

SENATE—Thursday, September 7, 1978

(Legislative day of Wednesday, August 16, 1978)

The Senate met at 10 a.m., on the expiration of the recess, and was called to order by Hon. PATRICK J. LEAHY, a Senator from the State of Vermont.

PRAYER

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

O Lord, our God, grant us clean hands and pure hearts to stand unblemished in Thy holy presence. Divest us of all that is mean and ugly and destructive. Invest us with that which is beautiful and good and true.

"Reclothe us in our rightful mind,
In purer lives Thy service find,
In deeper reverence, praise."

May we welcome this new day as a great adventure, with our spirit mastered by Thy spirit, that we may serve this Nation in a manner which sets forward Thy kingdom on Earth. Bless this Nation with wisdom and justice that it may be a blessing to the world.

We pray in the Great Redeemer's name. Amen.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

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

The legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, D.C., September 7, 1978.

To the Senate:

Under the provisions of rule I, section 3, of the Standing Rules of the Senate, I hereby appoint the Honorable PATRICK J. LEAHY, a Senator from the State of Vermont, to perform the duties of the Chair.

JAMES O. EASTLAND,
President pro tempore.

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

RECOGNITION OF LEADERSHIP

The ACTING PRESIDENT pro tempore. The Senator from West Virginia is recognized.

THE JOURNAL

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

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

ORDER OF PROCEDURE

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that I be recog-

nized following the expiration of time for the two leaders, and again following the expiration of routine morning business.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered. Mr. JACKSON. Will the Senator yield for a unanimous-consent request?

Mr. ROBERT C. BYRD. I yield.

PRIVILEGE OF THE FLOOR—CONFERENCE REPORT ON H.R. 5289

Mr. JACKSON. Mr. President, I ask unanimous consent that the following members of our committee staff be granted the privileges of the floor in connection with the natural gas conference report on H.R. 5289; June Diamond, Dan Dreyfus, Mary Flanagan, Grenville Gar-side, Mike Harvey, and Betsy Moler.

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

Mr. ABOUREZK. Mr. President, may I add to that list the names of Bethany Weidner, Alvin Duskin, Kevin Murray, Mimi Mager, Irene Emsellem, and Glenn Feldman.

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

The Chair, in his capacity as a Senator from the State of Vermont, will add the name of Sue Brannigan to be granted the privileges of the floor.

Without objection, it is so ordered.

Mr. ROBERT C. BYRD. Mr. President, I yield to the distinguished acting minority leader.

Mr. HANSEN. Mr. President, I ask unanimous consent that there be added to the list of persons proposed by the distinguished Senator from Washington (Mr. JACKSON) the names of Danny Boggs, Fred Craft, Carol Sacchi, and Nolan McKean.

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

Mr. ROBERT C. BYRD. Has the Senator finished?

Mr. METZENBAUM. Will the Senator yield for another unanimous-consent request?

Mr. ROBERT C. BYRD. I yield.

Mr. METZENBAUM. Mr. President, I wish to add the additional names of Dan Grady, Barry Diernfeld, Rick Wilson, Rick Sloan, and Roy Meyers, that they be granted the privileges of the floor.

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

Mr. PROXMIRE. Mr. President, I also ask unanimous consent that Howard Shuman of my staff be granted the privileges of the floor.

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

Mr. ROBERT C. BYRD. Mr. President, I understand the Senator from Wisconsin would like to have some time.

Mr. PROXMIRE. I would like to have 3 minutes.

Mr. ROBERT C. BYRD. I yield such

time as the Senator may require from my time.

CAMBODIA: A CONTINUING REMINDER OF THE NEED FOR THE GENOCIDE CONVENTION

Mr. PROXMIRE. Mr. President, it seems that every day we are confronted by new reports from Cambodia, each more shocking than the last. The Cambodian Government has attempted to cut that country off from the world, to keep under wraps their systematic decimation of the Cambodian people and their past.

But word has leaked out. And what has leaked out is, as I said before, utterly shocking.

In a report submitted 2 weeks ago by our Government to the United Nations, interviews with 22 refugees who fled from Cambodia into Thailand tell a gruesome tale. With a frightening lack of respect for life, the soldiers of the Khmer Rouge now resort to the death penalty at the slightest provocation. The most trivial offenses can cost a person their life. The refugees cited lateness to work as the most common offense warranting capital punishment. Complaints over food, work, or other conditions are also liable to this extreme measure.

Mr. President, what can we do? The U.S. Government has been forthright in bringing these atrocities to the attention of the world, but this has so far had little effect on conditions within Cambodia. Senator MCGOVERN has raised the question as to whether or not an international military force be formed to put an end to the disregard of human rights in Cambodia.

Mr. President, the situation in Cambodia must be remedied. The world must find the means to put an end to this bloodshed.

The situation in Cambodia, which can properly be called genocide, should remind the Senate of another matter that ought to be set right. The United Nations took action three decades ago to define and outlaw genocide. The treaty the U.N. proposed has awaited Senate ratification since 1949. In the meantime, 83 other nations have signed the treaty, including almost all of our allies.

The Genocide Convention will not stop genocide in Cambodia. Cambodia is not a party to the convention. But in the same way that the Geneva Conventions for the Treatment of Prisoners of War have improved the treatment of captured soldiers, the Genocide Convention can act as a deterrent to the sort of inhumanity we witness in Cambodia today.

However, for the Genocide Convention to have any effect, it must have the support of many nations, particularly the major powers. So long as the United States holds back its full support, the treaty has little chance of actually deterring genocide.

We must not wait for another massacre on the scale of Cambodia's before acting. Lets act now, to prevent and punish the crime of genocide.

WOMEN IN COMBAT: PRO AND CON

Mr. PROXMIRE. Mr. President, in the pro-con forum of the September 1978 American Legion Magazine, Maj. Gen. John K. Singlaub and I debate the question, "Should women be used in military combat?"

On the "pro" side I argue that all soldiers should be assigned to duty based on ability, not gender. Women should serve wherever they are needed, according to their capabilities, just as men are assigned according to need and ability. And many women are capable of fulfilling combat duty, as experience and numerous Defense Department studies have shown.

General Singlaub, with his long experience in the service, feels that many women are incapable of carrying out the physical duties associated with combat and that men tend to be protective of women in dangerous situations, thus weakening combat effectiveness.

Mr. President, I ask unanimous consent that the "pro" and the "con" positions be printed in the RECORD at this point.

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

SHOULD WOMEN BE USED IN MILITARY COMBAT?

"YES"—BY SENATOR WILLIAM PROXMIRE

The two objections most often heard to using women in combat are 1) concern for the women's safety and 2) doubts that women can carry out combat duties.

Concern for women's safety, while well-intentioned, is misplaced. Women today are inner city police officers, skydivers, race car drivers and firefighters. If a qualified woman wants to volunteer for dangerous duty, she should be free to do so. It's her decision to make, not the government's, which makes far too many of our decisions for us. The establishment of the all-volunteer force makes military service today a matter of choice, and women are waiting in line to serve.

No one wants to send women into combat, but as one woman testified before my subcommittee, "I find it doubtful that mothers or fathers weep more for their daughters than for their sons."

Certain types of combat duty require a level of strength which many women may not possess, and those women should be deployed elsewhere, just like weak men. But if some women are strong enough and qualified in every other way, there is no reason to exclude them.

Women who now serve in combat-support positions have been trained in defensive combat techniques, for their units could well come under enemy attack. Offensive combat is but one step further. The Army now gives the same seven-week basic training to men and women, including grenade throwing and use of a variety of arms.

The performance of women in past wars proves that women can make a tremendous contribution to our war effort. Women's Air Force Service pilots have trained male pilots in strafing, bombing, tracking and anti-aircraft fire, and during WW II a Russian all-woman fighter unit shot down 38 German aircraft.

Interestingly, the General Accounting Office reports that women lose about one-half as much time from duty as men—including time taken for pregnancy.

The discrimination against women by our armed services is an affront to the American sense of fair play and the ideal of equal opportunity, which our government professes to follow. Until recently women were excluded from such "combat" jobs as missile launch crews in the Midwestern United States.

Combat duty is the traditional route upward in all military services, but women now in the service cannot follow that route. Limiting the woman's role is also unfair to the men, who must shoulder all unpleasant duty including very long stretches at sea. Moreover, it is only fair that women be called upon to defend the freedoms they enjoy as U.S. citizens.

We must spare no effort to maintain a strong, lean, efficient and well prepared fighting force. By closing many combat or combat-related positions to women, however, the armed services are weakening our defense effort by refusing to let qualified personnel serve where they are needed.

No less than the Commander of the Marine Training Base at Parris Island, SC has declared that, "there is no reason the female can't fight just like the male." I agree.

"NO"—BY MAJ. GEN. JOHN K. SINGLAUB,
USA (RET.)

The primary mission of the United States Army is to preserve the peace by being instantly ready to engage in combat operations any place in the world. The ability to fight and win battles is too important to the security of this nation to permit the Army to be used as an instrument for sociological experimentation. Until such time as there is some evidence that women can withstand the extreme physical, mental and psychological stresses of battle, it is foolhardy, if not dangerous, to run the risk of reducing the combat capability of our Army by including women in units whose primary mission is to engage in actual combat operations.

This does not mean that there is no place for women in the Army. There are many jobs in the Army that can be performed better by women. The nation can ill afford to ignore or under-utilize the great reservoir of brainpower and skills represented in the women of our nation. There are, however, several important reasons why these highly motivated and patriotic female members of the Army should continue to be excluded from combat units.

First of all, the battlefield is a very physical place. The infantryman, cannoner and tanker are routinely called upon during battle crises to demonstrate great feats of upper body strength to preserve lives and equipment. The tasks of digging for shelter, moving ammunition and changing tank tracks are shared by all members of the unit, including the clerks, cooks and mechanics. All require the muscle structure and exertion normally associated with a defensive tackle on the Denver Broncos' football team. Most physiologists agree that for the foreseeable future far more men than women will be capable of meeting the physical demands of these situations. With women in combat units, the male soldiers would be required to carry an increased share of these critical physical requirements, thereby limiting the units' responsiveness to crisis situations.

In my experience, women in combat have an adverse impact on the male soldiers in the area. Men tend to be protective of women.

During the tree-trimming crisis in Korea in August 1976, many good soldiers were so concerned about their soldier wives or girlfriends or their subordinate women that they left their duty stations to see to their welfare

or evacuation to the rear areas. In fact, most of the women soldiers expressed the desire, if not the expectation, to be removed from the potential battle areas.

Another factor which suggests we should not permit our women soldiers to be used in combat is the image that this would project in the minds of our potential enemies.

At one time Russia and Israel used women in combat roles in their military forces, but both have now made it a matter of national policy that women will not be used in combat again. God forbid that we must go to war to learn the same lesson.

Mr. PROXMIRE. Mr. President, I thank the distinguished majority leader for so graciously yielding to me.

Mr. ROBERT C. BYRD. Mr. President, I reserve the remainder of my time.

RECOGNITION OF LEADERSHIP

The ACTING PRESIDENT pro tempore. Under the previous order, the acting minority leader, the Senator from Wyoming, is recognized.

Mr. HANSEN. Mr. President, I do not believe I have any requests at this time. I thank the Chair.

The ACTING PRESIDENT pro tempore. Under the previous order, the Senator from West Virginia is recognized.

NATURAL GAS POLICY ACT CONFERENCE REPORT

UNANIMOUS-CONSENT REQUEST

Mr. ROBERT C. BYRD. Mr. President, I have asked for recognition at this time in order to propound a request of the Senate. It would be for the purpose of allowing debate to go forward on the natural gas conference report without any danger of a surprise motion to table that conference report being made, catching Senators on both sides of the aisle, Senators on both sides of the question, out of town. It would be for their protection.

It would also provide for a vote to occur up or down, with no tabling motion in order, on the proposed recommittal motion. I would suggest that the vote occur, say, next Wednesday, at a given hour.

This would alert every Senator on both sides of the aisle, every Senator on both sides of the question, as to the hour and the date when such vote would occur. It will be a critical vote and I am sure every Senator would like to be here and to be recorded. It would give ample time, in the meantime, to debate the issue. All Senators would be on notice. There would be no surprise motion to table. All Senators would be on notice as to the hour and the date for the vote on the motion to recommit.

Of course, I would like to have the agreement specify that if the recommittal motion were to fail, we would immediately vote up or down on the conference report, or vote after another day or so of debate on the conference report. I have discussed that with my colleagues and I have found that that would be objected to.

But there was some indication on the part of some Senators last evening that

they would be willing to enter into an agreement to go as far as providing that there be no surprise tabling motions on the conference report, providing that there be a vote up or down on the motion to recommit next Wednesday at a given hour. There may be someone here who would object to that.

Mr. METZENBAUM. Will the majority leader yield for a question?

Mr. ROBERT C. BYRD. Certainly. I have not propounded the request, but that lays the groundwork for the request I shall make.

Mr. METZENBAUM. Does the majority leader also intend to include in his request that there be an opportunity for a tabling motion with respect to the motion to recommit? Does that count in the discussion of the majority leader?

Mr. ROBERT C. BYRD. I would prefer to leave open the right of Senators to move to table. But I would be willing—it is perfectly agreeable to me to waive that right by unanimous consent of the Senate so that Senators would be guaranteed an up or down vote on the motion to recommit if, in turn, they would guarantee that there be no surprise votes on moves to table the conference report when many Senators might be out of town.

Mr. METZENBAUM. As I indicated to the distinguished majority leader last evening, I personally have no problems with that particular approach, but as I also indicated this morning, I find that there are others who do have a strong interest in this legislation which has been evidenced over a period of many years—far longer than I have been here, for that matter—and who do have a different point of view than I do. They certainly can address themselves to that subject.

Mr. ROBERT C. BYRD. Certainly.

Mr. President, I make the request and Senators may reserve the right to object.

Mr. ABOUREZK. Reserving the right to object.

Mr. HANSEN. Mr. President, will the distinguished majority leader repeat the request?

Mr. ROBERT C. BYRD. Yes.

Mr. President, I ask unanimous consent that when Mr. JACKSON calls up the conference report, a vote occur on a recommittal motion which will be made by Mr. METZENBAUM and others, such vote to occur, up or down, on the motion to recommit next Wednesday at 4 o'clock p.m.; that in the meantime, no motion to table the conference report or recommit the conference report be in order; and that the time between the calling up of the conference report and the vote at 4 o'clock on next Wednesday on the motion to recommit be equally divided between Mr. JACKSON and Mr. HANSEN.

Mr. ABOUREZK. Reserving the right to object.

Mr. THURMOND. Mr. President, reserving the right to object.

The ACTING PRESIDENT pro tempore. The Senator from South Dakota is recognized.

Mr. ABOUREZK. Mr. President, I am not desirous, nor am I in a position to

agree to any unanimous-consent agreement with respect to time or time of voting on the natural gas conference report. I say to the distinguished majority leader that we are prepared, if they want to bring the conference report up now, we are happy to debate it. I think it is a very serious, very complicated matter that will require a thorough analysis by the Senate. There have been all kinds of backroom lobbying, we know that, on both sides. But there has been very little light shed on this issue. We were somewhat prevented from doing so during the conference meeting itself, from debating this issue or inquiring into it to find out the impact upon the public of this bill.

I think we are entitled to do that here, on the Senate floor, as I promised during the few times I was able to be recognized to speak on the issue during the conference meetings that I was invited to.

So, while we do not necessarily want to prevent a vote—incidentally, I might say that I spoke to the distinguished chairman of the Committee on Finance (Mr. LONG) this morning by telephone. He said that I was authorized to speak for him in making this particular objection, for the same reasons; and that if we bring it up, we might vote this afternoon, we might vote tomorrow. The vote might come quicker than the leader had anticipated. Therefore, I do not want to set a time agreement or agree to a time agreement on my own.

I, therefore, object to the request.

Mr. ROBERT C. BYRD. Mr. President, before the Senator objects, let me modify the request to provide for a vote, the vote on the recommittal motion up or down on next Wednesday, to be at 3 o'clock p.m. rather than 4 o'clock p.m.

Mr. ABOUREZK. I have the same objection.

Mr. METZENBAUM. Mr. President, I would have to object to that.

The ACTING PRESIDENT pro tempore. Objection is heard from the Senator from South Dakota.

Mr. METZENBAUM. The time is what I would object to. It would have to be later in the afternoon. Certain Senators have an election on Tuesday and would have difficulty getting back.

Mr. ROBERT C. BYRD. The Senator has a good point. The objection has been made, in any event.

Mr. President, I suggest that we now have a period for the transaction of routine morning business.

ROUTINE MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Under the previous order, there will now be a period for the transaction of routine morning business of not to exceed 10 minutes, with statements therein limited to 2 minutes each. Under the order entered this morning, the majority leader, the Senator from West Virginia, is recognized.

Mr. ROBERT C. BYRD. Mr. President, I yield my 2 minutes to the Senator from Wisconsin.

(The remarks of Mr. PROXMIER at this point in connection with the introduction of a bill are printed later in today's RECORD.)

CONCLUSION OF ROUTINE BUSINESS

The ACTING PRESIDENT pro tempore. Is there further morning business? If there be none, morning business is closed.

UNANIMOUS-CONSENT REQUEST

Mr. ROBERT C. BYRD. Mr. President, may I have the attention of the distinguished Senator from South Dakota?

Mr. ABOUREZK. Yes, Mr. President.

Mr. ROBERT C. BYRD. I wish to make one further proposal which would allow us to proceed with debate on the conference report. It would be simply this: That no motion to table the conference report or to recommit it be in order prior to next Wednesday at 4 o'clock p.m.

Mr. ABOUREZK. Yes; Mr. President, to object, Mr. President, it is virtually the same request that the leader made before, slightly modified. For the same reasons, I should have to enter an objection, so I object.

The ACTING PRESIDENT pro tempore. Objection is heard.

ORDER OF PROCEDURE

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that I be recognized following the call of the quorum. The reason I do that is that I think I am going to call up something else, and I want to see what else there is that managers are ready to call up.

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

QUORUM CALL

Mr. ROBERT C. BYRD. Mr. President, I suggest the absence of a quorum.

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

The second assistant legislative clerk proceeded to call the roll.

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

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

NATURAL GAS POLICY ACT CONFERENCE REPORT

UNANIMOUS-CONSENT REQUEST

Mr. ROBERT C. BYRD. Mr. President, I am about to propound another unanimous-consent request.

Mr. President, I would like to see the Senate proceed with debating the conference report on natural gas. It would

certainly not be my plan to offer any cloture motion—if this agreement were to go into effect, it would not be my plan to offer any cloture motion at least until 4 or 5 days of debate have occurred.

It is merely to protect Senators against surprise motions to table the conference report that I make the request. They do not have to be protected against a recommittal motion, because that is a debatable motion.

There are Senators on both sides of the question who need to be protected. There are Senators on both sides of the aisle who need to be protected against a surprise, sudden motion to table the conference report, which is not debatable.

Therefore, in the interest of debating the conference report pro and con, educating Senators and the people as to what is in the conference report, what is involved in the issue, and so on, today and tomorrow, Monday and Tuesday, I ask unanimous consent that, if the conference report is called up, no motion to table the conference report be in order until after a motion to recommit the conference report has been voted on, up or down. This request, as all Senators will note, protects against a sudden tabling motion. And I include the request that this protection run until 6 p.m. next Wednesday.

Mr. ABOUREZK. Reserving the right to object, Mr. President, for the same reasons that I discussed earlier with the distinguished leader, I am very reluctant to give up any rights we have on the natural gas conference report. In my view, agreeing not to offer or not to allow a motion to table a conference report—this conference report, in particular—I think is the yielding of a substantial right on my part, which I do not wish to do at this time.

I will elaborate a little further. Those of us who are opposed to the natural gas conference report do not really have the ability to do the backroom arm twisting that the President and his people have done and are able to do. We find it essential to be able to debate this conference report out in the open, on the record, here in the Senate, and to preserve our rights. I, for one, cannot give up my rights.

For example, Senator Long asked me to object to any agreements, on his behalf, this morning. He does not want to give up any of his rights. We are not trying to prevent a vote from taking place on the conference report. We are happy just to go along with the rules of the Senate, if we can, and do whatever is necessary. But we do not want to give up the right to make any motions we might be able to make on the conference report.

So, I object.

The ACTING PRESIDENT pro tempore. Objection is heard.

Mr. ROBERT C. BYRD. May I say, respectfully, to the distinguished Senator that my proposal would allow for debate, number one. That is why I would like very much for the Senate to accede to

the request. It would allow for debate. The only right the Senators would be giving up would be the right to move to table the conference report without due notice to other Senators.

However, in giving up that right, I also would be giving up the right, as other Senators would, to move to table the motion to recommit, when made. So there is a balancing out of the waiving of rights.

Furthermore, there is an election next Tuesday, and a good many Senators on both sides of the aisle are involved in those elections. It was for the purpose of delaying any untoward happening until late Wednesday that we had the election in mind, so that Senators who need to be here to cast a vote would not be out of town.

I hope the Senator will think about it during the day. If he and those who are working with him in his cause could agree on a time and date and a way to protect against a sudden tabling motion, I would be very glad to hear from them, because I would like to have debate today and Friday of this week on this measure.

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

Mr. ROBERT C. BYRD. I yield.

Mr. METZENBAUM. Mr. President, there is probably nobody in the Senate with whom I have worked more closely than my distinguished friend from South Dakota. I am not in total agreement in this matter. That does not mean we are not in total agreement—

Mr. ROBERT C. BYRD. Before the Senator from South Dakota leaves, I would like to change the time to Thursday, at 2 p.m.

Mr. ABOUREZK. I object, for the same reasons.

The ACTING PRESIDENT pro tempore. Objection is heard.

Mr. METZENBAUM. My feeling is—and I said this to the leader yesterday—that I was prepared to debate this matter as of today, bring it to a vote on Tuesday. As a matter of fact, I think I called and made that proposal. Later in the day, I indicated that it was necessary to check with some others who do have a strong interest in this legislation—the distinguished ranking member of the minority on the Energy Committee, my good friend from South Dakota, the chairman of the Finance Committee, and others.

I think the concern that has been expressed with reference to those who are back home campaigning and who cannot be present to vote, in the event there is a motion to table, is a valid concern. So I have indicated to the majority leader that I would be prepared to agree to the unanimous-consent request relative to making no motion to table until at least the motion to recommit has been disposed of, it being inrolled in the majority leader's request that the specific motion to recommit, about which he is speaking, is the one that the Senator from Wyoming, the Senator from South Dakota, the Senator from Oklahoma, and I intend to offer.

I say to the majority leader that I hope

that this matter still can be brought up and debated.

I have indicated to my good friend from South Dakota my own views. I think he properly is speaking for the chairman of the Finance Committee, who has concern about this matter.

I suggest that we at least spend time, not immediately, but provide a period in order that further discussion might be had on the subject. I support this effort to move the matter forward. I think we have the votes, and I think we ought to go.

Mr. ROBERT C. BYRD. I thank the Senator. He has been most cooperative and considerate.

So, for the time being, and hoping that some agreement might yet be reached during the day, I ask unanimous consent that the Senate proceed to the consideration of—

Mr. BARTLETT. Mr. President, will the Senator yield for a very short comment?

Mr. ROBERT C. BYRD. I yield.

Mr. BARTLETT. I thank the distinguished Senator from West Virginia. My comment will be very brief.

I hope we can proceed to the consideration of the conference report. In my opinion, there will be the need for considerable time for debate, because there are at least three points of view to be expressed, and there probably are variations of those by individual Senators.

I think that in order to have a meaningful debate, in which all facets of the different points of view may be clearly outlined, it will take considerable time.

So I hope that the distinguished majority leader will find it possible to bring up this matter as soon as possible, and I and other Senators will be happy to work with him to bring that about.

Mr. ROBERT C. BYRD. I thank the distinguished Senator. I appreciate his sentiments.

I perhaps should state at this time that only 5 weeks remain after this week until Saturday, October 14, the date on which we hope to see Congress achieve a sine die adjournment. I, for one, do not want to return after the election, but it may be necessary, if we do not complete our work. So every day now counts, and the calendar is running, and I hope we all will keep that in mind, because we have to settle this issue, up or down.

We have spent 16 months in this Congress already on this matter, and Senators ought to have made up their minds at this time; or, after a reasonable period for debate, they will have made up their minds one way or the other.

I think we should vote on the matter, up or down, and let it be the will of the Senate, and then go on to other matters. Nothing is going to be served by overly prolonging this debate and a final decision on the conference report.

We still have the defense appropriation bill. We have the HEW appropriation bill. We have the foreign assistance appropriation bill. We have the tax cut bill. We have several expiring authorization measures.

With only 5 weeks to go after this week, Senators can see what we are up against, if we are to entertain even a reasonably fair hope of completing our work by October 14, so that we will not have to come back after the election. My experience has been that post-election sessions are not very productive. Tempers are frayed, and we tie ourselves in knots. We get into wrangles among ourselves and with the other body and create a bad impression back home—or at least worsen the impression that may be created if we do not act in a reasonable period of time on this energy measure.

So, for one, let me enter a plea and a prayer to the good Lord that somehow we will be able to work out this thing and get out of here on October 14 and a plea and a prayer to my colleagues that they give consideration to this also.

I know, Mr. President, that once the election comes there is not a Senator in here who is going to want to come back, not one.

The ACTING PRESIDENT pro tempore. The Chair concurs.

Mr. ROBERT C. BYRD. As of today, September 7, not too many Senators have really drawn target on that sure date that is coming, but when the time comes and we get down to the end of the road—I know in the meantime we do not want to come in on Saturdays and do not want to stay late, we want to get out on October 14 no later than for the election—they are not going to want to come back to the Senate until next year.

They are all going to want to stay away. So if we want to stay away then, now is the time to think about it.

Remember the fable about the grasshopper. The grasshopper spent all of the summer singing his tune, but then came the winter and he had not laid in any harvest for the winter.

The time is coming. The time is coming when after the election Senators will say: "I wish I didn't have to pack my bags and go back to Washington. I just wish we didn't have to go back."

All right. Let us think about that.

JUDICIAL TENURE ACT

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar Order No. 957, S. 1423.

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

The legislative clerk read as follows:

A bill (S. 1423) to establish a Council on Judicial Tenure in the judicial branch of the Government, to establish a procedure in addition to impeachment for the retirement of disabled Justices and judges of the United States, and the removal of Justices and judges whose conduct is or has been inconsistent with the good behavior required by article III, section 1 of the Constitution.

There being no objection, the Senate proceeded to consider the bill, which had been reported from the Committee on the Judiciary with an amendment in the nature of a substitute.

The ACTING PRESIDENT pro tempore. Under the previous order debate is limited to 6 hours equally divided between the Senator from Arizona (Mr. DeCONCINI) and the Senator from South Carolina (Mr. THURMOND).

Who yields time?

Mr. ROBERT C. BYRD. Mr. President, I express the hope that we will be able to cut this time down. I do not think it will take anything like the time that is set forth in the agreement. But until the managers, who have not been alerted to the sudden calling up of the bill, can get to the Chamber, I suggest the absence of a quorum and ask unanimous consent that the time be equally charged against both sides on the bill.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

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

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

UNIFORM BANKRUPTCY LAW

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of calendar order No. 1026.

The ACTING PRESIDENT pro tempore. The clerk will state the bill by title.

The legislative clerk read as follows:

A bill (S. 2266) to establish a uniform law on the subject of bankruptcies.

There being no objection, the Senate proceeded to consider the bill to establish a uniform law on the subject of bankruptcies, which had been reported by the Committee on the Judiciary with an amendment in the nature of a substitute, and from the Committee on Finance with amendments to the substitute language.

The ACTING PRESIDENT pro tempore. The time on the bill is limited to 1 hour divided between the Senator from Arizona (Mr. DeCONCINI) and the Senator from Wyoming (Mr. WALLOP).

Who yields time?

Mr. BAYH. Mr. President, I ask unanimous consent that Nels Ackerson, Marcia Atcheson, Kevin Faley, and Louise Milone of the staff of the Subcommittee on the Constitution, and Mike Klipper and Joe diGenova of Senator MATHIAS' staff be permitted access to the floor during the debates and voting on the Judicial Tenure Act and the Bankruptcy Act.

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

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

Mr. ROBERT C. BYRD. I yield.

Mr. HATCH. Mr. President, I thank the Senator. I ask unanimous consent that Mike Hunter and Tom Perry of my staff be granted the privileges of the floor.

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

ROUTINE MORNING BUSINESS

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that there be a period for the transaction of routine morning business not to extend beyond 15 minutes with statements limited therein to 5 minutes each.

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

Mr. ROBERT C. BYRD. Mr. President, I suggest the absence of a quorum.

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

The assistant legislative clerk proceeded to call the roll.

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

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered. Who yields time?

Mr. HATCH. I yield myself such time as I may need, and I ask unanimous consent that the time not be charged against the bill.

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

Mr. ROBERT C. BYRD. Mr. President, will the Senator yield to me?

Mr. HATCH. I am delighted to yield.

Mr. ROBERT C. BYRD. Mr. President, the Pastore rule requires that Senators speak only on the subject matter before the Senate for the first 3 hours after the pending business is laid down or the unfinished business is laid down. I thank the Senator for yielding, and I ask unanimous consent that his statement not show an interruption in the RECORD, but I ask the Chair not to entertain any requests while I am off the floor that Senators speak on other matters than the matter before the Senate until we can get the managers of this bill seated, so that they can do whatever they like.

The ACTING PRESIDENT pro tempore. The Chair appreciates the comment of the majority leader and will pass on the word to succeeding Presiding Officers.

Mr. HATCH. I just wanted to put these two speeches in the RECORD. I should have asked to waive the Pastore rule.

Mr. ROBERT C. BYRD. The Senator had not asked to waive the rule?

Mr. HATCH. I did not ask to waive the rule.

Mr. ROBERT C. BYRD. The Senator asked that the time not be charged against this measure, and I object to that.

Mr. HATCH. I understand.

Mr. ROBERT C. BYRD. Pardon me for interrupting; I wanted to protect the Senators who are managing this bill, because with that kind of request, a Senator could get the floor and go all day long—all day long—unless someone made a point of order based on the Pastore rule. And once the first 3 hours have gone, that kind of point of order cannot be made.

So I want to protect all Senators. I am

not concerned about the Senator from Utah ever doing something he is not allowed to do under the rules.

Mr. HATCH. I appreciate the distinguished majority leader's comment. Of course, I am going to put these two matters into the RECORD so we will have them there.

I ask unanimous consent that, with regard to my speech on Martin Anderson on welfare reform, it be printed in the RECORD following the bankruptcy bill we are considering today.

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

MARTIN ANDERSON ON WELFARE REFORM

Mr. HATCH. Mr. President, welfare has been a major concern of the people of this country for many years now. It has been declared a mess and reformed on more than one occasion. Yet many believe we have not achieved the goal of significantly reducing the number of poor people in the United States. Should we seek still another reform before we better understand the problem?

Martin Anderson, senior fellow at the Hoover Institution and author of a book entitled "Welfare," provides much insight into the welfare problems which we face. Indeed, his book provides invaluable information without which we can only expect to make further mistakes.

Anderson reveals many misconceptions upon which welfare reforms are advocated. The first and most basic misconception is the belief that the welfare system has failed to reduce the number of poor in this country. We think it has failed because we are misled by statistics gathered by the Bureau of the Census. But, if the total amount of income given to the poor is considered, it is enough to raise every officially poor family 30 percent above its poverty line. How then is it that the Bureau of the Census tells us that between 1974 and 1975 the increase in the number of poor was the largest since 1959? The only rational explanation of the situation is that the Bureau of the Census has grossly overstated the number of poor.

Martin Anderson reveals some facts which account for this overstatement. First to be questioned is the validity of the information gathered. People may not remember exactly how much their total income was for the past year. Some people may deliberately lie about their earnings, and there is no check on what people themselves report. The major bias, however, is not caused by the incomes reported, but by the incomes not reported. The incomes not taken into account are those services such as food stamps, medicaid, and housing. Thus, a substantial amount of money expended each year to relieve the poor is not counted as income for the poor.

Many experts have known about these statistical biases for years, but the people in Government, who create the welfare programs, do not take them into account. As the benefits of the welfare

programs expand and as income thresholds for participants in the programs rise, more people are pulled into the programs. Yet the noncash benefits of the programs are not counted as income to the "poor." It would appear that the way the bureaucrats have it set up, the programs will continue to grow—a prospect that some politicians find appealing. After all, welfare dependencies are politically dependent.

The Congressional Budget Office's study on the amount of poverty in the United States in 1977 found 6.4 percent of the population poor while the Census Bureau reported 12 percent for the same year using the same poverty line. This wide discrepancy is explained by the fact that the Congressional Budget Office allowed for the under-reporting of income while the Census Bureau did not. The gap in estimates becomes even more understandable when one realizes that the \$40 billion spent in noncash benefits for the poor were not counted as income in the Census Bureau's report, but were in the Congressional Budget Office's study.

Anderson directs our attention to an even more startling report on the amount of poverty by Morton Paglin, professor of economics and urban studies at Portland State University, in October of 1977. Paglin improved the measures of poverty by allocating benefits according to household size. According to these estimates only 3 percent of Americans were poor in 1975.

Although the amount of poverty as reported by the Census Bureau has remained nearly constant, thus denying the effectiveness of welfare programs, the reports done by the Congressional Budget Office and Morton Paglin show that the level of poverty has declined to very low levels, thus revealing the fact that the welfare programs have successfully raised the poor above the poverty line.

Now that two separate studies have been concluded with more reliable results contrary to those of the Census Bureau, why do the policymakers continue to create more welfare reforms which entail even more spending? Why do we continue to appropriate more money? The Census Bureau, in a manner typical of bureaucratic vanity and self-preservation, ignores the results of the Congressional Budget Office's study. In effect, more and more of the taxpayers' dollars are being given to the non-poor, because the Census Bureau will not admit its mistakes.

Thus, a situation has evolved whereby billions of dollars—more money than World War II cost us—have been poured into welfare aid since 1964, until there are virtually no poor in this country. Some of the people who are, in the best of studies, counted as poverty stricken are, as Anderson says "in no sense poor." People may be unsure of their incomes or purposefully understating them. They may be living off undeclared assets or possess private incomes, but, considering the vast amount of money—\$300 billion to be exact—

that has been poured into welfare since 1964, it seems impossible that there could be many poor left in the United States.

These \$300 billion were not given merely in the form of cash, they were divided between 90-odd social welfare programs. Most people qualify for two, if not more, of these programs. These \$300 billion cannot be compared to earned income, because these \$300 billion were tax free.

This is more than waste of money—it exposes a terrible misconception concerning the number of poor in our country, and this misconception has caused the lawmakers of this country to create programs which retard the progress of the poor. Because the policymakers have accepted the Census Bureau's inaccurate figures, they have created more and more programs which further reduce the incentive to work for lower income workers.

After reading Martin Anderson's book one becomes aware that people who prefer unemployment are not so much lazy as they are economically astute. The problem is the welfare trap, which the Government has created, that prevents people from earning a living significantly better than welfare provides.

Anderson points out that the effective tax rates on low earned incomes are very high. I think we would all agree that people work primarily for job satisfaction and for money. If a person does not gain satisfaction from his job, then he is apparently working mainly for the money. If his income is only slightly over the poverty level, he can practically maintain the same level by not working.

His incentive to work is based primarily on his need for income. If employment is his only source of income, then he will work. In our system, however, employment is not the only source of income. There are many others of which welfare is the largest for the least wealthy members of our society. A person cannot work and still enjoy the benefits of welfare. As soon as his income rises above the poverty level then his medicaid and food-stamp benefits are severely cut, if not removed altogether. He cannot significantly increase his income by working. Martin Anderson points out some examples found in a December 22, 1972, press release by the Joint Economic Committee's Subcommittee on Fiscal Policy.

In New Jersey an unemployed man with a wife and two children receiving public assistance and food stamps would add only \$100 to his net monthly income if he took a full time job paying \$500 a month. In addition, he would lose eligibility for medicaid, which pays an average of \$52 a month for medical bills of an AFDC family in New Jersey.

A person is unlikely to give up his leisure and work a 40-hour week at an unsatisfying job for only a \$48 increase in net monthly income. Thus, the incentive to work has not only been destroyed, it has been reversed and an incentive not to work has been created. There is also a strong incentive to under-report income.

The people are caught in a trap created by the Government. The more income

they earn, the more probable that the Government will learn about this income. The more earned income the Government learns about the more it taxes and takes away benefits. The more it discourages work, the poorer the people become. The poorer the people become, the more they need welfare. The more they need welfare the more the Government gives them. It is all perfectly clear up until this point. Now comes the twist: The more the Government gives them the less the number of poor decreases. The Government has created a poverty wall which has entrapped the poorest members of our Nation into what Anderson terms "a new caste: The dependent Americans."

With this thought Anderson reveals that the Government is destroying more than the Nation's economy through its programs. It is destroying a basic American value—work. This destruction is apparent in the amount of money that is repeatedly poured into welfare and the growing welfare dependencies. Democracy is undermined if people are dependent on the Government for their incomes.

President Carter's plan to clean up our welfare system would increase the group of dependent Americans to nearly a third of the entire population. Why should the number of people on welfare, and the cost of welfare, increase so drastically when there are virtually no poor left in this country? Is our Government seeking to make a major part of the population dependent on Government handouts? Whether that is the Government's intention or not, that is exactly what Carter's plan would do if it were ever implemented.

When President Carter first assumed office he laid down 12 goals for this welfare program. One of these goals was that the cost would not increase. Then Secretary of HEW, Joseph A. Califano and Secretary of Labor, Ray Marshall sent him a memorandum telling him that without an increase in cost many of those receiving welfare benefits would be hurt. They wrote:

The states are our natural allies in welfare reform—most members of congress would still prefer not to deal with the subject at all—and there is virtually no relief in this proposal for governors and mayors. In addition there will be problems in cutting benefits for the aged, the disabled, and the blind, and there will be disputes over our ability to put a significant number of the 3.4 million mothers on welfare to work.

In quoting from this memorandum, Martin Anderson reveals the real reason our welfare system is a mess. Secretary of Labor Marshall and Secretary of HEW Califano ignore the fact that some people now on welfare should not receive aid. Their true concern seems to rest with the plan's popularity with politicians, not its economic and social impact on our country.

There are so many myths surrounding our welfare program that the average American has no way of knowing what policy is good policy. They are under the false impression that reform is necessarily good. They do, however, know what they feel the results should be. The vast majority of Americans feel that the poor should be given aid, but they also believe

that spending should be cut. Spending could be cut if those who are not really poor were removed from the welfare rolls, and if there was not such a strong disincentive to work one's way out of welfare dependency.

President Carter promised prompt welfare reform during his campaign. Upon entering office he realized how difficult it was going to be to fulfill his promise, but he managed to unveil his program for better jobs and income on August 6, 1977. Anderson, who was an adviser to both Presidents Nixon and Ford, maintains that Carter's plan was created by essentially the same nucleus of people who were responsible for Nixon's family assistance plan and the income supplementation plan presented to Ford.

The welfare bureaucrats' plans have followed the same vein since Nixon's family assistance plan. They have proposed to turn welfare into a guaranteed income program which would affect many more people and thus cost more money. Welfare dependencies are also political dependencies, and trading votes for handouts undermines democracy. These facts, however, are hidden behind the veneer of reform.

The CBO found that 22 million more Americans would be affected by Carter's program than are now. And these 22 million Americans are people whose incomes do not fall below the poverty line. Some 11.6 million of them are earning \$10,000 to \$25,000 incomes. These facts form a case in point. The Government is busy extending its welfare dependencies into the middle class.

President Carter's program cannot be introduced next year without changes. However, these changes will be made by the same people who have repeatedly created welfare programs for the non-poor. Thus, the basic structure of this welfare reform, with all its flaws, would remain the same. Carter's welfare program would reduce the incentive to work for middle income earners and trap them also in economic and social immobility. What we need to do is to destroy the welfare trap. HEW is devoting a large part of our national budget to preventing people from working. Must we spend still more to prevent more people from working?

Instead, we should accurately estimate the number of poor and reject the statistics that the Census Bureau offers us, if they continue to disregard the biases in their estimates. We should eliminate the inefficiencies in the welfare system by tightening its programs, not expanding them.

When experts like Martin Anderson show us the facts, we should demonstrate that it is not politically impossible to recognize and rectify the real problems in our welfare system.

THE VIETNAMESE COMMUNITY CENTER

Mr. HATCH. Mr. President, a little more than 3 years ago, millions of Americans' hearts were touched by the plight of thousands of South Vietnamese refugees who were determined to start a new life in the United States after their

homeland had fallen under the control of the Communists. Right here in the metropolitan Washington area, one of the most worthwhile attempts to help our South Vietnamese friends keep in touch with their culture and traditions needs our help if it is going to survive, and that is why I am mentioning it today.

What I am referring to, Mr. President, is the Vietnamese Community Center which was opened last December on the first floor of the Page Elementary School in Arlington, Va. This center is a place where the approximately 15,000 Vietnamese in the Washington area can gather together and conserve their heritage by speaking the language, listening to the music, viewing the artwork, and preparing the food of their native country. The center, the first of its kind in the Washington area, also plans to develop a wide range of services designed to make the refugees' transition to life in the United States easier, ranging from free tax form preparation to translation services to help them in their search for employment.

The Vietnam Refugee Fund, Inc., a nonprofit, tax-exempt organization which receives its funds through donations and fundraising drives, was able to rent the building in which the center operates from the county school board, but its lease expires at the end of this June. According to Mr. Nguyen Ngoc Bich, the president of the Vietnam Refugee Fund, Inc., unless the Fund can obtain adequate private funding, the center may not be able to continue operating.

Mr. President, this center is clearly a fine example of what free individuals working together privately can accomplish. I hope that those who wish to help it continue its efforts will contact Mr. Bich of the Vietnam Refugee Fund, Inc. The address is:

Mr. Nguyen Ngoc Bich
6103 Amherst Avenue
Springfield, Va. 22150

I ask unanimous consent to have printed in the RECORD an article entitled "Center Focuses On Preservation of Vietnamese Culture," written by Seth W. Moskowitz, and published in the Washington Post of Thursday, December 29, 1977.

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

CENTER FOCUSES ON PRESERVATION OF VIETNAMESE CULTURE

(By Seth W. Moskowitz)

In an effort to preserve their cultural heritage in their new land, members of the Vietnamese community have opened a Vietnamese Community Center at the Page Elementary School in Arlington. It is the first such center in the Washington area.

The event last week drew close to 100 participants, most of them Vietnamese refugees who came to see exhibits by Vietnamese artists, listen to Vietnamese music and eat the food of their home country.

"Everybody hoped to have a Vietnamese Center," said Pham Ngoc Luy, the captain of the last ship to leave Saigon with 4,000 refugees aboard shortly after the city fell to the North Vietnamese.

"I think it's a good start. You have prob-

lems with the language; (it's) hard to find jobs. We expect to have a center for all where you can meet each other, you can help each other, and you can keep up the Vietnamese culture.

"This is a place not only where the Vietnamese language will be spoken and understood," Luy said, but also where the "beautiful traditions of the family, society and friendship . . . which have been formed for many thousand years" will be respected and kept alive.

A pamphlet was distributed, outlining some services the center hopes to provide;

A lending library of Vietnamese books and magazines to augment the reading room already in operation.

Spring recreation programs, featuring tennis, volleyball and basketball.

Translation services to help Vietnamese in job searches and other needs.

Free tax form preparation.

A Vietnamese food shop, provided there are no licensing problems.

Classes, exhibits, and social functions.

Nguyen Ngoc Bich, president of the Vietnam Refugee Fund, Inc., estimated that there are approximately 15,000 (about 10 per cent of the U.S. total) Vietnamese in the Washington metropolitan area. Most of these are refugees who arrived in the United States in the spring of 1975, when Saigon fell.

An estimated 7,000-8,000 Vietnamese are Northern Virginia residents, with the largest concentration living in Arlington.

Until now, the only gathering places for the Vietnamese in Northern Virginia have been the churches where they have been segregated by religion, said the Venerable Thich Giac Duc, president of the Buddhist Congregational Church of America.

He estimates that the area's Vietnamese population is 40 per cent Buddhist, 40 per cent Catholic, and 20 per cent Protestant.

"At last we can have a place to get together. Every religion can be together here," Duc said.

"I have no worries about the economic problems of the Vietnamese refugees," said 71-year-old Truong Cam Khai. "I am worried about the cultural problem.

"This center will be useful in two ways," said Khai, a former professor who left Vietnam in 1968. "It will provide an opportunity to teach the young about Vietnamese tradition and moral values, and it will be a place where the Vietnamese will have social activities among themselves. . . . Here there is nothing to divide the Vietnamese among themselves."

The center is allowed the use of the entire first floor of the school at 1501 N. Lincoln St. On this floor there are 15 classrooms, an auditorium, a cafeteria with a large kitchen, a library and some office space.

The Vietnam Refugee Fund is leasing the building from the county school board for \$2,000 a month, money which the non-profit, tax-exempt organization receives through donations and fund-raising drives. The lease expires at the end of June, 1978.

Although the Vietnam Refugee Fund Inc. offered substantially less rent than the school board has asked, the fund was the only bidder who found the short term lease acceptable, Bich said.

When the lease expires, Bich said he doesn't know what will happen and doubts that the Refugee Fund will be able to retain use of the building. A school spokesman said that the board plans to review the use of the building in March or April and will decide then how it will be used in the future.

Dr. Harold Chu, a professor of Japanese language and literature at Georgetown University, presented the center with a plaque from the Arlington Trinity Teacher Corps which says "with our heartfelt support and good wishes." Near the bottom of the plaque it says *chuc mung may man*, Vietnamese for good luck.

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

Mr. ROBERT C. BYRD. Mr. President, will the Senator withhold that?

Mr. HATCH. Certainly.

Mr. ROBERT C. BYRD. I owe the Senator an apology, the Chair an apology, and all Senators an apology. I thought morning business had been closed. I had forgotten renewing morning business, and of course everything I said was without reason, rhyme, or substance, because we were in morning business. So I take it all back, every word of it.

Mr. HATCH. Mr. President, I know the Senator from West Virginia does a beautiful job of conducting the proceedings on this floor, and I have great respect for him. I fully understand, and apologize to the Senator. Let me state that I have not the slightest concern that he will ever have to worry about anything I do on this floor.

Mr. ROBERT C. BYRD. The Senator's apology is appreciated, but unnecessary.

The ACTING PRESIDENT pro tempore. The Chair appreciates the comment of the majority leader. The Chair was beginning to wonder whether it had been mistaken on the rule itself, and appreciates the clarification.

CONCLUSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Is there further morning business? If not, morning business is now closed.

UNIFORM BANKRUPTCY LAW

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate now resumes the consideration of S. 2266. Who yields time?

Mr. ROBERT C. BYRD. Mr. President, the Senator from Wyoming (Mr. WALLOP) is present. I understand he will be managing the bill on his side of the aisle.

I am quite sure it will be agreeable with Mr. DECONCINI if Mr. WALLOP wishes to proceed with his statement. The Senator might consider asking unanimous consent that his statement follow that of Mr. DECONCINI, inasmuch as Mr. DECONCINI is manager of the bill. If he will do that, I am sure there will be no problem, and the Senate could be making some progress.

Mr. WALLOP. Mr. President, in the interest of time, I will be happy to do that, and I so request. I ask unanimous consent that the statement I am about to make, follow, in the RECORD, the opening statement and remarks of the Senator from Arizona (Mr. DECONCINI).

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

Mr. WALLOP. Mr. President, I ask unanimous consent that the following members of the Judiciary Committee staff have the privilege of the floor throughout the discussion of both S. 1423 and S. 2266 and any votes thereon: Eric Holtman, Sally Rogers, Richard Velde, Pat Hoff; and that Harry Dixon and Robert Feidler have floor privileges during consideration of the bankruptcy bill.

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

Mr. METZENBAUM. Mr. President, I make a similar request for Nathan R. Zahn of the committee staff and Roy Myers of my staff, for both these two bills.

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

Mr. WALLOP. Also, Mr. President, I make the same request for Mr. Tom Carter and Mr. Meredith Preston of Senator HAYAKAWA's staff.

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

Mr. WALLOP. Mr. President, I suggest the absence of a quorum and ask unanimous consent that the time be equally charged against both sides.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. DECONCINI. I ask unanimous consent that Robert Feidler, Romano Romani, and Harry Dixon of the committee staff be granted the privilege of the floor during debate and votes on this measure.

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

Mr. DECONCINI. Mr. President, in 1970, Congress created the Commission on the Bankruptcy Laws of the United States to study and recommend changes in bankruptcy laws. The Commission became operational in June 1971 and filed its final report with Congress on July 30, 1973. Its report was in two parts. Part I contained the Commission's findings and recommendations.

Part II contained a draft of a bill to implement those recommendations. Senator QUENTIN BURDICK, chairman of the Subcommittee on Improvements in Judicial Machinery and a member of the Commission, and Senator Marlow Cook, a member of the Commission, introduced that bill in the 93d Congress as S. 4026. No action was taken on the bill during the 93d Congress.

In the 94th Congress, the Commission bill was again introduced by Senator BURDICK as S. 236. Senator BURDICK also introduced an alternative to the Commission bill that had been drafted by representatives of the National Conference of Bankruptcy Judges. The judge's bill, S. 235, differed in several major aspects from the Commission bill.

Hearings on both bills commenced in late February of 1975 and continued through November of 1975. All interested parties were invited to give testimony on the bills. The Subcommittee on Improvements in Judicial Machinery heard from several hundred interested parties and had nearly 80 witnesses personally testify over 24 days of hearings. The hearings covered all aspects of bankruptcy law. Testimony was heard on the structure of the new bankruptcy courts, the relationships of other laws to bankruptcies, tax aspects, consumer bankruptcies, business reorganizations, railroad reorganizations, and the effect and

interaction of the securities laws in bankruptcy cases.

Throughout the remainder of 1975 and all of 1976, the subcommittee continued to gather information and to begin work on a draft bill; however, no bill was reported to the full Judiciary Committee during the 94th Congress. Introduced in the House at this time were parallel bills to S. 235 and S. 236 entitled H.R. 31 and 32, and during the 94th Congress, the House also held extensive hearings on the bankruptcy reform bills. The House culminated its actions with the introduction early in the 95th Congress of H.R. 6, which was amended and reintroduced as H.R. 8200. That bill was passed by the House on February 1, 1978.

S. 2266, an analogous bill to H.R. 8200, was introduced by myself and Senator WALLOP on November 1, 1977. The Subcommittee on Improvements in Judicial Machinery conducted further hearings in late November and early December, receiving testimony from nearly 60 witnesses and again receiving several hundred written statements and comments with regard to the bill. Subcommittee amendments as a result of the hearings, statements, and comments were made to the bill over the next 5 months and these efforts culminated in the reporting by the subcommittee, on May 17, 1978, of a bill in the nature of a substitute. The report of the vote of the subcommittee was 3 in favor, none opposed, and 1 not voting.

The major purpose of this bill is the modernization of the bankruptcy laws. The substantive law of bankruptcy and the current bankruptcy system were designed in 1898, and underwent the last significant overhaul in 1938, nearly 40 years ago. Since that time, there have been vast changes in the law of debtor-creditor relations, including the widespread adoption of the Uniform Commercial Code in the early 1960's and the vast spread of consumer credit. There has been a steady growth in the number of bankruptcies, both consumer and the more complicated business reorganization cases, over the last 20 years, and this steady growth has led to great stresses and strains in the bankruptcy system. The bankruptcy referee has gradually taken over the prime responsibility for the operation of the system from the Federal district judges.

The hearings before the Subcommittee on Improvements in Judicial Machinery confirmed that revision was necessary, and the bill is the attempt to upgrade and modernize our bankruptcy courts and also the law which they must apply in the bankruptcy area.

S. 2266 was reported unanimously from the Committee on the Judiciary on July 12. Following that, the bill was sent on a sequential referral to the Committee on Finance where the tax amendments to the bill were also unanimously ordered to be reported on August 8. I believe the bill pending before the Senate reflects an evenhanded approach to bankruptcy reform and I remain hopeful that a satisfactory com-

promise can be arrived at on those issues where we differ from the House.

Mr. President, I take this opportunity to thank Senator WALLOP, the ranking member of the Judicial Improvements Subcommittee, for his participation and the assistance of his staff in the consideration of this bill. Without the bipartisan support this measure has received, and the lengthy and time exhausting work of the other members of the subcommittee, Senator ROBERT BYRD and Senator JOSEPH BIDEN, this measure would not be before us today.

In conclusion, I want to make clear that I share Senator WALLOP's concern about the final resolution of the railroad collective bargaining issue in S. 2266, but I am hopeful that, next year, hearings before Senator WILLIAMS' Human Resources Committee will provide a full airing of the matter and lead to reasoned legislation if such a need is shown. I shall direct the staff of the Judicial Improvements Subcommittee to continue to monitor developments in the area and to assist whenever appropriate.

Mr. WALLOP. Mr. President, I want to take this opportunity to recognize the great efforts that Senator DECONCINI and the staff of the Judicial Improvements Subcommittee have made in bringing this bill, S. 2266 to this point in its enactment. I personally appreciate the graciousness Senator DECONCINI has accorded me in presenting my views and those of the other minority Senators. This bill is the culmination of several years of hard work and extensive hearings. There has been widespread agreement of the need for bankruptcy reform but many different approaches have been suggested. It has been the task of the subcommittee to sift through these suggestions and weigh the merits of each. The bill as reported is the result of this long process. I think the bill has become finely turned by these efforts and that its enactment will provide broad based reforms that will more fairly allow debtors and creditors to meet and solve the problems of financial distress.

I am most pleased with the basic concept of this bill in regard to the structure of the new bankruptcy courts. The courts will be conducted by bankruptcy judges, not referees. The jurisdiction of the courts will be broad and pervasive. No longer will needless litigation in several courts be required to determine all the matters involved in a bankruptcy case. The distinction between plenary and summary jurisdiction will be abolished. The new judges will have 12-year terms, twice that of the present referees and will be functionally independent of the Federal district courts. The economy of initial appeals to the district courts will be preserved. The creation of these independent adjunct bankruptcy courts will be at a fraction of the cost of the alternative solution of new article III courts as recently passed by the House in the analogous bill, H.R. 8200.

The present system of private trustees will be retained with some added safeguards to upgrade the quality of trustees

and insure that favoritism in appointment is prevented.

Many procedures will be streamlined for the administration of the bankruptcy cases. Cumbersome requirements such as the need for a so-called "act of bankruptcy" for an involuntary case will be deleted.

The current law allowing States to determine the property exemptions that debtors will have for their fresh start after bankruptcy will be retained. The provisions for priority payments of certain kinds of unsecured claims over general unsecured claims will be revised. The priority for wages will be modernized to reflect current wage and benefit agreements.

In liquidation cases the court will continue to preside at the first meeting of creditors. Special provisions will be made for the liquidation of stockbrokerage firms and the bankruptcy of commodity future brokers.

Among the most dramatic changes from current law are the new provisions for corporate reorganizations. Current chapters X, XI, and XII will be combined into a single chapter 11. In most instances the debtor will be able to remain in control and direction of the business during the reorganization period. In the average case, appointment of a trustee will only occur after a finding by the court of necessity. In the very large public company case where there is great public interest and the creditors, stockholders and interested parties may be located throughout the country, a trustee will automatically be appointed to supervise the proceedings. He will be able to retain the current management if he desires but will not be required to do so. A recent example, the Equity Funding case, has demonstrated the wisdom and benefit that the disinterested trustee can bring to these sorts of cases.

The problems of the recent Pine Gate case which has given lenders pause in making real estate loans will be solved by the addition of specific guidelines as to the manner in which real estate loans can be dealt with in reorganization cases and when and how lenders will be able to foreclose properties that are part of the debtor's estate.

The effective date of the bill will be October 1, 1979, and its provisions will apply only to cases commenced after that date.

These comments should not be construed to mean that I agree with all the provisions of the bill. I think on balance it should be passed, but I would like to mention two of my concerns. The Judiciary Committee did not accept the subcommittee's provision on reaffirmations, which would have permitted reaffirmations but allowed for a 30-day cooling off period for rescission. Reaffirmations will be prohibited under this bill. I think that is a mistake.

Similarly, a provision in the railroad reorganization subchapter that would have allowed the trustee to reject the work rules portion of a collective bargaining agreement was dropped by the Judiciary Committee. I understand that Senator WILLIAMS is committed to hold-

ing hearings on this question. I hope that the hearing process is not the end of the matter and that further action by the Human Resources Committee and the Senate will follow. The testimony that was heard by the subcommittee on this subject made it clear that antiquated work rules can often frustrate the reorganization process. This is a disservice to employees, the company, and the public alike.

Mr. President, I have been privileged to have had this opportunity to participate in the consideration of this bill and I now urge its passage.

Mr. DECONCINI. Mr. President, I ask unanimous consent that the amendments in the nature of a substitute and the amendments reported from the Committee on Finance be adopted and treated as original text for the purpose of further amendment.

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

UP AMENDMENT 1818

(Purpose: To make technical and conforming changes to certain tax-related provisions)

Mr. DECONCINI. Mr. President, on behalf of the distinguished chairman of the Committee on Finance, I send to the desk a series of technical and typographical corrections to the bill.

The PRESIDING OFFICER. The amendments will be stated.

The assistant legislative clerk read as follows:

The Senator from Arizona (Mr. DECONCINI, for Senator LONG) proposes unprinted amendment numbered 1818.

Mr. DECONCINI. I ask unanimous consent that further reading of the amendment be dispensed with.

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

The amendment reads as follows:

On page 315, line 19, insert the following immediately before the semicolon: ", including any suspensions of such period occurring on or after the date of the filing of the petition".

On page 315, line 25, insert a comma immediately after "law".

On page 336, line 4, strike out "118" and insert in lieu thereof "18".

On page 345, line 3, insert a comma immediately after "events".

On page 345, line 17, insert a comma immediately after "or".

On page 346, line 11, strike out "interests" and insert in lieu thereof "interest".

On page 351, line 9, strike out "an".

On page 353, line 14, strike out "permitted" and insert in lieu thereof "not restricted".

On page 353, line 14, strike out "tax".

On page 356, strike out lines 5 through 12, and insert in lieu thereof the following:

"(h) Notwithstanding any other provision of this section, the trustee may prosecute an appeal or review of an adjudication by a judicial or administrative".

On page 374, strike out line 7, and insert in lieu thereof the following: "(g), or 502 (h) of this title may be filed".

On page 375, strike out lines 8 and 9, and insert in lieu thereof the following:

"(b) Except as provided in subsections (f), (g), or (h) of this section, if such objection to a claim is".

On page 377, line 15, strike out "and" and insert in lieu thereof "or".

On page 377, strike out line 16, and insert

in lieu thereof the following: "thereof was not sent to the trustee, on or before the last date for".

On page 386, line 16, insert a comma immediately after "to".

On page 387, line 7, strike out "a".

On page 387, strike out lines 21 through 25.

On page 388, strike out line 1.

On page 388, strike out line 2, and insert in lieu thereof the following:

"(3) When a determination by".

On page 391, line 13, insert a comma immediately after "or".

On page 391, line 14, insert a comma immediately after "remain".

On page 391, line 20, strike out "the".

On page 391, line 24, strike out "for a prompt audit of such liability".

On page 392, line 24, strike out "such" and insert in lieu thereof "the".

On page 392, line 24, strike out "under".

On page 393, line 1, strike out "paragraph (1)".

On page 397, line 9, strike out "adjustable" and insert in lieu thereof "adjusted".

On page 399, line 2, strike out "taxes" and insert in lieu thereof "tax".

On page 399, line 2, strike out the second comma and insert in lieu thereof a semicolon.

On page 399, line 8, insert immediately before "(iii)" an opening black bracket.

On page 399, line 12, insert a closing black bracket immediately after the semicolon.

On page 399, line 22, strike out "were" and insert in lieu thereof "was".

On page 399, line 25, strike out "taxes" and insert in lieu thereof "tax".

On page 403, line 16, insert "or his delegate" immediately after "Treasury".

On page 403, line 24, strike out "fine, penalty, or addition to tax" and insert in lieu thereof "penalty".

On page 406, line 24, strike out the beginning quotation marks.

On page 407, strike out lines 10 through 24.

On page 408, strike out lines 1 through 6.

On page 409, line 24, strike out "(5)" and insert in lieu thereof "(6)".

On page 410, line 1, insert "or" immediately after the semicolon.

On page 414, line 17, insert "any tax" immediately before the period.

On page 455, line 22, insert "expenses and" immediately before "claims".

On page 456, line 19, strike out "in".

On page 456, line 20, strike out "the same manner as" and insert in lieu thereof "by reference to".

On page 457, line 12, strike out "specified in" the first time it appears.

On page 457, line 12, insert a comma immediately after "order".

On page 539, line 12, insert an opening black bracket immediately before "(d)".

On page 539, line 15, insert a closing black bracket immediately after the period.

On page 543, line 24, strike out "was" and insert in lieu thereof "is".

On page 544, line 4, strike out "taxes" and insert in lieu thereof "tax is".

On page 544, line 19, strike out "[(4) (5) " and insert in lieu thereof "[(4) (5) ".

On page 551, line 4, strike out "[(c) ".

On page 551, line 14, strike out "[(d) ".

On page 551, line 21, insert a closing black bracket immediately after the period.

On page 572, line 14, insert an opening black bracket immediately before "claims".

On page 572, line 15, insert a closing black bracket immediately after "and" and insert the following: "claims which are nondischargeable under section 523 of this title; and".

On page 574, line 4, insert immediately after the period the following new sentence:

"Notwithstanding the preceding sentence, a governmental unit to which any tax is owing

may accept provisions of the plan providing for payment of the tax over a period longer than four years."

On page 577, between lines 6 and 7, insert the following:

"(d) Any tax liability provided for in the plan may be assessed against the debtor by the governmental unit, but any such assessment, if not previously made under otherwise applicable law, may not be made until after the plan is confirmed and may be made only within the limits of law otherwise applicable."

On page 577, line 15, strike out "[or]" and insert in lieu thereof "or".

On page 577, line 17, strike out "; or" and insert in lieu thereof a period.

On page 577, strike out line 18.

On page 580, line 18, insert an opening black bracket immediately before "§ 1331."

On page 580, strike out line 26.

On page 581, strike out lines 1 through 11.

On page 629, strike out lines 5 through 13 and insert in lieu thereof the following:

SEC. 318. (a) Subsection (b) (2) of section 47 of the Internal Revenue Code of 1954 (relating to certain dispositions, etc., of section 38 property) is amended by striking out "section 381(a)" and inserting in lieu thereof "section 371, 374, or 381(a)".

On page 629, beginning on line 14, strike out "Section 47(d) of the Internal Revenue Code of 1954 (as added by this Act) shall apply" and insert in lieu thereof "Paragraph (2) of section 47(b) of the Internal Revenue Code of 1954, as amended by this Act, shall apply".

On page 629, line 19, strike out "Section 47(d)" and insert in lieu thereof "Paragraph (2) of section 47(b)".

On page 629, line 20, strike out "added" and insert in lieu thereof "amended".

On page 630, line 3, insert the following immediately after the dash: "For purposes of any tax to which subsection (a) applies—".

On page 630, line 6, insert "a" immediately after "to".

On page 633, strike out lines 3 through 8, and insert in lieu thereof the following:

(2) by amending subsection (b) to read as follows:

"(b) Claim Filed Despite Pendency of Tax Court Proceedings.—In the case of a tax imposed by subtitle A or B or chapter 41, 42, 43, or 44, claims for the deficiency in interest, additional amounts, and additions to the tax may be presented for adjudication to the court before which a receivership proceeding or a case under title II, United States Code, is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Tax Court; but no petition for any such redetermination shall be filed with the Tax Court after the appointment of the receiver."

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment was agreed to.

UP AMENDMENT NO. 1819

Mr. DECONCINI. Mr. President, I send an amendment to the desk, offered by Senator KENNEDY, and ask for its consideration.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Arizona (Mr. DECONCINI) for Mr. KENNEDY, proposes an unprinted amendment numbered 1819.

Mr. DECONCINI. Mr. President, I send an amendment to the desk, offered by Senator KENNEDY, and ask for its consideration.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Arizona (Mr. DECONCINI) for Mr. KENNEDY, proposes an unprinted amendment numbered 1819.

Mr. DECONCINI. I ask unanimous consent that further reading of the amendment be dispensed with.

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

The amendment is as follows:

On page 312, line 12, strike the "." (period) and add the following: "except as otherwise provided in Section 766(b) and 770."

On page 481, immediately following line 10, insert the following:

(15) "forward contract" means a contract requiring the seller to sell and the buyer to purchase a specified quantity of a commodity on a specified date or within a specified time in the future, which contract is effected otherwise than on a contract market or board of trade but which requires delivery of a commodity (or by-product or essentially similar commodity) which is traded on a contract market;

(16) "forward contract merchant" means a person who in the regular course of business purchases and sells forward contracts and who is a member or an affiliate of a member of a clearing organization;

On page 481, line 11, strike "(15)" and insert in lieu thereof "(17)".

On page 481, line 17, strike "(16)" and insert in lieu thereof "(18)".

On page 481, line 20, strike "(17)" and insert in lieu thereof "(19)".

On page 482, line 1, strike "(18)" and insert in lieu thereof "(20)".

On page 482, line 6, strike "(19)" and insert in lieu thereof "(21)".

On page 485, line 17, after "made by," insert "or to."

On page 485, line 18, after "organization," insert "or by or to a forward contract merchant."

On page 490, line 3, after "broker" insert "or forward contract merchant".

On page 490, line 5, after "contract" insert "or forward contract."

On page 490, line 6, after "contract" insert "or forward contract."

The PRESIDING OFFICER. The question is on agreeing to the amendment.

Mr. WALLOP. Mr. President, reserving the right to object, I shall not object, but I want to express certain minor reservations about his amendment by Senator KENNEDY. I do not think it does violence to the bill. It came as a little bit of a surprise to me this morning. I have checked it out, but I do want to express certain reservations about it as it moves slightly from the posture that the minority had wanted with regard to commodity brokers in general.

I do not object.

The amendment was agreed to.

UP AMENDMENT NO. 1820

Mr. DeCONCINI. Mr. President, I send an amendment to the desk that is meant to correct an ambiguity in the committee report.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Arizona (Mr. DeCONCINI) proposes an unprinted amendment numbered 1820.

Mr. DeCONCINI. I ask unanimous consent that further reading of the amendment be dispensed with.

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

The amendment is as follows:

On page 365, delete line 25 through line 3 on page 366 and insert in lieu thereof:

(4) Notwithstanding anything to the contrary contained in this section, the trustee may neither:

A. assume an executory contract to make a loan or deliver equipment to or issue a security of the debtor; nor,

B. prior to assuming an unexpired lease, require a lessor to provide services or supplies incidental to that lease agreement until such time as the trustee has assumed the unexpired lease, or in the alternative, provides the lessor in writing, with adequate assurances that the lessor will be compensated pursuant to the terms of the lease, for any services and supplies provided thereunder, during the transition period.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from Arizona.

The amendment was agreed to.

Mr. DeCONCINI. Mr. President, if there are no further amendments, I ask for third reading of the bill.

Mr. WALLOP. Mr. President, Senator BARTLETT has been sent for. He has an amendment and is on his way over. Therefore, I suggest the absence of a quorum and ask unanimous consent that the time be equally divided. I think it will not be very long.

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

The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Who yields time?

Mr. WALLOP. How much time does the Senator want?

Mr. THURMOND. About 2 minutes.

Mr. WALLOP. Mr. President, I yield 2 minutes to the Senator from South Carolina.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. THURMOND. Mr. President, I rise in support of the pending legislation, the Bankruptcy Reform Act of 1978. The major purpose of this bill is to reform and modernize the bankruptcy laws of this country.

The substantive bankruptcy law was first created in 1898 and underwent a major overhaul in 1938. Since that time there have been a number of changes in debtor-creditor relations, but the Congress has not acted to make these changes in the bankruptcy laws. S. 2266 seeks to update and reform this important area of law.

In 1970, Congress created the Commission on the Bankruptcy Laws of the United States to study and recommend changes in the bankruptcy laws. The Commission's final report, filed with the Congress on July 30, 1973, is the basis for the pending bill. The legislation has been subjected to extensive hearings in both the 94th and 95th Congress. Numerous witnesses testified on all aspects of the bankruptcy law, including the structure of the new bankruptcy courts, consumer bankruptcies, business reorganizations, railroad reorganizations, and the effect of the bankruptcy laws on the securities laws.

Mr. President, I would like to summa-

rize the major provisions of this legislation. First, chapter 1 contains the general provisions which includes definitions, rules of construction and the basic procedural ground rules for the operation of the bankruptcy system.

Chapter 3 deals with voluntary bankruptcies where cases are commenced by the filing of a petition in the office of a bankruptcy judge. An involuntary case may be filed by three or more creditors having claims aggregating, at least, \$5,000 or more. If there are fewer than 12 creditors, 1 creditor holding a claim of at least \$5,000 may file.

The test for determining insolvency under this chapter is whether a debtor is generally unable to pay, or has failed to pay a major portion of his debts as such debts become due, or within 90 days before the filing of a petition a custodian has been appointed for the debtor's property. The inability or failure to pay debts is a change from current law which requires "balance sheet" insolvency.

The filing of a petition under this title automatically stays the enforcement of any act against the debtor to recover any claim owed by the debtor. The automatic stay seriously affects the rights of all the debtor's creditors, therefore, a number of limitations have been placed upon the continuance of the stay. The rights of creditors are protected where replacement liens or real property is involved. Moreover, the debtor may use cash collateral during a reorganization, but only after a hearing and finding by the court.

The rights of a trustee in bankruptcy are also protected and a trustee may reject executory contracts and unexpired leases which is now provided for in current law. The rights of a trustee to assume or reject executory contracts does not, however, include the right to assume a loan commitment.

Mr. President, chapter 5 provides procedures for all of the property of the debtor to be included in the bankruptcy proceeding. This also allows the trustee to more easily recover property that may have been transferred by the debtor. In addition, there is a new section requiring secured creditors to file claims, allowing an early evaluation to determine the secured and unsecured portion of the claim.

The bill retains current law in the area of exempt property that a debtor may retain after bankruptcy for a fresh start. Thus, the bill takes the approach of current law which adopts the exemption law of the State in which the debtor is located. This method of providing for a fresh start for a debtor is, in my opinion, much better than the approach taken by the House which allows a debtor to choose between State law or Federal exemptions. Unfortunately, this method can lead to the retention of substantial amounts of property, resulting in instant affluence in the face of a bankruptcy proceeding. The fairer way is to allow a fresh start, but on a limited basis.

Mr. President, the bill also retains current law with regard to certain debts, such as those obtained under false pre-

tenses or actual fraud, to be excepted from discharge. In addition, in the area of preferences, the preference section is changed from current law to add a presumption that during the 90 days preceding bankruptcy the debtor will be presumed to have been insolvent. The preference period is reduced from 4 months to 90 days.

Mr. President, one major reform of this bill is the establishment of a new bankruptcy court as an adjunct of the U.S. District Court.

Each circuit court of appeals will appoint bankruptcy judges for its circuit. Compensation will be at the annual rate of \$48,500, an income level believed by the committee to be commensurate with the duties of the office.

Qualifications for bankruptcy judges include bar membership in good standing for at least 5 years at the time of appointment and competence as determined by the judicial council of the circuit. Additional qualification standards may be prescribed by the Judicial Conference of the United States.

The appointment of bankruptcy judges by the district court as contributed significantly, first, to a real and apparent dependency on the part of the bankruptcy court and its judges upon the district courts which appoint and review the decisions of bankruptcy judges, and second, to the image of the bankruptcy court as the stepchild of the district court. This bill is designed to eliminate both the real and apparent dependency and subservience of the bankruptcy court, in part by vesting the power to appoint bankruptcy judges in the circuit courts of appeals, rather than in the district courts. The change is further warranted by the need to do away with the unseemly appellate practice whereby the district judge or judges who appoint the bankruptcy judge often rule on appeals from the orders of their own appointees.

There will be a 12-year term of office for bankruptcy judges appointed under new 28 United States Code, section 152. The present 6-year term is insufficient to attract the caliber of individual needed to perform the highly demanding and important functions of the office of bankruptcy judge. By doubling the term of office for future bankruptcy judges it is anticipated that a major goal of this reform legislation, the establishment of a functionally independent bankruptcy court, can be further advanced.

A bankruptcy judge whose term expires is permitted to continue to serve until a successor is appointed and qualifies.

The bill provides grounds upon which and prescribes the procedures by which the removal of a bankruptcy judge may be accomplished. In competence, misconduct, neglect of duty and disability, as determined by the judicial council of the circuit, are the sole grounds for removal. The bankruptcy judge is entitled to be heard on the charges against him.

The Senate bill, Mr. President, does not provide for the elevation of bankruptcy referees to the level of article III

judges. I agree with that position, because I believe that the upgrading of bankruptcy referees is unwarranted since there are numerous protections, as well as increased retirement benefits for bankruptcy judges. The reforms of this bill more than compensate for the arguments that may be made to make bankruptcy referees article III judges.

Finally, Mr. President, this bill represents an immense amount of work by the members of the Subcommittee on Improvements in Judicial Machinery and the staff of that subcommittee. I especially want to commend Senator DeCONCINI, the chairman of the subcommittee and Senator WALLOP, the ranking minority member. They did a fine job.

This legislation constitutes a monumental reform that is long overdue. The growth of consumer laws and the increased recognition by courts of the rights of consumers has underscored the need for a revision and modernization of our bankruptcy laws.

S. 2266 represents a careful redrafting of the bankruptcy laws of this country. It recognizes the relationship between State laws on bankruptcy on the one hand, and the need for a certain amount of uniformity at the Federal level on the other. The approach taken by this bill is, in my opinion, far superior to the version now being considered by the House.

Mr. President, as the ranking minority member of the Senate Judiciary Committee, I strongly support this legislation and urge its adoption.

The PRESIDING OFFICER. Who yields time?

Mr. WALLOP. Mr. President, is the Senator from Oklahoma ready to proceed with his amendment?

Mr. BARTLETT. I am ready to bring up the amendment.

The PRESIDING OFFICER. The Senator from Oklahoma.

UP AMENDMENT NO. 1821

(Purpose: To allow a bankrupt to rescind any revival or reaffirmation within 30 days of such action)

Mr. BARTLETT. Mr. President, I introduced an amendment yesterday and I have a slight modification which I send to the desk and ask that it be stated.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Oklahoma (Mr. BARTLETT) for himself, Mr. THURMOND and Mr. HATCH, proposes an unprinted amendment numbered 1821:

On page 421, strike out lines 4-18 and insert in lieu thereof the following:

(b) A debt extinguished by discharge in a case under this title may be revived or reaffirmed by written instrument or be all or part of any bargain creating a new debt except, however, the debtor may rescind his revival or reaffirmation by written notice to all concerned creditors within 30 days of such revival or reaffirmation. Any judgment, whenever obtained, that a debtor is personally liable to pay a debt extinguished by discharge, and not revived or reaffirmed in

accordance with this section, is null and void.

On page 421, line 19, strike "(d)" and insert in lieu thereof "(c)".

Mr. BARTLETT. Mr. President, my amendment to S. 2266 reinstates language in the bill that would enable voluntary reaffirmation or revival of debts subject to a rescission right of 30 days. It is identical to language in the bill as reported by the Subcommittee on Judicial Machinery on May 17, 1978, which was amended out of the bill by the full committee.

Although I believe the Judiciary Committee's effort was well intended, the effect of its amendment is to deprive consumers of a right they have always had, that is, of renewing a debt discharged in bankruptcy.

Without this right consumers will be denied the opportunity to protect a co-signer such as wife, a relative, or other family member from liability; or to protect collateral such as an automobile from repossession; or to honor a moral obligation. Even more importantly, the ban on reaffirmation in the committee bill can jeopardize a consumer's ability to save his home from foreclosure.

Rather than adopt an absolute ban on all reaffirmations, as S. 2266 purposes, my amendment provides a compromise adopted by the subcommittee which held hearings and studied the measure.

It is a simple, direct, approach which will protect the legitimate interests of consumers and creditors alike. It would allow, but not require, reaffirmation; it would permit a debtor 30 days to change his mind.

If abuse is a problem it can be limited without adopting an arbitrary prohibition on all reaffirmations. I submit the remedy proposed in S. 2266 exceeds any alleged abuse.

As a practical matter, thousands upon thousands of bankrupts reaffirm or revive debts with creditors each year for amounts totalling many millions of dollars. They do so voluntarily because they know it is to their advantage. I believe consumers should be able to retain that right. I also believe creditors should be able to recoup some of their losses. What is wrong with reaffirmation if it is voluntary?

Under my proposal, the debtor would have 30 days to reconsider his decision and cancel any reaffirmation. With this provision in the bill, any possible coercion or abuse by creditors is effectively avoided.

My amendment would afford the bankrupt more protection than current law and more real protection than the absolute ban now contained in S. 2266.

The record clearly shows that a major percentage of consumer bankruptcies are caused by a single, overwhelming debt such as a medical bill. Debtors may seek relief from such crushing medical expenses but wish to honor other obligations and retain their credit worthiness with those whom they have dealt with in the past—and with whom they wish to deal in the future. The committee bill

denies consumers the right to voluntarily and selectively reaffirm. It denies consumers the right to dispose of their future income as they see fit. There is no justification for this interference. It smacks of paternalism.

Additionally, I am concerned that the action of the Judiciary Committee prohibiting reaffirmations will create severe hardship for consumers in three distinct areas where it may be a benefit for them to renew their obligations. They may not do so because of the prohibitions of section 524 (b) and (c). These two subsections, read together with section 722, would permit property-related reaffirmations only in the event a bankrupt desires to redeem exempt tangible personal property subject to a nonpurchase money security interest. The power to reaffirm a debt only in this narrowly defined circumstance leaves the bankrupt helpless to protect other property which may be of substantial value, such as the following:

First. The bankrupt's home: The bankrupt will be unable to save his residence from foreclosure by the mortgagee. Since the bankrupt cannot revive his debt—section 524(b) makes any such effort "void"—the creditor must look to his security for payment through foreclosure. The bankrupt will not only lose his home, but in most cases any equity he might otherwise have protected through a homestead exemption. Likewise, the bankrupt's right to redeem—available under most State laws—would be lost for lack of power to execute a new obligation.

Second. Non-exempt personal property: Automobile and durable consumer goods of many kinds are usually acquired on credit, the seller retaining a purchase-money security interest in the auto or goods until payment in full is made. Under present law a bankrupt may often keep possession of such property by reaffirming his obligation with the seller. Under section 524 (b) and (c) and section 722 he would be powerless to reaffirm and the creditor would be obliged to repossess.

Third. All intangible property: The bankrupt may have pledged as security intangibles such as a credit union share, a certificate of deposit, stocks or bonds, contract rights or assignment of debt, life insurance policies et cetera. Again, pursuant to the strictures of section 524 (b) and (c) and section 722, he would be unable to prevent liquidation of such properties through an agreement to revive his discharged obligation.

The fresh start concept of the act will actually be thwarted in many cases by the ban on reaffirmations, resulting in substantial harm to consumers. The more flexible consumer-protective limitations on reaffirmation originally proposed and adopted by the subcommittee and now contained in my amendment will cure this disastrous defect in the bill.

I strongly urge the adoption of my amendment.

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

Mr. THURMOND. Mr. President, will the distinguished Senator yield?

Mr. BARTLETT. I yield.

Mr. THURMOND. Mr. President, I commend the able Senator from Oklahoma. He and I are members of the Armed Services Committee, and he has done a fine job there. On all his committees, he has done a splendid job. We are proud of him, and I am glad to join him in this amendment. It is a sound amendment and should be adopted.

Mr. BARTLETT. I thank the distinguished Senator from South Carolina.

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

Mr. BARTLETT. I yield.

Mr. WALLOP. Mr. President, I find myself in agreement, as I was during my opening remarks, with the posture the Senator has taken.

I ask those who are against this, what is wrong with offering a debtor flexibility as to a particular property or a particular debt?

It seems to me that it is inherently American to offer somebody a protected route to dignity. The 30-day cooling-off period, the opportunity for rescission, provides that protection and yet allows the debtor the option to restore personal confidence and dignity by reaffirmation if he chooses. I support the Senator.

Mr. BARTLETT. I thank the distinguished Senator from Wyoming.

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

The PRESIDING OFFICER. The Senator has 7 minutes remaining.

Mr. DECONCINI. Mr. President, Senator KENNEDY, the sponsor of the reaffirmation section as reported in the bill from the Judiciary Committee, is unavoidably absent today, but I would like to take this opportunity to defend and lend my support to the Kennedy provision on reaffirmations.

Under the current Bankruptcy Act, the effect of a discharge has generally been governed by State law. Under most State laws, a discharge is an affirmative defense to any action on the debt discharged. It does not forbid collection of the debt, nor does it erase the debt. The moral obligation to repay the debt remains, and is valid consideration for a new promise to repay. Thus, unsuspecting debtors are led into binding reaffirmations, and the beneficial effects of a bankruptcy discharge are undone. The advantages sophisticated and experienced creditors have over unsophisticated debtors in this area were lessened by the 1970 amendments to the Bankruptcy Act, but some still remain. The unequal bargaining position of debtors and creditors, and the creditors' superior experience in bankruptcy matters still lead to reaffirmations too frequently. To the extent that reaffirmations are enforceable, the fresh start goal of the bankruptcy laws is impaired.

The bill makes void any agreement that contains a reaffirmation of a discharged debt, and prohibits a creditor from entering into such an agreement. The consumer finance industry strongly opposes the provision. It has argued that debtors frequently voluntarily repay

debts, and that debtors should not be prohibited from repaying discharged debts, out of a sense of moral obligation or for other reasons. "Voluntary", however, is somewhat euphematic, and often has led to court action to enforce "voluntary" repayments. The bill recognizes the truly voluntary situation and permits legitimately voluntary repayments, but denies creditors court process to enforce a reaffirmation, other than under a nondischargeability or redemption agreement. H.R. 8200 guarantees that debtors may repay a portion or all of a discharged debt in a voluntary situation, without any fear of reaffirming the whole of the debt and being subject to the same court process that resort to the bankruptcy laws was designed to prevent.

This provision is a significant factor in making bankruptcy relief an effective remedy. It insures that a debtor will not come out of bankruptcy in the same situation as when he went in. It contributes to the debtor's fresh start. The provision prevents creditor experience in handling bankrupt debtors from overwhelming inexperienced debtors that are in a severely disadvantaged bargaining position after bankruptcy.

It was on vote of 10 to 2 that the Judiciary Committee accepted Senator KENNEDY's amendment, and I hope it will be sustained today.

Mr. BARTLETT. Mr. President, at stake here is the human dignity of an individual who does have large debts, does want to put them in order by taking advantage of the bankruptcy laws which have been available to a person in this situation for a long time. This is nothing new at all to a businessman, to a person who has some kind of financial activity and loses his job and has unusually large expenses, or whatever it may be. But he also wants to shout, loud and clear, that he wishes to reaffirm certain of these debts.

I think it is very important for an individual to have this right. I believe it is the most paramount and overriding issue involved with this amendment—that he must have the opportunity to say, if he wishes to say, that he wants to reaffirm certain of these debts. Then, if there is coercion, harassment, or some kind of pressure brought upon this individual, he has 30 days, a quiet period, in which he can think over his reaffirmation, and he can rescind it or alter it.

This provides the protection that the distinguished Senator from Arizona was talking about and that the distinguished Senator from Massachusetts (Mr. KENNEDY), who is absent, had in mind.

But this amendment is a compromise and it definitely provides protection for the individual from any kind of abuse or coercion. I think that it affords him the opportunity, if he wants, to say: "Yes, I reaffirm these debts." To deny an individual his right or deny him possibly the advantage of bankruptcy, which in many cases is the only way a person can go and work his way out and work his way up, I think is virtually almost a criminal act.

So I hope my colleagues will join with those of us who are sponsoring this in order to give every individual the op-

portunity to stand up and say, if he wants: "Yes, here is a debt or here are debts that I reaffirm."

I am happy to yield to the Senator from Utah.

Mr. HATCH. I thank the distinguished Senator from Oklahoma and I compliment him on his amendment here today.

As I have conferred with my constituents about S. 2266 I have heard a loud clamor about the reaffirmation provision that is presently in the bill. After carefully analyzing the portion of the bill relating to this issue as reported by the Judiciary Committee, I feel that the amendment offered by the Senator from Oklahoma is certainly justified.

I support the amendment, and I am pleased to join my colleagues as a cosponsor.

I am concerned that we in the Judiciary Committee perhaps acted a little hastily in changing the provisions of section 524 that have been proposed by the subcommittee after it held hearings and carefully drafted language based upon its findings. If seems only proper that we not eliminate the long accepted concept of reaffirmation.

I have no doubt in my mind that there has been minimal abuse of reaffirmation by over-zealous creditors. However, I do not think it appropriate to meet that problem by a ban of reaffirmation as we have in the bill now before us.

The amendment we are now considering restores the language suggested by the subcommittee and properly protects the right of reaffirmation as a means for the consumer to restore his credibility in a situation where he has found bankruptcy to be a necessary step.

I might add, as an attorney who represented many people who have had difficulties and have had problems with bankruptcy, I think many of these people would be deprived of a tremendous opportunity to be able to resolve some of the inner conflicts and emotional conflicts which occur when they go into bankruptcy if they do not have a right of reaffirmation.

So I urge my colleagues to join us in supporting this amendment of my good friend and colleague from Oklahoma.

Mr. BARTLETT. I thank my distinguished friend, the Senator from Utah. I appreciate his remarks and the remarks of the Senator from South Carolina (Mr. THURMOND), and the Senator also who offered this amendment in committee and supports it very strongly and has been very helpful to me, the Senator from Wyoming (Mr. WALLOP).

I am prepared to yield back the remainder of my time or if the Senator from Wyoming wishes additional time I yield.

Mr. WALLOP. Mr. President, the Senator from Wyoming has a unanimous-consent request.

Mr. President, I ask unanimous consent that Miss Beverly Charles, of Senator JAVITS' staff, and Ralph Oman, of Senator MATHIAS' staff, be accorded the privilege of the floor throughout the debate and votes on S. 2266 and S. 1423.

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

Mr. DeCONCINI. Mr. President, I ask unanimous consent that Mr. Michael Altier be accorded the privilege of the floor on both these bills.

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

Mr. BARTLETT. Mr. President, I make a similar unanimous consent request that Tom Wasinger, of my staff, be accorded the privilege of the floor.

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

Mr. BARTLETT. Mr. President, I am prepared to yield back the remainder of my time.

Mr. DeCONCINI. Mr. President, I am going to ask for a rollcall vote. I ask for the yeas and nays on the amendment.

The PRESIDING OFFICER. Is there a sufficient second?

There is not at the present time a sufficient second.

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

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

Mr. WALLOP. Mr. President, I yield such time as I have remaining to the Senator from Maryland.

Mr. MATHIAS. Mr. President, I extend my congratulations to our distinguished colleagues, the able floor managers of this major and much-needed modernization of our bankruptcy laws, for their fine work.

I particularly compliment them on their understanding and fair approach to the complex subject contained in subchapter IV of chapter 7 which deals with commodity broker liquidations. The field of statutory commodity law is really quite new—the Commodity Futures Trading Commission was established only 4 years ago—and the law in this area is continually unfolding with new twists and wrinkles.

Our colleagues have taken this quite new area of commodities law and successfully interlaced it with the protections of this major bankruptcy revision. I believe that the thoughtful approach to the law contained in the Senate version of this bill should prevail on the conference—it is an approach that looks more fairly at the nature of commodity transactions while fully and equitably contemplating the problems of the bankrupt. It is my hope that our Senate colleagues will press for this superior version of this section of the bill in conference.

FORWARD CONTRACTING

The proposed amendments to the Bankruptcy Act contained in subchapter IV of chapter 7 of S. 2266 are concerned with commodity firms which are regulated by the Commodity Futures Trading Commission (CFTC) under the Commodity Exchange Act. The amendments do not deal with forward contract merchant firms, which at present are not regulated by the CFTC but which provide

much of the backbone and underpinning to organized futures trading in the United States. Note, however, that section 20 of S. 2391, the CFTC reauthorization bill, would authorize the CFTC to monitor the forward contract markets.

Forward contract merchants are commercial trading firms which offer to commercial customers the ability to buy or sell commodities in the physicals market on a forward basis. For example, a precious metals merchant will sell, on a forward basis, silver to a photographic film manufacturer who requires actual delivery of a specified commodity on a future date; the film manufacturer would buy the metal from the forward contract merchant rather than use the facilities of a futures market to effect the forward purchase since the manufacturer requires a specified grade of the metal and requires delivery on a specified date and at a specified place. While futures contracts are quite effective for hedging market risks, they are not necessarily suitable for obtaining required delivery of a specified graded commodity.

In order for a forward contract merchant to provide a regular and efficient forward market, the forward contract merchant must make extensive use of the futures markets. In other words, when the precious metals merchant sells silver on a forward basis to the film manufacturer, the merchant invariably makes an offsetting purchase of the metal for delivery to the merchant at or about the same time.

Usually this offsetting purchase is made through the facilities of a futures exchange. The forward contract merchant does not take the market risk of the commodity which he sells forward; the merchant, however, is able to offer nonstandardized delivery of a nonstandardized product (which is required for industrial or commercial purposes) because the merchant firm can hedge its market risk by use of a standardized futures contract on a futures exchange. Such a hedged position is not speculative but in fact has a stabilizing force on the public markets.

Just as the commodity broker pays margin to the clearing organization to secure the broker's position, the customer of a forward contract merchant may pay margin to the merchant to secure its (the customer's) obligations. In effect, the margin money received from the forward contract merchant's customer is passed through to the clearinghouse as margin on the forward contract merchant's hedged positions in the futures market. Under the committee print of S. 2266 dated May 17, 1978, the payment of margin by the broker to the clearing organization is free from attack but the payment of margin in the physicals market by the film manufacturer is not necessarily protected and leaves a dangerous gap in the protection provided the clearing organization.

If, in the event of the bankruptcy of a sizable customer of a forward contract merchant, margin payments made to the forward contract merchant were required to be returned (or an order obtained restricting use of funds equal to such

margin payments), but the forward contract merchant was unable to retrieve the margin it paid to the clearing organization, the funds so returned must come from the forward contract merchant's own capital. By suffering a significant reduction or restriction of capital, the forward contract merchant would not be able to meet margin calls on its various futures positions on the exchange. This would result in the precipitous liquidation of substantial positions on the exchange. On this point, it is important to note that in many instances a forward contract merchant will hold a substantial position of the outstanding contracts on a futures market. The liquidation of those positions may drastically affect market price to the detriment of everyone else in the market.

Also, just as commodity brokers contract for the right to liquidate futures positions in the event of bankruptcy, forward contracts frequently contain such liquidation rights. Under the committee print contractual rights to liquidate futures positions cannot be stayed; similar protection should also be afforded the forward contract merchants, because the forward contract is inextricably linked with the futures market. Where the positions are sizable, the pressure on the forward contract merchant would jeopardize his entire position with the futures exchanges requiring immediate liquidation of massive futures positions.

In order to protect the clearing organization, it is suggested that forward contract merchants be treated in a fashion similar to commodity brokers with respect to section 766(b) (margin payments) and section 770 (contractual rights to liquidate contracts). Failure to extend those protections would mean that one side of a forward contract merchant's business would be protected (futures business) but that the other side (the physical or cash business which, ironically, is the reason and justification for most futures trading) would be exposed. In the end, however, the futures side would be jeopardized by the merchant's capital drain in the event of a major customer failure.

The changes in the Bankruptcy Act suggested in this memorandum are compelled by logic as well as by economic realities. Forward contract merchants are an integral part of the commodities business; generally speaking, the physical positions of a forward contract merchant are reflected by offsetting positions in the futures market.

The intricate connections between forward contract firms and the clearing organizations are such that a failure of a forward contract merchant could have serious repercussions to clearing organizations and the commodities community. The presently proposed revisions to the Bankruptcy Act should be modified to provide the additional protection suggested here.

The changes proposed are quite limited. They would apply only to forward contract merchants which are themselves clearing members or affiliates of clearing members, and "forward contracts" would be limited to commodities which are traded on future exchanges. These

conditions are necessary to limit the proposal to those instances where bankruptcy or liquidation could affect the public futures market. The following textual suggestions are offered:

The following definitions should be added to Section 761:

Commodity forward contract means a contract requiring the seller to sell and the buyer to purchase a specified quantity of a commodity on a specified date or within a specified time in the future, which contract is effected otherwise than on a contract market or board of trade, but which requires delivery of a commodity (or by-product or essentially similar commodity) which is traded on a contract market.

Forward contract merchant means a person who in the regular course of business purchases and sells commodity forward contracts and who is a member or an affiliate of a member of a clearing organization.

Section 770. Contractual Rights to Liquidate or Transfer.—

Nothing in this title or state law shall operate to prevent, stay, or otherwise prohibit a commodity broker or a forward contract merchant from exercising a contractual right to liquidate or transfer a commodity contract or forward contract, or to cause the liquidation or transfer of a commodity contract or forward contract, nor shall any court issue any order preventing, staying, or otherwise prohibiting the exercise of such a contractual right. As used in this section, the term contractual right includes, but is not limited to, a right set forth in a rule, regulation, or bylaw of a clearing organization or contract market or in a resolution of the governing board thereof.

Section 766. Nonvoidable transfers.—

(b) margin payments made by or to a commodity broker, other than clearing organization, or by or to a forward contract merchant, unless (1) the payment was made on or within one year before the date of the filing of the petition; (2) the payor made the payment with actual intent to hinder, delay, or defraud any entity to which such payor was or became indebted on or after the date that such payment occurred; (3) the transferee knowingly participated in the payor's scheme to defraud; and (4) the recovery is from the transferee or a subsequent transferee who had actual knowledge at the time of that subsequent transfer of the payor's scheme to defraud.

Section 766(b) of S. 2266 should be amended to provide that customer margin payments made to a commodity broker will not be considered voidable preferences in a bankruptcy proceeding in the absence of fraud by a bankrupt customer and collusion on the part of his transferee broker.

S. 2266, as passed by the Senate Judiciary Committee, provides that margin payments made by a commodity broker (absent participation in a fraud) (section 766(b)) or by or to a clearing organization (section 766(c)) are free from attack as voidable transfers. However, no corresponding protection is provided with respect to margin payments to a commodity broker from the broker's customer. It is submitted that this omission may result in jeopardizing the overall protections sought to be provided in S. 2266 toward preserving the integrity of futures markets, their public participants, and the clearinghouse mechanism. In addition, it would indirectly undermine the commodity broker regulatory pattern envisioned by the CFTC in

its recently promulgated minimum financial requirements.

These problems can best be demonstrated by reviewing the structure and internal mechanisms of the futures markets which provide the orderly, uninterrupted flow of funds through the markets and operate effectively to protect their financial integrity.

A clearing organization deals only with its clearing members and is not in privity with the broker's customers; it looks only to its clearing members for margin. As a practical matter, however, when a margin call is made by the clearing organization to a clearing member, the broker will request its customer (which could be the actual trader or another commodity broker with an omnibus account) to post additional margins. This margin money flows from the ultimate customer, through the broker to the clearinghouse and finally, through another broker to the customer on the other side. This is an unbroken sequence of events which occurs daily on America's futures markets. The brokers involved have no beneficial interest in these moneys. Indeed, the Commodity Exchange Act and regulations of the CFTC require that if at any time the broker has collected more margin money than he is in turn obligated to pay to the clearing organization, this money must be segregated and kept separate from his own funds.

If the broker is unable to retrieve margin paid by it to the clearing organization but is required to return margin funds paid to it by its customers, the funds so returned must come from the broker's own capital. By suffering a reduction of capital, the broker may not be able to meet its other customer obligations to the clearing organization, thereby potentially precipitating liquidation of all the futures positions carried by the broker. As noted earlier, in the ordinary course of its business, the broker acts as a conduit of funds with respect to margin due on customers' positions. However, it must be understood that it often happens that the clearing member must advance funds to the clearing organization prior to its receipt of corresponding margin from its customers; this is one of the reasons why clearing organizations require a substantial net worth for membership. If the broker's capital was to become unavailable because of a customer failure, the broker's position at the clearing organization would be completely exposed and the clearing organization protected against the failure of the broker.

Moreover, over the past 2 years the CFTC has been revising its minimum financial requirements for brokerage firms so as to provide additional protection to the firms' customers. Those proposed rules are carefully drawn to take into account current customer futures positions, deficit customer accounts, outstanding debt of the brokerage firm, and other such factors to assure that the broker is financially sound and that customer positions are safe. However, those proposed rules do not and cannot take into account the possibility that previous

margin payments by a bankrupt customer might have to be returned by the broker as voidable transfers.

If this were to happen and the broker's capital depleted, the CFTC's carefully developed financial requirements would be for naught and the firms' customers would be subjected to the very hazards the CFTC was trying to avoid. (We have enclosed for your information a copy of the CFTC's proposed financial regulations for brokerage firms.)

Finally, there is little justification for permitting margin funds transferred by a commodity broker to its customer on profitable positions (as required by law) to be free from attack, but not funds paid by a customer to a broker. It is submitted that the entire chain of margin payments must be protected from attack as a voidable transfer.

In order to accomplish the suggestion made herein, the words "or to" should be added to section 766(b) as follows:

(b) Margin payments made by or to a commodity broker. . .

TECHNICAL CONFORMING AMENDMENT TO SECTION 103(d) OF S. 2266

A technical conforming amendment should be made to § 103(d) of S. 2266, as passed by the Senate Judiciary Committee, adding the phrase "except as specifically provided in section 766(b) and section 770 therein" to the end of that section immediately before the period. This change is necessary to conform section 103(d) to subchapter IV of title VII of the bill which relates to "Commodity Broker Liquidation, Transactions With Commodity Brokers, and Related Commodity Matters."

Mr. President, I ask unanimous consent that the Federal Register, April 10, 1978, entitled "Commodity Futures Trading Commission—Minimum Financial Requirements," be printed in the RECORD.

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

COMMODITY FUTURES TRADING COMMISSION—
MINIMUM FINANCIAL REQUIREMENTS
COMMODITY FUTURES TRADING COMMISSION

[17 CFR Part 1]

MINIMUM FINANCIAL REQUIREMENTS

Proposed Adoption and Monitoring

Agency: Commodity Futures Trading Commission.

Action: Proposed rulemaking.

Summary: The proposed rules would amend the minimum financial and related reporting requirements imposed upon futures commission merchants (FCM's) and would change the computational formula used to determine whether a futures commission merchant meets the minimum financial requirements; establish an early warning system designed principally to give notice of a futures commission merchant's financial deterioration; and require all self-regulatory organizations under the jurisdiction of the Commodity Futures Trading Commission to adopt minimum financial and reporting requirements with respect to their member futures commission merchants. The rules would permit the responsibility for monitoring and auditing any FCM which is a member of more than one self-regulatory organization to be delegated to a single self-regulatory organization. The proposed regulations are intended to accomplish the Commission's goal of industry

self-regulation while ensuring adequate customer protection and the integrity of the futures market system, increasing regulatory efficiency, facilitating the reduction of the undue burden of multiple financial monitoring, auditing, and reporting imposed upon FCM's which are members of more than one self-regulatory organization, and facilitating the development of a registered futures association under Section 17 of the Commodity Exchange Act, as amended.

Dates: Comments on the proposed rule should be submitted by June 1, 1978.

Address: Send comments to Commodity Futures Trading Commission, 2033 K Street NW., Washington, D.C. 20581 Attention: Secretariat.

For further information contact:

John L. Manley, Chief Accountant, Division of Trading and Markets, Commodity Futures Trading Commission, 2033 K Street NW., Washington, D.C. 20581, 202-254-5218.

Supplemental information: The Commission proposed in four parts substantial revisions to its financial regulatory structure now applicable to FCM's and self-regulatory organizations. On October 6, 1976, the Commission proposed extensive revisions in the financial reporting requirements imposed upon FCM's under Commission regulations. 41 FR 45706 (October 15, 1976). On May 17, 1977, the Commission proposed substantial amendments to the minimum financial standards to which FCM's are subject under its regulation 1.17. 42 FR 27166 (May 26, 1977). On June 14, 1977, the Commission proposed an improved early warning system based upon the proposed amendments to its regulation 1.17. 42 FR 31740 (June 22, 1977). On July 27, 1977, the Commission proposed a regulation which would require each self-regulatory organization to adopt minimum financial and related reporting requirements with respect to its member FCM's and would permit the responsibility for monitoring and auditing the financial status of any FCM which is a member of more than one self-regulatory organization to be delegated to a single self-regulatory organization. 42 FR 39036 (August 1, 1977). In October, 1977, the Commission held public hearings on these proposals.¹

In view of the extent and complexity of these proposed rules and in order to afford maximum opportunity for public comment with respect thereto the Commission is hereby republishing them, as amended, and inviting public comment for an additional sixty days.

THE NEED FOR CHANGE

The Commission's responsibility to protect the integrity of the marketplace and the funds of customers who use that marketplace necessarily encompasses a duty to monitor developments in the commodities futures industry to determine whether the Commission's current regulatory approach is adequate in light of recent and anticipated changes in the industry. The Commission believes that the rapid and substantial increase in the number of registrants, the volume of commodity business that such registrants are doing, and the increased volatility of the futures markets in recent years have combined to produce a situation in which the Commission must shift its regulatory approach from direct regulation, relying primarily on direct auditing, to oversight regulation. In order to establish a structure under which oversight regulation may function effectively, the Commission determined that substantial revisions were necessary in its current regulations. The Commission further believes that to maximize the effectiveness of independent public ac-

¹ In the matter of: Proposed Minimum Financial and Related Reporting Requirements, October 5, and 6, 1977.

countants in this regulatory structure it is necessary to establish uniform computational criteria to determine the FCM's compliance with the Commission's minimum financial regulations.

In reaching the conclusions that this shift in regulatory approach is necessary, the Commission carefully considered a number of recommendations, including the recommendations of the Commission's staff. The Report of the Comptroller General of the United States to Congress on Improvements Needed in Regulation of Commodity Futures Trading (the "GAO Report")² recommended that the exchanges be delegated the primary responsibility for audits of FCM's and that the Commission "require FCM's to engage independent public accountants to make the required audits and to furnish reports on the results of these audits to the appropriate exchanges and to the Commission."³

Similarly, the Commission's Advisory Committee on Commodity Futures Trading Professionals⁴ recommended that the Commission "require that the year end financial statements submitted by FCM's be certified by independent public accountants."⁵ In addition, the Commission's Advisory Committee on Definition and Regulation of Market Instruments⁶ recommended that any financial reports required of persons dealing in commodity option transactions and leverage transactions in gold or silver be certified annually by an independent public accountant.⁷

The Commission believes that substantial revisions in the minimum financial regulations are necessary for reasons in addition to the need to change to an oversight role in the financial regulation of FCM's. At present the Commission, the Chicago Board of Trade (CBOT) and the Chicago Mercantile Exchange (CME) all have different requirements with respect to financial regulations and related reporting requirements of FCM's, and many FCM's are subject to more than one set of such requirements. In addition, over 50 FCM's, representing approximately fifty percent of all commodity customer business in the futures industry, are also registered with the Securities and Exchange Commission (SEC) as securities broker-dealers and are, therefore, subject to the minimum financial rules of that agency. As a result, many of these FCM's/broker-dealers are subject to as many as three different sets of financial regulations and corresponding audits to enforce these regulations. The Commission believes that these duplicative financial and related reporting requirements impose unnecessary burdens upon FCM's; therefore, it has proposed and is today republishing for comment, revised minimum financial regulations that would establish uniform computational criteria for use in the commodities futures industry.

² Report of the Comptroller General of the United States to Congress on Improvements Needed in Regulation of Commodity Futures Trading (June 24, 1975).

³ Id., at 46.

⁴ 40 FR 50558 (October 30, 1975).

⁵ Report of Commodity Futures Trading Commission Advisory Committee on Commodity Futures Trading Professionals (August 5, 1976).

⁶ 40 FR 50557 (October 30, 1975).

⁷ Report of the Advisory Committee on the Definition and Regulation of Market Instruments to the Commodity Futures Trading Commission: Recommended Policies on Commodity Option Transactions (July 6, 1976); Report of Advisory Committee on Definition and Regulation of Market Instruments to the Commodity Futures Trading Commission: Recommended Policies on Futures, Forward and Leverage Contracts and Transactions (July 16, 1976).

Another reason for revising the financial regulations is that the Commission's minimum capital rule, which is a part of these regulations, has substantial deficiencies which must be corrected. A major deficiency in the current minimum capital rule is that the computational criteria permits FCM's to finance their operations almost exclusively with non-subordinated, long-term debt; thus, an FCM may actually be insolvent and still satisfy the Commission's present rule. Other deficiencies in the current capital rule include the safety factors on open futures contracts, the definition of proprietary account, and the length of time unsecured deficits are allowed to be outstanding and still be included as current assets. The safety factors for high-dollar value, low volatility, open futures contracts provided in current regulation 1.17, are disproportionately high in terms of the risks involved in trading in such contracts when compared to the safety factors on more volatile, low-dollar value contracts. The definition of the term "proprietary" as it is used in the current minimum financial regulations results in unrealistic additional charges to capital of FCM's in relationship to the actual risk involved to these FCM's. Unsecured deficits may be outstanding up to thirty days and still be included as part of the firm's assets in calculating its capital position.

Finally, the Commission's present rules were not intended to, and do not, provide financial regulations with respect to domestic exchange-traded commodity options. It should be noted, however, that all references in the proposed financial regulations to Part 32 of the Commission's regulations (17 CFR Part 32) concerning commodity options relate to the proposed regulations contained in the October 17, 1977 Federal Register release (42 FR 55538) and those regulations have not been adopted. Therefore, it may be appropriate, in the event the Commission adopts the proposed financial regulations prior to taking action with respect to the proposed options regulations, to delay final action with respect to those financial regulations relating to such options until such time as the proposed options regulations are adopted.

MAJOR DIFFERENCES BETWEEN THE PRESENT PROPOSAL AND PRIOR PROPOSALS

Safety factors. The safety factor computations currently provided in regulations 1.17 (d) and (e) with respect to open commodity futures contracts are based upon the dollar values of such contracts. Therefore, as previously mentioned, the safety factors for high dollar-value, low volatility, open futures contracts are disproportionately high in terms of the risk involved in the trading of such contracts when compared to the safety factors on highly volatile, low dollar-value contracts. In order to relate the safety factors on a particular contract to the risk involved in trading in that contract, the Commission requested comment upon a proposal to adopt a new safety factor computation based upon the volatility rather than the dollar-value of each contract.⁸ Specifically, the safety factor would have been based on a percentage of the standard fluctuation of the price of that contract.

While the commentators in general agreed that amendment of the Commission's regulations respecting the safety factor computation was a desirable step, there was strong opposition to the concept of a computation based upon the standard fluctuation concept because of its complexity and because it would be based upon historical data which could only indicate what safety factors might have been appropriate in the past. Many of these commentators believe the contract markets are in the best position to assess

current market risks, and favor a safety factor computation based upon contract market margin requirements. The Commission believes that these arguments have merit and further believes that such margin requirements provide flexible indicia of the volatility of the futures contracts, as well as all other market conditions concerning such contracts. Therefore, the Commission is revising its earlier proposal and is proposing to compute the safety factors for customer positions based upon the amount by which any account is undermargined after a specific number of days are allowed for collection. The safety factor for proprietary positions will be a multiple of the margin requirement.

Self-regulatory organization membership. Several commentators criticized the proposals for not recognizing the advantages from the standpoint of regulation, surveillance and customer protection that accrue from an FCM's membership in a self-regulatory organization. Commentators cited such benefits as: (i) the frequency of audits of their member FCM's that self-regulatory organizations conduct or that they will be required to conduct in enforcing the proposed minimum financial regulations; (ii) the daily monitoring of clearing members' positions; (iii) audits of FCM's to determine compliance with margin requirements; and (iv) the speed and flexibility of a self-regulatory organization compared to a federal regulatory agency. The Commission also appreciates that members of self-regulatory organizations, in addition to the cost of their memberships, incur certain expenses in the form of membership fees or dues which, at least in part, are used to pay the costs of auditing, monitoring and other regulatory and surveillance programs of such organizations. Finally, the Commission recognizes that, historically, the losses of customers trading in futures contracts regulated under the Act, as a direct result of member firm failures have been minimal and this has been in part due to the willingness of other member firms to absorb such losses when the failing firm is a member of the same contract market. The Commission believes that these considerations in the context of a properly functioning self-regulatory organization provide a reasonable basis for distinguishing among categories of participants in the futures markets. Accordingly, the revised proposal would (1) establish higher minimum financial requirements and safety factors for non-contract market members than for members and (2) recognize guarantee deposits and clearing corporation stock as assets in computing net capital.

In adopting any Commission rule or regulation, the Commission is required, pursuant to Section 15 of the Act,⁹ to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives, policies and purposes of the Act. Accordingly, the Commission specifically requests comments as to the possible competitive impacts of making or not making the distinction described above among categories of participants in the futures markets.

Customer-proprietary definitions. The proposed amendments to the financial regulations would not have amended the current definitions of "proprietary account" as defined in § 1.3(y) or "customer" as defined in § 1.3(k). Many commentators felt that the Commission's definition of "proprietary account" is overly broad for application to the minimum financial regulations and that within this context it should be narrowed to include only the firm, subsidiaries, affiliates and certain partner accounts. The Commission has carefully considered these com-

ments and has determined to retain its current definition of "customer", while at the same time narrowing the definition of "proprietary" as it is used in the minimum financial regulations to include only the firm and general partner's account.¹⁰ All those accounts which are neither "customer" nor "proprietary" including the accounts of parents, affiliates, stockholders, officers, limited partners, and employees currently included in the definition of "proprietary" (section 1.3(y)) would be considered "non-customer", and with one exception non-customers would be treated the same as customers in the minimum financial regulations. The one exception would be that less time would be allowed for these non-customers to meet margin calls before a firm must take a capital charge for an undermargined position.

Minimum requirements. The Commission's current regulations require adjusted working capital of \$10,000.¹¹ The prior proposal would have required adjusted net capital of \$25,000. Many commentators suggested that the minimum level should be much higher than that of the proposal (some as high as \$250,000), and a few of the commentators suggested that the minimum should be lower than the proposed level of \$25,000. The Commission has carefully considered each of these comments and has concluded that even though comprehensive computational criteria are provided in the minimum financial regulations, there are many unforeseen risks which cannot be measured properly in a capital rule. Therefore, the Commission proposes to increase the minimum adjusted net capital level required of an FCM to \$50,000 for a member of a designated self-regulatory organization and \$150,000 for an FCM which is not a member of a designated self-regulatory organization.

A discussion of certain of the comments received by the Commission in response to its four proposals and a section-by-section explanation of certain of the Commission's revisions to its proposal regulations is set forth below.

FINANCIAL REPORTING REQUIREMENTS

Two commentators stated that there is no reason to believe that an audit which accompanies an application for registration as an FCM can be completed within any shorter period than the time required to complete an annual examination; therefore, the commentators suggested that the time within which the certified financial statements that must accompany an application for registration should be consistent with the time allowed for the preparation of annual certified statements required to be filed by registrants, i.e., within sixty days of filing.¹² Another commentator recommended that when filing an FCM application, businesses which are already established be required to provide certified financial statements that are not more than 12 months old and more up-to-date unaudited financial statements. The Commission has taken these comments into consideration and amended proposed regulation 1.10(a)(2) to require an applicant for FCM registration to file with the application either (i) financial statements certified by an independent public accountant as of a date not more than 45 days prior to the date on which such report is filed; or (ii) unaudited financial statements as of a date not more than 45

⁸ Proposed regulation 1.17(c)(5)(xi), 42 FR 27175 (May 26, 1977).

⁹ 7 U.S.C. 19 (Supp. V, 1975).

¹⁰ The changes in the definition of proprietary apply only as the term is used in regulation 1.17. The segregation and recordkeeping regulations of the Commission will remain unchanged as a result of this proposal.

¹¹ 17 CFR 1.17.

¹² The Commission initially provided a 45-day period. Proposed Rule 1.10, 41 FR 45711 (October 15, 1976).

days prior to the date on which such report is filed and financial statements certified by an independent public accountant as of the date not more than one year prior to the date on which such report is filed.

The Commission's October 15, 1976, proposal would have required that Form 1-FR be filed on a quarterly basis. Currently such reports are required to be filed semi-annually by the Commission. A number of commentators expressed the view there was no general need for quarterly rather than semi-annual reports, citing the increased costs to FCM's of more frequent reporting. The Commission believes that it must have timely information to monitor effectively the financial responsibility of FCM's, whose business is affected by rapid fluctuations in the futures markets. Moreover, the information which would be required in the new Form 1-FR is essentially that which would ordinarily be prepared in the normal course of business to facilitate management of the firm. The Commission understands that much of this information is being prepared monthly by most firms, although perhaps in a less formal manner than that required on the Form 1-FR. The Commission notes in this regard that over 50 FCM's are registered as broker-dealers with the Securities and Exchange Commission and are accordingly required to file quarterly reports with that agency. In addition, the Chicago Mercantile Exchange requires quarterly financial reports from most of its members, and the CME members together with the broker-dealers, comprise approximately 40 percent of the FCM community which are already filing quarterly financial statements. Thus, while the Commission recognizes that quarterly reporting requirement may increase costs for some FCM's the Commission does not believe it should significantly increase the costs to the industry as a whole. Also, the more frequent reporting will facilitate the Commission's shift from direct regulation through FCM audits to indirect regulation through a review of reports submitted by the FCM's and their independent public accountants. The possible increase in costs for some FCM's, appears to be justified in light of the advantages from a regulatory standpoint of more frequent reporting.

However, the Commission is concerned with the possible impact of quarterly reporting on small FCM's and those FCM's whose brokerage business is incidental to their other business operations. The Commission specifically requests comments on the quarterly reporting concept, including supporting data on increased costs to FCM's and any rationale for distinguishing among FCM's on this matter.

Eleven commentators argued that the thirty day time period allowed for filing quarterly reports was too short, with eight of these commentators specifically suggesting changing the quarterly filing time to forty-five days. Seventeen commentators expressed the view that the proposed sixty day time limit in which to file certified annual reports was too short. In light of these comments and the fact that more frequent financial reporting will be required, the Commission is proposing to revise regulation 1.10 (b) by extending the time period for quarterly and annual certified reports to forty-five days and ninety days, respectively.

One commentator suggested that if a registrant is a member of more than one self-regulatory organization and the proposed designation system is implemented an FCM's financial statements should be furnished only to the self-regulatory organization which is designated to monitor the financial condition of the FCM. The commentator further contends that distribution of these statements to all self-regulatory organizations of which the FCM was a member would give rise to unnecessary expense to be borne by the FCM. The Commission agrees with this comment and has changed the proposed

regulations to require that the financial statements be submitted only to the designated self-regulatory organization, if any, and the Commission.

Under the current requirements, each Form 1-FR must contain a Statement of Financial Condition, a Statement of Capital Computation of the Minimum Capital Requirements Pursuant to Regulation 1.17, and a Schedule of Segregation Requirements and Funds on Deposit in Segregation. To these, the Commission proposed to add in the October 15, 1976 proposal, Statements of (i) Income (Loss), (ii) Changes in Financial Position (comparative Statements of Income (Loss), and Changes in Financial Positions for the corresponding period of the prior year), (iii) Changes in Ownership Equity, and (iv) Changes in Liabilities Subordinated to the Claims of General Creditors. Many commentators questioned the need for comparative financial statements and argued that the preparation and filing of such statements would entail needless costs to the FCM's. The Commission believes these comments have merit and has, therefore, eliminated the proposed requirement respecting comparative financial statements.

Other commentators asked the Commission to reconsider requiring most or all of the additional statements, especially in the quarterly reports, citing the additional expense and burdens to FCM's. The Commission has carefully considered these comments but believes, nonetheless, that the income statement provides information that is essential to enable the self-regulatory organizations and the Commission to evaluate the financial status of an FCM. Therefore, the Commission is retaining, subject to further comment, its proposal to require quarterly submission of an income statement to the Commission and Self-regulatory organizations. The Commission believes the Statements of Changes in Financial Condition, Changes in Ownership Equity, and Changes in Liabilities Subordinated to the Claims of General Creditors also provide important information but, based upon further consideration and in light of the comments received, has amended its previous proposal that these statements be required on a quarterly basis and is instead proposing to require that these statements be presented only in the annual certified statements submitted to the Commission and the self-regulatory organizations.

One commentator suggested that the oath or affirmation that is required of a corporation in accordance with section 1.10(d) (4) be only required to be signed by the chief executive officer or the chief financial officer, instead of both as was proposed. The Commission has determined that one signature is adequate.

Section 1.10(f) as previously proposed, stated "An application for extension of time will be deemed denied unless the Commission, within ten days after receipt of the application, notifies the applicant or registrant of the grant of an extension." Eighteen commentators indicated that the Commission should notify the applicant or registrant in writing whether the extension request has been granted or denied. One commentator stated "since the FCM is taking good faith steps to comply with the rules, it is incumbent upon the Commission to respond, whether affirmatively or negatively sometime prior to the required filing date". The Commission has changed proposed regulation 1.10(f) in response to these comments by requiring that the application for extension of time be received by the Commission fifteen days before the filing deadline for the report. The Commission will respond to an application within 10 days after it is received. Proposed regulation 1.16(f) deals with extensions of time for filing audited reports, and it contains language similar to proposed regulation 1.10(f). Since the com-

ments respecting proposed regulation 1.10 (f) would be equally applicable to § 1.16(f), it also has been amended to incorporate the changes made in § 1.10(f).

Several commentators argued that the Commission should give confidential treatment to Form 1-FR. The Commission believes, however, that proposed regulation 1.10 (g) is consistent with § 145.5(d) (1) (i) of the Commission regulations and the implementation of the Freedom of Information Act. Therefore, the Commission has not proposed that this paragraph be changed.

The previous proposals would have required that the annual certified Statement of Financial Condition, the Computation of Minimum Capital Requirements Pursuant to Section 1.17 and the opinion of the independent public accountant with appropriate footnote disclosures be sent to all of the registrant's customers with open contracts and credit balances. The Commission received approximately 20 comment letters which strongly opposed the sending of any financial information to customers. These commentators emphasized the right of FCM's to privacy. In view of the comments, the Commission now proposes to eliminate these requirements from its proposed financial regulations.

MAINTENANCE OF MINIMUM FINANCIAL REQUIREMENTS BY FCM'S

Several commentators felt that proposed regulation 1.12 would require continuous determination of adjusted net capital. These commentators believe that the early warning system should be triggered only when an FCM knows or should know that the trigger level is reached. The Commission never intended to require continuous determination of adjusted net capital; accordingly, the proposed regulation has been amended to make this clear.

One commentator questioned the requirement of paragraph (e) of proposed regulation 1.12, that "Reports to the Commission by a contract market of an FCM's failure to file a notice pursuant to § 1.12 should result solely from a contract market's normal surveillance." This commentator stated, "No additional burdens should be placed on the contract market by virtue of this new regulation." The Commission did not intend that this regulation impose additional burdens, and contract markets will be required to report only when they know or should have known of a violation of the early warning system.

QUALIFICATIONS AND REPORTS OF ACCOUNTANTS

Proposed regulation 1.16(b) (1) establishes the qualifications which accountants must meet to practice before the Commission. The Commission will recognize only certified public accountants who are duly registered and in good standing under the laws of their place of residence or principal office; and licensed public accountants who were duly licensed on or before December 31, 1970, and in good standing under the laws of their place of residence or principal office. The Commission received two comments on this paragraph. Both pointed out that the proposed regulations are in conformity with the position of the Comptroller General of the United States,¹³ and one commentator com-

mended the Commission on its forthright stand on the issue. The other commentator, however, objected to the Commission's adopting the Comptroller General's restriction as to which non-certified public accountants may be considered qualified for the purposes of practicing before the Commission. In view of the Comptroller General's stance, the Commission does not propose to amend its qualification standards.

Proposed regulation 1.16(b) (3) concerns

¹³ Report of the Comptroller General of the United States to Congress on Improvements Needed in Regulation of Commodity Futures Trading (June 24, 1975).

the independence standards which accountants must meet to practice before the Commission. One group of commentators in a combined letter stated their belief that it would be inappropriate for the exchanges to be required to oversee the independence of accountants, and stated that the rule requiring independence of accountants in the securities industry is enforced directly by the Securities and Exchange Commission. The Commission wishes to make it clear, in response to this comment, that its regulations will govern the independence of accountants in connection with the audits of FCM's and does not intend to delegate this responsibility to the self-regulatory organizations.

Several commentators recommended that independent auditors should be required to issue supplemental reports describing material weaknesses in internal controls found to have existed since the date of their previous examination instead of including such a report as part of the independent accountant's report on the financial statements. Based on these comments, the Commission is proposing a new section 1.16(c)(5) which would require an independent accountant to issue a separate report on material inadequacies. The Commission is eliminating the requirement that the independent accountant state in his report on the financial statements whether a review was made of the procedures followed for safeguarding customer and firm assets in accordance with the provisions of the Act and the regulations. Several commentators felt that the language in proposed regulation 1.16(d) concerning material inadequacies was too broad and requested that it be narrowed. The Commission has responded to these comments by adding language to § 1.16(d)(2)(iv) limiting violations of the Commission's segregation, recordkeeping, or financial reporting regulations required to be reported to those that could reasonably be expected to result in the conditions prescribed in paragraphs (d)(2)(i), (ii) and (iii) of proposed regulation 1.16.

Regulation 1.16(e) as originally proposed would have required that an auditor who determines, in the course of an audit, that any material inadequacies exist in the internal controls of the FCM, must call such inadequacies to the attention of the FCM who must then inform the Commission and the designated self-regulatory organization of the inadequacies within twenty-four hours. Several commentators feared that twenty-four hours would not be long enough for compliance with this requirement, and suggested that three business days would be more realistic. Proposed regulation 1.16(e) has been amended to allow three business days for notification.

MINIMUM FINANCIAL REQUIREMENTS

General. Several commentators suggested that broker-dealers who are already regulated by the SEC and who are also registered as FCM's should be exempt from the Commission's proposed minimum financial requirements. The Commission does not believe that it can grant such an exemption consistent with its responsibilities under the Commodity Exchange Act (the "Act"). By exempting this category of FCM's from its financial requirements the Commission believes that effective regulatory surveillance for financial responsibility would be precluded. In addition, should the Commission after granting such an exemption suspect that a firm is violating the SEC's requirements, it would be placed in the position of having to rely completely on that Agency to take the necessary action to insure that the firm was brought into compliance with its obligations under the Act, inasmuch as the Commission lacks the authority to enforce SEC regulations. The Commission believes that this situation could foster incongruous results which would be intolerable in light

of its own obligations under the Act. As was indicated in the FEDERAL REGISTER notice which accompanied the proposed amendments to section 1.17¹⁴ the Commission's staff and representatives of the SEC have initiated cooperative efforts in connection with their respective financial regulations. In part as a result of such efforts, the Commission is, for example, proposing several amendments to its regulations, including the incorporation by reference of the SEC's safety factors or "haircuts" on securities. In addition, the Commission recommends that the SEC amend its regulations to incorporate by reference the Commission's safety factors on futures. If this step is taken, it will provide the requisite uniformity to permit those FCM's which are also registered with the SEC as securities broker-dealers to comply with the Commission's financial reporting requirements by simply filing copies of the SEC's FOCUS Report¹⁵ with the self-regulatory organizations and the Commission.

Two commentators stated they favored the utilization of a working capital concept rather than a net capital concept for the minimum financial regulations. In determining compliance with the minimum financial regulations a working capital concept would not take long term debt into consideration. The Commission believes, as it has stated previously,¹⁶ that the working capital concept which allows an FCM to finance its business solely through the use of non-subordinated, long-term debt is a major shortcoming of the current financial regulations. The Commission believes that a futures commission merchant must have a permanent capital base for its operations. Any minimum financial regulation which permits an FCM to finance its operations as described above and thus actually be "insolvent" and still comply with those requirements is seriously deficient.

The Commission is aware of the concerns expressed within the industry that the subtraction of long-term debt from current assets in computing adjusted net capital would needlessly exclude a certain class of firms from registration as FCM's, to the detriment of the commodities futures industry. Such firms would be those whose primary business is other than the brokerage business and whose FCM business is merely incidental to their primary business activities. These firms typically make extensive use of long-term debt to finance their primary business activities, and many of their assets acquired through the use of long-term debt would not fall within the definition of "current assets" under proposed regulation 1.17. Therefore, such asset could not offset long-term debt in evaluating the financial status of such firms and this would make it impossible for them to comply with the Commission's proposed minimum financial requirements. The Commission does not believe these concerns are valid because proposed regulation 1.17 would permit an FCM to reduce its long-term liabilities in evaluating its financial status to the extent of the net book value of the plant, property and equipment which is used in the ordinary course of any trade or business for a reportable segment of the firm's business, other than in the commodity futures, commodity option, securities and securities option segments.

Two contract markets commented that it is important for a firm which is experiencing financial difficulties to be able to get any infusion of additional funds without restricting these additional funds to subordinating debt or equity capital. The Commis-

sion believes these comments have merit and is therefore adding language to proposed regulation 1.17 which would allow self-regulatory organizations and the Commission at their discretion, to temporarily suspend the subordination requirements of paragraph (h) of proposed regulation 1.17, and permit the substitution of long term debt for subordinated debt for up to 30 days. The temporary suspension of the requirements of proposed regulation 1.17(h) under proposed regulation 1.17(h)(4) may be granted with respect to a particular FCM only once during any twelve month period.¹⁷

Regulation 1.17(a)(4) as proposed required a registrant to comply with § 1.17 at all times and to be able to demonstrate such compliance to the satisfaction of the Commission and/or any self-regulatory organization of which the registrant is a member. A registrant which did not meet these requirements would immediately have to cease doing business (except trading for liquidating purposes only) as a futures commission merchant until such time as the registrant could demonstrate such compliance. Many commentators questioned the use of the phrase "at all times"; stating that this language would be impossible to comply with and requested clarification.

In part as a result of these comments, proposed paragraph 1.17(a)(4) has been revised and divided into two paragraphs, 1.17(a)(3) and 1.17(a)(4). Proposed regulation 1.17(a)(3) provides that no person applying for registration as a futures commission merchant shall be so registered unless such person affirmatively demonstrates to the satisfaction of the Commission that it complies with the financial requirements of this section 1.17. The paragraph further requires that each registrant be in compliance with proposed regulation 1.17 at all times and to be able to demonstrate such compliance to the satisfaction of the Commission and/or the designated self-regulatory organization at all times.

Proposed regulation 1.17(a)(4) requires a registrant which cannot demonstrate compliance with requirements of section 1.17 immediately to transfer all customer accounts and cease doing business (except transactions for liquidation purposes). However, if such registrant immediately demonstrates to the satisfaction of the Commission or the designated self-regulatory organization the ability to get into compliance, the Commission or the designated self-regulatory organization may allow the registrant up to 10 days in which to do so without having to transfer accounts and cease doing business. This paragraph is intended to provide a specific procedure in the event a registrant fails to comply with the requirement of proposed paragraph (a)(4), and is not intended to limit or preclude action by the Commission or the designated self-regulatory organization for violations of any of the provisions of section 1.17. Thus, for example, the Commission or the designated self-regulatory organization might deem it appropriate to take action against a registrant which has not been in compliance with the requirements of section 1.17 regardless of the fact that such registrant gets into compliance within 10 business days.

One commentator stated that the reference in the proposed regulations to Secu-

¹⁷ Paragraph (h) of proposed regulation 1.17 defines, in detail, satisfactory subordination agreements. The definition is the same as that employed by the SEC except for those FCM's electing to comply with the minimum capital requirements of proposed regulation 1.17(g), (for such FCM's certain specific provisions have been added which relate directly to the requirements to which they are subject) and the proposed amendment described above.

¹⁴ 42 FR 27168 (May 26, 1977).

¹⁵ Financial and Operational Combined Uniform Single Report Under the Securities Exchange Act of 1934.

¹⁶ 42 FR 27167 (May 26, 1977).

urities Exchange Act Rule 15c3-1¹⁸ (The SEC's "net capital rule") is inappropriate, because it would require an FCM, as a result of its securities transactions which do not necessitate registration with the SEC and which may, in fact, be inconsequential transactions vis-a-vis the FCM's total business, to be fully aware of every provision of the SEC's net capital rule. The Commission believes that its reference to the SEC's rule is necessary, because with respect to those matters which are peculiar to the securities industry the Commission should rely on the expertise of the SEC. Therefore, if the SEC's rule is relied upon without being incorporated by reference, each amendment of that rule would necessitate a corresponding amendment of the Commission's regulations and this would be an unnecessary duplication of effort. Moreover, FCM's which are not also registrants of the Securities and Exchange Commission will only have to be familiar with only those provisions of the SEC's net capital rule (eg, "haircut" regulation for securities) which apply to such FCM's.

Current assets. Regulation 1.17(c) (2)(i) as proposed would have excluded from current assets any unsecured commodity futures or option accounts containing a ledger balance and open trades, the combination of which liquidate to a deficit or containing a debit ledger balance. However, the proposed regulation would have permitted such deficits or debit ledger balances which are the subject of calls for margin or other required deposits which are outstanding five business days or less to be included in current assets. Several commentators felt that the financial regulation should allow customers more time to respond to margin calls. Other commentators suggested that no unsecured deficits or customer ledger balances should be included in current assets. These commentators argued that the existence of unsecured deficits or debit ledger balances of customers constituted unwarranted risks to the firm. The Commission agrees with this latter argument and is, therefore, proposing to allow deficits or debit ledger balances only to the extent that they are subject of current calls for margins or other required deposits which are outstanding one business day or less.

Commentators had two major concerns with the Commission's proposed treatment of unsecured trade accounts receivable: (i) the proposed regulation was so narrow that it would eliminate all receivables which are not related to the sale or trading of commodities or commodities futures; and (ii) the time allowed for collection of such receivables were too short. In part in response to these comments, the Commission has amended proposed regulation 1.17(c) (2) (ii) (A) to characterize as current assets receivables resulting from the marketing of all inventories commonly associated with the business activities of the FCM and has extended the time (to seventy-five days from the date they arise) allowed for such receivables to be outstanding and still be included in current assets.

The proposed regulation concerning insurance claims which are allowed as current assets in computing an FCM's capital, received criticism from commentators who are engaged in other business activities besides the brokerage business. These commentators felt that the regulation would not permit a commodity firm to take into account its insurance claims such as a claim based upon losses related to the destruction of a grain elevator. The Commission is therefore proposing regulation 1.17(c) (2) (ii) (E) to provide that insurance claims which arise from a reportable segment of the FCM's business activities, other than the brokerage business, and which are not more than seventy-five days old from the date they are recorded

as a receivable may be included in current assets.

Proposed § 1.17 would have excluded unrealized commissions from current assets and a number of commentators suggested that such commissions receivable are legitimate current assets. The Commission agrees; therefore, it has deleted the specific exclusion of unrealized commissions from current assets and proposes to allow the firms to include unrealized commissions as current assets to the extent that the account in respect of which such commissions are earned its properly margined.

Several commentators expressed concern that inventory items such as seeds, fertilizers, fuels and other farm supply products would be excluded as current assets under the proposed regulations. To make it clear that this was not the Commission's intention, a paragraph has been added to the proposed regulation which specifically allows inventories held for resale which are commonly associated with the business activity of the FCM to be included in current assets.

The disallowance of Board of Trade Clearing Corporation stock as an asset was criticized, since this stock can be used as margin. Commentators suggested that the disallowance of the Clearing Corporation's stock and other guarantee deposits at clearing corporations would put clearing members at a severe disadvantage vis-a-vis all other participants in the futures markets. In light of these comments and the Commission's decision to recognize the benefits of contract market membership, language has been added to the proposed regulation which specifically allows as current assets guarantee deposits with, and stock of, clearing organizations to the extent of their margin value.

Secured transactions. The previous proposal would not have amended the definitions of "secured" from the current regulations. One commentator pointed out that the Commission's definition of this term might have potentially devastating effect if applied to securities broker-dealers, because certain items which would not be considered secured under the definition could not be included in current assets. The commentator cited such items as securities which broker-dealers are failing to deliver; securities borrowed in order to effectuate delivery; and customer's bona fide cash positions containing open, unpaid purchases which have decreased in value. Paragraph (b) (1) of proposed regulation 1.17 states "where an asset or liability which is defined in Securities Exchange Act Rule 15c3-1 (17 CFR 240.15c3-1), the inclusion or exclusion of all or part of such assets or liabilities for the computation of adjusted net capital and aggregate indebtedness shall be in accordance with Securities and Exchange Commission rules, unless specifically stated otherwise in § 1.17". The intent of this provision is to treat transactions which relate solely to the securities industry the same under Commission regulations as such transactions would be treated under the SEC's rules. Since the examples described by the commentator relate to transactions which arise solely in the securities industry these items would not be excluded from current assets in computing net capital.

Another commentator questioned the applicability of the "secured" definition in view of the book entry system for U.S. Treasury bills. This comment led the Commission to amend its initial proposal (which required that the collateral which is used to secure the transaction be in the possession and control of the FCM) to require that the collateral be in the possession or control of the FCM. Control for the purposes of this section would include U.S. Treasury bills on a book entry system and other securities pledged to secure a loan which are in the possession of the party making such a loan.

Liabilities. The regulation as previously

proposed would have excluded from liabilities in computing net capital, liabilities classified as long-term in accordance with generally accepted accounting principles to the extent of the net book value of plant, property, and equipment which is used in the processing, manufacture, storage or shipment of commodities, their products and by-products in a reportable segment of the applicant's or registrant's overall business activities, other than in the brokerage business. Several commentators suggested that the proposed language be broadened to allow long-term debt to be excluded from liabilities in computing net capital to the extent of the net book value of plant, property, and equipment which is used in any trade or business which is a reportable segment of the FCM's overall business activities other than the brokerage business. The Commission believes that this comment has merit and has amended its proposal accordingly.

Safety factors: Several commentators pointed out that the proposed five percent deduction on unsecured trade accounts receivable does not take into account any reserves established for uncollectable receivables. In view of this comment and the fact that the Commission is proposing to allow such receivables to be included as current assets for no longer than seventy-five days from the date that they arise, the Commission has decided to eliminate the five percent charge on these receivables.

Proposed regulation 1.17(c) (5) (ii) has been renumbered as paragraph (c) (5) (i), and the proposed ten percent charge on advances has, in view of the position taken by many commentators that a 10% "haircut" on such advances is inordinately high, been reduced to 5%.

Many commentators criticized the Commission's proposed capital charges on inventories, fixed price contracts, and forward contracts as being inordinately large in relation to the risks assumed. Two commentators suggested that the charges on these positions be based on the net "at risk" cash position. These commentators suggested that the Commission require all cash positions to be marked to their market value and require the safety factor to be based upon the net "at risk" position. The Commission believes that these comments have merit and is accordingly proposing to base the capital charges on all inventory, fixed price commitments and forward contracts upon the net position of the FCM. In addition, the Commission has changed the percentage charges which are applicable to these positions to conform with this new approach.

One commentator suggested that regulation 1.17(c) (5) (v) would permit non-broker-dealer/FCM's to use reduced capital charges applicable to security positions. Security positions of broker-dealers who elect to calculate their adjusted net capital pursuant to SEC Rule 15c3-1(f) are subject to reduced charges under that rule. However, the provisions of that rule have the effect of increasing certain deposit requirements for those broker-dealers. The commentator suggested that non-broker-dealers/FCM's are not subject to the increased deposit requirements and accordingly should not be permitted to take advantage of the reduced capital charges provided in the SEC's regulations. The proposed regulations would permit only securities brokers and dealers to utilize the reduced charges.

As previously discussed in this FEDERAL REGISTER release, the Commission is amending its proposal with respect to safety factors on commodity futures accounts and grantor commodity option accounts. The proposed safety factors, as revised, would be for customer and non-customer positions, based upon the amount by which any account is under-margined (after a specific number of days which would be allowed for collection) and for proprietary positions based upon a

¹⁸ 17 CFR 240.15c3-1.

multiple of the contract market margin requirements. The proposed regulations require a capital charge for undermargined customer commodity futures accounts and grantor commodity options accounts to the extent of the total amount of cash required in each such account to meet the maintenance margin requirements of the board of trade on which the contract that is the subject of the margin requirement is traded, after application of calls for margin, or other required deposits, which are outstanding five business days or less until December 31, 1979, four business days or less until December 31, 1980, and three business days or less thereafter. For under-margined, non-customer and omnibus commodity futures and grantor commodity option accounts, the safety factor would be the amount of cash required in each such account to meet the maintenance margin requirements of the applicable board of trade on which the contract that is the subject of the margin is traded after application of calls for margin or other required deposits which are outstanding two business days or less.

The safety factors on open futures contracts and grantor commodity options held in proprietary accounts carried by the FCM which are not covered (as defined in regulation 1.17(j)) by a position held by the FCM or which are not the result of a "changer trade," shall be: (i) for the positions cleared by a clearing member of an exchange, the margin requirement of the clearing organization; (ii) for an FCM which is a member of any contract market or domestic commodity option exchange 150% of the greater of the maintenance margin requirement of the applicable board of trade or clearing organization; and (iii) for those FCM's who are not members of any contract market or domestic commodity option exchange 200% of the applicable maintenance margin requirement of the applicable board of trade or clearing organization whichever is greater.

Except for the charges respecting undermargined accounts described above, the Commission has deleted from the proposed financial regulations, the safety factors on customer open futures contracts and grantor commodity options.

The proposed regulations require an FCM who is the "taker" of a commodity option to charge the premium to expense and who is the "grantor" of a commodity option to recognize the premium as income in computing adjusted net capital. In addition, there would be a safety factor on commodity options carried long by the FCM which would be the same safety factor required if the FCM were a grantor of a commodity option, but the charge would not exceed the value attributed to such option by the FCM in computing its current assets.

Aggregated Indebtedness. Several commentators criticized the proposed definitions of "aggregate indebtedness" in the proposed regulations, because under its terms an FCM which obtains a loan secured by documents which are eligible for delivery to finance delivery of spot commodities would have been required to include that loan in its aggregate indebtedness if such loan were obtained on behalf of a customer. These commentators stated that when a customer's position is fully hedged, it is virtually certain that the receivable from the customer will be collected, and that the risks assumed by the FCM in these situations are so small that the regulation should not be drafted to require that the loans in respect of such positions be included in aggregate indebtedness. The Commission believes these comments have merit and is proposing regulation 1.17(c)(6)(ii) which excludes from aggregate indebtedness, indebtedness arising in connection with advances to non-proprietary accounts when such indebtedness is adequately collateralized by spot commodities eligible for delivery on a contract market and when such spot commodities are fully hedged.

One commentator stated that the exclusions from aggregate indebtedness should not be limited to the credit balances in the accounts of general partners but should include all equities in accounts of general partners. It was not the intention of the Commission to limit the exclusion to cash credit balances, and the Commission has, therefore changed the wording of the proposed regulations to make this clear.

Withdrawal of equity capital. Proposed regulation 1.17(e) prohibits certain withdrawals of equity capital, advances, or loans to certain associated persons if, after giving effect to such withdrawals, advances, or loans and to certain debt payments payable during the following six months, adjusted net capital of the FCM would fall below certain minimum requirements. This provision would apply regardless of whether the FCM is currently obligated to permit such withdrawals, advances, or loans. One commentator stated that an exemption from such commitments to take account of current contractual obligations should be incorporated into the regulation, because he believed that if the proposed regulation were adopted, it would affect the ability of FCM's to meet current contractual obligations. The commentator further stated that if the withdrawals, advances, or loans cause an FCM's adjusted net capital to fall below the minimum required levels, all the other provisions in the rule, including the early warning system under proposed regulation 1.12, will remain applicable. The Commission does not believe such situations as the commentator describes will result from the new regulations, but to assure that these and other situations are dealt with effectively, the Commission has added specific language to paragraph (e) of proposed regulation 1.17 which states the Commission may grant relief from this paragraph if the Commission deems such relief to be in the public interest or for the protection of nonproprietary accounts.

Alternative capital requirement. The Commission proposed an alternative to its minimum financial requirement. Specifically the alternative requires a futures commission merchant to maintain adjusted net capital equal to or in excess of the greater of \$150,000 (\$50,000 for a member of a designated self-regulatory organization) or 4 percent of the funds required to be segregated pursuant to the Act and the regulations thereunder plus, for FCM's which are also securities brokers or dealers, 4 percent of aggregate debit items computed in accordance with the formula for determination of reserve requirements contained in the SEC's Rule 15c-3a (17 CFR 240.15c3-3a).¹⁹

Several FCM/broker-dealers objected to the proposed addition to their net capital requirements. The Commission believes the SEC's alternative capital requirement does not provide adequate protection for commodity customers of FCM/broker-dealers, especially those whose commodities business is large compared to their securities business. Therefore, the Commission has decided not to change the requirements set forth above. The Commission believes that this proposed alternative requirement would provide adequate protection for the commodity customers of an FCM because of its interrelationship with the FCM's segregation requirements. Several other commentators agreed with the Commission's proposed approach.

¹⁹ Rule 15c3-3a currently provides that a broker-dealer which has elected to operate pursuant to that agency's alternative minimum net capital requirement must maintain adjusted net capital equal to, or in excess of \$100,000 or 4 percent of aggregate debit items computed in accordance with the formula for determination of reserve requirements for brokers and dealers (Exhibit A to SEC Rule 15c3-3a, 17 CFR 240.15c3-3a).

COVER

The Commission amended § 1.3(z) of its regulations effective October 1, 1977. (42 FR 72748). The amendment generally broadened the scope of the definition of bona fide hedging transactions or positions to include current commercial risk-shifting practices in the markets regulated by the Commission. The intended effect of the amendment is to increase commercial utilization of the futures markets for the purposes of hedging by allowing additional exemptions from the Commission's limits on positions and daily trading, and by recognizing a broader range of risk-shifting uses of those markets.

On August 19, 1977, the Commission proposed an amendment to § 1.17 pertaining to minimum financial requirements.²⁰ This amendment would have changed § 1.17, which currently refers to the definition of bona fide hedging, so that it would include only those provisions of the revised bona fide hedging definition which are substantially the same as those in the previous definition.²¹ The purpose and effect of the proposed amendment was to correct an unintentional change in the minimum financial requirements which was brought about by the adoption of the new definition of bona fide hedging.

The proposed amendment to § 1.17 was to become effective on October 1, 1977, simultaneously with the revision of the bona fide hedging definition. In proposing the amendment to § 1.17, the Commission stated that it was necessary that the effective dates of the two amendments coincide in order to avoid "ambiguity or uncertainty in the method by which futures commission merchants are to continue to comply with § 1.17 * * *." However, as a result of the comments which the Commission received and of its own review of the interrelationship between minimum financial requirements and the definition of bona fide hedging, the Commission determined not to adopt the proposed amendment to § 1.17, pending further consideration of the related issues.

The Commission now believes it necessary to develop a separate hedging definition which will be termed "cover", to govern the treatment of risk-shifting devices under the Commission's minimum financial requirements.

The Commission's minimum financial requirements are for the protection of commodity futures and commodity option customer funds and the integrity of the marketplace, and it follows that a central consideration with respect to the appropriate treatment of a proprietary transaction or position is whether the transaction or position operates immediately and continuously to shift risks incidental to commercial operations. Therefore, the Commission believes that conceptually, the definition of cover should not substantially differ from that of bona fide hedging. However, in re-examining the interrelationship between the minimum financial requirements and the bona fide hedging definition, the Commission has identified several difficulties which necessarily would have resulted from a reference to the bona fide hedging definition in the minimum financial requirements, and which the Commission believes are resolved by the development of an alternative concept.

First, the bona fide hedging definition is primarily intended to exempt certain futures transactions from the Commission's speculative limits. As a result, the definition is limited in application to "transactions or positions in a contract for future delivery on [a] contract market," and it principally deals with the classification of those transactions or positions in markets where the Commission has speculative limits. Thus, risk-shifting devices not involving such lim-

²⁰ 42 FR 42767 (August 24, 1977).

²¹ *Id.*

its may be excluded from the definition regardless of their characteristics relative to the minimum financial requirements.

Second, the definition of bona fide hedging is not designed to, and does not, take into account the risk of capital impairment which a particular transaction or position might entail. For example, transactions which are risk-shifting in character may be considered bona fide hedging even though they are entered into for the purposes of offsetting fluctuations in the value of assets which are not owned and identified at the time of entering the transactions. In such cases, adverse market movements may seriously jeopardize capital during the interval between the execution of the risk-shifting transactions and the acquisition of the asset they are to hedge. Inasmuch as the purpose of minimum financial requirements is the protection of commodity futures and commodity option customers, such risks cannot be ignored in determining the treatment that a particular transaction should receive for the purposes of the minimum financial requirements.

Finally, the bona fide hedging definition includes many provisions which relate to the maintenance of orderly markets and which should have no effect on the treatment of a transaction of position under the minimum financial requirements.

Accordingly, the Commission believes that the definition of "cover" should take into account transactions or positions whose purpose and effect are the immediate and continuous shifting of risks incidental to commercial operations and which do not entail a significant risk of capital impairment, regardless of whether the transactions involve the purchase or sale of a futures contract.

Therefore, the Commission is proposing a definition of "cover" which: (i) Includes all contracts for future delivery and commodity options, (ii) excludes anticipatory hedging; and (iii) eliminates the provisions of the bona fide hedging definition which relate solely to the maintenance of orderly markets. In addition, the Commission will consider whether transactions and positions other than those enumerated in paragraph (j) (2) of proposed regulation 1.17 are within its definition of cover, upon specific request. These transactions or positions must at a minimum meet the general definition contained in paragraph (j) (1) of proposed regulation 1.17.

MONTHLY COMPUTATIONS OF ADJUSTED NET CAPITAL

As previously proposed, regulation 1.18 required formal computations of adjusted net capital as of the close of business each month. Such computations would have been required to be completed within ten business days. Sixteen commentators questioned the need for monthly computations and the majority of these writers and another twelve commentators objected to the ten day time frame within which the computation would be required to be completed. Since the Commission believes it is imperative that an early warning system be established in the commodities futures industry and it further believes that the monthly computations provide the basis for the early warning system proposed in § 1.12, the Commission does not propose to amend the monthly requirement. The Commission, in response to the comments, proposes to extend to thirty days the time within which the computation would be required to be completed.

THE REQUIREMENT OF SELF-REGULATORY OVERSIGHT

Regulation 1.52 requires that all self-regulatory organizations adopt minimum financial requirements with uniform computational criteria and permits the delegation of responsibility for monitoring the financial status of FCM's to a single self-regulatory organization. Two commentators questioned

the Commission's legal authority to compel self-regulatory organizations to adopt minimum financial and related reporting requirements for FCM's. However, the Commission believes its authority is clear, pursuant to sections 4c, 4f, 4g, 5a, 8a, and 17 of the Act²² to require self-regulatory organizations to adopt specific minimum financial regulations and further believes that this requirement is in keeping with the self-regulatory concept which is plainly envisioned by the Act.

One contract market stated that additional time would be needed for the industry and the exchanges to hire and train the necessary personnel to insure compliance with the new financial regulations. This commentator stated that it would be extremely difficult, if not impossible, on short notice to hire and train the necessary personnel. Another commentator felt strongly the exchanges should not be required to adopt and enforce any financial requirements until the feasibility and legal status of the National Futures Association is determined or until a new joint compliance program can be implemented for the exchanges. The Commission believes sufficient notice has been given to the self-regulatory organizations to hire, and train adequate personnel to cope with these new regulations. In the October 15, 1976 FEDERAL REGISTER release announcing the proposed revisions of financial reporting requirements for FCM's the Commission stated that:

"[I]t is Commission policy to encourage contract market self-regulation. In this regard, the Commission anticipates requiring all contract markets to adopt and to enforce uniform minimum financial and related reporting requirements. Such requirements will be subject to the same active oversight regulation as the other rule enforcement programs of the contract markets. However, because of the common interest of the contract markets in the financial integrity of their member FCM's and because of the uniform applicability of the minimum financial and related reporting requirements envisioned by the Commission, it may be advantageous for contract markets to engage in a joint enforcement or audit program to monitor compliance with such uniform minimum financial and related reporting requirements. Such a joint program or an alternative program through a National Futures Association, as provided for in Title III of the Commodity Futures Trading Commission Act of 1974, 7 U.S.C. 21, could meet the anticipated Commission requirements. 41 FR 45706."

This language was repeated in the FEDERAL REGISTER release which proposed regulation 1.52 42 FR 39036. The Commission stated further in that FEDERAL REGISTER release that "it is the responsibility of the contract markets, as quasi-public institutions, to insure the financial integrity of their member FCM's thereby insuring the integrity of the marketplace itself, as well as protecting the funds of customers who use that marketplace. This belief is in keeping with the self-regulatory responsibility of the commodity futures industry envisioned by the Commodity Exchange Act, as amended 7 U.S.C. 1-22 (Supp. V. 1975)." The Commission therefore, believes that the industry has been given ample notice of its intention to adopt the proposed financial regulations and that the self-regulatory organizations' auditing programs should be fully implemented no later than December 25, 1978.

The previously proposed regulations permitted the self-regulatory organizations to develop their own plans for the delegation of oversight responsibilities for FCM's which are members of more than one self-regulatory organization to a single contract market or other self-regulatory organization. The Commission believes that this approach will reduce the costs to the self-regulatory orga-

nizations and avoid unnecessary burdens upon FCM's and that these factors provide significant incentive for the self-regulatory organizations to reach an agreement on plans for delegation of oversight responsibility. Some commentators believe that it is essential to eliminate the undue burden of multiple self-regulatory organizations monitoring of the same FCM and believe the only way to guarantee such elimination is for the Commission to make the required delegation in the event that the self-regulatory organizations do not do so within a specified time period. In view of this comment and the comments of the previous paragraphs, the Commission is amending proposed regulation 1.52 by adding paragraph (k) which would give the Commission authority, after a reasonable amount of time has elapsed, to make such a delegation if the self-regulatory organizations do not.

In consideration of the foregoing, the Commission hereby proposes to amend 17 CFR Part 1 as follows:

1. By amending § 1.3 to include new paragraphs (ee) and (ff) to read as follows:

§ 1.3 Definitions.

(e) "Self-regulatory organization." This term means a contract market (as defined in § 1.3(h)), a domestic commodity option exchange (as defined in § 32.1), or a registered futures association under section 17 of the Act.

(ff) "Designated self-regulatory organization." This term means a self-regulatory organization of which a futures commission merchant is a member or, if the futures commission merchant is a member of more than one self-regulatory organization and such futures commission merchant is the subject of an approved plan under § 1.52, then a self-regulatory organization delegated the responsibility by such a plan for monitoring and auditing such futures commission merchant for compliance with the minimum financial and related reporting requirements of the self-regulatory organizations of which the futures commission merchant is a member, and for receiving the financial reports necessitated by such minimum financial and related reporting requirements from such futures commission merchant.

2. By revising § 1.10 to read as follows:

§ 1.10 Application for registration and financial reports of Futures Commission Merchants.

(a) Application for registration. (1) Application for registration as a futures commission merchant shall be filed on Form 7-R in accordance with the instructions contained therein. The initial application for registration shall be accompanied by a Form 8-R executed and filed by each sole proprietor and by each natural person who is a general partner, officer, director, or branch office manager of the applicant, or performs similar functions, or is any other controlling person of the applicant; except that an accompanying Form 8-R need not be filed by any individual who is registered as a floor broker or an associated person or has applied for registration as a floor broker or an associated person and such application has not been withdrawn or denied. Any natural person (other than a floor broker or associated person) who subsequently becomes a general partner, officer, director or branch office manager of the registrant or performs similar functions, or becomes any other controlling person of the registrant, shall promptly execute and file a Form 8-R. Each Form 8-R shall be filed in accordance with the instructions contained therein. Individuals who were previously required to submit biographical information on Form 94 or who have filed a Form 8-R as required by this section shall file a current Form 8-R, upon request by the Commission.

²² 7 U.S.C. 6c, 6f, 6g, 7a, 12a and 21.

(2) Except as provided in paragraph (a) (3) of this section, each person who files an application for registration as a futures commission merchant, and who is not so registered at the time of filing, must, concurrently with the filing of such application file either: (i) A Form 1-FR certified by an independent public accountant in accordance with § 1.16 as of a date not more than 45 days prior to the date on which such report is filed; or, (ii) a Form 1-FR as of a date not more than 45 days prior to the date in which such report is filed and a Form 1-FR certified by an independent public accountant in accordance with § 1.16 as of a date not more than one year prior to the date on which such report is filed. Each such person must include with such financial report a statement describing the source of his current assets and representing that his capital has been contributed for the purpose of operating his business and will continue to be used for such purpose.

(3) The provisions of paragraph (a) (2) of this section do not apply to any person succeeding to and continuing the business of another futures commission merchant. Each such person who files an application for registration as a futures commission merchant who is not so registered at the time of such filing must file a Form 1-FR as of the first month-end following the date on which his registration is approved. Such report must be filed with the Commission and the designated self-regulatory organization, if any, not more than 45 days after the date for which the report is made.

(b) *Filing of financial reports.* (1) Except as provided in paragraph (b) (3) of this section, each person registered as a futures commission merchant must file a Form 1-FR for each fiscal quarter of each fiscal year unless the registrant elects pursuant to paragraph (e) (2) of this section to file a Form 1-FR for each calendar quarter of each calendar year. Each Form 1-FR must be filed no later than 45 days after the date for which the report is made: *Provided, however,* That any Form 1-FR which must be certified by an independent public accountant pursuant to paragraph (b) (2) of this section must be filed no later than 90 days after the close of each registrant's fiscal year. This paragraph (b) (1) will be applicable to all fiscal quarters beginning after (the effective date of this section) but in no event more than 90 days after (such effective date).

(2) The Form 1-FR filed pursuant to paragraph (b) (1) of this section as of the close of the registrant's fiscal year must be certified by an independent public accountant in accordance with § 1.16. A registrant who has elected to file its Forms 1-FR for each calendar quarter of each calendar year pursuant to paragraph (e) (2) of this section, must nonetheless file a Form 1-FR as of the close of such registrant's fiscal year.

(3) The provisions of paragraphs (b) (1) and (b) (2) of this section shall not apply to any person registered as a futures commission merchant who is a member of a designated self-regulatory organization and conforms to minimum financial standards and related reporting requirements set by such designated self-regulatory organization in its bylaws, rules, regulations or resolutions and approved after (the effective date of these regulations) by the Commission pursuant to section 4f(2) of the Act: *Provided, however,* That each such registrant shall promptly file with the Commission a true and exact copy of each financial report which it files with such designated self-regulatory organization.

(4) Upon receiving written notice from any representative of the Commission or any self-regulatory organization of which it is a member, an applicant or registrant must, monthly or at such times as specified, furnish the Commission and the self-regulatory orga-

nization, if any, requesting such information with a Form 1-FR and/or such other financial information as requested by the representative of the Commission or the self-regulatory organization. Each such Form 1-FR or such other information must be furnished within the time period specified in the written notice.

(c) *Where to file reports.* The reports provided for in this § 1.10 will be considered filed when received by the regional office of the Commission where the applicant or registrant has its principal place of business and by the designated self-regulatory organization, if any; *Provided, however,* That information required of an applicant or registrant pursuant to paragraph (b) (4) of this section need be furnished only to the Commission and the self-regulatory organization requesting such information.

(d) *Contents of financial reports.* (1) Each Form 1-FR filed pursuant to this § 1.10 which is not required to be certified by an independent public accountant must be completed in accordance with the instructions to the form and contain: (i) a Statement of Financial Condition as of the date for which the report is made; (ii) a Statement of Income (Loss) for the period between the date of the most recent Statement of Financial Condition filed with the Commission (or the beginning of the fiscal quarter immediately following the effective date of this rule) but in no event more than 90 days after (such effective date) and the date for which the report is made; (iii) a Statement of the Computation of the Minimum Capital Requirements Pursuant to § 1.17 and a Schedule of Segregation Requirements and Funds on Deposit in Segregation, as of the date for which the report is made; and (iv) in addition to the information expressly required, such further material information as may be necessary to make the required statements and schedules not misleading.

(2) Each Form 1-FR filed pursuant to this § 1.10 which is required to be certified by an independent public accountant must be completed in accordance with the instructions to the form and contain: (i) a State of Financial Condition as of the date for which the report is made; (ii) Statements of Income (Loss), Changes in Financial Position, Changes in Ownership Equity, and Changes in Liabilities Subordinated to Claims of General Creditors, for the period between the date of the most recent certified Statement of Financial Condition filed with the Commission (or the beginning of the fiscal quarter immediately following (the effective date of this rule) but in no event more than 90 days after (such effective date) and the date for which the report is made, *Provided,* That for an applicant filing pursuant to paragraph (a) (2) of this section the period must be the year ending as of the date of the Statement of Financial Condition; (iii) a Statement of the Computation of the Minimum Capital Requirements Pursuant to § 1.17 and a Schedule of Segregation Requirements and Funds on Deposit in Segregation, as of the date for which the report is made; (iv) appropriate footnote disclosures; and (v) in addition to the information expressly required, such further material information as may be necessary to make the required statements not misleading.

(3) The statements required by paragraphs (d) (2) (i) and (d) (2) (ii) of this section may be presented in accordance with generally accepted accounting principles in the certified reports filed as of the close of the registrant's fiscal year pursuant to paragraph (b) (2) of this section or accompanying the application for registration pursuant to paragraph (a) (2) of this section, rather than in the format specifically prescribed by these regulations: *Provided,* The Statement of Financial Condition is presented in a format as consistent as possible with the Form 1-FR and a reconciliation is provided reconciling

such Statement of Financial Condition to the Statement of the Computation of the Minimum Capital Requirements Pursuant to § 1.17. Such reconciliation must be certified by an independent public accountant in accordance with § 1.16.

(4) Attached to each form 1-FR filed pursuant to this § 1.10 must be an oath or affirmation that to the best knowledge and belief of the individual making such oath or affirmation the information contained in the Form 1-FR is true and correct. If the applicant or registrant is a sole proprietorship, then the oath or affirmation must be made by the proprietor; if a partnership, by a general partner; or if a corporation, by the chief executive officer or chief financial officer.

(e) *Election of fiscal year* (1) Any applicant or registrant wishing to establish a fiscal year other than the calendar year may do so by notifying the Commission and the designated self-regulatory organization, if any, of its election of such fiscal year in writing concurrently with the filing of the Form 1-FR pursuant to paragraph (a) (2) of this section or within 90 days of (the effective date of this section), but in no event may such fiscal year end more than one year from the date of the Form 1-FR filed pursuant to paragraph (a) (2) of this section or more than one year from (the effective date of this regulation). An applicant or registrant which does not so notify the Commission and the designated self-regulatory organization, if any, will be deemed to have elected the calendar year as its fiscal year. A registrant must continue to use its elected fiscal year, calendar or otherwise, unless a change in such fiscal year is approved upon written application to the principal office of the Commission in Washington, D.C., and written notice of such change is given to the designated self-regulatory organization, if any.

(2) Any applicant or registrant may elect to file its Form 1-FR for each calendar quarter in lieu of each fiscal quarter by notifying the Commission and the designated self-regulatory organization, if any, of its election, in writing, concurrently with the filing of the Form 1-FR pursuant to paragraph (a) (2) of this section or within 90 days after (the effective date of this section). Any registrant wishing to change such election or to make such election other than concurrently with the filing of the Form 1-FR pursuant to paragraph (a) (2) of this section or within 90 days of (the effective date of this section) may do so only if such change or election is approved by the Commission upon written application to the principal office of the Commission in Washington, D.C., and written notice of such change is given to the designated self-regulatory organization, if any.

(f) *Extension of time form filing reports.* In the event any applicant or registrant finds that it cannot file its report for any period within the time specified in paragraphs (b) (1), or (b) (4) of this section or paragraph (b) of § 1.12 without substantial undue hardship, it may file with the principal office of the Commission in Washington, D.C., an application for an extension of time to a specified date which may not be more than 90 days after the date as of which the financial statements were to have been filed. The application must state the reasons for the requested extension and must contain an agreement to file the report on or before the specified date. The application must be received by the Commission fifteen days before the time specified in paragraphs (b) (1), or (b) (4) of this section or paragraph (b) of § 1.12 for filing the report. Notice of such application must be given to the designated self-regulatory organization, if any, concurrently with the filing of such application with the Commission. An application for extension of time will be responded to by the Commission, within ten days after receipt of the application. (See § 116(f) for exten-

sion of the time for filing certified financial statements.)

(g) *Confidentiality of reports.* All of the Forms 1-FR filed pursuant to this section will be public; provided, however, that if the Statement of Financial Condition, the Computation of the Minimum Capital Requirements Pursuant to § 1.17, and the Schedule of Segregation Requirements and Funds on Deposit in Segregation are bound separately from the other financial statements, footnotes disclosures and schedules of Form 1-FR, trade secrets and certain other commercial or financial information on such other statements and schedules will be deemed privileged or confidential. All information on such other statements and schedules will, however, be available for official use by any official or employee of the United States or any state, by any self-regulatory organization of which the person filing such report is a member, and by any other person to whom the Commission believes disclosure of such information is in the public interest. Nothing in this paragraph (g) will limit the authority of any self-regulatory organization to request or receive any information relative to its members' financial condition. The independent accountant's opinion filed pursuant to this § 1.10 will be deemed public information.

3. By adopting a new § 1.12 to read as follows:

§ 1.12 Maintenance of minimum financial requirements by futures commission merchants.

(a) Each person registered as a futures commission merchant, or who files an application for registration as a futures commission merchant, who knows or should have known that its adjusted net capital at any time is less than the minimum required by § 1.17 or by the capital rule of any self-regulatory organization to which such person is subject, if any, must:

(1) Give telegraphic notice as set forth in paragraph (f) of this section that such applicant's or registrant's adjusted net capital is less than is required by section 1.17 or by such other capital rule, identifying the applicable capital rule. This notice must be given within 24 hours after such applicant or registrant knows or should have known that its adjusted net capital is less than required by any of the aforesaid rules to which such applicant or registrant is subject; and

(2) Within 24 hours after giving such notice file a Statement of Financial Condition, a Statement of the Computation of the Minimum Capital Requirements Pursuant to § 1.17 (computed in accordance with the applicable capital rules), and a Schedule of Segregation Requirements and Funds on Deposit in Segregation, all as of the date such violation occurs.

(b) Each person registered as a futures commission merchant, or who files an application for registration as a futures commission merchant, who knows or should have known that its adjusted net capital at any time is less than (i) the greater of 120 percent of the appropriate minimum dollar amount required by § 1.17 or 8½ percent of aggregate indebtedness or (ii) if the applicant or registrant is operating pursuant to § 1.17(g), the greater of 120 percent of the appropriate minimum dollar amount required by § 1.17(g) or 6 percent of the funds required to be segregated pursuant to section 4(d)(2) of the Act and these regulations, plus, for securities brokers or dealers, 6 percent of aggregate debit items computed in accordance with the Formula for Determination of Reserve Requirements (§ 240.15c3-3a of this title); such applicant or registrant must file written notice to that effect as set forth in paragraph (f) of this section within five (5) business days of such event. Such applicant or registrant must also file a Form 1-FR or such other financial statement

designated by the Commission and/or the designated self-regulatory organization, if any, as of the close of business for the month during which such event takes place and as of the close of business for each month thereafter until three (3) successive months have elapsed during which the applicant's or registrant's adjusted net capital is at all times equal to or in excess of the minimums set forth in this paragraph (b) which are applicable to such applicant or registrant. Each financial statement required by this paragraph (b) must be filed within 30 calendar days after the end of the month for which such report is being made.

(c) If an applicant or registrant at any time fails to make or keep current the books and records required by these regulations, such applicant or registrant must, on the same day such event occurs, give telegraphic notice of such fact, specifying the books and records which have not been made or which are not current, and within 5 business days after giving such notice file a written report stating what steps have been made and are being taken to correct the situation.

(d) Whenever any applicant or registrant discovers or is notified by an independent public accountant, pursuant to § 1.16(e)(2) of these regulations, of the existence of any material inadequacy, as specified in § 1.16(d)(2) of these regulations, such applicant or registrant must give telegraphic notice of such material inadequacy within three business days, and within five business days after giving such notice file a written report stating what steps have been and are being taken to correct the material inadequacy.

(e) Whenever any self-regulatory organization learns that a member registrant has failed to file a notice or written report as required by this § 1.12, such self-regulatory organization must immediately report such failure as provided in paragraph (f) of this section.

(f) Every notice and written report required to be given or filed by this section must be filed with the regional office of the Commission for the region in which the applicant or registrant has its principal place of business, with the designated self-regulatory organization, if any, and with the Securities and Exchange Commission, if such applicant or registrant is a securities broker or dealer. In addition, every notice required to be given by this section must also be filed with the principal office of the Commission in Washington, D.C. Each Statement of Financial Condition, each Statement of the Computation of the Minimal Capital Requirements Pursuant to § 1.17, and each Schedule of Segregation Requirements and Funds on Deposit in Segregation required by this section must be filed in accordance with the provisions of § 1.10(d) of these regulations, unless otherwise indicated.

4. By adding a new § 1.16 as follows:

§ 1.16 Qualifications and reports of accountants.

(a) *Definitions.*—(1) *Accountant's report.* The term "accountant's report," when used in regard to financial statements, means a document in which an independent licensed or certified public accountant indicates the scope of the audit (or examination) which he has made and sets forth his opinion regarding the financial statements taken as a whole or an assertion to the fact that an overall opinion cannot be expressed. When an overall opinion cannot be expressed, the reasons therefore must be stated.

(2) *Audit or Examination.* The terms "audit" and "examination," when used in regard to financial statements, mean an examination of the statements by an accountant in accordance with generally accepted auditing standards for the purposes of expressing an opinion thereon.

(3) *Certified.* The term "certified," when used in regard to financial statements, means audited and reported upon with an opinion

expressed by an independent certified public accountant or independent licensed public accountant.

(b) *Qualifications of accounts.* (1) The Commission will recognize any person as a certified public accountant who is duly registered and in good standing as such under the laws of the place of his residence or principal office. The Commission will recognize any person as a licensed public accountant who was duly licensed on or before December 31, 1970, and is in good standing as such under the laws of the place of his residence or principal office.

(2) The Commission will not recognize any certified public accountant or licensed public accountant as independent who is not in fact independent. For example, an accountant will not be considered independent with respect to any applicant or registrant or any parent, subsidiary, or other affiliate of such applicant or registrant (i) in which, during the period of his professional engagement to examine the financial statements being reported on or at the date of his report, he or his firm or a member thereof had, or was committed to acquire, any direct financial interest or any material indirect financial interest, or (ii) with which, during the period of his professional engagement to examine the financial statements being reported on, at the date of his report or during the period covered by the financial statements, he or his firm or a member thereof was connected as a promoter, underwriter, voting trustee, director, officer, or employee, except that a firm will be deemed independent with respect to an applicant or registrant and its affiliates if a former employee or officer of such applicant or registrant or any such affiliate is employed by the firm and such individual has completely disassociated himself from the applicant or registrant and its affiliates and does not participate in auditing financial statements of the applicant or registrant or its affiliates covering any period of his employment by the applicant or registrant of its affiliates. An accountant will not be considered independent if he or his firm or a member thereof performs manual or automated bookkeeping services or assumes responsibility for maintenance of the accounting records, including accounting classification decisions, of such applicant or registrant or any of its affiliates. For the purposes of this section 1.16(b), the term "member" means all partners in the firm and all professional employees participating in the audit or located in the office of the firm participating in a significant portion of the audit.

(3) In determining whether an accountant may in fact not be independent with respect to a particular applicant or registrant, the Commission will give appropriate consideration to all relevant circumstances, including evidence bearing on all relationships between the accountant and that applicant or registrant or any affiliate thereof, and will not confine itself to the relationship existing in connection with the filing of reports with the Commission.

(c) *Accountant's reports.*—(1) *Technical requirements.* The accountant's report (i) must be dated, (ii) must be signed manually, (iii) must indicate the city and state where issued and (iv) must identify without detailed enumeration the financial statements covered by the report.

(2) *Representations as to the audit.* The accountant's report (i) must state whether the audit was made in accordance with generally accepted auditing standards, and (ii) must designate any auditing procedures deemed necessary by the accountant under the circumstances of the particular case which have been omitted and the reasons for their omission. However, nothing in this paragraph (c)(2) shall be construed to imply authority for the omission of any procedure which independent accounts would ordinarily

lly employ in the course of an audit made for the purposes of expressing the opinion required by paragraph (c) (3) of this section.

(3) *Opinion to be expressed.* The accountant's report must state clearly: (i) the opinion of the accountant with respect to the financial statements covered by the report and the accounting principles and practices reflected therein and (ii) the opinion of the accountant as to the consistency of the application of the accounting principles, or as to any changes in such principles which have material effect on the financial statements.

(4) *Exceptions.* Any matters to which the accountant takes exception must be clearly identified, the exceptions thereto specifically and clearly stated, and to the extent practicable, the effect of each such exception on related financial statements given.

(5) *Accountant's report on material inadequacies.* A registrant must file concurrently with the annual audit report a supplemental report by the accountant describing any material inadequacies found to exist or found to have existed since the date of the previous audit. An applicant must file concurrently with the audit report a supplemental report by the accountant describing any material inadequacies found to exist as of the date of the Form 1-FR being filed. The supplemental report must indicate any corrective action taken or proposed by the applicant or registrant in regard thereto. If the audit did not disclose any material inadequacies, the supplemental report must so state.

(d) *Audit objectives.* (1) The audit must be made in accordance with generally accepted auditing standards and must include a review of the accounting system, the internal accounting control, and the procedures for safeguarding customer and firm assets in accordance with the provisions of the Act and the regulations thereunder, including appropriate tests thereof, since the prior examination date. The audit must include all procedures necessary under the circumstances to enable the independent licensed or certified public accountant to express an opinion on the financial statements and schedules. The scope of the audit and review of the accounting system, the internal controls, and procedures for safeguarding customer and firm assets must be sufficient to provide reasonable assurance that any material inadequacies existing at the date of the examination in (i) the accounting system, (ii) the internal accounting controls, and (iii) the procedures for safeguarding customer and firm assets (including the segregation requirements of section 4d(2) of the Act and these regulations) will be discovered. Additionally, as specified objectives the audit must include reviews of the practices and procedures followed by the registrant in making (i) periodic computations of the minimum financial requirements pursuant to section 1.17 and (ii) daily computations of the segregation requirements of section 4d(2) of the Act and these regulations.

(2) A material inadequacy in the accounting system, the internal accounting controls, the procedures for safeguarding customer and firm assets, and the practices and procedures referred to in paragraph (d) (1) of this section which is to be reported in accordance with paragraph (e) (2) of this section includes any conditions which contributed substantially to or, if appropriate corrective action is not taken, could reasonably be expected to:

(i) Inhibit an applicant or registrant from promptly completing transactions or promptly discharging his responsibilities to customers or other creditors;

(ii) Result in material financial loss;

(iii) Result in material misstatement of the applicant's or registrant's financial statements; or

(iv) Result in violations of the Commission's segregation, recordkeeping or financial reporting requirements to the extent that could reasonably be expected to result in the conditions described in paragraphs (d) (2) (i), (ii), or (iii) of this section.

(e) *Extent and timing of audit procedures.*

(1) The extent and timing of audit procedures are matters for the independent public accountant to determine on the basis of his review and evaluation of existing internal controls and other audit procedures performed in accordance with generally accepted auditing standards and the audit objectives set forth in paragraph (d) of this section. In determining the extent of testing, consideration must be given to the materiality of an area and to the possible effect on the financial statements and schedules of a material misstatement in a related account.

(2) If during the course of an audit or interim work, the independent public accountant determines that any material inadequacies exist in the accounting system, in the internal accounting control, in the procedures for safeguarding customer or firm assets, or as otherwise defined in paragraph (d) of this section, he must call it to the attention of the applicant or registrant, who has the responsibility to inform the Commission and the designated self-regulatory organization, if any, of such inadequacies in accordance with paragraph (d) of § 1.12. The applicant or registrant must also furnish the accountant with a copy of said notice to the Commission within three business days. If the accountant fails to receive such notice from the applicant or registrant within three business days, or if he disagrees with the statements contained in the notice of the applicant or registrant, the accountant must inform the Commission and the designated self-regulatory organization, if any, by reporting the material inadequacy within three business days thereafter. Such report from the accountant must, if the applicant or registrant failed to file a notice, describe the material inadequacies found to exist. If the applicant or registrant filed a notice, the accountant must file a report detailing the aspects, if any, of the applicant's or registrant's notice with which the accountant does not agree.

(f) *Extension of time for filing audited reports.* (1) In the event any applicant or registrant finds that it cannot file its certified financial statements for any year within the time specified in section 1.10 without substantial undue hardship, it may file with the principal office of the Commission in Washington, D.C., an application for extension of time to a specified date and not more than 90 days after the date as of which the certified financial statements were to have organization, if any. The application must be sent to the designated self-regulatory organization, if any. The application must be made by the applicant or registrant and must: (i) state the reasons for the requested extension; (ii) indicate that the inability to make a timely filing is due to circumstances beyond the control of the applicant or registrant, if such is the case, and describe briefly the nature of such circumstances; (iii) be accompanied by the latest available formal computation of his adjusted net capital and minimum financial requirements computed in accordance with section 1.17; (iv) be accompanied by the latest available computation of required segregation and by a computation of the amount of money, securities, and property segregated on behalf of customers as of the date of the latest available computation; (v) contain an agreement to file the report on or before the date specified by the applicant or registrant in the application; (vi) be received by the principal office of the Com-

mission in Washington, D.C., and by the designated self-regulatory organization, if any, fifteen days prior to the date on which the report is due; and (vii) be accompanied by a letter from the independent public accountant answering the following questions:

A. What specifically are the reasons for the extension request?

B. On the basis of that part of your audit to date, do you have any indication that may cause you to consider commenting on any material inadequacies in the accounting system, internal accounting controls or procedures for safeguarding customer or firm assets?

C. Do you have any indication from the part of your audit completed to date that would lead you to believe that the firm was or is not meeting the minimum capital requirements specified in section 1.17 or the segregation requirements of section 4d(2) of the Act and these regulations, or has any significant financial or recordkeeping problems?

(2) An application for extension of time will be responded to by the Commission within ten days of the receipt of the application.

(3) On the written request of any designated self-regulatory organization, or an applicant or registrant, or on its own motion, the Commission may grant an extension of time or an exemption from any of the certified financial reporting requirements of this chapter either unconditionally or on specified terms and conditions.

(g) *Replacement of accountant.* (1) In the event (i) the independent public accountant who was previously engaged as the principal accountant to audit an applicant's or registrant's financial statements resigns (or indicates he declines to stand for re-election after the completion of the current audit) or is dismissed as the applicant's or registrant's principal accountant, (ii) another independent accountant is engaged as principal accountant, or (iii) an independent accountant on whom the principal accountant expresses reliance in his report regarding a subsidiary resigns (or formally indicates he declines to stand for re-election after completion of the current audit) or is dismissed or another independent public accountant is engaged to audit that subsidiary, the applicant or registrant shall file written notice of such occurrence with the Commission at its principal office in Washington, D.C., and with the designated self-regulatory organization, if any, not more than 15 days after such occurrence.

(2) Such notice must state (i) the date of such resignation (or declination to stand for re-election, dismissal or engagement) and (ii) whether, in connection with the audits of the two most recent fiscal years and any subsequent interim period preceding such resignation, dismissal or engagement there were any disagreements with the former accountant on any matter of accounting principles or practices, financial statements disclosure, auditing scope or procedures, or compliance with the applicable rules of the Commission, which, if not resolved to the satisfaction of the former accountant, would have caused him to make reference in connection with his report to the subject matter of the disagreements (if so, describe such disagreements). The disagreements required to be reported in this paragraph (g) (2) include both those resolved to the former accountant's satisfaction and those not resolved to the former accountant's satisfaction. Disagreements contemplated by this paragraph (g) (2) are those which occur at the decision making level, i.e., between personnel of the registrant responsible for presentation of its financial statement and personnel of the accounting

firm responsible for rendering its report. The notice must also state whether the accountant's report on the financial statements for any of the past two years contained an adverse opinion or a disclaimer of opinion or was qualified as to uncertainties, audit scope, or accounting principles (if so, describe the nature of each such adverse opinion, disclaimer of opinion, or qualification). The applicant or registrant must also request the former accountant to furnish the applicant or registrant with a letter addressed to the Commission stating whether he agrees with the statements contained in the notice of the applicant or registrant and, if not, stating the respects in which he does not agree. Each copy of the notice and accountant's letter must be manually signed by the sole proprietor or a general partner or a duly authorized corporate officer of the applicant or registrant, as appropriate, and by the accountant.

(3) If (i) within the 24 months prior to the date of the most recent audited financial statement, a notice has been filed pursuant to paragraph (g) (1) of this section reporting a change of accountants, (ii) included in such filing there is a reported disagreement on any matters of accounting principles or practices, financial statements disclosure, auditing scope, or noncompliance with the applicable rules of the Commission, (iii) during the fiscal year in which the change in accountants took place or during the subsequent fiscal year, there have been any transactions or events similar to those which involved a reported disagreement, and (iv) such transactions or events are material and were accounted for or disclosed in a manner different from that which the former accountant apparently would have concluded was required, the existence and nature of the disagreements and also the effect on the financial statements must be stated in a written notice to the Commission at its principal office in Washington, D.C., and the designated self-regulatory organization, if any, if the method which the former accountant apparently would have concluded was required had been followed. These disclosures need not be made if the method asserted by the former accountant ceases to be generally accepted because of authoritative standards or interpretations subsequently issued. The notice required by this paragraph (g) (3) must be filed by the applicant or registrant concurrently with the financial statements to which it pertains.

5. By amending § 1.17 to read as follows:

§ 1.17 Minimum financial requirements—futures commission merchants.

(a) (1) Except as provided in paragraph (a) (2) of this section, each person registered as a futures commission merchant must maintain adjusted net capital equal to or in excess of (i) the greater of \$150,000 (\$50,000 for a member of a designated self-regulatory organization) or 6% percent of aggregate indebtedness, or, (ii) in the case of a registrant electing to operate pursuant to paragraph (g) of this section, the greater of \$150,000 (\$50,000 for a member of a designated self-regulatory organization) or 4 percent of the funds required to be segregated pursuant to the Act and these regulations plus, for Securities Brokers and Dealers, 4 percent of aggregate debit items computed in accordance with the Formula for Determination of Reserve Requirements (Exhibit A to Rule 15c3-3, 17 CFR 240.15c3-3a).

(2) The requirements of paragraph (a) (1) of this section shall not be applicable if the registrant is a member of a designated self-regulatory organization and conforms to minimum financial standards and related reporting requirements set by such designated self-regulatory organization in its by-laws, rules, regulations or resolutions approved by the Commission pursuant to

section 4f(2) of the Act after (the effective date of this regulation).

(3) No person applying for registration as a futures commission merchant shall be so registered unless such person affirmatively demonstrates to the satisfaction of the Commission that it complies with the financial requirements of this section 1.17. Each registrant must be in compliance with this section 1.17 at all times and must be able to demonstrate such compliance to the satisfaction of the Commission and/or the designated self-regulatory organization.

(4) A registrant who is not in compliance with this section 1.17 or unable to demonstrate compliance with this section 1.17 as required by paragraph (a) (3) above, must transfer all customer accounts and immediately cease doing business as a futures commission merchant until such time as the registrant is able to demonstrate such compliance. *Provided, however,* That the registrant may trade for liquidation purposes only unless otherwise directed by the Commission and/or the designated self-regulatory organization. *Provided, further,* That if such registrant immediately demonstrates to the satisfaction of the Commission or the designated self-regulatory organization the ability to get into compliance, the Commission or the designated self-regulatory organization may allow such registrant up to a maximum of 10 business days in which to do so without having to transfer accounts and cease doing business as required above. Nothing in this paragraph (a) (4) shall be construed as preventing the Commission or the designated self-regulatory organization from taking action against a registrant for non-compliance with any of the provisions of this section.

(b) For the purposes of this section: (1) Where the applicant or registrant has an asset or liability which is defined in Securities and Exchange Commission rule § 240.15c3-1 of this title, the inclusion or exclusion of all or part of such asset or liability for the computation of adjusted net capital and aggregate indebtedness shall be in accordance with § 240.15c3-1 of this title, unless specifically stated otherwise in this section.

(2) "Customer" means customer (as defined in § 1.3(k)) and option customer (as defined in § 32.1(d)).

(3) "Proprietary account" means a commodity futures or options account carried on the books of the applicant or registrant for the applicant or registrant itself, or for general partners.

(4) "Non-customer account" means a commodity futures or option account carried on the books of the applicant or registrant which is not included in the definition of customer (as defined in § 1.17(b)(2)) or proprietary account (as defined in § 1.17(b)(3)).

(5) "Commodity option", "options customer", "premium", "striking price", "domestic commodity option exchange", and "domestic option customer funds" have the same meaning as in part 32 of these regulations.

(c) Definitions: For the purposes of this section:

(1) "Net capital" means the amount by which current assets exceed liabilities. In determining "net capital";

(i) Unrealized profits shall be added and unrealized losses shall be added and unrealized losses shall be deducted in the accounts of the applicant or registrant, including unrealized profits and losses on fixed price commitments and forward contracts;

(ii) All long and all short positions in listed security options shall be marked to their market value and all long and all short securities and commodities positions shall be marked to their market value;

(iii) The value attributed to any nontransferable commodity option shall be the differ-

ence between the option's striking price and the market value for the actual commodity or futures contract which is the subject of the option. In the case of a call commodity option, if the market value for the actual commodity or futures contract which is the subject of the option is less than the striking price of the option, it shall be given no value. In the case of a put commodity option, if the market value for the actual commodity or futures contract, which is the subject of the option is more than the striking price of the option, it shall be given no value; and

(iv) The value attributed to any unlisted security option shall be the difference between the option's exercise value or striking value and the market value of the underlying security. In the case of an unlisted call, if the market value of the underlying security is less than the exercise value or striking value of such call, it shall be given no value; and, in the case of an unlisted put, if the market value of the underlying security is more than the exercise value or striking value of the unlisted put, it shall be given no value.

(2) The term "current assets" means cash and other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold during the next 12 months. "Current assets" shall:

(i) Exclude any unsecured commodity futures or option account containing a ledger balance and open trades, the combination of which liquidates to a deficit or containing a debit ledger balance only, provided however, deficits or debit ledger balances in unsecured customers', non-customers' and proprietary accounts, which are the subject of calls for margin or other required deposits which are outstanding one business day or less, may be included in current assets;

(ii) Exclude all unsecured receivables, advances and loans except for:

(A) Receivables resulting from the marketing of inventories commonly associated with the business activities of the applicant or registrant and advances on fixed price purchase commitments; *Provided,* such receivables or advances are outstanding no longer than seventy-five (75) days from the date that they arise;

(B) Interest receivable, floor brokerage receivable, commissions receivable from other brokers or dealers (other than syndicate profits), mutual fund concessions receivable and management fees receivable from registered investment companies and commodity pools, *provided* such receivables are outstanding no longer than thirty (30) days from the date they arise; and dividends receivable outstanding no longer than thirty (30) days from the payable date;

(C) Receivables from "clearing organizations," option clearing organizations, foreign clearing organizations, and securities clearing organizations;

(D) Receivables from registered futures commission merchants or brokers, resulting from commodity futures or option transactions, except those specifically excluded under paragraph (c) (2) (i) of this section;

(E) Insurance claims which arise from a reportable segment of the applicant's or registrant's overall business activities, as defined in generally accepted accounting principles, other than in the commodity futures, commodity option, security, and security option segments of the applicant's or registrant's business activities which are not outstanding more than seventy-five (75) days after the date they are recorded as a receivable.

(F) All other insurance claims not subject to paragraph (c) (2) (ii) (E) of this section, which are not older than seven (7) business days from the date the loss giving rise to the claim is discovered; insurance claims which are not older than twenty (20) business days from the date the loss giving

rise to the claim is discovered and which are covered by an opinion of outside counsel that the claim is valid and is covered by insurance policies presently in effect; insurance claims which are older than twenty (20) business days from the date the loss giving rise to the claim is discovered and which are covered by an opinion of outside counsel that the claim is valid and is covered by insurance policies presently in effect and which have been acknowledged in writing by the insurance carrier as due and payable, provided such claims are not outstanding longer than twenty (20) business days from the date they are so acknowledged by the carrier;

(iii) Exclude all prepaid expenses and deferred charges;

(iv) Exclude all inventories except for:

(A) Readily marketable spot commodities; or spot commodities which "adequately collateralize" indebtedness under paragraph (c) (7) of this section;

(B) Securities which are considered "readily marketable" (as defined in 17 CFR 240.15c3-1(c) (11)) or which "adequately collateralize" indebtedness under paragraph (c) (7) of this section;

(C) Work in process and finished goods at market value which result from the processing of commodities;

(D) Raw materials at market value which will be combined with spot commodities to produce a finished processed commodity; and

(E) Inventories held for resale commonly associated with the business activities of the applicant or registrant;

(v) Include fixed assets and assets which otherwise would be considered non-current to the extent of any indebtedness excluded in accordance with paragraph (c) (6) (v) of this section, provided such liabilities are not excluded from liabilities in the computation of net capital under paragraph (c) (4) (v) of this section;

(vi) Exclude all assets doubtful of collection or realization less any reserves established therefore;

(vii) Include, in the case of future income tax benefits arising as a result of unrealized losses, the amount of such benefits not exceeding the amount of income tax liabilities accrued on the books and records of the applicant or registrant, but only to the extent such benefits could have been applied to reduce accrued tax liabilities on the date of the capital computation, had the related unrealized losses been realized on that date;

(viii) Include guarantee deposits with and to the extent of margin value, stock in clearing organizations;

(ix) Exclude exchange memberships.

(3) A loan or advance or any other form of receivable shall not be considered "secured" for the purposes of paragraph (c) (2) of this section unless the following conditions exist:

(1) The receivable is secured by readily marketable collateral which is otherwise unencumbered and which can be readily converted into cash equal to or in excess of that part of the receivable which is shown in the applicant's or registrant's records as secured; and

(ii) (A) The readily marketable collateral is in the possession or control of the applicant or registrant; or

(B) The applicant or registrant has a legally enforceable, written security agreement, signed by the debtor, and has a perfected security interest in the readily marketable collateral within the meaning of the laws of the state in which the readily marketable collateral is located.

(4) The term "liabilities" means the total money liabilities of an applicant or registrant arising in connection with any transaction whatsoever, including economic obligations of an applicant or registrant that are recognized and measured in conformity with generally accepted accounting principles. "Liabilities" also include certain deferred credits that are no obligations but that are recognized and measured in conformity with generally accepted accounting principles. For the purposes of computing "net capital", the term "liabilities":

(i) Excludes liabilities of an applicant or registrant which are subordinated to the claims of all general creditors of the applicant or registrant pursuant to a satisfactory subordination agreement, as defined in paragraph (h) of this section;

(ii) Excludes the amount of money, securities, and property due to commodity futures or option customers which is held in segregated accounts in compliance with the requirements of the Act and these regulations: *Provided, however*, That such exclusion may be taken only if such money, securities, and property held in segregated accounts have been excluded from current assets in computing net capital;

(iii) Includes, in the case of an applicant or registrant who is a sole proprietor, the excess of liabilities which have not been incurred in the course of business as a futures commission merchant over assets not used in the business;

(iv) Excludes the lesser of any deferred income tax liability related to the items in (A), (B), and (C) below, or the sum of (A), (B), and (C) below:

(A) The aggregate amount resulting from applying to the amount of the deductions computed in accordance with paragraph (c) (5) or paragraph (g) of this section, the appropriate Federal and State tax rate(s) applicable to any unrealized gain on the asset on which the deduction was computed;

(B) Any deferred tax liability related to income accrued which is directly related to an asset otherwise deducted pursuant to this section;

(C) Any deferred tax liability related to unrealized appreciation in value of any asset(s) which has been otherwise excluded from current assets in accordance with the provisions of this section; and

(v) Excludes liabilities which would be classified as long term in accordance with generally accepted accounting principles to the extent of the net book value of plant, property, and equipment which is used in the ordinary course of any trade or business of the applicant or registrant which is a reportable segment of the applicant's or registrant's overall business activities, as defined in generally accepted accounting principles, other than in the commodity futures, commodity option, security, and security option segments of the applicant's or registrant's business activities; *Provided*: That, such plant, property, and equipment is not included in current assets pursuant to paragraph (c) (2) (v) of this section, and *Provided further*: That, the exclusion provided for in this paragraph (c) (4) (v) does not apply when computing aggregate indebtedness pursuant to paragraph (c) (6) of this section.

(5) The term "adjusted net capital" means net capital less:

(1) The amount by which any advances paid by the applicant or registrant on cash commodity contracts and used in computing net capital exceeds 95 percent of the market value of the commodities covered by such contracts;

(ii) In the case of all inventory, fixed price commitments and forward contracts the applicable percentage of the net position specified below:

(A) Inventory which is covered by commodity futures or options—5 percent of the market value.

(B) Inventory which is not covered—20 percent of the market value.

(C) Fixed price commitments (open purchases and sales) and forward contracts which are covered by commodity futures or options—10 percent of the market value.

(D) Fixed price commitments (open pur-

chases and sales) and forward contracts which are not covered by commodity futures or options—20 percent of the market value.

(iii) (Reserved).

(iv) (Reserved).

(v) In the case of securities and obligations used by the applicant or registrant in computing net capital, and in the case of securities in segregation pursuant to section 4d(2) of the Act and these regulations which were not deposited by customers, the percentages specified in 17 CFR 240.15c3-1(c) (2) (vi) ("Securities Haircuts") and 100 percent of the value of "Non-Marketable Securities" as specified in 17 CFR 240.15c3-1(c) (2) (vii), or where appropriate, for Securities Brokers or Dealers the percentages specified in 17 CFR 240.15c3-1(f);

(vi) In the case of securities options used by the applicant or registrant in computing net capital, the deductions specified in 17 CFR 240.15c3-1 Appendix A, after effecting certain adjustments to net capital for listed and unlisted options as set forth in such Appendix;

(vii) In the case of an applicant or registrant who has open contractual commitments, as hereinafter defined, the deductions specified in 17 CFR 240.15c3-1(c) (2) (viii);

(viii) For undermargined customer commodity futures and grantor commodity option accounts, the amount of funds required in each such account to meet maintenance margin requirements of the applicable board of trade or if there are no such maintenance margin requirements, clearing organization margin requirements applicable to such positions after application of calls for margin, or other required deposits which are outstanding five business days or less until December 31, 1979, four business days or less until December 31, 1980, and three business days or less thereafter. If there are no such maintenance margin requirements or clearing organization margin requirements on such accounts, then the amount of funds required to provide margin equal to the amount necessary after application of calls for margin, or other required deposits outstanding five days or less until December 31, 1979, four days or less until December 31, 1980, and three days or less thereafter to restore original margin when the initial margin has been depleted by 50 percent or more. *Provided*, to the extent a deficit is excluded from current assets in accordance with paragraph (c) (2) (i) if this section such amount shall not also be deducted under this paragraph (c) (5) (viii);

(ix) For undermargined non-customer and omnibus commodity futures and grantor commodity option accounts, the amount of funds required in each such account to meet maintenance margin requirements of the applicable board of trade or if there are no such maintenance margin requirements clearing organization margin requirements applicable to such positions after application of calls for margin, or other required deposits which are outstanding two business days or less. If there are not such maintenance margin requirements or clearing organization margin requirements, then the amount of funds required to provide margin equal to the amount necessary after application of calls for margin, or other required deposits outstanding two days or less to restore original margin when the initial margin has been depleted by 50 percent or more. *Provided*, to the extent a deficit is excluded from current assets in accordance with paragraph (c) (2) (i) if this section such amount shall not also be deducted under this paragraph (c) (5) (ix);

(x) In the case of open futures contracts and grantor commodity options held in proprietary accounts carried by the applicant or registrant which are not covered by a position held by the applicant or registrant or which are not the result of a "changer trade" made in accordance with the rules of a contract market the safety factor shall be:

(A) For an applicant or registrant which is a clearing member of a contract market or domestic commodity option exchange for the positions cleared by such member on such contract market or domestic commodity option exchange, the applicable margin requirement of the applicable clearing organization;

(B) For an applicant or registrant which is a member of a contract market or domestic commodity option exchange 150 percent of the applicable maintenance margin requirement of the applicable board of trade or clearing organization whichever is greater;

(C) For all other applicants or registrants, 200 percent of the applicable maintenance margin requirement of the applicable board of trade or clearing organization whichever is greater, or

(D) For open contracts and commodity options for which there is no applicable maintenance margin requirements, 200 percent of the applicable initial margin requirement.

Provided, the equity in any such proprietary account shall reduce the deduction required by this paragraph (c) (5) (x) if such equity is not otherwise includable in adjusted net capital;

(xi) In the case of an applicant or registrant which is a taker of a commodity option, the safety factor shall be the amount of any commodity option premium which has been used to increase adjusted net capital and in the case of an applicant or registrant which is a grantor of a commodity option, the safety factor may be reduced by the amount of any commodity option premium which has not been previously recognized as income; and

(xii) In the case of a commodity option which is carried long by the applicant or registrant as a taker of a commodity option which has value and such value is used to increase adjusted net capital, the same safety factor as if the applicant or registrant were the grantor of such option in accordance with paragraph (c) (5) (x) of this section, but in no event shall the safety factor be greater than the value attributed to such option.

(xiii) Five percent of all unsecured receivables includable under paragraph (c) (2) (ii) (D) of this section used by the applicant or registrant in computing "net capital" and which are not receivable from (A) a registered futures commission merchant, or (B) a broker or dealer which is registered as such with the Securities and Exchange Commission.

(xiv) For Securities Brokers and Dealers, all other deductions specified in § 240.15c3-1.

(6) The term "aggregate indebtedness" means "liabilities" as defined in paragraph (c) (4) of this section excluding:

(i) Indebtedness adequately collateralized by spot commodities which are carried long by the applicant or registrant and indebtedness adequately collateralized by securities which are carried long by the applicant or registrant and which have not been sold, or by securities which collateralize a secured demand note pursuant to paragraph (h) of this section;

(ii) Indebtedness arising in connection with an advance to a non-proprietary account when such indebtedness is adequately collateralized by spot commodities eligible for delivery on a contract market and when such spot commodities are fully hedged;

(iii) Advances received by the applicant or registrant against bills of lading issued in connection with the shipment of commodities sold by the applicant or registrant;

(iv) Equity balances in the accounts of general partners;

(v) Long-term debt adequately collateralized by assets acquired for use in the ordinary course of the trade or business of an applicant or registrant but no other long-term debt adequately collateralized by assets

of the applicant or registrant shall be excluded unless the sole recourse of the creditor for nonpayment of such liability is to such asset;

(vi) Liabilities which are effectively subordinated to the claims of creditors (but which are not subject to a satisfactory subordination agreement as defined in paragraph (h) of this section) by other than customers of the applicant or registrant prior to such subordination, and such subordinations by customers as may be approved by the applicable designated self-regulatory organization or if the applicant or registrant is not a member of a designated self-regulatory organization, then the Commission; and

(vii) Deferred tax liabilities, not already excluded in paragraph (c) (4) (iv) of the section.

(7) "Liabilities" are "adequately collateralized" when, pursuant to a legally enforceable written instrument, such liabilities are secured by identified assets that are otherwise unencumbered and the market value of which exceed the amount of such liabilities.

(8) The term "contractual commitments" shall include underwriting, when issued, when distributed and delayed delivery contracts; the writing or endorsement of security puts and calls and combinations thereof; and commitments in foreign currencies; but shall not include uncleared regular way purchases and sales of securities. As series of contracts of purchase or sale of the same security, conditioned, if at all, only upon issuance, may be treated as an individual commitment.

(d) No applicant or registrant shall permit the total of outstanding principal amounts of its satisfactory subordination agreements (other than such agreements which qualify under this paragraph (d) as equity capital) to exceed 70 percent of its debt-equity total, as hereinafter defined, for a period in excess of 90 days or for such longer period which the Commission may, upon application of the applicant or registrant, grant in the public interest or for the protection of investors. In the case of a corporation, the debt-equity total shall be the sum of its outstanding principal amounts of satisfactory subordination agreements, par or stated value of capital stock, paid in capital in excess of par, retained earnings, unrealized profit and loss and other capital accounts. In the case of a partnership, the debt-equity total shall be the sum of its outstanding principal amounts of satisfactory subordination agreements, capital accounts of partners (exclusive of such partners' commodity and securities accounts) subject to the provisions of paragraph (e) of this section, and unrealized profit and loss. In the case of a sole proprietorship, the debt-equity total shall include the sum of its outstanding principal amounts of satisfactory subordination agreements, capital accounts of the sole proprietorship and unrealized profit and loss. Provided, however, that a satisfactory subordination agreement entered into by a partner or stockholder which has an initial term of at least three years and has a remaining term of not less than 12 months shall be considered equity for the purposes of this paragraph (d) if: (1) it does not have any of the provisions for accelerated maturity provided for by paragraphs (h) (2) (ix) (A), (h) (2) (x) (A), or (h) (2) (x) (B) of this section, and is maintained as capital subject to the provisions restricting the withdrawal thereof required by paragraph (e) of this section, or (2) the partnership agreement provides that capital contributed pursuant to a satisfactory subordination agreement as defined in paragraph (h) of this section shall in all respects be partnership capital subject to the provisions restricting the withdrawal thereof required by paragraph (e) of this section.

(e) No equity capital of the applicant or registrant or a subsidiary's or affiliate's equity capital consolidated pursuant to paragraph (f) of this section, whether in the form of capital contributions by partners (excluding amounts in the commodities and securities accounts of partners and balances in limited partners' capital accounts in excess of their stated capital contributions), par or stated value of capital stock, paid-in capital in excess of par or stated value, retained earnings or other capital accounts, may be withdrawn by action of a stockholder or partner or by redemption or repurchase of shares of stock by any of the consolidated entities or through the payment of dividends or any similar distribution, nor may any unsecured advance or loan be made to a stockholder, partner, sole proprietor, or employee if, after giving effect thereto and to any other such withdrawals, advances, or loans and any payments of payment obligations (as defined in paragraph (h) of this section) under satisfactory subordination agreements and any payments of liabilities excluded pursuant to paragraph (c) (4) (v) of this section which are scheduled to occur within six months following such withdrawal, advance or loan, either adjusted net capital or any of the consolidated entities would be less than 10 percent of aggregate indebtedness or its adjusted net capital would fall to equal 120 percent of the appropriate minimum dollar amount required or would be less than 7 percent of the amount required to be segregated pursuant to the Act and these regulations plus for Securities Brokers or Dealers, 7 percent of the aggregate debit items computed pursuant to 17 CFR 240.15c3-3, or in the case of any applicant or registrant included within such consolidation, if the total outstanding principal amounts of satisfactory subordination agreements of the applicant or registrant (other than such agreements which qualify as equity under paragraph (d) of this section) would exceed 70 percent of the debt-equity total as defined in paragraph (d). Provided, that this provision shall not preclude an applicant or registrant from making required tax payments or preclude the payment to partners of reasonable compensation. The Commission may, upon application of the applicant or registrant, grant relief from this paragraph (e) if the Commission deems it to be in the public interest or for the protection of non-proprietary accounts.

(f) (1) Every applicant or registrant, in computing its net capital and aggregate indebtedness pursuant to this section must, subject to the provisions of paragraph (f) (2) and (f) (4) of this section, consolidate in a single computation assets and liabilities of any subsidiary or affiliate for which it guarantees, endorses, or assumes directly or indirectly the obligations or indirectly the obligations or liabilities. The assets and liabilities or a subsidiary of affiliate whose liabilities and obligations have not been guaranteed, endorsed, or assumed directly or indirectly by the applicant or registrant may also be so consolidated if an opinion of counsel is obtained as provided for in paragraph (f) (2) of this section.

(2) (i) If the consolidation, provided for in paragraph (f) (1) of this section, of any such subsidiary or affiliate results in the increase of the applicant's or registrant's adjusted net capital and/or increases the applicant's or registrant's percentage of adjusted net capital to aggregate indebtedness or increases the applicant's or registrant's adjusted net capital and/or decreases the minimum adjusted net capital requirement called for by paragraph (g) (1) of this section and an opinion of counsel called for in paragraph (f) (2) (ii) of this section has not been obtained, such benefits shall not be recognized in the applicant's or registrant's computation required by this section.

(ii) Except as provided for in paragraph

(f) (2) (1) of this section, consolidation shall be permitted with respect to any subsidiaries or affiliates which are majority owned and controlled by the applicant or registrant and for which the applicant or registrant can demonstrate to the satisfaction of the Commission, and the designated self-regulatory organization, if any, by an opinion of counsel that the net asset values, or the portion thereof related to the parent's ownership interest in the subsidiary of affiliate, may be caused by the applicant or registrant or an appointed trustee to be distributed to the applicant or registrant within 30 calendar days. Such opinion must also set forth the actions necessary to cause such a distribution to be made, identify the parties having the authority to take such actions, identify and describe the rights of other parties or classes of parties, including but not limited to customers, general creditors, subordinated lenders, minority shareholders, employees, litigants, and governmental or regulatory authorities, who may delay or prevent such a distribution and such other assurances as the Commission or the designated self-regulatory organization by rule or interpretation may require. Such opinion must be current and periodically renewed in connection with the applicant's or registrant's annual audit pursuant to section 1.10 upon any material change in circumstances.

(3) In preparing a consolidated computation of adjusted net capital and/or aggregate indebtedness pursuant to this section, the following minimum and non-exclusive requirements shall be observed:

(i) Consolidated adjusted net capital shall be reduced by the estimated amount of any tax reasonably anticipated to be incurred upon distribution of the assets of the subsidiary or affiliate.

(ii) Liabilities of a consolidated subsidiary or affiliate which are subordinated to the claims of present and future creditors pursuant to a satisfactory subordination agreement shall be deducted from consolidated adjusted net capital unless such subordination extends also the claims of present or future creditors of the parent applicant or registrant and all consolidated subsidiaries.

(iii) Subordinated liabilities of a consolidated subsidiary or affiliate which are consolidated in accordance with paragraph (f) (3) (ii) of this section may not be prepaid, repaid, or accelerated if any of the entities included in such consolidation would otherwise be unable to comply with the provisions of paragraph (h) of this section.

(iv) Each applicant or registrant included within the consolidation shall at all times be in compliance with the adjusted net capital requirement to which it is subject.

(4) No applicant or registrant shall guarantee, endorse, or assume directly or indirectly any obligation or liability of a subsidiary or affiliate unless the obligation or liability is reflected in the computation of adjusted net capital and/or aggregate indebtedness pursuant to this section except as provided in paragraph (f) (2) (1) of this section.

(g) A registrant may elect not to be subject to the limitations of paragraph (a) of this section respecting aggregate indebtedness as defined in paragraph (c) (6) of this section. *Provided*, That in order to qualify to operate under this paragraph (g), such registrant must at all times maintain adjusted net capital equal to the greater of \$150,000 (\$50,000 for a member of a designated self-regulatory organization) or 4 percent of the funds required to be segregated by the Act and these regulations plus for Securities Brokers or Dealers, 4 percent of the aggregate debit items computed in accordance with the Formula for Determination of Reserve Requirements (Exhibit A to Rule 15c3-3, 17 CFR 240.15c3-3a) and shall notify the designated self-regulatory

organization, if any, and the Regional Office of the Commission in which the registrant has its principal place of business, in writing of its election to operate under this provision. Once a registrant has determined to operate pursuant to the provisions of this paragraph (g), he must continue to do so unless a change in such election is approved upon application to the Commission.

(1) A broker or dealer electing to operate pursuant to this paragraph (g) shall be subject to 17 CFR 240.15c3-1(f) in lieu of paragraph (c) (5) (v) of this section.

(2) A broker or dealer who is registered as such with the Securities and Exchange Commission and who is exempt from the provisions of 17 CFR 240.15c3-3 pursuant to paragraph (k) (1) or (k) (2) (i) of that section may not elect to use the alternative contained in this paragraph (g).

(h) The term "satisfactory subordination agreement" (hereinafter "subordination agreement") means an agreement which contains the minimum and non-exclusive requirements hereinafter set forth.

(1) Certain definitions for purposes of this section: (i) A subordination agreement may be either a subordinated loan agreement or a secured demand note agreement.

(ii) The term "subordinated loan agreement" means the agreement or agreements evidencing or governing a subordinated borrowing of cash.

(iii) The term "collateral value" of any securities pledged to secure a secured demand note means the market value of such securities after giving effect to the percentage deductions specified in paragraph (c) of this section.

(iv) The term "payment obligation" means the obligation of an applicant or registrant in respect to any subordination agreement: (A) to repay cash loaned to the applicant or registrant pursuant to a subordinated loan agreement; or (B) to return a secured demand note contributed to the applicant or registrant or to reduce the unpaid principal amount thereof and to return cash or securities pledged as collateral to secure the secured demand note; and (C) "payment" shall mean the performance by an applicant or registrant of a payment obligation.

(v) (A) The term "secured demand note agreement" means an agreement (including the related secured demand note) evidencing or governing the contribution of a secured demand note to an applicant or registrant and the pledge of securities and/or cash with the applicant or registrant as collateral to secure payment of such secured demand note. The secured demand note agreement may provide that neither the lender, his heirs, executors, administrators, or assigns shall be personally liable on such note and that in the event of default the applicant or registrant shall look for payment of such note solely to the collateral then pledged to secure the same.

(B) The secured demand note shall be a promissory note executed by the lender and shall be payable on the demand of the applicant or registrant to which it is contributed; *Provided, however*, That the making of such demand may be conditioned upon the occurrence of any of certain events which are acceptable to the designated self-regulatory organization and the Commission.

(C) If such note is not paid upon presentment and demand as provided for therein, the applicant or registrant shall have the right to liquidate all or any part of the securities then pledged as collateral to secure payment of the same and to apply the net proceeds of such liquidation, together with any cash then included in the collateral, in payment of such note. Subject to the prior rights of the applicant or registrant as pledgee, the lender, as defined herein, may retain ownership of the collateral and have the benefit of

any increases and bear the risks of any decreases in the value of the collateral and may retain the right to vote securities contained within the collateral and any right to income therefrom or distributions thereon, except the applicant or registrant shall have the right to receive and hold as pledgee all dividends payable in securities and all partial and complete liquidating dividends.

(D) Subject to the prior rights of the applicant or registrant as pledgee, the lender may have the right to direct the sale of any securities included in the collateral, to direct the purchase of securities with any cash included therein, to withdraw excess collateral or to substitute cash or other securities as collateral *Provided*, That the net proceeds of any such sale and the cash so substituted and the securities so purchased or substituted are held by the applicant or registrant as pledgee, and are included within the collateral to secure payment of the secured demand note, and *Provided further*, That no such transaction shall be permitted if, after giving effect thereto, the sum of the amount of any cash, plus the collateral value of the securities, then pledged as collateral to secure the secured demand note would be less than the unpaid principal amount of the secured demand note.

(E) Upon payment by the lender, as distinguished from a reduction by the lender which is provided for in paragraph (h) (2) (vi) (C) of this section or reduction by the applicant or registrant as provided for in paragraph (h) (2) (vii) of this section, of all or any part of the unpaid principal amount of the secured demand note, the applicant or registrant shall issue to the lender a subordinated loan agreement in the amount of such payment (or in the case of an applicant or registrant that is a partnership, credit a capital account of the lender), or issue preferred or common stock of the applicant or registrant in the amount of such payment, or any combination of the foregoing, as provided for in the secured demand note agreement.

(F) The term "lender" means the person who lends cash to an applicant or registrant pursuant to a subordinated loan agreement and the person who contributes a secured demand note to an applicant or registrant pursuant to a secured demand note agreement.

(2) Minimum requirements for subordination agreements: (1) Subject to paragraph (h) (1) of this section, a subordination agreement shall mean a written agreement between the applicant or registrant and the lender, which: (A) has a minimum term of one year, except for temporary subordination agreements provided for in paragraph (h) (3) (v) of this section, and

(B) is a valid and binding obligation enforceable in accordance with its terms (subject as to enforcement to applicable bankruptcy, insolvency, reorganization, moratorium and other similar laws) against the applicant or registrant and the lender and their respective heirs, executors, administrators, successors and assigns.

(ii) *Specific amount*. All subordination agreements shall be for a specific dollar amount which shall not be reduced for the duration of the agreement except by installments as specifically provided for therein and except as otherwise provided in this paragraph (h) (2) of this section.

(iii) *Effective subordination*. The subordination agreement shall effectively subordinate any right of the lender to receive any payment with respect thereto, together with accrued interest or compensation, to the prior payment or provision for payment in full of all claims of all present and future creditors of the applicant or registrant arising out of any matter occurring prior to the date on which the related payment obligation matures, except for claims which are the subject of subordination agreements which rank on the same priority as or junior to the

claim of the lender under such subordination agreements.

(iv) *Proceeds of subordinated loan agreements.* The subordinated loan agreement shall provide that the cash proceeds thereof shall be used and dealt with by the applicant or registrant as part of its capital and shall be subject to the risks of the business.

(v) *Certain rights of the borrower.* The subordination agreement shall provide that the applicant or registrant shall have the right to: (A) Deposit any cash proceeds of a subordinated loan agreement and any cash pledged as collateral to secure a secured demand note in an account or accounts in its own name in any bank or trust company;

(B) Pledge, repledge, hypothecate and rehypothecate, any or all of the securities pledged as collateral to secure a secured demand note, without notice, separately or in common with other securities or property for the purpose of securing any indebtedness of the applicant or registrant; and

(C) Lend to itself or others any or all of the securities and cash pledged as collateral to secure a secured demand note.

(vi) *Collateral for secured demand notes.* Only cash and securities which are fully paid for and which may be publicly offered or sold without registration under the Securities Act of 1933, and the offer, sale and transfer of which are not otherwise restricted, may be pledged as collateral to secure a secured demand note. The secured demand note agreement shall provide that if at any time the sum of the amount of any cash, plus the collateral value of any securities, then pledged as collateral to secure the secured demand note is less than the unpaid principal amount of the secured demand note, the applicant or registrant must immediately transmit written notice to that effect to the lender, the designated self-regulatory organization, if applicable, and the Commission. The secured demand note agreement shall also require that following such transmittal:

(A) The lender, prior to noon of the business day next succeeding the transmittal of such notice, may pledge as collateral additional cash or securities sufficient, after giving effect to such pledge, to bring the sum of the amount of any cash plus the collateral value of any securities, then pledged as collateral to secure the secured demand note, up to an amount not less than the unpaid principal amount of the secured demand note; and

(B) Unless additional cash or securities are pledged by the lender as provided in (A) above, the applicant or registrant at noon on the business day next succeeding the transmittal of notice to the lender must commence sale, for the account of the lender, of such of the securities then pledged as collateral to secure the secured demand note and apply so much of the net proceeds thereof, together with such of the cash then pledged as collateral to secure the secured demand note as may be necessary to eliminate the unpaid principal amount of the secured demand note; *Provided, however,* That the unpaid principal amount of the secured demand note need not be reduced below the sum of the amount of any remaining cash, plus the collateral value of the remaining securities, then pledged as collateral to secure the secured demand note. The applicant or registrant may not purchase for its own account any securities subject to such a sale; and

(C) The secured demand note agreement may also provide that, in lieu of the procedures specified in the provisions required by (B) above, the lender with the prior written consent of the applicant or registrant and the designated self-regulatory organization or if the applicant or registrant is not a member of a designated self-regulatory organization, then the Commission, may reduce the unpaid principal amount of the

secured demand note, *Provided,* That after giving effect to such reduction the adjusted net capital of the applicant or registrant would not be less than 10 percent of aggregate indebtedness or in the case of an applicant or registrant operating pursuant to paragraph (g) of this section, adjusted net capital would not be less than 7 percent of the funds required to be segregated pursuant to the Act and these regulations plus for Securities Brokers or Dealers, 7 percent of the aggregate debit items computed in accordance with 17 CFR 240.15c3-3a. *Provided, further,* That no single secured demand note shall be permitted to be reduced by more than 15 percent of its original principal amount and after such reduction no excess collateral may be withdrawn. No designated self-regulatory organization shall consent to reduction of the principal amount of a secured demand note if, after giving effect to such reduction, adjusted net capital would be less than 120 percent of the appropriate minimum dollar amount required by this section.

(vii) *Permissive prepayments.* An applicant or registrant at its option but not at the option of the lender, may, if the subordination agreement so provides, make a payment of all or any portion of the payment obligation thereunder prior to the scheduled maturity date of such payment obligation (hereinafter referred to as a "prepayment"), but in no event may any prepayment be made before the expiration of one year from the date such subordination agreement became effective; *Provided, however,* That the foregoing restriction shall not apply to temporary subordination agreements which comply with the provisions of subparagraph (h) (3) (v) of this section. No prepayment shall be made, if, after giving effect thereto (and to all payments of payment obligations under any other subordinated agreements then outstanding the maturity or accelerated maturities of which are scheduled to fall due within six months after the date such prepayment is to occur pursuant to this provision or on or prior to the date on which the payment obligation in respect to such prepayment is scheduled to mature disregarding this provision, whichever date is earlier) without reference to any projected profit or loss of the applicant or registrant, either the adjusted net capital of the applicant or registrant is less than 10 percent of its aggregate indebtedness or in the case of an applicant or registrant operating pursuant to paragraph (g) of this section, its adjusted net capital is less than 7 percent of the funds required to be segregated pursuant to the Act and these regulations plus for Securities Brokers or Dealers, 7 percent of the aggregate debit items computed in accordance with 17 CFR 240.15c3-3a or its adjusted net capital is less than 120% of the appropriate minimum dollar amount required by this section. Notwithstanding the above, no prepayment shall occur without the prior written approval of the designated self-regulatory organization and the Commission.

(viii) *Suspended repayment.* (A) The payment obligation of the applicant or registrant in respect of any subordination agreement shall be suspended and shall not mature if, after giving effect to payment of such payment obligation (and to all payments of payment obligations of the applicant or registrant under any other subordination agreement(s) then outstanding which are scheduled to mature on or before such payment obligation) either the adjusted net capital of the applicant or registrant would be less than 8½ percent of aggregate indebtedness or in the case of an applicant or registrant operating pursuant to paragraph (g) of this section, adjusted net capital would be less than 6 percent of the funds required to be segregated pursuant to the Act and these regulations plus for Securities

Brokers or Dealers, 6 percent of the aggregate debit items computed in accordance with 17 CFR 240.15c3-3a or its adjusted net capital would be less than 120 percent of the minimum dollar amount required by this section; *Provided,* That the subordination agreement may provide that if the payment obligation of the applicant or registrant thereunder does not mature and is suspended as a result of the requirement of this paragraph (h) (2) (viii) of this section for a period of not less than six months the applicant or registrant shall thereupon commence the rapid and orderly liquidation of its business, but the right of the lender to receive payment, together with accrued interest or compensation, shall remain subordinate as required by the provisions of this section.

(B) Whenever a subordination agreement provides that an applicant or registrant shall commence a rapid and orderly liquidation, as permitted in paragraph (h) (2) (viii) (A), the date on which the liquidation commences shall be the maturity date for each subordination agreement of the applicant or registrant then outstanding, but the rights of the respective lenders to receive payment, together with accrued interest or compensation, shall remain subordinate as required by the provisions of this section.

(ix) *Accelerated maturity.* Obligation to repay to remain subordinate:

(A) Subject to the provisions of paragraph (h) (2) (viii) of this section, a subordination agreement may provide that the lender may, upon prior written notice to the applicant or registrant and the designated self-regulatory organization or if applicant or registrant is not a member of a designated self-regulatory organization, then the Commission, given not earlier than six months after the effective date of such subordination agreement, accelerate the date on which the payment obligation of the borrower, together with accrued interest or compensation, is scheduled to mature to a date not earlier than six months after giving of such notice, but the right of the lender to receive payment, together with accrued interest or compensation, shall remain subordinate as required by the provisions of this paragraph (h) (2) or this section.

(B) Notwithstanding the provisions of paragraph (h) (2) (viii) of this section, the payment obligation of the applicant or registrant with respect to a subordination agreement, together with accrued interest and compensation, shall mature in the event of any receivership, insolvency, liquidation pursuant to the Securities Investor Protection Act of 1970 or otherwise, bankruptcy, assignment for the benefit of creditors, reorganization whether or not pursuant to the bankruptcy laws, or any other marshaling of the assets and liabilities of the applicant or registrant but the right of the lender to receive payment, together with accrued interest or compensation, shall remain subordinate as required by the provisions of paragraph (h) (2) of this section.

(x) *Accelerated maturity of subordination agreements on event of default and event of acceleration.* Obligation to repay to remain subordinate:

(A) A subordination agreement may provide that the lender may upon prior written notice to the applicant or registrant and the designated self-regulatory organization or if the applicant or registrant is not a member of a designated self-regulatory organization, the Commission, of the occurrence of any event of acceleration (as hereinafter defined) given no sooner than six months after the effective date of such subordination agreement, accelerate the date on which the payment obligation of the applicant or registrant, together with accrued interest or compensation, is scheduled to mature, to the last business day of a calendar month which is not less than six months after notice of acceleration is received by the applicant or registrant and

the designated self-regulatory organization, or if the applicant or registrant is not a member of a designated self-regulatory organization, then the Commission. Any subordination agreement containing such events of acceleration may also provide, that if upon such accelerated maturity date the payment obligation of the applicant or registrant is suspended as required by paragraph (h) (2) (viii) of this section and liquidation of the applicant or registrant has not commenced on or prior to such accelerated maturity date then notwithstanding paragraph (h) (2) (viii) of this section the payment obligation of the applicant or registrant with respect to such subordination agreement shall mature on the day immediately following such accelerated maturity date and in any such event the payment obligations of the applicant or registrant with respect to all other subordination agreements then outstanding shall also mature at the same time but the rights of the respective lenders to receive payment, together with accrued interest or compensation, shall remain subordinate as required by the provisions of paragraph (h) (2) of this section. Events of acceleration which may be included in a subordination agreement complying with this paragraph (h) (2) (x) of this section shall be limited to:

(1) Failure to pay interest or any installment of principal on a subordination agreement as scheduled;

(2) Failure to pay when due other money obligations of a specified material amount;

(3) Discovery that any material, specified representation or warranty of the applicant or registrant which is included in the subordination agreement and on which the subordination agreement was based or continued was inaccurate in a material respect at the time made; (4) Any specified and clearly measurable event which is included in the subordination agreement and which the lender and the applicant or registrant agree, (a) is a significant indication that the financial position of the applicant or registrant has changed materially and adversely from agreed upon specified norms; or (b) could materially and adversely affect the ability of the applicant or registrant to conduct its business as conducted on the date the subordination agreement was made; or (c) is a significant change in the senior management of the applicant or registrant or in the general business conducted by the applicant or registrant from that which obtained on the date the subordination agreement became effective;

(5) Any continued failure to perform agreed covenants included in the subordination agreement relating to the conduct of the business of the applicant or registrant or relating to the maintenance and reporting of its financial position; and

(B) Notwithstanding the provisions of paragraph (h) (2) (viii) of this section, a subordination agreement may provide that, if liquidation of the business of the applicant or registrant had not already commenced, the payment obligation of the applicant or registrant shall mature, together with accrued interest or compensation, upon the occurrence of an event of default (as hereinafter defined). Such agreement may also provide that, if liquidation of the business of the applicant or registrant has not already commenced, the rapid and orderly liquidation of the business of the applicant or registrant shall then commence upon the happening of an event of default. Any subordination agreement which so provides for maturity of the payment obligation upon the occurrence of an event of default shall also provide that the date on which such event of default occurs shall, if liquidation of the applicant or registrant has not already commenced, be the date on which the payment obligation of the applicant or registrant with respect to all other subordina-

tion agreements then outstanding shall mature but the rights of the respective lenders to receive payment, together with accrued interest or compensation, shall remain subordinate as required by the provisions of paragraph (h) (2) of this section. Events of default which may be included in a subordination agreement shall be limited to:

(1) The making of an application by the Securities Investor Protection Corporation for a decree adjudicating that customers of the applicant or registrant are in need of protection under the Securities Investor Protection Act of 1970 and the failure of the applicant or registrant to obtain the dismissal of such application within 30 days;

(2) Failure to meet the minimum capital requirements of the designated self-regulatory organization, or of the Commission, throughout a period of 15 consecutive business days, commencing on the day the borrower first determines and notifies the designated self-regulatory organization, if any, of which he is a member and the Commission; or any self-regulatory organization or the Commission first determines and notifies the applicant or registrant of such fact;

(3) The Commission shall revoke the registration of the applicant or registrant;

(4) The self-regulatory organization shall suspend (and not reinstate within 10 days) or revoke the applicant or registrant's status as a member thereof;

(5) Any receivership, insolvency, liquidation pursuant to the Securities Investor Protection Act of 1970 or otherwise, bankruptcy, assignment for the benefit of creditors, reorganization whether or not pursuant to bankruptcy laws, or any other marshaling of the assets and liabilities of the applicant or registrant. A subordination agreement which contains any of the provisions permitted by this subparagraph (2) (x) shall not contain the provision otherwise permitted by paragraph (h) (2) (ix) (A) of this section.

(3) *Miscellaneous provisions.*—(i) *Prohibited cancellation.* The subordination agreement shall not be subject to cancellation by either party; no payment shall be made with respect thereto and the agreement shall not be terminated, rescinded or modified by mutual consent or otherwise if the effect thereof would be inconsistent with the requirements of paragraph (h) of this section.

(ii) *Notice of maturity or accelerated maturity.* Every applicant or registrant shall immediately notify the designated self-regulatory organization and the Commission if, after giving effect to all payments of payment obligations under subordination agreements then outstanding which are then due or mature within the following six months without reference to any projected profit or loss of the applicant or registrant, either the aggregate indebtedness of the applicant or its adjusted net capital or its adjusted net capital would be less than 120 percent of the minimum dollar amount required by § 1.17 or in the case of an applicant or registrant who is operating pursuant to paragraph (g) of § 1.17, its adjusted net capital would be less than 6 percent of the funds required to be segregated pursuant to the Act and these regulations plus for Securities Brokers or Dealers, 6 percent of the aggregate debit items computed in accordance with 17 CFR 240.15c3-3a.

(iii) *Certain legends.* If all the provisions of a satisfactory subordination agreement do not appear in a single instrument then the debenture or other evidence of indebtedness shall bear on its face an appropriate legend stating that it is issued subject to the provisions of a satisfactory subordination agreement which shall be adequately referred to and incorporated by reference.

(iv) *Legal title to securities.* All securities

pledged as collateral to secure a secured demand note must be in bearer form, or registered in the name of the applicant or registrant or the name of its nominee or custodian.

(v) *Temporary subordinations.* For the purpose of enabling an applicant or registrant to participate as an underwriter of securities or other extraordinary activities in compliance with the adjusted net capital requirements of this section, an applicant or registrant shall be permitted, on no more than three occasions in any 12-month period to enter into a subordination agreement on a temporary basis which has a stated term of no more than 45 days from the date of the subordination agreement became effective. *Provided,* That this temporary relief shall not apply to any applicant or registrant if either the adjusted net capital of the applicant or registrant is less than 10 percent of its aggregate indebtedness or in the case of an applicant or registrant operating pursuant to paragraph (g) of this section, adjusted net capital is less than 7 percent of the funds required to be segregated pursuant to the Act and these regulations plus for Securities Brokers or Dealers, 7 percent of the aggregate debit items computed in accordance with 17 CFR 240.15c3-3a or its adjusted capital is less than 120 percent of the appropriate minimum dollar amount required by this section, or the amount of its then outstanding subordination agreements exceeds the limits specified in paragraph (d) of this section. Such temporary subordination agreement shall be subject to all the other provisions of this section.

(iv) *Filing.* Two copies of any proposed subordination agreement (including non-conforming subordination agreements) shall be filed with the Commission at least ten days prior to the proposed execution date of the agreement or at such other time as the Commission for good cause shall accept such filing. Copies of the proposed agreement shall be filed with the designated self-regulatory organization, if any, of which the applicant or registrant is a member in such quantities and at such time as the designated self-regulatory organization may require. The applicant or registrant shall also file with said parties a statement setting forth the name and address of the lender, the business relationship of the lender to the applicant or registrant and whether the applicant or registrant carried funds or securities for the lender at or about the time the proposed agreement was so filed. All agreements shall be examined at the Commission and the designated self-regulatory organization with whom such agreements are required to be filed prior to their becoming effective. No proposed agreement shall be a satisfactory subordination agreement for the purposes of this section unless and until the Commission has found the agreement acceptable and such agreement has become effective in the form found acceptable.

(vii) *Subordination agreements in effect prior to adoption.*—Any subordination agreement which has been entered into prior to (date of adoption) and which has been deemed to be satisfactorily subordinated pursuant to this section heretofore in effect or the adjusted net capital rules of a self-regulatory organization shall continue to be deemed a satisfactory subordination agreement until the maturity of such agreement. *Provided,* that no renewal of an agreement which provides for automatic or optional renewal by the applicant or registrant or lender shall be deemed to be a satisfactory subordination agreement unless such renewed agreement meets the requirements of this section, within six months of (the effective date of this section). *Provided further,* That all subordination agreements must meet the requirements of this rule within five years of (date of adoption).

(4) A designated self-regulatory organiza-

tion and the Commission may allow debt with a maturity date of one year or more to be treated as meeting the provisions of this paragraph (h) provided:

(i) Such exemption shall only be given when the registrant's adjusted net capital is less than the minimum required by this § 1.17 or by the capital rule of the designated self-regulatory organization to which such registrant is subject;

(ii) Such exemption shall be for a period of thirty days or such lesser period as the designated self-regulatory organization and the Commission may determine;

(iii) Such exemption shall not be allowed more than once in any twelve month period; and

(iv) At all times during such exemption the registrant shall make a good faith effort to comply with the provisions of this § 1.17 or the capital rule of the designated self-regulatory organization to which such registrant is subject exclusive of any benefits derived from this paragraph (h) (4).

(j) [Reserved]

(j) For the purposes of this section "cover" is defined as follows:

(1) *General definition.* Cover shall mean transactions or positions in a contract for future delivery on a board of trade or a commodity option where such transactions or positions normally represent a substitute for transactions to be made or positions to be taken at a later time in a physical marketing channel, and where they are economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise, and where they arise from:

(i) The potential change in the value of assets which a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising.

(ii) The potential change in the value of liabilities which a person owes or anticipates incurring, or

(iii) The potential change in the value of services which a person provides, purchases or anticipates providing or purchasing. Notwithstanding the foregoing, no transactions or positions shall be classified as cover for the purposes of this section unless their purpose is to offset price risks incidental to commercial cash or spot operations and such positions are established and liquidated in accordance with sound commercial practices and unless the provisions of paragraphs (j) (2) and (3) of this section have been satisfied.

(2) *Enumerated Cover Transactions.* The definition of covered transactions and positions in paragraph (j) (1) of this section includes, but is not limited to, the following specific transactions and positions:

(i) Ownership or fixed-price purchase of any commodity which does not exceed in quantity the sales of the same commodity for future delivery on a board of trade or the purchase of a put commodity option of the same commodity for which the market value for the actual commodity or futures contract which is the subject of the option is less than the striking price of the option.

(ii) Fixed-price sale of any commodity which does not exceed in quantity the purchase of the same commodity for future delivery on a board of trade or the purchase of a call commodity option of the same commodity for which the market value for the actual commodity or futures contract which is the subject of such option is more than the striking price of the option; and

(iii) Ownership or fixed price contracts of a commodity described in paragraphs (j) (2) (i) and (j) (2) (ii) of this section may also be covered other than by the same quantity of the same cash commodity, provided that the fluctuations in value of the position for future delivery or commodity option are substantially related to the fluctuations in value of the actual cash position.

(3) *Non-Enumerated cases.* Upon specific request, the Commission may recognize transactions and positions other than those enumerated in paragraph (j) (2) of this section as cover in amounts and under the terms and conditions as it may specify. Any applicant or registrant who wishes to avail himself of the provisions of this paragraph (j) (3) must apply to the Commission in writing at its principal office in Washington, D.C. giving full details of the transaction including detailed information which will demonstrate that the transaction is economically appropriate to the reduction of risk exposure attendant to the conduct and management of a commercial enterprise.

6. By revising § 1.18 (b) and (c) to read as follows:

§ 1.18 Records for and relating to financial reporting and monthly computation.

(b) Each applicant or registrant must make and keep as a record in accordance with § 1.31, formal computations of his adjusted net capital and of its minimum financial requirements pursuant to § 1.17 as of the close of business each month. Such computations must be completed and made available for inspection by any representative of the Commission or designated self-regulatory organization, if any, within 30 days after the date for which the computations are made, commencing the first month end after the date the application for registration is filed or the first month end after (the effective date of this section).

(c) [Revoked]

7. By adding a new § 1.52, reading as follows:

§ 1.52 Self-regulatory organization adoption and surveillance of minimum financial requirements.

(a) Each self-regulatory organization must adopt minimum financial and related reporting requirements for all its member futures commission merchants by December 25, 1978. Such requirements must be the same as, or more stringent than, those contained in §§ 1.10 and 1.17 of this part, and the definition of adjusted net capital must be the same as that prescribed in § 1.17(c) of this part.

(b) Any two or more self-regulatory organizations may file with the Commission a plan for delegating to a designated self-regulatory organization, for any futures commission merchant which is a member of more than one such self-regulatory organization, the responsibility of:

(1) Monitoring and auditing for compliance with the minimum financial and related reporting requirements adopted by such self-regulatory organizations in accordance with paragraph (a) of this section; and

(2) Receiving the financial reports necessitated by such minimum financial and related reporting requirements.

Such a plan may also delegate the responsibility of examining the books and records kept by such future commission merchant relating to its business of dealing in: (A) Commodity futures and cash commodities, insofar as such business relates to its dealing on contract markets, as required by § 1.51(a) (3); or (B) commodity options and physical commodities, insofar as such business relates to its dealing on domestic commodity option exchanges, as required by § 32.5(g) (4).

(c) Any plan filed under this § 1.52 may contain provisions for the allocation of expenses reasonably incurred by the designated self-regulatory organization among the self-regulatory organizations participating in such a plan.

(d) A plan's designated self-regulatory organization must report to that plan's other self-regulatory organizations any violation of such other self-regulatory organizations' rules and regulations for which the responsibility to monitor, audit or examine has

been delegated to such designated self-regulatory organization under this § 1.52.

(e) The self-regulatory organizations may, among themselves, establish programs to provide access to any necessary financial or related information.

(f) After appropriate notice and opportunity for comment, the Commission may, by written notice, approve such a plan, or any part of the plan, if it finds that the plan, or any part thereof: Is necessary or appropriate to serve the public interest; is for the protection and in the interest of customers; reduces multiple monitoring and auditing for compliance with the minimum financial rules of the self-regulatory organizations submitting the plan for any futures commission merchant which is a member of more than one self-regulatory organization; reduces multiple reporting of the financial information necessitated by such minimum financial and related reporting requirements by any futures commission merchant which is a member of more than one self-regulatory organization; fosters cooperation and coordination among the contract markets; and does not hinder the development of a registered futures association under section 17 of the Act.

(g) (1) Upon the approval of a plan or part thereof under § 1.52 (f), a self-regulatory organization which is included in such a plan shall be considered to have met its affirmative action responsibilities under § 1.51 to the extent that such responsibilities have been delegated to a designated self-regulatory organization.

(2) After the Commission has approved a plan or part thereof under § 1.52 (f), a self-regulatory organization relieved of responsibility must notify each of its members which is subject to such a plan: (A) Of the limited nature of its responsibility for such a member's compliance with its minimum financial and related reporting requirements; and (B) of the identity of the designated self-regulatory organization which has been delegated responsibility for such a member.

(h) The Commission may at any time, after appropriate notice and opportunity for hearing, withdraw its approval of any plan or part thereof established under this § 1.52, if such plan or part thereof ceases to adequately effectuate the purposes of section 4f(2) of the act or of this § 1.52.

(i) (1) If a futures commission merchant holding membership in a self-regulatory organization ceases to be a member in good standing of that self-regulatory organization, such futures commission merchant must, on the same day that event takes place, give telegraphic notice of that event to the principal office of the Commission in Washington, D.C.

(2) Whenever a futures commission merchant holding membership in a self-regulatory organization ceases to be a member in good standing of that self-regulatory organization, such self-regulatory organization must, on the same day that event takes place, give telegraphic notice of that event to the principal office of the Commission in Washington, D.C., send a copy of that notification to such futures commission merchant, and notify such futures commission merchant of its responsibilities under paragraph (i) (1) of this section.

(j) Nothing in this § 1.52 shall preclude the Commission from examining any futures commission merchant for compliance with the minimum financial and related reporting requirements to which such futures commission merchant is subject.

(k) In the event a plan is not filed and/or approved for each futures commission merchant which is a member of more than one self-regulatory organization, the Commission may design and, after notice and opportunity for comment, approve a plan for those futures commission merchants which are not the subject of an approved plan (under para-

graph (f) of this section) delegating to a designated self-regulatory organization the responsibilities described in paragraph (b) of this section.

(7 U.S.C. 6c, 6f, 6g, 7a, 12a and 17.)

Issued in Washington, D.C., on April 5, 1978, by the Commission.

WILLIAM T. BAGLEY,
Chairman,
Commodity Futures Trading
Commission.

[FR Doc 78-9400 Filed 4-7-78; 8:45 am]

Mr. DECONCINI. Mr. President, I ask unanimous consent to have printed in the RECORD a statement by the Senator from Massachusetts (Mr. KENNEDY).

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

STATEMENT OF SENATOR EDWARD M. KENNEDY ON THE AMENDMENT TO THE BANKRUPTCY BILL TO ALLOW REAFFIRMATION OF LAWFULLY DISCHARGED DEBTS

The over-600 page bill on each of our desks today is the result of years of efforts to modernize, reform, and make uniform our federal bankruptcy laws. The Senator from New Mexico (Mr. DeConnini) and the Senator from Wyoming (Mr. Wallop) are to be commended for the tremendous amount of time and energy they have put into this undertaking.

The result is an important and impressive piece of legislation. In addition to its attention to the procedures and institutions upon which a fair and effective bankruptcy system must be founded, this bill also attempts to make bankruptcy a more effective remedy for the consumer debtor. The basic principle embodied in the bill is that once a person has gone through bankruptcy, he or she should be given a truly fresh start. But, Mr. President, that is precisely the principle most offended by the amendment to section 524 to allow general reaffirmation of discharged debts.

The efforts by lending firms to reinstate their power to have new life breathed into discharged debts are, to me, unconscionable. The arguments for this amendment are simply devoid of merit. The practice of seeking reaffirmation permits unscrupulous and powerful lenders to force persons to reaffirm lawfully discharged debts through job pressure, deceit, and the temptation of an offer of further credit. It should be of no importance to careful, ethical businesses.

The primary justification for allowing bankruptcy discharges of debt is the fresh start it provides to persons who have become so burdened with debt that they are unable to function energetically and effectively in society. Reaffirmations are totally at war with this objective.

Some lenders have argued that reaffirmations are needed to make it easier for bankrupts to get further credit. The weakness of this position should be obvious. In the first place, permitting finance companies to condition the extension of further credit on the reaffirmation of a debt invites an outrageous evasion of state usury laws. In many instances, the lender will actually obtain what comes to interest in excess of 100% when both the costs of reaffirming the legally discharged debt plus the legal interest rate are considered. Do we really want to encourage individuals who have just put the public and other creditors to the expense of bankruptcy proceeding to assume that sort of obligation?

Secondly, I do not think we should encourage people who have just been through bankruptcy to begin immediately seeking credit with finance companies. We must assume that the inability to resist or to manage debt obligations was the cause of the initial bankruptcy in a large number of cases.

Finally, establishing new credit on the basis of a reaffirmation to one lender obviously puts the discharged bankrupt in a far worse position to assume and satisfy obligations to other businesses.

Generally, creditors work with each other and the debtor by deferring collection attempts and settling claims for less than their full value to help the debtor avoid bankruptcy. The creditors do this, of course, in their own interest because they want to avoid losing their entire claim in bankruptcy. Obviously, however, a firm which has hopes of recovering money through manipulation of reaffirmations has a far less incentive to assist and cooperate with the other creditors. We can safely assume that such lenders are more likely to pursue their individual claim aggressively without regard to whether that effort will eventually cause a declaration of bankruptcy.

Despite absurd claims to the contrary by some lenders, S. 2266, as now amended, would not deny debtors the right to satisfy their conscience by paying off discharged debts. There is nothing in the bill to prohibit a debtor from voluntarily making payments if he chooses or feels a moral obligation to do so.

In my view this issue is non-ideological and non-partisan. It arises only because of the efforts of a small group of creditors to maintain a legal sanction of their efforts to evade the intent of the bankruptcy laws.

I thus strongly oppose any attempt to delete my amendment to section 524.

Mr. BARTLETT. Mr. President, do I have any time remaining?

The PRESIDING OFFICER. The Senator has 2 minutes remaining.

Mr. BARTLETT. Mr. President, will the distinguished Senator from Maryland advise whether he needs additional time?

Mr. MATHIAS. I thank the Senator very much and I appreciate it, but I do not need additional time.

Mr. DECONCINI. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. DECONCINI. Mr. President, I yield back the remainder of my time on the amendment.

Mr. BARTLETT. I yield back the remainder of my time.

The PRESIDING OFFICER. All time having been yielded back, the question is on agreeing to the amendment of the Senator from Oklahoma.

On this question, the yeas and nays have been ordered and the clerk will call the roll.

The legislative clerk called the roll.

(Mr. METZENBAUM assumed the chair.)

Mr. CRANSTON. I announce that the Senator from South Dakota (Mr. ABOUREZK), the Senator from Alabama (Mr. ALLEN), the Senator from Minnesota (Mr. ANDERSON), the Senator from Delaware (Mr. BIDEN), the Senator from North Dakota (Mr. BURDICK), the Senator from Mississippi (Mr. EASTLAND), the Senator from Colorado (Mr. HASKELL), the Senator from Montana (Mr. HATFIELD), the Senator from Minnesota (Mrs. HUMPHREY), the Senator from Louisiana (Mr. JOHNSTON), the Senator from New Hampshire (Mr. MCINTYRE), the Senator from West Virginia (Mr.

RANDOLPH), and the Senator from Illinois (Mr. STEVENSON) are necessarily absent.

I further announce that the Senator from Massachusetts (Mr. KENNEDY) is absent on official business.

I also announce that the Senator from Rhode Island (Mr. PELL) is absent because of illness.

I further announce that, if present and voting, the Senator from West Virginia (Mr. RANDOLPH) and the Senator from Rhode Island (Mr. PELL) would each vote "yea."

Mr. CURTIS. I announce that the Senator from Tennessee (Mr. BAKER), the Senator from Massachusetts (Mr. BROOKE), the Senator from New Jersey (Mr. CASE), the Senator from Rhode Island (Mr. CHAFFEE), the Senator from New Mexico (Mr. DOMENICI), the Senator from Oregon (Mr. HATFIELD), the Senator from North Carolina (Mr. HELMS), the Senator from Nevada (Mr. LAXALT), the Senator from Idaho (Mr. MCCLURE), the Senator from Kansas (Mr. PEARSON), the Senator from Illinois (Mr. PERCY), the Senator from Vermont (Mr. STAFFORD), the Senator from Alaska (Mr. STEVENS), and the Senator from Texas (Mr. TOWER) are necessarily absent.

I further announce that, if present and voting, the Senator from Oregon (Mr. HATFIELD) would vote "yea."

The result was announced—yeas 51, nays 20, as follows:

[Rollcall Vote No. 373 Leg.]

YEAS—51

Bartlett	Hansen	Riegle
Bellmon	Hatch	Roth
Bumpers	Hayakawa	Sarbanes
Byrd,	Heinz	Sasser
Harry F., Jr.	Hollings	Schmitt
Byrd, Robert C.	Huddleston	Schweiker
Cannon	Inouye	Scott
Chiles	Jackson	Sparkman
Church	Leahy	Stennis
Curtis	Lugar	Stone
DeConcini	Magnuson	Talmadge
Dole	Mathias	Thurmond
Ford	Matsunaga	Wallop
Garn	Melcher	Weicker
Glenn	Morgan	Young
Goldwater	Moynihan	Zorinsky
Gravel	Nunn	
Griffin	Packwood	

NAYS—20

Bayh	Eagleton	Metzenbaum
Bentsen	Hart	Muskie
Clark	Hathaway	Nelson
Cranston	Hodges	Proxmire
Culver	Javits	Ribicoff
Danforth	Long	Williams
Durkin	McGovern	

NOT VOTING—29

Abourezk	Haskell	McIntyre
Allen	Hatfield,	Pearson
Anderson	Mark O.	Pell
Baker	Hatfield,	Percy
Biden	Paul G.	Randolph
Brooke	Helms	Stafford
Burdick	Humphrey	Stevens
Case	Johnston	Stevenson
Chafee	Kennedy	Tower
Domenici	Laxalt	
Eastland	McClure	

So the amendment (UP No. 1821) was agreed to.

Mr. BARTLETT. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. HANSEN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

● Mr. LONG. Mr. President, S. 2266 pro-

vides the first overall revision of the bankruptcy laws since 1938, in light of major changes in debtor-creditor relations during this period. The bill was reported by the Finance Committee on August 10, 1978.

S. 2266 was referred to the Finance Committee for its consideration and recommendations concerning several tax-related sections of the bill. These provisions deal with such subjects as defining the tax claims against the debtor's estate which are entitled to priority and nondischargeability, determining the tax liabilities of a debtor in bankruptcy, and clarifying the jurisdiction of different courts to rule on tax issues. The bill reported by the Finance Committee includes the results of its consideration of these matters, as well as additional technical and conforming amendments.

S. 2266 does not contain amendments to the Internal Revenue Code dealing with substantive tax issues arising in bankruptcy. A separate bill is now pending in the House, H.R. 9973, containing amendments designed to conform the tax rules to the bankruptcy changes we are considering today. H.R. 9973 was introduced on November 3, 1977, by members of the House Judiciary Committee and was referred to the Committee on Ways and Means, which held a hearing on the bill on February 22, 1978. We anticipate that Congress will act on these substantive tax issues early next year. Since the general effective date for S. 2266 is October 1, 1979, we have sufficient time to make the necessary code amendments so that all the new rules will become effective at the same time.

Mr. President, the Departments of the Treasury and of Justice have no objections to S. 2266, as amended by the Finance Committee. I urge its passage.●

Mr. STENNIS. Mr. President, will the Senator from Arizona, for an emergency matter, yield me 5 minutes?

Mr. DECONCINI. Mr. President, I am more than happy to yield 5 minutes to the Senator from Mississippi.

S. 3486—DEPARTMENT OF DEFENSE AUTHORIZATIONS, 1979

Mr. STENNIS. Mr. President, I appreciate the Senator's yielding to me. This is on an extraneous matter. Mr. President, may I have the attention of the Chair?

The PRESIDING OFFICER. The Senate will be in order.

Mr. STENNIS. Mr. President, if I may announce to the Senate, the House of Representatives has just voted on the veto of the military authorization bill which, as Senators know, is the basis for the appropriation bill for the Department of Defense. By a vote of 191 for overriding to 206 against overriding, the veto was sustained. This means that this is the end for that bill; it is null and void, and a new start must be made.

I ask unanimous consent, Mr. President, at this time and out of order, to introduce a bill authorizing the military program for fiscal year 1979. The bill as now drafted will be the bill that has just been vetoed, with the nuclear carrier

taken out. I will have a short statement here of explanation. Do I have the unanimous consent to introduce the bill out of order?

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Mr. STENNIS. I thank the Chair.

Mr. President, in view of what has happened, we must now move forward with providing for the common defense. The new fiscal year begins October 1, only 3 full weeks away. We must not delay this authorization bill or the subsequent defense appropriation bill, and thereby force reliance on a continuing resolution for an extended period. That will certainly not benefit the country or any group in it.

I strongly favor the idea of simply taking the nuclear carrier out of the previously agreed to conference report and passing a new bill without further change. Of course, our committee will call on the administration and give them a chance to make recommendations, but I trust that they will limit their requests to actual emergency matters. I will confer, of course, with the members of the full committee. We simply should not hold up authorization and appropriation bills for fiscal year 1979 any longer. Therefore, this is the reason that I have introduced in the Senate today a new fiscal year 1979 defense authorization bill, which, as I have said, is simply the conference report as vetoed, less the nuclear carrier.

Mr. President, it has been generally agreed that the bill that was passed was a balanced bill, that it contained necessary items, largely, and few, if any, unnecessary items. I have no resentment, but we must get to work and pass a bill. The appropriations bill is just suspended in midair, neither fish nor fowl, so far as the authorizations are concerned.

I appreciate this unanimous consent being granted. We can move right along on this bill.

I see the majority leader is here, and I will be glad to yield to him.

Mr. ROBERT C. BYRD. Mr. President, I wish to express my appreciation to the Senator from Mississippi, the chairman of the Armed Services Committee, for the approach he is taking in this matter. He strongly supported the nuclear carrier, and in view of the fact that that seems to have been the main bone of contention that created the veto, and in view of the fact that the House has sustained the veto, I think the distinguished chairman is being very realistic in a number of ways.

First of all, he is introducing a bill promptly. That bill leaves out the carrier, which was the problem. Also, he is suggesting, as I understand it, that we move quickly to act on the bill, not go into all the background, going from the bottom up, starting all over again. I am glad that he takes that viewpoint, because if the Senate is to complete its work and not come back after the election, I would say that mid-October is about the best we can do. That only leaves 5 weeks after this week. That does not give time to go back and thresh out

all of the things which have already been very meticulously looked at by the chairman and his committee, and keeping in mind that an appropriations bill does come behind this authorization bill. So we do have to act with deliberate speed here.

The chairman is taking this approach. I commend him for it, and I support him in it.

Mr. STENNIS. I thank the leadership. I have limited time. I see the Senator from Colorado seeking recognition. I yield 1 minute.

Mr. DECONCINI. I yield 2 minutes to the Senator from Colorado.

Mr. HART. Mr. President, I also commend the chairman for his action and underscore the words of the majority leader. Unfortunately, the Senate does not have the final authority in this matter and must agree with the House on any bill which we pass. The House has already served notice on us in the Senate and in the White House that it may work a good deal of havoc on the bill that we are talking about here. The bill that the President vetoed had a very carefully constructed compromise which addressed and solved the carrier problem once and for all. By vetoing this bill I am afraid the President has committed all of us to a very, very difficult situation. As admirable as the chairman's efforts might be, they may not be met with favor in the House.

I intend to approach our colleagues on the Armed Services Committee with a proposed compromise which I believe will be acceptable to the administration and the House of Representatives. I hope our colleagues in the Senate will pay some attention to this compromise which attempts to accommodate everybody's point of view, although it will not be ideal, probably, to any of the parties.

I am afraid the chairman's efforts will meet with some very difficult times in the House of Representatives.

Mr. STENNIS. I thank the Senator. We have to work out our matters here the best we can. We always meet with the House in the right frame of mind, I believe, and are able to get adjustments to bring back a bill.

Time is of the essence here. I believe we must recognize our goal and our mission. We will have differences, of course, which we hope we can straighten out.

I am disappointed that the President's veto of the Department of Defense fiscal year 1979 authorization bill was not overridden, because I believe it was a sound and balanced bill. The bill contains many new initiatives for each of the military services. All of the items in this bill were gone over carefully for months by the Congress, as well as the executive branch, and all of the items except for the nuclear carrier represent a broad agreement and consensus as to the many, many aspects of our defense program which are contained in this bill.

We must now move forward with providing for the common defense. The new fiscal year begins October 1—only 3 full weeks away. We must not delay this authorization bill or the subsequent defense appropriations bill and thereby force reliance on a continuing resolution for an

extended period. That will not benefit the country or any group in it.

I strongly favor the idea of simply taking the nuclear carrier out of the previously agreed to conference report and passing a new bill without further change. I will, of course, call on the administration and give them a chance to make recommendations, but I trust they will limit their request to actual, urgent emergency matters. I shall confer, of course, with all the members of the full committee. We simply should not hold up the authorization and appropriation bills for fiscal year 1979 any longer.

Therefore, I am introducing in the Senate today a new fiscal year 1979 defense authorization bill which is simply the conference report as passed by the House and Senate with the nuclear carrier taken out. I believe the real choice we have is to follow this simple approach rather than attempt to rewrite this entire, massive bill which may take months, delay the appropriation bill further, and require extensive reliance on unsatisfactory continuing resolutions.

BANKRUPTCY REFORM ACT OF 1978

The Senate continued with the consideration of the bill.

Mr. DeCONCINI. Mr. President, I know of no further amendments.

Mr. WALLOP. Mr. President, I know of no further amendments on the minority side.

Mr. DeCONCINI. Mr. President, I ask for a third reading.

The PRESIDING OFFICER. The question is on the engrossment and third reading of the bill.

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

Mr. DeCONCINI. Mr. President, I ask unanimous consent that the Judiciary Committee be discharged from further consideration of H.R. 8200 and that the Senate proceed to its immediate consideration.

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

The bill will be stated by title.

The second assistant legislative clerk read as follows:

A bill (H.R. 8200) to establish a uniform law on the subject of bankruptcies.

The PRESIDING OFFICER. Without objection, the Senate will proceed immediately to the consideration of the bill.

Mr. DeCONCINI. Mr. President, I ask that all after the enacting clause of H.R. 8200 be stricken and that the text of S. 2266, as amended, be inserted in lieu thereof.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from Arizona.

The motion was agreed to.

The PRESIDING OFFICER. The question is on the engrossment of the amendment and the third reading of the bill.

The amendment was ordered to be engrossed and the bill to be read a third time.

The bill was read the third time.

The PRESIDING OFFICER. The bill having been read the third time, the question is, Shall it pass?

The bill (H.R. 8200), as amended, was passed.

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

Mr. WALLOP. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. DeCONCINI. Mr. President, I ask unanimous consent that the Secretary of the Senate be authorized to make clerical and technical corrections in the engrossment of the Senate amendments to H.R. 8200.

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

Mr. DeCONCINI. Mr. President, I ask unanimous consent that the Senate insist upon its amendments and request a conference with the House and that the appointment of conferees be deferred at the pleasure of the Chair.

The PRESIDING OFFICER. The question is on agreeing to the motion.

The motion was agreed to.

Mr. DeCONCINI. Mr. President, I would like to take a moment to thank the staff of the Senate subcommittee, Romano Romani and Bob Feidler, for their expert work and reaffirm my thanks and appreciation to my colleague (Mr. WALLOP) and Harry Dixon of his staff. I would also like to thank Senator LONG and the Committee on Finance for their expeditious handling of the sequential referral of S. 2266. My thanks also to the staff of the Joint Tax Committee, particularly Dick Bacon and Jim Billinger, for their advice on tax aspects of the bill.

Mr. WALLOP. Mr. President, I would also like to add my thanks and admiration particularly to Romano Romani and Bob Feidler, of Senator DeCONCINI's staff; to Harry Dixon, whose work as a consultant to the minority was invaluable to everybody in constructing this bill and, of course, to Pat Hoff, of my own staff, whose help has been most rewarding.

I thank the distinguished Senator from Arizona for all of the courtesies extended to me.

Mr. DeCONCINI. Mr. President, I ask unanimous consent that S. 2266 be indefinitely postponed.

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

JUDICIAL TENURE ACT

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar Order 957, which was called up earlier this morning but which was set aside.

The PRESIDING OFFICER. The bill will be stated by title.

The legislative clerk read as follows:

A bill (S. 1423) to establish a Council on Judicial Tenure in the judicial branch of the Government, to establish a procedure in addition to impeachment for the retirement of disabled Justices and Judges of the United States, and the removal of Justices and Judges whose conduct is or has been inconsistent with the good behavior required by article III, section 1 of the Constitution.

The Senate resumed the consideration of the bill.

The PRESIDING OFFICER. Who yields time?

Mr. DeCONCINI. Mr. President, I yield myself the necessary time.

Mr. President, it is with great pleasure that I initiate discussion of S. 1423, as amended, the proposed Judicial Tenure Act. The bill was introduced on April 29, 1977, by my distinguished colleague from Georgia (Senator SAM NUNN). However, legislation of this type is not new to the Senate. Similar bills were introduced in the 90th and 91st Congresses by Senator Joseph Tydings. Senator NUNN renewed these efforts in the 93rd and 94th Congresses. Since 1965, the Subcommittee on Improvements in Judiciary Machinery has heard from 50 witnesses in approximately 20 days of extensive hearings. Seldom has any proposal received such lengthy and focused attention.

The past decade of struggle for this much-needed improvement in our judicial system culminated this year, as the Senate Judiciary Committee reported S. 1423 with virtually no dissent. I believe time has molded this legislation into a procedure for monitoring the Federal judiciary which is both more practical than existing impeachment powers, and fully supported by the Constitution.

Mr. President, I want to take this opportunity to thank Senators ABOUREZK, KENNEDY, THURMOND, and WALLOP for their participation and the assistance of their staff in the consideration of this bill. Without the bi-partisan support this measure has received, this proposal would not be before us today.

This bill is demanded by a public who is increasingly skeptical of our political institutions. All branches of Government must account for their actions, but it is especially critical that our Nation's courts be beyond any doubt. Although most Americans have a high regard for the overall integrity of the Federal judiciary, the publicity surrounding the activities of a few U.S. judges has provided ample opportunity for such doubt to arise. We owe constituents an accessible means of protesting judicial conduct that is inconsistent with the behavior required by the Constitution. Conversely, we owe Federal judges an alternative to the stigma attached to impeachment proceedings, in those cases where aberrant behavior is the innocent product of a poor mental or physical condition.

Historically, Congress has been reluctant to use the drastic measure of impeachment. Only eight Federal judges and one Supreme Court Justice have been impeached by the House of Representatives. Of those, only four judges were convicted by the Senate and removed from office. The last conviction took place in 1936. One reason for this reluctance is the fact that impeachment is a complex, slow, and cumbersome process that absorbs an incredible amount of time in both Houses of Congress. For example, Senate impeachment trials have continued for as long as 6 weeks. The average trial lasts 16 days. For many years, lawmakers have been unable to divert their time and attention from legislative work that grows with each session, and the impeachment process has fallen into disuse. Because it is not used, impeachment has ceased to be

a real deterrent to misconduct on the bench.

These developments come at a time when the total number of Federal judges is increasing rapidly. Present law authorizes 525 active judges and justices. However, a significant number of judges have taken senior status while continuing to serve in a judicial capacity. Thus, approximately 660 judges now serve in the judicial system. In addition, there is pending legislation in this Congress to create 152 additional circuit and district judges. The Federal Judicial Center predicts a need for 1,000 district judges and 250 circuit judges by 1990. Clearly, we face a judicial body that will soon be twice its present size. The impeachment process is inadequate now; future reliance upon it as the only viable procedure for inquiry into alleged misconduct is unrealistic.

Under the proposal, any person could file a complaint alleging judicial misconduct or a permanent mental or physical disability. The filed complaint, if not found to be frivolous, would be transmitted to a committee in each circuit or each of the special national courts. Upon completion of its preliminary investigation, the committee will prepare a recommendation to a newly created Commission which is known as the Judicial Conduct and Disability Commission. Depending on the nature of the recommendations, the Commission will either dismiss the case, or, upon its investigation, file a report with a newly created Court on Judicial Conduct and Disability.

The Court on Judicial Conduct and Disability will hold a hearing which conforms to specified due process requirements and either order the removal, censure, involuntary retirement, or dismissal of the case. Due to the uniqueness of the Supreme Court, the Court on Judicial Conduct and Disability can either prepare a report to the House of Representatives recommending that the Justice be impeached or censured or dismiss the case. I believe these proposed procedures will allow a growing judicial branch to better cope with increasing demands of the future.

Nonetheless, questions have arisen regarding the constitutionality of this legislation. Most of the doubts have arisen from the view that impeachment is the only method of investigating and remedying judicial conduct that is expressly authorized under the Constitution. The argument is based on a very literal reading of the Constitution and claims support from the Federalist Papers, as well as the well-established principle of the independence of the judiciary. In analyzing the constitutional arguments, both for and against the bill, however, I have come to the conclusion that the language of the Constitution ultimately lends support to this proposal. The need for the Judicial Tenure Act is reflected in the framers' sanction that Federal judges "shall hold their offices during good behavior." This is the only explicit reference to any standard of conduct expected of Federal judges. I believe the words "good behavior" were not intended to mean simply the absence of impeachable conduct. The "good behavior" require-

ment describes a condition which must prevail if a judge is to retain his office. Unless a truly viable mechanism exists for removing judges who have not committed an impeachable offense, but have, nevertheless, substantially departed from good behavior, a significant gap exists between the impeachment power as presently exercised and the constitutional prescription for judicial conduct. I believe the framers knew what they wanted and said it. This legislation is in full accord with that view.

In order to insure that we not only implement the apparent wishes of the framers, but also do not impinge upon judicial independence or any other constitutional imperative, such as separation of powers, the Judicial Tenure Act provides that the Federal judiciary itself will be responsible for examining and acting upon filed complaints. Of course, impeachment should remain as an available alternative. However, a reasonable reading of the Constitution does not lead to the conclusion that impeachment is the only means of removing a Federal judge. We should not require that a judge commit "high crimes or misdemeanors" before he or she will be subject to a removal procedure. A Federal judge occupies too important a position of public trust to allow "bad behavior" to go unnoticed. In my view, "high crimes and misdemeanors" represent one special category of "bad behavior." The "good behavior" standard is the criterion by which judges must finally be evaluated.

The doctrine of separation of powers implies the plenary power of each branch of Government to implement its own functions. Only where the Constitution specifically provides otherwise is there an exception to the general principle. Inherent in this doctrine is the power of each branch to remove unfit members of that branch. I recognize that the opponents of this view suggest that if the framers had wished to give each branch power over its members, they would have said so.

The theme of judicial independence really comes in two forms. One is the matter of judicial independence from interference from the other two branches. The other, however, is a broader question, and seems to be the one raised by most laymen, including a recent New York Times editorial.

Independence in the traditional sense is a corporate concept that involves the judiciary as a branch and its relations with the other branches. Prof. Raoul Berger has noted that:

All remarks in the several conventions that bear on judicial independence, as far as I could find, referred to freedom from legislative and executive encroachments. No one suggested that judges must be immune from traditional judicial conduct.

I might add that Professor Berger supports the legislation and finds nothing in it antithetical to any provision of the Constitution.

Our legislation clearly preserves judicial independence in this traditional sense. Because the mechanism we have created lies entirely within the judicial branch itself, there is no reasonable way

to argue that it weakens the corporate independence of the judiciary vis-a-vis the legislative or executive branches.

In all fairness, however, I believe that our critics are more concerned with a far broader question—that is, the independence of an individual judge from any pressure whatsoever, be it from his or her peers or anyone else. They argue that judicial independence can only be preserved by condoning all sorts of activities that may bring the bench into disrepute, and tell us that this license and ultimate irresponsibility is the price we must pay to maintain independence. This is a viewpoint that I heartily reject as inconsistent not only with the Constitution, but with the prevailing values of our society.

The only way in which this argument can be made against the Judicial Tenure Act is to assert that the independence of individual judges will be threatened by other judges. In our bill, judges sit in judgment of other judges in much the same way as they do in the appeals process. Of course, in a proceeding under our act, the final outcome can be removal from office, not merely reversal. However, such a decision can only be reached if it is demonstrated by "clear and convincing" evidence that a judge committed a major breach of "good behavior." Ultimately, any action taken against a judge by our Court on Judicial Conduct and Disability is reviewable by the Supreme Court. Throughout the procedure, the greatest care is taken to insure that, even under the "worst case" scenario, there is no chance for abuse. We provide in the act, for example, that "complaints relating to the merits of any decision or procedural ruling of a judge are outside the jurisdiction of the Commission."

Logically, the only fears that these critics could have is that brother judges might wish to influence one of their number who espouses views contrary to their own. How this might be accomplished in the context of the bill is unclear. First, complaints are lodged by individual citizens. Second, they undergo a careful screening process to insure that they fall within the scope of the legislation. A decision must be made to pursue the matter before the Court on Judicial Conduct and Disability by the Commission set up for that purpose and composed of judges representing the eleven circuits and three national courts.

The Court on Judicial Conduct and Disability, also composed of judges, can remove a judge if the complaint is deemed valid in a proceeding where the accused judge is represented by counsel. We were particularly sensitive at every juncture to create a bill that would be above criticism. For example, we specifically did not give the judicial council of each circuit a broader role because of the possibility that we might be criticized for allowing judges who work reasonably closely with one another to adjudicate each other's behavior.

all respects enhance the Federal judicial Tenure Act, and I believe it will in all respects enhance the Federal judiciary and make a positive contribution

to the quality of American justice. I am convinced that there is a need for this legislation, and that it is long, long overdue. I have examined all the possible constitutional arguments and am totally convinced—as are the judicial conference, the ABA, the Justice Department, the American Judicature Society, and many individual judges and lawyers throughout the country—that this legislation is totally within the letter and spirit of the Constitution.

The PRESIDING OFFICER. Who yields time?

Mr. THURMOND. Mr. President, I yield myself such time as I may require.

Mr. President, the bill which we consider today—establishing a procedure in addition to impeachment for involuntary retirement, removal, and censure of members of the Federal judiciary—is a most important one. Since the founding of our country and the drafting of its Constitution, the impeachment process has been the sole means utilized to remove those judges whose conduct was deemed to be inconsistent with constitutional requirements. Several scholars, writing in the first 50 years after ratification of the Constitution, expressed their belief that impeachment was the only method for removal of Federal judges. Many commentators today are of that same opinion.

The continued use of impeachment as a sole means of removing Federal judges, however, presents greater practical difficulties today than in 1789. Impeachment is a cumbersome, time-consuming process. The removal of even a single district court judge could conceivably tie up both Houses of Congress for a significant period of time. Attorney General Bell, in his testimony before the Subcommittee on Improvements in Judicial Machinery on September 14, 1977, stated that:

Not every judge who perhaps should be impeached can be impeached . . . Congress does not have that much time.

As a result of its cumbersome nature, impeachment does not act as a real deterrent to misconduct on the bench. These time considerations will loom still larger in future years as the legislative load of Congress increases and the number of Federal judges also climbs upward.

Historically, impeachment has been an infrequently utilized process. Eight judges have been impeached and tried, with the resulting convictions of four—the last conviction occurring in 1936. The potential need for legislation such as S. 1423 is demonstrated by the problems and controversy surrounding Judges Chandler and Ritter and the attempted impeachment of Justice Douglas.

Public confidence in the Federal judiciary would be enhanced by a disciplinary system such as that created by S. 1423 which provides standards for evaluating judicial performance and procedures for enforcing them. S. 1423 also provides for public participation in the disciplinary process by allowing anyone to file a complaint with the Commission. This provides a simple mechanism for citizens to express their grievances concerning Federal judges and justices. Any complaints which relate to

the merits of a decision or procedural ruling of a judge or justice are, however, beyond the scope of this legislation.

Also beyond the scope of S. 1423 are complaints concerning a condition or any conduct of a judge which is not connected with his office or which does not prejudice the administration of justice by bringing the judicial office into disrepute. S. 1423 provides for a small permanent Commission staff to receive and initially screen all complaints. The experience of the States with similar systems indicates that a large majority of complaints will probably be dismissed at this point in the process. Therefore, members of the Federal judiciary will not be inundated by complaints which pertain to the merits of their decisions and thus are outside the scope of S. 1423.

The vast majority of States, including my own State of South Carolina, have established similar disciplinary systems. New York did so in 1947. The California system, which has served as a model for many other States, was established in 1960. The overwhelming support of such legislation by the States indicates both the practical need for it and, in view of the length of time that some systems have been in operation, the feasibility of it.

The constitutionality of removing Federal judges by means other than impeachment is the most important issue raised by this legislation. Article II, section 4, provides that the President, Vice President, and all "civil officers" shall be removed from office "on Impeachment For, and Conviction of Treason, Bribery, or Other High Crimes or Misdemeanors." Opponents argue that, by virtue of the maxim "expressio cerius exclusion alterius," the Constitution prohibits any other means of removal. The language of article II, section 4, has not, however, been interpreted as exclusive in other contexts.

The first Congress determined that the President had the power to remove "civil officers" within the executive branch. The impracticality of dealing with the misconduct of any of hundreds of civil officers by the impeachment procedure could not be ignored. Also, the Supreme Court held in 1897 that the President could remove a U.S. attorney despite the impeachment clause of article II. If impeachment is not the exclusive means for removing certain civil officers, it would seem illogical to maintain that it is the exclusive means for removing Federal judges. Finally, if the framers had intended impeachment to be the exclusive means, they could easily have so provided.

Perhaps the crux of the argument supporting the constitutionality of S. 1423 is that the language of impeachment is contained in the executive article. Article III, the judicial article, includes no language regarding impeachment or any other means of removal for that matter. It simply provides that "Judges, both of Supreme and Inferior Courts, shall hold their offices during good Behavior." The grounds for impeachment set forth in article II and the good behavior standard prescribed by article III are apparently two distinct standards. At common law,

impeachment was a criminal proceeding conducted in Parliament on charges of "treason, high crimes and misdemeanors."

Moreover, this language was regarded as having a technical limited meaning encompassing only very serious offenses. "Good behavior" also had a particular meaning of common law. This type of tenure in office is commonly associated with the Act of Settlement (1700) which granted judges tenure for so long as they conducted themselves well. Thus, "good behavior" was regarded as the broader of the two standards—encompassing a wider range of misbehavior than that included within the terms "Treason, Bribery, and Other High Crimes and Misdemeanors."

Furthermore, removal of officers having "good behavior" tenure was accomplished by a judicial, rather than by a legislative proceeding. The common law writ of scire facias was used to initiate a civil proceeding for the forfeiture of the office in which termination was declared by the judiciary.

Arguably, when the framers utilized a term of art such as "good behavior" without indicating that they were using it in a novel fashion, they assumed that similar procedures to those at common law would be used to remove those judges who violated the "good behavior" standard. The present legislation provides for a means of removal analogous to the common law system for removing violators of the good behavior standard in that S. 1423 establishes a disciplinary system within the judicial branch itself. I believe that S. 1423, in providing a procedure to judicial enforcement of the good behavior standard, is a proper exercise of the "necessary and proper" clause (article I, section 8) of the Constitution.

Mr. President, S. 1423 would afford a fair, efficient alternative to the more cumbersome process of impeachment. This legislation has been endorsed by the Judicial Conference of the United States, the American Bar Association, the Department of Justice, the American Judicature Society, the National Association of Attorneys General, Attorney General Griffin Bell, and other legal scholars and Federal jurists.

I would like to thank Senator DeCONCINI, chairman of the Subcommittee on Improvements in Judicial Machinery, and his staff for the fine work which they have done on this legislation. I would also like to offer my appreciation to Senator WALLOP, ranking minority member of the subcommittee, for the commendable job he has done in managing this legislation for the minority. Finally, I ask that my distinguished colleagues support this needed legislation of which I am a cosponsor.

Mr. BAYH addressed the Chair.

The PRESIDING OFFICER. The Senator from Indiana.

Who yields time?

Mr. BAYH. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. BAYH. Who is in charge of the time on this side of the issue?

The PRESIDING OFFICER. The Senator from Arizona.

Mr. DeCONCINI. Mr. President, I do not know how much time the Senator from Maryland has.

Mr. MATHIAS. I do not have any time.

Mr. DeCONCINI. The Senator has no time.

I yield whatever time the Senator wants.

Mr. BAYH. That is fine.

Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. BAYH. I ask for clarification. What is the time allocation?

The PRESIDING OFFICER. Six hours on the bill, and 1 hour on amendments in the first degree.

Mr. BAYH. I accept the gracious offer of my distinguished friend from Arizona.

The PRESIDING OFFICER. The Senator from Indiana.

Mr. NUNN. Will the Senator yield at some point? I would like to make a statement.

Mr. BAYH. I yield to the Senator from Georgia. I did not see he was prepared.

Mr. NUNN. It is not necessary now. The Senator can go right ahead.

Mr. BAYH. I would just as soon wait. I have a couple more notes to make.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. NUNN. Mr. President, first of all, I want to thank the chairman of the Subcommittee on Improvements in Judicial Machinery (Mr. DeCONCINI) for his yeomanlike efforts in refining this legislation, which I introduced several years ago, and guiding it through the Judiciary Committee.

I also want to commend Senator WALLOP for his great help and assistance as the ranking minority member, as well as Senator THURMOND, who is the ranking minority member of the full committee.

Without the work of Senator DeCONCINI, Senator WALLOP, and Senator THURMOND, and also the able assistant of Senator DeCONCINI, Mr. Mike Altier, we would not be debating this bill today.

Mr. President, I am extremely pleased that the Senate is today considering what I believe is a very significant judicial reform—the Judicial Tenure Act. At the outset, I would like to take this opportunity to thank the chairman of the Subcommittee on Improvements in Judicial Machinery, Senator DeCONCINI, for his yeomanlike efforts in refining this legislation and in guiding it through the Judiciary Committee. Without the work of Senator DeCONCINI and his able assistant, Mike Altier, we would not be debating this bill today.

The concept embodied in this bill is not a new one. Serious congressional hearings have been conducted on the subject since the 1930's and a principle similar to that contained in S. 1423 has been before the Senate for over 10 years. While the Judicial Tenure Act does not represent an entirely new concept, it does represent a concept whose time has come.

S. 1423 would establish a procedure, within the Federal judiciary, to investigate allegations that a Federal judge is

not conforming to the constitutional standard of good behavior or that a judge is suffering from a permanent mental or physical disability that seriously interferes with the performance of his official duties. This legislation, which has become known as the Judicial Tenure Act, provides for the removal, censure or involuntary retirement of a Federal judge in the event that allegations of that kind prove to be meritorious. I introduced the Judicial Tenure Act in the 93d Congress as S. 4153 and in the 94th Congress as S. 1110 and the legislation which we are discussing today, with a few constructive alterations, is substantially the same as those bills.

Many lessons should be learned from the recent experiences of the Watergate era. We were reminded that power can intoxicate its holders, and be abused by the highest governmental officials in this Nation. We all must recognize the unfortunate fact that public confidence in Government has been eroded over the past few years for many reasons, and it will continue to decline unless affirmative steps are taken, in each branch of Government, to stimulate renewed trust in public officials and institutions.

The daily news reports are replete with accounts of the new disclosure requirements being imposed on Presidential appointees and of the implementation of Members of Congress. It is imperative that all governmental officials act to restore and maintain the public trust. I believe very strongly that in no branch of government is the public confidence and respect more vital than in the Federal judiciary.

It would be exceedingly shortsighted to focus reform efforts on insuring that members of the executive and legislative branches of our Federal Government conform to legal, moral and ethical standards of the highest order and, at the same time, to ignore the conduct and capabilities of members of the branch of Government which possesses the authority to interpret, delay, and discontinue the actions of the other two. As now Attorney General Griffin Bell stated during hearings on S. 1110,

We are living in a time when our public institutions are under examination and the courts are not exempt. A citizen should be afforded a clear method for complaining against the courts.

Our appointed Federal judges enjoy a high degree of independence; they are not required to answer periodically to the electorate, as are the President and Members of Congress. Although the need for a substantial degree of judicial independence is clear, experience has vividly demonstrated that no one person, or group of people, can be assumed perfect and therefore left completely unchecked. Despite the overall competence and integrity of members of the Federal judiciary, an occasional judge does misbehave or become physically or mentally disabled and yet continues to exercise the authority of his office. This problem has motivated my study of the subject of judicial tenure and discipline and my introduction of this legislation.

Historically, the sole procedure which has been employed to remove a Federal

judge who has misbehaved (or is disabled), for one reason or another, has been the impeachment power which is housed in articles I and II of the Constitution. A few selected statutory provisions, which generally provide administrative authority with regard to the operation of the Federal judiciary, have also been suggested as potential sources of additional disciplinary authority.

When America's Founding Fathers, in addition to requiring impeachment for the President and Vice President, provided for the impeachment of "civil officers," a term which has been interpreted to include Federal judges, they envisioned a nation comprised of 13 States with a Federal judiciary and a Congress of commensurate size and responsibility. During the course of the recently completed second session of the 94th Congress, in excess of 870 measures were passed by the U.S. Congress and 700 rollcall votes were cast in the Senate. It is unreasonable, to say the least, to assume that the House and Senate could or should lay aside all legislative business for weeks or months in order to impeach and try an obscure, yet misbehaving judge. Present law authorizes 525 Federal judges with an additional 168 retired or senior judges, a number infinitely larger than originally authorized. As you well know, Mr. President, a substantial increase in this authorization will be enacted in the near future.

The analogy of impeachment to a heavy piece of artillery, which was made by Lord Bryce, is eminently appropriate. The impeachment procedure is cumbersome and ponderous and is only practical in the most serious and flagrant cases of abuse. As a result, indiscretions which should be addressed are regularly ignored. Commonsense requires that a balance be struck between the necessity for institution of impeachment proceedings and the resultant interruption in the important legislative process. There must be a logical relationship between the importance and power of the respondent and the time required by the House to impeach and the Senate to conduct the trial.

History has borne out Thomas Jefferson's characterization of impeachment as an "impractical thing" and a "mere scarecrow." Over the course of our 200 years as a nation, only 54 judges and 1 Justice have been officially investigated. Of these only eight judges and one Justice have been successfully impeached by the House, resulting in the conviction and removal of a mere four judges in two centuries. The last impeachment and conviction occurred in 1936. While I am among the first to appreciate the overall quality of the Federal bench, it seems unreasonable to assert that only four Federal judges in our history have misbehaved or been disabled. On the contrary, the record is filled with substantial allegations levied against judges who continued to serve on the Federal bench.

The facts clearly demonstrate that impeachment has not been utilized to insure compliance with the constitutional standard of "good behavior" imposed on the Federal judiciary by article III. Moreover, except in the most flagrant

and publicized cases, it is questionable whether impeachment is an appropriate means through which to decide the merits of such serious allegations. Examination of the fifth amendment and its due process safeguards raises some interesting questions regarding the propriety, if not the constitutional sufficiency, of a trial where, as former Congressman Hatton Sumners described the scene, "at one time only three Senators (jurors) were present and for 3 weeks we presented evidence to what was practically an empty Chamber."

A point of view which is too often ignored is that of the accused judge. There is no question that society's rights must be protected, but is impeachment, with its attendant public humiliation and loss of pension, a proper remedy to address the problem of a senile or disabled judge who has served well but fails to recognize that the time to step down has arrived?

I believe that a thorough analysis of the impeachment procedure leads one to the inevitable conclusion that, in practical as well as legal terms, impeachment has not insured and cannot effectively insure judicial compliance with the constitutional "good behavior" standard. Woodrow Wilson stated this premise most succinctly as follows:

Judging by our past experiences, impeachment may be said to be little more than an empty menace.

The fact that repeated efforts have been made by scholars, jurists, and legislators to develop a reasonable alternative to impeachment can be viewed as substantial evidence, in and of itself, that a need for improved judicial accountability has existed throughout our history. The dissatisfaction of Congress with the efficacy of impeachment has been evidenced by legislative efforts originating as early as 1791 when the first constitutional amendment on the subject was proposed. Nine more such amendments were offered between 1807 and 1812 as a result of the impeachment of Justice Chase, and several bills were introduced in the period 1936 to 1950 following the Ritter impeachment. A few statutory provisions have been enacted which have been credited with possessing varying amounts of disciplinary authority.

In particular, these statutory enactments involve the creation of the Judicial Conference of the United States in 1922 and the Administrative Office Act of 1939. Various responsibilities and duties were assigned to several entities by these statutes and the exact amount of disciplinary authority which is available under these laws has been the subject of considerable debate. It is clear that the judicial councils of each circuit, the Administrative Office of the Courts, and the Judicial Conference have been authorized to deal with the administrative details of the Federal court system.

The question remains, however, whether or not any of the statutory language authorizes the disciplining or removal, in fact or in effect, of a judge subject to the jurisdiction of the council or other entity. The courts have avoided directly addressing the question and the

only consensus on the issue is that, at the least, whatever disciplinary authority may exist needs legislative clarification.

The logical and unavoidable conclusion at this point is that congressional inaction on the subject of judicial tenure and discipline has resulted in one of the three branches of our Federal Government being virtually unaccountable to anyone, even itself.

As I mentioned earlier, during the early 1800's several constitutional amendments on the subject of judicial discipline and tenure were proposed. It is in the years subsequent to the last impeachment in 1936, however, that this subject has been most clearly and carefully scrutinized.

In the late 1930's two bills were introduced in Congress on the matter of providing an alternative disciplinary and removal procedure. S. 4527, introduced by Senator William McAdoo, proposed the establishment of a special court composed of Federal judges which would have jurisdiction over all Federal judiciary misbehavior cases, except those involving Justices of the Supreme Court. The prosecutorial role was filled by the Department of Justice and the decision could be appealed to the Supreme Court. H.R. 2271 was introduced by the chairman of the House Judiciary Committee, Hatton Sumners, and provided that the House of Representatives, by way of resolution addressed to the Chief Justice of the United States, could initiate a hearing into the behavior of an accused district judge. Prosecution was to be conducted by Representatives from the House and appeal to the Supreme Court was provided. Both bills restricted the remedy to removal.

Serious legislative efforts in this regard were somewhat dormant from this period until former Senator Joseph Tydings, of Maryland, introduced the Judicial Reform Act in 1969. S. 1506 represented a novel approach to the subject because its procedures were totally confined within the Federal judiciary. A Commission on Judicial Disabilities and Tenure, composed of five Federal judges, was to act as a factfinding body with regard to any allegations of misbehavior. The Commission had the authority to dismiss a spurious complaint, or, in the event the evidence so warranted, to recommend removal of the accused judge to the Judicial Conference of the United States where a trial-like procedure would be conducted. A removal order from the Judicial Conference could be appealed to the Supreme Court.

The Judicial Tenure Act which I first introduced as S. 4153 in October of 1974 and reintroduced as S. 1110 in March 1975, and as S. 1423 in April 1977, although varying substantially in substance, is patterned in principle after the Judicial Reform Act.

In the spring of 1976, hearings were conducted on the Judicial Tenure Act before the Senate Judiciary Committee's Subcommittee on Improvements in Judicial Machinery. Hearings were again conducted in September of 1977. Several changes have been made in the legislation since its original introduction in

order to reflect the constructive suggestions made by witnesses in these hearings, as well as to insure its constitutionality.

The purpose of the Judicial Tenure Act is to provide a mechanism within the judicial branch itself to enforce the "good behavior" standard which is imposed on the Federal judiciary by article III, section I, of the Constitution. A procedure to investigate allegations that Federal judges have failed to exercise "good behavior," or charges that a judge is suffering from permanent physical or mental disability that seriously interferes with the performance of his duties is proposed to be established within the Federal judiciary. Each portion of this proposal has been subjected to scrutiny since the 1930's and language has been incorporated to perfect deficiency was identified. I believe that the Judicial Tenure Act represents comprehensive and reasoned approach which, if enacted, would address many of the insufficiencies in judicial discipline which I have described.

I have examined this issue in some depth and I am convinced along with numerous bona fide constitutional scholars and prominent individuals in the legal community, that the approach adopted by this legislation is entirely consistent with the U.S. Constitution. It is important to keep in mind that the Judicial Tenure Act is proposed as a means in addition to, not in place of impeachment.

Constitutional questions have been continuously raised by those who oppose creation of a procedure which would allow meaningful implementation of the "good behavior" standard. My intention is certainly not to cut off constructive discourse on the subject; however, the time has come to recognize the practicalities of this issue and to examine it in a broad perspective with reason and logic. Opponents rely upon the assertion that impeachment is the solitary means of removal permissible under the Constitution. I believe that it is productive to examine exactly what the Constitution says on this issue—and what it does not say.

The Constitution does say in article I, that the Houses of Congress shall have the sole powers of impeachment and trial of all civil officers. It does not say, however, that Congress shall have the sole power of removal of these officers. As a matter of fact, it was determined early in our Nation's history, that lesser executive branch officials could be removed by order of the President. The Supreme Court ruled in 1897 that the President had the authority to remove a U.S. attorney despite the fact that the impeachment clause provides for the removal of civil officers. How can it reasonably be argued that impeachment is exclusive with regard to some "civil officers," such as judges, and not exclusive with regard to others? Moreover, if the framers had intended impeachment to be the sole method of removal, it would have been a simple matter to employ specific language to that effect.

It is interesting to note that the extreme remedy of impeachment is pro-

vided for in article I, the legislative article, and article II, the executive article. No mention of this procedure is made in article III, the judicial article. In view of the fact that the debate by the framers on the subject of impeachment focused almost totally on the President and that the term "civil officers" was included almost as an afterthought, one could easily assume that the framers intended to further address the subject of tenure of Federal judges in the appropriate place, article III.

Our Federal system of government is predicated upon the doctrine of separation of powers. The interrelating system of checks and balances was devised by a group of men concerned by abuses produced through the dominance of one branch of government, the English monarchy, over the remaining two branches. They took great care to provide elaborate safeguards to insure against history repeating itself in the American Government by formalizing the separation of powers doctrine. I believe that impeachment of Federal judges was authorized, not as an exclusive means of disciplining the judiciary, but rather as one of the limited checks by one branch of government on another. Impeachment was not intended to preclude the judiciary from disciplining itself; rather it was intended as a carefully circumscribed exception to the doctrine of separation of powers to be used in extreme cases of abuse or as a safeguard against judicial branch inaction.

If we accept the principle that impeachment of Federal judges is a limited authority granted to the legislative branch as part of the system of checks and balances it seems logical that the framers must have contemplated a disciplinary mechanism that would be available for less than extreme cases of abuse and in the normal course of maintaining the integrity and efficiency of the judiciary branch. This mechanism was contemplated and it was logically placed in article III of the Constitution.

Prof. Raoul Berger, the noted constitutional scholar, who testified on behalf of this legislation during the 94th Congress, has compiled a detailed analysis of the history and precedent on which the "good behavior" clause is based. In his testimony before the Subcommittee on Improvements in Judicial Machinery, Professor Berger documented the technical legal distinction between impeachment and "good behavior" tenure.

His analysis generates the unavoidable conclusion that the grounds for impeachment and the "good behavior" requirement are two distinct standards of conduct and that "good behavior" is a much more stringent standard than a prohibition against bribery, treason or other high crimes and misdemeanors. (That is, not all forms of bad behavior constitute impeachable offenses.) Professor Berger pointed out that impeachment, at common law, was a criminal proceeding brought by the House of Commons in the House of Lords on charges of "treason, bribery, high crimes and misdemeanors." Berger further documented the fact that the terms

"high crimes and misdemeanors" had a limited technical meaning which referred serious offenses and did not encompass all forms of misbehavior.

As the House Judiciary Committee wrote in their report on the grounds for impeachment, during the Nixon impeachment deliberations:

High crimes and misdemeanors has traditionally been considered a term of art . . . The Supreme Court has held that such terms must be construed, not according to modern usage, but according to what the Framers meant when they adopted them.

Although the framers departed from the English model in separating the impeachment proceeding from a criminal proceeding, they intentionally retained the limited technical grounds of "high crimes and misdemeanors." Furthermore, there is no indication that the framers intended the impeachment provisions to be a complete recitation of the causes justifying removal from office.

In contrast to impeachment, removal for breach of "good behavior" was a judicial, not legislative, proceeding. Good behavior tenure was originated in the Act of Settlement in 1700 in an effort to isolate the judiciary from the arbitrary whims of the monarch. Professor Berger points out that the words "good behavior" in all commissions and grants, public and private, imparted an office or estate for the life of the grantee terminable only by his death or breach of good behavior.

This termination was declared by the judiciary in a civil proceeding for forfeiture of the office which was initiated by a writ of scire facias. Its sole objective was to remove the existing officer with no penalties or disqualifications involved. When the framers employed "good behavior," a common law term of ascertainable meaning, with no indication that it was being used in a novel fashion, they must have assumed the inclusion of similar procedures for its implementation. Such an assumption is supported by Madison's explanation to the Virginia Ratification Convention that "where a technical word was used all the incidents belonging to it necessarily attended."

A "gap" between the two standards, "good behavior" and the grounds for impeachment, must therefore exist. To assume otherwise would be to claim that the grounds for impeachment and "good behavior" tenure are the same and thereby render the "good behavior" clause meaningless. The longstanding constitutional principle that no clause in the Constitution is intended to be without effect will not permit this result. Therefore an alternative method to impeachment to accomplish the removal of Federal judges must have been contemplated by the framers to provide for the removal for misbehavior of disability less serious than an impeachable offense but in derogation of the "good behavior" standard. The substance of what constitutes "misbehavior" may be open to interpretation but it is completely clear that procedurally, "good behavior" was a term involving the judicial process.

In light of the evidence, it certainly

cannot be logically maintained that the Framers would have rejected a process of judicial removal other than impeachment. It seems apparent that the term "good behavior" was employed with the eminently logical intention of providing a disciplinary means, within the judiciary branch itself, in addition to the power authorized to the legislative branch through impeachment. Simple logic indicates that if an office is conferred during "good behavior" it is relinquished upon bad behavior and some means of enforcing that end must be available.

Some commentators assert that the enactment of legislation of the nature of the Judicial Tenure Act would dramatically dilute the independence of our Federal judiciary. Arguments of this kind are superficial and misleading. Judicial independence, a principle which we all agree is a precondition to an effective system of justice, has historically referred, not to the independence of judges from one another but rather to the independence of the judiciary as an institution from other branches of government.

The intention of the framers was to avoid the experiences of the British which saw the judiciary totally dominated by the King. Professor Berger noted that,

All the remarks in the several conventions that bear on judicial independence, so far as I could find, referred to freedom from legislative and executive encroachments. No one suggested that judges must be immune from traditional judicial control.

The assertion that a disciplinary mechanism, totally restricted within the judiciary, infringes on judicial independence simply does not make sense.

The time has come to recognize the practicalities of the issue and to examine it in a broad perspective with reason and commonsense. It is clear that impeachment, in practical terms, is not an effective disciplinary mechanism. It is clear that the existing statutory authority is ambiguous and insufficient in this regard. It is clear that substantial authority exists indicating that the procedure proposed by the Judicial Tenure Act is constitutional. No less jurists than Justice Rehnquist, Justice Burger, and Justice Blackmun have expressed the opinion that the principle represented by the Judicial Tenure Act is constitutional. Attorney General Bell has stated, with regard to the Judicial Act:

I am not troubled over the constitutionality of the proposed legislation.

The Judicial Tenure Act has been endorsed, in total or in principle, by the Judicial Conference of the United States, the American Bar Association, the American Judicature Society, and the American Association of Attorneys General. It is clear that Congress possesses the authority to enact legislation in this regard. This authority was described in detail by Professor Berger as follows:

Since the judicial power to declare a forfeiture on breach of a condition subsequent existed at the adoption of the Constitution, and since a dispute whether the condition was breached constitute a "case or contro-

versy," it falls within the judicial power. Consequently, legislation that would set up a special court within the judiciary branch to adjudicate disputes whether a judge breached the "good behavior" condition would merely entail a grant of fresh subject matter jurisdiction . . . such a grant would constitute action to supplement the "judicial power" under the "necessary and proper" clause or under the power of Congress to regulate the jurisdiction of the interior courts.

Professor Berger's testimony I think is the outstanding constitutional analysis of this particular measure going back in history, and I ask unanimous consent that Professor Berger's testimony dated February 26, 1976, before the Subcommittee on Improvements in Judicial Machinery of the Judiciary Committee be printed in the RECORD.

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

STATEMENT OF RAOUL BERGER BEFORE THE SENATE SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY

I thank you for your invitation to express my views on the Nunn Bill, S. 1110. In 1970, I studied the problem of removal of judges by judges in depth and published the results in the Yale Law Journal. It was that study that excited my interest in the questions presented by impeachment.*

You are to be congratulated for taking up a problem that has perennially troubled the Congress. Hatton Sumners, veteran chairman of the House Judiciary Committee, who participated in two impeachments, commented some 40 years ago that the House was reluctant to take the time of the Senate to try a "crooked judge" because it would distract the Senate from "all the other great business of a great nation and make them sit there for days and days." Back in 1936, Senator William McAdoo stated after the impeachment of Judge Halsted Ritter that the difficulties of impeachment made it a "practical certainty that in a large majority of cases misconduct will never be visited with impeachment," "a standing invitation for judges to abuse their authority with impunity." Few students would disagree. The procedure formulated in the Nunn Bill would relieve Congress of this burden; it would not encroach on the powers of the judiciary but would assist it in performing its own housecleaning.

I

At the outset we need to clarify a number of doctrinal matters and to disabuse ourselves of the notion, voiced by no less a personage than then Congressman Gerald Ford, that the impeachment process can be employed to remove an officer for breach of "good behavior." Impeachment and removal for breach of "good behavior" have altogether different roots; both are common law terms which had an established meaning. It has often been held that when the Framers employed common law terms like habeas corpus, bribery, they adopted the English meaning and practices associated therewith.

At common law impeachment was a criminal proceeding brought by the House of Commons before the House of Lords on charges of "treason, bribery, or other high crimes and misdemeanors" which could result in removal from office and very severe penalties. Impeachment must be regarded as a breach in the separation of powers; it enables the Senate by a two-thirds vote after a formal trial to remove an offending officer. The sole power of Congress to remove a civil

officer, it needs to be emphasized, is by impeachment for "treason, bribery, and other high crimes and misdemeanors."

This is underscored by the denial of the power to remove on an Address of both Houses to the President, a power exercised by Parliament and the king, embodied in a number of state constitutions, but deliberately withheld by the federal Constitution. Although the Framers departed from the English model in separating the removal proceeding from a criminal proceeding, they intentionally retained the "limited, technical" meaning of "high crimes and misdemeanors" at common law and although removal for "maladministration" was made a ground for impeachment by some state constitutions, that ground was rejected by the Framers.

Consequently I would differ from Congressman Gerald Ford's view that "high crimes and misdemeanors" means whatever the House and Senate choose them to mean. That view was not followed, I rejoice to say, by the House Judiciary Committee in the impeachment investigation of President Richard Nixon. It would have been a sorry spectacle to throw him to the wolves.

I have stressed these facts to underline that impeachment for "high crimes and misdemeanors" has a limited compass which does not comprehend all misbehavior.

In contrast to impeachment, removal for breach of "good behavior" was not a legislative, but a judicial, proceeding. "Good behavior" tenure, to use familiar legal terms, was an estate on condition subsequent which was forfeited on nonperformance of the condition. It was terminated by a breach of "good behavior," and the termination was declared in a civil proceeding for forfeiture of the office. Its sole object was to remove the misbehaving officer; there were no penalties, no disqualification to hold office in the future.

The Framers patterned the "good behavior" tenure of judges on the then English practice; it was proposed in the Convention at the very outset and was embodied in Article III, Section 1, the Judiciary Article. The provision for impeachment, on the other hand, was placed in the Executive Article, Article III, Section 1, for the simple reason that virtually all of the discussion of impeachment was centered on the President.

Only at the last minute were the words "all civil officers" added, without any discussion whatever of the removal of judges of the inferior courts. One commentator has suggested, therefore, that there may be some question whether the Executive Article was intended to apply to them.

"Good behavior" had its own criteria which may roughly be stated as the faithful and diligent conduct of an office; it might be breached by abuse of office, neglect of duty, nonattendance and the like. You may ask, does not neglect of duty likewise constitute an impeachable offense?

But the nonattendance instanced by Coke as a breach of "good behavior" is far removed from impeachable neglect such as that of an admiral to safeguard the seas or of a Commissioner of the Navy adequately to prepare against a Dutch invasion. "High crimes and misdemeanors" and breach of "good behavior" are like two intersecting circles; there is an enclave where they are coterminous. But while all "high crimes and misdemeanors" might constitute a breach of "good behavior," not all breaches of "good behavior" amount to "high crimes and misdemeanors," as is underscored by the Framers' rejection of "maladministration" as a ground for impeachment.

Congress therefore might be content to leave removal of judges to the judiciary in any case and keep its own impeachment power in reserve in the event that the judiciary failed to remove a serious offender.

This was precisely the role envisioned by the First Congress when it recognized the President's power to remove subordinates and stated that if he failed to remove a derelict officer, Congress had the supplementary power to do so.

For Article II, Section 3 does not make impeachment mandatory; it leaves it in the discretion of Congress.

When an office held "during good behavior" is terminated by the officer's misbehavior, there must be an "incident" power "to carry the law into execution," Lord Mansfield held many years ago, if "good behavior" is not to be an impotent formula. English law provided a proceeding to forfeit the office by a writ of scire facias.

Because almost all judicial appointments prior to the Act of Settlement in 1700 were held at the pleasure of the king, there were no cases of removal of judges by scire facias. But the remedy was known, and in two cases prominent, Sir John Walter and John Archer, who had been given "good behavior" tenure, resisted removal by the king except after a trial on scire facias. Chief Justice Holt, Lord Chancellor Erskine, and Sir William Holdsworth recognized the applicability of scire facias to removal of a judge.

Indeed it is captious ribbon-matching to demand a precise case of forfeiture of judicial office when scire facias was available for forfeiture of office held "during good behavior." The law proceeds by analogy; if scire facias lies for removal of an officer, it may also be employed for removal of a judge.

At worst, no more is involved than extension of a known remedy to judges in order to effectuate the Framers' design that judicial tenure terminate on misbehavior. When they employed the terms "during good behavior" they knew that the tenure terminated on misbehavior and was subject to forfeiture. All that is required is to spell out the mechanics for the forfeiture.

Observe that I do not rely on the Congressional power of impeachment, which is limited, but on the "necessary and proper" clause to provide a remedy for effectuation of the Framers' intention. Congress may and has fashioned new remedies, if scire facias for judges may be regarded as new. Enabling legislation may also be regarded as an additional grant to the courts of subject matter jurisdiction—forfeitures of judicial office. If it be assumed that the existing forfeiture jurisdiction is inadequate.

May I remind you that the existence of an exact precedent is not the test of "Judicial power"; all that is required is a "case or controversy," and that is satisfied when a charge of misbehavior is controverted. Mark too that all that is sought by the Nunn Bill is to supplement existing "Judicial power" as Congress has so often done in the past.

II

The arguments against removal by the Judiciary are three: (1) impeachment was made the exclusive removal process; (2) judges were given absolute independence; and (3) "good behavior" tenure affords judges special insulation.

(1) By Article I, Section 2, the House is given "the sole power of impeachment," and by Article I, Section 3, the Senate is granted "the sole power to try all impeachments." This means that no other body can bring or try impeachments; it does not purport to bar other methods or removal by the other branches. It is argued, however, under the maxim *expressio unius exclusio alterius* that the provision for impeachment bars all other methods of removal.

That is not an inexorable rule; it is employed where other evidence is lacking to ascertain the intention of the draftsmen, not to thwart it. First, the maxim would in part nullify the provision limiting tenure to "during good behavior," for as I have indicated, impeachment for "high crimes and

*My statement is drawn from that study, published in revised form in chapters 4 and 5 of my Book, "Impeachment: The Constitutional Problems."

misdemeanors" reaches only the more serious forms of misbehavior.

Forfeiture of office for misbehavior was an incident of the tenure, and Hamilton refused to regard the maxim as conclusive where it would curtail an existing power. Second, the First Congress, immediately on the heels of the Federal Convention, recognized that the President had an independent power to remove "civil officers" in the Executive branch, testimony that it did not deem the impeachment provision to be exclusive.

Third, Hamilton made an exception for insanity, for which no "formal or express provision was made." Fourth, the Act of 1790 provided for disqualification from office after a criminal trial and conviction of a judge for bribery. Since the impeachment provision contains an express disqualification phrase, this again testifies that the First Congress, the pre-eminent interpreter of the Constitution, did not deem the impeachment provisions to be exclusive.

In the words of Chief Justice Marshall, the implication of *expressio unius* may serve where it "promotes, not where it defeats the intention." It needs more than a maxim to overthrow the intention to terminate judicial tenure on breach of "good behavior."

(2) A second argument, first advanced by Justices Black and Douglas, is that judges enjoy "absolute" independence. Constitutional history affords no warrant for the claim. "The independence of each power," said James Wilson, "consists in this," it "should be free from the remotest influence" of each of the other two powers. But further than this, the independency of each power ought not to extend. In other words, the judiciary was to be free from encroachments by the legislative and executive branches, no more.

Judges of inferior courts had been subject to attachment by King's Bench for misconduct and oppression, and there is no evidence that this attribute of judicial power was to be curtailed. Jefferson wrote in 1816 that judges were removable "by their own body."

The very fact that judicial tenure was conditioned on good behavior alone indicates that it was not to be "absolute," i.e. unlimited. To my mind the Black-Douglas repugnance to judicial removal is passing strange. The recent Nixon proceedings once more demonstrated how hard it is to banish partisanship from impeachment proceedings. Political passions are far more likely to animate Congress than a court.

With all due respect, I would rather be tried by men trained to sit in judgment, by a court rather than by Congress. Are we to entrust to a court the trial of a man's life and lose confidence when it is a judge's right to remain in office that is to be tried?

(3) It is also argued that the "during good behavior" phrase affords judges special protection except by impeachment. As we have seen, that provision antedated the impeachment provision, which revolved almost entirely around the President. While "good behavior" was designed to protect judicial tenure, that tenure was expressly conditioned on "good behavior."

In employing the term the Framers were aware that the tenure was terminated by breach of "good behavior." They exhibited no intention of continuing a misbehaving judge in office. To insulate him from misbehavior would in part abort the "good behavior" provision. There is no evidence that the Framers meant to insulate a misbehaving judge from removal if he was not reachable by impeachment.

A canon of construction requires that if possible every portion of the Constitution must be given effect. To confine removal to impeachment is to deny effect to the words "during good behavior," for it did not require those words to authorize removal for "high crimes and misdemeanors," to which im-

peachment alone extends. "Good behavior," I submit, must be regarded not only as a shield for the protection of a judge but as a sword in the hands of his fellow-judges if he violates its demands.

A word about the criteria of good behavior employed in Section 372(b) of the bill (p. 14). Removal for mental or physical disability seems to me well within the requirement of the common law.

An officer who is disabled physically or mentally cannot "diligently conduct" his office. Hamilton, you recall, stated that insanity was an essential ground of disqualification, and to my mind senility or physical incapacity stand on the same ground. "Habitual intemperance" likewise interferes with the "diligent conduct" of an office, and in my opinion it also constitutes a breach of "good behavior." The first federal impeachment, that of Judge Pickering, was for insanity and habitual drunkenness; removal for "misbehavior" is more readily justified.

The caution with which you have approached the definition of lapses from "good behavior" is commendable. As a common law term embodied in the Constitution, "good behavior" is jurisdictional, that is, the power to remove is for such misbehavior as was regarded as a ground at common law. To profit from experience, I would suggest adding removal for corrupt or criminal conduct in office and for abuse of judicial power. It may be that there are also other grounds, for example demonstrated incompetence or ignorance, but these can wait on further experience with the suggested removal process.

In sum, it is open to Congress, and I consider it highly desirable, to enact legislation under its "necessary and proper" power which would give effect to the common law attributes of "good behavior" and confirm and facilitate judicial removal of judges for "misbehavior." At worst, the constitutionality of removal by judges may be open to question, but the last word on such doubts is for the Supreme Court. I would remind you of what Jefferson stated:

"It is not for those who are only to act in a preliminary form to let their own doubts preclude the judgment of the court of ultimate decision."

Enactment of the Nunn Bill will open the door to the Court's examination and determination of the issue.

Mr. NUNN. Mr. President, we could consume days discussing esoteric constitutional theories relating to this bill. It is clear that a substantial degree of expert opinion supports the conclusion that the bill is in fact constitutional. To delay this necessary reform simply to facilitate further academic debate is not only an inappropriate assumption of the responsibility of the judiciary but it is also a disservice to those who would like to see our system of justice improved. Therefore, I am hopeful that my colleague will support passage of S. 1423.

I might say in closing, Mr. President, I know there are those who do not favor this legislation. I know they have come to their conclusions after a great deal of thought and lengthy deliberations. I certainly respect their opinion.

I particularly want to express my appreciation to the Senator from Indiana for his cooperation in seeing that this measure was brought before the Senate. He has not agreed with me on all the principles I have stated here today, but he has cooperated in every way to see that the measure could be brought before the Senate this year. He has in no way held up the legislation, and I am grateful to the Senator from Indiana for

his usual courtesies which I certainly appreciate in this case.

Mr. President, I again thank Senator DECONCINI, Senator WALLOP, and Senator THURMOND for their splendid cooperation in moving this bill through the Judiciary Committee as rapidly as possible.

I also thank Senator MATHIAS, from Maryland, for his cooperation and courtesy in allowing this bill to be brought to the full consideration of the Senate today.

Mr. BAYH addressed the Chair. The PRESIDING OFFICER. (Mr. FORD). The Senator from Indiana is recognized.

Mr. BAYH. Mr. President, I ask the Senator from South Carolina to yield—I understand he has the time in opposition—such time as the Senator from Indiana may need in discussing this particular measure.

Mr. THURMOND. How much time does the Senator want?

Mr. BAYH. Frankly I do not know. I think this is a very serious matter, and I wish not to be proscribed.

Mr. THURMOND. Mr. President, I yield 1 hour to the Senator and will yield additional time if he needs additional time after that.

Mr. BAYH. I think that 1 hour will be adequate.

The PRESIDING OFFICER. Did the Senator say 1 hour?

Mr. THURMOND. One hour. If he needs additional time, we will try to accommodate him.

The PRESIDING OFFICER. The Senator from Indiana has 1 hour and is recognized for 1 hour.

Mr. BAYH. Mr. President, I appreciate the thoughtful remarks of our distinguished colleague, my friend from Georgia. I appreciate the position that he has espoused, and I understand the intensity and sincerity of his position on this issue.

It is not a new position. It is a matter of concern which he has expressed over a long period of time, and I salute him for his perseverance.

Also, I direct myself to the statement that has been given to us by our distinguished colleague, the floor manager of this bill, the subcommittee chairman, our friend and colleague from Arizona, Mr. DECONCINI, who chairs the subcommittee which considered this bill.

I have the greatest affection for him as a fellow member of the Judiciary Committee, and it is a difficult position to be in to be on the opposite side of an issue that he has studied thoroughly and that I have studied thoroughly but reached different conclusions.

I also appreciate the remarks that were made by the Senator from South Carolina, our distinguished ranking minority member of the Judiciary Committee.

But, Mr. President, I concur in what my colleagues have previously said about the problem which exists relative to some judges who are not performing as we would have them perform. I am deeply distressed that the remedy we choose is one which has a great possibility for mischief.

At the time this measure was before

the Judiciary Committee the Senator from Indiana was the only one who expressed opposition. The distinguished Senator from Maryland (Mr. MATHIAS), who was absent on official business at that time, also was equally concerned, and both of us found ourselves in a rather uncomfortable position where we are sort of like voices in the wilderness on this issue.

But it is an important issue and, for that reason, I have asked time to consider it at length so that some of the nuances involved which were not immediately apparent upon casual study of this might be more apparent as the Senate prepares to consider it.

In my judgment, there are two reasons for opposing this legislation: First, there can be little doubt that it exceeds the constitutional authority of both the Congress and the judiciary; and, second, it establishes procedures and sanctions which threaten the independence and character of the Federal judiciary.

I think we are all concerned about the independence of the Federal judiciary. The concern has been expressed by those who propose this as a solution to the problem. But I would like to point out in the strongest terms that I think we have not given enough attention to this matter of maintaining that sacred building block of our freedoms, the independence of the Federal judiciary. We must have judges who have the courage to stand up and say, "This is what the Constitution provides." They cannot be run out of office by a majority of the Congress, they cannot be run out of office by a majority of the judiciary, nor can they be removed by a plebiscite. They can stand until they are subject to the impeachment process, and it is that kind of independence that I want to maintain.

I take a little different view of the severity of this problem than do those who are supporting this legislation. I have no disagreement with the motivation behind this bill. We are all convinced that we need a wise, conscientious, and responsible judiciary. We concur in the necessity of having the ability to remove judges who have seriously betrayed both their oaths to uphold the Constitution and the laws of the United States and their duty to assure the administration of justice with which they are entrusted.

I also concur with the majority in viewing the growth of the Federal judiciary as a mixed blessing, a blessing which I hope we are soon able to realize because we need the additional judges. But it is a mixed blessing in that it provides citizens with means to address their grievances with some degree of dispatch but, at the same time, worries us by its very size and numbers. No longer is the Federal judiciary the select handful of jurists which existed at the beginning of our life as a Nation. By sheer commonsense and the laws of chance we are wary that there will be more bad apples in the lot.

However, I am concerned that with S. 1423, we are moving precipitately toward undefined goals without a clear and consistent view of the grounds which would be sufficient to remove Federal judges.

What judges are we willing to go to such radical means to get rid of? The slothful, the criminal, the unpopular? This bill gives no clear standard of acceptable or unacceptable behavior. Rather I fear with this bill we are creating new machinery of dubious constitutionality to achieve what might well be accomplished by less drastic means well within constitutional grounds: Better, more thorough, selection methods; strengthened interjudicial discipline, and refined preimpeachment procedures by which impeachment could become an effective mechanism when deemed to be necessary.

In short, it seems to me there are other more effective, easily constitutional, means to deal with the very real problem which, I think, most of us here today recognize as existing.

The majority take the position that since the constitutionality of S. 1423 is a question which can ultimately only be decided by the Supreme Court, Congress should not hesitate to pass a law and let the Court make its decisions. Let us take a look at that, if I may say to my colleagues. Certainly the Congress has passed legislation knowing it posed serious constitutional issues. The Voting Rights Act is as good an example as any I can think of, and I supported that enthusiastically as landmark legislation.

However, there is a great difference between legislation which is arguably unconstitutional and that which is very probably unconstitutional. A proposed law which poses serious constitutional issues demands the most careful scrutiny by the legislative branch. If it is very probably unconstitutional it should not be passed. Certainly the constitutional problems with S. 1423 are sufficiently serious to warrant closer examination of the policy questions which are raised.

Without trying to prejudice in advance what the Supreme Court might be prepared to do, I find the arguments for the constitutionality of S. 1423 to be very troubling. We are relatively late in the session, and we do not know whether our brothers and sisters in the House are going to act on this, and I hope they do not. But if, indeed, this matter is brought back again to the Senate, I would hope that because of the serious questions raised that we could give it more thorough consideration.

Without being unnecessarily critical, the only evidence of any study of this at the hearing stage that I can find is contained in the hearing manual which I now have in my hand on the Judicial Tenure Act. It is a relatively short hearing as hearings go.

A year earlier there was a hearing of about a similar volume as far as testimony is concerned. I also have here, I suggest to my colleagues who might care to note, that our former colleague from North Carolina, Senator Ervin, held much more extensive hearings in opposition to this particular proposal back in 1970, and that we really have not had the kind of comprehensive attention to this problem which, I hope, we would give to it in the future.

I do not want to be overly critical because at first blush this matter would

appear to be a relatively simple one. Now that certain rather complicated and rather complex questions have been raised and now that we have finally gotten a report from the judicial branch of this Government, which was not contained at the time the measure was considered in the Judiciary Committee, I think we can take into consideration their opinion.

I would also like to point out that subsequent to the hearings on which testimony was taken—I would like to point out there was nobody at the hearings who was opposed to this particular legislation—but even after that there were significant changes made in the content of the bill toward which there has been no hearing directed at all. So, hopefully in the future, we can have a chance, as busy as we all are, to get a broader mix of opinion on this measure before we proceed further.

Let me look at the relevant constitutional issues very briefly and try to summarize them.

Article II of the Constitution expressly provides that all civil officers shall be removed from office by impeachment. Article I states that the Congress shall have the sole power of impeachment. The proponents of this legislation argue that another means of removal exists within the Constitution in the "good behavior" clause of article III, section 1, and they maintain that for 190 years this alternative removal mechanism has been available whenever the Constitution wanted to employ it, but it simply has not been used.

The majority brush over the fact that throughout the country's history the idea that good behavior—the "good behavior" clause, as being intended to provide a way to get rid of Federal judges was not proposed. Even contemporaries of the framers, who felt strongly that it was a mistake to confine removal of judges to the impeachment process, never suggested that article III provided such an alternative. Historical precedents, case law, statutory construction, all sustained the traditional view that the Constitution provided only one means for removing a judge, and that is the impeachment process.

The standards for impeachment under article II, as we all know, are treason, bribery, or other high crimes and misdemeanors.

The proponents of S. 1423 grant that Congress has the exclusive power of removal for commission of the serious misconduct which is impeachable. They contend that a judge whose behavior falls in the gap between "good behavior" and "high crimes and other misdemeanors" is subject to removal by other judges through machinery set up within the judicial branch itself. In other words, a higher standard of conduct is imposed on judges than other civil officers. A different way of removal is provided for judges than for other officials.

I am prepared to deal with the rather significant distinction between the removal of a district attorney, which has been referred to two or three times here, and the removal of a judge, which is the difference in executive branch appoint-

ment. It has been made clear that the district attorney really serves at the pleasure of the President, whether it is Marston or somebody else. Historically, I do not know of any district attorneys who have been given life tenure, which seems to make a rather clear distinction between a district attorney's removal and this proposal for removal of a Federal judge.

To sustain this argument, it seems necessary that three assumptions withstand scrutiny: First, that the Constitution allows the creation of an alternative removal mechanism.

Is impeachment the only mechanism, or does the Constitution provide for an alternative mechanism? The second necessary assumption is that the "good behavior" clause requires a higher standard of conduct in the judiciary than would be imposed by impeachment; and third, that S. 1423's removal standards—"conduct which is or has been inconsistent with the good behavior required by article III"—does not impinge on the exclusive congressional power of removal by impeachment.

Let us look further at what we are talking about here. The proposition that article III's good behavior clause provided an alternate means of removal of judges was first offered in a law review article by Burke Shartel in 1930, and has recently been argued by Prof. Raoul Berger in his work on impeachment.

I ask my colleagues to look back through history, and find out where the seed of this idea was first planted. Has there been an overwhelming landslide proportion of judicial precedents and writings in support of this proposition? I respectfully suggest that there has not. The embryo was planted in 1930, and more recently has been argued by Prof. Raoul Berger in his work on impeachment.

On the other hand, the overwhelming authority in the United States has been consistent, that impeachment was the sole means of removal of Federal judges because of the language of articles I and II that the House and Senate are granted the "sole power" to impeach and convict office holders. Any argument to the contrary must meet the heavy burden created by this express constitutional provision. The majority places its argument primarily on the slender shoulders of the precedent in English common law of the obscure writ of *scire facias*, an argument derived from Berger and Shartel.

In other words, where did this whole business of a different standard, the good behavior standard, originally come from?

If you look back at where it all started, we are told it started back in the English common law, which was taken by our Founding Fathers and considered when they wrote the Constitution and talked about holding office for good behavior, and that is why judges are subject to a different standard than anybody else.

The Founding Fathers, the proponents say, must have intended an alternative means of removal of judges within the judicial branch itself since *scire facias*

proceedings were available at common law.

Let us look at this, I suggest to my colleagues. The proposition has been closely analyzed by many constitutional authorities and found to be wanting. I invite any of my colleagues who care to look into the matter to look at the "Report on the Removal of Federal Judges Other Than by Impeachment," the work done by the New York City Bar Association, to see how slender if not totally absent a thread this proposition provides to support such a contention.

The theory of *scire facias*, as the majority report explains, was that a grant of office imparted an office or estate for the life of the grantee terminable by his death or a breach of good behavior.

That is where it all came from. That is what Mr. Berger maintains the common law thrust was. You got the grant of authority for life, or subject to breach of good behavior.

The judiciary was empowered to issue a writ of *scire facias* to initiate a civil proceeding for the termination or forfeiture of the office. The object of the writ was to remove the officer without penalty. A close examination of the writ does not sustain the conclusion drawn by those who present this proposed legislation to us.

First of all, most authorities cite a lack of historical evidence that the framers of the Constitution even had knowledge of the generally discarded writ of *scire facias*, which had admittedly never been used to remove a judge. *Scire facias* was never included in any Revolutionary State constitution, nor was it considered at the Constitutional Convention.

There was no mention at all to give anyone even the scintilla of an idea that our Founding Fathers considered the "good behavior" of *scire facias*, as it was used in the context of our Constitution.

It is admitted by all the scholars that there is no record of the writ having ever been used to attack a letter patent—granting "good behavior tenure"—in a colonial court.

In other words, this good behavior remedy was not used by our Founding Fathers in any of their colonial courts.

Further, the positions subject to removal by the writ were only of minor court officials, not full-fledged judges. Officials so removed included such obscure officers as filazers, remembrances of the Exchequer, cord recorders, postmen, and auditors.

Now, some of you may ask, what in the world were those offices? That is the same question I asked, and it is almost impossible to find out what some of them were and what they did, because they were so obscure. Yet that was the caliber of office to which this writ was directed, on which this ground for removal, the breach of good behavior, was based.

Further, if we look at the precedents for this, no judge was ever removed by *scire facias* in England, even though the writ technically survived until 1947. It was not applied in England. The writ was not abolished in America until 1938. By the majority's interpretation, any Federal judge could have removed an-

other judge up until that time under the theory of *scire facias* simply by concluding that his brother or sister judge in effect breached a condition of his appointment by engaging in something that was not "good behavior." Not one judge has been so removed. Moreover, it is interesting to speculate what would have happened if a Federal judge had ever tried to employ this particular remedy of writ of removal on another Federal judge.

The undocumented precedent of *scire facias* is far too slender a reed to support such a radical change of practice that could effectively destroy the constitutionally mandated life tenure of Federal judges and give other judges broad new removal powers.

Other evidence argues against the constitutionality of any other means than impeachment for removal of judges.

I would like to call the attention of my colleagues to this, because it seems to me to be very persuasive that the only way to remove a judge is through impeachment. Early drafts of the Constitution gave impeachment powers to the Supreme Court; after long debate, it was decided that the best and most impartial tribunal would be the Senate, not members of the judicial branch.

Is there any better signal of what our Founding Fathers meant on how judges should be removed, when one of the early documents said, "Let the judges remove themselves," and the final document said, "No, we trust that to the Congress, not to the judiciary?"

Further, there is overwhelming evidence that the framers themselves considered impeachment the sole means of removal. If you look and see what Hamilton said in Federalist No. 79, he expressly said so. Jefferson held that opinion. Marshall, Story, and Kent concurred. The eminent constitutional scholar of this day and age, who has been a tremendous help to our subcommittee, Prof. Philip Kurland, has cited as emphatically as he can, "It is pellucidly clear that the intention of the framers was to make impeachment the sole means of removal."

Proponents argue that other branches of government under the Constitution have alternate means of early removal besides impeachment inherent within their own branch.

And it is true, they do, but I suggest with all respect to my distinguished colleagues that distinctions can clearly be drawn between those rights of removal and the way judges are to be treated under the Constitution.

An exception is expressly provided within the Constitution for the legislative branch, article I, section 5. The Supreme Court decided that the President can remove certain Federal officials performing executive duties within the executive branch for the reason that he appointed them. The same obviously cannot be said for the judiciary. The Court further held in Humphrey's case that the President is restricted in removing such officials as Commissioners of the FTC because this responsibility is a quasi-legis-

lative, quasi-judicial role requiring independence from other officials or departments of government in order to function properly.

If the Court has said that about the unconstitutionality of a removal of an FTC Commissioner, who is a quasi-legislative, quasi-judicial officer, what is the Court apt to say about the removal of a judge, where there can be no question of his judicial nature. Let me say this reasoning would hold in respect to the independence of the judge subject to the censure of the judiciary, as well as of the legislature.

It is also worth drawing an analogy to the 25th amendment, which was drafted to continue the consistency of our constitutional pattern. The 25th amendment provides that a President can only be removed for inability to perform his duties upon the judgment of the Congress, not the determination of his own Cabinet. Disagreement between a judge and his fellow judges over his judicial inabilities should likewise be resolved by the House and the Senate through impeachment and not by giving certain judges power over the removal of other judges. The Constitution is clear that judges are protected from members of their own branch as well as the legislative and executive branches.

As the principal author of the 25th amendment, I remember very well the debate on this particular point, when we were debating it right here on the Senate floor. We wanted to be very careful that you could not provide an end run to constitutional protections, that you could not make it possible for a handful of cabinet officials to railroad a President, or make it possible for a majority of Congress to remove a President for inability. The only way you could get rid of him by impeachment was by a two-thirds majority.

I invite my colleagues to look at the basis for that judgment back to the Andrew Johnson impeachment trial. Is there any doubt that had there been a lesser standard for disability for impeachment, Andrew Johnson would have been removed from office on the grounds of inability.

Mr. NUNN. Will the Senator from Indiana yield on that point?

Mr. BAYH. Yes.

Mr. NUNN. I understand what the Senator is saying, but the President has never been subjected to a good behavior clause. It seems to me that that point has nothing to do with the theory on which this bill is based, because there is a good behavior clause in the U.S. Constitution as pertaining to judges. If that good behavior clause is to have any meaning, then it has to be something different from the impeachment clause. The Andrew Johnson case had nothing to do with good behavior.

Mr. BAYH. That is right. I was only using that as an example of the danger if we lower the standard or the test which must be met before we remove an officer. I tried to emphasize the importance of maintaining impeachment as the only way of doing that either for a President or a judge.

The Senator from Georgia raises a

good point which I intend to address in just a moment.

In other words, I think it is very legitimate that he and the Senator from South Carolina and the Senator from Arizona think good behavior has a purpose for being in the Constitution. I concur. But I would invite a close examination to what appears to be a logical explanation on the part of the Senator from Indiana, which reaches a different conclusion than that which others have reached.

Since it is conceded by proponents of this legislation that Congress has the sole and exclusive power of removal for the commission of impeachable offenses in order for S. 1423 to be constitutional, it is necessary that it prove that the good behavior clause provides a higher standard of conduct, a different standard of conduct, a different way of treating judges than that required by impeachment.

I frankly do not believe that that proposition can be sustained.

Proponents assert the language of article III of the Constitution, which says that judges shall hold their offices during good behavior, was intended by the writers to establish the fact that judges who did not conform to good behavior should not be able to continue to hold office.

I think that is the proposition on which the Senator from Georgia very strongly argues his case.

These assertions, I suggest with all respect, again go back to the opinions of Professors Shartel and Berger.

You certainly cannot find any case law, you cannot find any precedent in history, to sustain that proposition as being a basis for this decision being made by our constitutional fathers. On the contrary, the great weight of historical research done by other constitutional experts argues that tenure during good behavior was intended to differentiate from tenure at the King's pleasure. It was rebellion against tenure during the King's pleasure which had led to the law in England in 1701.

Mr. President, I think this is a critical question. It was one raised by the Senator from Georgia. It is one that the Senator from Arizona and others have used as a basis for their sincere belief that the Constitution, by saying a judge shall serve for good behavior, in essence meant to establish a different standard of conduct by the use of that term than was used in the impeachment clause, so that thus you could use a different means for removing judges than impeachment.

The only way we can really come to grips with what is meant in that Constitution, it seems to me, is to look at what was happening at that time. What were our Founding Fathers angry about? Why did they bleed and die? Why did they overthrow the King?

When we look at one of the major reasons, it was that the King could, indeed, appoint judges at his pleasure. As I pointed out, one of the major reasons for the Revolution was to remove the right of the King to appoint judges at his pleasure. That led to the Act of Settlement in England in 1701 and it was

the monarch's arbitrary power over their judges which led the colonists to include it in their list of grievances against the King in the Declaration of Independence.

I invite attention to what our Founding Fathers said in the Declaration of Independence. I quote, talking about the King, grievances against the King:

He has made judges dependent on his own will alone, for the tenure of their offices, and the amount and payment of their salaries.

So, when Thomas Jefferson put together that great document, this was one of the grievances, the fact that the King controlled the judges. In other words, to the Founding Fathers, a good behavior grant of tenure meant that the executive was restricted in its powers of removal, not that it was a separate standard of conduct.

In other words, the choice available to our Founding Fathers at the time was the ability to serve as long as a judge was on good behavior as interpreted under the impeachment clause. That was one option which they chose. The other option was the one which they fought a Revolutionary War to get rid of. That was the right of the King to appoint judges and remove them at his pleasure.

Further, although, in our history, we have never definitively established a standard for impeachment, it is generally agreed that it is not so high as an indictable offense and, indeed, many scholars maintain that under 18th century common law, "misdemeanors" was synonymous with "misbehavior." Certainly, our record of impeachments would hold that interpretation.

In other words, are we creating a different standard to get at judges who are not performing than is already there under the use of the term "misdemeanors" in the impeachment clause of the Constitution?

If you look at the records of impeachment of judges that we have actually had, look at the facts again, you find that this is not true. I ask the Senators to look at the impeachment proceedings, back in 1804, of Judge John Pickering. He was impeached and convicted on several charges, including drunkenness and blasphemy. It sounds to me like that is misbehavior.

Judge George English was impeached and subsequently resigned on counts including conduct bringing the administration of justice into contempt and disgrace. I do not know how to define that other than misbehavior.

In 1936, the Congress convicted Judge Halsted Ritter on misbehavior. In other words, these acts which constitute misbehavior have been part and parcel of the proceedings that have traditionally been used in this body to remove judges that are not serving faithfully.

Mr. NUNN. Will the Senator yield on that for a minute?

Mr. BAYH. I am glad to yield.

Mr. NUNN. I am listening very intently to the Senator's argument. I believe he is making a very good historical presentation of his point of view, though I do not agree with him. I am a little puzzled, because the Dear Colleague letter sent out by the Senator from Indiana

and the Senator from Maryland, basically, seems to contradict the argument the Senator was just making about historically, good behavior having been interpreted along with impeachable offense to include things like drunkenness and so forth.

In this dear colleague letter it states:

S. 1423 would provide for a system whereby Congress would be creating a relatively easy mechanism by which it might rid itself of judges who have been guilty of "bad behavior" falling below the level of impeachable behavior. For the serious misconduct arising to the strictest standards of high crimes and misdemeanors, that is, indictable offenses, the cumbersome mechanism of impeachment remains.

The Senator is citing example after example of where the impeachment process went beyond indictable offenses and included things like drunkenness. In this letter, it is very strongly indicated that the Senator is of the view that only indictable offenses come under the impeachment clause.

I know this is a very hazy area. Historically, the position has been taken by Congress that the impeachment clause takes in a broad concept of other offenses, rather than just indictable offenses.

Mr. BAYH. The point I have been trying to make here from a policy standpoint, as well as a constitutional standpoint, and I am concerned about both, is that the legislation establishes, under the good behavior clause a remedy that is not existing under the impeachment clause. That is, are we really creating a different kind of remedy? When we look at how impeachments have been governed and what standards have been used to impeach judges, we see very clearly that standards which fall, and specifically, in the Ritter case, are charged in the impeachment indictment as lack of good behavior or misbehavior, those are part and parcel of the impeachment proceedings under the impeachment clause of the Constitution.

Mr. NUNN. Then this sentence would not be correct:

For the serious misconduct arising to the strictest standards of high crimes and misdemeanors, that is, indictable offenses, the cumbersome mechanism of impeachment remains.

Mr. BAYH. No, that is true. The sentence does not say only serious crimes are subject to impeachment.

The sentence says that for serious crimes, one must go the route of impeachment.

Mr. NUNN. That is the point I would like to get to. I should like the Senator from Arizona to correct me if I am in any way wrong. As the author of this bill and having followed it for a long time, it has been my strong view and remains my strong view that good behavior basically encompasses more than high crimes and misdemeanors; but it also encompasses high crimes and misdemeanors. In other words, a high crime or misdemeanor is bad behavior. There are things that are not high crimes and misdemeanors that are bad behavior, but all high crimes and misdemeanors, in the opinion of the Senator from Georgia, would be violations of good behavior standards and, therefore, would be bad behavior.

If the Senator from Arizona disagrees with me, I would like him to say so. It would be my interpretation of this good behavior clause and the legislation we are passing here that this judicial commission and the judicial court would have the authority to remove or to discipline, including censure, a judge who was found by them to have breached the good behavior clause, yes; but, also, a judge would be deemed to have breached the good behavior clause if he had committed an impeachable offense. So good behavior includes all of the above, so to speak.

Mr. BAYH. The Senator worries me—I cannot disagree with what he is saying about what we are doing here, but his interpretation worries me when he says an impeachable offense. You can still use this bill to remove a judge for what he considers to be an impeachable offense.

Mr. NUNN. That is exactly right.

Mr. BAYH. In other words, the whole business of requiring two-thirds of the U.S. Senate in the impeachment process, to have any impact at all on judges, is null and void. The logical sequence of that—

Mr. NUNN. It is a supplement. It could be used. Congress could still impeach a judge.

Mr. BAYH. But why should Congress impeach a judge when it is so much easier to do it by a majority of judges?

Mr. NUNN. The Senator has just made the argument for this bill. It has been a long time since Congress even found it necessary to involve itself in this process. I believe the last time was 1936. How would the Senator from Indiana have us deal with senile judges today? How would the Senator from Indiana have us deal with judges who have a drinking problem today? How would the Senator from Indiana have us deal with judges that are mentally incompetent when that condition does not breach the high crimes and misdemeanors standard?

Mr. BAYH. I suggest to the Senator that if he looks carefully at what has happened here, in the Pickering case, the question of insanity was raised as a defense.

All these things are not new. I pointed out, we removed a judge who was drunken. Another because he swore.

Well, maybe it is a bad thing for a judge to drink and swear, I will not argue that, but we have impeached judges that way. That is the way we have removed them. We have removed them for behavior by impeachment.

Mr. NUNN. I am not disagreeing—

Mr. BAYH. I will answer the question. I have not, and it is a good question, because we do have a problem when we have a judge not performing up to standards.

There have been occasions, not frequent, but occasions when we have judges, who, with the passage of time find their capacity is diminished, and how do we deal with that?

I suggest that the Judicial Conference has a mechanism of dealing with that now that is far short of this measure, which I feel flaunts the Constitution.

If I were to suggest, if it is necessary, after we have had more thorough study

of this it is necessary, perhaps it is, to find a way to make the impeachment process more meaningful as far as judges are concerned, then it would seem to me we ought to have this particular panel which has every right, and the judicial conference, of course, has the authority, to police the dispensation of justice and to watch what is happening.

They usually do a pretty good job. It is certainly within the constitutional fabric that we could give them authority to make this kind of determination, that Judge Brown or Judge Jones is not performing his duty, and recommend to the Congress that he or she be impeached.

We could put in there that this would automatically come to the attention of and automatically be a subject of business for the Senate and the House Judiciary Committee, so we would really force Congress to get off the dime and deal with it that way, which I think could be handled under the Constitution.

Mr. NUNN. I just say to my friend from Indiana, as I said in my opening statement, these are close questions. People of great constitutional background do disagree on these subjects.

I do not know that we can resolve these issues today and I am not trying to convince my colleague from Indiana today. But I do think one or the other of the Senator's arguments has to be dropped, because they are inconsistent.

On the one hand, the Senator says we do not need a good behavior enforcement mechanism like we propose here today, because good behavior, basically, has been interpreted in past cases by the Congress as being about the same thing as an impeachable offense, and Pickering was cited in that regard. That is one of the Senator's arguments.

I will not get off on that, because the Senator is probably historically correct on that. But, on the other hand, the letter by the Senator from Indiana and the Senator from Maryland basically says:

We would also like to point out a clearly anomalous result which would flow from the enactment of S. 1423 and which we believe argues strongly against its enactment. S. 1423 would provide for a system whereby Congress would be creating a relatively easy mechanism by which it might rid itself of judges who have been guilty of "bad behavior" falling below the level of impeachable behavior. For the serious misconduct arising to the strictest standards of high crimes and misdemeanors, that is, indictable offenses, the cumbersome mechanism of impeachment remains. Ironically, S. 1423 would create a system for relatively easy removal of judges for failing to behave properly, but removal of criminals from the bench would be much harder.

All I say to the Senator from Indiana is that one of the two arguments has got to be, from an intellectual point of view, dropped because if the Senator is correct on his historical interpretation of impeachment as it has been applied by Congress, this means the Senator believes historically that impeachment is broad enough to encompass bad behavior.

Mr. BAYH. Yes.

Mr. NUNN. But, on the other hand, if that is true, the second point made here that we are creating a mechanism which would be twofold, one purpose would be

to address high crimes committed by a judge, through impeachment; the other standard, good behavior, would be much easier to enforce by new mechanism proposed in S. 1423. I am saying one or the other of those arguments is wrong, because it is inconsistent.

I do not know whether the Senator follows what I am saying.

Mr. BAYH. I follow what my friend from Georgia says. I would be the last to say I have not on occasion been inconsistent.

I hope I can explain to him that, although he may not agree with my logic, and I do not want to speak for my friend from Maryland, but I assume he concurs in what we are trying to do here, we are really arguing two points.

The first question, as he mentioned a moment ago, on the basis of policy and constitutionality, I think we have to look at both of those. Either we are providing a new remedy under good behavior, or, one, there is no reason to do it; or two, it is going to be unconstitutional because it is already there in that clause.

I would like to point out, historically in this body we have impeached judges for that, that fell in the good behavior category. That is argument one.

Mr. NUNN. I understand that argument. I think historically there is justification for that argument.

Mr. BAYH. Now, let me get back to the purpose for that paragraph in the letter, the alleged anomaly we are referring to.

Generally, in our system of jurisprudence, and there is something, I think, about the gut feeling of equity we have as citizens of this country, that if we look at the equity of the situation it ought to be easier to remove a judge if the crime were serious and not so easy if the crime was not obvious or was not serious, and by this bill, we reverse this.

If this bill is enacted, the Senator is saying, if a person commits just petty larceny, it is going to be relatively easy to get rid of that person. But if it is a serious crime that ought to be obvious and apparent to everyone and the culprit removed quickly and easily, we cannot do that. We have to go the long, tortuous route, to use the Senator's words, and I think the accurate reflection of history, the tortuous route of impeachment.

The Senator may be on a different ground than the majority of the Judiciary Committee. I do not want to put words in their mouths. But, as the Senator from Georgia reflected a while ago, this particular vehicle, this law, if it is enacted, could be used, really, for all sorts of indictments.

Mr. NUNN. Good behavior, under this bill would authorize the removal or censure of people not only for bad behavior, but also for impeachable offenses. This would be an alternative.

I would like to have the Senator from Arizona and the Senator from South Carolina comment on that. That is my very clear interpretation of this bill.

Mr. BAYH. There is one paragraph here, if one reads the majority report on page 7, we point out the emphasis there.

I yield to my friend from Arizona to respond to that question.

Mr. DeCONCINI. The Senator is correct.

The good behavior standard would include impeachable offenses, and the court could make determinations regarding impeachable offenses.

Mr. BAYH. I should like to read this paragraph from the majority report. It says:

A "gap" between the two standards "good behavior" and the grounds for impeachment must therefore exist. To assume otherwise would be to claim that the grounds for impeachment and "good behavior" tenure are the same and thereby render the "good behavior" clauses meaningless. The long-standing constitutional principle that no clause in the Constitution is intended to be without effect will not permit this result. Therefore, an alternative method of impeachment to accomplish the removal of Federal judges must have been contemplated by the framers to provide for the removal for misbehavior or disability that was in violation of the "good behavior" standard but was less serious than an impeachable offense.

Are we changing the rules here?

Mr. DeCONCINI. Obviously, an impeachable offense falls within article I, section 3, and article II, section 4 of the Constitution. But good behavior is a broader standard. It specifically is referred to in article III, section 1. This legislation fills the gap between the standards of impeachable offense and good behavior.

Mr. BAYH. I was under the impression, according to the report and everything we discussed in the committee, that this was designed to fill a gap, a gap which the Senator from Arizona feels does not exist and the Senator from Georgia feels does not exist.

Mr. NUNN. I think there is a gap. I believe the Senator from Indiana is not interpreting correctly what I am trying to say.

Let me quote succinctly Professor Berger's testimony in this matter:

"High crimes and misdemeanors" and breach of "good behavior" are like two intersecting circles; there is an enclave where they are coterminous. But while all "high crimes and misdemeanors" might constitute a breach of "good behavior," not all breaches of "good behavior" amount to "high crimes and misdemeanors" * * *

The Senator from Indiana has been arguing that "high crimes and misdemeanors" historically has been interpreted as encompassing also all the elements of bad behavior. The Senator from Georgia has not disagreed with that historical interpretation because there are inconsistencies in this.

The House Judiciary Committee, though, in setting impeachable offenses so far as the President was concerned, did not interpret it that broadly. They drew a narrow interpretation which would be almost an indictable offense. So there are different precedents here.

What I am saying is that this legislation, as I interpret it, would give this Commission the authority to enforce the good behavior standard; and high crimes and misdemeanors, in all the cases I can think of, would constitute bad behavior. There may be some cases in which mis-

demeanors would not. It depends on how you define the word "misdemeanor"—whether it is a high misdemeanor or a parking ticket or something of that nature.

The reverse is not true, in my opinion—that is, all good behavior breaches are not high crimes and misdemeanors.

What I am saying to the Senator from Indiana is that when he interprets this paragraph, where the Senator says we are setting up two sets of standards, one for impeachable offenses, which is very difficult, the impeachment route, and the other is good behavior, which this Commission would deal with, the Senator is incorrect in that interpretation of this legislation. The power given to the Commission is much broader than that. If they found an impeachable offense, they could determine that is bad behavior, and they would be entitled to take the remedies prescribed in this legislation.

That may mean the Senator is more opposed to it than originally, so I am not trying to influence the Senator. All I am saying is that paragraph 2 of the Senator's letter is not a correct interpretation of this bill, and I believe that everybody who is connected with this bill on the pro side would agree that that is a misinterpretation of the bill.

Mr. BAYH. The Senator was only relying on the report of the majority, which is the best document I have seen supporting the reasoning behind this legislation.

Unless we are prepared here, as a body, to accept the constitutional premise that by statute, by mere law, you can negate the provisions of the Constitution so far as the impeachment clause is concerned, I do not know how in the world any of us can believe that by passing a statute under the good behavior clause, to remove a judge by good behavior, we also can include indictable offenses under the impeachment clause. If that is not clearly unconstitutional, I do not know what is.

Mr. NUNN. Does the Senator mean that he believes that an indictable offense is not bad weather? Is that what the Senator is trying to argue? Is he saying that if a judge commits murder and could be indicted for that murder, that does not constitute bad behavior?

Mr. BAYH. That certainly is bad behavior.

Mr. NUNN. That is what we are saying. We are in agreement. That is an impeachable offense. It is also bad behavior.

Mr. BAYH. Yes. But if you are to say it is an impeachable offense and you are going to let it be decided by a handful of judges, you are making a mockery of the impeachment proceedings of the Constitution of the United States, which says that you cannot remove officials that way.

Mr. NUNN. The Senator from Indiana is saying that he interprets this legislation as basically giving the judges and this Commission only the right to deal with matters that are nonimpeachable offenses.

Mr. BAYH. That is right.

Mr. NUNN. The Senator is totally incorrect in his interpretation of this legislation. We are on totally different

wavelengths about this legislation, because that is not the correct interpretation of it.

The House Judiciary Committee studied impeachment for months. Every impeachment proceeding has resulted in difficulty in defining what a "misdemeanor" is.

If the Senator from Indiana has interpreted this legislation that narrowly, that it deals only with things that are not necessarily impeachable offenses, then I say that the interpretation of the Senator from Georgia and the interpretation of the Senator from Indiana are different.

Mr. DECONCINI. This legislation is authorizing the judiciary to implement the good behavior clause, while still maintaining the separation of powers. The Constitution does not prohibit this. The bill fills the gap that the Senator refers to on page 7, the gap the Senator from Georgia has attempted to explain.

I will not try to convince the Senator from Indiana to withdraw his opposition to this. I understand his philosophical and his constitutional approach. His arguments are well thought out. But I believe the good behavior clause can be implemented, and that is what the majority of the Judiciary Committee believed when it reported this bill.

Mr. NUNN. There are two points here, and we should try to separate them.

One is the question of the severity of the offense, whether it is a breach of good behavior or an impeachable offense or it is in that gray area between.

The other question the Senator from Arizona has pointed out—the question of who removes. As I read the Constitution of the United States and the history of it, the question of who removes a judge was much more important to the framers of the Constitution than the precise offense for which the judge could be removed.

I think the argument of the Senator from Indiana has dealt mainly with the substance of the particular offense, but the framers of the Constitution were dealing mainly with the question of who could remove a judge by setting forth limited ways a judge could be removed by the executive branch and the legislative branch. They basically are saying in this impeachable offense category that a great deal of care must be taken in separating the three branches of Government.

So we are dealing with two questions here. One is the substance of the offense, whether it is a good behavior breach or whether it is an impeachable offense—high crimes and misdemeanors. That is one question.

The other question is, what branch of Government can do the removing? Of course, both those questions are important, but the question of who can do the removing is really the basis of this legislation.

The PRESIDING OFFICER. The time of the Senator from Indiana has expired.

Mr. BAYH. May I have another 30 minutes?

Mr. THURMOND. I yield 30 minutes to the Senator.

Mr. BAYH. I apologize for taking so long. I think this is the kind of debate that is very enlightening. It probes our innermost thinking.

Mr. MATHIAS. Mr. President, will the Senator yield at this point, so that I can ask a question of the manager of the bill?

Mr. BAYH. I yield.

Mr. MATHIAS. It seems to me sort of ridiculous that we bring a bill to the floor and have this kind of disagreement about how it works. I am wondering how many witnesses were called in opposition to the bill and whether this point was explored by any of the witnesses in opposition.

Mr. DECONCINI. I do not have a breakdown of how many witnesses appeared in opposition to this proposal. Fifty witnesses were called during the history of this legislation, and there were 20 days of hearings.

Mr. MATHIAS. This year?

Mr. DECONCINI. This year we held 1 day of hearings.

Mr. MATHIAS. Were there any witnesses in opposition?

Mr. DECONCINI. None appeared, but several were invited. They were district judges.

Mr. MATHIAS. How about our former colleague, Sam Ervin, for example, who was so immersed in this subject? Was he invited?

Mr. DECONCINI. No; I believe he was tied up with the ERA. He had testified in prior hearings and his testimony has been recited and considered.

Mr. MATHIAS. I think the record has to be deficient if there was not a single witness in opposition who was called.

Mr. NUNN. Frankly, I say to the Senator from Maryland, the number of people in opposition has gone down substantially over a period of time. We have the Judicial Conference of the United States endorsing this general concept. We have the American Bar Association. We have the Department of Justice, and we have the American Judicature Society. I say the number of opponents is diminishing. There are people who continue to argue the constitutional grounds. There is no doubt about that.

Mr. MATHIAS. Dr. Kurland, I do not think has changed his views. He is available. He has been a consultant to the Judiciary Committee, as for one example.

Mr. NUNN. Of course, this legislation has been around for a long number of years, and there is a whole record replete with people who are opposed to the legislation. No one is contending there are not people who think this legislation is not constitutional.

The main point I am making to the Senator from Indiana is that the Framers of the Constitution of the United States were concerned about the separation of powers. That was the main concern.

This bill addresses that concern. There is nothing in here that expands the power of the legislative branch or the executive branch to remove a judge. It is a question of the judicial branch being able to implement the good behavior standard.

I think certainly the separation of

powers question is the essence of the constitutional premise on which this is based.

Mr. BAYH. If I just might point out for the record, I think we should say that the Judicial Conference's endorsement of this was with reservations about the constitutionality of it, and the report was sent forward from the Judiciary Committee before the study of the position of the Federal judges of the country was before us. I do not fault the subcommittee chairman for that because they were late. We just received it 2 weeks ago. But we find 76 percent of the Federal judges expressing extreme concerns about this, and I want to put some of their concerns in the RECORD because one might say, "Well, you would expect the Federal judges not to want to have someone investigated."

Frankly I feel that if we look at some of the reasoning contained in this letter we will see it is based on a much stronger constitutional and policy question than one of self-preservation.

Mr. NUNN. As I understand it, the reservation on the constitutionality of this legislation as expressed by the Judicial Conference was on the point of including the Supreme Court. As the original legislation was presented it would have included the Supreme Court. As the legislation has evolved from the Judiciary Committee it basically leaves the question of removal of Supreme Court Justices up to Congress after a recommendation pursuant to the process. The Judicial Conference basically endorsed the concept of this legislation.

Mr. DECONCINI. Mr. President, will the Senator from Indiana yield for a moment?

Mr. BAYH. I yield.

Mr. DECONCINI. Senator BAYH states in his analysis that 74 Federal judges responded to the Judicial Conference questionnaire. That is slightly over 10 percent of the total number of Federal judges, including senior status judges. I do not think this number is a significant basis for a decision on the Judicial Conference after they met and approved the resolution.

Mr. BAYH. I respectfully say to my friend from Arizona they were given less than a month to respond.

Mr. DECONCINI. Are Federal judges so busy they cannot respond to a question as simple as that presented here?

Mr. BAYH. I suggest if the Senator will look at a matter of some 20 days to respond to something like this that is hardly time. If he is going to talk about the time being a reason, should he not consider the fact that three-fourths of them did respond who were against it? Then it seems to me the Senator has to look at the time given to them to respond.

Mr. DECONCINI. If there were an overwhelming amount of opposition among the Federal judges I think far greater than 10 percent or 11 percent of them would have responded to the questionnaire.

Mr. BAYH. It is going to be interesting to see what not only the Federal judges but constitutional scholars have to say after they have a chance to look

at this dialog here which, it seems to me, makes a shambles of the impeachment clause as far as judges are concerned.

Mr. NUNN. I might say to the Senator from Indiana on that point everyone who read this bill would have to come to the conclusion that under the good behavior standard basically an impeachable offense is bad behavior. I do not think anyone would conclude otherwise, and the Senator agrees with that also. The Senator has just said that he interprets an impeachable offense as being bad behavior. If that is the interpretation and this bill is giving the judiciary itself the power to enforce the good behavior standard, no one could have come to the conclusion that good behavior as defined in this bill did not include impeachable offenses.

Mr. BAYH. The Senator does consider, I assume, the impeachment clause of the Constitution does apply to judges as well as other branches of the Government, does it not?

Mr. NUNN. The impeachment clause of the Constitution, the Senator is correct, does. It has been interpreted to apply as well to other branches. But the Senator himself has made an argument that is so inconsistent that I cannot reconcile it. The Senator is saying in answer to my question that he believes a judge who commits an impeachable offense has also committed bad behavior or breached the good behavior standard and yet the Senator is also saying he is surprised by the fact this legislation, which has been set forth for years does not include impeachable offenses. People will be surprised to find that conclusion in the record.

Mr. BAYH. I will suggest that anyone who reads this document right here, that came out of the committee and went across the country saying what it does will see that it says that it is to fill a gap.

Mr. NUNN. It is to fill a gap, a huge gap.

Mr. BAYH. So we have a clear distinction here, if you have a judge out here who accepts bribes for deciding on a case or does something that is very clearly a major felony, for example, murders the foreman of a jury in righteous indignation when the jury brings in the wrong decision, something that may sound ridiculous but something that is obvious, it seems to me, to be a major crime, is the Senator suggesting that that should be handled under the impeachment clause or could it be handled by this?

Mr. NUNN. It could be handled—

Mr. DECONCINI. Mr. President, if the Senator will yield. That could be handled by the impeachment clause. If it were not handled by the impeachment clause, it could be handled by this procedure.

Mr. BAYH. I understand where the Senator is on this. But it seems to me that does great damage to what our Founding Fathers really meant.

I have tried to show—and I am not suggesting that any of my immediate friends here involved in this debate are going to be persuaded by this—is if you look at what is said in the Declaration of Independence, if you look at one of the major reasons we revolted against

the King, it was to change the way judges were to be appointed and to do away with the at-the-pleasure-of-the-King method of appointing them and instead to exchange that for a good behavior appointment. That is a matter of style in the Constitution and as to the removal process, the only place you deal with removal any place, with exception made for the legislative branch, is in the impeachment clause which applies to everyone.

So it seems to me that good behavior did not, with all respect to my friends, suggest that this go out here and implement another way of doing it, but this was to point out that the King could no longer appoint a judge at his pleasure but rather it should be under the "good behavior" clause, leaving aside the impeachment clause.

Mr. NUNN. May I say to the Senator—

Mr. BAYH. Let me just add one other point, if I might.

Mr. NUNN. All right.

Mr. BAYH. I do not know how much additional proof we need for what our Founding Fathers meant. We can, of course, change that by amending the Constitution. We tried to do a little of that, and my friend from Georgia knows that is not too easy. But we can change that. But if we look at what our Founding Fathers meant one of the first drafts of the Constitution was to give judges the right to remove judges.

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

Mr. BAYH. Yes.

Mr. DECONCINI. There is nothing in the Constitution that specifically says one branch of the Government cannot discipline itself within its own branch. This is what this legislation proposes as a means of implementing the "good behavior" clause, leaving aside the impeachment clause for the moment.

Mr. BAYH. I think we have to look at what "good behavior" means. The Senator is making an Empire State Building out of two words. What does "good behavior" really mean? What did it mean when the Founding Fathers put it in there? Did they really mean to give leeway under the terminology of "good behavior" to judges to remove judges? The Senator from Arizona says that is what they meant. But when they were deciding that matter in the Constitutional Convention, and when the issue was put plainly before them and a draft of the Constitution gave judges the right to remove judges, the Founding Fathers considered it, and said they did not want any part of it, and included impeachment in the hands of the Congress of the United States, not in the hands of the judges.

Mr. DECONCINI. Nevertheless, the framers did not include a prohibition of such a disciplinary mechanism in the Constitution.

Mr. BAYH. Why should they?

Mr. DECONCINI. If it was their intention that the judicial branch should not be able to exercise some measure of self-discipline, I would think they would have said so. They did not.

Mr. BAYH. Does it specifically say in the Constitution what the President

should not do as far as disciplining members of the executive branch is concerned?

Mr. NUNN. The Senator has a great point there, too. The King and the President could remove members of the executive branch. That does not violate the separation of powers.

Mr. BAYH. Because he appointed them. Judges are not appointed by judges.

Mr. NUNN. The Senator just made that as a statement. The Constitution does not say anything about that. The Constitution does not say anything about that, but we all know that the President can remove someone in the executive branch without that person being impeached. That is the same thing we are trying to accomplish here for the judicial branch of Government.

I might say the term "good behavior" goes back to the common law which was used in connection with judges forfeiting their office on a condition subsequent, forfeiting their office by not comporting with good behavior, and being removable, by not maintaining good behavior, by the judiciary itself.

I might say to the Senator there is nothing in this legislation that would give the executive branch of this Government, that being the President, the right to do anything it cannot do today.

Mr. BAYH. As I said earlier, and I will not repeat that language, if the Senator is going to base the use of "good behavior" in this legislation on that common law precedent, then I would like to have a list of judges who were removed from office under the common law on that basis, because I have not been able to find any. I have not been able to find a single judge removed on that basis.

Mr. NUNN. This would have to go back to the English common law.

Mr. BAYH. That is right. In English common law the "good behavior" writ, scire facias writ, was directed at the lower echelon, recorders, bailiffs, and this kind of thing.

Mr. NUNN. I say to the Senator from Indiana perhaps there were not any judges because the King was doing all the removing. The judiciary itself had very little time to do the removing because the King was doing the removing, and that is why the Founding Fathers did not want the President of the United States and the executive branch to be able to remove judges.

Mr. BAYH. It seems to me if the Senator is going to use a common law writ to support language in the Constitution, as we interpret it here in 1978, he ought to at least be able to give me an example of a judge or two who were removed back during the common law or during that period of time in which much of the law in the United States was common law.

I mean if you look at all of the colonial courts, if you look at all of the judicial decisions and the judges, then you cannot find any of them removed on this antequated writ. I just cannot. I have looked, and I hope the Senator will look, and maybe he will find one.

Mr. NUNN. What is the Senator's point? Let us assume there were none removed. So what? The writ was there.

It was a right. It was a legal procedure. It was known to the framers of the Constitution of the United States, and it was embodied in the words "good behavior". So the question of whether the power was ever used or not is not relevant to the question of whether or not it was there. It is not relevant to the question of whether the framers of the Constitution of the United States had that in mind when they put the words "good behavior" in.

If you follow the Senator from Indiana's argument to its logical conclusion, the Senator from Indiana is saying that the framers had nothing in mind when they put that in.

Mr. BAYH. That is not what the Senator from Indiana said. I said in the context of the Constitution, what Jefferson and what early scholars and early judges said, "good behavior" was meant to be an appointment for life not subject to removal at the pleasure of the King, which was the way things were done before the Declaration of Independence. That is what "good behavior" means.

Mr. NUNN. Why was it put in there if the appointment was for life?

If you are appointed for life, provided you have good behavior, then what happens if you have bad behavior under that argument?

Mr. BAYH. Then you are impeached under the same impeachment clause which is considered elsewhere. If the Founding Fathers meant to give judges the right to do something absent good behavior, why did they not put it in there at the time they were defining the rights under the judicial system of the United States?

Mr. NUNN. Normal constitutional interpretation is that words in the Constitution do have meaning, and the Senator is saying that the words "good behavior" are completely superfluous because they have no meaning in addition to the impeachment clause.

Mr. BAYH. I will say to my friend that is a couple or three times where although we may disagree, that is not what the Senator is saying. I am saying it did have meaning and it was not used to try to distinguish between the way the King was doing it, appointing judges at his pleasure, and the way the colonists wanted it done on good behavior, life tenure subject only to the impeachment powers which were very carefully enunciated. I mean, that was a very critical matter considered by our Founding Fathers, because they were tired of people being cut, hung, and dried by the King. If you dared to incur the displeasure of the King, you ended up with your head on a chopping block someplace.

Mr. NUNN. The Senator is not saying this legislation will do that.

Mr. BAYH. Not quite. No, I am not saying that.

Mr. NUNN. The Senator is not thinking of a case where the executive branch can do anything under this legislation that they cannot do now?

Mr. BAYH. The Senator is again getting back to why our Founding Fathers used "good behavior." All I can say to my friend from Georgia is look at what was happening at the time. The King was

appointing, the King was removing. I mean the King had arbitrary power, so that is why they used the words "good behavior." They distinguished between that, and went to great care in enunciating with great particularity how you removed officers, not only judges but Congressmen and Senators and the President himself, because they were sensitive of the fact that the arbitrary power of the King underlay all the grievances that led to the Revolution, and it is unbelievable to me that being as sensitive as they were about that unlimited, unfettered power of the King, that they would not have included any removal power for judges that they considered to be applicable only to judges. They put this all in the Constitution under the impeachment clause.

Mr. NUNN. Why did they put "good behavior" in the judicial article if it was a limitation on the executive branch?

Mr. BAYH. Well, as I said before, to distinguish the good behavior, life tenure appointment from the appointment at the pleasure of the King.

Mr. NUNN. You do not have to put "good behavior" in the Constitution in order to give life tenure. "Good behavior" is a limitation on life tenure. "Good behavior" is not a reinforcement of life tenure, it is a limitation on life tenure.

Mr. BAYH. It would have been totally inconsistent within the confines of the Constitution to say in one article you had life tenure, you could not be out of there until you died, and in another article you could be impeached. "Good behavior" were words of art to imply you could serve for life as long as you had good behavior, the cessation of which was to be determined under the impeachment clause.

Mr. NUNN. Why did they not say "serve for life unless removed under the provisions of article II?"

Mr. BAYH. I guess they were—

Mr. NUNN. That would have been so much clearer.

Mr. BAYH. I guess they were expecting us—

Mr. NUNN. To give us something to debate.

Mr. BAYH (continuing). To have a clearer view of what they were doing than you and I are now able to have.

Let me ask my friend from Georgia is he at all concerned or is his logic troubled at all if we are trying to—you and I really could not put our hands on a Bible and say for sure we know what our Founding Fathers meant—

Mr. NUNN. I agree with the Senator.

Mr. BAYH. We are trying to find out what they meant, so we try to look at certain actions they undertook. One of the things which has been very persuasive to me in determining what the Founding Fathers really meant by "good behavior" and what they really meant as far as how judges should be removed is to see how they looked at the words of the Constitution or the various drafts presented to them. One of the early drafts permitted judges to be removed by judges.

It said it right out there in so many words. They struck that. They struck it out, so that the only language applicable

to removing judges or impeaching officials is contained in the impeachment clause, where they give Congress the right.

Mr. NUNN. Of course, Thomas Jefferson wrote in 1816 that judges were removable by their own body. And of course Thomas Jefferson had a lot to do with the Constitution.

But if the Senator will yield, I think we can argue a long time about what the Founding Fathers meant by good behavior, and I am not going to convince the Senator from Indiana, and he is not going to convince me, today anyway. I think only the Supreme Court of the United States can make this final determination.

The problem is that we have no practical way of dealing with judges who may be senile, who may be drunkards. We have no way of dealing with those kinds of people on the bench. We well may look at the matter, from our lofty position up here, and say, "Why should the Congress of the United States take up its time with some obscure judge in Georgia or Indiana or California?"

But to the people who have to deal with him, that judge is more powerful in certain matters than even the President of the United States. We are talking about leaving people in office for a lifetime virtually untouched by Congress. The Senator from Indiana, I know, would agree that we are not going to take the time of the U.S. Senate and the House of Representatives to impeach a judge for being drunk on the bench. We have 200 years of precedent, and about 40 years in the last four decades, where there have been many instances of abuse of judicial power by people who were either drunkards, senile, or for other reasons disqualified, and the Congress of the United States has not done one single thing. The question really is whether we are going to deal with this issue or be caught up in a constitutional argument that none of us can solve.

Only the Supreme Court of the United States can tell us, in the final analysis, what good behavior means. Only the Supreme Court of the United States can tell us, in the final analysis, what the Founding Fathers may have meant. I may not agree with their conclusion and the Senator from Indiana may not agree with it, but they are the ones who are going to have to tell us.

In the meantime, do we stand around another 40 years and do absolutely nothing about a very grave abuse of the constitutional processes of our country? There is no remedy; there is no practical remedy for a judge who is not capable of being on the bench. Who is going to sit in judgment on a judge who is 83 years old, or 78 years old, and senile? Are we going to drag him up here and impeach him before the House of Representatives, and try him in the U.S. Senate? Everybody knows we are not going to do that. It has not been done in 40 years, and it will not be done in the next 40 years. Every day that goes by, it is less likely that we will employ the impeachment clause of the U.S. Constitution regarding judges.

I respect and appreciate the views of

the Senator from Indiana, and I will say to the Senator it is a close question. I cannot say to my colleagues that I am absolutely certain that this is a constitutional bill. I cannot say that truthfully, and I do not believe the Senator from Indiana can say he is absolutely convinced that it is unconstitutional.

As I say, I appreciate the Senator's views. I know of no one in the Senate in recent years who has studied the Constitution more thoroughly than the Senator from Indiana.

But the question is, are we going on and on and on with the abuse of power that can vitally affect the lives of the people of this country?

I think the vast majority of Federal judges are absolutely honest and above reproach, and of sound mind. Most of them are sober, and have views which reflect favorably on the Federal Government. But when you get a Federal judge, appointed for a lifetime, who has a mental problem or a physical disability that prevents him from performing his duties, and he is appointed for a lifetime, and the Congress of the United States can do nothing about it, it is a terrible disillusionment for the people of this country.

I do not think the Senate of the United States is today going to decide the constitutionality of this issue. What we will decide is whether the Senate of the United States is going on record as at least trying to seek a solution to a problem which has existed for many years, but is getting worse and worse.

I thank my colleague from Indiana for his statement and his time.

Mr. BAYH. Mr. President, I appreciate the courtesy and the real dedication of the Senator from Georgia in trying to resolve this problem. As I said earlier, it is a real problem. It is real, I guess, more in its isolation, because, as the Senator points out, there are not many judges who do not have exemplary standards of conduct. You may disagree with how they decide an issue, just as we disagree with other Members of this body. Most of them are doing their job, so the number of people involved is not very great.

But in that particular instance, inasmuch as that Federal judge is indeed the king, the man who has life and death power over others at a particular moment, it is important for us to deal with it.

The question for us to decide is, is this the way? We would like for it to be the way, but does the Constitution permit us to do it this way?

I do not like to be out here on the frontier like the Lone Ranger, a lonesome voice. Many are concerned about this issue, but there are not very many of us who have tried to alert the Senate to the possible constitutional question and the possible policy question.

I would just like to ask my friend from Georgia—I do not know what is going to happen to this legislation. I would doubt, the timing being what it is, that it is going to pass, which would mean that if it does not, and I know the Senator hopes it does, having tenaciously pursued it, but if it does not, then we have a chance to reflect and see if there is not another

way that perhaps is on stronger constitutional grounds and does not involve some of the real policy concerns that really trouble the Senator from Indiana.

It has been said, and indeed rightly so, by my friend from Georgia, the Senator from Arizona, and the Senator from South Carolina, that impeachment is a time-consuming process. It is a troublesome process, and it is one that the Senate is not going to involve itself in over something so minuscule or obscure as the removal of a Federal court judge who ought to be removed. We all agree, whether for bad behavior or lack of good behavior, or for high crimes and misdemeanors, that this is a serious step, an important step, to be taken if the circumstances merit it, but not a step to be taken lightly.

I know, from listening to my colleagues from Arizona and Georgia discuss this matter, that they do not anticipate this as a step to be taken lightly. I think we concur on that point.

I would much prefer, and I will say in more detail why I am concerned from a policy standpoint in just a moment, but the Senator asked what alternatives I propose, and I have one, to which I am not wedded, but which I feel would emphasize the importance of dealing more expeditiously with this question.

We cannot say that the impeachment process has not been used on Federal judges, because it has. It has not been used frequently. Perhaps it should not be used frequently. We have just had an example, with all respect to the spirit of the gentleman in question, that illustrated there should have been a way to see that the people of that given part of our country were given better service by the Federal judiciary.

I think the best approach to the matter is to consider beefing up the enforcement powers of the Judicial Council, and giving them some marching orders that "under these circumstances you shall act."

I have no objection—I am not wedded to it, but I have no objection—to the composition of this panel, either that kind of a structured panel or another kind of panel, being given marching orders. The law would mandate that given certain circumstances, they would hold hearings, they would see that the judge is given due process, and then they would recommend to the Congress of the United States that certain action be taken, and then we would mandate that we in Congress got off the seats of our pants and did something about it.

We would mandate that this matter go immediately to the Judiciary Committees of the House and the Senate, and within x number of days they were to hold hearings and have a report forthcoming.

Mr. NUNN. Will the Senator yield?

Mr. BAYH. Yes.

Mr. NUNN. I would say that would be much better than what we have today. But on the same case that the Senator just mentioned, and I will not go into details on that, there was not a single member of the House Judiciary Committee who had not been alerted at all to what was going on in that part of the

country, who was not acquainted with those facts. There was no need to have a commission go out and find facts and lay them on the table. There was no fact-finding need there. It was a question of inability to act.

We know the House Judiciary Committee, for instance, would be tied up as soon as they take up the criminal procedure code for literally months and months and months. They were tied up for a period of time during the Nixon impeachment question for months and months and months.

Even if a commission reported that there was a judge who had a chronic problem, drinking or some other problem, and laid the report right on the doorstep of the House Judiciary Committee and put it there for days afterwards, I do not think anybody will contend that the House Judiciary Committee would interrupt the criminal procedure code or any other issue of great urgency to the whole country, and take up this impeachment.

I do not believe anybody would contend that the Senate this year, with the Panama Canal debate, the labor reform debate, the debate on the forthcoming tax package would interrupt the procedures which affect not only this country but the world and have a trial of a judge from some State deemed by the House of Representatives or by a judicial panel as being unfit for the bench.

It is just not in the world of reality. It is not going to happen. In the case of the Supreme Court, I think that would be a little different. I believe the committee has come to an approach here which is not only judicious but also has a lot of commonsense. I like it better than the approach I originally drafted. I think the Congress would deal with a Supreme Court judge in those cases, but I do not think it will ever happen with a district judge.

What I am saying is that, though I can understand the Senator's constitutional approach, the Senator's remedy would virtually leave us where we are today. We might be moving 1 inch or 1 foot, but we would not be moving a yard.

Mr. BAYH. Let me say to my friend from Georgia it is rather clear that some members of the House Judiciary Committee were aware of the problem which existed out West. Perhaps some of us in this body were aware of it. It is also clear that members of the Judicial Conference were more painfully aware than we were. But there was no procedure which mandated that certain action be taken.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. BAYH. Will the Senator yield additional time?

Mr. THURMOND. I yield 2 additional minutes.

Mr. BAYH. I am sorry to have taken so long. I do want to hear from my fellow colleagues on this.

The PRESIDING OFFICER. How much time has been extended to the Senator?

Mr. THURMOND. How much time remains on each side?

Mr. NUNN. If it will help, I will pledge not to interrupt the Senator any longer. I have taken a lot of his time.

The PRESIDING OFFICER. The Senator from Arizona has 149 minutes remaining and the Senator from South Carolina has 76 minutes remaining.

Mr. THURMOND. The distinguished Senator from Maryland needs 1 hour so I cannot yield too much more to the distinguished Senator from Indiana. Can he finish in 10 minutes?

Mr. BAYH. Much of the time of the Senator from Indiana has been involved in—

Mr. DECONCINI. If the Senator will yield, I will yield 30 minutes.

Mr. BAYH. I hope not to take another 30 minutes. I did not mean to take the last 30 minutes.

Mr. NUNN. I promise not to interrupt the Senator further.

Mr. BAYH. No, I believe this is all in the interruption category. We are both trying to pursue the same goal, though we are following different vehicles. We have similar concerns but we feel they apply a little differently.

This is a serious matter. Although the matter is not as expeditiously taken care of under the proposal I have just made on an informal basis with my friend from Georgia as would be the case under the proposal which he is pursuing, I think it could be handled that way. This is not the first time we have put time limits on Congress to act and time limits on the President to act. If this matter is serious enough that we are going to remove a sitting Federal judge, it seems to me it is serious enough to say, "You are going to make this decision yes or no." Let me not deal further on that alternative because there might be a better one. Let me deal just quickly, in summing up, with the concerns that I have about this particular proposal from a policy standpoint.

I recognize that it is not necessarily a popular position to get oneself on the side of defending a recalcitrant Federal judge, someone who may not only be drunk, unfaithful, and disorderly, but may have voted on the wrong side of a whole slew of very sensitive, emotional issues. He may be a very unpopular character.

I want to say that I hope nobody on either side of this issue looks at good behavior as it is used in the Constitution and interprets that with a little asterisk down at the bottom of the page that this also means "unpopular"; that if you are on the wrong side of the busing question or the wrong side of an abortion question or the wrong side of a prayer in school question, the wrong side of carrying a sign against the U.S. Senate question or the President of the United States question, "You are not up to the standard of good behavior so we are just going to sort of get rid of you and put a judge in there who will decide these cases the way they ought to be decided." That is what concerns the Senator from Indiana.

We are told that for the Congress to go through the impeachment process is time consuming. It is. We are told that

Congress is not going to inconvenience itself, that it is too busy to worry about the future of an obscure Federal judge or, more importantly, the judicial district which is the jurisdiction of that Federal judge and the hundreds of thousands, the millions, of people who must look to that Federal judge for justice.

That may be true, I say to my colleagues. Maybe we are too busy. Maybe that is too insignificant a role for Congress to undertake. But if it is, it is an indictment of the Congress of the United States. If we are not willing to examine the way a judge is conducting his business once he is in office, then we ought to forfeit our right to advise and consent to affirm the appointment of that judge in the first place.

Congress is not too busy for an obscure Federal judge nomination to come before it, and there have been times when obscure Federal judges have been turned down because Congress has been indignant and has felt that those judges did not meet the standard they should meet under the Constitution.

Congress exercised its authority under the Constitution to advise and consent under Article II, where we are all very much aware of the authority, the responsibility, we have. The good behavior clause, the distinction between that and the appointment at the will of the King, all of this was designed by our Founding Fathers to give the representatives of the people in the Congress of the United States a voice in determining who Federal judges are and who they should not be; how they are appointed, when they are appointed, and when they are removed.

The people's representatives were involved in this very important decision of who was going to hold the life-and-death powers of the people of this country under the Federal judiciary.

Is this too obscure an issue? I invite my colleagues to go down through some of the issues that "we" have spent time on. We are worried about poppy seeds right now; the disposition of poppy seeds is on the calendar of this Congress. I sat here and voted on chicken feathers. The list is long of things that only involve a handful of people in this country, yet Congress takes time to consider. If we can consider those matters, it seems to me we should not be too busy to discuss and decide and dispose of the matter of a Federal judge who is not doing his job right.

I remind my colleagues, and I doubt if there are really very many of us who need more than a very quick reminder and I do not want to be presumptuous in doing so, that at this stage of a legislative session, when we are trying to explain to our wives or our constituents why we are not going to be able to join them at dinner at night because we are going to be working on the floor of the Senate, and we know we have so much work here that we do not know whether we are going to take care of it all, it is awfully easy to equate things under a yardstick of efficiency; what is the quickest way to get something done? That is only a normal tendency, but I suggest that to apply that yardstick to the Constitution

of the United States is a very dangerous rule. The very democracy that was structured under that Constitution has in it a number of protections that go to protect individual citizens and to create a very inefficient way of doing things. One of the prices of individual liberty is some inconvenience and some inefficiency. If you want to see an efficient government, you ought to see how it is being done in Nicaragua right now.

They dispense justice pretty quickly down there and they get it done just like that. I do not think we want justice dispensed that way in this country.

I am not suggesting that the passage of this legislation is going to do that at all. I am suggesting that when the time comes that the Congress of the United States can look for a way to circumvent its responsibility of testing judges, of advising and consenting to their appointment and in having a voice in their removal, when the time comes that, for the sake of convenience, we bring in some time and motion study fellow to say how we are going to judge what our constitutional responsibilities are, it is going to be a dark day for our country in a broad variety of ways.

As I said a moment ago, it is not necessarily a popular position to espouse, to be standing here, taking the time of my colleagues, risking the wrath of people in my constituency and elsewhere who may not be concerned about the independence of the Federal judiciary, who may be angry at a judge because he has ruled one way or the other. But I want to suggest to you that to our Founding Fathers, and you can look at the history from the standpoint of the Revolution until this time, it is abundantly clear why it was important to guarantee the independence of the judicial system of this country.

I want a Federal judge who feels he has the capacity to stand up and say "no" on an issue and not worry about how his fellow judges are going to look on him.

I do not want a panel of judges, who may be concerned that one of their own is a source of some embarrassment—maybe he drinks too much; maybe he stays out too late; maybe, God forbid, he wears a beard, and thus has evidenced instability—and that he ought to be taken off the Federal court.

Maybe he decided on the wrong side of the issues that confront judges day in and day out. Maybe his judgment of the Constitution is different from that of a majority of his peers. I say, in concluding, the test of a good judge is not that he is a judge who can win a popularity contest. We purposely do not want judges to be elected, because they have to make some tough decisions and the Constitution of the United States, the Bill of Rights of this country, should not be subjected to a majority vote. It should not be subjected to a majority vote of Congress; that takes two-thirds to change it. It should not be subjected to a majority vote of the people; and it certainly should not be subjected to a majority vote of a panel of judges, none of whom is responsible to a constituency

that can remove them by popular vote themselves.

Mr. President, at this point I would like to place my entire dissenting views to the Judiciary Committee report on S. 1423 into the RECORD.

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

ADDITIONAL VIEWS OF SENATOR BIRCH BAYH ON S. 1423, AS AMENDED, THE JUDICIAL TENURE BILL

Although I appreciate the considerations which have led the majority of the members of the Judiciary Committee to approve S. 1423, I cannot agree with their decision. Because this bill is in my opinion one of the most drastic and far-reaching pieces of legislation on which the committee will exercise its judgment, I feel it is important to express my concerns.

There are two reasons for my dissent on this legislation: first there can be very little doubt that it exceeds the constitutional authority of both the Congress and the Judiciary; and second, it establishes procedures and sanctions which threaten the independence and character of the federal judiciary.

I have no disagreement with the motivation behind this bill. We are all convinced of the need for a wise, conscientious and responsible judiciary. We concur in the necessity of having the ability to remove judges who have seriously betrayed both their oaths to uphold the constitution and laws of the United States and their duty to assure the administration of justice with which they are entrusted.

I also concur with the majority in viewing the growth of the federal judiciary as a mixed blessing, in that it provides citizens with the means to address their grievances with some degree of dispatch, but at the same time worries us by its very size and numbers. No longer is the federal bench the select handful of jurists which existed at the beginning of our life as a nation. By sheer common sense and the laws of chance we are wary that there will be more bad apples in the lot. However, I am concerned that with S. 1423 we are moving precipitously toward undefined goals, without a clear and consistent view of the grounds which should be sufficient to remove federal judges. What judges are we really willing to go to such radical means to be rid of? The slothful, the criminal, the unpopular? This bill gives no clear standard of acceptable or unacceptable behavior. Further, I fear that with this bill we are crating new machinery, of dubious constitutionality, to achieve what might well be accomplished by less drastic means well within constitutional bounds: better, more thorough selection methods, strengthened inter-judicial circuit discipline, and refined pre-impeachment procedures by which impeachment could become an effective mechanism when deemed to be necessary.

S. 1423 IS UNCONSTITUTIONAL

The majority report takes the position that since the constitutionality of S. 1423 is a question which can ultimately only be decided by the Supreme Court, Congress should not hesitate to pass the law and let the Court make its decision. Certainly, the Congress has passed legislation knowing that it posed serious constitutional issues. The Voting Rights Act is as good an example as any. However, there is a great difference between legislation which is arguably unconstitutional and that which is very probably unconstitutional. A proposed law which poses serious constitutional issues demands the most careful scrutiny by the legislative branch. If it is very probably unconstitutional, it should not be passed. Certainly the constitutional problems with S. 1423 are sufficiently serious to warrant close examina-

tion of the policy questions which are raised. With no precedence of what a decision by the Supreme Court might be, I find the arguments for the constitutionality of S. 1423 to be very troubling.

THE GOOD BEHAVIOR CLAUSE IS NOT A CONSTITUTIONAL BASIS FOR THE REMOVAL OF FEDERAL JUDGES

To summarize the relevant constitutional issues briefly, Article II of the Constitution expressly provides that all civil officers shall be removed from office by impeachment; Article I states that the Congress shall have the sole power of impeachment. The majority believes, however, that another means of removal exists within the Constitution in the good behavior clause of Article III, § 1, and maintains that for 190 years this alternate removal mechanism has been available whenever the Congress wanted to employ it, but has simply never been used. The majority brushes over the fact that throughout the country's history, the idea that the "good behavior" clause was intended to provide a way to get rid of federal judges was not proposed. Even contemporaries of the Framers who felt strongly that it was a mistake to confine removal of judges to the impeachment process never suggested that article III provided such an alternative. Historical precedent, caselaw, and statutory construction all sustain the traditional view that the Constitution provides only one means for removing a judge, the impeachment process.

The standard for impeachment under article II is treason, bribery, or other high crimes and misdemeanors. The proponents of S. 1423 grant that Congress has the exclusive power of removal for commission of the serious misconduct which is impeachable. They contend that a judge whose behavior falls in the gap between "good behavior" and "high crimes and other misdemeanors" is subject to removal by other judges through machinery set up within the judicial branch itself. In other words, a higher standard of conduct is imposed on judges than other civil officers.

To sustain this argument, it seems necessary that three assumptions withstand scrutiny: first, that the Constitution allows the creation of an alternative removal mechanism; second, that the "good behavior" clause requires a higher standard of conduct in the judiciary than would be imposed by impeachment; and third, that S. 1423's removal standards ("conduct which is or has been inconsistent with the good behavior required by article III") does not impinge on the exclusive congressional power of removal by impeachment.

IMPEACHMENT IS THE SOLE MEANS OF REMOVAL OF JUDGES

The proposition that Article III's good behavior clause provided an alternate means of removal of judges was first offered in a law review article by Burke Shartel in 1930, and has recently been argued by Professor Raoul Berger in his work on impeachment. Authority in the United States has been consistent, however, that impeachment was the sole means of removal of federal judges because of the language of Articles I and II that the House and Senate are granted the "sole power" to impeach and convict office holders. Any argument to the contrary must meet the heavy burden created by this express constitutional provision. The majority places its argument primarily on the slender shoulders of the precedent in English common law of the obscure writ of *scire facias*, an argument derived from Berger and Shartel.

The Founding Fathers, the proponents say, must have intended an alternative means of removal of judges within the judicial branch itself since *scire facias* proceedings were available at common law. This proposition has been closely analyzed by

many constitutional authorities and found to be wanting. Their work is summarized in "The Report on The Removal of Federal Judges Other Than By Impeachment by the New York Bar Association."

The theory of *scire facias*, as the majority report explains, was that a grant of office imparted an office or estate for the life of the grantee terminable by his death or a breach of good behavior. The judiciary was empowered to issue a writ of *scire facias* to initiate a civil proceeding for the termination or forfeiture of the office. The object of the writ was to remove the officer without penalty. A close examination of the writ does not sustain the conclusion drawn by the majority.

First of all, most authorities cite a lack of historical evidence that the framers of the Constitution even had knowledge of the generally discarded writ of *scire facias*, which had admittedly never been used to remove a judge. *Scire facias* was never included in any Revolutionary state constitution, nor was it considered at the Constitutional Convention.

It is admitted by all the scholars that there is no record of the writ having ever been used to attack a letter patent (granting "good behavior tenure") in a Colonial court. Further, the positions subject to removal by the writ were only of minor court officials, not full-fledged judges. Officials so removed included such obscure officers as filazers, remembrancers of the Exchequer, cord recorders, postmen and auditors. No judge was ever removed by *scire facias* in England, even though the writ technically survived until 1947. The writ was not abolished in America until 1938. By the majority's interpretation, any federal judge could have removed another judge up until that time under the theory of *scire facias* simply by concluding that his brother or sister judge in effect breached a condition of his appointment by engaging in something that was not "good behavior." Not one judge has been so removed. Moreover, it is interesting to speculate what would have happened if a federal judge had ever tried to employ *scire facias* on another.

The undocumented precedent of *scire facias* is far too slender a reed to support such a radical change of practice that could effectively destroy the constitutionally mandated life tenure of federal judges and give other judges broad new removal powers.

Other evidence argues against the constitutionality of any other means than impeachment for removal of judges. Early drafts of the Constitution gave impeachment powers to the Supreme Court; after long debate, it was decided that the best and most impartial tribunal would be the Senate, not members of the judicial branch. Further, there is overwhelming evidence that the Framers themselves considered impeachment the sole means of removal. Hamilton, in the Federalist No. 79 expressly said so. Jefferson also held that opinion. Justices Marshall, Story and Kent concurred. As the eminent constitutional student, Phillip Kurland, has said, it is "pellucidly clear . . . that the intention of the Framers was to make impeachment the sole means of removal."

The majority argues that other branches of government under the Constitution have alternate means of removal besides impeachment inherent within their own branch. Distinctions can clearly be drawn, however. An exception is expressly provided within the Constitution for the legislative branch (Art. 1, § 5). The Supreme Court decided that the President can remove certain federal officers performing executive duties within the executive branch for the reason that he appointed them. *Myers v. U.S.*, 272 U.S. 52 (1926). The same obviously cannot be said for the judiciary. The Court further held in *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935) that the President is restricted in re-

moving such an official as a commissioner of the FTC because his is a quasi-legislative, quasi-judicial role requiring independence from other officials or departments of government in order to function properly. The same might well be said in respect to the independence of a judge subject to the censure of the judiciary, as well as of the legislature.

It is also worth drawing an analogy to the 25th Amendment, which was drafted to continue the consistency of our constitutional pattern. The 25th Amendment provides that a President may only be removed for inability to perform his duties upon the judgment of the Congress and not the determination of his own cabinet. A disagreement between a judge and his fellow judges over his judicial inabilities should likewise be resolved by the House and Senate, i.e. impeachment, and not by giving certain judges powers over the removal of their peers.

The Constitution is clear that judges are protected from members of their own branch, as well as the legislative and executive.

THE GOOD BEHAVIOR CLAUSE DOES NOT IMPOSE A HIGHER STANDARD OF CONDUCT

Since it is conceded by the majority that Congress has the sole and exclusive power of removal for the commission of impeachable offenses, in order for S. 1423 to be constitutional, it is necessary that it prove that the "good behavior" clause provides a higher standard of conduct for judges than that required by impeachment. I do not believe this proof can be sustained.

The majority asserts that the language of Art. III of the Constitution which says that "the judges . . . shall hold their offices during good behavior" was intended by the writers to establish that judges who did not conform to good behavior should not be able to continue to hold office. These assertions again rest squarely on the scholarly opinions of Shartel and Berger. The great weight of historical research done by other constitutional experts, however, argues that tenure during good behavior was intended to differentiate from tenure "at the King's pleasure." It was rebellion against tenure "during the King's pleasure" which had led to the Act of Settlement in England in 1701, and it was the monarchy's arbitrary power over their judges which led the Colonists to include in their list of grievance against the King in the Declaration of Independence, "He has made Judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." In other words, to the Founding Fathers, a good behavior grant of tenure meant that the executive was restricted in its powers of removal, not that it was a separate standard of conduct.

Further, although in our history we have never definitely established the standard for impeachment, it is generally agreed that it is not so high as an indictable offense, and indeed many scholars maintain that under 18th Century common law, "misdemeanors" was synonymous with "misbehavior." Certainly our record of impeachments would uphold that interpretation. In 1804, Judge John Pickering was impeached and convicted on several charges, including drunkenness and blasphemy. Judge George English was impeached, and subsequently resigned, on counts including conduct bringing the administration of justice into "contempt and disgrace." In 1936, the Senate convicted Judge Halsted Ritter on a count of misbehavior.

If a judge can be impeached for misbehavior then the good behavior clause creates no separate or higher standard of conduct. Where, then, is the constitutionality of S. 1423?

The majority also contends that the good behavior clause would allow removal for disability. Its authority is in Mr. Berger's anal-

ysis that involuntary absence from office caused by mental or physical illness was historically grounds for forfeiture of a good behavior office if not for impeachment. Other scholars, including Shartel himself, have taken issue with this interpretation, however, and argued that a good behavior tenure office was not forfeited by disability. It is clear that at the time of the Constitutional Convention it was thought that good behavior tenure excluded removal for disability. For example, a critic of Art. III, Sec. 1 complained in *The Antifederalist Papers*, "there is no authority that can remove them from office for any errors or want of capacity." Perhaps as strong a proof as any that insanity, for instance, was not regarded as a cause for removal is in the fact that in the first impeachment proceeding (Judge Pickering in 1804) insanity was raised as a defense by the judge's defenders. No one thought to prosecute for insanity.

It is important to remind the majority in conclusion, however, that many of the problems of judicial disability are already addressed by statute without provision for removal, and therefore no questionable unconstitutional removal mechanism for disability is necessary. 28 U.S.C. 372(b) allows the Judicial Conference to certify to the President that a judge is unable to discharge his duties because of a permanent disability, and the President may then appoint another judge to take over his duties.

THE REMOVAL STANDARDS OF S. 1423 ARE AN INFRINGEMENT ON THE CONGRESSIONAL POWER OF REMOVAL

If S. 1423 is not intended by its supporters to provide a removal mechanism which will operate for the same misconduct as will the impeachment process, serious questions arise about its removal standards, even if we assume, wrongly I believe, that a gap exists between good behavior and impeachable offenses. In other words, if the bill is to be constitutional, the majority must be able to show that the standards for removal by the judicial branch in S. 1423 do not infringe on the congressional power of removal by impeachment.

The general standard of the bill, "conduct which is or has been inconsistent with the good behavior required by Art. III" is at best vague. The further guidelines for bad behavior in Sect. 388 of the bill are based on terms which state supreme courts have employed in cases involving state judges. As observed above "habitual intemperance" and "conduct prejudicial to the administration of justice" are grounds which have already been applied for impeachment and conviction. What lower standard could reasonably be applied to define the bounds to good behavior as something less than an impeachable offense?

In a disturbing provision, Section 385(c) (6) of S. 1423 authorizes removal of judges convicted of a felony, or a crime involving moral turpitude. This is in clear conflict with and infringes on the standard for impeachment, "high crimes and misdemeanors", since by definition criminal behavior is the subject of the impeachment process. The opinion of Berger himself seems to contribute to confusion along this line. In 1976 he testified on S. 1110, the predecessor to this bill, that the purpose of the legislation is to catch "little crooks". It appears then that at least some of the standards embodied in S. 1423 are overinclusive.

If we were willing to concede however, that a gap does exist between good behavior and impeachable behavior to which the provisions of S. 1423 might validly apply, an ironic incongruity is the final result. With S. 1423 Congress would be creating a relatively easy mechanism by which it might rid itself of judges who have been guilty of "bad behavior" falling below the level of impeachable behavior. For the serious miscon-

duct arising to the strictest standards of high crimes and misdemeanors, that is, indictable offenses, the cumbersome mechanism of impeachment remains. So S. 1423 would create a system for relatively easy removal of judges for failing to behave properly, but removal of criminals from the bench would be much harder.

S. 1423 AND SUPREME COURT JUSTICES

S. 1423 was amended in subcommittee in response to objections raised by the Judicial Conference and others to allow for different proceedings in the case of a Supreme Court Justice. It now provides for a recommendation for impeachment to be made to the House following a trial by the judicial court. As a final constitutional question, I would ask if this recommendation would not amount to an advisory opinion from an article III court, proscribed since *Hayburn's Case* 2 U.S. (2 Dall.) 409, 410 n. (a) (1792).

POLICY CONCERNS DO NOT JUSTIFY THIS LEGISLATION

The question which continues to trouble me after study of S. 1423 is what judges we want to be able to get rid of by this legislation and for what reasons. Since as has been argued in the preceding sections, there is small reason to believe that S. 1423 offers any new ground on which removal may be based, the question might well be, Do we simply want new ease of removal, and not necessarily removal for different kinds of misconduct? Or is it rather, that because of our frequent disaffection with unpopular opinions by the judiciary we want to be provided with new justifications for their removal? If any case, as in any major change in the way in which our constitutional system has functioned, the burden rests on the proponents of S. 1423 to prove that the relative ease of removal offered by this bill is worth the possible threat to judicial independence, independence, I have tried to argue, which the Constitution has provided should be protected from invasion by more powerful members of the judicial branch as well as by the legislative and executive branches. I would therefore hope that the Senate would fully address these issues of policy before it decides to approve or disapprove S. 1423.

First of all, the Senate must be convinced that there exists a problem among the Federal judiciary which demands a radical, new situation. Although I initially assumed such was the case, I have heard little of such proof in the Judiciary Committee. I am aware that some 36 States now have disciplinary commissions but the analogies between the State courts and the Federal bench are not strong. Interestingly, 26 of these commissions were established by constitutional amendments, presumably because mere legislation, such as S. 1423, was believed to be unconstitutional. Furthermore, the record on the bill discloses very little evaluation of these State policing systems, and in fact they have not been immune from criticism.

I cannot help but be aware of the dissatisfaction with which some judges, as authors of unpopular opinions, are held by our constituents, but the merits of opinions and judicial procedures are not, of course, intended to be legitimate subjects for complaint under this legislation. The press now and again presents a case against Federal judges, but what strikes me from these accounts is, first, that they are rare and isolated, and second, that in most instances the problems have been taken care of without the apparent need for legislation of this kind. Are the current means of handling the problems which will inevitably arise from time to time sufficient, or could they be strengthened at different points to make them adequate without establishing this radical, new system?

At the present time, the chief judge han-

dles most of the troublesome incidents as they arise in his district on an informal basis. The judicial council of the circuit has authority under 28 U.S.C. 332 to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuits." In addition, the Judicial Conference is empowered under 28 U.S.C. 372(b) to certify to the President the disability of any judge to fulfill his duties. And finally, there is the impeachment process. Improvement of these methods of control, along with greater care and investigation at the appointment of Federal judges might be sufficient solutions to the problems which exist.

It is not irrelevant at this point to take a look at the record on impeachment. The process may not have been as ineffective a means of discipline as it has been accused of being. Only four judges have been impeached and convicted but 55 have been charged on the floor of the House, an average of one every 3 or 4 years. Thirty-three have been charged with treason, bribery, or other high crimes and misdemeanors. Twenty-two have resigned rather than face Senate trial and public exposure. In all, one judge has left the Federal judiciary under pressure from impeachment approximately every 7 years.

Circuit Court Judge Clifford Wallace has proposed alternative legislation which would create greater disciplinary powers within the judicial circuits, with a final report from the Judicial Conference transmitted to the House in a case of serious misconduct. This proposal is among several seeking to improve the present system which I would hope could be the subject of hearings before the Senate decides on more drastic solutions provided by S. 1423. Certainly, also, the Congress should face its responsibilities under the Constitution and study methods by which impeachment will continue to be workable in the modern world.

The second question which the Senate should ask itself before it approves legislation such as S. 1423, is whether such a solution will create its own problems. There is, first of all, the obvious question which is presented upon the creation and vesting of power in any new bureaucracy: Will it abuse its power?

The striking thing about the structure of the bureaucracy created by S. 1423 is that its new and awesome power to remove fellow judges can be closely concentrated. The layers of the new bureaucracy are to be manned potentially by a small, tightly knit group. The 12-man Commission will represent only a few States. It will report its findings to the seven-member court, all of whom are to be chosen from the membership of the Judicial Conference by the presiding officer. He himself is selected from within the Conference. The Commission, through its Director (also chosen by the Judicial Conference) will initially screen complaints, a crucial step in the procedure, since an un-screened complaint is then sent back to the circuit of origin where investigation will be opened against the complained of judge. A hired staff which does not winnow out frivolous or ill-conceived complaints at this stage will be performing serious harm against the judge who has wrongly been accused of misbehavior. The Commission will conduct its own, in-depth investigation after receiving the report of the circuit committee and if it in turn recommends trial by the court, the Commission will become the prosecutor. Obviously, there is a danger of a close-knit overzealous bureaucracy seeking to justify its own existence by finding transgressions in all manner of judicial action, perhaps even in the nature of decisions and opinions.

By far the greatest damage which could result from an alternate removal mechanism of judges judging judges would be the chilling effect it could have on the individuals on

the bench. Philip Kurland has remarked that disciplinary systems in the States operate as "polite blackmail" by other judges and the bar.

I shudder to think how early the Federal courts might have been deprived of the services of Judge Learned Hand under such a discipline system as California's, for politeness to counsel and a willingness to tolerate fools gladly were not among his virtues, and it is only such virtues as regular attendance at the courthouse that the policing system seem capable of evoking from timid judges.

Justices Black and Douglas protested surveillance by other judges in the strongest terms in their well-known dissent to the *Chandler* case *Chandler v. Judicial Council*, 398 U.S. 74 (1970). *Chandler* did not go to the merits of the constitutional question of whether judges sitting on the judicial council were empowered to suspend the individual activities of a fellow judge. It did, however, serve to give a modern day forum to Black and Douglas to reiterate the fears of loss of independence voiced by leading jurists dating back to Chief Justice Marshall. A survey taken by Senator Sam Ervin in 1970 illustrated this fear sharply when fewer than 1 percent of the Federal judges supported the concept of the Tydings bill, predecessor to S. 1423. A like survey ordered by the Judicial Conference in March of this year has not yet been completed, but I believe the Senate should watch for its results carefully to evaluate the views of those who could judge and be judged.

In a very real way, removal within the judicial branch could have a profound effect on the Federal bench. The caliber of the men and women attracted to the judiciary might well change if they knew that while in the performance of their duties they could be subject to a barrage of public complaints and to open public scrutiny. The confidentiality provisions of S. 1423 to the contrary, the recent case, *Landmark Communications, Inc. v. Virginia* 46 U.S.L.W. 4389 (May 1, 1978) holds that the first amendment does not allow criminal punishment of the press for divulging or publishing information of confidential proceedings. At the farthest extreme, we would all suffer if subtle pressures from fellow judges or the bar were brought to bear on those whose judicial opinions on Federal statutory or constitutional issues were "unpopular." The leadership taken by the courts on matters of individual rights are too important to run any risks of being jeopardized in the name of responsiveness to public opinion.

The final question to be answered about S. 1423 is what is "bad behavior"? The majority of the Judiciary Committee tells us it is not crimes or even serious misconduct, for these must be handled by impeachment (although as noted above section 385 of S. 1423 provides that removal may be automatic upon final conviction). It has nothing to do with the merits of a decision nor with procedures at trial. The guidelines of section 388 say it is willful misconduct, willful failure to perform duties, habitual intemperance, or conduct prejudicial to the administration of justice. These are broad, vague terms at best. If the misconduct is not serious enough to be impeachable, does it merely rise to the level of triviality?

Examples furnished us in the majority report leave me with a certain amount of skepticism. Is it for vulgar horseplay and obscene conversations with clerks (*Geiler v. Commission on Judicial Qualifications*, 515 P. 2d, (California 1973) that we are erecting this elaborate mechanism? Surely there is a less drastic method of controlling such situations. It is cases like this which make Kurland's assessment of Learned Hand's vulnerability under such a system seem very possible. Such examples also make us realize how easily censure and even removal of judges who consistently write unpopular

opinions could be accomplished. Raoul Berger in his 1976 testimony expressed his opinion that judges could be removed for "ignorance." Finally, we are again stuck with the irony of being able to remove a judge guilty of obscene conversations with relative ease, but being able to get rid of a judge who has committed murder or treason or accepted bribes only through impeachment.

I firmly believe that it is the responsibility of the Congress to help insure that we have an effective and responsible Federal judiciary. In that wise, it is the duty of the Senate to play its role in the selection process well, especially since the number of judges will increase rapidly. It is the duty of both Houses to see that the impeachment and trial process work. Certainly much can be done in that area. Congress should be taking a look at other means by which the disciplinary process could be strengthened. S. 1423, however, appears to create a solution worse than the problem. Of dubious constitutionality, the implications of its policy are far reaching and dangerous. There has been only 1 day of hearings on S. 1423, and none since the bill was amended extensively in subcommittee. Our Federal judiciary deserves more from the Senate than precipitous action on this important matter. So in fact does the general public.

As Philip Kurland has reminded us:

"The provisions securing the independence of the judiciary were not created for the benefit of the judges, but for the benefit of the judged. It is not in the keeping of the judges to surrender this independence under pressure or voluntarily to give it away. Judicial independence is held in trust for the people. * * *"

(Mr. MOYNIHAN assumed the chair.)
Mr. HATCH. Will the Senator yield for a question?

Mr. BAYH. Yes.

Mr. HATCH. I am sorry to interrupt the Senator's very eloquent statement.

Mr. BAYH. If the Senator will give me just one other sentence or two, I shall be glad to yield.

Mr. HATCH. I am delighted to.

Mr. BAYH. I do not want what I have said to be misinterpreted. As the Senator from Georgia (Mr. NUNN) very honestly and accurately pointed out, most judges are not in need of this particular kind of sanction. Most of them are good judges. We are talking about isolated instances. But I suggest that our Constitution is as strong and provides as much protection for one individual citizen or one judge, as far as the rights guaranteed in that Constitution, as it does for the multitude. That is one of the real and really important distinctions of our form of Government compared to most others on the face of this earth. The individual and individual rights, whether it is an individual citizen or an individual judge, must be held sacrosanct under our Constitution, or our whole system changes. My concern, in closing, is about the creation of this panel, and to let a majority of this panel assume the responsibility which I feel very strongly was given to the Senate of the United States and the Congress of the United States, where our Founding Fathers said it is serious enough to require a two-thirds majority for impeachment. Instead, we are taking it away under this bill and we are permitting impeachment of judges by a majority vote of a panel of judges.

I do not believe judges are immune from the normal frailties that afflict all human beings from time to time, and I

am concerned that circumstances of the moment, some distant moment, whether it is because of a judge's personal habits or a judge's philosophical position on an issue, might be considered as a source of embarrassment to a majority of that panel of judges and they would use the vehicle which we are now considering to remove a judge—not because he is failing to perform his constitutional function under the Constitution of this country, but because he does not meet the standard they believe is important.

I am glad to yield to the Senator from Utah. I unfortunately had the floor for a limited amount of time.

(Mr. HODGES assumed the chair.)

Mr. DE CONCINI. Mr. President, I ask the Senator from Utah to yield 2 minutes to the Senator from Georgia for other business.

Mr. HATCH. Certainly.

Mr. TALMADGE. I thank my distinguished friend.

Mr. President, I am very pleased to rise in support of S. 1423, the Judicial Tenure Act, of which I am a cosponsor.

This is a measure to which my distinguished colleague (Senator NUNN) has devoted many long and hard hours of research and legislative effort in order to bring it before the Senate for consideration.

In this day of widespread public cries for accountability of all public officials in the executive, judicial, and legislative branches, the Congress has attempted to respond fully to the comments and criticisms concerning the executive and legislative branches. Until today, however, it has not addressed problems in the judicial branch.

S. 1423 provides an apparatus by which the judicial branch of the Federal Government can keep its own house in order in the form of a Judicial Conduct and Disability Committee. S. 1423 establishes procedures, in addition to the existing cumbersome process of impeachment, for the retirement of disabled justices or judges of the United States. It also provides for the removal of justices or judges whose conduct is or has been inconsistent with the good behavior requirement of the U.S. Constitution.

Impeachment has not insured, and cannot insure, compliance with the constitutional good behavior requirements with the size of today's Federal judiciary and the multiplicity and complexity of issues that are adjudicated. It is simply impossible in today's world for Congress to fulfill this role alone. Specifically, an additional mechanism is necessary because of the increases in the total number of Federal judges mandated by the judicial business of the Nation. Specifically, an additional mechanism is necessary because of the litigation trend which has given rise to predictions that there will be a need for over 1,000 district judges and over 250 circuit judges by the year 1990.

Also, specifically, an additional mechanism is necessary because of the rapidly increasing workload of Congress which has, as a practical matter, created an atmosphere in which consideration of any single issue for an extended length of time on the floor can threaten the

passage of other vital legislation that is essential to the very lifeblood of the Federal Government. An impeachment must, therefore, compete with pressing national legislative priorities for the time of the House of Representatives and the Senate. To those of us who so strongly desire a sound judicial branch free from criticisms of failures of competence and integrity, this is simply not acceptable.

If I had my way, we would have much less Federal Government, Federal laws, Federal rules, Federal regulations, and, therefore, resulting Federal litigation. However, even this would not return us to the early days of our Nation where the impeachment process was sufficient to keep the judicial branch of our Government in proper working order.

Mr. President, I hope that the Senate will move to expeditiously act on S. 1423, and I once again commend Senator NUNN for his able efforts in this regard.

Mr. President, I yield the floor and I thank my distinguished colleague from Arizona for yielding.

The PRESIDING OFFICER. Who yields time?

Mr. DECONCINI addressed the Chair.

Mr. THURMOND. Mr. President, I yield 1 hour to the distinguished Senator from Maryland.

Mr. DECONCINI. Mr. President, I have the floor, I believe.

The PRESIDING OFFICER. The Senator from Arizona has the floor.

Mr. DECONCINI. Mr. President, I had agreed to yield 15 minutes to the Senator from Utah.

Mr. MATHIAS. I have been waiting.

Mr. HATCH. I will make my remarks very short to accommodate the Senator.

Mr. MATHIAS. I have been here since 12 o'clock.

Mr. HATCH. I have been here since 10 o'clock on all these bills, so I will make my remarks short.

Mr. THURMOND addressed the Chair.

The PRESIDING OFFICER. The Senator from Arizona yields 15 minutes to the Senator from Utah.

The Senator from Utah has the floor.

Mr. HATCH. Mr. President, in deference to the distinguished Senator from Maryland, I will try to cut my remarks down, but I have been on the floor since 10 o'clock this morning, although on and off the floor, waiting to speak on some of these issues.

Mr. President, let me say I enjoyed the remarks of the distinguished Senator from Indiana and his eloquence on this subject. I think he has raised a number of important issues which deserve great consideration.

Mr. President, as a trial lawyer who has, literally, been involved in thousands of cases in front of Federal and State courts, I rise in support of the efforts of Senators NUNN, DECONCINI, THURMOND, and others. I support this judicial tenure bill. I think it is long overdue. It is something that this country needs and I believe it will be constitutionally upheld in spite of the objections raised by not only the distinguished Senator from Indiana, but also by my friend from Maryland. I think this bill is an intelligent approach to judicial tenure.

In spite of all that the distinguished Senator from Indiana has said, I do believe that many illustrations he has brought up, in fact, most of them, will not suffer from the applicability of the provisions of this bill.

The bill is designed to provide a means to remove those unwarranted restraints that appear in the law presently; so that we can, literally, handle some of the problems that exist in the judiciary today.

As a trial lawyer who has tried innumerable jury trials, all kinds of non-jury trials, in almost all courts in at least two States, I have found a lot of abuses in the judiciary that nobody does anything about.

I tried a number of cases in one of the courts most criticized by Judiciary Committees in both the House and the Senate, and I must say there were some redeeming qualities in our late chief judge in Utah. I liked him personally and considered him a friend. He always treated me with courtesy in his courtroom. Nevertheless, I saw and observed many things which should have been corrected and which were allowed to exist because there is nothing available in the present law that would have prevented or corrected those kind of abuses.

In my legal practice, I have seen certain Federal judges controlled or influenced by large corporations. I have seen control of certain Federal judges by large law firms and I have seen it on more than one occasion. I have also seen Federal judges who were controlled by special interests.

I have seen Federal judges become arbitrary, capricious, exhibit all kinds of partiality, and I have seen an abuse of the legislative processes by what has been referred to as "Government by judiciary."

I have seen judicial intemperateness and I have seen judges continually intervening in the trial of cases, even when there were competent trial lawyers trying the cases, because the judges took sides early in the trials instead of being impartial as judges should be.

I have seen repeated abuses of the trial process. I have seen judges who did not put the time in on the bench, who would not work hard, who, literally, would not do the things they should.

I have seen judges drunk on the bench, Federal judges, if you will, appointed for lifetime tenure, judges who should know better and, who should be examples, impeccable examples to the people of this country.

It is not any wonder to me that we have problems, even with all the good Federal judges on the bench, and I can say from experience that the vast majority of them are fine people, exceptional judges, and a credit to the Federal bar. But there are some who should never have been appointed to begin with, who have been a disgrace to the bench and continue to be a disgrace even today. There are those who literally ought to be thrown right off the bench because they are breaching every code of conduct that should be imposed on judges in our society.

I should say this, sometimes our selection of judges in this country deserves a little more consideration. I have been led to believe that of the judicial appointments since this administration has taken over, only one has been Republican—I have to admit the Republican Party is the minority party, but I do think more than one Republican is qualified in all the judges appointed by this administration.

The President of our country has repeatedly indicated he believes in judicial merit selection. Only the best should be on the bench in the United States.

As I have sat on the Judiciary Committee, I have seen some of the best who have been nominated and appointed, but I have seen some who probably should not have been appointed.

They cannot tell me that, in these United States, we cannot find better, more qualified people to sit on the Federal bench and work in the Federal Judiciary than some of the people we appoint right here in Washington.

I am aware of a matter in which a judge took the fifth amendment, a Federal judge took the fifth amendment himself, and continued to serve on the bench until he retired from the bench in what appeared to be political dealing.

I saw a case where some people actually went out and, as they always did, cut down Christmas trees on Federal land, which they have done for 30 years, and they were sentenced to 5 and 10 years imprisonment by a Federal judge for "theft" of a few dollars worth of Christmas trees.

I have seen cases where judges who knew better deliberately wrote opinions they hoped, it seemed to me that they hoped, would be reversed on appeal because they knew their opinions were wrong. I think those judges were influenced, or at least there is good evidence they were influenced, by special interest forces and special interests themselves.

The point I am making is that, in spite of the fact that the vast majority of our Federal judges are competent, decent, honorable, ethical people of integrity, there are those occasions when you have powerful Federal judges, appointed for life, who literally abuse their office, and nothing can be done about it because the remedy basically has been confined to impeachment.

I think this bill may be criticized by some because, under its provisions, we are relying on judges to judge other judges, and people never are going to believe that other judges are going to come down fairly against their peers. But I believe they will.

I have been shocked by the criticisms I have heard about certain judges in this country who have abused their offices, who have abused the attorneys, who have abused the parties, who have abused the citizens and the States in which they have sat, and who certainly have not lived up to the mandates of the Federal Government in taking the positions to begin with. These people literally should have to face responsibility for items listed in the report of the committee: willful misconduct in office, willful

and persistent failure to perform duties of the office—you can go right down the line—habitual intemperance, and other conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Their fellow judges may be a lot tougher on abuses of that nature than perhaps any of us in Congress would be.

I think the Senator from Georgia and others who are sponsoring this legislation are doing the country a great service, because if there is anything for which we should have respect, it is the judiciary of this country.

I have to admit that I have seen attorneys deprecate the Federal judiciary; I have seen the public deprecate them; I have seen the individual parties deprecate them; I have seen other leaders deprecate them. In all honesty, even though some of those deprecations were absolutely right, nothing could be done about it.

I do not believe that the Constitution forecloses getting rid of judges who have consistently acted improperly on the bench. I cannot conceive of any particular commission or committee throwing judges off the bench for innocent mistakes that could be made by any judge sitting on the bench.

However, we are talking about a lifetime tenure job the minute you put a Federal judge in; it seems to me you have made him a millionaire because, for the rest of his life, if he stays there 10 years, he has his full salary on that bench and can stay there as long as he wishes, basically, under present law, with impunity, and be just as vicious and violent as he wants to be. Again, fortunately, the vast majority of our Federal judges are not of this type.

This bill has merit. I support it. I support an upgrading of our judicial system. I support merit selection where judicial selection is taken out of politics. Unfortunately, I do not think we have any aspect of that today in our society.

I commend those who are managing the bill and those who have worked hard to have the Judicial Tenure Act come up and be considered by the Senate.

I also pay tribute to Senator BAYH and Senator MATHIAS, because I know their sincerity and the arguments they are making and have made. I disagree with those arguments. I believe that these officious problems that exist in the Federal judiciary have to be stopped. We have to solve them, and we have to do something to upgrade our judiciary so that it is, without question, the greatest system of justice in the world today. This legislation, I believe, will help us do that, without being abusive to judges who sit on the bench.

I share some of the concerns Senator BAYH has raised. I commend him for raising them. But, in balance, I cannot conceive of any panel of judges, any commission, deciding against a judge unless there is ample evidence that that decision should be made against him.

Mr. President, I thank the distinguished Senator from Arizona for this time, and I again thank the distinguished Senator from Maryland for his patience. I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. THURMOND. Mr. President, I yield 1 hour to the distinguished Senator from Maryland.

The PRESIDING OFFICER. The Senator from Maryland is recognized for not to exceed 1 hour.

Mr. MATHIAS. Mr. President, I express my thanks to the distinguished Senator from South Carolina for making this time available for me. It seems a lot of time after so much discussion, but this is a very important subject and one that deserves careful scrutiny. It is that kind of thoughtful consideration which the Senator from South Carolina and the Senator from Arizona give to this subject. I think this scrutiny indicates the importance they attach to it and indicates why they are willing to make arrangements for the kind of thorough review of this whole topic which it really deserves and demands.

I think we were all helped in our understanding of the bill by the participation in this debate of the author of the bill, the Senator from Georgia (Mr. NUNN). I believe we will have a better understanding of what are trying to do and what we should do—and perhaps, more important, what we should not do—because this whole debate really weighs the question of whether judicial control is worth the sacrifice of judicial independence.

As we weigh that question, we have to do it against the background of the very serious challenges that are before the courts today. We have to recognize that these are challenges which affect not only the Federal courts but also the State courts. We have to appreciate the enormous volume of judicial business which is generated not only by our population of more than 200 million Americans but also by an affluent society. Our populace finds more reasons to go to court, brings more causes of action than ever before, has higher degrees of civic awareness which have tended to be litigious at times, and is beset by social problems which we urge people to take it to the courts instead of to the streets.

All this has put pressure on the court system, and all this is involved in bringing this bill and this issue to the Senate today.

However, I believe this: The changes in the system of the administration of justice have to be approached with very great care. Tampering with judges is as dangerous as tampering with the courts themselves. I do not have to enlarge upon these apparent and obvious dangers.

However, when we look at a bill such as this, which provides for a rather radical remedy, we should reflect that, notwithstanding the unhappy experiences of the Senator from Utah, by and large, over the years, such unhappy experiences in the Federal courts are very rare. The Federal judiciary in almost every State is an ornament—an ornament to the bar, to the bench, and to our system of constitutional government.

Mr. HATCH. Mr. President, will the Senator yield for one comment on that? I do not mean to interrupt the Senator.

Mr. MATHIAS. I yield.

Mr. HATCH. I did not want to give

the wrong impression. My experience in the Federal bar and in cases before the Federal courts has been pleasant, for the most part, and extremely satisfying. But I have seen these isolated judges' actions which have been oft repeated, as I have mentioned, and those are only some I have heard of.

Again, I reiterate that I think—as does the distinguished Senator from Maryland—that the vast majority of the members of the Federal bench are extremely competent and dignified and decent men and good judges. My experience typically has been a very good experience.

The reason I asked for the Senator's kindness in interrupting is because if I indicated otherwise I certainly would not want the record to read that way. But in the many case experiences that I have had there have been more than a few unsatisfactory situations.

Mr. MATHIAS. I thank the Senator from Utah. I think he makes the point which is important. As he says, I think I use his word, which was "isolated" cases.

Mr. HATCH. That is right.

Mr. MATHIAS. The very fact that the cases are rare and the fact that they are isolated is the reason that they get a lot of attention.

But what I think we have to remind ourselves here today is that we do not want to be misled by the attention which some unique situations get to the point that we are saying to the American people that the whole system is archaic or outmoded or of very little further use.

I think that is the danger in allowing this to get out of the proper perspective.

The basic reason that I cannot support this bill is because of the radical and violent change that it would work on the architecture of the Constitution. Perhaps it is that I am just too conservative, and not only too conservative, too much of a strict constructionist of the Constitution. I think we are dealing here with a principle, and, Mr. President, it is a principle worth preserving. It is not a new principle. It is an ancient principle. It is a principle which goes back into the history of mankind long before the Constitution of the United States was written, long before Columbus arrived in America.

Herodotus, the Greek historian, writing the history of ancient Persia, tells us in that history:

The royal judges are men chosen from among Persians, who continue in office until they die, or are convicted of some injustice. They determine causes between the Persians, and are the interpreters of the ancient constitutions and all questions referred to them.

So this principle of judicial independence is not 200 years old, but we have here the positive record that it is more than 2,000 years old.

And the founders of this country were wonderful men. They were citizens of the world. They were scholars. They read carefully the history of the classical world and they knew about Herodotus. They knew that in establishing the independence of Federal judges they

were not creating any new experiment in government. They were in fact embodying the wisdom of the ages in the Constitution of the United States. They gleaned from the experience of other peoples the lessons to be learned from history; and they wrote those lessons into the organic law of this country. In this bill we today are tempted to tamper with that organic law.

The framers of the Constitution dealt at great length with this subject. They came back to it again and again and again during the Constitutional Convention.

On Monday, August 27, 1787, they came to it when Mr. Dickinson moved an amendment to article XI, section 2. After the words "good behavior" he would add the words "provided that they may be removed by the executive on the application by the Senate and House of Representatives."

Mr. Gerry, known to history for being the author of gerrymander, perhaps more notably than this particular occasion, seconded the motion. "Gouverneur Morris thought it a contradiction in terms during good behavior, and yet being removable without a trial. Besides it was fundamentally wrong to subject judges to so arbitrary an authority."

I am skipping down in the journal for that day:

Mr. Randolph opposed the motion as weakening too much the independence of the judges. Mr. Dickinson was not apprehensive that the Legislature composed of different branches constructed on such different principles would improperly unite for the purpose of displacing a judge.

On the question for agreeing to Mr. Dickinson's motion it was negative. Connecticut, aye, and all the other States present, no.

That was the vote. No. Every State except Connecticut.

What they were trying to do there was to provide for the embodiment of the ancient principle of the independence of the judiciary in the new Constitution.

The Senator from Georgia in his colloquy with the Senator from Indiana made the point that it was hard to impeach Federal judges, that it had not been done for 40 years. I agree with that. It is hard to impeach anyone under the procedures which we follow in this country and which have been imported or inherited almost directly from the British Constitution. But it ought to be hard to impeach a Federal judge. It ought to be very hard to impeach a Federal judge. And that is the way the Founders intended it; and that is the way they wrote it, and that is the way it is.

It does not mean that it cannot be done. But it is hard because they intended it to be hard, and it ought to stay hard.

There are a lot of things that citizens could do. People who do not feel that a judge is acting right can exercise their constitutional right to petition the House of Representatives for a bill of impeachment at any time. Any citizen, any group of citizens, any bar association, can do that any time.

But the impeachment process is and ought to be hard.

The Senator from Georgia raised the question of the views of Thomas Jefferson on this subject. Of course, Jefferson was serving in another capacity during the Constitutional Convention. He was on the other side of the Atlantic as our representative in France. But he has left us some evidence of his views about judges; one of which was quoted in a letter to Senator DeCONCINI from Judge James L. Oakes, a judge in the U.S. Court of Appeals for the Second Circuit.

In that he quoted a letter from Thomas Jefferson, whom Judge Oakes characterized as no lover of the judicial branch, a letter from Thomas Jefferson to James Madison in which Jefferson said:

In the arguments in favor of a declaration of rights you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity.

Now, as Judge Oakes points out in his letter, the stress that Jefferson puts on the word "independent" is pertinent and important to our discussion here today.

I must say that I was taken by surprise by the colloquy between the Senator from Arizona and the Senator from Georgia on their interpretation of this bill as being a bill which was so comprehensive that it would really eliminate the necessity for further impeachment procedures in the Congress.

I had depended on that language on page 7 of the report in which it says, and I quote:

Therefore, an alternative method of impeachment to accomplish the removal of Federal judges must have been contemplated by the framers to provide for the removal for misbehavior or disability that was in violation of the "good behavior" standard but was less serious than an impeachable offense. The substance of what constitutes "misbehavior" may be open to interpretation; but it is completely clear that procedurally, "good behavior" was a term involving the judicial process.

But we have made a considerable amount of legislative history here today. I am not sure what use it will be put to in the future; but I think that courts or other bodies that may have to interpret this bill at some time are going to find a good deal of difficulty with this particular portion of the bill.

I feel, however, if there is to be judicial interpretation of the legislative history we are making here, that we ought to refer to the report on the removal of Federal judges other than by impeachment which was rendered by the Committee on Federal Legislation of the Association of the Bar of the city of New York on April 1, 1977. In that report the city bar said this:

We also do not believe that any gap exists between the "good behavior" and "impeachment" clauses. The grant of good behavior tenure is, in our view, simply a grant of life tenure subject to removal by impeachment. The impeachment process allows removal for misconduct which is criminal, and some which is not explicitly criminal, but stops short of the all-inclusive basis for removal suggested by the vague phrase "bad behavior." We believe a constitutional convention which rejected impeachment for mal-

administration because the term was unclear and overly broad, would not have provided for removal under so ill-defined a standard as failure to maintain good behavior.

We do not believe that framers, interested in defining and circumscribing power, would place such unlimited power in the hands of any group, even the judiciary.

I think that that certainly ought to be part of the legislative history of this particular provision.

George Mason, that great member of the Constitutional Convention from Virginia, suggested the addition of "maladministration," and his fellow Virginian, James Madison, objected "that so vague a term will be equivalent to a tenure during pleasure of the Senate." It was at that point that George Mason withdrew the word "maladministration" in favor of the phrase "other high crimes and misdemeanors," a phrase which was familiar to colonial lawyers and lawyers of the early Republic because that was a phrase carried on the title page of the reports of State crimes with which they were all familiar.

I think we do have some responsibility to deal with both the constitutionality of this bill and with the policy involved in it. I must take issue with my good friend from Georgia when he said that only the Supreme Court can interpret the Constitution, only the Supreme Court can decide the constitutionality of a bill.

I just have to say that I think we have a responsibility which we cannot avoid. We can be wrong, we can be in error, just as I think the Court is sometimes in error, but we have taken an oath to discharge the duties of Senators in accordance with the Constitution. I do not believe we can undertake to perform those duties without undertaking the responsibility to come to some conclusion as to whether what we are doing is constitutional and to interpret the Constitution in light of legislation that we are passing.

As Chief Justice Burger has reminded us:

In the performance of assigned constitutional duties, each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. *United States v. Nixon*, 418 US 683, 704 (1974).

I think that states very succinctly that we have the duty to make a judgment on this bill, and I have to come down on the point that the bill is not constitutional.

I think we can only encourage the denigration of that respect that we should have of the courts by saying, in effect, "Well, we don't know about the constitutionality of this, so let us just pass it and let the courts decide on it."

That is one of the reasons why the courts are in trouble these days. There are a lot of legislative acts that have been passed with that kind of disregard for the legal sculpting that ought to be done by legislators. If the laws were more carefully drawn, there perhaps would not have to be quite as much burden on the courts as there is.

In coming to my own conclusion that this bill is unconstitutional I feel fortified by the kinds of judgments that have been placed on the record by distin-

guished legal scholars and the judges around the country. I am happy to cite as an example one of the letters that was written to Mr. William James Weller of the Administrative Office of Courts on this subject by Judge Alexander Harvey of the U.S. District Court for the District of Maryland. Judge Harvey is one of the distinguished jurists not only in Maryland but in the entire country.

He says:

In my opinion, S. 1423 has serious constitutional defects and, in any event, is inadvisable legislation. I am therefore strongly opposed to the passage of this bill.

First, I do not believe that the proposed statute is constitutional. I do not think that a federal judge can, under the United States Constitution, be removed from office and his salary and retirement benefits terminated except through the impeachment process. Merely because such a process is unwieldy and time consuming does not mean that the Constitution can be interpreted in a manner not intended by its framers.

Mr. President, I ask unanimous consent that Judge Harvey's letter be printed in the RECORD in its entirety at the conclusion of my remarks.

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

(See exhibit 1.)

Mr. MATHIAS. But there is also, of course, a question of policy here, as well as a question of constitutionality, and that question of policy is addressed in a similar letter written to Mr. Weller by Judge J. Joseph Smith. In that letter, Judge Smith said:

We can survive the abrasiveness of a Judge Chandler or a Judge Willis Ritter. We could not survive the loss of independent minds which would result from outside monitoring—including monitoring by other judges applying discipline to their fellows.

And that, of course, gets us to this very difficult question of policy.

Mr. President, I ask unanimous consent that Judge Smith's letter also appear in the RECORD in its entirety at the conclusion of my remarks.

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

(See exhibit 2.)

Mr. MATHIAS. I asked earlier whether we had invited our former colleague Senator Ervin to testify, because I have such vivid recollections of his forceful leadership and his eloquent expression of views when the subject of judicial tenure has been before the Judiciary Committee in past years. I regret that he was not here this year to speak again, but even though he has not been here in person, his words are here, and they are available to us. I think they are worthy of being repeated in this debate.

Sam Ervin said:

The separation of powers concept, as understood by the Founding Fathers, assumed the existence of a judicial system free from outside influence of whatever kind and from whatever source, and further assumed that each individual judge would be free from coercion, even from his own brethren.

Maybe those of us who have not been judges do not understand the full import of that phrase: "Free from coercion even from his own brethren." But judges understand that. Hugo Black, the distinguished Senator from Alabama who went to the Supreme Court for a long period of

service, said in the case of *Chandler v. Judicial Council*, 398 U.S. 74 (1970):

The wise authors of our Constitution provided for judicial independence because they were familiar with history; they knew that judges of the past—good, patriotic judges—had occasionally lost not only their offices but had also sometimes lost their freedom and their heads because of the actions and decrees of other judges. They were determined that no such things should happen here. But it appears that the language they used and the protections they thought they had created are not sufficient to protect our judges from the contrived intricacies used by the judges of the Tenth Circuit and this Court to uphold what has happened to Judge Chandler in this case.

So Justice Black understood what judges could do to each other, and so did Justice Douglas. Justice Douglas, in the same case, said:

It is time that an end be put to these efforts of federal judges to ride herd on other federal judges. This is a form of "hazing" having no place under the Constitution. Federal judges are entitled, like other people, to the full freedom of the First Amendment. If they break a law, they can be prosecuted. If they become corrupt or sit in cases in which they have a personal or family stake, they can be impeached by Congress. But I search the Constitution in vain for any power of surveillance that other federal judges have over those aberrations. Some of the idiosyncrasies may be displeasing to those who walk in more measured, conservative steps. But those idiosyncrasies can be of no possible constitutional concern to other federal judges.

It is time we put an end to the monstrous practices that seem about to overtake us, by vacating the orders of the Judicial Council that brand Judge Chandler as unfit to sit in oncoming cases. Only Congress can take action, unless the Constitution is amended to allow judges to censor, police, or impeach their fellow judges.

That, Mr. President, I think sums up very succinctly what needs to be said both on the question of constitutionality and on the question of policy.

One of the great judges of this century was Justice Frankfurter. He offered a thought which is perhaps useful at this time, when we are finding new powers and new authority within the Constitution to deal with Federal judges; powers that were rejected by the Constitutional Convention itself; powers which have been considered from time to time and always considered to be lacking.

So this new discovery of power to deal with the removal of judges is, I think, akin to new powers that Justice Frankfurter referred to in a totally different context, in which he said:

The history of archeology is replete with the unearthing of riches buried for centuries. Our legal history does not, however, offer a single archeological discovery of new, revolutionary meaning in reading an old judiciary enactment. The presumption is powerful that such a far-reaching, dislocating construction as petitioner would now have us find in the act of 1875 was not uncovered by judges, lawyers or scholars for 75 years because it is not there.

I think that is really the case we are dealing with today. The reason why people have not found, with all of the legal archeological work that has gone on over the years, a way to get rid of unpopular judges, is because it is not there. And there have been plenty of unpopular

judges, and there has been great popular heat against some good judges.

I do not think we can find one today; and with all due respect to my good friend from Arizona and my good friend from Georgia, I do not think we can find these new powers within the four corners of this bill.

EXHIBIT 1

U.S. DISTRICT COURT FOR THE DISTRICT OF MARYLAND,

Baltimore, Md., April 5, 1978.

Re The Judicial Tenure Act—S. 1423, 95th Congress.

Mr. WILLIAM JAMES WELLER,

Legislative Liaison Officer, Administrative Office of the U.S. Courts, Washington, D.C.

DEAR MR. WELLER: Receipt is acknowledged of your memorandum of March 15, 1978, with enclosures. As requested by the Judicial Conference, I am setting forth herein my views concerning S. 1423.

In my opinion, S. 1423 has serious constitutional defects and, in any event, is inadvisable legislation. I am therefore strongly opposed to the passage of this bill.

First, I do not believe that the proposed statute is constitutional. I do not think that a federal judge can, under the United States Constitution, be removed from office and his salary and retirement benefits terminated except through the impeachment process. Merely because such a process is unwieldy and time consuming does not mean that the Constitution can be interpreted in a manner not intended by its framers.

But besides these constitutional infirmities, I believe that this legislation is wrong for policy reasons and would have a serious inhibiting effect on decision making by federal judges. One of the keystones of our federal judicial system is the absolute and unfettered independence of each member of the judiciary. Unlike judges appointed or elected in many states, a federal judge, appointed for life, is beholden to no one. He is therefore absolutely free to decide each case before him on the basis of the facts and the applicable law. His decision need not be affected by the fear of personal consequences or by the desire to please some governmental commission.

I think it makes little difference whether such a commission exists within the executive or the judicial branch of government. A federal judge under present law need not be concerned with the views or predilections of other federal judges. Of course, if he errs in a ruling, appeal procedures are available to correct the error. The superstructure of a Judicial Conduct and Disability Commission with power to look over a judge's shoulder at all times can only result in having a serious inhibiting effect on every federal judge in his decision making.

Finally, I do not believe that the few instances in recent years of a lack of "good behavior" or of inability to perform judicial functions justify the procedures mandated by the statute. The problem instances in recent years have been very few. However, the unfortunate inhibiting effects on all judges will be substantial and certainly not commensurate with the perceived harm.

If further comment concerning my views in this regard are desired, please let me know.

Sincerely yours,

ALEXANDER HARVEY, II,
U.S. District Judge.

EXHIBIT 2

HARTFORD, Conn., April 20, 1978.

HON. IRVING R. KAUFMAN,

Chief Judge,

U.S. Court of Appeals, U.S. Courthouse,
New York, N.Y.

DEAR IRVING: I agree with the tenor of Judge Brieant's letter of April 6, 1978. Im-

peachment is a cumbersome process. I can recall the time, effort and heavy weight of responsibility on members of the House in determining to present to the Senate articles of impeachment of a sitting judge. As a result minor and some not so minor faults of judges go uncorrected. Where actual corruption exists, impeachment can be and has been used. But no lesser machinery has been devised, or could be, that would place anyone in a position to monitor the day-to-day work of the judges without creating a danger to the judges' necessary independence of thought and action. Pride and peer pressure, as Judge Brieant points out, have kept the system functioning well, with relatively few problems. We can survive the abrasiveness of a Judge Chandler or a Judge Willis Ritter. We could not survive the loss of independent minds which would result from outside monitoring—including monitoring by other judges applying discipline to their fellows.

Our best judges are least swayed by passing changes in public moods, notably in times of crisis. To be sure, some of the best have not gladly suffered incompetence of counsel before them and may have reacted too strongly on occasion. They would be targets of any "disciplinary" system.

"Discipline" for such matters can too easily mask opposition to substantive rulings. That minor faults may be ignored is a small price to pay for the preservation of the fundamental integrity of the judiciary. In my view any "disciplinary" body poses too great a danger of use actually to control the decision making of the judges.

The architects of our system chose independence over control and rightly made removal no easy matter.

The title of S. 1423 is enough to condemn it. "Judicial Tenure" is a constitutional, not legislative, subject.

Sincerely,

J. JOSEPH SMITH.

Mr. BAYH. Will the Senator yield?

Mr. MATHIAS. I am happy to yield to the Senator.

Mr. BAYH. Mr. President, I want to express my deep appreciation to my friend and colleague, my coworker in the vineyards on previous constitutional matters, for his succinct and interesting dissertation. I particularly concur in the way in which he stresses the critical constitutional question, which it seems to me is the fundamental question we have to resolve the best we can, and having resolved that one way or the other to go on to the second point which he also emphasized, the policy question.

I concur with him. I think this legislation fails on both grounds. I do not see how in the world we can take the phrase "good behavior" which was clearly in the context as used by our Founding Fathers to be "good behavior, appointment for life," on one side, and appointment at the pleasure of the King on the other side, and use that as a reason to totally subvert the impeachment clause.

I would like to point out to my good friend from Maryland, if he will indulge me, matters that I did not have at my fingertips when the Senator from Georgia and I were discussing this earlier, a matter which the Senator from Maryland is very clear about.

As will be recalled, the Senator from Indiana asked the Senator from Georgia why the Founding Fathers did not give some more instructions to us other than just the use of the words good be-

havior as a suggestion that further implementing legislation was to be expected.

I would suggest to my good friend from Maryland that when we look at the specific degrees of particularity that are contained in the Constitution as far as how you remove House Members, as the Senator will recall in section 5, in article I, it goes into some detail about how the House shall govern itself. It sets its own rules.

Mr. MATHIAS. The Senator is exactly right. The Constitution provides that Congressmen can remove Congressmen, Representatives are removed by Representatives, Senators are removed by Senators, but it does not say that judges are removed by judges. That is a very significant difference.

Mr. BAYH. The only place it talks about removal being applicable to judges is in the impeachment clause. I concur with the sense of my good friend that this legislation does not pass muster on the constitutional merits, and it does not pass muster on policy merits.

If we can think for a moment in terms of Judge Frankfurter, instead of using the term bad judge, to use the term unpopular judge, that being a better phraseology in today's terminology, can the Senator imagine the kind of pressure that can be put on the panel of judges who wanted to maintain the dignity and the acceptance of the judicial branch as they bore in on some judge because of his position on some of the sensitive issues of abortion, of prayer, of busing, some of these things that cause all of us nightmares? I want a judge to feel he or she can stand up and say to any other judge that he is right until proven wrong by the Supreme Court of the United States, or until two-thirds of this body convicts him according to the impeachment clause of the Constitution.

I thank my friend. I am glad to be with him on this point.

Mr. MATHIAS. I thank the Senator from Indiana not only for this intervention but also for carrying so much of the burden of this side of the debate throughout the day. He has demonstrated his wonderful knowledge of the Constitution.

I might say to him, because he remembers sitting for many hours over a period of many years in the Judiciary Committee with Sam Ervin, that perhaps a good place for me to pause is to quote again Senator Ervin, who tried to sum up in the same eloquent way as the Senator from Indiana has just done not only the constitutional questions, the technical questions, but the human questions.

He used these words to do it. He said:

The Founding Fathers knew that the form of Government they established would not create a judiciary composed of judicial angels who could do no wrong. They knew the activities of a few judges might handicap the operation of the system. But at the same time, they realized that individual liberty is best protected by an independent judiciary composed of judges who were subject to the Constitution alone. They had learned the lesson of history, and attempted to build safeguards into our system which would prevent its repetition. We must not

reject their wisdom and destroy our own freedoms by regarding the Constitution they drafted as a piece of ancient parchment which can be folded and rearranged to suit the whims of individual men.

That expresses, I think very beautifully, that whole range of history which stretches into great art from Herodotus through the millennium down through the Constitutional Convention and to this very debate today.

I would hope that the Senate would read the lessons of history, would learn from the lessons of history, and would avoid a repetition of the problems that history tells us about. In order to do that, I think we have to reject this bill.

Mr. President, may I inquire how much time I have remaining?

The PRESIDING OFFICER. The Senator has 18 minutes remaining.

Mr. MATHIAS. I reserve the remainder of my time.

The PRESIDING OFFICER. Who yields time?

Mr. DeCONCINI. Mr. President, how much time does the Senator from New Mexico want?

Mr. SCHMITT. I would like 5 minutes on the bill.

Mr. DeCONCINI. I yield 5 minutes to the Senator from New Mexico.

The PRESIDING OFFICER. The Senator from New Mexico may proceed for 5 minutes.

Mr. SCHMITT. Mr. President, on a variety of other occasions since entering the Senate, and I am sure on a variety of other occasions in the future, I have opposed what probably on many occasions will be called unnecessary tampering with the Constitution. I think whenever possible we should not tamper with the Constitution. I am afraid that S. 1423, the Judicial Tenure Act which is under consideration at this time, is an example of such unnecessary tampering.

On its face, with some particularly glaring cases having been in the public view recently, this bill may appear reasonable. It would establish within our judicial branch of Government a system for investigating and resolving allegations regarding the conditions or conduct of members of our heretofore independent Federal judiciary, conditions or conduct which may be inconsistent with the good behavior requirement of article III, section 1 of the Constitution of the United States.

That article and section reads as follows:

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

Article II, section 4, however, of that same Constitution, sets the standards for removal of the President, Vice President, and all civil officers of the United States, that is, officers such as those in the judiciary. For purposes of the Constitution, Federal judges are civil officers. That section, article II, section 4, reads as follows:

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors.

Mr. President, what this bill would do is to remove from the legislative branch, the Congress, the sole constitutional right to remove Federal judges from office. Furthermore, it would lessen the standards for removal as they apply to our Federal judges. Instead of treason, bribery or other high crimes and misdemeanors, our Federal judges could under this bill, be removed from office for "lack of good behavior," whatever that means, or may be deemed to mean with changing times. They could be removed not by the elected Congress but by a small group of men not responsible to the Congress or to the people, for the most part.

Mr. President, this bill represents a most dangerous threat to our independent Federal judiciary, the judicious interpretation of our Federal laws, and our freedoms in general. Unnecessary tampering with the Constitution almost invariably will, in one way or another, affect at least the future freedom of our citizens. One of the reasons why our country has prospered is, in large measure, due to the structure, the designated structure and independence of the Federal judiciary. Because we have judges who are not afraid to render unpopular decisions if they are required, because we have judges who are protected from the temporary furor of those same unpopular decisions, there is, I believe, no better or fairer judicial system in the world today or, in fact, in history, at least a system that oversees the judicial problems of a country of the size and complexity of the United States of America.

The proponents of this measure claim that the actions of a few bad judges require this change that the experience of 190 years is inadequate. They claim that the fact that in our country's history, only eight judges and one Justice have been impeached and only four of those convicted makes this legislation necessary, because it shows how difficult it is to remove bad judges. Well, I look at the same record but interpret it differently. It should not be easy to remove Federal judges from their office. And the fact that it has been deemed necessary to try only nine times in 190 years is some indication of how well the system has worked.

Our Founding Fathers, the drafters of our Constitution, wisely made it very difficult to remove such judges. They had the foresight to realize that an independent Federal judiciary was absolutely essential if the rights of the citizenry were to be fully protected, not only in the present, but in the future. S. 1423 would dangerously erode the protection designed by our Founding Fathers. I am afraid.

To those Senators who are undecided on this issue, I commend for reading the excellent additional views of Senators BAYH and Senator MATHIAS. In those views, our distinguished colleagues clearly rebut the arguments of the proponents of this legislation.

If we want to avoid the situation of Federal judges not conforming to the requirements of "good behavior"—again, whatever that term is supposed to mean—then let us take more care in whom we place on the Federal bench. In my home State of New Mexico, I am happy to say, my senior colleague (Mr. DOMENICI), the New Mexico Bar, and I have established a New Mexico Federal Judicial Selection Commission to make recommendations as to those who should sit on the Federal bench, and for those recommendations to be made solely on merit. This process has already been activated for the appointment of one Federal judge and for the appointment of a Federal attorney. Hopefully, by using the highest standards for selection to the Federal bench, later problems with Federal judges can be avoided, but if not, there are other ways to address these problems. If the offense is that which is outlined in article II, section 4 of the Constitution, then impeachment is the proper step to be taken.

If a Federal judge's alleged offenses did not fall within the scope of article II, section 4, but rather was a failure to maintain the standards of good behavior, if they can be judged as standards, then there are measures which can be taken and have been taken by a higher judicial authority. For example, no cases would be assigned to that particular judge.

History has shown that our independent often courageous Federal judiciary, designed by our ever-seemingly-wise Founding Fathers who knew the dangers of the passions of the moment, has been the greatest bulwark for our freedoms. Passage of this bill would be a monumental blow against that independent branch of Government.

Finally, Mr. President, I shall again, as I am sure has been done before, quote Plato, who in the Republic wrote:

Mankind censures injustice, fearing they may be victims of it and not because they shrink from committing it—

"It" being injustice.

This bill should be defeated and I commend my colleague from Indiana and my colleague from Maryland for their stalwart defense of the judiciary.

Mr. BAYH. Mr. President will the Senator yield for just a moment?

Mr. SCHMITT. I should be happy to yield, but I am afraid my time has expired.

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

Mr. BAYH. I want to thank the Senator for presenting a very fine statement.

Mr. THURMOND. Mr. President, I yield 5 minutes to the Senator from New York.

(Mr. NUNN assumed the chair.)

Mr. JAVITS. Mr. President, I have been a lawyer all my life, in addition to other careers, and I am deeply disquieted by this bill, though I admire the ingenuity and the craftsmanship which Senator NUNN has put into it. I should like to consider whether this is the best way. I realize there is a problem.

There is a problem, and it has been very adequately described, of whether impeachment and trial by the Senate are

simply not too difficult a course to deal with judges who may be inadequate to the task for very profound reasons. But the Federal judiciary has been such a bulwark of justice and selflessness, as far as anybody can be selfless, as a group in this country for 200 years, that I am very reluctant to see judges judged by judges. Senator NUNN has crafted a plan which is essentially the State plan. Many States have this kind of procedure. The Federal courts have been a unique body precisely because of life tenure and I think, on the whole, we have paid very little for this remarkable precaution.

I am deeply moved, because I, perhaps, had some of the most important times in my own career in the Senate, by the experience of Judge Johnson, of Alabama, who, because he believed in enforcing the Constitution, might easily have been removed by panels of judges from his own region, still suffering under what was then called the social order of that particular region.

When we consider one such case as compared with others where judges might have been drunk or irritated or otherwise irresponsible and the modern ability to strip them of their functions and of their cases as a way of dealing with that kind of situation, I am very deeply disturbed, still, by the fact that, in the Federal courts, we would establish a system by which judges could be removed by other judges.

I thought of, because it did not have a constitutional problem, the possibility of giving the right to Congress, by concurrent action of both bodies, to sustain or overturn a determination of removal by this council. That may be a way. I do not say it is or it is not, but it would require deliberation and consideration.

I deeply believe that the present occupant of the chair has been responsible for a historic breakthrough in trying to think this through and prescribe a remedy. I am not prepared to endorse that remedy here and now, because I believe it is so portentous for the history of our country. I understand there is not a bill in the House; there may not be. So this may go nowhere right now.

I wish that it were possible for all of us, paying due tribute to the Senator from Georgia, to hold it over until next year and to again consider it.

I emphasize my respect and admiration for the professional craftsmanship which went into this bill, but at this time, because I have to vote yea or nay, I do not feel that I can support it.

But I am deeply interested. I may be able to support this or a variant next year. But I feel we all ought to deliberate on it very critically and seriously and that a good deal more exploration needs to be made, not inordinate in time, but that we should, and I have no doubt we will, come to a decision on this particular matter in the year 1979.

I hope very much we will have that span of time in which to do it, do it intelligently and do it responsibly.

I thank my colleague for the time.

The PRESIDING OFFICER. Who yields time?

Mr. BAYH. Will the Senator yield me just 1 minute?

Mr. THURMOND. I yield 1 minute.

Mr. BAYH. I want to say to my distinguished colleague from New York, who has had long legislative experience and a wealth of legal experience before coming to this body, that I think his contribution to this discussion is very rewarding.

I think we share common concerns with our distinguished colleague from Georgia that there is a problem that needs to be resolved, but that there is a better vehicle to be utilized, rather than this one which flies in the face of the Constitution on the one hand, and the good policy of independent judiciary on the other.

I just wanted to express my appreciation to my friend and colleague from New York.

Mr. JAVITS. I thank my colleague.

Mr. THURMOND. Mr. President, I yield 2 minutes to the distinguished Senator from Wyoming.

Mr. WALLOP. Mr. President, I rise in support of S. 1423, the Judicial Tenure Act. This legislation is designed to build public confidence in our Federal courts by establishing a new procedure for involuntarily retiring, censuring or removing Federal judges from the bench for conduct which falls short of the good behavior standard set forth in article III, section 1 of the Constitution.

In recent years, there has been tremendous demand for accountability of all public officials in the executive, legislative, and judicial branches of government. The American public deserves honest and scrupulous service from its elected and nonelected public officials, including its judges. This legislation is intended to provide greater accountability within the Federal judiciary. S. 1423 accomplishes this by establishing an alternative to the time-consuming and impractical impeachment procedure provided for in the Constitution for the removal of Federal judges for conduct inconsistent with article III's good behavior standard.

Over the history of this country, impeachment has proved to be an ineffective mechanism for disciplining or removing Federal judges whose conduct casts a cloud on the judiciary. Only eight Federal judges and one justice have been impeached and of that number, only four judges were convicted and removed from office. The last impeachment and conviction of a Federal judge occurred in 1936. It is apparent, then, that while the impeachment procedure is available for removing unsuitable Federal judges whose conduct does not conform to the good behavior standard of the Constitution, it has not provided an effective vehicle for disciplining members of the Federal judiciary. As a result, public confidence in the Federal courts has suffered.

Mr. President, S. 1423 provides a needed alternative to this cumbersome and infrequently used impeachment process. It establishes within the judicial branch a method for investigating and resolving complaints against Federal judges who are alleged to have acted inconsistently with the good behavior standard of article III, section 1, which reads as follows:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The judges, both in the supreme and inferior courts, shall hold their Offices during good behavior, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during their continuance in office. (Italics added.)

It is significant that S. 1423 envisions a disciplinary system for Federal judges which rests within the judicial branch of Government. The circuit committees, the Judicial Conduct and Disability Commission and the Court of Judicial Conduct and Disability established by this legislation consist of Federal judges who render decisions on the merits of the complaints filed with them. By placing the responsibility for disciplining, by involuntary retirement, censure or removal, those Federal judges whose conduct is inconsistent with the good behavior standard within the judicial branch, S. 1423 protects the independence and integrity fundamental and essential to the functioning of our Federal courts. This also preserves the separation of powers concept fundamental to our Constitution. To further insulate the members of the Federal judiciary from political, personal or philosophical assaults, S. 1423 provides for the dismissal of complaints which relate "to the merits of any decision or procedural ruling of a judge, and complaints relating to the condition or conduct of a judge which is not connected with his judicial office or which does not prejudice the administration of justice by bringing the judicial office into disrepute" (section 383).

Mr. President, the time is ripe to enact implementing legislation for the good behavior clause in article III of the Constitution. It is in keeping with efforts of this Congress to improve the Federal judiciary and its service to the public. Congress is on the verge of adding 152 new Federal judgeships to the judiciary. The Improvements in Judiciary Machinery Subcommittee and the Judiciary Committee have devoted their energies and attentions to providing more meaningful and greater access for this country's citizens to the Federal courts. S. 1423 will establish for the first time a disciplinary system within the judicial branch which will enhance the reputation, integrity and thereby, the effectiveness of our Federal courts. It would be ironic indeed if we achieve greater access to the courts only to find incompetency in the bench.

It would be shortsighted not to briefly discuss the principal objection argued by opponents to S. 1423, that is, that impeachment is the sole and exclusive constitutional means for removing Federal judges from the bench. It is the opinion of this Senator and of the Judiciary Committee which considered this legislation that S. 1423 will withstand constitutional challenge. While article I, section 2 of the Constitution provides that "the House of Representatives shall have the sole Power of Impeachment," it does not expressly bar other methods of disciplining or removing Federal judges. The committee report explores the constitutional and legal bases for

this legislation which I would incorporate by reference into my statement. I am persuaded by the arguments in support of the constitutionality of S. 1423 advanced by the distinguished constitutional law expert from Harvard Law School, Raoul Berger, whose views are referred to in both the hearing record and report on S. 1423. Having considered arguments to the contrary, I am persuaded that S. 1423 will pass constitutional muster and survive even the most rigid scrutiny of the Supreme Court.

It is noteworthy that support for the legislation comes from groups who have a strong interest in preserving the independence and strength of the judiciary and who are well versed in constitutional law. These organizations include the Judicial Conference of the United States, the American Judicature Society, the American Bar Association as well as the Department of Justice. In addition, the very distinguished jurists, Chief Justice Burger, Mr. Justice Rehnquist, and Mr. Justice Blackmun, have in extrajudicial statements indicated that they did not see a threat to judicial independence in predecessor measures to S. 1423.

Mr. President, before closing, I would commend my colleague and chairman of the Improvements in Judiciary Machinery Subcommittee, Mr. DeCONCINI, for his efforts in bringing this important legislation before the Senate. Compliments are also in order for the diligence of the subcommittee staff in producing the excellent piece of legislation before us now.

Mr. President, I have heard the arguments on both sides and I remain convinced that this is a needed change to promote public confidence in the judiciary. I endorse S. 1423 and encourage my colleagues to do the same.

I thank the Chair.

Mr. THURMOND. Mr. President, I yield 5 minutes to the distinguished Senator from Virginia.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. SCOTT. Mr. President, I appreciate the Senator yielding.

I believe that this proposal before us, the effort to provide tenure for our Federal judges, is a very fine thing. I feel that we should, that every official elected and appointed should from time to time have to account for his stewardship.

We in the Senate are elected for periods of 6 years and Members of the House of Representatives for 2 years.

So far as I know, all public officials from time to time have to account for their stewardship. Yet we find in the Constitution in article III the judicial power is vested in the Supreme Court and such inferior courts as the Congress may from time to time ordain and establish, and it provides that the judges, both of the Supreme and inferior courts, shall hold their offices during good behavior.

During good behavior, I believe, is the fly in the ointment insofar as this bill is concerned.

In my judgment, the bill is contrary to the Constitution. I think it is an act of futility for us to pass this meas-

ure, because I believe the only way that we can remove a Federal judge is through the impeachment process, and that is provided for. The House of Representatives impeaches, the Senate tries anyone that has been impeached by the House and has the power to remove that person from office. I feel that when we attempt to short circuit the regular procedure as is provided in the Constitution that we are attempting an unconstitutional act.

I know in some of our State courts we do have similar procedures, but in the State courts the judges hold their offices for terms.

In my own State of Virginia, a trial judge is elected by the General Assembly for a period of 8 years. A judge of our State Supreme Court is elected by the General Assembly for a period of 12 years. We have a procedure somewhat akin to what is provided for in this bill, but it is a different situation.

During good behavior, that is lifetime tenure unless removed by the Senate after the House has impeached.

I have offered a measure that would provide for tenure whereby we would amend the Constitution to provide that for the reconsideration of a judge every 10 years he could be renominated, the Senate would have the opportunity to reconfirm. To me, this is the proper procedure to follow and not the procedure that is provided in this bill. A good effort being made, but going at it in the wrong manner.

I hope this bill will be defeated, because I do not believe the Senate should pass an unconstitutional act, knowing it to be contrary to the Constitution, or having a reasonable doubt as to its constitutionality, and passing that burden on to the Supreme Court.

Did my colleague from Maryland want me to yield?

Mr. MATHIAS. I just wanted to have a moment to thank the Senator for his participation here and to say that I agree with him absolutely on both points he made, that if the change is to be made, the Senator from Virginia is exactly right, it has to be made through the amending process.

Mr. SCOTT. We had this matter up during the 94th Congress. The distinguished occupant of the chair, the junior Senator from Georgia, appeared before the subcommittee. We had others that appeared before the subcommittee. No action was taken by our subcommittee at that time and for the primary reason that we were of the opinion that this proposal was contrary to the Constitution.

Now it has been changed in that it has added the Justices of the Supreme Court, but the Justices of the Supreme Court would be handled in a different manner.

It would be recommended to the House that impeachment proceedings be brought against a Justice of the Supreme Court if he did not behave in the proper manner, if he were found to be guilty of wrong behavior, and perhaps that phase of it might be constitutional, where a recommendation would be made and the House and the Senate would act in

a constitutional manner. But the bill, in my judgment, is contrary to the Constitution.

Does the Senator from Florida desire to speak?

Mr. CHILES. I desire to speak a moment on the bill, if I may.

Mr. SCOTT. The Senator from South Carolina yielded 5 minutes, and if time remains, I yield it to the Senator from Florida.

The PRESIDING OFFICER. The Senator's 5 minutes have expired.

Mr. THURMOND. Does the Senator wish to speak for or against the bill?

Mr. CHILES. For the bill.

Mr. THURMOND. The Senator from Arizona has time.

Mr. DeCONCINI. I yield 5 minutes to the Senator from Florida.

Mr. CHILES. Mr. President, I welcome the opportunity to say a word for this bill.

If there is any concern by the distinguished Senator from Virginia, I say to him that I worked for this bill, and I consider it to be constitutional. I want to relieve any concern he might have.

All of us are constitutional experts, by virtue of being in the Senate. I suppose that is one of the things that go with us. I just want to say that I hereby pronounce it constitutionally sound, and I think it will stand the stamp of time in that regard.

We have a provision such as this, and we have a constitutional provision that virtually follows the U.S. Constitution in regard to the way we are set up to provide for impeachment.

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

Mr. CHILES. I yield.

Mr. MATHIAS. I think the Senator is exactly right in saying that we have a duty to make that constitutional decision. I believe he has made the decision all wrong, but he has accepted the responsibility that we have to make that decision.

Mr. CHILES. I am delighted to accept it. I accept it for the distinguished Senator from Maryland, too, if he would like me to.

Mr. MATHIAS. The only problem is that the Senator from Florida has only 1-percent shot.

Mr. CHILES. Constitutional tests have been made on this in Florida. We have a constitution that is very similar. We copied the U.S. Constitution in setting up our provisions for the judiciary.

We found that we were in a situation in which we had impeachment processes, and I happened to sit in on the impeachment of a judge. The trial lasted days in the House. The House voted for impeachment. It went to the Senate, where the trial lasted for a period of weeks—2 or 3 weeks at least.

At that time, there were not sufficient votes, because I think it required a two-thirds vote of the Senate, and a tremendous expense was incurred. I am sure that made many people feel there is no reason to try to bring a judge up on charges. The legislature cannot afford it, the people cannot afford it, nothing is going to happen, and there is not going to be discipline.

That went on for a period of time, until we changed our procedure, and we provided that we could discipline judges, and that has worked very satisfactorily in our State.

I believe this is something we should try to do. The court certainly will rule on the question, if the matter is brought before it, and it will have occasion to instruct us as to its final ruling, as it does on every act we pass.

The committee has had a chance to look at this. It comes before us from the committee. A lot of work has gone into this. It seems to me that this is a pressing problem that we have in the country today.

We see the feelings of the people with regard to their respect for the courts, knowing that there is no way that we in the Senate can act properly in our role to try to serve with respect to impeachment, and knowing there are many times when we should not be impeaching but simply discipline a judge, to see that we are going to be able to have the proper judiciary.

I support this bill, and I commend the distinguished Senator from Georgia, who has been working long and hard to pass it. He has had support in this matter from many distinguished members of the judiciary who know this has to be done. They are outstanding leaders of the bar who know that we have long needed this kind of legislation. I support the bill.

Mr. BAYH. Mr. President will the Senator from South Carolina yield me a minute, so that I may ask a question of the distinguished Senator from Florida?

Mr. THURMOND. I yield 1 minute to the Senator.

Mr. BAYH. I appreciate the concern of the Senator from Florida and his sharing the Florida experience.

In dealing with this problem, did Florida amend the State constitution?

Mr. CHILES. I think we did it two ways. We had a procedure that was set up statutorily. We later changed it and had a judicial article changed, too.

Mr. BAYH. I bring this up, because 16 States do have this kind of mechanism, all of which felt that this was important enough that they should amend their constitution. It is a concern some of us have here, that we are getting into an area, when we go this route, of violating the Constitution.

I salute the Senator from Florida for recognizing the problem, although I do not agree with the remedy.

Mr. SCOTT. Mr. President, will the distinguished Senator from South Carolina yield me 30 seconds on the bill?

Mr. THURMOND. I yield a half minute to the Senator.

Mr. SCOTT. Mr. President, I have looked for authority with respect to this bill, and the only time the Supreme Court has addressed itself to this question, it was done by Mr. Justice Black and Mr. Justice Douglas. These were opinions in the case of Chandler against Judicial Council.

They were dissenting opinions, but they were not dissenting as to the fact that Federal judges, under our system,

can be removed only through the impeachment process.

When we know that a bill is unconstitutional or have reason to believe it is, I believe we have a responsibility, as Senators, not to pass legislation, if we have reason to believe it is contrary to the Constitution.

I thank the Senator for yielding.

Mr. THURMOND. Mr. President, I yield myself 5 minutes.

Mr. BAYH. Mr. President, may I ask the Senator from South Carolina to give us a breakdown of the time remaining?

Mr. THURMOND. Will the Chair announce the time situation?

The PRESIDING OFFICER. The Senator from South Carolina has 19 minutes. The Senator from Arizona has 98 minutes.

Mr. DECONCINI. I yield the Senator whatever time he wishes.

Mr. THURMOND. Mr. President, although I am in control of time for those opposed to the bill and the distinguished Senator from Arizona is in control of time for those in favor of the bill, he is yielding me such time as I may require to speak in favor of the bill.

Mr. President, I already have spoken on this bill, and I shall say only a few words more. I agree with the distinguished Senator from Virginia that a Member of this body should support only legislation which he feels is constitutional.

In fact, when I came to the Senate, I resolved that I would ask myself three questions when I voted on a piece of legislation:

First, is it constitutional?

Second, is it wise?

And, third, can we afford it?

So I heartily agree with the able Senator from Virginia that no Senator should vote for this bill unless he feels it is constitutional.

I presume no one knows for sure that this bill is constitutional. There is no decision of the Supreme Court on this question. There is no precedent for us to go by. But I want to say this:

There is nothing in the Constitution that I know that would prohibit Congress from passing this legislation.

Article II, section 4, of the Constitution reads this way:

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Mr. President, that says that if the President or the Vice President or civil officer is guilty of those things, on impeachment and conviction of those things, he shall be removed. He has to be removed if he is found guilty. But it does not say that this is the only way that they can be removed and it does not say that this is exclusive. Because it does not say exclusive, it seems to me Congress will have the right to pass this legislation.

Under this bill, also, judges may be better off than if they are impeached and tried because under this bill there is other action that can be taken. There can be involuntary retirement for a judge unable to discharge his duties efficiently be-

cause of permanent mental or physical disability, or a judge can be removed or censured for conduct inconsistent with the good behavior standard in article III. So this gives flexibility to the court that would act on this matter to determine whether a judge should be tried for impeachment or whether he should be tried for lesser conduct of misbehavior and maybe censure him or give him lesser punishment.

Mr. President, I realize, as has been stated, that Senators here on both sides are thoroughly conscientious and there is ground to take on either side that the bill is constitutional or unconstitutional, but those are merely opinions. There is nothing definite and no one can get up and say that this bill is unconstitutional or even say that it is constitutional. We can merely express an opinion.

I think it is constitutional; therefore, I support it. I think it has advantages. I think we need this flexibility. I think it will be a procedure where a judge will be considered by his peers and that might be better than to be considered by the House of Representatives and the Senate with a long drawnout trial. It seems to me that this will promote better administration of justice than just relying on impeachment alone. That being the case, I am supporting the bill and I hope it will pass.

Several Senators addressed the Chair.

The PRESIDING OFFICER. Who yields time?

Mr. MAGNUSON. Mr. President, I ask the Senator from South Carolina—the Senator from Arizona is not here—how does this bill affect senior judges? We have a system now with Federal judges when they reach the age of 70 they technically retire but they still come in and try cases. Does it affect them just the same as the full-time judges?

Mr. THURMOND. Mr. President, in reply, I will say they will not be affected on that.

Mr. MAGNUSON. No; I hope not. They are merely called in to help a crowded calendar.

Mr. THURMOND. That is right.

Mr. President, this merely provides in the case of misbehavior what would be done.

Mr. MAGNUSON. All right. I just wanted to know that.

Mr. BAYH. Mr. President, will the Senator yield me 4 or 5 minutes, please?

Mr. THURMOND. Mr. President, I yield 5 minutes to the distinguished Senator from Indiana.

Mr. BAYH. I might not want to use it all.

I only wish to say to my friend from Washington that under normal circumstances the response that he received would be accurate, but in the event that a majority of the judges on this panel thought that when you got beyond age 70 you were no longer competent performing the duties of a judge, they could drag you off of there the same as otherwise would be the case.

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

Mr. BAYH. I am glad to yield.

Mr. MAGNUSON. What happens is that the presiding judge in, say, the

western district of any area, calls upon these people to come in and help him with a case.

Mr. DECONCINI. That is right.

Mr. MAGNUSON. So his peers have acted upon him in a sense if they think he is capable of trying the case.

Mr. DECONCINI. That is right.

Mr. MAGNUSON. They do that when they assign the case to him. Is that not correct?

Mr. DECONCINI. That is right.

Mr. BAYH. That is accurate. But if a majority of the panel disagreed with the judge who was asking for help, in my judgment they would have every opportunity to exercise the same removal power.

Mr. DECONCINI. If the Senator will yield, that is correct, but that would be a frivolous complaint. It has to be something of substance. A complaint would have to be filed. The fact he is 72 years old would not be enough and would be considered frivolous and dismissed.

Mr. BAYH. Of course, the complaint would not be based on the fact he was 72 years old or 66 years old, or whatever it was, but because he was unable to operate. It is the same kind of situation we have when we are trying to deal with a fellow who was sitting there and just was not working. Something has gone haywire and he was not functioning properly.

I cannot see how you can say you are going to give this panel an opportunity to remove the full-time judge without at the same time saying they are going to have the power to deny a part-time judge of having the opportunity to serve.

Mr. DECONCINI. The Senator has interpreted it incorrectly. You have to file some reason for the removal with your complaint. The Commission then sends it back to the local districts to be reviewed, and they are going to make some determination. They cannot dismiss that. They then forward it back with their recommendation. They can recommend that it is a frivolous complaint; that is only done because they do not think he is popular or they think he is too old.

Mr. BAYH. The Senator from Indiana has not stated the case well, and I apologize.

Let us take whatever the criteria is that the Senator from Arizona feels is sufficient to let this panel remove a judge, whether it is, drunkenness, adultery, blasphemy, playing golf, and going fishing instead of sitting and hearing cases, whatever it might be for which you are going to be removed. Let us accept that that case is going to qualify and the majority is going to vote to remove that judge. Suppose you can make the same case, with all of the same ingredients, about a part-time judge who is asked to serve. Is it not fair to suggest that the power to remove a full-time judge and prohibit him from serving is also there as far as removing a part-time judge?

Mr. DECONCINI. Yes; that is correct. But if the Senator is trying to leave the impression that it would be subject to abuse in the fact that it would be filed because a certain case was design-

nated to a senior status judge, I do not think that is realistic.

Mr. BAYH. The Senator did not say that.

Mr. DECONCINI. What objection does the Senator have?

Mr. BAYH. The Senator suggested that he cannot categorically state, as my friend from Arizona said, this would not apply to part-time judges who are asked to serve. That is not what the Senator meant but is what the Senator said.

The fact is the same criteria would apply to part-time judges as are applied to full-time judges. If the majority of the judicial panel said, "You are not qualified to serve," out you go in either case.

Mr. DECONCINI. But the Senator from Indiana said the panel could take them off because they were senior panel judges.

Mr. MAGNUSON. He does not ask to serve particularly; he merely says he is available for service, and the presiding judge—they have meetings—and he picks up Judge A who says "Here is a big case and the calendar is full," and he is willing to take on the case, and that is what happens. He does not ask to be put on.

Mr. BAYH. I do not know who has time, but I would like to pursue this for just a bit.

The PRESIDING OFFICER. Does the Senator yield time?

Mr. DECONCINI. Yes.

Mr. BAYH. This is really the kind of thing that worries the Senator from Indiana. If you have a clear-cut case of negligence, malfeasance or misfeasance and the judge is not qualified to serve, then I am not worried about what the panel is going to do. They are going to make the right decision.

I am concerned about the marginal question of whether he is qualified or is not qualified, and then in that instance the fact that the fellow is older might have the kind of an impact on the mind of those judges sitting there who want to see the judicial system turned over and old people purged and young people brought in. That is the kind of thing that could enter their minds, and that is the kind of thing that really concerns me about this legislation.

Mr. DECONCINI. But the Senator is using "qualified" as the standard. The standard is good behavior. That is the difference as to whether he qualifies. If he did not qualify he should not be on there in the first place. He should be there on good behavior.

Let us take the Senator's situation that he cited where someone files a complaint that is questionable, and the court decides to hear it. The judge at that time is able to have counsel and is entitled to full due process to present his side of the story in opposition to the complaint. Every protection is there.

Then after that it is subject to Supreme Court review. I do not know what more protection you can grant except, as the Senator suggested earlier eloquently, not to have this.

Mr. MAGNUSON. What bothers me a little is the question of is he qualified or not qualified for the particular case they

ask him to come in on or is he not qualified to handle any case.

Mr. DECONCINI. That would not be subject to this bill at all.

Mr. MAGNUSON. What about a lawyer on one side or the other, the calendar is full, the regular judges are just rolling, so here is a retired judge—they call them senior judges—who says he would be willing to hear the case. Can a lawyer file a complaint against him on the basis that he is not qualified because of age? Could that happen?

Mr. DECONCINI. If a lawyer files a complaint based on that set of circumstances it would be dismissed because it would be considered frivolous. It is outside the jurisdiction of the Commission.

Mr. MAGNUSON. The judges would not ask him unless they thought he was qualified. I would assume—

Mr. DECONCINI. That is right.

Mr. MAGNUSON (continuing)—To handle this particular case, I am talking about the senior judge.

Mr. DECONCINI. Mr. President, I ask for the yeas and nays.

Mr. BAYH. Mr. President, will the Senator yield to permit me to ask him a question? In discussing this with the Senator from New York and the Senator from Maryland we do not want to be put in a position where by opposing the bill, opposing the efforts that the Senator from Georgia and the Senator from Arizona have embarked upon, that we give the impression that we do not recognize that there is a problem.

What I would like to do at the proper time and, frankly, you probably will beat us—I do not know where the votes are on this—but I would like to have this matter recommitted to the committee for further study without instructions. But I think that is what we want to do, not to say we are against this effort but we think this matter needs more thorough discussion, and I say that right now.

Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. BAYH. Is the proper time to make that request when all time is yielded back?

The PRESIDING OFFICER. The Senator can make that request now with a time limit of 20 minutes under the present order.

Mr. BAYH. Let me make that request. I move, Mr. President, that the bill be recommitted to the Judiciary Committee for further consideration. I will ask for the yeas and nays and will say, unless someone else desires to do this, that I do not want to prolong it unnecessarily, so, it would seem to me, there would be no need to have a roll-call on passage on this, but to just have one vote on the measure.

Mr. THURMOND. Mr. President, if the Senator has made the motion, I move to table the motion.

The PRESIDING OFFICER. There are 20 minutes on this particular motion. Until that time is yielded back, the motion to table would not be in order. There are 20 minutes.

Mr. THURMOND. Is the Senator ready to yield back the time?

Mr. BAYH. I think we have heard all that we possibly can.

Mr. SCOTT. Mr. President, will the Senator yield briefly? As I understand it, we did not have a rollcall vote on reporting this bill. In fact, I do not even remember when we passed it out from the Committee on the Judiciary. I do not doubt for a moment that we did this, but apparently it was without a rollcall vote, and on a matter of this importance certainly the Committee on the Judiciary should have a rollcall vote, so I support the motion the distinguished Senator from Indiana proposes that it be recommitted to the Committee on the Judiciary.

Mr. BAYH. I appreciate the remarks of the Senator from Virginia.

Mr. THURMOND. Mr. President, from what I understand, both sides are ready to yield back the time. There will be a motion by the distinguished Senator from Indiana to recommit the bill, and at that time I will move to table that motion.

The PRESIDING OFFICER (Mr. TALMADGE). The motion to recommit has already been made. The question is on yielding back the 20 minutes.

Mr. BAYH. I would just like to make a 1-minute observation.

The thrust of this motion is very much in line with what we have been trying to say. There is a problem on occasion with judges who are not qualified to serve and that this matter should be handled in a way in which the Judicial Conference is given additional power, they make strong recommendations, and we can legislate, the Congress being required to act upon receiving certain kinds of recommendations.

We do not take away the right of Congress to impeach judges and give it to a panel of judges, this kind of unheard of authority. That is what we are trying to do. I would hope we could put it back in committee and come up with a solution to the problem.

Mr. NUNN. Mr. President, will the Senator yield on his 10 minutes just for a brief comment? I have no objection to proceed to a motion to table a motion to recommit, and certainly if that motion fails, of going ahead with a motion to recommit. I hope that will be defeated. But I would hope after years and years of debate on this particular issue, considering the importance of the issue, we ought to have a rollcall vote if the motion to recommit is defeated.

I would like to have a rollcall vote on passage of this legislation. If the sense of the Senate is such that we have a majority or very close vote on this, it is obvious it probably is not going to get very far in the House, but I think we ought to know this. This has been worked on for some 35 or 40 years, and some will say 100 years, and I think we ought to find out the sentiments of the Senate about whether we are going to do anything about some of the abuses that have taken place and continue to take place on the Federal bench.

Mr. THURMOND. Mr. President, if we are ready to yield back our time—

Mr. ROBERT C. BYRD. Mr. President, I hope the Senators will not yield

back their time so that we can get the word out that there is going to be a vote, if the Senators can avoid yielding back their time for the present.

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

Does anyone object to going ahead if the motion to recommit does not prevail, of going ahead with a final vote on this bill? Does the Senator from Indiana have any objection to moving on to a vote if his motion fails?

Mr. BAYH. I think my friend from Georgia very thoughtfully mentioned in his remarks that the Senator from Indiana has tried in every way to cooperate with everyone who is for this legislation.

Mr. NUNN. And I commend him for it.

Mr. BAYH. I just felt compelled to point out we are on some very dangerous constitutional policy grounds, and I feel what we are really after is to recommit this bill and get a better solution; not to take a position that makes it look as if we do not recognize the problem.

Mr. NUNN. I understand the Senator from Indiana's position and I commend him for making a very erudite statement here on the floor. I do not happen to agree with his conclusions, but I do know there are two sides to the question. It is not an easy question. It is a close question, as I said earlier. I do not believe anybody can stand here and guarantee that the bill is constitutional. On the other hand, I do not think anyone can guarantee it is not constitutional, and I am persuaded that it is. But I would like to get a rollcall vote if the motion to recommit is not agreed to by the Senate, and I think the majority leader might want to notify Senators, if there is no disagreement on this, that we would have the likelihood of two rollcall votes, after which this bill will be concluded one way or the other.

Mr. ROBERT C. BYRD. I wonder if we can get consent that if the motion to table—am I to assume that there will be a motion to table the motion to recommit—if the motion to table the motion to recommit fails that the vote then occur immediately on the motion to recommit, and if it fails, that the vote occur immediately on the passage of the bill. Could we get that agreement?

Mr. NUNN. I certainly have no objection.

Mr. ROBERT C. BYRD. All right; then I modify my request as follows: Mr. President, I ask unanimous consent that if the motion to table fails, I take it the motion to recommit will occur immediately, because time will have expired, and if the motion to recommit fails, there will be 10 minutes for debate before final passage, that it be divided equally between Mr. DeCONCINI and Mr. THURMOND, and that a vote then occur on passage.

The PRESIDING OFFICER. The committee substitute would have to be acted on first.

Mr. ROBERT C. BYRD. Yes; I ask unanimous consent that after the 10 minutes of debate, the committee substitute be acted upon without further debate or motion, and that upon the adoption of the committee substitute, a vote then occur upon the bill.

Mr. NUNN. Mr. President, does the majority leader's request include a request that if the motion to table the motion to recommit is agreed to by the Senate, we would go to final passage of the bill? Is that the request?

Mr. ROBERT C. BYRD. If the motion to table the motion to recommit—

Mr. NUNN. Passes.

Mr. ROBERT C. BYRD. Carries, then would Senators not want 10 minutes for debate?

Mr. NUNN. I think we have debated it pretty thoroughly. I think we could go on to final passage.

Mr. ROBERT C. BYRD. Then, in that event, there would be no further debate; but if the motion to table the motion to recommit fails, and the motion to recommit fails, would Senators then want 10 minutes of debate before the vote on passage?

Mr. BAYH. May I say to the majority leader I think we have discussed this up one side and down the other, but giving us 10 minutes, I think, gives us a safety valve, and it is not necessary to take the 10 minutes.

Mr. ROBERT C. BYRD. I agree with that, that Senators have 10 minutes which they may yield back.

Mr. NUNN. Mr. President, before concluding the debate, I would like again to commend the Senator from Indiana and the Senator from Maryland. I know they have strong views on this subject. I just want to say if the motion to recommit of the Senator from Indiana passes, I pledge my support in looking for another solution. I believe this is the best solution we can come up with, but I think the Senator from Indiana has shown a very constructive attitude, and if his motion is agreed to, I pledge my support in a search for another solution.

Mr. BAYH. Would the Senator from Georgia like to have another minute or two to proceed in that same vein?

Mr. NUNN. No, because I really do not want anyone to believe that I think the Senate would buy the Senator from Indiana's argument.

Mr. MAGNUSON. Let's go. Let's vote.

Mr. MATHIAS. Mr. President, if the Senator from Indiana will yield for a moment, I believe the pledge the Senator from Georgia has made to devote his astute mind and his erudite legal talents to this matter will make the passage of the motion to recommit virtually certain.

Mr. NUNN. Unfortunately there have not been enough Senators here to hear that argument and be persuaded.

Mr. MAGNUSON. Vote!

Mr. ROBERT C. BYRD. Mr. President, I would hope we could have just a very few more minutes before voting.

The PRESIDING OFFICER. Who yields time?

Mr. DeCONCINI. Mr. President, I ask unanimous consent to proceed for 2 minutes on the motion.

The PRESIDING OFFICER. The Chair did not understand the Senator's request.

Mr. DeCONCINI. Two minutes on the motion to recommit.

Mr. BAYH. The Senator has 10 minutes on the motion.

Mr. DECONCINI. All right; I yield myself, from the 10 minutes on the motion, such time as I may require.

Mr. President, I think we have had a good day of discussion, and we have gone over the matter with a fine-toothed comb.

I would like to remind the Senator from Indiana, the Senator from Maryland, the Senator from New Mexico, and the Senator from Georgia that a great deal of time and effort has been put into this proposal. It is not a piece of legislation that just came zipping out of the Judiciary Committee this year. It has had a history of constant hearings, with some 50 witnesses. It has been going on since 1968, in the 90th Congress.

Such outstanding Senators as Senators Tydings, EAGLETON, Goodell, HATFIELD of Oregon, MAGNUSON, MONDALE, MUSKIE, SCOTT, STEVENS, and Yarborough have served as cosponsors of this legislation, the Judicial Reform Act. The 92d Congress took it up, the 93d Congress took it up, the 94th, and the 95th. Thanks to the distinguished Senator from Georgia we were able to again bring this matter to the Judiciary Committee and thus hold hearings this year.

The constitutional question that we have hashed over very thoroughly today, I think, is one no one can be sure of, and that is the risk of being a legislator: You are passing on laws and passing judgment, and we all have to make the judgments for ourselves.

But it is interesting to note, as has been called to the attention of this body, that some very fine groups intimately involved in the law and in constitutional matters, such as the American Bar Association, the American Judicature Society, the Department of Justice, and the American Association of Attorneys General have all endorsed this measure, along with many scholars of constitutional law. This measure has wide support in the Senate, and I think it merits passage.

I am not standing here to say this is going to satisfy all of the problems of misbehaving judges, but it certainly will provide the American people, for the first time, some hope that judges are as responsible as anyone else is. The idea that we cannot alter the Constitution under article III, section 1, in interpreting the good behavior clause, does not make good sense to me. Article I, section 8, the necessary and proper clause, certainly gives the legislative branch, the House and the Senate, the right to do what we are doing today, and I sincerely hope that the Senate will join in supporting Senator THURMOND's motion to lay on the table the motion to recommit.

Mr. ROBERT C. BYRD. Mr. President, before Senators yield back their time, will they yield me some time?

Mr. THURMOND. Mr. President, I yield back the time on this side.

The PRESIDING OFFICER. Who yields time to the Senator from West Virginia?

Mr. DECONCINI. I yield to the Senator from West Virginia.

THE NATURAL GAS CONFERENCE REPORT

Mr. ROBERT C. BYRD. Mr. President, both Mr. ABOUREZK and Mr. METZEN-

BAUM are here, and both Mr. BARTLETT and Mr. HANSEN are here—

Mr. METZENBAUM. If the Senator will yield, I do believe Senator LONG—

Mr. ROBERT C. BYRD. We tried to reach him and could not find him. But I believe there are Senators here to represent Senator LONG's point of view.

We have attempted, during the afternoon, to reach an agreement which would permit the Senate to proceed with debate on the conference report on natural gas tomorrow, the rest of the day today and tomorrow, and Monday and Tuesday and Wednesday, and which would protect all Senators who are away from town in the meantime from any surprise motion to table the conference report. Such a motion would, of course, be nondebateable, and there would be no way to protect Senators who are out of town. There are Senators on both sides of the aisle and Senators on both sides of the question who need to be protected.

Those of us who support the conference report are willing to enter into an agreement to protect Senators against a motion to table the conference report. We are willing to enter into an agreement to vote up or down on a motion to recommit the conference report, and set a date and an hour next week at which time that vote would occur. We are also willing to agree to set a date and an hour as to when the vote would occur up or down on the conference report itself.

The matter has been debated pro and con in the Senate now for 16 months. It has been debated in conference during that 16 months, certainly for 8 or 10 months. It is a lengthy report, and certainly is worthy of a reasonable amount of time and consideration. So I am not pressing for a vote on the conference report tomorrow or the next day or next Monday or Tuesday or Wednesday.

I would like for the Senate to begin debating the conference report, however, with an equal division of time, so that neither side will take all the time, and with the built-in protection for those Senators who are not in town against a surprise motion to table the conference report, which would be nondebateable.

I do not believe we have been able to be successful. Some of the participants on both sides of the question are willing to enter into such an agreement, but I think I ought to make one final effort to see if such an agreement could be reached.

While I say I would prefer an agreement that would see the Senate complete action on the conference up or down at a given date and hour, I am not asking for that now because I know that would be futile.

Therefore, in the interest of getting the measure up for debate, having equal time on both sides of the question, and to fully protect Senators on both sides of the question, on both sides of the aisle, who are out of town against a surprise nondebateable motion to table, I make the following request:

I ask unanimous consent that if the conference report is called up today or tomorrow, no tabling motion, no motion to table the conference report, will be in order prior to a vote up or down on a recommitment motion, neither of which

votes will be in order before next Wednesday at 6 p.m.

The PRESIDING OFFICER (Mr. NUNN). Is there objection?

Mr. ABOUREZK. Reserving the right to object—

Mr. ROBERT C. BYRD. And that the time in the meantime be equally divided between Mr. JACKSON and Mr. HANSEN.

Mr. ABOUREZK. Mr. President, I want to yield to the Senator from Vermont but I want to ask a question of the leader before I do yield.

The prefatory remarks that the leader made to his unanimous-consent request indicated somehow that he philosophically or technically or procedurally could not call up the conference report without this agreement. I just want to ask the leader, is there anybody here preventing the chairman of the Energy Committee or the leader from calling up the conference report? We are all for it. That is what I am trying to say. He can call it up any time he wants to and we are ready to go. I have planned the last year of my life around that conference report and I am waiting.

Mr. ROBERT C. BYRD. Mr. President, I have the floor. I do not lose the floor while making my unanimous-consent request. I will answer the question.

Those of us who support the conference report are ready to enter into an agreement to vote on a motion to recommit at a certain date, on a certain hour. That is for the protection of Senators who are out of town. We want to protect Senators who are out of town against any surprise motion to lay on the table this conference report, a motion which is not debateable.

The answer to the Senator's question is no, there is nothing to prevent the Senator from Washington from calling up the conference report right now except—except—the desire of the majority leader to protect Senators on both sides of the aisle. I want to protect him. I want to protect Senators on both sides of the question, and my colleagues on want to protect Senators on both sides of the aisle. Most of them want to afford the same protection against a surprise motion to table this conference report. That is all that is keeping the Senator from Washington—

Mr. ABOUREZK. Mr. President, I was recognized.

Mr. ROBERT C. BYRD. No, the Senator from West Virginia—

The PRESIDING OFFICER. The majority leader asked for unanimous consent and the Chair asked if there were any objections.

SEVERAL SENATORS. Reserving the right to object.

Mr. ROBERT C. BYRD. Mr. President, in making the request—

Mr. ABOUREZK. Who has the floor, Mr. President?

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. ROBERT C. BYRD. A Senator does not lose the floor when he makes a unanimous-consent request, but other Senators can reserve the right to object. I would like to yield for a moment to the Senator from Vermont (Mr. LEAHY).

Mr. LEAHY. I thank the majority leader. I will be very brief. I reserve the right to object, though I will not object. I can truthfully say, Mr. President, that I am one of what I think is a fairly significant number of Senators who really have not made up their minds on this matter. Of course, a filibuster could occur, obviously. I might say, if I was leaning any way, I would be leaning against the conference report, but I will make up my mind based on what I hear in debate on the floor of the Senate, not from the lobbyists or anybody else. Quite frankly, I would hope that an agreement can be worked out on specific times and that during that time we can have full, significant debate on both sides of the issue for the benefit of those of us who have not been able to make up our minds, and for those of us who would like to be able to make up our minds in the way the Senate is designed. That is through debate.

I would really hope that nobody would object to a unanimous-consent request that would allow specific times set out for specific debate where we can plan our schedules, knowing when we can come in and hear the pros and cons of this matter.

Mr. ROBERT C. BYRD. Mr. President, that is the whole point I am making. That would give all Senators a date and an hour on which they could expect to be here, to know that the votes would occur on this very critical issue on which I am sure all Senators feel they want to be recorded.

Mr. JACKSON. Reserving the right to object—

Mr. ABOUREZK. Mr. President, may I be recognized?

Mr. JACKSON. Mr. President, reserving the right to object.

The PRESIDING OFFICER. The Senator from West Virginia has the floor. The Senator has a pending unanimous-consent request.

Is there objection?

Mr. ABOUREZK. Mr. President, reserving the right to object.

Mr. BARTLETT. Mr. President, reserving the right to object.

Mr. ROBERT C. BYRD. May I yield to the Senator from Washington?

Mr. BARTLETT. I will reserve the right to object, but I think some of us would also like to participate in this discussion, and I am one of those.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that I may have the floor for 10 minutes while Senators may reserve the right to object. Mr. BARTLETT, Mr. HANSEN, Mr. ABOUREZK, and Mr. METZENBAUM may have the 10 minutes equally divided, 2 minutes each.

The PRESIDING OFFICER. Is there objection to that unanimous-consent request? Without objection, it is so ordered.

Mr. ABOUREZK. Mr. President, the first thing I would like to address to the distinguished majority leader is this: We have no intention of surprising anybody with any motion to table or motion to recommit. What we are willing to do is that if we do decide to make a motion to table or a motion to recommit, we will

give adequate notice for that, although we do not want to agree to a time agreement.

Now, if, as the majority leader has said, he is interested in protecting the rights of absent Senators, and I am not here to try to tell the leader how to do his business of scheduling the Senate, I might just offer a suggestion: Call up the bill after you have given notice. Do not call it up today and make us sit here for 5 days after everybody leaves town and goes and campaigns knowing there will not be a vote until next week, with HOWARD METZENBAUM and I sitting here talking to each other about the natural gas conference report, trying to convince SCOOP JACKSON.

Mr. ROBERT C. BYRD. Is the Senator willing to agree that no motion to table the conference report will be made?

Mr. ABOUREZK. No; I cannot do that, as I stated this morning. It has the very same effect of running everybody out of town so they can campaign. They will know they are safe. When we debate the natural gas bill we believe it is of such significance that we ought to have a shot at getting Senators on the floor. We know they are not going to come over, all of them. We know that even if they are in town they are not going to come over. But if they are out of town, we do not even have a shot at them and I do not think that is fair, Mr. President. I think it is unfair to us.

We do not have the ability, Mr. President, to go down here and offer nuclear aircraft carriers or deep water ports in the Missouri River in South Dakota or nuclear breeder reactors or judgeships, or whatever else they have been promising at the White House. We have to depend upon debate in the open light of day in the Senate Chamber. That is the only thing we have.

We have to be able to do that. We have to have a shot at getting Senators over here to listen to what this natural gas bill is all about.

The PRESIDING OFFICER. The Senator's 2 minutes have expired.

Mr. ABOUREZK. HOWARD wants to yield me 1 minute.

Mr. METZENBAUM. I yield 1 minute.

Mr. ABOUREZK. This natural gas conference report, Mr. President, was fashioned in secret. We never had a chance to debate this conference report in the conference committee. There are many of us who are members of the committee who did not get invited to the meetings. They were held in secret, barred from the press, from the public, from many Senators who were, in fact, members of the conference committee. I do not think it is too much to ask that we have a chance for full participation of the Senate in debating this natural gas conference report.

I thank the Senator for yielding.

Mr. BARTLETT. Mr. President, I want to comment on the remarks made by the distinguished Senator from Vermont. He and I had a conversation privately, similar to this. I should like to say to him that I know he is very serious and sincere about participating and asking questions and listening to the debate that would take place. But I think he is the

exception. I think that there will be some interested in the debate, but the debate is actually taking place right now, outside of this Chamber, with people explaining the conference report, others explaining the motion to recommit with instructions and what that does.

I should like to see us enter into a debate on the floor, but I do agree that if we enter into a restriction, then we are not going to have any audience outside of this Chamber, or in it, to talk to and explain our position and our side. I agree with him that there are many undecided voters. There are many people who are very confused, and I think rightfully so, because I think this is an extremely confusing bill.

A number of people have read it recently and they are very confused; they do not understand it. I think it is very important that we have a chance to explain our side and, certainly, the administration and Senator JACKSON, my chairman, will have an equal or even a better chance to explain their side, which is also important. We are both doing this at the present time and I think this will continue until the decision is made to bring the bill up. Then I guess that whichever side, at some time, decides it has the votes, will act. Right now, my own opinion is that neither side does.

I think we need to move as quickly as we can to have the bill brought up without any restrictions on the debate.

Mr. JACKSON. Mr. President, this is not just another bill. Without a doubt, I think it is the most important piece of domestic legislation that has been brought up in this Congress. As the majority leader has mentioned, the bill has been before the House and Senate for over a year. A lot of hard work has gone into it, day and night.

I think, Mr. President, that the distinguished Senator from Vermont (Mr. LEAHY) summed it up very well, that he would like to know when critical votes are going to occur. I can only say, Mr. President, that the decent thing to do, in the closing hours of this Congress, is to let our colleagues know when a critical vote—not just another vote—is going to occur. That, to me, is a test of decency.

Mr. ROBERT C. BYRD. Will the Senator yield?

Mr. JACKSON. Yes, I yield.

Mr. ROBERT C. BYRD. There are 29 of them absent today. If a motion to table that conference report were to be made right now, 29 of our colleagues would be caught short.

Mr. JACKSON. I just want to point out that a motion to table could occur at any moment under those circumstances and how would this body look, with 29 absentees, voting on a critical matter such as the key part of the President's energy program?

I hope that the suggestion made by the distinguished Senator from Vermont, who is uncommitted and, he has indicated, may be leaning against the conference report—his recommendation makes a lot of sense, because it is the right thing to do in light of all the circumstances. I hope, Mr. President, that we can have a vote in which all Mem-

bers of the Senate will be able to vote on this, the most important domestic piece of legislation we have in this Congress.

Mr. HANSEN. Mr. President, let us recall what the history is. I hold few people in higher esteem than my good friend, the Senator from Washington (Mr. JACKSON), but if I recall correctly, it was he who spoke about legislation in the sunshine. Speaking as a member of the old Interior Committee and, more recently, the Energy and Natural Resources Committee, we held legislation in the sunshine. We held hearings, we held markups, we did not have any secret sessions.

Then what happened last spring? It is all well and good to say that 29 or 27 Senators are not here. The fact is that a very select, handpicked group sat down together for several months. I was not there; the Senator from Ohio was not there; the Senator from Oklahoma was not there; the Senator from Connecticut was not there, nor was the Senator from Nevada. I could go on and on.

We do not know what is in this bill and most Senators, I say categorically, do not know what is in this bill. After it had been seemingly brought into agreement and the thing fell apart here a few weeks ago, there were changes made on 119 pages; 119 pages were changed. I did not know what was being changed, nor did any other Member of the Senate, other than those who were participants in the secret session. That is exactly what we are talking about.

I have been around here not as long as many, but more than some, and I am aware of this fact: If you want to insure that very few people will be here to understand this bill as, indeed, we should understand it, let us agree to this unanimous-consent request and there will not be many people around until next Wednesday.

On the other hand, and this is precisely the crux of the matter, I think, the reason—and I can understand why my good friend, the majority leader, the Senator from West Virginia (Mr. ROBERT C. BYRD) and the Senator from Washington, do not want to bring up the bill now. It is not so much that we may come up with a surprise motion to table.

I guess my time is up.

Mr. ROBERT C. BYRD. I ask unanimous consent that the Senator have 30 seconds. I want to hear what he is going to say about the majority leader.

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

Mr. HANSEN. The concern is that no one knows exactly how this vote may come out. But obviously, the leadership does not have sufficient confidence to run the risk of bringing it up now. We are not going to surprise them by saying, "We'll table in the next 15 minutes." We shall give them adequate notice. But they are on notice that, under the rules of the Senate, that motion is in order and it is not debatable.

Mr. ROBERT C. BYRD. That is right.

Mr. HANSEN. I say there is nothing wrong with that, and if you want to assure that there is an understanding by

all Members of the Senate, proceed under those rules, because everyone then is on notice that that motion is in order.

If we want to have them all, let us bring it up Monday. That is fine with me. But let us not go through the charade of trying to lay it down now and letting people scatter to the four winds and not return until Wednesday. I want the Senator from Vermont and every other Senator to know what is in that bill. I am persuaded that if they know what is in this bill, this compromise will not fly.

Mr. ROBERT C. BYRD. I ask unanimous consent now that I may have 1 minute to respond to the Senator, who mentioned my name.

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

Mr. ROBERT C. BYRD. Mr. President, the Senator just might be surprised. He could be surprised.

Mr. HANSEN. I have been many times.

Mr. ROBERT C. BYRD. He has been many times, and undoubtedly he could be again.

Do not bank, just do not bet on the reason that the Senator has just stated as being the reason why the majority leader does not want to call up this measure right now. The majority leader has contacted, I daresay, more Senators, face to face, person to person, on this one issue than anybody else in the administration, outside the administration, in this Senate, or outside the Senate. I have the tally sheets here. I only take a man's word on this issue when I hear him say it with his own lips.

So it is not that I am afraid to call it up now, not that I am afraid to call it up now. We can beat you on a tabling motion today. We can beat you on a tabling motion. I would be willing to call it up right now, move to table myself and vote against the tabling motion, and show you we can beat you.

Mr. HANSEN. We are all ready.

Mr. ROBERT C. BYRD. We can beat you. But I do not want to catch Members on your side of the aisle, who are running for elections, out of town with that kind of surprise, low-blow motion.

But do not say that we are afraid we do not have the votes to beat a tabling motion. We can beat a tabling motion today. But I want a time that all Senators may know that they can come and vote on a motion to recommit, which I understand will be proposed. I think it is only fair to them and fair to the Senators who are here to know when that critical vote is going to take place.

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

The Senator from Ohio has 1 minute.

Mr. METZENBAUM. Mr. President, I ask unanimous consent to have 3 minutes.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. METZENBAUM. Mr. President, I agree with the majority leader that a motion to table, I think, could be defeated at the moment. I am prepared to say to the majority leader that I would support that motion today or at any other day because I do not want to defeat the Natural Gas Pricing Act and

that is what we are talking about. We are talking about an alternative. We are talking about a bill. We are not talking about defeating the bill, and the issue has been totally confused.

I do not want to kill a bill and neither do many of these other persons who have stood with us on the motion to commit. But I have said to the majority leader Tuesday and on Wednesday, I was prepared personally to bring up the bill and with a time limit because I feel confident of our position, and if we cannot prevail, so be it.

But I have been persuaded by the logic of the position and the arguments that have been made, I have been persuaded by the fact that if the Senator says we are going to vote next Thursday, or next Wednesday, or next Tuesday, nobody is going to be on the floor. Everybody is going to run for home, and, if I did not have to protect the floor, I would be one of those running for home, as well.

I think the bill ought to be brought up because I do not think there is any chance this conference committee report can be tabled.

I say that because I am prepared to work the floor and try to urge people not to vote for a motion to table the conference committee report, and I do not think anybody is going to offer a motion to table the conference committee report. I think my friend from Wyoming would probably be in the same position. Nobody wants to kill the bill.

Mr. HANSEN. Will the Senator yield 15 minutes?

Mr. METZENBAUM. 15 seconds.

Mr. HANSEN. I mean 15 seconds.

He and I are cosponsors of a Dear Colleague letter which says precisely what we want to do. We are not going to try to table this bill. My good friend from West Virginia knows that.

Mr. ROBERT C. BYRD. I do not know it. I do not know it. If the Senators are willing to say they are not going to do that, let us enter into the unanimous consent agreement.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator will be in order. The Senator from Ohio's 3 minutes have expired.

Mr. METZENBAUM. One second more.

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

Mr. ABOUREZK. I ask unanimous consent for 1 minute.

Mr. JACKSON. 1 minute.

The PRESIDING OFFICER. Is there objection?

Mr. METZENBAUM. I cannot say what other people will do, but what I will encourage them to do, and I will work against a motion to table, I can say I, personally, will not offer a motion to table. But as far as the unanimous consent, there are others in this body who have a view as well and, as we know, it takes unanimity.

Mr. ROBERT C. BYRD. Will the Senator yield?

Mr. METZENBAUM. I certainly will.

Mr. ROBERT C. BYRD. I can assure the Senator, if talk lapses, we can put some other bills into the gaps and there will be votes to keep Senators in town.

Mr. METZENBAUM. I say to the Sen-

ator that I truly do not believe anybody will offer a motion to table. I do not believe that.

Mr. ROBERT C. BYRD. I think the Senator is very sincere in saying that, but I think we have to guarantee to our absent colleagues that a surprise motion will not be made.

Mr. ABOUREZK. Mr. President, I ask unanimous consent for 2 minutes on this issue.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. ABOUREZK. Mr. President, I think it is important, I think the Senator from Ohio brought up a very important point. I do not know that anybody in the coalition that is opposing the natural gas bill wants to do away with emergency allocation, and that happens to be in the substitute that we intend to offer when this thing does come up for debate.

I think the real issue of this is, do we want to debate at a time when we can have people's attention, at least those willing to come over to the floor to listen to the debate. That is the issue.

The attempt on the part of the chairman of the Energy Committee and the majority leader to paint this as coming within our control is an attempt that is not valid, Mr. President. What it amounts to is this, the control—

Mr. ROBERT C. BYRD. Will the Senator agree to my request, then?

Mr. ABOUREZK. Pardon me.

The control of the conference papers are within the control of the chairman of the Energy Committee (Mr. JACKSON). He can call up the conference report at any time he wants to.

We have told him that we are here now to protect against losing our rights under a unanimous-consent request.

He can bring that conference report up now and we are willing to go into debate with him and the majority leader when he discusses this matter, and, apparently, for some reason, do not want to call it up, and it goes beyond that. It goes beyond that then not wanting to call it up. They want to lay it off on us as though we had control. We do not have any control. We are here just waiting at their mercy.

We asked Senator JACKSON for the papers and said we would call it up. He said, "You can't have them. I've got them in my pocket," or wherever he keeps them. I think they are too bulky for his pocket. But he has got them and he will not give them up and we are willing to go anytime he wants to offer the report.

Mr. JACKSON. A big dark secret. It is part of that secret meeting we had.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent I may proceed for 1 minute.

The PRESIDING OFFICER. Is there objection?

Mr. SCOTT. Mr. President, reserving the right to object, and I shall not object, this is going on and on. I have told my staff I would be back over there to sign my mail. There should come a time when this terminates.

Mr. ROBERT C. BYRD. I agree, Mr. President.

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

Mr. ROBERT C. BYRD. Mr. President, let me simply say, the Senator from South Dakota has said that the majority leader and the manager of the conference report have it all under their control. That is not quite correct.

Any single Senator who wishes to move to table the moment we bring it up has it under his control to bring about an immediate vote.

Mr. ABOUREZK. The Senator said he can beat us.

Mr. ROBERT C. BYRD. But who wants to do this with 29 Senators out of town?

Mr. ABOUREZK. I do not want that.

Mr. ROBERT C. BYRD. And they will pick the time to move to table.

Mr. ABOUREZK. That is better than the Senator picking the time.

Mr. ROBERT C. BYRD. All right.

Mr. President, I ask the Chair to put my request.

The PRESIDING OFFICER. Is there objection?

Mr. ABOUREZK. I object.

Mr. HANSEN. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. ROBERT C. BYRD. Mr. President, I make one further request, I ask unanimous consent the conference report may be called up with no tabling motion of the conference report to be in order today or tomorrow.

The PRESIDING OFFICER. Is there objection?

Mr. ABOUREZK. Reserving the right to object, the Senator is talking about the natural gas conference report?

Mr. ROBERT C. BYRD. I agree.

Mr. ABOUREZK. And the Senator is trying to limit our rights to offer any kind of tabling motion, or something else, at any time?

Mr. ROBERT C. BYRD. Today or tomorrow. No tabling motion today or tomorrow.

Mr. ABOUREZK. Mr. President, regretfully, I once again have to object.

The PRESIDING OFFICER. Objection is heard.

Mr. LEAHY. Will the Senator withhold that, reserving the right to object?

Mr. ABOUREZK. I will reserve my right.

Mr. LEAHY. As I understand that, Mr. President, all that means is that today and tomorrow there would be no motion to table and everything is fair game Monday, Tuesday, Wednesday, Thursday, or Friday?

Mr. ROBERT C. BYRD. Right, exactly.

Mr. LEAHY. Unless a unanimous-consent request is entered into.

I ask my good friend from South Dakota how that really differs, with the exception of a few hours remaining today and whatever time we are in tomorrow, how that differs from simply bringing up the conference committee report anyway and going forward? It involves only a few hours today, whatever hours we are in tomorrow, and then it is fair game from Monday on.

Mr. ABOUREZK. I ask the Senator from Vermont, if that request were agreed to, how many Senators does he think would stay in town between now and Monday, when it might be fair game?

Mr. LEAHY. If it is any help, I will

stay here until late tomorrow afternoon, then I will go to Vermont.

Mr. ABOUREZK. Aside from the Senator from Vermont.

Mr. LEAHY. I do not know. Perhaps no more—

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

Mr. LEAHY. Reserving the right to object to the unanimous-consent request, perhaps—

The PRESIDING OFFICER. There is no more time remaining.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Senator from Vermont may have 1 minute.

The PRESIDING OFFICER. Is there objection?

Mr. BARTLETT. Mr. President, reserving the right to object, I would like to hear the question the Senator is stating.

Mr. LEAHY. I ask for 1 minute.

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

Mr. LEAHY. Perhaps not very many, but probably no more than if it were brought up anyway.

Mr. ABOUREZK. Mr. President, I object to the request.

The PRESIDING OFFICER. Objection is heard.

JUDICIAL TENURE ACT

The Senate continued with the consideration of the bill.

Mr. ROBERT C. BYRD. Vote.

The PRESIDING OFFICER. The question recurs on the motion to recommit S. 1423.

Mr. LEAHY. Mr. President, I ask unanimous consent that Susan Brannigan, of my office, have the privilege of the floor throughout the remainder of the day.

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

Mr. NUNN. Mr. President, I ask unanimous consent—

The PRESIDING OFFICER. The Chair has not recognized any Senator yet.

We are now on the pending business, which is the recommitment of S. 1423, and the vote is to occur.

Mr. DECONCINI. I move to table, and I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The question is on agreeing to the motion to table the motion to recommit. On this question the yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. CRANSTON. I announce that the Senator from Alabama (Mrs. ALLEN), the Senator from Minnesota (Mr. ANDERSON), the Senator from New Hampshire (Mr. DURKIN), the Senator from Mississippi (Mr. EASTLAND), the Senator from Colorado (Mr. HASKELL), the Senator from Montana (Mr. HATFIELD), the Senator from Minnesota (Mrs. HUMPHREY), the Senator from Louisiana (Mr. JOHNSTON), the Senator from New Hampshire

(Mr. McINTYRE), and the Senator from Illinois (Mr. STEVENSON) are necessarily absent.

I further announce that the Senator from Massachusetts (Mr. KENNEDY) is absent on official business.

I also announce that the Senator from Rhode Island (Mr. PELL) is absent because of illness.

Mr. CURTIS. I announce that the Senator from Tennessee (Mr. BAKER), the Senator from Massachusetts (Mr. BROOKE), the Senator from Kansas (Mr. DOLE), the Senator from New Mexico (Mr. DOMENICI), the Senator from Oregon (Mr. HATFIELD), the Senator from North Carolina (Mr. HELMS), the Senator from Nevada (Mr. LAXALT), the Senator from Idaho (Mr. McCCLURE), the Senator from Illinois (Mr. PERCY), the Senator from Vermont (Mr. STAFFORD), the Senator from Alaska (Mr. STEVENS), and the Senator from Texas (Mr. TOWER) are necessarily absent.

The result was announced—yeas 43, nays 33, as follows:

[Rollcall Vote No. 374 Leg.]

YEAS—43

Bartlett	Glenn	Packwood
Bentsen	Goldwater	Ribicoff
Biden	Gravel	Riegle
Bumpers	Hansen	Roth
Burdick	Hatch	Sasser
Byrd,	Hayakawa	Schweiker
Harry F., Jr.	Hodges	Sparkman
Byrd, Robert C.	Huddleston	Stennis
Cannon	Jackson	Stone
Chiles	Leahy	Talmadge
Clark	Long	Thurmond
Culver	Magnuson	Wallop
Danforth	Morgan	Young
DeConcini	Nelson	Zorinsky
Garn	Nunn	

NAYS—33

Abourezk	Hart	Metzenbaum
Bayh	Hathaway	Moynihan
Bellmon	Helms	Muskie
Case	Hollings	Pearson
Chafee	Inouye	Proxmire
Church	Javits	Randolph
Cranston	Lugar	Sarbanes
Curtis	Mathias	Schmitt
Eagleton	Matsunaga	Scott
Ford	McGovern	Welcker
Griffin	Meicher	Williams

NOT VOTING—24

Allen	Hatfield	McClure
Anderson	Mark O.	McIntyre
Baker	Hatfield,	Pell
Brooke	Paul G.	Percy
Dole	Helms	Stafford
Domenici	Humphrey	Stevens
Durkin	Johnston	Stevenson
Eastland	Kennedy	Tower
Haskell	Laxalt	

So the motion to table the motion to recommit was agreed to.

The PRESIDING OFFICER. There will now be 10 minutes debate on the bill.

Mr. DeCONCINI. Mr. President, I understood that the unanimous-consent agreement only asked for debate if the motion to table did not carry. Am I correct?

The PRESIDING OFFICER. No. There will be a period now for 10 minutes of debate unless Senators yield the time back.

Mr. DeCONCINI. I am ready to yield back.

The PRESIDING OFFICER. Time is yielded back.

Mr. DeCONCINI. Time is yielded back.

The PRESIDING OFFICER. The question then occurs on agreeing to the committee amendment in the nature of a substitute.

Mr. DeCONCINI. That is right.

Mr. President, I ask unanimous consent that the amendment in the nature of a substitute reported by the Committee on the Judiciary be adopted and the bill as thus amended be considered original text for the purpose of further amendment.

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

The bill is open to further amendment.

UP AMENDMENT NO. 1822

Mr. DeCONCINI. Mr. President, I send to the desk an amendment composed of technical corrections to the bill and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Arizona (Mr. DeCONCINI) proposes unprinted amendment No. 1822.

Mr. DeCONCINI. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

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

The amendment is as follows:

TECHNICAL AMENDMENTS TO S. 1423

1. On page 18, the 8th unmarked line, immediately after the word "Conference" insert the words, "of the United States".

2. On page 49, line 21, strike "January 1, 1979" and insert in lieu thereof "October 1, 1979".

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from Arizona.

The amendment was agreed to.

Mr. CRANSTON subsequently said: Mr. President, I was opposed to S. 1423, and was seeking recognition, though I did not make any great effort to obtain recognition, before the vote. However, I ask unanimous consent that a statement of mine on that bill appear in the RECORD before the vote.

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

Mr. CRANSTON. Mr. President, I oppose S. 1423, the Judicial Tenure Act, because I believe it to be unwise legislation which would invite subtle and direct pressures against the independent Federal judiciary, perhaps under circumstances which we cannot foresee today.

We must keep in mind that a Federal judge often sits alone, in the midst of a hostile community, upholding the Constitution and laws of the United States against angry local sentiments. That judge could be subject to strong pressures brought to bear through the mechanisms provided in S. 1423. The committee report merely hints at "letters from constituents, disgruntled litigants, and from attorneys containing various allegations concerning Federal judges" which could be referred to a "body that has the means and ability to investigate well-founded complaints."

It is fair to imagine what could happen. At the very least Federal judges who

render unpopular local decisions will be harassed with a deluge of "complaints" and the possibility of some sort of investigation into his or her continued fitness to sit on the bench.

I do not think that the Founding Fathers' concept of an independent Federal judiciary serving on good behavior included a review of every complaint about some unpopular Federal judge. A reading of Federalist Paper No. 78 suggests instead that the authors of the Constitution believed that Federal judges should be insulated from local sentiments running contrary to their decisions and actions.

I recognize that my own State of California has used effectively machinery similar to that in S. 1423. But what is right for the individual States is not necessarily right for the Federal Government. The Founding Fathers recognized that the States differed among themselves on methods of appointment of judges and term of office. They accepted these vital differences and our Constitution accommodates them.

The guiding principles which ought to settle this matter for the Senate are provided for us by Hamilton in the 78th Federalist Paper. There he writes:

Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments. . . . The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all reservations of particular rights or privileges would amount to nothing.

Hamilton said further that judges are to serve on good behavior. Enforcement of the standard of good behavior is provided by the Constitution in the impeachment power of Congress. There, in Hamilton's view, is where the matter should rest.

S. 1423 joins the legislative branch with the proposed Council on Judicial Tenure in the Judicial Branch in direct ways. The Council itself will be staffed by civil servants who will be beholden to Congress for appropriations, pay increases, benefits, amenities, and operating budget.

There already are numerous involvements of the judiciary with the legislative and executive without adding a new entanglement which more directly than any of the others threatens the independence of the Federal judiciary so essential to the protection of the Constitution.

In summary, S. 1423 changes fundamentally the original Constitution intent to establish an independent Federal judiciary serving on good behavior. If Congress arguably has the power to enact the Judicial Tenure Act, to do so, in my opinion would permanently and seriously alter the balance of Constitu-

tional powers among the three branches of Government.

There are adequate ways of dealing with the legitimate concerns of S. 1423. And if time must be the final cure to specific problems I do not think that is too high a price to pay for preserving the independence of the Federal judiciary.

On these grounds I recommend rejection of S. 1423.

Mr. DECONCINI. Mr. President, there are no further amendments. I ask for third reading and passage of the bill.

The PRESIDING OFFICER. The question is on the engrossment and third reading of the bill.

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

Mr. DECONCINI. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is, Shall the bill pass? On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The second assistant legislative clerk called the roll.

Mr. CRANSTON. I announce that the Senator from Alabama (Mrs. ALLEN), the Senator from Minnesota (Mr. ANDERSON), the Senator from New Hampshire (Mr. DURKIN), the Senator from Mississippi (Mr. EASTLAND), the Senator from Colorado (Mr. HASKELL), the Senator from Montana (Mr. HATFIELD), the Senator from Minnesota (Mrs. HUMPHREY), the Senator from Louisiana (Mr. JOHNSTON), the Senator from New Hampshire (Mr. McINTYRE), and the Senator from Illinois (Mr. STEVENSON), are necessarily absent.

I further announce that the Senator from Massachusetts (Mr. KENNEDY) is absent on official business.

I also announce that the Senator from Rhode Island (Mr. PELL) is absent because of illness.

Mr. CURTIS. I announce that the Senator from Tennessee (Mr. BAKER), the Senator from Massachusetts (Mr. BROOKE), the Senator from Kansas (Mr. DOLE), the Senator from New Mexico (Mr. DOMENICI), the Senator from Oregon (Mr. HATFIELD), the Senator from North Carolina (Mr. HELMS), the Senator from New York (Mr. JAVITS), the Senator from Nevada (Mr. LAXALT), the Senator from Idaho (Mr. McCLURE), the Senator from Illinois (Mr. PERCY), the Senator from Vermont (Mr. STAFFORD), the Senator from Alaska (Mr. STEVENS), and the Senator from Texas (Mr. TOWER) are necessarily absent.

I further announce that, if present and voting, the Senator from Oregon (Mr. HATFIELD) and the Senator from North Carolina (Mr. HELMS) would each vote "yea."

The result was announced—yeas 43, nays 32, as follows:

[Rollcall Vote No. 375 Leg.]

YEAS—43

Bartlett	Garn	Packwood
Bentsen	Glenn	Ribicoff
Biden	Goldwater	Riegle
Bumpers	Gravel	Roth
Burdick	Hansen	Sasser
Byrd,	Hatch	Schweiker
Harry F., Jr.	Hayakawa	Sparkman
Byrd, Robert C.	Jackson	Stennis
Cannon	Leahy	Stone
Chiles	Long	Talmadge
Clark	Magnuson	Thurmond
Culver	Metzenbaum	Wallop
Curtis	Morgan	Young
Danforth	Nelson	Zorinsky
DeConcini	Nunn	

NAYS—32

Abourezk	Hathaway	Moynihan
Bayh	Heinz	Muskie
Bellmon	Hodges	Pearson
Case	Hollings	Proxmire
Chafee	Huddleston	Randolph
Church	Inouye	Sarbanes
Cranston	Lugar	Schmitt
Eagleton	Mathias	Scott
Ford	Matsunaga	Weicker
Griffin	McGovern	Williams
Hart	Mecher	

NOT VOTING—25

Allen	Hatfield,	Percy
Anderson	Paul G.	Stafford
Baker	Helms	Stevens
Brooke	Humphrey	Stevenson
Dole	Javits	Tower
Domenici	Johnston	
Durkin	Kennedy	
Eastland	Laxalt	
Haskell	McClure	
Hatfield,	McIntyre	
Mark O.	Pell	

So the bill (S. 1423) was passed.

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

Mr. THURMOND. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

CORRECTION OF VOTE—S. 1423

(On September 11, 1978, the following proceeding occurred. The foregoing rollcall vote has been corrected to reflect the order of the Senate.)

Mr. McGOVERN. Mr. President, on September 7, on final passage of the Judicial Tenure Act, S. 1423, I was recorded as not voting. I was here and cast a "nay" vote. Indeed, my vote was so recorded by the unofficial recorder, Mr. Patrick Hynes, but was missed by the official recording the vote.

I ask unanimous consent, under those circumstances, that my vote be recorded as I voted. I pointed out that this change will not affect the outcome of the vote.

The PRESIDING OFFICER. Is there objection?

Mr. BAKER. Mr. President, reserving the right to object, and I shall not object, this matter was brought to my attention this afternoon. While it is an extraordinary thing to change a roll call vote, I think it also would be extraordinary not to accept the representations just made by the Senator from South Dakota. Since it does not change the result, since he was kind enough to bring it to our attention before making the request, and since he was in the Chamber and did vote, we have no objection to the RECORD being changed in accordance with the request made by the distinguished Senator.

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

Mr. McGOVERN. Mr. President, I thank the distinguished minority leader.

Mr. DECONCINI. Mr. President, I ask unanimous consent that the Secretary of the Senate be authorized to make technical and clerical corrections in the engrossment of S. 1423, as amended.

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

Mr. DECONCINI. Mr. President, I again wish to thank Senator THURMOND, the ranking Republican member of the Judiciary Committee, Senator EASTLAND, the chairman of the committee, the staff, particularly Mike Altier and Romano Romani, and the ranking Republican member, Mr. WALLOP, and the members of his staff, who gave a great deal of time and effort.

Needless to say, Senator NUNN, the author of this bill, deserves a great deal of credit for the fact that we have had an opportunity to pass it today.

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

Mr. DECONCINI. I yield to the Senator from South Carolina.

The PRESIDING OFFICER. The Senate will be in order. The Chair is now ruling that, without objection, the title amendment is agreed to.

The title amendment is as follows:

A bill to establish a procedure in addition to impeachment for the retirement of disabled members of the Judiciary of the United States and the removal of those whose conduct is or has been inconsistent with the good behavior required by article III, section 1 of the Constitution, and for other purposes.

Mr. NUNN. Mr. President, I simply want to thank again the Senator from South Carolina (Mr. THURMOND), the Senator from Arizona (Mr. DECONCINI), and the able staffs for all the work they have done. I would add the Senator from Wyoming (Mr. WALLOP), and Gordon Griffin, my able legislative assistant, who has worked on this measure long and hard for about 4 years. I think he has done a tremendous job.

The PRESIDING OFFICER. Who seeks recognition?

Mr. THURMOND. The Senator from Arizona yielded to me.

The PRESIDING OFFICER. The Senator from Arizona is recognized.

Mr. DECONCINI. Mr. President, I yield to the Senator from South Carolina.

Mr. THURMOND. Mr. President, I want to commend the able and distinguished Senator from Arizona for the great amount of work he has done on this bill. I think it is a fine accomplishment, and I think it will be a great asset to the administration of justice.

I also commend the able Senator from Georgia for sponsoring this measure as its chief sponsor. I feel that his work on this bill has been most valuable.

Mr. NUNN and Mr. ROBERT C. BYRD addressed the Chair.

The PRESIDING OFFICER. The Senator from Georgia. Does the Senator

from Georgia yield to the majority leader?

Mr. ROBERT C. BYRD. Mr. President, there is nothing before the Senate, is there?

The PRESIDING OFFICER. There is no business before the Senate.

Mr. ROBERT C. BYRD. So any Senator could speak.

The PRESIDING OFFICER. The Senator is correct.

ROUTINE MORNING BUSINESS

Mr. ROBERT C. BYRD. I merely seek recognition to ask unanimous consent that there now be a period for the transaction of routine morning business of not to exceed 30 minutes, with Senators permitted to make statements therein up to 5 minutes each.

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

MESSAGES FROM THE HOUSE

At 11:24 a.m., a message from the House of Representatives delivered by Mr. Berry, one of its reading clerks, announced that the House has passed the bill (S. 3067) to extend the Commission on Civil Rights for 3 years, to authorize appropriations for the Commission, to effect certain changes to comply with other changes in the law, and for other purposes, with amendments in which it requests the concurrence of the Senate.

The message also announced that the House has passed House Joint Resolution 1088, providing financial assistance for the city of New York, in which it requests the concurrence of the Senate.

At 2:57 p.m., a message from the House of Representatives delivered by Mr. Berry, one of its reading clerks, announced that the House agrees to the report of the committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to H.R. 6699, an act to establish a national climate program, and for other purposes.

The message also announced that the House, having proceeded to reconsider H.R. 10929, an act to authorize appropriations for fiscal year 1979 for procurement of aircraft, missiles, naval vessels, tracked combat vehicles, torpedoes, and other weapons and for research, development, test and evaluation for the Armed Forces, to prescribe the authorized personnel strength for each active duty component and the Selected Reserve of each Reserve component of the Armed Forces and for civilian personnel of the Department of Defense, to authorize the military training student loads, to authorize appropriations for civil defense, and for other purposes, returned by the President of the United States with his objections, was not passed.

ENROLLED BILL SIGNED

The message further announced that the Speaker has signed the following enrolled bill:

H.R. 6669. An act to establish a comprehensive and coordinated national climate policy and program, and for other purposes.

The enrolled bill was subsequently

signed by the Acting President pro tempore (Mr. LEAHY).

COMMUNICATIONS

The PRESIDING OFFICER laid before the Senate the following communications, together with accompanying reports, documents, and papers, which were referred as indicated:

EC-4241. A communication from the Acting Director, Defense Security Assistance Agency, reporting, pursuant to law, concerning the Department of the Navy's proposed Letter of Offer to Iran for Defense Articles estimated to cost in excess of \$25 million; to the Committee on Armed Services.

EC-4242. A confidential communication from the Director, Defense Security Assistance Agency, reporting, pursuant to law, concerning the Department of the Navy's proposed Letter of Offer to Australia for Defense Articles estimated to cost in excess of \$25 million; to the Committee on Armed Services.

EC-4243. A communication from the Director, Defense Security Assistance Agency, reporting, pursuant to law, concerning the Department of the Air Force's proposed Letter of Offer to Korea for Defense Articles estimated to cost in excess of \$25 million; to the Committee on Armed Services.

EC-4244. A communication from the Acting Assistant Secretary for Congressional Relations, Department of State, reporting, pursuant to law, that the President has determined that it is in the national interest for the Export-Import Bank of the United States to support transactions involving the purchase or lease of products or services by, for use in, or for sale or lease to, the Hungarian People's Republic; to the Committee on Banking, Housing, and Urban Affairs.

EC-4245. A communication from the President and Chairman, Export-Import Bank of the United States, reporting, pursuant to law, on loan, guarantee and insurance transactions supported by Eximbank during July 1978 to Communist Countries (as defined in section 620(f) of the Foreign Assistance Act of 1961, as amended); to the Committee on Banking, Housing, and Urban Affairs.

EC-4246. A communication from the Acting Secretary, Interstate Commerce Commission, reporting, pursuant to law, that the Commission is unable to render a final decision in Docket No. 36810, Rail-Water Rates, Sea-Land Service, January 1978, within the initially-specified seven-month period; to the Committee on Commerce, Science, and Transportation.

EC-4247. A communication from the Acting Secretary, Interstate Commerce Commission, reporting, pursuant to law, that the Commission is unable to render a final decision in Docket No. 36810, Rail-Water Rates, Sea-Land Service, January 1978, within the initially-specified seven-month period; to the Committee on Commerce, Science, and Transportation.

EC-4248. A communication from the Acting Chairman, Interstate Commerce Commission, transmitting, for the information of the Senate, an updated copy of Appendix M, "Operating Results by Route," of the ICC's March 15, 1978, Amtrak Report; to the Committee on Commerce, Science, and Transportation.

EC-4249. A communication from the Acting Secretary of the Interior, reporting, pursuant to law, that the Mesa Petroleum Company has submitted an application to the Department for repayment of one year's rental totalling \$15,000 for lease OCS-G 2291, South Marsh Island Block 171, offshore Louisiana; to the Committee on Energy and Natural Resources.

EC-4250. A communication from the Assistant Secretary for Policy and Evaluation,

Department of Energy, reporting, pursuant to law, of a delay in submission of the annual report on the Economic Impact of Energy Actions; to the Committee on Energy and Natural Resources.

EC-4251. A communication from the Under Secretary, Department of Energy, transmitting, pursuant to law, a report on Photovoltaic Incentives Options, August 1978; to the Committee on Energy and Natural Resources.

EC-4252. A communication from the Secretary of the Interior and the Secretary of Agriculture, transmitting, at the request of the President, the Twelfth and Thirteenth Annual Reports on the status of the National Wilderness Preservation System; to the Committee on Energy and Natural Resources.

EC-4253. A communication from the Secretary of Transportation, reporting, for the information of the Senate, on the recent determination by the Department of the Interior that there are technical and program constraints on the use of funds from the Abandoned Mine Reclamation Fund for projects to improve roads that serve active coal mines; to the Committee on Energy and Natural Resources.

EC-4254. A communication from the Administrator, General Services Administration, transmitting, pursuant to law, the 1977 Status Report of the GSA covering public buildings projects authorized for construction, alteration and lease in accordance with the Public Buildings Act of 1959; to the Committee on Environment and Public Works.

EC-4255. A communication from the Assistant Administrator for legislative Affairs, Agency for International Development, Department of State, transmitting, pursuant to law, justification of an increase in the funding level of the proposed FY 1978 program in Chile; to the Committee on Foreign Relations.

EC-4256. A communication from the Chairman, Board of Directors, Washington Metropolitan Area Transit Authority, transmitting, pursuant to law, a long-range financial plan to cover funding of all remaining segments of the full Metro system, to provide for federal/state/local cooperative action to service principal and interest on Metro revenue bonds, and to establish more equitable and politically realistic means for paying annual Metrobus/Metrorail operating subsidies; to the Committee on Governmental Affairs.

EC-4257. A communication from the Comptroller General of the United States, transmitting, pursuant to law, a report entitled "What Rules Should Apply to Post-Federal Employment and How Should They Be Enforced?" August 28, 1978; to the Committee on Governmental Affairs.

EC-4258. A communication from the Comptroller General of the United States, transmitting, pursuant to law, a report entitled "Progress in Improving Program and Budget Information for Congressional Use," August 29, 1978; to the Committee on Governmental Affairs.

EC-4259. A communication from the Comptroller General of the United States, transmitting, pursuant to law, a report entitled "The Department of Defense Continues to Improperly Subsidize Foreign Military Sales," August 25, 1978; to the Committee on Governmental Affairs.

EC-4260. A communication from the Comptroller General of the United States, transmitting, pursuant to law, a report entitled "Problems and Outlook of Small Private Liberal Arts Colleges," August 25, 1978; to the Committee on Governmental Affairs.

EC-4261. A communication from the District of Columbia Auditor, transmitting, pursuant to law, (1) a report entitled "The City Should Consider Whether an Exemption From Deed Recordation Tax Which Benefits Developers Should Be Restricted"; (2) a letter to Council Chairman Sterling Tucker re Job Corps Centers at Junior Village and Maple Glen; (3) a letter report to Mayor and Council re Elimination of GS-2 Positions

from Workforce; (4) a letter to Councilmember Marlon Barry re various aspects of the District's Supplemental Food Program; (5) a report entitled "Preference of Police Officers for Police District Assignment and Station-house Duty Has Created a Racially and Sexually Imbalanced Work Force"; (6) a letter to Councilmember David Clarke re assumptions used by the Department of Finance and Revenue in estimating revenue loss; (7) a report entitled "Management of Contracts for Services to Public Housing Projects"; (8) a letter report to Mayor and Council re reprogramming of funds at budget category level; (9) a letter report to Mayor and Council re safety and health inspections of food vendors; and (10) a letter to Councilmember David Clarke re overtime records of the Metropolitan Police Department; to the Committee on Governmental Affairs.

EC-4262. A communication from the Acting Secretary of the Interior, transmitting, pursuant to law, a report on the organization of leasing operations of the Federal Government; to the Committee on Governmental Affairs.

EC-4263. A communication from the Assistant Secretary for Administration, Department of Transportation, transmitting, pursuant to law, a modification to an existing system of records; to the Committee on Governmental Affairs.

EC-4264. A communication from the Administrator, Veterans Administration, transmitting, pursuant to law, a report on the new system for the VA Fee Basis Medical and Pharmacy Program; to the Committee on Governmental Affairs.

EC-4265. A communication from the Chairman, Council of the District of Columbia, transmitting, pursuant to law, an act adopted by the Council on July 25, 1978, which would amend the Condominium Act of 1976, D.C. Law 1-89 (Act 2-260); to the Committee on Governmental Affairs.

EC-4266. A communication from the Chairman, Council of the District of Columbia, transmitting, pursuant to law, an act adopted by the Council on July 25, 1978, which would order the closing of a public alley and the dedication of certain other land for public alley purposes (Act 20261); to the Committee on Governmental Affairs.

EC-4267. A communication from the Chairman, Council of the District of Columbia, transmitting, pursuant to law, an act adopted by the Council on July 25, 1978, which would order the closing of part of an east-west public alley and the dedication of certain other land for public alley purposes (Act 2-262); to the Committee on Governmental Affairs.

EC-4268. A communication from the Chairman, Council of the District of Columbia, transmitting, pursuant to law, an act adopted by the Council on July 25, 1978, which would create employment opportunities for blind and other severely handicapped individuals by assuring a market for products and services provided by them, and for other purposes (Act 2-263); to the Committee on Governmental Affairs.

EC-4269. A communication from the Chairman, Council of the District of Columbia, transmitting, pursuant to law, an act adopted by the Council on July 25, 1978, which would order the closing of Eye Street, N.W., between 23rd and 24th Streets, N.W. (S.O. 75-34) (Act 2-259); to the Committee on Governmental Affairs.

EC-4270. A secret communication from the Comptroller General of the United States, transmitting, pursuant to law, a report on the major issues of the Army's ballistic missile defense program and related aspects of strategic offensive weapons; to the Committee on Governmental Affairs.

EC-4271. A communication from the Chairman and General Counsel, National Labor Relations Board, transmitting, pursuant to law, the Board's report for a proposed new

system of records; to the Committee on Governmental Affairs.

EC-4272. A communication from the Deputy Secretary, Department of Energy, transmitting, pursuant to law, a report for a proposed new system of records; to the Committee on Governmental Affairs.

EC-4273. A communication from the Deputy Assistant Secretary of Defense (Administration), transmitting, pursuant to law, a report for a proposed new system of records; to the Committee on Governmental Affairs.

EC-4274. A communication from the Deputy Assistant Secretary of Defense (Administration), transmitting, pursuant to law, a report for a proposed new system of records; to the Committee on Governmental Affairs.

EC-4275. A communication from the Secretary of Health, Education, and Welfare, transmitting, pursuant to law, the first annual report of the Director of the National Institute of Arthritis, Metabolism, and Digestive Diseases on arthritis activities under the Arthritis Plan; to the Committee on Human Resources.

EC-4276. A communication from the Chairman, National Institute of Education, Department of Health, Education, and Welfare, transmitting, pursuant to law, the fourth annual report of the National Council on Educational Research, Reflections and Recommendations; to the Committee on Human Resources.

EC-4277. A communication from the Chairman, National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, transmitting, pursuant to law, a report entitled "Report and Recommendations: Institutional Review Boards"; to the Committee on Human Resources.

EC-4278. A communication from the Commissioner, Immigration and Naturalization Service, Department of Justice, transmitting, pursuant to law, orders in cases of certain aliens who have been found admissible to the United States under the Immigration and Nationality Act; to the Committee on the Judiciary.

EC-4279. A communication from the Commissioner, Immigration and Naturalization Service, Department of Justice, transmitting, pursuant to law, 431 reports covering the period July 31 through August 14, 1978, concerning visa petitions which the Service has approved according to the beneficiaries of such petitions third and sixth preference classification under the Immigration and Nationality Act, as amended; to the Committee on the Judiciary.

EC-4280. A communication from the Deputy Comptroller General of the United States, transmitting, pursuant to law, a report and recommendation concerning the claims for relief from liability to the United States of 17 employees of the Long Beach Naval Shipyard, Department of the Navy, Long Beach, California, whose names appear in the report; to the Committee on the Judiciary.

EC-4281. A communication from the Certified Public Accountants, Future Farmers of America, transmitting, pursuant to law, a financial report as of June 30, 1978 and 1977, and the related statements of income and retained income and changes in financial positions; to the Committee on the Judiciary.

EC-4282. A communication from the Chairman, Federal Election Commission, transmitting the Commission's fiscal year 1980 appropriation request; to the Committee on Rules and Administration.

POM-780. A resolution adopted by the Legislature of the State of California; to the Committee on Commerce, Science, and Transportation:

"HOUSE RESOLUTION No. 66

"Whereas, Aircraft noise is a major problem affecting the present viability and future growth of this country's air transportation system; and

"Whereas, Over 6 million Americans and 900,000 acres of land are impacted by aircraft noise; and

"Whereas, Airport proprietors have expended over \$200 million to acquire noise impacted land around airports; and

"Whereas, Potential noise liability suits may measure in the billions of dollars; and

"Whereas, Future airport development and expansion face long delays; and

"Whereas, Aircraft noise is present in every state in the Union which makes this a national rather than a local problem; and

"Whereas, A strong national policy and national funding source are necessary; and

"Whereas, The United States House of Representatives has before it for floor action the week of August 7 HR 8729 and the United States Senate Finance Committee is holding S 3279 pending a vote by the house on HR 8729; and

"Whereas, Title I of the bills is aimed at making compatible those lands adjacent to airports; and

"Whereas, Title II increases airport grant levels of the Airport and Airways Development Act of 1970; and

"Whereas, Title III of HR 11986 and S 3279 provide the funding to re-engine and replace noisy aircraft; now, therefore, be it

Resolved by the Assembly of the State of California, That the Congress of the United States is hereby requested to favorably act on HR 8729, HR 11986, and S 3279; and be it further.

Resolved, That the Chief Clerk of the Assembly transmit a copy of this resolution to each Senator and Representative from California in the Congress of the United States."

POM-781. A concurrent resolution adopted by the legislature of the State of Iowa; to the Committee on Commerce, Science, and Transportation:

"HOUSE CONCURRENT RESOLUTION 112

"Whereas, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee Road) provides rail transportation service to many Iowa counties and directly serves many Iowa communities and population centers; and

"Whereas, the Milwaukee Road rail system is an essential portion of Iowa's grain and industrial transportation system; and

"Whereas, this rail transportation system is essential to Iowa's ability to participate in the international grain and industrial market; and

"Whereas, sales of Iowa grain and industrial exports help to substantially reduce the United States' deficit balance of payments; and

"Whereas, many of Iowa's farms and industries are directly dependent on the Milwaukee Road and will incur substantial financial hardship if the Milwaukee Road ceases or suspends operation; and

"Whereas, there are over 13,000 employees on the Milwaukee Road whose employment will be adversely affected even to the point of furlough or termination, if the Milwaukee Road were to cease or suspend operation; and

"Whereas, the existing and anticipated long range energy shortage requires that energy efficient means of hauling bulk goods for long distances be preserved and protected; and

"Whereas, the calculated shortage of box-cars and jumbo hopper cars the week of

PETITIONS

The PRESIDING OFFICER laid before the Senate the following petitions and memorials, which were referred as indicated:

February 6, 1978, was 3,000 in Iowa and 7,000 in the Midwest; and

"Whereas, the Milwaukee Road's financial problems have been grievously aggravated by the intolerable delays of the Interstate Commerce Commission in dealing with merger requests of the Milwaukee Railroad and other railroad companies; and

"Whereas, the delays by the Federal Railroad Administration in processing and approving loan and grant applications have further weakened the Milwaukee Road; and

"Whereas, federal aid and regulatory responsiveness is essential for the Milwaukee Road to continue to provide transportation services and employment and pay property and corporate taxes in Iowa and elsewhere; Now therefore,

"Be it resolved by the House of Representatives, the Senate concurring, That the President of the United States, the Secretary of Transportation and the Federal Railroad Administration act quickly in providing the necessary loans and grants to the Milwaukee Road; and

"Be it further resolved, That the President of the United States, the Secretary of Transportation, the Interstate Commerce Commission, the Federal Railroad Administration and Congress consider and act on a permanent solution to the midwest rail crisis; and

"Be it further resolved, That copies of this Resolution shall be transmitted to the President of the United States, the President of the Senate of the United States, the Speaker of the House of Representatives of the United States, the Secretary of Transportation, the administrator of the Federal Railroad Administration, and the Iowa Representatives and Senators in Congress.

"We, Dale M. Cochran, Speaker of the House and Arthur A. Neu, President of the Senate, and David L. Wray, Chief Clerk of the House and Kevin P. Light, Secretary of the Senate hereby certify that the above and foregoing Resolution was adopted by the House of Representatives and the Senate of the Sixty-seventh General Assembly, Second Regular Session."

POM-782. A resolution adopted by the National Water Supply Improvement Association, relating to reauthorization of the Federal Desalination program; to the Committee on Environment and Public Works.

POM-783. A joint resolution adopted by the Legislature of the State of California; to the Committee on Finance;

"ASSEMBLY JOINT RESOLUTION No. 92

"Whereas, California's unique environment and its enterprising farmers have combined for a total agricultural production in excess of nine billion dollars; and

"Whereas, California produces over 200 agricultural commodities and is unique among the states in the diversity of its agricultural production; and

"Whereas, Exports of California's agricultural products generate over 80,000 jobs and provide a favorable balance of trade surplus; and

"Whereas, Agriculture is California's number one industry, and there is a worldwide demand for the agricultural products produced in California; and

"Whereas, Despite the demand for these commodities, some nations unfairly penalize California agricultural exports through illegal quotas, discriminatory duties and other nontariff barriers; and

"Whereas, The removal of these trade barriers would permit the expansion of California's agricultural exports resulting in expanded job opportunities and in improvement in the nation's balance of payments; and

"Whereas, Negotiators from the Office of the Special Trade Representative, the International Trade Commission, and the Department of Agriculture are presently involved in negotiations aimed at reducing

these illegal trade barriers; 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 both the Congress and the President of the United States to vigorously negotiate the reduction of unfair barriers to free trade which currently exist and, thereby, expand the international commerce in agricultural products, including the agricultural commodities produced in California; 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."

REPORTS OF COMMITTEES

The following reports of committees were submitted:

By Mr. ABOUREZK, from the Select Committee on Indian Affairs, with amendments:

S. 2502. A bill to authorize the States and the Indian tribes to enter into mutual agreements and compacts respecting jurisdiction and governmental operations in Indian country (Rept. No. 95-1178).

By Mr. LONG, from the Committee on Finance, with an amendment and an amendment to the title:

H.R. 2852. An act to amend the Internal Revenue Code of 1954 to provide that refunds of the taxes on gasoline and special fuels shall be made to aerial applicators in certain cases (Rept. No. 95-1179).

By Mr. LONG, from the Committee on Finance, without amendment:

S. Res. 553. An original resolution waiving section 402(a) of the Congressional Budget Act of 1974 with respect to the consideration of H.R. 2852. Referred to the Committee on the Budget.

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. PROXMIRE:

S. 3485. A bill to amend the Federal Reserve Act to provide for maintenance of reserves in order to facilitate the implementation of monetary policy, to promote competitive equality among depository institutions, to require the imposition of service charges for services by Federal Reserve banks, and for other purposes; to the Committee on Banking, Housing, and Urban Affairs.

By Mr. STENNIS:

S. 3486. A bill to authorize appropriations for fiscal year 1979 for procurement of aircraft, missiles, naval vessels, tracked combat vehicles, torpedoes, and other weapons and for research, development, test and evaluation for the Armed Forces, to prescribe the authorized personnel strength for each active duty component and the Selected Reserve of each Reserve component of the Armed Forces and for civilian personnel of the Department of Defense, to authorize the military training student loads, to authorize appropriations for civil defense, and for other purposes; to the Committee on Armed Services.

By Mr. BELLMON (for himself and Mr. BARTLETT):

S. 3487. A bill to change the name of Clayton Lake in the State of Oklahoma to Sardis Lake; to the Committee on Environment and Public Works.

By Mr. CASE:

S. 3488. A bill for the relief of Yaroslav L. Tiajloff; to the Committee on the Judiciary.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. PROXMIRE:

S. 3485. A bill to amend the Federal Reserve Act to provide for maintenance of reserves in order to facilitate the implementation of monetary policy, to promote competitive equality among depository institutions, to require the imposition of service charges for services by Federal Reserve banks, and for other purposes; to the Committee on Banking, Housing, and Urban Affairs.

MONETARY POLICY IMPROVEMENT ACT OF 1978

Mr. PROXMIRE. Mr. President, I am today introducing the Monetary Policy Improvement Act of 1978. The legislation is designed to deal with the problems associated with the erosion of membership in the Federal Reserve System. The objectives of the bill are to:

First, strengthen the ability of the Federal Reserve Board to conduct monetary policy;

Second, promote greater competitive equality between financial institutions;

Third, enhance the safety and soundness of the banking system;

Fourth, improve the efficiency of the Federal Reserve payments system; and

Fifth, minimize any loss in Treasury revenues.

I am introducing this bill primarily for discussion purposes and in an effort to provide the Senate Banking Committee with a lower cost alternative to the various membership proposals that have been advanced. These include the original Fed proposal, S. 3304, which I introduced by request, S. 3461 introduced by Senator BROOKE, and H.R. 13847 introduced by Congressman REUSS together with the changes to that bill recommended by the Federal Reserve Board and by the staff of the House Banking Committee.

The House Banking Committee is meeting on September 7 to begin discussing the Fed membership issue and the Senate Banking Committee has scheduled a corresponding mark-up on September 19 and 20. While I am reasonably flexible on the details of any membership proposal, I am concerned about the cost to the Treasury. Accordingly, if the Congress does act on the Fed membership issue, I do believe the cost to the Treasury, and ultimately the American taxpayer should be held to a minimum. The legislation I am introducing would result in an annual net, after-tax revenue loss to the Treasury of only \$41 million. This is about what the Treasury will lose anyway, without legislation if Federal Reserve membership continues to decline at current rates.

SUMMARY OF MAIN FEATURES

The principal features of the bill are as follows:

First, Universal reserve requirements: All federally insured depository institutions with deposits above a specified amount would be required to maintain reserves against those deposits in accord-

ance with the reserve ratios prescribed by law. The Federal Reserve Board is authorized to vary those ratios within a limited range for monetary policy reasons.

Federally insured commercial banks would be required to maintain reserves against their combined demand and savings deposits in excess of \$40 million and against their time deposits in excess of \$40 million. A savings deposit is defined as a deposit with a maturity of 30 days or less and a time deposit is defined as one with a maturity of more than 30 days.

All other federally insured depository institutions or members of the Federal Home Loan Bank System including mutual savings banks, savings and loan associations, and credit unions would be required to maintain reserves against their transaction accounts in excess of \$40 million. A transaction account is defined to include a demand deposit, a NOW account, a share draft account, or other account from which payments may be made to third parties.

Second. Simplified reserve requirements: Under the present hodge podge system, the Federal Reserve Board has prescribed 12 separate reserve ratios depending upon the type of deposit, its maturity, and the size of the bank. The proposed legislation would substantially simplify this complex structure by prescribing just three reserve ratios for all commercial banks subject to reserve requirements:

- (i) 9 percent against demand and savings deposits;
- (ii) 4 percent against shorter term time deposits with initial maturities of less than 180 days; and
- (iii) 1 percent against longer term time deposits with initial maturities of 180 days or more.

Other depository institutions subject to reserve requirements would be required to maintain a 9-percent reserve against their transaction balances.

Third. Reporting requirements: The Federal Reserve Board is authorized to require periodic financial reports from all depository institutions in order to perform its monetary policy responsibilities. Institutions not subject to reserve requirements can provide these reports to their respective supervisory agencies.

Fourth. Access to discount window and other Fed services: All depository institutions required to maintain reserves and who are not members of the Federal Reserve System would be automatically entitled to all of the privileges of membership including access to the discount window. In addition, all nonmember banks who, because of their size are not subject to reserve requirements, would be given access to the discount window upon a certification of solvency from the FDIC.

Fifth. Pricing of Fed services: The Federal Reserve Board is required to publish a schedule of fees for its services to commercial banks by July 1, 1979, and to begin charging for these services by July 1, 1980. All depository institutions would be able to purchase these services on the same terms and conditions as member banks. The fees would take into account an allowance for taxes and the cost of capital.

EFFECT OF THE PROPOSAL

First. Effect on financial institutions: The system of universal reserve requirements together with the \$40 million exemptions as proposed in the legislation would halt the decline in the percentage of bank deposits subject to reserve requirements, while at the same time relieving most banks from the burden of maintaining reserves. The bill would subject only 1,723 banks to reserve requirements compared to a present total of 5,664. Moreover, because the bill authorizes banks to count their vault cash against their reserve requirements, only 1,117 banks would have to keep reserves at a Federal Reserve bank. This includes 762 banks that are presently members of the Federal Reserve System and 355 nonmember banks. Some of these nonmember banks covered by reserve requirements would be covered anyway by the International Banking Act recently passed by the Congress.

Of the 5,664 current member banks, 4,523 would be relieved by reserve requirements entirely; 379 would be able to meet all of their reserve requirements with their present amount of vault cash; 706 would have their present reserve requirements reduced; and 56 would have their present reserve requirements increased. The bill provides that any increase in reserve requirements would be phased in gradually over 4 years for any member bank facing higher reserve requirements and for any nonmember bank subject to reserve requirements.

The bill also would apply reserve requirements to nonbank depository institutions offering transaction accounts that are equivalent to demand deposits. However, because of the \$40 million exclusion, and because many thrift institutions still lack the legal authority to offer transaction accounts, and because of the ability to satisfy reserve requirements with vault cash, less than 10 nonbank institutions would actually be required to maintain reserves with the Fed, according to estimates supplied by the Federal Reserve staff. Thus, the application of reserve requirements to all depository institutions offering checking-type accounts would have virtually no financial impact on the thrift industry; but it would foreclose a potential source of erosion in monetary control if, in the future, Congress and the States were to provide thrift institutions with additional powers to offer checking or similar type accounts. It also insures a greater degree of competitive equality between bank and thrift institutions in competing for the public's checking account business.

Second. Effect on monetary policy: The legislation would strengthen in a number of ways the ability of the Federal Reserve Board to perform its monetary policy responsibilities.

First, the bill would halt the decline in the portion of total bank deposits subject to reserve requirements. The erosion in the Federal Reserve's membership has reduced the percentage of total deposits at banks subject to reserve requirements from approximately 84 percent in 1961 to less than 73 percent today. Unless action is taken to halt this decline, a further erosion in Fed membership could

begin to weaken the ability of the Federal Reserve to control the Nation's money supply. The system of universal reserve requirements proposed in the bill together with the \$40 million exclusions would cover 71.6 percent of total bank deposits. Thus, the Fed's ability to control the monetary aggregates would be stabilized.

Second, the simplified structure of reserve requirements proposed in the bill would make it far easier for the Fed to predict and control future changes in the money supply. Under the present system, if a consumer transfers funds from his checking account to his savings account at his bank, the bank's reserve requirement against those funds could decline from 16¼ to 3 percent. These freed-up reserves could produce a multiple expansion in the money supply unless offset by the Federal Reserve. Similar complications arise when funds are transferred from a checking account into a NOW account or from a checking account in a large member bank to a checking account in a medium or similar sized member bank. In theory, the Fed can predict these transfers and take them into account when formulating monetary policy. However, innovations in funds transfer technology have made it far easier for consumers and businesses to shift funds between their accounts, thus complicating the Fed's monetary projections.

Many of these problems would be alleviated under the proposed legislation. The bill would apply the same reserve requirement against demand deposits, savings accounts, and NOW accounts. Thus, deposit shifts between these types of accounts would have no monetary significance. Also, the uniform 9 percent reserve requirement against demand deposits would reduce the complications arising from shifts in demand deposits between different size banks which, under the present system, have reserve requirements ranging from 7 to 16¼ percent.

Monetary policy would be further strengthened by authorizing the Fed to require timely financial reports from non-member financial institutions. The lack of timely data from these institutions has, in the past, caused the Fed to make monetary policy judgments on the basis of incomplete and inadequate information. In order to minimize reporting burdens, the bill further provides that these reports may be provided through an institution's regular supervisory agency.

Finally, monetary policy would be strengthened and the safety and soundness of the banking system would be enhanced by permitting all banks to meet their liquidity needs through the Federal Reserve's discount window. Under the current system, a sizable portion of the banking industry is excluded from the discount window except under severe emergency conditions. This exclusion can dilute the aggressiveness of the Federal Reserve Board in pursuing a restrictive monetary policy. There are times when the Board may hesitate to impose the degree of restraint called for by economic conditions in order to avoid the

potential liquidity strains that could be visited upon non-member banks. Guaranteeing all nonmember banks access to the discount window will allow the Board a great degree of freedom in conducting monetary policy.

Third. Effect on competitive equality: On balance, the legislation would provide more competitive equality between different classes of financial institutions. Our present system creates numerous imbalances in the competition for deposits, since reserve requirements are not applied uniformly. A 1 percentage point reserve requirement raises the effective cost of funds by as much as 10 basis points. This extra cost can place member banks at a substantial disadvantage compared to nonmember banks and thrift institutions.

Under the proposed bill, the system of universal reserve requirements will place member and nonmember banks on a more equal footing. All banks would be subject to the same reserve requirements regardless of membership status.

The bill also helps to equalize competition between commercial banks and thrift institutions in the market for certificates of deposits (CD's). Under the present system, a member bank is required to maintain a reserve of 6 percent against its short term CD's in excess of \$5 million with initial maturities of less than 180 days. Under the proposed bill, this reserve requirement would be reduced to 4 percent. The bill further helps to restore competitive parity in the longer term CD market where, under the present system, member banks are required to maintain a reserve of 2½ percent against CD's in excess of \$5 million that are between 179 days and 4 years in maturity. This would be reduced to 1 percent under the proposed bill.

The bill would also provide further competitive equality between banks by guaranteeing that all nonmember banks shall have access to the discount window. This access would be automatic in the case of the 355 nonmember banks required to keep reserves at the Federal Reserve. However, the remaining 8,374 nonmember banks would also be given ready access to the discount window upon a certification of solvency from the FDIC. Under current Federal Reserve Board interpretations of the Federal Reserve Act, nonmember banks cannot be given access to the discount window except under severe emergency conditions.

Access to the Fed's discount window can enhance the long-term viability of our smaller, locally controlled banks. By providing them with an alternative source of credit for liquidity needs, it also reduces their dependence on their larger correspondent banks. This in turn should strengthen the ability of smaller banks to compete more equally with their big city rivals.

Finally, the bill promotes competitive equality by requiring that all depository institutions be able to purchase Federal Reserve services on the same terms and conditions that apply to member banks. This will insure that the Federal Reserve pricing proposals do not discriminate against nonmember institutions.

On the negative side, the bill would raise the reserve requirement on savings

deposits from 3 to 9 percent, thus affecting the ability of the larger banks to compete for these deposits with thrift institutions and with smaller banks. However, it should be noted that these requirements apply only to 1,117 banks. For 4,902 smaller member banks, the present 3 percent reserve requirement against savings deposits would be eliminated, thereby strengthening the ability of these banks to compete more equally with thrift institutions.

Fifth. Effect on Treasury revenues: This legislation would affect the revenues of the Federal Reserve banks and ultimately the Treasury in a number of ways:

First, the revised reserve requirements together with the \$40 million exemptions would cost the Treasury \$682 million in pre-tax revenues.

Second, the application of reserve requirements to the larger, nonmember banks will result in a \$140 million revenue increase to the Treasury before taxes.

Third, the mandate to begin charging for Federal Reserve services would produce an additional \$451 million in pre-tax revenues to the Treasury. This assumes the Federal Reserve's estimate of the cost of these services—\$410 million—would be increased by 10 percent to reflect the cost of capital and taxes that would be incurred by a private firm providing similar services.

The combined effect of these changes would result in a pre-tax revenue loss of \$91 million. However, these net losses in revenue to the Treasury would also constitute a corresponding net gain in income to the banking system or its customers. This additional income would be subject to taxation. Assuming a marginal tax rate of 55 percent, the net after tax revenue loss to the Treasury would be approximately \$41 million.

While \$41 million a year is a substantial amount, it is far less than the cost of other Fed membership proposals that have been advanced. Moreover, according to estimates by the Federal Reserve, the Treasury will lose about this much revenue anyway if the decline in Fed membership continues at the same rate that has occurred over the last several years. Finally, the reserve loss must be evaluated in terms of the corresponding benefits. It is clearly worth something to strengthen the ability of the Federal Reserve to conduct monetary policy. Also, the efficiency of the banking and payments system will be enhanced through pricing of Fed services and through the greater degree of competitive equality that will result from the legislation. These benefits will accrue to the public generally in the form of lower prices for banking services.

Mr. President, I ask unanimous consent that a section-by-section analysis of the bill be printed in the RECORD.

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

MONETARY POLICY IMPROVEMENTS ACT OF 1978
SECTION-BY-SECTION ANALYSIS

Section 1. Title. This section indicates that the title of the Act is the "Monetary Policy Improvements Act of 1978."

Section 2. Definitions. This section defines "depository institution" as any insured bank,

mutual savings bank, savings bank, insured credit union, and savings and loan association. It also indicates that for the purposes of collection of checks, drafts, or maturing notes and bills by Federal Reserve Banks any association which consists of depository institutions will itself be considered a depository institution.

This section also defines "transaction account" as a deposit or account on which the holder of the account is allowed to make withdrawals by any type of negotiable or transferable instrument for the purpose of making payments to third persons. Transaction accounts include demand deposits, negotiable order of withdrawal (NOW) accounts, and share draft accounts.

Section 3. Transaction Accounts. This section indicates that the Federal Reserve Board, in consultation with the Board of Directors of the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, and the National Credit Union Administration, may determine on account or deposit to be a transaction account where such accounts may be used to make payment or transfer funds to a third person.

Section 4. Reporting requirements. In this section the Federal Reserve Board is authorized to collect reports from any depository institution of the institution's liabilities and assets as may be necessary or desirable to enable the Board to discharge its responsibility to conduct monetary policy. In cases where the depository institution is subject to reserve requirements set by the Board, such reports would be made directly to the Federal Reserve. For all other depository institutions the reports would be made to the appropriate Federal regulatory agency, or to a state officer or agency, and through such agency to the Board. This section indicates that the Board shall endeavor to avoid unnecessary reporting burdens. Different reporting requirements may be made in different classes of depository institutions.

Section 5. Reserve requirements. This section indicates the basic framework for reserve requirements against deposits held by depository institutions. Reserve requirements would be set by the Federal Reserve Board and would be applicable to deposits held by insured banks and to transaction accounts at other depository institutions. Reserve requirements would apply to the total of demand and savings deposits in excess of \$40,000,000 and to time deposits in excess of \$40,000,000 at insured banks. Banks may apply the \$40,000,000 exemption for time deposits against such deposits with initial maturities of 179 days or less first and other time deposits second. For nonbank depository institutions reserves would apply to transaction accounts which in the aggregate exceed \$40,000,000.

Reserve requirements would be uniform for all institutions regardless of size. The initial reserve requirement and the range within which the Federal Reserve Bank may set the reserve requirement by regulation (solely for the purpose of implementing monetary policy) are as follows: (1) total of net demand deposits and savings deposits at banks and transaction accounts at other depository institutions, 9 percent within a range of 8 to 10 percent; (2) time deposits with initial maturities of 179 days or less, 4 percent within a range of 2 to 6 percent; and (3) time deposits with initial maturities of 180 days or more, 1 percent within a range of ½ of 1 percent to 2 percent.

This section also provides that in extraordinary circumstances the Federal Reserve Board may impose reserve requirements outside the limits prescribed for a period not exceeding 30 days, which may be extended for an additional 30 days. Exercise of this authority requires the Board to promptly transmit to Congress the reasons for its use of this authority.

For banks subject to reserve requirements, the Board is also permitted to impose re-

serve requirements against net balances owed by domestic offices of banks in the United States to their related foreign offices and to nonrelated foreign banks and against their borrowings based on loans to United States residents made by overseas offices of banks with offices in the United States and assets held by foreign offices of banks in the United States acquired from their domestic banks, if such action is necessary to the implementation of monetary policy.

Reserve requirements for any depository institution not a member bank on August 30, 1978 would be phased in over a period of four years. During the first year required reserves would be reduced by 75 percent, during the second year by 50 percent, and during the third year by 25 percent.

For any member bank which would have its reserve requirements increased by this legislation, the additional reserve requirement would be phased in over a four year period in a similar manner.

This section also indicates that in the case of affiliated banks and affiliated non-bank depository institutions, the total deposit liabilities exempted from reserve requirements shall not exceed in the aggregate the product resulting from multiplying the number of institutions in such affiliated group on August 1, 1978 by \$40,000,000 for each such exemption. For each such exemption, no more than \$40,000,000 shall be exempted at any individual bank or non-bank depository institution.

The new reserve requirement structure in this section would result in a reduction in reserve requirements for many member banks and for the banking system as a whole. In order to provide for an orderly transition period, the Board may implement the new reserve requirements on a gradual basis over a period of 24 months.

Any depository institution maintaining reserves as required by the Federal Reserve Board would be entitled to all the privileges of membership in the Federal Reserve System, except the holding of stock in, or voting for any director of, a Federal Reserve Bank.

Nonmember banks not maintaining reserves would be entitled to access the Federal Reserve discount window. The Federal Reserve Board may as a condition of access require certification of solvency of such bank from the Federal Deposit Insurance Corporation.

Section 6. Form of reserves. Reserves held to meet the reserve requirement set by the Board may be in the form of (1) balances in a Federal Reserve bank at which the depository institution is a member or at which it maintains an account; (2) balances maintained by a nonmember depository institution in a bank that maintains required reserve balances at a Federal Reserve bank, in a Federal Home Loan Bank, or in a central liquidity facility that may be established for credit unions, provided that such funds are then passed-through to a Federal Reserve bank; or (3) in the form of vault cash. The proportion of vault cash that may be counted to satisfy reserve requirements must be identical for all depository institutions. Balances received by a bank from another depository institution that are used to satisfy reserve requirements on such depository institution would not be subject to reserve requirements imposed on the receiving bank or to assessment imposed on such bank pursuant to the Federal Deposit Insurance Act.

Section 7. Pricing of services. This section requires the Federal Reserve Board to price services provided by the Federal Reserve System at a market cost and to provide access to such services to all depository institutions on the same terms and conditions. Such services are currently provided by banks without charge. The Board would be required to publish for comment a set of

pricing principles and a proposed schedule of fees for Federal Reserve services by July 1, 1979, and to institute pricing of its services by July 1, 1980.

The pricing principles would be required to take into account the taxes that would be paid and the capital costs that would be incurred if privately owned organizations provided similar services. Due regard would be given to competitive factors and to the provision of an adequate level of services nationwide.

Section 8. Committee on money substitutes. This section would require that the Federal Reserve Board establish a committee to examine questions related to the imposition of reserve requirements against bank and nonbank liabilities that are substitutes for demand deposits. The Committee would be composed of five members to be appointed by the Board and the individuals would have broad backgrounds on monetary affairs, economic policy, or finance. The appointees could not be United States Government employees, or employees, officers, or directors of a Federal Reserve bank.

The committee would conduct a thorough study and investigation of (1) the need for legal reserve requirements against short-term liabilities such as nonbank "federal funds", security repurchase agreements, Eurodollars, security dealer repurchase agreements, liquid asset mutual funds, cash management services, and travelers checks; (2) the appropriate level of reserve requirements against each type of money substitute; and (3) the need for the Federal Reserve Board to have flexibility to change such reserve requirements.

The committee would be required to include in its report to the Board recommendations for administrative actions and legislation.

Section 9. Authority of State bank supervisors. This section indicates that nothing in this Act or in amendments made by this Act shall be construed as derogation of the authority of any state bank supervisor over any institution it supervises by state law.

Section 10. Effective date. The new reserve requirements included in Section 5 and 6 shall take effect on the first day of the sixth calendar month after enactment. All other sections take effect on the date of enactment.

By Mr. STENNIS:

S. 3486. A bill to authorize appropriations for fiscal year 1979 for procurement of aircraft, missiles, naval vessels, tracked combat vehicles, torpedoes, and other weapons and for research, development, test and evaluation for the Armed Forces, to prescribe the authorized personnel strength for each active duty component and the Selected Reserve of each Reserve component of the Armed Forces and for civilian personnel of the Department of Defense, to authorize the military training student loads, to authorize appropriations for civil defense, and for other purposes; to the Committee on Armed Services.

(The remarks of Mr. STENNIS when he introduced the bill appear elsewhere in today's proceedings.)

By Mr. BELLMON (for himself and Mr. BARTLETT):

S. 3487. A bill to change the name of Clayton Lake in the State of Oklahoma to Sardis Lake; to the Committee on Environment and Public Works.

● Mr. BELLMON. Mr. President, I am introducing a bill today for myself and my colleague, Senator BARTLETT to correct a situation that occurred inadver-

tently due to the Flood Control Act of 1962. This act provided for a new reservoir to be constructed in Pushmataha County, Oklahoma.

This reservoir, presently under construction, was named Clayton Lake in the legislation. Less than ten miles from the site of the new lake is an existing Clayton Lake. Many Oklahomans have contacted my office pointing out the confusion that would result from two lakes of the same name in the same county.

The bill, which I am introducing today, will rename the lake, Sardis Lake, after the town of Sardis which will be partially inundated by the new reservoir. The name Sardis was chosen by the resident of Pushmataha County during a public meeting.

Mr. President, I ask unanimous consent that the bill be printed in the RECORD.

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

S. 3487

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the lake known as Clayton Lake, which is being constructed as part of the project for the Clayton and Tuskahoma Reservoirs, Kiamichi River, Oklahoma, authorized in the Flood Control Act of 1962, shall hereafter be known as Sardis Lake, and any law, regulation, document, or record of the United States in which such lake is designated or referred to shall be held to refer to such lake under and by the name Sardis Lake.●

ADDITIONAL COSPONSORS

S. 3248

At the request of Mr. MORGAN, the Senator from Kentucky (Mr. HUDDLESTON) was added as a cosponsor of S. 3248, to create a National Agricultural Cost of Production Board.

S. 3280

At the request of Mr. BAYH, the Senator from South Dakota (Mr. ABOUREZK) was added as a cosponsor of S. 3280, to establish a National Institute of Justice.

S. 3320

At the request of Mr. HATHAWAY, the Senator from New Hampshire (Mr. DURKIN) was added as a cosponsor of S. 3320, a bill to provide tax breaks for investments in stock of small businesses.

S. 3425

At the request of Mr. HATHAWAY, the Senator from Vermont (Mr. LEAHY) was added as a cosponsor of S. 3425, the Community Mental Health Assistance Act of 1978.

S. 3447

At the request of Mr. STONE, the Senator from North Carolina (Mr. MORGAN), and the Senator from Iowa (Mr. CLARK) were added as cosponsors of S. 3447, the Agricultural Export Trade Expansion Act of 1978.

SENATE RESOLUTION 553—ORIGINAL RESOLUTION REPORTED WAIVING CONGRESSIONAL BUDGET ACT

Mr. LONG, from the Committee on Finance, reported the following original

resolution, which was referred to the Committee on the Budget:

S. RES. 553

Resolved, That (a) pursuant to section 402 (c) of the Congressional Budget Act of 1974, section 402(a) of such Act shall not apply with respect to the consideration in the Senate of the bill (H.R. 2852) to amend the Internal Revenue Code of 1954 to provide that refunds of the taxes on gasoline and special fuels shall be made to aerial applicators in certain cases; and

(b) That waiver of this section is necessary in order to enable the Senate to consider legislation which will extend and modify the program of antirecession fiscal assistance established by the Public Works Employment Act of 1976; and further

(c) That it was infeasible to complete action on this legislation within the usual time limits prescribed by this section because of the uncertain legislative status of the program in the House and because this program is so particularly related to economic conditions as to make it highly desirable to delay action beyond the usual deadline in order to obtain as accurate a view of present economic trends as possible.

NOTICES OF HEARINGS

SUBCOMMITTEE ON FEDERAL SPENDING PRACTICES AND OPEN GOVERNMENT

● Mr. HEINZ. Mr. President, the Subcommittee on Federal Spending Practices and Open Government is announcing a hearing on S. 3284, the Free and Fair Trade in Procurement Act of 1978, to be held Tuesday, September 12, at 10:00 a.m., in 3302 Dirksen Office Building.

Any inquiries regarding the hearing should be directed to Mr. Joseph Robinson, subcommittee professional staff (224-6740.) ●

SUBCOMMITTEE ON LABOR

● Mr. WILLIAMS. Mr. President, the Subcommittee on Labor will have hearings on the Administration and Enforcement of the Occupational Safety and Health Act of 1970 on Tuesday, Wednesday, and Thursday, October 3, 4, and 5, 1978. The hearings will be held in room 4232 of the Dirksen Building, and will commence, on each day, at 9:30 a.m.

Those wishing additional information, or wishing to testify at these hearings should contact Mike Goldberg of the committee staff, at room G-237 of the Dirksen Senate Office Building, Washington, D.C. 20510, telephone (202) 224-3674. ●

COMMITTEE ON VETERANS' AFFAIRS

● Mr. CRANSTON. Mr. President, I would like to announce for the information of the Senate and the public that the Committee on Veterans' Affairs will conduct a hearing to receive the legislative recommendations for fiscal year 1979 from the national commander of the American Legion, John M. "Jack" Carey, on Tuesday, September 12, 11 a.m., in room 318 of the Russell Building. ●

AUTHORITY FOR COMMITTEES TO MEET

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Committee on Commerce, Science, and

Transportation be authorized to meet during the session of the Senate today to hold an oversight hearing on motor carrier safety.

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

ADDITIONAL STATEMENTS

THE LOBBYING CAMPAIGN ON HOSPITAL COST CONTAINMENT LEGISLATION

● Mr. CURTIS. Mr. President, the National Conference on State Legislatures apparently has undertaken a massive lobbying campaign on behalf of the amendment introduced by my colleague on the Committee on Finance, the Senator from Wisconsin (Mr. NELSON). On August 17, they wrote all of the chairmen and members of the respective State legislative health committees, urging that they contact their senatorial delegation in support of the Nelson amendment to H.R. 5285, the hospital cost containment legislation recently reported by the committee.

State Senator Richard A. Snyder, a distinguished member of the Pennsylvania State Senate and ranking minority member of the Public Health and Welfare Committee, does not at all share NCSL's enthusiasm for the Nelson amendment. I request that his response, forwarded to Senator HEINZ, be printed in its entirety in the RECORD.

The material follows:

SENATE OF PENNSYLVANIA,
August 22, 1978.

HON. H. JOHN HEINZ, III
U.S. Senate, Dirksen Building,
Washington, D.C.

DEAR SENATOR HEINZ: This is response to the Honorable Irving Stolberg's communication of August 17 requesting my views on legislation which is presently before the Congress. Representative Stolberg is Chairman of NCSL's Committee on Human Resources.

I regret that I cannot support the Nelson amendment to HR 5285. Interestingly, such an effort in Pennsylvania's medical assistance program was declared unconstitutional several weeks ago.

While the hospital increases exceed inflation figures in other areas of our economy, it is encouraging to note that the Voluntary Effort program by the nation's hospitals has succeeded in lowering the rate of inflation in the past year. It would seem only fair to permit the hospitals to monitor their own industry for at least another few years, offering incentives for more efficient management rather than the threat of government control.

Government does not belong in the private hospital business as suggested by the Nelson amendment. We already have too much government control, and perhaps it is time for government to examine the proliferation of inspections and paper work with which hospitals must comply rather than to take a broad step that will only lead to additional government intervention.

I do share the concern of Congress for the high rate of inflation in medical charges by hospitals. I also must express my concern for the high costs of public assistance and other government programs. If Congress is truly attuned to reducing overall costs of medical charges, it is time to review eligibility

criteria and waste and fraud in these areas. Penalizing those who provide needed care to the indigent will not correct the problem.

Cordially,

RICHARD A. SNYDER. ●

CURRENT U.S. POPULATION

● Mr. PACKWOOD. Mr. President, I wish to report that, according to U.S. Census Bureau approximations, the total population of the United States as of September 1, 1978 is 219,294,521. In spite of widely publicized reductions in our fertility levels, this represents an increase of 1,677,708 since September 1 of last year. It also represents an increase of 183,637 since August 1, 1978, that is, in just the last month.

Over the past year, therefore, we have added more than enough people to fill the city of Houston, Texas. In the last month, we have added more than enough people to fill the city of Syracuse, N.Y. ●

DEEP SEABED MINING AND THE LAW OF THE SEA CONFERENCE

● Mr. JACKSON. Mr. President, the Senate will soon be considering S. 2053, the Deep Seabed Mineral Resources Act. Similar legislation has already been passed by the House of Representatives (H.R. 3350).

This legislation has a significant relationship to the current negotiations in the Third United Nations Law of the Sea Conference. I have been concerned about the potential impact of any Law of the Sea Treaty on the ability of American industry to recover minerals from the deep ocean floor.

On August 7, I put into the RECORD (page 24670) a copy of a letter to Ambassador Richardson from Senator HANSEN and me expressing our concerns about the current version of the treaty. I have just received an encouraging response from Ambassador Richardson which, I believe, will be of interest to all Senators. I ask that Ambassador Richardson's response together with the letter which Senator HANSEN and I sent him be printed in the RECORD.

The letters follow:

COMMITTEE ON ENERGY AND
NATURAL RESOURCES,
Washington, D.C., August 2, 1978.

HON. ELLIOT RICHARDSON,
Ambassador at Large, Department of State,
Washington, D.C.

DEAR MR. AMBASSADOR: S. 2053, the Deep Seabed Mineral Resources Act, has been ordered reported by the Senate Energy and Natural Resources Committee and is now pending before the Senate Commerce, Science, and Transportation Committee. The House of Representatives recently passed a similar bill. Since it is likely the Senate will consider this legislation sometime this summer, we have been keenly interested in the progress of negotiations in the Third United Nations Law of the Sea Conference, particularly those in Committee. One bearing on formulation of a new legal regime for the deep seabed.

We fully appreciate the complexity of your assignment. Defining the national interest relating to UNCLOS negotiations is in itself an extraordinarily difficult exercise, quite apart from the problems inherent in carrying forward discussions with over 150 delegations each with its own constellation of national

interests in maritime law. We can understand the need to balance and weigh these many considerations in arriving at the United States position on any given issue. The U.S. delegation under your leadership has achieved impressive gains in some areas. For these achievements you are to be congratulated.

However, the trend in Committee One negotiations appears less than promising. Last September you testified before Congress that there were a number of key features of the Informal Comprehensive Negotiating Text (ICNT) produced at the Sixth UNCLOS Session which were "fundamentally unacceptable" to the United States and you itemized those unacceptable provisions. Unfortunately, the Seventh UNCLOS Session held at Geneva appears to have yielded little progress in satisfactorily modifying these unacceptable provisions of the ICNT. Spokesmen for the U.S. ocean mining industry have voiced serious doubts about the ability to proceed to commercial recovery of manganese nodules under terms and conditions of the ICNT. After the Geneva Session, a joint statement representing the views of Belgian, British, Canadian, Dutch, French, German, Japanese and United States ocean mining companies said that "the draft treaty texts resulting from the Seventh Session did not significantly improve the previous draft treaty proposal (ICNT) which was considered to be 'fundamentally unacceptable'—in some cases the new texts were worse."

As we understand it, the ICNT would (among other things) impose what amounts to the mandatory transfer of technology from private firms who have invested many millions of dollars in development, to a competing international seabed authority; would unduly limit the production of minerals with no comparable restraint upon production by the authority; would severely restrict the number of available mine sites for U.S. ocean mining firms; would allow no meaningful review of authority decisions denying contracts to U.S. ocean mining firms; and would establish a 20-year termination process which would inhibit entry by new U.S. firms into ocean mining activity.

We are deeply concerned that our legitimate seabed mining rights are being traded away in the treaty negotiations. We understand you have stated in more than one forum that (in effect) the United Nations Moratorium Resolution of 1969 (G.A. Res. 2574D XXIX) declaring the resources of the deep seabed to be the Common Heritage of Mankind and off-limits to exploitation has all but nullified the traditional high seas freedoms under which U.S. ocean mining firms have always assumed their right in international law to engage in the commercial recovery of manganese nodules. To illustrate this point, you are said to have compared the current United States position in Committee One with a hypothetical multinational corporation dickering with the Government of Indonesia for off-shore drilling rights. It seems to us in so doing you are implicitly acknowledging ownership and control of the deep seabed by an international community dominated by a Third World majority which is unfriendly to U.S. ocean mining rights and interests.

The implications of this position are most disquieting. There are several reasons for our uneasiness. First, the United States has never, either formally or informally, recognized the U.N. Moratorium Resolution as carrying the force and effect of international law. In fact, in May, 1970, the President said "I do not believe it either necessary or desirable to try to halt exploration and exploitation of the seabed beyond a depth of 200 meters during the (treaty) negotiating proc-

ess." U.S. negotiators have consistently adopted this attitude ever since that time.

Second, deep seabed mining legislation now moving through Congress (as well as similar bills introduced in prior Congresses) strongly asserts the right of U.S. ocean mining firms to proceed to commercial development under existing high seas freedoms, pending completion of UNCLOS negotiations and ratification of a law of the sea treaty by the Senate.

Third, until such time as the term Common Heritage of Mankind has been given legal definition by a treaty ratified by the United States Senate, its legal application to U.S. citizens is inevitably subject to conflicting and ambiguous interpretation. Fourth, in our view the moratorium on seabed mining contained in the U.N. Resolution of 1969 cannot prevent seabed development unless control of the seabed has been acquired by an international seabed authority under terms of a duly ratified law of the sea treaty. Fifth, we detect an inconsistency between the United States delegation's forthright—and so far successful—defense of high seas freedoms of navigation for vessels in the Exclusive Economic Zone and your apparent relinquishment of high seas freedoms for ocean mining activities.

Sixth, we can see no evidence of a United States negotiating "bottom line" in Committee One: what you cited as being fundamentally unacceptable to the United States in the ICNT before the Geneva Session would now appear to be acceptable through changes in the text which lack substance. Nor are we aware of any straight-forward response to the point-by-point criticisms of the U.S. negotiating position which have been submitted by the ocean mining industry and other more neutral observers.

Last October, when you appeared before the combined hearing of the Senate Energy and Commerce Committees to report on the unacceptable terms of the ICNT, you accurately set forth what is essentially our own view of the position the United States should adopt in Committee One negotiations. We believe the statements you made then is worth repeating:

"What is involved here is the establishing of a regime for half the Earth's surface. While today's technology points only to manganese nodules, there is no telling what lies ahead in the future. We simply cannot agree to a regime which would unnecessarily inhibit, and perhaps even prevent, deep seabed development. To do so would make a mockery of the Common Heritage of Mankind and reduce to a pitiful trickle the benefits that could otherwise accrue—not only to the entrepreneurs who will risk their capital, but also to mankind as a whole, in particular the developing countries."

In light of this statement, and in light of our considered opinion that high seas freedoms for U.S. ocean industries are not impaired by United Nations actions short of a duly ratified law of the sea treaty, we would respectfully suggest a reassessment of the direction and tenor of the United States negotiating posture. Moreover, we would suggest a careful examination of whether or not the United States Senate is prepared to ratify a law of the sea treaty containing terms and conditions such as those in the ICNT which would inhibit and prevent deep seabed development by U.S. firms. We are inclined to believe the Senate would not ratify such a treaty.

Would it be possible to provide the Senate, prior to the reconvening of the Law of the Sea Conference in New York, with a report on the "bottomline" United States negotiating position in Committee One? This could be done either in the form of a letter or, if you prefer, through your appearance be-

fore a hearing of the Senate Committee on Energy and Natural Resources.

We look forward to your response.

Very truly yours,

HENRY M. JACKSON,
Chairman.
CLIFFORD P. HANSEN,
Ranking Minority Member.

AMBASSADOR AT LARGE,
Washington, D.C., August 28, 1978.

HON. HENRY M. JACKSON,
U.S. Senate

DEAR MR. CHAIRMAN: Thank you for your letter of August 2. As you may know, I have only recently returned from a trip to Latin America. I regret that my absence from Washington prevented an earlier response to your letter.

Your letter raises several very important issues. I would begin by examining three assumptions upon which your arguments appear to be based. The first of these is that the "trend in Committee I negotiations appears less than promising." Certainly, no one could safely predict a quick and satisfactory resolution of Committee I issues, but if we are patient, the trend is in our direction.

The session in Geneva this past spring may have marked a turning point in the Conference. The posturing and rhetorical excess that had marked previous sessions was absent in Geneva. It was replaced by a genuine willingness upon the part of all delegations to seek a workable compromise embodied in a "parallel system of access" to seabed resources.

This is not to say that the substance of the negotiations improved at the same pace as the atmosphere, for the issues dealt with were among the most difficult. Though there was some improvement in texts at Geneva, we are still far from agreement that fairly accommodates the interests of the U.S. and other industrialized countries.

This brings me to the second assumption: that the ICNT seabed texts are regarded by the U.S. delegation as acceptable or nearly acceptable. This assumption has underlain much of the criticism directed toward the delegation since the end of the Geneva session. Putting it bluntly, it is a "red herring."

I share many of the criticisms that have been directed toward the ICNT by the industry and other observers, and have so stated publicly on many occasions. Enclosed is a copy of a statement made last week by my deputy, Ambassador Aldrich, in Negotiating Group I to ensure that there can be no misunderstanding of our position in the Conference.

Clearly, an acceptable seabed text will have to contain significant improvements over the ICNT. We are engaged in what could well be a long process of seeking these improvements. Our objective is to negotiate a text that provides assured access to seabed resources for state-sponsored miners.

The means we have chosen to achieve that objective is to create a parallel system that is and is perceived to be viable on both sides—the "private" (state-sponsored) side and the "Enterprise" side.

Several elements must be combined into a package to form a viable parallel system. These include a structure and voting system of the governing institutions which protect the important economic interests at stake, financial arrangements which place reasonable burdens on private miners, and procedures for obtaining contracts that provide reasonable assurance of access.

In addition, ways must be found to provide reasonable assurance that the Enterprise will be able to get into business promptly. This part of the package includes financing the Enterprise and providing it as-

surance that it can purchase the necessary technology during the start-up period.

Because we are negotiating a package, it is not possible to define a single "bottom-line" position in terms of each separate element. If we could, it would make our task far easier. It is necessary, rather, to assess the package in its entirety to determine whether it satisfies our basic requirement of assured access. Following the close of the Seventh Session, we shall examine the seabed package as it then stands with a view to formulating Administration policy for subsequent negotiations.

The third assumption is to me the most troubling. It is the idea that we have fallen back from the position that seabed mining is a freedom of the high seas. We continue to hold this position just as firmly as ever. I have pointed out that others disagree with our view. I have described their arguments.

But my description of their positions and analysis of the possible consequences of a legal and political conflict over this issue should not be mistaken for adoption on my part of those arguments nor for a lack of willingness on the part of the Administration to face up to the consequences of such a conflict. Also enclosed is a copy of a statement I made on August 28 in the General Committee of the Conference defending the legality and the wisdom of our legislation on seabed mining.

I am also disturbed by the implication that we have not taken into account the views and suggestions of the industry and other observers. Our relationship has been one of constant cooperation and interchange of ideas. Industry representatives have been most helpful to us in preparing for the current negotiations in New York where we continue to consult closely with them.

You asked that I consider "... whether or not the U.S. Senate is prepared to ratify a Law of the Sea Treaty containing terms and conditions such as those in the ICNT..." Such an examination would be necessary only if I were willing to recommend to the President that he submit such a treaty to the Senate. I am not so willing. When and if a treaty is submitted to the Senate, I intend that it be a treaty that protects U.S. interests in seabed mining.

I have explained above why it is impossible to provide the Energy and Natural Resources Committee a "bottom-line" seabeds negotiating position. I would be more than happy, however, to meet with the Committee following the conclusion of the current session to explain in greater detail our positions on various issues and to provide you my assessment on future prospects.

With best regards,
Sincerely,

ELLIOT L. RICHARDSON.

STATEMENT MADE IN NG-1 BY THE REPRESENTATIVE OF THE UNITED STATES

AUGUST 24, 1978

MR. CHAIRMAN: I want to support your proposal that we not go back over the texts produced in Geneva, but move ahead to work on other elements of the system of exploitation, in particular, Annex II. I think the most important thing is that the texts produced in Geneva have moved us closer to consensus and will form the basis for further negotiations.

Even more significant than the production of these new texts is the fact that the negotiation proceeded in a heartening atmosphere of cooperation. Virtually all delegations have accepted a common challenge—how to make the parallel system of exploitation workable, and our efforts have been directed to this common task.

I would not, however, want to leave the impression that our future work will be easy. Far from it; many seemingly intractable issues lie ahead. The texts produced in Geneva

reveal our failures as well as our accomplishments. My delegation's belief that we should now proceed to other issues should not be misunderstood as implying our satisfaction with or acceptance of the Geneva texts. These texts need significant further improvements, both in detail (which I would not wish to discuss here) and with respect to major issues. Ambassador Richardson has asked that I make clear our concerns with respect to these issues.

Among the major defects of these texts is the review clause, which remains unsatisfactory, although it is clearly an improvement over the comparable provisions in the ICNT. The minerals from the seabeds will be more needed by the world's economy in the next century than they are now; clearly we could not be expected to agree that our access to them might be denied at that time. The common heritage of mankind is not something that can be hidden away and hoarded. On the contrary, it must be available for use by all states as needed.

Similarly, some of the provisions on transfer of technology continue to cause us deep concern. While they use an acceptable standard, fair and reasonable commercial terms and conditions, we were disturbed to find that our willingness to contemplate the imposition upon contractors of extraordinary and unprecedented obligations in order to assure the Enterprise that it will be able to acquire the technology it needs has encouraged further demands that these obligations continue indefinitely, long beyond the time they are needed, and that the same obligations be undertaken for the benefit of developing countries which may want to engage in seabed mining on their own.

These provisions are not needed to make the parallel system of exploitation workable, and pressure for them would imperil acceptance of obligations designed to put the Enterprise in business. Moreover, I think it is generally recognized that the texts produced in Geneva need improvement with respect to arbitration, the award of damages, and the availability of other sanctions to avoid any implication that contracts can be annulled as a result of inevitable disagreements over the terms on which technology will be sold.

The production control contained in Article 150 bis is clearly an improvement over that contained in the ICNT. Like all compromises, it confronts both producers and consumers with painful decisions. My government has not yet decided whether it is acceptable, and we can understand that others may also wish to examine it in the context of a fully developed parallel system of exploitation.

Article 150 bis needs to be revised to make clear that the Authority can become a party to any commodity agreement only if all major producers and consumers of the commodity in question also become parties. This is necessary to protect the interests of both producers and consumers. We should not overlook the fact that many other elements of the system of exploitation require much further work, clarification and improvement before my government, or, I would expect, the governments of most states represented here would be in a position to pass judgment on the acceptability of the system as a whole. This will be one of our principal tasks at this renewed session.

Also, we shall have to ensure that the Enterprise is a responsible competitor—that it bears substantially the same burdens as state and private companies. This consideration impels me to suggest that we begin our work this year with the question of whether part or all of Annex II applies to the Enterprise. It is impossible to deal intelligibly with the question of the selection of applicants without including the whole question of the approval of plans of work for the

Enterprise as well as for state and private contractors.

STATEMENT BY AMBASSADOR ELLIOT L. RICHARDSON ON NATIONAL SEABED MINING LEGISLATION AT THE GENERAL COMMITTEE OF THE LAW OF THE SEA CONFERENCE

AUGUST 28, 1978

MR. PRESIDENT, I have listened with respect to the views expressed by the distinguished representative of Fiji on behalf of the Group of 77, and I do not wish to precipitate a lengthy debate on the subject of the deep seabed mining legislation. However, in my view and in the view of the other countries whose enterprises are now in the process of developing the means of recovering hard minerals from the deep seabed, the concept of the common heritage of mankind, which we supported in 1970 and to which we still subscribe, has never meant that these resources must remain unexploited in the absence of an internationally agreed seabeds regime. I would have thought this point would have been made clear by our concurrent opposition to the moratorium resolution, which was not adopted by consensus.

In our view, states and their nationals have the legal right to use the mineral resources of the deep seabed beyond national jurisdiction. This is a freedom of the high seas which has not been abridged either by any treaty or by customary international law. Although we are all engaged in the process of developing a treaty, this process has proved long and difficult, and its successful conclusion is not yet at hand.

I understand why the Group of 77 would prefer that we agree to defer any mining until an agreed treaty can be concluded, but I trust the Group will also understand why we cannot responsibly do that in face of the world's long-range need for the minerals and the more immediate need to proceed with the research and development that will in turn lead to the beginning of commercial mining. Far from jeopardizing the Conference, seabed mining legislation should facilitate the early conclusion of a generally acceptable Law of the Sea Treaty by dispelling any impression that the governments of the countries preparing to engage in such mining can be induced to acquiesce in an otherwise unacceptable treaty because that is the only way to obtain the minerals.

Mr. President, so far as the US is concerned, the goal of my Government remains the earliest possible conclusion of a generally acceptable Law of the Sea Treaty, and I believe the legislation now before the Congress to be entirely compatible with the principles on which the eventual treaty will be founded;

It recognizes that the resources of the seabed are the common heritage of mankind.

It requires that revenues be set aside for developing countries.

It requires stringent standards for the protection of the marine environment.

It does not assert any right of sovereignty or sovereign rights over seabed mine-sites.

It will be superseded whenever a law of the sea treaty takes effect with regard to the United States.

It does not declare or imply any intention that American seabed mining companies should remain outside the jurisdiction of an International Seabed Authority under such a treaty.

Finally, Mr. President, under the legislation that has just emerged from the Senate Committee on Foreign Relations, no permits for commercial recovery of hard mineral resources could in any case be issued for several years. This will allow ample time for our negotiations to conclude, thus assuring that seabed resources will be developed only under the international regime we are striving to achieve.

Thank you, Mr. President.

SHIRLEY CUSICK CROWNED WINNER OF MISS INDIANA WHEELCHAIR PAGEANT

● Mr. LUGAR. Mr. President, in July of this year Shirley Cusick of Terre Haute, Ind., was crowned as the winner of the 2d Annual Miss Indiana Wheelchair Pageant. Her life is one of triumph over the odds and victory over a handicap which might have defeated individuals of lesser determination and commitment. I draw her story to the attention of my colleagues as an example of the tenacity of the human spirit and as a source of inspiration to us all.

Shirley Cusick enjoyed an active childhood and loved the outdoors. She played softball, baseball, basketball, and participated in water sports of all kinds. Throughout her high school years and the first few years of her marriage, she was a member of countless organizations, often serving as the chairman or officer of a committee. Her secure childhood and early adult life were temporarily shattered on August 10, 1968, when an automobile accident left her totally paralyzed. In time and with extensive rehabilitation, Shirley regained the use of her body but learned that she would have to use a wheelchair for the remainder of her life.

Accustomed to an active life, the adjustment to a wheelchair could not have been an easy one for Shirley Cusick. As the mother of two small children, she knew that the accident which forced her into a wheelchair could not retire her from a demanding schedule. She set about to pick up the pieces of her life and decided to enter college. Six years later, Shirley is a college graduate who fully operates her own home and cares for her children. She has worked as a Girl Scout leader, a volunteer in the physical therapy department, and as a member of various groups formed to increase the public's awareness of the special needs of handicapped persons.

Shirley Cusick is continually tackling a new challenge and is presently learning to drive a van. She intends to continue her education and her work on behalf of the handicapped. For Shirley Cusick the future is a promising one filled with unlimited opportunities for service. I salute her courage and willingness to share her life so abundantly with her family, friends, and community. ●

THE INVESTIGATION OF GENERAL SERVICES ADMINISTRATION

● Mr. CHILES. Mr. President, as you know, last March I directed the Federal Spending Practices Subcommittee to begin an investigation into the substantial scandals which, 6 months later, appear to be engulfing the General Services Administration (GSA). While investigative hearings have been held in June, and will continue on September 18, one matter has become so pressing as to require immediate action and public knowledge that the problem exists.

Accordingly, I want to advise the Senate that I have contacted Mr. Ben Civi-

letti, head of the Criminal Division of the Department of Justice, and Mr. Vincent Alto, Acting Inspector General of GSA, and requested them to meet with me early next week.

The topic of our discussion is painfully familiar to them, and to many persons in the law enforcement community who are involved in the current GSA investigations.

Once again, it appears, the internecine warfare between competing bureaucracies has begun. As public interest in the GSA scandals rises, the race for glory becomes more intense.

Unfortunately, this race is working to the detriment of the investigation itself. My investigators report that several rapidly progressing and very promising investigations have become bogged down in a three sided name calling contest among Federal Bureau of Investigation agents, GSA investigators, and Justice Department personnel.

Out on the street, various charges of ineptitude and incompetence are traded among the investigatory staffs involved. Too much time is still being spent arguing about who dropped the ball back in 1975 when Mr. Bob Lowry first went to the authorities.

As a consequence, I regret to report that we will probably hear at our September 18 hearing that the reforms promised at the June hearings have not happened yet. The indictments would not be in, and the crooks will not have been fired. Some perhaps, but not in anywhere near the numbers necessary to overcome the waves of criminal activity GSA has suffered for years.

I realize that Mr. Civiletti and Mr. Alto have met several times on their own initiatives in an attempt to solve this problem. But, while I compliment them for their foresight, it is now plainly evident that the word has not trickled down to their squabbling subordinates.

Consequently, I propose to extract an operating protocol from these gentlemen and then hold them to it. If the squabbling and time wasting continues, then I shall be forced to consider making public the names and ranks and specifics of each instance we are aware of where Federal officers have spent more time fighting among themselves than conducting criminal investigations. I would, of course, only do this as a last resort. But I think this constitutes fair warning to the obstructionists that the Congress is not going to stand aside and accept the possibility that the GSA investigations are going to go down the drain again. ●

COLUMBUS, IND.

● Mr. BAYH. Mr. President, the September issue of National Geographic magazine contains an article on Columbus, Ind., which I would like to share with my colleagues. I have long recognized the outstanding qualities of Columbus and am pleased that a magazine such as the National Geographic has focused national attention on this extraordinary city.

A combination of talented people,

generous businesses, and remarkable architecture make Columbus a unique community. The article aptly captures the spirit, history, and lifestyle of Columbus and reinforces my pride and honor in representing such a fine community.

I request that the article be printed in the RECORD.

The article follows:

A MOST UNCOMMON TOWN: COLUMBUS, IND.

As civic decoration, it's not your typical cannon on the courthouse lawn—"Chaos I" (left), a clanking tangle made of old Indiana machinery by Swiss sculptor Jean Tinguely. But it's in Columbus, and that's not your typical midwestern county seat, either.

This day schoolchildren have come to The Commons, an enclosed public space designed by architect Cesar Pelli, to draw their impressions of the kinetic sculpture. People on their way to the adjoining shopping mall stop to look and to listen. Some regard the sculpture with heads cocked in puzzlement. Some scowl while others smile. Few ignore it.

At one end of The Commons older men gather in small groups to solve the world's problems and bemoan the price of fertilizer. Maybe some parts from their old combines, threshers, and augers—serious machines for serious work—have become, well, art. That's a good one.

In a way Columbus is like that, a town without any apologies for hard work, solid and industrious, yet one alive to and filled with art, especially contemporary architecture of national significance.

Roughly 40,000 people yearly come to look around this town of 32,000. Some just wander about on their own. Many go to the Visitors Center for guidance. So it's commonplace for a bus loaded with architecture students on tour to stop at The Commons. Children there won't pay them any mind, busy as they are exploring the universe of their fancies in a Playtank (right) while their parents run errands.

For townspeople the forty-plus buildings designed by modern masters of architecture do not make a spectator sport. They are places to learn in, pray in, read, in have fun in, work in, bank in, have the daily life of the community written and printed in. Small town in scale, they fit in like slightly eccentric neighbors, adding variety, provoking debate, and stimulating a taste for the unconventional.

Turning on at the City Power House, the Senior Citizens Kitchen Band, with Clara Wilds on her kazoosahose-funnelphone, practices in the former utility plant renovated for senior activities. The band goes "everywhere we're asked," getting raves at the State Fair and such requests as the one from a man in the convalescent home who asked for "a good old Methodist hymn—'Barney Google.'"

Over at City Hall, there's a brief break from the necessary but mundane concerns of streets, utilities, and budgets. Mayor Max Andress (facing page), former schoolteacher and football coach, beams as he concludes a wedding ceremony for a couple who had come down from Indianapolis because they like the lively spirit of building and rebuilding in Columbus.

Morning lights the rectangular planes of the First Christian Church (below), built in 1942 to Eliel Saarinen's design as the town's pioneer modern building.

Now that towns and small cities across the United States are enjoying a renaissance, Columbus stands among them as something of a Florence, with its Medici of the corporate variety.

Responsibility to the town was well established as a policy of the Cummins Engine

Company when J. Irwin Miller (above, with his wife, Xenia) became its chief executive. Founder Clessie Cummins was the chauffeur to a local banker, W. G. Irwin, and persuaded him to finance improvements to the diesel engine. But the profits, Irwin insisted, were not to be the sole purpose of the venture. They were also the means to provide jobs and personal and moral growth for the community. The jobs now total about 11,000 locally. The firm's philanthropy continues.

Most visible during Miller's tenure was a program that began with the schools. Cummins would pay the design fees if the school board picked from a given list of top architects. That was all; otherwise, the schools had complete control. Since 1957, 11 schools and several other public buildings have been so designed.

Setting its own example, Cummins built a new plant (right) into the landscape, with parking tucked away on top, and an outside view for all 2,000 employees.

From A to Z, the schools designed under the architects fee-paid program have, over 20 years, mirrored changing trends in educational philosophy. The most recent, Fodrea Community School, nestles into a neighborhood of modest, well-kept houses. Planned with the active participation of students, parents, and teachers, it features learning centers that occupy open, flexible space, where team teaching may be used to best advantage. As plans develop and funds permit, the school should become a center for the activities of all ages.

Sometimes the town gets its back up a bit. The building committee for the new library decided it wanted to choose its architect directly. So it went out and hired the renowned I. M. Pei on its own. It then turned around and asked Cummins for a building gift—and got \$800,000.

A sampler of Columbus architecture might begin anywhere and run a gamut of public, private, and commercial structures done by such prominent architects as Harry Weese, John M. Johansen, Eero Saarinen, and Skidmore, Owings & Merrill. A spacious glass arcade connects two downtown bank buildings. The bell tower of the First Baptist Church crowns a house of worship whose aura is both post-modern and pre-Gothic. Eero Saarinen thought his North Christian Church might be the work that would most commend him to St. Peter.

Others are less reverent, calling Saarinen's church the "oilcan" and grumbling about company-town charity. Hoosier disdain for paternalism goes back a long way. In 1821 Gen. John Tipton gave 30 acres to found a town named Tiptona in his honor. The town promptly changed the name to Columbus. The general left in a huff and never came back.

Clowning around on the Fourth of July, children mug it up as some 40,000 Cummins employees and families converge on their own recreation complex, the 345-acre Ceraland, which offers everything from camping to concerts.

All on "The Family," a granite schoolyard sculpture by Harris Barron, join in on a chopper launch.

Art for its own sake enjoys widespread support and participation. When the Hartford Ballet came to town, it not only gave performances but also offered workshops in dance. Corporate and private sources help finance the arts, but their vitality depends on volunteers. That is what all the musicians in the Columbus Symphony Orchestra are. As commercial and cultural center for a seven-county area, Columbus has it both ways: enough people, talent, and enthusiasm to support city amenities, yet preserve a smaller town atmosphere.

For six generations the same family has watched sunsets go down beside the original farmhouse as additions to it went up. With a

thousand acres in wheat, soybeans, corn, and tobacco, Ray and Lou Marr expect to see "at least one more generation in farming." Lou is active in historic preservation, and here enthusiasm is widely shared by others as concerned for the best of the old as for the best of the new.

At Zaharako's turn-of-the-century ice-cream parlor downtown, a satisfied customer thinks the cut glass, onyx, and polished brass are OK, but the cherry phosphates—wow!

Retired from big crops, a farmer and his wife expertly tend their small, intown yard and garden.

Little details can make life more livable. Add some paint and imagination, and a handball court becomes a poster. Multiply the details, large and small, all over town, and life becomes that much more pleasant. Made a part of corporate philosophy by such large local concerns as Cummins, Arvin Industries, and Cosco, Inc., the amenities become strong points in recruiting executive talent that might more naturally head for the big cities.

"We're really mountain and ocean people." That's how Dianne and Ron Hoge felt six years ago when they came to town with a two-year commitment to midwestern life. In their cedar and glass home designed by architect Scott Mitchell, they admit to having "been won over by Columbus," where in day-to-day living they learned to enjoy an improved quality of life away from the "urban hassle."

With the nation's growth now shifting to more rural areas, Columbus can only hope that hassle doesn't end up moving to town. ●

U.S. PIONEERS IN INSULIN RESEARCH ACHIEVE BREAKTHROUGH FOR DIABETICS

● Mr. SCHWEIKER. Mr. President, yesterday afternoon a team of researchers in California announced an extremely significant breakthrough in medical research. In the laboratory, they have succeeded in producing human insulin using new recombinant DNA techniques.

As reported by the group of scientists at the City of Hope National Medical Center and at Genentech, Inc., the process used involves the insertion of a synthetic gene into a bacterium known as *E. coli*. The gene can "order" the bacterium to produce insulin. The bacteria, complete with the new gene, are then grown in a fermentation process. As the bacteria reproduce, the offspring also contain the synthetic gene. In other words, the scientists are able to restructure the genetic material, or DNA, of the *E. coli* to incorporate an insulin-producing trait, which can then be triggered by the scientists.

The implications of this research breakthrough are enormous. There are over 1 million diabetics in the United States alone who must depend on daily insulin injections, and the number is steadily increasing as the prevalence of diabetes rises. The insulin now used is extracted from the pancreas glands of cattle and swine, so it is obvious there are definite limits to the total supply. A recent report from the National Diabetes Advisory Board indicates that some day, the demand for insulin in this country could exceed the amount available from beef and pork glands, although no shortage can be predicted for at least the next two decades. The possibility that bacteria can be used to produce insu-

lin at the bidding of scientists could help alleviate any supply problem far into the future, guaranteeing diabetics in the United States and throughout the world that the life-sustaining insulin they need will always be available. They will no longer be dependent on the vagaries of beef and pork production. The price of insulin may also come down, as insulin manufacturers will no longer have to depend on costly extraction from animal glands.

The production of human insulin holds out other important benefits. Although the insulin we have today is undoubtedly life-giving, insulin produced in animal pancreas glands is not a perfect match for human insulin. Many diabetics, perhaps as many as 10 percent at one time or another develop an allergic reaction to the animal insulin they are now using. Obviously, this presents a very serious medical problem. If diabetics are able to receive insulin, produced by bacteria but identical to that produced in the human body, these allergic reactions may significantly decrease.

Yesterday's news also pointed out the importance of cooperation between the scientific community and American industry. Simultaneously with the scientists' announcement of this exciting breakthrough in insulin research, the U.S. largest manufacturer of insulin, Eli Lilly and Co., announced an agreement with the researchers to begin long-range development aimed at eventual commercial production. According to Lilly's research officials, much more work needs to be done before we can know for certain that mass commercial production of human insulin using this technique is feasible, and it is still too early to predict when animal and human testing can begin. American industry is excited about the potential application of the scientists' discovery and is eager to pursue it.

The foundation for the achievement reported yesterday lies in the groundbreaking work of other U.S. scientists in developing recombinant DNA technology, many of whom have been supported by our National Institutes of Health. The first success of experimenters in producing human insulin represents an application that grew out of years of painstaking basic research into the understanding of the workings of DNA; we are now beginning to see how this research can be of important practical benefit. The end result may help millions of people throughout the world who suffer from diabetes. I know my colleagues join with me in congratulating all those responsible for this breakthrough, which stands as a clear reminder of the pioneering greatness of American science and industry. ●

CETA REAUTHORIZATION

● Mr. BAYH. Mr. President, as the senior Senator from the State of Indiana, a State that overwhelmingly supports the reauthorization of the Comprehensive Employment and Training Act (CETA), I voted in favor of this legislation.

It is my strong feeling that a comprehensive job and jobs training program such as CETA is necessary if we are going to effectively fight unemployment

among our youth and disadvantaged citizens. The plight of our country's unemployed has always been one of my major concerns. Over the years I have struggled with this problem. Therefore, it is pleasing to me to know that so many of my colleagues, as is reflected in the vote, also share my concern.

But it is important that we not stop now in our constant battle with unemployment. We must turn our attention to the Humphrey-Hawkins legislation as another tool in our efforts to reduce unemployment. With the reauthorization of CETA and with the eventual passage of Humphrey-Hawkins, the Senate can stand proud in its accomplishments on behalf of our unemployed.

Specifically, I feel that the Senate version of the CETA reauthorization legislation reflects the President's and Congress intent to eradicate the abuses the program suffered during its first 5 years. Such provisions in title I as the limits on the length of time an individual can be enrolled in a CETA program and the maximum wage provision should cut back on the amount of substitution practiced by local prime sponsors. The establishment of an office of compliance and investigation should serve as an effective mechanism by which to combat fraud and abuse.

The title II provision limiting expenditures for public service employment wages to not more than 50 percent of the title II allotment will assure that at least half those funds be used for manpower services like on-the-job training, manpower training projects, work experience and other support services needed to enable people to obtain unsubsidized employment.

I am pleased to note that the Senate version of this legislation has retained the President's request for 725,000 title VI job slots. As you know the House cut 125,000 jobs from the title VI provision. Such cuts can only hurt the overall intent of this legislation, which is to reduce the unemployment ranks. The reason given for the House action was that antirecession jobs are not necessary in an improving economy.

However, it seems to me that the improvement in the economy may be as a result of such public service jobs. To cut back while unemployment still exceeds 6 percent is comparable to cutting off medication before the patient is well simply because he shows signs of improvement. Even though we all must be conscious of the need to cut back on unnecessary programs, we cannot afford to do so to the detriment of those most in need of such assistance.

Another key component of the legislation is the private sector initiative program. This program is designed to encourage prime sponsors to work more closely with local private employers, organized labor, community based organizations, and educational agencies and to experiment with a variety of approaches which ultimately will place disadvantaged persons in private employment. It is my understanding that Indianapolis has already established a Private Industry Council, consisting of a wide range of businessmen, local prime sponsors,

and key citizen organizations for the purpose of coordinating the private sector initiative program. I will watch with great interest the progress of this program in the largest city in my home State. Hopefully in the future such councils can be established throughout the State of Indiana. For it is ultimately within the private sector that the problem of unemployment will be solved.

And finally, I am pleased to see the provision under the CETA bill for displaced homemakers. I have indicated over the years, my strong concern for the plight of those women, who through no fault of their own, find themselves without any economic assistance. In the last two Congresses, I have introduced legislation which would provide employment opportunities, training and counseling services to homemakers who are considered displaced from their family support through death of a spouse, divorce, or other loss of family income. The provisions of this bill are the first step in our country's dedicated effort to protect American homemakers, who often times find themselves in extremely vulnerable positions.

So again let me reiterate my firm support for the CETA reauthorization and further urge that this Congress continue to push legislation designed to eradicate poverty and unemployment in this the richest and greatest Nation in the world. ●

PROVIDING FOR SOCIAL SECURITY

● Mr. HAYAKAWA. Mr. President, although the Social Security Amendments of 1977 did several things to alleviate ever-increasing troubles, the social security system remains significantly underfinanced.

Under the new law, the tax rate and the wage base have been increased and will continue to be for several years. However, if we are to pay all of the benefits we promise, these levels will have to be increased again and again. The rising cost of social security, along with various other retirement systems, is becoming an unbearable burden on today's working population. This burden is bound to grow heavier.

Yesterday's Wall Street Journal carried an interesting article on this subject, written by A. Haeworth Robertson, chief actuary of the Social Security Administration from 1975-1978. Mr. Robertson states that we need to change our views on old age and retirement. He speaks of training persons for second, third, and even fourth careers, an idea I agree with profoundly.

I think Mr. Robertson presents some excellent ideas and I wish to share them with my colleagues. I ask that this article, entitled "Providing for Social Security," be printed in the RECORD.

The article follows:

PROVIDING FOR SOCIAL SECURITY
(By A. Haeworth Robertson)

The Social Security Amendments of 1977 made important revisions in the Social Security program. These amendments are generally considered to be the most significant social security legislation since 1972, and possibly since 1950.

Under the old law future generations of

workers would have received progressively higher levels of retirement benefits, relative to their preretirement earnings, than today's generation receives. The amendments revised the method of determining benefits so this would no longer be true. In fact, benefits will be about 5 percent to 10 percent less generous for the majority of future recipients than for today's recipients. There will be an even greater reduction in the case of death and disability benefits payable with respect to relatively young insured persons. Of course, these changes reduced the future cost of the program.

The amendments provided for extraordinary increases in the maximum amount of earnings used for computing benefits and assessing taxes during the period 1979-81. Thus, in 1981 and later approximately 91 percent of the total payroll of persons in covered employment will be subjected to tax and recognized in determining benefits (compared with 85 percent at present). This change increased the income more than it increased the benefit payments.

INCREASES ALL AROUND

The amendments increased the tax rates themselves as well as the earnings which are taxable. The tax rate for both employes and employers under the Old-Age Survivors, Disability, and Hospital Insurance programs combined is 6.05 percent in 1978. The new law provides for a gradual increase in this tax rate, beginning in 1979, to an ultimate level of 7.65 percent in 1990 and later. Tax rates for the self-employed are scheduled to increase from 8.10 percent in 1978 to 10.75 percent in 1990 and later.

But even after all these changes, the Social Security program is still significantly underfinanced. To pay for the benefits which have been promised, taxes paid by the employe and the employer must continue increasing beyond the level of 7.65 percent in 1990. The tax rate must increase to approximately 8 percent by the year 2000 and 12 percent by the year 2025. The ultimate tax rate for the self-employed must become about 16 percent.

These future tax rates are based on the "intermediate" assumptions utilized by the trustees of the Social Security program. Actual future tax rates will be different from these estimates but it seems more likely that they will be higher than the estimates than that they will be lower.

The Social Security program, however, is only one component of the myriad of employe benefit systems which have grown up over the years in an attempt to satisfy the needs generated by an individual's illness, disability, old age or death. There are numerous other employe fringe benefit and income maintenance programs: worker's compensation, unemployment insurance, private retirement systems, group life and medical insurance plans, sickness benefit plans, among others.

The steadily growing cost of these systems may well be developing into an unsustainable burden. If this is true, the only conclusion is that the problem itself must be changed. Some way must be found to reverse the present trend whereby the inactive population is growing at a faster rate than the active working population. It seems highly unlikely that the active working population, already chafing under the yoke of today's burden, will be able and willing to assume the heavier burden projected for tomorrow.

In seeking ways to change the dimensions of the problem, the nation's concept of work, education, leisure and retirement should be reviewed carefully. It should be presumed that an individual will engage in gainful employment suitable to his physical and mental condition until an age well beyond age 60 or 65, perhaps even until the end of his life.

Such a trend may be a natural development as health and life expectancy improve.

and as the growth in the work force slows because of the low fertility rates now being experienced and expected to continue in the future. Still, significant changes will be required in existing social and economic arrangements.

The nation must take appropriate action to provide an environment in which the capabilities of each individual can be utilized effectively, an environment which fosters meaningful activity, not empty idleness. Both the incentive and the opportunity should exist to enable every individual to work and produce throughout his lifetime in a series of endeavors compatible with his changing physical and mental abilities. Governmental policies should be directed toward these goals and not toward the removal from the active work force of able-bodied persons who must then be supported by the remaining active workers.

Jobs must be structured so they are more meaningful and satisfying to the individual. Persons must undergo training and retraining to enable them to have not just second careers, but third and fourth careers. In some instances jobs must be designed to fit the capabilities of the human resources available. For older persons as well as disabled persons, less strenuous jobs and part-time employment must be made available.

Significant advances will be required in our ability to match persons with jobs. Sometimes this can be achieved with one employer, but in some cases it will involve many different employers and may require geographical relocation as well.

These changes must begin to take place during the next 10 years, and they must be well under way by the turn of the century when the children of the post-World War II baby boom begin to reach their 40s and 50s. Bringing about these changes will be a slow process which will require the cooperation of many institutions, not just Social Security.

The first step in this process of change was the recent action by Congress prohibiting an employer from imposing mandatory retirement at an age lower than age 70 (with certain exceptions). This action was coincidental and was just another step in the direction of eliminating job discrimination altogether. Nevertheless it fits in well with the eventual need for a more complete utilization of the nation's human resources. As time goes by and health of the elderly improves, further increases in the mandatory retirement age may be advisable.

But the Social Security program effectively dictates the retirement policy of the nation and, since the program itself fosters a policy of relatively early retirement, Social Security must be revised. The mere existence of the Social Security program in its present form sets a standard and thus creates an expectation, which then fosters a presumption of entitlement, for retirement in a person's early to mid-sixties, regardless of the condition of his health and his ability to continue as a productive and useful member of society. The Social Security program thus creates some of the needs it purportedly exists to serve.

JUST 28 YEARS FROM NOW

To some observers, major changes in the Social Security program are out of the question because of the size and scope of the program and because it is so firmly established. On the other hand, 53 percent of the present population consists of those born after World War II, persons who are now under age 33. These young persons will begin reaching their 60s just 28 years from now in the year 2006.

It is today that a general framework should be constructed regarding the retirement of this generation—the type and level of benefits to be provided, the source of benefits and the approximate age at which benefits will commence. In making these choices

the nation must not be influenced unduly by decisions made in the past by and for different generations of people living under different circumstances.

It will not be easy for the nation to move in the direction of full utilization of its human resources and thus bring under control the rising cost of supporting the inactive population. The alternative, however, will be even more difficult: continued high unemployment and underemployment, an ever increasing pool of idle "disabled persons" and "aged persons," and a total cost to society which will become destructive. ●

VETO OF DEFENSE AUTHORIZATION BILL

● Mr. BAYH. Mr. President, I am pleased that the House of Representatives has sustained President Carter's veto of the Department of Defense Authorization bill for fiscal year 1979. After a review of the issue involved, I believe that the President has acted correctly and that our national defense will be strengthened if we forego construction of a fifth nuclear-powered aircraft carrier and redistribute those funds to the more unglamorous but essential programs aimed at improving the readiness of our forces in being. Those programs involve funding more armored combat vehicles, cargo helicopters, surface-to-air missiles for field army air defense and additional tanks for our front line forces in NATO. They include more money for operations, maintenance, and logistics purposes to make sure supplies are available to our troops when they need it. They will support a real increase in our excellent research and development efforts in all phases of defense policy in order that we retain our qualitative edge over the Soviet Union which is in our supreme national interest. By rejecting authorization of a \$2.4 billion nuclear-powered aircraft carrier, we will also free up funds in the appropriation process so we can purchase more of the right kinds of combat aircraft to help deter a Soviet armored challenge in Europe and immediately bolster our national security across the board without "busting" the budget.

Like the B-1 strategic bomber program which was cancelled before it, the fifth nuclear-powered carrier (CVN-71) would have been an impressive addition to our Nation's military arsenal. Anyone who has ever stood overlooking the flight deck of a large aircraft carrier cannot help but be impressed by the sheer size a vessel over 1,000 feet long, weighing more than 80,000 tons and equipped with the most sophisticated weaponry known. Nor should the importance of the carrier task force in a dangerous and unpredictable world be discounted. Its ability to control the seas by projecting power shore to secure, or exert control over critical terrain (such as Norway's North Cape or the Dardanelles) remains crucial to our security. In addition, there is perhaps no more visible and compelling symbol of American power and purpose than the sight of a task force steaming off the coast of a world trouble spot. Another nuclear-powered carrier would, however, be an expensive symbol which could impair our efforts to control the sea lanes.

Despite the important "traditional" missions of the carrier task force, the advent of the Soviet antiship cruise missile threat has forced some naval planners to rethink just how effective such a force could be operating close to the Soviet Union or on the open sea if the Soviet Union chose to challenge our fleet. This situation has been recognized by John Collins who is the senior specialist in national defense at the Library of Congress. In his analysis of American and Soviet Military Trends Since the Cuban Missile Crisis, he points out that:

U.S. sea control tactics traditionally try to destroy enemy weapons before they endanger our ships. Surprise first strikes by Soviet cruise missiles, launched at close range, could make this approach obsolete. . . . Successful defense likely will depend on SAM's and interceptor aircraft systems in combination with ECM, strategy, tactics and doctrine. An appropriate package is not yet available.

The absence of such a package concerns me greatly. For this and other reasons I supported additional funding for work to put the Navy on course in developing antisubmarine warfare platforms and the kinds of aircraft and helicopters to go on them to defeat the Soviet submarine launched cruise missile threat. I believe more resources would be available for this task if we did not fund another nuclear-powered carrier.

In addition to the diversion of resources from this vital task and subsequent delay of such an antiship cruise missile defense package, the \$2.4 billion for construction of the CVN-71 could adversely affect the other services as well. This is so because the true cost of another nuclear-powered carrier is \$40 billion not \$2.4 billion or the \$1.9 billion suggested by the Armed Services Committee; \$40 billion is the total estimated cost of the carrier plus escort ships (17), complement of aircraft (88) and operations and maintenance expenses of the world's most expensive ship for its 30 year life cycle. And even if we do procure the CVN-71, she will not be ready to sail until 1987. In the meantime, \$40 billion could purchase the following for the Army, Navy, and Air Force:

ARMY

1. 3 Armored Divisions with new equipment.
2. 5,000 infantry fighting vehicles.
3. 2,300 new Main Battle Tanks—XM-1's.
4. 1,000 Black Hawk Helicopters.
5. 550 Advanced Attack Helicopters.

NAVY

1. At least one Trident Ballistic Missile Submarine with full complement of 24 missiles.
2. Naval Battle Group less Aircraft Carrier but with underway replenishment.
3. 12 Guided Missile Frigates.
4. 6 nuclear attack submarines.
5. 3 Spruance Class destroyers.

AIR FORCE

1. 130 F-15 "Eagle" Interceptors.
2. 350 F-16 fighter-bombers.
3. 480 A-10 anti-tank close support aircraft.
4. Enough Air Launched Cruise Missiles to equip 105 B-52's (7 squadrons).

Mr. President, perhaps the money saved by not purchasing another carrier task force could buy even more hard-

ware. The items listed above serve to illustrate just what a defense commitment of \$40 billion can mean. I think even the most stalwart supporter of another nuclear-powered carrier task force would agree that the defense items listed above provide us with a better overall balance for our defense forces than the commitment of those same dollars to construct a CVN-71 and all that must go with it.

When viewed in this light, the CVN-71 program appears to be a sea-going B-1. Both programs were glamorous and exciting. The potency of each was truly impressive. Yet each can only be seen as a luxury when matched against the military realities of the times and the availability of more cost-effective alternatives.

As such, I am persuaded that another nuclear-powered aircraft carrier can only impair our national defense. Unfortunately, the Congress did not suitably grasp this aspect of the issue and defeated attempts to take the CVN-71 out of the fiscal year 1979 defense program. The President has wisely used his constitutional prerogative of the veto at the proper time to assure that our resources for defense are spent wisely and in a manner which will guarantee our security now and in the future. ●

OSHA

● Mr. WILLIAMS. Mr. President, the Occupational Safety and Health Act of 1970 represented the promise by this Government to millions upon millions of American working men and women, a promise that the greatest industrial nation in the history of the world could maintain productivity while assuring workers a safe and healthful working environment.

That law has been in effect for more than 6 years and while the initial administrative and enforcement efforts of the Occupational Safety and Health Administration left much to be desired, during the past 20 months, under the stewardship of Secretary of Labor Marshall and Assistant Secretary for Occupational Safety and Health Bingham, great improvements have been made. Under their leadership, OSHA has vastly reduced burdensome recordkeeping, it has reduced the amounts of penalties assessed for violations, and has redirected its regulatory and enforcement thrust so that the vast bulk of its efforts are now directed toward the most serious workplace hazards.

Despite this progress, the OSHA program has generated more than its share of controversy. Employers, both large and small, see OSHA as a bureaucratic monster, which interferes with the operation of business enterprises. And, we in the Congress have reacted by imposing restrictions on the enforcement of many parts of the program. With increasing, and distressing frequency, the Congress is being called upon to make major and substantive changes in the Occupational Safety and Health program, without the benefit of hearings or a full appreciation of the nature of the problem and the effects of the offered solutions.

It is therefore my intention to conduct oversight hearings on the Occupational Safety and Health program on October 3, 4, and 5, 1978. In my mind, a number of factors warrant such oversight.

First, it is necessary for the Congress to measure the progress made by Secretary of Labor Marshall and Assistant Secretary Bingham in streamlining the enforcement of the act.

Second, there have been several significant court decisions bearing on the OSHA program, including the Supreme Court's decision in Barlow's against Marshall, the effects of which must be clearly understood in terms of the overall statutory program.

Third, the interagency task force on workplace safety will have issued its first report on the overall OSHA program, and the work of this group deserves careful congressional scrutiny.

Finally, it is the responsibility of the Human Resources Committee to investigate the allegations by small and sometimes even large businesses, that the OSHA program constitutes a harassment of business far out of proportion to the benefits which it ultimately provides to workers, and to understand how we can best protect workers in a manner which least interferes with the operation of American business.

These hearings are intended to examine and evaluate the broad range of OSHA programs.

They must be held now, so that if the need for legislative reform is demonstrated, the Committee on Human Resources will be able to propose legislative solutions early in the 96th Congress.

Piecemeal limitations of the OSHA program in the long run serve neither workers nor small business. If, in fact, the charges currently being levied against the OSHA program are justified, comprehensive permanent legislative solutions are in order. These solutions can only be brought about after careful review and appropriate consideration by the Committee on Human Resources. These hearings are the first step in determining our future actions.

America's workers and the American public deserve the best, the most efficient and the most effective program to control workplace hazards. At the same time, the legitimate businessman must not be overburdened with costly bureaucratic overregulation which serves no useful purpose.

These hearings are to be the first step in insuring that both of these objectives are accomplished in a just and equitable manner. ●

ACHIEVEMENTS OF PRESIDENT CARTER

● Mr. BAYH. Mr. President, last weekend I attended a meeting of the Indiana Democratic Editors Association and was privileged to hear my colleague in the House of Representatives, the Honorable LEE HAMILTON, give a speech on the accomplishments and high quality of the first 20 months of the Carter administration.

It has become fashionable for many

to criticize the President and his administration, and, as a result, President Carter's great successes have been overlooked far too often. I think LEE HAMILTON accurately brought to our attention the many achievements of President Carter on a variety of issues facing this country today.

I commend him for his speech and ask that it be printed in the RECORD.

The speech by Mr. HAMILTON follows:

SPEECH OF LEE HAMILTON

I have the high privilege this evening to speak for eight Democratic members of the United States House of Representatives from Indiana: Adam Benjamin, Floyd Fithian, John Brademas, Dave Evans, Dave Cornwell, Phil Sharp, Andy Jacobs, and myself.

At the risk of being immodest, may I say to you what the Speaker of the House has said to me on several occasions: the Indiana House Democratic delegation stands second to none in the United States Congress for the quality and effectiveness of its representation.

My colleagues from Indiana asked me to convey their warm wishes to each of you. They also asked me to convey several comments to you.

First, we are grateful to you, as the leaders of the Democratic party in Indiana, for making it possible for us to serve in the Congress. We know that without you we would not have that opportunity.

Second, we are proud to endorse and run with Rex Carpenter, Pat Byrd, John Ruby and Billy McCullough and we pledge our best efforts to elect each of them and the entire state and county Democratic ticket.

Third, it is time, in our judgment, to speak up for the Carter Administration.

President Carter's polls may be down, but they were down for Harry Truman, too. Recent history tells us that no matter what an American President does, his popularity declines. It is one thing to be down in polls that measure the President against someone's standard of excellence, but quote another to run against a real live Republican.

When measured against the like of Richard Nixon and Jerry Ford, Jimmy Carter stands tall. Besides, nothing is more dangerous for a President than to live in the temperamental atmosphere of the public opinion polls. He has only one duty, only one safe course, and that is to try to be right and to do and say what he believes to be right.

Mr. Carter, more than any other President, has been measured against expectations. There is no doubt that he raised high hopes and great expectations during his campaign. Neither he nor we need apologize for that.

Mr. Carter expressed his dream with the fervor of an evangelist. He built the hope of a fresh, new administration that would be clean, honest, efficient and capable of producing change. He talked about economic stability, balanced budgets, and an end to political favoritism. He talked about fair tax laws, cutting down the bureaucracy, and a new era of fairness and competence.

We Democrats have to acknowledge that all these things have not been accomplished. There has not been a great leap forward from the day Mr. Carter became President. We are a long way from achieving all of these things. But it is a plain fact that if these goals had not been expressed, people today would have relatively little to criticize.

It is always better to aim higher than you hit.

We may not have rung in a millenium. We may not have hit all of our targets. But one thing is quite clear: Mr. Carter's Administration is by no means as clearly disastrous as the years of Nixon and Ford.

Criticisms of President Carter as ineffective come with ill-grace from our Republican friends. It was they who gave us 9 percent unemployment, double-digit inflation,

the largest and deepest recession in the post-war period, and government by veto—to say nothing of Richard Nixon, Bob Haldeman, John Ehrlichman, and John Mitchell. The President inherited a sticky and messy economic and political situation with a lot of economic damage done. It takes time to turn that around.

It is still true, as Will Rogers observed, that the only way to keep the Republican party respectable is to keep it out of office.

We all believe in the two-party system and we believe in a Republican party that is strong, vigorous, alert—and small.

I believe Jimmy Carter will be a two-term President. He stands low in the polls principally because he has had the fortitude to tackle the tough issues, like energy, the Panama Canal, Social Security and Civil Service Reform, in his first months in office.

Let's take a closer look at the Carter record.

In foreign affairs he has had major victories with

The passage of the Panama Canal Treaties; The vote to lift the Turkish Arms Embargo; and

The vote to approve the Middle East Arm Sales.

He has won for the United States new acceptance and new respect in Africa. He has strengthened NATO's combined forces in Europe. He has brought human rights to the consciousness of every world leader. He continues to work to keep the Middle East at peace. Our prayers go out to him in these days as he prepares for the historic and unprecedented Camp David Summit meeting.

And most important of all: This country is at peace today.

On the domestic side, the accomplishments are also impressive.

Foremost is the substantial drop in unemployment. It stood at 8 percent when Mr. Carter took office. It has dropped in 18 months by almost 2 percentage points. His administration has seen a net total of 6.1 million jobs added to the economy, and that is a record.

Business recovery has continued for 4 years, the longest peacetime recovery since World War II.

When President Carter took office, the social security system faced bankruptcy. He submitted proposals to the Congress. Congress approved them and the system is now fiscally sound until after the year 2000.

The budget deficit has been reduced from about \$60 billion dollars a year in fiscal year 1977 to somewhere in the \$40 billion range or below for fiscal 1979—and it will drop further in 1980.

A comprehensive effort is now underway to reorganize the government;

A new Department of Energy has been created;

The Executive Office of the President has been streamlined;

Consolidations have occurred in other areas;

A major civil service reform proposal is pending before the Congress, and

A new tone, civil and compassionate, has come into government.

Already his Administration has seen: Dramatic decreases in airline fares; a reduction of "perks and frills" at the White House; the termination of nearly 500 advisory commissions; tougher financial disclosure requirements for the executive branch; and record numbers of blacks, hispanics, and women in government service.

The President has made the American Presidency an open one. He is more accessible to the press and public than any other modern President.

I think this President is a good man. I do not know anyone who has occupied the Office of President who has tried harder and with more ability than Jimmy Carter.

He does not have an ego problem. He admits mistakes. He does not have a mean streak

in him. I am impressed by a man trying to do his absolute best—trying to do what he thinks is right.

If I have a criticism, it is that he should let up on those 18 hour days in Washington and get into the country to see the people more. He should come to Indiana.

So, my friends, the President is presiding over the country during a period of remarkable stability. He may not have worked heroic changes, but times are pretty good.

It is time for you and me to stand up and be counted for Jimmy Carter and for the Democratic Party. ●

A RESPONSE ON THE BHUTTO TRIAL

● Mr. McGOVERN. Mr. President, on August 21, I inserted in the RECORD an article by former Attorney General Ramsey Clark containing his observations on the trial of former Prime Minister Bhutto of Pakistan.

The Embassy of Pakistan, through Press Counsellor Khalid Ali, has submitted a response to the Nation magazine in which that article appeared.

To permit my colleagues to examine both sides of this issue, I request that the response be printed in the RECORD.

The letter follows:

AUGUST 31, 1978.

THE EDITOR,
The Nation,
New York, N.Y.

DEAR SIR: The article by Mr. Ramsey Clark, in your issue of August 19, is full of erroneous statements calculated to cast aspersions on the judicial process in Pakistan, prejudice a case which is before the Supreme Court and interfere in the internal affairs of Pakistan.

The peaceful takeover on July 5, in contrast to brutal violence and killings of overthrown personalities in other countries, and the rejection of a quick summary trial of those involved in the murder case shows that the Government is not interested in the elimination of personalities but the dispensation of justice. The murder conviction of Mr. Benigno Aquino in the Philippines, to which Mr. Clark referred bears no comparison to the present case. Mr. Aquino was tried by a military court while Mr. Bhutto is being tried under the normal law in the civil courts.

The question is: Should political leaders accused of murder not be tried under the law of the land? If no man is above law, if life has a sanctity, who else but the courts of that country can make the final determination of the guilt or innocence of the accused.

The appeal in this criminal case is being heard in an open court and by judges who were serving in the Supreme Court or the High Courts under the regime headed by Mr. Bhutto. It is not a trial under martial law or even a specially constituted tribunal. The accused have been given full facilities of legal defense and Mr. Bhutto's lawyers presented the case for 57 days which was fully reported in the press. The Supreme Court accepted Mr. Bhutto's plea for the presentation of the in-camera statements recorded in the lower court. These statements now form part of the record of the Supreme Court and were reported in extenso in the media. Even Mr. Bhutto's lawyer has acknowledged the fairness of the proceedings and has thanked the Supreme Court for "its exceptional kindness, consideration and a very patient hearing." Mr. Ramsey Clark also acknowledges that "the nine judges engage in a meticulous review of the record. They are impressive men, learned in the law and skillful in their examination of the trial transcript."

Yet, instead of letting these "impressive and learned men" decide the case, Mr. Ramsey

Clark has arrogated to himself the role of defence, prosecution and judge. Mr. Clark has said that the Chief Justice of Lahore High Court, which sentenced the accused to death was "an old enemy who had heard Bhutto's case when he was arrested in 1968." He should therefore have been disqualified. The fact is that in 1968 the High Court, of which this judge was a member, came to the rescue of Mr. Bhutto and his associates. In December 1968, the Court ordered the release of one of Mr. Bhutto's associates, Mr. Khar. Sensing the trend of the Court, the then Government released Mr. Bhutto. This evoked expressions of satisfaction from the Court of which the now Chief Justice of Lahore High Court was a member. In any case the Supreme Court which is seized of this and many other points and whose members have been extolled by international jurists, can be expected to make a fair and honest determination of this as well as other aspects of the case. The Supreme Court is fully competent to uphold, set aside or to commute the sentence awarded by the High Court.

The doomsday scenario drawn up by Mr. Ramsey Clark is a futile exercise in speculation. There is peace in the country. The Government of Pakistan has announced that election would be held by October 1979 and power would be transferred to civilian hands. The future of States or indeed of democracy does not depend upon the fate of single individuals. The judicial process and rule of law cannot imperil the future of States.

Yours sincerely,

KHALID ALI,
Press Counsellor. ●

SENATE SEATS FOR WASHINGTON, D.C.?

Mr. SCOTT. Mr. President, I have before me a copy of an editorial published in the September 11 U.S. News & World Report, entitled "Senate Seats for Washington, D.C.?" It is a very timely article. It suggests that the States, in their ratification process, take their time and consider very carefully the proposal for full voting rights for the District of Columbia.

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

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

SENATE SEATS FOR WASHINGTON, D.C.?

(By Marvin Stone)

"No taxation without representation." That was a stirring battle cry in the American Revolution. Now it is being used again—this time as an argument for giving the District of Columbia voting representation in Congress.

States are being asked to ratify a constitutional amendment that would let residents of the nation's capital elect two U.S. senators and at least one, perhaps two, members of the House of Representatives.

On its face, that seems only fair. The District, which is actually the city of Washington, has a population of nearly 700,000. Seven states with smaller populations have the same kind of voice in Congress that Washington wants.

The issue is not a simple one, however. And because backers of the amendment have seven years to procure the required approval of three fourths of the state legislatures—38 in all—the individual states should take time to give it cautious study.

Admittedly, politicians face problems in voting on this amendment. D.C.'s population is 75 percent black. In local and presidential elections, it has voted overwhelmingly Democratic and liberal. Its selections for Congress

would almost surely be black, liberal Democrats. So anyone opposing the D.C. amendment risks being accused of racism and Republican partisanship. Those who support it can count on winning votes among blacks.

Issues raised by the amendment, however, are too important to be decided by such considerations. Some of the arguments deserve critical examination.

Take that cry of "taxation without representation." In Senate debate on the amendment, it was pointed out that the District gets back from the federal government \$1 for every 29 cents it pays in federal taxes. "That is not taxation without representation," argued one senator.

D.C. is not entirely unrepresented in Congress. It has a delegate in the House of Representatives. Though he can't vote on the floor, he can in committees. And he can argue for his constituents on the floor.

Washingtonians are not the only American citizens who have no direct representation in Congress. Puerto Rico, with more than 3 million U.S. citizens, has the same nonvoting representation. So do the territories of Guam, American Samoa and the Virgin Islands. Will they be next to demand votes in Congress?

The question boils down to this: Should a single city be given the same kind of representation in Congress as an entire state?

Washington has an area of only 67 square miles, and lacks many of the attributes of even a thinly populated state. Without farms, mines, forests, small towns or much industry, its interests are narrow. Almost half its people make their living off the government—federal or local. As one senator said: "What we are doing here is giving the federal bureaucracy itself voting representation in Congress."

That obviously is not what the authors of the Constitution intended. They set up the District of Columbia as a separate, nonpolitical enclave, belonging to citizens of all the states, and immune to local pressures. Would giving it votes in Congress inevitably lead to the kinds of pressures that the framers of the Constitution wanted to avoid?

It was frequently predicted, in Senate debate, that the D.C. amendment will fail to win ratification by the states. Its passage by Congress, sending it on its way to the states for further action, was described by some lawmakers as a "political charade" to woo black votes back home.

That's probably an unfair characterization. Undeniably, there are appealing arguments for giving D.C. residents a voting voice in Congress. But there are also good reasons why states should weigh both sides carefully before voting on such a fundamental change in Washington's constitutional role.

ORDER THAT S. 2640 BE PRINTED AS PASSED

Mr. RIBICOFF. Mr. President, I ask unanimous consent that S. 2640, the Civil Service Reform Act of 1978, be printed as passed by the Senate and that 300 additional copies be printed for use by the Committee on Governmental Affairs.

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

PRIVILEGE OF THE FLOOR

Mr. CRANSTON. I ask unanimous consent that Hal Gross and Karen Manden may have the privilege of the floor throughout the consideration of the natural gas conference report when it comes before the Senate.

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

SUSTAINING THE VETO OF THE MILITARY PROCUREMENT BILL A SETBACK TO OUR NATIONAL DEFENSE POSTURE

Mr. THURMOND. Mr. President, the national defense posture of this Nation in real terms and in the eyes of our friends and enemies abroad suffered a severe setback today when the veto by President Carter of the military procurement bill was upheld in the House.

President Carter's veto action was not one of strength but one of weakness. His position on defense matters is so out of tune with the people of this Nation and the Congress itself that he has resorted to the veto, an action needing only one-third support in either House to be sustained.

Besides killing the B-1 program and delaying the mobile missile development, he has cut Navy shipbuilding by one-half for the next 5 years and today axed a badly needed nuclear aircraft carrier for the Navy. This action will not only weaken us in real terms, but will confuse our allies and encourage our enemies.

Mr. President, I shall continue to fight for ships for our Navy, including an aircraft carrier. When the military bill once again comes before our committee it should be strengthened, not weakened. This veto makes absolutely no sense. It was apparently the work of President Carter's advisers who oppose naval superiority on the grounds it is inimical to the United States-Soviet strategic balance.

Mr. President, in my judgment today was a watershed in the internal efforts to beat down our defense programs under the whip of the veto. Although this Congress is one of the President's own party by a sizable margin, his weak and misguided defense policies have to depend on the veto to be sustained. By sustaining this veto, those who favor parity with the Soviets have been handed a new weapon which they will continue to use in order to whip the Congress into line. This is a sad day in this Nation's national defense history.

THE CALENDAR

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of the following calendar orders, all of which have been cleared on the minority side: Calendar Orders Nos. 1063, 1067, and 1075.

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

AIR FORCE GRADE EXTENSION AND EXTENSIONS OF CERTAIN OTHER CURRENT MILITARY PERSONNEL PRACTICES

The PRESIDING OFFICER. The first bill will be stated by title.

The legislative clerk read as follows:

A bill (S. 3454) to amend the Act of August 29, 1974 (88 Stat. 795; 10 U.S.C. 8202 note), relating to the authorized numbers for grades of lieutenant colonel and colonel in the Air Force and to authorize the Presi-

dent to suspend certain provisions of law when he determines that the needs of the Armed Forces so require, and for other purposes.

The Senate proceeded to consider the bill.

UP AMENDMENT NO. 1823

(Purpose: To change an incorrect section reference and to make other technical changes)

Mr. ROBERT C. BYRD. Mr. President, I send an amendment to the desk on behalf of Mr. NUNN and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

The Senator from West Virginia (Mr. ROBERT C. BYRD) on behalf of Mr. NUNN, proposes an unprinted amendment numbered 1823.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

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

The amendment is as follows:

On page 2, line 3, strike out "provision" and insert in lieu thereof "provisions".

On page 2, line 5, strike out "5705 (c)" and insert in lieu thereof "5707 (c)".

On page 3, line 25, insert "incurred in line of duty" before "during the period".

On page 6, line 22, strike out "5787d." and insert in lieu thereof "5787d".

On page 7, strike out lines 5, 6, and 7 and insert in lieu thereof the following:

"(1) A board to recommend brigadier generals for promotion to the grade of major general, consisting of nine officers serving in the grade of major general or above."

On page 7, line 11, insert "(a)" after "Sec. 11."

On page 7, line 15, strike out "promotions" and insert in lieu thereof "promotion".

On page 7, after line 23, add the following:

(b) The table of sections at the beginning of chapter 545 of such title is amended by striking out the item relating to section 5787c and inserting in lieu thereof:

"5787c. Navy and Marine Corps; warrant officers and officers designated for limited duty; temporary promotion."

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment was agreed to.

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

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

S. 3454

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of August 29, 1974 (88 Stat. 795; 10 U.S.C. 8202 note), is amended by striking out "through September 30, 1978" and inserting in lieu thereof "through September 30, 1979".

Sec. 2. (a) For the period beginning on September 15, 1978, and ending on September 30, 1979, the President is authorized to suspend application of the following provisions of title 10, United States Code:

(1) Section 5707(c).

(2) Section 5751 (a), (b), and (e).

(3) Section 5770.

(b) No suspension invoked by the Presi-

dent under authority of subsection (a) shall be effective after September 30, 1979.

Sec. 3. Effective only for the period beginning September 15, 1978, and ending September 30, 1979—

(1) Section 1201(3) of title 10, United States Code, is amended as follows:

(A) striking out the word "or" at the end of subclause (B) (ii);

(B) striking out the period at the end of subclause (B) (iii) and inserting in lieu thereof a semicolon and the word "or"; and

(C) adding at the end of subclause (B) a new item as follows.

"(iv) the disability was incurred in line of duty during the period beginning on September 15, 1978, and ending on September 30, 1979, except that the condition provided for in this item shall not be effective during such period unless the President determines that such condition should be effective during such period and issues an Executive order to that effect."

(2) Section 1203(4)(A) of such title is amended by—

(A) striking out the word "or" at the end of item (i);

(B) striking out the semicolon at the end of item (ii) and inserting in lieu thereof a comma and the following: "or (iii) incurred in line of duty during the period beginning on September 15, 1978, and ending on September 30, 1979, except that the condition provided for in this item shall not be effective during such period unless the President determines that such condition should be effective during such period and issues an Executive order to that effect";

(3) Section 1203(4)(C) of such title is amended by striking out "the proximate result of performing active duty nor incurred in line of duty in time of war or national emergency" and inserting in lieu thereof "(i) the proximate result of performing active duty, (ii) incurred in line of duty in time of war or national emergency, nor (iii) incurred in line of duty during the period beginning on September 15, 1978, and ending on September 30, 1979, except that the condition provided for in this item shall not be effective during such period unless the President determines that such condition should be effective during such period and issues an Executive order to that effect".

Sec. 4. (a) Chapter 545 of title 10, United States Code, is amended by inserting after section 5787c a new section as follows:

"§ 5787d. Navy lieutenants: temporary promotion.

"(a) Line officers not restricted in the performance of duty in the grade of lieutenant, possessing skills in a critical shortage and serving in lieutenant commander billets requiring such skills, may be temporarily promoted to lieutenant commander under such regulations as the Secretary of the Navy may prescribe. Temporary appointment under this section shall be made by the President alone.

"(b) Temporary appointments under this section do not change the permanent, probationary, or acting status of members so appointed, prejudice them in regard to other promotions or appointments, or abridge their rights or benefits.

"(c) Temporary promotions under this section may be made only upon the recommendation of a board of officers convened for that purpose. In addition to recommending officers for promotion, a board so convened shall make the report required by section 6384 of this title.

"(d) Each temporary appointment under this section, unless expressly declined, is, without formal acceptance, regarded as accepted on the date made, and the member so appointed is entitled to the pay and allowances of the grade to which promoted from that date.

"(e) Temporary appointments under this section will terminate upon an officer's detachment from a qualifying billet so designated by the Secretary of the Navy. When

an officer, whose name is on a promotion list as a result of selection to lieutenant commander other than under this section, is detached, an appointment will be issued to include the interim period between the subject officer's detachment from the qualifying billet and the date of promotion as a result of selection board action.

"(f) When his temporary appointment under this section is terminated or expires, each member of the naval service on active duty shall have the grade he would hold if he had not received any such appointment.

"(g) No appointments may be made under this section after September 30, 1979."

(b) The table of sections at the beginning of chapter 545 of such title is amended by inserting

"5787d. Navy lieutenants; temporary promotion."

below

"5787c. Navy and Marine Corps, warrant officers: temporary promotion."

Sec. 5. Section 5504(d) of title 10, United States Code, is amended by inserting "or 5787d" after "5787".

Sec. 6. (a) Section 5786(c) of title 10, United States Code, is amended by inserting "or 5787d" after "5787".

(b) Section 5791(a) of such title is amended by inserting "and 5787d" after "5787".

Sec. 7. Section 6325(b) of title 10, United States Code, is amended by inserting "or 5787d" after "5787".

Sec. 8. (a) Section 6384(a) of title 10, United States Code, is amended by inserting "and each board of officers convened under section 5787d" after "under chapter 543".

(b) Section 6385 of such title is amended by striking out "or 5787" and inserting in lieu thereof "5787, or 5787d".

(c) The catchline of such section is amended by striking out "and 5787" and inserting in lieu thereof "5787, or 5787d".

(d) The table of sections at the beginning of chapter 573 of such title is amended by striking out "and 5787" in the item relating to section 6385 and inserting in lieu thereof "5787, or 5787d".

Sec. 9. Section 905(h) of title 37, United States Code, is amended by inserting "or 5787d" after "5787".

Sec. 10. (a) Section 5703(a)(1) of title 10, United States Code, is amended to read as follows:

"(1) A board to recommend brigadier generals for promotion to the grade of major general, consisting of nine officers serving in the grade of major general or above."

(b) The amendment made by subsection (a) shall be effective only for the period beginning on September 15, 1978, and ending on September 30, 1979.

Sec. 11. (a) Section 5787c of title 10, United States Code, is amended to read as follows:

"§ 5787c. Navy and Marine Corps; warrant officers and officers designated for limited duty: temporary promotion.

"(a) Warrant officers may be temporarily promoted to higher warrant officer grades under such regulations as the Secretary of the Navy may prescribe.

"(b) (1) Officers designated for limited duty may be temporarily promoted to a higher grade under such regulations as the Secretary may prescribe.

"(2) No promotion may be made under this subsection after September 30, 1979."

(b) The table of sections at the beginning of chapter 545 of such title is amended by striking out the item relating to section 5787c and inserting in lieu thereof:

"5787c. Navy and Marine Corps; warrant officers and officers designated for limited duty: temporary promotion."

Mr. ROBERT C. BYRD. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. GOLDWATER. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent to have printed in the RECORD an excerpt from the report (No. 95-1144), explaining the purposes of the measure.

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

FORM OF COMMITTEE ACTION

The administration has submitted several legislative proposals related to the extension of authorized grades for the Air Force and relating to several current personnel practices that would lapse under the provisions of the National Emergencies Act of 1976 (Public Law 94-412). Many of these personnel procedures and many other provisions not involving these procedures are included in another bill, H.R. 5503, on which hearings were held but on which action has not been completed. These circumstances made it desirable to report an original bill.

COMMITTEE BILL

The bill provides for the following:

1. Extending the authorization of an increase for 1 year in the number of Air Force colonels and lieutenant colonels provided under 10 U.S.C. 8202(a). This would be effected by extending for 1 year, Public Law 93-397, which expires on September 30, 1978.

2. Authority for the President to suspend the application of certain provisions in law through September 30, 1979, when he determines that the needs of the Armed Forces so require. The application of these provisions is now suspended. Suspending these provisions of law for another year would maintain current personnel practices for the military in these areas.

3. Extending authority for 1 year to allow spot promotions of certain Navy lieutenants, below the zone promotion for Navy limited duty officers, and to allow temporary Marine Corps major generals to sit on Major General Selection Boards.

AIR FORCE GRADE EXTENSION

The bill would provide authority for 1 more year for the number of Air Force colonels and lieutenant colonels currently authorized by Public Law 93-397 which expires on September 30, 1978. Public Law 93-397 authorizes an increase in the number of colonels and lieutenant colonels serving on active duty in the Air Force above the permanent authorization of 10 U.S.C. 8202. The number of authorized colonels and lieutenant colonels is based on the total officer strength of the Air Force.

The temporary extension of this authority should allow the Air Force to adequately man its officer force and to maintain predictable promotion patterns for commissioned officers pending enactment of permanent legislation. Failure to enact legislation extending this authority would mean that the number of officers allowed to serve in the field grades would be based upon the table established in permanent law by the Officer Grade Limitation Act (OGLA) of 1954, substantially below current strengths.

The extension of the authority will permit the Air Force to promote officers for the next year to the grade of major, lieutenant colonel, and colonel at about the same career points and with approximately the same percentage of promotion opportunity as has been the case in the recent past and as is comparable to the Army and Navy.

BACKGROUND ON THE AIR FORCE FIELD GRADE OFFICER PROBLEM

The original Officer Grade Limitation Act (OGLA), which placed limits on the number of field grade officers in the Armed Services, was passed in 1954. At that time, the

Air Force was a comparatively younger branch of the Armed Services and thus needed fewer grade authorizations to provide adequate career progression. Aware of this fact, Congress provided substantially fewer field grades for the Air Force than for the Army and Navy, but it also realized that the Air Force would need to seek relief in the form of additional authorizations as the force matured. The Congress has provided this additional authorization on eight previous occasions. The most recent authority was provided by Public Law 93-367 which expires September 30, 1978.

THE PROPOSED DEFENSE OFFICER PERSONNEL MANAGEMENT SYSTEM

The Defense Officer Personnel Management System (DOPMS) proposed by the Department of Defense, is far-reaching, complicated legislation to provide permanent and more uniform promotion systems among the Services and new field grade authorization tables. It would include new grade authorization tables for the Air Force, and thus obviate the need for temporary grade relief legislation. While the DOD proposal would overhaul or eliminate more than 300 sections of current law, it would not make a major shift from the present officer management system.

The Subcommittee on Manpower and Personnel has studied the DOPMS proposal in detail but has not completed action on the proposal. The Committee therefore finds it prudent to act on the needed Air Force grade relief extension pending action on the broader DOPMS proposal.

NATIONAL EMERGENCIES ACT RELATED PERSONNEL ITEMS

The National Emergencies Act of 1976 terminates the current reliance by the executive branch on national emergency power to suspend provisions of law. The effect of this act is to revoke, effective September 15, 1978, suspensions of provision in law which depend upon the declaration of a national emergency for the suspension. There are several military personnel items that are affected. Most, but not all of these, would have been repealed or changed under the proposed Defense Officer Personnel Management Act. For these items the committee bill will have the effect of allowing the military to maintain current practices by providing new authority for the President to suspend through September 30, 1979 the application of appropriate provisions of law when he determines the needs of the Armed Forces so require. The committee intends to review each of these items again in detail when the proposed Defense Officer Personnel Management Act is considered.

REQUIREMENT FOR SEA OR FOREIGN SERVICE FOR REGULAR OFFICERS OF THE NAVY

Prior to 1917, the promotion of Navy officers was solely a function of seniority. In the Naval Appropriations Act for fiscal year 1917, the 64th Congress provided for promotion through a selection process. The sea service requirement was included to insure that officers performed at sea prior to promotion.

In 1964, Executive Orders 11151 suspended section 5770. The National Emergencies Act (Public Law 94-412) will, in effect, vacate the suspension as of September 15, 1978.

The 1964 suspension was necessitated by developing technology which resulted in the skill requirements for Naval officers being considerably different than they were in 1917. The increased complexity of weapons, engineering and management systems required that unrestricted line officers receive concentrated scientific training in discrete technological areas. This training, in many cases, precluded the opportunity for sea duty for extended periods. The Navy believes that this rationale for the suspension remains valid and will continue to obtain for the foreseeable future.

The committee bill would authorize the President to suspend section 570 of title 10,

United States Code, relating to the requirement of sea or foreign service to certain officers of the Regular Navy when he determines the needs of the Armed Forces so required.

LIMITS ON BELOW THE ZONE SELECTION AUTHORIZATION FOR REGULAR OFFICERS

Current law authorizes below the zone selection for promotion for most Navy and Marine Corps officers on active duty. Permanent regular officers who may receive accelerated selection are limited to 5 percent of the total number that a selection board is authorized to select. By way of comparison the Army and the Air Force do not have a legal restraint on the number of below the zone selections.

In order to provide for accelerated promotion of exceptional officers who have demonstrated that they can progress rapidly to positions of greater responsibility, Executive Order 11554 in 1970 suspended the operation of the provisions of section 5707(c) of title 10, United States Code. Pursuant to the authority provided by the Executive Order, increased below zone selections have been selectively utilized and have never exceeded 15 percent. The suspension of section 5707(c) will expire September 30, 1978. An extension will be precluded by the effect of the National Emergencies Act. The 5 percent limited on below zone selection for permanent regular officers would then be reinstated.

The committee bill would provide authority to the President to suspend Section 5707(c) of title 10, United States Code, which now limits below the zone selection of permanent regular officers to 5% of total number of officers authorized to be recommended for promotion, when he determines that the needs of the Armed Forces so require.

SERVICE IN GRADE ELIGIBILITY REQUIREMENTS FOR CONSIDERATION BY SELECTION BOARDS FOR PROMOTION OF ACTIVE DUTY NAVY MALE LINE OFFICERS AND TO ACTIVE DUTY MARINE CORPS OFFICERS

Initial time in grade eligibility requirements were established by the Officer Personnel Act (OPA) of 1947. Sections 5751 (a) and (b) of title 10, United States Code, provide that an active duty male officer of the line of the Navy, or of the Marine Corps is eligible for consideration for promotion to the next higher grade by a selection board that is convened in the fiscal year in which he completes the specified number of years of service in the grade in which he is serving.

In the years since passage of OPA, continued adherence to the above minimum time in grade eligibility requirements became increasingly difficult. Since 1947, promotion flow points for certain grades, have been accelerated to meet vacancy requirements. As a result, in these cases, increasingly younger officers have been made eligible for consideration. The time in grade laws were originally designed to operate in a stable strength environment with normal promotion flow occurring at specified points during a 30-year career. During the period 1954 through 1967, various portions of sections 5751 (a) and (b) were suspended by Executive orders.

Vacation of the President's suspension of sections 5751 (a) and (b), effective September 15, 1978, would mean a return to the 1947 time in grade eligibility requirements which, in certain cases, could severely limit the number of officers eligible for selection to fill vacancies in higher grades.

The committee bill would provide authority for the President to suspend sections 5751(a) and 5751(b) relating to service and grade eligibility requirements for consideration of selection boards for promotion of certain Navy and Marine Corps officers when he determines that the needs of the Armed Forces so requires.

PHYSICAL DISABILITY RETIREMENTS

Since December 16, 1950, when President Harry S. Truman proclaimed the existence of a state of national emergency (Proclamation 2914), any member of the Armed Forces who is unfit for service because of physical disability incurred while on active duty for more than 30 days who is disabled in line of duty while entitled to basic pay has been entitled to retirement or separation (depending on the extent of disability) with pay. The National Emergencies Act terminates the authority in law possessed as a result of a declaration of national emergency. As a result a member with less than 8 years' service would be entitled to retirement or separation under existing criteria only if the disability were the proximate result of performing active duty; if it were not, he would be entitled only to separation pay and then only if the disability exceeded 30 percent under Veterans' Administration standards.

Those who would be affected by this change are the junior members of the Armed Forces without extensive service for pay purposes.

The committee bill would add a provision to 10 U.S.C. 1201 and 1203 allowing the President to continue current practice through September 30, 1979, if he determines that the needs of the Armed Forces so require.

SPECIFIC AUTHORIZATIONS FOR PROMOTION PROCEDURES

In some cases current promotion procedures in the Navy and Marine Corps rely upon specific authority given to the President in time of war or national emergency. The committee bill would allow these practices to continue through September 30, 1979 by providing new authorization not related to a declaration of war or national emergency. The committee will review each of these provisions as part of its consideration of the proposed Defense Officer Personnel Management Act.

TEMPORARY PROMOTION OF NAVY LIEUTENANTS

The committee bill provides authority for unrestricted line officers in grade of lieutenant possessing skills in a critical shortage and serving in lieutenant commander billets, to be temporarily promoted to lieutenant commander for the period through September 30, 1979. This authority is referred to as spot promotion authority.

The spot promotion authority currently in effect is authorized by 10 U.S.C. 5787 and is applicable only in time of war or during a national emergency declared by the President. Current spot promotion authority will terminate in September 1978, due to the effects of the National Emergency Act.

The Secretary of the Navy is currently using his authority under 10 U.S.C. 5787 to spot promote line officers in the grade of lieutenant possessing skills in a critical shortage and serving in lieutenant commander billets as engineer officers, engineering department principal assistants, material officers in afloat units and other staff engineering billets which directly support fleet engineering readiness. Fleet engineering readiness is impeded by the shortage of middle grade officers with skills in this area.

Under the current provisions prescribed by the Secretary of the Navy, there are about 386 spot promotion qualifying billets. Due to the shortage of available middle grade qualified engineers, significant numbers of lieutenants are being assigned to fill these designated lieutenant commander engineering billets. In the nuclear submarine community, there are currently only 91 qualified lieutenant commanders available to fill 189 engineering department head billets. This shortfall is further evidenced by the fact that 104 of 166 nuclear submarine Engineer Officer billets are currently being filled by spot promoted lieutenant commanders. The surface warfare community is faced with a similar situation. Only about 75 lieutenant

commanders with prior engineering experience are available to fill 130 engineering department head billets.

SELECTION BOARDS TO RECOMMEND BRIGADIER GENERALS FOR PROMOTION AND FOR CONTINUATION ON THE ACTIVE LIST IN THE MARINE CORPS

The National Emergencies Act will terminate the Secretary's authority pursuant to 10 U.S.C. section 5448(a) to prescribe a number of permanent major generals and brigadier generals in excess of 36 on the active list. Currently, the Marine Corps has a total of 66 general officers on the active list, all in the permanent grades of major general and brigadier general, 33 in each grade. The National Emergencies Act will not affect the total number of general officers (66) that may be on active duty in the Marine Corps, nor their distribution in temporary grades; however, it will reduce to 36 the number who may hold permanent appointments.

The need for a change in law is related to the legal requirements of promotion board membership. Section 5703(a)(1), title 10, U.S.C. specifies that at least once each year the Secretary of the Navy will convene a selection board to recommend brigadier generals for promotion and for continuation on the active list. The section further specifies that the board will consist of nine officers holding permanent appointments in the grade of major general or above. In addition, section 5703(e) specifies that no officer may be a member of two successive boards for the consideration of officers for promotion to the same grade.

When the National Emergencies Act becomes effective September 15, 1978, the number of permanent major generals will be limited to 18, and the Marine Corps could not meet the requirements of section 5703, of title 10, United States Code without every permanent major general on active duty serving on a major general selection board every other year.

The committee bill provides authorization through September 30, 1979 for permanent and temporary major generals to sit on selection boards convened to select brigadier generals to the grade of major general.

PROMOTION OF LIMITED DUTY OFFICERS

Present law does not specifically provide for below zone selection for limited duty officers. The limited duty officer program is unique to the Navy and Marine Corps and provides an avenue for technically oriented enlisted members to obtain officer appointments and participate as a separate group in the promotion process through the grade of commander in the Navy and lieutenant colonel in the Marine Corps. These officers are assigned to duty in their respective specialties and enable the Navy Department to meet the requirements for specialized technical management at a higher level than provided by warrant officers. The authority contained in section 5787 of title 10, United States Code has been used to provide for limited duty officer below zone selections in concert with those provided other officers. This authority will terminate September 14, 1978 under the National Emergencies Act.

The committee bill would allow the President to suspend through September 30, 1979 the operation of section 5751(e) of title 10, which prevents normal below zone selection of limited duty officers. The bill also amends 5787(c) to provide for temporary promotion of limited duty officers for the period through September 30, 1979 similar to the present authority for warrant officer temporary promotions. This provision is necessary to prevent grade revision for limited duty officers who have been previously selected and promoted under section 5787 of title 10.

INTERNATIONAL PETROLEUM EXPOSITION

The joint resolution (S.J. Res. 154) authorizing the President to invite the States of the Union and foreign nations to participate in the International Petroleum Exposition to be held at Tulsa, Okla., from September 10, 1979, through September 13, 1979, was considered, ordered to be engrossed for a third reading, read the third time, and passed, as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States is authorized and requested to invite by proclamation, or in such other manner as he may deem proper, the States of the Union and foreign nations to participate in the International Petroleum Exposition to be held at Tulsa, Oklahoma, from September 10, 1979, through September 13, 1979 for the purpose of exhibiting machinery, equipment, supplies, and other products used in the production and marketing of oil and gas, and bringing together buyers and sellers for the promotion of foreign and domestic trade and commerce in such products.

Mr. ROBERT C. BYRD. Mr. President, I move to reconsider the vote by which the joint resolution was passed.

Mr. CRANSTON. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent to have printed in the RECORD an excerpt from the report (No. 95-1145), explaining the purposes of the measure.

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

PURPOSE OF THE RESOLUTION

The joint resolution calls for the President to invite, by proclamation or in any other appropriate manner, foreign nations and the individual States of the United States of America to participate in the 1979 International Petroleum Exposition to be held in Tulsa, Okla.

BACKGROUND

The International Petroleum Exposition is sponsored by a nonprofit organization composed of major oil companies, petroleum and gas trade associations, and trade publications. For over 50 years it has periodically held trade fairs to exhibit products used in the production and marketing of oil and gas, and to bring together buyers and sellers of such supplies. Its purpose is to stimulate both the domestic and international sale of these products.

In 1975, the Congress acted favorably on a similar joint resolution which requested the President to extend invitations to the 1976 trade fair in Tulsa. Over 37,000 participants representing every State of the Union and 63 foreign nations attended that exposition. Inasmuch as the 1979 International Petroleum Exposition will feature enhanced recovery techniques, the organizers anticipate even larger attendance. Furthermore, as the United States is the largest producer of oil and gas drilling, transporting, refining and distribution materials, and the furthest ahead in petroleum technology, the organizers believe the fair will stimulate exports, thereby promoting the domestic economy and improving the Nation's balance of payments.

W. R. "BOB" POAGE PECAN FIELD STATION AND THE ROMAN L. HRUSKA MEAT ANIMAL RESEARCH CENTER

The Senate proceeded to consider the bill (S. 3467) to designate the U.S. Department of Agriculture Pecan Field Station in Brownwood, Tex., as the "W. R. 'Bob' Poage Pecan Field Station," and to designate the U.S. Department of Agriculture Meat Animal Research Center located near Clay Center, Nebr., as the "Roman L. Hruska Meat Animal Research Center."

Mr. HATCH. Mr. President, I ask unanimous consent that a statement by Senator Tower be printed at this point in the RECORD.

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

STATEMENT BY SENATOR TOWER

The Congress of the United States has few more appropriate occasions to honor its members than at those times when official names for public buildings are under consideration. Memorials to the great men who have served in the Congress, who have won the hard-earned respect and admiration of their colleagues and their constituents seems a small price to pay for the service they have given.

A bill we are considering today would provide permanent public tribute to one most deserving of the honor. I speak of my colleague and good friend from Texas' eleventh congressional district, Bob Poage. He is co-dean of the House, having served Texans in his district since the 75th congress, and the unquestioned "dean of good sense" in that fine body. He has been a voice of reason and studied eloquence in the legislative process for 10 these many years. As a member of the House Committee on Agriculture since the beginning of the 77th Congress, and its chairman from 1967-74, in addition to other leadership roles, Bob Poage has helped shape every piece of agricultural legislation for nearly 4 decades. Such a record indeed speaks of a dedicated public official . . . one worthy of the public's lasting recognition.

S. 3467 would designate the U.S. Department of Agriculture Pecan Field Station in Brownwood, Texas, the "W. R. Poage Pecan Field Station." It is a tribute richly deserved. Bob Poage will be retiring at the end of this Congress. We could provide no more fitting recognition for such dedicated public service than to ascribe Bob Poage's name to this USDA facility. I urge my colleagues to join me in passing this measure.

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

S. 3467

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

W. R. "BOB" POAGE PECAN FIELD STATION

SEC. 1. The United States Department of Agriculture Pecan Field Station in Brownwood, Texas, is designated as the "W. R. 'Bob' Poage Pecan Field Station". Any reference to such pecan field station in any law, regulation, map, or other record of the United States shall be held and considered to be a reference to the W. R. "Bob" Poage Pecan Field Station.

ROMAN L. HRUSKA MEAT ANIMAL RESEARCH CENTER

SEC. 2. The United States Department of Agriculture Meat Animal Research Center lo-

cated near Clay Center, Nebraska, is designated as the "Roman L. Hruska Meat Animal Research Center". Any reference to such meat animal research center in any law, regulation, or other record of the United States shall be held and considered to be a reference to the Roman L. Hruska Meat Animal Research Center.

Mr. ROBERT C. BYRD. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. CRANSTON. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent to have printed in the RECORD an excerpt from the report (No. 95-1153), explaining the purposes of the measure.

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

SHORT EXPLANATION

The bill would authorize the naming of Federal facilities in honor of Congressman W. R. "Bob" Poage of Texas, and former Senator Roman L. Hruska of Nebraska, for their outstanding contributions to American agriculture.

BACKGROUND AND NEED

I.

The Pecan Field Station in Brownwood, Tex., would be renamed the W. R. "Bob" Poage Pecan Field Station in honor of Congressman Poage. Mr. Poage has served in the House of Representatives since 1937.

In 1941, Mr. Poage was appointed to the House Committee on Agriculture, whereupon he left all other committees to serve solely on Agriculture. He was the committee's vice chairman from the 82d through the 89th Congresses and during the 94th and 95th Congresses. He served as chairman of the Agriculture Committee during the 90th through 93d Congresses.

Mr. Poage's reputation as an expert on virtually all aspects of agriculture is well established. Of great importance to Mr. Poage was the establishment of the Department of Agriculture Pecan Field Station near Brownwood, Tex. Although raising pecans is considered by some to be merely an avocation, in many areas of the country it is a large commercial business with significant impact on local populations. Mr. Poage is aware of the importance of this industry and was instrumental in the establishment of the field station, although it was not in his district at the time it was created. Through the years, he has been an avid supporter of the field station and as a result of his efforts, the station has had a significant impact on the industry and has been of particular benefit to the many small pecan farmers who use this as a cash crop.

The research station occupies 160 acres of land near Brownwood, Tex., and employs 12 persons. The station was established for the purpose of conducting breeding and culture studies on pecans with emphasis on the development of new varieties, the development of superior root stocks, studies of high density planting, and method of controlling pecan insects. The field station is also in the process of establishing a pecan germplasm repository. This will involve the collection and preservation of superior native and wild pecan seedlings that will be made available to pecan breeders for the development of superior future varieties.

II.

Roman L. Hruska began his service in the House of Representatives in 1953. After serving one term, he was elected to fill the vacancy caused by the death of Senator Hugh Butler. Born and raised in rural Nebraska, Roman Hruska kept his respect for, and belief in, American agriculture when he came to the Congress. He filled out the remainder of the unexpired term to which he was first elected to the Senate, and on his reelection in 1958, he began his first full term as a member of the Senate Committee on Appropriations.

In 1959, he began his service as ranking member of the Subcommittee on Agricultural Appropriations, and served on it continuously until his retirement from Congress in 1976. In that position, Roman Hruska represented the interests and concerns of agriculture and rural America. It was from this vantage point that he was to play the single most important role in the development and establishment of the U.S. Meat Animal Research Center.

While serving on the Senate Appropriations Subcommittee for Agriculture, Roman Hruska was quick to realize the problems and shortcomings of the Department of Agriculture in the field of livestock research and production improvements. Senator Hruska sponsored and supported efforts by the Department of Agriculture to centralize its research activities in livestock. His encouragement and interest in working with the Agricultural Research Service to establish a claim on Federal lands near Clay Center were instrumental in securing approval by the Secretary of Agriculture for the location of the facility in Nebraska. His dedication to the need for livestock research was rewarded, in 1964, by the passage of legislation to establish the Meat Animal Research Center in Nebraska.

The first appropriations for acquisition of lands and initial construction of the Center were provided in fiscal year 1966. Today, it occupies 35,000 acres of land in central Nebraska. It is now serving as the central location for Government research, development, and study of increased efficiency in livestock production, quality, and feeding; in disease control in livestock; and in virtually all other areas of concern in the production of livestock.

Animal scientists and veterinarians working at and through the Meat Animal Research Center study and test ways to develop superior strains of livestock; to control diseases and parasites affecting these animals; and to improve feeding and management practices that provide efficient production while avoiding or minimizing pollution due to animal wastes. Because of the longstanding efforts of Senator Hruska for the establishment of the U.S. Meat Animal Research Center, it is appropriate that the Congress rename this facility the Roman L. Hruska Meat Animal Research Center.

III.

The Nation has profited greatly from Congressman Poage's and Senator Hruska's dedication to agriculture. To name the pecan field station and the animal research center after these men would be an appropriate way to show appreciation for their tireless efforts. The committee members, as well as other Members of Congress, realize the outstanding contributions made by Congressman Poage and Senator Hruska to agriculture.

The committee is aware of the U.S. Department of Agriculture's general policy of not singling out individuals for recognition in view of the contributions others have made to a research facility. However, the accomplishments of men like Congressman Poage

and Senator Hruska should not go unnoticed. Worthy individuals should be recognized for their services to agriculture and the Nation, and to have Federal facilities bear the names of such individuals is an acknowledgement of their contributions. This bill gives the Federal Government and its people an opportunity to honor these men.

INTERNATIONAL INVESTMENT SURVEY AUTHORIZATIONS

Mr. ROBERT C. BYRD. Mr. President, I ask that the Chair lay before the Senate a message from the House of Representatives on S. 2928.

The PRESIDING OFFICER laid before the Senate the following message from the House of Representatives:

Resolved, That the bill from the Senate (S. 292) entitled "An Act to amend the International Investment Survey Act of 1976, and for other purposes", do pass with the following amendments:

Strike out all after the enacting clause, and insert: That section 9 of the International Investment Survey Act of 1976 (90 Stat. 2059) is amended to read as follows:

"Sec. 9. To carry out this Act, there is authorized to be appropriated \$4,000,000 for the fiscal year ending September 30, 1979."

Sec. 2. Section 4(d) of the International Investment Survey Act of 1976 is amended by striking out "his findings and conclusions" and all that follows through the end of the subsection and inserting in lieu thereof the following: "to the Congress an interim report of his findings and conclusions not later than two years after the date of enactment of this Act and a final report of such findings and conclusions not later than three years after such date of enactment."

Sec. 3. Section 8(b) of the International Investment Survey Act of 1976 is amended—

(1) by striking out "It shall be the responsibility of the Council on International Economic Policy to" and inserting in lieu thereof "The President shall"; and

(2) by striking out "Council's" and inserting in lieu thereof "President's".

Sec. 4. The amendment made by the first section of this Act shall take effect on October 1, 1978.

Amend the title so as to read: "An Act to authorize appropriations for the fiscal year 1979 under the International Investment Survey Act of 1976, and for other purposes."

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Senate agree to the amendments en bloc.

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

The amendments were agreed to en bloc.

Mr. ROBERT C. BYRD. Mr. President, I move to reconsider the vote by which the amendments were agreed to en bloc.

Mr. CRANSTON. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

ORDER FOR CONSIDERATION OF S. 3447 TOMORROW

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that on tomorrow after the two leaders or their designees have been recognized under the standing order, the Senate proceed to the consideration of Calendar Order No. 1061,

S. 3447, a bill to strengthen the economy of the United States through increased sales abroad of American agricultural products.

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

Mr. ROBERT C. BYRD. May I ask if that has been cleared with the minority?

Mr. HATCH. It has not been cleared yet. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. MATSUNAGA). The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

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

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

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that after the two leaders or their designees have been

recognized on tomorrow, the Senate proceed to the consideration of Calendar Order No. 1061, S. 3447, a bill to strengthen the economy of the United States through increased sales abroad of American agricultural products.

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

ORDER FOR RECESS FROM TOMORROW UNTIL 11 A.M. MONDAY, SEPTEMBER 11, 1978

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that when the Senate completes its business tomorrow, since the Senate will not be in session on Saturday, it stand in recess until the hour of 11 o'clock a.m. on Monday.

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

Mr. ROBERT C. BYRD. I thank the Senator for yielding.

ORDER FOR RECESS UNTIL 9:30 A.M. TOMORROW

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in recess until the hour of 9:30 a.m. tomorrow.

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

RECESS UNTIL 9:30 A.M. TOMORROW

Mr. ROBERT C. BYRD. Mr. President, if there be no further business to come before the Senate, I move, in accordance with the order previously entered that the Senate stand in recess until 9:30 a.m. tomorrow.

The motion was agreed to; and at 6:16 p.m. the Senate recessed until Friday, September 8, 1978, at 9:30 a.m.

HOUSE OF REPRESENTATIVES—Thursday, September 7, 1978

The House met at 10 a.m.

The Reverend James E. Casey, St. Michael's Roman Catholic Church, Brandywine, Md., offered the following prayer:

Almighty God, we thank You for the gift of a new day. Help us to use this day for Your honor and glory. Make our thoughts, words, and actions pleasing to you. Give all Members the grace to act wisely as they use the gift of leadership for the common good. Holy Scripture states You are interested in justice, mercy, and compassion more than You are in holocausts and sacrifices, may these virtues be exercised in all deliberations of this body. You remind us that "unless the Lord builds the house they labor in vain who build it." Remove all vanity and grant grace as Members strive diligently to carry out the legislative responsibilities placed upon them. Oh, God grant these blessings so that "treasure may be stored in heaven where thief does not steal and moth does not destroy." We ask in the name of Jesus Christ our Lord. Amen.

CALL OF THE HOUSE

Mr. BAUMAN. Mr. Speaker, under rule I, clause 1, of the rules of the House, I make the point of order that a quorum is not present.

The SPEAKER. Evidently a quorum is not present.

Without objection, a call of the House is ordered.

There was no objection.

The call was taken by electronic device, and the following Members failed to respond:

[Roll No. 729]

Abdnor	Bingham	Conable
Ammerman	Bolling	Congers
Anderson, Ill.	Brodhead	Crane
Andrews, N.C.	Brown, Calif.	Davis
Archer	Buchanan	Delaney
Armstrong	Burke, Calif.	Dellums
Ashley	Burke, Fla.	Diggs
Beard, R.I.	Byron	Dingell
Beard, Tenn.	Chisholm	Dodd
Bellenson	Clawson, Del	Downey

Drinan	Krueger	Risenhoover
Duncan, Oreg.	Leggett	Roe
Edwards, Okla.	Lehman	Rosenthal
English	Lundine	Santini
Erlenborn	McCloskey	Sarasin
Fary	McDonald	Scheuer
Forsythe	McFall	Seiberling
Fraser	McKinney	Shpley
Frey	Martin	Sisk
Garcia	Meeds	Symms
Gaydos	Metcalfe	Teague
Gibbons	Mikva	Thone
Goldwater	Milford	Thornton
Hansen	Miller, Calif.	Tsongas
Harris	Murphy, N.Y.	Tucker
Harsha	O'Brien	Udall
Hawkins	Pepper	Vander Jagt
Heckler	Pettis	Waxman
Hefelt	Pike	Wiggins
Huckaby	Pressler	Wilson, Bob
Ireland	Preyer	Wilson, Tex.
Johnson, Colo.	Quile	Young, Alaska
Kasten	Quillen	Young, Tex.
Kemp	Richmond	

The SPEAKER. On this rollcall 331 Members have recorded their presence by electronic device, a quorum.

By unanimous consent, further proceedings under the call were dispensed with.

THE JOURNAL

The SPEAKER. The Chair has examined the Journal of the last day's proceedings and announces to the House his approval thereof.

Without objection, the Journal stands approved.

There was no objection.

MESSAGE FROM THE SENATE

A message from the Senate, by Mr. Sparrow, one of its clerks, announced that the Senate had passed with an amendment in which the concurrence of the House is requested, a concurrent resolution of the House of the following title:

H. Con. Res. 683. Concurrent resolution revising the congressional budget for the U.S. Government for the fiscal year 1979.

REV. JAMES E. CASEY

(Mr. STAGGERS asked and was given permission to address the House for

1 minute and to revise and extend his remarks.)

Mr. STAGGERS. Mr. Speaker, I rise this morning to say a few words about our visiting chaplain, the Reverend James E. Casey.

Jim Casey's life is a modern-day Horatio Alger story. He is now pastor of St. Michael's Church at Brandywine, Md., but he was born and raised in my hometown of Keyser, W. Va. During the time of the depression, after he graduated from high school, his father died. Jim Casey had to start to work in order to help support the family. During World War II, he joined the Navy, and the Navy put him to work as an inspector at the Glenn L. Martin Airplane Co. As an aircraft inspector, he rose to one of the high positions with the Martin Co. While working in Baltimore, Jim attended Johns Hopkins University and earned a degree. Continuing his service with the Navy, Jim applied for, was accepted, and attended law school at night.

After receiving his law degree, Father Casey was requested to serve at the Pentagon, with the National Security Agency, in a high-level position. During his assignment with that agency, Jim Casey realized that "fame and fortune" were not his ultimate goals in life. He felt the highest calling one could have and the best job he might be able to do would be to serve his God through serving his fellow man. Jim realized in order to do this he would have to begin again—and he did just that. He accepted that great call; attended a seminary in Boston, and after 4 years was ordained as a full-fledged priest of the Gospel.

Mr. Speaker, today the Reverend James Casey is with us to deliver our morning invocation. I am very proud to have known him throughout the years and doubly proud because I had the privilege of marrying his younger sister.