, including the all-important Phantom jets. Help we

can, and help we must, if we are to do our part in helping Israel face the gravest challenge of its existence.

The challenge in the Mideast also calls upon us to demonstrate once again our resolve not to be intimidated by the Soviets, and not to let all the sweet-talk about "détente" confuse and distract us. The United States will not encourage meaningful agreements with the Soviets by knuckling under to renewed Soviet pressure in the Middle East. On the contrary, such a response on our part would only whet the appetite of the Kremlin for another round of subversion and extension of influence.

Mr. President, this is no time for flowery oratory or elegant speeches. This is preeminently a time for action—action now. We must respond and we must do so without further delay.

I urge my colleagues to join in passage of this important resolution. In doing so, we will demonstrate once again America's friendship with Israel and America's determination to resist the encroachments of the Soviet Union.

Mr. RIBICOFF. Mr. President, I am pleased that so many of my colleagues have today joined Senators JACKSON, HUMPHREY, JAVITS and myself in offering a resolution urging the continued flow of jet aircraft and military equipment to Israel.

The tragic conflict now going on must be brought to an end soon. A satisfactory conclusion consistent with the vital interests of the United States is a decisive victory by Israel.

If Israel is provided the quantities of equipment it requires in time, Israel can win the struggle. The bitter battles now raging are crucial not only for Israel's own survival, but for the United States and the entire free world.

Upon the final outcome hinges the question of who shall control the Suez Canal—Russia or the West. But even more important, future stability and peace in the entire region depend on the outcome. An Arab victory will not, as some claim, bring the parties closer to peace. It will only embolden the Arab nations to try again—as soon as they are resupplied by the Soviet Union. It is vital that Arab aggression not be rewarded.

The Arab nations, who launched this aggression, should realize that peace is better than war. Until the Arab states renounce war as a viable option, and are willing to accept the fact of Israel's existence in their midst—there can be no peace.

The resolution offered today is meant to reaffirm our country's traditional policy of not permitting the arms balance to tilt against Israel. This means more than mere replacement of current Israeli losses. For after all, the Arab aggressors launched their attack with more than a 3 to 1 advantage in men, armor, and supersonic aircraft. Provided with the latest in Soviet military technology in order to start this war, they are being constantly replenished by both sea and air with sophisticated weapons of all types. The United States can do no less.

If our Government demonstrates an unwillingness to provide Israel with what it requires to win this war, the lesson will not be lost on our allies in NATO and elsewhere—with disastrous consequences for our foreign policy.

Détente between the United States and the Soviet Union cannot be a one way street. The current conflict in the Middle East is another tragic example of Russian deeds demonstrating the falsity of Russian promises.

The overwhelming support being given this resolution today puts this body on record in favor of a continued and timely flow of U.S. "Phantom aircraft and other equipment to Israel in the quantities needed to repel the aggressors." There should be no mistake on the part of anyone as to exactly what this plain language means.

Mr. KENNEDY. Mr. President, I am pleased to join the distinguished Senator from Minnesota (Mr. HUMPHREY) as a cosponsor of his resolution to reaffirm the commitment of the Senate to assuring the people of Israel the means to defend their future.

We state in this resolution our regret that the Arab nations chose to forsake the conference table for the battlefield. We state as well our conviction that this most recent attack by Egypt and Syria demonstrates the need for Israel to maintain an adequate defense to deter future aggression.

The goal of the United States, as the goal of all nations, must be that peace return to the Holy Land and that both Israeli and Arab find a permanent solution to issues dividing them.

But if we were not to meet the Israeli defense requirements resulting from the losses they have suffered in the past 2 weeks, we would be stating to the Arabs that we will stand by as they attempt a military solution to those issues.

Only by demonstrating to the Soviet Union and to the Arab nations that the United Nations will act to restore the arms balance in the Middle East can the leaders of those nations ever be completely convinced that the road to peace lies through direct negotiations and not through military gambles.

The massive supply lines opened by the Soviet Union at the virtual outset of this conflict demonstrates only too convincingly their willingness to support continued military action by the Arab nations. Failure to respond could well encourage such irresponsible action.

Failure to respond also could create a situation where the Arabs believed that a few more days, or a few more weeks could place Israel against the wall, with ammunition running low and a slow attrition of their military supplies.

Our readiness to provide those supplies hopefully will be an incentive to the Arabs to accept the road of cease-fire and negotiations rather than the road of more fighting, a road which leads only to tragedy for both Israeli and Arab alike.

Mr. MATHIAS. Mr. President, I want to ask this question of the Senator from Minnesota because I think it is extremely important, in light of the views expressed by the majority leader and by the views expressed by the Senator from Minnesota (Mr. HUMPHREY) and by my own concerns, that the use in the resolution which he has submited today of the term "by any means whatever" should be very clearly defined; that in view of the fact that the Mideast resolution is still on the books in such language and has raised questions in the past and this has had tragic consequences, and the fact that such language has sometimes been used to avoid the constitutional processes, I am wondering whether the Senator from Minnesota would give us his personal definition of that phrase in the resolution.

Mr. HUMPHREY. Mr. President, the phrase referred to, "by whatever means necessary," is cited in the resolution as follows:

Resolved, That it is the sense of the Senate that the announced policy of the United States Government to maintain Israel's deterrent strength be implemented by continuing to transfer to Israel, by whatever means necessary, Phantom aircraft and other equipment in the quantities needed by Israel to repel the aggressors.

Mr. President, that does not mean American manpower or a landing party of Americans in Israel. It merely refers to the means of either by air or by ship, or from factories, or from depots or bases. It does not mean—and I want to make this clear—it does not mean American manpower involvement.

Mr. MATHIAS. It does not contemplate going outside the constitutional processes defined by the Constitution and statute law by which foreign policy is properly developed and executed?

Mr. HUMPHREY. By no means. Absolutely not. We must be very clear on that.

Mr. MATHIAS. I thank the Senator from Minnesota very much.

Mr. McCLURE. Mr. President, many of my colleagues in the Senate are very sincerely, and with great justification, concerned for the safety of the brave people of Israel. I share their concern and, at the same time, I worry about the logic of their solution. The surest way to safety is through peace; a stable lasting peace, mutually guaranteed. As many Senators have eloquently expressed, an arms race is not always conducive to peace. If, to follow their reasoning, an arms race endangers peace in a cold war situation, it must encourage further warfare in a hot war, a war which if protracted indefinitely can only mean disaster for all participants.

It seems reasonable then, even obvious, that Israel can only be protected by a stable and guaranteed peace. In addition to being reasonable and obvious, it is even practical. In the current situation we have antagonists who have specific grievances and, in my opinion, a genuine desire for a solution. It seems to me that this is one situation in which the United States can look beyond the mechanics of warfare to the tools of peace.

It is self-evident that Israel must protect herself. Her status as a nation should be recognized and the safety of her borders guaranteed. Appropriate buffer zones should be set up and maintained with any assistance necessary to assure their inviolability. At the same time, the question of the Palestinian refugees must be confronted, and a solution found, and

captured Arab lands returned. The specifics for such arrangements would, of course, have to be discussed at length by the participants, but the only way to begin discussion is to stop fighting. An immediate cease-fire in place and the drawing up of a timetable which would ultimately result in a permanent peace treaty could begin immediately.

Historically, war only leads to peace when one side utterly demolishes the other or when after years of hostilities, all participants retire exhausted and battered to a scene of domestic tragedy. Either result is unthinkable and unnecessary in the Middle East today when a cease-fire and talks could begin at once.

I want to express that I do not blame either the Arabs or Israel for this current outbreak. I blame the United States. One of our grave mistakes has been in giving the Israelis the impression that with a total commitment from the United States she is invincible—that there has been no reason to negotiate, no reason to deal with the very real common problems shared with the Arab nations. We are all concerned with interlocking concerns in this volatile situation. We care about the safety of Israelis and about the fate of Palestinian refugees. We care about détente and our relations with the Soviet Union. And we care about the future of all nations which depend upon stability in the Middle East to assure access to vital energy resources. The entire free world has every reason to promote peace and none to promote war.

Mr. President, I ask unanimous consent to have printed in the RECORD an article which was published in the Washington Star-News entitled "Strategy of Moderation Seen," written by Andrew Borowiec.

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

STRATEGY OF MODERATION SEEN

(By Andrew Borowiec)

BEIRUT.—The embattled Arab world appears to have opted for a strategy of political moderation coupled with a determination to continue the war of attrition against Israel.

The tone was set by Egyptian President Anwar Sadat in his speech yesterday which most Arab observers regarded as Sadat's finest hour and one of the most memorable pronouncements in modern Arab history.

Although Sadat mentioned his long-range missiles—long forgotten by the outside world; the main theme was that peace talks are possible as soon as Israel withdraws to the pre-1967 borders.

The fact that the Israeli premier, Mrs. Golda Meir, said later there would be no cease-fire until "the enemy is broken," confirmed the Arab belief that the Middle East has settled down to a protracted war.

As the 12-day war continued its deadly routine without significant changes, the Arabs appeared confident that within a short time Israel will show signs of fatigue.

But there were no immediate signs that the Arabs were preparing to strike at American interests as feared at the time when the U.S. State Department announced its decision to supply arms to Israel.

Sadat, and by now he is the unquestionable leader of the Arab world—has not called for a boycott of American products or for a war against American business interests in Arab countries.

Rather, he attempted to convince the United States that its long-range interests were in the Arab countries rather than in Israel. This has been Sadat's view since he took the power three years ago. Pro-American at heart, the Egyptian president has been steadily frustrated in his overtures by American's unconditional support of Israel.

The American attitude is expected to cost the United States some discomfort as time goes by. The Arab oil producing countries are meeting in Kuwait today to listen to Saudi Arabia's recommendation for a "limited oil war" against the United States.

The meeting was preceded by a decision of the Arab Persian Gulf states to raise their price for crude oil by 17 per cent. It was a unilateral decision expected to run into opposition by the oil companies exploiting the fields.

Arab intelligence sources estimate that after 12 days of total mobilization and unprecedented war effort, Israeli economy will begin to sag beyond the point where simple remedies will suffice. Israeli admission that every hour of fighting costs the Jewish state $10 million appears to be bearing out this theory.

The Arabs are not fighting for the annihilation of the Jewish state. In fact, by now most Arab politicians admit something they would not admit before—that the Jews have a right to a homeland in the land of the Bible.

But the Arabs view the role of the Jewish state in a sharply different light. While admitting Israel's right to exist, they do not want it to be a military powerful super state able to impose its will on its neighbors. In short, the Arabs will tolerate an Israel cut to size, a Jewish homeland for homeless Jews.

This overall view is yet to be reconciled with the claims of the Palestinian guerrilla organizations for a total and unconditional victory over Israel. But the Palestinians have long been a pawn in Arab hands and once a settlement with Israel is near, they are likely to be sacrificed for the sake of political expediency.

For the time being all this is theory, unlikely to reach the negotiating table for some time.

Many observers around the world still refuse to believe that the Arab countries are capable of a lengthy and determined effort against what hitherto was believed to be an invincible army.

The fact that after some very determined thrust Israel has been unable to throw the Egyptians back across the Suez Canal or open the road to Damascus tends to show the Arabs in a totally different light.

SENATE RESOLUTION 190—SUBMISSION OF A RESOLUTION EXPRESSING THE SENSE OF THE SENATE RELATIVE TO THE WAR IN THE MIDDLE EAST

(Referred to the Committee on Foreign Relations.)

Mr. MATHIAS. Mr. President, I am very much interested in the remarks on the Middle East made by the distinguished majority leader. I sought recognition at this time, because my thoughts are so closely related to the thoughts just expressed by the majority leader.

I would like to explore my own views concerning the Mideast, because I think it is important to stress that the United States has just withdrawn from a painful war of over 10 years duration. If any lesson is to be drawn from the war in Vietnam it is that national disputes cannot be settled by force and arms, but that only negotiation among nations can provide lasting settlement of disputes. The United States today views itself as being in a position of leadership in the world. The history of all nations in the world teaches us that war only leads to the annihilation of civilization as we know it. Israel and the Arab States are not the only nations affected by the war in the Mideast.

As a consequence, the United States and the Soviet Union, the nations of Europe, and all of the nations of the world have compelling reasons for seeking a peaceful solution of the issues that have been plaguing the world for over 20 years.

I thank the Senator from Minnesota for permitting me to be a cosponsor of his resolution.

However, in thinking over this total problem, it seems to me that the ultimate desirability of a peaceful settlement is so important that any resolution the Senate ultimately agrees to must contemplate the position of the United States as being a prime mover in seeking a negotiated end of the war.

For that reason, I am submitting at the present time a parallel resolution with some additional thoughts and a somewhat different approach, which I hope the Foreign Relations Committee will consider as it considers the Humphrey resolution.

It is, of course, ironic that the Holy Land, the birthplace of three great religious beliefs, should be the arena of repeated wars that have claimed the lives of many innocent victims and which has been a waste, in what I can only describe as being in a criminal fashion, of resources that could be better used to improve the lives of all people, whether Arabs or Israelis.

It is further ironic that the birthplace of three great religions should be known for its history of violence rather than peace and reason.

On the basis of our own recent experience in Vietnam and on the basis of our national tradition and our adherence to the United Nations resolution of 1958, which is still on the books, our policy should be to provide for an equitable peace among all those who are interested in the Mideast.

The United States has pledged its word in the form of international law and international commitments to preserve the integrity of Israel and all states in the area. I certainly have fully supported that commitment through the years and do so at the present time.

We have repeatedly asserted our interest in the integrity of all the nations of the Mideast. At the present time we are supplying Israel with the weaponry she needs to defend herself as a direct result of the Soviet Union supplying arms to the Arab countries. I support that policy, although I must say that I regret with all my heart the necessity for doing so.

From the earliest days of our Republic, it has been the American purpose to seek friendship toward all neighbors and enmity toward none. For that reason we must make a great effort to seek a peaceful solution to the conflict in the Mideast which is the cradle of all civilization.

And civilization, if it has any meaning at all, is a life based upon peace, and not upon terrible wars that only leads to self-destruction which has all too often taken place.

The Senator from Minnesota has been dedicated to this belief. And I know, as we all know, that our fundamental purpose is to make it possible for men to live in peace and remove the scourge of war from the Earth.

As I join with the Senator from Minnesota (Mr. HUMPHREY), I am submitting a parallel resolution which has the same essential purposes as his resolution, but which I think strengthens it by stating in a somewhat different way that it is the sense of the Senate that we try to achieve a fair and equitable settlement among the warring parties.

I think it brings into this important sense-of-the-Senate resolution the additional factor of the importance of negotiations. I hope that the Senator from Minnesota as well as other members of the Foreign Relations Committee will consider this resolution when it comes before that committee for study and consideration, because it is my view that the primary goal of American policy in the Mideast should be, to achieve a negotiated settlement. The settlement should embrace all the issues in dispute if the peace to last and to lessen the likelihood of any future destructive conflicts in the Middle East which have plagued the world for so long.

The resolution is as follows:

S. RES. 190

Whereas the war in the Middle East is a scourge to all mankind and a criminal waste of resources vitally needed by the world; and

Whereas the Middle East is the Holy Land of three great religions; and

Whereas these three great religions seek the benefits of peace for all peoples on earth; and

Whereas hostilities in the Middle East or anywhere on earth endanger the peace of all nations and threaten the survival of life itself; and

Whereas the United States is committed by the Charter of the United Nations and by its own historical tradition to seek peace through peaceful means; and

Whereas the United States has solemnly pledged its support for the just rights of all nations in the Middle East;

Now therefore be it resolved that it is the sense of the Senate that the United States should continue to maintain Israel's deterrent strength as long as continued Soviet supplies to other combatants or other conditions require it to do so, and

Be it further resolved that every effort be made within the United Nations to bring about a negotiated settlement at the earliest possible time on the basis of equity and justice for all parties concerned.

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

Mr. MATHIAS. I yield.

Mr. HUMPHREY. Mr. President, I commend the Senator from Maryland. The Senator was here when I submitted my resolution. I said at that time that I did not look upon the use of force and arms as a way to achieve peace.

The purpose of the resolution that was submitted was to restore some balance in the Mideast armament because of the Soviet Union's massive shipment of military weapons and to provide Israel with a means to defend herself so that she would not be overrun and have her freedom and independence destroyed.

I happen to believe that long ago we should have had an arms embargo to all Mideastern and all other nations and thus prevent this tragedy that has happened to the gifted and talented people in the Mideast, and they are just that.

Mr. MATHIAS. Mr. President, I join the Senator from Minnesota in that sentiment.

Mr. HUMPHREY. Mr. President, I know that the Senator from Maryland has always been of that sentiment. We have had this unbelievable waste of life and have experienced the hate and the bitterness that come out of war.

I, therefore, assure the Senator, as I did a few moments ago, that I support the effort of our Government to bring about a negotiated settlement in that area.

It is my judgment that the negotiation will only be successful when the parties engaged in the war and the dispute over territories, boundaries, and so forth, meet face to face in honorable negotiations.

It is also my view that the détente we talk about between the United States and the Soviet Union should include on the part of the Soviet Union—which I hope it does, and which it appears to be according to today's newspaper articles—that the Soviet Union join with us in trying to bring about an end to these hostilities and to have a cease-fire so that peace can take the place of violence.

I believe that is the only answer.

I thank the Senator from Maryland for his constant efforts not only in the Mideastern area of the world, but also in Indochina to seek peace and not an extension of war.

ADDITIONAL COSPONSORS OF A SENATE RESOLUTION

SENATE CONCURRENT RESOLUTION 51

Mr. THURMOND. Mr. President, on October 5, 1973, I was pleased to introduce Senate Concurrent Resolution 51, which expressed the appreciation of Congress to our Vietnam veterans and commended them for their efforts to make it possible to observe Veterans Day 1973 in peace.

Thirty-four other Members of the Senate joined me in cosponsoring this resolution. It passed the Senate unanimously on October 11, and the House concurred on October 16.

Since this resolution passed the Senate, three additional Senators have contacted me to request that their names be added as cosponsors to Senate Concurrent Resolution 51.

Mr. President, I, therefore, ask unanimous consent that the Senator from North Carolina (Mr. ERVIN), the Senator from California (Mr. TUNNEY), and the Senator from Minnesota (Mr. MONDALE) be added as cosponsors and that the Journal and the permanent RECORD so state.

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

SOCIAL SERVICES AMENDMENT OF 1973—AMENDMENT

AMENDMENT NO. 633

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

"AMENDMENT TO SOCIAL SERVICES AMENDMENT OF 1973"

Mr. KENNEDY. Mr. President, I submit for appropriate reference an amendment intended to be proposed by me to the Social Services Amendments of 1973 (S. 2528) introduced by the distinguished Senator from Minnesota (Mr. MONDALE). The purpose of my amendment is to assure provision of social services for older Americans under the Social Security Act.

I wish to commend my colleagues for their swift and decisive action in introducing the current legislation. This is the second time within a few months that congressional action has been necessary to prevent the virtual demise of a social services program which has taken over a decade to develop. When the social services regulations were first published for comment last February by the Department of Health, Education, and Welfare, many members of Congress voiced objection to the destructive effect which the regulations would have on service programs in assisting lower income persons to remain free of welfare and institutionalization. The Subcommittee on Federal, State and Community Services, of which I am chairman, published a report last March on the threatened fall of social services programs and called for revision of the then proposed regulations on several points. As we know too well, subsequent changes made by the Secretary of Health, Education, and Welfare have been minor and inadequate. The potential disruptive impact of the regulations is still great.

Many national aging groups have asserted that a comprehensive social services delivery system must have a wide range of available services for needy and qualified individuals. It is unfortunate that the regulations proposed by Department of Health, Education, and Welfare—by requiring a State plan to provide only one adult social service—fail to recognize this need. On this point the proposed regulations represent a giant step backward.

The amendment I offer today is designed to remedy this omission.

This would be achieved by requiring a State plan to include a minimum of three mandated services to be made available to all qualified elderly and handicapped individuals. The specific services would be chosen by the State agency which is in a position to assess local needs and preferences. The twofold effect of my amendment would be to assure a comprehensive system of social services while at the same time retaining local discretion.

The range of services included under the present bill includes day care services, homemaker services, home delivered meals, housing improvement services, transportation and legal services, and home health care services. Obviously these are the kind of services which will determine whether an individual will be

able to remain in the community or whether we will be forced needlessly and at great expense to be institutionalized.

This amendment is designed to prevent that cycle from taking place. It does not mandate specific services but it requires at least three services to be provided to the elderly and handicapped.

NATIONAL FUELS AND ENERGY CONSERVATION POLICY—AMENDMENT

AMENDMENT NO. 634

(Ordered to be printed, and referred to the Committees on Commerce and Public Works.)

NO-FARE TRANSIT

Mr. HART. Mr. President, I submit for appropriate reference an amendment to S. 2176, the "National Fuels and Energy Conservation Act of 1973" on behalf of Senator MAGNUSON, Senator BARTLETT, and myself and ask unanimous consent that the text of Senator MAGNUSON'S introductory remarks, an article, and of the amendment itself be printed in the RECORD in full.

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

REMARKS BY SENATOR MAGNUSON

Mr. President, I am pleased to introduce on behalf of myself and the Senator from Michigan (Mr. HART) an amendment to S. 2176, the "National Fuels and Energy Conservation Act of 1973".

The amendment would require the Secretary of Transportation to conduct demonstration projects to determine the extent to which fare-free and reduced fare mass transit and car pooling can conserve energy. But perhaps even more importantly, the amendment would enable us to demonstrate and study how these techniques might affect the quality of life in our cities by less reliance on the automobile for our urban transportation needs.

Without doubt the use and types of transportation available within the cities can dramatically alter urban life. While the proliferation of automobiles has given us a freedom of movement which is unparalleled in history, it has also given us traffic jams, air pollution, noise, disruption of communities, and a literal transformation of many parts of our cities into concrete slabs.

While the rush to the automobile must cease, we must provide alternatives that offer similar mobility and convenience.

Certainly the decline in mass transit ridership must be stopped, and reversed. Federal programs to subsidize mass transit construction are now in progress and legislation to authorize operating subsidies has passed both houses of Congress.

The amendment I introduce today is based on those same needs, but suggests that we demonstrate and study and the notion of going one vital step further—to test the effectiveness of fare free and low fare transportation in combatting the ills of our cities. The amendment also directs DOT to take certain measures to encourage the use of car pools and the more effective use of automobiles within our cities.

Limited experimentation has taken place to demonstrate fare free mass transportation, and with promising results. On September 10, Seattle, Washington, began a year-long experiment of providing fare free transportation in a 77 square block area of downtown Seattle. While results are obviously limited, Seattle officials and downtown businessmen and residents have nothing but high praise for the experiment. An excellent description of the progress so far appeared in an article in the September 24th issue of Newsweek.

Limited experiments have taken place in cities like Rome and Bologna, Italy, and small towns like Commerce, California; Auburn, New York; Wilkes-Barre, Pennsylvania; and Dayton, Ohio.

Our limited experience to date with fare free experiments and a number of cities with reduced fare systems has been highly encouraging. Without exception, transit ridership increased dramatically in each experiment, and with the substantial bonus of eliminating the need to collect, count, and protect fares—a substantial savings.

But there has yet to be a long-term project in a major city and importantly we have yet to study in detail what the effects might be. As the amendment would also require DOT to determine the feasibility of encouraging the more efficient use of automobiles through carpooling—another promising means of reducing automobile traffic. Commuter automobiles are vastly underutilized and means to increase the number of passengers per car should be studied in depth.

It is my hope and belief that the demonstration and study of reduced fare and fare free mass transportation as well as means of improving automobile transportation stands a very good chance of yielding benefits far in excess of the modest cost of the amendment. If we can determine that by assisting public transportation and encouraging the more efficient use of automobiles that we might avoid the expense and bitterness caused by a controversy like that surrounding Interstate 66 here in Washington—estimated to cost in excess of 300 million—then indeed the investment will be a bargain. If the additional benefits of increased mobility for the poor and the elderly, less air pollution and disruption of our cities would be realized, then indeed the expenditure of $25 million per year for three years would be a pittance.

BORNE FREE

For years, urban experts have argued that one antidote to the stagnation of the central cities would be the creation of free public transit. The service, they argued, would be financed by taxes on merchants and residents, would pay its own way and yield extra dividends in the process. Free busing would end the ruinous cycle of spiraling fares that had driven away so many riders; it would draw new cutsomers into dying downtown shopping areas, and thus justify the added tax burden. Finally, it would reduce pollution by helping to cut traffic and ease the daily tie-ups at rush hours.

In Dayton, Ohio, tax-subsidized free busing in the heart of the downtown shopping area has steadied a faltering transit system and helped stem a loss of riders and revenue. Reduced fares for the elderly are in effect in many cities. In Atlanta, fares have been rolled back from 40 to 15 cents for everyone, leading to a 15 per cent increase in riders. Last week, Seattle became the first major U.S. city to take the next step; it eliminated downtown bus fares entirely.

Begun as a one-year experiment, Seattle's new "Magic Carpet" bus service will give free rides to anyone traveling within the 77-square-block area containing most of the city's major department stores, office buildings, hotels, theaters and restaurants. Intended to lure people out of their cars and onto the buses, the system was conceived by aides of Mayor Wesley C. Uhlman, partly to help meet strict air-quality standards laid down by the U.S. Environmental Protection Agency. It is being helped by a $64,000 city-council appropriation and operated by Metro Transit, which runs all transit operations—free and fare-paid—in a 2,000-square-mile area in and around Seattle. Optimistic planners hope Magic Carpet may entice enough new riders onto the buses to eliminate the need for subsidy.

Whether or not these rosy predictions are fulfilled, free busing is already resoundingly popular among downtown merchants and property owners. After watching business trickle away year after year to suburban shopping centers, they now sense an end to the dollar drain. Restaurant trade in Seattle's Pioneer Square historical district, half a mile from downtown, has been booming since fares were abolished, and midtown workers feel a newfound mobility. Riders rarely have to wait more than a minute for a bus, and are being won over to the system in droves. "It's great!" exclaims one downtown civil servant. "I can leave city hall, catch a bus to shop, or to Pioneer Square for lunch."

Even the bus drivers, who estimate they are carrying double or triple the number of passengers they once did in peak hours, seem delighted to be a part of it all. "Sure, the number of people slows us down a little," says one. "But now that we don't have to watch over the farebox, we can get them on and off a lot faster."

GLOW

Encouragingly, Magic Carpet is already attracting a more varied cross section of passengers. Suburban matrons and downtown executives now mingle with public transit's hard-core clientele of children, the poor and the aged. Even Mayor Uhlman himself now makes a point of riding buses to meetings. In the glow of the noble experiment, in fact, there is evidence of a growing esprit. "We moved out of Seattle twenty years ago to the suburbs," confides one happy shopper. "But if this is what the city is going to be like in the future, I feel like moving back in!"

A more demanding measure of Magic Carpet's value, however, will be whether it succeeds in keeping cars off the streets. But for the moment, free busing itself—at least in such a limited area—has the look of a thumping success. "The people love it, the drivers love it, the businessmen love it!" exults Mayor Uhlman. "I predict that inside a year every major city in the U.S. will have the same program, or will be working on one."

AMENDMENT NO. 634

On page 37, after line 24, insert the following new section:

"TRANSPORTATION ENERGY CONSERVATION DEMONSTRATIONS"

"SEC. 15. (a) GENERAL.—The Secretary of Transportation is authorized and directed to enter into such contracts or other arrangements as may be necessary or appropriate for research and the development, establishment, and operation of demonstration projects to determine the feasibility of programs to conserve energy utilized in the transportation of individuals, including fare-free urban mass transportation systems; low-fare urban mass transportation systems; and car pools and other arrangements to increase the number of individuals transported per private passenger automobile through incentives such as access to special lanes on highways, reduced fees on toll highways, bridges, and tunnels, preferential access to parking facilities, and the establishment of Car Pool data processing to match individuals and automobiles.

"(b) FEDERAL SHARE.—Federal grants or payments for the purpose of assisting projects pursuant to subsection (a) of this section shall cover not to exceed 80 per centum of the cost of the project involved, including operating costs and the amortization of capital costs, if any, for any fiscal year as

to which such contract or other arrangement is in effect.

"(c) CRITERIA.—The Secretary of Transportation shall select cities or metropolitan areas for projects assistance under this section upon the basis of applications in writing in such form and with such content as he shall require and in accordance with the following criteria:

"(1) to the extent practicable, such cities or metropolitan areas as have a failing or nonexistent transit system, a decaying central city, automobile-caused air pollution problems, or an immobile central city population;

"(2) projects shall be selected from cities or metropolitan areas of differing size and characteristics, including population density and distribution;

"(3) preference shall be given to projects that will introduce a high level of innovative transportation service to such cities or metropolitan areas consistent with the needs of residents for convenient access to employment, shopping, and recreation; and

"(4) to the extent practicable, projects utilizing different techniques, methods, and modes of transportation energy conservation shall be approved.

Recipients of project assistance under this section shall make periodic reports and evaluations of each such project to the Secretary of Transportation in such form and with such content as such Secretary shall require.

"(d) EVALUATION.—The Secretary of Transportation shall study transportation energy conservation methods and systems assisted under this section to determine—

"(1) the effects of such method or system on energy and fuel conservation;

"(2) the effects of such method or system on motor vehicle traffic and attendant air pollution, congestion, and noise; the mobility of urban residents; and the economic viability of central city business establishments;

"(3) the techniques, methods, and modes of mass transportation that can best meet desired National objectives;

"(4) in the case of fare-free or low-fare systems, the extent to which frivolous ridership increases; the extent to which such systems may reduce the need for urban highways; and the best means of financing such systems on a continuing basis; and

"(5) in the case of car pools and other such arrangements, the extent to which individuals voluntarily join when political subdivisions of States, employers, or private groups or associations organize and make them easily available; and the best means of organizing and financing such systems on a continuing basis.

"(e) ANNUAL REPORT.—The Secretary of Transportation shall make annual reports to the Congress on the information gathered pursuant to this section and shall make a final report, including recommendations for legislation, not later than June 30, 1976.

"(f) ADVISORY COMMITTEES.—In carrying out the provisions of this section, the Secretary of Transportation may provide for advisory participation by interested State and local government authorities, mass transportation systems management personnel, computerized data processing experts, employee representatives, commuters, and such other persons as he deems necessary or appropriate.

"(g) AUTHORIZATION FOR APPROPRIATIONS.—There is authorized to be appropriated to carry out the provisions of this section not to exceed $20,000,000 for fare-free and $10,000,000 for low-fare demonstrations, car pools and other arrangements for each of the fiscal years ending on June 30, 1974, June 30, 1975, and June 30, 1976, respectively."

ANNOUNCEMENT OF OPEN HEARINGS BY SUBCOMMITTEE ON PARKS AND RECREATION

Mr. BIBLE. Mr. President, I wish to announce for the information of the Senate and the public that open hearings have been scheduled by the Subcommittee on Parks and Recreation at 10 a.m. on November 6, 1973, in room 3110, Dirksen Senate Office Building on the following bills.

S. 1039, to authorize appropriations for additional costs of land acquisitions for the national park system.

S. 1468, to authorize the establishment of the Knife River Indian Villages National Historic Site.

S. 1976, to study an Indian nations trail within the national trails system.

S. 979, to authorize the establishment of the Springfield Armory National Historic Site, Mass.

ANNOUNCEMENT OF OPEN HEARINGS BY SUBCOMMITTEE ON PARKS AND RECREATION.

Mr. BIBLE. Mr. President, I wish to announce for the information of the Senate and the public that open field hearings have been scheduled by the Subcommittee on Parks and Recreation on December 3, 1973, in LaGrande, Oreg.; and December 14 and 15, 1973, in Lewiston, Idaho.

S. 657, to designate the Hells Canyon National Forest Parklands Area, and for other purposes.

S. 2233, to establish the Hells Canyon National Recreation Area in the States of Idaho, Oregon, and Washington, and for other purposes.

ANNOUNCEMENT OF HEARINGS ON PHARMACEUTICAL INDUSTRY

Mr. KENNEDY. Mr. President, last July, I announced that the Health Subcommittee would begin a comprehensive series of legislative hearings on the pharmaceutical industry in the fall. Today, I am announcing that those hearings will begin on November 7, and will continue at regular intervals through the spring of 1974.

Mr. President, the issues involved in these hearings affect the lives of all Americans. The cost and quality of drugs is a matter of concern to all of us. In the course of these hearings, the subcommittee hopes to travel to different parts of the Nation to hear directly the views of our citizens.

The goal of these hearings is to enact legislation. Senator NELSON, for example, has several important pieces of legislation pending before the committee. The subcommittee staff is drafting additional legislation. We welcome legislative suggestions from all interested parties.

It is 10 years since the Kefauver-Harris amendments were enacted and implemented. It is time to evaluate what they have and have not accomplished.

Those interested in appearing before the subcommittee should feel free to contact the committee staff, room 4226, Dirksen Office Building.

ADDITIONAL STATEMENTS

DISCLOSURE POLICY WITH RESPECT TO AUDITING ACTIVITIES UNDER THE FEDERAL ELECTION CAMPAIGN ACT

Mr. MANSFIELD. Mr. President, in the interests of providing public notice to Members of the Senate, candidates for the Senate and persons involved in political campaigns for Senate seats, I wish to call attention to certain policies and procedures which have been initiated by the Secretary of the Senate pursuant to the Federal Election Campaign Act. As supervisory officer for Senate elections, the Secretary is directed by the act to conduct audits and field investigations with respect to reports of receipts and expenditures made in connection with Senate elections. The law also requires that he report apparent violations of law to appropriate law enforcement authorities.

In conformity with these stipulations, a systematic program of audit and investigations with respect to the 1972 Senate elections has been underway for several weeks. A press release describing the program was released by the Office of the Secretary on September 17. I ask unanimous consent that it be published in the RECORD at the conclusion of these remarks.

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

(See exhibit 1.)

Mr. MANSFIELD. Mr. President, it seems to me that the painful experiences of the past few months underscores the absolute necessity for even-handed, fair and scrupulous enforcement of the Federal Election Campaign Act. As far as Senate elections are concerned, I have every expectation that such will be the case.

One of the questions which arises in connection therewith is publicity in situations which ultimately may involve legal action pursuant to the auditing and referral responsibilities under the act. The Secretary of the Senate has been advised by legal counsel that the procedures which are followed in this connection should serve to protect the rights of the parties concerned and at the same time to insure the integrity of the enforcement process. Accordingly, the Secretary has issued a memorandum to his staff with respect to this matter, and I ask that the text of that memorandum be printed in the RECORD at this point.

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

OCTOBER 12, 1973.

Memo to: Darrell St. Claire, Assistant Secretary; Orlando B. Potter, Consultant on Administration, Office of Public Records.

Re disclosure policy with respect to auditing activities under the Federal Election Campaign Act.

1. In advance of field investigations, auditors will notify committee treasurers or other responsible persons to make mutually convenient arrangements. Auditors will also notify candidates in the event that investigations of the candidate's campaign records are to be undertaken, or if it is necessary to enlist the candidate's assistance in con-

tacting his campaign treasurer or other responsible persons. Other than in the above connection, this office will not give advance notification or announcement of the time or circumstances of a field investigation.

2. Where appropriate, on completion of a field investigation, a verbal review of findings may be provided by the auditor to persons responsible for the records audited. The text of the investigator's formal report, however, shall be submitted only to the Secretary of the Senate and no portion, summary or abstract thereof nor any checklist, work paper or other document prepared in connection with the audit will be made available to a committee treasurer, candidate, press, or any other person, other than appropriate law enforcement authorities.

Apart from periodic general summaries of activity by this office under the Federal Election Campaign Act, which will be released to the public, no notification will be given and no announcement will be made respecting any particular referral of apparent violation(s) to the Department of Justice. Since only the Department of Justice can prosecute violations, all inquiries, whether from Members, candidates, other interested parties, press or public, will be referred to the Department of Justice.

Reference may also be made to the Press Release of September 17, 1973 for further information on enforcement procedures.

FRANCIS R. VALEO,
Secretary of the Senate.

EXHIBIT 1

PRESS RELEASE: OFFICE OF THE SECRETARY OF THE SENATE

The Office of the Secretary of the Senate reported today that audits and filed investigations were currently being undertaken into campaign finance disclosures made in connection with the 1972 Senatorial elections.

The audits and field investigations are required under Sec. 308 of the Federal Election Campaign Act which assigns to the Secretary of the Senate supervisory responsibility over Senate campaign disclosures. The Act directs the Secretary to conduct such audits and investigations and to report apparent violations of law to appropriate authorities.

The audits will encompass the campaigns of candidates in the 33 States in which Senate elections were held in 1972, in addition to selected national committees involved in Senate races.

In general, the audits will proceed in alphabetical order of States, with priority being given to those States in which formal complaints were filed with the Secretary.

The first phase of the review consists of a desk audit of documents submitted by candidates and committees, including responses to enforcement notifications sent out by the Secretary during the year. On the basis of this review, check-lists are being prepared showing apparent violations of law indicated on the face of the reports and these will be automatically referred to the Department of Justice.

The desk audit will be supplemented by field investigations in the States in which formal complaints have been filed, and in others, as necessary, to clarify findings of the desk audit. Treasurers of campaign committees and other responsible parties are notified in advance of field investigations to produce records for audit as required by the Act.

At the request of the Secretary of the Senate, two employees have been detailed from the General Accounting Office to conduct the field investigations, which began during the month of August.

Audits and investigations are scheduled to continue throughout the balance of the year. In keeping with established practice, no public announcement will be made as to the identification or substance of any referrals to the Department of Justice.

EQUAL EDUCATIONAL OPPORTUNITY THROUGH NEIGHBORHOOD SCHOOLS

Mr. TOWER. Mr. President, I am pleased to announce to my colleagues this morning that representatives of over 1,085 organizations in 48 States across the Nation formed to promote equal educational opportunity through neighborhood schools have been invited to meet in Washington, D.C., next week—October 23, 24, and 25—to encourage congressional approval of legislation to prohibit the forced busing of their children.

To date, representatives from 25 States have indicated they will be present for the conference. Arrangements have been made for Members of the U.S. Senate to meet with these representatives on Wednesday, October 24, at 10 a.m., in room 1202 of the Dirksen Senate Office Building. I urge my colleagues to be present for this important meeting.

NEED FOR HIGHER ETHICS

Mr. ROBERT C. BYRD. Mr. President, yesterday, Wednesday, October 17, I had the privilege of speaking before the National Association of Food Chains 40th Annual Convention.

I ask unanimous consent that my speech be printed in the RECORD.

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

SPEECH BY SENATOR ROBERT C. BYRD

Mr. Chairman, Mr. Boyce, distinguished leaders of the National Association of Food Chains, it is a unique experience for a man who has been listening with mounting horror to his wife's reports on the price of ground beef in the supermarket over the past few months, to stand before such an impressive gathering of supermarket executives.

I thank Mr. Boyce for his gracious introduction. It would be well-nigh impossible for the introduction to be anything else than gracious, coming as it did from a man who lives and works in the gracious State of Georgia.

I was intrigued when I saw the names of the speakers who are joining me in the National Association of Food Chains 40th Annual Meeting. Secretary Butz, Senator Jackson and Bryce Harlow. Sounds like a high-priced Washington law firm—Byrd, Butz, Jackson and Harlow. Mr. Butz, of course, would hardly be the silent partner.

I do not propose to discuss with you the economic aspects of the current shortages in some of the staples that we Americans have taken for granted would always be in ample supply throughout the length and breadth of this great country in which we live. I would venture the thought, however, that under the free enterprise system, the law of supply and demand being a basic law of the marketplace, it will remain so regardless of all the scientific study and application that are put to work to render the operation of our retail trade even more sophisticated than it has now become.

But one of the newer laws with which we Americans are almost wholly unfamiliar is the law of demand and non-availability, and this climate, to which the consumer has been exposed for many weeks now, is a brand new experience. It is an experience that may well get worse before it gets better, and we are perhaps going to find that the cornucopia of American abundance has a bottom, after all. Not that this will necessarily be a bad thing. I have an immense faith in the ability of the American economy to bounce back from any kind of temporary setback, and I have every confidence that we will overcome our current problems of shortages and high prices. I doubt that prices will ever be rolled back to where they were in 1968, but I believe that we can look forward to a downward adjustment that will make the American housewives a little happier.

While that process is going on, I am not so sure that the period of more Spartan living will do us any harm. Pleasant and comfortable as it is to wallow in the lap of luxury and plenty, there is also the danger that people may get so accustomed to having the silver platter, that they will lose some of their capacity for withstanding the slings and arrows of outrageous fortune. In other words, a nation that has it too good for too long can get soft. In this world of uncertainties, we need a backbone and a resiliency in our people just as much as we need an $87 billion defense appropriation. Perhaps the four most dangerous words in today's circumstances are "It can't happen here." It certainly can happen here, and if it does, we are going to need all the spirit and the determination with which this nation has always met its crises heretofore.

I am not suggesting that a major world crisis is just around the corner, but unless the nature of men and nations has undergone a metamorphosis of which I am unaware, the possibility is always with us.

It is reasonable at this juncture to ask: by what means can we ensure that the backbone and resiliency that this nation will need as we embark shortly on our third century, will always be present in our society? By what means can we ensure that the qualities of the heart and the strengths of the spirit that made America great, will continue to be part of the American culture? I believe that the answer is simple. I believe that our survival as a free nation depends far more on what we do to improve our ethics and our morality than on what we do with our economics.

Just one week ago, the Vice President of the United States resigned amid allegations that his conduct as a public official had been highly unethical—and, in fact, illegal. Almost one year ago, the American people began to hear and see reports of conduct by highly placed government officials that time and evidence have shown were highly unethical, as the sordid Watergate case unfolded. Major corporations—some of the great pillars of our economic and financial structure—have engaged in practices that were, at best, highly unethical. There have been numerous cases where men of high reputation and outstanding professional success have been charged with conduct that was, again at best, highly unethical, to say nothing of its being unlawful. There has been created in our society a climate of distrust, of cynicism, and of hypocrisy that bids fair to make a mockery of the great idealism that motivated the men and women who laid the foundations of this Republic.

There are different definitions of ethics, but one definition that appeals to me is the brief one given by Dr. Albert Schweitzer.

"In a general sense, ethics is the name we give to our concern for good behavior. We feel an obligation to consider not only our own personal well-being, but also that of others and of human society as a whole."

In other words, from an ethical standpoint, one cannot stand still and remain silent when lawlessness, permissiveness, hypocrisy, and corruption threaten to destroy our so-

ciety and our political system. And one of the most prevalent and frightening attitudes in America today is that of being complacent, apathetic, and non-committal—the absence of deep convictions on anything. Should this increasing lack of conviction—this giving glory to compromise and approval to passivity—gain much more momentum in our society, the cherished freedoms that were so dearly won by our ancestors will be placed in dire jeopardy.

Public apathy toward basic issues is one of democracy's severest handicaps, and when that apathy is accentuated by a failure on the part of the leaders of the people to be other than non-committal on these same issues, the Republic is in danger.

We can condemn—and we do—the intellectual shortcomings of television and newspapers; we can decry, as we should, those who abuse the protection of the Fifth Amendment; we can deplore, as we do, the vicious and senseless criminality that pervades our social structure. But how often do we hear our leading citizens, in all walks of life, stand up in public and declare themselves unequivocally on matters of real principle and consequence? Ethics cannot thrive in a neutral mind, and the most dangerous enemies to our way of life are not only those who loudly threaten to overthrow the system; equally dangerous to our freedoms are those who say they don't much care, one way or the other.

This is the age of investigations. They are legion, and their purposes are multifarious. But have all of us ever given a thought to taking a good look at *ourselves?* Have we ever asked ourselves how well each of us is performing his or her role in keeping this nation a strong and alert land of law, and justice and freedom? When did we last equate our individual rights and freedoms with our individual responsibilities. As the Scottish poet, Robert Burns, once pleaded:

"O wad some Pow'r the giftie gie us
To see oursels as ithers see us!"

It is a fact that whenever people become non-committal, become overly satisfied with the status quo, shirk the performance of duty that a mature sense of responsibility would call for, and fail to exercise a reasonable level of self and community discipline, they open the door to manipulation of their lives and their destinies by the few who seek power and dominion over the many.

In corporations, for example, as long as the per-share dividend keeps up, all too many stockholders care little about what management does, with whom or how management does business, or even who management is. In labor unions, if wages keep increasing, with shorter and shorter work hours and a bonus holiday now and again, all too many members are undisturbed if a few union leaders dip their hands in the till occasionally. In a democratic nation such as ours, prosperity is usually enough to gain the "yes" vote—not only in politics but also in almost everything else.

Does the desire for liberty and freedom diminish with the security of a high standard of living? Do we want affluence and comforts so much that we will bend with every unethical breeze that helps us to retain or increase them? These are questions that we Americans must ask ourselves—not next month or next year, but *NOW*, when trust and confidence in our government and in our leaders are at such a low ebb.

I am not a historian, though I have read some history, and I have no desire to invent history. But it seems that at other times and in other places, other civilizations that advanced far—by their times and standards—failed to make it to the next level of human achievement because they were unwilling to discipline themselves and to dedicate themselves to purposes of the spirit as well as to the desires of the flesh. When ethics, honesty, honor, integrity, and self-discipline perish, the inevitable result is imposed discipline and totalitarianism. Ethics are little known in a totalitarian state for the simple reason that police power controls the actions and, to a great degree, the thoughts of the individual citizen.

The great question that faces our country today is whether we Americans, who have reached the highest plateau of human achievement in the history of mankind, can make the breakthrough to an even higher ethical plateau of human conduct.

For this nation to survive, with freedom and liberty under law, I am convinced that we must make that breakthrough.

One of the most revealing statistics I have read in many years was published in the *Wall Street Journal* recently. The story concerned a survey of business executives conducted by the American Marketing Association. Close to three thousand executives were interviewed, and 50% of them believed that a "dynamic personality" and "ability to sell yourself" are more highely valued attributes in American business today than is a reputation for honesty or strong moral conviction though, of course, they are by no means mutually exclusive.

This diminution of ethical standards is by no means confined to business. It is also found, to a degree in politics, in the law, in the medical profession, in amateur and professional athletics, and in all other walks of life. Many of our religious and educational institutions bear a share of the blame for this growing weakness throughout our land. But whatever the cause, the effect will be devastating if we are not prepared to do something about it.

In this nation, our heritage has always been a heritage of character and principle. It has been the bedrock of our strength as a patriotic people. Perhaps now is a good time for each of us to examine himself, and to reaffirm our faith in the great principles on which our Republic was founded.

THE ELEMENTARY SCHOOL READING EMPHASIS ACT OF 1973

Mr. DOMENICI. Mr. President, recently I became a cosponsor of a bill introduced by my friend and colleague, Senator GLENN BEALL, which I believe will initiate badly needed improvements for teaching reading to our Nation's young people. I believe this measure, S. 1318, the Elementary School Reading Emphasis Act of 1973, would attack this national problem in the elementary schools through improved teacher training techniques and learning incentive programs.

Mr. President, in many areas of this Nation there are individuals who lack the skill of reading—that vital skill which is necessary to survival in the increasing complexity of American life. Problems relating to the teaching of reading rank among the most crucial educational issues in this country today. Test scores released from the Office of Education last year revealed that both inner-city and rural schools are experiencing a decline in reading scores. Throughout the country some 10 million elementary and secondary children are severely deficient in reading.

Serious study of a recent Louis Harris poll shows that 11 million American adults cannot read well enough to obtain a driver's license. Fourteen million cannot read well enough to qualify for a bank loan and 10 million encounter severe difficulty resulting from reading deficiencies in qualifying for social security.

Closer to my home, in my own State of New Mexico, 42 percent of all fifth graders are reading below grade level, as are 59 percent of all sixth graders. These figures are startling and they certainly warrant our immediate action.

The administration has asserted a goal of establishing programs to insure by the year 1980, 99 percent of all schoolchildren aged 16 and under will be functionally literate. I believe this proposed legislation will go a long way in assuring that goal. Obviously, time is of the essence.

Accordingly I have contacted all members of the Senate Subcommittee on Education to strongly urge that this measure be given priority attention so enactment will be possible in the very near future. Each month or year that goes by without action results in many personal failures on the part of our young people and I feel we must not be reluctant to act as soon as possible. I have indicated my willingness to testify before the subcommittee in support of a comprehensive reading preparedness measure.

In addition, Mr. President, I have requested comments from principals and teachers in the State of New Mexico regarding their opinions of this bill. Many, many educators responded to my inquiry, of which I ask unanimous consent to print only a few of their comments in the RECORD for my colleagues' attention.

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

THE ELEMENTARY SCHOOL READING EMPHASIS ACT OF 1973

G. C. Ross, Principal, 109 Cooper Ct., Clovis, New Mexico 88101: "The bill appears to be well thought out. We desparately need the kind of help this bill would make available."

O. M. Hamilton, Principal, P. O. Box 1147, Shiprock, New Mexico 87420: "Through my years of experience I have found that reading in the primary grades is the most singular thing that will either produce success or failure in the future of each student."

Mrs. Elizabeth Girard, Resource Room Teacher, Route 2, Box 3J, Portales, New Mexico: "It is so necessary to get our children to function up to their capacity and reading is a prime requisite. I'm 100% for any kind of help—and particularly this type which also would work toward cutting down teacher-student ratios."

John Spradling, Principal, Tucumcari, N.M.: "I think this is very important. We have a serious problem at our school—Good Luck."

Eulogio Ortega, Principal, Box 1, Dixon, N.M.: "Such a program would certainly help the Spanish-speaking children in the Dixon-Velande area where I'm working. One could do more—so many ideas come to mind, but it is always a lack of money to implement programs. Right now our primary grades have too many children for our teacher to cope with the situation."

Mr. DeVere E. Walker, Principal, Farmington, N.M.: "We surely need some help in coping with this need."

Eli A. Martinez, Principal, Santa Rosa,

New Mexico: "My teachers are solidly behind you on this."

Mr. H. Johnson, Principal, Gallup, N.M.: "We need all the help you can give us, Pete."

J. M. Romero, Principal, Los Lunas, New Mexico: "Teachers in the schools need to be trained further in diagnosing and correcting reading problems. Small groups to work with, and reading programs and materials for all types of disabilities need to be made available."

Al Garcia, Principal, Church Rock, New Mexico: "Program should be for all and not limited to only from low income families."

Arthur Bartley, Principal, Artesia, N.M.: "I have been working in the area of reading for a number of years and would like to see more being done. Keep up the good work."

Fred H. Chaffee, Principal, Dexter, N.M.: "As the first "Right to Read" school in New Mexico, Dexter Elementary is behind S. 1318 100%."

Perry C. Andrews, Principal, Des Moines, New Mexico: "A great deal of attention is being shown to urban school problems. Please remember the rural schools have as many problems."

Eli C. Garcia, Principal, Milan, New Mexico: "I feel that the Reading Specialist must include all grades one through three. Why build part of the foundation—build all of it. This program should provide for all students regardless of ethnic group."

Henry Munoz, Principal, Silver City, N.M.: "There is genuine concern for a great number of children who are experiencing reading difficulties in spite of teachers attempting many approaches to correct the situation."

William A. Chavez, Principal, Albuquerque, New Mexico: "I have been in education for close to 20 years and it seems like the teaching of reading is on a continuous decline. We do need financial assistance. Not that money is the answer but that we need the aide in educating teachers to teach reading. I believe that much could be done also by lowering the pupil-teacher ratio in the first 3 grades where the basics are taught."

D. N. Amijo, Principal, Albuquerque, New Mexico: "I have been an educator all my life and reading has been one of my greatest concerns. The staff here at Five Points School is 100% behind this effort."

RANCHOS-TALPA ELEMENTARY SCHOOLS,
Ranchos de Taos, N. Mex., September 19, 1973.

Hon. PETE V. DOMENICI,
U.S. Senate,
Washington, D.C.

DEAR MR. DOMENICI: I am very pleased as Elementary Principal of the Ranchos-Talpa Area Schools that you are aware of the many school children in our state and country who are having reading difficulties. I support your efforts on the National Reading Problems.

According to our test results last year our main weakness was in vocabulary, which proves that reading and its components is the single most important key to learning and that the mastering of reading skills determines in large part success in school and subsequent adult life.

Congratulations Senator, I commend you and your staff for the superb effort in education.

With best wishes.

Sincerely,

POLITO E. MARTINEZ,
Principal.

SEPTEMBER 18, 1973.

Senator PETE V. DOMENICI,
Washington, D.C.

DEAR SENATOR DOMENICI: There have been a number of excellent federal programs in the area of reading and this sounds like an excellent one. I would like to see some kind of continuing program developed. Most federal programs are designed for three years and then to be taken up by the district or state but most are already budgeted to capacity and can't follow through and the program dies. Would you look into this matter of maybe renewing the program after three years if it is successful.

Respectfully yours,

RAY SWINNEY,
Principal.

LAS CRUCES, N. MEX.,
September 21, 1973.

Senator PETE V. DOMENICI,
U.S. Senate,
Washington, D.C.

DEAR SENATOR DOMENICI: I have just completed reading your bulletin of September 14th, regarding the implementation of the reading program for those appalling numbers of people in the United States that do not read. I have been in education for 25 years, beginning my educational experience in a two room school and am presently principal of University Hills Elementary School in Las Cruces, New Mexico with an enrollment of 600 students.

Reading problems and problem readers have been of great concern to me since I began my teaching career in 1948. Since that time, I have constantly sought ways and means to help the poor and nonreaders under my tutelage. This same concern has been so paramount in my mind that it prompted me to get my specialist degree in reading. The problem of finding help for these people is even more frustrating now because of the lack of funds to implement special reading programs and/or clinical assistance.

It is not a completely dark future as the Las Cruces School System has opened the door slightly in it's implementation of the Right to Read program for the bilingual and economically deprived child.

In addition, we have been able to secure state enrichment funds to implement our Able Learner program which is intended to serve at least 10% of our total student enrollment of 15,500 students, regardless of ethnic or economic status. This later program needs to be expanded to the extent that help may become a reality for these students.

May I apologize for the lengthy response to your questionnaire but you presented a program that struck a very hopeful chord nearest to my heart and therefore I wholeheartedly support your efforts with other senators in promoting S. 1318 and hope and pray that we can write into the program provisions for all students who are in need of reading assistance. You may also rest assured that I will ask for support for this bill from my staff and others of the Las Cruces community.

Sincerely,

SHERMAN R. OSBURN,
Principal, University Hills Elementary School.

GRANTS, N. MEX.,
September 24, 1973.

PETE DOMENICI,
U.S. Senate,
Washington, D.C.

DEAR PETE: I am so pleased you have backed the bill the Elementary School Reading Emphasis Act of 1973. New Mexico is far below the national reading norms.

I hope the bill provides for all children that have severe reading problems regardless of their race or the area in which they live.

I will be anxious to hear how New Mexico will fair in the funding if this bill is passed.

Sincerely,

JUNE P. HALE.
Board Member, District 3.

HEW'S NATIONAL HEALTH INSURANCE PROPOSAL

Mr. KENNEDY. Mr. President, the Wall Street Journal of October 17, 1973, contained an excellent article by Mr. Jonathan Spivak entitled "HEW To Propose National Health Insurance With Costs and Benefits Above 1971 Plan." In the article, Mr. Spivak gave a detailed description of what he purported to be HEW'S latest thinking in the area of national health insurance. Subsequent to the appearance of Mr. Spivak's article, I have obtaind a staff document from the Office of the Secretary of HEW summarizing an HEW proposal for national health insurance. This staff document confirms many of the details contained in Mr. Spivak's article.

I ask unanimous consent that both the Wall Street Journal article and this HEW staff document be printed in the RECORD in order that they be available for general discussion and comment.

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

HEW TO PROPOSE NATIONAL HEALTH INSURANCE WITH COSTS AND BENEFITS ABOVE 1971 PLAN

(By Jonathan Spivak)

WASHINGTON.—The Department of Health, Education and Welfare has come up with a new version of national health insurance that would provide more benefits to more people at a substantially greater cost.

The HEW program, to be formally submitted to the White House in the next few days, is designed to plug the gaps in President Nixon's first national health insurance proposal, which got nowhere in Congress. It's the result of months of work ordered by HEW Secretary Caspar Weinberger. If it survives White House review, the plan could turn out to have considerably more appeal on Capitol Hill, where Democrats are pushing more generous plans.

But the budget impact of the new HEW plan will be a big obstacle to getting White House approval. While cost estimates are still being prepared, the net additional federal outlays required could be around $10 billion a year. The need to raise more revenue is certain to trouble the White House, although the President is committed to sending a health insurance plan to Congress next year.

HEW officials say their new program has three main aims: to broaden coverage of the first plan, extending it to all Americans except those over 65 years old, who would remain under Medicare; to ensure that the poor, whose health care is subsidized, get the same quality of care as workers who are self-sufficient, and to tighten cost controls through simplifying administration.

The new plan, like the original, is divided into two segments: a larger one paid for by workers and employers, known as the Standard Employer Plan, covering an estimated 39 million families; and a smaller, subsidized plan for the poor called the Government Assurance Program, which would also aid persons with unusually high health risks. Both would operate through conventional insurance channels—Blue Cross, Blue Shield or commercial companies.

COVERAGE EXPANDED

Instead of being limited to families, the subsidized portion would cover anyone in medical or financial need, including single persons and childless couples. Benefits in both plans would be substantially enlarged

from the original plan to include payments for drugs, mental illness and skilled nursing and home health care, plus eye exams, hearing and dental services for children through age 12. As before, hospitalization and most physicians' services would be covered.

The program also would feature a unique medical credit arrangement in which every American would receive from the insurance carrier an identifying "health card" to be presented to hospitals and doctors. The card would enable patients to budget their payments for the portion of medical bills that wasn't covered by the national health insurance program. The insurance company would pay the doctor or hospital immediately, eliminating the burdensome problem of bad-debt collection. The insurance company would extend credit to patients who couldn't pay immediately.

The plan would also relate charges for health insurance to income, cutting off the subsidy at $10,000 a year but guaranteeing that after a family spent $1,500 for its medical expenses it would be fully covered without limit in any given year. The original administration proposal imposed a ceiling of $50,000 in health care benefits and required greater out-of-pocket outlays.

Many of these features will be politically attractive, but they add to the program's cost. The administration's original health plan, presented in 1971, was estimated to require added outlays of only $1 billion. While this figure was conceded to be deceptively low, perhaps by $2 billion to $3 billion, the new plan is certain to cost much more.

OTHER CONTROVERSIES

Firm decisions on financing haven't been made even within HEW, but whatever the final decision it's likely to be controversial. Among the options under consideration: making workers pay taxes on the value of health insurance premiums provided by employers, which would yield the Treasury about $5 billion a year; requiring states to pay part of the subsidy to the poor or to assume the entire fiscal burden of furnishing $3 billion a year in long-term nursing care currently provided under the Medicaid program, which would be phased out; or, of course, individual or corporate income taxes could be raised.

Other sources of controversy are likely to arise. The program's reliance on the private health insurance industry to administer the program will offend those who want the federal government to assume a more active role. A greater delegation of regulatory responsibility to the states, which HEW appears to favor, could also anger liberal critics. Then, too, the administration's national health insurance program will call for curtailing of some restricted but highly popular federal health efforts that have powerful political defenders on Capitol Hill.

Although changes may still be made, the Standard Employer Plan, as it currently stands, would cost an average of $625 per family, with the employer paying 75% of this premium and the worker 25%. Patients would have to pay the first $150 of medical costs for an individual each year (up to $450 per family), and then pay 25% of the cost above that until the family had paid $1,500. After that, all medical service covered by the plan would be free.

The Government Assurance Plan would guarantee that most Americans, regardless of income or medical need, would be able to buy health insurance in the private market. It would replace the existing federal-state Medicaid program, give the poor better benefits, and extend coverage to many other Americans who have trouble getting care.

The poor, disabled, unemployed, retired and others with high health risks would obtain the same benefits as workers at a 50% higher premium—initially, $900 a year. The government would pay all the premium for families earning less than $5,000 a year and a lesser proportion up to the $10,000 income level. The deductible and the patient's share of the medical bills would also be based on income. Above the subsidy level, the employer would be responsible for 75% of this higher premium and the worker 25%.

An employer could choose either plan for his workforce, and might find it useful to select the Government Assurance Plan if his workers had unusually high health costs. Individuals would be free to join either plan or none at all.

SUMMARY OF HEW PROPOSAL FOR NHI

This paper summarizes some of the major features of the revised HEW proposal for national health insurance, to the extent that they have been formulated. Staffwork in several important areas is still underway. The proposal would retain the underlying principles of the National Health Insurance Partnership Act, introduced by the Administration during the last Congress. These principles include:

Mixed public-private financing and administration;

Restricting Federal intervention to areas where private decision making has not worked well;

Reliance on States for major aspects of administration where State laws meet Federal standards; and

Achieving evolutionary changes in delivery systems, such as incorporating provisions for an HMO option in both public and private insurance.

The HEW proposal, however, would make the following changes, which respond to the more fundamental criticisms of the Administration's previous bill:

Most importantly, it would assure that all Americans have access to health insurance that they can afford, as called for in the President's 1971 Health Message. The Administration's previous bill did not cover low income singles and couples. It also failed to assist unemployed persons—such as early retirees—who are not low income but who are unable to obtain private medical coverage at affordable rates because of their being high medical risks.

The same services would be covered under both the publicly and privately financed programs; the only difference between the two programs would be reduced cost sharing for low income persons under the publicly financed program.

The cost sharing for low income workers would be partially subsidized to ensure both that they do not face excessive deductibles and coinsurance and that an employed person is not worse off than an unemployed person at the same income level.

The benefit package would be broadened to encompass services not previously covered. At the same time, we would propose a higher deductible than was included in the previous bill for persons who are not low income. We view broad coverage with increased cost sharing as preferable to narrow coverage with lower cost sharing.

BASIC STRUCTURE

NHT would have two parts, the Standard Employer Plan (SEP) and the Government Assurance Program (GAP). Under SEP, employers would be required to offer their employees a minimum plan and pay a fixed percentage of the premiums, as under the Administration's previous bill. Although HEW is still reviewing selected aspects of the benefit package, the intent is for SEP to cover the following services:

1. Hospital services;

2. Physician services, except that preventive services would be limited to family planning, maternity, and well child care;

3. Other medical services as currently covered under Medicare, except chiropractic services;

4. Outpatient and inpatient drugs;

5. Eye examinations, eyeglasses, hearing aides, and dental services for children through age 12;

6. Mental illness limited to 30 hospital days and 15 outpatient visits, except that partial (day/night) hospitalization and outpatient services provided in organized community settings would be covered without a limit; and

7. Limited skilled nursing facility and home health benefits, as in Medicare.

Covered services would be subject to an annual per person deductible of $150 with a maximum family liability of three deductibles, and coinsurance of 25M for expenses over the deductible. However, all cost sharing would be waived after the family incurred $1,500 in out-of-pocket expenses for cost sharing in a single year. Thus, although the cost sharing (coinsurance and deductibles) would be higher than that in many of the competing bills, a maximum would be placed on out-of-pocket expenses, thus providing excellent catastrophic protection.

In addition, the deductible would be waived but coinsurance retained for family planning; outpatient maternity; well child care; and eye, hearing, and dental care for children. These are principally preventive services—which, unlike other medical services—are intended to be used at regular intervals. Applying a deductible to these services appears inadvisable because doing so would create the incentive for greater use of these services only in years in which the person had high medical bills. In addition, waiving the deductible would underscore the Administration's priority of assisting mothers and children. Finally, these services have been emphasized by Federally-funded health center programs, from which the Administration seeks to withdraw on the grounds that health insurance rather than direct Federal grants to providers is the appropriate funding vehicle.

State and local employers would be covered by the SEP mandate. We believe that public employers have the same social responsibilities as private employers. However, there would be a longer phase-in time on employer contributions to premiums to allow State and local governments to adjust to new demands being placed on them. The Federal Employees' Health Benefits program would be adjusted to conform to the SEP mandate, but the Federal premium contribution would not be changed.

GAP would be a joint State-Federal program that would be available to all Americans. However, the premium structure would in effect restrict coverage to those who cannot obtain coverage privately, either because they lack the financial resources or are in poor health. Under GAP, the government would contract with private carriers, who would offer coverage to anyone seeking it. GAP would cover the same services as SEP. It would have a premium, deductible, and cost sharing structure that would be related to income. An income related maximum would be placed on cost sharing to ensure that no one faced inordinate out-of-pocket expenses. The schedule for a family of two or more persons would be as follows:

Annual income	Annual premium	Annual per person deductible	Coinsurance above deductible (percent)	Maximum annual cost sharing
$0 to $2,499	0	0	10	[1] 3
$2,500 to $4,999	$300	$50	15	[1] 6
$5,000 to $7,499	600	100	20	[1] 10
$7,500 and over	900	150	25	$1,500

[1] Percent of income.

Single persons would face the same cost sharing structure but would have their premiums reduced by 50%.

The coinsurance and deductible for persons over $7,500 would be identical to those in SEP. The premium contribution for families above $10,000 is set at 50% higher than the average rate charged employer groups and would be adjusted automatically as that average changed. Consequently, people who are not low income would have the incentive to purchase insurance privately if they are not bad medical risks. For employed persons eligible for SEP who elect GAP coverage, the employer would be required to make a contribution to his premiums equivalent to what he would have made had the employee elected coverage through the employer's carrier. In practice, only employed persons with incomes under $5,000 would elect to enroll in GAP rather than accepting private coverage through the employer.

OTHER CHARACTERISTICS

Both GAP and SEP would include an HMO option.

As part of NHI, Medicaid would be terminated for populations covered by NHI. However, some 30% of Medicaid expenditures are for long-term care, equal to roughly $3 billion (State and Federal share combined) in 1975, and incorportaing a Medicaid-type benefit under NHI for the whole population does not appear appropriate. Instead, we would incorporate in NHI a much narrower benefit modeled after the Medicare program. This leaves open the issue of the Federal role in funding long-term care, particularly for low income persons. The Department is examining this matter, and proposals will be submitted subsequently. We are also evaluating the future of Medicare under NHI.

In addition, we would propose the termination of selected tax subsidies for health insurance and medical expenses. Currently, an employer's contribution toward health insurance premiums is not taxable as income. Instead, we would have it be taxable as income. The current practice benefits principally higher income groups and, more importantly, militates against efforts to contain medical care price inflation by encouraging the purchase of first-dollar health insurance coverage. In addition, we would propose terminating the medical tax deduction, which the President's tax reforms proposals would have substantially reduced in any case. This deduction loses much of its justification once universal entitlement to health insurance is achieved, since NHI would contain its own upper limits on out-of-pocket expenditures. We estimate that eliminating these two tax expenditures would generate $6.8 billion in 1975, which could be used to finance a substantial portion of NHI. The $6.8 billion estimate excludes additional revenue loss of as much as $1 billion that SEP would generate under existing tax practices.

Finally, carriers under both GAP and SEP would be required to provide their enrollees with a "Health Card," similar to any other credit card. All payments to providers for covered services would be made by the carrier rather than by the enrollee. The enrollee would in turn bill the carrier for cost sharing. The Health Card offers several important advantages:

The provider would have no reason to discriminate against low income patients since he is guaranteed reimbursement by the carrier.

The ability to enforce quality and cost controls would be vastly improved since all bills, including those below the deductible, would flow through the carriers.

The administrative burden on the patient and the provider would be substantially reduced. In addition, bad debt problems of providers would be virtually eliminated.

Mr. KENNEDY. Mr. President, the health insurance proposal described in this document is still under development and does not as yet reflect official policy of the Department of Health, Education, and Welfare or of the administration. There doubtless have been changes in some of the details which are not reflected in this document. For example, I understand that the Secretary Weinberger recently disclaimed any HEW intention to support elimination of the medical deduction from the income tax system. This document, however, contains a proposal to eliminate the medical deduction and also to tax employers contributions to group health policies as employee income.

The proposal relies upon these two changes to generate an additional $6.8 billion of revenues for the Federal Government ostensibly as a means of paying for the proposed health insurance plan.

Since this proposal does not represent HEW policy, it would be premature to criticize it in any detail. It is alarming to note, however, that the proposal retains many of the major shortcomings of the administration's earlier national health insurance proposal. It will create a windfall of billions of dollars for the health insurance industry in this country, while proposing only minimal regulations and controls of this industry. In addition the proposal would pour billions of dollars into health care in our Nation while creating little or no incentives for increased efficiency and economy and minimal controls on health care costs.

Finally, the proposal would exact very high payment from low-income families for insurance coverage. For example, a family of four with a yearly income of only $3,000 would pay an annual premium of $300. This amounts to 10 percent of the family's annual income. A family of four making the average income in our Nation of $10,000 to $12,000 a year, would very likely pay only $150 as their share of their employers group plans. This amounts to only 1½ percent of their family income.

I am hopeful that by the time this HEW proposal is converted into official policy, they will attempt to rectify these grave shortcomings.

In the meantime, I am delighted to make this data available for general discussion by those interested in health care in our Nation.

SOCIAL SERVICES AMENDMENTS OF 1973

Mr. TOWER. Mr. President, I am pleased to join a number of my colleagues in cosponsoring a measure which I feel is vital to my State and in the best interests of responsible administration of our Nation's program of public assistance.

I have long advocated a program of assistance to our Nation's indigent citizens which would encourage retention of personal dignity while providing an opportunity for upward mobility economically. In my opinion, S. 2528 provides guidelines which should enable the social services program to fulfill these objectives.

Primarily, by restoring responsibility to the individual State governments for making the ultimate decision regarding eligibility standards and the range of services to be offered, we are encouraging a maximization of benefits. State welfare agencies are undoubtedly in the best position to determine the needs of their own people as well as the best means of meeting those needs within the fiscal limitations imposed by the Federal Government.

At this time, I would like to address myself briefly to several provisions of the social services amendments which I feel are of particular importance to my own State of Texas.

PRIVATELY DONATED FUNDS

Texas carries the distinction of being the only State with a statutory ceiling on welfare expenditures. The critical limitation on resources this ceiling imposes, dictates the most prudent use of the funds available to meet the most pressing needs, when considered in conjunction with Texas' low per capita income and high percentage of population below the poverty level. Because of this, the State of Texas has traditionally relied heavily on privately donated funds and in-kind private contributions to make up its share for matching Federal social services grants. Under proposed HEW regulations, in-kind private contributions could no longer be used for this purpose. Consequently, I feel the provisions of S. 2528 which permit the use of private funds for matching Federal grants is imperative if we are to sustain a viable program of social services in my State.

ELIGIBILITY

Under the proposed HEW regulations, eligibility for social services would be almost entirely limited to those presently receiving public assistance payments, thus forcing back on welfare rolls, many families just above the welfare level who are trying desperately with the help of the benefits of this program to hold their own economically in this difficult time of rampant inflation. More specifically, under these proposed regulations, 90 percent of all funds must be used for services to current recipients of public assistance payments.

Most restrictive of all, however, are the provisions which require that of the remaining 10 percent which could be used for services to former and potential recipients, only those individuals who have been on welfare within 3 months, and those likely to be on welfare within 6 months would be eligible. I must oppose these unrealistic eligibility restrictions.

Mr. President, I firmly believe that most Americans do not choose a welfare existence. Nevertheless, some find they are unable to maintain self-sufficiency despite their best efforts to support their families independently. Furthermore, I am convinced that once on welfare, most families are willing to take advantage of every available opportunity to regain self-sufficiency.

Recent studies of welfare recipients illuminated several important facts which have often been blurred or misunderstood in the past:

First. People wind up on welfare not because they are cheats, loafers or malingerers, but because they are poor. Further, their poverty is not simply financial. They have had poor education, poor health care, poor chances at decent employment, and generally poor prospects for anything better.

Second. By far the greatest majority of those supported by welfare are children under the age of 16—approximately 8 million.

Third. Most of our Nation's poor are not on welfare. Out of approximately 25 million Americans officially below the poverty level of $4,000 a year for a family of four, only 15 million receive some form of public assistance. Another 30–50 million are just barely above the $4,000 per year level.

Fourth. Less than 1 percent of welfare recipients are able-bodied employable males. Many of these are in their late-middle years and most are uneducated. All are required by law to sign up for work or work training.

Fifth. Apart from children and the small handful of potential employables on welfare are more than two million aged, and more than 1 million totally and permanently disabled or blind.

Sixth. No one is living comfortably on welfare. It allows, at best, a bare-bone existence. In no State does the average welfare payment bring a family up to even poverty level. Maximum payments for a family of four range from $700 a year in Mississippi to $3600 in New York. Thirty-nine States pay less than their own established standard of need.

Seventh. Cheating and fraud in welfare are minimal. The Department of Health, Education, and Welfare estimates there is cheating among fewer than 1 percent of welfare cases, and even this small percentage is being systematically reduced through more stringent eligibility checks by State welfare agencies.

Eighth. There is no evidence to sustain the belief that welfare is necessarily habit-forming. About 65 percent of all welfare recipients at any given time are on welfare for the first time, and stay on for less than 3 years.

Ninth. Welfare costs less than 2½ cents of every dollar paid in Federal taxes.

As these statistics indicate, welfare recipients and those just above the eligibility level are, for the most part, trying hard to regain their self-sufficiency. I endorse the provisions of S. 2528 which allow States the flexibility to provide up to 25 percent of the benefits under social services programs to those who have been on welfare within 2 years, or who are likely to be on welfare within 5 years. These provisions will provide the assistance necessary to keep many potential recipients off the welfare rolls, and help former recipients stay off.

SERVICES

Finally, I feel it is imperative that States retain the flexibility to design programs to meet local needs. Provisions of the Social Services Amendments of 1973 provide not only a list of statutorily defined services felt necessary by a representation of welfare officials from across the nation, but also a list of optional services which may be provided, as needed, on the basis of priorities established in each State.

Mr. President, I am convinced that the guidelines proposed in the Social Services Amendments of 1973 provide the best opportunity for States to meet the overriding needs of their least fortunate citizens. Furthermore, the programs made available under these social services amendments will provide the means and incentives for welfare families to break the chains of poverty, pull themselves out of the vicious welfare cycle, and become, once more, proud and productive members of our society. I urge congressional expediency in considering this important measure.

NEW ADVISORY COMMITTEE NEEDS ADVICE

Mr. METCALF. Mr. President, I wish to call attention to the President's and Governor Love's new Energy Research and Development Advisory Council, and the irregular procedures which attended its first meeting, on Thursday, October 11.

I raise this issue because I do not want national energy policy to be arranged in private meetings between top officials of the executive branch and industry. I do not believe that other Members of Congress, and the public they represent, desire such arrangements.

I do not want this new advisory committee to become another lobby for weakening patent and antitrust law and enforcement.

Nor do I want this new advisory committee to be yet another lobby for the fossil fuel and uranium interests.

Increasing profits provide more than enough funds for the energy corporations to finance their own research and development. The Federal R. & D. effort should concentrate on development of alternate energy sources—solar, water, sewage conversion and wind.

These energy sources are inexhaustible, and unmonopolized. They are superior to the fossil fuels and uranium from an environmental viewpoint, from an operations viewpoint and especially now, with the Middle East at war, from the national security viewpoint.

Furthermore, this new advisory committee is bound by the Federal Advisory Committee Act which the President signed on October 6, 1972, and the subsequent guidelines issued by his Office of Management and Budget and Department of Justice.

The meetings of this new advisory committee should be well publicized in advance.

They should be held where there is ample room for public citizens.

They should be public, in their entirety.

The committee should hear from the disciplines which are not represented on this committee, those who believe in basing our national energy R. & D. policy upon those alternate, inexhaustible energy sources which do not pollute, destroy the soil and produce dangerous waste, whose operating costs are low and which are not subject to monopoly control and pricing and foreign wars.

The Federal Advisory Committee Act (P.L. 92–463) provides in section 10 that advisory committee meetings shall be open to the public, subject to the Freedom of Information Act exceptions. Section 10 further provides that timely notice of advisory committee meetings shall be published in the Federal Register and that other types of public notice will be provided "to insure that all interested persons are notified of such meeting prior thereto."

The act limits public attendance at, appearance before, and filing statements with advisory committees to "such reasonable rules or regulations" as the Director of the Office of Management and Budget may prescribe. The OMB-Justice guidelines, which are included in the President's First Annual Report on Advisory Committees, spell out those "reasonable rules and limitations." They include the following:

"Such meeting shall be held at a reasonable time and at a place that is reasonably accessible to members of the public.

Mr. President, the first public opportunity to become aware of the new Energy R. & D. Council's first meeting, held on Thursday, October 11 meeting occurred on the preceding day, Wednesday, October 10. The notice—dated October 5—appeared in the October 10 Federal Register. Congressman DAVID R. OBEY put the notice in the CONGRESSIONAL RECORD on October 10, observing that "the effective way to turn a public meeting into a private gathering is to give either no notice of it or short notice."

The text of the meeting notice as it appeared in the October 10 Federal Register, is as follows:

ENERGY POLICY OFFICE, ENERGY RESEARCH AND DEVELOPMENT ADVISORY COUNCIL—NOTICE OF MEETING

Pursuant to section 10(a) (2) of the Federal Advisory Committee Act (Public Law 92–463, 86 Stat. 770) the Energy Policy Office announces the following public advisory committee meeting.

The Energy Research and Development Advisory Council will hold a meeting on October 11, 1973, in the Old Executive Office Building, Room 248, 17th and Pennsylvania Avenue, Washington, D.C. The meeting will commence at 11:15 a.m. local time and last until 3:30 p.m., except for a one hour break for lunch at 1 p.m. The meeting will be for the purpose of discussing matters related to national energy research and development policy and programs.

The Advisory Council was established by the President on June 29, 1973, and announced in his Energy Statement of the same date. The objective of the Council is to help ensure the development of comprehensive technological programs to meet the Nation's energy needs. It would do this by providing independent advice to the Energy Policy Office on matters relating to energy R&D.

Members of the public will be admitted up to the limits of the capacity of the meeting room. Members of the public who plan to

attend the meeting are requested to so inform Dr. William McCormick, Executive Secretary of the Advisory Council prior to October 11, 1973. Dr. McCormick can be contacted in Room 472, Old Executive Office Building, Washington, D.C., or on (202) 456-6575.

WILLIAM T. MCCORMICK, Jr.,
Executive Secretary, Energy Research and Development Advisory Council.

October 5, 1973.

[FR Doc. 73-21633 Filed 10-9-73;8:54 am]

Mr. METCALF. Members of the Subcommittee on Budgeting, Management and Expenditures staff learned of the meeting through Congressman OBEY'S remarks in the CONGRESSIONAL RECORD, which of course was not available until October 11, the day of the meeting. They were well aware of my interest, and that of other members of the Committee on Government Operations, in agency adherence to the Federal Advisory Committee Act. They were also aware of my special interest in energy research and development, a subject which the Senate Interior Committee had planned to discuss Thursday morning in open mark-up of S. 1283.

Subcommittee Staff Director Vic Reinemer called the number of Dr. William McComick, executive secretary of the Advisory Council, which was listed in the meeting notice. Mr. Reinemer was told that Dr. McCormick was not available and that no seats were available at the meeting—which was not due to start for 20 minutes. Thereupon Mr. Reinemer and Subcommittee Chief Counsel E. Winslow Turner promptly went to the Old Executive Office Building, where the meeting was to be held.

They showed the officers of the Executive Protective Service their Senate credentials. They were told they could not go to the meeting room because their name was not on the list of those to be admitted. They were advised to call Dr. McCormick's office, which they again did, to be told that he was in the meeting room which had no phone—there was a phone in the room—and that the meeting which had begun at 11:15 had—at 11:25—been adjourned—it had not been adjourned.

Chief Counsel Turner then called Mr. William Hawley, who is OMB's one-man staff administering the Federal Advisory Committee Act. Mr. Hawley immediately came over from the New Executive Office Building, discussed the matter with the two Senate staff members and went up to arrange for their admittance to this "public" advisory committee meeting.

While he was making those arrangements Sergeant Fioramanti of the Executive Protective Service questioned Mr. Reinemer and Mr. Turner about bothering Dr. McCormick's secretary with phone calls and—while a plainclothesman loaded his revolver in the background—emphasized that the Old Executive Office Building was one place in town where there are not any public meetings and that if anybody called a public meeting there the intention undoubtedly was to not have the public attend.

Mr. Reinemer and Mr. Turner showed this official of the Executive Protective Agency the notice of the public meeting, as reprinted from the 10 October Federal Register, page 27955, in the CONGRESSIONAL RECORD for October 10, page 3370, at Congressman OBEY'S request. Sgt. Fioramanti immediately commented that any statement made in the CONGRESSIONAL RECORD "didn't mean a thing" to him and had no operative effect on any action to be taken by his agency, even though it contained a reprint from the Federal Register.

By noon—45 minutes after they had arrived for the 11:15 meeting—and through the personal intercession of Mr. Hawley—my staff members were admitted to the meeting. Chairs were available.

Mr. President, before I proceed with the subject matter of the meeting, and the manner in which the public was excluded from the last portion of the meeting, I ask unanimous consent to print at this point in the RECORD the October 11 White House press release regarding this new advisory committee's duties and membership and the meeting agenda. You will note that according to the agenda the President was scheduled to address the advisory council at 10:30 in the White House, prior to the 11:15 meeting in the Old Executive Office Building. I am advised that the President did not meet with the group.

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

ENERGY RESEARCH AND DEVELOPMENT ADVISORY COUNCIL, ENERGY POLICY OFFICE

In his June 29 energy statement, the President announced the establishment of the Energy Research and Development Advisory Council reporting to Governor John A. Love, Director of the Energy Policy Office. The Charter for the Council was filed with the Director of the Office of Management and Budget on August 7, 1973. The Council, which comprises eminent scientists and engineers representing the Nation's leading experts in various areas of energy research and development, is intended to provide the Director of the Energy Policy Office with independent advice and counsel on the overall direction of the Federal energy R&D effort and to assist the Director in reviewing national energy R&D plans and programs. The Council, which is meeting at the White House for the first time today, is expected to meet about six to eight times a year.

DUTIES OF THE ADVISORY COUNCIL

The specific duties of the Advisory Council are:

To provide advice to the Director of the Energy Policy Office on the overall direction of the Federal energy R&D effort;

To suggest new energy R&D programs and technical approaches that may contribute to the solution of energy-related problems;

To examine, at the discretion of its Chairman, selected Federal energy R&D programs;

To apprise the Director of the Energy Policy Office of significant new scientific and engineering developments that may influence the conduct of our Nation's energy R&D programs;

To examine, at the discretion of its Chairman, specific recommendations by Federal agencies regarding energy-related R&D programs.

MEMBERSHIP OF THE ADVISORY COUNCIL

Chairman

Dr. H. Guyford Stever, Science Advisor and Director of the National Science Foundation.

Members

Dr. William O. Baker, President, Bell Telephone Laboratories, Murray Hill, New Jersey.

Dr. Manson Benedict, Professor of Nuclear Engineering, Massachusetts Institute of Technology, Cambridge, Massachusetts.

Dr. Lewis M. Branscomb, Vice President and Chief Scientist, International Business Machines Corp., Armonk, New York.

Dr. Paul F. Chena, Vice President, Research Laboratories, General Motors Corp., Warren, Michigan.

Dr. Murray Gell-Mann, Professor of Physics, California Institute of Technology, Pasadena, California.

Dr. Edward J. Gornowski, Executive Vice President, Esso Research & Engineering Company, Linden, New Jersey.

Dr. Henry H. Linden, Executive Vice President and Director, Institute of Gas Technology, Chicago, Illinois.

Dr. Gordon J. F. MacDonald, Director, Environmental Studies Program, Dartmouth College, Hanover, New Hampshire.

Dr. Elliot W. Montroll, Einstein Professor of Physics, University of Rochester, Rochester, New York.

Dr. Ruth Patrick, Head Curator of Limnology, Academy of Natural Sciences, Philadelphia, Pennsylvania.

Dr. Simon Ramo, Chairman of the Board, TRW Inc., Redondo Beach, California.

Eric H. Reichl, Vice President for Research, Consolidation Coal Company, Library, Pennsylvania.

Louis H. Roddis, Vice Chairman of the Board, Consolidated Edison Company, New York, New York.

Dr. Chauncey Starr, President, Electric Power Research Institute, Palo Alto, California.

Dr. Alvin M. Weinberg, Director, Oak Ridge National Laboratory, Oak Ridge, Tennessee.

Executive Secretary

Dr. William T. McCormick, Jr., Staff Assistant, Energy Policy Office.

OCTOBER 9, 1973.

ENERGY R. & D. ADVISORY COUNCIL—AGENDA FOR OCTOBER 11, 1973 MEETING

ROOSEVELT OR CABINET ROOM—WHITE HOUSE

9:30-9:45—Swearing In.

9:45-10:15—Discussion of Council Operation, Dr. Stever.

10:15-10:30—Opening Remarks, Governor Love, Mr. DiBona.

10:30-10:45—Remarks by the President.

10:45-11:00—Break (Go to E.O.B.).

OLD EXECUTIVE OFFICE BUILDING—ROOM 248

11:00-1:00—Federal Energy R. & D. Program.

11:00-11:15—Overview, Dr. Donovan, NSF.

11:15-11:45—Nuclear Energy R. & D. Program, Dr. Teem, AEC.

11:45-12:15—Fossil Energy R. & D. Program, Dr. Gouse, Interior.

12:15-12:40—Environmental-Energy R. & D. Program, Dr. Greenfield, EPA.

12:40-1:00—Other Energy R. & D. Programs, Dr. Eggers, NSF.

1:00-2:00—Luncheon hosted by Governor Love (Conference Dining Room—W.H.).

2:00-2:30—Status of Government Organizational & other Energy-related Legislation, Mr. Bingman, OMB.

2:30-3.00—$100M FY 1974 Add-on, Dr. McCormick, EPO.

3:00-3:30—Role of Industry in Energy R. & D., Mr. Sawhill, OMB.

3:30-4:30—Status of $10 Billion Program, Dr. Ray, AEC, Dr. Smith, AEC.

4:30-5:00—Study on International Cooperation in Energy R. & D., Mr. Pollack, State.

Mr. METCALF. Mr. President, Chief Counsel Turner returned to the Hill early in the afternoon to attend another

of our continuing staff sessions regarding budget control legislation. Staff Director Reinemer stayed until, despite his objection, the meeting was closed and the public excluded from discussion of the status of the $10 billion energy R. & D. program that the President announced earlier this year.

Mr. Reinemer advised Dr. Stever, the committee chairman—who is also the President's science advisor and director of the National Science Foundation—that the meeting was public, that it had been so noticed in the Federal Register, and that closing of the meeting would be a violation of the Federal Advisory Committee Act. Dr. Stever declined to reconsider his decision to close the meeting. So the few persons who had learned about the meeting and overcome the hurdles to entry departed, leaving high executive department and industry officials in cozy conference regarding the public's business.

Mr. President, I believe that Members of Congress and the public generally should know something of what these advisory committee members discussed, in addition to energy R. & D. before the meeting was closed.

They talked about patent policy. They said they want to talk more about patent policy in further meetings, which are expected to be held about six to eight times a year. OMB's Associate Director John C. Sawhill, who handles energy and science policy for OMB said that "we really want to get industry's view of patent policy" adding that "we can probably administer patent law in a flexible way."

They discussed antitrust laws, which Mr. Sawhill said "we" will look at, adding that "we are very anxious to get uranium enrichment into the private sector."

They talked with concern about Senator JACKSON's S. 1283, the energy R. & D. bill, and the concept of TVA-type government research corporations in which "you lose the advantage of the kind of control we want to exercise in COMSAT-type corporations—which—let industry in on decisionmaking."

And they chortled when a distinguished scientist made a presentation regarding solar power, windpower, and sewage waste conversion. Such alternate energy sources, some of us believe, should be the basis of a sound Federal energy R. & D. program. But they are apparently of little interest to the fossil fuel and uranium interests which dominate the energy industry and the energy-related agencies of Government, including this new advisory committee.

Hydropower and the energy-saving potential of a national power grid were not even mentioned, at least during that part of the session which the Senate staff members were permitted to attend. OMB officials are aware of hydropower. For 4 years now they have stymied the Corps of Engineers study of additional generating capacity at existing mainstem dams on the Missouri River. From an environmental viewpoint, these nonpolluting kilowatts would be an ideal increment. Other countries are ahead of us in development of hydropower. The French harnessed the tides off Brittany 6 years ago. Last year this tidal plant added 560 million kilowatt-hours to the French national grid.

Mr. President, I submit that the major component of the energy crisis is the domineering role of the fossil fuel-uranium complex, which includes financial institutions behind them and the Government officials who implement their policies up front. The Energy Research and Development Advisory Council appeared in its debut to be the most recent manifestation of this malady.

Furthermore, its decision to hold a public meeting on 1-day notice, to convene it in one of the most inaccessible buildings in this city, and to exclude the public from a key part of its deliberations puts this group in a category with two of President Nixon's other advisory committees which tried to do the public's business in private.

One was the National Industrial Pollution Control Council, composed of the heads of major polluting firms, which was surprised and chagrined to find press and public trying to get into their meetings. So it moved to the new State Department Building, with its built-in security arrangements. The other was the National Business Council for Consumer Affairs, which met with the President to, in his words, "identify and examine current and potential consumer problems." It, too, met secretly.

Consumer affairs, along with pollution and energy R. & D. hardly involve national security. But they could involve monopoly security. I suspect that therein lies the real reason for the secrecy with which this administration attempts to shroud high-level discussion of those issues.

The day before this Energy R. & D. Advisory Council met, the first court decision under Public Law 92-463 was handed down, by U.S. District Court Judge Aubrey E. Robinson, Jr., in the U.S. District Court for the District of Columbia. The full text of the order and memorandum—Civil Action No. 1864-73—was inserted by Congressman OBEY in the October 16, 1973 CONGRESSIONAL RECORD, page 34444. The Council and its chairman should especially note this comment by Judge Robinson:

> Congress was concerned with the proliferation of unknown and sometimes secret "interest groups" or "tools" employed to promote or endorse agency policies. Congress established openness to public scrutiny as the keystone of the Advisory Commitee Act. Arguments that public participation and disclosure would inhibit debate and the frank expression of views were heard and rejected by Congress.

Judge Robinson goes on to say that an exception was created, for matters truly confidential. The Energy R. & D. Advisory Council did not attempt to justfy an exception. Instead, its chairman simply closed an open meeting, in violation of the act.

Mr. President, I hope to schedule oversight hearings of the Federal Advisory Committee Act within the next few months. I look forward to reviewing with Chairman Stever, at those hearings, the progress of his committee toward conformance with the letter and spirit of the act.

In addition, I invite others to help advise this new advisory committee. At last week's meeting Mr. Sawhill of OMB distributed to advisory committee members an outline of the strategic issues to be considered as part of the President's proposed $10 billion energy R. & D. program. Inasmuch as his outline may be useful to persons who wish to communicate with the advisory committee and its members, I ask unanimous consent to print it at the conclusion of my remarks.

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

TOWARD A STRATEGIC APPROACH TO FEDERAL AND PRIVATE INVOLVEMENT IN ENERGY R. & D.

THE STRATEGIC ISSUES

The President has proposed federal commitment of $10 billion to energy R&D over next five years. Dr. Ray is developing a long term national strategy for energy R&D.

Questions of institutional strategy are as challenging as the technological issues:

What are the proper roles for the federal government and various elements of the private sector (industry, universities, other research groups) in energy R&D?

What criteria should be used for federal sponsorship and participation in energy R&D efforts?

What can be done to encourage private investment in energy R&D and to accelerate commercial application of new energy technology?

What modes of government sponsorship other than direct federal funding are appropriate?

How should government and private sector organize themselves to carry out respective roles, and what new cooperative institutional arrangements are required?

Good answers to these questions are critical:

If poorly structured, stepped-up federal effort could be counterproductive: substitute federal for private funds, discourage competitive approaches, insulate decisions from market forces, and slow technology transfer.

If wisely structured, federal effort could have tremendous positive leverage: catalyze and complement private investment, facilitate commercialization, provide overall balance and direction.

Now is the time for a fresh, imaginative look at these issues.

Dr. Ray's Task Force & Executive Office of the President actively investigating them, but wide discussion needed and welcomed.

GUIDELINES FOR FEDERAL INVOLVEMENT IN ENERGY R&D

No hard and fast criteria exist for determining federal role, but some general guidelines can be presented for purposes of discussion.

Selecting areas for involvement

Government support and incentives for energy R&D should focus on:

Areas where benefits not capturable by private institutions (e.g. basic science).

Areas where costs to public are high if research is not undertaken by industry (e.g. environmental controls, reactor safety).

Areas where market may not elicit desired results soon enough (e.g. synthetic fuels from coal).

Areas where magnitude of risks or length of development lead times inhibits support solely by private sector (e.g. breeder reactors).

Areas where a relatively small federal in-

vestment can have high positive leverage on private investment (e.g. geothermal brine?).

Areas where government itself needs the research in order to act responsibly as overseer of the U.S. energy system, as an owner of energy resources, as a supplier and consumer of energy, and as manager of federal energy R&D (e.g. research on health effects of pollutants, studies of U.S. energy system).

ALTERNATIVE INSTRUMENTS FOR FEDERAL SUPPORT AND COOPERATION

General considerations

Need to maximize flexibility in institutional and funding arrangements to reflect diversity in industry characteristics and status of the technology.

Need to maximize opportunities for cooperative effort between industry and government.

Need to consider ways of "pulling" technological innovation in energy system through adjustments in regulatory and marketplace incentives, rather than "pushing" all of it through a federally managed R&D pipeline.

Industry and government both appear receptive to considering innovative means of cooperation. Opportunity should be capitalized on.

Examples of alternative financing arrangements

Civil service or support contractor (government laboratories).

Research grants.

Traditional R&D contracts.

Cost-sharing contracts.

Government loans or loan guarantees.

Procurement guarantees.

Tax incentives.

Examples of alternative industry-government relationships

Traditional agency-contractor model.

Cooperative projects or support of industry research associations (e.g. American Gas Association, Electric Power Research Institute).

Mixed ownership corporations (e.g. COMSAT).

Federal Energy Research and Development Corporations (Jackson Bill—S. 1283).

QUESTIONS FOR DISCUSSION

Council's view of:

Key leverage points for stimulating private investment in energy R&D.

Major pitfalls for government/industry cooperation.

SENATOR PERCY ADDRESSES DETROIT ECONOMIC CLUB

Mr. GRIFFIN. Mr. President, I wish to call attention to a speech by the Senator from Illinois (Mr. PERCY) before the highly respected Detroit Economic Club on October 15.

I ask unanimous consent that Senator PERCY'S speech be printed in the RECORD.

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

THE AMERICAN ECONOMY AT THE CROSSROADS

There are probably few in this room who would not agree that our economy is in trouble. We don't need opinion polls to tell us that in the United States today is a widespread and deep-seated malaise about our economic future.

Ironically, this malaise is not the result of economic recession. As you know, we are just now emerging from a period of full-blown economic boom. Instead, I believe, the pervasive dissatisfaction about the economy I find everywhere I go stems not just from increased market-basket costs, but from a profound loss of confidence and trust—loss of confidence in policy planners, a new scepticism about the viability of our economic institutions and a lack of trust in the function of our marketplace economy.

We have seemed unable to find the proper mix of fiscal and monetary policies which will check inflation and yet foster high productivity growth and permit a rising standard of living for all our people.

AMERICA STANDS AT A CROSSROADS

We must step back and freshly evaluate the entire range of economic policy before we go any further.

One thing seems eminently clear to me; we must make economic decisions on the basis of long-term objectives and *not* on the basis of day-to-day political pressures.

We, as a nation, must make some hard choices. Are we going to tie our domestic economy to a make-shift system of governmental controls? Or are we going to take positive steps to move our economy back towards the principles of the free marketplace? Are we going to close the doors of the United States and hide our economy behind a shield of protectionism, as the Burke-Hartke bill proposes? Or are we going to accept the challenge of foreign competition and integrate our economy more fully with the greater world economy?

We must decide how to shape the institutions and structure of our economy. Are we going to toss the basic principles of a free economy aside and impose an ever-increasing patchwork of regulations and controls in our search for stability and continued prosperity? Or are we going to build on what we have, work with it and constantly strive to make it better?

What is our situation today and what basic decisions must we make? I have very strong beliefs about the principles that should guide us.

Let me first address the question of the underlying precepts of our domestic economy. Are we going to continue to saddle our economy with controls or are we going to try to free it?

Over the course of the past 26 months, the American economy has been dragged through five separate phases of the Economic Stabilization Program. It is hard to imagine that we could be any worse off than we are today had *no* controls at all been imposed in mid-1971. The Stabilization Program has failed mainly because economic policy has lacked consistency of purpose and direction. Day-to-day political pressures have formed the basis for too many alterations in the stabilization policy. Controls have *not* stabilized prices or wages and they have *not* stopped inflation. They have instead encouraged production cut-backs, shortages and black markets, and have contributed to the confusion in the marketplace for producers as well as consumers. Controls have too often been shaped by day-to-day political pressures and thus they have produced two unanticipated and undesired results. First, by short-circuiting the price mechanism, they have created deep distortions in the allocation of goods and services. Second, and perhaps more importantly, they have created a crisis of public confidence in economic policy planners.

Perhaps the failure of controls will ultimately prove instructive. It may have served to dramatically remind Americans of some of the virtues of a free market system.

Take, for example, some of my colleagues in the United States Senate. Just a little more than four months ago, a group of 33 Democratic Senators voted in caucus to support "a 90 day freeze on everything." When the Administration's controls on food prices were announced on June 13, many assailed the measures as "to little, too late!"

It took less than two months for the Senators' eyes to be opened. The freeze on beef prices created shortages, plant shut-downs and black markets. Suddenly, everyone saw the virtues of the free marketplace economy—including those 33 U.S. Senators—and on August 2, the Senate voted 85 to 5 to end the freeze on beef prices altogether.

It is now much clearer than ever before that we *must* scrap controls as soon as possible. There is no other acceptable policy. We simply do not know how to manage a controlled economy in peacetime and furthermore, the American public does not want a controlled economy.

Let me add here that I am pleased that business and labor now overwhelmingly agree on the need to remove controls. It's high time you did. I have always opposed controls, but until very recently, you in business and labor have made it more, not less difficult for those of us in public life to stand against increasing regulation.

The Cost of Living Council should now accelerate its efforts to lift controls selectively as soon as conditions warrant. I think the American consumer has learned the lesson of the failure of the Stabilization Program.

It's been the greatest adult education course in economics the nation has ever had.

But the education of the American public must continue. The cold truth of the matter is that long before the Administration began its Stabilization Program, the economy was encumbered with controls of all kinds. Some of them, of course, are necessary, some are superfluous, but many others are actually harmful.

Over the years, the federal government and the states have enacted a variety of special interest legislation, much of it at the request of elements of the business community itself, which has produced serious inefficiencies in important sectors of the economy.

Examples of this range from Interstate Commerce Commission regulations which have actually contributed *toward* the bankruptcy of many American railroads, to the state fair trade laws which have produced inflationary rigidities in the retail sector by interfering with manufacturers' ability to ever offer volume discounts.

But perhaps the most notorious example is in the agricultural sector. In 1972, with food prices skyrocketing due to severe supply shortages, the United States government was *subsidizing* farmers to hold out of production 60 million acres of tillable farm land—that is, almost 20 percent of all the tillable farm land in the entire country.

To compound this error, the Department of Agriculture, ignoring available economic intelligence data, negotiated a grain deal with the Soviet Union that made the tough Yankee trader look like a starry-eyed schoolboy. In 1973, with prices continuing to rise, the Administration finally initiated a production expansion policy and the senseless subsidies have been discontinued. Unfortunately, the fruits of this change will not be seen until next year.

Our abiding goal must be to get away, not only from the cumbersome controls of the Stabilization Program, but also from the built-in controls which in the long run fail to serve the best interests of the economy.

The challenge facing American policymakers is not merely how to get away from controls, but how to break out of the trend toward increasing government regulation of all kinds. I believe that if we continue to travel our present road, we will soon find ourselves at a dead end with an economy increasingly and irretrievably controlled by the government. Now is the time to change course before it is too late.

America stands at a crossroads in international economic policy as well. We are going to have to decide just what our economic relationship is going to be to the rest of the world. Do we throw ourselves enthusiastically into the competition of world markets? Or do we move to "protect" the U.S. economy from the fluctuations of international trade

and money markets and adopt protectionist proposals, such as the Burke-Hartke bill, which seek to disengage our economy from those of other nations?

If there is anything we should have learned from our current food and fuel difficulties, it is that the economy of the world, like the economy of the United States, is not static and cannot be forced to fit any one pattern indefinitely. Protectionist measures which set fixed quotas for imports and sharply restrict freedom of U.S. investment abroad run directly counter to the marketplace economy system, and I categorically reject them.

Protectionism reduces U.S. industrial competitiveness and eliminates incentives for cost-cutting and more efficient management and manufacturing practices.

Protectionist legislation would lead to massive foreign retaliation striking hardest at U.S. export industries, industries which traditionally tend to involve higher pay and more advanced technology. And it would undermine the position of U.S. corporations' overseas subsidiaries and foreign investments, which last year added $10 billion to the plus side of the U.S. balance of payments ledger.

We must begin to move away from controls on international movements of capital and commodities. Fortunately, the Administration is already advocating that the interest equalization tax and the mandatory controls on direct investment should be scrapped.

While reaping the benefits of our own private foreign investment, we should not try to block foreign corporations that wish to invest in American industries and properties. This is a new experience for us, but I for one think it is a healthy experience. International investment promotes international interdependence. And an integrated world economy will prove to be an investment in world peace.

In discussing all the fundamental economic decisions which today confront us, we must all bear in mind the astonishing extent to which the physical well-being of the nation's economy depends upon the psychological state of the nation.

Today, we in the United States seem seriously disturbed. We're disturbed by Watergate, and the dark cloud hanging over the Presidency; we're deeply disturbed by the resignation of the Vice-President; we're disturbed by the handing-down of indictments against former Cabinet officers and high White House aides; we're disturbed by our inability to deal with our pressing social needs; and we are disturbed by our inability to stabilize our economy and halt rampant inflation. Opinion polls show that public faith in all our institutions has dipped to the lowest levels in years. The American people don't trust the Congress, the President, business, labor unions, policemen, the press; they don't seem to trust anyone.

Once again, we as a nation have to make a choice. Do we abandon our political, economic and social institutions? Or do we accept our present situation as a challenge to work with the institutions that have been developed so painstakingly and make them better?

There is no doubt in my mind that we—as men and women of intelligence, ideals and determination and resources—can renew and strengthen our institutions. To do so, we must regenerate the spirit of trust. Trust between business and labor. Trust between business and the consumer. Trust between the people and their government.

Anyone who has ever been in business knows how crucial the attitude of its employees is to any business enterprise, large or small. If industry and labor are willing to work together—through job redesign, profit-sharing and worker stock-ownership programs, and incentive pay plans—not only will the labor force be better served, productivity can be raised as well. And just a slight annual increase in productivity growth rate would yield great increases in America's gross national product, relieving pressure on the economy and lessening the need for government-imposed wage and price controls. Cooperation and trust between business and labor can make U.S. productivity growth competitive once again. I wish that we could recreate today the thousands of productivity councils involving millions of labor and management personnel that worked so well together during World War II.

Business must also win back the trust of the consumer. Business must do more than advertise; it must act. It must take the initiative and use its resources to help clean up air and water pollution, to sponsor job-training and rehabilitation programs, to support day-care centers and other worthy projects within the community.

Government, as much as business, must recognize that to be respected you must be respectable. If the people of the United States no longer trust the institutions of their government, what value do the institutions have? The Vietnam War and Watergate have infected our country with doubt and disbelief, two dangerous and highly contagious diseases. We have seen the damage they have done.

Let me confess, however, that I am an incurable optimist. In Washington and around the country, I can see changes—changes for the better—happening every day:

A Senate Government Operations subcommittee recently reported out a Congressional Budget Reform bill, of which I am the principal Republican cosponsor, that will go a long way toward ending the annual budget and appropriations logjam which hamstrings government fiscal policy.

The archaic seniority system is giving way gradually in the Senate, and we have just passed overwhelmingly the most sweeping election campaign reform bill in Congressional history.

Business is increasingly active in urban problems, civic and community projects and public affairs.

Many companies are studying ways of making work on the production line more meaningful and satisfying for the worker, and others are putting profit-sharing programs and incentive pay plans into effect.

American labor is successfully getting away from counterproductive strikes. Since 1971, the number of man-days lost because of strikes has dropped nearly 40 percent, to labor's benefit and the benefit of the nation.

If, as we approach the 200th anniversary of our independence, we can encourage this spirit of interdependence and trust, we will have gone a long way toward overcoming the problems that today beset our economy and our society.

But the economy will not stabilize itself on its own.

The American economy is indeed at the crossroads. We must decide if we will bow to the pressures of devaluation and inflation and mutely accept a lower standard of living or if we are going to work to bolster our national productivity growth rates.

I believe that the second of these is the harder choice, but by far the better choice, and the choice now being made by both labor and management throughout the nation.

We can increase our national productivity growth rate—through increased capital investment, through continued research and development and experimentation.

Individually and corporately, we must eliminate the wastefulness that has unhappily become a trademark of American society. We must conserve our God-given resources wisely.

The lessons of the past two years make it clear that the problems of acute instability and lack of confidence will be worsened by too-frequent resort to regulatory and control mechanisms. To stabilize the economy, the government must follow a stated, rational policy which will carry us away from controls just as quickly as conditions allow.

As foreign economies expand and foreign consumers grow more affluent, this demand will grow even greater, to our benefit. We must do everything we can to encourage expanded farm production to meet the opportunity of foreign demand and to bring down high domestic prices. The name of the game for stabilizing prices in any field is to either stimulate more supply or dampen down excessive demand.

We must retain the improved amortization and depreciation rates and the investment tax credit as a permanent part of our tax structure. We must encourage increased industrial efficiency and modernization and we should consider increasing the investment tax credit rate to improve the United States' competitive position in world markets.

You in business can make the most basic contributions to our prosperity:

You can improve the quality and value of your products to make them more attractive in domestic and world markets.

You can increase your own research and development efforts in order to retain, if not regain, technical superiority for U.S. producers. (Research and development and creative ingenuity produced the Instamatic and the Polaroid, revolutionizing and revitalizing the American camera industry.)

You must not be afraid of competition. (Kodak, Polaroid, and Bell & Howell all have achieved dramatic gains in sales and markets in the face of sharp tariff reductions on foreign photographic equipment.)

You can create new world markets for your goods and expand your exports by taking advantage of the devalued dollar. It is a national scandal that only 4 percent of U.S. companies export at all. Aggressive search for markets and export expansion is a must. American farmers in recent years have increased their prosperity through expanding their exports. American industry can learn from the farmers' example.

Finally, we must all work together to restore stable economic conditions and to foster confidence that makes non-inflationary behavior and smooth expansion of production possible once again.

This means businessmen who have confidence in the future of free markets.

It means workers and consumers who believe that price increases will not erode wage increases.

It means farmers who do not fear the risk of ruinous market instability.

It means assuring all Americans that the federal government will systematize and rationalize its outmoded budgetary procedures and live within its means.

And above all, it means assuring all participants in our economy that the government won't tinker with economic controls with every shift of the political wind.

Out of such assurances, solidly-based confidence will spring, and with it, a new prosperity based on stable economic growth.

HEARING OF THE AFRICAN AFFAIRS AND SOUTH ASIAN AFFAIRS SUBCOMMITTEES SHOW NEED FOR UNITED STATES AND WORLD FOOD EMERGENCY RESERVES

Mr. HUMPHREY. Mr. President, on October 5, Senator McGOVERN and I held a joint hearing of the South Asian Affairs and African Affairs Subcommittees of the Foreign Relations Committee on the impact the world food shortage has had on the critical emergency food needs of these areas.

The witnesses at this hearing were Maurice J. Williams, Acting Adminis-

trator of the Agency for International Development; Julius L. Katz, Deputy Assistant Secretary of State for International Resources and Food Policy; Dr. Jean Mayer, professor of nutrition and master of Dudley House, Harvard University; Richard E. Bell, Deputy Assistant Secretary for International Affairs and Commodity Programs, Department of Agriculture; Lester Brown; Senior Fellow, Overseas Development Council; and Roy L. Prosterman, University of Washington School of Law.

Mr. President, the world food shortage that has sent prices skyrocketing on the American market has had a far more serious effect on the poor countries of the world and a disastrous effect on those threatened by famine.

As Senators know, I introduced the amendment to the Foreign Assistance Act, which the Senate adopted, calling on the President to initiate a commission study of the world food problem and possible ways of dealing with it. This amendment also stated that the United States should cooperate in the establishment of an international system of strategic food reserves which would provide for an equitable distribution of the direct and indirect costs between producer and consumer nations. It called on our special representative for trade negotiations to explore through the GATT means of assuring equitable access by all nations to basic resources such as mineral and agricultural supplies. Finally, it provided the Secretary of Agriculture the flexibility to respond to emergency food needs through the Public Law 480 program and called on him to include in his estimates of expected food demands needs for humanitarian food assistance.

I have also joined with Senators JAVITS, DOLE, and MCGEE in sponsoring Senate Concurrent Resolution 50, calling for a world food conference to be held in 1974 under the auspices of the United Nations. This conference would discuss ways of increasing world food production and improving distribution, world food reserves, and world relief efforts in case of natural disaster.

I have also proposed, in S. 2005, the establishment of a U.S. food reserve. I believe it is crucial that these three pieces of legislation be passed. They are important first steps in a worldwide effort to solve the food shortage problems raised during these hearings.

As Mr. Brown pointed out, the large segment of mankind that spends 80 percent of its income on food cannot possibly offset a doubling in the price of its principal food staples. The Foreign Minister of South Vietnam recently told me that the world price of rice is so high that the people of his country cannot afford to eat the food they produce. Although they are predominantly agricultural, many of the poor countries have to import food. This past year they have had to spend money badly needed for economic development and government services on the food necessary to keep their people alive. Under such conditions, these countries cannot afford to maintain stocks to cushion them against disaster.

In those countries where disaster struck this past year—in west Africa where six nations saw their crops and livestock destroyed by drought, in Pakistan where floods destroyed the wheat in storage and the rice in the fields, in India and Bangladesh where subnormal rainfall brought inadequate harvests—we have seen what world food shortages can mean for those threatened by famine. High prices made it impossible for these countries to build reserves in advance to feed their people when the crises began. Emergency shipments of food were tied up in ports. And donor countries like the United States had to ration their small supplies of food available for relief. Public Law 480 title II has dropped from $524 million in 1972 to a preliminary figure of $396 million for 1973—and each dollar buys much less grain.

During the hearings, we often heard the expression "enough to squeak through." The United States was unable to meet its full commitment of emergency food shipments to Bangladesh because it was decided that the people there could "sqeak through" while the people of west Africa could not. In both west Africa and south Asia, this meant that countries were provided with barely enough to avert widespread famine. People still died of starvation or diseases they were too weak to resist. Even more children and infants died than is normal in these areas; and the old died earlier than they normally would have. Those who have survived are weak, vulnerable to disease, and unable to put forth the effort required to make next year's harvests better. At a time of worldwide food shortage, the donor nations were able to provide just enough relief assistance to keep most of the people threatened by starvation alive—and no more.

Mr. Prosterman described what world food shortages on top of natural disaster meant for many west Africans and south Asians this past year:

> When a family that exists almost entirely on a diet of grain, and on less, often far less, than 2000 calories a day per adult person, misses out each day on a loaf of bread, or on a bowl of rice for each, they die. When a family that gets its food from the soil sees its crops swept away by floods or withered by drought—and there are millions of such today—they die. When a family that gets its food from its cattle sees those cattle starve—and there are millions of these people in the Sahel—they starve too. When a family living in the fetid disease-ridden city slums, that gets its food from the market or the government warehouses, sees scarcity drive that food up to twice or three times its former price or off the floor of the government warehouse, then that family dies. They cannot go to a bank to borrow money to replace their crop, or their cattle, or to pay the doubled price of food. They cannot go to friends or relatives, because this is not an individual tragedy, but one that affects their friends and relatives too. They cannot get a better-paying job, or spend less on housing or clothing. They have nowhere to turn.

Mr. President, in both south Asia and west Africa, the need for emergency food relief is still critical. In south Asia, the harvests are expected to be good this year; but they will not be in until December. In west Africa, the rains did not come again this year. The harvest will again be far below normal; and it is expected that emergency food needs will be the same or greater this next year than they were last.

The people in these areas will be almost totally dependent for their lives on the willingness of the affluent nations to provide food. Mr. Prosterman has estimated that in nine countries hit by drought and flood this year the emergency food needs in the next 12 months will be anywhere from 4.5 million tons to 7.7 million tons.

At the same time, the capacity of the United States and other affluent countries to meet these needs has been seriously diminished by the world food shortage. Mr. Brown pointed out that this year Public Law 480 shipments of wheat will be less than one-third those of 2 years ago; shipments of rice, feed grains, and vegetables less than half; and milk shipments have stopped completely. Mr. Prosterman stated that title II of Public Law 480 will probably be down to $120 million in the next year.

With the threat of famine still very real in south Asia and west Africa, it is crucial that humanitarian considerations be given higher priority in deciding how much grain will be available for Public Law 480 title II purchases. We cannot assume that there will be enough grain left over after export sales to meet emergency needs in the next year. The amendment to the foreign aid bill which I introduced with Senators JAVITS and DOLE gives the Secretary of Agriculture the authority to put humanitarian considerations above export requirements if necessary.

It is essential that we do our part in averting famine in the next year and that we encourage other affluent nations to join in a coordinated international effort to relieve those threatened with starvation. As Willy Brandt has said:

> Morally it makes no difference whether a man is killed in war or is condemned to starve to death by the indifference of others.

Mr. President, the current world food shortage and our inability to fully meet the needs of countries threatened by famine are not temporary phenomena. World demands for food are growing much faster than supplies.

Lester Brown pointed out that while during the 1960's increasing world demand for food was due primarily to population growth in the less developed countries, during the 1970's demand has grown because of rising affluence in the developed countries as well. He stated that in the United States and Canada per capita grain consumption is approaching 1 ton per year, and that consumption levels in the northern tier of industrial countries—from Europe to Japan—approximate those of the United States in the 1940's. In all the affluent countries, grain is consumed primarily indirectly in the form of animal protein. In none of them has demand for grain leveled off.

At the same time, demand continues to grow with population increases in the developing countries. Mr. Brown stated that with the present world population expanding at nearly 2 percent per year, food production will have to double in a little more than a generation merely to

maintain current per capita consumption levels. For millions in the less developed countries, current levels mean malnutrition and extreme vulnerability to disease.

This increasing world demand has brought about the depletion of world food reserves. North America has been the major producer of surplus food and the major holder of world reserves. The United States is the world's major exporter of wheat, feed grains, rice, and soybeans. Today, the United States and Canada together control a larger share of the world's exportable surplus of grains than the Middle East does of oil.

North American idle cropland and grain reserves have been the world's buffer against threats of famine. With reserves at their lowest point in 20 years, and with the U.S. Government having released all our idle cropland, these two important reserves can no longer be counted on to feed the world in times of shortage.

It is now time to start serious negotiations to establish a system of world food reserves. Such a system, which I have long advocated, would assure that responsibility for maintaining adequate reserves is shared among the nations. All nations—net importers as well as exporters, less developed as well as developed—would be required to contribute to global reserves. These reserves would be built up in times of abundance out of production surplus and drawn down in times of acute scarcity. This would not only assure the continued capacity of the world to feed those threatened by starvation, but would also provide a measure of price stability on the world food market that would be in the interest of producers and consumers of all nations.

A second important feature of the world food reserve system that has been proposed by the FAO is that it requires accurate reporting by all countries of their stocks and their predicted needs. As we have learned from the disastrous Russian wheat deal and from the crisis in the Sahel—which could have been avoided if shortages had been foreseen—such a system of coordinated information on global food supplies and needs is badly needed.

Finally, many witnesses stated that in the long run the growing world demand for food will not be met unless production in the less developed countries is greatly increased.

These countries represent the world's greatest unexploited potential for food production. Production per acre can be increased at much less cost than in the developed countries. Mr. Brown pointed out that today rice yields per acre in India and Nigeria still average only one-third those of Japan. Corn yields per acre in Thailand and Brazil are less than one-third those of the United States.

We can contribute much to increasing agricultural production in these countries. In many cases, production is low because farmers are not linked by roads to their markets, have inadequate water supply, cannot obtain fertilizer, seeds or tools, or have no way of getting credit. The United States can contribute some of the capital necessary to overcome these problems.

But perhaps more important, we can contribute much of the scientific research and technical expertise that will be needed in increasing agricultural production in these countries. Witnesses pointed to the success of high yielding varieties of wheat and rice—developed on U.S. private and public initiative. New forms of labor-intensive agricultural technology will have to be developed that will capitalize on the vast unexploited human potential of these countries—and keep the capital and energy costs of agricultural production as low as possible. U.S. experience in semiarid agriculture, in livestock management, and in developing improved agricultural inputs should be applied to increasing the production of the less developed countries.

Mr. President, I believe that the world food shortage problem is indeed critical. In the next year inadequate reserves will endanger our ability to avert famine in West Africa and South Asia. In the coming years, increased world demand for food will mean continually rising prices for the rich and a growing threat of starvation for the poor.

But the situation is not hopeless. The world has the capacity to build reserves adequate to prevent famine. We have the technology and research skills necessary to increase world food production to the point where we can not only keep people from starving, but also guarantee them adequate nourishment to live full and productive lives. What is needed now is a universal recognition that, as Mr. Williams said, "all of us in the world live out of the same food basket"—and a worldwide commitment to making this basket as full as possible.

REDUCTION OF MILITARY STRENGTH

Mr. DOMENICI. Mr. President, I recently testified before the Senate Subcommittee on Defense Appropriations out of a deep concern that we may risk a reduction of our military strength because an "air" of détente is said to exist between the United States and our principal potential adversaries, particularly the Soviet Union. It is this détente, this lessening of tension or hostility, between the Soviet Union and our Nation that I am again questioning the reality of today. I would like to reiterate my belief that, even though an atmosphere of détente exists, world hostility and tension have not been eliminated.

We cannot assume that two nations, so opposite in their ideological beliefs, have joined together in a mutually shared, mutually defined policy of détente. An article in the Washington Post, of October 18, 1973, by Mr. Robert Kaiser aptly substantiates what appears to be the Soviet's position and intention on détente which I believe to be a correct summary of that issue.

I, therefore, request unanimous consent that Mr. Kaiser's article be printed in the RECORD.

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

SOVIETS ON "DÉTENTE"—MIDEAST ACTIONS DEMONSTRATE KREMLIN'S NARROW DEFINITION

(By Robert G. Kaiser)

Moscow, Oct. 17.—While Americans may worry that Soviet support for the Arabs jeopardizes detente—by which many Americans mean something broader and more substantial than the dictionary definition of a mere relaxation of tensions—the Soviets have a different view.

The best demonstration of this may be the Soviet interpretation of the "Basic Principles of Relations" between the Soviet Union and the United States signed by President Nixon and Leonid I. Breznev in May 1972. That document says, "The U.S.A. and the U.S.S.R. have a special responsibility . . . to do everything in their power so that conflicts or situations will not arise which would serve to increase international tensions. Accordingly, they will seek to promote conditions in which all countries will live in peace and security . . ."

That fine language had no apparent effect on the Soviet Union when, a few days before the Mid-East war began, Moscow obviously learned of the Arabs plans and began evacuating Soviet citizens from the region—apparently without trying to stop the war and without informing the United States. Nor did any agreement with Washington deter Brezhnev from encouraging Algeria to enter the war against Israel.

Some Americans may see this as a case of duplicity. More likely, it is the first clear demonstration of the real Soviet definition of detente. That definition may be rather narrower than many in the West would like.

The central element of the Soviet definition is Moscow's conviction that a mortal struggle between East and West is inevitable. Even if it can be conducted without direct military confrontation and without a Cold War atmosphere. This message has been repeated again and again since detente began in earnest 18 months ago, but the Middle-East war has given it substance.

The principal consequence of this conviction is that Moscow's new partners in detente are still treated as opponents in virtually every situation.

An American businessman whose company has been a loyal and productive trading partner of the Soviet Union for many years recounted his frustrations recently. "They always treat me as an enemy," he said, "even when I'm trying to help them."

British students arriving in Leningrad on an official cultural exchange are held up in customs for hours while Soviet officials comb their belongings seizing dozens of books in the process. A Moscow musician who used to visit a West European journalist in his Moscow flat is warned to stop consorting with the "ideological enemy."

A Westerner living here could collect dozens of such examples during the past year and a half of Soviet-American detente.

This is not to say that detente is meaningless. If much is unchanged, much is also new. The Soviet government has stopped jamming most foreign radio broadcasts in Russian, a decision which can be expected to have palpable consequences in this society.

The Soviet Union has begun to open some of the secrets of its space program to American scientists in the first stages of their work on a joint space flight—an example of the real benefits of exchanges and cooperation with the Soviets in specialized fields.

The atmosphere here has changed, too. Americans are treated in a more friendly manner. Official propaganda is optimistic about the prospects for peace, and the Soviet public is no longer warned of the impending danger of world war.

The Soviet Union has abandoned the policy of seeking economic self-sufficiency, and is trying to join the world economic system—in an extremely limited and careful fashion. The government is inviting dependency on foreign products and processes, a radical change in Soviet attitudes.

But when a war broke out in the Middle East, the men who rule this country reverted to their pre-detente posture, apparently pursuing the "unilateral advantage" at the expense of the United States which the "Basic Principles of Relations" solemnly foreswear.

One reason for this surely is the Soviet belief that the Americans are no more sincere than they are about abandoning their adversary relationship. The last U.S. defense budget, with new money for a super-submarine and new long-range bombers, was seen here as proof of that. So was the decision to continue financing Radio Free Europe and Radio Liberty.

In the West, these moves may appear to be prudent reactions to the Soviet military buildup and the Soviet "ideological struggle," but it is certain that inside the Kremlin there is a different perspective on the question about the chicken and the egg.

Soviet ideology has contributed to the present Middle East policy, trapping the Soviet leaders in support of an ideologically "just" war. (It is defined as just because the Arabs are fighting to liberate their own territory; how it happened that the Arabs came to lose their territory is another chick-egg dilemma on which the Soviet Union and the United States have different opinions.)

But the essential fact is that the Soviet Union still mistrusts the West and tends to expect the worst from it. Moscow wants to deal with the West in areas where it is convinced the West shares Soviet interests. This means trade, selective arms control and the relaxation of international tensions—and not much more.

The struggle against imperialism, the ideological struggle, the struggle of progressive forces against international reaction—such Soviet slogans still have meaning in Moscow. Recent events in the Middle East seem to confirm that the Soviet Union is still unwilling to abandon these struggles and move beyond the present stage of armed, suspicious detente.

MARGARET CHASE SMITH DAY IN MAINE

Mr. HATHAWAY. Mr. President, on Tuesday, October 16, 1973, the people of the State of Maine paid special tribute to the first woman to be elected to both the U.S. House of Representatives and the Senate, Margaret Chase Smith. By official proclamation of Gov. Kenneth M. Curtis, this past Tuesday was designated Margaret Chase Smith Day in Maine. It was also a day on which this distinguished lady received the Julia M. Emery Award, given annually by the National Order of Women Legislators to an outstanding American woman.

Senator EDMUND MUSKIE and I wish to add our tribute to this lady from Maine whose years of service have meant so much to our State and to the Nation as a whole, and who is continuing to inspire the youth of America as a distinguished university lecturer.

Mr. President, I ask unanimous consent that the text of Governor Curtis' proclamation be printed in the RECORD.

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

PROCLAMATION

Whereas Senator Margaret Chase Smith, the first woman to be elected to both the United States House of Representatives and the Senate, holds the all-time consecutive voting record; and

Whereas Senator Smith served for many years as Chairman of the Naval Affairs Subcommittee of the Armed Services Committee of the United States Senate; and

Whereas in 1948 she led the successful campaign to grant women regular status in the Armed Services and was the first woman to launch a Presidential campaign; and

Whereas Senator Smith is the author of two documents of American history—Declaration of Conscience and Valiant Women: and

Whereas, as a nationally syndicated columnist, Senator Smith has been honored by the news media as "one of the three most respected women in the world, 1971," "one of the four top public servants in America, 1972," "woman of the year, 1964," and "one of the four most admired women, 1964"; and

Whereas on October 16 Senator Smith will receive the Julia Emery Award from the Organization of Women Legislators;

Now, therefore, I, Kenneth M. Curtis, Governor of the State of Maine, do hereby proclaim October 16, 1973, as Senator Margaret Chase Smith Day in the State of Maine and urge all citizens to pay tribute to this outstanding Maine native.

THE MIDDLE EAST CRISIS

Mr. HATFIELD. Mr. President, while the United States has heretofore exercised great and commendable restraint in our arms shipments to the Israeli Government, the continuing flow of Soviet weaponry to the Arabs appears to have catalyzed an escalated arms race between Washington and Moscow that can only fuel the war and prolong the killing. Indeed, one of the most tragic aspects of the war now engulfing the Middle East is the singular lack of restraint evidenced by the Soviet Union in both exhorting Arab States to join in the fighting initiated by Egypt and Syria, and in resupplying them with arms for further destruction and conflict.

If our détente is to be meaningful in fact as well as in spirit, the Soviets ought to have joined with us in searching for ways to bring a halt to the bloodshed. Instead, all available evidence is that they are furnishing the tools for a costly and bloody war of attrition in that troubled region.

A détente with the Soviets will not work if it extends no further than promoting a distorted conception of the Soviet national interest. Détente must be mutual. Restraint in arms supply to the combatants must be mutual. I cannot believe that the Soviets do not accept this principle in theory. But they have clearly violated their responsibility to follow it in practice.

While it must be recognized that our arms shipments to Israel came in response to the actions taken by the Soviets, it must further be recognized that an arms race offers no hope whatsoever for a true and lasting peace in the Near East. In fact, there exists a very real danger that the longer the war there persists, the greater the chance will be for it to widen. Short of placing Israel's survival in danger, we must continue to explore every means possible to bring an end to this conflict. If an American-Soviet détente is to be functional and of value, Moscow must join in that exploration at once.

FEDERAL TRADE COMMISSION AND OIL

Mr. ALLEN. Mr. President, emotionalism often leads to spur-of-the-moment decisions which can lead to results which prove to be contrary to those which were desired.

Two Federal agencies are facing this possibility as they consider the most effective routes to follow in easing and solving the energy crisis. In this instance the Federal Trade Commission and the Department of the Treasury are at odds in how best to deal with problems relating to the Nation's oil industry.

In its issue of Monday, September 17, 1973, the Birmingham News published an editorial entitled "FTC and Oil: Road Blocks?" which deals with possible pitfalls in the path of legal attempts to break up vertically integrated oil corporations. The editor wisely points out that this is not the time to play games with an industry which is already hard-put to keep the Nation's oil supplies flowing.

I ask unanimuos 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:

FTC AND OIL: ROAD BLOCKS?

In an historic development in the antitrust action by the Federal Trade Commission against the major oil companies, the Treasury Department has joined in a counter-attack.

The premise behind the FTC's legal attack on the eight largest oil companies is that the industry lacks competition and has limited competition because of what is called "vertical integration." That term refers to the consolidation of crude exploration, production and transportatin plus refining and marketing operations in one company.

The FTC wants to break up the different operations of the major oil companies.

The Treasury report, countering FTC premises, said, however, "Misinterpretations have caused the FTC incorrectly to conclude that the present shortage is a result of sinister, anti-competitive actions on the part of the major oil companies . . . The shortage has been caused by a variety of factors, mostly governmental laws and policies."

Further, the Treasury report said, "Divestiture is not warranted from the facts, and it would work contrary to the goals of increasing domestic refinery capacity and production."

The FTC has been operating on a number of premises which the Treasury report disputed with hard facts.

If the Treasury Department is correct, the FTC is making a huge mistake in attempting to restructure the petroleum industry.

As the nation is gripped by an ominous shortage of heating oil and gasoline, it is no time to tamper with the existing industry structure.

Things may be bad under the present system, but that does not mean that they could not be worse if the present system were broken up.

If the government wants to play an important role in alleviating the energy shortage, it could find out what could be done to en-

courage the development of greater refining capacity in the industry.

Those politicians with an axe to grind with the industry cannot punish the industry without hurting the consumer who depends on peak industry production.

For the long run, the government should do everything possible to encourage energy conservation. But until effective conservation measures can be taken, the government should not take misguided disruptive legal action based on premises which are false.

The Treasury Department is to be commended for trying to set the record straight and for trying to protect the existing energy delivery systems.

The petroleum industry may not be perfect, but the nation, depending on its products, cannot afford frivolously to tinker with its structure.

RECOGNITION OF THE IMPORTANCE OF SMALL BUSINESSMEN IN OUR ECONOMIC SYSTEM

Mr. DOMENICI. Mr. President, I would like at this time to call the attention of my colleagues to recent action taken by the Cost of Living Council relating to price control regulations for retail sales of gasoline. I would also like to publicly commend the Cost of Living Council for having taken this action because it will relieve some of the burdens being carried by the thousands of small businessmen across this Nation who are gasoline retailers.

Prior to October 15, 1973, the phase IV regulations established a ceiling price on gasoline at the gasoline pump, but those regulations permitted refiners to increase the price they charged retailers. This resulted in the retailers having to absorb those price increases. I have been among those Members of this body who recognized that such a system put the burden of holding down gasoline prices on the most vulnerable element in the gasoline distribution system—on the small independent businessmen who sell gasoline to the consuming public. I was among those who communicated strong disagreement with this approach and who urged modifications to remove the unfair and oppressive burden such a system placed on gasoline retailers, particularly small independent dealers who operate on the closest of margins even under the best of circumstances.

As you know, Mr. President, several legislative proposals have been introduced in the Senate to require the Cost of Living Council to modify those regulations to permit the passthrough of price increases between refiners and dealers.

I am a cosponsor of three of these bills and I have introduced a sense of the Senate resolution to allow dealers to pass through to their customers price increases from refiners. The action taken by the Cost of Living Council which was effective on October 15 seems to me to eliminate the need to proceed on these legislative proposals.

As I understand it, the Cost of Living Council announced that dealers would be allowed to raise their prices to reflect all price increases prior to October 15 and that both retail and wholesale prices would be frozen at the October 15 level until November 1. Regulations proposed to take effect on November 1 will allow refiners to increase their prices to dealers by increments of 1 cent per gallon when their increase in costs accumulate to 1 cent per gallon. Dealers would be allowed to automatically pass through to the consumer those 1 cent per gallon increases.

This proposed system appears to me to address the difficulties I found with the previous approach which placed the burden of controlling prices on the very element in the system which was least able to bear that burden. As I previously indicated, I appreciate the very difficult task that the Cost of Living Council has in trying to hold down prices and control inflation in the gasoline and oil industry which is so complex and difficult to regulate under the best of circumstances, and particularly now when petroleum is in such short supply and the difficulties associated with foreign imports are even more acute.

All of what I have said, Mr. President, clearly indicates to me that those of us responsible for creating laws which govern this Nation and those who are responsible for executing those laws, must at all times be aware of the impact of our actions on the independent businessman who provides the foundation and strength of this Nation's economic system and who, in addition, is the best insurance of free competition to the benefit of the consuming public.

In a nation where the economic system is fundamentally one of free enterprise, it is virtually impossible to design and implement controls which do not disrupt or dislocate existing systems. We must insure that when it becomes necessary to insert Government controls into those systems beyond the regulation of antitrust and monopolies, that we do not overlook the legitimate needs and problems of the small business segment simply because of ease of regulation or because of complexity of the entire system.

This Nation and the consuming public would be the loser in the long run if we were to allow the small business element to be severely damaged or destroyed by Government regulatory action. So, I say, Mr. President, I am pleased that the Cost of Living Council, in pursuit of the very important goals established for it by the Congress under the Economic Stabilization Act, has changed its approach in this particular case and that the independent small businessmen who serve this Nation as gasoline dealers will be able to stay in business and continue to contribute to the economic vitality which is so necessary to the Nation's well-being.

THE CONFLICT IN THE MIDDLE EAST

Mr. RIBICOFF. Mr. President, Sunday night, October 14, Senator JACKSON made a most significant foreign policy address in Los Angeles. It was delivered at a time of great flux in American Middle East policy.

Events in the past few days have certainly justified the validity of Senator JACKSON's contention that the United States must not stand by watching the massive Soviet airlift to Egypt without responding to Israel's military needs.

The plain truths spoken by Senator JACKSON at that time deserve the most careful study by all those following the current Middle East conflict. Already, the overwhelming majority of the Senate has shown that it is again supporting the position outlined by Senator JACKSON.

Because of the significance of this address, I ask unanimous consent that it be printed in the RECORD in its entirety.

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

REMARKS BY SENATOR HENRY M. JACKSON

On the most sacred day of the Jewish year—a day when communications are silenced and transportation halted—the armed forces of Egypt and Syria launched, without provocation, a coordinated war of aggression against Israel.

Even as Syrian and Egyptian forces prepared for war, Israel refrained from acting in her own defense in the hope that war would yield to diplomacy, and in the conviction that if war could not be avoided, at least it should not be started by Israel.

This tragic war was not started by Israel, which desired only peace. But I am confident that it will be finished by Israel, and that Israel will not stop until it has achieved a restoration of the pre-war cease-fire lines.

It would be a most severe setback for the interests of the United States in the Middle East, for Israel's security and for the future of peace in that troubled area if outside political intervention were now to force a cease-fire with Egypt on the East Bank of the Suez Canal. Egyptian aggression must not be rewarded by diplomatic maneuvers that will enable Israel's enemies, who decided when the war would start, to decide also when the war will end. This war can only be ended by a return to the lines of the cease-fire that was so treacherously violated on October 6. To permit the termination of this war to be decided by men in Moscow or at the United Nations would be an invitation to aggressors everywhere to resort to force by treachery and surprise in the knowledge that any military gains will be consolidated and protected by outside powers.

Moreover, a conclusion to the present hostilities that left the Soviets in possession of the Suez Canal would do great harm to the position of the United States in the Persian Gulf and the Mediterranean. The Suez Canal should remain closed in any event, and most certainly we must not allow military means to be the instrument of its reopening. With the Canal open the Soviet fleet can move easily between the Mediterranean and the Persian Gulf. The use of this waterway by the Soviet fleet has the effect of doubling the effectiveness of the Russian navy in the oil-producing region of the world.

The Canal, if opened, would be a Russian Canal, a highway for the Soviet navy and merchant fleet. American super-tankers and our carrier-based navy cannot pass through the Suez Canal which is neither deep nor wide enough to accommodate our fleets.

I can think of nothing that would restore the Russian position in the Middle East more quickly, or threaten the future peace of the Middle East more gravely, than for Egypt, by force of Soviet-supplied arms, to regain control of the East Bank of the Canal. Such a result would set the stage for future aggression and that in turn would be an engraved invitation for the return of Soviet influence in Egypt.

Israel must win this war and it must win decisively.

The outbreak of war eight days ago was the culmination of a series of events going back at least to August of 1970. The unfolding of those events is so instructive that I wish to review some of them with you now.

On August 7, 1970 the United States, the Soviet Union, Egypt and Israel entered into a standstill cease-fire agreement that had been hastily arranged by the American Sec-

retary of State. The August cease-fire provided that neither side would introduce or construct any new military installations in a zone extending 30 miles on either side of the Suez Canal. No sooner did the cease-fire with its standstill provision start than the first Soviet-Egyptian violations occurred—that very night of August 7. The extent of the illegal movement of surface-to-air missiles in the cease-fire zone removed any doubt that the violations might have been unauthorized or spontaneous. It was a calculated effort to take advantage of Israeli compliance. The Russians were deeply involved in the planning and execution of the violations.

At the time, as soon as our intelligence sources confirmed the nature and extent of the cease-fire violations, I advised Dr. Kissinger, who was then the President's National Security Adviser, as follows: "In my judgment, we should insist that the illegally emplaced surface-to-air missiles be removed. . . . We cannot legitimize these violations by proceeding—and asking the Israelis to proceed—as though they had not occurred. Whatever we may choose to say publicly, our private communications with the Soviets must be clear on this point."

I further advised Dr. Kissinger: ". . . a failure to stand firm now may well invite further violations. The illegal activity subsequent to August 7 is an early and alarming indication of what we must expect. While no single violation will, in and of itself, give sufficient cause for terminating the cease-fire, the accumulated result could do irreparable harm to Israel's security."

Referring to the SAM missiles moved illegally into the cease-fire zone, I said this in a December 1970 report to the Senate Committee on Armed Services:

"The position of some elements of this air defense network is such that they are effective against aircraft operating several miles on the Israeli side of the Canal. The net effect is to imperil the effectiveness of the Israeli Air Force as a means of preventing both cross-canal fire and an actual crossing of the canal itself.

"If the present uneasy cease-fire deteriorates and hostilities resume, the Israeli Air Force would pay a high price in lives and aircraft in attempting to destroy the SAM defense system. We can assist in mitigating this situation by doing what we can to assure that the Israelis will have the aircraft necessary for this purpose.

"Any way one looks at it, the burden Israel must bear to sustain an adequate level of security is greater now than before the U.S. guaranteed cease-fire. A resumption of the earlier level of hostilities along the canal would claim a higher number of Israeli casualties, both on the ground and in the air, than was the case prior to August 7, 1970."

This is one of those cases where I wish I had been wrong—but unhappily I was right. And the tragic fact is that young Israeli pilots are this very hour paying with their lives for the failure to insist that Egypt and the Soviet Union adhere to the agreement that we arranged and that they joined.

In the more than three years that followed, the Soviet Union engaged in one of the largest military build-ups in their history, supplying guns, tanks, aircraft and missiles to Egypt and Syria in huge quantities and under the cover of the cease-fire. We, for our part, limited the Israelis to piecemeal supplies of aircraft and armor—despite the fact that the Congress, in 1970, adopted my amendment to the Defense Procurement Act authorizing the President to transfer to Israel by credit sale whatever was needed in aircraft and other equipment to offset equipment furnished to the Arab armies.

In recent months the flow of Soviet arms into Syria reached flood-like proportions. More than half of the jet aircraft in the Syrian Air Force and nearly all of the surface-to-air missiles that have claimed the lives of so many Israeli pilots have been delivered by the Soviet Union to Syria since the beginning of this year. We now know that a substantial fraction of the Syrian force of SA-6 missiles that have been used with deadly effect against Israel's Phantoms were delivered in the weeks just preceding the outbreak of war.

My point is simple: we have stood by and watched while the Soviet Union has supplied the means by which this bloody war was initiated and is now being fought.

Without Soviet support and material encouragement, without Soviet training and equipment, without Soviet diplomatic and political backing, this war would not have been started. And yet Dr. Kissinger, the Secretary of State, comes before the American people, as he did on Friday in Washington, to say that Soviet behavior has been moderate and not irresponsible.

I cannot agree with Secretary Kissinger. I believe that Soviet behavior in the Middle East has been reckless and irresponsible. For six years following the Six Day War, American restraint in supplying Israel with the means to provide for her own defense was met, not by equal restraint on the Soviet side, but by a most mischievous and irresponsible program of training and arming Egypt, Iraq and Syria for the war that is now being fought.

Soviet irresponsibility did not stop last week with the outbreak of war. Secretary Brezhnev, violating the letter as well as the spirit of agreements reached with the United States in Moscow last year, did his best to urge other Arab states to join the attack against Israel. Then the Soviets undertook a massive airlift of weapons into Syria and Egypt, resupplying the Egyptian and Syrian armies with sophisticated military hardware. Scores of Soviet transports have been engaged in a resupply effort that the Secretary of State has characterized as moderate.

Well, it is time for the Secretary of State to admit that hundreds of lives, or even many more, will be lost because the Soviets have been engaged in what he calls a "moderate" airlift—and the American people have had enough of that sort of moderation. There can no longer be any justification for withholding from Israel the arms she needs to defend herself. It's not enough for our government to promise resupply at some point in the future. The question is how soon will vital equipment be arriving at the battlefield. I say it should be there now. Time is of the essence. The Phantom aircraft and other weapons that Israel requires should be dispatched at once—not in a day or a week but now, at this moment, so that a brave and deserving friend of the United States can provide for her own defense.

The President of the United States has the authority under the Jackson Amendment to the Defense Procurement Bill—and this week we extended that authority for another two years—to transfer to Israel on long term credits whatever may be required for Israel's defense. The President should use that authority at once to make available aircraft and other essential equipment—or he should send the Secretary of State to the Senate tomorrow morning to explain why he is withholding the means of self-defense from a friend at war while the Soviets pour weapons into Egypt and Syria.

RETIREMENT OF DR. FRANKLIN FOOTE

Mr. RIBICOFF. Mr. President, I want to bring to the attention of my colleagues in the Senate the retirement of one of Connecticut's most outstanding public officials, Dr. Franklin Foote. Dr. Foote has served with distinction as health commissioner in Connecticut for 14 years.

In 1959, as Governor of Connecticut, I appointed Dr. Foote to his present position. Since that time he has compiled an outstanding record of accomplishment in all areas of the health field.

One of his first tasks after appointment was to implement a bill I had signed to combine four State health agencies into one. Quickly and expertly he brought together the tuberculosis control, mental retardation, hospital care, and rehabilitation agencies into a smoothly functioning public health agency.

He successfully decentralized the enlarged units offices to put workers out where the need is. The results were astonishing. Within the first 4 months 1,300 communicable disease cases were detected as compared to 468 in the previous period.

During his tenure he led the way in investigating the harmful potential of drugs, the quality of nursing home care, and the need for more adequate pollution controls.

His national reputation is well-known and he has served on a number of committees formed to raise health standards. He has been especially recognized for his work in mental retardation and camp safety.

In retiring, Frank can be proud of his record of achievement. He has left his mark on Connecticut and we are all the better for it. I hope we will continue to have the benefit of his counsel in the years ahead.

I ask unanimous consent to print various Connecticut newspaper articles commenting on Dr. Foote's retirement in the RECORD.

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

CAUSE FOR PRIDE

The retirement of Dr. Franklin M. Foote as commissioner of the state Health Department removes from government a gentleman who diligently served three governors.

During the 14 years that he directed a vital state agency, Dr. Foote fought the good fight. He withstood all kinds of criticism in the days when fluoridation of water was a burning issue. The creation of regional public health offices was another of his projects. Today there are four which stand as testimony to his victory.

All aspects of health care were his genuine concern and, while others may have received much of the public acclaim for Connecticut's pioneering efforts in behalf of the mentally retarded, Dr. Foote was nonetheless a prime motivator for these innovations.

He is leaving at the end of the month. Though his time in the current Administration may not have been to his complete liking, Dr. Foote can certainly reflect upon his full career in state service and find many hours of triumph for the causes to which he remains so ardently devoted.

DR. FOOTE LEAVING POST AS STATE HEALTH CHIEF

HARTFORD.—Douglas Seward Lloyd, a 33-year-old doctor two years out of the Duke Medical School, on Nov. 1 will become Connecticut's new state health commissioner.

The appointment of Lloyd was announced Monday night by Gov. Thomas J. Meskill as he disclosed the resignation of Cmsr. Franklin

M. Foote as of the end of this month. According to the governor, the 65-year-old Foote had wanted to step down earlier but had agreed to remain until a search for a successor was concluded.

"Connecticut has been fortunate indeed to have the dedicated service of Dr. Foote, and I am confident that the fine traditions and record he has established in the health department will be continued by Dr. Lloyd," Meskill added.

Foote thus becomes the fifth commissioner to leave the governor's official family this year. Previously the heads of environmental protection, insurance, transportation and motor vehicles departments had all resigned.

In addition, Edward Kozlowski had left the public works commissionership to take the motor vehicles post.

Foote had initially been given the health commissionership by Gov. Abraham A. Ribicoff in 1959. He stayed on for more than 14 years—receiving reappointments from Ribicoff, Gov. John N. Dempsey and Meskill.

A lieutenant in the medical corps of the Naval Reserve, Lloyd is at present chief resident in family practice residency at Duke University in North Carolina. Licensed to practice medicine in both Connecticut and North Carolina, Lloyd will be paid a $31,581 starting salary.

Lloyd is a graduate of Suffield High School and his parents still live in the northern Connecticut town. His wife comes from Windsor Locks.

"I am confident I speak for the medical profession and the many local public health administrators who have worked with Dr. Foote in expressing their deep gratitude and the gratitude of the people of Connecticut for his outstanding service." said the governor.

DR. FOOTE'S RETIREMENT

While Dr. Franklin M. Foote was a medical student at Yale, he was influenced to go into public health, impressed, as he put it, "with the idea that prevention is more important than just curing sick people." Since his appointment in 1959 by Governor Ribicoff as Connecticut's health commissioner, Dr. Foote has waged steady war against disease through immunization. With the announcement of his retirement on November 1, he and the state can look back on a career distinguished by substantial achievements in that field. But there are many more contributions which will benefit Connecticut for years to come.

First of all, his appointment was announced but minutes after the Governor signed a bill combining four state health agencies into one, presenting a challenge to the new official to reorganize the departments into a cooperative body. That he did so, bringing together the former Tuberculosis Control, mental retardation, hospital care and rehabilitation agencies into the office of public health is history.

It also is recalled how he tried to decentralize the enlarged unit's offices to put workers out where the need is, as he said, in regional offices beginning in Willimantic. The validity of his idea was confirmed by the detection of 1,300 cases of communicable diseases in the first four months compared to 468 in the previous period.

Besides such centers Dr. Foote also continued to work for more full-time health directors in each community. And realizing that "in public health it is an absolute essential that you win the cooperation of the people," education has been important to his program.

During the years he sparked investigations into the harmful potential of drugs including diet pills, nursuing home care, and pollution controls. Fluoridation of public drinking water cooperatives among hospitals for greater efficiency and lower costs and improved sanitation operations throughout the state resulted from his continued efforts.

During Dr. Foote's tenure he has served on a number of national committees formed to raise health standards. For his contributions many honors have come his way such as being named Man of the Year this year by the Connecticut Camp Directors Association in recognition of the state's 1969 Camp Safety Act, considered the nation's model legislation.

Connecticut was fortunate indeed when Dr. Foote left his position as head of the National Society for the Prevention of Blindness to lead the continuing fight for better health in the state, a duty performed in the finest non-political tradition.

THE LOCKHEED LOAN

Mr. PERCY. Mr. President, as part of our oversight function, it is our responsibility to follow up and analyze the results of actions that we have previously taken in the Congress.

Since we in the Congress basically acted as a "board of directors" in a sense in approving a loan to the Lockheed Corp. and designated the U.S. Treasury as our executive director in carrying out our decision to provide a Government-guaranteed loan to the company, I think we should from time to time take a look at the credit worthiness of the borrower and the prospects of having our loan repaid.

The Washington Star of October 7 makes me less than totally optimistic about the worthiness of the loan. As pointed out by the Star, we should take into account the following factors:

First. Lockheed L–1011 sales have not reached the level required to repay the corporation's investment in the L–1011 program and some anticipated sales have been delayed;

Second. Other military divisions of the corporation are experiencing financial difficulty;

Third. The growth potential for the airline industry, and thus aircraft sales, is not as high as previously predicted. The basic conclusion of the article is that at best the Government-guaranteed loan will not be able to be repaid as soon as originally thought, and at worst the companies existence is once again threatened.

The final chapter in this story has not yet been written, but before we in Congress are asked to bail out another faltering corporation or industry, I think we should carefully study the story of Lockheed.

Mr. President, I ask unanimous consent that the article from the Washington Star referred to be printed in the RECORD.

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

ANOTHER SETBACK FOR LOCKHEED

(By Robert J. Samuelson)

Every time things seem to be settling into place for beleaguered Lockheed Aircraft Corp., there's an unwelcome instrusion—a piece of bad news that stirs up the muddy waters of the company's finances.

There was such a piece of bad news last week: Eastern Air Lines—apparently heading for a $30 to $40 million deficit this year—announced the "resignation" of its president; at the same time, Eastern asked Lockheed to delay the delivery of the last nine of the 37 TriStar jets it has ordered.

Eastern is the largest customer for the TriStar and, as Lockheed officials privately concede, the airline's request probably will have to be accommodated in some fashion.

Combined with other recent events—the possibility of an unfavorable settlement on a military contract, and a slowdown in the growth of U.S. airline traffic—Eastern's troubles inject a new element of uncertainty into the outlook for Lockheed.

At best, the company probably won't be able to repay its multimillion-dollar government guaranteed loan as early as planned; at worst, it's possible that the amalgam of problems could utlimtely mushroom and jeopardize the company's survival.

Any such crisis would almost certainly involve the government—both because Lockheed remains a major defense contractor and because the loan guarantee was essential to the TriStar program.

To the casual observer, Lockheed's situation may not look precarious. Ever since Congress approved the loan guarantee in 1971, the company has been reporting profits—$15.4 million in 1971 and $16.2 million last year. But the reported earnings aren't as significant as they appear.

First, for all practical purposes, Lockheed can't pay any dividends until the government guaranteed loan is repaid.

Second, and more important, the reported profits are based on a critical assumption—that Lockheed will be able to sell a certain, predetermined (but undisclosed) number of TriStars by 1978. All that's known is that the number is something above 220 and that Lockheed now has firm orders for 126.

The added sales are needed to help Lockheed repay its enormous investment in the TriStar program.

At the end of last year, Lockheed had nearly $1.1 billion in TriStar "inventory"—development costs, tooling expenses, new plant construction; that huge investment hasn't been counted as a current cost, but as is often done, is being written off over the program's anticipated sales. The trouble is that the sales are still anticipated.

Until recently, Lockheed had been making some progress. It had won a few important new orders from British European Airways and All Nippon Airways (ANA), and Delta Airlines—after absorbing tiny Northeast last year—indicating that it might ultimately buy more by taking options on six additional planes.

Against these sales now comes a series of reverse:

(1) Eastern's troubles: Eastern originally had been scheduled to receive the last 11 Tri Stars next year. Now the airline—with far more jumbo jets than its traffic justifies—wants to take only two in 1974, staggering the rest over 1975 and 1976.

It's possible that Lockheed will be able to find other customers to take early delivery on their Tri Stars, and, thus, avoid a disruption of the production line.

More likely, as company officials concede, is that the production line will probably have to be slowed down; in the best of circumstances, that means higher manufacturing costs per plane, because Lockheed's fixed expenses have to be spread over a smaller output.

Lockheed officials insist that they have ample time to accomplish a smooth production slowdown, but there's always the risk that the change will bring an unanticipated spurt in costs.

Until recently, Lockheed has estimated that it would borrow no more than $180 million of the $250 million government-guaranteed loan; repayment was scheduled to begin at the end of 1973 with $10 million and finish by the third quarter of 1975. Now,

Lockheed probably will have to borrow more than the $180 million, and the repayment schedule will be stretched out.

(2) Military Procurement Problems: In 1971, Lockheed and the Navy reached a tentative agreement on a Lockheed claim for $159 million in extra payments on a shipbuilding contract. The agreement gave Lockheed $62 million with a first payment of $49 million pending final settlement.

Last May, Lockheed asked the Armed Service Board of Contract Appeals to force the Navy to pay either the remaining $13 million or the full $159 million. Meanwhile, however, a Navy contracting officer issued a final decision on the original dispute, finding that Lockheed was entitled to only $7 million, not the $49 million.

It's possible, as Lockheed officials argue, that the company will prevail on appeal, but if it doesn't there could be an additional $42 million liability to the Pentagon a couple of years from now.

(3) Slowdown in airline traffic growth: This may be the most serious development of all, because it calls into question how many Tri Stars Lockheed can ultimately sell—or, at least, how fast they can be sold.

Most of Lockheed's forecasts have assumed an annual traffic growth of 10 to 12 percent; in fact, the 10 percent growth has been exceeded only once in the last four years.

With the U.S. economy booming, most airline economists had expected an 11 percent rise this year, but traffic has increased slowly in recent months and the gain may be only 7 to 9 percent. Next year, it could be as low as 3 to 5 percent.

All this is beginning to suggest that the frenzied era of airline growth—in the mid-sixties, annual growth often averaged between 12 and 20 percent—is gone forever.

If this is so, it has enormous implications for aerospace companies. A gap of a couple of percentage points in growth—when compounded annually—makes a big difference. In 1971, when Lockheed was asking Congress for a $250 million loan guarantee, the Civil Aeronautics Board gave the Senate Banking and Currency Committee the following table estimating the demand of U.S. domestic airlines in traffic increases:

Average Traffic Increase	*Planes 1971–80*
10.8%	798
10	704
9	591
8	485
7	384
6	323
5	323

There's a sobering statistic that can be put with this table: At last count, Lockheed and McDonnell Douglas (which manufactures the other jumbo trijet, the DC10) already had firm orders for about 200 trijets. Moreover, total demand for the jumbo jets may have slipped somewhat, because many airlines—instead of ordering the wide-bodied jets—bought more "stretch" 727–200s from Boeing.

All this casts a considerable shadow over the status of Lockheed's enormous investment in the TriStar. In 1971, when it was before Congress, Lockheed said it was writing off that investment over projected sales of 220 planes by 1978; since then, the 220 figure has been increased on the rationale that the ANA order (for 14) hadn't been included in the calculations.

Lockheed isn't saying what the new number is, but—whatever it is—it's beginning to look questionable.

None of this means that Lockheed faces an inevitable survival crisis. Profits on defense programs might be enough to support the TriStar; Lockheed's major banks (which have invested $400 million in the company that's not covered by the government guarantee) might be lenient on repayment; Howard Hughes—who has already indicated he's interested in putting up $100 million for the long-range version of the TriStar—might find some more money. A lot of things could happen. But a genuine threat to Lockheed's existence—with a government rescue or a change in current ownership—is one of them.

MEMBERS OF CONGRESS AND CONSUMER FEDERATION PROTEST FPC EFFORT TO DEREGULATE NATURAL GAS

Mr. HUMPHREY. Mr. President, on September 14, 1973, with no public notice, the Federal Power Commission issued an administrative order which, in essence, deregulated the wellhead price of natural gas.

Immediately following that notice, the Consumer Federation of America—CFA—under the able leadership of Lee White, former chairman of the FPC and now chairman of the CFA Energy Policy Task Force, requested the FPC to stay their order. Their request for a stay was refused but the FPC did modify their plan for comments on the order.

The CFA, therefore, requested that the U.S. Court of Appeals stay the FPC order. Their request was granted by the court on October 3 and the FPC order was stayed until public comments could be received and reviewed.

I have joined with five other Senators and six Members of the House in filing comments opposing the deregulating order and requesting that it not be reinstated, particularly while the Senate Commerce Committee is deliberating on this subject.

Mr. President, I consider this action by the FPC to be an administrative attempt to erode the regulatory controls over natural gas pricing that were guaranteed the American consumer by Congress in the Natural Gas Act and I am opposed to their action.

I ask unanimous consent that the comments provided by several colleagues and me to the FPC order, those of the Consumer Federation of America, and the CFA's October 3 announcement of the court stay of the FPC order, be printed in the RECORD.

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

[United States of America Federal Power Commission, Docket No. RM–74–3]

PROTECTION OF RELIABLE AND ADEQUATE SERVICE FOR THE 1973–1974 WINTER HEATING SYSTEM

Comments of Senators Humphrey, McGovern, Metcalf, Moss, Mondale, and Proxmire, and Congressmen Aspin, George Brown, Eckhardt, Fraser, Moss and Reid opposing Orders No. 491 and 491–A

These Orders pose the question whether the Commission has the power to broadly suspend price regulations in its issuance of Producer Certificates under Section 7 of the Natural Gas Act.[1] The question comes to whether the Commission may de-regulate producer rates. Since they believe that such broad and drastic decisions as represented by these Orders are a direct encroachment on legislative authority and since the matter is of vital significance to consumers, Senators Humphrey, McGovern, Metcalf, Mondale, Moss and Proxmire, and Congressmen Aspin, George Brown, Eckhardt, Fraser, Moss and Reid file the following comments.

The above listed persons are either United States Senators or United States Representatives. As such they have a specific interest in the enforcement of the law by administrative agencies. Additionally, they have representative and personal interests in the enforcement of natural gas pricing regulation. The mailing address and telephone number of the above persons is:

United States Congress, Washington, D.C. 20515. Telephone: 202–CA 4–3121

Additionally, comments may be served on Robert A. Jablon, Esquire, Spiegel and McDiarmid, 2600 Virginia Avenue, Northwest, Washington, D.C., 20037.

The above Senators and Representatives strongly oppose Orders No. 491 and 491A, which represent an administrative attempt to erode completely the regulatory controls over natural gas pricing that were guaranteed the American consumer by the Congress. In so acting the Commission would not only demonstrate a disregard of its statutory responsibilities under the Natural Gas Act, but disregard the difference between the legislative and administrative powers as well. While certainly administrative agencies have broad authority in interpreting and applying regulatory statutes, this authority must be exercised in accordance with the general purposes of the statutes they administer.

"The purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas *Federal Power Comm. v. Hope Natural Gas Co.*, 320 US 591, 88 L. Ed. 333, 64 S. Ct. 281 (1944). As the original Section 7(c) provided, it was the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." 52 Stat 825. [footnote omitted]. The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Co. v. Public Service Commission of New York*, 360 US 378 388 (1959).

Whether there is merit to the de-regulation of natural gas, as written by Congress and interpreted by the Courts, the law at present requires vigilant Commission price regulation. If the Commission deems the statute unwise or inappropriate (as apparently it does), its recourse is to recommend modified legislation and not to implement a *de facto* legislative change. In this way Congress may consider the underlying political, social and economic issues. In this connection it is noteworthy that the President has recommended legislative changes to the Congress as a part of his energy program and that hearings are to commence shortly before the Senate Commerce Committee.[2]

Apart from the constitutional illegality of de-regulation by administrative fiat, the Senators and Representatives are deeply disturbed by the prejudicial consequences that will flow from any further avoidance by the Commission of its consumer protection responsibilities. It is particularly inappropriate to sanction de-regulation, by precipitous administrative action, during times of scarcity, thus leaving the consumer at the mercy of an industry which has been determined to possess monopoly power. Such action compounds inflationary impacts. It is apparent that the result—and the purpose—of Order No. 491 is to greatly increase the price of natural gas.

As expressed in Order 491–A, the premise of the Commission's action is that by an allegedly temporary elimination of price regulation over new gas supplies, the Commission will alleviate the natural gas shortage.

Footnotes at end of article.

However, the Commission ignores that the Natural Gas Act is based upon the opposite premise that regulation is necessary. Indeed, to the extent that there are either structural or other market impediments so that competition cannot be presumed to bring forth sufficient natural gas supplies at just and reasonable prices or that there are natural supply limitations compared with visible demand, the *fact* of a shortage demands price regulation—not its abandonment. This is the underlying basis for the statute. Furthermore, there are very practical problems to "temporary" de-regulation. Apart from its ignoring of the statutory purpose, if the ability of natural gas producers to obtain higher prices is allowed during certain periods of time, new findings will certainly be withheld from the market awaiting further periods of de-regulation. It would not make economic sense for a natural gas producer to do otherwise. This leads to the additional harm of creating expectations of even higher prices, which itself creates incentives for withholding gas from the market and which furthermore economically penalizes actions taken in conformity with the general regulatory purpose. A system of regulation cannot be tolerated where there is economic penalty and dis-incentive for the producer to voluntarily comply with the Act. Moreover, the de-stabilizing forces created by orders such as 491 and 491–A are directly contrary to the national goals of eliminating inflation and providing price stability and stable investment climates.

The Commission's action represented by these Orders is even more disturbing in view of its apparent ignoring of other actions which the Commission has already taken in order to stimulate natural gas production and sale in interstate markets. For example, the Commission has already greatly increased natural gas producer prices under its area rate regulation and other allowances and incentives to increased production. These actions allow for monetary incentives far in addition to cost based rates. If the Commission is to now allow newly found gas to flow in interstate markets without price ceiling limitations, by this action it makes certain that the price increases that it has already granted to stimulate new gas findings will not work because of the holding forth of the additional carrot of *no* responsibility to producers who withhold gas. If, on the other hand, the Commission deems the other actions to have been insufficient, it may merely be an admission that its program of price de-regulation by stages has not worked and there is no reason to believe that more of the same will do any better.

The Senators and Representatives are further disturbed by the breadth of the administrative action. If it is assumed that specifically directed proposals to alleviate the shortage might be effective, this still does not provide justification for a general de-regulation of producer certificate prices. Compare the Commission's action in allowing the certification of additional facilities to provide for the transportation of new, additional amounts of federal domain gas for intrastate refinery uses at the same time similar uses in other areas of the country could not be accommodated. *Chandeleur Pipe Line Co.*, 44 FPC 1797 (1970), 45 FPC 370 (1971), *affirmed, Public Service Commission of New York v. FPC*, 463 F. 2d 824 (CADC, 1972).[3] Thus, the Commission might reserve new Federal Domain Gas for interstate sales. If it is worried about the diversion of natural gas to intrastate markets, the Commission might petition Congress to amend the statute to control intrastate sales. See *Houston, East and West Texas Ry. v. United States* 234 U.S. 342 (1914, *"Shreveport Case"*).

The above listed Senators and Representatives are deeply concerned about the threatened shortage of natural gas and are committed to pursuing all appropriate corrective action. However, they cannot support administrative abandonment of the consumer protections provided by Congress. The Commission must not attempt to revitalize Order No. 491 and 491–A which has been stayed by Court order.

The teaching of *CATCO* (*Atlantic Refining Co. v. Public Service Commission of New York, supra*) is precisely that the Commission should not abandon regulation under threats that gas will otherwise be withheld from interstate markets. There, like here, here were clear threats of shortage. However, if the Commission was merely to raise rates as an answer to shortage, it had to give the "reason why". 360 U.S. at page 393. Like in *CATCO*, here there is no real explanation that the action will result in substantially more interstate gas supplies. Compare *Texas Gulf Coast Area Natural Gas Rate Cases*, CADC No. 71–1828 (August 24, 1973). Indeed, the expectation of total de-regulation signaled by the Commission may encourage the *withholding* of gas from interstate commerce. And while additional gas may flow under temporary permissions, this may substitute for gas which would have been sold under regular certificates. Indeed, the orders provide every incentive for producers not to request regular Section 7 certification in the hope that de-regulation will be made permanent.[4] Like in *CATCO*, there is no assurance that Section 4 or Section 5, which were there termed "nigh interminable" will fill the gap. Indeed, to the extent it might, the actions taken here would be antithetical and make it more difficult to control prices in the future. See also *United Gas Improvement Co. v. FPC*, 290 F. 2d 133 (CA 5, 1961), *cert. denied sub nom Sun Oil Co. v. UGI*, 368 US 823 (1961). Conclusory hopes that suspension of regulation may bring more supply is not sufficient to ignore the statute.

FOOTNOTES

[1] Natural Gas Act, Section 5, 15 U.S.C., Section 717f.

[2] Senators Humphrey, McGovern, Metcalf, Mondale, Moss and Proxmire and Congressmen Aspin, George Brown, Eckhardt, Fraser, Moss and Reid do not here take a position of the *desirability* of legislative changes. However, they deeply believe that statutes should not be applied directly contrary both to their language and basic purpose because of an allegation that statutory changes may be necessary. Of course, they do not take a position as to how they may vote on various proposed legislative changes that may come before them for decision.

[3] We cannot understand, for example, the justification for special procedures for sales of offshore gas on the basis that this gas may be diverted to intrastate markets, since this gas is already under FPC control.

[4] If gas is actually committed to interstate markets under these orders, this could provide for a permanent commitment, "pre-abandonment" notwithstanding.

[United States of America Before the Federal Power Commission, Docket No. RM74–3]

POLICY WITH RESPECT TO ESTABLISHMENT OF MEASURES TO BE TAKEN FOR THE PROTECTION OF RELIABLE AND ADEQUATE SERVICE FOR THE 1973–74 WINTER HEATING SEASON

Comments of American Public Gas Association, American Public Power Association and the National League of Cities—U.S. Conference of Mayors

These comments are filed on behalf of the Consumer Federation of America ("CFA"), the American Public Gas Association ("APGA"), the American Public Power Association ("APPA") and the National League of Cities—United States Conference of Mayors ("Conference"),[1] pursuant to the terms of FPC Order No. 491–A issued September 25, 1973.

1. Copies of all filings, notices and other papers should be served upon:

Edward Berlin, Esq., Berlin, Roisman and Kessler, 1712 N Street, N.W., Washington, D.C. 20036 (833–9070), General Counsel for CFA.

Charles F. Wheatley, Jr., Esq., American Public Gas Association, 2600 Virginia Avenue, N.W., Washington, D.C. 20037 (337–5544), General Counsel for APGA.

Frank W. Frisk, Jr., Esq., American Public Power Association, 2600 Virginia Avenue, N.W., Washington, D.C. 20037 (333–9200), Special Counsel for APPA.

2. We have already pointed out in our Petition for Rehearing that, in our view, Order No. 491 which effects a 180-day suspension of the Act is unlawful and must be discarded since it finds no support in either Section 7(c) or any other section of the Natural Gas Act. Congress obviously never intended Section 7(c) of the Act to be used to deregulate gas sales for a period of 6 months, and the Commission's argument that since it has already achieved the same result (in Order Nos. 402[2] and 418)[3] for lesser periods, a period Order No. 491 is valid,[4] is sheer bootstrap. The point, of course, is that the Courts have never affirmed the FPC's asserted power to suspend the Act, and the Commission may not cite one (unchallenged) questionable act to support another. The Commission may not abdicate its statutory responsibility to see that all jurisdictional sales are in the public convenience and necessity, which finding entails a close scrutiny of rates involved.[5] The promise of rate review in future pipeline proceedings,[6] is obviously a false one since pipelines merely use their PGA clauses to pass through such gas costs to consumers. The absence of any refund commitment by the producers of or any procedure whereby they can be required to make refunds, makes it impossible to seek to hold the pipelines responsible for contracting at excessive rates in pipeline rate proceedings. The vague standard of prudence in pipeline cases cannot be substituted for the Commission's responsibility under the Act to set just and reasonable rates for producers.[6a]

3. The Commission's rationale for its extreme actions in the docket is that we have an emergency gas shortage situation and absent suspension of the Act for six months, the situation will be aggravated.[7] Such reasoning necessarily presumes that the Commission is working from the premise that the oil industry has gas reserves available for the interstate market which it has been withholding pending this penultimate step by the Commission.[8] In other words, the Commission is confirming the view of money (including its own Office of Economics) that the greatest disincentive to dedication of new gas reserves to the interstate market has been the Commission's self-fulfilling promise of price increases. The stated commitment of the FPC Commissioners themselves to deregulation would encourage any prudent businessman operating in an oligopolistic market to withhold his product pending resolution of the regulation versus deregulation issue. The fact so proudly cited by the FPC that the 60-day emergency purchases and limited-term certificates have brought certain quantities of gas to the interstate market[9] obscures the more important point that but for these procedures the interstate market might have secured long-term commitments of gas rather than the short-term commitments which perpetuate the crisis atmosphere which the Commission cites as authority for still another short-term solution.

4. Though we are unable to find a single reference in Order No. 491 or 491–A to the intrastate market, we must assume that one purpose of the six-month suspension period

Footnotes at end of article.

is to permit interstate purchases to compete with intrastate purchasers for available gas supplies. Thus, though the Commission apparently does not want to face the issue,[10] it is clear that one of the major problems facing the gas industry today is the suicidal competition now being waged between interstate and intrastate purchasers to secure gas supplies. Of course, the oil industry thrives on such "competition" because it drives up the price of gas without regard to costs. It is time that the Commission asserts its plenary power under the Act to control the allocation of gas supplies on a nationwide basis,[11] and put an end to the senseless, self-destructive bidding contest which the Commission's policies (culminating in Order No. 491) have not only sanctioned but encouraged to the detriment of the entire consuming public.

5. Our views on the Commission's failure to adhere to basic notions of due process and to the APA in issuing Order No. 491 have already been thoroughly discussed in our Petition for Rehearing and need not be repeated here.

6. Pre-granted abandonment, which is contemplated in Order No. 491 violates one of the fundamental concepts of the Natural Gas Act that a jurisdictional sale, once initiated, may not be discontinued absent a finding *at the time abandonment is applied for* that it is required by the public interest. Section 7(b) of the Act (15 U.S.C. § 717f(b)) precludes abandonment:

". . . without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

Since Order No. 491 contemplates no hearing at all, it is patently impossible for the Commission abide by Section 7(b) of the Act much less to make the requisite findings required by Section 7(b) with regard to a proposed *future* abandonment. The Commission may not abdicate its recognized "regulatory responsibility to assure that gas once dedicated to the interstate market will continue to be available to that market so long as the public interest demands . . ." *Continental Oil Co.*, 31 F.P.C. 1079, 1082 (1964); see also *Atlantic Refining Co.* v. *Public Service Comm'n of N.Y.*, 360 U.S. 378, 387–89 (1959); *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 156 (1960).

It is well established that a natural gas company may not provide for cessation of its service on a specified future date simply by contracting to sell gas only until that date (*e.g., Harper Oil Co.*, 23 F.P.C. 2, 3 (1960)), and yet that is exactly the effect of pre-granted abandonment. In short, pre-granted abandonment obviously violates Congress' clear intent that abandonment of service or facilities is proper only if certain stated findings are made by the Commission after a hearing *at the time abandonment is to be effected.*

Wherefore, for the foregoing reasons, we respectfully submit that Order No. 491 is unlawful and must be discarded and we respectfully urge that the Commission solve the emergency situation which it describes by exercising its plenary power to allocate gas reserves on a nationwide basis.

FOOTNOTES

[1] The interest of each of these parties was set forth in their "Petitions for Leave to Intervene and for Rehearing for an Immediate Stay" filed in this docket on September 20, 1973. The arguments set forth in that Petition are incorporated herein by reference, as anticipated by the Commission in Order 491–A (p. 2).

[2] 43 F.P.C. 707 (1970).

[3] 44 F.P.C. 1574 (1970).

[4] Order No. 491–A, pp. 2, 11.

[5] Atlantic Refining Co. v. P.S.C. of N.Y., 360 U.S. 378 (1959).

[6] Order 491–A, p. 8.

[6a] With respect to any 6-month sales consummated prior to the issuance of the stay order by the Court of Appeals on October 3, 1973, we think the Commission if it does not set them aside, should at the very least require refunds.

[7] Order No. 491–A, p. 8. We are tempted to suggest that the Commission look over its shoulder for a moment at all the carrots it has thrown the oil industry since 1969, and reflect for a moment how the carrots have only seemed to whet the appetite of the oil industry—a result long predicted not only by consumer groups but also by the chief economists in the FPC's own Office of Economics.

[8] It is obvious to all concerned that the six-month deregulation fiat could not result in the development of new reserves for the interstate market due to the 3–5 year lay time involved in exploration and development of new gas supplies.

[9] Order No. 491, p. 3; No. 491–A, pp. 8–9.

[10] The Commission's embarrassment is well-grounded since it continues to resist before Congress regulation of the intrastate market, despite the fact that a number of its Administrative Law Judges have found *on the basis of record evidence* that regulations of the intrastate market was the only sane solution to the dislocations of gas supply now facing the nation.

[11] *E.g.*, FPC v. Louisiana Power & Light Co., 406 U.S. 621 (1972).

CONSUMER VICTORY—COURT HALTS FPC DEREGULATION ORDER

WASHINGTON, D.C.—In their continuing struggle against the Federal Power Commission's attempts to deregulate the price of natural gas, the Consumer Federation of America and other groups today won a major victory.

The U.S. Court of Appeals for the D.C. Circuit today upheld the request to stay recent orders of the Federal Power Commission which would have allowed gas producers and pipelines to enter into six month contracts without any price regulation by the FPC as mandated under the Natural Gas Act.

The request for a stay was filed in the Court of Appeals by CFA, the American Public Gas Association, the American Public Power Association, the National League of Cities—United States Conference of Mayors, and the Public Service Commission for the State of New York.

Indications were that if the FPC's procedure were permitted to continue, the prices charged by producers would skyrocket to unprecedented levels at least twice as high as those previously held to be the lawful limits.

The Court order leaves it yet open to the Commission to endeavor to reinstate its deregulation order on or before November 13, 1973, if it can find that such a procedure would be lawful and consistent with the public interest.

Under the Court's ruling, the FPC will be able to reconsider its de facto deregulation order by accepting comments from interested parties.

Lee C. White, CFA's chief energy spokesman and former Chairman of the Federal Power Commission, said that CFA intends to strenuously avail itself of this commenting opportunity and will insist that the Commission must aggressively move to discharge its statutory responsibilities to insure that all rates charged by natural gas producers are just and reasonable.

White commented, "In view of the threatened scarcity of natural gas supplies, it is now, more than ever, absolutely essential that consumers must demand rigorous enforcement of the FPC's regulatory responsibilities and receive protection from exploitation by natural gas companies.

"We fervently hope," White continued, "that the FPC will now recognize this fact and get on with the business of properly regulating in the public interest."

NONRETURNABLE BEVERAGE CONTAINER PROHIBITION ACT

Mr. HATFIELD. Mr. President, last June 25, I introduced the Nonreturnable Beverage Container Act, designated S. 2062. The purpose of this legislation is, very simply, to ban the use of nonreturnable soft drink and beer containers. The bill is modeled after a law enacted in the State of Oregon which has been in effect for just over 1 year.

Since S. 2062 was introduced, a number of articles have appeared which I would like to bring to the attention of my colleagues. The first of these is a United Press International article which appeared in the Medford, Oreg., Mail Tribune on October 2. The article takes a look at 1 year's experience with the law and its impact on our State. Over the summer, Mr. Edward P. Morgan, the ABC news commentator, visited Oregon and was able to observe firsthand our cleaner highways. Mr. Morgan was so impressed that he devoted a commentary to our "bottle bill." Business Week magazine has also studied the nonreturnable issue in national terms, and an article from their July 28 issue outlines some of the opposition to legislation of this nature.

In addition to these articles, the Environmental Protection Agency, which is studying Oregon's law, published a report on the first 6 months' experience with the bottle bill, which includes some telling statistics relating to litter reduction.

Mr. President, our experience in Oregon, combined with the studies I have read on the extra energy costs we pay by using nonreturnable containers, strengthens my belief that we need to adopt a policy similar to Oregon's on a national level.

I ask unanimous consent that the materials I mentioned be printed in the RECORD and I commend them to the attention of my colleagues.

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

OREGON'S "BOTTLE BILL," 1 YEAR OLD, IS HAILED AS A SMASHING SUCCESS

(By Quinton Smith)

PORTLAND.—Oregon's one-of-a-kind "bottle bill" celebrated its first anniversary Monday, with state officials hailing it as a smashing success. But those making out-of-state beverages for Oregon assailed it as a detriment.

One thing is for sure—it is widely accepted and acclaimed by citizens of the state, and Oregon's six-month long legislative session which refused to repeal the law passed by the 1971 session.

A group of brewers, can manufacturers and bottlers are presently appealing a Marion County Circuit Court decision upholding the law to the state Appeals Court, which expected a trial date late this month or early November. They claim the law, which outlaws unreturnable bottles and cans and requires payment on return bottles and cans, is discriminatory and interferes with interstate commerce.

"HERE TO STAY"

"I feel the law is here to stay and will be going into other states and even other countries," said William Moore, head of the Oregon Liquor Control Commission's enforcement division and the man who sees the bottle law is obeyed. "Consumers have made a success of the container law."

When the law became effective six beer bottles were certified by the OLCC for a two-cent deposit. All other bottles, including soft drink containers carry a five-cent minimum deposit. The familiar pull tab can was outlawed, virtually wiping out canned beer and soft drinks from the state's grocery shelves. At present only three types of bottles meet certification standards which say they must be used by at least two bottlers and are reusable. Moore says he hopes by the end of the year a 12-ounce "export" bottle is decertified, leaving only the 11 ounce stubby and a 32-ounce container on the Oregon market.

The object of the law was to wipe out litter on the state's highways. Both Moore and Kessler Cannon, Gov. Tom McCall's coordinator for natural resources, believe it has accomplished its purpose.

PICKED UP QUICKLY

"It has practically eliminated litter of this type on roadways, in parks and on forest trails," Moore said. "For those who still throw containers out—and there are darned few anymore—there's someone right behind them picking them up for the deposit."

"Even the sack or carton that used to carry the bottles to the garbage can, now goes back to the store," Cannon said. He said that monthly surveys since the inception of the law showed decreasing amounts of litter to now where it is at a "very low level."

"Last May the price of case beer in Oregon went up 40–50 cents, the first increase in four years, Moore said. While brewers said some small amount might have been due to the new law, most admitted that rising costs for labor, raw material and packaging had spurred the hike.

Bill Wessinger, chairman of the board of Blitz-Weinhard, an Oregon based brewery, and also the largest seller in the state, said the market was affected slightly by the bottle bill "but by how much we don't know."

NORMAL GROWTH

Moore maintains there has been the normal growth in the beer sales, while soft drink sales were reported on the increase.

Wessinger said 40 per cent of the Blitz' sales were in cans. Its can line now sits idle, while a new $1.5 million bottle line has taken its place. He also says the law has added $100,000 in yearly handling costs to its Portland distribution firms.

"There's no question that there is a real burden on the retailer," Cannon said. "But instead of fighting for part of the deposit, they should be trying to handle the load more easily."

Some supermarkets say their storage rooms are now being used for bottles instead of foodstuffs. Several distributors have built new warehouses for handling the empties.

A spokesman for Fred Meyer supermarkets said the firm has added an average of 1½ employes per store because of the increased handling of bottles, but it was the only increase in costs to them.

NO OTHERS YET

While the impact of Oregon sales consists of only one per cent of the national beer and soft drink market, Moore said manufacturer and brewery groups are opposing similar legislation presented in 39 state legislatures this year. None have passed yet. But Moore keeps on getting inquiries from states and foreign countries.

He said that every state except Alaska has contacted him for information on the bill and many have sent state or local government officials. A representative of the South Australian government also spent a week in Oregon and assured Moore when he left that his state would soon enact the law. Several Canadian provinces have passed it also.

Cannon said similar laws have been introduced in both houses of Congress, with hearings scheduled in the near future.

"There are a lot of people violently opposed to it in industry," Cannon said. "But those people who have come to Oregon without backgrounds in other legislatures or industry, have found for themselves that the law was working quite well."

THE SHAPE OF ONE MAN'S OPINION

(By Edward P. Morgan)

This is Edward P. Morgan, ABC News Washington, with the Shape of One Man's Opinion. A look at the returns on returnable bottles after this word.

The state of Oregon is learning that it pays to be beautiful. Two years ago the state legislature, judiciously prodded by Governor Tom McCall, a Republican, passed a bill making it illegal to sell beer or soft drinks in anything but returnable bottles. This was an anti-litter measure with teeth in it. Predictably, the soda pop, cola and brewery lobbies fought it furiously. To everybody's astonishments, including the legislature's, the lobbies lost, and since last October the new law has been operative.

As an eye-witness, I can testify that it is working. Much of last week I drove the highways and byways of western Oregon and they were cleaner than any roads I can remember anywhere. They were not immaculate. Here and there were empty bottles and cans—beer cans are now strictly illegal. But the litter was spectacularly minimal and as if determined to reduce it to the vanishing point, litter patrols have been organized. I saw one unit operating along the Nehalem river just inland from Arch Cape on the Pacific Coast, a squadron of kids, girls and boys, in hard hats, heaping the manmade flotsam and jetsam in plastic bags for truck collection.

Apart from the law's esthetic value in conserving Oregon's lush natural beauty, the economic ramifications of breaking the "no deposit-no return" syndrome are fascinating. The state's former governor and now senior Senator, Mark Hatfield, found them so exciting that he was emboldened in June to introduce a bill banning the shipment and sale of virtually all nonreturnable beverage containers in interstate commerce. The Environmental Protection Agency will publish a one-year study of the effectiveness of the Oregon law in October and Hatfield hopes it will give considerable impetus to his bill despite inevitable lobbying by brewery and bottling interests.

The fact is that using returnable containers saves energy—of which we are supposed to be short. It works this way: a returnable bottle is reused about 15 times. Thus, a University of Illinois study concluded that the energy required to deliver a unit of beverage to the consumer is about triple in a throwaway glass container over a returnable bottle. The study calculated that if the entire beverage industry were converted to returnable containers, the energy saved could have supplied the total electrical needs of Boston, Pittsburgh, San Francisco and Washington, D.C. for some five months in 1970 usage levels.

Oregon has found some pain in adjustment. Can company closings lost 142 jobs. But more demand for bottles may produce new jobs. And it is considerably cheaper to the consumer to buy returnable bottles. The law is only nine months old but results are measurable. Before October, 1972, an Oregon state survey showed beverage containers formed some 62 per cent of the volume of litter. That has dropped to something like two per cent.

I'll have a footnote in 30 seconds.

Only Vermont has been bold enough so far to follow Oregon's lead in banning no deposit-no return containers. But if by some miracle the Hatfield bill should pass, what a tidy nation we would become!

This is Edward F. Morgan, ABC News Washington, with the shape of one man's opinion.

[From Business Week, July 28, 1973]

OREGON: A TEST CASE FOR RETURNABLE CONTAINERS

("No deposit. No return. Born circa 1935. Died in Oregon Sept. 30, 1972 May it rust in peace.")

So reads a tombstone mockingly erected in Portland by environmentalists last fall, when Oregon became the first state to outlaw the sale of beer and soft drinks in nonreturnable bottles and cans. For 10 months now, consumers have had to plunk down a 2¢ deposit for standard bottles that can be refilled by more than one brewer or bottler, and 5¢ for other containers. The law also bans cans with detachable pull-tab tops.

The aim of the law is to curb litter. However worthy this goal, the statute is now at the center of a controversy with nationwide implications for environmentalists and for a whole bevy of business interests, from bottlers and brewers to can and glass container makers The businessmen strongly oppose the statute, and fear it may spread to other states On July 1, for example, a similar law took effect in Vermont, and last month Senator Mark Hatfield (R-Ore) introduced a national version of the Oregon law

Is the Oregon "bottle bill" effectively reducing litter? Yes, says a preliminary report released last month by the Environmental Protection Agency. The number of beverage containers in roadside litter during the three winter months after enactment declined 81% from the year earlier period, the federal agency said And it found that the share of beverage containers in litter was nearly halved—from 37% to 18.9%. "The law," says Eileen Claussen, who wrote the report, "has had a significant and positive impact on litter."

CANS CANNED

But the law has caused economic disruptions, too, she reports. Cans, which cannot be refilled, were all but driven off the shelves, declining from 41% of the soft drink market and 35% of the beer market to less than 1% of each. As a result, National Can Corp., Oregon's largest supplier, closed one plant in Yakima, Wash., while Emerald Canning Corp., a local canner of soft drinks, went out of business. Total jobs: 142. And retailers have been "inundated" with empties, EPA says, raising handling and storage costs.

Like the bearer of bad tidings, the EPA report is being attacked by industry, which insists that the "bottle bill" is ineffective. "It is an inaccurate and irresponsible document," charges Patrick Van Keuren, director of environmental services at American Can Co. and chairman of the Oregon Beverage Industry Task Force, a group of companies that opposes the statute. Van Keuren says the litter data gathered before and after the law cover different stretches of highway. "They are statistically not comparable," he says. Furthermore, he claims that Eileen Claussen "is the leading advocate of a national bottle bill," and is therefore "biased." Says he: "The proliferation of the Oregon law would be extremely harmful to the country."

Ms. Clausen, a program manager at EPA's Office of Solid Waste Management, admits that the data, furnished by the Oregon State Highway Dept., cover different stretches of road. "But the highways are so similar that the data are fully comparable," she contends. She also denies the advocacy charge. "I did testify in Montgomery County, Md. [which held hearings on a similar law], but I merely presented the findings. I suggested the county make up its own mind."

NATIONAL IMPLICATIONS

The dispute reflects issues that transcend Oregon. The state has only 1% of the nation's population, and its beverage markets are dominated by local brewers and bottlers who stand to lose very little from the law. But if similar laws are passed elsewhere, they could spell disaster for many companies. More than half the cans produced annually are beverage containers—a fast-growing market that could be crippled wherever Oregon-type laws appear. Bottle makers stand to make some short-run gains at the expense of cans, but widespread acceptance of returnables would eventually erode bottle sales, too. One statistic shows how vast the impact could be: Some 90-billion beverage containers will be produced this year—450 for every man, woman, and child.

If the law spreads, it could also restructure the beer industry. The major brewers depend on lightweight, nonreturnables to compete in markets far from their breweries. For example, National Brewing Co. of Phoenix, which ships Colt 45 Malt Liquor to Oregon, watched its transportation costs soar from 32¢ a case to 72¢ after the law was passed. The problems are not as severe for soft-drink companies, since national brands are bottled and canned locally. But convenience containers are partly responsible for the huge per capita rise in consumption of soft drinks—from 4 oz. a day in 1960, to 8½ oz. in 1971—and manufacturers worry that such laws will slow growth.

INEFFECTIVE AND COSTLY

With so much at stake, the various commercial interests immediately attacked the Oregon bill as ineffective. But their early conclusions now seem dubious. For example, a senior vice-president of the American Iron & Steel Institute noted that the share of returnable bottles in glass litter increased from 27% just before the law took effect to 50% three months later. But because nonreturnable bottles were off the market, the proportion of returnables was bound to go up. Other evidence purporting to show the law a failure ignored the fact that litter is seasonal—more in summer, less in winter. "You must compare winter months this year with winter months last year," says Eileen Claussen.

Oregon Governor Tom McCall also ignored seasonal factors when he made his widely quoted statement declaring the law "a riproaring success." It was this war of press releases drawing unwarranted conclusions that lead the EPA to make its preliminary study. The agency is also funding a more definitive study that will contain crucial data on summer littering.

Meanwhile, several important questions persist. Even assuming that Oregon-type laws reduce litter, are the benefits worth the costs? Will consumers pay more for beverages? Will such laws help alleviate the more pressing solid-waste problem?

Beer and soft drink prices have risen in Oregon since Ms. Claussen completed her study. But because retail prices vary from store to store and because of the price freeze, meaningful data are scant. Moreover, no one knows what portion of the price increase can be attributed to the bottle bill. According to Van Keuren of American Can, Oregonians will pay $10-million more for their beer and soft drinks this year, most of it because of the new law. The total, he says, is 15 times as much as Oregon spends to pick up all its litter. And, he points out, banning throwaway containers does nothing to deal with other litter, which accounts for 80% of the problem nationwide.

Ms. Claussen insists that beverage prices in returnable bottles are still lower than they were in nonreturnable cans. "The refillable system is cheaper," she says, "because of lower container costs." And since container litter is highly visible, "a mandatory deposit bill is one way to fight litter," she says. "It's up to the community."

LARGER GOAL

Though the Oregon law was set up to curb litter, it now figures in the growing debate over how best to deal with solid waste in cities. The beverage container interests favor resource recovery—a system that would turn a —garbage load into a resource lode of metal, glass, and energy. Oregon-type laws, they say, destroy the economic feasibility of resource recovery because they effectively remove cans, which have high scrap value.

But Connecticut, which is setting up a statewide resource recovery network, claims that its system will derive most of its revenue from user charges levied on participating towns, rather than from the sale of scrap. In any event, it will be years, perhaps, decades, before the bulk of the nation is served by recycling systems. One big reason is that transportation rates and depletion allowances discriminate against scrap in favor of raw material consumption.

Though environmentalists favor resource recovery, they also want to cut garbage through "resource reduction." According to new EPA data, beverage containers account for 7% of municipal solid waste, a tempting target for source reduction as well as material and energy savings. But this approach, is not so clear-cut, either. If most people simply throw away their returnable containers, a city's waste load may actually increase. The reason: Returnable bottles are much heavier than cans or throwaway bottles. Also, returnables require more packaging.

In the end, both source reduction and resource recovery may be necessary to manage the nation's soaring garbage load. For all their convenience, one-way containers impose social costs—an increase in either litter or municipal refuse plus added material and energy use. They are bound to be the target of environmentalists and legislators for years to come.

Oregon's Bottle Bill: the First 6 Months

(By Eileen Clausen)

Since October 1, 1972, all beer and soft drink containers sold in the State of Oregon have been required to carry refund values. Cans with pulltab openers have been banned outright. This is the first law of its kind to be enacted by a State, and it has caused a great deal of interest in State legislatures throughout the country. This paper provides a brief analysis of the Minimum Deposit Act and an assessment of its impact since its date of enactment.

THE LAW

Oregon's "Bottle Bill," signed into law in June 1971 by Governor Tom McCall, went into effect October 1, 1972. The Act required a minimum 2-cent refund to purchasers on the return of "certified" containers of beer, malt beverages, and carbonated soft drinks, and a 5-cent refund on the return of all other beverage containers. Certified containers are defined as containers that are used by, and that will be accepted for reuse by, more than one manufacturer. In addition, the law outlaws the sale of the flip-top or pull-tab beverage container.

Industry reaction to the measure was predictably negative, and suit was filed January 24, 1972, in the Circuit Court of the State of Oregon by various container manufacturers, brewers, and soft drink manufacturers who claimed that the Oregon law was unconstitutional. The defendants were the Oregon Liquor Control Commission and the Oregon State Department of Agriculture. The plaintiff's argued: (1) that the statute violates the commerce clause of the U.S. Constitution by imposing an excessive burden on interstate commerce, and by favoring local concerns at the expense of distant interstate operators; (2) that the statute violates the equal protection clause of the U.S. Constitution by differentiating between carbonated and noncarbonated soft drink containers; (3) that the statute violates the due process clause of the U.S. Constitution by lacking a real and substantial relationship to the objectives sought by the law. The decision of the Court, which was rendered September 1, 1972, declared the act constitutional. The September 1 ruling has been appealed to the Oregon Court of Appeals by the plaintiffs.

The major purpose of the bottle bill is to control litter in the State of Oregon. In a region with a demonstrated concern for environmental quality and an emphasis on outdoor recreation, it was considered essential that measures be taken to avoid the widespread littering that had become characteristic of the region's beaches, highways, and other public areas. A mandatory deposit mechanism, designed to provide disincentives for throwing away containers, was chosen as a means of reducing the beverage container portion of litter.

EFFECTIVENESS OF THE LAW

In a 1972 study by Research Triangle Institute, beverage containers were estimated to constitute 19.1 percent of roadside litter by item count.[1] The breakdown by container type was 73.1 perecnt cans, 17.0 percent nonrefillable bottles, and 9.9 percent refillable bottles. By container content, beer represented 71.3 percent, soft drinks 25.7 percent, and wine and liquor 3.0 percent of all beverage containers in litter.

Beverage containers contributed a far greater percentage of the volume of roadside litter. A survey conducted by the State of Oregon indicated that beverage containers formed approximately 62 percent of the volume of litter. Analyses by Midwest Research Institute revealed that consumer perception of beverage containers in litter seemed to be based more on their volume than their numerical frequency of occurrence.[2]

Shortly after the bottle bill was passed in 1971, litter surveys were made on a monthly basis by the Oregon State Highway Department. These surveys were continued after enactment of the legislation so that data could be obtained on the effectiveness of the law in reducing the beverage container portion of litter. Release of these data to the public caused considerable controversy. Some industry groups claimed that the data collected prior to enactment of the bottle bill were not comparable with the data collected since October 1, 1972, because the early data included beverage-related paper in the nonreturnable container total. This was questioned by officials in the Governor's office, and is as yet unresolved. Even if one assumes that this view is correct, there is little change in the basic results of the litter analysis. Beverage-related items totaled less than 2 percent of the total for the period since the law went into effect. Other litter studies, including the study for Keep America Beautiful, Inc., by Research Triangle Institute, showed beverage-related paper as representing below 12 percent of total litter. A deduction of either amount to adjust the figures before the bill's enactment produces only a minor change in the results.

Preliminary comparisons between the winter prior to enactment (1971–1972) and the

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[1] Bingham, T. H., and P. F. Mulligan. The beverage container problem; analysis and recommendations. U.S. Environmental Protection Agency, Sept. 1972. 190 p. (Distributed by National Technical Information Service, Springfield, Va., as PB 213 341.)

[2] Midwest Research Institute. The national impact of a ban on nonrefillable beverage containers. Kansas City, Missouri, 1971. 120 p.

present winter (1972–1973), for example, revealed that the law had a significant and positive impact on litter in Oregon (Table 1). For these winter months for which litter data were collected in 1971 and 1972, beverage containers averaged 7,787 per month based on 29 one-mile surveys. This represented 269 items per mile per month. Data for the winter after enactment of the legislation showed a definite drop. For the three winter months of 1972 to 1973, there were 1,274 containers littered per month based on 25 one-mile surveys, for an average of 51 items per mile. This was a decrease of 81 percent, or 218 items per mile per month. The proportion of beverage containers in litter also dropped significantly, from 37 percent before enactment to 18.9 percent after the law went into effect.

It is also important to consider that of the beverage containers in litter since enactment of the law, only 24.1 percent were returnable bottles. The remainder were nonreturnables, presumably purchased before enactment of the law and still uncollected. If these nonreturnable containers are disregarded in order to obtain a more realistic picture of current littering in Oregon as compared with littering before the law was passed, beverage containers in litter can be shown to have declined by approximately 96 percent (from 7,787 items to 308 items).

IMPACT ON INDUSTRY

Although the initial effects of the law appear to indicate positive litter reduction, the bottle bill has also been attended by some disruption in the beverage and beverage container industries. The law apparently affected container usage and sales.

Container usage

Prior to enactment of the bottle bill, the Oregon National Soft Drink Association reported that approximately 51 percent of all soft drinks were sold in refillable bottles, 8 percent in nonrefillable bottles, and 41 percent in cans. This mix of containers changed significantly after October 1, 1972. In March 1973, no nonrefillable soft drink bottles were being sold in the State. Cans had declined to less than 1 percent of the total soft drink market. Only Shasta Beverages, a warehouse brand distributor, continued to sell soft drinks in cans.

In December 1971, the Oregon Liquor Control Commission reported that approximately 35 percent of all beer in Oregon was sold in cans. During the first month of enactment of the law, the percentage of cans decreased to 4.3 percent. This percentage declined still further, and by December 1972, 99.5 percent of all beer was being sold in refillable bottles, with only 0.5 percent sold in cans. This shift resulted in lower cost to the consumer, as been in cans sold in March 1973 at six for $1.58 (including a 30-cent deposit), while certified refillable bottles of beer sold at six for $1.17 (including a 12-cent deposit).

Prices and sales

By March 1973, the Oregon market had seen neither a decrease in sales nor an increase in prices since the law had gone into effect. In fact, beer sales for the fourth quarter of 1972 showed an increase of 40,000 barrels over the fourth quarter of 1971, according to the Oregon Liquor Control Commission. (This represented an increase in beer excise taxes collected by the State of Oregon of $52,000). Sales of soft drinks, while not indicating an increase, did not indicate any unseasonal decrease either.

As of March 1973, retailers in the State indicated that no retail prices had increased. and Oregon consumers were purchasing beer and soft drinks at lower prices on the average than prior to the enactment of the law. This is because refillable bottles, which now account for almost all of beer and soft drink sales, are considerably cheaper for the consumer to purchase than nonrefillable bottles and cans.

Container industry

The metal container industry has been adversely affected by the Oregon bottle bill. National Can Corporation, the largest metal can supplier to the Oregon market prior to October 1, 1972, had to close one of its plants in Yakima, Washington. This, in conjunction with minor shutdowns in other plants serving the area, resulted in a total layoff of 82 employees.

Glass container manufacturers, while gaining in market share, have had to change from nonrefillables to refillable bottle production exclusively. If trippage rates are high (if each refillable bottle is returned and reused many times), the glass container industry could experience a sales decline. No estimates are yet available on the impact of the law on this industry.

Contract canners

The State of Oregon had only one contract canner, Emerald Canning Corporation, prior to October 1, 1972. Emerald Canning recently announced that it could no longer continue to can soft drinks. Approximately 60 employees were terminated as a result. It is anticipated that much of the volume once sold in cans will be sold in refillable bottles.

Soft drink industry

Major soft drink bottlers have said that the bill has not adversely affected the soft drink bottling industry in Oregon. Most bottlers experienced a gain in market share, although this required increased investment in capital equipment to wash, fill, and deliver refillable bottles. No data were available concerning employment impact on the soft drink industry, although it seemed likely that, assuming no sales decline, employment decreases in the canning sector would be at least partially offset by employment increases in bottling plants.

Brewing industry

The effect of the Oregon legislation on the brewing industry has been mixed. Brewers operating in the Pacific Northwest have been favored, while shipping brewers (national-brand beer producers who ship their beer from outside the Pacific Northwest) have suffered adverse effects. Approximately 88 percent of all non-bulk beer sales in the State since October 1 have been in certified 2-cent deposit bottles.

Brewers within the States of Oregon and Washington have traditionally accounted for approximately 81 percent of the Oregon beer market. These brewers, all of whom have sold beer in certified containers since October 1, have been positively affected by the bill. Because of their efficient dstribution systems, and because the shipping distance from the Oregon market to these northwest breweries has been minimal, the regional brewers have been able to acquire as many 2-cent deposit bottles as they can use. Since new refillable bottles cost as much as five times the deposit values, these brewers have experienced a substantial decrease in costs.

Shipping brewers, on the other hand, have not been able to ship refillable bottles to and from Oregon economically. National Brewing Company, located in Phoenix, Arizona, for example, increased its shipping costs into Oregon by 38 percent (from 32 to 44 cents per case) due to the weight and breakage factors associated with refillable container distribution. The cost of returning the empty containers to Phoenix would be an additional 28 cents. The economics associated with selling nonrefillable bottles or cans of beer in Oregon were, however, worse for the brewing industry, and all brewers were using refillable containers for their Oregon sales.

Most shipping brewers have also experienced low return rates partly because of the speed with which regional brewers have been purchasing returned bottles. No data are yet available, however, on the specific costs and employment impacts associated with the brewing industry.

Retail stores

Oregon food retailers have already been inundated with empty beer and soft drink containers. This has, quite naturally, resulted in increased costs to the retailer for handling the returned bottles. Some additional markup may be required to compensate the store for these additional costs, although no increases in price were passed on to the consumer as of March 1973.

Retailers have also had substantial space problems due to the additional quantities of returned containers. Increased pickups and deliveries by bottlers were expected to minimize the space problem.

TRENDS

Oregon's bottle bill has now been in effect for 6 months. Certain trends have begun to emerge, and data are becoming available to assess the effectiveness and impacts of the law. The following results can nevertheless be pointed to at this time:

The beverage container portion of litter decreased by at least 49 percent between winter of 1971 to 1972 and winter of 1972 to 1973.

Container usage has been dramatically altered by the law. Less than 1 percent of all soft drinks and 0.5 percent of all beer was being sold in cans as of March 1973.

The enactment of the law has been attended by an initial loss of 142 jobs. A sizeable number of new jobs may be created in the bottling industry to offset these losses.

More data will doubtless be forthcoming in the months ahead. To assist in the accumulation and analysis of these data, the U.S. Environmental Protection Agency is providing the State of Oregon with a grant to evaluate the effectiveness and impact of the law. It is anticipated that this study will provide an objective and definitive assessment of all the costs and benefits associated with the Oregon Minimum Deposit Act.

A COMPARISON OF OREGON LITTER DATA BEFORE AND AFTER MINIMUM DEPOSIT ACT [1]

	Before enactment					After enactment					Winter average comparison per mile before/after (percent)
	October–November 1971	December 1971	February 1972	Winter average	Winter average per mile	November 1972	January 1973	February 1973	Winter average	Winter average per mile	
Total beverage containers	8,527	9,580	5,254	7,787	269	1,705	949	1,168	1,274	51	−81.0
Returnable	971	1,060	689	907	32	316	272	335	308	12	−62.5
Nonreturnable	7,556	8,520	4,565	6,880	267	1,389	677	833	966	39	−85.4
Total other litter	15,860	11,440	12,357	13,219	456	7,052	4,896	4,470	5,473	219	−51.9
Total all items	24,387	21,020	17,611	21,006	728	8,757	5,845	5,638	6,747	270	−62.9
Beverage container percentage of total	34.9	45.6	29.8	37.0	37.0	20.7	16.2	19.4	18.9	18.9	−49.1

[1] Oregon State Highway Department Litter Survey.

"THE GO-GO YEARS" A DELIGHTFUL CONTRIBUTION TO AN UNDERSTANDING OF A NEGLECTED CONGRESSIONAL RESPONSIBILITY

Mr. PROXMIRE. Mr. President, once in a great while a book will come to my attention that is a joy to read and provides a sharp, clear understanding of a complicated problem.

"The Go-Go Years," by John Brooks, is just such a book. All of us have been perplexed and baffled at one time or another by our great securities markets, and the complicated and often astonishing ways in which a few men from time to time are able to use the markets to earn or lose immense sums of money.

"The Go-Go Years" is a breezy, exciting course in how it has been done. Starting with the loss of some $450 million in a single day by Ross Perot, through the fabulous riches to rags saga of Eddie Gilbert, the heathen Chinee "Go-Go" manipulations of Gerry Tsai, the appalling "Back room" scandals of some of America's greatest brokerage houses and the putty-like susceptibility of too many in the accounting profession, John Brooks tells a fascinating story.

This is a story from which Members of Congress can learn a great deal. This body as well as our handmaiden, the Securities and Exchange Commission, has a long, long way to go to provide the kind of consistent investor protection we should provide, and I do not know a more enjoyable way to learn the background as well as to get into the mood to act on it than to read this book.

Mr. President, I ask unanimous consent to have printed at this point in the RECORD the New York Times review of "The Go-Go Years," by John Brooks. The review is written by Christopher Lehmann-Haupt. In a couple of minutes of reading, this review can tell you why the Brooks' book will represent an excellent investment of your time.

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

BOOKS OF THE TIMES: NOW THAT THEY ARE GONE-GONE

(By Christopher Lehmann-Haupt)

("The Go-Go Years." By John Brooks. 375 pages. Weybright & Talley. $10)

Economics may well be the dismal science, but there's nothing less dismal than a good book about money. And in a decade that's produced an unusual number of good ones, John Brooks' latest, "The Go-Go Years," seems to me one of the best. For if "Adam Smith's" reports flew us on eye-opening joy rides straight through the heart of the Wall Street jungle—if The Times of London Insight team slithered exuberantly to the very bottom of Bernie Cornfeld's swamp in "Do You Sincerely Want to Be Rich?"—then Mr. Brooks' new book is a luxurious 474 flight from which we can suddenly discern the entire terrain of the stock market in the nineteen-sixties. Oh, I know there are grounds for flagging his flight to a stop before it takes off some will say that Wall Street no longer deserves to be viewed as a mirror of American society; others will worry about Mr. Brooks's admiration for the political middle-of-the-roaders who helped to bail the Street out of bankruptcy in the early seventies (if principles lying somewhere between conservatism and liberalism can still be characterized as middle of the road); and still others will wonder at the note of wistfulness with which Mr. Brooks wonders if the Wall Street he once knew and loved (sort of) is now dying.

All of which is perfectly reasonable from an ideological point of view. But I must confess that I found myself sneaking past the ticket takers of morality and the Friskems of ideology; I found myself settling with a huge groan of comfort into the first-class prose of Mr. Brooks s craft; and I found myself wide-eyed with wonder over how much he has shown us—and of what variety—in his flight over the forest.

MASS OF DRAMATIC DETAIL

How, for instance, has he managed to absorb us in such a mass of dramatic detail and still make us feel as if we understand the stock market of the sixties as we never understood it when it was happening? How has he successfully limned the decade's most memorable personalities—the flashy Edward Gilbert, who slipped on his hardwood flooring empire and slid all the way down to Brazil; Gerald Tsai, the mutual-fund genius from the Orient, whose market maneuvers became so scrutable that he collapsed under the weight of his audience; James Ling, the conglomerateur, who proved that two plus two could equal zero; and National Student Marketing Corporation founder Cortes Wesley Randell, who discovered the fountain of youth and polluted it . . . How has Mr. Brooks brought these characters to life again and yet also made them function as cardboard caricatures of his era?

How has he succeeded in exploring Wall Street's physical environs—the atmosphere in the enormous back room, where the Puritan work-ethic sprang a leak and went down with a fortune in stock certificates on board; the ambiance of the thoroughfares below, which astonishingly became a bull market for drug pushers; the scene around Trinity Church, where go-go churchmen sought to turn the Street people green, and hardhats countered by turning them black and blue . . . How has Mr. Brooks so successfully painted in such details (all the way down to that infamous crowd of streetmen that gathered every morning for a time to cheer for one streetwoman's secondary sex characteristics), and yet still turned the Street into a walk of American life?

And how can he serve up such scathing denouncements of those go-go years—of the market's repeated practice of closing loopholes in the law only after the public's money had drained through them; of the decline of the accounting profession's art into "creativity"; of corporate impresarios who made love to their bottom lines; of the whole fast shuffle that in 1969–70 picked more money out of the public's pocket than the crash had in 1929 ($300-billion to $30-billion, Mr. Brooks scores it) . . . How can he expose such disasters, and yet still convey his love for the brawl of the Street and his sorrow that it may now be on the verge of extinction and that, indeed, "This may be, conceivably, one of the last books to be written about 'Wall Street' in its own time," as he concludes?

NO EXPLAINING IT

I suppose I could speculate on how Mr. Brooks has done it—I could imagine the charts and diagrams he must have pasted around his writing room to remind him where the various pieces fit in; conceive how he must have tinkered and tinkered to make each of them carry its full load; and guess how he must have polished to make his prose roll—until the entire machine hummed smoothly from its beginning (Texas billionaire H. Ross Perot rides onto the scene) to its end (H. Ross Perot rescues the Street from itself, marries it, and rides into the sunset). But in fact I can't explain exactly how Mr. Brooks makes it all work so well, any more than I can diagram how O. J. Simpson gains ground.

All I know is that Wall Street is one of the forests most difficult to see for its trees (and how many people can even tell about the trees—whether they are growing or falling over?). Yet Mr. Brooks has flown us over the terrain and shown us everything from the topography to the bulls and bears sporting beneath. So please don't take "The Go-Go Years" too much for granted; as effortlessly as it seems to fly, it is nonetheless an unusually complex and thoughtful work of social history.

PROBLEMS INVOLVED IN DEPENDENCE ON MIDDLE EAST OIL

Mr. JACKSON. Mr. President, in a recent speech at the Johns Hopkins School for Advanced International Studies, Dr. John H. Lichtblau of the Petroleum Industry Research Foundation discussed the problems involved in our growing dependence on Middle East oil.

Dr. Lichtblau's analysis makes clear that there are sound reasons of economics as well as conservation for future production curtailment in some form by the major exporting countries. This conclusion reinforces the arguments in favor of moving the United States toward the option of energy self-sufficiency as rapidly as possible.

Dr. Lichtblau's speech also underscored the urgent need for slowing the rate of increase in oil demand. He notes that at an annual average growth rate of 5.5 percent, much less than the rate over the past decade, we would consume about 133 million barrels per day or 48 billion barrels in 1993.

Assuming the world ratio of annual production to proved reserves drops from its current level of 35 years to 15 years within that period, we would need 663 billion barrels of proved reserves in 1993. Deducting from this the world's current proved reserves results in required new finds of 768 billion barrels to meet the oil requirements of the next 20 years. This would be about 80 billion barrels more than we found in the last 20 years and only 7 percent less than all the recoverable oil found in the world—exclusive of the Soviet bloc—since 1859.

Mr. President, I ask unanimous consent that the full text of Dr. Lichtblau's speech be printed in the RECORD.

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

MIDDLE EAST OIL AND THE U.S. ENERGY CRISIS

(Speech by John H. Lichtblau)

(A paper delivered at the Seminar, "The Mounting Energy Crisis and the Middle East" held at Johns Hopkins University, School for Advanced International Studies, Washington D.C.)

This summer the U.S. faced a small but real gasoline shortage. This winter we may well have to contend with a real heating oil shortage. We are also encountering problems in supplying our airlines with sufficient jet fuel and our trucks, buses and railroads with all their diesel fuel requirements.

Concurrently, the oil exporting countries in the Midlle East and North Africa which contain 2/3 of the world oil reserves are partially or fully nationalizing U.S. and other Western oil companies; some of them are also curtailing production and are inti-

mating that these actions and others yet to follow are taken in retaliation against our Middle East policy.

The public and the press have tied these two factors—the U.S. oil shortage and the actions and pronouncements in the Middle East—together and have concluded that the real reason for the shortage is our dependency on Middle East oil and the reluctance of these countries to let us have sufficient supplies. The recent controversial cover of *Newsweek* showing an Arab in traditional headdress holding the nozzle of an American gasoline pump and the words "Arab Oil Squeeze" emblazoned across it is typical of many such comments in the U.S. press relating our oil shortage to Arab policy.

The connection is understandable because of its apparent and simple logic. Nevertheless, it is quite wrong, at least up to now. For one thing, our dependence on Arab oil is very small. In the first five months of this year only 6.4% of our total crude oil supplies came from Arab sources, or 7.4% if we also include Iran—the only non-Arab exporting country in the Middle East.

Next, the Arab countries have by no means shut off or curtailed their oil supplies to the U.S. The 790,000 b/d we received from them in the first 5 months represent a 63% increase over a year ago.

Above all, there is no general crude oil shortage in the world at this time. Otherwise, Western Europe, Japan, and other large oil importers would also be affected. As it is, only the U.S. among major industrial countries is suffering from it.

Since no oil exporting country has taken special steps to withhold oil just from the U.S., the reason for the shortage is obviously internal. We need look no further than our domestic refining capacity. For a variety of reasons U.S. refiners have not built sufficient capacity in recent years to meet the growth in demand. As a result domestic refineries, currently running at virtually full capacity, are no longer able to meet the demand of all customers. This is the reason for our gasoline shortage and our potential heating oil shortage. Had we 10% additional refining capacity right now, neither of these two shortages could have occurred. Since the gasoline and distillate fuel oil export capacity of foreign refineries is quite limited, we can alleviate the shortage only partially through additional imports of these products.

Our only course of action is to build new refineries as rapidly as possible. Here the uncertainty over future Middle East oil supplies may have an impact because planned refinery projects may not materialize for lack of secure crude oil supplies. But since it takes 3½ years to build a new refinery and since the starting date is May 1, 1973, the day the President removed crude oil import controls, U.S. gasoline and heating oil supplies will be tight for the next 3 years and sporadic shortages will occur even if the Middle East were to be a politically and economically secure supply source for U.S. importers.

This does not mean that Arab or other foreign oil may not be used in the future for political purposes against the U.S. Those leaders who have warned of such action may well be in a position to bring it about. But it has not happened yet and is not likely to happen in the immediate future. Any U.S. oil shortage this year and probably also next must be traced to our own past policy, particularly our oil import policy, rather than to anti-American acts by foreign oil producers. It may not appear that way in view of what has happened to the cost of the oil we import or to American enterprises operating in some major foreign oil producing countries. But none of these acts have been directed specifically against the U.S. and many are, in fact, primarily economic measures taken in the national interest of the countries concerned.

The oil producing countries have done three things in varying degrees since 1970 which have affected us: They have sharply and more or less uniformly raised the tax revenue per barrel of exports, they have requested and received a share in the equity and production of the foreign companies operating on their soil and they have nationalized several foreign companies. Some of these actions were accompanied by political attacks against America's Middle East policy, attempting to tie the two together. But the real reason for these actions is the recognition by the oil countries that their international economic position had changed drastically in recent years and that the time was ripe to benefit from these changes.

The first and foremost factor in this is the overwhelming importance of foreign oil in the economies of the industrial nations. This may sound like a cliche by now. But, in fact, it is only since 1967 that imported oil has accounted for at least half of Western Europe's total energy needs and only since 1971 that all increases in U.S. oil requirements had to come from overseas sources.

The second factor is the awareness that in the short run no real substitutes of any kind exist for oil and in the long run such substitutes would be far more expensive than oil at the world prices prevailing in the late 1960's. The apparent terminal decline of the European coal industry, the shift from coal to cleaner fuels in the U.S. and the massive delays in developing nuclear energy helped to form this awareness.

Finally, there is the growing desire of all developing countries to have more control over their economies and particularly their natural resources. This desire has been greatly enhanced by evidence in recent years—particularly in Latin America—that nationalization of private foreign enterprises is really much less risky, from the political, economic and military point of view, than had been assumed.

These are the underlying trends affecting the oil policies of the Middle East countries and they will continue to determine their policies regardless of what we do because they make sense for the oil producing countries. Thus, oil prices will continue to rise and the control of oil production and exports will continue to shift from the companies to the governments.

For the U.S. and other importing nations this will mean less security of supply and higher energy costs for the foreseeable future, notwithstanding the comforting theory expounded by some academic economists that once the private international companies get out of the oil producing and exporting business competition among the national oil companies will drive prices down again. So far, exactly the opposite has occurred. The market competition which clearly existed when the international oil companies were in control, so to speak, has started to erode as their control has declined. So far, most sales by national companies of their newly obtained participation oil have been at prices above the previously existing market level.

There are several reasons why this situation is not likely to change to one of vigorous market competition. In the first place, the national companies do not function like private companies. Their ultimate responsibility is to their government and their function is to be an instrument of government policy. The private companies, by contrast, must ultimately account to profit minded shareholders for their actions. Secondly, the existence of a well functioning and highly respected coordinating institution in the form of OPEC could be expected to intervene if large scale price competition threatened to develop among OPEC members. Thirdly, only two or three of the 11 OPEC members are in a position to seek substantial increases in market shares. These are Saudi-Arabia, Iran and, to a smaller extent, Iraq.

The other OPEC members will not be able to maintain their world market shares beyond the next few years. But, with a steadily expanding world oil market all OPEC members will be able to increase their exports if they are able to do so. Under these circumstances, vigorous market competition among state oil companies is not likely to develop.

My analysis of the underlying trends of Middle East oil developments does not imply that we can ignore potential political threats to Middle East oil supplies. If any of the major exporting countries should actually curb existing production or prevent required increases in production for a specific foreign political reason and maintained the restriction until the reason is removed the effect could obviously be quite damaging. We all know that the possibility of such action has been raised and this has to be taken seriously.

However, here too, we must be sure to differentiate between economic and political motivation, notwithstanding the rhetorics in producing and consuming countries which tend to obscure this difference. Two Middle East countries have already taken action to limit production. Both actions have had a perceptible negative effect on world oil supplies. Yet, neither action can be considered a political gesture against the U.S. or any other importing country. Libya's oil production just before the first reductions ordered by the government in June 1970 stood at 3.6 million barrels daily and was rising at a rapid rate. It is now generally agreed that this was excessive relative to Libya's proved reserves, variously estimated at 25 to 30 billion barrels. The magnitude and suddenness of the reductions in the midst of negotiations was obviously designed to put pressure on the companies. But the production rate of May 1970 could not have been sustained in any case. Furthermore, it makes sense for Libya not to let its total known recoverable reserves be drained in 20 to 25 years but to spread the income from this resource over a longer period and make additional production dependent on additional finds.

Similarly, the freezing of the 1971 production rate in Kuwait for the past two years is based on the belief of that country's legislature that existing reserves are inadequate to permit further increases. An important consideration in this decision was the fact that Kuwait, even more than Libya, could in the short run not usefully absorb the additional funds resulting from a maximization of production from existing reserves. For both countries a longer pay out period with smaller annual income increments would seem nationally preferable.

Similar considerations could in the future well lead to similar action by other Middle East countries. We know already that Iran expects its production to peak at about 8.5 million barrels daily. This would be only some 2½ million barrels above its present production rate. Furthermore, with the expected steady growth in revenue per barrel there is no longer a cost attached to postponing production. Most producing countries have come to accept the principle that "oil in the ground is worth more than money in the bank." The truth of this axiom has been dramatically illustrated in the last three years as tax costs per barrel rose by 75% at the Persian Gulf and about 160% in Libya, excluding participation cost. The axiom would have applied if tax costs had risen by only 25%. And of course curtailment of production tends to generate price increases, making resource conservation a paying proposition.

Thus, there are sound reasons of economics as well as conservation for future production curtailment in some form by the major

exporting countries. It is of course possible that the curtailments may go beyond economic requirements so as to exert international political leverage or, conversely, that economically desirable curtailments may be postponed for political reasons. This is the principle political risk faced by America and other major oil importers in the years ahead. We must remember, however, that not all actions by Middle East oil producers which may affect us negatively need to be politically motivated.

What can we do about our growing dependency on Middle East oil? In the short run relatively little, as has so often been pointed out in the last couple of years. The view recently expressed by a high government official that in 3 or 4 years the U.S. may once again be more or less self sufficient in oil supplies deserves high marks for optimism but for nothing else.

One thing that could be done within the next four years is to develop strategic storage facilities so that we would be less immediately affected by any foreign supply reduction or interruption. This would include not only the importation of foreign oil for emergency storage but also the development of our now unused and unavailable naval petroleum reserves for this purpose.

In the longer run—the period beyond 1981—we have quite a number of options to reduce or at least stabilize our Middle East oil imports. To a large extent these options are the direct function of the producing countries' current pricing policies. Oil, like most essential commodities, has a low short term elasticity of both supply and demand but a considerably higher long term elasticity.

It is therefore quite likely that as oil prices rise the demand for oil will be affected. The remarkable shift to smaller cars this year coincidental with the nation's first peacetime gasoline shortage is a sign of this trend. If all existing U.S. passenger cars were of the compact or subcompact variety, our current gasoline consumption might be ⅓ less. Government tax policies could help to accelerate this trend towards smaller cars.

In the longer run—the period beyond tion between price and consumption exists in the long run. As the cost of heating fuel rises, the expenditure for additional insulation to conserve heat becomes increasingly attractive.

Industrial consumers of oil will also want to utilize the product more efficiently as its cost increases. There is considerable room for such improvement in this particular market.

But it is on the supply side that we can expect the price increase to have the most drastic impact. All of the synthetic crudes—shale oil, tar sands, liquefield coal—become competitive at crude oil equivalent prices of $5–$6/bbl which is likely to be the cost of imported and new domestic crude oil in the mid-1970's.

Without trying to belittle the technical and environmental problems in developing synthetic oil on a large scale, I believe once the process becomes commercially competitive, which has not been the case so far, we have the genius to bring it into commercial production. Eventually, synthetic fuels will make a significant dent into our need for imported oil.

Atomic energy will make another dent. This source of power is already considerably cheaper than oil in generating electricity. Three years ago this was not the case. After 1980 virtually all the growth in U.S. electric power requirements is expected to come from nuclear plants.

Thus, given time, technology and determination, we should be able to start reducing our dependence on overseas oil from the early 1980's on.

I would like to conclude my remarks with one additional point. Suppose there were no political risks in relying on Middle East and other foreign oil and suppose world oil prices were still at approximately the level of the first half of 1970, with no radical changes in sight.

Given these idyllic conditions, how much longer could we and the rest of the world go on using crude oil at our accustomed growth rate. I believe that within 15 years we would have to take the same measures to curb the growth in demand and develop crude oil substitutes that we are now beginning to take.

Let us look at a few figures. Currently the world, exclusive of the Communist countries, is consuming about 46 million b/d or 17 billion barrels a year. At an average annual growth rate of 5.5%—considerably less than the 7.5% rate of the last 10 years—we would consume about 133 million b/d or 48 billion barrels in 1993. Assuming the world ratio of annual production to proved reserves drops from its current level of 35 years to 15 years within that period, we would need 663 billion barrels of proved reserves in 1993. Deducting from this the world's current proved reserves results in required new finds of 768 billion barrels to meet the oil requirements of the next 20 years. This would be about 80 billion barrels more than we found in the last 20 years and only 7% less than all the recoverable oil found in the world (exclusive of the Soviet Bloc) since 1859.

We might find the required quantities but it is likely to be an increasingly difficult and therefore costly process. As we approach the end year of our period some evidence of supply strains would probably begin to show up. After 1993 these strains would rapidly increase. Furthermore, as producing countries see their reserve/production ratios decline year after year, they could be expected to conserve their remaining reserves by putting a lid on production increases. All of this would put us in about the same position we are in now regarding the need to curb growth rates in demand and find alternate supply sources. Only the date would be the second half of the 1980's instead of the first half of the 1970's.

Certainly, the benefits to us and other importing countries from another 15 years of access to foreign crude oil on the terms that existed in the late 1960's would have been considerable. But even under the best of circumstances we would have to address ourselves to the problem of inadequate world crude oil supplies well before the end of this century.

THE ENERGY CRISIS—ADDRESS BY SENATOR ROBERT C. BYRD

Mr. McCLURE. Mr. President, yesterday I was privileged to attend the International Coal Symposium at the Madison Hotel and listen to a thought-provoking speech on the energy crisis by the distinguished Senator from West Virginia (Mr. ROBERT C. BYRD).

The importance of this conference was underscored by the fact that Senator BYRD took time from his busy schedule to participate in it. His remarks were most timely—not only because the energy problem occupies our uppermost thoughts, but also because of the events taking place in the Middle East.

Senator BYRD made this abundantly clear when he said:

We have come to the point in world development where intelligent co-operation among nations is not just something to be desired—it is a matter of sheer survival.

Mr. President, I ask unanimous consent that the full text of the Senator's remarks to the Symposium be printed in the RECORD.

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

SPEECH BY SENATOR ROBERT C. BYRD

Mr. Chairman, gentlemen, it is indeed a pleasure for me to have been invited to be with you today at this initial international gathering of coal men from the United States and overseas. In this day and age when détente, rapproachment, and international understanding are becoming almost everyday words, it is gratifying to know that men whose lives and works are intimately concerned with that most valuable resource upon which my home State of West Virginia for so long depended, are not lagging behind in the search for meaningful co-operation among men and nations.

We have come to the point in world development where intelligent co-operation among nations is not just something to be desired—it is a matter of sheer survival. It is no longer possible, even for this industrial colossus that is the United States, to go it alone, even if we wanted to. It is even less possible for smaller nations that lack our immense resources. And this realization is not confined to matters diplomatic, political or military. It includes matters of fuel and food, which in the final analysis, are much more basic to man's survival. It is estimated that if the world population increases at the same rate for the next quarter-century as it has in the last twenty-five years, by the beginning of the twenty-first century, nearly half of the population of the world will starve, unless man's ingenuity and technology find ways to produce food currently beyond his capabilities.

There is very little doubt that most of that technology, if it is to be developed, will depend substantially on there being an adequate supply of energy to drive the machines that our brains produce. Present supplies of energy fuels, with the exception of coal, are in even more hazardous states than are our food potentials. While it is easy to think of the vast oil reserves of the Persian Gulf as being limitless, they are very far from being limitless. That is what we once thought of the supplies of oil and gas in the United States, and current shortages are bringing home to us the fallaciousness of that belief. What has happened in the energy fuels field nationally, is now happening in the energy fuels field globally.

The equation is really very simple. Food and of equal human survival—not American survival, or British survival, or French survival, or German, Spanish, Belgian or Canadian survival, but the survival of life on this planet and the continued existence of the human animal, of whatever national origin.

This cataclysm is not going to happen tomorrow. It may not happen in the lives of our children. But happen it will if we are not prepared to start—and start immediately to regard the natural resources of the earth as our only guarantee of the continuation of life on this planet. There has to be an intelligent accommodation between national and international priorities and the priorities of human survival. And while man's moral consciousness is struggling to catch up with his intellectual and technological excellence, it behooves us all to take stock of what we must do to maintain a reasonable standard of life while the gap is being bridged.

The shape of things to come in world energy fuels was graphically illustrated recently when Colonel Muammar Qeaddafi of Libya expropriated the assets of two American oil companies, and assumed majority

control of two others. The Libyan leader described these actions as "a strong slap on America's cool, arrogant face." The oil nations of the Persian Gulf, while maintaining a posture of friendliness toward the United States and the West, are nevertheless throwing out hints that they are in the driver's seat. The driver, they indicate, is no longer only the chauffeur—he is now also the owner. And the former owners are going to have to pay heavy fares, even to ride in the back seat. If they won't pay the fares, they won't even be allowed in the vehicle.

This is hard to take for powerful nations which have been accustomed to cocking an economic eyebrow and watching the world tremble. It is also a valuable, though painful lesson in the art of looking forward.

Though America is not the only culprit in the world, we bid fair to be the leader in the profligate use of oil, gas, and electricity. We have long since passed the point where the mindless overuse of our energy resources provided only comfort and convenience, and for years we have wallowed in unnecessary luxury, where the electric toothbrush and electric knife, electric hairdryers, and electric juice-squeezers have come to be the symbols of the "good life." I have no more desire than anyone else to go back to the days of the outside toilet, or the days when we risked a broken wrist every time we cranked up the old flivver, but I am also a firm believer in the value of self-discipline and the character-building properties of moderate self-denial. It is an unfortunate, but inescapable trait in humans that for every ounce of ease that our technology provides us with, there is a concomitant ounce of laziness added to our characters. For fifty years in American society, the question "Why do it the hard way when you can get the same result doing it the easy way?", has been a valid question. The incredible technological advances of the first half of this century have made America into practically a pushbutton society. It is almost frightening to think of how many of our everyday activities, at work and at play, are becoming subject to the control of computerized systems. I sometimes fear that man's intellect and ingenuity have gone so far, so fast, that we are in imminent danger of developing ourselves out of our own control.

Though that may be overstating the case, it is not an exaggeration of thought to wonder whether a continuation of sybaritic living would sap many of the strengths inherent in the American character. Fortunately, it is not too late for a reappraisal of our priorities, and it is just possible that some of the inconveniences that may be visited upon us by an unavoidable cutback in our luxuries, may be blessings in disguise.

We are all familiar with the story of the man who asked his friend why on earth he was banging his head against a brick wall, and his friend replied "Well, it feels so good when I stop." I do not go quite that far, but I am inclined to think that we Americans would come to no harm—and might be done some good—if a few exigencies replaced a few excesses for a reasonable period of time.

Almost two years ago, a group of scientists at the Massachusetts Institute of Technology published a book entitled "The Limits to Growth". In it, they argued that the mushrooming growth of population and production would reach earthly limits in the twenty-first century and bring about a collapse of industrial society. Now, I believe that that prediction is overly pessimistic, but it also has the gem of truth. After all, if I had made a speech on the Floor of the United States Senate in October of 1971 and said that within two years, we would see beef on the black market in this country, retail food prices going out of sight, and families going cold for lack of heating oil, I would have drawn many questioning looks. But those things have happened, and unless we take a hard and realistic look at ourselves immediately, they will continue to happen to an even greater degree.

You gentlemen are concerned with the one energy fuel—perhaps the one world commodity—of which the proven reserves are adequate for world needs for five centuries. This being the case, it would be easy to become complacent, and rest content that there is this abundance. I most fervently hope that this does not happen. We have spent too many years in a trance of neglect toward coal, and while it has its limitations under current technology, it also has an unlimited potential if we are prepared to spend the money necessary to vastly improve that technology. As a member of the Senate Committee on Appropriations, I was successful recently in adding $39.3 million to the appropriation for the Department of the Interior to be utilized by the Office of Coal Research and the Bureau of Mines for research and development in coal technology. Though this sum is an important contribution, it is but a drop in the bucket of what will have to be spent by public and private interests on coal research over the next decade, if the full potential of coal is to be realized, and if the industry is to make the vital contribution it can make toward alleviating our energy problems.

But while it is only natural that men are most concerned with matters that most intimately touch their lives, I believe that all of us must pay attention to the signs that may be outside of our own personal orbit. There are increasingly heavy pressures of world demand on an increasingly limited and decreasing world supply. The respected London Economist index of world commodity prices shows that food has risen 50%; fibers, 93%; and metals 76%, in one year. But apart from the symptom of prices, it would behoove us, in every country of the world, to be aware of the gathering clouds of resource shortages. The rapidly accelerating growth of world population poses a new challenge to human society. This challenge will require mankind to undertake a cold, realistic appraisal of what is attainable to provide a decent existence on a world level. This does not mean that nations with a high standard of living will, of necessity, be forced or even asked to lower their standards to the lowest common denominator. The nature of man is such that people of ingenuity, industriousness, and farsightedness will always enjoy a superiority of lifestyle over the peoples whose commitments to these qualities are less clearly defined. But it does mean that there may well be a more equitable distribution of the world's resources, and that some nations which have enjoyed an abundance that has seemed to be limitless, will be forced to sacrifice that portion of the abundance which has heretofore provided the preponderance of life's luxuries.

Let me hasten to assure you that I am not a disciple of the patron saint of Moral Rearmament, Dr. Buchmann, or a passionate devotee of the "one world" concept. But I am a man who tries, at all times, to be a realist. I have a deep and abiding love and respect for this great Republic of which I am fortunate enough to be a citizen and a Senator, and I am convinced that as we approach the beginnings of our third century as a nation, we must be prepared to sacrifice some of our luxuries in order to preserve the health and the strength of our national structure, and to ensure the freedoms that are our true reason for being.

When this nation was founded, our frontiers were the Atlantic Ocean and the Allegeny Mountains. A century later, our western frontier was the Pacific Ocean. Today, there are no frontiers anywhere in the world. The intellect and the ingenuity of man have crossed all the frontiers. Let us pray—and work together—to insure that that same intellect and that same ingenuity are equal to the task of perpetuating man's existence on this planet.

THE CAPITAL GAINS TAX TOO HIGH?

Mr. PERCY. Mr. President, I would like to call to the attention of my colleagues an article on capital gains taxation by Robert B. Anderson, the very distinguished former Secretary of the Treasury. Secretary Anderson's case is that capital generation is an extremely important objective in a society in which business is being called upon to bear an increasingly heavy load of valid social objectives, and that renewed efforts to undermine sources of capital accumulation are really counterproductive to our larger societal aims. Secretary Anderson singles out the current capital gains tax of 35 percent—the highest in our history—as a major deterrent to capital investment. It means that a successful investment must now be so great as to compensate not only for inflation but also for a 35-percent rate of capital gains tax. This, in Secretary Anderson's view, is a serious impediment to investment and risk-taking, and thus to national growth.

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

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

[From the New York Times, Oct. 5, 1973]

CAPITAL GAINS? CAPITAL!

(By Robert B. Anderson)

WASHINGTON.—My work as Secretary of the Treasury in the Eisenhower Cabinet left me with a strong concern over the massive burden that today's national tax policy places on capital accumulation.

More capital is a necessary steppingstone to further advances in our standard of living. The higher American standard of living as compared with other countries is a direct outgrowth of higher levels of capital investment per worker. America's ability to combat inflation at home and to meet foreign competition is in direct proportion to her ability to accumulate larger capital resources.

In the area of expanding employment opportunities we must be equally aware of the demands for more and more capital. Frederick B. Dent, Secretary of Commerce, recently cited the staggering figure that each new industrial job created in this country requires an average capital input of $25,000. Since my tenure at the Treasury Department we have also witnessed an increase in the demand that our economic system provide the answers for such valid national goals as clean water, pure air and better land use. Americans must realize that how we legislate or control our national stock of capital directly affects our standard of living, our jobs, our environment and our ability to fight inflation.

Unwise tax policies that discourage savings and dampen the psychological climate for investment have an adverse effect on our total national well-being and on all segments of our society. There can be no more important national objective than to increase our capital resources. But we see instead under the guise of tax reform renewed attacks on the sources of capital accumulation.

Of particular importance in this regard is the impact of the Federal tax on profits earned on the sale of an investment—the capital gains tax. In the 1969 tax act Con-

gress increased capital gains tax rates to a maximum of 35 per cent for individuals or even more if minimum tax provisions were taken into consideration. Prior to 1969 the rate was at a maximum of 25 per cent. At the same time the corporate capital gains rate was increased by a flat 20 per cent.

These increases strike at the ability of our citizens to accumulate the capital so vital to our national economic productivity and growth. A successful investment must now be of sufficient magnitude to compensate not only for continuing inflation but for a capital gains tax rate that can reach more than 35 per cent. A reluctance of investors to see their capital stock eaten away by the highest over-all capital gains tax in our history slows the pace of capital transfers.

This slower pace of capital transfers may well lessen, not increase, the Federal tax revenues in the long run.

The essential unfairness of this tax penalty is further demonstrated by the fact that tax provisions limit the taxpayer's ability to write off capital losses, thus allowing the Government to participate fully in the investor's success but only partially in the investor's unsuccessful risk capital venture.

At a minimum we should revert to the capital gains rates in effect prior to the 1969 tax act. The Federal Government would under this proposal take no more than 25 per cent of any capital gain made by a successful investor. Hopefully, the remaining 75 per cent would compensate the investor for the ravages of inflation and for the genuine risks taken. It may well prove necessary to make additional reductions in the capital gains tax rate to further stimulate capital formation so vitally needed. Such a policy might be accomplished under a long-range plan with phased reductions over a number of years, but let us take the first essential step now. Let us return to the pre-1969 tax rates on capital gains.

GENOCIDE CONVENTION REQUIRES INTERNATIONAL GOOD WILL TO ENFORCE

Mr. PROXMIRE. Mr. President, the International Court of Justice was established after World War II to arbitrate international disputes. If two countries have a disagreement which they cannot settle by negotiation, they can submit the matter to the International Court. After hearing both sides of the dispute, the Court renders an opinion. The Court has absolutely no power to enforce its judgment. Only mutual good will between the involved parties serves as the enforcement power.

One of the criticisms against the Genocide Convention is that it would subject America citizens to trial in foreign courts without any of their constitutional rights.

Article IX of the Genocide Convention says that any disputes over the treaty's meaning will be decided by the International Court. Nowhere does the treaty state that the Court has the power to try individuals. Rather, the Court is to issue an opinion as to what the treaty says. If either party to a dispute disagrees with that opinion, the Court still has no power to force adherence to its decision.

Article VI of the Convention, although making mention of an international tribunal, does not establish such a tribunal.

Mr. President, the fear that the Genocide Convention would negate constitutional guarantees to Americans accused of genocide is groundless. Any trial must occur in a competent tribunal of the country where the crime of genocide is allegedly committed. I urge the Senate to act swiftly to ratify the Genocide Convention.

REMARKS BY GEN. CREIGHTON W. ABRAMS AT ASSOCIATION OF U.S. ARMY MEETING

Mr. THURMOND. Mr. President, an outstanding address, worthy of the attention of every citizen in this Nation, was delivered Tuesday, October 16, by Army Chief of Staff Gen. Creighton W. Abrams before the annual meeting of the Association of the U.S. Army at the Sheraton-Park Hotel in Washington.

The message offered by General Abrams centered on the theme that while a "détente" among the superpowers could serve the cause of world peace, such a détente would best be preserved by this Nation maintaining a military force which recognized the realities of power. In so doing, General Abrams argued, we would be ready if ever that détente evaporates which could be the case overnight.

In one paragraph General Abrams brought all of his thoughts together. He declared:

A credible and effective fighting force is not wasted if it is not actually called upon to fight. In fact, fighting may be interpreted as a failure of deterrence. Again and again in recent history, the fact that one nation had a credible force in being and the apparent will to employ that force against another were sufficient for that nation to protect its interests or obtain its goals without war. Our past enemies knew this, and gained great silent victories by forcing alliances, imposing neutrality, creating satellites—often by mere threat of force alone. The nations that were not prepared to fight, or which had advertised that they would not fight, did in fact avoid the fight—but they did so by gross accommodation, sometimes at the sacrifice of their freedom.

Mr. President, that nations will seek to dominate other nations if they think such is possible was demonstrated from the beginning of recorded time and finds its confirmation in recent history.

Mr. President, I ask unanimous consent that this address by General Abrams be printed in the RECORD.

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

ADDRESS BY GEN. CREIGHTON W. ABRAMS, CHIEF OF STAFF, U.S. ARMY

It is a pleasure for me to be here, among so many friends and thoughtful critics of our Army. It is a rare opportunity indeed, for me—or for any officer in the United States Army—to be able to talk directly with so many of our Nation's business, civic and military leaders. And since you are the Army's most valuable friends—as much for your wise counsel as for you staunch support—I appreciate this chance to tell you how I see the Army today, and how it fits into the world picture.

The environment today is a difficult one for the country's security. The word "détente," which for some people evidently colors everything rose and turns their perceptions away from even obvious threat, has gained some currency.

"Détente" is expressed by some as a fact;
It is applauded by others as a policy;
It is saluted by still others as a new era;

And it provides the basis—at least the semantic basis—for some who would reduce military capabilities to what I believe would be a dangerous level, some who desire that we withdraw out of hand large numbers of troops deployed in Europe against very real and very capable opposing forces, and whose philosophies discourage young men and women from serving their country in its Armed Forces.

I think it's fair to say that we may have a period of the beginnings of détente—but we do not have world peace. For some people, the fact that we, ourselves, are not at war may be peace enough. But unless we can lessen the threat of war everywhere in the world, we cannot have a stable, durable peace on which we can depend. Détente means only that the tension between countries in the world may in some way have decreased. This is a matter of quality and degree.

Détente is also an idea, a perception of intentions among countries. As such, it is not an objective fact. It can change as quickly as perceptions change. But we must deal in facts—in the reality of power, of capability, of strength—when we are addressing the Nation's security. We should not cast off the dream of peace—God help us if we lose that vision. We should not ignore the hope that possible détente offers, and all the benefits it could bring. But neither should we lose sight of the real threats and the real dangers where they exist, and of our need to be prepared for them.

Our country can seek to reduce certain kinds of tension with other countries by various actions and efforts—diplomatic, economic, psychological, cultural, and so on—and it can seek to reduce these tensions by varying amounts. But an underlying assumption of détente is that the nations concerned can reach some agreement on how tensions will be reduced and by how much. What happens if a nation or group of nations is threatened and satisfactory agreements cannot be reached gets little attention in the enthusiasm of some for the perceived initial success of détente.

We have made progress in strengthening diplomatic communication with other countries which might have been considered potential enemies. We have increased cooperation and trade with them, as the result of diplomatic agreements. On their own fairly restrictive terms, the countries behind the Iron and Bamboo Curtains have become somewhat more open to us, though of course not nearly as open as our country always has been—so we're not exactly at parity on cooperation and openness.

We do not, however, have world peace. We do not have peace in any Utopian sense. Nor do we have peace in the down-to-earth sense of a greatly lessened need for our own military forces. What we find instead is that as our involvement in the war in Southeast Asia diminished, we cut back our forces, brought troops home, terminated the draft, and otherwise reduced our strength. Today, less than a year after the last U.S. ground combat forces were brought home from Southeast Asia, our Army is less than half the size it was at the peak of our effort there. We are many divisions smaller, and we have fewer weapons and less equipment. These are the facts and realities of our capability in this period of détente.

It is also interesting to observe that we are the only major power to have reduced our forces in Europe in the past decade. The Warsaw Pact nations, and the Soviet Union itself, have not reduced their forces. The fact is, in past years, the Warsaw Pact forces

have grown steadily and at a rather impressive rate. On the other side of the world, I am not aware of any reduction in the size or effectiveness of the armed forces of the People's Republic of China, as trade and diplomacy continue. Their forces have become steadily larger and more capable, though in some ways their strength is harder to measure. Again, possible detente—but not assured peace. And again, the delicate balance of hope and reality.

In my period of service, which includes the span of three wars, I can tell you that I don't need or want any more war—but then I could have made the same statement a month after I arrived in Europe in 1944. Nobody in his right mind welcomes war, especially those who have seen it. The carnage, the destruction, the pain are beyond telling. But the less prepared we are, the more wishful our thinking, the greater the costs of war when it comes. I came into the Army in 1936. We were a horseback and rifle Army in a country that was still largely convinced that we couldn't have another World War. The idea that we had ended the possibility of war at Versailles blinded many of us to reality. We had heard that there was a German Army, and that they had been building and maneuvering with tanks, and that the Luftwaffe was flying fighter aircraft far more capable than our Air Corps', but we ignored the facts in our desire for peace—until we were forced into action. And you know what happened—We did not prepare. When we could no longer avoid it, we got thrown into a huge war in Europe, unready, ill-trained in many respects, saved only by distance and the time our Allies' efforts bought for us. In the Pacific, we relentlessly avoided Japan's clear warnings of her capability, and even of her intent. We have Pearl Harbor and Bataan to remember for our complacent outlook. The cost was dreadful. In Europe, in Africa, in the Pacific we paid and paid and paid again—in lives and in blood—for our unpreparedness, for our insistence that because our shores were not under direct explosive attack, we were at peace.

When the war ended, we erased history again. We pretended that guaranteed peace was at hand. We were so anxious to achieve the dream of peace that we closed our eyes to the facts of capability, to the reality of threat. We cut back our Armed Forces to nearly nothing, and allowed our strength to dissipate. The United Nations had made war obsolete, some were convinced.

When the Korean War broke out, the situation was not much different than it had been in the opening days of the Second World War. We were not prepared. We were not adequately trained. We were not equipped. But we entered the war rapidly, throwing half-ready units in to buy time for the Army to get ready. And again, we paid dearly for our unpreparedness during those early days in Korea with our most precious asset: the lives of men. The monuments we raised to their heroism and sacrifice are really surrogates for the monuments we owe ourselves for our blindness to reality, for our indifference to real threats to our security, for our determination to deal in intentions and perceptions, and for our unsubstantiated wishful thinking about how war could not come.

These costs of our unreadiness, in just the years I have been in the Army—in the span of just one man's career—can be charged off to the desire for peace, the hope for détente, the faith in the good intentions of those who later became our enemies. The desire, the hope and the faith were accompanied by an unwillingness to face the facts, to grasp the reality of enemy capabilities, and a reluctance to invest the far lesser price for the preparedness, strength and clear resolve it would take to preserve that peace.

Here we are again.

The end of our involvement in Southeast Asia puts us back into a familiar frame of mind: "Ignore the threat, and it will go away"; "We can avoid war, if only we will stop arming ourselves for war"; "Nothing is worth the cost of another war."

In this period of possible détente—not real peace, but possible détente—we are opposed by formidable strength. We face, at various places around the world, strong and capable adversaries, becoming stronger all the time.

These are facts. As our relations throughout the world improve, we should consider that we have more and more to gain by preventing another war, and the only way I know how to do that, the only way that has worked in the past, is by maintaining our own strength, our own capability and our own resolve to defend our security, our freedom, and those of our Allies.

A credible and effective fighting force is not wasted if it is not actually called upon to fight. In fact, fighting may be interpreted as a failure of deterrence. Again and again in recent history, the fact that one nation had a credible force in being and the apparent will to employ that force against another were sufficient for that nation to protect its interests or obtain its goals without war. Our past enemies knew this, and gained great silent victories by forcing alliances, imposing neutrality, creating satellites—often by mere threat of force alone. The nations that were not prepared to fight, or which had advertised that they would not fight, did in fact avoid the fight—but they did so by gross accommodation, sometimes at the sacrifice of their freedom.

And so for the Army today, this means we must be ready, prepared to stand for the country. We must have effective, potent and credible strength to defend the Nation's security and its freedom. Insuring that the Army is prepared is my most fundamental duty and is the Army's primary mission at all times. It is the Army's mission today.

If the Army is to be prepared to meet the challenges it faces, it must consider not only the spirit of possible detente, but also the very real capabilities of potential enemies. If the arrangements of possible detente mean that forces on one or both sides can be reduced, thereby lessening the fact of mutual threat, so much the better. With an actual reduced threat comes the increased chance for the real peace we all desire. But to arbitrarily reduce our own capability—either intentionally or through unwillingness to invest in preparedness—because we think we know a potential adversary's intentions, is the kind of head-in-the-sand posture that has cost this country so dearly so many times in the past.

For the Army to be prepared, we must, of course, have good people. We must have good leadership and a lean and effective fighting structure. We must have a high state of training and discipline, and the right kind of weapons and equipment—we must have all these things. There is something beyond these factors, however, beyond the countable, measurable indicators of preparedness. The intangible is spirit. A "ready" spirit is a precious commodity: in the individual soldier, it shows up in increased alertness, in a willingness to try harder; in a small unit, it brings improved coordination, teamwork and discipline; in the Army as a whole, it gives credibility to our strength. By our credible strength we assure our friends and deter our enemies in the interests of peace. So naturally we do everything we can to foster and develop this spirit.

We hold and nurture and support this precious spirit everywhere in the Army, and we anxiously look for it elsewhere in the country. For this spirit of readiness cannot be sustained by the Army alone.

It must have its roots in our country, or it cannot survive. There must be clear evidence throughout our country that we, as a Nation, are prepared, that we have the spirit and will to do what is necessary to defend the country, and to insure its well-being. We must hear the people express their determination to support the efforts of their Army to meet the needs of the country, and to avoid the terrible costs of being prepared too late or not at all. The spirit of preparedness must resound so that any potential enemy can discern it, and can see that he can set out on no cheap adventures at our expense.

Our country can avoid war only by showing clearly that, while anxious to avoid war, it is willing and able to fight, if necessary; that within this Nation abides the will to fight for its security and its interests. We must be able to demonstrate that we are prepared to defend ourselves and what we stand for, that we will fully honor our commitments, and that we will stand up to any enemies.

We cannot do this from the reclining position. We cannot say, "If you start something with us, we will spring to arms," for there will be too little time to begin to get ready. We must be far more committed, far more dedicated, far more prepared than that.

Each time we have faced major war unprepared, we have barely gotten ready in time. In World War II it was months before we could act; in Korea it was weeks. In future wars, we will have only days to get ready. The costs of our being unprepared in the past have been atrocious. The Army is doing everything in its power to see to it that we do not have to pay that exorbitant price in lives and treasure again. With your support, we should not have to pay that price again.

I have faith in our country, and in its people. And of course, I have faith in our Army. We have met challenge upon challenge, at home and overseas in ways that only a Nation of great spirit could have met them. We can continue to meet these challenges if we are prepared for them, if we have the will to face them resolutely before they overtake us.

If we set ourselves to the task of preparing for war if it comes, of being ready to meet the challenge of war before it is upon us, we shall be achieving the real peace that men everywhere can understand, and that nations everywhere can respect.

A SINO-AMERICAN SOYBEAN RESEARCH INSTITUTE

Mr. HUMPHREY. Mr. President, over the past few years we have seen the spectacular rise of American soybean production. This is encouraging in light of the huge world protein needs. However, we are reaching a point where land available for growing soybeans is becoming limited. In fact, soybean production over the coming year is expected to decline as present land is directed into other uses. Unless we find ways of increasing the yields on available land, our protein deficit may become a protein crisis, as population growth and rising affluence create the demand for more and better food.

Many experts are now seeing nutritional problems more and more as protein problems. However, the ability to expand our traditional sources of protein is becoming limited. Our agricultural scientists have not been able to develop any commercially viable way of getting more than one calf per cow per year.

We are also beginning to find that the grazing capacity of much of the world's land is almost fully utilized. And, when you add to this the decline in the world's fish catch which we have been experi-

encing over the past few years, the prospects become all the more alarming.

Much of our hope for increasing the availability of protein is being placed on soybeans.

Vegetable proteins such as soybeans are much lower in cost than animal proteins since much less land space is required to generate a given amount of protein for vegetable proteins than for animal proteins. And as land prices skyrocket this difference becomes all the more important.

But our scientists have not been able to achieve a breakthrough in obtaining higher yields for soybeans. In fact, since 1950 we have only been able to increase our soybean yield by 1 percent per year.

If we are to meet the growing world demand for protein and adequate nutrition we must direct significant resources toward improving these yields.

Together the United States and the People's Republic of China produce about 90 percent of the world's soybeans. Much can be gained in joining with China in an effort to find ways to improve soybean yields.

In the October 19 issue of Science magazine, Dr. Lester R. Brown proposed a Sino-American Soybean Research Institute. I think that this is an excellent proposal and I am drafting legislation to effect it.

Mr. President, I ask unanimous consent that this article be printed in the RECORD.

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

A SINO-AMERICAN SOYBEAN INSTITUTE

Over the past quarter-century, soybeans have emerged as one of the world's leading sources of protein. In recent years, world demand for soybeans has been expanding by nearly 7 percent annually. If sustained, this rate of growth doubles consumption every 11 years. For a billion people in East Asia, soybeans are consumed directly, constituting an important dietary staple. For the affluent industrial countries of North America and Europe, they have become the dominant source of high-quality protein for livestock and poultry feed. As growth in the world fish catch slows, the pressure on soybean supplies intensifies further.

Perhaps the best single barometer of the increasing world demand for protein is U.S. soybean exports. The growth in exports has been phenomenal, climbing from a few hundred million dollars in the early 1960's to more than $2 billion in 1972. The value of U.S. soybean exports now exceeds that of any other product, including high-technology items such as computers and pet aircraft.

Future demand prospects for soybeans are very bright. Both growing populations and rising affluence are generating additional demand. The supply problem is somewhat less promising. The world protein market is being converted from a buyer's to a seller's market. Soybean prices in 1973 have been more than double the average price during the 1960's.

Agricultural scientists have not been able to achieve a breakthrough in soybean yield per acre of the sort achieved for most other important crops. Since 1950, yields of soybeans in the United States, where two-thirds of the world's soybean crop is produced, have increased just over 1 percent per year. This contrasts with nearly 4 percent per year for corn. As a result, most of the fourfold increase in U.S. soybean production since 1950 has come from expanding the acreage of soybeans. We get more soybeans by planting more soybeans. As of 1973, nearly 1 in every 6 acres of cropland in the United States is planted to soybeans.

Together the United States and mainland China produce 90 percent of the world soybean crop. With the cropland idled under government programs in the United States rapidly disappearing, and with the world dependent on the United States for 85 percent of exportable soybean supplies, this inability to achieve a yield breakthrough suddenly begins to loom as a rather formidable cloud hanging over the world food economy. The Department of Agriculture now projects a decline in the U.S. soybean crop in 1974 as other crops, especially cotton, compete for available cropland. Such a decline combined with continuing growth in the world demand for soybeans can bring only higher prices for soybeans and for livestock products produced with soybeans.

Within China, the remarkable achievements on the nutritional front are based in large measure on the extensive direct consumption of soybeans. If the production of soybeans in China continues to decline, as soybeans are displaced by the higher-yielding cereals, the nutritional gains of the past decade may be reversed.

These difficulties in raising soybean yields in a land-scarce world suggest the need for a much greater research and in particular for the creation of a Sino-American Soybean Research Institute. Since the soybean originated in China, it probably has the most diverse available collection of germ plasm, a vital asset in an expanded soybean research effort. On the other hand, scientists in the United States have expended a great deal of effort to devise better cultural practices and to make the soybean plant more productive. The critical importance of the soybean to both economies, not to mention mankind as a whole, and the pressing need to achieve breakthrough in yields of soybeans argues for a pooling of germ plasm, the coordination of research efforts, and the sharing of research results.

STATE AND LOCAL GOVERNMENTS SUPPORT FOR REVENUE SHARING: RESULTS OF ACIR HEARING AND ILLINOIS POLL

Mr. PERCY. Mr. President, the State and Local Assistance Act has now been in effect for nearly a year. There have recently been attempts to evaluate the success of Federal revenue sharing. I think that a honest examination of the program is necessary in the light of the fact that Federal revenue sharing is annually a $6 billion Federal expenditure. On October 11, 1973, the Advisory Commission on Intergovernmental Relations, of which I am a member representing Republicans in the Senate, held hearings to determine the impact of revenue sharing on State and local governments. I have also conducted a survey of Federal revenue sharing in the State of Illinois to obtain from local officials their opinions about the program. The results of the ACIR hearings and my own survey indicate an overwhelming support for Federal revenue sharing.

The Advisory Commission on Intergovernmental Relations hearings, under the chairmanship of Robert Merriam were very informative. Testimony was presented by five panels of leading State, local and county officials. While there is very wide support for revenue sharing, the program is not seen by these officials as perfect. They expressed great concern for the uncertainty of Federal financing. They need to know more precisely and earlier what Federal funds will be available to their localities annually. They therefore ask for an early renewal of the revenue sharing program in order to reduce uncertainty about it, a suggestion that I wholeheartedly endorse.

However, the officials do feel that revenut sharing has helped to arrest increases in State and local taxes. They offered mixed opinions about the extent to which the Federal Government should control the way in which the revenue sharing funds could be spent, but most officials testified that the "strings" on revenue sharing for priority expenditures are not an impediment to their operations under the program.

Another possible fault in the program is that Federal funds might forestall reform in government at the local level. These remarks, however, were not offered as attacks on revenue sharing, but only as constructive criticisms which were expressed in the hope of improving the program. The officials attending the ACIR hearings testified that revenue sharing provided funds for many programs which would have otherwise been impossible. They expressed the opinion that the continuation of Federal revenue sharing was desired, and even imperative for the survival of many local governments.

Independently of the work of the ACIR, I have sought information about the implementation of the revenue sharing program from municipal governments in Illinois by conducting a statewide survey. All levels of local government in the State were asked to indicate how they are spending revenue sharing money and also whether, in their opinion, they believe the program is effective. The questionnaire also asked them for their opinions and for suggestions about ways to improve the program.

Two hundred and nine governments responded to the survey. Of that number, 183 responded that the program is helpful and support its continuation. Thus, contrary to some claims, there is clear evidence that local officials want revenue sharing to continue.

The survey found that on the average, revenue sharing funds contribute 9.62 percent of the total budget of the responding governments, though revenue receipts of individual local governments varied widely around this mean.

With regard to the uses of revenue sharing funds, our survey indicated that 69 municipalities spent part of their funds on recurring expenses, while 120 spent their funds for nonrecurring expenses such as capital outlays and debt retirement. Only 20 spent their funds to replace "own source" revenues so as to cut local taxes. Twenty-five other governments reported that, without revenue sharing funds, they would have had to raise local taxes.

One hundred and fifty-five respondents believe revenue sharing allows them to plan better for future needs while only 25 believe that it does not. Several respondents indicated that their planning efforts have been hampered by the 5-year limit on the program. These

communities apparently are uneasy about making commitments based on resources which they have no assurance of having at the end of 5 years.

In reply to the question whether Federal revenue sharing "strings" such as priority expenditures, maintenance of State aid to local government, and prohibition on use as matching funds, are a serious deterrent to the best allocation of revenue sharing funds, 104 indicated that these "strings" are a deterrent, while 78 believe they are not.

If Federal requirements—even though limited—had proven to be an impediment—which the majority of respondents believe they are—I wanted to know whether the problem is caused by a lack of information or advice to city officials about use of their funds. One hundred thirty governments indicated that they needed no additional guidance from Federal agencies, while 55 responded that they do want more information. However, in many cases, government officials do not simply want more information, rather they need clarification and simplification of Federal program requirements. The extensive failure of local governments throughout the country to submit the reports required by law may be an indication of confusion about the requirements placed on them.

The survey also indicated that the availability of Federal revenue sharing funds has not substantially reduced the efforts of city officials to obtain Federal aid for specific programs. Only 27 responding officials had abandoned their efforts, while 150 had not. Governments indicated that the reason for continued application for Federal aid is that there is no assurance that Federal revenue sharing will continue.

The questionnaire also asked what former Federal aid programs might be supplanted by revenue sharing funds. Few governments responded to this question. Those that did said that revenue sharing is being used in place of Federal funds for open spaces, OEO programs, street improvement, and erosion control.

With no assurance of long-term continuation of funding, local officials seem to have three choices about how to use their money. First, they can spend the available money for secondary and somewhat less worthwhile projects which will not vitally affect the community if discontinued due to lack of funds. Second, they can save the money presently available, in the hope that it will accumulate enough interest to fund a worthwhile project completely. The third alternative is to do piecemeal work on important projects, some of which might never be finished if Federal revenue sharing is abandoned.

Aside from concern about the continuation of Federal revenue sharing, city officials complain about administrative problems. They see no reason for planning forms, penalties, and deadlines. They feel the Federal Government should only be concerned with the amount of money received by the municipality and the manner in which it is spent. They warn against additional red tape.

These comments, as with the criticism offered at the ACIR hearings, should not be interpreted as negative responses to revenue sharing. The fact that officials took the time to offer their opinions proves that they believe that Federal revenue sharing is a valuable program to them and worth working to improve.

Mr. President, I ask unanimous consent to include at the close of my remarks a list of the distinguished representatives of State and local governments who shared their experience with the Advisory Commission, and a survey of the results of my survey of Illinois local government officials.

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

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS—HEARING ON GENERAL REVENUE SHARING

SCHEDULE AND PANELIST LIST

Morning Panels—9:30 A.M. to 12:00 Noon

Georgia Officials

Governor Jimmie Carter.
Mayor James M. Beck, Valdosta.
Commissioner Gil Barrett, Dougherty County.

West Virginia Officials

Governor Arch A. Moore, Jr.
Delegate George Seibert, Minority Leader, House of Delegates.
Commissioner Dewey E. S. Kuhns, Kanawha County.
Mayor William Nicely, Parkersburg.

LUNCHEON

AFTERNOON PANELS—1:30 P.M. to 4:30 P.M.

National League of Cities—U.S. Conference of Mayors

Mayor Roman Gribbs, Detroit, Michigan.
Mayor Wes Wise, Dallas, Texas.
Mayor Alfred Del Bello, Yonkers, New York.

National Association of Counties

Mayor-President W. W. "Woody" Dumas, East Baton Rouge—Parish, Louisiana.
County Executive Louis V. Mills, Orange County, New York.
Commissioner Daniel Lynch — Douglas County, Nebraska.

Council of State Governments

Eugene Farnham, Legislative Fiscal Analyst, Michigan.
John Murray, Budget Officer, Rhode Island.
Leigh Grosenick, Federal-State Relations, Minnesota.
Lewis Stettler, Director of Fiscal Planning, Maryland.

REVENUE SHARING QUESTIONNAIRE—TOTAL RESPONSES 209

(1) What percentage of your total budget is comprised of money from federal revenue sharing? 9.62%

(2) Could you please list under the three designated categories how you have spent federal revenue sharing money and in what percentage: Total 208

(A) For recurring expenses in order to expand operating programs. 69 (34%)

(B) To replace "own source" revenues and thereby cut taxes. Please list what taxes were cut and by how much, by percent. Without federal revenue would you have had to raise local taxes even more? 20 (9%)

(C) For non-recurring expenses—capital outlay, debt retirement. 119 (57%)

(3) Does the money received from federal revenue sharing allow you to better plan for future needs? Total: 180 Yes: 155 (85%) No: 25 (15%)

(4) Do you consider the present federal revenue sharing "strings" (priority expenditures, maintenance of State aid to local government, maintenance on use at matching funds) a serious deterrent to the best allocation of revenue sharing funds? Total: 184 Yes: 106 (57%) No: 78 (43%)

(5) Do you need additional guidance or information from federal agencies in using revenue sharing funds? Total: 187 Yes: 56 (39%) No: 131 (61%)

(6) Have you abandoned or lessened your efforts to apply for federal categorical aid now that revenue sharing funds are being distributed? Total: 177 Yes: 27 (15%) No: 150 (85%)

(7) What former federal programs, if any, have you seen fit, since the reduction of federal aid to cities, to finance with revenue sharing funds?

(8) On balance, has the general revenue sharing program been helpful? Would you support its continuation? Total: 190 Yes: 183 (96%) No: 7 (4%)

(9) What suggestions have you for improvement of federal administration of the revenue sharing program?

BAD NEWS ON HOUSING STARTS—ADMINISTRATION HAS UPSIDE DOWN POLICY

Mr. PROXMIRE. Mr. President, the predicted sharp drop in housing starts and home construction came true yesterday when the Department of Commerce announced that new starts for homes and apartments for September were at a seasonally adjusted annual rate of 1.76 million units.

In 1972 we built 2.36 million units.

The drop this month represents a 15 percent drop over last month. It represents a 25 percent drop over the 1972 annual rate. It is the biggest monthly drop since February 1960.

But that is not all. Building permits which foretell from its shares, also fell by 8 percent in September over August and indicate a further annual rate of building private homes and apartments of 1.6 million units.

TIME TO FACE TRUTH

This discouraging news should jolt the administration into changing its negative housing policies. Here is the sad, sad plight.

First, because of the high interest rates, at least two-thirds of the families in the United States are now priced out of the new construction market. Average family income is about $11,000 a year. With that income, one should not pay more than $25,000 to $27,500 for a house. But $25,000 houses or apartments for a family of 4 or 5 are out of the question. They cannot be built for that price and with the present interest rates, the average family could not afford the payments even if they could be built for that price.

Second, mortgage rates are stickier than most other interest rates. That means that even if interest rates in general come down somewhat, there is no general easing of the high mortgage rates in sight.

Third, even if interest rates fall somewhat, the price of land and construction will continue to rise.

HOUSING CRUNCH IN THE OFFING

The country therefore faces a real possibility of another housing crunch. That's the hard, tough, sober truth. We now face another devastating housing crunch in which housing, almost alone,

is required to bear the overwhelming burden of fighting inflation.

In 1966 this happened with terrible consequences for housing and for families who needed housing.

In 1970–71 the country faced a similar problem. But in that year the Government housing programs, authorized in the 1968 Housing Act, were beginning to roll. Units built under public housing and the homeowners interest rate subsidy programs offset the decline in private starts and a housing crunch, with all its evil consequences, was avoided.

Therein lies a lesson.

ADMINISTRATION FOLLY

But the administration has either failed to learn that lesson or it is deliberately courting a housing disaster.

In the face of what every reliable forecaster has predicted would happen to private housing starts, the administration and HUD have suspended or terminated or abandoned the Government housing programs.

Last January they suspended or ended 15 HUD programs and 4 Farmer's Home Administration programs.

When the President's Housing message finally came to the Congress in late September, no constructive alternative program for housing construction was proposed. Instead we were told to wait until 1976 when a housing allowance program might possibly be recommended. And, as most experts agree, a housing allowance program, even if put into effect now instead of 1976, would most likely bid up the rents and prices of existing housing units rather than to stimulate production of new units.

This was a formula for disaster. Now the housing disaster is upon us.

There is no housing for low-income families. New public housing starts have been stopped.

There is no housing for moderate-income families. The home ownership interest rate program has been abandoned.

And, because of the high interest rates, there is now no housing for middle-income families and many upper middle-income families who traditionally have been able to provide for their own housing through the conventional private housing market.

URGENT ACTION NEEDED

The drop in conventional housing starts in September and the drop in new building permits, which forecasts the future, should lead the administration to abandon its foolish policy of freeze, suspension, and termination.

What we need are two things:

First, we need programs and policies at the Federal Reserve Board to make certain that funds are available in sufficient quantities so that housing, small business, and State and local governments do not once again have to bear the overwhelming burden of a credit crunch.

Second, we need an immediate revival of the HUD and Farmers Home Administration programs at levels sufficient to offset this huge decline in private starts.

I hope the administration will act, and act soon. In the meantime I intend to propose just such action to the Senate Banking, Housing, and Urban Affairs Committee when we begin our markup sessions in the next 2 weeks.

IRV KUPCINET

Mr. PERCY. Mr. President, Irv Kupcinet is a name synonymous with the lively world of entertainment, the arts and politics. As a syndicated columnist for the Chicago Sun-Times, Kup is known for his incisive brand of reporting. As host of Kup's Show, a syndicated television discussion program, he is known for his provocative conversation.

This Sunday Kup will be honored in Chicago for another aspect of his career and personality that often escapes public attention—his deep concern for the welfare of others. Kup will be the guest of honor at a national tribute sponsored by the Weizmann Institute of Science in Rehovot, Israel. The tribute will mark the establishment of an international student program at the Institute in honor of Karyn Kupcinet, the late daughter of Irv and his wife Essie. Under this program, 150 graduate students from throughout the free world will gather for one month a year at the Weizmann Institute to share their scientific knowledge.

I can think of no finer tribute to Karyn Kupcinet than this outstanding program. It also is a tribute to Irv and Essie Kupcinet for their unselfish support of worthwhile causes.

AMERICAN REVOLUTION BICENTENNIAL LEGISLATION

Mr. KENNEDY. Mr. President, I am delighted that the Senate has acted favorably on H.R. 7446, a bill establishing the American Revolution Bicentennial Administration. For the first time in 7 years, we can have real hope that the organizational difficulties which have plagued the National Bicentennial program are at an end. The Bicentennial Administration which is established in this legislation will have clear lines of authority, adequate funding, and direction and purpose in outlining a program of national celebration of the American Revolution.

Even more importantly, this legislation will provide matching grants to the States for their individual bicentennial programs. The Judiciary Committee adopted my amendment to provide up to $400,000 to each State on a matching grant formula. These funds will allow each State to decide how it wants to celebrate the anniversary of the American Revolution and to what extent it wishes to commit funds for this purpose.

In Massachusetts we are particularly fortunate to have both a State Bicentennial Commission and the city of Boston, Boston 200 program which have demonstrated commonsense and initiative in approaching the celebration of our bicentennial. In Boston and throughout the Commonwealth, Massachusetts residents will welcome visitors from other States to join with them in the celebration of the struggle for freedom 200 years ago.

There will be no carnivals for the bicentennial in Massachusetts. The city of Boston and the Commonwealth of Massachusetts will be the showcases of the American Revolution. Throughout the city of Boston and all over the Commonwealth, the historic landmarks of the American Revolution will serve to remind visitors from across the Nation of the difficult and costly sacrifices the early Americans made to insure freedom for us and for our children.

In Boston recently we had the opportunity to hear from the owners of historic sites, from State and city officials, and from private citizens regarding expected visitor increases in 1975 and 1976 for the Bicentennial. Legislation which I introduced to restore and preserve the Revolutionary War landmarks in Boston hopefully will be acted on soon in the Senate. But beyond the problems of restoration and maintenance of historic sites, there remain the problems of providing essential services for the Bicentennial visitors.

I ask unanimous consent to insert in the RECORD the city of Boston's cost estimates for these services.

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

COST OF BOSTON'S SELF-DEFENSE PROGRAMS

A. Information and Hospitality Services:

Information Centers, central accommodation system for commercial and non-commercial overnight space, information pieces to assist visitors, extra signing, etc., Total Projected Cost, $2,400,000.

B. Emergency Services:

1. Medical Stations.
2. Mobile Medical Station.
3. Misc. Emergency Services.

Total projected cost, $500,000.

C. Environmental Impact Programs:

Extra cleanup for all important historical sites (Boston Common, Garden, Bunker Hill, Faneuil Hall, etc.). Self-defense planning and extra sanitation facilities for important areas. Extra police and other security details during peak periods (July 4, Bunker Hill Day, etc.).

Total projected cost, $3,750,000.

D. Institutional Self-defense:

Planning and implementation of extra facilities and manpower to handle increased visitor flow.

Total projected cost, $1,100,000.

Total projected cost, $7,750,000.

Mr. KENNEDY. Mr. President, as I indicated H.R. 7446 includes my amendment to authorize matching grants to the States so that they may decide for themselves what kind of Bicentennial program to launch. This is the kind of partnership between Federal and State governments which assures both adequate funding for and community participation in our Nation's 200th birthday celebration. It is the kind of constructive Federal involvement which recognizes that the States are in the best position to implement a program uniquely suited to their needs. It is the kind of legislation which makes sense, which is adequate without being exorbitant, and which guarantees that after the Bicentennial celebration is over, we will not have to appropriate emergency funds to the States to recover from visitor impact.

The Senator from Nebraska has done

an outstanding job in shepherding this important bill through the Senate, and I believe the amendments added to the House bill reflect a positive contribution to this legislation. I commend Senator HRUSKA for his energetic commitment to breathing a new vitality into our American Revolution Bicentennial celebration.

OCTOBER 14 TO 20 MARKS NATIONAL SCHOOL LUNCH WEEK

Mr. PERCY. Mr. President, this week marks our annual observance of National School Lunch Week. It seems fitting that the Senate should complete work this week on an amended version of the conference report on our latest set of amendments aimed at perfecting the National School Lunch Act.

All Members of the Senate and the House of Representatives are aware of the very fine work done by the members of the American School Food Service Association in preparing and delivering hot nourishing meals to over 25 million schoolchildren daily.

Together with the USDA's Food and Nutrition Service, the 60,000 members of ASFSA are attempting to use the National School Lunch Week theme of "You Are What You Eat" to carry a nutrition education message into school cafeterias across the land.

The typical type A meal served in the school lunch program provides one-third of the minimum daily requirement for each student. It offers a balance of needed vitamins and minerals and supplies the correct number of calories needed for each age group that the school lunch serves.

I want to take this opportunity to salute the thousands of dedicated persons who make the national school lunch program such an important part of our war against hunger and malnutrition. And I want to commend the ASFSA for the very effective work they do year in and year out to make the Congress aware of its obligation to assure adequate nutrition for this Nation's schoolchildren.

Mr. President, all of us can take great pride in the accomplishments of our school food service programs.

I ask unanimous consent that the splendid remarks of Dr. Clayton Yeutter, Assistant Secretary of Agriculture, before a luncheon in Atlanta, Ga., launching National School Lunch Week be printed in the RECORD.

There being no objection, the remarks were ordered to be printed in the RECORD, as folllows:

NATIONAL SCHOOL LUNCH WEEK

(Address by Assistant Secretary of Agriculture Clayton Yeutter)

It is a great pleasure to join in your first annual kickoff luncheon for National School Lunch Week. The occasion is doubly significant because it also marks the 30th anniversary of school lunch in the Georgia Department of Education.

What better place to hold today's event than in Atlanta, the home of the Braves. You can be justly proud of your baseball team, not only for their home run prowess, but also because of their enthusiastic cooperation in lending support to child nutrition programs. While the Braves' Hank Aaron has been building toward a record in home runs, he's also been making a record for himself as a school lunch booster. He and several of his teammates have recorded numerous radio messages spotlighting the nutritional benefits of the National School Lunch Program. Many of you have no doubt heard them on radio urging parents and kids to get in on the good nutrition of school lunches. Coming from sports idols, this message is sure to have impact.

Let's play one of the tapes now:

"This is Hank Aaron of the Atlanta Braves with an important message for young people. Nutritious, low cost lunches served at school under the National School Lunch Program help you grow strong and stay healthy. That's why it's a good idea to eat lunch at school everyday. For better health, make lunch at school a habit."

You can't beat that for good sound advice, from an authoritative source. He's right on target with this year's school lunch week theme: "You Are What You Eat." Who can be more persuasive on the relationship between good food and fitness than a top athlete who's on his way to setting a new all time home run record? Let me take this opportunity to say a special word of thanks to Hank Aaron and all the other members of the Atlanta Braves who raised their voices in public support of National School Lunch Week—Marty Perez, Daryl Evans, Phil Niekro, Dusty Baker, and Ralph Garr. We appreciate what they've done and I know that countless children and parents add their thanks too.

As evidenced here today, school lunch is truly a community affair, requiring the talents and support of people at all levels of Government, the private sector, civic, professional, and voluntary groups. Recognizing this, President Nixon, proclaiming the twelfth annual National School Lunch Week pointed out that "... Since its inception the National School Lunch Program has worked in partnership with State and local communities, providing food, funds and technical assistance to establish the largest and most comprehensive child nutrition program in the world." He urged that "the people of the United States" take this opportunity "to give special and deserved recognition to the role of good nutrition in building a stronger America through its youth."

Though the subject of nutrition has been receiving increased attention in recent years, it is important to recognize that 27 years ago, thoughtful people of good will—particularly Georgia's late Senator Richard Russell—realized that children need good solid meals and balanced diets. The basic philosophy and approach as outlined in the original National School Lunch Act of 1946 still stand:

". . . to safeguard the health and well-being of the Nation's children and to encourage the domestic consumption of nutritious agricultural commodities . . . by assisting the States through grants-in-aid and other means . . . for the establishment, maintenance, operation, and expansion of nonprofit school lunch programs."

In the years since the Act became law, the National School Lunch Program has grown tremendously in scope and emphasis until it is now commonly agreed that the program is making a major contribution to the health and learning power of the children of America.

It is now available to 43 million, or 85 percent of the Nation's 51 million children enrolled in public and private schools. As recently as 1968 just 73 percent of our school children had access to the National School Lunch Program.

Along with expansion and growth has come increasing emphasis on assuring that needy children who can't afford the regular price of lunch are served free. Since 1969—the year President Nixon launched his all-out drive against hunger and malnutrition—the number of needy children reached has more than doubled to a current level of 8.8 million.

School Food Service added a new dimension during the last half of the sixties—the breakfast program, which has grown steadily until it now helps some 9,000 schools serve nutritious breakfasts to over a million youngsters.

On another front, the five-year-old summer food service activity helps span the nutrition gap for needy children when schools close down for summer vacation. This year we reached a peak of 1.7 million youngsters with that program.

Thus, school lunch, over its 27 year history, has broadened its horizons to encompass a comprehensive series of child nutrition activities now operating at a Federal cost in the neighborhood of $1.5 billion annually. The school lunch program remains the oldest and largest of these, built on a solid foundation of teamwork by Federal, State and local governments. In recent years the Federal share of contributions to the school lunch partnership has grown from a modest 24 percent four years ago to more than 40 percent of total program costs presently. Contributions from State and local revenues are up, but not significantly in proportion to the size and needs of school lunch service today. In my view, State and local governments need to take a stronger role in this partnership. Georgia just raised its State contribution from 2½ to 4½ cents a lunch. We need to see a lot more action like this.

We're talking about a network of 86,000 school lunch programs, operating at a combined annual cost of around $3 billion a year, representing the largest single food service network in the world. The food bill alone approaches $1.8 billion. Another major factor is the salaries and wages of some 350,000 school food service employees across the country. These figures give you some idea of the major impact of the school lunch program—not only on the nutritional health of children—but also on the Nation's agriculture, in fact on the total economy.

The National School Lunch Program is where it is today because of the vision and understanding of such national leaders as Georgia's Senator Herman Talmadge, the distinguished chairman of the Senate Committee on Agriculture and Forestry. The program has the strong support of Secretary of Agriculture Earl Butz and his Undersecretary Phil Campbell.

Unquestionably, the success of school lunch in Georgia has a lot to do with the State Department of Education's 30-year-long commitment to the program we honor today. Leadership is of paramount importance and you have two of the best in Jack Nix, State Superintendent of Schools and Josephine Martin, School Food Service Administrator. We feel particularly fortunate in having Josephine Martin as a charter member of the National Advisory Council on Child Nutrition, which I chair as Assistant Secretary of Agriculture.

Those of us who have responsibilities for American agricultural policy have been greatly concerned about recent imbalances in food distribution and prices and the effects these circumstances are having on school food service programs. We are doing everything possible to minimize the impact of these changes on schools—as American farmers expand production to meet domestic and worldwide food demands and move toward a maket-oriented agricultural economy. We are all well aware that the school lunch programs—while providing good nutrition—also help teach proper food habits to children during their formative years, toward the day when they become food shoppers in their own right. Pursuing this natural association, the Georgia Department of Education has a contract with us at USDA to ex-

plore the relationship between classroom nutrition training and lunchroom experience.

There is no question but that a firm and growing demand base is the foundation of a sound and productive agriculture. Nowhere is that more evident than here in Georgia, home of one of the Nation's outstanding lunch programs. Some 850,000 youngsters take part on a daily basis, running up an annual food bill of $50 million. Those purchases are made right here in the State with major emphasis on food produced by Georgia farms.

Farmers in your State, incidentally, also supply impressive amounts of food to nationwide family assistance and child nutrition programs. Last year, for example, the USDA bought 65 million pounds of poultry, peanut butter and all-purpose flour from Georgia suppliers. Of that, 35 million pounds was Georgia-processed peanut butter—going to child and family feeding programs across the country.

While food supplied by us makes an important contribution to school lunches, it represents only about 20 percent of the total amount used in the national program. The other 80 percent is bought from local suppliers, clearly indicating that the greatest impact of school lunch purchases is on local economies.

For example, Georgia is the Nation's second largest producer of both poultry and eggs. Last year your schools bought 12.8 million pounds of poultry and 5.3 million dozen eggs for school lunch programs. The grocery list also includes 79.8 million pounds of fruits and vegetables and 210 million half-pints of milk—obviously providing a major market for Georgia agriculture. Conversely, the availability of home-grown food is a boon for Georgia schools.

Clearly, your school lunch program is one of the best in the country. Latest figures indicate that 99.9 percent of Georgia's public school students have access to the National School Lunch Program. On a regular basis—81 percent of your students choose to take advantage of what has to be the best nutrition bargain available.

We're conducting two important drives right now in an attempt to borrow from the knowledge and experience of States like Georgia to strengthen school lunch programs in other areas. Our hope, of course, is to reach many more students who should have the opportunity and proper encouragement to take part in school lunch programs.

First we have a concerted drive on, working with school officials across the Nation, to make school lunch programs accessible to the nearly 5 million children attending schools still without any food service. Of these youngsters, 2.3 million are in parochial or other nonprofit private schools; the remainder are in public schools. There are solid indications of progress in this effort, thanks to the help and cooperation of many concerned organizations. Among them are the U.S. Catholic Conference, the Women's Auxiliary to the American Medical Association, the American Legion, and the Jaycees with their newly-announced coalition of national organizations. With this kind of broad support we hope for impressive results over the next several months.

On another front, while the national rate of student participation in the lunch program advances every year, many students—especially at high school level—still choose not to take part. We have been working closely with schools over the country to learn the secret of attracting teenagers to the lunch program. Our study showed there's really no secret to winning over high schoolers. What is required is a combination of such key factors as school administration support, student involvement, and good "selling techniques." Currently, we're moving to encourage schools with low participation to study and adopt some of the techniques that have found success in States like Georgia, where school lunches contribute to the nutritional well-being of students at all age and economic levels.

Because of your leadership, it is especially appropriate that as school lunch week opens we come here to salute the National School Lunch Program as a potent force in American society. Congratulations on your 30th birthday!

THE CLASH OF SECRECY AND FOREIGN POLICY

Mr. PROXMIRE. Mr. President, Nicholas deB. Katzenbach, former Under Secretary of State and Attorney General, has authored an extraordinary article in the October 1973 issue of Foreign Affairs.

It is extraordinary because it links the tragedy of Watergate with testy question of deliberate Government secrecy. He argues that U.S. Presidents have been the prisoners of the cold-war view of politics which in turn led to the "virtual impossibility for any President to be candid about the costs and risks of our foreign policy." Thus, the American public has been denied the right to influence decision-making by making rational choices of alternatives presented to them.

It is the problem of secrecy that inhibits debate over foreign policy, the demand for justifications, and the isolation of viable alternatives. The power to conduct foreign policy has slipped more into the hands of the Executive Department and with that has come a series of national disasters unparalleled in our history. The Bay of Pigs invasion, the Tonkin Gulf incident, the Vietnam War, are examples of major foreign policy issues decided in the darkness of secrecy. We have given up the traditional American cry for participation and justification. We now accept ignorance and argue over the few "facts" made available by a hostile and suspicious Executive Department convinced that only it knows best for the country.

Mr. President, the Katzenbach article does not leave us at this point, as do so many other analyses. It continues by offering a series of recommendations.

KATZENBACH RECOMMENDATIONS

First, the President must welcome and encourage the support of the American public and the Congress of public discussion and criticism of his foreign policy proposals. Secrecy must be dropped as a political compromise as in secret consultations with limited numbers of congressional figures during meetings with "watchdog" committees which Mr. Katzenbach typifies as doing more "dogging than watching."

Second, the personnel and techniques that are employed in foreign policy decisionmaking must be made public.

Third, we should abandon publicly all covert operations designed to influence political results in foreign countries.

Fourth, we must minimize the role of secret information in foreign policy.

Mr. President, this article cannot be overlooked. It contains too much that is useful. I commend it to the attention of my colleagues.

Mr. President, I ask unanimous consent that the Foreign Affairs article and my CIA bill S. 1939, together with my statement on it, be printed in the RECORD.

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

[From Foreign Affairs, October 1973]

FOREIGN POLICY, PUBLIC OPINION AND SECRECY

(By Nicholas deB. Katzenbach)

What foreign policy will arise from the ashes of Watergate—and how it can gain that public consensus without which no foreign policy can hope to succeed—are questions we need to address now. Drift, debate, division are the inevitable aftermath of recent events; and it will take time and leadership—both in short supply—to discover, to create and to build upon a viable consensus.

The problem, of course, is not simply Watergate—though the destruction of presidential leadership and credibility and the confrontation of Executive and Congress which have accompanied that disaster would be problems enough. What adds infinitely to those difficulties is the clear connection between the sordid revelations of Watergate and the conduct of the Indochina War (at home and abroad), which in turn is related to the sometime excesses of a foreign policy too oriented to cold-war concepts of "national security." The relationship is neither accidental nor coincidental, and it is important to the future of our foreign policy to understand why this is so.

I have come to this conclusion with considerable reluctance for two reasons: First, I would feel personally more comfortable if all that is associated with Watergate could be blamed on President Nixon—if the lawless and totalitarian overtones of his administration could be seen as purely aberrational, without roots in the past. To a large degree I think they are, but unhappily they are not so rootless as I would wish.

Second, I can give no support either to Henry Kissinger, who understandably would like to segregate Watergate from the real need to consolidate and perhaps even institutionalize the Nixon administration's productive advances in moderating our relations with the Soviet Union and China; or, at the opposite extreme, to the revisionists who rewrite the history of post-World War II foreign policy in ways which adjust the past to their present and future preferences. We have to go through a difficult period if we are to build, as we must, on a solid basis of popular support for our foreign policy, and the essentials of that task are candor and honesty.

The thesis of this article is simple. Our foreign policy must be based on policy and factual premises which are accepted by the overwhelming majority of the American people. This means that this President or his successor must reestablish the credibility of that office; that there must be broad support in the Congress and in the press and public for the policy he seeks to forward, and virtually total confidence that there is no manipulation of facts to prove the wisdom of that policy or, which may often be the same thing, the honest commitment of his administration to it. Today—when confidence in the honesty and integrity of both the President and the Presidency is at rock bottom—that is a big order. We may have to modify or abandon foreign policy objectives supported by many to arrive at a satisfactory level of public confidence. But until an Administration can achieve it, we cannot hope to succeed in any foreign policy, however modest it may be by comparison with either the recent past or the somewhat lesser role which the United States might legitimately be expected to play in the future.

II

In foreign policy there is no substitute for presidential leadership in formulating and

administering our foreign affairs. To say this is not to denigrate the role of either Congress or the public. The President needs support in both quarters, and if, despite his considerable power, he cannot achieve it, then he must trim his objectives to those which will be supported. In the past this basic fact of democracy has undoubtedly restrained and inhibited Presidents from acting in circumstances where later judgment would have supported the wisdom of doing so; the experience of President Roosevelt between the 1937 quarantine speech and the 1940 election was a classic and bitter example to men and women then forming their views. Indeed, this unhappy restraint may well have been a factor in the subsequent assertion of presidential prerogatives, with the result that no President since Truman has felt similarly restrained.

At any rate, the pendulum has now swung back. In recent history—especially in regard to Vietnam and related events in Southeast Asia—the effect of broadly held public views on our foreign policy has been very great indeed. This is hardly surprising. Concern for our national safety and independence are bound to be strong in times of crisis. The influence on the public of a sense of extremely large and unnecessary costs in human lives, or dollars, or risks of even more massive future involvement, is almost as great. One should hardly expect these powerful sources of public motivation, channeled at any given time into particularly widely held attitudes about the outside world and our relations with it, to be anything less than a major determinant of foreign policy in a democratic society.

There is nothing subversive about all this—although it may appear so to a President thoroughly committed to the importance and rightness of a particular course of action. Vocal and widespread dissent may easily frustrate his policy; damage our national security as he perceives it; severely limit his capacity to lead; and encourage the view that such opposition is truly subversive, the work of our enemies, and something to fear and even seek to repress.

Yet in fact the expression of dissent, however vocally vehement, is fundamental to the functioning of our democracy. Those responsible for the creation and execution of our foreign policy must be responsive to public attitudes and cannot seek to repress dissent and disagreement, conceal the truth from the public, or violate the letter and the spirit of the Constitution. There is no "country" whose interests they serve apart from the people of the United States. There are no "interests" of that country apart from the interests of its citizens. However difficult and complex our foreign policy may be, there is no license to free it from the mandates of the Constitution or the constraints of public views, interests and wants, any more than any other difficult and complex problem can be freed from the same constraints.

All of this ought to be self-evident. That it is not—or, at least, that Presidents, and especially the present Administration, do not appear to accept it in fact—is the product of history, of the problems of a relatively open foreign policy, and finally of the rationalizations for secrecy, deception and unrestrained presidential leadership which have resulted from our conduct and national attitudes during the cold war.

First, throughout most of our history the American people have had little concern with foreign policy: there has been no continuing, everyday, costly involvement in relations with other nations. Apart from two world wars, foreign policy had little effect on our daily lives. With the notable and important exception of its negative role between those wars, Congress had little involvement and little interest.

Continuing and widespread public concern over our relations with other countries is really a phenomenon of the last 25 years. Measured in terms of even our relatively short history as a nation, we have not had much time to gain experience or adjust our political institutions to this new state of affairs.

Second, we were thrust into world affairs after World War II in an atmosphere of continuing crisis and virtually total responsibility for the future and well-being of the non-Communist world. We perceived the Soviet Union and its satellites as a major threat to our values, our national security and the continuing existence of a "free world"—and hence to our own national survival. In general, with disagreement only in degree, this view has prevailed until very recently. It may have been painting international affairs with too broad a brush, but I do not think it was essentially wrong, and I believe that the foreign policy which evolved from this thesis was by and large successful until 1965, even in cases where its stated premises were questionable.

As a touchstone of domestic politics, this policy had its vices as well as one great virtue—the capacity to unify Americans behind an expensive, tough, far-flung foreign policy. The Truman Doctrine, the Marshall Plan, the rehabilitation of West Germany and Japan, NATO, the Common Market, military assistance, Point Four and economic assistance to developing nations, even our Latin American programs—many of them policies of high humanitarian content and internal motivation—all were justified, to Congress especially, in terms of national security related to the threat of world communism backed and encouraged by the Soviet Union.

The vices of this policy—of what became a bloated concept of national security—have been that it has tended not only to overextend our national commitments but to inhibit public debate and understanding of the complex world in which foreign policy is made and executed. It has, of necessity, given a major voice in foreign affairs to our large military establishment, and for much of the past 25 years there has been a tendency to equate dissent or criticism with disloyalty, with subversion, with being a Communist "dupe." Obviously this repression of dissent reached its peak after the "loss" of China and during the era of the late Senator Joseph McCarthy. But appearing to follow the Communist line has been a political risk for critics during most of this period. And, again because of its "national security" premise, the policy has bred a host of questionable practices relating to security clearances, systems of classification of information, lists of subversive organizations, and snooping by security agents into the background, beliefs and associations of many citizens. It is not too long a step from security practices of the past to the ridiculous beliefs of the Watergate "plumbers" and their creators, and to the acts they sought to justify in the name of national security. Indeed—and I think this is a major part of the problem—very little of the protest activity associated with Vietnam would have been tolerated in the 1950s, and repressive measures might well have been accepted by the general public not so long ago.

III

But I think the most dangerous part of our foreign policy of containment of communism has been the extent to which it has made our Presidents prisoners of popular political passion. Any foreign policy—and certainly one as global as that of the United States—involves inevitable trade-offs among the various costs we must pay for our security and well-being. Some mix of dollar costs, lives, nuclear risks, and risks because of changing allegiances of governments and populations is the daily gruel of those who seek to decide. Dollar costs can be reduced by a policy of massive retaliation, accenting increased nuclear risks. Both costs and nuclear risks can be reduced if we are willing to tolerate the loss of various allies or of influence in countries of marginal importance to us. But costs there will be, and trade-offs will continue to be the grist of our foreign policy. Yet the public has never been made aware of this central fact—and only after the price of Vietnam became so totally unacceptable have many become aware of the costs implicit in our foreign policy as it has stretched down the years and over space from its origin in the time of the Truman Doctrine.

Thus, since China and the McCarthy aftermath, no President has been politically willing to question the basic objective of no loss of territory to Communist regimes—to admit that such an objective cannot be absolute and that it may involve excessive risks of nuclear war or unacceptable costs of limited war (as it did in the end in Vietnam and might well have done in Korea as well). Accepting that objective as all-controlling, we have promoted it by our economic and military aid programs, by our systems of alliances, and to a limited degree by covert activities. We have seen dominoes not only in Southeast Asia and in Greece and Turkey, but also in Africa and Latin America. We have hoped that we could deter and prevent loss of territory by shoring up friendly regimes, giving them the military means to prevent subversion and the economic means to claim progress and prosperity. We have not been able to be selective in the process—as we should and could have been. Our selectivity has been dictated more by crisis than by purpose or policy; wherever the danger of Communist take-over existed, there went the dollars and the arms.

Again I do not suggest that, in the reality, this fire-fighting principle was either all good or all bad. I do suggest that it was motivated as much by the fear of the domestic political consequences of any "loss of territory" to communism as it was by serious security calculations. Legitimate concerns about Soviet expansionism and subversion were converted, after China and the Korean War, into domestic political fears of the consequences of a Communist take-over in Cuba, the Dominican Republic, Guatemala, Chile, the Congo, Tanzania, Iran, Vietnam, Laos—the list goes on and on. Since the Communist techniques of subversion, assistance to revolutionary groups, propaganda and exploitation of legitimate complaints have been extremely difficult to thwart or deflect by traditional diplomacy, we have often been forced, for better or worse, to give overt economic and military aid to repressive regimes. Worse yet, we have had to resort to covert means to blunt revolutionary movements aided and abetted by covert Soviet (and Chinese) funds and assistance. We have been forced to deny publicly—almost by definition—the covert assistance, and to defend the overt aid in terms of some threat to our national security—or worse, the democratic aspirations of dictators. Since the threat was often less than obvious—probably based on the assumption (not entirely unrealistic during the early part of the cold war) that Communist governments were totally subservient to Moscow—we reinforced by our words and actions the concept that any "loss of territory" anywhere was a potential threat to the United States. Everything we did tended to confirm the common perception that any adverse result was a disaster for the United States—thus making it a serious potential political disaster to the Administration that let it happen.

My purpose here is not to seek to disentangle the real from the imagined. My point

is that no effort to do so was politically possible. Every President felt threatened by any Communist success anywhere, and took steps—some, at least, excessive in retrospect—to insure that the blame was not his. He operated in a climate of opinion where to be "soft on communism"—to lose anywhere, any time—was a serious blow to his status at home. And Presidents acted accordingly.

I have said that Presidents became the prisoners of the cold-war view of politics, even though each also contributed to it. The general public and congressional perception of the cold war—and, incidentally, of an exaggerated American power to influence and control events—made it virtually impossible for any President to be candid about the costs and risks of our foreign policy. The "China syndrome"—the aftermath of Joe McCarthy—meant politically that it was easier to accept the premise of "no loss of territory" in the hope that his Presidency would not be called to account than to attempt to gain public and congressional acceptance that the premise might involve unacceptable risks and costs. There was no hope—perhaps no time without crisis—for a public debate in the 1960s about the premises of the 1950s. Could President Johnson have permitted a Communist take-over in the Dominican Republic or in Vietnam, stating that he did not regard "friendly regimes" as important enough to our foreign policy to warrant military intervention? Was the American public prepared for such a statement? And was it, on the other hand, prepared for the costs which Vietnam demanded?

IV

In a sense, all of this political exposition is prelude to the major point of secrecy. But it is, I believe, tremendously important to the understanding of why we are where we are.

In our political system the President enjoys—or suffers—enormous advantages of leadership. His is an extremely difficult role to share, and to a considerable extent the advantages interact with the problems, one upon the other, to cripple the political system. His principal advantage is that the general public—even the best-informed public—views the world beyond our borders as confusing and dangerous. In the mass of information that flows to us each day, it is harder and harder to tell the players and the teams without a program.

To the extent that the average citizen is confused, he tends to place his trust in the President and in the experts. The feeling of danger—reduced and diffuse today but still very much present—brings with it a strong sense of the necessity for teamwork under a united leadership. And so the President operates from a protected position behind the high wall of the public's desire to delegate trust to one man—a wall built, on the one hand of feelings of danger and confusion, and, on the other, of the fact that the President, as our nationally elected leader and our "sole voice" in foreign affairs, is the natural recipient of that trust. An opponent who would attack the President's leadership must first convince the public to endure the feelings of danger and uncertainty that come when trust and confidence are taken from the President. And that is a risky political endeavor.

Unfortunately, Presidents are inclined to think this blind trust in their wisdom is wholly justified. Having almost sole access to the full range of classified information and expert opinion, Presidents are tempted to think that the opinions of Congressmen, academics, journalists and the public at large are, almost unavoidably, inadequately informed. It is too easy to conclude that the opinions of others lack essential knowledge and that unequal information and unequal background make their views less important. The subtle insights of specialists or classified pieces of information are often accorded a totally undeserved attention and importance in comparison to more widely shared insights and knowledge.

All this reduces the politically healthy feeling of being constrained by the disagreement of many of one's peers. But that might not be particularly serious if the President and the executive branch were bias-free and single-minded in their desire to produce results representing the long-run preferences of the American public. Unfortunately, neither of these conditions is likely to prove true.

For there are biases built into the position of the President—and the advice he receives—that are likely to lead to departures from the needs of the country as perceived by others. For one thing, the very factors which reduce the value of the opinion of others on tactical questions have a way of spreading to questions of basic values. There is a tendency to assume that such fundamentals as the amount of dollar cost the public will bear to reduce nuclear risks, or the loss of lives that we will bear to avoid a particularly offensive weapon, are technical decisions for experts—although these decisions plainly involve only value judgments, not specialized knowledge, once the choices are fairly laid out.

The problem is further complicated by the fact that Presidents in recent years have become increasingly enamored of their role on the stage of world affairs and are likely to resist a more limited role even if the public were to assign it to them. Presidents want to secure an honored place in history and feel that the scope of American power, prestige and influence is a crucial aspect of a historian's memory of their terms of office. This can be a heady business. It is compounded by the relative freedom that the President has in foreign affairs—freedom from annonying congressional restraints and freedom based on the generalized need of the public for unitary leadership in times of danger. It would be going too far to say that a President welcomes a Cuban missile crisis or a Six-Day War in the Middle East. But it would not be going too far to say that the Presidency thrives upon it, as the Nixon Presidency has thrived on his televised visits to China and Russia.

All of these pressures make a relatively retiring presidential role less likely whatever the public interest. When they lead a President to costly or risky policies with which much of the public cannot identify its interests, or which seem to exceed the discretion required by the danger, these biases can cause the President to lose that basis of popular support on which he necessarily relies.

Over the years, then, we have moved farther and farther away from the basic premises of our democratic political system to put important decisions on foreign policy in the hands of the President and, in effect, to charge him with its successful administration. Our almost total reliance on the President's leadership and accountability; the felt need to fight insurgency with counter-insurgency, often secretly; our unwillingness to test foreign policy initiatives in the ways in which we test domestic policy proposals—through debate and discussion; the appeal of "national security" as sufficient justification for a vague and extensive foreign policy; and, most of all, the fear of the President that his political popularity, his place in history and his capacity to lead all depend on not having another China, or Cuba, or other major loss to communism—all these considerations tempt a President to go it alone in the hope that the policy will succeed. The temptation to let the end justify the means is clearly present, even if the means requires dissembling or misleading the Congress and the American people. Such conduct can, in the environment of the recent past, be rationalized as necessary to maintain that secrecy on which success depends. And, after all, it is unlikely that the President's honesty and good faith will be brought effectively into question if the policy is successful.

The Bay of Pigs debacle of 1961 is an illustrative example. The idea that, in an open society, one can expect to launch a covert attack on a neighboring country in total secrecy seems patently absurd. For that adventure there are only two explanations: Presidents Eisenhower and Kennedy must have assumed, first, that the public would not require a political accounting of the authority of the President to act in secret without formal Congressional authorization or knowledge; second, that total failure of the operation was improbable, and that the secrecy essential to its success could be maintained for a sufficient length of time. And I suspect that President Kennedy, despite his obvious reservations about the whole plan, was extremely reluctant as the incoming President to cancel a project initiated by his prestigious predecessor in view of the domestic political risk which that would involve.

The significant aspect of this incident is the fact that President Kennedy's *mea culpa* related to the failure of the mission, and the later investigation into how the President could be so misinformed. He felt no need to apologize for undertaking so extensive a covert activity on presidential authority alone.

Was the Bay of Pigs different in kind or quality from the secret bombing of Cambodia (and falsification of records) at President Nixon's direction? True, in the first case there was complete candor after the event, but in both cases the element of total secrecy was overriding at the time of action, because it appeared necessary to achieve what the President (and many others) regarded as legitimate foreign policy objectives. But, however justified by such necessity, secrecy destroys our democratic process when it also deceives the American public on important and controversial matters.

There have, of course, been other covert operations, though perhaps none so extensive as these. Operations in Laos and Thailand were more or less open secrets, better known to Congress and the press than some recent outbursts would suggest. But nonetheless all such operations raise the question of how far the President can go it alone, and especially when the operations themselves have no formal congressional sanction and are unknown to—and undiscussable by—the general public.

The war in Vietnam has raised still deeper questions. Between 1961 and 1964 our operations in Vietnam through "military advisers" were, at most, partially covert. The fact of their number was known, and their roles only modestly concealed. As the operation grew and the possibility of more massive intervention became clearer—and, I am convinced, well before he had made up his own mind how far he would intervene—President Johnson did go to the Congress for authority in the form of the Tonkin Gulf Resolution. The form, at least, was observed, though unhappily in part as a political response to Senator Goldwater's position in the 1964 campaign.

Yet I cannot, in retrospect, square the Vietnam War with my concept of democratic government. What President Johnson did not do, when he had made up his mind in 1965, was to lay out fairly and frankly for Congress and the American people the choices facing us, the risks we were taking, and the possible consequences of our intervention. His failure to do so led in the end directly to attacks upon his credibility and

to a serious erosion of the trust and confidence of the public in the President.

And, of course, as the war unfolded, lack of candor was compounded by miscalculations that I am sure far outweighed conscious deceit. At critical points, the dominant personalities within the Administraton reflected to the President a degree of optimism which turned out to be totally unwarranted, and it was that optimism which the President in turn conveyed to the Congress and the public and which so destroyed his credibility. The voices of caution and doubt were not believed by the President, and were not, therefore, reflected in public statements. Added to what turned out to be miscalculation based on wishful thinking was the concern the President felt about unleashing the more militant forces epitomized in the 1964 presidential campaign by Goldwater and General LeMay. Mr. Johnson did not want the war, felt he could not let Vietnam go without overt military assistance, and was genuinely concerned about its potential for expansion. Once committed, he saw no retreat without too great a loss of prestige both at home and abroad.

In 1965 I have no doubt the public and the Congress would have overwhelmingly accepted and supported our intervention in Vietnam, and that any alternative (harsher or softer) course, as I am sure President Johnson knew, would have badly divided the country. There was in 1965 no basic contrary view; virtually no one of any political weight was avowedly prepared to accept the collapse of the non-Communist government in South Vietnam. In these circumstances it would have been difficult for Mr. Johnson to have volunteered all the risks potentially involved, to have prepared the American people for the worst. His primary political interest was the Great Society—not Vietnam—and his political compromise was to downplay Vietnam in the hope that guns and butter were both possible. In retrospect he should have encouraged a Great Debate; had he known his worst fears would be realized, he undoubtedly would have. Yet the harsh fact is he did not, and that he did not importantly narrowed his future options.

Then, as the war dragged on, and as opposition to it became increasingly vocal, the Administration's motivation subtly changed. It saw the opposition as making an already difficult task more difficult; as stiffening the resolve of the enemy; as making the search for an honorable peace infinitely more complicated. Information withheld, promulgated half-truths, propagandizing the good news—all of which were to a degree misleading—were now justified by the necessity to minimize the degree of opposition so that peace could be more rapidly achieved. And so the credibility gap widened farther, and trust and confidence eroded faster. Ironically, the fact that the statements of the government were less and less believed probably gave the domestic opposition a strength it never could otherwise have achieved.

Mr. Nixon—prior to Watergate—recouped some credibility for the Presidency. He did not, however, do so by frankness and candor. His technique was to reduce the levels of U.S. troops and casualties; to seek to focus attention on other matters by his China initiative; and to continue to dissemble and to restrain discussion on Vietnam. His excessive views of presidential power, his seeming disdain for congressional views, and his moving the center of decisions and operations from the State Department to the White House all have tended to reduce public discussion and, consequently, public opposition. And to a completely unprecedented degree he has conducted his foreign policy secretly. He regained considerable trust and confidence in the Presidency, not because his statements were believed, but because many of those naturally in political opposition grudgingly admired the initiatives toward China and Russia and respected the brilliance and competence of Mr. Kissinger.

Unhappily, secrecy in foreign affairs—and particularly in the atmosphere we have lived in for the past 25 years—is easily rationalized. Yet the reasons seldom have much to do with the rationalizations. In recent years, at least, the real motive has been precisely to avoid the difficulties inherent in our political system and hopefully to present the public with triumphant *faits accomplis*. What initially stemmed largely from confrontation between a growing vocal minority in Congress and the President, as well as increasing public demonstrations, was converted into constitutional principle by Mr. Nixon. In his Administration, neither the Congress nor the public has been informed about foreign affairs except at a level of high generality, and even then without the opportunity for discussion. Indeed, not even the bureaucracy has been consulted or informed. And this in turn has led to a failure to consult with, and inform, our allies abroad, culminating in the insult to the Japanese with respect to the change in our China policy.

Thus, even without Watergate, personal diplomacy conducted in secret, without public understanding or solid institutional foundation within the government, should now be insufficient basis for a viable foreign policy. And if, as I believe, Watergate has destroyed confidence in the President's credibility, much more is now needed.

V

What must be done today to put our foreign policy on a viable basis is, first, to promote discussion sufficient to establish the domestic consensus necessary to gain acceptance for, and support of, our foreign initiatives. We stand as a badly divided nation and we face some very tough problems. Second, we must restore confidence in the integrity of the Presidency. The Congress and the people need to believe what the Administration says. Both of these objectives mean dramatic changes in the style of the Presidency in foreign affairs.

I would propose the following changes:

(1) The President must indicate that he needs and wants the support and participation of Congress and the public in formulating his foreign policy. He must welcome public discussion and criticism of his proposals. Clearly, he must do the proposing, he must provide the leadership. But he and his principal assistants must be far more willing than in the recent past to lay out candidly the problems, the choices, the recommended actions.

To involve the Congress in this fashion is, despite congressional protestations to the contrary, as much a problem for the Congress as for the President. The unpleasant fact is that most members of Congress find little political profit with their constituents in foreign affairs and in accepting the compromises necessarily involved. The role of critic after the fact is often more politically rewarding than that of a constructive participant. It is easy for opposition—especially in the Congress—to center around short-term considerations rather than long-term policies, to make appeals to national pride, to criticize almost any negotiation on the grounds that the Administration gave away too much in the mutual bargaining. The record of Congress on many foreign policy issues, usually in the form of amendments to foreign aid bills, is far from a distinguished one; and the temptation of the Executive to interpret away crippling amendments to its foreign policy has served to create still another tear in the fabric of constitutional government.

Secrecy in foreign affairs is not, therefore, a one-way street born of presidential ambition for power. Too often it suits congressional politics quite well—particularly in the House of Representatives, with its biennial elections. The temptation in both parties is to let the President assume responsibility, and to let future events determine the length of his coattails.

Nor is a compromise approach—secret consultations with relevant congressional committees and leaderships—much of an answer. If the issue is sufficiently controversial, there will be "leaks" to the press. If it is not—and especially if the matter is likely to become public knowledge in the near future—I do not think secret consultation serves much purpose. As for special "watchdog committees," they have generally done more "dogging" than "watching." Members of Congress feel totally dependent on the information secretly provided by the Administration; they are inhibited by national security considerations in taking their case to the public; they fear the political risk of frustrating executive action on matters they do not thoroughly understand and about which they have no independent information.

I do not wish to put aside totally the wisdom of such consultations and special committees; I only wish to note that they should be used rarely and resisted on both sides as an adequate substitute for a more open process of congressional oversight and decisionmaking. If the policy in question fails, the fact of this kind of congressional consultation may create as many problems as it solves. Rarely will the members of Congress feel a truly shared responsibility. And the efforts to put them in this position may easily result in recriminations about the nature and quality of the information provided.

No, today there can be no substitute for a general rule of openness with the Congress. Congress must become truly involved in decisions and programs for action, and it must be told what the problems are, what the apparent options for action are, and why the Executive has come forward with particular proposals. If, in the process, nations abroad come to know somewhat more about the way an Administration's mind is working, I think the price—if it is that—eminently worth paying.

(2) It follows that the principal makers of foreign policy decisions must be exposed to Congress, the press and the public. If presidential assistants participate in the framing and execution of foreign policy to anything like the degree that Mr. Kissinger has done, they must be exposed to public view and scrutiny, and fully available to the Congress without subterfuge or the use of devious methods.

(3) We should abandon publicly all covert operations designed to influence political results in foreign countries. Specifically, there should be no secret subsidies of police or counterinsurgency forces, no efforts to influence elections, no secret monetary subsidies of groups sympathetic to the United States, whether governmental, nongovernmental or revolutionary. We should confine our covert activities overseas to the gathering of intelligence information.

I come to this conclusion with some reluctance, because in a few instances such activities have been legitimate and useful. But I believe the impossibility of controlling secret activities—and the public's apprehension about them—outweigh the losses which will be sustained. Much of this activity was phased out under Kennedy and Johnson, and I think the rest can go.

(4) We must minimize the role of secret information in foreign policy.

Many Presidents have sought to tinker with the present classification and declassification system, conscious that the tendency to reclassify and to spawn classified files has been out of control for years. If public proof of that fact were necessary, the Pentagon Papers and the ensuing trial pro-

vided it. All the documents involved carried high security classification, yet there was little evidence that any related importantly any longer to "national defense"—the test required by the major provision of law under which the trial was held. On the contrary, there was at the trial much expert testimony that none did relate importantly to the "national defense," and a determined and persuasive defense argument that little of the factual information provided in the mass of documents was in fact new. What made the release newsworthy was less its content than its voyeuristic appeal—the relatively rare public exposure of governmental processes to the public eye.

Prior efforts to revise the system have not worked, primarily because in no instance has major surgery been tried. Classifiers have mixed the desire to keep information confidential and "closely held" for whatever reason, good or bad, with information actually affecting the "national defense." To do this is a perversion of the law. Perhaps worse, it is a perversion of the processes of government, because it does not force officials to consider honestly the reasons for confidentiality or the relevant time frame. And the fact of gross overclassification tends, in turn, to destroy the system itself.

Prior to the Watergate exposures, the Nixon administration had presented to the Congress proposals to codify the classification system and to make disclosure of classified information a criminal offense in itself, with the validity of the classification not open to challenge in court. I assume that, in the present climate, any such legislation is dead—and rightly so. While the law under which Mr. Ellsberg was tried is crude, its essential criteria—that the information relate to the national defense and that its disclosure be with intent to damage the national interest—seem to me those that should prevail in this country for purposes for criminal sanctions.

At any rate, this is and will remain the law—and I believe that the classification system within the exectuive branch should now conform to it. Essentially, the extremely strict internal procedures of a full-scale classification system, and the threat of criminal sanctions for its deliberate breach, should now be coextensive with the law—while still emphatically leaving to the courts in any prosecution the testing of the validity of the executive classification as well as the question of intent.

What exactly would be covered by such a restricted classification system, limited to matters affecting the national defense? Examples would be CIA and DIA intelligence material on foreign military capabilities, troop dispositions, missile placements, and weapons development; and defense and AEC information on our own weapons systems, future technological developments, current strength and disposition, mobilization estimates, and military plans to the extent such information is not already in the public domain. Even such a drastic cutback as this will result in some overclassification. But it should be more workable than the present morass.

I do not propose that all other information be made public or even generally available. I simply suggest that it not be classified as "national defense" information, carrying such exotic labels as "Top Secret" or "Cosmic Top Secret" or the like. I have no problem with limiting distribution within the bureaucracy of information which is politically "sensitive," or with general rules concerning the confidentiality of discussion with foreign diplomats, ambassadorial or other bureaucratic recommendations as to policy, or personal or investigative records. (In the case of diplomatic exchanges, such common-sense rules long antedate the postwar expansion of classification.) Frankly, I think we can rely on the good sense of bureaucrats to keep confidential what should be confidential most of the time, without employing bloated concepts of national security to do so. I know this worked in the past within the Department of Justice and I see no reason why it should not work elsewhere.

(5) Classification will not stop leaks anyhow. What minimizes these is loyalty to superiors, based not so much on agreement with policy as on respect for their fairness, integrity and openness to recommendations and ideas. A part of the new style of operation must be far greater openness within the executive branch itself. All Presidents fear becoming the prisoners of the governmental bureaucracy, and all Presidents have a healthy distrust of bureaucratic expertise. It is good that they should seek advice elsewhere and that departmental recommendations should be tested in various ways, including the competition of agencies and the interplay between full-time professional officers and those who enter government under political auspices. But to attempt to bypass the bureaucracy has heavy costs not only in the very "leaks" to which I have just referred, but above all in the failure to understand policy, to administer it effectively, to explain it to other constituencies at the appropriate time, and often to make decisions with full awareness of their consequences abroad.

VI

In the present world situation, far greater congressional and public involvement in formulating our foreign policy seems to me not only right but nearly inevitable. There are two reasons for this:

First, problems of trade, investment, resources, development and international monetary stability promise to take on increasing importance in the future. All of these problems will require legislative solutions and therefore extensive congressional participation and action. All will involve a continuity in policy over relatively long periods of time and thus need public understanding and support.

Second, as communism has become less monolithic, as China has emerged as a competing ideological center, as the Soviet Union has become less stridently revolutionary and more concerned with China and with its its own domestic progress, and as Europe and Japan have become centers for wealth and power, security considerations in the United States' foreign policy have become less consuming and less global. Mr. Nixon's approaches to both the Soviet Union and China, as well as the modest progress made in the SALT talks, are evidence of a changing security environment. Problems will remain but they will lack the felt intensity of the past 25 years.

Notwithstanding these changes in the world scene, the shift to a more open style in foreign policy will not be without its difficulties. One is the extent to which openness may in fact reduce options or be perceived as doing so. I accept the fact that it sometimes does. But I also think the extent of that reduction is exaggerated, often for improper purposes. I accept, too, that there are circumstances where the President or the Secretary cannot be totally candid without affecting the situation he is discussing. I think the press and public understand this. They know, for example, that high government officials cannot publicly discuss corruption of high South Vietnamese officials, or that high-level expressions of doubt about the viability of a foreign government may bring it down. But these inhibitions are not serious ones, because the underlying facts—if they are important to understanding policy—can be made available to the public in other ways.

The most serious problem of a more open foreign policy lies in congressional response. In Congress controversy can lead to delay, to inaction, to unworkable compromise, to missed opportunities. Minorities can obstruct; special interests can sometimes manipulate policy more easily on the Hill than in the executive branch. The accident of committee leadership and membership can skew policy away from the national interest to more parochial concerns. No one should be sanguine about these risks. The danger of getting hopelessly bogged down in a congressional quagmire is clear and present.

Nonetheless, I am prepared to take some losses in our foreign affairs if by doing so we can restore the fundamentals of representative democracy to our foreign policy. As Watergate demonstrates, democracy is too fragile to be divided into foreign and domestic affairs. We cannot give the President a free hand in the one without eroding the whole of the governmental system that all policy seeks to preserve.

[From CONGRESSIONAL RECORD, June 4, 1973]

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. PROXMIRE:

S. 1935. A bill to amend section 102 of the National Security Act of 1947 to prohibit certain activities by the Central Intelligence Agency and to limit certain other activities by such Agency. Referred to the Committee on Armed Services.

TIME FOR REVIEW OF INTELLIGENCE OPERATIONS

Mr. PROXMIRE. Mr. President, on April 10, I first spoke about the role of the U.S. intelligence community in our Government and domestic life. At that time I talked about the historical need for intelligence to overcome the barriers nations erect to the free flow of ideas and technology. I discussed the National Security Act of 1947 to determine just what Congress had in mind when this broad legislation was enacted. And then I went into the question of possible "spillover" effects coming from the use of clandestine techniques overseas. In recent days, the Watergate story has unfolded in sufficient detail to shake all of us into concern about the dangerous consequences of domestic intelligence operations for political purposes.

My original speech also detailed the composition of the intelligence community and made certain recommendations regarding more efficient practices.

Let us now take a close look at what has become the most alarming aspects of the intelligence process—domestic and foreign programs that are called covert operations or "dirty tricks" and include espionage and subversion of foreign governments.

Nothing in this speech comes from classified sources. I have pieced together my information from public documents and open conversations with Government officials.

Since a great deal of the following analysis hinges on drawing distinctions between various activities, I must rely to some degree on language that has precise meaning within the intelligence community. Wherever used I will attempt to clarify the meanings of such terms as covert action or intelligence collection.

THE STRUCTURE OF THE CLANDESTINE SERVICES

The Central Intelligence Agency is divided into Directorates by function. Until recently, these were called the Directorate of Plans, the Directorate or Intelligence, the Directorate of Support and the Directorate of Science and Technology, or as abbreviated: DD/P, DD/I, DD/S, and DD/S. & T. standing for the four Deputy Directors serving under the Director of Central Intelligence and his Deputy Director. For the purposes of this speech, I will concentrate mainly on the DDP, that is, Directorate of Plans now renamed DD/O for Directorate of Operations.

Thus the CIA is several organizations under one roof. The DD/I—Intelligence—and DD/S. & T.—Science and Technology—deal with intelligence collection as opposed to intelli-

gence operations. The DD/O—Operations—and its support elements in DD/S—Support—carry out covert action programs. There has been a great deal of discussion about the propriety of this arrangement linking the analysis and covert activities and I will deal with the arguments later.

Authority for approving and continuing programs and other activities that are sensitive—meaning the potentiality of embarrassment or compromise—rests with a Cabinet-level committee composed of representatives of the Department of Defense, Department of State, White House National Security Adviser, Joint Chiefs of Staff, and the Director of Central Intelligence. This informal committee which meets several times a month has been called by many names including the 54/12 Group, Special Group, the 303 Committee—named after a room number in the Executive Office Building—and more currently the 40 Committee after a national security decision memorandum with the same numerical designation.

In theory, proposals for covert action programs are presented to the 40 Committee after being worked out by the participating agencies at a lower level. Then the 40 Committee gives its approval or rejects the concept or requires modifications in the original plan. Most projects, however are well coordinated by the time they get to the 40 Committee.

The primary need for the 40 Committee and its authority to initiate covert action programs is the stated requirement to provide the President with methods of accomplishing foreign policy objectives without attribution to the United States.

We have come a long way from Secretary of State Stimson's comment that gentlemen do not read other peoples' mail. The modern world is far more complex now. More barriers to the flow of information have been erected. I believe that there are occasions when this Government must for its own protection use techniques that are by domestic U.S. standards extra-legal. But there must be adequate control over the exercise of these aspects of our foreign policy or we will find ourselves gripped in an interminable cycle of false information and foreign intervention. These controls have been painfully inadequate. For this reason it is necessary to take a hard look at what distinctions can be drawn between activities that are necessary for national security and also productive and those that create situations that actually erode our national security.

In practice, it appears that the 40 Committee mainly approves activities coordinated at lower levels. If a promising operation can be coordinated at a working level where the concept originates, it often rises through the intelligence community with little critical challenge until it arrives at the 40 Committee. There because it has been reviewed by the "experts" it is frequently approved. Result: a serious effect on U.S. policy.

Having the 40 Committee consist of high level officials is supposed to be a safeguard against the initiation of activities actually detrimental to the national interest. It is presumed but never stated that major decisions of the 40 Committee are then checked with the President. The reason for the lack of substantiation of this latter point is clear. The President is insulated from any direct association from such illegal activities so that in time of crisis such as a "blown"—exposed—mission, he can deny knowledge of the entire affair. Again and again this is the most important point of many covert action programs—the insistence that the President be insulated from any damaging effect, regardless of his prior knowledge or role in the command process. Thus when a crisis occurs, say with the U–2 affair, the President has the option of denying the whole thing and preserving his innocence by placing the blame on others. President Eisenhower chose to take responsibility for the U–2 incident, a move that many intelligence specialists criticized as unnecessary and a bad precedent. In my view, as I will develop later, President Eisenhower was absolutely right.

Once a decision is reached and approved by the 40 Committee and White House, the resources of the DDO or as it is sometimes called the Clandestine Service—CS—are put into action. These resources are enormous and consist of worldwide depots of equipment and arms, numerous communications networks, arrangements with front organizations for providing support, working associations with the military departments which can supply men, material, and the normal complement of case officers—the designation for DDO professional personnel as opposed to agents which are those recruited by case officers.

It can be said that the Agency—CIA—probably can carry out a middle- or low-level operation with more skill and speed than any other arm of the Government. There is less bureaucratic interference and the lines of communication are much quicker. With regard to high level operations of the size of an invasion, the CIA's record is marginal. But, paramilitary activities are a distinct part of the Agency's resources.

There is far less command and control of covert operations than should be the case.

Here is why:

First. The 40 Committee's control is only absolute in the sense of a final decision but not in the shaping of policies regarding the initiation of such activities or for that matter how they will affect the long-range interests of the country.

Second. There is a tendency for those in the business to fall into the mental state of acquiesence in the propriety and necessity of such operations and thus provide no effective restraint.

Third. In all of this, Congress plays absolutely no role. While Congress may be funding a certain international program, the 40 Committee could be deciding to impede that same program in a certain country for other reasons.

Fourth. Small operations have a way of becoming major operations even without 40 Committee oversight.

JUDGING THE RELATIVE IMPORTANCE OF INTELLIGENCE COLLECTION PROGRAMS

Intelligence comes from varied sources. It can be categorized in the following manner:

First. Open sources such as newspapers, periodicals, translated foreign literature, and radio broadcasts;

Second. Satellite derived intelligence used for mapping, targeting observation of military construction, industrial capacity communications, and military deployments;

Third. Technical collection techniques—intercept of signals, electronic emissions, communications, and radar data;

Fourth. Human resources such as defectors, agents in place, interviews with selected travelers, immigrants, and foreign government officials.

It is often stated that the bulk of all intelligence comes from open sources that are refined and analyzed. In terms of quantity this probably is true. The really significant intelligence, however, now comes from satellites and technical collection devices.

Reconnaissance activities provide high confidence data about military and economic questions of the highest importance such as missile deployments, submarine development or industrial construction. By far and away this is the most important category of intelligence information.

Somewhat below this in importance are the other technical programs which provide scientific data of interest for specialized purposes. Interrogating radar systems would be one example. Other signals might give information about missile characteristics or ABM developments. Intercept of communications, part of a category of intelligence referred to as Comint or Communications Intelligence, once was a very important source of information but with the countermeasures now available such as land lines and encoding devices, Comint is more difficult to obtain and process.

Human resources comprise this last category. Human resources refers to any traditional spy activities that involve the direct use of human beings as opposed to technical devices. The recruitment of foreign government officials, the espionage of military secrets by travelers, the forced entry into offices to obtain data, the establishment of spy rings, all are examples of human resource programs.

By any measure of cost effectiveness, human resources simply do not produce the quantity and quality of reliable data necessary for their justification. About 60 percent of the CIA budget continues to go into human resource programs.

The argument has been made that even though human resources provide little information of value compared to technical and satellite data, what they do provide in a few instances might be of the most significant and valuable of all—that of political or military intentions. Hardware programs can be observed by reconnaissance but a camera cannot look into a man's mind.

But factual data about intentions is so illusive and fragmentary that it is almost nonexistent. Knowledge of adversary intentions requires a source of reliable information at the highest levels of a foreign government such as the U.S.S.R. or People's Republic of China. Human resources of this quality and rank are rare indeed. We have heard about Colonel Penkovsky and certain other defectors and agents in place, but it is the consensus of many experts that high level human resources are few and far between, and provide a pathetically inadequate payoff.

DRAWING A DISTINCTION BETWEEN COVERT ACTION PROGRAMS AND INTELLIGENCE COLLECTION PROGRAMS

What is the difference between intelligence collection and covert action "cloak and dagger" programs? At times the distinction may be hazy. Both are done within the intelligence community but Congress can act to separate and define the two areas of activity.

Intelligence collected by covert means including the satellite, technical devices and human resources mentioned above qualifies as intelligence collection. It involves the acquisition by open and extra-legal means of information determined necessary to national security. Requirements are established to guide this type of collection within given priorities.

The following are examples of selected information acquired by intelligence collection:

Photography, space and missile signals, economic data, power elite and political party data;

Military construction, deployments, research and development, troop movements;

Industrial capacity, communications capabilities, food production; scientific information; mapping, geological, climatic data.

In short the collection of all information that could possibly be useful to policymakers. The means of collection might be covert "cloak-and-dagger."

One distinction: With intelligence collection there is a conscious decision to obtain the information without influencing the source or its content. Such is not necessarily the case with covert action programs.

Covert action involves a more intrusive role than the passive acquisition of science

or economic data or even information supplied by agents in place. Covert action could involve any of the following types of activities:

Paramilitary operations in support of foreign governments or dissident forces; financial support for individuals, governments, unions, political parties or other internal organizations:

Operations in support of political allies such as acquiring politically damaging information or the creaton of such information or the supplying of internal security techniques and equipment;

Exchange programs for social, economic or long term political reasons; economic manipulations of companies, governments, commodity supplies.

One characterization of all covert action programs is their deniability. They must be clearly separable from official U.S. Government sanction. Instead of pure collection of information, covert action programs are designed to influence future events or alter the expected course of events in foreign countries to the benefit of the United States.

ACCOUNTABILITY: ASSET OR LIABILITY

The principle of a plausible deniability is critical to any covert operation. I relate to the capability of our Government to know what the CIA has been doing. If it were not a problem then operations could be carried out in the open. But since many operations would be considered either illegal, immoral, hostile, or be greatly embarrasing in the target country, they must be done without overt relationship to the U.S. Government.

There are certain "backstops" built into a covert operation. An American presence is kept at a low level.

Native personnel are used where possible. Third countries may be co-opted to participate and other devices used so as to preclude any tie-in with the United States.

In the event that an operation is blown and it becomes known that some American has participated, there are two further ploys to use. First, the U.S. Government can disassociate itself from the blown operation by stating that it was not sanctioned. Arrangements then would have to be made to see that the U.S. personnel involved could be provided assistance. In the meantime, all affiliation with the CIA would be denied. Such was the case with John Downey and Richard Fecteau held captive by the People's Republic of China since the 1950's.

As a second fall back position, in an extremely serious case, it may be necessary to admit U.S. responsibility but deny that the President had anything to do with it, thereby attempting to salvage his prestige and reputation. The choice then is up to the President whether he wants to admit responsibility or continue to bluff his way through the crisis. This situation occurred with President Eisenhower and the U–2 affair.

I think the whole notion of deniability should be reconsidered very carefully by Congress and all our Government. It is one that could get us into the deepest kind of trouble.

President Eisenhower, to his enduring credit, flatly refused the deniability option and manfully assumed responsibility for the U–2 flights, although in doing so he endangered vital negotiations at that time with the U.S.S.R.

This brings up the critical point. Should there be clear accountability by the President? Mechanisms have been established for foreign operations which protect the President from failures and embarrassment. He can shift the blame to other people or organizations. The CIA for example, has long been known as an organization willing to assume the public blame for operations approved by the President that ended in failure.

In this Senator's view there is never justification for a lie by anyone including, and I might say especially by, the President of the United States. Such deliberate, planned "official" lies undermine the credibility of the Government. The coverup becomes a way of life. It is a corroding compromise with integrity.

What is more, it is stupid because it frequently does not work. It is not believed and when it is exposed as a lie, the loss of faith in government is far greater than any gain.

In domestic affairs the use of "plausible denial" could be a most insidious antidemocratic political device. As in so many other areas of covert activities, the major fear is that a commonly accepted technique used abroad will become so successful that it is only an easy moral judgement away from application in the United States.

Six men sitting around a table week in and week out discuss various covert foreign operations. They are masters at the techniques of deception, intrigue, espionage, covert action: One day they receive a suggestion, couched in terms of national security that involves the use of these same techniques domestically. The suggestion comes from the White House, maybe even the President. They have all served the White House, regardless of its occupant for their entire lives. It is the center of power from which they draw their authority. It is the justification of their lives. How do they answer?

This fictionalized portrayal is not intended to be taken literally. But it makes the point. There are vast unrestrained powers within the executive department that may someday threaten more than some foreign nation.

One additional aspect of accountability needs to be explored.

It may be possible that the delegation of authority in such matters as intelligence collection and covert action programs has gone so far down from the President that he has no functional control over many of these programs. In the delegation of authority rests an immense commitment of trust. If subordinates are trusted and events seem to be moving well, a President could be insulated from those decisions taken in his name that have widespread and damaging consequences. I do not think this is a very realistic situation but it is an outside possibility.

I think we should be aware of this, because too few of us appreciate how very busy the President is, how involved he is in many areas, how distraught any President must become because the demands on his interest and his time are so enormous.

Congress has no way of knowing any of these things because Congress never has exercised any real control over the intelligence community. We have all thought that this was an area in which national security interests naturally limited congressional participation. We have left it to the experts. We have handled it with informal relationships and secret meetings and inadequate staff work. We have looked the other way. And we have paid the price.

We agonize over an appropriation of $1 million, and I do that as much as any. But we calmly let $4, $5, or $6 billion slip through our fingers without so much as one critical question on the floor of the Senate.

There are certain matters that pertain to the intelligence community that cannot ever be made public for to do so would be to endanger sources of information or techniques of collecting that information. Our potential adversaries could deny us that information if they became aware of its value to us. We must also protect the lives of the Americans serving overseas and their families from hostile retaliation.

The intelligence budget is not such a case. There is no sound reason why this budget must remain hidden from the public in aggregate terms.

There would be no security risk in letting the world know that the United States spends $5 or $6 billion on intelligence. It is a form of deterrence. It would tell our adversaries that we intend to find out the truth about any potential hostile actions on their part and that we are willing to spend great resources to do so.

Just as it was deemed important to let the U.S.S.R. and China know of our military strength as a deterrent to a surprise attack, so would it be prudent to tell them that we have other capabilities to guard—our Nation. We need not say more than the size and general distribution of the intelligence budget by agency. We need not speak of missions or other sensitive matters. But we must reestablish the responsibility that Congress has in the formation and funding of foreign policy and above all else we must protect our domestic freedoms from any bureaucratic challenge from within the executive department. The danger is here. We cannot refuse to act.

THE NATIONAL SECURITY ACT OF 1947

WHAT DOES IT ALLOW?

The first thing to be noted about the establishment of the CIA is that it is a part of the Executive Office of the President and as such reports directly to the President through the National Security Council and the Director of Central Intelligence which is a cabinet level post. Under the National Security Act of 1947, the CIA was given the duty of advising and making recommendations to the National Security Council and of correlating and evaluating intelligence relating to the national security and providing for appropriate dissemination. All of these duties are relatively passive. In no way can they be interpreted as authority for engagement in domestic operations or foreign operations. That is clear.

Further on in the same section, the act specifically states that the CIA shall have no "police, subpena, law-enforcement powers, or internal security functions." This is a broad and widespread prohibition. The meaning of "no internal security functions" is a blanket disapproval for any active domestic police-type functions.

After that prohibition, however, come three statements which are oblique by nature and subject to various interpretations. They need to be quoted in full for they constitute a possible justification for both domestic functions and foreign covert activities.

"And provided further, that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure;

"To perform, for the benefit of the existing intelligence agencies, such additional services of common concern as the National Security Council determines can be more efficiently accomplished centrally;

"To perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct."

The first statement could be cited for justifying operations domestically and the following two could be used for justifying foreign operations or even domestic operations.

THE MISSING CHARTER

It is not possible to state with authority what interpretation the executive department has placed on these particular sections of the National Security Act of 1947 because subsequent interpretations have been done in secret. In fact, the CIA charter is not fully contained in the National Security Act of 1947 but is extrapolated from the act by a series of National Security Council intelligence directives after the passage of the act. These were, and remain, classified. Thus we are faced with a highly unusual situation.

Congress has enacted a law with a set of prescribed relationships and duties for the CIA. And the executive department through the National Security Council has interpreted this law in secret. Whether this subsequent secret interpretation is allowed by the original act is in doubt. Whether the procedure of allowing secret interpretations and extensions of authority upon a congressional act is in doubt.

This can only be resolved by a court test, a review by the enacting committees and bodies of Congress of the original intent of the legislation, or by amending the 1947 National Security Act to prohibit extraneous interpretations or extensions.

It would be best for all concerned if the charter for the CIA was distinctly agreed upon by Congress and the executive department and at least in general language made public.

AN AMENDMENT TO THE NATIONAL SECURITY ACT OF 1947

In order to initiate a full examination of the proper role of the intelligence community in foreign affairs as well as domestic affairs, I now introduce a bill as an amendment to the National Security Act of 1947.

Mr. President, I ask unanimous consent that this be printed in the RECORD.

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

S. 1935

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 102 of the National Security Act of 1947, as amended (50 U.S.C. 403), is amended by adding at the end thereof a new subsection as follows:

"(g)(1) Nothing in this or any other Act shall be construed as authorizing the Central Intelligence Agency to—

"(A) carry out, directly or indirectly, within the United States, either on its own or in cooperation or conjunction with any other department, agency, organization, or individual any police or police-type operation or activity, any law enforcement operation or activity, or any internal security operation or activity;

"(B) provide assistance of any kind, directly or indirectly, to any other department or agency of the Federal Government, to any department or agency of any State or local government, or to any officer or employee of any such department or agency engaged in police or police-type operations or activities, law enforcement operations or activities, or internal security operations or activities within the United States unless such assistance is provided with the prior, specific written approval of the CIA Oversight Subcommittee of the Committees on Appropriations and the Committees on Armed Services of the Senate and the House of Representatives;

"(C) participate, directly or indirectly, in any illegal activity within the United States; or

"(D) engage in any covert action in any foreign country unless such action has been specifically approved in writing by the CIA Oversight Subcommittees of the Committees on Appropriations and the Committees on Armed Services of the Senate and the House of Representatives.

"(2) As used in paragraph (1)(D) of this subsection, the term 'covert action' means covert action as defined by the National Security Council based on the commonly accepted understanding of that term within the intelligence community of the Federal Government and the practices of the intelligence community of the Federal Government during the period 1950 through 1970."

Mr. PROXMIRE. Mr. President, this amendment is designed to clarify the role of the CIA with regard to domestic activities. It has four provisions. First, it makes it clear that the National Security Act of 1974 itself or any subsequent interpretations of the act by the executive branch, be they classified or unclassified, shall not authorize the CIA to engage in police, law enforcement, and internal security functions by itself or in conjunction with other organizations. Although there is a similar provision in the National Security Act, subsequent interpretations of that act by the National Security Council intelligence directives or other more loosely worded language in the National Security Act itself requires a reaffirmation—and I mean a public reaffirmation—of congressional intent.

A second provision would prohibit the CIA from providing assistance to other Government organizations engaged in police, law enforcement, or internal security activities. The obvious question to be dealt with here is the problem of normal, routine coordination between CIA and the FBI. This type of activity would be expressly approved on an ongoing basis but within distinct limitations by the CIA oversight committees of both houses.

The third provision of this amendment expressly prohibits the CIA from participating in any illegal activity within the United States, either directly or indirectly.

The fourth provision deals with the foreign activities of the CIA. It is remarkable that nothing in the National Security Act of 1947 directly authorizes the CIA to engage in covert foreign operations. Subsequent interpretations of the act have empowered the CIA to conduct such activities but the act itself is not explicit. The hidden charter for CIA is far more important in this regard than the National Security Act. But due to the classified nature of the hidden charter, Congress has not participated in the interpretation of the law it approved. Therefore, it is now necessary to define just what is the congressional intent of the act.

My fourth provision draws a distinction between the normal activity of intelligence collection and covert action programs. It would prohibit the CIA from engaging in any covert foreign action programs without the written prior approval of the CIA oversight committees of the House and Senate. The pattern for prior approval, for example, could be based on techniques worked out between the executive department and Congress such as exist for reprograming authority. I would also recommend that both Houses of Congress form one body with responsibility for CIA oversight.

WHY IS THE AMENDMENT NEEDED?

This amendment is necessary for the national security. I do not say this lightly. The purpose of the intelligence community is to insure that the highest policymakers have the knowledge and means to protect this country. It is a vital line of defense. But is there a possibility that the very instruments established to guarantee our national security could be used to subvert it?

Mr. President, this is the most chilling message of Watergate. The activities we engage in overseas have come home to roost. The techniques, the organization, the personnel, the equipment, the power to obtain information and influence foreign events have been turned to use domestically. Nothing could be more dangerous. Are we successful in rigging a few elections? In supporting a few friendly organizations? Bribing officials? Pressuring governments? Maybe, maybe not. But it is not worth the price if the same techniques become a more likely threat to our freedoms than any invasion.

Without proper controls we are in danger of falling prey to our own national security mechanism.

Is it far fetched to contemplate the illegal use of the FBI, CIA and the rest of the intelligence community against political opponents or any other faction within the United States? That is exactly what has been attempted. The FBI and CIA have wavered under the pressure. This is the most serious aspect of the Watergate crisis. It has gone so deep into the fabric of the Federal bureaucracy that even the untouchable agencies have been tarnished.

Fantastic? No, indeed, it is real and it is happening today. Firm steps must be taken to reestablish the confidence that should reside in the CIA and to eliminate the nightmare that someday as Sinclair Lewis wrote of the prospect of an American Hitler "It can happen here."

I have great admiration for the CIA and its Directors. It appears that they have resisted pressures of great intensity from the White House itself. That took a great deal of courage. It is for the sake of the CIA as well as the American people that I offer this amendment.

In closing, I would like to quote two remarks by former U.S. Presidents, each from a different era but both endowed with the insight that comes from a keen mind and a sense of American democracy.

On May 13, 1798, James Madison wrote to Thomas Jefferson stating—

"Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad."

One hundred sixty-five years later another great President, Harry Truman, reflected on his administration:

"For some time I have been disturbed by the way the CIA has been diverted from its original assignment. It has become an operational and at times a policy-making arm of the government. I never had any thought that when I set up the CIA that it would be injected into peacetime cloak-and-dagger operations. Some of the complications and embarrassment that I think we have experienced are in part attributable to the fact that this quiet intelligence arm of the President has been so much removed from its intended role that it is being interpreted as a symbol of sinister and mysterious foreign intrigue and a subject for cold war enemy propaganda."

Mr. President, nothing that I have said here today should be interpreted as condemnation of the CIA. The CIA has been under the direction of several Presidents. In many ways, the CIA has performed an invaluable service to our Government that could not have been done by any other agency. In its testimony before Congress on foreign weapons programs and in its estimates of capabilities and intentions, the CIA has presented remarkable unbiased analysis of the highest quality. This is an essential role.

But the CIA now must be protected from the executive department and our democracy must be protected from any directed misuse of the CIA.

To do less is to risk our heritage.

Mr. President, I am confident if my amendment becomes law we will provide that protection for the CIA and, more importantly, for our form of government.

THE LONELY—AND CONSERVATIVE—CHICAGO CUBS FAN

Mr. PERCY. Mr. President, the Chicago Cubs are not in the World Series this year—again. If you are from Chicago you know that glaring absence is as normal as windy weather. Unlike the distinguished Senators from California, Mr. CRANSTON and Mr. TUNNEY, and the distinguished Senators from New York, Mr. JAVITS and Mr. BUCKLEY, who can so proudly march into this august Chamber, the Senators from Illinois are a somber twosome. We cannot point with pride to our baseball team, nor can we insert

in the RECORD glowing editorials of skill and derring-do on the baseball diamond.

To be a Cubs fan is to know what it is like to sit alone and cold on the floor of the U.S. Senate while other Senators congratulate themselves on their teams reaching the World Series. At least the White Sox won the American League pennant in 1959. But for more than a quarter of a century, Cubs fans have watched their sultans of swat try so gallantly, only to fail year after year after year.

Recently George Will, an esteemed journalist and a diehard Cubs fan, editorialized on station WTOP on what it is like to be a Cubs fan. It was a moving recitation. He touched on the peculiar effect this mania for the Cubs can have on one's politics and philosophy. Mr. Will, an unabashed conservative, traces his conservatism to his desolate years spent cheering on the Cubs. He argues that conservatives are a pessimistic lot, certainly more so than liberals, and that one sure way to become a staunch pessimist is to root consistently for the Chicago Cubs.

There may be some validity to his point, and I think it worth examining. It would not surprise me to find that most Cubs fans are conservative. On the other hand, after the Cinderella season that the New York Mets have had, I would not be at all surprised to find that many Mets fans have become more liberal as the season has worn on. However, I will not ask Senator BUCKLEY where he stands on that. It might be useful for someone, under the auspices of a Federal grant, of course, to conduct a survey and gather statistical information by polling the members of the Americans for Constitutional Action—ACA—and the members of the Americans for Democratic Action—ADA—and then cross reference the results with Cubs and Mets fans. The results could have deep meaning to political and sports analysts alike.

However, hope springs eternal, and next year, the fans will troop out to Wrigley Field, ready to cheer on their Cubs, knowing that the potential is always there, ready to catapult the Cubs into the World Series. Watching the Cubs fans, one will note that most are conservatively dressed—pin striped suits, skirts a half inch—but no more—above the knee. Each fan will have his hopes and his chin high, waiting for what must surely come one day—a Cubs pennant. And would not everyone be surprised if next year the Cubs pulled it out and went to the World Series. But, be aware that the shock waves from such a glorious event might be traumatic: Off would come the conservative pin-striped suits, to be replaced by flowered shirts; the carefully knotted tie would yield to a rakish ascot; instead of skirts, we would see hip-hugger trousers. Even George Will might have to give his political philosophy an agonizing reappraisal.

But all that may be the impossible dream. For now, I ask only that there be unanimous consent that the editorial delivered by George Will on October 16 be printed in the RECORD so that all of my distinguished colleagues will have a little more understanding for the dour look on the faces of the Senators from Illinois. And if we enter the Chamber a little slowly, looking a little downtrodden, you will all know that the baseball season is only recently ended, and our football team, the Bears, have started off this football season with a won-one and lost-four record. Thus our lives are far more encumbered than those of some of our colleagues whose smiles have noticeably brightened lately. Perhaps through understanding will come compassion.

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

EDITORIAL BY GEORGE F. WILL

One letter has poured into this station demanding to know how I became such a grumpy reactionary at such a young age. I shall explain now, at World Series time, because baseball made me what I am—an embittered old man at age 32.

For the twenty-eighth year in a row, my team, the Chicago Cubs, will not be in the World Series. No other team—except for young expansion teams—can match that record of sustained futility. For twenty-five years—since I became a Cub fan at the tender age of seven—I have seen my high hopes of April turned to dust by September—if not July. Being a Cub fan is like being hit on the head by a crowbar 90 times a year. And, believe it or not, this punishment has political consequences—it turns you into a brooding conservative. Conservatism, like liberalism, is as much a matter of temperament as it is ideology. Liberals are tempermentally inclined to see the world as a place of sweetness and light, where good will prevails, and good intentions are rewarded. Conservatives are inclined to see the world as a dark and forbidding place, where pain exceeds pleasure; where hopes are dashed; where good intentions go unrewarded. Where man should not expect happiness.

Since I became a Cub fan they have lost nearly 2,500 games. That's more than 6,000 hours of losing baseball. All this suffering has warped my temperament in a conservative direction.

So, I hope all parents will profit from my tragic example. Don't let your child make the mistake of my ill-spent youth. Don't let him be a Cubs fan. Remember: the stakes are enormous. A child who is a Cubs fan at ten will be a Republican at 30. He will be used to losing.

VISIT OF CARDINAL MINDSZENTY

Mr. KENNEDY. Mr. President, we recently had the honor in this Nation of receiving the visit of József Cardinal Mindszenty, one of the world's heroic symbols of freedom and liberty.

Cardinal Mindszenty did more than celebrate a Mass or participate in religious services. By his presence, he reminded us once again of the indivisible nature of man's spirit and the eternal quest for individual liberty.

The outpouring of respect and love from the Hungarian-American and Eastern European communities demonstrated once more how strongly imbedded in the minds and hearts of these Americans was the lonely ordeal of this brave man of the church.

Mr. President, the obligation upon all Americans to honor the arrival and the visit of Cardinal Mindszenty is evident, for he symbolizes our own commitment to freedom.

Mr. President, I ask unanimous consent that articles describing his visit be printed in the RECORD so that there might be a permanent record of his visit.

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

[From the New York Times, Sept. 30, 1973]

ST. PATRICK'S GETS SURPRISE VISITOR

(By George Dugan)

Jozsef Cardinal Mindszenty, the 81-year-old exiled Primate of Hungary, made an unscheduled, informal visit yesterday morning to St. Patrick's Cathedral.

The prelate was introduced to some 1,000 Ladies of Charity attending their annual mass by Cardinal Cooke, the celebrant. He described Cardinal Mindszenty as a man who "served God in faith and honor."

The Hungarian churchman was arrested in 1948 on treason charges and sentenced to life imprisonment by the Communist-dominated government of his country. Freed by freedom fighters in 1956, he found refuge in the United States Embassy in Budapest. Two years ago he took up his present residence in a seminary in Vienna.

Mrs. Edwin P. Wheeler, chairman of the Manhattan Council of the Ladies of Charity, said later that the Cardinal's visit was an "overwhelming surprise."

"We were honored to have that wonderful man appear before us and bless our work," she added.

Roszalia Sebestyen and her son, Thomas, 8, from Rego Park, Queens, said they had been waiting at the Cathedral just to see the Cardinal and also to present him with some home-grown flowers.

After the 9 A.M. mass, Cardinal Mindszenty stood on the steps of Cardinal Cooke's residence at Madison Avenue and 50th Street, where he greeted about 75 members of various Hungarian-American groups and federations.

Many were dressed in brightly colored Hungarian costumes. They had come in the hope of getting a glimpse of the prelate. Among them was Paul K. Machalik, a Denver resident and a nephew of the Cardinal and Gabor Blogh, an imposing figure in the full dress garb of a Husser officer. Cardinal Mindszenty arrived here Friday and spent last night in Cardinal Cooke's residence.

This morning, Cardinal Mindszenty will bless the newly renovated Church of St. Ladislaus in New Brunswick. He is to fly back to Vienna on Tuesday.

[From the New York Times, Sept. 27, 1973]

MINDSZENTY TO VISIT NEW BRUNSWICK FOR DEDICATION OF HUNGARIAN CHURCH

(By Eleanor Blau)

Jozsef Cardinal Mindszenty, the Roman Catholic Primate of Hungary who is in exile, will visit the United States beginning Friday to dedicate a renovated church in a Hungarian section of New Brunswick, N.J.

The Rev. Julian Fuzor, pastor of the church, St. Ladislaus, said the 81-year-old Cardinal was making the trip because of the church's efforts to "strengthen our faith and our national heritage—he feels we're doing exactly what he suffered and worked for."

A State Department spokesman described the trip as "purely private."

The Cardinal, who lived as a political exile in the American Embassy in Budapest for 15 years after the uprising in Hungary was put down, moved to Vienna in 1971 and now is touring Canada, where Hungarian nationals are celebrating the 1,000th anniversary of St. Stephen, first King of Hungary.

'STRONG HUNGARIAN ATMOSPHERE'

Father Fuzor said Cardinal Mindszenty had canceled a planned six-week tour of the United States so he could complete his mem-

oirs but had kept St. Ladislaus on his agenda because of its symbolic significance.

"National parishes are dying in America these days," added the pastor, who has been in correspondence with Cardinal Mindszenty since his move to Vienna. "But we renovated the church for half a million dollars, and the church has a very strong Hungarian atmosphere."

He said that Hungarian was taught in the 252-pupil parochial school and that services were conducted in both English and Hungarian.

About 800 families attend the church. The neighborhood has been Hungarian since about the turn of the century, Father Fuzor said, but many of the 18,000 or more Hungarians there now came to the United States after the 1956 uprising. They settled in New Brunswick after staying temporarily at nearby Camp Kilmer.

St. Ladislaus has stained-windows representing the saints of Hungary and the history of the church there.

COOKE TO GREET MINDSZENTY

Cardinal Mindszenty will be met at Kennedy International Airport tomorrow night by Cardinal Cooke, will stay overnight at the Cardinal's residence here and then proceed to New Brunswick.

He will dedicate the renovated church, celebrate mass and then, on Sunday, attend a testimonial dinner on his behalf at the Holiday Inn in North Brunswick. The Cardinal plans to leave for home on Tuesday, stopping en route in Toronto and Frankfurt.

Cardinal Mindszenty was arrested by the Hungarian Government in December, 1948, and charged with "treason, attempting to overthrow the democratic regime, espionage and foreign-currency abuses."

He "confessed" guilt to many of the charges, but his haggard appearance prompted speculation that he had been brainwashed.

Sentenced to life imprisonment the Cardinal was freed by the Hungarian Freedom Fighters in 1956 but he sought refuge in the American Embassy when Soviet forces crushed the rebellion a few days later.

[From the New York Times, Sept. 29, 1973]

HUNGARIANS GREET MINDSZENTY HERE

(By John T. McQuiston)

Josef Cardinal Mindszenty, the 81-year-old exiled Primate of Hungary, was reunited at Kennedy International Airport last night with 200 Hungarians who fled to the United States in 1956 following the Hungarian uprising.

The prelate, formally welcomed to New York by Cardinal Cooke, was praised as "a symbol of courage, of integrity and of hope."

Cardinal Mindszenty kissed Cardinal Cooke on both cheeks, his eyes filling with tears, then thanked him because he had "come in person to meet me." He also thanked "the people of America for feeling for me and my countrymen."

"It was in 1956 that I became a 'guest' of the American legation in Budapest for 15 years," he said. "I will never forget their services."

HUNGARIANS ON HAND

Cardinal Mindszenty sought refuge in the United States Embassy in 1956, after he was freed by freedom fighters after his arrest and imprisonment for life in 1948 by the Hungarian Government on treason charges.

Cardinal Cooke led the visiting prelate, distinguished by his white hair and red cap, through a crowd of newsmen to the British Overseas Airways Corporation main lobby where the Hungarians and their American families, many wearing native Hungarian costumes, cheered his arrival.

Several young children dressed in colorful costumes carried baskets of small zinnias and daisies. They tossed the flowers into the air, raining them down on the crowd as it cheered, "God bless Cardinal Mindszenty!"

Mrs. Ava Balimtitt, who fled Hungary in the 1956 counter-revolution and who had been confirmed by Cardinal Mindszenty in 1948 in Budapest, joined in singing the Hungarian national hymn for the prelate.

Cardinal Mindszenty, who arrived from a week-long tour of Canada, will bless the newly renovated Church of St. Ladislaus in the largely Hungarian community of New Brunswick, N.J., this morning. He will remain in New Brunswick for three days, then return to New York for a flight back home to Vienna, where he now lives, on Tuesday.

FDA'S PROPOSED DECISION ON DEPOPROVERA FOR LIMITED USAGE

Mr. KENNEDY. Mr. President, the proposed decision by the Food and Drug Administration to approve DepoProvera for "limited usage" as an injectable contraceptive is both ill-advised and unenforceable. The decision raises profound ethical questions which underline the urgent need to enact the Protection of Human Subjects Act, which recently passed the Senate by a vote of 81 to 6.

My concern is not whether there are appropriate limited uses for DepoProvera as an injectable contraceptive; it is rather whether the defined population can be identified, whether their rights can be adequately protected by the mechanism proposed by FDA, and whether enforcement of this "limited use" policy is possible.

The FDA has already acknowledged: First, that there is widespread, unapproved use of DepoProvera now as an injectable contraceptive; second, that the FDA is powerless to control this or any other unapproved use of a drug because of what they interpret as "a congressional mandate" not to interfere with the practice of medicine; and third, they are unable to document the extent of unapproved use of DepoProvera at the present time.

I believe there is a real danger that this decision will result in widespread use of DepoProvera in institutions for the mentally retarded and in health clinics serving the poor and uneducated. How will informed consent be obtained in these circumstances? Who will monitor the doctor's performance in obtaining informed consent? Why should the limited use policy be more effective in assuring appropriate use when inappropriate use was widespread when the drug was not approved at all?

The Protection of Human Subjects Act creates a National Commission to study, among other things, the complex ethical questions raised by this decision. What group within FDA addressed these ethical questions? What standing group in FDA continually deals with these problems?

I do not believe the FDA can adequately monitor the use of this or any other drug in this country. I do not want to see a drug that is too dangerous for general use be utilized within a medical care system that has no quality controls or peer review built into it. The upcoming drug hearings of the Health Subcommittee will explore these issues in great detail.

THE FABULOUS "BEAR" BRYANT OF ALABAMA

Mr. ALLEN. Mr. President, only a privileged few live long enough to hear the favorable verdict of history on their careers.

One such person is the athletic director and head football coach at the University of Alabama, Paul W. "Bear" Bryant. He is indeed a living legend.

As I have indicated, Coach Bryant already holds a place in our Nation's athletic history that few may ever attain. His record as a collegiate football coach includes 225 wins, more than any other active coach and he ranks fourth in the all-time victory list in the football coaching profession.

In 28 years of coaching, Bear Bryant has taken 19 of his teams to post season bowl games, including 14 consecutive bowl trips for the University of Alabama. Since returning to his alma mater in 1958, Coach Bryant has directed the Crimson Tide to three national championships—in 1961, 1964, and 1965. He has won six Southeastern Conference titles at Alabama, plus one at the University of Kentucky for a total of seven conference crowns, more than any other coach in the history of the conference.

Twice, Coach Bryant has won the National Coach of the Year title and he has been named Southeastern Coach of the Year three times. He is also the immediate past president of the American football Coaches Association.

Currently, Bear Bryant's 1973 edition of the Crimson Tide is undefeated in five games and ranks second nationally in the prestigious football polls of the Associated Press and the United Press International. This coming Saturday, a majority of our Nation's television viewers will have the opportunity to see Alabama clash with its longtime rival, the undefeated Volunteers of the University of Tennessee. Before the end of the current regular football season, sports fans will have two more opportunities to view Alabama football on national television.

Mr. President, commensurate with his rare talent for teaching winning football is Coach Bryant's dedication to the character building and citizenship training of the young men who have been fortunate enough to play for him. Coach Bryant's code of moral and spiritual integrity has enriched the lives of thousands of young men and, yes, women, by instilling in them the senses of pride, honor, courage, and self-reliance necessary to be participating citizens when they attain adulthood.

Numerous Bear Bryant students of yesterday are now to be found in high places everywhere. A listing of prominent business executives, attorneys, physicians, coaches, scientists, teachers, Armed Forces leaders, and other successful men—all former Bear Bryant pupils—would indeed be formidable.

One of the innumerable instances of Coach Bryant's lifelong concern and devotion for our young men and women

occurred a few days ago when he made a personal gift of $100,000 to the University of Alabama to be used for academic scholarships.

No athlete is eligible for this scholarship assistance unless and until he pursues postgraduate studies and only then if approved by the University Scholarship Committee. The Athletic Department will have nothing to do with determining recipients.

Mr. President, I ask unanimous consent to print in the RECORD a press release concerning this donation to his alma mater by Coach Bryant.

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

SCHOLARSHIP FUND FOR THE UNIVERSITY OF ALABAMA

UNIVERSITY, ALA.—Paul Bryant, athletic director and head football coach at the University of Alabama, has donated a personal gift of $100,000 to the University to be used for academic scholarships.

The University will establish the Paul Bryant Scholarship Fund with the personal gift from Bryant, who started his winning career in football here in 1932 when he enrolled as a student and member of the Crimson Tide.

Bryant's gift to the University is one of the largest single academic scholarship funds at the Capstone.

"As far as I know, a gift of this kind from an athletic director and coach is without precedent," said Dr. David Mathews, University president.

"And it is certainly characteristic of Paul Bryant's tenure," Dr. Mathews said. "His great feelings for the University as an educational institution, and his deep feeling of responsibility to this institution are, even if less well-known, as significant as his winning record on the field."

Bryant's record as a football coach includes 223 wins overall, which is more than any active football coach, and his teams have recorded the most wins in the Southeastern Conference—103.

His teams at Alabama have won the National Championship three times (1961, 1964, and 1965), and the Southeastern Conference Championship six times. He also won the Southeastern Conference Championship while coaching at Kentucky, and captured the Southwest Conference title when he coached at Texas A&M.

Bryant has won the National Coach of the Year title twice.

When asked to comment on his gift, Bryant said:

"Fortunately, I've had friends outside of football who have advised and put me in investments that have been profitable. I probably owe the University more than anyone else who went here, and I just want to share it with them."

Bryant said the selection of the students for these academic scholarships will be made by the scholarship committee.

"However," he added, "I would hope that the committee would consider the sons and daughters of football players I have coached at Alabama, and physically handicapped students who are academically qualified."

Dr. Mathews said the Paul Bryant Scholarship Fund will be a significant benefit for the University. "And most significantly," he added, "to the students who might not have a chance for a college education without this fund."

Mr. ALLEN. Coach Bryant's generous donation will, of course, mean much to the academic scholarship program at the University of Alabama and to the young men and women, particularly physically handicapped students, who will be direct recipients of the Paul Bryant Scholarship Fund.

Most important, however, is the fact that Coach Bryant has again displayed his deeprooted love for our youth and his dedication to helping them prepare for their duties and responsibilities of tomorrow.

I salute Coach Bear Bryant for his gift of $100,000 to establish academic scholarships at the University of Alabama and in doing so, I know I am joined by countless Americans everywhere.

When I think of the many outstanding accomplishments and contributions of this remarkable man, I am especially proud that I am an Alabamian.

FEDERAL DISASTER ASSISTANCE TO CHELSEA, MASS.

Mr. KENNEDY. Mr. President, on Sunday, October 14, fire destroyed one-quarter of the city of Chelsea, Mass. On Tuesday, October 16, President Nixon declared the city a major disaster area eligible for Federal disaster relief.

Sunday night, I sent a telegram to the President urging him to take this action, and Monday, after touring the devastated area of Chelsea with Mayor Phillip Spellman and the regional director of the Federal Disaster Assistance Administration, I spoke with Governor Sargent and with Secretary of Housing and Urban Development James Lynn urging expeditious action on the application for the declaration of the city as a major disaster area.

Under the procedures established by the Disaster Relief Act and recent executive orders, the Federal Disaster Assistance Administration is the coordinating agency both for the initial decision as to whether an area qualifies and then for the actual allocation of assistance.

For that reason, I also was in touch Sunday night through my staff with the Federal Disaster Assistance Administration in Washington to insure their immediate action. They began immediately to establish centers for assistance to Chelsea. The decision announced by the President Tuesday will enable those centers to furnish immediate assistance authorized by the Disaster Relief Act of 1970.

Federal Assistance for the victims of the fire includes food stamps and commodity food programs, temporary housing including free rental units for up to a year for those who were displaced, unemployment insurance payments, manpower training and help in obtaining jobs, and Small Business Administration low-interest loans for both the reconstruction of residences and for the rebuilding of businesses.

These Federal programs are vital if we are to move quickly to provide relief to the victims, to restore vital services, and to rebuild housing and industries which were destroyed.

At the same time, Federal programs triggered by the announcement of the President will enable municipal and other public services to be restored through grants directly to the municipal agencies. Those grants can cover 100 percent of the cost of restoring vital services.

We have so much to be thankful for that no lives were lost and no one was seriously injured in the fire in Chelsea. But we have a great deal to do to restore the city and rebuild the lives of those who suffered tremendous losses in the blaze. Chelsea's greatest asset is its citizens and working with them we can revitalize the economy and rebuild the city.

THE 3–M COMPANY SUPPORTS ACTIVITIES BENEFITING ELDERLY

Mr. PERCY. Mr. President, as one who has a very deep interest in and concern about the problems of the elderly, I am always pleased to learn of a parallel interest and concern in the private sector.

Activities in the field of the aging sponsored by the Minnesota Mining and Manufacturing Co. of St. Paul, Minn.—the 3–M Co.—have recently come to my attention.

Earlier this month 3–M funded a 1-day seminar at the Andrus Gerontology Center of the University of Southern California for senior officers of national organizations which have policies, activities, or programs relating to the elderly in our society.

The Gerontology Center developed the seminar to sensitize the 25 leaders and to impart information about specific issues in aging—education, income, mental health, and so forth—and methods for dealing with these issues at the local level.

Then on October 29, 3–M will underwrite a special 90-minute broadcast to be produced by public television station KCET, Los Angeles, entitled "Wrinkles, Birthdays, and Other Fables."

The special, hosted by Flip Wilson, will be made up of an hour-long broadcast, incorporating entertainment forms to deliver information concerning the elderly, followed by a 30-minute related discussion program.

The entertainment portion will feature music, comedy, and dramatic vignettes to convey its messages. PBS stations are being urged to preempt the followup discussion portion of the show and replace it with locally produced programs which will provide information directly related to the needs of older Americans of individual communities.

The American Medical Association, American Association of Retired Persons, American Academy of Family Physicians, American Geriatrics Society, American Nurses Association, Council of Churches, and B'nai B'rith are some of the national organizations supporting the project.

I believe the 3–M Co. is performing a most worthwhile community service by funding these activities. I commend the 3–M Co. for its interest and concern in the problems of the elderly and for its efforts in translating interest into action.

SENATOR EAGLETON'S CONTRIBUTIONS TO HEALTH CARE

Mr. KENNEDY. Mr. President, I would like to call to the attention of the Senate an award recently presented to our

distinguished colleague, Senator EAGLETON. He is the recipient of this year's Meritorious Service Award of the Optometric Council of the National Capital Region—OCNCR. The award cites Senator EAGLETON's "significant contributions made to the health care of the population through dedicated public service."

The presentation was made last week by Dr. Harold Glazier, OCNCR chairman; Dr. Michael Obremskey, immediate past chairman; H. E. Mahlman, OCNCR executive director; and Harry J. Doyle and Richard E. Martinez, both of the American Optometric Association staff.

As chairman of the Senate Health Subcommittee, of which Senator EAGLETON is also a member, I want to commend the Optometric Council for selecting him to receive this award. His contributions to our work have been substantial, particularly in the area of Federal programs to assist in training needed health personnel, where his leadership has been outstanding. Moreover, as a member of the HEW Subcommittee of the Appropriations Committee, Senator EAGLETON has the rare opportunity to participate not only in the development of legislation authorizing health programs, but also in their funding.

Mr. President, the entire Nation has benefited from Senator EAGLETON's dedicated efforts in the field of health care and I am pleased that members of the optometric profession have recognized his efforts through this award.

TRADE LEGISLATION

Mr. PERCY. Mr. President, the issue of international trade and whether it benefits or hurts the United States always arouses a great deal of emotion. It is always instructive to have as many facts as possible at one's command before making decisions on issues of this importance.

It has long been my contention, in business as well as in the Senate, that expanded international trade is in the best interests of this country. Further, it is my contention that expanded international trade is in the best interests of American industry and the American worker.

Thus I was most pleased to see an article by James J. Kilpatrick in the Washington Star on October 3, 1973, reporting on the experience of two U.S. companies which have become actively involved in international trade.

The first of these companies is the Caterpillar Tractor Co. of Peoria, Ill. Since 1950, when Caterpillar established its first overseas subsidiary, Caterpillar's sales, jobs and exports have grown. Between 1950 and 1972, Caterpillar's exports grew from $93 to $800 million, its purchases from domestic suppliers grew from $188 million to more than $1 billion and it has created 20,000 jobs here at home.

The second example is that of the Clark Equipment Co. At the same time that the company has invested abroad in 23 countries, the company's export business has grown from $5 million in 1950 to $96 million in 1972 and 2,800 jobs have been created in this country.

Various legislative proposals are pending in Congress that would restrict the right of U.S. companies to invest abroad and which would restrict international trade. Based on the experience of Caterpillar and Clark, it is hard to see what benefit these proposals would bring. In fact, I think they would be very damaging to the prosperity of this country.

Mr. President, I ask unanimous consent that the article by Mr. Kilpatrick be printed in the RECORD.

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

DESERVING OF A FAIR SHAKE

(By James J. Kilpatrick)

Nothing much has been heard in recent months of the Burke-Hartke bill, more precisely known as the Foreign Trade and Investment Act. The proposal has vanished like so much grist in the mills of the House Ways and Means Committee, which is grinding out a single bill covering many aspects of foreign trade.

The protectionist attitudes embraced in Burke-Hartke have not vanished at all. The bill, sponsored by Rep. James A. Burke of Massachusetts and Sen. Vance Hartke of Indiana, continues to draw the enthusiastic support of the AFL–CIO and of other pressure groups opposed to multinational corporations. These spokesmen can be counted on to renew their clamor when the package bill makes its appearance this month.

A brochure published by the Industrial Union Department of the AFL–CIO argues stridently, in great splashes of red ink, that the multinational corporation is "unfair to American jobs." Such a corporation, with capital investments around the world, is a "modern-day dinosaur which eats the jobs of American workers." The charge is made that the foreign plants "produce goods which compete unfairly with American-made products."

The AFL–CIO arguments have been ably refuted recently by two spokesmen for American industry, William A. Naumann of Caterpillar Tractor and Walter E. Schirmer, chairman of Clark Equipment Company. Because the union's position has been widely publicized by such articulate advocates as Burke and Hartke, the other side of the story deserves a fair shake.

Naumann spoke last week at a conference of the Cast Metals Federation, representing several hundred iron and steel foundries. He bluntly acknowledged their fear that when a company such as Caterpillar builds a foreign plant, and begins to buy castings and other production materials abroad, domestic foundries are hurt. He offered convincing evidence that precisely the opposite is true.

Caterpillar has 11 plants abroad. In every case, Naumann said, Caterpillar's exports to the host nation have increased as a consequence of establishing the factory. The foreign plants not only require substantial amounts of U.S. parts and components for foreign assemblies; more significantly, he said, these plants "help us increase sales of our whole product line, including machines made only in the U.S."

Between 1950 and 1972, Caterpillar's exports grew from $93 million to $800 million. In this same period, its purchases from domestic suppliers rose from $188 million to more than one billion dollars. By Naumann's estimate, Caterpillar's exports and foreign earnings in the past 10 years not only have produced a net inflow of $5.2 billion, but also have created 20,000 domestic jobs.

Schirmer, who spoke in July at Duquesne University, offers the same affirmative evidence. His company, best known for its forklift trucks, has invested $122 million in plants in 23 nations, most notably in Brazil. Far from "exporting jobs," as the AFL–CIO contends, the foreign plants create jobs here at home. The Clark plants themselves become, in effect, markets for Clark components. The company's export business has soared from $5 million in 1950 to $96 million last year. The growth has created 2,800 jobs that otherwise would not exist.

The Burke-Hartke approach, by imposing punitive taxes on the multinational corporations and requiring import quotas, would stifle this healthy expansion. In theory, the protectionists would "keep jobs at home." In point of fact, their small-bore thinking would kill off the jobs of thousands of industrial workers, most of them union members, whose livelihood depends on foreign trade. Maybe this makes sense to George Meany, but it is hard to see how it makes sense to anyone who understands the parable of the goose that laid the golden egg.

PAYCHECKS ARE SHRINKING

Mr. HUMPHREY. Mr. President, we all know that a bag of groceries cost more today than it did 1 year ago, or even a month ago. The cost for housing, clothing and other necessities have also shot up to record rates. This situation is alarming, but the administration has been trying to comfort us with the assertion that real wages too are rising at record rates.

However, the rise in wages is illusionary. According to an article in the Wall Street Journal by Alfred L. Malabre, Jr., the average working man's pay has actually shrunk in terms of what it can buy. And while this may not spell recession in the economist's book—as gross national product leaps to ever greater heights—it certainly means recession for the wallet of the average working man.

The ramifications of this decrease in buying power are wide and serious. This drop in real earnings could signal new difficulties across a wide range of economic areas. The consequences of this trend are outlined and discussed in the aforementioned article by Mr. Malabre.

Mr. President, because of the importance of the facts presented and the analysis provided on the economic position of the American worker and his family, I ask unanimous consent that this important article be printed in the RECORD.

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

TAKING HOME LESS—PAYCHECK BUYING POWER SHRINKS AS INFLATION OUTRUNS GAINS IN WAGES

(By Alfred L. Malabre, Jr.)

Economists, armed with slide rules and computers, debate whether a recession impends. Some indicators of business activity say yes. Some say no The outlook remains unclear.

But don't tell that to the average working man. For him, the recession began a year ago.

The number of dollars in his weekly paycheck continues to expand. But since October 1972, with inflation ranging, his pay has shrunk in terms of what it can buy. And, for the bread winner, that's a recession, even if gross national product leaps from record to record and the sun shines again on Wall Street.

The table below pinpoints the shrinkage of paycheck buying power since last October. The figures in both columns are based on the average weekly pay of nonsupervisory

workers in private business. The buying-power figures are obtained by adjusting actual paycheck pay to reflect price increases and Social Security and federal income tax payments.

Weekly pay, weekly buying power

October	$139.13	$97.49
November	138.76	96.98
December	138.75	96.78
January	139.11	95.81
February	140.62	96.08
March	141.35	95.67
April	142.85	95.96
May	143.22	95.61
June	143.58	95.29
July	145.45	96.16
August	145.43	94.34

Thus, from October through August, the latest month for which figures are available, the average paycheck has gone up $6.30 a week while its acutal buying power has gone down $3.15 a week.

A squeeze on workers' living standards is only one painful ramification of the drop in paycheck buying power. And while workers have less money to spend these days, they have less inclination to spend it. The University of Michigan's latest survey of consumer attitudes shows pessimistic consumers plan a sharp drop in spending; see article on page 19.) On the labor front, it suggests an increasingly tough stance by union bargainers in coming months. As the figures indicate, pay gains simply haven't been keeping up with inflation and taxes.

An economist for the AFL–CIO in Washington confides he is "astounded" that union bargainers, in view of such a trend, remain "so docile," and he anticipates "much harder bargaining" just ahead.

A TRADITIONAL LAG

One explanation for the "docility" of labor, the AFL–CIO official surmises, is simply that there is traditionally a lag before workers realize their paychecks are worth less. He also blames "a lack of publicity" given to statistics that bear on buying power. In an attempt to remedy this, the leading article in a recent issue of the AFL–CIO News focuses on the decline in "real" earnings. Another possible reason that labor hasn't been loud in its arguments for raises is that many big unions have cost-of-living clauses in their contracts, and thus they receive raises automatically as living costs increase.

For many corporations, of course, tougher bargaining could end in an extra squeeze on profits that already are expected by most economists to show little or no growth next year. For Washington's harried inflation-fighters, the limits of Phase 4 pay controls—generally a top of 5.5% a year—could be sorely tested by adamant union leaders determined to keep their people ahead of the price spiral.

Even before any step-up in union pay demands materializes, it's noteworthy that labor costs appear sharply on the rise. In August, the latest reading, unit labor costs in manufacturing stood at a record 123.8 (on a base of 1967=100). This was up from 118.3 in December. During 1972, in contrast, the labor-cost index was flat. The recent rise, analysts explain, reflects reduced gains in worker productivity, rather than any acceleration in pay boosts.

For business as a whole, the drop in buying power could signal new difficulties across a wide range of economic areas. Although it isn't among the so-called leading indicators that economists follow to track the likely course of general business activity, paycheck buying power was approximately flat for several years, and then turned down, before the country's last major recession, in 1969–70.

WORSE THAN IN A RECESSION

The economy began to pull out of that recession in December 1970, and buying power figures moved up accordingly, from a nadir of $89.09 in October 1970 to the record $97.49 attained 24 months later. The $3.15 drop since last October exceeds by far the decline in buying power that occurred before or during the 1969–70 slump. Over the course of that 12-month recession, the paycheck shrinkage amounted to $1.19, less than half the recent decline.

It's possible, of course, to attach too much significance to a single economic statistic. No index of business activity is perfect, and that recording the average worker's pay in real terms is certainly no exception. For one thing, it doesn't take into account fringe benefits, which bulk ever larger in the overall remuneration of employes. For another, it measures only the pay of nonsupervisory workers in private business, a job category that covers about 50 million persons in a work force of more than 85 million.

On the other hand, the buying power index also doesn't take into full account state and local tax payments, which increasingly erode overall pay. To a considerable extent, government analysts say, this omission offsets the failure of the index to cover fringe benefits.

In any event, the trend that has been evident in paycheck purchasing power since October has very recently begun to show up in other, broader measures of the individual's economic well-being.

One notable index that recently has stopped climbing measures the per-capita income of the entire U.S. population, all 210 million of us, after federal income taxes have been paid and allowance has been made for inflation. In the second quarter of this year, this index—our broadest economic yardstick of U.S. living standards—stood at $2,877, on an annual basis, down a smidgen from the first-quarter level of $2,878. The tiny decline marked the first quarter-to-quarter drop since late 1970, at the pit of the last recession. Then, the index touched $2,602, a full $275 less than in the latest quarter.

A glance at the economic record book shows that real per-capita income usually rises briskly in times of general business expansion. Indeed, other than during recessions, the index has fallen only five times—including the latest drop—in the past 20 years.

It's noteworthy, also, that the recent drop in per-capita income has come at a time when consumer saving, as percent of after-tax income, has also been declining. The second-quarter saving rate stood at 5.9%, down from 6.6% at the end of last year. In late 1970, in contrast, this rate amounted to 8.4%, up sharply from levels earlier in the year.

Still other statistics show that the recent decline in real pay ranges across a wide front. The table below details what has been happening to the purchasing power of weekly paychecks in various major industries during a recent 12-month span.

Buying Power Decline

	Percent
Mining	−0.6
Construction	−1.9
Manufacturing	−1.9
Transport & Utilities	−0.4
Trade	−3.2
Finance	−3.2
Miscellaneous Services	−1.7

As distressing as they may be, such declines are made doubly painful, some analysts contend, by the fact that the dollar's international worth since late 1971 has been dwindling.

The various indexes measuring real income in the U.S. generally don't take this decline into account. If they did, one government economist remarks, "an already bad pay picture would look absolutely awful."

He cites the decline of the dollar in terms, for example, of West German marks. In a recent three-year period, he says, the buying power of American workers, on average, edged up about 2%. But in the same three years, the analyst continues, the value of the dollar in terms of marks fell more than 40%.

"In German terms, the real take-home pay of Americans has plunged in the last few years," the analyst asserts, "and the situation is similar if you take such major countries as Japan or other European nations."

There is, of course, a brighter side to the coin. It's precisely this decline in the dollar's international value that has recently gained the U.S. increased attention from West Germans, Japanese, French and other foreigners as a relatively inexpensive labor market. In the process, many U.S.-produced goods, while ever costlier for Americans, have also grown cheaper for many foreigners.

A more competitive labor force, of course, could ultimately mean more jobs for U.S. workers. As one government analyst puts it, however, "it remains to be seen whether that happy prospect will induce unions to temper their demands once they fully see what's been happening to what their people are taking home."

AMERICA'S INDEPENDENT COLLEGES AND UNIVERSITIES

Mr. PERCY. Mr. President, I have been aware for some time of the increasing difficulties that nonpublic institutions of higher education are having in maintaining their position in the forefront of American education.

Their continued existence not guaranteed by Federal, State or local government, independent colleges and universities must compete with heavily subsidized public institutions. During these times of soaring costs, they are having increasing difficulty keeping these standards high and attracting sufficient numbers of students to function effectively. The present tight money market and the problems of inflation without doubt influence more students to select lower cost public institutions. Private schools in many cases are beyond the financial range of middle-income students.

Several of my colleagues from the Illinois Congressional Delegation and I recently met with representatives of the Federation of Independent Illinois Colleges and Universities. The meeting was most beneficial to all of us who attended. The congressional delegation had an opportunity to learn first hand the seriousness of the mounting financial problems confronting independent colleges and universities.

I would like to have printed in the RECORD two reports that may shed further light on these problems.

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

CURRENT STATUS OF FEDERAL STUDENT AID PROGRAMS

Current Status of Federal Support for Student Aid Programs with Implications for the State of Illinois and the Programs of the Illinois State Scholarship Commission

One year ago, 130 of the colleges of Illinois estimated in forms filed with the USOE that their 1973–74 student financial aid needs

were $84.5 million. Their estimates took into consideration what amounts of dollars could be realistically expected from parents, the applicants' self-help in earnings, and expected institutional, private, and State of Illinois aid programs. When all these resources were subtracted from college cost budgets, a deficit of $84.5 million remained.

Available and allocated dollars to meet this request for 1973–74 are $38.5 million or 45.6% of the panel-approved institutional requests. For 1973–74 the following amounts were released to Illinois institutions:

[In million]

Supplemental Educational Opportunity Grants	$10.548
College Work Study Funds	13,718
National Direct Student Loans	14,258
Total	38,524

By mid-July of 1973, a new federal program of Basic Grants was launched, with $122. million made available for the nation, with a maximum award of $452 and available to only first time, full time undergraduate students. Experience to date in this program has been disappointing. Targeted to low income and asset families, only 46% of the 210,000 announced Base Grants as of 9/25/73 are demonstrating financial need. Illinois students should have realized $6 to 7 million from this program in 1973–74; however, to date I would estimate $1.5 million has been awarded to Illinois residents. The late announcement of the program, a program targeted to predominantly low income families, a program offering average awards of about $250, and, in my opinion, an excessive expectation from family assets have kept applications received to date at about 20% of original expectations.

Other significant sources of federal dollars for post-secondary education support to students as Illinois residents are estimated as:

Social Security, $26.0 million.

Veterans Benefits, $87.0 million.

Another significant form of potential federal benefits for Illinois residents (not funded to date) is the State Scholarship Incentive Grant Program. Once funded, at a level of $50.0 million, Illinois would qualify for an additional $2.5 to $3.5 million of student aid.

As we look to 1974–75, one can only speculate on available federal student aid dollars. I would assume another $38. to 40 million for Illinois in the federal funded and campus administered programs (SEOG, CWS, and NDSL), and a growth of Basic Grants to a minimum U.S. figure of $440.0 million. Figures for Basic Grants totaling $725.0 million are also being discussed. A higher maximum award to include both freshmen and sophomore full-time students seems likely.

It should be reported that all federal programs are now available to vocational/trade schools with accreditation, a minimum of a six months program, and those having existed for at least two years. All federal aid programs except Basic Grants are available to half-time students. Both Basic and Supplemental Grants are limited to undergraduates.

Provided Basic Grants are funded at $440.0 million and State Incentive Grants are also funded, an additional $20 to 25.0 million of federal non-repayable student aid in grants could be available to Illinois students in 1974–75.

A new needs test to qualify for interest subsidy in Guaranteed Student Loans has reduced volume in this program by 37% in Illinois. We have yet to study the full causes and impact of this drop. All states report similar decreases.

It is essential to determine for whom this loan program is intended, and additional federal amendments are anticipated by the spring of 1974 to restate purposes, desired federal/state partnership, approved eligible lenders, and the role and need of interest subsidy.

IMPLICATIONS FOR THE STATE OF ILLINOIS AND THE PROGRAMS OF THE ILLINOIS STATE SCHOLARSHIP COMMISSION

Until FY 75, federal appropriations for student aid programs are known and signed into law, it becomes most difficult to deal with implications.

The Board of Higher Education in 1972 received reports from The Commission on the Financing of Higher Education and from the Student Financial Aid Study Committee. Issues raised in these reports included several matters dealing with potential changes in Illinois student aid programs. Any answers to these changes must be made in relationship to federal student aid programs and their level of funding.

As of 1973–74, Illinois funded student grant programs (under ISSC administration) are not serving the following post-secondary students or purposes:

1. less than full-time students.
2. graduate students.
3. home study students.
4. students requiring five years to obtain baccalaureate degrees.
5. grant dollars for any expenses beyond tuition and fees.
6. the payment of tuition or mandatory fees above $1,300.
7. grant dollars to any students at Illinois proprietary schools.
8. students attending out-of-state institutions.

Matters of public policy require priorities as to where available dollars should be invested. Increases in tuitions (at either public or non-public institutions) require a review as to whether or not additional grant dollars are needed to lessen the impact on both access and choice.

For the past five years, the ISSC has received sufficient dollars to help all needy undergraduate applicants applying between October and August for the year to follow. If they attended full-time, we have been able to assist all eligible applicants, up to $1,300 for tuition and fees in 1973–74. Over 70,000 students will be assisted in 1973–74 with the $55.32 million appropriation for ISSC monetary awards.

Beyond the decision of what changes are recommended in the grant program, major issues remain as to the need for a state funded work-study program for college students as well as the possibility of the State of Illinois becoming an eligible lender in the Guaranteed Student Loan Program. Are reciprocity agreements with other states to be developed?

In a few months the National Commission on the Financing of Post Secondary Education will release its recommendations. Their report could have significance for federal and state roles. The State of Illinois Economic and Fiscal Commission also plans a report to be released in a few months reviewing Illinois student aid programs and recommending changes.

Perfect timing as to when to review changes becomes an almost impossible task. Legislative, academic, and application processing calendars do not follow similar dates and provide ideal planning. The State of Illinois best uses its student aid resources when responses take full cognizance of federal student aid programs and respond in order to supplement, not duplicate or overlap.

Some observations on comparing our 1973–74 award year Monetary Award Program applicants with a year ago may assist you in understanding other changes in Illinois higher education.

	Award year 1972–73	Award year 1973–74		Percent change
APPLICANTS				
Total	113,944	112,966	down	0.86
Male	58,206	56,117	down	3.49
Married	8,063	9,882	up	22.56
Freshman	45,440	44,277	down	2.56
Sophomore	27,616	27,548	down	.25
Junior	23,732	23,526	down	.87
Senior	17,010	17,293	up	1.66
Emancipated	14,414	18,484	up	28.24
American Indian	302	348	up	15.23
Black	19,844	22,499	up	13.38
Caucasian	87,118	80,999	down	7.02
Oriental	775	842	up	8.65
Spanish surnamed	1,938	2,554	up	31.79
Other	2,384	2,398	up	.59
Not reported	1,020	3,302	up	223.73
COLLEGE CHOICE				
Public 2 yr	13,554	14,937	up	10.20
Public 4 yr	52,372	51,087	down	2.45
All public	65,926	66,024	up	.15
Private 2 yr	2,222	3,255	up	46.49
Private 4 yr	39,163	36,093	down	7.84
All private	41,385	39,348	down	4.92
Professional	1,949	2,994	up	53.62

It must be noted that this past year (in which 112,966 applications were received—a drop of 978 over the year before) was the first time since 1968–69 we have not received at least 16,000 more applications than the previous year. The inference of this fact is simply that any future additions to our budget can serve other purposes beyond normal growth under current benefits.

Other significant issues to be resolved in the best interest of students are:

1. Should applicants of state awards be required first to apply for any federal student aid benefits for which they qualify?
2. Should one application and administrative unit be designated as the channel by which families and/or students know what federal *and* state student grant aid benefits they are eligible to receive?
3. What represents the best partnership among federal/state/and institution roles and funds in serving both mutual and distinctive purposes?

The Illinois State Scholarship Commission desires to continue to work in a cooperative manner with the Board of Higher Education in its development of broad public policies which will keep Illinois as a national leader in its programs of student financial aid.

HIGHER EDUCATION: THE C.E.D. REPORT
OCTOBER 4, 1973.

(A Commentary by Alban Weber, Executive Director, Federation of Independent Illinois Colleges and Universities)

The recently issued report of the Committee on Economic Development entitled "The Management and Financing of Colleges" has created quite a storm in the academic community, generating some immediate vocal antagonism from some elements in the public higher education sector as well as in Congress. The controversy, however, seems to be a healthy one, if it ends up in stimulating some thought as to actual goals in higher education, and if it does not polarize thinking on the issue.

The key recommendation of the report which has created controversy is the recommendation that there be substantial tuition increases to support some of the spiraling costs in higher education. The report was most careful to point out, however, that no such increases should take place without the application of the additional funds and the availability of other funds to prospective students to pay the additional tuition so that no students would be de-

prived of an education because of lack of funds.

The immediate attack on the report (aside from some intemperate language about its sponsorship) was based on the premise that tuition rises would make education difficult for middle income students and middle income families.

Rep. O'Hara, Chairman of the House Special Subcommittee on Education, has attacked both the proposals of the Committee on Economic Development and the Carnegie Commission on Higher Education because his philosophy supports a national policy of higher education for all who can profit from it without financial barriers. While some of his attack on the two reports (C.E.D. and Carnegie Commission) was directed at specific figures used by them, the general thrust has been to merely support the status quo of present tuitions in the public sector.

While he and other critics do not say so, they are thus indirectly on record as favoring the continued decline in the nonpublic sector of higher education and its eventual elimination through unfair economic competition. The fact of the matter is that independent colleges and universities in the nonpublic sector see the recommendations of these reports as the first expressions of the enlightened development of a public policy that will actually support the national goal of availability of higher education for all without financial barriers, so eloquently expressed as an end by Rep. O'Hara. The status quo of low tuitions which often amount to less than one-fourth of the total annual instructional cost and a much lower percentage of the total cost of educating students in the public sector, creates a very worthwhile subsidy for the needy, but in addition, provides an unneeded subsidy for children of the rich and very rich, as well as those in the middle income classes, with no regard either to academic achievement or merit, or on the other hand, to individual or family need. The real crux of the situation, as Rep. O'Hara indicated, is the middle income family whose educational needs are, to some extent being subsidized by low public college and university tuitions. The possibility of reducing or destroying that subsidy is not only not desirable, but is, of course, politically highly infeasible, either through action of the Congress or in state legislatures.

But there is an aspect to this controversy to which Congress and the legislatures should be addressing themselves, and this involves the middle income families who are, through unfair economic distribution of subsidy, being forced to choose tax supported institutions even when they prefer a particular independent college because it offers some particular values they seek. The injustice created by the present situation stems in large measure from the failure of legislators and the public at large to fully realize the great transformation in higher education under which the differences between the so-called "private" sector and the "public" sector have been erased in many respects and the main legal distinction today relate to the source of financial support and the issue of governance. No longer, for example, are the independent colleges rich men's schools, since as indicated, the only source of subsidy for a rich man's son or daughter is attendance at a state institution with its written-in basis of indiscriminate subsidy for all. The nonpublic institutions can only afford to subsidize the needy and the academically meritorious, while their sister public institutions down the street can, through low tuition, be categorically indiscriminate.

The soul searching now being done in academia, therefore, relates to the question as to how to solve national goals both for "freedom of access" to higher education and "freedom of choice." The financial crisis of the independent institutions for the last few years has forced to the forefront another important question, the question of the value of maintaining a pluralistic system, of assuring the survival of independent institutions. There is no question that we need a strong and basic foundation of public higher education in this country. The great growth in numbers of students to whom higher education is available could only be absorbed in a fast growing public sector. But we believe the private sector is also worth preserving. It is interesting, for example, that, in Illinois, nonpublic higher education today enrolls slightly more students in absolute numbers than it did in 1960, while at the same time, its percentage of the total student population has decreased from about 50% to 30%. Both the absolute figures and the percentages speak well for the general handling of the problem in Illinois.

In the Congress, a great stride forward was made with the Higher Education Amendments Act of 1972, which created a whole set of new programs. In Illinois we can be particularly proud of the role played by former Rep. Pucinski in working on much of this legislation, as well as the very active sponsorship by Rep. Erlenborn of the Sallie Mae sections of the Act, and the great support given by Rep. Michel in the Appropriations Committee and on the House floor. All in all, reports across the country have indicated that the Congress in its rightful concern about freedom of access has paid great attention to the problems of the very needy but also has almost completely by-passed the two most pressing problems of higher education in the United States—the problem of the middle income family and the problem of maintaining a pluralistic system and not putting the independent college out of business.

We of the independent sector, therefore, strongly urge a careful consideration of both the Carnegie Commission report and the C.E.D. report, and we endorse its recommendations for increasing student aid in an amount sufficient to permit the allocation of a higher tuition cost in the public sector. Rep. O'Hara has pointed out, and we emphatically agree, that the dividing line for assistance seems to have arbitrarily been placed at the $15,000 income mark. This is not realistic in today's inflated world and there should be a much greater spread of whatever subsidy Congress or the legislatures determine to undergird the high cost of education for middle income families. This should, however, be done through aid to students rather than by low tuition rates. Tuition fees should be determined to a much higher degree both in the public and private sectors by actual operating costs and these should then be paid partially by federal or state subsidy and to the degree possible, by the students and their families.

We, therefore, strongly urge a much higher degree of attention to the scholarship provisions, a much more flexible definition of need and a relaxation of some of the provisions of Sallie Mae to make available student loans on a much broader basis.

VETERANS' EDUCATION AND TRAINING SERVICE

Mr. MATHIAS. Mr. President, the World War II GI bill was for me, as for many other veterans, the first and only chance to get a college education. Too many of today's veterans lack opportunity equal to that we had, but the general impression that today's benefits are just as substantial as those of 1948 has severely hampered many Vietnam veterans seeking jobs and education. As one young man put it:

What made the situation particularly galling was that at least fifty per cent of the people I encountered (fellow students, faculty members, friends of my family) all thought I was receiving the same benefits my father and his generation received.

This problem was underscored by a report requested of the Veterans' Administration by the Congress in the 1972 GI bill. The study, released last month by the Educational Testing Service, which carried out the research, shows the degree to which the Vietnam veteran lacks GI bill parity with World War II veterans.

Monday, October 22, we will celebrate Veterans' Day. Nothing would be more appropriate than to celebrate this day with more than traditional praise, by commitments to back our words with action.

The present benefits of $220 per month, out of which a veteran must pay tuition, books, fees, and living expenses, represents in current dollars the same amount World War II veterans received for living expenses alone.

In 1948, the veteran's subsistence allowance of $75 per month equaled 35 percent of the average monthly U.S. earnings. If we used the same measure today, 35 percent of current monthly earnings would ironically be $220, or the equivalent of today's monthly payment which must cover all expenses.

Geographical disparity exists among veterans seeking an education under the GI bill. A veteran living in California can expect tuition at State colleges around $200 per year. In Ohio and New Jersey, he can expect to pay $600 to $800. California has a far more extensive junior college system. As a result, 37 percent of California veterans attended junior or 4-year public colleges, while only 17 percent of New Jersey and 16 percent of Ohio veterans did so. Yet the level of desire for further education is equal. With close to 58 percent of Vietnam veterans residing in 12 States—all charging relatively expensive tuition—it is clear that many veterans are hurting.

In my own State of Maryland, the veteran attending the University of Maryland has $125 per month to live on after he pays tuition and fees from his benefits. With the job market such as it is, and with veterans continually being excluded from work-study programs and Federal employment programs because their GI bill benefits are considered adequate income, many vets who might otherwise get a college or vocational education do not even try. My question is this: If we have a commitment to today's veteran comparable to our commitment to men who fought in World War II, why are we not only pricing the Vietnam vet out of private colleges but rapidly pricing him out of major public universities and many State colleges? It must make these young men feel that now that they have done the dirty work. they are to be discarded with a token and unrealistic stipend.

The time has never been more crucial for putting together a realistic educational package for these men—a package of educational benefits which not

only alleviates the serious geographical disparities, but allows him to choose education without resigning himself to near poverty.

I ask unanimous consent at this time to print in the RECORD the final report of the Special Veterans' Opportunity Committee of the National League of Cities and U.S. Conference of Mayors which examines this issue, based on three public hearings held in Newark, Cleveland, and Seattle. They were chaired by Congressman SILVIO CONTE, of Massachusetts, who also received his education under the GI bill.

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

NATIONAL LEAGUE OF CITIES AND
U.S. CONFERENCE OF MAYORS,
September 4, 1973.

Hon. SILVIO O. CONTE,
U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN CONTE: This report is the culmination of an extremely important, timely and productive undertaking—the series of public hearings which we, as Mayors, co-chaired with you under the sponsorship of the National League of Cities and the U.S. Conference of Mayors. As local chief executives, we are very much aware that many Vietnam-era veterans have problems. These problems—jobs, the search for understanding, educational opportunities and the attitude of the public—are not the things these young men should have to face on a daily basis.

Opportunities in both employment and education should be readily available; and the gratitude of a nation well-served should be automatically apparent. The fact that neither of these is the case is the real lesson of the hearings.

With the issuing of this final report, we all must dedicate ourselves to making these recommendations a reality, and these findings obsolete. Just as the hearings brought together in common cause public officials, academic leaders, business and labor executives, the military, a concerned citizenry, the media, and the veterans themselves—that same coalition must follow through, with this report as the first step.

We look forward to working with you as this is done.

Sincerely yours,

KENNETH A. GIBSON,
Mayor, Newark.

RALPH J. PERK,
Mayor, Cleveland.

WES UHLMAN,
Mayor, Seattle.

FINDINGS AND RECOMMENDATIONS OF THE SPECIAL VETERANS' OPPORTUNITY COMMITTEE OF THE NATIONAL LEAGUE OF CITIES AND UNITED STATES CONFERENCE OF MAYORS

SUMMARY OF FINDINGS

A. Public reaction to the Vietnam War has been a severe obstacle to civilian readjustment of returning GI's.

B. The present GI Bill has not been able to adequately help those who need it the most.

C. The World War II veteran got a substantially better deal in terms of benefits and acceptance.

D. Jobs for GI Bill-enrolled veterans is a major problem.

E. Veterans generally see the bureaucracy only as something to be overcome—not as a positive force.

F. There are wide geographic disparities in GI Bill use and in available assistance programs.

G. The federal government has primary responsibility for veterans' programs, but should make its resources available for support of state and local assistance efforts.

H. Lack of uniform in-service assistance by the military has made civilian readjustment more difficult.

I. There is a lack of leniency and understanding in the administrative dealings with those who may have gotten less than honorable discharges by proceedings other than courts martial.

SUMMARY OF RECOMMENDATIONS

A. The GI Bill should be restructured so that it pays 80% of all tuition and fees and makes a separate subsistence payment of at least $220 a month.

B. Work-study and public employment programs should guarantee a job to every enrolled veteran who needs or wants one.

C. Delays and obstacles to discharge review should be eliminated; and the VA should be more lenient in the granting of educational benefits in those cases where it has administrative jurisdiction.

D. A program of effective marketing and communication should be undertaken to increase use of the GI Bill.

E. Readjustment programs and pre-release remedial education efforts should be expanded and made universally available to GI's, on a continuing basis.

F. A special commission should review the relevancy of VA benefits and procedures and recommend needed reforms.

G. The Veterans Cost of Instruction Provision in the 1972 Higher Education Act should be fully funded. Other programs which support or supplement local veterans assistance efforts should be expanded and continued.

INTRODUCTION

When I came home from World War II, my home town turned out for a welcome. There were parties, ceremonies, honors and a feeling that, whether we served in combat or were on permanent KP in the states, we were all heroes.

More importantly, the nation we fought for showed its gratitude through the GI Bill; and each and every one of us had the opportunity to get—at little or no cost to us—all the education we wanted. I'm sure the 7,000,000 World War II vets who used the GI Bill feel as I do, that it was the most valuable thing that ever happened to us. Without it, I certainly would not be in Congress today.

This report is the result of an eight-month effort to find out what the problems of today's veterans are, and what can be done about them. I was asked by the National League of Cities and the U.S. Conference of Mayors to chair a Special Veterans Opportunity Committee and hold a series of public hearings across the country, so that we could hear, first-hand, from the veterans themselves, as well as from those who are in a position to help them.

The all-day hearings were designed to strengthen city-sponsored veterans assistance projects by involving local leaders and by hearing the views of veterans and other concerned citizens.

The hearing panels included Vietnam veterans, public officials and leaders of the business, labor, academic and service organization communities. The first hearing was held in Newark, New Jersey, on October 25, 1972; the second in Cleveland, Ohio, on March 9, 1973; and the third in Seattle, Washington, on May 18, 1973.

In the three hearings, a total of 111 witnesses were heard, 62 of whom were Vietnam-era veterans. The hearing panel members and complete witness lists are attached.

As can be seen from the hearing summary reports, these findings and recommendations represent a broad consensus, although several witnesses wanted to go much farther in remedial action. The evidence indicates that what is contained here is fair, reasonable and necessary.

The National League of Cities and the U.S. Conference of Mayors operate the Veterans Education and Training Service (VETS) through a grant from the Office of Economic Opportunity. VETS has helped to establish Vietnam-era veterans assistance projects in 10 cities across the country and has provided technical assistance to veterans efforts in many other cities.

In the course of running these projects, thousands of Vietnam-era veterans have been contacted, counseled, enrolled under the GI Bill, and helped with employment and benefit problems.

A major recurring complaint of veterans is that they feel few people are either listening to or really caring about their problems. They believe their problems are unique, due to the nature of the Vietnam conflict and the public reaction to it.

These public hearings were, therefore, conducted to provide the veterans themselves—as many as wanted to testify—a chance to tell a panel (which included Vietnam veterans) what they think the problems are, and what the solutions to those problems should be.

This testimony was supplemented by testimony from college officials, employment services, businessmen, psychiatrists, psychologists, veterans organizations, state legislators, U.S. Congressmen, military personnel, federal, state and local agency officials, labor leaders and interested citizens.

We greatly appreciate the full cooperation we received from all these groups and individuals—especially benefits personnel at the Veterans Administration—and believe that their valuable contributions will lead to positive and immediate action.

As a World War II veteran who benefited so substantially from the GI Bill, I am most concerned with the problems of today's veteran. It is disquieting that these highly motivated young men would—as one did at the Cleveland hearing—equate their plight with the soldier's lament from "All Quiet on the Western Front":

"Now, if we go back, we will be weary, broken, burnt-out, rootless and without hope. We will not be able to find our way any more, and men will not understand us. For the generation that grew up before us, though it has passed these years with us here, already had a home and a calling; now it will return to its old occupations and all will be forgotten. And the generations that have grown up after us will be strange to us and push us aside. We will be superfluous even to ourselves and will grow older. A few will adapt themselves—some others will merely submit—and most will be bewildered. The years will pass by, and in the end we shall have fallen into ruin."

There is much that we can do to see that today's veterans have a more hopeful future.

It is apparent to me that we must work to see that today's veterans have more than just the present GI Bill available to them. There will be many who will need a package of assistance that will include a guaranteed part-time job, special counseling, help in obtaining other applicable programs, as well as the financial assistance available through both the GI Bill and the individual educational institutions. We cannot expect that the majority of Vietnam-era veterans will be able to put all this together themselves—even if it were universally available. We must have both adequate programs—available to all—and an efficient and usable delivery system.

That is what this report is all about.

SILVIO O. CONTE,
Chairman,
Special Veterans Opportunity Committee.

PART I—FINDINGS

A. The Vietnam Veteran

"Today's veteran must not be a political pawn. The hawks and the doves have had their day in court, and now society must understand the need to assist the *man*. His

problems are society's problems."—Mayor Kenneth Gibson, Newark hearing.

The Vietnam-era veteran is no different from the veteran of earlier conflicts. But the *war* was different—and the public reaction to the war is different. Any assistance program must recognize this.

This is *not* to say that the Vietnam-era veteran is any less highly motivated or less valuable as a student, employee or citizen. Having survived a complex and difficult assignment in a difficult time, he may be *more* valuable.

A production manager for a steel plant said at the Cleveland hearing, "Our experience with today's vets shows them to require less training, less supervision and to be more work-disciplined than non-veteran employees." A college president at the Newark hearing commented that his experience with Vietnam vets showed that they were highly motivated and mature students and less likely to drop out [for non-financial reasons] than the student fresh from high school.

Former Army Chief of Staff General William Westmoreland has said of today's veterans, ". . . . They are, as a group, more eager for betterment and more responsible than GI's of the same age in past wars. Their service has been difficult, demanding and devoid of the public acclaim that was given to past GI's. They understand and accept this and have proven to be unusually anxious to build a meaningful future for themselves."

However, during the course of the hearings, it became obvious that the world is a long way from beating a path to their doors. Far from being welcome heroes, many veterans at the hearings told of feeling, in effect, discriminated against just because they were Vietnam veterans. At Cleveland, one young veteran said, "Most people treated me like I was a psycho, a probable drug addict or just a dummy for fighting in a dumb war. It got so that I hid the fact that I was a veteran."

Psychiatrists and psychologists who testified at the Newark hearing confirmed this. Dr. Gordon Livingstone, an Army psychiatrist, said, "Today's vets are survivors of what happened in Vietnam and . . . have become a crucible for all of society's doubts and misgivings about our involvement in Vietnam." The VA's Harris Survey showed that "A plurality of the people feel 'Veterans of this war were suckers, having to risk their lives in the wrong war at the wrong time.'"

Several expert witnesses traced the problem back to the decision to fight the war basically with draftees, taken under a less than universal draft—recognized on all sides to be highly unfair in its operation. The college deferment exempted people from higher income brackets, and lower income men served in their place. Later, these men came home to an economic situation that was rapidly deteriorating. From 1970 through 1972, while close to a million men a year were discharged, veteran unemployment rose from 100,000 men to a high of 400,000 (in January of 1972), with the rate exceeding 15% "and among nonwhite veterans and those with less than a high school education reaching 21% and 31% respectively," according to the VA's Harris Survey.

As a result, these men became frustrated. They expected that their service to their country would be fully recognized, as earlier service had been recognized. Yet the controversy surrounding the war made this impossible. They felt that the bureaucracies of the Veterans Administration, the employment services and the colleges where they sought help disregarded their sacrifices and treated them as children. A persistent theme was that the federal government educated, trained and transported the soldier-citizen for combat with great efficiency. But the manner in which the veteran returning to civilian life is treated contains none of that efficiency and concern.

Their own words best reveal their feelings:

"Why do we have to beg for assistance or even attention?"

"All we want is the chance that the guys got who didn't have to go."

"Either I can take care of my wife and child or I can go to school—not both. Why should I have to make such a choice?"

"Liberals hate us for killing and conservatives hate us for not killing enough."

"The real prisoner of this war is the ordinary veterans—the conscripted grunt who didn't have the political connections to get into the National Guard to sit it out."

"All we want is what our fathers got."

"We feel that no one is really listening."

B. GI Bill use

Many returning Vietnam-era veterans lack the financial resources to use today's GI Bill, which they see as their best opportunity. A high proportion of the draftees in the Vietnam era were high school dropouts, members of minority groups and persons from lower income backgrounds. Consequently, a GI Bill which requires supplementary financial aid, special outreach and remedial efforts by educational institutions and a sophisticated understanding of government and bureaucracy will reach primarily those veterans who had pre-service higher education. This is generally what has happened. The use of the GI Bill is, therefore, inverse to need.

The proof of the "use is inverse to need" claim lies in the following discussion (based on VA statistics). About 20% of returning Vietnam-era veterans have less than a high school education. And yet, of those actually enrolled in college or junior college under the GI Bill, this educational group represents only about 3% of the total. You have to dig this figure out because the largest number in this category are in the "other schools" group, which is about 70% correspondence schools. This group is discounted here because, according to a recent GAO report, those vets in correspondence schools have a 75% dropout rate. The combined college and junior college use rate is higher today than after earlier wars, because of the higher level of education offered by junior colleges that previously would have been counted under other categories. The availability of cheap, good technical education at junior colleges, as well as the higher education qualifications demanded for jobs, are the reasons this report stresses the college and junior college participation route. But many veterans have much to gain from on-the-job and technical training in other settings. We recognize that fact.

Today's GI Bill has educated hundreds of thousands of veterans, and will cost $2.5 billion this year. It is in many respects the best available federal scholarship program, yet it operates with an uneven impact. Its successes in helping many veterans must be weighed alongside the difficulties other veterans have in using this—the prime readjustment tool. While nationally 46.1% of the nation's 6,220,000 Vietnam-era veterans have used the GI Bill (for one purpose or another), 53.9% have not. Within the ranks of those that have used it, there are many that have failed to complete their courses, for reasons that were brought out during these hearings and in Congressional hearings.

The low level of GI Bill benefits has for all intents and purposes precluded most veterans from using the bill to go to private colleges. In effect, these veterans have been forced to compete for limited spaces in public community and junior colleges with low tuition. Even the tuition at four-year public colleges is higher than some veterans can afford. This was demonstrated at the Cleveland hearing, when one young vet said he was enrolled at Cuyahoga Community College (instead of Cleveland State College, where he wanted to go) merely because of the difference in tuition: At Cuyahoga, he said, the tuition was $380, while at Cleveland State it was over $700. "Why should I be restricted in the choice of a *public* college just because of $320? Doesn't that mean there is something wrong with a GI Bill that does that?"

The monthly subsistence funds a student veteran at Rutgers Newark would have for living expenses, after payment of tuition, rose on account of the October 1972 benefits increase from $101.11 to $133.33. Veterans at the Newark hearing considered both sums inadequate because of the consistently high unemployment rate in the Newark metropolitan area, resulting in difficulties in locating part-time jobs, and a high cost of living in the city.

Far more veterans appear to be married than non-veteran students, and their financial obligations are commensurately greater. According to an American Council on Education research report—"The Vietnam-Era Veteran Enters College"—38.3% of the veteran students are married, while only 1.2% of non-veteran, first-time college students are.

C. Comparison with situation of World War II GI's

Compared with the World War II veteran his counterpart today is receiving unequal treatment, both in terms of benefits and opportunities and in terms of public acceptance. "We only want what our fathers got," was a frequent veteran comment. After World War II, veterans had most tuition and fees paid directly by the federal government, a book allowance, some subsidized housing and a $75 month subsistence allowance; and they were eagerly sought after by educational institutions, both public and private. Today's GI Bill, increased in three stages, now gives the single veteran a base allowance of $220 a month, out of which must come his tuition, as well as money for rent, food, books, transportation and other basic necessities. Schools and colleges do little to adapt their procedures to the needs of veterans.

Under the World War II GI Bill, veterans could attend any approved institutions of higher education. Today they are effectively excluded from private colleges by high tuition costs, which are five times higher than those of the late 1940's. The average tuition charge at private colleges has risen from $396 to $1,902. After World War II, public colleges were encouraged to take veterans as a result of direct reimbursement from the federal government of what amounted to out-of-state tuition rates for in-state veterans. Out-of-state tuition rates more truly recognize the actual or true costs of education to the states.

Those rates today are $2,000 or more in California, Ohio, Michigan and Pennsylvania—four of the states with large concentrations of veterans. In effect, the federal government has shifted a large bulk of the costs of education from itself to state and local government, and to the veteran. Until $25,000,000 for the Veterans Cost of Instruction Provision was released in June 1973, no federal funds went directly to colleges to support veterans education efforts other than a $4.00 per student processing fee, and the small Upward Bound for Veterans Program. Thus, the federal government no longer funds—through the GI Bill—the expansion of post-secondary education necessary to enroll additional veterans.

As a result, the veteran of the Vietnam era feels that his lot is directly related to the unpopularity of the war and the divisions and debates engendered by it.

As pointed out at the Seattle hearings by Dr. Charles Odegaard, President of the University of Washington:

"Soldiers from Vietnam were not universally conscripted as they were during

World War II; more were chosen from among men who could not go to college and who were not granted deferments. Not surprisingly, then, veterans from Vietnam include more financially disadvantaged men and more minorities than previous veteran groups, at least in recent history. Predictably, these men are going to have unusual, indeed unique problems. They are not going to be as well prepared for college, so that they will require more and specialized attention to get through college and to enter graduate or professional study. They are going to be difficult to place in jobs; and more than previous veteran groups they are going to find re-entering civilian life an emotionally difficult and traumatic experience. Unless these men are given special help, the original inequity which encouraged the drafting of poorer and less well educated individuals will be magnified by the fact that those who were less equipped to support themselves when they were drafted come back as veterans to compete in the job market with men who have had two more years of education and training. At the same time they have to face a less receptive and unfriendly environment than their predecessors."

At the Seattle hearing, the Director of the VA regional office took issue with the World War II "discrepancy" argument, submitting a chart showing differences in costs and allowances in constant dollars. The VA chart did not refute the testimony of veterans, who offered their budgets and cost figures and compared them to what was available to the World War II GI Bill-enrolled veterans.

One veteran, William Albinger, Jr., wrote to the Evening Star in Washington, D.C., after reading about these hearings. His feelings were similar to those of many other veterans:

"After receiving the Grateful Nation speech in Cam Ranh Bay, I got on the plane to return to the United States and resume my law studies. I was surprised to return to a place that was practicing cut-rate government. Like in so many other ways, the hidden costs of the war were being foisted off on those who lacked the votes, organization, or money to have political clout—the returning veterans. . . . I wonder how the hell guys who were shot up make it through. What made the situation particularly galling was that at least 50 percent of the people I encountered (fellow students, faculty members, friends of my family) all thought I was receiving the same benefits my father and his generation received."

Because of the continuing controversy about the relative benefits given World War II and today's veterans, the Committee staff undertook its own analysis of the available data.

The VA chart used in Seattle, which is similar to other such presentations, lumps together the charges at two- and four-year public colleges. Four-year public college tuition has climbed so that the average charge is now $609 in the 12 states with 60% of veteran population. The point is that today's veteran in many states, unlike his World War II predecessor, has been hard pressed to command four-year college or graduate education at public colleges, and is priced out of private colleges completely. The latest of the three increases since the GI Bill was reenacted in 1966 (at a level lower than the Korean War benefits) has come the closest to giving today's veteran subsistence monies equivalent to those the World War II veteran received.

The veteran, in the cities where we held hearings, trying to attend four-year public colleges received the following benefits after paying for tuition and books:

MONTHLY LIVING FUNDS AFTER PAYMENT OF TUITION

	1969–70 academic year	1971–72 academic year	1972–73 academic year
Rutgers University	$51.33	$101.11	$133.33
Cleveland State	68.33	84.44	129.44
University of Washington	74.55	106.11	143.44

The GI Bill carried benefits, before tuition payments, of:

[Per month]

June 1969	$130
June 1971	175
Oct. 1972	220

The value of $75 in subsistence (received by World War II vets) in current dollars:

1969	$114
1970	121
1971	126
1972	131
June 1973	138

As noted above, the October 1972 increase in the GI Bill came the closest to giving the veteran a sum equivalent to the $75 a month subsistence of a single veteran after World War II. However, the strict dollar conversion of the $75 into today's seems to overestimate the buying power today's veterans' benefits represent in many states. The World War II veteran had subsidized housing in many instances. The familiar quonset hut was frequently mentioned during the hearings. The colleges and employers adapted their procedures to student veterans. Today's veteran has no such benefits.

But, more importantly, when the GI Bill is compared to the percentage of average monthly earnings, as the VA did, in testimony to the Senate Veterans Affairs Committee, then the difficulties of the Vietnam-era veteran become readily apparent. The GI Bill was never intended as a full scholarship; however, it was designed to give the veteran a fair chance at working his way through school. The World War II GI Bill did this by giving the veteran with no dependents 35.4% of the average monthly earnings; the veteran with one dependent, 49.5%; and the veteran with two dependents, 56.6%.

Today's veteran with no dependents, after paying the average tuition at all two- and four-year public colleges, is left with 26.4% of average monthly earnings; with one dependent, 33.1%; and with two dependents, 38.9%. The veteran who attempts to attend four-year public colleges in major states ends up with 22.4%; 29.0%; and 35.0%, respectively. What this means is that the Vietnam-era veteran has to have alternative sources of income, particularly part-time and summer jobs that bring in substantially more than the World War II veteran needed. Given the high cost of living in cities and the difficulties in finding part-time jobs of the last several years, the demands of the veteran for equal treatment become justifiable.

COMPARISON OF U.S. AVERAGE MONTHLY EARNINGS TO G.I. BILL BENEFITS

Date	Average monthly earnings	No dependents		1 dependent		2 dependents	
		Monthly payment	Percent of average monthly earnings	Monthly payment	Percent of average monthly earnings	Monthly payment	Percent of average monthly earnings
1948	$212	$75	35.4	$105	49.5	$120	56.6
May 1973 (after payment of average tuition and book costs at all public colleges)	617	163	26.4	204	33.1	241	39.8
May 1973 (after payment of average tuition and book costs at major 4-year public colleges)	617	138	22.4	179	29.0	216	35.0

D. Unemployment

Employment of any kind is the major concern of veterans. To use the GI Bill, most veterans (without outside financial help) must have either a full- or part-time job. Many veterans found they had to get a job and get reoriented to civilian life before they could make the decision to return to school. Yet in many cases, the jobs they thought they were qualified for because of their service were unavailable. In the cities, where most vets are concentrated, jobs are difficult to obtain. Where it has been used for veterans, the EEA Public Employment Program has helped some. But under the President's budget, that program is scheduled for termination; and even those jobs will no longer be available. The college work-study program has not helped the veteran enough, primarily because of funding levels and demands on it by non-veterans. In fact, testimony was presented that veterans were largely excluded from the HEW work-study program because of inclusion of their GI Bill income in determining their economic status.

Unemployment among Vietnam veterans aged 20–24 has remained consistently high, and the figures for the first quarter of 1973 were 11.0% for veterans, versus 7.3% for non-veterans (not seasonally adjusted) in that age bracket. The seasonally adjusted fiures were 9.2% for veterans, 7.0% for non-veterans. Testimony was heard repeatedly at the hearings that the Vietnam veteran was caught in a vicious cycle because he lacks the education and training to obtain a job. Yet without a job to supplement his inadequate GI Bill benefits, he cannot obtain the education and training.

Both veterans and college officials agreed that the greatest need was for an assistance package that combined an assured part-time job with GI Bill educational benefits. One veteran testified at the Newark hearing that in his search for a job (which he needed to be able to make it under the GI Bill), it was only after he threatened to call his Congressman that he finally secured employment. Part-time employment did not yield enough income, so he carries both a full course of study *and* a full-time job.

Veteran witnesses told of giving up on using the GI Bill after fruitless searches for part-time jobs. While the state employment services came in for much criticism, the problem is that many employers do not list with the service, and usually only full-time jobs are available. Obviously, the employment service has a difficult time in supplying jobs in a time of high unemployment, like that beginning in 1970.

E. Bureaucracy

Many of today's veterans feel that the whole system of assistance—the VA, the governmental bureaucracy and the traditional veterans organizations—is neither sympathetic to their needs nor representative of their era of service.

While the VA, the employment service, the American Legion, the Veterans of Foreign Wars and others have made important efforts to use Vietnam veterans in their programs, they have had great difficulties in getting veterans to accept those efforts at face value.

One veteran at the Newark hearing summed up the feeling of many about bureaucracy:

"America needs to gamble on the potential of this generation of veterans to at least the same degree as it did on the World War II generation. Instead, with its tradition of diversity, American society can only offer benefits to Vietnam-era veterans through increasingly narrow channels, developed over 25 years ago and administered with decreasing flexibility, under tons of regulations and overregulation, by people who it seems have forgotten the gamble society took on them.

* * * * *

"Efforts on behalf of Vietnam-era veterans should be more in humanistic terms rather than the present national and economic crisis terms. A greater number of Vietnam-era veterans should be involved in the development and running of efforts on behalf of veterans, not just token representation, or a Vietnam-era veteran with a title, for display purposes, with no authority or responsibility. Programs are designed and implemented on a 'Daddy knows what's best for you' philosophy, and when they fall short or fail, the reason is always 'you don't really know what's best for yourself.'"

At the Cleveland hearing, an advertising executive (himself a Korean War veteran) noted that the problem seemed to be one of communication, and cited the many forms and brochures with their governmental jargon—and then asked, "How can you expect to relate to today's alienated vet with this sort of stuff?"

At the Seattle hearing, a veteran of World War I, representing the combined charter veterans organization, offered this comment to the Vietnam vets: "I know what it is to be frustrated by bureaucracy." However, he urged vets to "approach it on the basis of negotiation rather than abuse." He suggested that the charter veterans organization's tactic of "constantly watching and constantly checking up" was a good one, and was a lobbying effort worth emulating.

Also in Seattle, a Vietnam veteran—one of the few to be elected to a state legislature—testified that this era of vets needs a lobby of its own. He urged the election of more Vietnam veterans to public office, and suggested that they organize themselves more effectively. He cited the fact that there are no Vietnam veterans in Congress today, and said that in contrast, 1946 saw newly elected vets—such as John F. Kennedy and Richard M. Nixon.

Many vets in the hearings noted the absence of young veterans in outreach roles and in responsible positions in regional offices. They felt the need for Vietnam veterans to have a major influence in the development of national policies, as well as at the local level, on their behalf.

Another major thrust of the veterans was for local organizations that were veteran-run and veteran-influenced. Satisfaction was expressed with the third-party contracts that bring federal money in to support city-sponsored and controlled agencies. The difficulties of federal regional agencies, such as the VA regional office, that were pointed out included their inability to involve the local public and private non-profit agencies and important men and women who could contribute to programs for veterans. From the testimony given at the hearings, it was evident that there was a great deal of good will that could be channeled to Vietnam veterans; yet the lack of operable mechanisms, such as the citizen committees that were formed in Seattle, prevented assistance from reaching many veterans through existing public and private agencies.

Testimony was given at the Cleveland hearing on the tremendous value of the recent Upward Bound for Veterans projects funded by HEW in 1972. Former astronaut Neil Armstrong, now a professor at the University of Cincinnati, detailed how such a project is working there. Similarly, officials at Cuyahoga Community College told how they have set up successful outreach, counseling, remedial education and assistance efforts with such a grant. These, and projects such as College Discovery, run at Fort Dix by Montclair State College (and detailed at the Newark hearing), show the advantages of federal funds going to locally run "vets helping vets" projects.

Tom Tharpe, a product of College Discovery, testified at the Newark hearing, "When I was in high school, I was told I wasn't college material. Then in the service I discovered College Discovery. They counseled me and got me into college, where I have a 3.2 average." Mr. Tharpe will graduate soon from Brooklyn College with a degree in mathematics.

Ralph Munro, Special Assistant to Governor Daniel Evans, suggested that the principle of special revenue sharing be applied to veterans. He felt that if the state had the financing to tackle veterans problems, it could go a long way toward solving them. Unfortunately, the Emergency Employment Act program, with which the state had launched a major veterans program, assigning veterans to each community college in the state, may run out shortly. Munro suggested that a special revenue sharing program for veterans could solve the problem.

Delays in the receipt of GI Bill benefits have been particularly harmful to Vietnam veterans attempting to stay in college. The fact that checks are late in arriving makes it hard for counselors to persuade veterans to return to school. In fact, many men in school have had to drop out because of late receipt of their checks. The President's Committee on the Vietnam Veteran pointed out in its 1969 report that low participation in the GI Bill was related to these delayed payments. The report said:

"The effect of this after-the-fact method of payment can be to discourage program participation by the veteran who cannot afford the initial outlay required by most schools for prepayment of fees, tuition, books, and necessary money for subsistence for himself and his family until the first payment is received. The intent of the program is thus jeopardized."

While the advance payment provision of the 1972 GI Bill is designed to correct this, many veterans at the hearings expressed skepticism, as long as the system depends on computers. However, the new system, developed as a result of combined administration and Congressional initiatives, should alleviate the very major problem of payment delays. It appears from discussions with the Veterans' Administration officials that taking a veteran's file out of the system to find out why delays are involved may in its own right slow down the processing of his claim. Obviously, the computer is only as good as the paper that is fed into it; and the current system, with its potential delays—by the veteran, by the college and by the Veterans' Administration—works a serious hardship on individuals.

F. Geographical differences in GI Bill effectiveness

The programs of assistance which are designed to supplement the GI Bill are not uniformly available to veterans. The GI Bill itself is used to widely varying degrees in different states. Some states have bonuses and free public tuition. Some schools have federally funded veterans' assistance efforts. Some local areas have outreach programs. Some areas have available jobs. But nothing, not even the GI Bill itself, is uniform in its effectiveness.

The effectiveness of the GI Bill depends on which state a veteran returns to. California has the nation's most extensive public college system. Community colleges and a state college system with a 200,000-student enrollment are available at low tuition rates.

A California student veteran pays $140 of his GI Bill benefits for tuition at a state college, while a New Jersey veteran pays $630 and an Ohio veteran $700. (Because the present program no longer takes into account variations in tuition costs, equal military service no longer means equal readjustment opportunities, as it did under the World War II GI Bill.)

The National Association of Collegiate Veterans submitted a report that it had prepared, entitled *The Vietnam-Era GI Bill—Equal Military Service—Unequal Readjustment Opportunities*. Unfortunately, NACVI President James Mayer was unable to come to Cleveland and testify. However, the substance of the report shows that per capita payments to individual veterans vary greatly from state to state. California leads the major states, with its veterans able to use over $1230 in GI Bill benefits on a per capita basis during the five years from fiscal 1968 to fiscal 1972. New Jersey and Ohio veterans used slightly more than half as many dollars in GI Bill benefits.

The NACVI report cites the difference in how California veterans were able to make use of the benefits in contrast with New York veterans. In fiscal 1972, Californians used $302,000,000 in benefits, while New Yorkers used $99,000,000. These two states ordinarily get nearly equal shares under most federal programs; however, between fiscal 1968 and fiscal 1972, California veterans used more than $565,000,000 more than New York veterans in GI Bill benefits. This is largely a reflection of the mix of the state's post-secondary education system and the lower levels of tuition in California. With few private colleges, a heavily subsidized state system, and a community college system three times as large as New York's, the California veteran had much easier access to the GI Bill than did the New York veteran. It should be noted that California veterans take no money away from New York veterans when they use the GI Bill to the extent they do, for the GI Bill contains a unique commitment by Congress to make more money available as more veterans decide to use the benefits.

The attached chart shows the great disparities among states in the usage of the GI Bill. On a per capita basis (to show the relation of GI Bill payments to the number of veterans on a state-by-state basis), annual educational benefits go from a high of $469 for veterans in North Dakota to a low of $174 for veterans in Virginia. As for the utility of the GI Bill for college or junior college education, 35% of California's veterans use it, while less than 14% of Indiana's veterans do so.

This points up the inherent inequity in the practical limits on the way the GI Bill can be used by veterans in various states. Further variances among veterans with different economic and social backgrounds were testified to at the hearings. However, no definitive national statistics exist on this point.

IMPACT OF VIETNAM-ERA GI BILL

	Payments per 10,000 Vietnam-era vets	Vietnam-era vet population (November 1972)	Total GI bill payments fiscal year 1972	Percent ever in college under GI bill
1 North Dakota	$4,690,000	15,000	$7,040,000	34.4
2 New Mexico	4,550,000	31,000	14,120,000	29.7
3 Arizona	4,500,000	61,000	27,440,000	32.2
4 South Dakota	4,210,000	15,000	6,320,000	27.2
5 California	4,170,000	725,000	302,180,000	35.3
6 Out of Country	3,900,000	71,000	27,690,000	16.4
7 Utah	3,880,000	38,000	14,750,000	28.2
8 Colorado	3,810,000	81,000	30,860,000	26.6
9 Alabama	3,690,000	90,000	33,240,000	20.8
10 Hawaii	3,670,000	28,000	10,280,000	26.7
11 Oklahoma	3,670,000	87,000	31,950,000	25.5
12 Washington	3,450,000	136,000	46,890,000	27.8
13 Florida	3,410,000	213,000	72,590,000	25.4
14 Oregon	3,390,000	77,000	26,140,000	29.2
15 Louisiana	3,370,000	94,000	31,700,000	20.0
16 Idaho	3,350,000	21,000	7,040,000	28.8
17 Texas	3,320,000	342,000	113,680,000	24.3
18 Kansas	3,300,000	67,000	22,130,000	25.3
19 Tennessee	3,230,000	114,000	36,870,000	19.9
20 Montana	3,180,000	22,000	7,000,000	26.8
21 Arkansas	3,160,000	51,000	16,140,000	19.4
22 Georgia	3,040,000	147,000	44,730,000	16.6
23 South Carolina	2,990,000	77,000	23,000,000	17.2
24 North Carolina	2,970,000	136,000	40,360,000	20.1
25 Wyoming	2,960,000	11,000	3,260,000	27.3
26 Wisconsin	2,930,000	125,000	36,610,000	21.5
27 Minnesota	2,900,000	128,000	37,070,000	20.6
28 Mississippi	$2,870,000	45,000	$12,910,000	19.8
29 Iowa	2,820,000	79,000	22,300,000	19.1
30 Missouri	2,790,000	141,000	39,360,000	20.8
31 Nebraska	2,780,000	43,000	11,970,000	24.1
32 Rhode Island	2,730,000	33,000	9,020,000	19.2
33 Michigan	2,650,000	255,000	67,600,000	22.1
34 Illinois	2,550,000	309,000	78,940,000	20.5
35 Nevada	2,430,000	19,000	4,610,000	16.9
36 Kentucky	2,330,000	83,000	19,340,000	15.8
37 New Hampshire	2,310,000	26,000	6,010,000	17.0
38 Connecticut	2,300,000	91,000	20,890,000	19.1
39 Maine	2,280,000	29,000	6,620,000	17.0
40 Massachusetts	2,270,000	181,000	41,070,000	19.1
41 West Virginia	2,250,000	45,000	10,120,000	17.6
42 New York	2,160,000	461,000	99,730,000	20.3
43 Pennsylvania	2,160,000	344,000	74,160,000	16.1
44 Vermont	2,080,000	14,000	2,670,000	13.3
45 New Jersey	2,040,000	198,000	40,440,000	16.4
46 Delaware	2,020,000	19,000	3,840,000	18.2
47 Indiana	1,970,000	161,000	31,750,000	13.8
48 Maryland	1,940,000	133,000	25,860,000	20.2
49 Ohio	1,910,000	322,000	61,590,000	16.2
50 Alaska	1,800,000	12,000	2,160,000	15.4
51 Virginia	1,740,000	152,000	26,510,000	18.5
Total	[1] 2,960,000	6,220,000	[2] 1,806,540,000	[3] 23.4

[1] Average per 10,000 vets.
[2] Total GI bill payments, fiscal year 1972.
[3] Average.

Source: "Vietnam-Era Veterans Population and College Participation Rate," Department of Veterans Benefits, Veterans Administration; payments by State, VA work sheet for Office of Management & Budget Report, Federal Outlays Bulletin of November 1973.

G. Federal responsibility

The President's Budget Message for FY 1974 says, "The primary responsibility for most [ed ucation and manpower training] activities, *other than those for veterans*, rests with state and local government. (emphasis added)" Yet with the shortcomings in federal funds—not only for the GI Bill, but for the Veterans Cost of Instruction Program, work-study, EEA, OEO and other programs needed by veterans—it is the states that are trying to deal with the gap. State and local governments have had to make up for the differences in today's GI Bill and that of World War II. Where they have not, veterans have been unable to use their opportunities. California, with its extensive public higher education system, has, in effect, created a universal scholarship program for all its citizens. Most states have not. As a result, the veteran who returns to California has a far better chance to effectively utilize GI Bill benefits.

The federal government's programs which have benefited veterans—such as the EEA and the Jobs for Veterans Program—and the National Alliance of Businessmen's veterans program have gone part way in reducing veterans unemployment and in creating opportunities. But with 250,000 veterans still unemployed, the federal government will have to assume a greater share of the burden. Where local veterans projects exist, each must persuade the city to allocate money for those veterans. The veterans themselves are largely unorganized and competing with established interest groups for available funds.

At all three of the hearings, testimony was given by members of the state legislature about proposed or existing cash bonuses for veterans or so-called State GI Bills granting educational benefits as add-ons to the federal GI Bill. A survey of all 50 states revealed an incredible amount of activity in this regard, as the attached chart shows. The total amount of one-shot cash bonuses either passed or pending is more than a billion dollars, while the annual amount of total state education benefits is nearly half a billion dollars. These figures say a great deal about the inadequacy of the present GI Bill; and, while much of this state legislation will probably not become law, it is significant that so many public officials feel it is necessary.

Ohio State Senator Anthony Calabrese put the case of state legislators for federal responsibility when he said, "The State doesn't have adequate resources to solve the (veterans) problem. The federal government alone has the power to declare and wage war; therefore, because the federal government is responsible for this war, it has responsibility for the veterans of this war."

At both the Newark and the Cleveland hearings, the American Servicemen's Union testified in favor of a flat $2500 bonus for all Vietnam-era veterans—a figure representing the minimum average difference between civilian and military pay over the usual two-year military tour of service. The Committee tends to agree more with the testimony of the state legislators at the Cleveland and Seattle hearings, who argued that cash bonuses are an inappropriate way of structuring veterans benefits. Such benefits under the GI Bill are more appropriately related to the pursuit of education and training, and any cash payments should be made only for subsistence while enrolled in school.

Pending State Veterans Benefits. This is a chart showing present and pending Vietnam-era veterans benefit legislation by state. It is limited to either cash bonuses or educational benefits, such as tuition credits. It does not include the multitude of bills affecting POW's, MIA's or survivors and dependents of veterans. It also does not include the low or non-interest loan bills being considered by the states.

The estimated costs of the benefit levels are figured in the following way: Bonus payments are multiplied by the latest VA figures showing numbers of Vietnam-era veterans by state (figures do not include payments some states make to earlier veterans); tuition credit costs are figured by multiplying 75% of the number of veterans using the GI Bill to go to college (75% being the average number of students in state schools) by the average out-of-state tuition rate (as being close to the true cost of education to the state).

States not listed either do not have legislatures in session or do not have identifiable veterans legislation.

Sources: American Legion, VFW and Council of State Governments, May 1973

State and legislation	Status	Provides	Estimated cost (millions) Annual payment	Total payment
Arizona:				
(1) Veteran bonus	Committee	$500 maximum		$30.5
(2) Education benefit	Introduced	$50 cut/semester in tuition	$1.5	
Arkansas: Education benefit	Committee	Free textbooks, full tuition, State schools	6.0	
Colorado: Education benefit	Senate passed	$300 tuition, credit at State schools	4.8	
Connecticut: Veteran bonus	Passed	$300 maximum		27.3
Delaware:				
(1) Veteran bonus	do	do		5.0
(2) Education benefit	Committee	Tuition, all schools	3.5	
Florida: Education benefit	do	Tuition credit	64.8	
Illinois:				
(1) Veteran bonus	Passed	$100		31.0
(2) Education benefit	Committee	Tuition, State schools	61.7	
Indiana: Veteran bonus	Passed	$200 Vietnam veterans		5.0

State and legislation	Status	Provides	Estimated cost (millions) Annual payment	Total payment
Iowa: Veteran bonus	Committee	$500 maximum		28.0
Louisiana: Veteran bonus	Passed	$250		23.5
Massachusetts:				
(1) Veteran bonus	do	$300 maximum		54.3
(2) Education benefit	Pending	Tuition, State schools	$18.2	
Michigan:				
(1) Veteran bonus	Committee	$500 maximum		127.5
(2) Education benefit	do	Tuition, State schools	50.0	
Minnesota: Veteran bonus	do	$300 maximum		63.0
Missouri:				
(1) Veteran bonus	do	$200 maximum		28.2
(2) Education benefit	do	66 percent reduced tuition, State schools		
Montana:				
(1) Veteran bonus	Introduced	$300 maximum		6.6
(2) Education benefit	do	Tuition, State schools	5.8	
New Hampshire: Veteran bonus	Committee	$100 maximum		2.6
New Jersey: Education benefit	Passed House	$500 tuition credit	15.0	
New Mexico: Education benefit	Introduced	Tuition, State schools	3.2	
New York: Education benefit	do	do	84.6	
North Dakota: Veteran bonus	Passed	$600 maximum		9.0
Ohio: Veteran bonus	Conference	$500		225.0
Pennsylvania:				
(1) Education benefit	Introduced	$50 per month supplemental to G.I. bill	25.0	
(2) Veteran bonus	Passed	$750 maximum		256.0
Rhode Island: Veteran bonus	Introduced	$350 maximum		9.9
South Dakota: Veteran bonus	Passed	$500 maximum		7.5
Tennessee: Veteran bonus	Not yet signed	$300 maximum		34.2
Texas: Education benefit	Committee	Tuition, State schools	85.7	
Vermont: Veteran bonus	Passed	$120 maximum		1.7
Washington: Veteran bonus	do	$250		34.0
West Virginia: Veteran bonus	Conference	$400 maximum		40.0
Wisconsin: Education benefit	Committee	Tuition credit, all schools	5.5	
Total bonuses amount (of which 454.3 passed)				1,049.8
Total annual education benefits				448.2

H. The military

The military itself has done far too little in the area of GI readjustment. Many psychiatrists and psychologists contend that no attempt at real readjustment counseling has been made. Given the nature of the war and the public reaction to it, these experts feel that lack of readjustment—and lack of any significant elapsed time between field service and homecoming—are the heart of the veteran problem.

Present veterans outreach efforts, conducted by nearly 30 different national public and private groups and agencies, would have been greatly simplified if the military had conducted a uniform and thorough program of information about, and encouragement to use, the GI Bill.

As it is, some GI's have benefited from demonstration projects, such as Fort Dix's College Discovery. But the vast majority returning from Vietnam have merely been told to be proud of their service and to convert their GI life insurance. They have been released to confront an often hostile public and to deal with a complex system of sporadic and uneven assistance.

Testimony from Fort Dix officials at the Newark hearing and from the Commanding General of Fort Lewis at the Seattle hearing told of commendable pre-release programs at these installations. However, such efforts are not national in scope, and often depend on local unit commanders as to whether GI's can have proper counseling and remedial education available to them—especially on a "release time" basis.

Project Transition received roughly $17,000,000 a year in Labor Department funding for several years, and additional Department of Defense support, but each base commander had the option as to how deeply to get involved in Project Transition. However, the veteran coming back directly from Vietnam was in many cases discharged directly, without ever getting the chance to take advantage of a transition program. He was briefed at his point of discharge, which was often in California. This briefing was limited and usually given to a man whose attention was focused on his return to his family and loved ones. If the Army would begin to treat the veteran, from his first day, as someone whose future it was concerned with, the morale problem might be greatly improved, and the ability of the veteran to find post-service opportunities might also be substantially enhanced.

I. Discharges

The present system of awarding less-than-honorable discharges by administrative proceedings can be unfair in its application and can result and has resulted in unwarranted hardships. Testimony at the Cleveland hearing both by the co-author of the Nader Report on the Vietnam Veteran, a former Marine Corps lawyer, and by recipients of such discharges, gave ample indication of the problem. Congressman Louis Stokes also testified about many constituents who have been unduly penalized.

However, it appears that agreement of the type and means of reform will require much more investigation and research. Meanwhile, the results of the present system must be dealt with. The VA, as well as present military boards of review, have authority to deal with such cases, but have a record of delay, complexity and a demonstrated lack of leniency and understanding.

The VA, while it has a limited right to grant educational benefits to certain recipients of less-than-honorable discharges, has a 93% rejection rate of such applications. Given the hardship this imposes on the veterans involved—most of whom share common economic and social backgrounds—this seems shortsighted and harsh. Since a less-than-honorable discharge already imposes employment restrictions on the recipient, to deny him a chance for needed education shuts him completely off from society and from any means of readjustment and rehabilitation.

The process for discharge review is complex, costly and to a large extent unrewarding. The American Legion and American Red Cross (as well as other groups) provide valuable assistance for some veterans in this regard. However, the successes are limited, and many veterans are precluded from pursuing the matter if only because of the cost of travel involved.

If the problems of alienation, peer involvement and readjustment are to be met, it seems logical that veterans who are precluded from using the GI Bill must be given assistance and understanding. Otherwise, charges of discrimination, undue hardship and harassment will continue. The most outspoken and emotional parts of the public hearings concerned this one issue, indicating the need for more sensitivity on the part of the benefits system.

PART II—RECOMMENDATIONS

A. GI Bill

If today's GI Bill is going to be truly adequate for Vietnam-era veterans, the experience of these hearings is that major changes must be made in the present GI Bill. As the President of the University of Washington put it, "Though the benefits are intended to be equally available, they are not equally accessible to all veterans."

Therefore, today's GI Bill must do two things:

(1) It must make a reasonable tuition payment, so that more veterans can further their education without regard to state differences in education costs; and

(2) It must provide a subsistence allowance equivalent (in terms of buying power) to that which was available to World War II veterans.

As presently constituted, the GI Bill is not equally available to veterans of differing economic means. This has implications that disturb many Vietnam-era veterans, college administrators and public officials. Further, the structure of the GI Bill limits its use by veterans in many states. Merely raising the present benefits will not attack the major problem—the GI Bill must be made more usable by more veterans, especially those who most need its education and training benefits. Only in this way will the GI Bill give those who were called to military service the same chance for advancement enjoyed by those who stayed home. If the GI Bill really represents this country's gratitude toward those who sacrificed their best time and efforts in behalf of their country in a difficult war and in a difficult time, then it must be uniformly available to all who want or need it.

Therefore, the educational benefits under the GI Bill must be made part of an assistance package to the veteran—a package which includes: a reasonable tuition payment which does not limit the veteran in applying to the school of his choice; a subsistence payment equivalent to that given the World War II veteran; loans; a part-time job for those who need it; counseling; and whatever remedial measures are necessary to enable the veteran to get full usage out of the GI Bill.

How can this be done? First, each veteran eligible for educational benefits should be given a voucher which constitutes at least 80% of tuition costs at institutions of higher

learning of his choice. Both the VA and the educational institutions should work together on this system, so that the veteran is least impaired by paperwork, financial complexities, computer delays and timetables for payment.

This Committee initially recommended a tuition payment which would represent the average non-resident tuition at public colleges ($1200). However, as was pointed out at the Seattle hearing, college charges are such that such a strict payment formula would not allow veterans to enroll in many nearby private colleges that might exactly suit their needs. Also, it would disadvantage those veterans presently enrolled in low-tuition community colleges. An initial recommendation would have limited them to a subsistence allowance of $150 per month, which is less than they are presently getting.

To be a fair equivalent of the World War II GI Bill, close to full tuition at private colleges must be paid. College tuitions at private colleges have increased, on the average, five times from what they were in 1948—far exceeding the cost of living increase since that time.

Testimony by two college presidents at the Seattle hearing dwelt on the fact that the present GI Bill represents "a tilt toward public colleges," and that this is neither wise nor fair. Dr. Odegaard, President of the University of Washington, pointed out that some 30 states assist private colleges, while others do not, and that if a GI Bill is going to be "equally accessible," it will have to pay tuition and fees at both public and private colleges. The 80% maximum is consistent with the principle that the veteran make a significant contribution to his own education.

Besides the World War II system, a precedent of direct tuition payment is within the present GI Bill. Full tuition for disabled veterans is paid through the GI Bill. Adequate safeguards have been devised to protect the government against abuse when tuition is paid for the disabled veteran. These safeguards could easily be carried over to the regular veteran students.

The second element in restructuring the GI Bill is to contain a direct subsistence payment to the enrolled veteran. This figure should be the present $220-a-month base payment. This amount is the equivalent of the World War II GI Bill subsistence payment, in that the $75 a month paid then was 35.4% of the average monthly earnings reported by the Department of Labor. The latest average monthly earnings figure is $617, and an equivalent 35.4% of that is $220. Married veterans' payments are out of line with the corresponding World War II percentages, however, and payments for married veterans with two or more dependents especially should be brought into line.

Several witnesses at the hearings recommended a straight cost-of-living increase be applied to the World War II $75-a-month subsistence payment—yielding a base payment of about $150 a month. However, the percentage applied to the average monthly earnings figure more closely approximates the buying power available to veterans of World War II—especially when consideration is taken of the fact that the earlier bill covered cost of books and that colleges then made available low-cost veteran housing, frequently government surplus.

These two changes—the 80% tuition voucher and the base $220-a-month subsistence payment—would wipe out the disparities that exist in the usage of the present GI Bill. They would also enable veterans to consider enrolling in private colleges—something they are economically precluded from doing now. The following chart reflects this situation in comparison to that of the World War II era:

	1947–48			1971–72		
	Enrollment	Veterans	Percent veterans	Enrollment	Veterans	Percent veterans
Sample private college veteran enrollment:						
Harvard University	5,600	3,326	59	6,073	89	1.5
Holy Cross University	1,079	939	87	2,379	13	.5
New York University	26,438	14,359	54	10,932	463	4.2
Northwestern University	21,128	9,941	47	9,372	90	1.0
Notre Dame University	4,200	3,587	85	6,439	108	1.7
Pepperdine University	4,431	2,299	52	4,641	639	13.8
St. Olaf	1,660	564	34	2,650	5	.2
Stanford University	15,800	7,011	44	18,000	291	1.6
Whittier College	1,249	507	41	1,815	66	3.6
Xavier University	3,163	1,715	54	2,918	175	6.0
Yale University	5,676	3,365	59	4,739	37	.8

	1948–49			1972–73		
	Enrollment	Veterans	Percent veterans	Enrollment	Veterans	Percent veterans
Sample public college veteran enrollment:						
University of California	43,469	18,948	44	148,813	9,635	6.5
Ohio State University	23,929	12,146	51	49,943	3,516	7.0
Pennsylvania State University	12,410	5,496	44	52,360	4,364	8.3
Purdue University	13,674	7,623	56	27,492	1,256	4.6
Rutgers University	9,088	4,290	47	38,060	3,729	9.8
University of Illinois System	25,920	11,880	46	57,536	4,427	7.7
University of Wisconsin	22,353	10,808	48	135,921	12,342	9.1

A further recommendation is to relax the present eight-year time limit for GI Bill eligibility. It was felt that this unnecessarily puts the veteran under the gun to take courses that will enable him to get through college as quickly as possible—without proper regard to field of study and relevant courses. If a veteran is going to college half-time, he literally must begin the day he is separated to complete his studies before his benefits run out. This seems an unwarranted restriction. It also prevents veterans from using, today, a program that, when enacted in 1966 at $100 a month, offered benefits $10 less a month than the Korean War GI Bill offered. The 1972 amendments gave veterans in many states, for the first time, a level of GI Bill benefits that was feasible for them to begin to use, even though these benefits remained far below those of World War II in terms of buying power. Indeed, the 1972 amendments passed by the Congress and signed by President Nixon enabled the veteran to come closer to parity with World War II benefits than he had ever been before.

A similar easing of the 36-month entitlement period—extending it to 48 months—is also recommended. This gives the veteran needed flexibility in changing courses, upgrading job skills and other aspects of education and training.

It is estimated that there would be a major increase in public dollar expenditures for veterans' education by such changes in the GI Bill. However, the GI Bill is a unique investment in individuals. It is proven; indeed, many think our post-war prosperity rests on the trained manpower that resulted from the $19 billion expenditure on the World War II and Korean War GI Bills. Some savings might be realized in the many federal, state and local programs which are now tapped by veterans because of present low GI Bill benefits. These range from welfare to food stamps, to social security benefits, to unemployment compensation, to education grants and loans, to other programs which have been funded to help veterans take advantage of the GI Bill. If benefits were adequate, veterans would not so often have to seek and use funds from these other social programs.

Secondly, a survey of activity in the 50 state legislatures reveals that more than a billion dollars is currently either pending or available in Vietnam-era veterans' cash bonuses, and nearly $500 million in *annual* educational benefits costs is pending for veterans. This substantial fiscal activity is only planned because of the inadequacies of the federal GI Bill. Much of it will probably not become law, because of the unpopularity of the war, although earlier veterans received significant benefits in this fashion. The President's FY 1974 Budget Message stated that the federal government has primary responsibility for veterans' benefits and programs. Therefore, veterans should not be subject to the kind of disparities such non-uniform state efforts engender. Educational opportunity should be equally available for equally rendered national service.

More important than any fiscal impact of such GI Bill benefits changes is the effect of producing a fairer and more usable system of educational assistance.

Veterans who testified at the hearings resented the fact that they are compelled to act as charity cases in order to take advantage of the GI Bill. As veteran Walter Copeland said at the Newark hearing, "The legend is the Army builds men . . . what kind of man has to walk around begging people to help him?" Another veteran complained that the state of New Jersey houses its veterans affairs agency in the department that deals primarily with prisoners, mental patients, orphans and the handicapped—thereby confirming how the veteran is categorically viewed by the government. Vets at the Cleveland and Seattle hearings also complained of the complexities and the demeaning task of seeking aid from welfare, unemployment compensation, food stamps and other programs which were not primarily designed for use by veterans attempting to use their GI Bill benefits.

At the Cleveland hearing, Mr. Bernard B. Direnfeld, past National Commander of the Jewish War Veterans, testified, "The GI Bill for Vietnam veterans . . . as pertains to education . . . is grossly inadequate, and substantially less than the World War II veteran received. . . . It is my hope that Congress will be realistic in according today's returnees an allowance for living expenses and tuition that is in line with today's prices and requirements."

In a statement submitted to the hearing by student veterans from campus clubs associated with the National Association of Collegiate Veterans, the indictment of today's GI Bill was precise and characteristic of the bulk of veteran testimony:

"It is a tragic fact that the Vietnam-era GI, unlike his World War II counterpart, is almost totally at the mercy of factors out of his control—income; geography; higher education's finances—in utilizing today's very different GI Bill. The individual's motivation, initiative and need regrettably play a minor role. While many veterans are able to use it, others with equal service and equal qualifications cannot.

"The degree of educational opportunity available to today's veteran unfortunately depends on such things as what state he lives in; what city he lives in; the local unemployment rate; the extent of commitment of local and state leaders; the quality and structure of the educational system available to him; his economic and social background; the public attitude towards the war; and whether his area has been selected as the site for a limited number of federal demonstration assistance efforts."

B. Employment

Employment opportunities for veterans are a total necessity. In areas of high unemployment, the federal government should be the funding source, through public employment programs.

Given both the educational and economic background of the veterans who do not use their GI Bill benefits, a part-time job (at the very least) is their main concern, if they are to use the GI Bill. It has been demonstrated by many veterans at the hearings that the lack of such jobs, combined with the complexities of securing benefits and their unfamiliarity with higher education admissions procedures, has produced college enrollment rates among veterans that are way below reasonable expectations.

It is obvious to this Committee that a substantial work ingredient is an essential part of making the GI Bill more available and more usable to more Vietnam-era veterans.

Jobs for GI Bill-enrolled veterans should be a national priority. Even with the GI Bill changes recommended above, enrolled veterans will need *and should have* the necessary jobs to enable them to meet the high costs of furthering their education. *The veterans' needs must be viewed as a package.*

Under its present structure, the GI Bill largely precludes the poorer veterans from its benefits. The Bill must be changed so that all veterans have an equal opportunity to further their education by using its benefits. With the disproportionately high unemployment rates among veterans in the key 20–24 year age group, and the general paucity of adequate part-time jobs in most cities, this means that the government will have to take the lead.

At the Newark hearing, Mr. Benito Guzman, a Vietnam veteran who has worked with Spanish-speaking veterans, testified that he knew of several vets who became so frustrated in trying to find work to enable them to go to school that they gave up and reenlisted in the Army. Veteran John Moss, at the Cleveland hearing, told how he was forced to drop out of college because he couldn't earn enough to meet costs, even with the GI Bill *and* a part-time job. Similarly, veteran Larry Parker, at the Cleveland hearing, said, "Either I can take care of my wife and son, or I can go to school—not both. Why should I have to make such a choice?"

After World War II, veterans studying under the GI Bill worked, depending on their economic circumstances, in a wide variety of part-time jobs. The jobs were there. Today the jobs are too often not there, and with more veterans in the low income category, the jobs are needed now more than ever.

There are five specific steps that can be taken to assure that GI Bill-enrolled veterans can have jobs available to them:

1. A public employment program should be continued and fully funded. Percentages of these public employment jobs suggested for Vietnam-era veterans should reflect the employment needs of veterans in each locality.

The Emergency Employment Act, in those cities, counties and states where it has been used to give jobs to veterans, has had two extremely valuable applications. First, because these jobs have been on a one-year basis, they have had natural application to veterans enrolled in school and college. This has been especially true where the job has been "split," so that two veterans share it—freeing each for full-time study.

Second, the EEA jobs have been used to hire veterans to recruit and counsel other veterans to use their GI Bill benefits. This type of peer outreach has been of key importance in dealing with the Vietnam-era veteran who generally feels that the system doesn't relate to him.

This precise point was made strongly by educator Dr. Murray Polner and Army psychiatrist Dr. Gordon Livingstone at the Newark hearing. Also, the VETS projects themselves in 10 cities (as well as similar outreach efforts) have had great success with this approach. Where the VA, employment service and American Legion have participated in the training of these peer recruiters and counselors, results have been even more substantial.

2. Not only EEA jobs, but also federal employment opportunities, should be made available to GI Bill-enrolled vets on a split-job basis.

At the Newark hearing, Co-Chairman Conte mentioned the President's Memorandum to Executive Agencies and Departments, urging the hiring of veterans and the use of this split-jobs-for-veterans approach. In subsequent follow-up with the Civil Service Commission and other government agencies, requested by veterans at the Newark hearing, it appeared that the split-job initiative had not produced substantial results.

Available federal jobs must be set aside and designated as available on a split-job basis for veterans enrolled under the GI Bill, in order to ensure results.

3. The college work-study program and the VA work-study provision of the GI Bill Amendments of 1972 should be adequately funded and expanded to meet the employment needs of GI Bill-enrolled veterans. In addition, the new Work-Study for Community Service Learning Program, contained in the Higher Education Act of 1972, should be funded. These programs should be fully coordinated with the GI Bill so that the question of whether a veteran can afford to use his educational benefits becomes moot. A job for those who need it should be part of his GI Bill benefits package. Federal work-study funds should be made available in sufficient quantities to areas with high unemployment rates for the key veteran age group, perhaps through a separate GI Bill program.

The college work-study program, many veterans testified, is largely unavailable to them, since qualification for it is based on income, and colleges consider GI Bill benefits as income. One veteran complained that if the GI Bill benefits weren't considered as income for tax purposes, why should they be considered as income in the awarding of work-study jobs? He concluded that such a determination was just a bureaucratic way of limiting funds for the purpose. Veterans Cost of Instruction funds provide a significant source of jobs for student veterans, and it is urged that colleges use all these funds, rather than just the 50% required by statute to aid veterans.

4. All efforts should be made to provide for the transferability on military training and skills to civilian use for full credit and qualification. There is no reason, for instance, why military driving licenses, and especially heavy equipment operators' permits, should not be acceptable and certifiable by the states. The Department of Labor should work with labor unions to see that military skills with civilian utility receive full recognition.

5. The President's Jobs for Veterans program, an interagency task force, has done a commendable job with a small staff and limited funds. Its advertising campaigns have brought an awareness to the public and to employers, and have probably contributed to the success that the National Alliances of Businessmen has had in placing several hundred thousand veterans in job opportunities. JFV should be allowed to continue its efforts among employers and communities as to the need to hire the vet. Job fairs should be expanded to include counseling and information on benefits and educational opportunities, so that the GI Bill-enrolled vet can have easy access to available jobs.

C. Discharges

As long as the present system of awarding less-than-honorable discharges through administrative (non-court martial) proceedings affects veterans, review, upgrading and benefits awards methods should be reformed. Discharge review should be available in each of the 10 federal regions, and should be by boards made up of not just military and VA personnel, but also Vietnam veterans' representatives, local leaders and service organizations. In addition, the VA must be more lenient in administratively granting educational benefits to recipients of less-than-honorable discharges.

The practice of coding DD–214 separation papers so that employers know whether a veteran is reenlistable (due to drug use or other reasons) should be stopped. Such a red flag, representing a judgment that may be arbitrary or questionable (or related to a situation since corrected), is merely a further stigma to a veteran seeking employment. The reenlistment code was not intended for use by employers as a means of judging an applicant's qualifications, but that is what is happening.

Congressman Louis Stokes and Raymond Bonner, a former Marine captain and a lawyer with considerable experience with veterans who have less-than-honorable discharges, both testified in Cleveland as to the ills of the present system. They added considerable weight to the testimony of several veterans who have suffered under the stigma of such discharges.

Veterans' testimony in Cleveland confirmed that even with the notable help of the American Legion and the American Red Cross, upgrading of discharges is virtually impossible—the more so because review takes place only in Washington, D.C., before a board representing only the military.

The cries of anguish from veterans with less-than-honorable discharges who try to get a job or education were shrill. One veteran at the Cleveland hearing said the system was driving these veterans to violence and crime. "He doesn't want to do this," he said. "It's what you are forcing him to do."

The appropriate Congressional committees would make a large contribution by undertaking an intensive review of the processes used for granting less-than-fully-honorable discharges during the Vietnam War. Recommendations for the reform of those discharges deserving of it and for a system to aid veterans who might otherwise fall into a vicious circle of problems would also be evaluated.

D. Communication

To ensure that no veteran neglects his benefits and rights merely because of poor communication, the federal government should fully fund an effort to reach and convince veterans to use the GI Bill—using the best marketing, advertising and communications techniques, like those employed in the campaign to recruit volunteers for the Armed Services. These tools of communica-

tion should be available not only for VA and employment service use, but for the coordinated use of all the nearly 30 private groups and agencies involved with veteran outreach and counseling across the country.

Where necessary, explanatory materials should be printed in Spanish or otherwise adapted, so that benefits are clear and easily utilized.

Mr. George Sapin, a vice president of the advertising firm of Meldrum & Fewsmith, testified at the Cleveland hearing (as a professional communicator) that the government's effort to reach and inform returning GI's of their rights and benefits had the appearance of "non-communication." He suggested that if the same kind of expertise went into an effort for veterans as presently goes into the drive to recruit volunteers for the Armed Forces, many more veterans would at least try to use the GI Bill.

The complexities and bureaucrats-ese embedded in the whole system of veterans assistance (from the VA to employment service to other government efforts) were cited repeatedly by veterans at the hearings. Veteran Larry Parker, at the Cleveland hearing, as well as veteran Bob Penn, who sat as a panelist, cited the callous, bureaucratic treatment veterans receive. They suggested that the speedy, personalized, no-expense-spared treatment accorded men entering the service is typical of how the government feels about them—"Get us in, do the job and then forget us."

Mr. Raul Vega, testifying at the Cleveland hearing, said the problem of non-communication is much more severe for Spanish-speaking veterans. The Senate Veterans Affairs Committee Report reported testimony that only one Puerto Rican veteran was working as a VA counselor in New York City

It is apparent that much of the effort to inform veterans of benefits and procedures is through direct mail—a project largely ignored and discounted by today's veteran. One veteran at the Newark hearing told of receiving 45 separate pieces of such mail—benefits information, form welcome home letters from organizations, sales pitches and the like.

Shortly after the Cleveland hearing, the United Press carried a story on the reaction of Ohio veterans to direct mail:

"DISCHARGED VETERANS LEAVE CHECKS UNCASHED

"COLUMBUS, OHIO, April 11.—An Air National Guardsman mailed $1 checks to 50 recently discharged servicemen last month. So far only one check has been cashed.

"M. Sgt. Charles Dowdy said he sent the checks out of personal curiosity to find out if men fresh out of the service read their mail. The envelopes also contained recruiting information and personal letters. Dowdy said yesterday one check has been cashed, two were sent back because of changed addresses and one was returned with a "No thanks."

"He believes the other 46 were thrown away as junk mail."

The complex legal jargon used in pamphlets and brochures is further proof to many veterans that the system cannot and will not relate to them. Changing that jargon and widely distributing information through television and radio would be a distinct signal to the veteran.

E. In-service programs

The military should make a special effort for those 350,000 to 400,000 men who will continue to be released annually. Readjustment programs and pre-release remedial education efforts should be expanded and made uniformly available. Unit commanders should be required to allow participating GI's to utilize such programs during duty hours. Every effort should be made to provide for and encourage GI Bill enrollment before separation.

Testimony was given at the Newark hearing by officials and GI's involved in Fort Dix's College Discovery program. This project, a PREP program funded through the 1970 GI Bill Amendments, is an excellent and effective attempt to offer and deliver college preparatory instruction to GI's.

The main ingredient in such programs is release time from military duties to attend remedial courses. Several veterans testified that their unit commanders would not grant this, while others received it. This is a local commander option. It illustrates the necessity that in-service education be stressed by the Department of Defense, so that local commanders will encourage their men to use the opportunities.

It makes good sense to have released GI's be "satisfied products," especially if the Armed Services are going to depend exclusively on enlistments. Efforts to help the educationally disadvantaged should be made while the GI is still in the service. Similarly, programs to help him readjust and use his benefits should be directed at the pre-released GI, and coordinated with local institutions of higher education. The varied program in effect at Fort Lewis, described by Major General Fulton at the Seattle hearing, could serve as a model for many bases.

F. Veterans Administration

A review commission, similar to that appointed after World War II, should be established to study and recommend reform of veterans benefits and benefits procedures. Congressman Peter Rodino, Chairman of the House Judiciary Committee, stated at the Newark hearing:

"It is time to call for a new national Commission on Veterans Affairs to conduct a careful examination of the kind of treatment our veterans can reasonably expect from this society and how we are delivering on that expectation. My colleague, Congressman Joseph Minish, and I recommend that such a commission be established by the Congress, with carefully balanced representation from major segments of the society, and not simply the education community and business who were the only groups represented in President Eisenhower's Commission. We recommend that such a Commission have substantial representation from traditional veterans service organizations, representatives of all major groups of veterans, including Vietnam-era veterans, as well as the education, business and the religious communities. The Commission would consider all aspects of benefits, reemployment rights, pensions and compensations. It would examine the $12 billion budget of the Veterans Administration, as well as the substantial funds expended by other Federal and state agencies for services and evaluate the quality of support and service that those Federal dollars bring to today's veterans."

Many other witnesses—veterans, academic leaders and others—endorsed this proposal and urged that it be enacted immediately, so that any results could be of timely help to today's veterans.

G. Support programs

In addition to the work-study programs previously mentioned, there are a number of other programs which, if fully funded, could measurably improve educational opportunities for Vietnam-era veterans. Chief among these is the Veterans Cost of Instruction Provision of the Higher Education Act of 1972.

This provision authorizes a $300 payment per enrolled veteran to educational institutions showing a 10% increase in veterans for the purpose of conducting outreach and remedial education. After a prolonged Congressional struggle, and legal action brought by the National Association of Collegiate Veterans, $25 million in appropriated funds was finally obligated. However, due to the low funding level, a payment of only $55 per veteran was actually made. If this program is really going to give incentives to higher education institutions to seek out the veteran and help him further his education, the full authorized funding will be needed.

The rationale behind the Veterans Cost of Instruction program, as originally enacted, was to provide colleges and junior colleges with federal funds to undertake efforts on behalf of the Vietnam-era veteran. Unlike under the World War II GI Bill, whereby money passed through the hands of the colleges, no more than a $4.00 payment is made directly to the colleges through the GI Bill. With the funds, which, in the case of public colleges, covered the equivalent of out-of-state tuition rates for in-state veterans, colleges and junior colleges were able to develop administrative structures to deal with the problems of the World War II veteran. Although there was a change-over to a direct tuition payment to the veteran under the Korean War GI Bill, those administrative structures remained in place throughout the Korean era—but went out of existence in the period subsequent thereto. The Veterans Cost of Instruction funds would give colleges which increase their enrollment of veterans the direct funding needed to undertake veterans outreach and counseling programs and offer special courses.

The point was made at the Seattle hearing that schools with large enrollments of veterans may be unable to meet the 10% increase requirement, because of past activities which have been successful, and because of the dropoff in the numbers of veterans. The Committee would suggest that a longer base period be considered in determining eligibility under the increase requirement, and that the dropoff in the numbers of veterans be recognized.

As noted in the findings, the Committee recognizes the value of the Upward Bound for Veterans projects now operating at 67 colleges. This most worthwhile program, which is being continued, should be expanded, for while many veterans benefit from its counseling and remedial education, many more do not—just because a college in their area may not have received such funds. Between this program and the Veterans Cost of Instruction Provision, such efforts should reach *all* veterans.

As one young veteran, who is in college because of such a program, testified at Seattle, "Every veteran should have the same opportunity."

Another key support program can be Veterans Administration funding of non-federal agencies to aid veterans through contracts. The Senate Veterans Affairs Committee Report of July 1972 recognized the need for such outreach activities, but there has been no significant support of such agencies by the Veterans Administration. There are nearly 30 national groups and agencies (both public and private) conducting veterans outreach, counseling and assistance programs. Given the fact that the workload of the VA is increasing concurrent with administrative funds and personnel cuts, such outside activity is essential.

In Seattle, for instance, the regional office of the VA reported a 10% increase in benefits workload and an 8% reduction in personnel. Agencies such as SeaVac perform a function that would be impossible for the VA itself within existing funding. Such groups now funded by OEO, the Department of Labor, HEW and many private foundations should be supported and coordinated by the VA. Third-party contracts are the best way to do this.

All these support-type programs are part of the total package that must be available and fully funded at the federal level if today's veterans are to really receive the intended benefits of the GI Bill.

CONCLUSION

This public hearing process, which produced this report, brought forward much

new information on the problems of the Vietam veteran. Obviously, much has been done on his behalf, and those efforts should not be underestimated. But there remains much more to do. The personal testimony taken at the hearings clearly pointed up the gap between present education and job opportunities and those available to veterans of World War II. This gap merely serves to reinforce the belief of today's veteran that he fought an unpopular war and must deal with public apathy about his future.

The trend to merely increase the GI Bill benefits in stages has not dealt with the basic problem that many veterans simply cannot afford to use the GI Bill.

The federal government and the Congress must show decisive leadership in rectifying the situation and in supporting and encouraging state and local efforts to make benefits and opportunities equally available to all veterans. The fact that the United States' involvement in the Vietnam conflict has ended should not make this effort any less necessary or pressing.

PUBLIC HEARING ON THE PROBLEMS OF VIETNAM-ERA VETERANS, NEWARK, N.J., OCTOBER 25, 1972

Panel:

Mayor Kenneth A. Gibson.
U.S. Representative Silvio O. Conte (R.-Mass.).
U.S. Representative Henry Helstoski (D.-N.J.).
Msgr. Thomas Fahy, President, Seton Hall University.
Mr. Mark Hanson, National Council of Churches.
Mr. Joel Jacobson, United Auto Workers, Region 9.
Mr. Austin Kerby, National Headquarters, American Legion.
Mr. Robert Penn, Vietnam veteran; Commissioner of Parks, Buffalo, New York.
Mr. Robert Kleinert, President, N.J. Bell Telephone Co.
Dr. Nathan Weiss, President, Newark State College.
Mr. Angel Rodriguez, Newark VETS Project Director.

Witnesses (in order of appearance):

**U.S. Senator Clifford P. Case (R.-N.J.).
**U.S. Representative Joseph G. Minnish (D.-N.J.).
**Rev. Philip E. Kunz, N.J. Council of Churches.
Dr. Murray Polner, author of "No Victory Parades."
*Mr. Walter Myer, Vietnam-era veteran.
Mr. Benito Guzman, Vietnam-era veteran.
Mr. Walter Copeland, Vietnam-era veteran.
Mr. Jack McMahon, Vietnam-era veteran.
*N.J. Assemblyman William H. Hamilton, Jr., Middlesex County.
Dr. James Smith, clinical psychologist, N.Y.C.
Dr. Gordon Livingston, psychiatrist, Columbia, Md.
Mr. Otilio Mighty, N.Y.C. Urban League.
*U.S. Representative Peter Rodino (D.-N.J.).
Mr. Alan Leder, Vietnam-era veteran.
Mr. Emilio Mola, Vietnam-era veteran.
Mr. James Pizzaro, Vietnam-era veteran.
Mr. Neil Clarke, Vietnam-era veteran.
Mr. Thomas Giddings, Project College Discovery, Ft. Dix.
Ms. Barbara Barnes, Project College Discovery, Ft. Dix.
Sp3 Dan Keyes, Ft. Dix, N.J.
PFC Jose Nieves, Ft. Dix, N.J.
Sp3 Thomas Tharpe, Ft. Dix, N.J.
Mr. George G. King, Montclair State College.
Mr. Cody Barrett, N.J. State Employment Service.
Mr. Ralph Geller, N.J. State Employment Service.
Mr. Frank Donovan, Vietnam-era veteran.
Mr. Ken O'Brien, Vietnam-era veteran.
Mr. Kenneth C. McCarthy, disabled veteran.
Mr. John Hagan, Director, VA Regional Office, Newark.
Mr. Hakim Abdullah, American Servicemens Union.
Mr. Raul Morales, American Servicemens Union.
*Mr. William Vincenti, Rutgers Newark.
Mr. John Rowan, Vietnam Veterans Against the War.
Mr. Skip Delano, Vietnam Veterans Against the War.
Mr. Robert Sniffen, National Association of Collegiate Veterans.
Mr. Fabio Frank, Vietnam Veterans Against the War.

FOOTNOTES

*Also submitted written statement.
**Submitted written statement only.

PUBLIC HEARING ON THE PROBLEMS OF VIETNAM-ERA VETERANS, CLEVELAND, OHIO, MARCH 9, 1973

Panel:

Mayor Ralph J. Perk.
U. S. Representative Silvio O. Conte (R.-Mass.).
Mr. Austin Kerby, National Headquarters, American Legion.
Mr. Robert Penn, Vietnam veteran; Commissioner of Parks, Buffalo, New York.
Mr. Lester W. Dettman, Regional Vice President, General Electric.
Mr. John Rosel, Cleveland Federation of Labor.
Mr. James Gillam, Cleveland VETS Project Director.

Witnesses:

**U. S. Senator Robert A. Taft (R.-Ohio).
**U. S. Senator William Saxbe (R.-Ohio).
**U. S. Representative Charles Vanik (D.-Ohio).
Professor Neil Armstrong, former astronaut.
*U. S. Representative William Minshall (R.-Ohio).
U. S. Representative William Keating (R.-Ohio).
*U. S. Representative Louis Stokes (D.-Ohio).
Mr. Greg Penn, Vietnam veteran.
Mr. James Vocaire, Vietnam veteran.
Mr. Robert Swift, Vietnam veteran.
Mr. William Cade, World War II veteran.
U. S. Representative James Stanton (D.-Ohio).
Mr. Larry Holmes, American Servicemens Union.
Mr. Welton Chappell, Vietnam veteran.
Mr. Thrice Polk, Vietnam veteran.
Mr. Donald Clayton, Vietnam veteran.
Mr. John Moss, Vietnam veteran.
Mr. Paul Schumacher, Vietnam veteran.
Mr. Ron Johnson, Vietnam veteran.
Mr. Bill Schumacher, Vietnam veteran.
Mr. Billy Jones, Vietnam veteran.
Ms. Nicolette McClure, veteran.
Ms. Hunter, mother of Vietnam veteran.
*Capt. Ray Bonner, Vietnam veteran.
State Senator Anthony Calabrese.
Mr. Chester Koch, Ohio VFW.
Mr. Roger Munson, Ohio American Legion.
*Mr. Bernard Direnfeld, former National Commander, Jewish War Veterans.
Mr. Freddie Williams, Greater Cleveland Veterans Council.
Mr. Harry Lee, AmVets.
*Mr. George Traicoff, Dean of Community Services, Cuyahoga Community College.
Mr. Samuel Carrington, Director, Project Search.
Mr. Paul Taylor, veterans counselor.
Mr. Larry Parker, Vietnam veteran.
Mr. Raul Vega, veteran.
Mr. George Sapin, Vice President, Meldrum & Fewsmith.
Mr. Arthur Haffner, Vietnam veteran.
Mr. Jim Carlton, Vietnam veteran.
Mr. Michael Carmody, Vietnam veteran.
Mr. Raymond Hammond, Vietnam veteran.
*Mr. John Belliveau, President, Ohio Private Employment Services Association.
Mr. Ray Barnett, Manager, Manpower, Inc.
Mr. Robert Jones, Ohio Bureau of Employment Security.
Mr. Jack Faught, Production Manager, Standard Pressed Steel Corporation.
Mr. Robert Johnson, Vietnam veteran.
Mr. Clint Nelson, Vietnam veteran.
*Dr. John Corfias, President, Dyke College.
Mr. Kenneth Sislak, Vietnam veteran.
Mr. Ronald Chandler, Vietnam veteran.
Mr. John J. Pokorny, American Red Cross.
**Mr. Julius P. Scipione, President, Cleve-Tech Machine & Tool Company.
**Mr. John Rosel, Cleveland Federation of Labor.
**Mrs. Dorothea Brown, Director, Extended Learning Program.
**Mr. John Grady, Vietnam-era veteran and faculty member, Pennsylvania State University.

FOOTNOTES

*Also submitted written statement.
**Submitted written statement only.

PUBLIC HEARING ON THE PROBLEMS OF VIETNAM-ERA VETERANS, SEATTLE, WASH., MAY 18, 1973

Panel:

Mayor Wes Uhlman.
U.S. Representative Silvio O. Conte (R-Mass.).
Mr. Austin Kerby, National Headquarters, American Legion.
Mr. Robert Penn, Vietnam veteran; Commissioner of Parks, Buffalo, New York.
Rev. William B. Cate, President, Church Council of Greater Seattle.
State Senator Booth Gardner.
Mr. Robert Hill, Project Director, VETS.
Mr. Stuart Feldman, Program Coordinator, VETS.
Ms. Jeanette Williams, Seattle City Council.

Witnesses (in order of appearance):

*U.S. Senator Warren G. Magnuson.
*U.S. Senator Henry M. Jackson.
*U.S. Representative Brock Adams.
Dr. Charles Odegaard, President, University of Washington.
Dr. Nolen Ellison, President, Seattle Central Community College.
Mr. Jose Garcia, Director, Sea-Vac.
Mr. William Phillips, Director, VA regional office.
Mr. John Rabel, State Representative.
Mr. Les Blevins, Vietnam-era veteran.
Mrs. Santiago Juarez, Vietnam-era veteran.
Mr. Edgar Bentley, Vietnam-era veteran.
Mr. Phillip Meyerson, Vietnam-era veteran.
Mr. Ralph Munro, Special Assistant to the Governor.
Mr. Ernest LaPalm, Assistant Commissioner, Employment Service.
Mr. Peter Jamero, Assistant Secretary, Department of Social and Health Services.
Mr. Gregory Barlow, Director, Special Projects, Community College Education.
Mr. J. B. McKremmin, State Office of Economic Opportunity.
Maj. Gen. Howard McGee, Adjustant General, Washington National Guard.
Maj. Gen. William Fulton, C. G. 9th Division & Ft. Lewis.
Ms. Mary Garvey, Vietnam-era veteran.
Mr. James Sanders, Vietnam-era veteran.
Mr. Richard Moore, Vietnam-era veteran.
Mr. Dale Bott, Vietnam-era veteran.
Mr. Tom Davis, Vietnam Veterans Against the War.
Mr. Wellington Rupp, United Veterans Organizations.
Mr. Dwight Long, Chairman, Executive Committee, Washington State Veterans Coalition.
Mr. Tom Levanto, Vietnam-era veteran.
Mr. Jon Lantz, Vietnam-era veteran.
Mr. Michael Rooney, Vietnam-era veteran.
Mr. Paul Richards, Vietnam-era veteran.

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*Submitted statements.

APPENDIX A

A summary comparison of World War II and today's GI Bills follows, with an evaluation of the impact those differences make:

World War II

GI Bill paid for all tuition, books and fees (effectively) at any public or private college or technical school.

Today

No direct tuition payment to schools—a flat $220 a month to the vet. Education costs at many colleges are five times greater than in 1948.

World War II

A separate monthly subsistence allowance of $75—35% of average monthly earnings. Available cheap quonset hut housing.

Today

Cost of living doubled. Vet must cover it, *plus tuition*, from $220. In many areas, this barely covers rent and food. There is no subsidized housing.

World War II

Part-time jobs readily available.

Today

Tight job market has made part-time jobs hard to find.

World War II

Public colleges paid out-of-state tuition by the federal government for vets. Colleges and technical schools eagerly recruited vets. Led to expansion of higher education.

Today

Vets pay in-state tuition rates at public colleges from their $220. Out-of-state charge at U of Cal is $2100; total GI Bill is $1980; vets pay $660. Colleges have few significant vets programs.

In large part because of the funding differences between the World War II and today's GI Bill, the effectiveness of the GI Bill is uneven, particularly for college and junior college education and for institutional non-college training.

(1) *Great regional disparities in GI Bill use.* California has a 36% GI Bill use rate; New York, 20%; Massachussets, 19%, Pennsylvania and Ohio, 16%. In fiscal 1972, California vets used $302,000,000 in GI Bill benefits; New York vets used $99,000,000.

(2) *Equal military service means unequal opportunity.* Since today's veteran pays tuition out of his GI Bill, veterans in states with cheap public colleges end up with considerably more subsistence money than those from states whose public colleges charge higher tuition; for example, California State at Los Angeles charges $117, while Jersey City State charges $635, a difference of $518, leaving the New Jersey veteran with $1,365 to live one for nine months, while the California veteran has $1,862—almost $500 more.

(3) *Veterans are a smaller percentage of college students.* After World War II, veterans were 50% of all enrollees in colleges. Today they are 9%. Although there was a larger universe of eligible World War II veterans—15,000,000 versus 6,220,000 Vietnam-era veterans—today's veterans are still a large potential audience. Higher levels of education in the population and the greater availability of junior colleges result in a higher percentage of veterans using their opportunities for college—23.4% versus 20.8% after Korea, and 14.5% after World War II.

(4) *Use is inverse to need.* Roughly 20% of the 6,220,000 Vietnam-era veterans have pre-service college; 20% are high school dropouts; and 60% are high school graduates. High school dropouts have about a 20% use rate, while those with pre-service college have a 50% use rate, and high school graduates have close to a 50% rate. But the dropouts and high school graduates make the greatest use of the GI Bill for correspondence courses, with 800,000 persons having done so; 75% of those, according to a GAO study, dropped out prior to completion.

(5) *Percent of federal budget devoted.* After World War II, the GI Bill took 7.5% of the federal budget; today it takes 1%.

(6) *Ruled out of private colleges, with fewer at state universities.* Today veterans comprise only 1% of total enrollment at Holy Cross, Northwestern and Yale; veterans can no longer afford most private colleges, and represent less than 10% of the student body at major state universities.

OREGON PUBLIC WORKS

Mr. HATFIELD. Mr. President, on August 16 of this year President Nixon signed into law the measure making appropriations for public works and the Atomic Energy Commission for fiscal year 1974. Congress sent to the President a bill that was $8 million below the administration budget request for these items.

In its considerations of the public works-AEC budget, the Appropriations Committees of both Houses reordered the administration's priorities in several areas, most notably in energy items. For the Pacific Northwest, where our citizens are facing disaster in the form of an inadequate electrical power supply, the Congress made significant increases to accelerate the development of the Federal Columbia River Power System.

I ask unanimous consent to have appear in the RECORD following these remarks the Federal public works appropriations as they affect Oregon, including a breakdown of House, Senate, and conference action on each of the items.

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

FISCAL YEAR 1974 PUBLIC WORKS APPROPRIATION BILL

Project	House bill	Senate bill	Conference bill
Energy:			
Bonneville Lock and Dam, 2d powerhouse (Corps):[1] Construction	0	$3,000,000	$3,000,000
Bonneville Lock and Dam, modification for peaking (Corps): Construction	$7,400,000	7,400,000	7,400,000
Columbia Basin project, Grande Coulee Dam 3d powerhouse (Bureau):[1] Construction	24,950,000	28,950,000	28,950,000
The Dalles Lock and Dam, additional power units (Corps): Construction	2,200,000	2,200,000	2,200,000
Chief Joseph Dam, additional power units (Corps): Construction	10,000,000	10,000,000	10,000,000
Ice Harbor Lock and Dam, additional power units (Corps): Construction	11,500,000	11,500,000	11,500,000
Little Goose Lock and Dam, additional power units (Corps):[1] Construction	0	450,000	450,000
Lower Granite Lock and Dam, additional power units (Corps):[1] Construction	0	450,000	450,000
Lower Monumental Lock and Dam, additional power units (Corps):[1] Planning	0	330,000	0
Civilian reactor development program (AEC)	323,800,000	329,800,000	326,800,000
Controlled thermonuclear research (AEC):[1] Increase for fusion research	49,200,000	53,000,000	53,000,000
Applied energy technology program (AEC):[1] Includes solar and geothermal research	16,900,000	18,600,000	17,850,000
Bonneville Power Administration:			
Construction	97,500,000	97,500,000	97,500,000
Operation and maintenance	33,300,000	33,300,000	33,300,000
The Oregon coast:			
Chetco River (Corps, Nav.):[2]			
Investigation on jetty extension	0	5,000	5,000
Operation and maintenance	103,000	103,000	103,000
Coos Bay (Corps, Nav.):[2]			
Planning	0	150,000	150,000
Operation and maintenance	1,538,000	1,538,000	1,538,000
Coos and Millicoma Rivers (Corps, Nav.): Operation and maintenance	37,000	37,000	37,000
Coquille River (Corps, Nav.): Operation and maintenance	99,000	99,000	99,000
Depoe Bay (Corps, Nav.): Operation and maintenance	45,000	45,000	45,000
Port Orford (Corps, Nav.): Operation and maintenance	72,000	72,000	72,000
Rogue River, harbor at Gold Beach (Corps, Nav.): Operation and maintenance	228,000	228,000	228,000
Siuslaw River (Corps, Nav.):[2]			
Investigation on jetty extension	$15,000	$75,000	$15,000
Operation and maintenance	339,000	339,000	339,000
Tillamook Bay and Bar (Corps, Nav.):			
Investigation on increasing project dimensions	20,000	20,000	20,000
Operation and maintenance	16,000	16,000	16,000
Construction on south jetty	2,400,000	2,400,000	2,400,000
Umpqua River (Corps, Nav.):[2]			
Investigation on jetty system and increasing project dimensions	20,000	66,000	45,000
Operation and maintenance	217,000	217,000	217,000
Yaquina Bay and Harbor (Corps, Nav.): Operation and maintenance	440,000	440,000	440,000
Willamette and lower Columbia Basins:			
Blue River Lake (Corps, F.C.): Operation and maintenance	65,000	65,000	65,000
Columbia and Lower Willamette Rivers below Vancouver and Portland (Corps, Nav.):			
Operation and maintenance	4,890,000	4,890,000	4,890,000
Construction on 40-foot channel	1,800,000	1,800,000	1,800,000
Columbia River at the mouth (Corps, Nav.): Operation and maintenance	1,022,000	1,022,000	1,022,000
Columbia River between Vancouver and the Dalles (Corps, Nav.): Operation and maintenance	291,000	291,000	291,000
Bonneville Lock and Dam (Corps, M.P.): Operation and maintenance	2,410,000	2,410,000	2,410,000
Cottage Grove Lake (Corps, F.C.): Operation and maintenance	175,000	175,000	175,000
Cougar Lake (Corps, M.P.):			
Operation and maintenance	290,000	290,000	290,000
Construction on fish hatchery	1,400,000	1,400,000	1,400,000
Detroit Lake (Corps, M.P.): Operation and maintenance	995,000	995,000	995,000
Dorena Lake (Corps, F.C.): Operation and maintenance	175,000	175,000	175,000
Fall Creek Lake (Corps, F.C.):[2]			
Operation and maintenance	155,000	155,000	155,000
Construction on recreation facilities	0	45,000	45,000
Fern Ridge Lake (Corps, F.C.): Operation and maintenance	270,000	270,000	270,000

Footnotes at end of table.

Project	House bill	Senate bill	Conference bill
The Oregon Coast—Continued			
Green Peter and Foster Lakes (Corps, M.P.): Operation and maintenance	$955,000	$955,000	$955,000
Hills Creek Lake (Corps, M.P.): Operation and maintenance	370,000	370,000	370,000
Lookout Point Lake (Corps, M.P.): Operation and maintenance	1,340,000	1,340,000	1,340,000
Lower Columbia River and tributaries (Corps, F.C.): Investigation	90,000	90,000	90,000
Lower Columbia River bank protection (Corps, F.C.): Construction	700,000	700,000	700,000
Luckiamute River (Corps, F.C.):[3] Investigation	0	40,000	40,000
Marys River (Corps, F.C.): Investigation	49,000	49,000	49,000
Scappoose drainage district (Corps, F.C.): Construction	100,000	100,000	100,000
Skipanon channel (Corps, Nav.): Operation and maintenance	35,000	35,000	35,000
Willamette River above Portland and Yamhill River (Corps, Nav.): Operation and maintenance	541,000	541,000	541,000
Willamette River at Willamette Falls (Corps, Nav.): Operation and maintenance	345,000	345,000	345,000
Willamette River bank protection (Corps, F.C.):			
Operation and maintenance	400,000	400,000	400,000
Construction	700,000	700,000	700,000
Willamette River Basin (Corps, Comp.): Investigation	165,000	165,000	165,000
Tualatin project (Bureau, M.P.):[3]			
Construction	7,585,000	7,785,000	7,785,000
Investigation	125,000	125,000	125,000
Willamette River project (Bureau, M.P.): Investigation	120,000	120,000	120,000
Southern Oregon:			
Applegate Lake (Corps, F.C.):[3] Construction (land acquisition only).	Carryover from fiscal year 1973 of $100,000 disallowed by House, allowed by Senate, disallowed by conference due to authorization language requiring prior completion of irrigation agreements.		
Elk Creek Lake (Corps, F.C.): Construction	1,100,000	1,100,000	1,100,000
Lost Creek Lake (Corps, M.P.): Construction	35,600,000	35,600,000	35,600,000
Rogue River Basin project, Merlin division (Bureau, M.P.): Planning	300,000	300,000	300,000
Rogue River Basin project, Medford and Rogue River Valley irrigation districts (Bureau, Irr.): Construction	75,000	75,000	75,000
Rogue River Basin project (Bureau, M.P.):[3] Investigation	0	$25,000	$25,000
Eastern Oregon:			
Catherine Creek Lake (Corps, F.C.): Construction	$700,000	700,000	700,000
John Day Lock and Dam (Corps, M.P.):			
Operation and maintenance	2,476,000	2,476,000	2,476,000
Construction	7,475,000	7,475,000	7,475,000
McNary Lock and Dam (Corps, M.P.):[3]			
Operation and maintenance	2,964,000	2,964,000	2,964,000
Construction (increase for recreation facilities on Lake Wallula)	2,500,000	2,653,000	2,653,000
Silvies River and tributaries (Corps, F.C.): Investigation	21,000	21,000	21,000
The Dalles Lock and Dam (Corps, M.P.): Operation and maintenance	2,053,000	2,053,000	2,053,000
Willow Creek Lake (Corps, F.C.):[3] Construction (land acquisition and road relocation)	0	450,000	450,000
Klamath project (Bureau, M.P.): Construction	600,000	600,000	600,000
Klamath project, Shasta View irrigation district (Bureau, Irr.): Construction	2,500,000	2,500,000	2,500,000
Crooked River project, Ochoco irrigation district (Bureau, Irr.): Construction	40,000	40,000	40,000
Tumalo irrigation district (Bureau, Irr.): Construction	550,000	550,000	550,000
Westland irrigation district (Bureau, Irr.): Construction	50,000	50,000	50,000
Umatilla Basin project (Bureau, M.P.): Investigation	85,000	85,000	85,000
Walla Walla project (Bureau, M.P.): Investigation	70,000	70,000	70,000
Recreation facilities at existing projects (Bureau):[3] Planning and construction	136,000	186,000	186,000
Miscellaneous:			
Columbia River and tributaries (Corps, F.C.):[3] Investigation	444,000	620,000	620,000
Pacific Northwest River Basin (Corps, Comp.): Investigation	205,000	205,000	205,000
Western States water plan (Bureau): Investigation	1,000,000	1,000,000	1,000,000
Water Resources Council planning grants to States (WRC)	3,000,000	3,000,000	3,000,000
Pacific Northwest River Basin Commission (WRC)	171,000	171,000	171,000

[1] Language inserted in Senate report and held in conference: Hopper Dredge "Pacific"—the committees "continue the moratorium, with one minor exception, on all proposed plans for replacement or modification of dredges which are not presently under contract, including hopper dredges, pending completion of the comprehensive National Dredging Study. . . . The exemption from the moratorium . . . is for modification of the dredge 'Pacific.' Because of the urgent need to update this plant, particularly the replacement of the power system, the Corps is urged to develop and submit its plans for the needed work. However, this special exception of the 'Pacific' is subject to the restriction on the use of the 'Pacific' to bar or entrance channel work, commonly referred to as 'outside harbor work' following repair and upgrading."

[2] Language inserted in Senate report and held in conference: Umpqua River navigation study—the committees "direct the Corps to complete the Umpqua River navigation study in fiscal year 1974 if sufficient unused funds are available from appropriated funds for other navigation studies in Oregon."

[3] Language inserted in Senate report and held in conference: "The Corps . . . is directed to complete planning of the Beaver Drainage District Project during the fiscal year with currently available funds."

U.S. POLICY IN THE MIDDLE EAST

Mr. McCLURE. Mr. President, it is ironic that last week's dove is suddenly this week's hawk. Let us contrast the suggestion of the resolution of support for Israel, cosponsored by more than one-half of the Members of the Senate, with prior positions many of them have taken. Perhaps then the results of this action would be more clearly apparent.

The course the United States is now taking can only help the Soviet Union. Despite this fact, the United States—in a generous, but misguided response to the events in the Middle East—is contributing to precisely that polarization which it has officially denounced for so long. The emotion is good, but the logic is bad. I intend to submit a substitute to the Middle East resolution which attempts to demonstrate this by the simple application of the same thinking, in the same terminology to the situation in South Vietnam.

We are told that we have a commitment to Israel. If we have one, it has not been made public. I do not hear any complaints from most of those who have protested secret agreements on the part of the Executive.

The war powers bill recently passed by this body with only 20 dissenting votes stipulates that even troop deployment or the massing of troops within our own borders can be provocative. Is that more provocative than supplying jet fighters? Many Members of Congress have stated their view that the United States is not, and cannot be, a world policeman. Is not the Middle East part of the "World"? Many Congressmen have voted against the sale of any armaments or the donation of any sort of military assistance to other nations. But surely they are the same people who most vociferously and most correctly insist upon the recognition of Israel as a nation.

Those who are most confident in the policies of détente have failed to recognize that the real cause of war in the Middle East is the Soviet buildup by air and sea of the Arab military machine. The only way to defeat this Soviet strategy is to achieve peace. Otherwise, we fall into a very obvious trap. The ironic fact is that Israel and the Arab nations are merely cynically used pawns in the plans of a country which has the best interests of neither one at heart.

Mr. President, I ask unanimous consent that the text of the substitute which I intend to submit be printed in the RECORD.

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

Resolution to urge the continued transfer to Israel and South Viet-Nam of Phantom aircraft and other equipment

SEC. 1. Whereas the President is supporting a strong and secure Israel as essential to the interests of the United States; and

Whereas the armed forces of Egypt and Syria launched an unprovoked attack against Israel shattering the 1967 cease-fire; and

Whereas Israel refrained from acting preemptively in its own defense; and

Whereas the Soviet Union, having heavily armed the Arab countries with the equipment needed to start this war, is continuing a massive airlift of sophisticated military equipment to Egypt and Syria; and

Whereas Public Law 91-441, as extended, authorizes the President to transfer to Israel by credit sale whatever arms may be needed to enable Israel to defend itself: Now, therefore, be it

Resolved, That it is the sense of the Senate that the announced policy of the United States Government to maintain Israel's deterrent strength be implemented by continuing to transfer to Israel, by whatever means necessary, Phantom aircraft and other equipment in the quantities needed by Israel to repel the aggressors.

SEC. 2. Whereas the President is supporting a strong and secure South Viet-Nam as essential to the interests of the United States; and

Whereas the armed forces of North Viet-Nam launched an unprovoked attack against South Viet-Nam shattering the 1954 cease-fire; and

Whereas South Viet-Nam refrained from acting preemptively in its own defense; and

Whereas the Soviet Union, having heavily armed North Viet-Nam with the equipment needed to start this war, is continuing a massive airlift of sophisticated military equipment to North Viet-Nam; and

Whereas the Gulf of Tonkin Resolution authorized the President to transfer to South Viet-Nam whatever arms may be needed to enable South Viet-Nam to defend itself: Now, therefore, be it

Resolved, That it is the sense of the Senate that the announced policy of the United States Government to maintain South Viet-Nam's deterrent strength be implemented by continuing to transfer to South Viet-Nam, by whatever means necessary, Phantom aircraft and other equipment in the quantities needed by South Viet-Nam to repel the aggressors.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. The time for the transaction of routine morning business has expired.

EXECUTIVE SESSION

Mr. ROBERT C. BYRD. Mr. President, I move that the Senate go into executive session to consider the nomination of Mr. William John Fellner.

The motion was agreed to, and the Senate proceeded to the consideration of executive business.

COUNCIL OF ECONOMIC ADVISERS

The legislative clerk read the nomination of William John Fellner, of Connecticut, to be a member of the Council of Economic Advisers.

FELLNER, NEW ECONOMIC PICK OF ADMINISTRATION, FAVORS HIGHER UNEMPLOYMENT POLICY

Mr. PROXMIRE. Mr. President, seldom do we have before us a nominee whose views on public issues have been so carefully articulated in advance as those of Dr. William Fellner, on whose nomination as a member of the Council of Economic Advisers the Senate will soon act.

This is a tremendously important nomination, not only because the Council of Economic Advisers is an important body, not only because Mr. Fellner is expected to become chairman of that council within a few months, when Dr. Stein resigns, but also because of the nature of Dr. Fellner's views, and the reflection that will have on the change in economic policy this country is likely to undergo, based on his appointment as the President's top adviser.

In the recent studies he has prepared for the American Enterprise Institute, in a speech to the National Association of Business Economists in September, in a press conference on September 29, and in his testimony before the Senate Banking Committee, Dr. Fellner has spelled out his views on employment, inflation, and other major economic issues with candor and precision.

One can only admire Dr. Fellner's honesty and outspokenness. I hope it will be sustained in office. Certainly some plain speaking about economic policy will be a welcome breath of fresh air in an administration whose chief policymakers can so seldom remove their rose colored glasses long enough to look at the real economic problems which confront the country.

While I admire Dr. Fellner's honesty and while I have great respect for his fine intellect and his long record of academic achievement, I find myself in sharp disagreement with him on the most basic issues of economic policy. The Senate should confirm Dr. Fellner only with a clear understanding of his views and of the need to resist the central thrust of Dr. Fellner's recommendations on some key issues of economic policy.

While I admire Dr. Fellner's honesty and have great respect for his fine intellect and his excellent record—not only is he a distinguished professor at Yale University, but also is a distinguished member of the American Economic Association—we must have a clear understanding of his views and of the need to resist the central thrust of Dr. Fellner's recommendations on some of the issues of economic policy.

The most disturbing of Dr. Fellner's recommendations has to do with unemployment. Dr. Fellner is firmly convinced that, given the present structure of the economy, it is dangerous to try to reduce unemployment to 4 percent. He urges a 5-percent unemployment rate as the new target toward which monetary and fiscal policy should be directed. To push unemployment below 5 percent will, he believes, produce a continuously accelerating rate of inflation, and that in turn will lead to a serious recession.

Since Dr. Fellner's view on unemployment is apparently shared by an increasing number of academic economists, it is important that this question be carefully examined on its merits. In the course of hearings before the Joint Economic Committee I have questioned both administration officials and a large number of academic economists on this question of the appropriate target for unemployment. I have concluded that while support for an unemployment target higher than 4 percent is widespread among economists, the evidence which supports this conclusion is extremely limited. Indeed, I am both surprised and disturbed that such a sweeping conclusion has been reached on the basis of so little evidence.

Support for a higher unemployment target rests on the argument that the proportion of women and teenagers in the labor force has increased. Since these groups typically have higher unemployment rates than adult men, a higher overall unemployment is now consistent with a quite low unemployment rate for adult men.

In itself this fact is indisputable. There is no question that the proportion of women and young people in the labor force has increased dramatically since the 1950's. But this is only one of many dramatic and important labor market changes. The occupational structure has changed just as dramatically. We are now predominantly a white collar rather than a blue-collar economy. Educational levels have increased. The skill requirements of various jobs have changed. Surely it would be a tragic mistake to commit ourselves to the sacrifice of the income and production associated with a lower unemployment rate when these crucial questions have not even been examined. Yet this, as I understand it, is what Dr. Fellner and others who share his views would have us do.

Economists and others seem to have forgotten the high costs which are associated with higher unemployment. Let me review some of them. A 5-percent rather than a 4-percent unemployment rate means—

About 850,000 more unemployed.

Many thousands more on part-time work.

Almost $40 billion per year in lost output.

A $12 to $15 billion reduction in Federal tax receipts.

A $3 to $5 billion reduction in State and local tax receipts.

Surely before we agree to accept those costs, we should have overwhelming evidence that there is no other way to stabilize the economy and avoid recession.

I urge Dr. Fellner, who as a distinguished academic economist must surely appreciate the importance of full evaluation of the evidence, to put the resources of the executive branch to work on a more complete analysis of changes in the labor market, and of other causes of inflation. Wait until the results are in before reaching a conclusion that the Nation must pay the enormous costs of higher unemployment. Perhaps the results of fuller examination of the evidence will surprise him. Perhaps he will find that the favorable changes in the labor market outweigh the unfavorable ones, and that a lower rather than a higher unemployment target is appropriate.

If we analyze our present inflation, economist after economist has been unable to show that the reason why prices have been rising is that unemployment is lower; that there is a shortage in the labor market. That is not the case. It is not primarily a food inflation. It rests primarily in the shortage of paper, oils, chemicals, and the like. It is not a labor inflation. In fact, all the testimony is that wages have behaved extraordinarily well. Just this morning we have further testimony to that effect. They have greatly lagged behind prices. As a matter of fact, in the last year real wages are 3 percent below what they were a year ago. So working people have not benefited and they are not responsible for the increase in prices.

Perhaps Dr. Fellner will find that women and young people can be trained for the jobs traditionally held by adult men, thereby eliminating many inflationary labor bottlenecks. Perhaps he will find that stronger action against discrimination in employment will eliminate many bottlenecks. Perhaps he will find that the enormous growth presently occurring in the adult population between 25 and 35 years of age is providing an invaluable reservoir of well-educated, full-time workers who can help eliminate inflationary bottlenecks caused by shortages of skilled labor. Until these questions have been examined we should not be so pessimistic about the ability of our

economy to combine full employment with reasonable price stability.

A second area where I would urge Dr. Fellner to rethink his views and to examine additional evidence is the area of price and wage control. Dr. Fellner has said emphatically that we should remove the controls as soon as possible and that they should be removed for good. Everyone recognizes that controls create problems, that they cause distortions, that they have a cost. No one wants a permanent phase IV. Nonetheless, our recent unhappy experience with the premature removal of phase II at the beginning of this year, which marked the beginning of the worst inflation this country has had in the last 25 years, should certainly warn us against making the same mistake twice. Surely we should examine the possibility of improving rather than prematurely abandoning phase IV. And surely we should consider very carefully what is to come after phase IV. To me it seems incredible that the administration would repeat the mistake it made on first taking office in 1969 of abandoning all forms of income policy. Yet a complete "hands-off" attitude appears to be the preferred alternative of Dr. Fellner and of other leading ad-administration officials. I urge them to reconsider.

Despite my feeling that this represents a serious change in our economic policy, and one I oppose, regret, and expect to do all I can to prevent, I must say that Dr. Fellner is clearly qualified; he is a man of outstanding intellect who has occupied prominent positions. I have talked to a number of economists who have great respect for Dr. Fellner.

I support the confirmation of Dr. Fellner because I admire him for his honesty and plain speaking. And because he brings to his office the most impeccable of academic credentials. But I urge him to searchingly reexamine his views on unemployment and on the control of inflation. I, for one, will continue to oppose his position on both these issues until he can present me with far more persuasive evidence than he has so far that he is right and I am wrong.

The PRESIDING OFFICER. The question is, Will the Senate advise and consent to the nomination of William John Fellner, of Connecticut, to be a member of the Council of Economic Advisers?

Without objection, the nomination is confirmed.

LEGISLATIVE SESSION

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Senate return to the consideration of legislative business.

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

MESSAGES FROM THE PRESIDENT—APPROVAL OF BILL

Messages in writing from the President of the United States were communicated to the Senate by Mr. Heiting, one of his secretaries, and he announced that on October 18, 1973, the President had approved and signed the act (S. 2419) to correct typographical and clerical errors in Public Law 93-86.

EXECUTIVE MESSAGES REFERRED

As in executive session, the Presiding Officer (Mr. HATHAWAY) laid before the Senate messages from the President of the United States submitting sundry nominations, which were referred to the Committee on the Judiciary.

(For nominations received today, see the end of Senate proceedings.)

ADJOURNMENT FROM OCTOBER 18, 1973, TO OCTOBER 23, 1973

Mr. ROBERT C. BYRD. Mr. President, I ask the Chair to lay before the Senate a message from the House of Representatives on Senate Concurrent Resolution 54.

The PRESIDING OFFICER laid before the Senate the amendment of the House of Representatives to the concurent resolution (S. Con. Res. 54) providing for adjournment of the Senate from Thursday, October 18, 1973, to Tuesday, October 23, 1973, which was in line 4, after "1973", insert ", and that when the House adjourns on Thursday, October 18, 1973, it stand adjourned until 12 o'clock meridian on Tuesday, October 23, 1973."

Mr. ROBERT C. BYRD. Mr. President, I move that the Senate concur in the amendment of the House.

The motion was agreed to.

TRANSACTION OF ROUTINE MORNING BUSINESS

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that there now be a period for the transaction of routine morning business for not to exceed 30 minutes, with statements limited therein to 15 minutes.

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

QUORUM CALL

Mr. ROBERT C. BYRD. 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. BENNETT. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

AUTHORITY FOR THE SECRETARY OF THE SENATE TO RECEIVE MESSAGES DURING ADJOURNMENT

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that during the adjournment of the Senate over to Tuesday next at 12 noon the Secretary of the Senate be authorized to receive messages from the President.

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

ORDER FOR ADJOURNMENT FROM TUESDAY, OCTOBER 23, 1973, TO FRIDAY, OCTOBER 26, 1973

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that when the Senate completes its business on next Tuesday it stand in adjournment until the hour of 12 noon on Friday next.

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

ORDER FOR ADJOURNMENT FROM FRIDAY, OCTOBER 26, 1973, TO TUESDAY, OCTOBER 30, 1973

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that when the Senate completes its business on Friday next it stand in adjournment until the hour of 12 noon on the following Tuesday.

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

OIL THREAT POINTS UP U.S. ENERGY POLICY PROCRASTINATION

Mr. ROBERT C. BYRD. Mr. President, yesterday's announcement by the oil producing nations of the Persian Gulf that they will cut back production by 5 percent a month until Israel withdraws from territory occupied as a result of the 1967 war points up once again the vital need for a national energy fuels policy in the United States.

That such a threat is possible is due in no small measure to our own failure to formulate a sensible, forward-looking national energy fuels policy. Such a policy has been talked about for years, but, so far, the talk has not been translated into action.

It is absolutely essential for the future security of the United States that a national fuels policy be formulated without further delay, and that research and development in our most abundant fossil fuel—coal—be stepped up immediately.

The proven reserves of coal in the United States are adequate for our energy fuel needs for 500 years, if we are prepared to spend the funds to develop the technology necessary to coal's full utilization. Such a policy would render the United States impervious to any threat of energy fuel blackmail, from any quarter. I believe, in the light of developments in the Middle East, that a national fuels policy, with an accent on coal research, is one of this Nation's top priorities, and that steps should be taken immediately to implement such a policy.

ORDER FOR TRANSACTION OF ROUTINE MORNING BUSINESS ON OCTOBER 23, 26, AND 30, 1973

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that on October 23, 26, and 30, immediately after the two leaders or their designees have been recognized under the standing order, there be a period for the transaction of routine morning business for not to exceed 30 minutes, with statements therein limited to 3 minutes.

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

QUORUM CALL

Mr. ROBERT C. BYRD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. ROBERT C. BYRD. 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 TUESDAY

Mr. ROBERT C. BYRD. Mr. President, it is not expected that there will be any yea-and-nay votes on Tuesday, October 23. There will be a period for the transaction of routine morning business after the two leaders or their designees have been recognized under the standing order. The period for routine morning business will not extend beyond 30 minutes, under the order, with statements therein limited to 3 minutes.

ADJOURNMENT UNTIL TUESDAY, OCTOBER 23, 1973

Mr. ROBERT C. BYRD. Mr. President, if there be no further business to come before the Senate, I move, in accordance with the provisions of Senate Concurrent Resolution 54, as amended, that the Senate stand in adjournment until 12 o'clock noon on Tuesday next.

The motion was agreed to; and at 2:13 p.m. the Senate adjourned until Tuesday, October 23, 1973, at 12 noon.

NOMINATIONS

Executive nominations received by the Senate on October 17, 1973, pursuant to the order of October 16, 1973:

COUNCIL ON ENVIRONMENTAL QUALITY

Russell W. Peterson, of Delaware, to be a Member of the Council on Environmental Quality, vice Russell E. Train.

UNESCO SESSION REPRESENTATIVES

The following-named persons to be Representatives of the United States of America to the Third Extraordinary Session of the General Conference of the United Nations Educational, Scientific, and Cultural Organization:

Roy D. Morey, of Maryland.
William B. Jones, of California.
Edward O. Sullivan, Jr., of New York.

OVERSEAS PRIVATE INVESTMENT CORPORATION

Donley L. Brady, of California, to be a Member of the Board of Directors of the Overseas Private Investment Corporation for a term expiring December 17, 1975, vice Daniel Parker, term expired.

DEPARTMENT OF JUSTICE

Charles H. Anderson, of Tennessee, to be United States Attorney for the Middle District of Tennessee for the term of four years. (Reappointment.)

Leigh B. Hanes, Jr. of Virginia, to be United States Attorney for the Western District of Virginia for the term of four years. (Reappointment.)

R. Jackson B. Smith, Jr., of Georgia, to be United States Attorney for the Southern District of Georgia for the term of four years. (Reappointment.)

William H. Stafford, Jr., of Florida, to be United States Attorney for the Northern District of Florida for the term of four years. (Reappointment.)

Executive nominations received by the Senate on October 18, 1973:

DEPARTMENT OF JUSTICE

Jack V. Richardson, of Kansas, to be United States Marshal for the District of Kansas for the term of four years. (Reappointment.)

Rex Walters, of Idaho, to be U.S. Marshal for the district of Idaho for the term of four years. (Reappointment.)

CONFIRMATIONS

Executive nominations confirmed by the Senate October 18, 1973:

OLD WEST REGIONAL COMMISSION

Warren Clay Wood, of Nebraska, to be Federal Cochairman of the Old West Regional Commission.

COUNCIL OF ECONOMIC ADVISERS

William John Fellner, of Connecticut, to be a member of the Council of Economic Advisers.

(The above nominations were approved subject to the nominees' commitment to respond to requests to appear and testify before any duly constituted committee of the Senate.)

HOUSE OF REPRESENTATIVES—*Thursday, October 18, 1973*

The House met at 12 o'clock noon.

Rev. Richard R. Madden, superior, Carmelite Monastery, Youngstown, Ohio, offered the following prayer:

Dear Lord, so many times we stand before You, as now, and say nothing. So many times, we praise You with our lips, while our minds are far from You. But at this moment, we beg You, hear us.

You have entrusted us with high dignity. You have made us the fond hope of our great land. Give us the wisdom to understand that we are only Your instruments—that You use our hands, our eyes, and our minds to accomplish Your will. And let us never forget that far more important than our own personal needs are the needs of our people, who have no one but us.

Help us know that you made an imperfect world deliberately, so that each one of us, by our integrity, by our strength, and by our love, might add our finest touch to Your great masterpiece. In Jesus' name. 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.

REDUCTION OF OIL PRODUCTION BY ARAB STATES CAN BE A TWO-WAY STREET

(Mr. BARRETT asked and was given permission to address the House for 1 minute, to revise and extend his remarks and include extraneous matter.)

Mr. BARRETT. Mr. Speaker, the Arab oil states have turned to oil pressure diplomacy in their efforts to dictate our foreign policy. As we all know by now, they are going to reduce their oil production by 5 percent every month, with the reduction being imposed against oil shipments to the United States. They have taken this action because of our support of Israel in its continued struggle for survival.

Mr. Speaker, this amounts to an attempt to blackmail the United States—and we will not be blackmailed. Restrictions on exports can cut two ways. The Arab States are importers of many needed items and supplies from the United States. The President has the power and authority to curtail those exports from the United States. Accordingly, I am today introducing a House concurrent resolution expressing the sense of Congress on this matter which reads as follows:

Resolved by the House of Representatives (the Senate concurring), That it is the sense of the Congress that the President should curtail exports of goods, materials and technology to any nation that restricts the flow of oil to the United States in a quantity which is proportionate to the quantity of such restriction of oil.

I ask my colleagues in the House to cosponsor this resolution.

THE GREAT PROTEIN ROBBERY: NO. 10

(Mr. STUDDS asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. STUDDS. Mr. Speaker, on June 13, I introduced in the House, simultaneously with Senator WARREN G. MAGNUSON in the Senate, a bill, H.R. 8665, to extend U.S. fisheries jurisdiction over coastal species of fish out to 200 miles from our shores, and over anadromous fish—such as salmon. This jurisdiction would exist until international agreement is reached and implemented on extended fisheries jurisdiction. On June 29, I reintroduced my bill with 35 cosponsors. Today I am reintroducting the bill, this time with additional cosponsors.

We need urgently to establish immediate conservation measures to protect the marine resources in our coastal waters. Huge, government-subsidized fishing fleets from Russia, Poland, Japan, East Germany, and other nations are currently exploiting the fish stocks in the Northwest Atlantic at such a rate as to