SENATE—*Tuesday, July 10, 1979*

(Legislative day of Thursday, June 21, 1979)

The Senate met at 11 a.m., on the expiration of the recess, and was called to order by Hon. DENNIS DECONCINI, a Senator from the State of Arizona.

PRAYER

The Reverend Paul J. Henry, O.S.F.S., coordinator, office of chaplain services, U.S. Catholic Conference, Washington, D.C., offered the following prayer:

Our Father, the God of Abraham, Isaac, and Jacob, hear our prayer today. We know that throughout all ages You have selected certain men and women to guide and govern Your people.

Bless this, the Senate of our United States. Make its Members fully attentive to the fact that all authority comes from You. Touch their hearts with Your grace and give them the gifts needed to accomplish Your will for Your people. Especially, give to all here the gift of wisdom to wisely and prudently enact laws for Your people; the gift of justice so that all States from the largest to the smallest may feel the equality and fairness which is theirs; but above all, give to all here the gifts of Your love and peace so that what they do for all Your people might be inspired by that loving care which You show to that same people at all times. We ask all this through Jesus Your Son and our Lord. 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. MAGNUSON).

The assistant legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, D.C., July 10, 1979.

To the Senate:

Under the provisions of rule I, section 3, of the Standing Rules of the Senate, I hereby appoint the Honorable DENNIS DECONCINI, a Senator from the State of Arizona, to perform the duties of the Chair.

WARREN G. MAGNUSON,
President pro tempore.

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

RECOGNITION OF THE MAJORITY LEADER

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

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.

Mr. ROBERT C. BYRD. Mr. President, I have no need for my time. Therefore, by unanimous consent, I will yield it to the minority leader if he needs it, and, if he does not need it, I will yield it to the first order, which is under the control of Mr. KENNEDY.

RECOGNITION OF THE MINORITY LEADER

The ACTING PRESIDENT pro tempore. The Senator from Tennessee.

Mr. BAKER. Mr. President, I have no need for the time on this side. I appreciate the offer of the distinguished majority leader. It is my intention to yield back my time as soon as that is in order. I appreciate the offer, but I have no desire for the extra time.

Mr. ROBERT C. BYRD. Mr. President, I thank the distinguished minority leader.

VITIATION OF ORDER FOR RECOGNITION OF SENATOR KENNEDY

Mr. ROBERT C. BYRD. Mr. President, I am advised that Mr. KENNEDY does not wish to use his order, so I ask that that order be vitiated.

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 now be a period for the transaction of routine morning business, not to exceed 15 minutes, and that Senators may be permitted to speak up 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. PROXMIRE. 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.

"MENTAL HARM" AS AN ACT OF GENOCIDE

Mr. PROXMIRE. Mr. President, questions have often been raised concerning the section of the Genocide Convention that includes as an act of genocide the causing of "serious mental harm." Critics fear that the wording of this section is so vague that it invites minority groups in this country who have been the victims of prejudice to charge the United States with genocide.

Mr. President, this fear must now be laid to rest. It is quite clear that the United States intends to interpret this section narrowly.

First of all, the mental harm suffered by members of a group must involve permanent damage before a charge of genocide will be deemed valid. The Foreign Relations Committee has proposed a formal understanding to the treaty which reads:

> That the U.S. Government understands and construes the words "mental harm" appearing in Article II(b) of the convention to mean permanent impairment of mental faculties.

This understanding will also be a part of the treaty's proposed implementing legislation.

Second, the "intent to destroy" the members of a national, ethnic, racial, or religious group must be present before mental harm could constitute genocide.

It is certain, Mr. President, that the harsh treatment encountered by many groups within this country is worthy of the attention of lawmakers.

However, it is equally certain that this treatment does not fall within the bounds of the treaty's definition of genocide, for there is no intent to destroy the group as such.

Former Supreme Court Justice and U.N. Ambassador Arthur Goldberg writes:

> "Mental harm" . . . would not support propaganda charges of harassment by minority groups, as charged by some critics, because mental harm becomes an element of genocide only when done with an intent to destroy a group.

Mr. President, it is clear from the treaty's wording and from the report of the Foreign Relations Committee that the term "mental harm" will not promote improper charges of genocide. With this in mind, I ask my colleagues to join me in supporting the ratification of the Genocide Convention.

Mr. President, I thank my good friend, the majority leader, and I yield the floor.

CONCLUSION OF MORNING BUSINESS

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

DIRECT POPULAR ELECTION OF THE PRESIDENT AND VICE PRESIDENT

The ACTING PRESIDENT pro tempore. The Senate will now resume consideration of the unfinished business, Senate Joint Resolution 28, which the clerk will state.

The assistant legislative clerk read as follows:

> A joint resolution (S.J. Res. 28) proposing an amendment to the Constitution to provide for the direct popular election of the President and Vice President of the United States.

● This "bullet" symbol identifies statements or insertions which are not spoken by the Member on the floor.

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

The Senate resumed the consideration of the joint resolution.

The ACTING PRESIDENT pro tempore. Who yields time?

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

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

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

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

Mr. GOLDWATER. Mr. President, a parliamentary inquiry.

The ACTING PRESIDENT pro tempore. The Senator will state it.

Mr. GOLDWATER. Is there allotted time or is this just——

Mr. BAKER. Will the Senator yield to me for a brief moment?

Mr. GOLDWATER. Yes.

Mr. BAKER. Mr. President, the pending question now before the Senate is Senate Joint Resolution 28. There is controlled time, which is under the control of the distinguished Senator from Indiana (Mr. BAYH) and the Senator from South Carolina. But there is ample time, I believe, and if the Senator from Utah, who is acting on behalf of the opposition, would yield time, I am sure there would be no objection.

Mr. HATCH. I am delighted to yield such time as the Senator needs.

Mr. GOLDWATER. I thank the Chair and I thank the minority leader, because I have something I would like to discuss.

I wish that the majority leader were here, but I am sure he will read it and provide the answers.

ACTIONS OF SENATE PARLIAMENTARIAN IN TREATY TERMINATION LAWSUIT

Mr. GOLDWATER. Mr. President, I rise to address a matter of some importance to the Senate involving what may be the unprecedented effort by our Parliamentarian to inject himself into a lawsuit concerning the powers of the Senate, either at his own volition or at the invitation of the executive branch.

As everyone of my colleagues knows by now, I, together with seven other Senators and one former Senator, have filed a lawsuit in the U.S. District Court here in the District of Columbia asking for a ruling on the constitutional power of the Senate to be a partner with the President in the field of treaty termination. On June 6, Judge Oliver Gasch said that while the court agreed treaty termination is a shared power to be exercised jointly by the two political branches, our case had been filed prematurely pending some expression by the Senate as a body relative to its possession of a shared power in this field.

Within hours after the judge's opinion became public, the Senate voted overwhelmingly for the Byrd amendment as a substitute for the proposed text of Senate Resolution 15, which had been reported by the Foreign Relations Committee. Accordingly, I filed a motion with the court asking the judge to consider whether this vote would satisfy him that the voice of the Senate had been spoken in a fashion suitable for judicial review of the constitutional question. The executive branch asked for a delay in responding to my latest motion until yesterday, July 9, and it was not until late yesterday afternoon that a copy of the reply submitted to the court for the President was delivered to my office.

Mr. President, in reading through the papers submitted for President Carter, I was surprised to see attached to it a four-page statement by the Senate Parliamentarian, Mr. Murray Zweben. Now, I do not think there is anything in his statement that would persuade the judge to rule against my motion, but his action raises some very interesting questions which I believe deserve answers.

First, in my 23 years in the Senate, I cannot recall one single instance in which the Senate Parliamentarian has poked his nose into a lawsuit, without at least some direction from the Senate as a body. In fact, I would doubt if there is ever a precedent for our Parliamentarian to provide a sworn statement to a court for inclusion with legal papers filed on behalf of the executive branch.

Now, there are some questions I would like to ask about this situation. Who exactly was it that gave approval to the Parliamentarian to, in effect, serve as an expert witness on behalf of the executive branch in this case?

Did any officer of the Senate or committee authorize his giving a sworn statement to the executive branch?

Did the Parliamentarian consult with any officers of the Senate, such as the majority leader and the minority leader, before making his statement?

Why did the Parliamentarian make any statement at all? Was he subpenaed by the President's lawyers? Was he invited by the executive branch to make a statement? Or, did he voluntarily, and at his own initiative, offer to address himself to the court in this manner?

Did the Parliamentarian consult with the Ethics Committee to determine whether any possible conflict of interest, or even the appearance thereof, may exist in having an officer of the Senate participate with the executive branch in a legal case involving the prerogatives of this body?

Finally, I would ask whether there is any precedent for our Parliamentarian to submit what amounts to an advisory opinion or ruling to the executive branch?

Mr. President, there are some differences I have with the interpretation given to Senate action concerning Senate Resolution 15, particularly where the Parliamentarian states that—

> The Senate chose to proceed to the consideration of another measure . . .

The Senate did not vote to proceed to the consideration of the direct election constitutional amendment, nor did it move to that subject by reason of a unanimous-consent request made at the time.

Rather, the majority leader used authority previously given him to take up direct election, regardless of what other subject was then the pending business. So I believe it is misleading and erroneous to say that the Senate "chose" to set aside the Byrd resolution, when it was the decision of the majority leader to do so without asking what the will of the Senate was.

But that is not the point of my remarks. My lawyers can take up before the judge any questions we have about the substance of the Parliamentarian's statement.

The question I am raising today is whether it is appropriate for the Senate Parliamentarian to in effect serve as an adviser to the President of the United States, which is what he is doing in this case? If his statements were expressed through rulings announced by the Presiding Officer in this body, after having appropriate questions put to the Chair, that is one thing. But by making a sworn statement outside of this Chamber for official use in a court proceeding, and by serving as an expert witness for the executive branch, the Parliamentarian may be setting a dangerous precedent for the future no matter how insignificant or harmless his statements may be in this case.

The matter is one which I believe deserves the Senate's attention, and I hope it will be considered by the leadership on both sides of the aisle and that my questions will receive an answer.

Mr. President, I ask unanimous consent that the declaration of Murray Zweben before the U.S. District Court for the District of Columbia, in civil action No. 78–2412, be printed in the RECORD.

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

[U.S. District Court for the District of Columbia, Civil Action No. 78–2412]

SENATOR BARRY GOLDWATER, ET AL., PLAINTIFFS, v. JAMES EARL CARTER, ET AL., DEFENDANTS

DECLARATION OF MURRAY ZWEBEN

1. I am the Parliamentarian of the Senate, having held that position since January 1975. In that capacity I advise the Senate on matters of parliamentary procedure under its rule and precedents. I make this affidavit to explain the status of the Senate's consideration of Senate Resolution 15 concerning mutual defense treaties.

2. Final action has not been taken by the Senate on S. Res. 15. The resolution has not been agreed to and is no longer the pending business of the Senate. It has been returned to the Senate calendar. The Senate may or may not return to its consideration in the future. This conclusion results from the following chronology.

3. On January 18, 1979, Senator Harry F. Byrd, Jr., submitted a resolution (S. Res. 15) concerning mutual defense treaties which read as follows:

"*Resolved*, that it is the sense of the Sen-

ate that approval of the United States Senate is required to terminate any Mutual Defense Treaty between the United States and another nation." 125 Cong. Rec. 475.

On March 7, 1979, Senator Harry F. Byrd proposed an amendment in similar language to the then pending Taiwan Enablying Act, S. 245. 125 Cong. Rec. 4114. On March 8, 1979, Senator Byrd agreed to withdraw his amendment pursuant to a unanimous consent agreement that the Committee on Foreign Relations would consider and report his resolution. 125 Cong. Rec. 4306–4314.

4. On May 1, 1979, the Committee reported S. Res. 15 with an amendment to strike all after the resolving clause and insert substitute language recommended by the Committee on the basis of its hearings. 125 Cong. Rec. 9189.

5. On June 6, 1979, the Senate proceeded to consider S. Res. 15 as reported from the Committee. Senator Harry F. Byrd, Jr., by unanimous consent, proposed an unprinted amendment numbered 228 to amend the Committee substitute by inserting in lieu of the Committee language the following:

"That it is the sense of the Senate that approval of the United States Senate is required to terminate any mutual defense treaty between the United States and another nation." 125 Cong. Rec. 13673.

(As used in this affidavit, "S. Res. 15" refers to the resolution submitted by Senator Harry F. Byrd on January 18 and "the Byrd Amendment" refers to the amendment proposed by him on June 6. Though the language of the two is the same, their procedural status is different.)

6. The Byrd amendment was in order because of a unanimous consent agreement at the time S. Res. 15 was referred to Committee that the Senator would have the opportunity for the first up-or-down vote on his proposal. 125 Cong. Rec. 4313. The Senate agreed by a vote of 59 to 35 to substitute the Byrd Amendment for the Committee substitute. 125 Cong. Rec. 13696. The Senate then continued with the consideration of S. Res. 15.

7. During the course of the debate, a parliamentary inquiry was raised as to whether the Byrd Amendment, the Committee substitute, or S. Res. 15 could be further amended. The Presiding Officer advised that the Byrd Amendment was not amendable and that amendments would have to be directed to the language of the original resolution, S. Res. 15. 125 Cong. Rec. 13704, June 6, 1979.

8. In the course of the debate which followed the Presiding Officer's response, Senator Church offered two amendments to S. Res. 15. An unprinted amendment numbered 229 was proposed (125 Cong. Rec. 13706) and subsequently withdrawn (125 Cong. Rec. 13714). An unprinted amendment numbered 230 (subsequently printed amendment number 221) was proposed. It reads:

On page 1 line 4 after the word "nation," insert the following:

"The provisions of this Resolution shall not apply with respect to any treaty the notice of termination of which was transmitted prior to the date of adoption of this Resolution." 125 Cong. Rec. S7061.

The Presiding Officer held this amendment to be in order as an amendment to the original text of the resolution (S. Res. 15) 125 Cong. Rec. 13719. Shortly thereafter the Senate recessed without disposing of either Amendment No. 221 or S. Res. 15.

9. On June 18, 1979, Senator Goldwater offered unprinted amendment numbered 234 as a substitute amendment for Senator Church's amendment numbered 221. 125 Cong. Rec. 15209–15210. It reads:

On page 1, line 4, after "nation" insert:

"(1) The provisions of this resolution shall not be construed to approve or disapprove of the proposed termination of the Mutual Defense Treaty with the Republic of China, such proposed termination not having been submitted to the Senate or the Congress for approval prior to the date of adoption of this resolution.

"(2) Nor shall anything in this resolution reduce or prejudice any of the Constitutional powers of the Senate."

10. On June 21, 1979, the Senate once again considered S. Res. 15 and the proposed amendments numbered 221 and 234 to it. When the Senate chose to proceed to the consideration of another measure, it had the effect of returning S. Res. 15 to the Senate calendar without completing action on it.

11. The substitution of the Byrd Amendment language for the Committee substitute is not the final action of the Senate. Its effect was to replace the Committee substitute with Senator Harry F. Byrd's language in the amendment then under consideration by the Senate. Before such final action, the Senate will need to deal with Amendments numbered 221 and 234 as well as with other possible perfecting amendments which could significantly change the content of the resolution, and with the Byrd Amendment substituting language for the Committee substitute. It is also possible that the Senate will not take final action on S. Res. 15; or, if it is acted upon, it could be defeated, or tabled, or postponed indefinitely, any of which would kill the resolution.

12. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

MURRAY ZWEBEN.

Executed on June 29, 1979.

Mr. BAKER. Mr. President, will the Senator from Utah yield to me briefly?

Mr. HATCH. I am delighted to yield.

Mr. BAKER. Mr. President, this is a matter of absolute first impression to me. I had no prior notice of any type of the matters about which the distinguished Senator from Arizona has spoken. No one consulted me.

I am frank to say that I do not know exactly what the rules provide, but it is my impression that a Member of the Senate, or even more particularly an officer of the Senate, could not testify nor be made to respond to subpena to testify without leave of the Senate, adopted by resolution.

In any event, I was not consulted on this matter, and that was one of the questions put by the distinguished Senator from Arizona, I have no knowledge of it. But I assure him that I will now look into it. I will inquire into it directly and promptly and personally.

I will consult and confer with the Parliamentarian, and I will discuss it at the appropriate time with the majority leader as well.

I can assure Senator GOLDWATER that the matter will receive very careful and very prompt attention and that he will have further information from me at the earliest possible moment.

Mr. GOLDWATER. Mr. President, if the Senator from Utah will yield so that I may reply to my leader, I appreciate those remarks, because this concerns me very gravely.

This whole matter that I am involved in concerns me. It does not wrap itself around Taiwan and the people I love over there. It wraps itself around whether or not the President of my country can violate the Constitution of the United States.

To see a person employed by this body use the powers of the Senate and the powers of his office to give a sworn statement to the judge who is going to decide this case—and I first saw this about a half-hour ago, which is why I jotted down what I had to say and came over here and said it—I think it is appalling.

If we are going to sit around this body and see the rules abused and the precedents of the Senate abused and the history of this body abused, it is time we did something about it.

I do not give a damn whether I win that suit or not, but I give a care about the Senate, because I hope it is around when my grandchildren are old enough to love their country. I am getting sick and tired of what has been going on in this body.

Mr. BAKER. Mr. President, I do not know of anybody in this body who has a greater reverence and respect for this institution than the Senator from Arizona. I not only understand what he says but I also understand the intensity of his emotions and his feelings about it. I respect what he said and what he feels about that.

I assure him that I will leave no stone unturned to find out how this came about and to make sure that the position of the Senate is validly presented. He has made a valid point in a courageous way, and I congratulate the Senator from Arizona for his usual forceful presentation of an important matter to this body.

We will get to the bottom of it.

Mr. HATCH. Mr. President, I associate myself with the remarks of my friend and colleague from Arizona, for whom I have great esteem, respect, and personal reverence.

I am grateful that he has brought these matters to the attention of the Senate today.

Mr. ROBERT C. BYRD [subsequently said]: Mr. President, in response to the questions raised today by the senior Senator from Arizona (Mr. GOLDWATER) regarding an affidavit filed in the case, *Senator Barry Goldwater, et al.*, v. *James Earl Carter, et al.*, Civil Action No. 78–2412 in the U.S. District Court for the District of Columbia by Mr. Murray Zweben, the Parliamentarian of the Senate, I think the following provides the answers.

Subsequent to the Senate vote to agree to the amendment of the Senator from Virginia (Mr. HARRY F. BYRD) as a substitute for the committee substitute for Senate Resolution 15, it was contended that this was final action by the Senate on the issue. The State Department Legal Office contacted Mr. Zweben to discuss this. They asked him if he would execute his explanation as an affidavit to be filed with their response brief. He said he would if the Senate leadership approved. I did approve and went over the affidavit with him prior

to his filing it. This had been done by Dr. Floyd M. Riddick when he served as Parliamentarian in court cases without the approval of the whole Senate, both in cases where subpenas were issued and where they were not.

Furthermore, there is nothing in the Senate rules or precedents that governs this situation. Rule XXX of the Standing Rules of the Senate only comes into play if a subpena duces tecum is involved directing a Member, officer, or employee of the Senate to produce Senate papers which can only be withdrawn by order of the Senate, usually accomplished by a simple resolution. No Senate papers were involved in the instant matter.

DIRECT POPULAR ELECTION OF THE PRESIDENT AND VICE PRESIDENT

The Senate continued with the consideration of Senate Joint Resolution 28.

Mr. HATCH. Mr. President, I have cleared this with the distinguished Senator from Indiana.

I ask unanimous consent that the remarks of the Senator from Arizona, the Senator from Tennessee, and myself not be charged against either side in this debate.

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

Mr. HATCH. Mr. President, yesterday and throughout this debate I have enjoyed listening to the distinguished Senator from Indiana. There is no doubt in my mind that he is the authority on his amendment to the Constitution of the United States.

There also is no doubt in my mind that, as the chairman of the Subcommittee on the Constitution, he does an excellent job in trying to be fair and equitable to his fellow Senators and to those who come before his esteemed subcommittee.

I was particularly impressed by his willingness yesterday to resolve the difficulties with the distinguished Senator from Virginia.

I am very grateful and respectful of my friend from Indiana for making that concession, because I believe that it resolved a substantial impasse here that may have misled some people into believing that this matter was being filibustered when in fact this was not the case.

In fact, I have sought an up or down vote on this matter because I think that otherwise we will see it year after year, unless it is passed or defeated today on an up or down vote.

The amendment, on its merits, does not deserve to become an amendment to the Constitution of the United States.

Yesterday, the distinguished Senator from Indiana mentioned a number of special interest groups which were in support of his position. There are of course an equal number of groups in this country who are totally and vehemently opposed to his position, including the American Farm Bureau, the National Association of Manufacturers, the American Jewish Congress, the NAACP, PUSH, the Urban League, the American Conservative Union, and a host of others.

CONSTITUTIONAL BACKGROUND OF ELECTORAL COLLEGE

The discussion of changes in the electoral college should not be conducted in a constitutional vacuum. It is at least incumbent upon Members of the U.S. Senate, who have sworn to uphold and defend the Constitution of the United States, to reach an understanding of the way in which the Founding Fathers designed it before we vote to alter it in a fundamental manner by eliminating the institution of the electoral college. To be sure, we may have different notions of how our entire democracy should work than did the Founding Fathers, but we should know how they believed democracy should operate before we modify their handiwork.

The electoral system embodied in the Constitution, we should realize, was emphatically not based upon the notion of direct democracy, or the simplistic principle of one man, one vote. It was a very much more subtle than that. At the Federal level it was a three-tiered system with built-in checks and balances.

To be sure, the principle of direct and equal representation was embodied in the House of Representatives, with the very slight modification that every State should be guaranteed at least one Member of the House of Representatives. The number of Representatives allowed a State was to be directly determined by its population, and under a single-member constituency system each Representative represented a relatively limited number of constituents—although for some time certain States elected their Representatives at large. In any case, at the present, as a result of the Supreme Court decision on equality of representation, the House is elected quite precisely on the basis of universal and equal suffrage. In addition, the terms of House Members were deliberately made very short, so that they might be as responsive as possible to the demands of the electorate. Also, the fact that the entire House is up for election each 2 years makes it the Chamber which is theoretically the most sensitive to changes in political viewpoint throughout the Nation, although in fact in modern times the value of a House incumbency is high and the stability of its membership greater than it was in, say, the 19th century. Be that as it may, the fact is that the House of Representatives under the Constitution embodied the principle of one man, one vote, and representation kept very close to the people through frequent elections.

The Senate, on the other hand, as part of the original compromise between the States, was established to represent the States as political entities, and not individual voters. For this reason each State was given the same representation, regardless of its population: for the basis of representation was the State, and not the population. For this reason, too, through the 19th century Senators were elected as originally provided for in the Constitution: by the legislatures of the several States as the duly elected representatives of the people of those States. In the early part of the 20th century, however, the Constitution was amended to provide for the election of Senators directly by the people. Now, as a result, Senators represent the people of individual States, and not the States themselves as embodied in their State legislatures.

The Senate was also originally designed to be less responsive to changes in the electorate. Senators were given much longer terms than Representatives, and their terms were staggered so that only one-third of the Senate's membership would be up for election in any particular election year.

If the House of Representatives was designed to embody the principle of direct democracy, and the Senate the principle of representation of States, then the Presidency was intended by the Founding Fathers to be removed as far from the realm of politics as possible. For that purpose they established the ingenious and still little understood institution of the electoral college. The electoral college was deliberately designed to cushion the election of the President, through the intermediary structures of the State, from direct democracy.

The Constitution provides that:

> Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress.

It is further stipulated that the electors should not be holders of political office. The original idea, then, was that the States should "appoint"—and not necessarily even elect—individuals not directly involved in politics who were known for their political sagacity and wisdom. These electors would meet in their individual States to consider who might best be qualified to become President of the United States. There could be no problem of the "faithless elector" here, for the elector was supposed to exercise his independent judgment in voting for President. Moreover, the Constitution makes relatively elaborate provision for the election of a President by the House of Representatives in the case that no individual received a majority of the electoral votes for President, an eventuality which the Founding Fathers evidently regarded as fairly likely. After meeting in the electoral college, the electors would disperse to their homes, having fulfilled the one function for which they were brought together.

From this exposition it should be clear that the election of the President was originally supposed to occur at two removes from the electorate: the electorate would choose the legislature of the State, which in turn would choose electors for the State, who in turn would choose the President. This system was very far from the notion of direct election embodied in the proposed amendment on the abolition of the electoral college.

It may well be that the electoral col-

lege was from the start an impossibly idealistic institution. Certainly it began to break down as soon as political parties and declared candidates for the Presidency appeared, for electors then began to be pledged to certain individuals and did not exercise their independent judgement on the matter.

The electoral college as it now exists at least retains the element of voting for the Presidency on a statewide basis. To that extent it maintains for the States an element of importance in our now much-weakened federal system. The proposed amendment would sweep away any vestige of the role of the States in the election of the President.

The proposed amendment for the direct election of the President, it will be seen, is simply a logical extension of the philosophy which holds that all the representatives of the people in a democracy should be elected directly and on the basis of equal suffrage. The individual citizen is the only entity which is entitled to representation in the structure of government, according to this view.

Now it may be that we do wish to recast our political institutions along these lines, and the amendment process established by the Constitution makes it possible for us to do so if we wish. But let us be clear that in accepting such a principle, we are altering drastically the system of representation as established by the Founding Fathers. We need not, of course, be bound by what they would have wanted, but let us be clear that we are undoing in very substantial measure what they undertook to do when they framed the Constitution.

When the Supreme Court handed down its decision on one-man-one-vote with regard to the apportionment of congressional districts, it said it did this on the ground that inequality of representation is unconstitutional. I submit that inequality of representation from the viewpoint of one-man-one-vote democracy may be unfair, it may be unjust, it may be any number of things, but it is not unconstitutional—for the Constitution itself provides explicitly for such inequality of representation in establishing the Senate of the United States. And, I submit, if we accept the direct election of the President, the sole remaining example of a glaring disparity of representation in the federal system will be the U.S. Senate itself.

For, as we all know, in the Senate inhabitants of Alaska, or Vermont, or North Dakota enjoy a substantial preponderance of representation over the voters of New York or California. Although it may seem unlikely now, it could be—given the constant stream of amendments to the Constitution which has emanated from the Congress over the last 20 years—that voices will be heard proclaiming that the Senate itself is unconstitutional because one citizen's vote is not equal to another's in Senate elections in various States.

Now we could extend the principle of one-man-one-vote democracy to provide for the direct election of Senators and the President by the relatively simple procedure of amending the Constitution. But the amendment article of the Constitution in effect provides that the Constitution cannot be amended to alter the basis on which the Senate is chosen: the Constitution provides that "no State, without its consent, shall be deprived of its equal suffrage in the Senate." This means that the principle of one-man-one-vote democracy could not be extended to the Senate unless every single State agreed to a scheme for a reapportionment of Senate seats. That, as we can imagine, is very unlikely to happen in the foreseeable future.

That provision is found in Article V of the Constitution. It is the last proviso of Article V and it was raised during the District of Columbia voter representation debate, albeit on a different point and in a different manner, but the fact of the matter is that this call for one-man-one-vote democracy could not apply to the Senate. So anybody who says the pure majoritarianism is the only moral way to go just does not understand the Constitution.

The central issue in this debate, then, has to do with the nature of our representative democracy. The principle of one-man-one-vote, democracy, is very simple, very attractive to many people, and quite destructive of our established traditions. The principle of representation espoused by the Founding Fathers was much subtler and indirect; it meshed quite marvelously the various levels of our federal system. If we accept the amendment for the direct election of the President, we shall weaken still further the role of the individual States in our system, and we will provide at least justification for a move to call the function of the U.S. Senate itself into question and bring on what would be nothing less than a true constitutional crisis. Perhaps this is an alarmist view. But I believe the Founding Fathers constructed our system well, and we tamper with it needlessly at our own peril. The electoral college system has worked well in the course of our history. Let us not abandon it out of a few of possible but highly unlikely electoral disasters at the Presidential level, none of which has become disastrous. Even as it has been modified by the force of circumstance through the years, the electoral college has given clearer results in most instances than the popular vote. Senators and Congressmen and even Presidents have been elected with under 50 percent of the popular vote and been able to function perfectly well, but none has been elected with less than 50 percent of the electoral college vote.

When our Founding Fathers set up a Constitution they made a very simple proposition: that was that "we do not want the Constitution of the United States to be readily amendable." So in the history of our Republic—and I might add our Federal Republic, not "one-man, one-vote" democracy—we have had some 6,000 proposed amendments to the Constitution of the United States, and only 33 have come out by the only means thus far utilized by Congress, that is, by a two-thirds vote of both the Senate and the House. Only 33 out of 6,000. And of the 33 only 26 have been ratified. Of the remaining seven only two are left. They happen to be the equal rights amendment, which was given a 3½ year reprieve last year, after 7 years of attempts to ratify, at a point where they had only obtained 35 States' ratification with 5 rescinding, and the D.C. voter representation amendment which came out of this great body last August.

To make a long story short, these Founding Fathers did not want the Constitution to be readily amendable, and that is precisely what we are talking about here today.

This is another one of those ill-conceived and, I think, ill-thought-out amendments which create more problems than they would ever solve, which literally should be rejected on the floor of the Senate today. That is with all due respect for the genius, the virtuosity, and the abilities of my dear friend from Indiana—and he does have my respect and my fondness and appreciation for many of the things that he tries to do as chairman of the Subcommittee on the Constitution.

ABA, AFL–CIO

I might also add that many of the groups which are presently supporting the amendment of my distinguished colleague from Indiana have not themselves endorsed a general "one-man, one-vote" notion of democracy with respect to their own organizations.

It is my understanding that both the American Bar Association and the AFL–CIO, for example, accord influence in the selection of their officers in part on the basis of various interests within the organization. For instance, the United Rubber Workers, with approximately 156,000 members, do not have precisely 1.56 times as much influence as the 100,000 members of the Brotherhood of Railway Clerks.

With respect to the American Bar Association, of which I am a long-time member, I have never had the opportunity to vote directly for the president of the association.

In addition, I have never had the opportunity to express my opinion on the ABA's endorsement of the direct election proposal.

I am not sure that the American Bar Association, for which I have great respect, has ever seen fit to adopt direct popular election for much of anything.

JUSTICE DEPARTMENT ON HOUSTON ELECTION DISTRICTS

I noticed in the newspaper the other day that the Justice Department had ordered the city of Houston to postpone all city-wide elections until a new system could be instituted. The Department apparently took this action under the Voting Rights Act of 1964.

According to Drew Days of the Civil Rights Division of the Department of Justice, the Department of Justice was

prepared to withdraw its objections if Houston were to eliminate its system of "at-large" elections and substitute at least some elections from single member districts. The "at-large" elections, it was felt, effectively denied full and fair representation to the city's black and Hispanic minority groups.

What do direct election proponents think of this action by the Justice Department? Do they agree that the city of Houston is violating the civil rights laws by electing its members "at-large" rather than from single member districts?

How can my colleagues argue that Houston is depriving minority groups of their rightful influence while at the same time arguing that Senate Joint Resolution 28 would not also do that? How can the present administration support direct election while pursuing the Houston case?

Direct election, it seems to me, would effect the same reduction in minority influence on a national scale that the Justice Department argues Houston is creating on a local scale. I think that the proponents of this particular amendment ought to see the inconsistency in these positions.

I ask unanimous consent for the article to be printed in the RECORD at this point.

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

[From the Washington Post, June 12, 1979]

HOUSTON HELD TO VIOLATE CIVIL RIGHTS IN ANNEXATIONS; ELECTIONS ARE IN DOUBT

(By Bruce Cory)

HOUSTON, JUNE 11.—The U.S. Justice Department today ruled that the majority of Houston's annexations during the last two years violate federal civil rights law by diminishing the strength of minority voting.

The department ordered the city not to hold any elections in which those in largely white-populated annexed areas could vote until its system of electing all city officials at-large is changed.

The decision could force postponement of regular city elections Nov. 6 in the nation's fifth largest city.

The city also will be unable to hold a $400 million bond election or a proposed tax limitation referendum without Justice Department approval.

The department's civil rights division ruled that Houston's 1977 and 1978 annexations of 14 tracts adding about 140,000 persons effectively reduced Houston's black population from 26 percent to 24.8 percent, and its Mexican-American population from 14 percent to 13.5 percent.

"Based on relevant court decisions, and in view of the relevant characteristics of the city of Houston, we find such reductions to be legally significant," Assistant Attorney General Drew Days III said.

The city has a population of about 1.7 million, including 680,000 minority members.

In a letter telephoned to the city legal department today, Days said the Justice Department would consider withdrawing its objections to the annexations if the city changed its voting system to include the election of "some" members of the city council from single-member districts, not at large in the city.

The city council cannot make such changes alone; it would have to go to the city's voters for approval.

In a telephone press conference from the U.S. Conference of Mayors meeting in Pittsburgh, Houston Mayor Jim McConn said the city would attempt to compromise on city council composition with the Justice Department.

McConn said he and City Attorney Robert Collie might go to Washington next week to seek a clarification of the department's ruling.

He said he opposes appealing the ruling, but said a decision on such an appeal would not be made until after he meets with the city council Thursday.

All eight city council members are elected citywide, although five represent specific districts and must reside in those districts.

The Justice Department found that, although three of every eight Houstonians are either black or Mexican-American, only one black and no Mexican-Americans have ever served on the city council in its current form.

A suit by a coalition of liberal and minority groups challenging Houston's at-large city council system is before the 5th U.S. Circuit Court of Appeals.

Under the civil rights laws, Houston and other southern cities are required to submit annexations and other changes in voting boundaries to the Justice Department for approval.

Mr. HATCH. Mr. President, I believe that the overwhelming weight of argument supports the position that we should not amend the Constitution of the United States when it is working well, functioning properly, and operating as it should.

We should not tamper with the Constitution merely because it seems like a good idea to do so. I think the arguments against this proposed constitutional amendment are so overwhelming that I expect my fellow Senators to resoundingly reject it, although I will be extremely happy if we can just obtain 34 votes at 5 o'clock today.

The vote later this afternoon, an up-or-down vote on the direct election proposal, will be the first Senate vote ever on direct election. It will be an extremely instructive one. I look forward to it.

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

The PRESIDING OFFICER (Mr. HEFLIN). The clerk will call the roll.

The 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.

Mr. THURMOND. Mr. President, I ask unanimous consent that the distinguished Senator from New Hampshire (Mr. HUMPHREY) be permitted to speak for as much as 15 minutes, with the time charged equally to both sides.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Mr. THURMOND. Mr. President, I suggest the absence of a quorum until the Senator from New Hampshire returns.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. THURMOND. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded, and that the Senator from New Hampshire be allotted 10 minutes, charged to our side, as the Senator from Indiana has requested.

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

Mr. BAYH. Mr. President, I do not think it is an unusual practice to follow that the proponents of the amendment yield to proponents and the opponents yield to opponents. That is sort of the rules of the game, I thought.

Mr. THURMOND. The Senator from New Hampshire is not going to speak on this subject, so I thought it would be all right.

Mr. BAYH. Oh, I see.

Mr. THURMOND. But we have no objection to that.

Mr. BAYH. I understand.

The PRESIDING OFFICER. The Senator from New Hampshire.

(The remarks by Mr. HUMPHREY at this point are printed later in today's RECORD.)

The PRESIDING OFFICER. Who yields time?

Mr. BAYH. Mr. President, I yield time to the Senator from Kentucky. How much time does he desire?

Mr. FORD. Mr. President, if I could have 5 minutes, that would be sufficient.

Mr. BAYH. I yield 5 minutes. I should say on my own time that the Senator from Kentucky has been a known ally and supporter of the direct election, and the Senator from Indiana is grateful for his consistent support and his perceptive logic for doing so.

Mr. FORD. I thank the Senator from Indiana. He is more than kind.

Mr. President, I have long been a supporter of the proposed amendment to the Constitution providing for the direct, popular election of the President and Vice President. I believe the reform of the electoral college system is long overdue.

Throughout this country there is a growing sentiment that the electoral college has outlived its usefulness. Recent polls indicate that over 80 percent of the population support an electoral system which would insure that the President and Vice President be elected by a majority rather than a plurality of the voters. Furthermore, the level of support for direct popular election is equally dispersed throughout all regions of this country.

The framers of the Constitution could not have envisioned the development of today's electoral system—a system which has surely outgrown the electoral college. The constituency to which the Founding Fathers were addressing themselves was very much different from today's electorate.

The increasing dissatisfaction with the electoral college system is due, in part, to the realization that the system possesses some major defects. The historical development of the present system demonstrates the fundamental flaws in the electoral college. Three times in our history, a candidate who lost in the national popular vote assumed the Presidency.

The principal flaw in the electoral college is the unit rule of winner-take-all provision. The unit rule provision awards all of a State's electoral votes to the candidate who wins a popular vote plurality. This provision has had two consequences. First, it has forced the Presidential candidates to concentrate their efforts on the 11 most populous States. It is necessary for the Presidential candidate to devote particular attention to these States because the entire electoral vote of a State is cast for the popular vote winner of that State, however small the candidate's popular margin may be.

Second, the awards of victory in these States increases the possibility of the losing candidate in the popular vote being the winner.

Let me make one other observation, Mr. President. In the 1976 Presidential election, a shift of less than 8,000 votes in two States would have made Gerald Ford the winner with 270 electoral votes to 268 for Carter—despite the fact that Ford would still have trailed Carter by nearly 2 million popular votes. Carter would not have been elected President even though he would have still had a majority of the popular vote. The minuscule shifts in the popular vote of Hawaii and Ohio could have frustrated the popular will of the people.

Mr. President, under the present system, some voters are more important than others because of the State in which they reside. Direct election of the President will mean that all votes would be counted equally regardless of State boundaries. This amendment guarantees that each voter, no matter where geographically located, will have an equal say in who will be elected.

This amendment would eliminate the possibility that an individual who fails to receive a plurality of the popular vote still could be elected President or Vice President.

Moreover, it will assure that the final say as to who will be President will rest with the people and not with a faithless elector. This points to another flaw in the present system—the problem of defection by a faithless elector. By abolishing the electoral college, we will no longer be permitting the electors to disregard the will of the people.

In my opinion, the direct popular nationwide election would eliminate many of the principal defects of the present system. Furthermore, it would demonstrate a sincere commitment to the removal of the current barriers to full citizen participation in the election of our nation's highest public officials. It will improve and make more democratic the system by which we select the President and Vice President.

Mr. President, I would have to concur with the conclusion reached by the American Bar Association's commission on electoral college reform:

> While there may be no perfect method of electing a president, we believe that direct, nationwide popular vote is the best of all possible methods.

The proposed amendment has been the subject of extensive debate and many hours of congressional hearings. The direct election issue was debated in Senate Judiciary Committee hearings as far back as 1966. The Judiciary Committee has amply reviewed the various proposals to reform the present system of electing the president. The committee has also discussed the rationale used to justify a change in the electoral system. In addition, the Subcommittee on the Constitution recently held 4 additional days of hearings. Yet, the Senate has not to this day been allowed a vote on this important measure, which vote, I understand, will be at 5 p.m. today. As a strong supporter of an amendment providing for the direct, popular election of the President and Vice President, I hope that the Senate will reject the various other proposals to reform—rather than abolish—the electoral college and, instead support the direct election method. I am pleased to have been along with my distinguished colleague (Mr. BAYH), a cosponsor of Senate Joint Resolution 1, an amendment identical to Senate Joint Resolution 28.

Mr. President, I ask unanimous consent that I be added as a cosponsor of Senate Joint Resolution 28, and I again urge immediate Senate passage of this important measure.

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

Mr. FORD. Mr. President, I see the Senator from Indiana is here now and I yield to the distinguished Senator from Indiana.

Mr. BAYH. Mr. President, I shall be glad to yield time to the Senator from Michigan. How much time does the Senator wish?

Mr. LEVIN. Five to 10 minutes.

Mr. BAYH. I yield to the Senator from Michigan.

Mr. LEVIN. I thank my colleague from Indiana (Mr. BAYH).

Mr. President, we have read and listened to the pros and cons of direct election in the past weeks, here, on the Senate floor and at various times in the past decade or so as a legislative body.

During that time we have heard all the arguments. Some urge that small States will be hurt by direct election because they will lose the alleged advantage of the electoral college formula, which gives small States the same number of electors as they have Senators and Representatives. Others argue that small States will be benefited by direct election because a voter in New York for instance, will no longer be able to influence more electoral votes for the President than a voter in Alaska.

Some argue that large industrial States will be hurt by direct election because of the alleged influence voting blocs in urban centers have on a State's entire electoral vote. Others argue that those same States will be benefited because, under direct election, the votes of the urban centers will not be subject to the unit rule and cannot, therefore, be totally negated.

Some argue that minorities will be hurt by direct election because they will lose their alleged power to swing an entire State by their electoral vote. Others argue that minorities will be benefited by direct election because large numbers of minorities, who have been effectively disenfranchised by the unit rule, will be guaranteed to have all their votes counted.

Some argue that the two-party system will be hurt by direct election because the 40 percent plurality necessary for a victory will induce the creation of splinter or third parties. Other argue that direct election will protect the two-party system from the undue influence of a third party in the event the electoral college is deadlocked, the threat of which we experienced in 1968.

Some argue that direct election will increase the risk of voting fraud. Others argue that direct election will reduce voting fraud because the degree of such fraud under direct election would have to be so great in order to be of any consequence.

In this lengthy and detailed debate, each little piece of our body politic has been carefully examined and scrutinized under a microscope—with disputed results. If we step back from a microanalysis, however, and look at the whole, the issues become clearer. There are two critical ones.

First, what would happen to our national body politic if a minority President were elected? The majesty of the electoral process in this country is no more evident than in the way we accept the results of an election. No matter how bitterly fought it is, after the votes are counted, we join together as a people and announce our support for the winning candidate. We have such faith in the system that we accept its verdict, no matter how much we may disagree with it.

What the electoral college contains is the potential for eliminating that acceptance of results. If people see their candidate win the popular vote, then denied office because of the electoral vote system, they would not as freely give their consent to be governed by a minority President in modern day America. A minority President will have a diminished ability to govern, so vital in these times. A minority President simply would not have the mandate that an election normally gives a leader.

The potential for a minority President is too great and the consequences for such a President and our Government

too ominous to allow us to continue to play electoral roulette with a system that was conceived in a different time and which no longer relates to the reality of the current role we play as a Nation in the world.

The social and political fabric of modern America can be torn apart by the election of a minority President.

Opponents argue that earlier 19th century examples should vitiate these fears since the electoral process survived these occasions. Yet the state of our country today is far different from the 1800's. The great growth in the power of the President, mass communication, the rise of the global community, have all changed the complexion of our society to such an extent that were we to have a minority President, our political vitality would suffer and credibility in Government be further sapped.

Opponents also argue that we need not fix a system before it has broken down. We should not accept that approach to insuring the health of our political system any more than we should ignore the needs for preventive medicine to insure the health of our families. Why must the American people have to wait for the time when a minority President is elected before this dangerous system is changed? We need not wait for a catastrophe before we take steps to prevent it from happening.

The second fundamental question is whether the American body politic will be healthier if every vote in the Presidential election counts the same. Even if we could resolve the conflictiing answers and arguments in this debate, the issue cannot be—what narrow or sectional interest would gain or lose by a change to direct election. The issue must be whether America will gain if our votes at last count the same.

This country desperately needs a sense of unity. We have a great centrifugal diversity in America—differences in background, geography, racial, and ethnic origins and religious beliefs. The Presidency alone embodies the common hopes and common purpose of all Americans. The Presidency supplies some of the glue which holds us together.

We therefore approach this issue, not as representatives of small States or large, and not giving special consideration to particular sections of our country, or to Democrats or Republicans, to rich or poor, minorities or majorities. We approach this issue—the election of our only truly national officer, the President—as Americans. In a similar context, over 200 years ago, Patrick Henry in an effort to bring a sense of national unity and national purpose to the first Continental Congress said what is fitting to be remembered here today.

> I hope future ages will quote our proceedings with applause. . . . All distinctions are thrown down. The distinctions between Virginians, Pennsylvanians, New Yorkers, and New Englanders, are no more. I am not a Virginian, but an American.

I want to commend Senator BAYH and the others who have worked so faithfully on this particular resolution and amendment, Mr. President. They are to be commended for their perseverence and their patience.

I hope our vote today reflects and rewards that perseverence.

I thank the Chair.

Mr. THURMOND addressed the Chair.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. THURMOND. Mr. President, I yield such time as may be required to the able and distinguished Senator from South Dakota (Mr. PRESSLER).

The PRESIDING OFFICER. The Senator from South Dakota.

Mr. PRESSLER. Mr. President, I rise in opposition to Senate Joint Resolution 28, the Direct Election of the President Resolution.

I have come to this conclusion very reluctantly, and I want to say that I have high regard for the Senator from Indiana and his efforts.

I have seen varying reports as to what effect direct elections would have on the power of small States. Coming from the State of South Dakota, these reports concern me.

At the Constitutional Convention, one of the geniuses was the protection of minorities and the protection of small States, and yet a resolution for majority will.

I note in a CONGRESSIONAL RECORD study entitled "Direct Election, Who Gains, Who Loses?" that my State of South Dakota with four electoral votes has 0.74 percent of the national total, and a percentage of the national total under a direct election would be 0.37. In other words, the power of South Dakota in Presidential elections would be approximately cut in half, or indeed, with the continuing increase in population in other States, the power of South Dakota in Presidential elections would be only about one-third to one-half what it is today.

Also, Mr. President, I have been increasingly impressed with the number of minority groups in the United States having expressed reservations and opposition to this, ranging from black groups to Indian groups to agricultural groups to senior citizen groups.

I have also been impressed by the number of thoughtful editorials by writers of different political philosophy: Al Hunt in the Wall Street Journal in an article entitled "Don't Fix The Electoral College" of Thursday, July 5, 1979; James Kilpatrick in an article entitled "Direct Election Is A Bad Idea" in the Washington Star of Saturday, July 7, 1979; and the New York Times in an editorial entitled "Vote For The Federal President."

I certainly do not base my vote in this body on editorials or, indeed, solely on the interests of South Dakota. But, nevertheless, I do represent South Dakota here.

At the Constitutional Convention, the debate was very heavily between the large States and the small States, and the Union was pulled together only because there were compromises and protections for the small States.

There is no doubt but that direct election of the President is an idea that sounds good upon first hearing. But in making a change that is so comprehensive, we must be assured that the present system has inherent flaws that warrant change. We must also be convinced that the new proposal will remove the flaws in the present system without adding greater harms. Proponents of the change have not convinced me of this.

The editor of the New York Times said in yesterday's edition:

> For reasons that Senators should value, these United States have found it useful and in no sense undemocratic to retain some imbalance and geographical color in their Federal system. Simplicity is not the synonym of democracy. Voter parity is not the only source of stability.

It seems to me also that direct election of the President in reality, could be full of pitfalls.

Prof. Judith Best has pointed out repeatedly that, under the direct election system, a candidate could become President with only regional support. As she said, any President so elected, "* * * would have great difficulty governing."

Because individual States would lose their identity, we could easily see a breakdown of State boundaries. As Theodore White states:

> Once you erase the State lines in a presidential election as this proposal suggests, you erase the traditional communities of America. The rules of the game change. The new bosses will be the media professionals, or the men who pay the media professionals. They will draw sinuous winding curves showing the demography of the United States as a geological map shows the contours of its height, depth, and terrain. They will be able to ignore the States of the union as election constituents. What candidate, whose experts draw a demographic map of the USA, will pay attention to the vote in Gary or Hammond, Indiana . . .? What candidate will any longer consider Roxbury, North Dorchester, or Cambridge-Somerville as a seriously important factor in his campaign . . .? Massachusetts will no longer exist except as an administrative unit.

The winner-take-all aspect of the electoral college encourages the continuation of our two-party system. Because this would not be encompassed under direct election, our two-party system could be jeopardized. Minor parties would be encouraged to run. Under the present system, this winner-take-all aspect discourages minor parties and encourages the continuance of our two party system.

Because minor parties would be encouraged to run, it would be difficult for any candidate to receive the 40-percent vote that Senate Joint Resolution 28 requires. If a candidate comes within 1 or 2 percentage points of this 40 percent, we could easily see a nationwide recount. We all know how long recounts take. If, after a recount, a candidate still did not receive 40 percent of the votes, there would be a runoff election. All of this could prove to be very costly and time consuming.

Granted, there are minor flaws in the present system, such as the faithless elector, but we do not need such a comprehensive change to remedy these minor flaws. We especially do not need a change that has such a possibility for abuse and harm.

As I stated previously, the runoff proposal in Senate Joint Resolution 28 could provide problems. If one candidate did not get at least 40 percent of the vote, it would be a situation that would be very chaotic.

If we had a requirement for a runoff election and if the 40-percent vote were not achieved, then we would have a runoff, presumably, much as some of the European countries do. But if the runoff were equally close and if a recount were demanded, we would be in a situation that would take literally months to resolve.

I recognize that there are potential shortcomings in the present electoral college system. But in any system we have, we could create scenarios in which there would be very difficult and very painful results. Some have said that we could have a deadlocked electoral college or that members of the electoral college could be faithless to those for whom they were supposed to vote.

All of these things are possibilities, but the system has worked quite well in the history of our Republic.

If Senate Joint Resolution 28 were passed, the most devastating blow would fall on the small States in Presidential elections. Indeed, in the studies of direct election, who gains and who loses—and I stand here as a U.S. Senator for all of the United States but nevertheless I represent South Dakota, a small State—the statistics show that our power in Presidential elections would be cut from a third to 50 percent of what it presently is.

Finally, I have been impressed by the number of thoughtful Americans who have studied this matter and who have made comments, and I have quoted some of them.

I quote author Theodore White:

In the place of traditional election day maps illustrating which candidates carried which States, direct election will give us election day maps illustrating which candidates carried which media markets.

Also, Time Magazine has said:

In a direct vote, small States and less populated regions of the country would no longer be guaranteed a role—however minor—in determining who would live in the White House.

Those are some very strong and compelling arguments.

For these reasons, I oppose Senate Joint Resolution 28. I ask that my colleagues who are undecided at this point consider these arguments in making their final determination.

Mr. President, I ask unanimous consent to have printed in the RECORD the articles to which I have referred, together with a table in connection with direct elections.

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

[From the New York Times, July 9, 1979]

A VOTE FOR THE FEDERAL PRESIDENT

A strong alliance of reformers is again pushing the idea that we elect our Presidents by direct popular vote, without the filter of an Electoral College. Counting every vote equally sounds so simple and attractive that normally cautious politicians find it difficult to resist. A Constitutional amendment to abolish the College reaches the Senate this week with an outside chance of obtaining the necessary 67 votes.

One would think that the reformers' zeal for "one person, one vote" might as logically lead them to abolish the Senate. If any of our Federal institutions offends arithmetical justice it is the one that grants the same two votes to 22 million Californians and 650,000 Nevadans. For reasons that Senators should value, these United States have found it useful and in no sense undemocratic to retain some imbalance and geographical color in their Federal system. Simplicity is not the synonym of democracy. Voter parity is not the only source of stability. A Presidential election that is federal is not therefore unsound.

Every youngster understands our rules for electing a President. The winner of the popular vote in every State receives its total "electoral vote." Each state's electoral vote equals the size of its delegation in Congress; as in the Senate, this arithmetic favors smaller states. But in a close election, there is compensation for voters in more populous states. As urban minorities have recognized, winning a large state by a slight margin yields a richer prize than winning a small state by a landslide.

The unplanned effects of this system have been mostly good. It turns the contest for President into 52 races (including the District of Columbia and Puerto Rico). It makes it impossible for candidates to write off the less populous regions or overcrowded city slums; both count for slightly more than their numerical weight. Moreover, the system blunts single-issue fury. Citizens who oppose gun control or abortion cannot simply unite nationally to elect, or defeat, a President; they must join, state by state, with other voters moved by other passions.

This necessity for compromise, in turn, holds most voters inside our two federal parties, and the parties are thus held near the middle of the political road. To elect a President, even arrogant majorities must be solicitous of minorities; even alienated minorities must work with majorities. The system encourages moderation in radical times and protects against parochial passions. It discourages minor parties yet rewards their protest with major-party attentiveness. It is widely understood and accepted. It is a bond with history, a source of stability.

So why abandon it?

Because to many a "direct" and "popular" election sounds more democratic. They also want to avoid the largely theoretical risk that electoral votes might elect a candidate who lost the popular vote. That could happen—but it hasn't happened since 1888.

To guard against that small risk, Senator Birch Bayh and 38 cosponsors of his amendment would abandon all the advantages of federal voting and run dangerous new risks. Knowing that a direct election would encourage third and fourth and fifth parties to run their own candidates, they would let a vote of 40 percent determine the winner. Sensing that minor candidates might skim off enough votes to leave no one with even 40 percent, they would then run a *second* election between the two top contenders, who had maybe 37 and 32 percent of the original vote. Just imagine their sordid barter for the support of the first-round losers.

The clamor for abolition of the Electoral College was born in the fear of George Wallace in 1968. Some thought the strident Alabaman might parlay a mere 10 percent of the popular vote into enough electoral votes to deny Richard Nixon or Hubert Humphrey a majority. And because electoral votes are cast by real people in the Electoral College, he might have traded their ballots for a heavy price. Mr. Nixon, especially, might have paid well to avert a deadlock that threw the choice to a Democratic House of Representatives.

It didn't happen. And the chances are that Mr. Wallace would have won still more votes in the first round of a "direct" election—and thus enormous influence in the runoff. But that is only one of the flaws of the proposed reform. The danger of tawdry trading in the Electoral College is easily averted without any radical change. The desirable amendment would abolish the flesh-and-blood electors yet retain the counting of electoral votes. Why change what works?

[From the Wall Street Journal, July 5, 1979]

DON'T 'FIX' THE ELECTORAL COLLEGE

(By Albert R. Hunt Jr.)

("If it ain't broke, don't fix it."—Bert Lance)

WASHINGTON.—When the Senate soon considers a constitutional amendment to abolish the Electoral College and elect Presidents by direct popular vote, many civic-minded citizens and organizations will be cheering for the change.

Supporters include national political figures ranging from Republican Sen. Robert Dole to President Carter, "good government" groups—the League of Women Voters, Common Cause and the American Bar Association—and powerful interests from the AFL-CIO to the U.S. Chamber of Commerce.

They argue the Electoral College is an anachronism and the only virtuous alternative is direct election. "In our system of politics," suggests the noted political author Theodore H. White, "anything that can be described as virtuous automatically enlists the support of all high-minded people, most of the media and all those pressure groups that respond to the call of virtue as Pavlov's dog to his bell."

Supporters claim direct election would affirm the principle of "one man, one vote." Equally basic is their negative view that the Electoral College system is a political time bomb waiting to explode. An earnest League of Women Voters lobbyist, contending a candidate defeated in the popular vote might well carry enough states to command a majority in the Electoral College, explains: "We face a constitutional crisis here."

If so, it is amazingly elusive; the nation has escaped that danger in the past 22 presidential elections. Moreover, the current electoral system has distinct advantages: It provides many states with a stronger political identity and offers a time-tested mechanism for resolving a lack of clear national consensus in the popular vote.

To be sure, the Electoral College system has flaws. Most obvious is the so-called "faithless elector"—the rebel who on rare occasion casts a vote at odds with the popular-vote results in the state he's representing. Thus in 1976, although Gerald Ford carried Washington in the general election, one of that state's electors voted for Ronald Reagan in the Electoral College.

THE SYSTEM AIN'T BROKE

But, overall, to borrow Bert Lance's phrase, the system ain't broke.

Moreover, the fixes envisaged under the proposed constitutional amendment are likely to aggravate, not alleviate, any existing deficiencies. Direct elections would depoliticize presidential contests, enhance the role of media merchants trying to manipu-

late public opinion and possibly produce a proliferation of parties and candidates.

The drive for a direct-election amendment—which must win approval of two-thirds of both the Senate and House and then three-fourths of the states—invariably follows a close presidential election, such as 1976. Accordingly, Sen. Birch Bayh (D., Ind.), the long-time champion of this amendment, now is pressing his big point: "Under the Electoral College, one American's vote is not equal to another's, simply on the basis of where he happens to live. Only with direct elections would all votes be equal."

Sen. Bayh has little regard for the "system ain't broke" argument. He contends that's "sort of like saying to the farmer whose barn is not on fire, don't take out fire insurance.' "

The Indiana Democrat insists the nation needs insurance for the presidential election system. He notes that not just the 1976 contest but two others among the past five elections involved "near misses." In 1976, if no more than 9,246 Jimmy Carter votes in Ohio and Hawaii had gone instead to President Ford, the Republican would have won even though receiving some 1.7 million popular votes less than Mr. Carter. In 1968, with third-party candidate George Wallace in the race, a shift of only 70,000 votes in a few states would have deadlocked the Electoral College and thrown the decision into the House of Representatives. The 1960 Kennedy-Nixon race was another squeaker.

Sen. Bayh recognizes the danger that his amendment might lead to a proliferation of presidential candidates. To keep anyone from winning the White House with only, say, 33% of the popular vote, his amendment would create a runoff between the top two finishers if no candidate receives at least 40% of the total.

There's a recurring argument, too, over whether the political power of small states would suffer if the Electoral College with its state-by-state representation were done away with. But that argument misses a more fundamental point: the damaging effect that direct election would have on the political process in all states, big and small.

Mr. White, an opponent of direct election, believes the damage would be significant: "It is good when a voter in Indiana goes to the polls that he thinks of himself as a Hoosier trying to move his state; that a proud Texan thinks of himself as a shaker in the Lone Star State; that a man from Boston thinks of himself as a Baystater, the state of mavericks. We are a nation of communities—ethnic communities, religious communities, rural communities, urban communities and yes, above all, historic communities. Americans do not want to be homogenized. Each election night, every four years, we fit the jigsaw of America together all over again."

That may be an overly romanticized picture, but it's true politicians and volunteers down to the precinct level do organize and work together to carry a state for their presidential candidate.

Mr. White is not alone in foreseeing that this process would be weakened by the simple, sanitized direct-election system. Political scientist Aaron Wildavsky, for instance, argues: "By removing the main incentives our political parties have to coalesce—the necessity of creating a coalition across diverse states to make a majority—abolition of the Electoral College would drive the last nail in the coffin of our party system."

MEDIA IMAGERY

Into the breach would step the image-makers. Why spend money on campaign organization rather than on national television time? "The contest would not be between those who could recruit and organize," says elections expert Curtis Gans, "but rather who could most effectively and skillfully manipulate media imagery."

The runoff proposal leads to other problems. With the Bayh amendment's formula, the national race "would resemble the Boston Marathon, with presidential candidates representing every special-interest group in the country," contends Sen. Orrin Hatch (R., Utah). "Each will seek to push the major parties . . . below the 40% threshold and position themselves to negotiate during the pre-runoff period."

It's instructive to envision the effects of direct election in a close contest, such as the 1960 Kennedy-Nixon race. John Kennedy won that election by only 110,000 popular votes, but he captured the electoral vote by a more decisive 302 to 219. To change that outcome, Mr. Nixon would have had to alter results not only in Illinois, where the fabled Cook County Democratic machine produced suspect results, but in at least one other state as well.

With direct election, the 1960 outcome would have been decided by less than one-half of 1% of the total vote, creating a powerful demand for a nationwide recount. It would have taken months to determine the winner and it's doubtful that even the recount would have ended the suspicions or charges of chicanery.

So it's perfectly plausible that a direct-election system might become more of a political time bomb than the present indirect system. Sooner or later, a 1960-style squeaker might come along again.

Still, certain changes in the present arrangement are needed. The discretion of individual electors should be eliminated to avoid the "faithless elector" problem. The states should consider dividing their solid blocs of electoral votes in proportion to the votes each candidate receives, instead of continuing the current winner-take-all system. There may be some merit in the suggestion by Sen. Russell Long (D., La.) to retain the Electoral College but award bonus electoral votes to the popular-vote winner, though that raises some of the same problems of the direct-election approach.

But certainly the politicians should tread carefully before dismantling a system that not only ain't broke but seems to be functioning rather well.

[From the Washington Star, July 7, 1979]

DIRECT ELECTION IS A BAD IDEA

(By James J. Kilpatrick)

The pending order of business in the Senate this month is Birch Bayh's proposal to provide for the direct national election of future presidents.

This was a bad idea when the gentleman from Indiana first trotted it forth in 1963. It remains a bad idea today.

Under Bayh's resolution, Article II of the Constitution would be drastically rewritten. Bayh would abolish the Electoral College altogether.

In its place he would provide for a national popular election in which presidential and vice presidential tickets would compete. If no ticket received as much as 40 percent of the vote, a runoff would be held between the top two tickets. Thirty days later the winner would be officially proclaimed.

The existing system of presidential elections admittedly is flawed. We vote state by state for surrogate electors, but these electors can violate their trust with impunity. If no candidate wins a majority of the electoral vote, the election goes to the House of Representatives, where each state casts a single vote.

Many observers object to the scheme of "winner take all," by which a state's entire electoral vote goes to the top vote-getter.

Acknowledging these imperfections, skeptics rightfully may inquire if Bayh's popular election plan is any better. In my own view, the senator proposes a cure far worse than the mild disease.

The Bayh amendment, if it ever were ratified, would wipe out the last vestiges of a substantive two-party system. Granted, not much remains of the two-party system now, but the form is there and we have built our legislative and executive structures around it.

So long as candidates compete for electoral votes in each separate state, it remains formidably difficult for a third-party ticket to make a significant showing. Only four times in this century have minor party candidates figured noticeably in the records—Roosevelt in 1912, LaFollette in 1924, Thurmond in 1948 and Wallace in 1968. In no instance were their electoral votes sufficient to affect the outcome.

Under direct popular election, all this would change. Bayh's amendment purports to leave it to each individual state to decide which names would appear on its ballot, but the senator cannot truly mean this.

A national election, at the very least, must be national; every voter must have an opportunity to choose among identical slates of tickets. Election laws would have to be precisely uniform throughout the country.

Once the Bayh plan went into operation, we could expect to see a multiplicity of parties in the European fashion—a black party, a women's liberation party, a resurgent socialist party, a pro-abortion and an anti-abortion party, an anti-busing party, an anti-gun control party, and so on.

None of these splinter groups realistically could hope to win a national election outright. Collectively, they quite plausibly could prevent either major party ticket from winning 40 per cent of the vote. In a runoff, the minor parties would barter their support to the most promising bidder.

Perhaps the American people want to plunge headlong into political disorder, but I doubt it. My guess is that many of the high-minded outfits that are supporting the Bayh amendment have not thought the thing through. The concept of popular election has a fine, simplistic appeal.

The trouble is that our constitutional system is not simple. It is marvelously complex. It rests fundamentally upon the concept of federalism, the grand design by which political power is distributed among the states respectively. This is the true genius of the American Constitution.

Bayh would wreck the grand design. He would obliterate one of the base compromises of our federal system, and in the process he would disturb the beautiful balance of the Constitution as a whole.

It seems to me unlikely that two-thirds of the Senate—or the House—will support any such radical surgery, and still less likely that 38 states could be persuaded to ratify the amendment. But Bayh has his baby on the floor, and if his troops can break a filibuster, we will soon get to the yeas and nays.

DIRECT ELECTION: WHO GAINS? WHO LOSES?

[The following chart compares each State's voting strength in the 1976 Presidential election under the electoral college system and direct popular vote. A plus (+) is indicated next to each State that had a higher share of the national total using its total popular vote, while a minus (−) is indicated next to States which had a lower share]

	Electoral vote	Percentage of national total	1976 popular vote	Percentage of national total
East:				
Connecticut	+8	1.49	1,381,526	1.69
Delaware	−3	.56	235,834	.29
District of Columbia	−3	.56	168,830	.21
Maine	−4	.74	483,216	.59
Maryland	−10	1.86	1,439,897	1.77
Massachusetts	+14	2.60	2,547,558	3.12
New Hampshire	−4	.74	339,618	.42
New Jersey	+17	3.16	3,014,472	3.70
New York	+41	7.62	6,534,170	8.01
Pennsylvania	+27	5.02	4,620,787	5.67
Rhode Island	−4	.74	411,170	.50
Vermont	−3	.56	187,765	.23
West Virginia	−6	1.12	750,964	.92
South:				
Alabama	−9	1.67	1,182,850	1.45
Arkansas	−6	1.12	767,535	.94
Florida	+17	3.16	3,150,631	3.86
Georgia	−12	2.23	1,467,458	1.80
Kentucky	−9	1.67	1,167,142	1.43
Louisiana	−10	1.86	1,278,439	1.57
Mississippi	−7	1.30	769,361	.94
North Carolina	−13	2.42	1,678,914	2.06
Oklahoma	−8	1.49	1,092,251	1.34
South Carolina	−8	1.49	802,583	.98
Tennessee	−10	1.86	1,476,345	1.81
Texas	+26	4.83	4,071,884	4.99
Virginia	−12	2.23	1,697,094	2.08
Midwest:				
Illinois	+26	4.83	4,718,914	5.79
Indiana	+13	2.42	2,220,362	2.72
Iowa	+8	1.49	1,279,306	1.57
Midwest—Continued				
Kansas	−7	1.30	957,845	1.17
Michigan	+21	3.90	3,653,749	4.48
Minnessota	+10	1.86	1,949,931	2.39
Missouri	+12	2.23	1,953,600	2.40
Nebraska	−5	.93	607,668	.75
North Dakota	−3	.56	297,188	.36
Ohio	+25	4.65	4,111,873	5.04
South Dakota	−4	.74	300,678	.37
Wisconsin	+11	2.04	2,104,175	2.58
West:				
Alaska	−3	.56	123,574	.15
Arizona	−6	1.12	742,719	.91
California	+45	8.36	7,867,117	9.65
Colorado	+7	1.30	1,081,554	1.33
Hawaii	−4	.74	291,301	.36
Idaho	−4	.74	344,071	.42
Montana	−4	.74	328,734	.40
Nevada	−3	.56	201,876	.25
New Mexico	−4	.74	418,409	.51
Oregon	+6	1.12	1,029,876	1.26
Utah	−4	.74	541,198	.66
Washington	+9	1.67	1,555,534	1.91
Wyoming	−3	.56	156,343	.19
Regional totals:				
East	+144	26.77	22,115,807	27.12
South	−147	27.33	20,602,487	25.26
Midwest	+145	26.95	24,155,289	29.62
West	−102	18.95	14,682,306	18.00
Total	538		81,555,889	

Mr. THURMOND. Mr. President, I commend the able and distinguished Senator from South Dakota for the splendid remarks he has just made.

The Senator from South Dakota is a new Member of this body, and he has made a very fine impression here. His speech on this subject today is indicative of his knowledge of the Constitution and of the electoral system in this country.

The PRESIDING OFFICER. Who yields time?

Mr. THURMOND. Mr. President, I suggest the absence of a quorum, with the understanding that the time will be charged equally to both sides.

The PRESIDING OFFICER. Is there objection? The Chair hears none, and it is so ordered.

The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. 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.

Mr. THURMOND. Mr. President, I yield to the distinguished and able Senator from New Jersey such time as he may require.

The PRESIDING OFFICER. The Senator from New Jersey is recognized.

Mr. BRADLEY. Mr. President, the vote to be taken today in the Senate over the proposed constitutional amendment for direct election of the President is perhaps the most important one Members of the Senate will cast this year. I say that with full recognition of the upcoming debate on the SALT Treaty, the windfall profits tax on energy, and other important issues we will be facing.

The constitutional processes by which we elect the members of our Government affect the basic structure of our country. The decision at the beginning of the century to elect Senators by popular vote has had profound changes that go far beyond that simple and important advance in the democratic character of this body. Even nonconstitutional changes, such as the Voting Rights Acts and campaign financing reforms, profoundly alter the political organization of our country, change patterns of political power and influence, and ultimately bear on the Nation's ability to meet the recurring needs of the modern world. Any Senator must, therefore, approach a decision on a constitutional amendment of such fundamental importance with caution, seriousness, and with an appreciation of the limitations of human wisdom and foresight.

In a very real way, the responsibility placed on me and on every other Senator is the same as that placed on the members of the Constitutional Convention 200 years ago. In John Marshall's words, we must remember that it is a constitution we are expounding.

Mr. President, I want to take a few moments of the time of the Senate to explain the considerations that have led me to oppose this amendment.

I have listened carefully and read the arguments on both sides of the direct election debate. I find the arguments of my good friend from Indiana, Senator BAYH, highly impressive. "One person, one vote" is more than a slogan. It expresses the highest ideals of the American democracy. It is a worthy and necessary goal, for the very basis of our constitutional system is founded on the will of the people.

I am also impressed by the other major argument advanced in favor of direct election—the threat to the political stability of the Nation should a President be chosen through the electoral college who does not have the majority, or at least a significant plurality, of the popular vote. In the 19th century, there was considerable national dismay when the popular winner was not elected. Yet the fabric of the country was not destroyed and the dichotomy between the electoral college result and popular vote result was accepted.

The strength of our political system is amazing. We have survived a decade of crisis in Presidential successions. I have little question that the country would ultimately accept, albeit with some hesitation and misgivings, an electoral college result which differed from the popular vote tally. But I do think that such an event would be a time of trial and uncertainty.

As weighty as are these considerations in favor of a change, I am more persuaded by the arguments opposing direct election. I am concerned that this proposal may weaken the strength of the two-party structure, and so perhaps encourage the kind of divided mandate that the amendment is designed to counter. Because of the tradition that State winners take all the electoral vote, political groups within each State are induced to build alliances. This process encourages the two-party system, which itself is a stabilizing institution. I do not say that the two-party system could not survive direct election, but with such a change an important support for the system would disappear.

I worry as well about the effect of direct election on the federal system. I think it is unquestioned that the unit system, although not constitutionally required, does put a premium on campaigning on a State basis. It not only

focuses the election campaign process, but it helps preserve the importance of the States as social and political entities. I am not persuaded by arguments that the federal system or the States are outmoded features of early America. States are part of the glue that binds this vast Nation together. The Federal structure insures diversity and freedom while still building national unity. It was an inspired concept when it was enshrined in the 1787 Constitution and it serves us well to this day.

This point is particularly important to me as a Senator from New Jersey. My State already suffers from being in the shadows of New York City and Philadelphia. The immense influence of these two centers has weakened the sense of State identity in New Jerseyans. Under direct election, New Jersey as a political fact would be further weakened. Candidates would campaign for the New York metropolitan area vote. They would do that campaigning from Times Square, and New Jersey votes would be no different than Long Island votes, or Westchester votes. The same would happen in Philadelphia. Forgotten would be all the New Jersey voters who are not reached by this campaigning—the south-central and western residents. And forgotten as well would be the New Jersey interests in the north and south which are decidedly not the same as New York City or Philadelphia interests.

I am afraid that under direct election, New Jersey would disappear from the thoughts of candidates and become in their minds, in their campaigns, and later as Presidents, just a part of New York or Philadelphia. New Jersey has more than enough trouble getting attention paid to its needs and problems under the electoral system. Under direct election, it would be forgotten.

Finally, I am also mindful of the impact of direct election on particular groups whose political strength is enhanced by the electoral system. While it is awkward to defend disproportionate voting strength in abstract, pure, democratic theory, as a practical matter it is vitally important to consider how direct election affects patterns of political strength. For minorities, especially, the ability to leverage votes into electoral strength is an important advantage. The history of changes in civil rights in recent decades shows that voting strength and economic power have been the tools of gaining equality. I am persuaded that the responsiveness of the South to civil rights changes—and the remarkable progress we have seen in such a short historical time—is due in large measure to the effective development and use of the franchise. Civil rights gains in the North, and in New Jersey, also have depended on political strength and the willingness to use it in Presidential elections.

The leverage that the electoral college gives to racial, religious, and ethnic minorities, is not a distortion of democracy, but a vital part of it. Democracy is more than majority rule. It is also respect, consideration, and attention to the rights and needs of the minority. We must preserve the electoral college system precisely because it is an integral part of our democratic system.

Finally, I have decided to vote against this amendment because I do not believe anyone can confidently predict what consequences it would have to our national structure. I think we alter our constitutional system at our peril. At no time, whether at the beginning, nor at any time since, has any group of individuals accurately predicted the consequences of the structural changes they made to our Constitution. Even the wise men who framed our Constitution in 1787 turned out to be poor prophets, indeed, in many important respects. They saw the electoral college as a group of savants that would stand between the common voter and a wise choice of leader. It did not work that way at all, and it did not work that way from the start. Those same wise men never contemplated the rise of party, and yet before the term of our first President was over, party had become a major factor in our constitutional scheme.

We are considering a change with implications far broader than any other structural change we have ever made in the Constitution. I believe no one can know or predict with any degree of certainty how direct election will alter our Nation and its political structure. I think it is just as likely that the change will induce more instability and doubt, and perhaps disorganization, as it is that it will correct an admitted potential defect.

I am persuaded that this imperfect constitutional structure has served us well for 200 years. It may be that the hand of Providence has guarded us against the disaster inherent in its fragile plan. But I would not tempt fate and support a change unless I were persuaded that the change was more than merely desirable. I must be persuaded that it is also necessary and imperative. I am not so persuaded. Therefore, I believe we should continue as we have in the past, with fingers crossed if need be. I would rather continue with the threat of a constitutional crisis, and trust in the judgment, patience, and good sense of the people of the country to see us through.

It is for these reasons, Mr. President, that I oppose the amendment advanced by my good and dear friend from Indiana.

Mr. THURMOND. Mr. President, I wish to commend the able and distinguished Senator from New Jersey. I know about pressures that have been on him concerning this question. He has given this matter consideration and has concluded that it would be unwise to change the Constitution in order to have the direct election of the President. He has made a very fine statement here, and he is to be highly complimented.

Mr. President, I yield myself such time as may be required.

Mr. President, Mr. Martin Diamond, who was professor of government and the holder of the Thomas and Dorothy Leavey chair on the Foundations of American Freedom at Georgetown University and an adjunct scholar of the American Enterprise Institute, testified on July 22, 1977, at a hearing of the Subcommittee on the Constitution of the Committee on the Judiciary of the U.S. Senate regarding an amendment proposed by the distinguished Senator from Indiana which we are now considering in this body.

This amendment would eliminate the electoral college and would provide for direct election of the President.

Only minutes after testifying Professor Diamond collapsed and died. Professor Diamond was a very outstanding witness on that occasion, and his testimony is so knowledgeable and so important that I wish to make the following quotations part of the RECORD. I wish to quote the following excerpts from his testimony. These are his words:

> I believe there has been a tendency on the part of the scholars, and perhaps even of politicians, to regard the Electoral College as the product of an old and archaic and outmoded and bygone era.
>
> That prejudice has worked to the disadvantage of the Electoral College. I believe that, far from being an old and outmoded instrument, it is, on the contrary, the very model (I hesitate to use the word *paradigm*) of a first-rate constitutional mechanism—namely, one which is old and to which the people are habituated. That habituation is a major source of legitimacy and an invaluable ingredient to free government. It is a model constitutional provision which is old and dynamically adaptive, which in every election has proven itself demographically responsive to changing conditions.
>
> As you know better than I, every presidential election is a new ball game. The Electoral College has adapted itself and historically evolved in response to the growth and the changing political, social, and economic characteristics of the country. That much can be said on the problem of its archaism.
>
> Let me proceed to the second point I wish to make. It is the most important objection made to the Electoral College, and it must be dealt with firmly: It is the idea that the Electoral College holds an undemocratic potential; that it is possible a candidate would be elected under the Electoral College system because he has more electoral votes, but fewer popular votes, than one of his opponents has. This is what Senator Kefauver called the "loaded pistol to our heads"—the possibility that a candidate will win the presidency because of having won the Electoral College but not the popular vote. That is the objection that must be dealt with if the Electoral College is properly to be defendable.
>
> Let me point out that the discrepancy between winning the popular vote and winning seats, or winning elections exists in every districted system of election. Let me start further afield. This discrepancy exists in the United Kingdom, which many American scholars and politicians admire for its parliamentary system. Under the British districted system, the Prime Minister is chosen and the Government is formed by the party that has won the majority of seats. In the history of the British parliamentary system, a party with a minority of the popular vote has frequently formed the Government. It is the inevitable consequence of there being a dis-

crepancy between winning seats in a districted system or electoral votes in an electoral system, and winning raw popular votes. It happened as recently as 1974, when the present Labour government won only a minority of the popular votes but won a majority of the seats.

To avoid the discrepancy between popular votes and electoral votes, or seat votes, or district votes, every vestige of districting, or any other electoral device, must be eliminated. That is the cost of the system now being proposed in place of the Electoral College.

I believe that the preservation of the districted basis of election—wards in cities, counties in states, and states in the American federal system—is invaluable to a free democracy such as ours. It permits responsiveness to minorities, for just one example. By and large, it is preserved in most of the Western democratic countries.

Now let me switch to a second aspect of this problem of the discrepancy between the popular vote and the electoral vote. The amendment you propose, sir, is called direct election of the President. Perhaps you will permit me to say that this is a misnomer. If I am right in my criticism, it is—with the best of intentions and with the best of rhetorical effect—a misnomer.

The President is now elected directly, in my judgment. There is now in the election of the President, under the Electoral College system, one person/one vote—in every state. The candidate with the most votes wins—in every state. The present system is federally democratic.

The only effect of the proposed amendment will be to increase not the democracy of the election, or the directness of the election, but the pure nationalness of the election. The sole practical effect of the amendment will be to diminish the federalness of the election, to eliminate the states from their share in the political process. We now have, in Indiana and Illinois and every state of the Union, one person/one vote and winner take all: the pure direct democratic principle of winning prevails in each state. The election of the American President cannot be made more directly democratic. It is being proposed to be made more directly national.

When the issue is put in terms of national versus federal elections, I believe the Electoral College may be defended with a comfortable conscience—not only a good, but also a comfortable, conscience. It is a means of preserving federal democracy, or a federal element, in the electoral process.

After a thoroughgoing dispute, and a process of give-and-take and compromise at the federal convention, the makers of the Constitution agreed to include the states in the process of selecting the President of the United States. In my judgment, that has proven invaluable in this centralizing age. When all forces tend to homogenization and centralization, we have a saving remnant of decentralization in the federal aspect of the election of the American President.

Regarding that federal aspect, let me end with this comment. I have heard proponents of the so-called direct election of the President make the point that the President, of all officials, should be chosen in a straight, national vote by all the people. He is, after all, our chief national executive officer.

I would answer in the language of the Constitution of the The Federalist. He is not simply our chief national executive officer. The President of the United States is also our chief federal officer. That is what has been forgotten by some of the proponents of the so-called direct election of the President.

The President is a federal and national officer. As with the Senate of the United States, there are both federal and national characteristics in the mode of his selection. As with the House of Representatives, there are both federal and national characteristics in the mode of his choice and operation. The Constitution created a compound state and national system. It built a role for the states into the choice of national lawmakers and of the national executive.

The sole constitutional effect of the proposed amendment is to defederalize and nationalize the election of the President. I regard that, in an age when our decentralized federal system has proved so manifestly of value to us, as a dangerous change and an unwarranted one.

Mr. President, the more I study this question, the more I am convinced that it would be detrimental not only to the smaller States of the Nation, as the study by the Library of Congress shows, but also to the larger States, because we will be transferring from a federal system of elections to a national system of elections. A federal system embodies the National Government and the respective State governments of the Nation.

Some time ago, I had the pleasure of reading an article in the Illinois Quarterly, written by Harry A. Bailey, Jr. Professor Bailey is a black man and he testified before the Constitutional Subcommittee of the Senate. He was an outstanding witness, and his testimony impressed everyone present.

He has prepared a pamphlet, and I would like to quote the following excerpts from this pamphlet, dated December 1973, volume 36, No. 2.

For years—

There has been a continuous expansion of the American national government in domains and endeavors long considered the prerogative and responsibility of state and local governments. This development has particularly alarmed people concerned with the future of federalism.

It is alleged that—

The electoral college method of electing the President is "archaic, undemocratic, complex, indirect, and dangerous. Most of the proposals boil down to three major plans: district, proportional, and direct election. These may be divided into two groups; There are those who favor retaining the present federal structure and those who favor altering the present federal structure. Retention of the federal structure assumes essentially no change in state control over the presidential electoral process. Alteration of the federal structure assumes considerable loss of state control over the presidential electoral process to the national government. Each of these will be discussed in turn.

PROPOSALS THAT WOULD RETAIN THE FEDERAL ARRANGEMENT

The district plan. This plan would retain the present federal system, although some of its less attractive features would be enhanced. District plans have varied widely in their details but the one given most consideration would divide a state's electoral vote by congressional district, on a district-by-district winner-take-all basis, retain individual electors, and keep the two electoral votes per state (based on the two federal senators). The plurality winner in the statewide vote would receive both of these votes. In the event no candidate won a majority of the nationwide electoral vote, the plan provides for a joint session of Congress to decide the matter in lieu of the present arrangement of selection by the House of Representatives.

The worst aspect of this plan, according to John Banzhaf, is that by reducing the unit rule to the level of congressional districts and retaining the two electoral votes for each state, the relative voting power of the citizens of the small states would be greatly increased, while the relative voting power of the citizens of larger states would be greatly reduced. Further, the district plan would drastically decentralize and localize presidential elections. The President's constituency would be about the same as that of the Congress.

The district plan would strengthen the congressional parties at the expense of the presidential ones. In this respect, James MacGregor Burns has argued that there are four parties in the American political system: that two presidential parties—one Democrat, the other Republican—which address themselves to the nation as a whole, and the two congressional parties—one Democrat, the other Republican—which are concerned primarily with local issues.

Strengthening the congressional parties at the expense of the presidential ones would be unfortunate for two reasons: 1) the congressional parties—individual Congressmen in control of their districts—are by definition, aloof from national trends; 2) the districts, themselves based on House districts, are unrepresentative of the nation. To the extent that this occurs, the "national" nature of the presidency would be lost.[7] However, the district plan would maintain the present federal arrangement because of its retention of two electoral votes for each state beyond those allocated on a population basis.

The Proportional plan. This plan would divide each state's electoral vote, including the two votes corresponding to a state's federal senators, in proportion to the popular vote in that state. It would eliminate the unit rule or winner-take-all aspect entirely.

The proportional plan, unlike the district plan, eliminates the human elector or electoral discretion in favor of the automatic casting of electoral votes. Like the district plan, however, the proportional plan also provides for a joint session of Congress contingency procedure, except that in this case a candidate may receive just under 40 percent of the electoral vote before the contingency procedure becomes operative. In the district plan, anything less than a majority of the electoral vote puts the contingency feature into operation.

Under the proportional plan, as under the district plan, the relative voting power of small state citizenry would be inflated due to the continued existence of an electoral vote for each of a state's two federal senators. Moreover, minus any unit rule (some of which the district plan retains), there would be no means to counteract the weight gained by each small state as a result of the "constant-two" electoral votes. That is to say, small states have two electoral votes for their federal senators just as do large states. However, this small state advantage vis-à-vis large states is offset to some extent by the existence of the unit rule, i.e., large states gain by the presence of the unit role or winner-take-all arrangement. Barring the unit role would result in a transformation of "the present electoral college system with its countervailing biases into a single, systematic bias" favoring small states.

The important matter to note, for purposes of this paper, is that the federal arrangement would be maintained under the proportional plan. This is true because the plan retains the constant-two electoral votes for each state, large and small alike.

The proposals which would alter the fed-

eral arrangement include the direct election plan, which we are considering here.

The direct election plan is the one proposal that would seriously alter the American federal system. The direct election plan would not reform the electoral college as would the district and proportional plans; it would abolish it.

There have been in fact not one but two principal proposals for direct election of the president. The first would set up a single election (one without a run-off provision) with the winner being the candidate obtaining a mere plurality of the popular vote. This arrangement would, of course, enable a candidate securing the approval of, theoretically, a minute portion of the electorate to become president of the entire country. The advantage of this arrangement is its simplicity and decisiveness. As Sayre and Parris have said, " 'spoilers' would no longer be able to delay an election decision." However, the possibility of the presidency resting on only a fraction of the popular vote would do away with any semblance of representativeness; this plan would not seem to be an acceptable one in any case.

The second proposal for direct election of the president makes two distinct elections possible, and that is what is proposed here, in the amendment proposed by the distinguished Senator from Indiana. The candidate receiving 40 percent or more of the popular vote in the first election would become president. If, however, no candidate gets more than 40 percent of the vote, there would be a run-off (second) election between the two who ranked the highest. This plan is also noted for its simplicity, as well as for its capacity to abolish discrimination in "voting power" throughout the country.

Despite its simplicity, the direct election plan presents severe challenges to the current role of the states in the American federal system. Herbert Wechsler has said, "the continuous existence of the states as governmental entities and their strategic role in the selection of the . . . President are so immutable a feature of the system that their importance tends to be ignored." The same observer has written, "And with the President . . . the crucial instrument of the selection . . . through electors—is the states . . . states are the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics."

Daniel Elazar, a distinguished scholar of American federalism, makes clear the special nature of each American state. He wrote, "Every state . . . is a *civil society*, a relatively complex social system organized and defined politically which (1) pursues a particular conception of justice that it makes its own; (2) encompasses a wide variety of social and economic interests; (3) is charged with considerable responsibility for satisfying the technological, economic, and social needs of its people; and (4) is capable of authoritatively mobilizing the resources necessary to do so in a manner sufficient to ensure its own maintenance.

"Every state as a civil society possess its own *political system* to handle its internal government and authoritatively manage the pursuit of common political ends. This political system, which includes the formal agencies of government and the structure of internal interests and electoral groups that influence the formulation and execution of public policy within the boundaries of the state, is one of a number of 'systems' (i.e., the social system, the educational system) that together make up a civil society."

Precisely because each American state is a civil society, each becomes infused with the purposes and needs of its various ethnic, religious, racial, and economic groups and thus develops a separate identity. An important practical effect, then, of the electoral college is its capacity to insulate the political system of one state from that of any other state. Beyond this very practical consideration, the electoral college has tremendous symbolic value in that it confirms the federal structure which guarantees small and large state equality in the Senate.

Meyer Kestnbaum, an eminent student of intergovernmental relations, has written: "The proper division of labor and authority between the nation and the states is the key to maintaining the federal nature of our systems of government." The direct election plan would alter this division since federal controls over elections to include the setting of identical age, literacy, and registration requirements throughout the country, as well as the federal administration of elections would be necessary.

This is because each voter would have an immediate interest in the fairness and accuracy of election machinery in every other state, a concern not now evidenced. Because state borders would be irrelevant in aggregating the vote for president, there would be no remaining separation between the states and the national government in this one instance.

By obfuscating the distinctions and powers of the states as separate entities from their citizens, the principle of federalism (i.e., reduction of government into two distinct levels—national and state—with separate powers, functions, and responsibilities for each) would be weakened. This one move in the direction of a clear, undivided 'national will' would result in additional power accruing to the national government at the expense of the states. 'National will,' in this case, refers to that conglomeration of interests which elects the president. In actuality, there is only a limited national will. What really exist are 'state wills,' each of which is measured and given strength individually. In the election of the president, an individual's opinion has force only in the state in which he resides. Thus there are mainly 'state wills' which from time to time come into agreement to form what we call the national will. The electoral college is the device which makes this process possible and workable.

Adoption of the direct election plan would threaten the continued existence of the present nominating process. The logical consequence would be a nationwide presidential primary operating along the same lines as the direct election. If none of a party's candidates received a plurality of at least 40 percent, a run-off would be held between the top two candidates. Thus if both direct election for the President and a nation-wide primary were adopted, the likelihood would be four national elections in a three-month period, since few candidates could be expected to get 40 percent of the vote where several candidates vie for the nomination of their party and several parties compete for the presidency. There is no gainsaying the wear and tear on the American voting public and the likely consequences, one of which would likely be increased voter apathy. More corrosive of federalism, a national primary would have the effect of reducing the importance of the states as civil societies in the election of the President.

Constitutional stability could be affected by abolition of the electoral college. The direct election plan could make possible a worse situation than what has usually happened in the history of presidential elections. Under the extant system, most winners of the presidency have garnered a good deal more than 40 percent of the popular vote and thus have enjoyed considerable legitimacy as president because the popular plurality has almost always converted to a majority in the electoral college. Since 1824 when the popular vote was first recorded on a nationwide basis, only four presidents have secured less than 45 percent of the popular vote. They were John Quincy Adams in 1824 with 31.9 percent, Abraham Lincoln in 1860 with 39.8 percent, Woodrow Wilson in 1912 with 41.9 percent and Richard Nixon in 1968 with 43.4 percent. Twenty-nine of the 38 elections since 1824 have sent to the presidency men who secured more than 48 percent of the popular vote. The remaining five presidents who captured more than 45 percent of the vote but less than 48 percent were Zachary Taylor in 1848 (47.3 percent), James Buchanan in 1856 (45.6 percent), Rutherford Hayes in 1876 (47.9 percent), Benjamin Harrison in 1888 (47.8 percent), and Grover Cleveland in 1892 (46.0 percent).

The two-party system would be affected considerably by the abolition of the electoral college. Presently minor parties can win votes in the electoral college only by carrying an entire state. Since few minor parties can succeed at this, they soon wither and fade away. However, the run-off provision of the direct election plan would likely give rise to minor parties competing seriously for the presidency. Indeed, a minor party could conceivably earn enough votes to win an election where two major parties divide the vote. Failing this, a minor party, in forcing a run-off, could conceivably help elect a candidate who is in fact the voters' second choice. Dorothy Buckton James concludes that the electoral college inhibits development of a multi-party system.

The "umbrella function"—the bridging of a wide variety of interests in American life—performed by each of the two major parties would be endangered by the direct-election plan. Just as the two-party system requires the various interests to bargain and form coalitions *prior* to elections as opposed to multi-party systems which foster bargaining and coalitions *after* elections, so it is that national conventions foster bargaining and compromise *prior* to elections as opposed to runoff elections which extend bargaining and compromise to a more critical juncture in the electoral process. The bargaining of politicians at a national convention seems eminently preferable to asking voters to reorder their choice for president at a run-off election. The very circumstance of the necessity to balance group and sectional interests in selecting a potential chief executive of a multi-group society engenders this preference.

Finally, the direct election plan would alter the relationship of state and local politicians to national politicians. States are the level at which American political parties are constituted. The real power is at this level with national parties emerging at four-year intervals to meet very defined tasks. Elimination of the role of the states in the presidential selection process would transfer much of the power of state and local politicians to national politicians. Here, again, the balance between national and state power would be considerably altered, and federalism jeopardized.

CONCLUSION

Many observers see the electoral college process of electing an American president as a remnant of an age when mass democracy was a possibility to be feared. These same observers argue the logic for such fears no longer holds and, what is more, the electoral college poses a greater threat than direct election because of its possibility for deadlock. So too, many see the present hybrid system (party primaries, state conventions, as well as the national conventions) for nominating a president as too gruelling for the candidates, and too chaotic for many of the citizenry to understand or respect. But as the eminent scholar of American federalism, Morton Grodzins, has said, "Decentralization by mild chaos is more desirable than centralization by order." This is a persuasive argument for the view that the present role

of the states, in presidential election and nominating processes, be taken as a datum of American federalism which should not easily be tampered with. Herbert Wechsler puts it concisely: "the President must be . . . the main repository of the 'national spirit' in the central government. But both the mode of his selection and the future of his party require that he also be responsive to local values that have large support within the states."

Perhaps a new constitutional scheme for the selection of the President and Vice-President is in order, but whatever reform is adopted must clearly recognize that the politics of the American federal system is at least complex and that real damage to American federal principles could result if parties and candidates, by virtue of the electoral process, become unconcerned with state interests.

Mr. President, I think it is clear, and will be to the people of this country, that they do not favor a system that takes the power of elections away from the States and transfers it to a national system in Washington. That is what the direct election system does.

Right now, the States conduct their own elections and we get the consensus in each of the 50 States of the Nation. We do not just get a popular vote by all the people in the Nation.

Some people say, "Well, if you elect the Governor of a State by a popular vote, why can't you elect a President that way?"

Well, this is no argument at all. The States are sovereign entities and they elect their State officers by popular vote, but when we elect a President who is going to serve all the people of the Nation and all the States of the Nation. We have embodied in the Constitution the federalism that has proved so worthy down through the ages.

If there is going to be change, I would prefer the district system or the proportional plan. That way, we would take elections back to the grassroots and to the people. We would not destroy federalism. But if we adopt a direct election system, we transfer all of the powers of elections to the Federal Government.

It is easily understandable that the people of a State, as I have stated previously, would want their State to have as much power as possible. If we adopt this direct system, then we would have States vying with each other to let 17- or 16-year-olds vote so they would have more votes.

It would come to a point where we would have to have a uniform system. Otherwise, there would be chance-taking and there would be competition for a State to get as many votes as it could in order to exert more influence in a national election. That would be bad.

Mr. President, again I say in closing that we do not want to change the Constitution in such a way that we destroy federalism. We want to keep the system in a way that preserves for the States the control of the elections, and in that way we preserve a very important principle that was embodied in the Constitution of the United States.

I hope the Senate will think most carefully over this matter, because the vote today is one of the most important votes that will ever be cast by a Senator in the United States.

It is a question of whether we want to retain federalism that has served us so well down through the years, or whether we want to adopt a centralized, all-powerful system to give the National Government all of the power over elections and ignore those principles embodied in the Constitution by James Madison and the others who were at the Constitutional Convention.

It is my sincere hope that this amendment by the distinguished Senator from Indiana will be defeated and that we will not go to a national system of elections in this country.

The PRESIDING OFFICER. Who yields time?

Mr. BAYH. Mr. President, I am glad to yield to the distinguished Senator from Minnesota.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. BAYH. I believe the Senator said he wanted 10 minutes.

Mr. DURENBERGER. Ten minutes.

The PRESIDING OFFICER. The Senator from Minnesota is recognized for not to exceed 10 minutes.

Mr. DURENBERGER. Mr. President, it hardly seems necessary to restate the potential for constitutional crisis that lies in the electoral college system. Each time the Nation approaches a Presidential election, the possibilities are exhaustively discussed, in both private conversations and the analysis of political experts. Yet despite widespread recognition of its flaws, the electrol college and its potential for constitutional crisis has stubbornly remained in the law.

Unquestionably, the system's most serious flaw lies in its inability to insure that the candidate supported by the majority of American voters will win the election. It was, after all, only 90 years ago that Grover Cleveland won a plurality of the popular vote only to lose the Presidency to William Henry Harrison. The obstacles to Presidential leadership have magnified since 1888, and it is doubtful that a President "elected" under such circumstances could lead the Nation today. With confidence in the responsiveness of Government at an alltime low, we cannot indulge in the luxury of perpetuating the electoral system until a similar circumstance recurs.

Nor can we ignore the possibility that a close election might be decided by a "faithless elector." Present law does not require that electors follow the voter preference in their State. And the risk in this system is more than hypothetical, as illustrated by the fact that in six of the past eight national elections, electors have deviated from voter expectations. Present law does not only perpetuate this possibility, it raises the more serious possibility that a close three-way race could be decided by two candidates agreeing to "pool" their electors against the express will of the public. The prospect of such an electoral swap was seriously discussed during George Wallace's 1968 campaign, and any system which can permit a few men to override the will of the people is in serious need of overhaul.

Of equal concern are the so-called contingency election procedures, which place the election in the House of Representatives if no candidate receives a majority of the electoral vote. Under the constitutionally mandated one-vote-per-delegation system, it is highly possible that a partisan house majority would overlook the voters' choice and select the candidate of their own party, be he a second- or third-place finisher. Moreover, we should bear in mind that the House of Representatives cannot legally meet until January 3—barely 2 weeks before the scheduled inauguration. Even should the House reach a quick accord, the new President would be left with scarcely 2 weeks in which to assemble his administration. But there is no guarantee that the House could act with dispatch, given the requirement that it choose among the top three contenders. It is highly conceivable that none of the three would amass a majority—or that a third-place finisher might ultimately become President. However time consuming the runoff election procedures under the proposed amendment might be, they offer a far better chance that the result will reflect the public will than the convoluted system they replace.

The fact that these eventualities have not occurred is a poor argument against change. The system permits them to occur, and each would precipitate a serious constitutional crisis. It makes far more sense to remedy the problem before the crisis occurs than in its aftermath.

The truth is, however, that the most damaging effect of the electoral system has already occurred, in every State and in every Presidential election. For with its "winner take all" requirement, the electoral college effectively disenfranchises every man and woman supporting the candidate who fails to carry their State. Under that system, votes for the losing candidate have no significance whatsoever in the overall outcome of the election. And for this reason, candidates who either pull far ahead or fall far behind in a State have the incentive to "write it off"—simply ignore it—in planning their campaign appearances. In contrast, the proposed amendment would grant every vote the same degree of significance in determining the final outcome. Candidates would be forced to consider their margins in every State, and the tendency to ignore a "safe" or "lost" State would be sharply diminished. By restoring the significance of every vote, Senate Joint Resolution 28 increases the incentive to vote, which in itself is a significant argument for passage.

The arguments raised against the amendment simply do not outweigh the positive results it achieves. While the proposed system might provide a marginal incentive toward recounts, this is hardly a significant concern. Recounts would not be carried on at a national level, but on a precinct-by-precinct basis as they are today. There is no reason to doubt the ability of States and localities to manage a recount, and nothing to suggest that a candidate would frivolously incur the expense of requesting one. And even if this were not the case, the

potential danger in selecting a President rejected by a majority of the voters far outweighs the potential inconvenience in administering a recount.

Nor is the suggestion that direct election will allow single-issue parties to distort the electoral process persuasive. That argument rests on some negative assumptions about the intelligence and integrity of American voters, and I simply cannot accept those assumptions. The great majority of voters recognize that Government deals with a multiplicity of problems, and will not be swayed by any single issue no matter how significant. There is no reason to believe that single issue voting will be more prevalent under the direct election system than it has been under the electoral college, and nothing in this argument outweighs the benefits flowing from improvement of the electoral process.

Mr. President, it is no secret that because of its high voter turnout, Minnesota would gain more influence under a direct election system than any other State. But I want to stress that my reasons for supporting this amendment come not from what it would do for Minnesota, but rather from what it would do for the Nation. In its present form, our Presidential election system is truly a crisis waiting to occur. There is no good argument against exercising the foresight to remedy that system, and this afternoon's vote is a unique opportunity for every Member of the Senate to alter the course of history in a positive manner.

Had the Founding Fathers adopted a direct election system, it is inconceivable that anyone would be rising after 200 years to propose replacing that system with the electoral college. My predecessor, Hubert Humphrey, put it well when he told the Judiciary Committee just 2 years ago:

> The fundamental principle on which our democracy is founded is that the people governed shall have a controlling voice in their government. This means that they shall elect their public servants by popular vote. We in the United States can no longer abide by a system that is not governed by this principle, by at least what we call majority rule.

We can no longer abide by that system, and each of us has the opportunity to alter it by his action this afternoon. I will vote to do so.

The PRESIDING OFFICER. Who yields time?

Mr. BAYH. Mr. President, I yield myself 60 seconds, which is entirely inadequate, to express the deep appreciation that the Senator from Indiana has for his colleague from Minnesota.

I find his reasoning extremely persuasive. His argument effectively dealt with some of the strawmen that have been set up by the opponents.

One can easily imagine all sorts of horror stories. One can imagine walking down the front steps of the Capitol and having one of the pillars fall on him while he is on the way over to the office building. But that kind of thing does not happen very often.

The improbability of some of the terrible consequences described by the opponents was effectively brought across in the very fine speech of the Senator from Minnesota. I think the chances of these things happening are just about as great as the possibility I mentioned of the pillars falling.

The chance of a regional president, of endless recounts, of rampant fraud, and all the other horror stories we have heard as excuses not to give the people the right to vote for their President directly—those things can all happen under the present system. They do not happen very often, fortunately, but they can occur.

Again I thank the distinguished Senator from Minnesota for voicing his support and for making his eloquent presentation here today.

The PRESIDING OFFICER. Who yields time?

Mr. THURMOND. Mr. President, I ask unanimous consent that Miss Liz Nichols, of the staff of Senator MATHIAS, have the privilege of the floor during the consideration of and vote on this measure.

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

If no one yields time, time will be charged equally against both sides.

Mr. BAYH. Mr. President, I suggest the absence of a quorum, with the time to be charged equally against both sides.

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

The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

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

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

Mr. BAYH. Mr. President, it has come to the attention of the Senator from Indiana that the 7-year time limit for submission and ratification by the State legislatures is in the preamble.

Frankly, the Senator from Indiana does not look forward to another extension confrontation such as the one we had with the equal rights amendment. Some have suggested that the danger of such an extension controversy would be alleviated if the 7-year time limit were put in the body of the amendment.

UP AMENDMENT NO. 312

I ask unanimous consent that an additional section, section 5, be placed following section 4 of Senate Joint Resolution 28, thus taking the preamble language relative to a 7-year time limitation for ratification and putting it in the body of the amendment. This will insure that if we should get the necessary two-thirds required for passage today, ORRIN HATCH, STROM THURMOND, and BIRCH BAYH are not going to be sitting here in 7 years arguing the issue of time limitations as we have in the past.

The amendment is as follows:

On page 2, line 3, beginning with "States," strike all down through "Congress:" on line 6, and insert in lieu thereof the following: "States:"

On page 4, after line 5, insert the following new section:

"SEC. 6. This article shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress."

On page 4, line 6, strike "6" and insert "7".

On page 4, line 8, strike "7" and insert "8".

Mr. BAYH. So that there will be no question, let me say that we are talking about a purely procedural matter here. We are not talking about the substantive question that existed with regard to the ERA extension last year.

The Senator from Indiana can offer this amendment in good conscience, and I hope that my colleagues will go along, because I think it basically accomplishes something we are trying to do. If we are going to pass a direct election amendment, let us make sure that we pass the most fair and equitable one possible.

Mr. THURMOND. Mr. President, I have no objection to that amendment, if the Senator wishes to offer it.

Mr. HATCH. Mr. President, reserving the right to object—and I shall not object—I compliment the distinguished Senator from Indiana for clarifying this matter in this way.

It is one of the amendments we had filed against this bill, and it certainly would correct that still ambiguous determination, whether or not the 7 years is to be within the amendment or whether being in the preamble is sufficient.

So I have no objection and am pleased to have it in the amendment itself.

The PRESIDING OFFICER. Is there objection?

Without objection, the amendment is in order.

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

Mr. BAYH. I yield.

Mr. HATCH. It is my understanding we have 52 minutes remaining. I will put most of my remarks in the RECORD as quickly as possible. I wish to do that, but I wish to not have that time start to run until the Senator's time comes down to that extent. If we can do so, we will have about an equal amount remaining for the last few minutes. Why do not I put these matters in and ask the indulgence of my friend from Indiana to try and make it so we will have some time here at the end of this debate today. We still have 3 hours to go.

Mr. BAYH. I think it is a fair request that Senators be permitted to have some time to speak at the close of this debate. I hope that my colleagues will understand that.

Mr. HATCH. We do.

Mr. BAYH. We have some Senators waiting in the wings to speak.

Mr. HATCH. We are prepared to have them all come over to speak.

Mr. BAYH. The other side has had most of the speaking opportunities here thus far.

Mr. HATCH. That is correct.

Mr. BAYH. I do not know how exactly I want to deal with that.

Mr. HATCH. I think we can work that out.

Mr. BAYH. I see the Senator from Massachusetts is here.

Mr. HATCH. Right.

Mr. BAYH. Would my distinguished colleague from Utah object to disposing of the question at hand? Mr. President,

I move that the subject of the unanimous consent——

The PRESIDING OFFICER. Will the Senator send the amendment to the desk?

Mr. BAYH. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. BAYH. The unanimous-consent request has made such that an amendment by the Senator from Indiana is permissible. Is that correct?

The PRESIDING OFFICER. The Senator is correct.

Mr. BAYH. I thank my two distinguished colleagues of the opposition for their courtesy.

I see that my distinguished colleague from Massachusetts is here to speak.

Mr. HATCH. Mr. President, will the Senator yield so I may put these matters in the RECORD and then I will be happy and delighted to yield to my friend from Massachusetts.

Mr. BAYH. I am happy to yield.

HOUSE OF REPRESENTATIVES AS A MAJORITARIAN BODY

Mr. HATCH. Mr. President, we have argued extensively that the one-man, one-vote issue does not apply, nor should it, in the election of the President, the Senate, and in the selection of Supreme Court Justices. Nor does it apply with respect to the functions of these branches: The President is allowed to veto legislation endorsed by a majority of the direct representatives of the people; the Constitution cannot be amended by a simple majority nor is law made or treaties ratified on the basis of majority rule; and the Supreme Court can overturn decisions that might have been reached by an overwhelming consensus of the people and their respective representatives. We have ably demonstrated that the Constitution contemplates a number of nonmajoritarian institutions.

Almost completely overlooked in the argument, however, is the fact that the one-man, one-vote principle does not even apply strictly to the House of Representatives. Edward S. Corwin and J. W. Peltason, two of the leading authorities on the U.S. Constitution, make this point in the eighth edition of their excellent text, "Understanding the Constitution." We read concerning article I, section 2, clause 3 which stipulates that the number of representatives shall not exceed 1 for every 30,000:

> This restriction of the size of the House of Representatives is now meaningless. After the 1970 concensus, our resident population (excluding the District of Columbia) was 203 million. The constitutional limit would allow for 6,766 Members (203 million divided by thirty thousand). Obviously, a Chamber this size would be of little value; Congress, by law, has limited the number of representatives to 435, approximately 1 Representative for every 467,000 persons.
>
> After the 1970 census, three states, Wyoming, Vermont, and Alaska, had fewer than 467,000 inhabitants; each, however, was given its constitutional minimum. (Nevada with 489,000, Delaware with 548,000, and North Dakota with 618,000 also only have one representative. Even though their population is above the national average, it is not sufficient to win for them an additional seat). Because of this requirement, even the House of Representatives cannot provide that every person in the United States has equally weighted voting power with every other person; one person in the least populous states has slightly more voting power than a person in more populous states.

THE CASE AGAINST DIRECT ELECTION

Mr. President, the cry for direct election of the President has been urged upon the public by those who suggest that a change is necessary to avert a "crisis." The proponents of direct election stress that the electoral system is an archaic system that should no longer be tolerated. Behind the alarming rhetoric, there is little substance that would indicate that the electoral college has not performed strikingly well the function of peacefully electing a President of the United States since the beginning of the country.

To begin with, the electoral system has for 200 years operated to select a President; there has never been a major crisis in the past, but rather a smooth transfer of executive power. Americans may fail to appreciate just how successful the transfer of executive power has been unless they look abroad to other nations, the majority of whom have not yet succeeded in devising systems that transfer power without periodic violence. With such a successful past history, those who wish to completely do away with the electoral vote system bear a heavy burden to show that there is a telling need to do so.

Supporters of direct election, such as Senator BAYH, assert that the constitutional crisis which could theoretically occur under the electoral college is a "runner-up President."

The election of 1824, 1876, and 1888 are often cited as examples of the electoral college "misfiring" and electing runner-up Presidents. The question that comes to mind is why was there no constitutional crisis if a runner-up President was actually elected? The answer is that the runner-up President produced no constitutional crisis.

Furthermore, the election of 1824 does not illustrate the misfire of the electoral system. In this election, John Quincy Adams defeated Andrew Jackson despite receiving fewer popular votes. However, this occurred largely because several of Adams' strongest supporting States, such as the large State of New York, cast no popular vote at all for the Presidency. In 1824, the legislatures of six States were responsible for determining electors, rather than using a popular vote. No valid conclusion concerning who won the popular vote can be reached when about half the States did not cast a popular vote.

The next election is that of 1876, in which Rutherford Hayes received fewer popular votes than Samuel Tilden, yet became President. This election is widely recognized as the most corrupt Presidential election in our country's history, when Tilden suffered a one-vote electoral loss at the hands of a partisan Electoral Fraud Commission. As one respected historian concluded, "We will never know who received more popular votes." In summing up the election, Prof. Judith Best of the State University of New York has stated:

> In our centennial year, the electoral process was so debased and dishonored by fraud and intimidation that only an eccentric majoritarian would single out the technical runner-up presidency of Hayes as a matter for criticism and concern.

In the election of 1888, which is frequently cited by critics of the electoral system, Grover Cleveland was defeated by Benjamin Harrison despite receiving seven-tenths of 1 percent more of the popular vote. In a new study done by the Library of Congress, it indicates that the slim majority received by Cleveland resulted from intimidation and fraud, both in the Tammany Hall precincts of New York City, and against black/Republican voters in the South. The study, done by Joseph Gorman, an analyst in American Government, concludes that:

> The evidence seems overwhelming that not only was the electoral college "misfire" of 1888 created by intimidation and fraud against black/Republican voters in the South, but that the majority of the Nation realized this was the case.

As for creating a constitutional "crisis" which the supporters of direct election proclaim would be the result of a runner-up President, the same study by Joseph Gorman states:

> Thus, to contemporary America, the election of 1888 demonstrated the need to retain the electoral college rather than illustrating how it could be used to thwart the will of the people.

In fact, the study indicates that had the fraud against the black voters in the South not occurred, Harrison would have won the popular vote.

In summing up the three elections used by Senator BAYH and his supporters, it is doubtful whether a runner-up President ever occurred under 200 years of the electoral college except in cases of fraud or when half the States cast no popular vote. Yet, even if one wished to concede for the sake of argument that the electoral college produced a runner-up President in the past, the examples of 1824, 1876, and 1888 only serve to illustrate that a constitutional crisis does not occur in the case of a runner-up President.

But what about the elector who votes contrary to the pledged loyalties of the State? Opponents of the electoral college often raise the issue of the so-called faithless elector as additional evidence of the irreparable defects in the present electoral college system.

Historically, the problem of the faithless elector has been minuscule, with less than a dozen of the 18,000 electors elected ever casting their votes contrary to the pledged loyalties of their States; never has the possible outcome of the election been altered in any way by this voting switchover. Yet, the possibility and significance of an elector voting independently of pledged loyalties is increased with the possibility of a close election. Although the critcal influence of a faithless elector on the election outcome is not a high probability, it is a possibility and therefore it may be well

to have the necessary machinery prepared if that possibility should materialize.

Does this unlikely possibility justify the abolishment of the present system or could a remedy be found with less far-reaching repercussions? Prof. Charles L. Black, Jr., in a recent article in the Louisiana Law Review argues one possible solution to the problem. He reasons that "the problem of the faithless elector is a problem, primarily, not of constitutional law, but of contract law." He supports this observation by explaining that the elector has made an express or implied-in-fact promise to vote for a specific candidate with the voters and should therefore be dealt with according to contract law, which is the area of law customarily used to deal with broken promises. A constitutional amendment should not be necessary to bind the elector to vote the way his constituency did.

The problem then, according to Professor Black, is primarily the question of procedure for enforcement of the contract. He suggests that since the Houses of Congress are already responsible for judging the validity and effect of certificates from the electors, recourse to a court is unnecessary and that—

> Congress should, when needful, have those simple powers of a court of equity which would suffice in this situation—the power to reform an instrument to conform to legal obligation, and . . . the general equitable power to treat that as done which ought to be done.

As a final precaution he suggests that it would be wise to codify it all so it would occur automatically. The remedy to the problem, then, is the application of simple contract law and remedies instead of a constitutional amendment.

For those who cannot accept that the problem of the faithless elector can be cured without a constitutional amendment as suggested by Professor Black, a less radical amendment than direct election would be highly preferable. This amendment could be one which simply binds the elector to cast a vote which directly reflects the votes recorded in that State according to proportion or the "winner-take-all" philosophy. Although this solution may still require an amendment to the Constitution, its impact would not be noticeable in the present system except upon the remote occasion when an elector might try to vote differently from the popular vote in his region, and then it would efficiently, and automatically solve the problem without any additional far-reaching, unforeseen effects that the more radical amendment of direct election would cause.

When evaluating the proposal for direct election, it is important not only to recognize that the fears paraded by direct election proponents are extremely unlikely to occur, but also that it is crucial to carefully analyze the other results upon the political process that the imposition of direct election will cause. As the late President John F. Kennedy eloquently remarked in defense of the electoral process:

> It is not only the unit vote for the presidency we are talking about, but a whole solar system of power. If it is proposed to change the balance of power of one of the elements of the system, it is necessary to consider the others.

In changing something as fundamental as the electoral system which has functioned smoothly in the past, the late Prof. Alexander Bickel of the Yale Law School cautioned, "the sudden abandonment of institutions is an act that reverberates in ways no one can predict and many come to regret."

Recognizing that any reasoned debate must also consider the dark side of any new proposal for change, it is interesting to note that the proposal for direct election, Senate Joint Resolution 28 could produce a runner-up President. Under the proposal no one will be declared a winner unless the threshold of 40 percent of the popular vote is obtained by at least one candidate. If no candidate receives more than 40 percent of the popular vote, then the two candidates receiving the highest counts will have a runoff. In the runoff the past votes cast are no longer valid. Thus, it is possible that the leading candidate in the first election who received 39 percent of the vote will be running against the candidate who received the next largest bloc of votes of 25 percent. However, if the runner-up candidate who originally received 25 percent of the votes now gets more votes than the candidate who originally received 39 percent, then the original runner-up candidate becomes President.

The proponents of direct election have not offered an adequate study of the possibility of electing a runner-up President under the electoral college. The possibility appears remote when it is observed that it has not happened in the past except in fraudulent elections or an election in which almost half of the States cast no popular vote. This proposal, Senate Joint Resolution 28, creates the possibility of electing a sectionalist President. This could occur under direct election with a candidate winning big in one section of the country, or even one State in the country, but who lost by small margins everywhere else. In fact, this specific proposal, Senate Joint Resolution 28, would permit the election of a candidate who won nowhere, but received a 40 percent plurality overall, but was opposed by 60 percent of the voters. Certainly these results would also present the danger of a constitutional crisis that would adversely affect the ability of such a winner to govern.

THE IMPACT OF DIRECT ELECTION ON MINORITIES

Columnist George Will has observed:

> The permanent problems of this nation are race and regionalism: the electoral system serves, I believe, to ameliorate both problems.

The minorities would be harmed under direct election because they would no longer be assured of attention to their demands because the "swing vote" they currently exercise in closely contested electoral States would be eliminated. When aggregating the vote on the national level, their vote does not determine whether a candidate wins or loses the entire electoral vote of a State, but is simply averaged into the national pool. It is, therefore, much easier for a candidate to avoid paying attention to minority demands under direct election because the result is not the entire loss of a closely contested State's vote, where 50,000 minority votes mean taking "all or none" of the electoral votes in a State: All that is lost under direct election is a few minority votes, not the vote of the entire State. The Black Forum, the NAACP, the SCLC, the Urban Coalition, PUSH, and other black groups, stated that direct election would result "in serious setbacks for minorities."

Eddie Williams of the Joint Political Center explains that:

> The concentration and influence of black voters in major electoral states accord the black vote a measure of respect which could easily be lost under direct election . . . less attention will be devoted to the concerns of those groups of citizens who are on the low end of the socioeconomic ladder, and particularly those who have relatively low rates of political participation.

CARDISS COLLINS, the distinguished Congresswoman who spoke for the Congressional Black Caucus, replied to Senator BAYH that the general consensus of black leaders is:

> Black Americans must remain extremely vigilant against measures which may either intentionally or inadvertently have the effect of reducing our power at the polls * * * the general consensus among black leaders is that direct election of the President would most likely have the effect of reducing the significance of the black vote.

The Brookings Institution study in 1970 also pointed out that direct election would work against blacks in still another way. It would magnify the political weakness blacks already suffer in terms of their relatively low registration and turnout rates, especially in the South:

> Groups lower in socioeconomic status, who are less likely to vote than are the more affluent, would stand to lose under the direct-vote plan. This is because voting would be the basis for representation in the nationwide tally: under the existing system, population is the basis of the size of a state's representation in electoral votes.

Black Americans are not the only minority that will lose influence under direct election. As the Washington Star stated:

> Jews, Catholics, blacks, farmers, and other minorities will suffer. The electoral college system gives minorities a chance to seize center stage in the battle for electoral votes of key states.

The American Jewish Congress, testifying before the Senate, agreed:

> By tending to inhibit the nomination of candidates likely to be objectionable to sizable minority groups, the electoral system assures attention to the needs and desires of groups whose interests might be given much less consideration under a system of direct election.

The Black Leadership Forum also pointed out that the setback would also be for other minorities as well as blacks:

> By virtue of their residential and voting patterns, racial and ethnic minorities derive some political advantage under the electoral college system * * * the late Alexander M. Bickel of Yale Law School was a major proponent of this view. The 1970 Brookings Institution study on "the Electoral College and the American Political System" also makes this point. The American Jewish Congress, the NAACP, the National Urban

League, and the Joint Center for Political Studies among others, share this view * * * since ethnic groups living in urban and suburban areas would be of less strategic importance, their pressures on policy formation would be less effective. These groups prominently include Negroes, Jews, Irish, Puerto Ricans, and Italians, among others.

The American Farm Bureau Federation explained that direct election would harm the agricultural minority vote as well as other minorities.

The abolition of the electoral college will destroy much of the effectiveness of minorities in presidential politics . . . the adoption of a national plebiscite (direct election) as the method of electing our president will swallow up agriculture in presidential politics.

Prof. Jean Kirkpatrick, of Georgetown University, states that the tendency to ignore minorities would actually occur under direct election:

The smaller the electoral unit, the more important are all the people and groups which compose it. The Polish vote is more important in Milwaukee than in Wisconsin and more important in Wisconsin than in the Nation. Black, Jewish, and Latin votes in New York are much more important now than they would be if the State's votes were aggregated with those of a nationwide electorate . . . under direct election, a rational campaign strategy would scratch them off, write them off, forget about them . . . the electoral college forces politicians to take account of all minorities—urban, rural, ethnic, religious.

Another matter that greatly concerns those opposed to direct election is that it will greatly magnify the role of the national media in Presidential election campaign. Greater emphasis on the political commercial at the expense of grassroots organizations is likely to be the result. Curtis Gans, testifying on behalf of the Americans for Democratic Action in 1977, explained:

For two decades, or ever since the advent of television as a central factor in American lives, the practice of politics has increasingly been dominated by the political commercial, image making and mass media manipulation. Only the need to maximize the vote in key States has forced national campaign managers to expend resources for organization in the several States. However, should this Nation move to a system of direct popular vote for president, what few remaining incentives to political organizations would be lost. Electoral contests would be between Pat Caddell and Robert Teeter, between Deardourff and Bailey and Rafshoon. The contest would not be among those who could recruit and organize the largest number of participants in the process but rather who could most effectively and skillfully manipulate media imagery.

Senator Bayh and many other supporters of direct election have relied heavily upon the testimony of Mr. Bailey, a media firm manager, who attempts to downplay the increased role of the national media and the harm to grassroots organizations under direct election.

Theodore White sharply disagrees with Mr. Bailey. Theodore White is a nationally prominent author of several books concerning Presidential elections. In addition, he has been reporting Presidential campaigns every 4 years since 1956. He has reported the elections from the field, from Presidential candidates' headquarters, and from the rim of the great national networks on election night.

After listening carefully to the testimony of Mr. Bailey before a Senate committee, Theodore White explained that professional interest would cause media men such as Mr. Bailey to support direct election because they would be direct beneficiaries. In addition, Mr. White explained that grassroots organizations would be harmed:

Mr. Rafshoon, Mr. Deardorff, Mr. Bailey's firm, a great many of these gentlemen are friends of mine. I deal with them. I do business with them. But that is their business. They are media manipulators. That is what they should be. But the chances for manipulation in this thing are so large. There will be a transfer of power from established politicians and the old fashioned bosses, as they were called, to the professional campaign managers of the kind that you mentioned.

It is to their interest to have a national pool of votes. In effect, you dissolve the 50 States of the Union and you run the Union now by all the States becoming obsolete except for administrative purposes and you run the Union by the media, the 10, 12, or 20 major media managements of the country. It is to their professional interest, I believe.

Later in his testimony, Mr. White explained in greater depth the increased role the media would play under direct election and how grassroots organizations would suffer:

I would hate to see the identities of Iowa and West Virginia, of Maryland and Ohio wiped out as the television commentators stir them around in the pool of direct national voting on election night.

Which leads me to the last point, a sordid one, but just as real. This new proposal wipes out the function of the old American politician—and turns that function over to people less worthy. I happen to like American politicians because I like the way they try to operate this country. It is done, as all of you know, by making deals. Labor wants a share of decision, and business wants its share too. The Hispanics now want a piece of the action; so do the blacks; so do the Jews; so do the Catholics; so do every one of our heritage groups. The old people want to be heard, so do students and youth. I have never found myself upset reporting the honest deals that go on in Presidential politics. Every four years, as earnest men in both parties, try to put together a winning candidacy, they seek to put together a coalition of diverse Americans, a coalition to which they can give a common and binding political goal.

These coalitions used to be put together by bosses. Bosses gave us Abraham Lincoln as well as Warren Harding. They gave us Franklin Roosevelt and Adlai Stevenson. John F. Kennedy and Dwight D. Eisenhower conscripted or recruited bosses. But the power of the bosses rested on their power to deliver their states, their communities.

What this new plebiscite proposal implies appalls me. In the nine years since I last testified here, the power of television, its grip on politics and the imagination has multiplied frighteningly. A minute of prime time that used to cost $50,000 nationwide will, this coming fall, in the presidential campaign probably run to $200,000. Such enormous sums of money as are required must be managed by professionals, managers expert in the reach, the impact, the audience of every kind of media exposure. Every headquarters in a presidential campaign has its maps of the fifty states, and their electoral votes. But in the back offices of the media manipulators are those maps which show what they call "the major media markets."

Once you erase the state lines in a presidential election as this proposal suggests, you erase the traditional communities of America. The rules of the game change. The new bosses will be the media professionals, or the men who pay the media professionals. They will draw sinuous winding curves showing the demography of the United States as a geological map shows the contours of its height, depth, and terrain. They will be able to ignore the states of the union as election constituents. What candidate, whose experts draw a demographic map of the U.S.A., will pay attention to the vote in Gary or Hammond, Indiana, Senator Bayh? What candidate will any longer consider Roxbury, North Dorchester, or Cambridge-Somerville as a seriously important factor in his Campaign, Senator Kennedy? Massachusetts will no longer exist except as an administrative unit.

This plebiscite proposal will withdraw from us a large and throbbing memory of our history—all those lovely maps of election which tell school children as well as grown-ups how the country has swung, section by section, from mood to mood. Instead we will have this boiling pot of 70 or 75 million votes, stirred by mix-masters, manipulators and television, understandable only by statistics and social scientists.

Ronald Wilner, testifying on behalf of the political consulting firm, the Robert Goodman Agency, commented on the role the media would play under direct election:

Advertisers buy on a cost-per-thousand basis ratio. . . . A dollar spent anywhere will reach virtually the same number of potential voters. However, there is a way to beat the prevailing cost-per-thousand ratios and this is by taking advantage of the efficiencies offered in network advertising. I would suspect that we would see our presidential candidates using a lot more of it—network advertising—than in the past. Lacking the need for a state-by-state strategy, they would be prime candidates as network advertisers.

Such an economic incentive would sharply increase the likelihood that national media would be more frequently and intensively used, increasing their influence over the Presidential process.

Another grave objection to the proposed direct election of the President and Vice President, Senate Joint Resolution 28, is that it would lead to the demise of the two-party system by creating a proliferation of third parties. The late Prof. Alexander Bickel of Yale Law School explained the value of the two-party system and how the electoral college supports it:

The fruit of the two-party system is a politics of coalition and accommodation, stability of the regime, and governments that are centrist and moderate. . . . The electoral college is a safeguard of the two-party structure.

Professor Bickel also explains that the electoral college prevents third parties from spreading beyond their regional base:

The electoral college makes it impossible for a third-party candidate to have any sort of impact unless he has a strong regional base. Without such a regional base, his popular vote will not register in the electoral college. Hence, all he can hope to do is spoil the election for one of the other major candidates, but on election day and after he counts for nothing. . . . Chiefly for this reason, it has not failed to produce a general election winner since 1824.

Prof. Judith Best of the State University of New York notes that since the

creation of the unit rule by almost all the States, which was accepted by all but two States by 1932, the electoral college has never failed to produce a winner. In addition, she states:

The electoral college is biased in favor of the two-party system, against third parties, and against ideological candidates and parties. . . . In the current climate, when the two-party system is somewhat indisposed with the number of independents rising, it is not time to kick away one of the two-party system's institutional props.

The example of George Wallace illustrates just how effectively the electoral college and the unit rule protect our two-party structure from splinter parties. In 1968, George Wallace had amassed 21 percent of the popular votes 4 weeks prior to the election. At election time George Wallace won approximately 14 percent of the popular but only 8 percent of the electoral vote. George Will explains why Wallace was not able to accomplish his purpose of forcing a deadlock and gaining concessions from the major two-party candidates:

It was the electoral college that revealed the fundamental truth which was that George Wallace (in 1968) was a regional candidate. It guaranteed that he would be confined in the decisive voting—the electoral votes—to the South. Therefore, it made clear in late October to those elsewhere who might have been tempted to vote for him that he was, in essence, a frivolous vote. That caused the withering away of his support in the final days.

The cause of the proliferation of parties under Senate Joint Resolution 28 is the 40 percent runoff provision. As George Will explained, "Under direct election, third parties would try to force a second vote so that they could sell their support."

As Richard Goodwin, a former adviser to Presidents Johnson and Kennedy said:

You can be very powerful if you have the capacity to make others win or lose . . . even though you can never win yourself.

All that the third parties have to do is prevent the major candidates from achieving 40 percent of the popular vote, and they are in an extremely strong position to wring concessions from the two front runners in the runoff.

Considerable scholarly weight predicts that the 40 percent runoff provision of direct election would result in a proliferation of parties, thus seriously wounding the two-party system.

Theodore White noted that "direct election results in less compromise. It opens up the possibility of ideological parties or racist parties." Professor Bickel has explained how direct election provides for doctrinaire candidates at the party nominating stage:

Under a system of popular election, every consideration . . . that would bring forth issue-oriented candidates for the nomination at any time would with equal and greater force propel them into the general election.

Richard Goodwin has also warned about the destabliizing effect of direct election:

Groups united by general conviction or common interest could well see advantage in forming a new party. Even if they only organized in a few states, such groups could use a new party to maximize their power. They could bargain with the major party or party candidates for endorsement. They might offer to withdraw in the middle of a campaign in return for concession.

Wade Martin, speaking on behalf of the National Association of Secretaries of State, remarked that direct election would "precipitate many new parties."

Prof. Ernest Brown of Harvard noted the likelihood that the popular vote method would cause doctrinaire third parties to multiply. In addition, he added:

And the idea that we could do anything that would encourage the spirit of dogmatism and doctrinaire groups in this country rather than the spriit of accommodation is just inconceivable to me.

Prof. Charles Black added his voice to this viewpoint by predicting that the disappearance or weakening of the two-party system is "an extremely likely consequence of such reform," which he would deplore.

The 40-percent runoff rule in Senate Joint Resolution 28 would be the primary cause of the multiplicity of third parties. Proponents of direct election argue along with the American Bar Association that only once in history has there has been a President with less than 40 percent of the popular vote, Abraham Lincoln. It is clear that all this argument supports is that the electoral college has been very successful in past history in creating popular mandates for Presidents. Prof. Judith Best has pointed out that when you abolish the electoral college then you cannot assume that direct election will produce candidates with over 40 percent of the popular vote as the electoral college did. As she says, "when you change the rules, you change the game."

Actually, the 40 percent runoff rule in Senate Joint Resolution 28 would remove the barriers to third parties that the electoral college provides, and create new incentives for running. To begin with, popular vote percentages of third parties are higher than electoral percentages. For example, Wallace's popular vote total was almost double his electoral vote percentage. The reason is simply that sectional candidates are strengthened by the 40-percent runoff arrangement; the third parties keep their sectional strength and in addition they pick up the extra votes across the country. Under the electoral system they only retain votes when they have enough to take an entire State.

Traditionally, the restraint on third parties under the electoral system has been "don't waste your vote," which caused support to fade as election day neared. This is because third parties desert their candidates to vote for the lesser of the two evils.

Prof. Martin Diamond of Georgetown explained how the runoff provision and other incentives under direct election would encourage third parties, and cause people to give greater support to third parties. He states:

The threat that dissident wings might bolt from one of the two major parties would instantly become more credible and thereby more disruptive within them; sooner or later the habit of bolting would probably take hold. Would there not also be an inducement to militant wings of ethnic, racial, and religious groups to abandon the major party framework and go it alone? And, as the recent proliferation of primary candidacies suggests, would-be "charismatics" might frequently take their case to the general electoral, given the inducements of the proposed new machinery . . .

There would, of course, still be a single office finally to be won or lost, but not in the first election. That is the key. If runoffs become the rule, as is likely, the first election would become in effect a kind of two-member district. There would be two winners in it; we would have created a valuable new electoral prize—a second place finish in the preliminary election. This would be a boon to the strong minor candidacies; needing now only to seem a "viable" alternative for second place, they could more easily make a plausible case to potential supporters. But, more important, there would be something to win for nearly everyone in the first, or preliminary, election.

Minor party votes now shrink away as the election nears and practically disappear on election day. As is well known, this is because minor-party supporters desert their preferred candidates to vote for the "lesser evil" of the major candidates. But the proposed reform would remove the reason to do so. On the contrary, as in multiparty parliamentary systems, the voter could vote with his heart because that would in fact also be plenty of time to vote for the lesser evil in the eventual runoff election. The trial heat would be the time to help the preferred minor party show its strength. Even a modest showing would enable the minor party to participate in the frenetic bargaining inevitably incident to runoff elections. And even a modest showing would establish a claim to the newly available public financing that would simultaneously be an inducement to run and a means to strengthen one's candidacy.

Let us examine an illustration of the difference under the two electoral systems. At present, opinion polls teach minor-party supporters to desert come election day; the voter sees that his party has no chance of winning and acts accordingly. Under the proposed system, the polls would give exactly the opposite signal: hold fast. The voter would see his party or candidate making a showing and would see that a runoff was guaranteed: He would have no reason to desert his party. The first election would thus, cease to have the deterrent effect on minor parties; the prospect of the runoff would change everything.

The proponents of direct election argue that the 40-percent rule will not be likely to encourage or allow third parties to accumulate 20 or more percent of the popular vote to prevent any candidate from getting 40 percent. Their case is not convincing. In the past, despite the disadvantage and discouragement of the unit rule and the "wasted vote" argument, third-party candidates still amassed significant popular vote percentages, although they failed to amass significant electoral vote percentages. A look at history should give one pause.

Millard Fillmore won 21 percent of the popular vote but won only 2 percent of the electoral vote. William H. Taft won 23 percent of the popular vote, but he won only 1.5 percent of the electoral vote. The list could be extended, but suffice it to say that the accumulation 20 or more percent of the popular vote by one or more third parties is not a

fantasy, particularly when new incentives for entering the race are created. It is much simpler for third parties to amass 20 percent of the popular vote than 20 percent of the electoral vote. Our two-party system would be drastically altered. Prof. Charles Black states that there would be:

> The radical reorganization of party structures and politics, the pretty certain disappearance of the two-party system, seems to me an extremely likely consequence of direct election . . . I would deplore the rising of little parties—why not 10 or 20 as in France—each with a special mission, a special issue.

The New Republic sums it up:

> The 40 percent runoff provision will encourage a proliferation not only of parties and factions, but of charismatic personalities as well. The first election will become a trial heat with something for everyone. It would include the left and right of the GOP, the Socialists and Libertarians, perhaps a party of blacks, browns, and indians, a women's party, the anti-welfare, and anti-abortionists, an aggregation of social issue and ethnic purity voters, maybe a fundamentalist Christian candidacy or party, and perhaps a John Gardner or Ralph Nader above-politics candidate to appeal to independents.

Not only would the runoff provision provide a multiplicity of parties, but it would also cause expensive new campaigns after the general election, cut into valuable time when a President-elect would normally be making vital choices about his cabinet to be, and create a longer period of instability that would impair the United States in the eyes of foreign countries.

Senate Joint Resolution 28, which proposes the direct election of the President and Vice President, should be rejected as a dangerous amendment that will only harm the Nation.

THE FAITHLESS ELECTOR

Mr. President, the subject before this body today is not an unfamiliar one to these Senate Chambers. This subject has prompted one commentator to note that—

> The road to reform in the method of choosing the President and Vice President of the United States is littered with the wrecks of previous attempts.

In this decade alone, over 1,000 pages of the CONGRESSIONAL RECORD contain the accounts of past conflicts on this constitutional battleground. In the scant time I have been a Senator, the Subcommittee on the Constitution has produced three volumes of testimony from numerous hearings.

But, as I have previously alluded, this subject is not new. Since 1823, when Senator Thomas Hart Benton first sought its reformation, there have been more than 500 amendments introduced into Congress to alter or abolish the electoral college.

This knowledge has given me much pause for reflection as to why this provision in our Constitution has engendered such a fierce and prolonged struggle. In fact, the comment made by Alexander Hamilton in No. 68 of the Federalist still seems to make eminently good sense and to voice the proper concern for this subject:

> The mode of appointment of the Chief Magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure.

It is therefore puzzling to me, as I am sure it would be to Alexander Hamilton, to find the electoral college the recipient of such prolonged and incessant "severe censure."

However, I have come to fully appreciate that there are many who have varying viewpoints concerning the electoral college system. There are good thinkers on both sides. They can and have argued both points on both sides.

Such has been the case since 1823. It is with profound gratitude then, that I realize this body has emulated the advice given by George Washington in his famous farewell address:

> In all changes to which you may be invited, remember that time and habit are at least as necessary to fix the true character of government as of other human institutions; that experience is the surest standard by which to test the real tendency of the existing constitution of a country: that ease of change, upon the credit of mere hypothesis and opinion, exposes to perpetual change.

I believe his advice should be reaffirmed by our action on this subject. The U.S. Senate has always acted deliberately and never precipitously. As Hamlet said: "It is better to bear the ills we have, then fly to others we know not of."

I believe the advice of both Washington and Shakespeare is especially pertinent when we are dealing with amending the Constitution.

In the words of my esteemed colleague from Indiana and participated in this same exchange 9 years ago:

> The burden in this debate will be on those of us who support direct popular election. Congress should approve constitutional amendments only when there has been exhaustive study and the need for constitutional change has been clearly demonstrated.

Indeed, the burden of proof is always borne by the proponents of change where a constitutional amendment is concerned. The gravity of the subject requires persuasive evidence. I admonish my colleagues who are undecided on this matter to remember the weight of this burden and whose shoulders on which it rests.

Abolition was first proposed in 1832 and has been on someone's agenda ever since. A direct election plan was first introduced in Congress in 1826. Both sides have armed themselves with ever more sophisticated analysis and statistics designed either to demonstrate the electoral college's potential to produce a constitutional crisis or its immense adaptability and legitimizing effects.

Surely one of the most curious aspects of this debate is how the advocates of direct election have seized the initiative by indicting the electoral college. Their indictment is not for what it has done, nor for any current default. Thus it is something of a puzzle to me that the electoral college comes under so severe an attack. It has produced for us nearly 200 years of tranquil democratic elections. It has produced for us, in comparison with every other democratic political system, 190 years of effective political campaigning, unambiguous outcomes, and tranquility, legitimately accepted outcomes. Having worked so well for so long, I find it puzzling that it should be the object of so strenuous an attack. One hundred and ninety years of experience is on the side of the proponents of the electoral college. Supposition, guesswork, and unevidentiary speculation is the stock in trade of the proponents of change.

Admittedly, some problems exist under our present electoral system. However, if every electoral procedure with negative elements was ipso facto rejected, it would be impossible to have elections at all. The present situation reminds me of an old West Virginia saying: "If it ain't broke, don't fix it." Indeed, it is the fixing process entailed in this amendment which I find so objectionable.

When you start tampering with the election procedure, there are some very vital questions raised. I believe the answers to such questions are dependent on whether we want to preserve what the Founding Fathers thought. Their thinking and subsequent actions seem to be an argument against direct election. I believe this is evident from a close inspection of the origin and development of the electoral college. Hopefully, a brief summary will be instructive to my colleagues.

The origin of the electoral college, of course, is the origin of the election of the President of the United States. On September 4, 1787, Delegate James Wilson of Pennsylvania said of the debates at the Constitutional Convention regarding a method for electing a President:

> This subject has greatly divided this House, and will also divide people out of doors. It is in truth the most difficult of all on which we have had to decide.

During the entire summer preceding Wilson's remark, the delegates to the Constitutional Convention offered various plans for electing a President. The matter was taken up on 17 occasions and produced 31 separate votes.

The question proved vexatious because the method of presidential election was, in the Framers' eyes, inextricably intertwined with the nature of the Presidential office itself and with the whole "bundle of compromises" that produced the Federal system, a bicameral legislature, and the separation of powers. It is true that many delegates thought that direct election of the President by the people would be the best method. Delegates of this persuasion included James Madison, Elbridge Gerry, and the aforementioned James Wilson, among others.

Over the course of the entire summer of 1787, nine different plans were put forth, debated, voted on and defeated, including proposals on direct election and an electoral college. During the closing days of the Convention, in September 1787, the electoral college plan was finally adopted. The device of independent electors was hit upon for this reason, which does not support the thesis that the intention was fundamentally undemocratic: The electors were not devised as a substitute for the popular will, but

rather as a substitute for the State legislatures. The electoral college was the product of the give-and-take and the compromises between the large and the small States. As they did regarding the House of Representatives and the Senate, those who sought to retain much of the Articles of Confederation fought hard to have the President selected by the State legislatures or by some means that retained the primacy of the States as States. It was to fend off this confederalizing threat that the leading framers, Madison, James Wilson, and Gouverneur Morris, hit upon the electoral college device. As a matter of fact, their own first choice was for a straight national popular vote. But when the "States righters" vehemently rejected it, Wilson, Madison, and Morris settled on the device of popularly elected electors.

The Constitution was adopted only by having this compromise. It was necessary in order to get the Constitution adopted. The largest States would not take one-State, one-vote, and the smaller States refused to be controlled by the large popular majority in the larger States. So, ultimately, this compromise was worked out. No one was actually in favor of it. But it had to be made. Lo and behold, it has operated for 200 years. It was accepted on the faith of the representation that this does increase the power of the smaller States. That was a pledge, and it is still a pledge. The idea that we can brush it aside today is neither appropriate nor in good faith.

In practice, the electors, the framers believed, would be among the most knowledgeable and capable men in the country. The electors were to be chosen in the manner prescribed by the various State legislatures. The electors were to then meet in their respective States and vote by ballot for President and Vice President. Certified copies of the various results were sent to Congress to be counted before joint session.

This method of Presidential election, set forth in the original article II, barely survived the two terms of President Washington. The American Enterprise Institute points out:

> Concerning Washington it may be said that his popularity was such that almost any mode of election would likely have put him in office. However, upon his departure in 1796, the electoral college—(and this is an important distinction) which, like the Presidency itself, seems to have been designed with the example of Washington in mind—demonstrated flaws which rendered it inoperable when someone like Washington was no longer on the scene.

This so-called inoperability came about during the subsequent term of John Quincy Adams. Those opposed to Adams' policies rallied behind Thomas Jefferson to develop what is now recognized as the first national political party: the Jeffersonian Republicans. They soon seized upon the strategic salient of securing the appointment of electors pledged to a preferred candidate. Adams and Hamilton and the Federalist Party did not lag behind in exploiting this strategy.

The rise and growth of political parties in effect circumvented the framers' original design within a decade of its creation. From a very early point, electors were no longer regarded as being authorized to deliberate about the choice of President. From a very early point, they came to be considered as mere automatic registers of popular will.

Beginning in 1796, more aggressively in 1800, and in effect universally thereafter, electors were coalesced into partisan slates—but within the States. The creation of such slates became the principal organizing function of would-be national parties.

Admittedly, the framers did not contemplate the development of political parties, pledged electors, or nominating conventions. Rather, they envisioned an electoral system under which the most knowledgeable and capable persons in each State would be chosen as electors. The electors would examine the merits of the various candidates for President and exercise sound and independent judgment in casting their votes.

But the emergence of political parties put an end to these beliefs. In short order, the electors became mere agents without discretion. They were nominated by their parties as part of a slate of electors with instructions to vote automatically for their party nominees for President and Vice President.

The electoral vote system as we know it today more or less fully evolved by the 1830's. No major institutional change has occurred in more than 140 years. Indeed, today's system is far closer to the system of the 1830's than the system of the 1830's was to the original plan of the framers. The essential features of the system as it emerged in the 1830's remain the essential features of the system of 1979.

However, despite the fundamental alteration in the original scheme occasioned by the rise of political parties, the structure of such parties was decisively determined by the formal constitutional provisions of article II, and in particular by the requirement that electors be chosen by and within the several States.

It is critical to our determination of this issue to recognize this fact. Notwithstanding the greatly reduced, if not decimated, role which the office of elector encompassed following these developments, the two-party system was required to develop within the constraints of article II. Although the ground rules, as perceived by the framers had been altered, it was still the same ball game as set out by the Constitution.

I believe this point bears repeating. The new system, though radically different in substance from the old, developed through the constitutional form in which the older system had been embodied. There would still be electors; the electors would still be appointed or elected within the several State; the electors would still cast two ballots; and a majority of votes so cast would still be necessary for election—but everything else would be radically different.

Perhaps no other feature of the Constitution has had a greater capacity for dynamic historical adaptiveness. The electors became nullities; Presidential elections became dramatic national contests; the Federal elements in the process became strengthened by the general-ticket practice; modern mass political parties developed; campaigning moved from rather rigid sectionalism to the complexities of a modern technological society—and all this occurred tranquilly and legitimately within the original constitutional framework of article II.

While it now operates in historically transformed ways, in ways not as the framers intended, it nonetheless still operates largely to the ends that they intended. What more could one ask of a constitutional provision?

Mr. President, although having concluded this defense of the electoral college, I am unable to conclude my remarks at this time. This is because of the persistence of a bogus issue which the proponents of direct election continue to cast up as substantive.

Twenty years of legal and forensic combat have taught me that relatively few disagreements are total disagreements. Most disagreements, in my experience, are matters of degree. Ordinarily there is something to be said for an opponent's position. One can find some merit, however faint, in the question at hand. This particular question before the Senate this afternoon provides an exception.

I am speaking of the infamous Samuel Miles, Preston Parks, W. F. Turner, Henry D. Irwin, Lloyd W. Bailey, Roger McBride, and two other constitutional footnotes whom the sponsors of this amendment would have us believe have brought this Nation to the brink of constitutional chaos. In 1796, 1820, 1948, 1956, 1960, 1968, 1972, and 1976 this country has teetered on the edge of destruction.

It is indeed a grateful nation that can count only 8 of 17,592 electors who have betrayed their trust and earned the ignominous title of "faithless elector." To those who cannot cast such aspersions lightly, a less opprobrius term is "defector-elector."

To respond at length to the issues raised by the faithless elector would give undeserved legitimacy to its weight as a viable argument in the present debate.

However, the substantive charge against the present system is that the office of elector is potentially dangerous because in a close election a few renegade electors could frustrate the will of the majority. Although no election has been stolen by faithless electors, a few electors have disregarded the expressed will of the voters in their States, effectively misappropriating their votes. The electors normally cast their votes for the winners in their States, and are considered morally bound to do so. Electors have functioned for all practical purposes as the mandated agents of popular choice.

Lucius Wilmerding, in his book "The Electoral College," states that—

> There has never been a single occasion, and I doubt if there ever will be one, when the eccentricities of the electors have changed the result of an election.

In no case have we ever been threatened by faithless electors stealing an

election. Indeed, many of these faithless electors would not have been faithless, according to their own accounts, if there had been any chance of subverting the election. They did it for publicity. And never has a faithless ballot been cast with the intention of influencing the outcome of an election. They have all been cast for symbolic purposes only, and ironically enough, usually as a symbolic response to majority opinion in the aberrant elector's home constituency. In short, it is about as likely that "faithless electors" will usurp an election as it is that the English crown will reassume the regal power of Henry VIII.

Admittedly, the faithlessness of even a single elector thwarts the will and expectations of the voters in his State. And as long as the Nation continues the present electoral-college system, it accepts the risk that in a close electoral election errant electors could hold the balance of power and that the result of the contest could turn on their vote. However, while admitting this fact to be true, it must also be admitted that such a risk is extremely remote.

It has been this dissatisfaction with human electors that has been the force behind numerous reform plans. The most common is the so-called automatic plan, wherein the office of elector would be abolished, but the electoral-count system would be retained. Each State's electoral votes would be automatically awarded to the candidate with a plurality in that State. The automatic plan concept is one of the oldest reforms extant; it was first proposed by Senator Thomas Hart Benton in 1823.

As far as the faithless elector is concerned, I personally would have no objection to eliminating the office of elector, although I have some question as to whether it is worthwhile to engage in a constitutional reform for such a trifling matter.

Prof. Judith Best has said that—

> Even if one believes that it is undesirable to continue the office of elector, the problem of faithless electors is miniscule, and the meager and technical benefits of eliminating the office do not justify the effort to pass a constitutional amendment.

It is her conclusion that, "a constitutional amendment would be a last resort to remedy a serious and substantive problem. We should not change the Constitution lightly or without having tried extraconstitutional approaches."

One such extraconstitutional approach may be typified by a theory of Prof. Charles L. Black. Professor Black characterizes the faithless elector as a contracts law problem. The State and the elector are treated as having entered into an express or an implied-in-fact promise, with the Presidential candidate as a third-party beneficiary of that contract. Such a third-party beneficiary has a right of enforcement of the contract if the elector attempts to breach the contract's terms; that is, not casting his vote for the candidate. Such a theory is feasible and no constitutional amendment is necessary.

Wallace Sayre and Judith Parris, in their important book, "Voting for President," have another remedy for the defector-elector problem, one that would place more responsibility on the political parties.

> Voters in States where this happens are not always or even usually hapless victims. The election of maverick electors may be, at least in part, a fault of the system under which they were chosen by their party as members of a ticket—presumably without sufficient dissemination or understanding of their individual views. And remedy would thus appear to be a logical and easily met responsibility of State and local party leaders. State party leaders themselves can minimize an already insignificant problem by carefully selecting nominees, requiring loyalty resolutions at party conventions, pledging each nominee, and using the sanctions of national patronage and campaign funds.

Let us pledge the electors, bind them or abolish them, if that need be. With that I have no quarrel. But do not let us longer hear the cant about the faithless elector as a reason to abolish the college and the electoral count.

A longstanding constitutional arrangement secures, by its very age, that habitual popular acceptance, which is an indispensable ingredient in constitutional legitimacy. By this reasoning, we should preserve the electoral college simply on the grounds of its nearly two-centuries long history of tranquil popular acceptance.

This body spent a great deal of time during the fall of 1970 debating these very issues. In the words of columnist James Kilpatrick:

> The past decade has provided not a single additional reason for leaping to ratification of this radical scheme. On the contrary, the elections of 1968, 1972, and 1976 have confirmed the continuing usefulness and vitality of a system exactly as antiquated, as outmoded, as archaic, as the beloved and venerated document in which it remains embedded.

Serious people consider probabilities, not possibilities. Possibilities and conjecture are all the proponents of this measure have offered for rejecting the known for the unknown, abandoning the tried for the untried. They have assumed; they have hypothesized; they have supposed; they have predicted.

In looking at this conflict between probabilities and possibilities, the words of Lord Salisbury should be instructive:

> A violent, isolated artificial improvement in the institutions of a community, undertaken without regard to the condition of the other portions of the machinery in concert with which it is to work, is a danger so great that no improvement at all is almost to be preferred.

My good friend from Indiana is not going to achieve something the founders were too wise to attempt—a Constitution under which no unpleasant outcome is even theoretically possible.

Mr. President, I ask unanimous consent that the subcommittee minority views of ORRIN G. HATCH, STROM THURMOND, and ALAN K. SIMPSON, pursuant to Senate Joint Resolution 28, the New Republic article, and other articles be printed in the RECORD.

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

SUBCOMMITTEE MINORITY VIEWS OF ORRIN G. HATCH, STROM THURMOND, AND ALAN K. SIMPSON: SENATE JOINT RESOLUTION 28

I. INTRODUCTION

There is no more important domestic legislative measure that this Congress will consider than S.J. Res. 28. This resolution proposes to amend the Constitution of the United States for the purpose of abolishing the electoral vote system by which this nation has traditionally elected its President and Vice President. In its place, the amendment would substitute a system of direct election for these offices.

We are in agreement with Professor Charles Black of the Yale Law School who says of this amendment: "If it passes, it will be the most deeply radical amendment which has ever entered the Constitution of the United States." Theodore White, perhaps the most experienced and perceptive observer of American presidential campaigns, has described S.J. Res. 28 as a "revolutionary" and "dangerous" proposal.

Because of the radical nature of the proposed amendment, we believe that the proponents of direct election bear a very heavy burden of proof, heavier even than that normally present for a Constitutional amendment. Proponents must show:

(1) The present electoral vote system is seriously flawed and needs to be changed; and

(2) The proposed system of direct election, S.J. Res. 28, would be a significant improvement.

If proponents fail to prove either of these propositions, then the case for direct election fails. We believe that proponents have failed on both points.

We do not believe that proponents have presented sufficient evidence that a change is needed. The major argument in support of the present system is that it works. For nearly two hundred years, the electoral system has operated to select a president in a single election and then smoothly transfer executive power. The only major argument that has been presented for radically changing the present system is that it permits election of a runnerup President, one who has received fewer popular votes than one of his opponents. It is claimed that such an occurrence would create a major crisis, that such a president would lack legitimacy, and that such a President would find it difficult to effectively govern. We disagree. We know of no evidence to sustain such a view. No major crisis occurred in 1888 when Benjamin Harrison was elected with a smaller share of the popular vote than Grover Cleveland, nor in 1974 when Gerald Ford became President without having received any popular votes.

Nor do we believe that direct election would represent any improvement over the present system. Direct election would create more problems than it would solve. More specifically, we believe that S.J. Res. 28 would:

Seriously undermine one of the few remaining vital areas of American federalism by eliminating the role of the states in the electoral process;

Threaten the continued existence of a moderate, two party system by encouraging the proliferation of small, frequently extremist, splinter parties;

Polarize public opinion and endanger electoral minorities through a restructuring of the nature of political compromise;

Erode the popular "legitimacy" of Presidents, who, under a system of direct election, may have significant support in but a single region of the country;

Create new incentives for electoral fraud and corruption;

Sharply reduce the orderliness of the presidential transition period through interminable electoral recounts and runoff elections;

Involve the federal government far more deeply into areas of voter eligibility and election administration, currently within the purview of the states; and

Sharply increase the influence of the national media, and professional "image-makers" in Presidential elections.

Of perhaps equal concern are the unknown and unanticipated consequences that inevitably attend "reforms" of the magnitude of S.J. Res. 28. What will be its impact upon the Presidential nominating process? How will it affect relationships between elected federal officials and their state party organizations? Will state party organizations retain their same character? What sort of role will the media play in the new presidential election system? What sorts of coalitions will develop among voters? How will the relationship between the executive and legislative branches be affected?

Above all, it should be borne in mind that we cannot reconstruct the Presidential election process in a vacuum. As John F. Kennedy remarked in defense of the electoral process:

"It is not only the unit vote for the Presidency we are talking about, but a whole solar system of power. If it is proposed to change the balance of power of one of the elements of the system, it is necessary to consider the others."

In a system in which the concept of "checks and balances" plays such an integral role, change in any one of our political institutions represents change in each of them.

II. BURDEN OF PROOF

It is our opnion that the Republic has survived nicely for two centuries under the electoral system. In general, we have elected to the offices of President and Vice President persons who have served those offices well. The Nation has developed and prospered under the leadership of these persons. There have been no major constitutional crises concerning the election of President and Vice President. There have been no crises in legitimacy. There have, in general, been smooth transitions between office-holders and between political parties.

In short, the electoral system has worked reasonably well to select the executive authority. It is not a perfect system—such systems being difficult to achieve in this worldly realm—but it is a more than workable system that has proven its effectiveness in the course of nearly fifty hard-fought Presidential campaigns.

Because the present system has worked well and continues to work well and because of the radical nature of the proposed change, it seems to us that proponents of S.J. Res. 28 bear a very heavy burden of proof. They must show beyond a reasonable doubt that (1) the present system is seriously flawed and should be changed, and (2) the proposed direct election system would be a significant improvement. The burden of proof is not on defenders of the present system. It is upon those who would reject a system that has worked, in favor of one that might or might not work.

As observed by Richard Goodwin, former advisor to Presidents Kennedy and Johnson, in speaking of direct election of the President:

"We will exchange a mechanism which is clumsy but has worked well for an ideal construction of political theory whose consequences can't be foreseen . . . It is not enough to demonstrate that direct election will probably be an improvement. It must be shown beyond all reasonable doubt that the adverse consequences which are predicted by many will not occur."

The late Professor Alexander Bickel of the Yale Law School warned, "The sudden abandonment of institutions is an act that reverberates in ways no one can predict and many come to regret."

It is curious that far greater scrutiny seems to have been given the present system, the defects of which are known and certain, than to the system of direct election, the defects of which remain unknown or speculative. We believe that a proportioned debate on S.J. Res. 28 must accord as great attention to weighing the merits and demerits of direct election as to those of the present system. After listening to four days of testimony this year, and reviewing the debate from previous years, it is our judgment that proponents of S.J. Res. 28 have not met the burden of demonstrating theirs to be a superior system to the present one.

III. DESCRIPTION OF THE PRESENT ELECTORAL VOTE SYSTEM

Before discussing in detail the need for changing the present system and the defects of the direct election proposal, we think it is important that we furnish our colleagues a description of just what the present system consists of.

Despite substantial controversy at the constitutional convention with respect to the method of selection of the president, Alexander Hamilton was later able to say:

"The mode of appointment of the Chief Magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure or which has received the slightest mark of approbation from its opponents.

The electoral vote system was the product of extensive compromises between the large states and the small states, and between those who advocated an extended, national republic and those who advocated simple reforms of the articles of confederation. It was a rare compromise that ended up satisfying all parties.

Article II, section 1 of the Constitution specifies that each state is entitled to representation in the electoral vote system to the extent of its combined representation in the House of Representatives and the Senate. As a result, each state (including the District of Columbia through the 23rd amendment) is provided at least three electoral votes, California and New York, currently the most populous states, have 45 and 41 electoral votes respectively.

The same section further specifies that each State is to apportion its electors "in such manner as the legislature thereof may direct." While there was substantial variance in State apportionment procedures in the formative years of the Nation, by 1832 every State but one had adopted the method that predominates today. States award their allotment of electoral votes, on a winner-take-all basis, to the popular vote winner within the State.

Nothing in the Constitution, however, forbids States from awarding their electoral votes on a proportionate or other basis. In 1969, for example, the State of Maine unilaterally repealed its unit-vote rule, deciding instead to apportion electors on the basis of popular vote majorities with congressional districts.

The formal mechanisms of the electoral vote process are outlined in the 12th amendment to the Constitution. On election day every four years, voters cast their ballots for a slate of individual "electors" placed there by each political party and pledged to cast their electoral votes for that party's Presidential and Vice Presidential candidates. The chosen slate of electors within each State is convened in their respective State capitals in mid-December at which point they cast their votes in the manner in which they are pledged. Certified tallies are then forwarded from each of the States to Congress with the formal results being announced in early January before a joint session.

The apparent cumbersomeness of this process is undoubtedly responsible for generating much of the opposition to the present system. It is more apparent, however, than real. The electoral vote system has proven remarkably flexible, evolving and being refined over a period of nearly two centuries. As observed by the late Professor Martin Diamond of Georgetown University:

"Perhaps no feature of the Constitution has had a greater capacity for historical adaptiveness. The electors became nullities; Presidential elections became dramatic national contests; the Federal elements in the process became strengthened by the general-ticket practice; modern mass political parties developed; campaigning moved from rather rigid sectionalism to the complexities of a modern technological society—and all this occurred tranquilly and legitimately within the original constitutional framework."

Proponents of the present system, thus, are not defending a relic of the 18th century, but rather a system that has evolved, in the words of columnist George Will, "shaping and shaped by all of the instruments of politics, especially the two party system."

The office of the elector, the cause for so much of the confusion concerning the electoral vote system, has evolved into little more than an automation, faithfully reflecting the popular will. Of the nearly 18,000 electors that have been selected in the history of the Republic, no more than a dozen have ever cast their votes in contravention of their pledged loyalties. None of these has come anywhere near to actually affecting an election. The only present function of the electoral college procedure, in the words of Professor Robert G. Dixon, is to "perform the essentially simple administrative duty of translating popular votes into electoral votes."

In the event that no candidate receives a majority of the electoral votes cast throughout the country, a situation that has not arisen since the election of 1824, the House of Representatives is authorized to select a President from among the three individuals with the greatest number of electoral votes. Each State is entitled to a single vote in this process. The Senate is charged with the responsibility for selecting a Vice President from among the two individuals with the most electoral votes for that office. The 12th amendment, establishing these contingency procedures, was ratified in 1803 in order to correct language in article II, section 1 which had been rendered outdated by the rapid rise in the new nation of "factions" or political parties.

That so distinguished an assemblage as the founders found it necessary, in the light of unanticipated developments, to alter the basic electoral mechanism after only a few years should be instructive with respect to the difficulties inherent in establishing workable electoral systems.

Albert Einstein, whose centennial we are celebrating this year once remarked, that, "Everything should be as simple as possible, but not more so." The electoral system is not the simplest of all systems, it is complex to the extent that it seeks to achieve complex goals—responsiveness to majorities with protection for minority rights, equal political rights for all while preserving individual freedom and liberty, balance between centralized authority in the national government and dispersed authority in the State governments. Because these goals are sometimes in tension, and because they are diverse, it is necessary not to have the simplest conceivable form of government.

IV. DEFENSE OF THE ELECTORAL VOTE SYSTEM—LEGITIMACY OF A RUNNER-UP PRESIDENT

The major argument made against the electoral vote system on behalf of a system of direct election consists of assertions about risks and crises associated with election of a runner-up President. The electoral system is termed a "loaded pistol," for example, be-

cause a candidate can theoretically win election with little more than 25 percent of the total vote by eking out marginal victories in the eleven largest states and failing to receive a single vote in any other state.

The likelihood of this occurrence is about the same as that of a candidate, under a system of direct election, receiving a unanimous vote in the state of Alaska, losing the other 49 states by narrow margins, and emerging as President of the United States.

In fact, only once in the history of the country has a clear popular vote winner emerged as the loser in the electoral vote process (see appendix). Even in that election, in which the popular vote winner received seven-tenths of 1 percent more vote than his opponent, the Electoral College denied him victory for exactly the right reasons: his support was heavily concentrated in a single section of the country.

No "constitutional crisis" was precipitated by this election (1888). In the description of Professor Diamond:

"The funny thing about this loaded pistol is that the last time it went off, no one got hurt; no one even hollered."

Until recent years, with proponents of direct election having become fond of raising the spectre of "crisis", it was generally considered that the Constitution by itself was capable of lending "legitimacy" to a President elected under its processes. One might prefer that the other candidate had won, or even wish to alter the Constitution so that he would have won, but there would be no "constitutional crisis." Professor Diamond alludes to the "constitutional crisis" argument in these terms:

"What serious difference does it make to any fundamental democratic value if, in such elections, 50 percent minus one of the voters might—very infrequently—win the Presidency from 50 percent plus one of the voters? There really is something strange in escalating this popgun possibility into a loaded pistol. For one thing, the statistical margin of error in the vote count (let alone other kinds of errors and chance circumstances) is larger than any anticipated discrepancy . . . only a severe case of doctrinaire myopia makes us see a crisis in the mathematical niceties of elections where no fundamental democratic issues are involved."

Proponents of direct election are also fond of playing around with election figures and estimating how much of a shift in one or another of the states would have resulted in the election of a popular vote runner-up. Professor Judith Best responds to this quadrennial parlor game by noting that,—

"Numbers are easier to manipulate and control than voters; it is fun to create a parade of horribles in a conjectural world over which we have complete control."

The shortcoming of the "shift of XYZ votes" argument is simply that elections do not occur in a vacuum. An event or occurrence or statement made by a candidate sufficient to induce such a shift is likely also to induce a shift in an opposite direction with some other group of voters, either within the same state or in another state.

It should also be remembered that a more genuine threat of severe crisis would be present under a system of direct election. See the discussion below on the dangers of a "sectionalist" president.

V. DEFECTS OF THE PROPOSED DIRECT ELECTION SYSTEM

A. Damage to Federalism

Direct election of the President strikes hard at some of the most enduring principles of our system of government. It takes one of the strands of the American political fabric—political equality—and seeks to reweave a new cloth with this single strand.

Political equality and "democracy" and majority rule represent some of the most basic concepts that underlie our political system. But they are not alone. Our system is not as simple as those who speak only of majority rule and "one-man, one-vote" would have us believe. The founding fathers did not bequeath us with a simple system of government, a system conforming to a single, unwavering principle.

Rather, they provided us a remarkably durable system that contemplates a variety of basic principles—checks and balances, separation of powers, federalism, concurrent majorities, limitation of powers, and protection of minority rights. Each of these principles must be considered when this body legislates and, even more importantly, when it attempts to propose new amendments to the Constitution. None can invariably be considered to the exclusion of the others.

S.J. Res. 28 attaches overriding priority to the single value of political equality. In the process, other important values are necessarily subordinated. Perhaps the most important of these is the principle of federalism.

Direct election offers nothing new in applying the Democratic principle to presidential elections. As noted earlier, presidential elections have been conducted on a popular basis since the 1830's. The candidate with the most popular votes in a given state wins that state's electoral votes. There is direct, popular election already in place, but at the state rather than the national level.

What direct election offers is not to make our presidential elections any more Democratic in nature, but to make them more national, more centralized. As professor Martin Diamond frames the issue:

"Should our Presidential Elections remain in part federally democratic, or should we make them completely nationally democratic?"

It is not democracy per se that is at question, but federalism.

Under the electoral vote system, there are fifty-one democratic elections, one in each of the states and the District of Columbia. As a result, the states are the focus of the electoral process. Campaign strategies are formulated around the states; political parties are structured along state lines; and individual voters tend to perceive of themselves as members of discrete state electorates. In the words of professor Herbert Wechsler of the Columbia Law School.

"The states are the strategic yardsticks for the measurment of interest and opinion, the special center of political activity, the separate geographical determinants of national as well as local politics . . . the president must be the main repository of the national spirit in the central government; but both the mode of his selection and the future of his party require that he also be responsive to local values that have large support within the states."

It is only through achieving an understanding of the integral role of the states in the national election process that one can appreciate the flaws of the "disenfranchisement" argument that suggests that those in the electoral minority within a state are somehow deprived of their vote under the electoral system. Such voters, in fact, are no more deprived of their vote than are those who have voted for a losing House or Senate candidate. There are no partial victories in our single-member political system.

Direct election, by diminishing the role of the States within the Union, and more particularly within the electoral process, would effect substantial changes in political institutions that have developed coincident with the present system. As States decline as the locus of political activity in Presidential campaigns, that void is likely to be filled by some other means. Professor Harry Bailey of Temple University's Center for the Study of Federalism, suggests that special interest groups are likely to serve this function. While there can be little dispute that numerous such groups already carry great influence in Presidential campaigns, the raw influence of numbers that these groups would exert in a pure national plebiscite is presently tempered by the fact that they must work within the confines and constraints of individual States.

Unless an interest group is powerful enough within an individual State, it must engage in the give-and-take of compromise and negotiation during the course of a Presidential election campaign. There is an incentive to work out, within the borders of a State, compromises that are applicable not only to Presidential campaigns, but to State and local campaigns as well. Under a system of direct national election, these same special interests may be provided with incentives not to engage in compromises at this level. It would be in their very numbers across the country that they should be most capable of maximizing their influence. Compromises foregone in the context of national elections would undoubtedly render more diffcult the achievement of compromises in the context of State and local election campaigns.

The impact upon State and local party organizations would be substantial. State and local parties would bear no necessary relation to national Presidential coalitions. The ability of State and local party leaders and elected officials to moderate disputes would be sharply curbed. As predicted by Dr. Bailey, "What direct election would accomplish would be to transfer much of the power of State and local politicians to national politicians. . . . The balance between national and State power would be considerably altered."

The nature of State and local party organizations would undoubtedly be revamped.

In addition, the attention accorded by the executive branch to the concerns of the States, frequently communicated through the local party organizations, might well be diminished. Quite possibly, also, the relationship between the executive and legislative branches of the national government might be subtly altered—not simply because they would no longer possess an essentially common electoral base, but because it is difficult to estimate how much of a Senator's or Congressman's influence with the executive derives from his State's role in the electoral college. We believe that many of our colleagues would be likely to find it disturbingly high.

The Federalist principle forms one of the most fundamental foundations of our Republic. The "great compromise" achieved between the larger and the smaller States at the constitutional convention bore most immediately upon the legislative branch of the national government. In one House of Congress, the House of Representatives, representation was to be based purely upon population. In the other House, the Senate, the States were forever to be represented equally. The States may have been unequal with respect to numbers of citizens, or in any number of other ways, but with respect to their inherent "Stateness," and sovereignty, they were all deemed equal.

The Federalist principle was also incorporated in the executive branch by the drafters of the Constitution. The "Great Compromise" was accurately reflected by the electoral vote allocation accorded each State by article II. The States as States were to have the same degrees of influence in the selection of the President as in the selection of Congress. Rather than being the lone truly "national" office, as it has frequently been referred to, it is probably more accurate to describe the Presidency as the lone office in which a single individual fully embodies the Federal principle. It is the lone truly "Federal" office.

Theodore White remarks that—

"Our system of electing Presidents enhances the sense of the importance of being a Texan or South Carolinian or New Yorker * * * it gives them a sense of being in a community * * * This lovely sense of identity which holds this Union together can be erased by this direct election proposal."

Under a system of direct election, the States would be rendered nullities in the Presidential election process. The variety and diversity brought to bear upon the Presidential election of the States of the Union would be effectively undermined.

Professor Judith Best of the State University of New York has testified:

"If federalism is an anachronism, if cross-sectional concurrent majorities are no longer necessary to maintain liberty, if we are immune to the political disease of faction, then we should consider abandoning the Federal principle for the National Legislature as well as for the Executive. To do the one without the other and, in particular, to make the President the only recipient of an all-national mandate in the Nation's history would fundamentally change our system of government."

To reiterate, it is not "one-man, one-vote" that is at stake in the debate over S.J. Res. 28. It is not whether the President of the United States is going to be popularly elected. Rather, the root question is how popular votes are going to be aggregated: At the national or at the State level? It is our belief that the States should continue to matter in our system of government. The effect of eliminating their participation in the selection of the President and Vice President will be to work a profound impact upon the American system.

B. MISPLACED APPEAL TO "ONE-MAN, ONE-VOTE"

A former president of the American Bar Association has argued in opposition to the electoral vote system, "There is no valid reason why the concept of one person, one vote should not be applied to the highest officers in our land." One might fairly ask, by the same token, whether or not there is any "valid reason" why the States should be represented unequally in the Senate, despite unequal populations. Is there any "valid reason" why the President should be able to veto legislation endorsed by a majority of the direct representatives of the people? Is there any "valid reason" why the Constitution of the United States cannot be amended by a simple "one person, one vote" majority? And what is the "valid reason" for enabling that most highly undemocratic of institutions—the Supreme Court—to overturn decisions that might have been reached by an overwhelming consensus of the people and their representatives?

In short, the Constitution contemplates a number of nonmajoritarian institutions. The Bill of Rights itself is a check on the majority doing what it wants. As Professor Walter Berns has noted, "constitutionalism is a qualification of majoritarianism."

In Jefferson's first inaugural address, he observed of the new Republic that—

"The will of the majority is in all cases to prevail, but that will, to be rightful, must be reasonable."

This is, perhaps, the central theme of our constitutional experience. The institutions created by that document, including the electoral vote system, are not designed to thwart democracy or self-rule; they are designed only to ensure that such rule does not violate the rights of minorities.

The electoral vote system forces candidates for the Presidency to be concerned with something more than the pure size or magnitude of their majorities; it requires them to give at least nodding consideration to the nature or the character of their majorities. Electoral victories can be achieved under the present system only by broadly based and widely dispersed majorities—cross-sectional majorities so to speak. Prevailing candidates must have majority appeal, but their appeal must be relatively uniform throughout the country.

S.J. Res. 28 would further "vulgarize and trivialize" the idea of democracy in America, in the phrase of Irving Kristol and Paul Weaver:

"Far from being a complex idea, implying a complex mode of government, the idea of democracy has been debased into a simple-minded arithmetical majoritarianism."

Direct election would transform the constitutional ideal from the pursuit of concurrent, or "reasonable" majorities into the pursuit of adding machine majorities. In place of a system that forces serious Presidential candidates to consider the concerns of citizens in many regions of the country, and to construct majority coalitions from elements within many regions, direct election would bequeath upon us, every four years, campaign strategies with all the depth and dimension of an abacus.

It is difficult for us to see how other constitutional institutions can be indefinitely maintained which violate the simplistic sloganeering of "one-man, one-vote," in the face of the establishment of direct election. If the premise is accepted that nothing is more exalted than pure plebiscitarian headcounts, what philosophical defenses do we have to any number of other radical reforms that purport to promote this ideal? Why, for example, should it be possible (and abstract possibilities have always played a key role in the anti-electoral vote campaign) for a political party to win a strong majority of the congressional vote cast throughout the Nation and still remain the minority party? In 1942, for example, Republican congressional candidates captured nearly 52 percent of the national two-party vote. Democrats controlled the subsequent congress by a 13-representative margin.

In every congressional election but one, since 1932, the Republicans have captured a lesser proportion of total House seats than they have achieved in the national popular vote.

Any districted or segmented electoral system, whether it be the House of Representatives, State legislatures, ward-elected city councils, or the Electoral College, necessarily allows occasional discrepancies between the popular vote and the electoral vote. There is a hypothetical chance that even the most perfectly apportioned legislative body can be controlled by 26% of the electorate. Can any of these institutions survive, and maintain popular legitimacy and respect, if the simplistic "democratic" notion of S.J. Res. 28 is accepted?

It is not simply direct election that is at stake in the present debate; rather, it is a conception of American diplomacy that we believe is sharply at odds with what our Nation has traditionally stood for. It is a conception which ignores the qualities and characteristics of constitutional majorities, concerning itself with nothing more than nose-counting; it is indifferent to anything but pure, raw numbers. It is a conception of democracy forcefully and repeatedly rejected by the Founding Fathers.

C. DAMAGE TO THE TWO-PARTY SYSTEM

The moderate two-party system that exists in this country is not an accident of history. It is a direct function of our Nation's political institutions, including the electoral vote system. In the absence of the electoral vote system, there is a strong likelihood that party politics in this country would more closely resemble the multiple party states on the European continent. The French electoral system, for example, closely resembles the direct election that would be established by the present resolution. There would likely be a proliferation of smaller and frequently more extreme political parties, with governments perpetually dependent upon the support of at least some of these parties for their position. Professor Bickel predicts:

"The monopoly of power enjoyed by the two major parties would not likely survive the demise of the Electoral College."

The present electoral system serves as a disincentive to serious participation by third parties. Their ideas may be considered seriously, and ultimately integrated into the platforms of the two major parties, but such parties themselves are unlikely to become dominant electoral forces. There is no possibility that they will gain electoral votes, or provide much obstacle to the major parties, unless they are capable of winning on a statewide level. There is no possibility that they will deny an Electoral College majority to a winning candidate unless they can demonstrate enough strength within several States to carry those States.

The impact of the electoral vote system upon third parties was illustrated well by the election of 1968, an election ironically that proponents of direct election point to as justification for their proposal. Reference is often made to the professed intention of Governor George Wallace, the American Independent Party candidate, to create an electoral vote deadlock in order to permit himself to serve as kingmaker of sorts in the electoral college. To that end, he obtained affidavits from his electors which pledged them to vote for himself or for the individual of his choice, pledges of rather dubious legality. Certainly, it is argued, this is not how the President of the United States should be elected.

In fact, that is exactly how the President of the United States was not elected. George Wallace, who at one point early in the campaign garnered nearly as much support as the Democratic nominee in opinion polls, and who garnered in excess of 20 percent of the vote in late-campaign opinion polls, eventually won only 13 percent of the popular vote. This translated into approximately 8 percent of the electoral vote. The Wallace candidacy came nowhere close to achieving its goal of electoral deadlock.

Because it was recognized that, outside the Deep South, Wallace was unlikely to carry pluralities in any States, the "wasted vote" syndrome was clearly in evidence. Rather than casting their votes for an individual who had no chance to gather electoral votes in their States, large numbers of Wallace sympathizers swallowed hard and cast their vote for one of the two major party contenders. In this manner, the electoral system minimizes, rather than exaggerates, third party influence in presidential campaigns.

Under a system of direct election, specifically that proposed by S.J. Res. 28, splinter parties are provided with incentives, rather than disincentives, to participate in presidential elections. S.J. Res. 28 specifies that, in the event of no candidate receiving 40 percent of the popular vote, a runoff is to take place among the two top vote-getting candidates. The existence of the 40 percent threshold—indeed the existence of any precise threshold figure short of 50 percent—ensures a proliferation of small parties.

Rather than having to engage in the hopeless task of attracting large numbers of votes to defeat a major party candidate, and thereby exerting influence, small splinter parties will be competing only to deny the major parties the threshold vote percentage. Splinter parties will not be competing against the larger parties, but against the 40 percent threshold. It will not be necessary that there be a dominant third party or fourth party capable by itself in denying the threshold level to the major parties, but simply that minor parties, taken in the aggregate, be able to keep both parties beneath this figure. The general election will be transformed into a national primary.

The traditional case against voting for third parties—the wasted vote argument—will no longer exist. Each vote for a third or fourth or tenth party, however insignificant these parties, will count toward deny-

ing to a major party the achievement of the threshold percentage.

Proponents of direct election like to point out that only in the election of 1860—Abraham Lincoln's first presidential victory—would a runoff have been necessitated under the 40 percent rule. Thus, we are assured, the contingency procedure is something likely to occur only under highly unusual circumstances.

This argument is not untypical of many that have been expressed by proponents of direct election. They seek to change the rules of the presidential election game in one significant respect while assuming that everything else about the game is likely to remain the same. This is not likely to be the case. Splinter parties have never posed major problems in presidential elections because their participation has been strongly discouraged by the ground rules; change the ground rules and we will experience splinter parties emerging from all corners. Splinter labor parties, splinter right-to-life parties, splinter racist parties, and splinter one-issue parties of every conceivable hue. As suggested by Michael Uhlmann, the author of a forthcoming book on the electoral college, the question facing these parties will no longer be "why run?", but "why not run?".

What will be their incentive beyond the opportunity to make life difficult for the major parties? These parties, in the event of a runoff election, will be positioned nicely to negotiate for their support prior to the runoff election. George Will suggests that, "they would try to force a second vote so they could sell their support." Minority, often extremist minority, parties will be able to exert an influence under the direct election system that is wholly denied them under the electoral vote system. Coalition building that currently takes place prior to the general election, and within the confines of the two parties, will be shifted to the hectic, pre-runoff period and take place within the context of inter-party coalitions. It will be a time, in Madison's words, of "extraneous management and intrigue." There will be no incentives for pre-general election compromises and moderation; such action may indeed limit the flexibility of the parties in the post-general election period.

In addition, traditional notions of party responsibility will be sharply altered. The consensus effect of the national convention process will be lost as losing candidates will have new encouragement to pursue post-convention campaigns.

A word is in order about the precise impact of the "winner-take-all" or unit-rule system, upon the complexion of our two party system. While the unit-rule has been much maligned—and indeed there is disagreement among us on the merits of preserving this system—it should be recognized that it has made a significant contribution in the moderating influence that it has had upon the American political system. Parties are under a strong inducement to extend their appeal as broadly as possible within a state since anything less than outright victory will result in zero electoral votes. Except in unusual circumstances, both parties have to appeal to large numbers of voters and special interests who are not inextricably identified with either of the two major parties. As they seek to broaden their bases, each of them appealing to essentially the same core of nonaligned voters, the parties become more and more like each other.

While this may make for presidential elections with less spectator appeal, and less capable of effecting cataclysmic change, than they might otherwise be, this *does* ensure a certain stability in the system. When candidates are perceived as falling outside this consensus, landslide majorities for the opposition are usually guaranteed.

Thus, whatever the drawbacks of the unit-rule, it should be understood that this system does have the generally desirable effect of encouraging parties to become broad, inclusive, accommodating, temperate institutions, rather than exclusive and rigidly ideological ones.

D. SMALL STATE VS. LARGE STATE ISSUE

None of us was elected to office in order to promote the relative decline in influence of our States in Presidential elections. At the same time, each of us recognize that, with respect to amending the organic law of our country, there are limits to parochialism. These limits have had to be borne in mind as we considered the question: which States will benefit through direct election and which will not?

It is our view that, in at least one sense, none of the States will benefit from the establishment of direct election. As we have already noted, direct election would totally eliminate the role of States as States in the electoral process. Once direct election has been implemented, it will make no difference whether or not Vermont or Florida or Illinois has become more "powerful." That, in our opinion, is a concern that is relevant only to the extent that the States matter at all in the electoral process. By removing the States as intermediaries in the electoral process *each* of the States becomes less of an influence with the executive branch of the National Government.

On another level, we note the existence of two Library of Congress studies dealing with the large State-small State controversy. The first appears to show a small State advantage resulting from the impact of the 'constant-two' electoral votes given to each State regardless of the population. As a result, the smaller States have slightly disproportionate representatives in the electoral college as, indeed, they do in the legislative branch of our National government. This has been the traditional view of the electoral college, a conclusion easily attested to by a break down of votes cast by small-State and large-State senators and Congressmen during previous roll-calls on this matter.

TABLE A.—EFFECT OF THE ADOPTION OF DIRECT POPULAR ELECTION OF THE PRESIDENT AND VICE PRESIDENT ON THE RELATIVE INFLUENCE OF THE SEVERAL STATES IN ELECTING THE PRESIDENT AND VICE PRESIDENT IN 1976

[Congressional Reference Service, Library of Congress]

State	Percentage of 1976 electoral college	Percentage of nation-wide popular vote	Percentage gain loss under direct popular election
Alabama	1.6729	1.4504	−13.31
Alaska	.5576	.1515	−72.83
Arizona	1.1152	.9107	−18.35
Arkansas	1.1152	.9411	−15.61
California	8.3643	9.6463	+15.33
Colorado	1.3011	1.3262	+1.93
Connecticut	1.4870	1.6940	+13.92
Delaware	.5576	.2892	−48.13
District of Columbia	.5576	.2070	−62.88
Florida	3.1599	3.8632	+22.26
Georgia	2.2305	1.7993	−19.33
Hawaii	.7435	.3572	−51.96
Idaho	.7435	.4219	−43.25
Illinois	4.8327	5.7861	+19.73
Indiana	2.4164	2.7225	+12.67
Iowa	1.4870	1.5686	+5.49
Kansas	1.3011	1.1745	−9.73
Kentucky	1.6729	1.4311	−14.45
Louisiana	1.8587	1.5676	−15.66
Maine	.7435	.5926	−20.31
Maryland	1.8587	1.7655	−5.01
Massachusetts	2.6022	3.1237	+20.04
Michigan	3.9033	4.4801	+14.78
Minnesota	1.8587	2.3909	+28.63
Mississippi	1.3011	.9434	−27.49
Missouri	2.2305	2.3954	+7.39
Montana	.7435	.4031	−45.78
Nebraska	.9294	.7451	−19.83
Nevada	.5576	.2475	−55.61
New Hampshire	.7435	.4164	−43.99
New Jersey	3.1599	3.6962	+16.97
New Mexico	.7435	.5130	−31.00
New York	7.6208	8.0119	+5.13
North Carolina	2.4164	2.0586	−14.81
North Dakota	.5576	.3644	−34.65
Ohio	4.6468	5.0418	+8.50
Oklahoma	1.4870	1.3393	−9.93
Oregon	1.1152	1.2628	+13.24
Pennsylvania	5.0186	5.6658	+12.90
Rhode Island	.7435	.5042	−32.19
South Carolina	1.4870	.9841	−33.82
South Dakota	.7435	.3687	−50.41
Tennessee	1.8587	1.8102	−2.61
Texas	4.8327	4.9928	+3.31
Utah	.7435	.6636	−10.75
Vermont	.5576	.2302	−58.72
Virginia	2.2305	2.0809	−6.71
Washington	1.6729	1.9073	+14.01
West Virginia	1.1152	.9208	−17.43
Wisconisin	2.0446	2.5800	+26.19
Wyoming	.5576	.1917	−65.62

In the tables above, the 2d column, "Percentage of 1976 electoral college," presents the percentage of the total number of 538 elector votes cast by each State and the District of Columbia. The 3d column, "Percentage of nationwide popular vote," presents the percentage of the total nationwide popular vote of 81,555,889 cast in each State and the District of Columbia. The 4th column, "Percentage gain/loss under di ect popular selection," presents the gain/loss, in percentages, of the respective States' and the District of Columbia's share of influence in electing the President and Vice President had direct popular election replaced the present electoral college system for the 1976 election. [Source: Richard M. Scammon and Alice V. McGillvary, Comps. "America Votes 12" (Washington, Congressional Quarterly, 1977) 15.]

The second study, referred to in the majority report, relies heavily upon complex, computer modelling and suggests that the large States are advantaged under the electoral system. This advantage purportedly results from the fact that the individual voter within the large State is capable of influencing more total electoral votes than is the individual voter within the small State.

We note, in particular, that this latter study relies heavily upon an analysis of Professor John J. Banzhaf, III, who has since stated in correspondence to the subcommittee that his research should not have been cited by the library as supporting the proposition that the electoral system is biased in favor of large States. In his view, the library study is "incorrect, incomplete, and misleading."

The "electoral college-large State advantage" argument is a generally misleading one, in our opinion. What the studies state precisely is not that the State of New York or the State of Michigan is advantaged by the electoral college, but that the individual voter within that State, at some given moment in time, has more potential influence than his counterpart in the smaller State.

Whatever the theoretical truth of that assertion, the voters of a small State collectively, i.e., when considered as a group, have a larger share of electoral votes than their share of popular votes cast. Thus, under the present system, the majority of voters in a small State choose a candidate for the entire State. The majority choice is accepted as the collective choice for that State and this collective choice is given greater weight than is represented by the small State's share of popular vote.

Finally, whatever is demonstrated by the conflicting array of sophisticated computer studies, a critical consideration in the small State-large State argument is how Presidential candidates themselves view the importance of the States. As observed by one of our colleagues, who has been through the experience, Senator Goldwater:

"What these mathematical studies miss is the human factor. They do not take account of the human psychology which governs real-life politics . . . I am afraid that direct election would destroy the special extra weight now given in elections for protection of smaller States. For even if a candidate fails to visit a given State, he may well take

a particular position on this or that issue calculated to attract voters in that State."

Former Presidential adviser, Richard Goodwin, has testified to the same effect. He has noted that—

Most Presidential campaigns are concentrated on no more than twenty percent of the vote, the swing vote, on the asumption that the rest are pretty well committed. Today, nearly every State has a swing vote which, even though very small, might win the State's electoral vote. Thus, nearly every State is worth some attention.

E. INFLUENCE UPON MINORITY INTERESTS

It is not only the smaller States, however, that stand to lose influence through the implementation of direct election. Not surprisingly, in view of the weight that the electoral vote system accords the principle of concurrent majorities, or "reasonable" majorities, cohesive minority groups within the larger States also stand to lose substantial electoral influence.

According to Vernon Jordan, chairman of the Black Leadership Forum, direct election would result in "serious setbacks for minorities." In their study for the Brookings Institute on direct election, Wallace Sayre and Judith Parris observed that direct election would cause metropolitan areas to "lose their most important point of leverage in the total political system." The ability of these areas, heavily populated by minority groups, to hold the balance of power in larger, competitive two-party States would be lost. Instead, they would simply be tossed into the national electoral pool indistinguishable from other voters.

Jordan, testifying on behalf of the Urban League, the NAACP, the National Urban Coalition, PUSH, and the Southern Christian Leadership Conference, warns too that direct election would—

"Inevitably mean the formation of black political parties, voting along racial lines and increasingly separated from the major parties who would themselves be weakened and dependent upon coalitions with splinter groups. This would not only weaken the political system, but would be a polarizing factor destructive of racial harmony."

The Ameircan Jewish Congress has testified also in recognition of the contribution of the electoral vote system to minority rights and aspirations:

"By tending to inhibit the nomination of candidates likely to be objectionable to sizable minority groups, the electoral system assures attention to the needs and desires of groups whose interests might be given much less consideration under a system of direct popular election."

This point was echoed by the American Farm Bureau Federation with respect to the minority interests of rural America.

F. RISK AND LEGITIMACY OF A SECTIONALIST PRESIDENT

There are several risks of a crisis of legitimacy under a system of direct election: (1) a candidate can become President with only regional support. It is quite conceivable that a candidate could concentrate nearly full-time efforts on maximizing vote totals in heavily populated, but relatively circumscribed geographical areas. Other areas could be almost totally ignored. Direct election does not require that a candidate carry on a genuinely "national" campaign as does the electoral college; it is concerned only with the magnitude of vote majorities, not with their distribution.

The committee report presents a table which purports to show that a sectionalist president is unlikely. However, there are several flaws in that table. First, the assumption that 70 percent is the maximum likely margin of victory is not reasonable. The figure was apparently chosen because there have been few cases of greater than 70 percent margins under the current system. What is more relevant, of course, is the likely figure achievable under a direct election system with the kind of sectionalist campaign that is far more likely to occur under that system. Nevertheless, in order to make the example below more conservative, the 70 percent figure is used.

The second flaw in the table is that it assumes that the candidate receiving 70 percent in the listed states would receive no votes at all in other states. This assumption is clearly unrealistic and will not be applied in the example below.

In order to make clear that a sectionalist candidate might indeed be elected, Table B is presented. The table presents the hypothetical votes cast for a candidate focusing his campaign on the northeast plus Indiana, Michigan, and Ohio. The effect of adding Illinois is also considered. The candidate is assumed to have received 70 percent of the total votes cast in such states during the 1976 presidential election. The candidate is also assumed to have received 30 percent of the votes cast in other States.

The results for such a candidate are 44.7 percent of the popular vote (47.0 percent of Illinois is included).

This percentage of votes is above the 40 percent threshold required for victory under S.J. Res. 28. Further, it is likely to be a winning margin under a direct election system in light of the additional candidates and parties that would be encouraged (see above discussion of the damage to the two-party system under direct election).

TABLE B.—ARITHMETIC OF A SECTIONALIST PRESIDENT

Delaware	235,834		
District of Columbia	168,830		
Indiana	2,220,362		
Maine	483,216		
Maryland	1,439,897		
Massachusetts	2,547,558		
Michigan	3,653,749		
New Hampshire	339,618		
New Jersey	3,014,472		
New York	6,534,170		
Ohio	4,111,873		
Pennsylvania	4,620,787		
Rhode Island	411,170		
Vermont	187,765	Illinois	4,718,914
Subtotal	29,969,301	Add Illinois	34,688,215
70 percent of subtotal	20,978,511		24,281,751
Total votes cast	81,555,889		----------
Total votes cast in other States	51,586,588		46,867,674
30 percent of total in other States	15,475,976		14,060,302
70 percent vote plus 30 percent vote	36,454,487		38,342,053
Percentage of total votes cast	44.7		47.0

Note: The left column of figures first sets forth the total votes cast in the 1976 Presidential election in the listed States. The hypothetical sectionalist candidate is assumed to receive 70 percent of these votes. He is also assumed to receive 30 percent of the total votes cast in the unlisted States. The votes in listed and unlisted States is then totalled and a percentage figure calculated. The right column repeats this procedure on the assumption that Illinois is part of the sectionalist voting region. Raw data is taken from America Votes 12, compiled and edited by Richard M. Scammon and Alice V. McGillivary.

(2) A candidate can become President without a majority, indeed even without a plurality, in a single state. This is basically the converse of the first possibility. A candidate whose support is insufficient to gain him a majority or plurality in a single state may emerge victorious in a three-way competition if his votes are distributed evenly throughout the country. Thus, a candidate could be elected President of the United States without having captured a single one of those states.

(3) The candidate prevailing in the runoff election might have placed a distant second in the general election. Such a candidate would hardly be likely to have an overwhelming public mandate. Professor Brown of the Harvard Law School observes of such a candidate that—

"The majority that supports him in the runoff is at best a reluctant majority, and he remains substantially in pledge to those who swung support to him in the runoff, since it has been demonstrated that he could not have won without them."

The New Republic asks: "Will the results of the first election ever be forgotten, or will those results actually define the new president's ability to govern?"

One of the strengths of the present system is that it gives us but a single election. Not since 1824 has it been necessary to invoke the contingency provisions of the 12th amendment. The unit-rule provisions of the electoral system has the effect, further, of magnifying the popular vote margin into a larger electoral vote margin, thus discouraging prolonged challenges and dispute even in the case of close elections.

(4) Finally, in light of the democratic preoccupation of direct election advocates, it is worth stressing that such a system of presidential election will routinely give us presidents who are opposed by a majority of the electorate. These advocates may lament the fact that the 49.8 percent presidency comes along every century or so under the electoral vote system, but they are giving us a system which, through its encouragement of splinter parties, is likely to make 50 percent presidencies a historical curiosity. If "one-man, one-vote" is the overriding, all-compelling American principle, how can advocates of direct election tolerate a system that expressly contemplates and would encourage 40 percent presidents? We feel it is important to note that, under the electoral system, the nation has generally been governed by Presidents who have achieved much better than a 40 percent plurality. Only three have been elected in the history of the country with less than 45 percent of the popular vote.

Whatever the threshold level established by a direct election amendment, it is virtually certain that presidential campaigns will be fought in the context of candidates narrowly succeeding or narrowly failing to achieve that margin. With a 40 percent threshold, it is likely that we will have a 50 percent presidency only in rare landslide election years, as observed by Vernon Jordan:

"The paradox is that democracy and democratic practice is better served under the indirect electoral college system than under the misleadingly democratic direct election system."

Efforts to compare the relative "crises in legitimacy" of Presidents elected under different electoral systems are, of course, speculative. We do, however, have the benefit of experience with the electoral college to suggest that a 'runner-up' presidency would be as readily accepted and 'legitimated' as, for example, the presidency of a Gerald Ford, who was elected not at all to either the presidency or vice presidency. In the same way that the 25th amendment, then less than a decade old, lent respectability to the Ford administration, article II of the Constitution would seem sufficient to do the same for a 'runner-up' presidency.

According to Professor Judith Best, author of a study on direct election:

"If a truly sectional President were to be elected under this system, the country would be ripe for civil discord, if a President, let us say because of an overwhelming victory in the populous eastern megalopolis, won a majority or plurality of the popular votes although receiving insignificant support in the other sections of the country, he would be considered "their" President, not "our" President by the rest of the country. He would have great difficulty governing."

Presidential acceptance, or "legitimacy" depends upon more than simple arithmetical preponderance; it also rests upon tradition, the stability of the regime, the naturalness

of transition, the integrity of the person, the base and breadth of his support, and public perception of the 'fairness' of the system.

While the "crisis" attached to the electoral vote system involves what is in substance a mere technical violation of bastardized Democratic theory, the "crisis" of direct election (a far more real possibility in our opinion) is the pitting of region against region. The electoral college is an impediment to sectionalism; it is a bulwark against Presidents and Presidential campaigns that are relatively unconcerned about large sections of the country. Professor Best notes, in comparing the relative gravity of "crises" fostered by 49.8 percent Presidents and by sectionalist Presidents, that the former is a "pin prick," the latter a "bleeding artery":

"A truly sectional President * * * would be a substantive violation of the spirit and intent of the constitutional system as a whole."

G. RISK OF FRAUD, RECOUNTS, AND RUNOFFS

It is our opinion that direct election would be an invitation to fraud, would encourage interminable vote challenges and recounts, and create chaos in what is currently an orderly and rational transition period between administrations.

Much of this stems from the fact that direct election, in effect, substitutes for fifty separate state elections, a single national election. As a result, the benefits of "compartmentalization" derived from the electoral system are lost. As noted by Professor Ernest Brown of the Harvard Law School:

"The present system insulates the States. When the vote is counted by the states, those lines insulate the area of contest and keep it local, and they insulate the significance of the contest."

With respect to fraud and vote corruption, for example, there is presently incentive for such activity only in those states obviously, in which it can make a difference. Unless there is a relatively close contest within a state, there is no inducement for fraud. As a result, fraud in presidential elections under the present system has been a relatively unusual occurrence and, when it has transpired, it has only rarely been capable of influencing an election nationally.

Under a system of direct election, new incentives would exist for vote fraud in every precinct in every state across the country. Each vote wrongfully obtained would have potentially national significance regardless of the closeness of the campaign in any single state. In the event of a close national election, there may well be tremendous pressure for vote manipulation and maneuvering, particularly in the western-most states. The change of a very few votes per precinct, across large numbers of precincts, would pose great difficulty of detection.

The electoral vote system does not foster any more or less honesty among vote counters than does direct election; it is simply that vote chicanery is discouraged by limiting the scope of its significance. As Theodore White has put it, under the present system, "the crooks are each sealed in their own state containers."

By the same token direct election would sharply undermine the certainty of electoral counts. Contested elections, which may well pose constitutional crises in their own right, will become routine in close elections such as those of 1960, 1968, and 1976. There will be an incentive placed upon forcing such challenges and recounts because the shift of even a handful of votes in a number of precincts across the Nation may have a substantial impact upon close national election. Under the present system, there are inducements for challenges and recounts only where an election in an individual State is close.

It is not unlikely that in razor-thin elections there will have to be recounts of each of the nearly 200,000 polling places across the country. In even the most honestly and conscientiously managed polling places, it is unusual that recounts do not result in minor vote adjustments. No narrowly losing Presidential candidate could afford to forfeit the opportunity to cumulate those votes through a recount.

The impact of fraud and vote recounts is not limited, under a system of direct election, to whether or not Candidate Smith or Candidate Jones becomes President. It may also play a critical role in determining whether or not Candidate Smith is forced into a runoff, and, if so, whether or not he will be opposed by Candidate Jones or Candidate Thomas. Not only might the leading candidates' votes have to be recounted and re-analyzed, but the total vote, including disqualified, damaged, write-in ballots et cetera, will have to be assessed in order to determine whether or not 40 percent of the total vote equals 20 million votes or 20 million plus one. Consider the nightmarish situation in which the country is placed, during what has otherwise been a smooth interregnum period, if Candidate Smith is initially given 40.1 percent of the vote, Candidate Jones 30 percent, and Candidate Thomas 29.9 percent. The existence of a runoff and the identity of the runoff participants would be uncertain for, at minimum, a three- or four-week recount period. Political data analyst Lance Tarrance considers it "computationally impossible" to certify such an election outcome for up to a several month period. He notes that the electoral vote system currently serves the largely overlooked function of "cleaning out much of the error debris in our election tabulation system by concentrating on State outcomes, rather than a national outcome."

How much time would the candidates have to campaign following the general election and the recount if a runoff were forced? What if the runoff were also decided by a narrow margin? The country could be well into January without an inkling of who its next president would be. Whoever the new president, his opportunity to reflect over his victory and prepare for his new administration would be virtually nil. No doubt, the scare of doing extended battle would also deny him any significant "honeymoon" period.

During a juncture in which wounds are now allowed to heal, and during which the president is transformed from a narrowly partisan figure into the spokesman for a single people, direct election would give us the paralysis of recounts and the bitterness of electoral conflict. Backroom coalitions and bargaining that, under the present system, would have ben long forgotten would now just be beginning.

H. NEED FOR A FEDERAL ELECTION CODE

At a time when there is so much disillusionment with concentrating power in the Federal Government, S.J. Res. 28 would nationalize one of the most important functions currently performed by the States—the administration of elections. A uniform, national election code imposing uniform election procedures upon each of the fifty States is a virtual certainty if direct election is instituted.

While distinct electoral practices can be tolerated within each State since presidential elections are now conducted on a State-by-State basis, this cannot obviously be permitted once a single national election has been established. So long as the ballot procedures, or residency requirements, in Kentucky or Arizona do not affect elections in Missouri or New Hampshire, they can be tolerated. Under a system of direct election, however, which occurs in each precinct in each State affects every other precinct in every other State. If, for example, a precinct in West Texas counts both checkmarks and "X"s on its written ballots, while a precinct in Connecticut counts only checkmarks, is not the electoral influence of the west Texas precinct increased at the expense of the Connecticut precinct?

Professor Richard Smolka, professor of government at American University and the author of numerous works on elections, has testified eloquently with respect to those areas in which the Federal Government will have to preempt the States under direct election. Among the issues that Congress will have to deal with:

Times, places, and methods of voter registration;

State residency laws (S.J. Res. 28 authorizes Congress to "establish uniform residency qualification");

Absentee ballot requirements and procedures;

Methods by which candidates and political parties can qualify for the ballot;

Who has the right to use party names? May a candidate run on the liberal or conservative party tickets in New York, or the DFL or IR tickets in Minnesota, and have their votes aggregated with differently named parties in other States?;

Can Presidential ballots be combined with State or local ballots? Will voting be by party row or party column? Can a party level be used? Will ballot position be fixed?;

What will voting hours be? What types of voting machines will be permitted? How large an area may a precinct comprise? What sorts of election officials must oversee each precinct?;

Who will count ballots? Who will rule on disputed ballots? What appeals procedures will be established? What showing will be necessary for a recount? How will ballots be maintained pending recounts?

These questions form the tip of the iceberg. Under a system of direct election, the most minute and insignificant aspects of election, qualifications and procedures will be transformed into grand matters for congressional and Federal judicial determination. One of the few remaining areas in which federalism still flourishes will be eliminated. Decision-making that is currently handled in a responsible, orderly manner by thousands of election officials throughout the country will be rigidly centralized in Washington, D.C. A grandiose new bureaucratic structure will undoubtedly be necessary to administer these responsibilities.

A national election code would be particularly dangerous to the extent that it reflected the biases of the party then in the majority in the national government.

I. ADDITIONAL POWER TO NATIONAL MEDIA

One matter that concerns us greatly about the direct election proposal is that it will enhance the role of the national media in Presidential election campaigns. Increasingly, in recent years, political reforms designed to open up the system have had the net effect of increasing the influence of the communications media, and those who are skillful in utilizing it.

Curtis Gans, testifying on behalf of the Americans for Democratic Action in 1977, explained,

"For two decades, or ever since the advent of television as a central factor in American lives, the practice of politics has increasingly been dominated by the political commercial, image making and mass media manipulation. Only the need to maximize the vote in key states has forced national campaign managers to expend resources for organization in the several states. However, should this nation move to a system of direct popular vote for President, what few remaining incentives to political organizations would be lost. Electoral contests would be between Pat Caddell and Robert Teeter, between Deardourff and Bailey and Rafshoon. The contest would not be among those who could

recruit and organize the largest number of participants in the process but rather who could most effectively and skillfully manipulate media imagery."

In the absence of political and geographical boundaries, campaigns could be conducted on a centralized basis. The institution best equipped to promote such a campaign would be the national mass media.

In the place of traditional election day maps illustrating which candidate carried which State, Theodore White predicts that direct election will introduce us to election day maps illustrating which candidate carried which media markets.

Ronald Wilner, testifying on behalf of political consulting firm, Robert Goodman Agency, commented:

"Advertisers buy on a cost-per-thousand basis ratio . . . A dollar spent anywhere will reach virtually the same number of potential voters. However, there is a way to beat the prevailing cost-per-thousand ratios and that is by taking advantage of the efficiencies offered in network advertising. I would suspect that we would see our Presidential candidates using a lot more of it—network advertising—than in the past. Lacking the need for a state-by-state strategy, they would be prime candidates as network advertisers."

Such an economic incentive would sharply increase the likelihood that national media would be more frequently and intensively used, increasing their influence over the Presidential election process.

In the place of traditional election day maps illustrating which candidate carried which State, Theodore White predicts that direct election will introduce us to election day maps illustrating which candidate carried which media markets.

VI. PROPOSALS FOR ELECTION REFORM

None of us believe the present electoral system to be perfect. Nor are we necessarily in agreement that the present system is even the best of all electoral worlds. What unites us is simply the belief that the present system is far superior to direct election of the President and Vice President.

Among the alternatives that have been proposed to the present system are (1) the proportional plan which maintains the electoral vote structure but requires states to apportion their electoral votes to each candidate in the proportion of his popular votes within that state. As we observed earlier, his option is currently available to the states, although at their discretion; (2) the district plan, which maintains the electoral vote structure but requires states to apportion their electoral votes on the basis of popular vote margins within each state's congressional districts. This, too, is an option currently available to the states at their discretion; (3) the 20th Century Fund "bonus plan," which maintains the present electoral vote system, yet awards an automatic 100-electoral vote bonus to the candidate winning the national popular vote; and (4) limited modification of the present electoral system, for example, abolition of the office of elector.

While we have differing individual points of view on the merits of these proposals, we are in agreement that each would represent a far less radical departure from the present system than would direct election. Senator Thurmond, for example, has long been an advocate of the "proportional plan." Each of these proposals is premised upon the same fundamental values as the present system and would preserve those values in the context of Presidential campaigns. Each would be complementary, not destructive, of the basic political institutions that have served our country so well for so long.

None of us, too, would seek to defend the office of the "elector." While we believe that the so-called "faithless elector" argument is largely a red herring, in view of the fact of its minuscule frequency of occurrence, we concede that the system would be a better one if that temptation were conclusively foreclosed. Whether or not this problem can be cured extra-constitutionally, as suggested for example by Professor Charles Black who believes that resort to simple contract theory should suffice to bind electors, or whether an amendment is necessary, is something with respect to which we have an open mind.

It is our concern that this relatively trivial and insignificant shortcoming in the present system not be used as justification for imposing changes of a truly radical dimension upon the country.

VII. CONCLUSION

We would be remiss if we did not mention that we are also concerned about several technical difficulties with S.J. Res. 28, including its failure to specify a time limit for ratification, and the possibility of its abolition of the electoral college between the time of a general election and the time of the formal electoral college processes.

We are concerned also, in light of the need for uniformity of State election procedures under a system of direct election, that nothing in S.J. Res. 28 precludes the States from relaxing suffrage qualifications, for example, lowering their voting age to 16, and thereby achieving an advantage with respect to the other States. In order not to lose relative influence, it will be necessary for each State to follow the lead of that State most liberal in its voting requirements.

In addition, it is noteworthy that, upon the submission of this amendment to the States, the States will be faced simultaneously with three separate constitutional amendments for the first time since the Bill of Rights was considered in 1789–91. A fourth amendment may well be offered the States as a result of their own initiaitve in petitioning for a constitutional convention. We find it ironic, to say the least, that the commttee is insistent upon submitting the present amendment to the States despite an almost total absence of public demand for this measure, while doing its obstructive best with respect to an amendment that is being demanded by the public. We have heard absolutely no public hue and cry for the immediate proposal. Public opinion polls, relied upon by the committee, which purport to show public support for S. J. Res. 28 suffer from the usual weaknesses that arise from attempting to distill complex constitutional debate into a single Harris or Gallup Poll query.

For the reasons that we have stated in these views, we are strongly opposed to the pending resolution. We respectfully urge our colleagues to examine it with a maximum of care and caution. In proposing an amendment to the constitution that would totally alter the processes of what Theodore White refers to as the "central rite" of our democracy, we believe that S. J. Res. 28 forebodes changes of the greatest dimension in our system of government. Each of us must consider whether or not such changes are truly needed.

ORRIN. G. HATCH.
STROM THURMOND.
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[From the New Republic, May 7, 1977]

A BAD IDEA WHOSE TIME HAS COME

"The electoral college method of electing a president of the United States is archaic, undemocratic, complex, ambiguous, indirect and dangerous." That is the very considered opinion of the American Bar Association, which has lined up with Birch Bayh and 44 of his colleagues in the Senate, with the AFL–CIO, the Chamber of Commerce, Common Cause, the American Federation of Teachers, the Farm Bureau, the UAW and the League of Women Voters, all determined to eradicate the electoral college. It also appears to be the opinion of President Carter, who nearly became the first man since 1888 to win the popular vote for president and lose the electoral vote. A shift of only 9200 votes in only two states, Hawaii and Ohio, and Gerald Ford would still be President. It is an impressive array of political clout, and with all that common resolve, you have to conclude that direct election of the president probably is an idea whose time has come.

The principal objections to the electoral college center on the practice now followed by most states of awarding all their electoral votes to the candidate with a popular vote plurality. One routine result of this practice is that narrow national popular vote pluralities are translated into substantial electoral vote majorities. John F. Kennedy won 49.5 percent of the popular vote in 1960 and 56.5 percent of the electoral vote. Richard Nixon saw his 43.6 percent of the 1968 popular vote inflated to 56 percent in the electoral college. Sometimes a walloping popular vote majority accumulated in one region—such as Jimmy Carter piled up in the South last year—may be dissipated when an opponent accumulates narrow victories in more states and thus greater electoral college strength. It is the extreme of this tendency that most nettles the abolitionists: the possibility of an electoral college victory—and thus the Oval Office—going to a popular vote loser, as nearly happened in 1916, 1948, 1960, 1968 and 1976. This possibility, they proclaim, represents a loaded gun, and the law of averages indicates that a misfire is inevitable.

With that worrisome prospect in the wings, the case for abolition may boil down to "Why not?" In an age when direct democracy is practicable, the electoral college represents an unnecessary artifact interposed between the voters and the president they elect. It is the appendix of the body politic, a vestigial organ serving no useful purpose with great potential for mischief.

But the issue of the electoral college is more complicated than that. Abolition was first proposed in 1824 and has been on someone's agenda ever since. Both sides have armed themselves with ever more sophisticated analyses and statistics either designed to demonstrate the electoral college's potential to produce a constitutional crisis or its immense adaptability and legitimizing effects.

Today's opponents of the electoral college tend to base their case primarily on the potential for a constitutional crisis—of one sort or another. They point to 1968: what if George Wallace had thrown the election into the House of Representatives? It is possible to rejoin that this country has weathered worse in the past decade. That would not have made Wallace a kingmaker. The nation and the Congress would have had to suffer him for a few days more, then the members would have followed the constitutional prescription and elected either Nixon or Humphrey, and how might they have chosen worse?

Or what if those hypothetical 9,200 votes actually had switched in Hawaii and Ohio last year, awarding the presidency to Mr. Ford? Americans simply and wisely would have chalked off Jimmy Carter's 1.7 million popular vote edge for what it was, a margin swollen by more than that number from his native South. Four years hence, they would have either reelected Mr. Ford or set things right.

It is even possible to conclude from the carefully gathered statistics of one of the chief abolitionists that the dread possibility has already occurred, that we have already had the ill-fated misfire and nobody noticed. Neal Pierce, in his studious 1968 book, *The People's President*, notes that John Kennedy's

narrow popular vote plurality of 110,000 in 1960 rests on the questionable logic of counting votes cast against him and for a slate of unpledged Democratic electors in Alabama as part of his national total. Strip Kennedy of those votes and Nixon comes out the actual winner of the popular vote for president in 1960. Nixon never complained about the mathematics, perhaps because either way Kennedy's electoral college majority was unaffected. Had he more characteristically insisted on setting the historical record straight, would he have plunged America into a constitutional crisis? Martin Diamond calls the loaded gun contingency a "popgun possibility."

The constitutional amendment proposed by Birch Bayh and his colleagues calls for election of the president and vice president by nationwide popular vote, with a runoff if no candidate gets a 40 percent plurality. In short, the abolitionists simply would apply pure majoritarianism at the presidential level. It is not clear what effects such a change would have on the presidency or on the presidential mandate. Direct popular election would entail shifts in electoral strategy that might affect both. If it is fair to press for change on grounds of what might happen but never has, it is essential to estimate what might happen should we change.

Opponents of direct election contend that it would cause a proliferation of parties, or factions, or independent candidacies. Their logic is persuasive. The electoral college has the same effect in perpetuating two parties at the presidential level that single-member districts have in elections for the U.S. House and parliaments abroad. The winner-take-all custom in the electoral college encourages all but regional splinter parties to make an early accommodation, and discourages voters from casting their votes for a candidate who obviously cannot win. George Wallace dropped from a Gallup Poll high of 23 percent to 13 percent on election day of 1968; the falloff came almost entirely in the North, where he had no hope of capturing electoral votes.

Those who argue for a direct election with a runoff point out that with one exception (Lincoln in 1860), the winner always has gotten 40 percent. But in the past, the electoral college has been there to deter multiple candidacies. As Alexander Bickel put it, "To draw conclusions about future political behavior under a radically changed electoral system from the evidence of behavior under the system about to be dismantled is to take a long leap in the dark."

In this television age, the 40 percent runoff provision will encourage a proliferation not only of parties and factions, but of charismatic personalities as well. The runoff will make the first election for president like the two-primary system of the deep South in the heyday of its no-party politics—a trial heat with something for everyone. It would include the left and the right of the GOP, of course, the Socialists and Libertarians, perhaps a party of blacks, browns and Indians, a women's party, the anti-welfare and anti-abortionists, an aggregation of social issue and ethnic purity voters, maybe a fundamentalist Christian candidacy or party, and perhaps a John Gardner or Ralph Nader above-politics candidate to appeal to the independents. We would provide a reasonable shot at the highest office in the land to every charismatic or quasi-movement figure in America, not only Norman Thomas, Eugene McCarthy and George Wallace, but Father Coughlin, Anita Bryant and Billy Graham.

And what would prevent the ideologists from becoming hard-edged? What mechanism would assure the moderating and compromising now accomplished by national party nominating conventions? The system advanced by the abolitionists is not one to encourage accommodation, but rather one designed in its every particular to fuel uncompromising causism.

Would the factionalism take root? Would there be any more staying power than third and fourth parties have demonstrated in the past? Indeed there would. With no electoral college mechanism to eradicate the votes of minor parties; independents and splinter groups who have suffered for want of money in the past will be able to find start-up funds on the strength of the change. And let us not forget, campaign finance laws now on the books require that public monies be turned over to all factions that attain a reasonable first beachhead.

The abolitionists also wish to purify the presidential mandate by removing the intermediary body. Neal Pierce says, "The President is the only American official who represents the American people entire. . . . We are one people in the White House, or should be." The rhetoric sounds Caesarist in an era when we are more usually concerned with diminishing the imperial trappings of the presidency.

But aside from that, the direct popular vote proposal is dangerous not only in the runoff, but also in the stand-off. The electoral college, as we have seen, tends to magnify majorities, to inflate narrow popular victories into wider electoral margins, and many believe this has a salutory effect, that it adds to the legitimacy of the result and enhances the ability of a president to govern. When 70 million voters divide with a plurality of only 100,000 votes, as they did between Kennedy and Nixon in 1960, the result approaches perfect dissensus. Reasonable men must count the outcome a standoff. What is needed in these circumstances is precisely what Kennedy had, a standby device previously agreed upon to permit one of the two men to govern: an electoral college. What will remain of a president's mandate to govern, however popularly purified, if such a result occurs in a runoff election? Will the results of the first election ever be forgotten, or will those results actually define the new president's capacity to govern?

We know well enough by now that it is impossible to tinker with one part of the electoral mechanism without creating a ripple effect among the rest. If the electoral college is abandoned, the next step surely would be a national primary or some variation thereon. As Austin Ranney has noted, all the first principles argued against the electoral college apply with equal force against national nominating conventions: they are an imposition between the electorate and the outcome; they are mechanisms for aggregating minorities and, as such, often bend results; and it has happened in both parties that the man with fewer popular votes ultimately wins the nomination.

Follow the ripples in the water just a bit further. Most proposals for a national primary include the same provision for a 40 percent runoff as the Bayh amendment for direct popular vote. Thus it is quite conceivable, and even probable, that we could have the equivalent of six national elections every four years—two national primaries and a general election, each with a runoff!

The enormous impact that television has had on presidential politics, the recent spread of primary elections, and last year's public financing experiment all reflect a trend toward nationalizing presidential politics. Proposals for direct election of the president and national primaries will prejudice our politics in the same direction: both diminish the role of the states and devalue the nominations of the major parties. Nor are these the only propositions for further reform. President Carter, Vice President Mondale and most of Birch Bayh's coalition also wish to adopt a system of universal voter registration, abolish the Hatch Act and use public funds to finance congressional races.

Political reform is an episodic phenomenon in the United States. The progressive era was the last time there were so many serious possibilities of change on the horizon at the same time. The reforms of that period included women's suffrage, the direct election of senators, the direct primary and referendum and recall. The progressive impulse was to give stronger and more certain direction of public affairs to a popular majority. Yet at least two of its instruments (referendum and recall) and in some instances a third (the direct primary) were turned into tools for minority pressure.

The current reform impulse seems to be in the direction of a purer one-man-one-vote majoritarianism, set in motion by the reapportionment decisions of the Supreme Court. We have removed barriers to registration and voting and eliminated other features that seemed to dilute the influence of individual citizens in the political process. Elimination of the electoral college is a threshold change to a future of strict majoritarianism. If only one could know what that future holds.

The American political system may be at a point of serious mutation. As we evaluate the proposition that Senator Bayh places before us, we would do well to heed the caution of Professor Bickel: "There are great virtues in a conservative attitude towards structural features of government. The sudden abandonment of intitutions is an act that reverbertates in ways no one can predict and many come to regret. There may be a time when societies can digest radical structural change, when they are young and pliant, relatively small, containable, and readily understandable; when men can see the scenery shift without losing their sense of direction. We are not such a society."

[From the National Review, Apr. 7, 1970]

LET'S KEEP THE ELECTORAL COLLEGE

(By Ronald C. Moe)

Every few years, politicians and pundits pound out an old tune on the tom-toms: Abolish the Electoral College. And the beat is especially strong this year, for a man named George Wallace badly scared the leaders of both major parties. In 1968, for some time before the votes actually came in, a third party candidate seemed capable of throwing a Presidential election into the House. And it is the memory of this threat that account for much of the fervor for electoral reform today.

This concern is certainly understandable. But it is misdirected. For, as I will attempt to show, three electoral institutions strengthen rather than weaken our two-party sytem, a system which, people as dissimilar as Hubert Humphrey and Barry Goldwater agree, accounts for the stability of American republican democracy. These three electoral institutions are: the state laws regulating parties; the single-member-district concept for Congress; and the Electoral College.

This two-party system has attracted international attention for decades. Why should America, the most heterogeneous of lands, enjoy the stability and moderation generally associated with a two-party system? Scholars, foreign and domestic, are not entirely persuasive in their attempts to answer this question. Some have argued that a single "cause" has led to the establishment and maintenance of only two parties; others assume that several factors working together have accounted for our dualistic politics. In general, the explanations fall into three

groups: dualistic theories; consensus theories; and institutional theories. I prefer the third.

The dualists trace the origins of our present party system back to the conflicts involving our Founding Fathers. The path is tortuous. Initially, the battle was between the Federalists and Anti-Federalists over the Constitution. Later the lines shifted. The conflict became sectional, first between the financial interests in the East and the agrarian interests of the West, then between the North and the South over slavery. Today, dualists believe, the battle is largely between urban and non-urban interests.

A variation of this historical theme is offered by social scientists who see our dualist politics as the offspring of our national character. Americans somehow like to think in dualistic either/or terms. They purposely shun shades of difference in favor of clear-cut contests between two groups. This tendency toward ideological dualisms encourages the maintenance of a two-party system. Americans, they contend, take many different positions on a single issue and establish interest groups to promote each view.

The second category of theories revolves around notions of social consensus. Many scholars attempt to explain our party system in terms of widely held social and political norms. Despite our heterogeneous cultural heritage and society, Americans, numerous studies have informed us, share a consensus over the fundamentals that divide many other societies. Virtually all Americans accept the prevailing social, economic and political institutions; they accept the Constitution and its governmental apparatus, the regulated free-enterprise economy and the social class pattern. This consensus is lacking in many other countries where the legitimacy of basic institutions is often questioned. In such countries, multiple-party systems thrive.

Finally, we come to the various institutional theories. Such theories argue that America's heterogeneous society would spawn many parties, not few, without artificial checks. In other words, our two-party system is not a natural outgrowth of American character or history, nor is it a product of some ephemeral consensus. It is the result of our electoral system and our constitutional institutions. The corollary to this argument is that if we were substantially to alter our electoral system we would substantially alter our political party system. They are inseparable.

While the academic fashion is to attribute approximately equal credit to each of these three categories of explanation, I find that no such equal credit is warranted by the evidence. No doubt there are some supporting factors to be found in the arguments of the dualist and the consensus schools, but these are not determinative. I favor the third theory, for the best available evidence supports the idea that political party systems are electoral artifacts, easily altered by changing the rules of the game, notwithstanding cultural factors which might tend to militate against change.

ENCOURAGING NATIONAL PARTIES

Our national parties have been aptly described as loose alliances of state parties. E. E. Schattschneider notes: "Decentralization of power is by all odds the most important single characteristic of the American major party; more than anything else this trait distinguishes it from all others. Indeed, once this truth is understood, nearly everything else about American parties is greatly illuminated. . . ." The Massachusetts and Alabama Democratic parties, for example, bear little family resemblance. The state party systems are, for the most part, products of the various state electoral laws.

In the nineteenth century, states tended to view parties as private groups and made few laws to supervise their activities. Coincident with the progressive movement and its interest in direct primaries, state legislatures began to pass laws regulating parties and elections.

The situation became acute in many states during the 1912 campaign when secessionist Republicans formed the Bull Moose Party and attempted to wrest control of local party apparatuses. In most states it was relatively easy to get on the ballot, thus, Theodore Roosevelt was able to run a strong race against the regular party. The state parties became alarmed and passed a great deal of electoral legislation, the most important having to do with definitions of what constituted a legitimate party.

California provides an excellent example of how state laws encourage the two-party system and discourage the formation of splinter parties. If a group wants to run a candidate for President, it must first constitute itself a party. This means that it must have an enrolled membership of 1 per cent of the total registered voters by January 1 of the year it seeks to hold a primary and run a Presidential candidate. Thus, a new party cannot be established after the political conventions. This also means that the group has to work hard, well in advance, in order to run a candidate in November.

While the regulations appear rigorous, they are fair and surmountable as attested to by the success of the Peace and Freedom Party and the American Independent Party in 1968. The rules discourage secessionist movements and millionaires trying to buy their way on to the ballot.

The second electoral institution is the single-member district concept as it is applied to congressional elections. The single-member district concept refers to the method by which many countries elect members to their legislatures. It might be more accurately described as the first-past-the-post system. If a nation decides to have territorial units represented in its legislature it must devise a method for apportioning these districts and this, in turn, affects the nominating process of the parties.

In a majority of instances where the single-member district concept prevails, plurality elections are followed. That is, the candidate who receives more votes than any other candidate wins the single seat at stake, even if his vote falls short of a majority.

It is well known that this system produces inaccurate results. A party may receive, for instance, a majority of seats without having received a majority vote from the electorate. Theoretically, at least, the Democrats could receive only 435 more votes than the Republicans nationwide, a minute fraction of 1 per cent, and enjoy complete control over the House, 435–0, if the votes were distributed perfectly among the districts. Realistically, of course, the problem is one of distortion. In 1968, for example, the Republicans, nationally, received 48.9 per cent of the votes cast for all representatives, yet received only 44 per cent of the seats in the House. In fact, since 1932, the Republicans have been under represented in every Congress except the Eightieth (1947–49).

The theory underlying the single-member district concept is best understood when compared with the opposite theory—proportional representation. Under pure proportional representation all votes in the country are tabulated together and the parties are awarded seats according to the percentage of votes received nationally. If the country had 25 or so parties, as was the situation in the French Fourth Republic (pre-de Gaulle), each party would submit a list of candidates in order of preference and then an agency of the national government would distribute the seats among them according to their relative strength. In a six-hundred member assembly, for example, if an extreme party received only 3 per cent of the votes spread over all the districts, it would still be assured of eighteen seats in the assembly. A party receiving only 3 per cent of the votes nationally in a country operating under the single-member district concept with plurality elections would, in all likelihood, have won no seats in the legislature.

IMPOSSIBILITY OF PARITY

The point is obvious—proportional representation, or the application of the one-man, one-vote principle to general legislature elections, increases the probability of legislatures composed of many small parties with coalition government required to rule. The weakness of the French Fourth Republic was attributed, in the main, to the plethora of parties and their inability to establish a stable government.

De Gaulle, upon ascension to power, eliminated proportional representation and instituted a single-member district system without, however, including a plurality election clause. Even with run-off elections required (a gimmick to weaken the Communists), most of the minor parties were driven from the scene and the elections came to resemble rather closely their American and British counterparts.

The fact is that it is simply impossible to have an absolute parity of voting power—that is, every man's vote counting equal in the *final* distribution of seats in the legislature—if a nation wants its legislature to represent territorial units. It is equally impossible to have absolute parity of voting power except under a system of national proportional representation and such a system virtually assures a multiparty political system.

The goals of voting parity and the maintenance of a two-party system are, for all practical purposes, incompatible.

The final institutional pillar of our two-party system is the Electoral College. The concept underlying the Electoral College is similar to that of the single-member district system except that it applies to the Presidency. In effect, just as a congressman cannot be split in half because the opposition party received only a few votes short of the necessary plurality, a state is similarly viewed as indivisible. The unit rule means that all of the state's electoral votes will be cast for the one candidate, and his party, who garnered the greatest number of votes. (The unit rule for voting in the Electoral College is a tradition, not a constitutional requirement. Recently, the legislature of Maine voted to eliminate the unit rule and replace it with a modified congressional district elector plan.)

IMPORTANCE OF UNITY

Occasionally, critics will claim that the unit rule serves to disenfranchise the minority. This is false. First, they had an opportunity to vote and win. They did not win, but it does not follow that they were disenfranchized. To lose is not to be disenfranchized.

The race for President is not just another election race. This contest sets the tone for the whole political system. The fact that a party and its Presidential candidate must win more votes than any other candidate in a given state in order to receive any electoral votes means that a high premium is placed on remaining a unified party.

If a party permits its ranks to be split, it loses not just the amount of votes that the dissenters can subtract from the total,

but any chance at all for the votes cast by the electors of the state.

Consequently, the stakes are high. Traditionally, the parties have been moderate and pluralistic for they found they lost when they indulged in exclusive ideologies. Both major parties were required to be inclusive in character. "True believers" and congenital reformers, eager to emulate European parties, are constantly annoyed at the non-doctrinaire approach to politics followed by the two parties.

Not only are the two parties required to be moderate and non-doctrinaire, they also are required to be national in orientation and organization. If a party confined its appeal to one section of the country, it might be able to build a majority in the popular vote and still lose in the Electoral College. Parties early found that it really did no good to build up a substantial lead in New York, say, if it meant that Minnesota and smaller Western states were ignored. They count too.

A Presidential candidate needs only one more vote than any other party to win New York, then the battle has to be shifted to other states. Building a massive plurality in one state, at the expense of attention to other problems and other areas of the country, is not smart politics. The big states, while crucial, do not hold the entire key to the election. Mr. Nixon proved this rather conclusively in 1968.[1]

The debate on reform of the Electoral College has been quite one-sided so far—that is, only the critics have been heard. This is, in part, understandable since virtually everyone today considers himself a critic of one type or another. The Electoral College, so the argument goes, is an anachronism and ought to be abolished before it causes chaos. This is one thing Gore Vidal and Richard Nixon can agree upon. If ever there was consensus on an issue, this is it.

But the first step toward wisdom in matters of electoral structure is to recognize that no electoral system will ever be able to eliminate in advance all chance of confusion and crisis. When we talk about elections, we really talk about one of the oldest problems known to man, succession to power. One of the traditional attractions of a republic as a polity has been its anwser to the question of succession. Somehow elections seem a less expensive way to transfer power from one group to another than a clash of arms or interminable palace intrigues.

Recognizing the immensity of the problem, possibly our goal ought to be to devise a system in which the odds against crisis are minimized and the odds of a majority Executive maximized. This was the goal of the Founding Fathers—not the creation of a perfect system with all risks eliminated. They were never utopian.

AN ALTERNATIVE

The unfortunate aspect to our inordinate affection for the present is that it makes it more difficult to raise meaningful questions about our political institutions. The relevant question with regard to the Electoral College, for example, is whether or not the Electoral College performs a useful function toward maintaining the two-party system today, not what were the original purposes of the institution or what might have happened in a particular election a century ago if no candidate had received a majority. These kind of questions are of interest to historians, but are, essentially, irrelevant to the contemporary problem of succession to power.

Those who criticize the Electoral College cannot be charged with failure to offer an alternative. In fact, there are many alternative plans being circulated which run from pure proportional representation, to electoral voting according to congressional district, to simple, direct election.

The proposal enjoying the most support at present is the elimination of the Electoral College altogether and the substitution of simple direct election. Modifications have been added, however, in recent months. A provision generally accepted: If no candidate received 50 percent of the popular vote in the general election, a second, run-off election would be held between the two candidates who had received the most votes. This proposal has subsequently been further modified so that if no candidate receives 40 per cent of the vote, a run-off election will be held. These modifications are designed to placate those who see the problem of a minority President and multiple parties becoming critical. The above described proposal, herein greatly simplified, is essentially that which both Senator Birch Bayh, Chairman of the Senate Constitutional Amendments Subcommittee, and the American Bar Association have vigorously campaigned for.

FAULTY REASONING

Their political goal, in philosophical terms, is to "have every vote count equally in the final counting process." Is there a price that must be paid in order to achieve this deceptively appealing end? The sponsors answer in the negative. I suggest, to the contrary, that there's a very high price indeed. We had best be aware of it in advance.

The direct election plan is ironic in that it proposes to institutionalize a weakness which it alleges the Electoral College possesses, but which, in reality, the Electoral College has not exhibited since the election of 1824. That flaw, according to political folklore, was that a third candidate, Henry Clay, was able to jockey for personal advantage in determining to whom he would shift his support. The great contemporary fear is that no Presidential candidate will get a majority of the electoral votes and hence the election will go to the House with the third-party candidate holding the critical balance of power. This fear was spelled out in great detail in the newspapers during the 1968 election as they conjured up horror stories about what would happen if the vote were thrown into the House.

Let us look briefly, then, at the cause of this fear: Mr. Wallace and his American Independent Party. It should be noted, at the outset, that it is impossible to ignore any candidate who receives 10, 15, or 20 per cent of the popular vote. He has a right to be heard. The question is: Under what conditions can the influence of a third party be kept minimal while still permitting all votes somehow to count? The fear was that under the current Electoral College system Mr. Wallace would play a maximum role in terms of his voting strength rather than a minimal role.

The reasoning of those who believed this argument was faulty. The Electoral College, far from exaggerating the strength of third parties, minimizes their strength. Also, the Electoral College virtually assures, if we use history as a guide, a majority vote, in terms of electoral votes, to a major party candidate, thus eliminating the uncertainty which follows any run-off election whether popular or in the House.

Under the present system with its unit rule the probability of a majority President, that is, one cloaked with the legitimacy of over 50 per cent of the popular as well as electoral vote, is very high. If ever the system were to fail us, it should have been in 1968. The two major parties were evenly split with a strong third party, having a national base, challenging their hegemony. Why was the Wallace effort so unsuccessful?

It was unsuccessful because, and not in spite, of the Electoral College's unit rule. The functioning of the unit rule exhibits many subtle manifestations. It is not merely a mechanical process applied by the commentators on election night. It also influences how people will vote in the first place. Under direct election Mr. Wallace's vote would no doubt have been substantially greater, for then his votes would have been cumulated nationally. Many people realized that to vote for Wallace, as their first choice, was, in most states, wasting a vote since he would not gain a plurality in the state. Hence, they voted for one of the two major candidates. The unit rule, therefore, has an anticipatory impact on the voting decision of the individual citizen.

The Electoral College assures, in virtually every case, that a majority President is elected in the first instance thus permitting the President to begin his job without the question of his legitimacy being raised. Is not the strength of our political system explained principally in terms of the stability of our succession process? The Electoral College permits us to settle the problem of Presidential selection quickly and bestow legitimacy on the man who captured enough states to win a majority of electoral votes.

The Electoral College is "undemocratic" only if we are willing to brand all forms of indirect selection of officials or distortions of the one-man, one-vote principle by definition as "undemocratic." Our Founding Fathers offered no such definition. They contended that they had established a "popu-

[1] Some liberal groups have recently decided that the Electoral College with its unit rule ought to be maintained. Their reasoning is that it benefits the large industrial states wherein certain minority groups can exert maximum influence. Statistically, of course, this is a questionable argument. Because of the present system which provides for a base of three votes per state, every state with a population below the median gain political influence in relation to those states above the median in population. Using the 1960 census and the two most extreme states. Alaska and New York, each elector from Alaska represented 75,389 citizens while each elector from New York represented 390,286 citizens. The unit rule does not change the impact of these statistics. The real significance of the "malapportionment" of electors is that it forces the parties to think and operate in national terms. The greater the spread in appeal of the party, the greater the chance of victory. The election of 1968 is a classic example of how distribution of votes may count for more than sheer numbers. While Nixon and Humphrey were close in the popular vote, Nixon's appeal was more national than Humphrey's so he was able to win one elector per 105,594 votes while Humphrey, whose appeal was largely in a few industrial states, required 163,696 votes to win one elector. Wallace was hampered even more by the limitations imposed by his sectional strength and needed 215,185 votes to receive one electoral vote.

The Electoral College, then, provides certain statistical imperatives which steer Presidential politics toward a two-party pattern and moderate national leaders.

All of this is to suggest that our two-party system is no accident; it is *not* peculiarly a product of American "culture" or of some other socoiological phenomenon. It is an institutional artifact which we have the option of preserving or destroying. And one of the surest ways to bring on destruction is to abolish the Electoral College.

lar government," with "republic" and "democracy," as understood in the terms of the participants, being equally valid species of this genus. A republic, or rule by indirect participation, is a valid form of popular government. The Electoral College, while not democratic in the narrow sense, is surely within the intellectual framework of popular government and its sub-type, the republic. The Electoral College, with its traditional unit rule, is a subtle, yet effective method of keeping the politics of the Presidency, and hence, to a large degree, of our parties, within manageable proportions.

PILLARS OF STABILITY

The indirect selection process of the Electoral College insures that splinter or third parties will have great difficulty in gaining sufficient strength to be decisive in the final outcome. Under any of the proposals, whether for direct election, proportional representation of electors or the host of variations on these two themes, the third party (in 1968, the American Independence Party) would have been permitted to exercise maximum leverage.

Under direct election, Mr. Wallace's strength would no doubt have reached that which the polls indicated he enjoyed prior to election day. If this assumption is correct—even with the 40 per cent requirement—a runoff election would have had to have been held with Wallace and his party providing the crucial swing factor.

In other words, the reformers want to rid us of a system which discourages splinter parties and which minimizes the odds of non-majority Presidents. They want to substitute instead a system whereby splinter parties and candidates will have maximum influence. We will change from a situation in which crisis is possible but unlikely, to a situation in which it might be chronic.

Few words cause more intellectual confusion than the word "reform." When someone says he wants to reform" some institution, he has generally begun his intellectual deliberations with a conclusion and worked backward. Almost by definition the status quo is judged "bad" and it then becomes necessary to rewrite the rules governing that institution in order to provide advantages to a particular group promoting a particular set of policies. Change, a more neutral word than reform, is almost always justified in terms of the general welfare when, in fact, changes in rules and institutions invariably aid one group at the expense of another. Change, then, is not inherently good. There are good changes and bad changes. The criteria for good and bad is measured according to the general theory of politics one accepts.

Throughout this essay a theory of popular government has underlain my substantive arguments. The theory is that democracy, as generally defined today, functions best when there are two major parties, as opposed to a multiparty system. These parties ought to be relatively non-doctrinaire and original in their organization and approach. They ought to conceive of themselves as the "ins" and the "outs," with both parties being committed to the fundamental values of the regime. Two-party politics suggests that both parties ought to contain a portion of most of the groups in the society and that neither ought to become exclusive or ideological. While such a politics may lack the momentary excitement of the righteous cause victorious, it is a politics which permits all groups to share in power and hence provides the environment necessary for the society to face real problems and make measured social progress.

The Electoral College, with its traditional unit rule, is a critical factor in the maintenance of our two-party politics. While it is conceivable that our politics would remain largely non-ideological and within the two major parties without the Electoral College, it is unlikely. The Electoral College does serve an important function today. One can, of course, be opposed to the two party model of politics or one can desire to have ideologically oriented parties, as the New Left does. If this is the political theory you support, then the elimination of the Electoral College should be high on your list of priorities. What the facts do not support, however, is the argument that the demise of the Electoral College will actually strengthen the two major parties and curtail the potential dangers of third parties.

Our two-party system is capable of being maintained only if the three pillars described previously are maintained in good order. To destroy any one of them would be to endanger the entire structure. At the very least, we owe it to those who are to follow us not to scuttle our electoral system, which has served us so well for nearly two centuries, without first attempting to understand the system. We must not permit ourselves to fall into the trap of substituting emotion and slogans for reasoned analysis.

[From the New Republic, May 10, 1969]

THE POPULAR ELECTION OF FUTURE PRESIDENTS: WAIT A MINUTE

(By Alexander M. Bickel)

The House Judiciary Committee last week approved a proposal for a constitutional amendment abolishing the electoral college and substituting direct popular election of Presidents. While he had said initially that popular election was not his first preference, Mr. Nixon later told a press conference that if the Senate and House adopted the proposal, he would support it. And now the President is quoted as promising that he will, given Congressional approval of the amendment, "throw the full weight of his office behind the drive for ratification." The amendment would be effective one year after the 21st day of January following ratification by three-quarters (38) of the state legislatures. Thus, the chances that a President will be elected by direct popular vote in 1976, though probably not in 1972, look better than they ever have. But perhaps Congress and the country may still be induced to pause for a second thought.

One objection to the electoral college as it now operates is that it can put in office a minority President—not merely, like any other system being discussed, a plurality President, but a candidate who had fewer votes than his chief opponent. That is indeed theoretically possible, and it has happened once in normal circumstances, though not in this century. But it is at all likely to happen only when the election is a toss-up, as in 1888, when 100,000 votes divided Cleveland from Benjamin Harrison. In such circumstances, it is pretty doctrinaire to think of either man as the popular winner. If there were no other considerations in play, it might be as well not to run even this risk. But other considerations are in play, and they are very substantially more important.

Proponents of the popular election claim that the electoral college is malapportioned in favor of the small states. And so it is, formally, because the electoral college assigns each state as many electoral votes as the state has Congressmen and Senators and each state has, of course, two Senators regardless of its population; and it gets one Congressman even if the state is a good bit smaller than any single Congressional district in, say, New York. If each state's electoral vote were divided—precisely or approximately—in proportion to the popular vote cast for each Presidential candidate, the malapportionment would be quite real, and might have considerable effect. (Mr. Nixon has said that proportional division of the electoral vote is what he would like to see done.) But as things now stand, we do not have a proportional system. The electoral votes of each state are cast by the unit rule—winner takes all. This is not constitutionally required, but it has been the uniformly followed practice for well over a century.

Owing to the operation of the unit rule, the malapportionment in the electoral college in favor of the small states is for the most part only apparent, not in practice real. The candidate who carries New York or Illinois by a 50,000 or even 5,000 plurality or majority gets a greater number of electoral votes than he can obtain by carrying several smaller states by larger popular majorities. For this reason, the system is malapportioned in favor of the big industrial states, in which party competition is vigorous, and which generally swing by relatively small percentages of the popular vote. Not only that; the system is in effect malapportioned in favor of cohesive interest, ethnic or racial groups within those big states, which often go very nearly en bloc for a candidate, and can swing the state's entire electoral vote.

Mr. John F. Banzhaff, III has expressed all this mathematically. Defining voting power as "the ability to affect decisions through the process of voting," he has concluded that voters in New York and California have over two and one-half times as much voting power (*i.e.*, as much chance to affect the national result in a Presidential election) as voters in smaller states. Pennsylvania, Ohio, Michigan, Illinois, even Massachusetts are also substantially advantaged. This fact governs the strategy of modern Presidential campaigns and the decision of the nominating conventions, and has in our day resulted in the orientation of the Presidency, as a rule, toward an urban constituency. That orientation of the Presidency, countervailing a tendency in Congress toward more conservative, rural and small-town attitudes, would be less secure under a system of popular election. With popular elections, a hard campaign aimed at New York or California could get a candidate some few hundred thousand votes that he might not otherwise have obtained. So would a campaign designed to appeal to the Southern or the Mountain states, let us say. There is more paydirt now in large industrial states. If Presidents were elected by popular vote, there might be more to gain elsewhere.

On balance, therefore, the smaller states, especially those that are relatively homogeneous and nearly one-party, should prefer popular election over the present system. But that does not mean that some small-state Senators and Representatives may not also perceive possible advantages in the present system. There is first of all a symbolic value in play for the small states, since the electoral college, on its face, confirms the federal structure, and the equality, as in the Senate, of all states, large and small. Secondly, circumstances are conceivable in which tiny shifts of popular votes in a group of small states, combined with equally minor shifts in at least one big state, could swing the election, regardless of the total national popular vote. In 1960, small shifts of popular votes, totalling no more than some 11,000, in New Mexico, Hawaii and Nevada, as well as in Illinois and Missouri, could have put Nixon in office.

The possibility of such a decisive role falling to a group of small states is highly

remote. Actually, it is small margins of the popular vote in the big states that have often been decisive, and in any event, this much greater likelihood exerts its powerful influence on the nominating process, and on the nature of Presidential campaigns. But some small-state Senators and Representatives may take comfort in the other possibility, however remote; they may think it worthwhile to retain the present system because circumstances are conceivable in which the apparent and generally ineffective malapportionment in favor of the small states may actually work out that way. This is a remote expectation, but it is not an irrational one, and those who entertain it are entitled to it. The fact that they may entertain it does not alter the realities that should control the judgment of Representatives from large states. It simply happens that the electoral college can satisfy, at once, the symbolic aspirations and remote hopes of the small states, and the present, practical needs of the large ones. Not many human institutions work out quite as artistically as that.

Whatever its other effects and consequences might be, a system of popular election would seriously endanger the two-party system, and hence the stability of our politics. The electoral college makes it impossible for a third-party candidacy to have any sort of an impact, to entertain any hopes of deadlocking the election and thus putting itself in a good bargaining position, unless it has a strong regional base. And even George Wallace, who did take five Southern states in '68 couldn't do it. For a third-party candidate can get up to 20 percent or more of the popular vote, and yet no or very few electoral votes. And so third-party candidacies that have a general national appeal are effectively deterred. Popular election, on the other hand, would invite them; and it would do so without deterring the regional candidacies that are now possible. In order not to put plurality Presidents with weak mandates in office, the popular election amendment now before us provides for a run-off in the event that no candidate achieves 40 percent of the popular vote. One strong minor party candidate, or several weaker ones together, would stand an excellent chance of keeping anyone from getting 40 percent, and thus of putting themselves in a worthwhile bargaining position in the period between the first election and the run-off.

Candidates like Eugene McCarthy or Nelson Rockefeller gave little thought in 1968 to making an independent race after they lost the nomination, because a popular vote of even as much as 25 percent could well have left them with no electoral votes at all. But under a system of popular election, every consideration that brought forth issue-oriented candidates for the nomination would with equal or even greater force propel them into the general election. There is a strong possibility, if not probability, that under a system of popular election the run-off would be typical; the major party nomination would count for much less than it now does; there would be little inducement to unity in each party following the conventions; coalitions would be formed not at conventions but during the period between the general election and the run-off; and the dominant positions of the two major parties would not long be sustained. This sort of unstructured, volatile multi-party politics may look more open. So it would be—infinitely more open to demagogues, to quick-cure medicine men, and to fascists of left and right. Where a multi-party system has been tried, it has been found costly in just this way, and it has scarcely yielded the ultimate in participatory democracy or good government.

Another benefit of the present system, as Professor Ernest J. Brown of the Harvard Law School has pointed out, is that it "isolates and insulates charges of voting irregularities." Most frequently, a shift in popular votes, even if it should change the result in a state, will not affect the national outcome. Claims of voting irregularity are consequently not often pursued. But if everything depended on the total popular vote, we would very likely face in each close election, as Professor Brown has said, "reexamination of every ballot box and voting machine in the country, not to mention also the records of registration and qualification of voters." We could not possibly continue to let the states run the elections as they now do. Centralized federal control of qualifications for voting very probably, and centralized federal control of the counting process certainly, would be essential. There is no call, perhaps, to be unduly alarmed at this prospect. We are not quite a South American republic yet. But there is no use blinking the fact, either, that central control of vote counting opens up opportunities for national manipulation. Nobody is likely to seize these opportunities in the near future, but surely it is better that they not be available.

To approve of the present electoral college system as in essence more equitable and safer than any substitute that has been proposed is not to say that it is perfect. It needs prompt improvement in at least two respects. There is no good reason why an elector should be free—as in theory the electors are now free—to vote his own personal preference and thus break the unit rule. To make sure that this cannot happen, the electors should be abolished as such, and the electoral vote of each state should be cast automatically for the popular winner.

Another fault of the present system—although it has actually manifested itself only once since passage of the 12th amendment in 1804—is that in the event that no one has a clear majority of the electoral votes, a President is chosen by the House of Representatives. But members of the House on such an occasion do not vote individually, in the usual fashion. Rather each state's delegation polls itself, and a majority of each delegation then casts its state's vote, one vote per state, whether New York or Alaska. This method has nothing to commend it. Election by a majority of the individual votes of members of the House would be infinitely preferable, as would election by a joint session of Congress, each Senator and Representative casting one equal vote. Representative Bingham of New York has proposed a run-off *within* the electoral college system, and that is also a possible cure. Otherwise, however, the electoral college needs no fundamental change. And as John F. Kennedy said in 1956, quoting Falkland, "When it is not necessary to change, it is necessary not to change."

[From the Baltimore Sun, Apr. 28, 1977]

KEEP THE ELECTORAL COLLEGE

(By Austin Ranney)

"If it is not necessary to change, it is necessary not to change."

So said John F. Kennedy, who led the fight in 1956 against proposals to abolish the Electoral College. Kennedy's principle may be too strict to control all public decisions, but it seems as prudent now as in 1956 for judging constitutional amendments to change our political process.

I shall apply it here to Senator Birch Bayh's proposed amendment to elect the President by direct popular votes, counted without regard to state lines with a run-off election if no candidate receives 40 per cent or more of the votes.

President Carter, in a March 22 message to Congress, endorsed in principle the Bayh amendment and the proposition of abolishing the Electoral College, without endorsing any of its specifics. Rather than proposing a specific direct election amendment, he would allow the Congress to proceed with its work on the Bayh amendment without the interruption of a new proposal.

By the Kennedy principle, the amendment should be adopted only if there is a clear and present danger of evils the amendment will prevent without bringing even greater dangers. What is the danger here? The amendment's supporter base their case largely on what Senator Bayh calls "electoral roulette"—the risk under the present system that the candidate who wins a plurality of popular votes will win fewer electoral votes than his opponent.

The possibility is indisputable. The "unit rule" procedure awards all of a state's electoral votes to the candidate who wins a plurality, however small, of its popular votes. Consequently it is no trick to conjure up arithmetic nightmares in which a candidate gets the most popular votes but loses to an opponent with more electoral votes.

The Kennedy principle, however, requires a clear and present danger, not an arithmetic possibility. Does such a danger exist? Senator Bayh thinks so. "Only by sheer luck," he said in 1976, "have we survived another round of electoral roulette without the popular will being thwarted."

The senator's notion of "sheer luck" would not, I think, serve him well at a roulette wheel. The fact is that only twice in our history—1676 and 1888—has the candidate with the most popular votes lost in the Electoral College. So in 38 elections since 1828 (the first in which most electors were chosen by popular votes) the system has failed to produce the popular winner only twice, and the most recent failure happened 88 years ago. Most human contrivances that work 95 percent of the time are not considered in urgent need of repair.

That is not enough for the amendment's supporters. They say it could happen any time. In 1976, some offer for an example, if 5,559 votes had switched in Ohio and 3,066 in Hawaii, Carter's 297–240 margin in the Electoral College would have become a 269–268 Ford victory, even though Carter would still have had over 15 million more popular votes.

Quite true. But it is equally true that if comparable numbers of voters had switched in Iowa, Maine, Oregon, and South Dakota, Carter's Electoral College total would have swelled from 297 to 319. As long as we are switching votes around hypothetically, why not switch them that way too? After all, a change in issue position or a reallocation of campaign time that switches votes one way in some states is likely to switch them the other way in other states.

Senator Bayh has never explained why the rules of "electoral roulette" as he plays it require all hypothetical switchers to move from the Electoral College's winner to its loser. But if we turn from games to the real world, we can see reasons why the Electoral College has in fact unfailingly elected the popular winner for nearly a century now—even in such eyelash-close elections as those of 1916, 1960, and 1968.

The first fact to note is that the 12 largest states have a combined total 285 electoral votes, well more than a majority. Hence by how these states vote. And quite remarkably, they vote as the nation does.

For instance, in their combined total of presidential elections since 1952, those states have voted for the winner 67 times. Even more remarkable is how closely their divisions of the popular vote match the na-

tion's: In those seven elections the national winning candidate's per cent of the popular vote in these states has deviated from his per cent in the nation by an average of less than one-half of one per cent.

So the Electoral College's 38-year perfect record for electing the popular winner is not "sheer luck." It is the direct result of the nationalization of American politics, which means that as goes the nation so will go most of the states that dominate the Electoral College.

Can we be absolutely certain they always will? Of course not. But than, can we be absolutely certain—or even as certain—that the Bayh amendment would not bring worse evils? Theodore White, for example, predicts it would result in massive vote frauds. A 1970 Brookings Institution study concludes it would gravely weaken the two-party system. Other commentators believe it would deprive the ethnic and racial minorities in big cities of the special voice the Electoral College now gives them. How likely is the amendment to produce these evils? We can only guess.

In short, today as in 1970 and 1956 we are being asked to embrace the unknown risks of new evils in preference to the known risks—at a probability of 5 chances in 100—of the system we have. Is this the kind of clear and urgent need for change that warrants a constitutional amendment? The fairest conclusion. I think, is the old Scottish verdict: Not proven.

[From the Congressional Record, Apr. 9, 1979]

DIRECT PRESIDENTIAL ELECTIONS—THE CASES PRO AND CON

(By Warren Weaver, Jr.)

WASHINGTON.—In the 1976 Presidential election, a shift of fewer than 10,000 votes in Ohio and Hawaii would have given Gerald R. Ford 270 electoral votes to Jimmy Carter's 268, keeping the Republican in the White House despite a popular majority of nearly 1.7 million votes for the Democrat. A shift of fewer than 15,000 votes in Ohio and Delaware would have left each contender with 269 electoral votes, and the decision would have passed to the House of Representatives, with each state entitled to one vote. If all House members had voted their party, Carter would have overwhelmed Ford, 36 to 11, with three states—New Hampshire, New Mexico and Virginia—unable to vote because their delegations were evenly divided.

Neither of these disquieting scenarios took place. But under rules for the Presidential election embodied in the United States Constitution and untouched since 1804, either very easily could have. Such possibilities are lending impetus to the latest effort to amend the Constitution, under consideration in the Senate Judiciary Committee last week.

As he has before, Senator Birch Bayh, Democrat of Indiana, is leading the campaign for an amendment to abolish the Electoral College, elect the Presidential candidate who receives the highest popular vote and hold a runoff between the two top candidates if no one receives 40 percent of the vote. Leading the opposition are three conservative Republican Senators—Strom Thurmond of South Carolina, Orrin G. Hatch of Utah and Jesse A. Helms of North Carolina.

Efforts to revive the direct election plan tend to be cyclical, gaining renewed strength after a national election so close that the popular vote winner almost failed to become the electoral vote winner, or one in which potential abuse of the existing system caused widespread apprehension. In 1968, George C. Wallace openly threatened to use any third-party electors he won to ensure that the House, operating under the constitutional provision for no electoral vote majority, would choose the major party candidate he favored whatever the popular vote might be. Less than a year later, the House approved a direct election amendment 338 to 70. It died in the Senate, where 68 votes are required before an amendment goes out for ratification by three-quarters of the state legislatures, when supporters were unable to break a filibuster by Southern and small-state lawmakers.

There are several compromises that would retain electoral votes; eliminating electors, who sometimes vote against their mandate, and automatically casting a state's electoral vote for the candidate who carried it; allocating electoral votes by Congressional district rather than state; and dividing a state's electoral votes proportionally among candidates according to their popular vote.

But none of these is likely to figure in this years' debate, which seems to be narrowed to an all-or-nothing matter. More openly than before, minority groups are actively supporting the electoral college on the ground that any change would deprive them of present political leverage. Others argue that direct election would subordinate the electoral process to the pressures of the press and weaken the two-party system, as some say the proliferation of Presidential primaries in the last two decades has already done.

Mr. Hatch and Mr. Bayh were interviewed separately on the subject last week; excerpts from the discussions follow. The first question asked of each was what changes he thought are needed in the Constitution to give each voter a full and fair share in the choice of the President.

SENATOR HATCH

A. Under our dual Federalism system we have an approach thought out during the great compromise between the large states and the small states. The founding fathers were afraid of the tyrannical majority, and so instead of having one-man, one-vote in the vote for the President, they adopted the reasonable majority rule by emphasizing the power of the states. I would not change the Constitution.

Q. What about the "faithless elector" problem?

A. Of the 20,000 electors since the beginning of this Republic, only 10 have been faithless. The faithless elector is a red herring raised to try and create some argument in favor of direct election. Now, I would have no problem at all in doing away with the possibility.

Q. By statue or by amendment?

A. The states can do it, under the Constitution. But I would have no objection to an amendment.

Q. You're not troubled by the prospect of electing a minority President?

A. We have only had one minority President elected, in 1888, Benjamin Harrison. But even in that election, in which Grover Cleveland capturd seven-tenths of 1 percent more of the popular vote, substantial vote corruption occurred in the Tammany Hall precincts of New York, one of the Cleveland strongholds. Cleveland's main problem was that his support was relatively sectionalized. Harrison went all over and as a consequence won because of the Electoral College. And that's precisely what our founding fathers wanted to happen. They did not want to have any region of the United States control the whole country.

Q. But if you vote for the losing candidate within your state, your vote is cancelled out. Does that bother you?

A. Not at all. Direct election takes one of the diverse principles that underlies the constitutional system—political equality—and transforms it into the sole operating principle. It ignores basic values and principles of Federalism—separation of powers, checks and balances, geographical balance.

The Constitution contemplates many non-majoritarian institutions. Number one is the Senate of the United States. The Presidential veto is a non-majoritarian institution. So is judicial review. In other words, the Constitution was not drafted by nose-counting Democrats like some of those who are propounding the direct election of the President.

Q. You think there'd be an increase in the number of candidates?

A. It'd look like the Boston Marathon. In the end you're going to have every special interest group in the country—from big labor to the Right-to-Lifers to the Birch Society to the Communist Party—trying to split off and force a run-off. The run-off is going to be the real election and there's going to be all kinds of corruption and jockeying for position.

Q. Do you sympathize with the black and Jewish organizations who feel a change would dilute their political power?

A. I certainly do. They're saying this because they've realized that it's easier for minorities to be heard on a state level under the Electoral College system than it is for them to just be lost in a sea of a majoritarian election process.

Q. You don't feel that the advantage minority groups now have is unfair?

A. Oh no. The founding fathers provided the Electoral College precisely for that reason. They didn't want minorities to be walked on by a radical majoritarian approach. While an ideological devotion to one-man, one-vote may create a "simpler" system of government—and I question that—it was in its very variety and complexity that the founding fathers envisioned their new government best protecting the rights and security of its citizens.

Q. That is consistent with the large-state/small-state situation. Small states are minorities.

A. No question about it.

Q. But you're not disturbed by the fact that under the Electoral College system, let's say 10,000 voters in Salt Lake City have greater influence than 10,000 voters in New Haven or New York?

A. I would hate to see it any other way. In the place of a system that has worked, direct election would substitute a system with respect to which experts are in some substantial disagreement. Would the small states or large states benefit? What special interest would benefit? What would happen to the two-party system? What about political party conventions? What about party organizations?

Instead of competing for electoral victory, small parties would now be competing in conjunction with other small parties to deny the 40 percent threshhold to a majority candidate. A recount would throw the office of the Presidency into a turmoil, and under a single national direct election each one of the 180,000 precincts would have to be recounted in the event of a close race—and I think that would be a matter of course after a few years. It isn't a simple question. The burden of proof hasn't been met.

SENATOR BAYH

A. There's only one way, and that's to have a direct election of the President. That is the criterion we've established for every other election in America. Everybody's vote counts the same, and the winner is the one who gets the most votes.

Q. Is election of a President with a minority of the vote the most serious flaw in the present system?

A. The first time it happened, when we had Hamilton vs. Burr [in 1800], we ended up with the 12th Amendment [providing a mechanism to choose a winner when there

is no electoral vote majority through one-state, one-vote in the House of Representatives]. All the people who think the founding fathers had infinite wisdom ignore the fact that one of the first changes to be made in the Constitution was this very feature of how you elect the President.

Suppose we had had a dead tie [in 1976]? It doesn't take much imagination. All you have to look at is Humphrey's testimony and Dole's testimony in which they very candidly admitted that in a situation like that they'd go out shopping for electors to see if you could buy one.

Q. Was the black and Jewish groups' claim—that they're going to have diluted power if the Electoral College is abolished because they now enjoy a balance position—as openly and bluntly stated in the past?

A. The American Jewish Congress has had a consistent position on this. In fact, look at what John Kennedy said. He opposed direct election and admitted there was this bias. But he said that he would buy that because there were a lot of states where black voters weren't registered. Since then, of course, that has been remedied.

Q. Do these groups have an immutable right to the same kind of advantage?

A. Well I think it's questionable whether they have had an advantage. Secondly, I don't think they have any right to it.

Q. It's argued that the situation is parallel to that of the small states versus the large states.

A. It's specious. If the Jewish argument makes sense, why is it that New York went Democratic and New Jersey, right across the river, went Republican? For the black voters, how does somebody who's a black leader in Chicago protect a system in which every black vote on the West Side was cast for Jerry Ford in the last election—every black vote in Gary, every Chicago vote in Southern California, was cast for Jerry Ford, despite the fact that probably 85–90 percent voted for Jimmy Carter. I don't see how you can say that black voters have an advantage.

Q. Does Federalism, greater state identity, trouble you?

A. Well, anybody who's read the Constitution's guards knows that the Federal system was put together by our founding fathers in the legislative branch of our country. The United States Senate really represents equal representation in each state.

Q. But on a popular-vote Presidential campaign, would smaller states be ignored?

A. With more emphasis being placed on television, with the unit rule and most of the people living in the large elective vote states, that's most of the campaigning under the Electoral College system. Direct popular vote wouldn't change the fact that you're going to go where most of the people are. You would prabably spend more time in the large population centers of the small states and less time in the small population centers of the large states. Now you ignore places not because you wouldn't like to appeal to 200,000 voters but because you're only talking about three electors, four electors. Whereas you go in a smaller size city—Olney, Illinois—knowing that you're talking about 28 electors.

Q. Would direct election encourage many more splinter party Presidential candidates and produce run-offs?

A. I don't think so. If you were talking about a 50.1 or 50.01 percent, then a small party could make a difference. The biggest split we've had was [in 1912] when Teddy Roosevelt and the Bull Moosers come in second, the Republicans, third and you had Eugene Debs with a million votes. Still, Wilson got almost 42 percent of the popular vote.

The party system is not based on Presidential politics. It's based on the foundation of how the political system works and the understanding of most politicians that if somebody goes out there and runs independent, then we're going to lose and the other side is going to win. The people who suggest the Electoral College is the saviour of the two-party system apparently have forgotten a guy by the name of George Wallace, or another fellow named Gene McCarthy. Gene McCarthy, with less than 1 percent of the popular vote was almost determining the President of the United States—not because he wanted to win but because he wanted to try to keep somebody else from winning and almost did. If he'd gotten on the ballot in New York, he'd of done it sure as the world.

[From the Washington Star, July 10, 1979]

"NO" TO THE BAYH AMENDMENT

We note the disarming admission of some prominent advocates of the proposed constitutional amendment to scrap the electoral college for a popular-vote system that it is among the most "radical" changes "ever proposed to the Constitution."

That it is; and we trust the fact will not be lost on the Senate when it votes this week—first, on a cloture motion to shut off debate, and later, if the cloture motion succeeds, on the issue itself.

It is a sound proposition in constitutionality, as in sport and war, that you can't beat something with nothing. The electoral college is a big something in our system—the linchpin of the federal system and the pillar of a stable two-party system. One needn't ignore its flaws—e.g., the occasional "faithless elector" who defies popular instruction, or the minuscule risk of a president who ran second in the popular vote—to believe that the popular vote amendment is the closest thing to nullity responsible tinkerers with the Constitution could devise.

Even if the mechanics of the popular vote plan worked as advertised—even if in hair's-breadth elections it delivered a clear choice—what kind of choice would it be? A choice, surely, in which the states were denied their mediating role. A choice in which most of the campaigning had been done, not by traditional techniques that put candidates in personal touch with the electorate, but from remote network television studios under the direction of "media experts."

The nature of the presidency created by a popular-vote system is, to be sure, unpredictable. But it would be a very different presidency from the one that has served us well for nearly 200 years—dangerously immune to and out of touch with the complex interests and identities of states and regions, insufficiently disciplined by the particular interests of traditional voting blocs (labor, business, minorities, urban ethnics, Southerners) with vital points of view to assert and protect. And such a presidency would be the greatest imaginable boon to single-issue politics and fringe candidacies.

If, as many of us suspect, the decline of presidential authority and the volatility of public confidence in presidential leadership are closely related to the decline of a strong two-party system, a plebiscitory presidency would aggravate those weaknesses. The electoral college, by its nature, requires Americans every four years to subordinate private piques and single-issue obsessions and join in broad political coalitions under major party banners. In that respect, it is the glue of the party system. In a popular vote system that glue would dissolve, with incalculable effects on the fragile mechanisms of unity that bind this diverse nation together.

These might well be the foreseeable results of the popular-vote presidency, even if it worked as advertised. But will it even work as advertised? Under Senator Bayh's amendment a candidate would need at least 40 per cent of the popular vote to be elected; if no candidate won such a plurality, a runoff election would follow.

Is it not likely that a multitude of candidates, undisciplined by broad party coalitions, would face the voters? That no candidate, with the vote so diffused, would win the needed plurality? That the actual choice of a president would then be left to a runoff election and thus to a squalid system of horse-trading, haggling, bargaining and power-brokering among the top candidates?

And with what probable result? A strong chief executive, responsible to the public? Or a caretaker president, heavily mortgaged by political debts not of his choosing, whose administration had been shaped by a multitude of deals and promises, open and secret, and more resembling an Italian or French prime minister of the feebler sort than a traditional American president? There is that danger.

We are confident, then, that when the senators reflect this week on the wisdom of swapping a successful election system that has worked without major hitches for decades for a system shadowed by dozens of disturbing uncertainties, they will say a decisive "no" to the Bayh plan. And say it so decisively, perhaps, that the nation can get on with its political business—including, by the way, the search for sensible perfecting changes in the electoral college system—without fearing in every new Congress that the tested wisdom of the Constitution might be supplanted by flighty innovation.

POSSIBLE CONSEQUENCES OF DIRECT ELECTION OF THE PRESIDENT

(By Richard G. Smolka)

The U.S. Senate is now considering Senate Joint Resolution 1, a proposed constitutional amendment to elect the president of the United States by a direct popular vote.

If a direct election amendment is passed and ratified, Congress must implement it by appropriate legislation. It is most unlikely that any direct election of the president could be conducted by a continuation of existing laws and practices in the various states, plus the current election laws of Puerto Rico, the Virgin Islands, Guam, and the trust territories if these are extended the franchise.

Congressional legislation to implement a direct election amendment must address at least five fundamental questions relating to political parties, candidates, ballots, and voters.

1. How do political parties and candidates obtain a ballot position?

2. What uniform type of ballot arrangement—office block, party column, straight-ticket option, party position on the ballot—will prevail?

3. What will be the uniform qualifications for voting in a national election?

4. What rules governing voting—hours, places, method of voting—will apply?

5. What will be the standards and procedures for vote tallying and recounts?

Some of these questions may be answered by Congress now, if it chooses to do so. A direct election amendment, however, would require this type of legislation and would give Congress a unique opportunity to structure a national election code to achieve specific political and/or social purposes.

This article presents a general overview of current state election law practices and, based upon the research findings of political scientists, speculates about the impact of some possible federal election laws which could be enacted to implement the direct election of the president.

ACCESS TO BALLOT

One of the most immediate and important questions which Congress will be required to address is the manner by which candidates and political parties are listed on the ballot. Who is entitled to be listed? Who determines the nominee of a political party and how is that nomination decided? Can independent candidates without any party affiliation qualify for the ballot? May a candidate who has been denied the nomination of his party obtain a ballot listing as a new party or as an independent candidate? Events which occurred during the 1976 presidential campaign illustrate the complexities of ballot access laws and the administrative consequences of last-minute court decisions interpreting these laws. Thirteen presidential candidates qualified for the ballot in six or more states, but no state ballot contained all 13 names. Twelve candidates qualified for ballot position in New Jersey and Washington, but in five states (Arkansas, Georgia, Maryland, West Virgina, and Wyoming) only the two major party candidates were on the ballot.

President Gerald R. Ford and Democratic nominee Jimmy Carter were on the ballot in all states. The 12 minor party and independent candidates and the number of states in which their names were listed on the ballot are shown in Table 1.

TABLE 1.—*Number of States in which candidates qualified for ballot position*

Candiate and party:	*Number of States listed on ballot**
Jimmy Carter (Democrat)	51
Gerald R. Ford (Republican)	51
Roger MacBride (Libertarian)	31
Eugene McCarthy (Independent)	29
Peter Camejo (Socialistic Workers)	28
Lyndon LaRouche (U.S. Labor)	24
Lester Maddox (American Independent)	20
Gus Hall (Communist)	20
Thomas Anderson (American)	18
Julius Levin (Socialist Labor)	10
Benjamine Bubar (Prohibition)	9
Frank Zeidler (Socialist)	7
Margaret Wright (People's)	6
Ernest Miller (Independent)	1

*States includes the District of Columbia.

Not all candidates were listed under the same party label in every state. In New York, President Ford was on the Conservative Party line as well as on the Republican line, and Jimmy Carter was on the Lberal party line as well as on the Democratic line. Mr. Carter was also listed twice in Vermont, as a Democrat and as the nominee of the Independent Vermonters.

Unusual party listings included Libertarian Party nominee Roger MacBride as Civil Libertarian Economic Freedom in Wisconsin, Free Libertarian in New York, and Alabama Libertarian in that state; Lyndon LaRouche as International Development Bank and Julius Levin as Industrial Government Party in Minnesota; Margaret Wright as Peace and Freedom in California, Human Rights in Michigan, and Bicentennial Reality in Washington; Eugene McCarthy as McCarthy '76 Principle in Minnesota, McCarthy '76 in New Hampshire, Pennsylvania, and Vermont, as Non-Partisan in Delaware, and No Party in Iowa; and Thomas Anderson as American Constitution in Washington.

In some states, if a political party did not qualify for the ballot, its candidates were listed as independent. For example, Gus Hall (Communist), Peter Camejo (Socialist Workers), and Roger MacBride (Libertarian) were all identified as Independent on California ballots.

There were disputes over the use of the American Independent or American Party label. In Michigan, where two factions disputed the nomination, each conducted a nominating convention and attempted through administrative procedures and court action to obtain a ballot position. Michigan recognized only one American Independent Party and would not rule on which faction held the "official party convention." Michigan offered to list any candidate both factions could agree upon and this position was upheld by the courts. Although the party could not agree on its nominee for president and, therefore, had no candidate listed for that position, any candidate nominated by either faction would have been listed as the official party candidate if there was no duplicate nomination for the position.

Although the courts ordered the names of some candidates off the ballots, there were instances when the decision came so close to the date of the election that it was administratively impossible to remove the names from the absentee ballots and even from some ballots at the polling places. For example, the New York Court of Appeals, that state's highest court, ruled on October 27 that McCarthy's name should not be on the ballot, but the very next day the chief judge granted a one day stay of the order pending appeal to the U.S. Supreme Court.[1] Only after the U.S. Supreme Court refused to consider the case on October 29, the Friday before the election, were local officials free to remove McCarthy's name from the ballots. By this time, however, almost all absentee ballots had been sent out and most had been returned. In addition, most voting machines had already been sent to the polling places and McCarthy's name was never removed from some machines. Although votes for McCarthy were not counted, many of those who voted for him did not know and probably still do not know this and, of course, they did not have another chance to vote for a candidate for whom their vote would have counted.

The federal court decisions from state to state and even within a state were not necessarily consistent. On September 14, 1976, U.S. Supreme Court Justice Lewis F. Powell declined to overturn a lower court ruling which denied McCarthy a position on the Texas ballot because he had not demonstrated prior community support in time for verification and that to allow him on the ballot would "disrupt the entire election process in this state." After Justice Powell's first decision, McCarthy went to the Fifth U.S. Circuit Court of Appeals and was turned down. His subsequent appeal to Justice Powell was then successful and on September 27, two weeks after his first decision, Powell ordered Texas Secretary of State Mark White to place McCarthy on the ballot.[2]

The methods by which each minor party or candidate qualified for the ballot in each state are shown in Table 2. States in which the candidates conducted active write-in-campaigns are also listed in Table 2.

The potential impact of third-party or independent candidates was made clear in 1976 even though the number of votes pulled from the major parties was far fewer than it was in 1968 when George Wallace was on the ballot in all 50 states. In Oregon, Ford won by only 1,559 votes while McCarthy drew 40,296. In Ohio, which Carter carried by 11,116 votes, McCarthy drew 58,258 votes. On the other hand, McCarthy was not on the ballot in Hawaii where Carter won by a slim margin of 7,372 votes or in New York where Carter's margin was 278,767 out of more than 6.6 million votes cast. Most observers believe that in those states where McCarthy's name was on the ballot, Carter suffered.

Footnotes at end of article.

The question of ballot access by minor parties is directly related to the constitutional right of association. How much support will be needed to demonstrate a national candidacy? What type of support? If petitions, how many and what will be the procedure by which they will be verified and tabulated?

If ballot access is made "too easy," the number of candidates and/or parties may well tax the capacity of existing voting equipment and may result in a total paper ballot presidential election. If, however, ballot access is made "too restrictive," the courts, cognizant that the same Congress which prescribed the requirements has a substantial interest in maintaining the status of the two major parties, may well strike down the law.[3]

It appears unlikely, based on 1976 federal court decisions, that laws which effectively exclude from the ballot serious, if not widely supported, candidates would be upheld.

There is also a major distinction between an independent presidential candidate, such as Eugene McCarthy, and the nominee of a political party, as were all the other candidates whose names appeared on the ballot in 1976. In state law, parties may qualify for ballot position by the number of votes received in past elections or by the number of registered voters. These types of criteria do not apply to independent candidates; yet, the direct election of the president may be viewed as a move toward a contest between candidates rather than the current legal presumption of a contest between parties.

BALLOT ARRANGEMENT

After the question of candidate access to the ballot has been determined, the next major question pertains to the arrangement of the ballot. Basically, there are two types of ballot formats in use today, the party column and the office-block ballot. In 29 states, the voter also has an option to cast a straight ticket by a single mark on the ballot or a single pull on a lever. Although the straight-party lever or option is associated almost exclusively with party column ballots, the introduction of punch-card ballots has created situations in which the candidates are listed by office but a straight-ticket option is made available to the voter. This was the situation in Illinois.

A national election code must address the straight-ticket option. Recent federal and state campaign regulations assume that there are advantages to several candidates by combining presidential, congressional, and state candidates on a single slate for advertising purposes and asking the voter to exercise the straight-ticket option. Must a national election law require the separation of the presidential, congressional, and state contests on the ballot because these may be governed by different laws and procedures?

Other possibilities include prohibition of a straight ticket by a national election code or separation of the presidential ticket from the balance of the other races by state legislation. Either way, there are serious consequences for presidential, congressional, and state elections.

The impact of ballot arrangements has been studied by political scientists. Jerrold G. Rusk's study of races between 1876 and 1908 found that ticket-splitting increases with the absence of party voting devices and that office-block ballots are more likely to produce split tickets than ballots with party columns or rows.[4] Angus Campbell and Warren Miller found a 15 percentage point difference in split-ticket voting between states with party circles or levers and those with no straight-ticket option.[5] Milton C. Cummings obtained similar results from his study of presidential elections and congressional districts from 1932 to 1964.[6]

TABLE 2.—BALLOT LISTINGS OF MINOR-PARTY AND INDEPENDENT CANDIDATES FOR PRESIDENT

[The following table shows States in which minor party and independent candidates for President are listed on the ballot (indicated by X), how they gained access to the ballot (1—based on pas results, 2—petitions, 3—legal action, 4—other methods), and States in which those candidates have active write-in campaigns (indicated by W). The figures in the last column represent the minimum number of petition signatures required this year by minor-party or independent candidates to gain access to the ballot.]

	Anderson (American)	Maddox (American Independent)	Hall (Communist)	McBride (Libertarian)	Wright (People's)	Bubar (Prohibition)	Zeidler (Socialist)	Levin (Socialist Labor)	Camejo (Socialist Workers)	LaRouche (U.S. Labor)	McCarthy (Independent)	Other	Number of signatures required
Alabama		X(1)	X(2)	X(2)		X(1)							5,000
Alaska				X(2)									2,957
Arizona				X(3)					X(2)		X(2)		(1)
Arkansas	W										W		38,219
California	W	X(4)	X(2)	X(2)	X(4)			W	X(2)		W		99,284
Colorado			X(2)	X(2)		X(2)		W	X(2)	X(2)	X(2)		5,000
Connecticut		X(1)	W	W						X(2)	W		14,093
Delaware	X(1)					X(1)		X(2)		X(2)	X(3)		2,609
District of Columbia			X(2)	X(2)					X(2)	X(2)			2,362
Florida	X(2)			W			W	W			X(3)		36,213
Georgia	W	W							W		W		108,394
Hawaii				X(4)									3,500
Idaho		X(3)		(X2)						X(2)			1,500
Illinois			X(2)	X(2)				X(2)	X(2)	X(2)	X(2)		25,000
Indiana	X(2)								X(2)	X(2)			8,409
Iowa	X(4)		X(2)	X(2)			X(2)	X(2)	X(2)	X(2)	X(2)		1,000
Kansas	X(1)	X(3)		X(3)		X(1)					X(2)		2,500
Kentucky	X(2)	X(2)	X(2)	X(2)					X(2)	X(2)	X(2)		1,000
Louisiana		X(2)	X(2)	X(2)					X(2)		X(3)		1,000
Maine						X(2)					X(2)		10,918
Maryland													51,155
Massachusetts	X(1)			W	W	W		W	X(2)	X(3)	X(3)		37,096
Michigan	W	W	W	X(2)	X(1)	W		X(2)	X(2)	X(2)	X(3)		17,674
Minnesota	X(2)		X(2)	X(2)	X(2)		X(2)	X(2)	X(2)	X(2)	X(2)		2,000
Mississippi	X(4)	X(2)		X(2)					X(2)		X(2)		1,000
Missouri											X(3)		18,000
Montana	X(1)												15,938
Nebraska		X(3)		X(3)							X(3)		2,000
Nevada		X(1)		X(2)								X*	8,500
New Hampshire				X(2)				X(2)	X(2)	X(2)	X(2)		1,000
New Jersey		X(2)	X(2)	X(2)	X(2)	X(2)	X(2)	X(2)	X(2)	X(2)	X(2)		800
New Mexico				X(4)		X(4)	X(4)		X(4)				N/A
New York			X(2)	X(2)					X(2)	X(2)			20,000
North Carolina	X(2)			X(2)						X(2)	W		(2)
North Dakota	X(2)	X(2)	X(2)	X(2)		X(2)	X(2)		X(2)	X(2)	X(2)		(3)
Ohio		X(2)	X(2)	X(2)		W		W	X(2)	X(2)	X(2)		(4)
Oklahoma											X(3)		40,243
Oregon											X(4)		(5)
Pennsylvania		X(2)	X(2)						X(2)	X(2)	X(2)		30,584
Rhode Island			X(2)	X(2)				X(2)	X(2)				1,000
South Carolina	X(1)	X(1)											10,000
South Dakota		X(2)	X(2)						X(2)				(6)
Tennessee	X(2)	X(3)	X(2)	X(3)		X(2)				X(2)	X(3)	X**	25
Texas	X(2)								X(2)		X(3)		16,650
Utah	X(1)	X(1)	X(3)	X(2)					X(3)		X(3)		500
Vermont									X(2)	X(2)	X(3)	X***	1,411
Virginia	X(2)			X(2)					X(2)	X(2)			9,007
Washington	X(4)	X(4)	X(4)	X(4)	X(4)		X(4)	X(4)	X(4)	X(4)	X(4)		100
West Virginia													7,620
Wisconsin		X(2)	X(2)	X(2)	X(2)		X(2)	X(2)	X(2)	X(2)	X(2)		3,000–5,007
Wyoming													6,344

Other Ballot listings:
*"None of These Candidates."
**Ernest Miller (independent—petitions).
***Jimmy Carter (Independent Vermonters—caucus).
Petition Requirement:
[1] Minor party, 11,044; independent, 5,522.
[2] Minor party, 10,000; Independent, over 100,000.
[3] Minor party, 15,000; Independent, 300.
[4] Convention, 1,000; minor party, 37,660.
[5] Convention, 1,000; minor party, 37,660.
[6] Minor party, 27,823; independent, 2,782.

Donald G. Zauderer intensively studied the consequences after Ohio shifted in 1950 from a party-column, straight-ticket-option voting to an office-block ballot. Zauderer found that the effect was precisely that which was intended by the dominant Republican party of the day—a sharp decline in straight tickets and a marked roll-off in voting for offices further down the ballot. He also found that this roll-off affected lower educated groups, black and white, disproportionately, thereby hurting Democratic candidates for less prominent offices. Zeunderer also found that office-block voting was beneficial to candidates with greater name identification.[7]

If Zaunderer's findings applied to national elections, the Republicans might gain from mandated office-block ballots and, conversely, Democrats may gain an advantage from mandated straight-party-ticket options.

EXERCISE OF THE FRANCHISE

A basic election question is "Who can vote?" In most of the United States, registration prior to election day is a prerequisite for voting, and in most states registration closes 30 days prior to an election. Federal law makes exemptions for federal elections for certain classes of persons, including military, citizens residing overseas, and persons who change their residence immediately prior to an election. Six states permit registration on election day.

In all probability Congress will not wait for the direct amendment to be ratified before enacting some type of national voter registration legislation. Proposals to create a national voter registration agency and to establish a mail registration system have been before Congress since 1971. President Carter favors a system which does not require prior voter registration for voting in federal elections. If this approach is adopted, any resident of a precinct who can satisfy polling place officials of his identity, qualifications, and residence, will be permitted to vote.

ABSENTEE VOTING

Who can vote depends not only on suffrage and registration requirements but also on absentee ballot laws. About 4 percent of the votes cast in presidential elections are on absentee ballots. Absentee registration requirements, eligibility for requesting an absentee ballot, and procedures for casting an absentee ballot vary widely among the states. Moreover, procedures for tabulating absentee ballots vary and in some cases may inadvertently violate the secrecy of the ballot.[8]

The simplest laws accept requests for absentee ballots at face value. The most complex may require precise reasons for absentee voting, notarization of the ballot application request, the returned voted ballot or, in the case of illness, a medical certificate or statement. The time periods in which ballots may be requested differ substantially. Deadlines for receipt of the ballot may be set prior to election day, at various hours on election day, or merely postmarked no later than election day and delivered to the election officials within two weeks after election day.

HOURS OF VOTING

At present, election day hours vary not only among states but also within states. Factors affecting variations include the size of the community and the type of voting equipment. Some states permit local option within prescribed limitations. In general, the variations in voting hours have been ac-

Footnotes at end of article.

cepted where they exist, but court tests of such practices are rare. During the last three Congresses, legislation has been introduced to standardize hours of voting on election day. Although there is little evidence of the political effects of the variations, congressional or judicial concern for greater uniformity if not absolute equality in election day practices remains a distinct possibility.

National reporting of election returns would also be affected by a simultaneous close of the polls. Will the networks then draw a national sample of precincts and predict a national result within minutes of a simultaneous close of the polls? Will presidential election returns continue to be reported by state if state returns have no special meaning? Perhaps it is more likely that a national election code would mandate equal hours of voting rather than simultaneous voting.

What if election day is declared a national holiday? Although several states now proclaim election day a state holiday, the holiday appears to be honored primarily by government workers, schools, and banks. Retail and commercial establishments frequently ignore state-declared holidays and some retailers have even turned more widely honored national holidays such as the Fourth of July and George Washington's birthday into "gigantic sale" days. If election day is not declared a national holiday, will those states that celebrate an election day holiday give their residents an election advantage that may be considered unconstitutional?

Apart from these consequences, what of the political consequences? Will more or fewer voters come to the polls? Which voters are most likely to be affected? In general, supporters of an election day holiday have argued that turnout will be greater.

All of the above potential complications of the election procedures, together with the probability that Congress will amend such laws with regularity, may well induce the states to move state elections to odd-numbered years. States already have been avoiding presidential election years—only 14 governors were elected in November 1976 and two states (New Jersey and Virginia) will elect a governor in 1977.

A change of date in state elections will affect turnout both in congressional and state elections. By far the greater number of voters vote at presidential elections. If a state election is conducted in a year other than a federal election year, barring any radical change in voting behavior, the turnout will be lower. Further, if there is no state election in even-numbered, nonpresidential election years, turnout in those congressional election years is likely to drop very sharply. If past experience is any guide, the dropoff will occur primarily among the less-educated, less-motivated segments of the population. There is little doubt that the costs of campaigning, at least to turn the vote out, will escalate in all nonpresidential election years.

VOTE COUNTS AND RECOUNTS

Voting Equipment

The manner in which votes are counted depends upon the method by which votes are cast. Each state now has its own standard for testing vote-counting equipment and for establishing the integrity of its procedures. About 60 percent of the voters now cast their ballots on mechanical lever machines, about 20 percent vote on punch-card ballots and, with few exceptions, the remainder vote on paper ballots.

The mechanical lever voting machine prevents the voter from casting an overvote through a locking mechanism. Provisions for setting up lever machines, verifying their mechanical condition, and tallying the results vary from jurisdiction to jurisdiction. Because there is no individual ballot, only summaries from each machine may be checked. Oregon prohibits this system because there is no individual ballot audit trail.

Punch-card voting, which is rapidly gaining acceptance, remains prohibited in 17 states because the names of the candidates are not printed on the ballot itself; because the punch-card ballots can be folded, multilated, or otherwise damaged and thereby prevented from being counted by various readers; or because of other reasons which indicate a lack of confidence in the system. For example, jurisdictions which use punch-card ballots are required to establish "duplicating boards," consisting of persons who must "duplicate" all ballots which cannot be read by machine. This process increases the need for ballot security.

Even paper ballots, technically the simplest method, produce major problems of interpretation when the voter marks the ballot in ways other than those prescribed by law. In some states, ballots not marked in accordance with the law are voided. This is done to prevent identification of individual ballots by counters or watchers. The trend in recent years, when greater honesty is assumed, has been to count ballots if the "intent of the voter" can be determined. In an attempt to obtain impartial rulings on the intent of the voter during the John Durkin-Louis Wyman New Hampshire contest in 1975, the U.S. Senate Rules Committee built ballot holders to enable the senators to see the marks without seeing the names of the candidates.

It would seem logical that a national election law would provide at least the basic ground rules about which paper ballot marks should or should not count rather than permitting identical marks to be counted in one state and thrown out in another. Similarly, the basic standards for ballot security, whether computers, lever voting machines, or paper ballots are used, would probably be included in national legislation.

The impact of such changes, as with some of the other procedures identified above, will depend in large measure on the differences between what is adopted nationally and the existing practice in effect in any given state.

Recounts

The last point is the recount of the votes cast in a direct presidential election. Will a recount be a right of candidates? Who will be able to ask for a recount and under what conditions? How will a national recount be conducted? Will it be possible to conduct a partial recount in selected states or counties or precincts?

The recount situation in presidential elections is confusing now. According to a study by the Congressional Research Service, only 16 states had laws on the books in 1976 which provided for recounts of votes cast for presidential electors. There is further confusion in the states about the proper state function in conducting recounts of congressional elections. Despite the Supreme Court decision in *Roudebush* v. *Hartke*,[9] which treats recounts as part of the original vote count under state jurisdiction, several states, such as Michigan, have not provided for recounts of congressional elections because they assume that the appropriate house of Congress will exercise jurisdiction over such matters.

If a popular direct election is close, perhaps a margin of two-tenths of one percent of all votes cast, will it be possible or desirable to have a recount? What if there appears to be a major error in the vote tally in a particular community? Can a recount be focused on only a single city or state? If so, does the apparent winner of the first count have the right to ask to have other jurisdictions recounted if his victory is reversed? Who will supervise the recount and under what rules will it take place? Neither the senate nor the house of representatives is bound by state law in conducting recounts of congressional elections. In the 1961 *Roush* v. *Chambers* contest, the house of representatives counted ballots cast by voters which could not be counted under Indiana law.

If procedures have been established in advance, at the very least contestants will know which rules prevail. Otherwise, we will be back to 1876 and perhaps another presidential election commission.

A CONCLUDING NOTE

While this article has concerned itself with the significant administrative questions which must be answered by either the states or the federal legislature, it has not attempted to deal with the significant theoretical questions which are inherent in the issues raised. Nevertheless, as with all exercises in policy analysis, the theoretical and administrative relationships cannot be separated. For example, the question of candidates' access to the ballot, a technical question in many respects, nevertheless requires a specific definition of political party, a definition on which state laws, court decisions, and political scientists do not agree. In addition, the relationship between the formal electoral processes and social units arises when a determination must be made about whether an election is a contest among individual candidates or among political parties.

Because there are widely divergent theories currently held in the states, one consequence of which is illustrated by the number of presidential candidates on the ballot and how they get there, the theory which is ultimately accepted by Congress will have a major impact on all elections in the states.

These congressional decisions, whatever their merits, will cause substantial change in state election codes and practices. For this reason, and because Congress may amend its own provisions at any time, states may decide, as a matter of policy, to separate state elections from federal elections. Such a decision would directly affect voter turnout in state elections and in congressional elections held in nonpresidential election years. More certain is the possibility that Congress will regulate presidential primary elections, prescribing dates, methods of voting, and thereby directly affecting the national convention and presidential nominating process of the major political parties.

FOOTNOTES

[1] *Contessa* v. *McCarthy*, 40 N.Y. 2d 629, decided Oct. 27, 1976.

[2] *McCarthy* v. *Briscoe*, U.S. District Court for the Western District of Texas, No. A-76-CA-158.

[3] The potential conflict of interest of a legislature in election laws was noted in *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969).

[4] Jerrold G. Rusk, "The Effects of the Australian Ballot Reform on Split Ticket Voting." *American Political Science Review*, vol. 64 (1970), pp. 1220–39.

[5] Angus Campbell and Warren Miller, "The Motivational Basis of Straight and Split Ticket Voting." *American Political Science Review*, vol. 51 (1957), pp. 293–312.

[6] Milton C. Cummings, Jr., *Congressmen and the Electorate* (New York, N.Y.: Free Press, 1966), pp. 174–79.

[7] Donald G. Zauderer, "Ballot Reform in Ohio: An Assessment of Consequences" (paper delivered at the 1972 Annual Meeting of the American Political Science Association, September 5, 1972).

[8] Indiana University, Poplars Research and Conference Center, "Analysis of Laws and Procedures Governing Absentee Registration and Absentee Voting in the United States," Report No. 1U-GAO-53-175-50-75-1 (prepared for the Office of Federal Elections, U.S. General Accounting Office, June 1975).

[9] *Roudebush* v. *Hartke*, 405 U.S. 15 (1972).

THE PLEBISCITARY PRESIDENCY: DIRECT ELECTION AS CLASS LEGISLATION

(By Aaron Wildavsky)

(The Senate Judiciary Committee has, for the last 13 years, considered proposals to replace the electoral college with a system of direct election of the President. These would replace a present system of counting votes for President state-by-state on a winner-take-all basis, with a system that would award the Presidency to the winner of the largest number of popular votes nationwide. The matter is controversial, more so than it deserves to be, given the clear and demonstrable danger to our political system such a proposal threatens. Beyond the simplistic appeal of arguments by proponents that the votes for President, cast nationally, should be counted nationally, there lurk a variety of dangers which should, from time to time, be recalled lest we forget the disposition of the Founding Fathers that the parts of the federal system—like the method of electing Presidents and the governmental structure of the nation—should relate to each other.)

Abolition of the electoral college would create the appearance of direct mass election and the reality of indirect elite manipulation. The proposal to replace the electoral college system with direct election is class legislation. It is fated to advantage elites, make voting choices for citizens more complex, threaten—indeed, more likely kill—our two-party system, force a proliferation of elections and of candidates for the Presidency, and a similar proliferation of parties, many of which will be extreme or oriented to single causes.

The real questions posed by proposals for "electoral college reform" are not, therefore, about direct election of the President, which we already have but about a mass society, without intermediaries like parties, which we do not want. The mediation of the major political parties presently structures choice through national conventions and competitive two-party elections. These would be replaced under so-called electoral college reform by crowds of candidates making their appeals to people solely through the media.

The consequences of so profound a change in so basic a political structure as the electoral college cannot be limited merely to the presidential election process. I argue, *inter alia*, that it would change the Presidency itself, alter parties and party politics, and not incidentally since we *are* discussing elites, create jobs for certain classes of people in America. Direct election would change the way the votes for President are counted. That much is obvious. It would have other consequences which, perhaps because they are less obvious, are less well-known.

WINNERS AND LOSERS

No one, for example, will openly argue that substituting four national elections—a national primary, a run-off primary, a general election, and, at least as often as not, a run-off general election—for a single one will make work for media managers and campaign cohorts instead of simplifying choice for citizens. Yet that would be the result.

No one says that multiplying the number of political parties and candidates by removing the remaining rationale for a two-party system in presidential politics will confuse voters instead of enlightening them. Yet this would surely be a consequence of direct election.

No one asks citizens whether they want "one man—one vote" even if it means removing the restraints of federal structure on Presidents. Yet those restraints would fall if the electoral college system were abandoned.

Why, then, is there such substantial support for a plebiscitary presidency?

Polls suggest people favor direct election. Usually, the formula is to ask, "do you favor majority rule?" Put that way, of course the answer is yes. Would people also favor a unitary rather than a federal government? Would they prefer multiple parties and numerous elections? The answers you get depend on the questions you ask.

The disadvantage of the electoral college rule is that on rare occasions it is possible for a candidate to be elected President while receiving less than a plurality of popular votes. So what? Every mode of election contains weaknesses as well as strengths. If every electoral procedure with negative elements was *ipso facto* rejected, it would be impossible to have elections at all. The real question, as always, is "compared to what?" that is, how do existing arrangements compare to alternatives, especially to the current proposal to count votes on a straight national basis rather than summing them up, as the electoral college does state-by-state on a winner-take-all basis? After all, there would be little interest in electoral methods if they did not distribute power differentially to various interests in society. Who wins and loses under these alternative arrangements is of prime importance.

Who stands to gain from a plebiscitary presidency? People with time do, people with dispensable occupations and communications skills who wish enhanced access to political power without having to cater day-by-day to a diffuse public. In short, upper middle and upper class professionals stand to gain. That is why, in recent years, these elites have launched attacks on the existing intermediary organizations that stand between the citizen and the state—labor, business, and parties. All have been subject to sanction and their political participation limited. A plebiscitary presidency, in which only national media rather than state parties stand between the mass and the polity, fits in with this scheme. So does distaste for mass culture, including vulgar displays at national conventions, messy forms of organization like federalism, and apparent inconsistency such as the overlap and duplication of a political system that has two of everything—executives, legislatures, courts, Houses of Congress, even parties.

Self-interest lies just beneath the surface of such elite groups for which style is supreme. On what can groups of this kind agree? They can agree on procedures, apart from outcomes; that money should no longer taint politics (the public will pay for their campaigns); that meetings will be open (to those who can afford to come); and so on. Substantive issues would divide them; procedural issues can unify them by submerging class hostilities.

Who stands to lose from direct election? People who lack education, high income or prestigious occupational status or who wish to limit their participation: in short, people who need intermediaries stand to lose. Political participation by the poor or working or middle class citizens requires intermediary organizations like trade unions or political parties. Left alone, without the customary anchor of party, faced with a bewildering array of candidates, many of them unknown or appearing for the first time, citizens will have little on which to base their choice. Once having chosen, they might have even less of a basis on which to hold incumbents responsible when in the absence of strong party identifications, a quite different array of forces and choices is likely to appear every four years.

Under "direct election" life would be made simpler for upper middle and upper class elites who want to express their preferences, it is true, but their simpler life would come at the expense of mystifying most Americans. Those who use politics and government to earn their livings would be advantaged compared to others who just need government in order to live their lives. The mediation of the major political parties would be foreclosed. Federal elections, mediated through the states would be replaced by *national* plebiscites mediated, if at all, only through the media, which makes less sense than it sounds.

THE TWO-PARTY SYSTEM AND "DIRECT ELECTION"

These new election elites would be able to compete: a) sporadically, every four years; b) independently, without working with others; and c) expressively, catering to a narrowly conceived clientele. The stress, in such elite national politics, would be on internal consistency of views to enable candidates and their supporters to express themselves purely, rather than on coalition-building and the compromise that attends it.

By contrast, major political parties require: a) continuity, so the same party is held responsible over time; b) community, so that disparate interests are brought together under the same banner; and c) connectivity, so that the emphasis is on winning by discovering what people want and by interpreting to them what they ought to want.

Today, we barely have a party system. The vast majority of state legislatures and governorships are Democratic. The dominance of the Democratic Party is so great in both Houses of Congress that in the near term it is difficult to imagine a single election changing that result. As things stand presently, the United States has, at best, a modified one-party system. Nonetheless, the major parties still provide the arena in which the presidential contest is decided and the contest for the Presidency, at least, remains reasonably competitive. Under the electoral college's ground rules, the competition is *federal* in nature and the winner is the one who wins not the most votes simply, as under direct election, but the most votes in the most states. Thus, the candidates and parties are forced to make broader, less extreme appeals, and politics as a result, is both more moderate and more stable than it might be otherwise.

Abolition of the electoral college system, by removing the requirement that pluralities be achieved in sufficient states to create national majorities, would negate the main function of a major party—to nominate a candidate who can coalesce sectional into national priorities. By removing the main incentive our political parties have to coalesce—the necessity of creating a coalition across diverse states to make a majority—abolition of the electoral college would drive the last nail in the coffin of our party system.

Another immediate effect of non-federal elections for Presidents would be to increase vastly the number of elections, parties, and candidates confronting voters. This multiplicity is not problematic but inevitable. The only uncertainty is exactly how many there will be at a given time. Thus, there is the rather remote possiblity (which has not yet occurred in this century) that under the electoral college procedure a candidate, without a plurality, might win a two-party race. This must be weighed against the vastly increased probability, under direct election, that there will be many more candidates, parties, and elections without, however, knowing in advance precisely how many there will be. The adoption of direct election would mean trading away a small and calculable uncertainty for a large and incalculable one.

Under either system, elections themselves are easy to understand. Under the proposal, there must be a run-off, that is, a second election unless at least one candidate (and the vice-presidential candidate on the ticket) receives at least 40 percent of the vote. Evidently, if past rules prevailed, at least one and probably two such candidates (one presidential and one vice-presidential) would exceed 40 percent, deciding the election then and there. But that is just the point: Past

rules will not prevail. Additional parties and candidates would be tempted to come in, both to publicize their cause, and to better their prospects.

EXTREMISM AS A DEFENSE FOR MODERATION

Tiny parties and cause candidates, enticed in addition by the prospects of public financing for their campaigns, would enter so as to use this unparalled opportunity for publicity. Minor party, and celebrity candidates would enter, either hoping they might be the lucky ones, or trying indirectly to influence the outcome. Let us suppose that parties of the radical right and left, together with cause candidates, will get, all together, 10 percent of the vote. This would leave 90 percent to be divided by the candidates of today's two major parties. What is worse, these two candidates would probably face competition from several others for the center vote. This would make it far less likely that any candidate would get even 40 percent of the vote, much less as much as 45 percent, half of the non-extreme 90 percent. But surely the losers in the major party nominating processes would be tempted to enter either as spoilers or on the chance lightning might strike, diluting the "winner's" plurality even more. If they were to divide evenly, it would be clear to everyone that the winner was, in effect, a minority President who received less than half the total.

Under these or similar circumstances, bargaining with party extremes would become more difficult because the wings, left or right, could run their own slates convinced that their votes would not be wasted. (They would be right.) It would also become more necessary because, in the absence of such bargains carefully, if not gingerly, struck, the "wings" could reduce the mainstream candidate's total below the necessary 40 percent. Plebiscitary elections, therefore, will either lead to more extreme major parties or more numerous minority parties or (as luck would have it), both. Any way one looks at it, the chances of having a 200 percent increase in elections (two instead of one) are much greater.

The only real chance of retaining a single presidential election—by evolving a dominant major party—is entirely undesirable. As the minority party (or, likely, *parties*) become less and less representative, they would reduce to their hard cores, thus making more and more extreme appeals. The *real election*, as V. O. Key showed in his classic work on southern politics,[1] would be driven down to the primary of the major party where personal appeal provides a poor substitute for party principle.

THE WITHERING AWAY OF THE STATES?

A plebiscitary election, of course, is bound to lead to a plebiscitary primary. Once the states have been eliminated from national elections it would be anomalous to include them at the nominating stage. A convention of the state parties to select a presidential nominee would give way, predictably, to a nation of individuals choosing among candidates who lacked party labels to help the voters differentiate.

The likelihood of a run-off in the primary would be even greater than in the general elections. It is quite probable that many candidates—perhaps as many as ten of them—might obtain enough signatures on nominating petitions to get on the ballot. Imagine a crowd of challengers hustling all over the United States, campaigning in a national primary. It would take, of course, enormous amounts of money. Although government financing might be available, this would have to depend upon demonstrated ability to raise money previously in order to discourage frivolous candidates. The pre-primary campaign, therefore, would assume enormous importance and would be exceedingly expensive. It would also help if each of our hypothetical, but predictable ten candidates were already well-known. It is not hard to forecast that nobody would win a clear majority in such a primary with a large number of contenders. Since all contenders would be wearing the same party label, it is hard to see how voters could differentiate among candidates except by already knowing one or two of their names in favorable or unfavorable contexts, by liking or not liking their looks, by identifying or not identifying with their ethnic or racial characteristics, or by some other means of differentiation having nothing whatsoever to do with ability or inclination to do the job, or even with their policy positions. Since patents on policy positions are not available, it is reasonable to suppose that more than one candidate would adopt roughly the same set of positions. The intellectual content of the campaign thereafter would consist of quibbling about who proposed what first and, more relevantly, who could deliver better.[2]

Suppose, then, that the primary vote were divided among several candidates and that, as is the case for gubernatorial elections in some southern states, ten or twelve aspirants divided the votes. One possibility is that the party nominee would be the man with the highest number of votes. Nineteen percent of the total vote would be impressive under such circumstances, but nonetheless, a much less democratic choice than we have now. Another possibility would be for the two highest candidates to contest a fifty-state run-off after the first primary and before the general election in a campaign that would begin to remind observers who can remember that far back of a marathon jitterbug contest. The party might end up with a good candidate, of course, if there were anything left of him to give to his party. By following this procedure, the United States might have to restrict its presidential candidates to wealthy athletes.

THE TWO-PARTY SYSTEM AND NATIONAL PRIMARIES

Such national primaries would also weaken the party system. If state experience with primaries is any guide, a prolonged period of victory for one party would result in a movement of interested voters into the primary of the dominant party where their votes would count for more. As voters deserted the losing party, it would be largely the diehards who were left. They would nominate candidates who pleased them but who could not win the election because they were unappealing to a majority in the nation. Eventually, the losing party would atrophy, seriously weakening the two-party system and prospects of competition among the parties. The winning party would soon show signs of internal weakness as a consequence of the lack of competition necessary to keep it unified. Since the long-run weakness of the Republican Party in our system may come close to providing these conditions already, I believe that the institution of a national primary would in this respect be especially dangerous.

Every four years, then, the nation would face the likelihood of at least two elections, national in scope (the regular election and the run-off primaries), and the increased probability of more than one regular election. One predictable consequence is confusion. Another is exhaustion. A third is delegitimization as elections succeed each other without notably *clarifying issues* (candidates too far apart have little to say to one another and are more likely to challenge those like them who seek the same votes), or *illuminating candidates* (whom the electorate sees only on television and who need no certification by party leaders), or *changing policies* (since winning the Presidency would be disconnected from other elements of political life, such as Congress, whose cooperation is essential).

Not only would the Presidency be disconnected from the rest of political life, but so would presidential voters. Without the effective mediation of parties, they would have to face alone a confusing array of candidates who conduct themselves as just described.

The nearly inevitable consequence would be a mass society, with its atomized individuals who could interact only vicariously through the media. In such a society, politics would come to resemble launching a play. Each time a new list of backers would be assembled. Sometimes they might collapse in the try-outs, other times they might make it to opening night. The lucky ones might collect and the rest recuperate for the next production. In the theatre this endless cycle—birth, death, regeneration—is appropriate because no one risks anything except his own money or a boring evening. A travelling road-show, however, complete with financial angels and aspiring ingenues, and an audience full of passive observers (which is what the voters would become), while it does allow a limited avenue of expression, is not exactly a desirable model for presidential elections.

THE PERILOUS PRESIDENCY

Abolition of the federal electoral base of the Presidency must be considered in its relationship to the rest of the political system. Separation of powers, and checks and balances, (unless these are also to be abolished), enmesh Presidents in relationships with others—state and local officials, Congressmen, interest groups—almost all of whom have a federal base. What is to be gained by requiring Presidents to cooperate with forces from whose electoral connections they have simultaneously been severed?

A plebiscitary presidency would be removed from the federal structure of relationships that inform all of the other federal offices. As it is, one hears quite a lot about differences between the President and Congress. Adoption of direct election would create a new situation altogether, in which the constituency of the Presidency would be wholly different from that of the Congress. This would be inevitable, because for now, congressional and presidential party politics hold more in common than apart; most importantly they share a necessity for coalitions. Direct election would unburden the Presidency of that necessity, at the same time weakening both its prospects for some friendly support from the Congress when needed and the Congress' ability to exercise restraint should the President become overbearing. The latter, at least, would still be possible, understand, but only through confrontation of the President by Congress, rather than by political cooperation.

A plebiscitary presidency is a perilous presidency. Do we want Presidents appealing over the heads of Congress, Governors, and anyone else out there, not as an extraordinary matter, but as part of the usual method of operation? Has our experience taught us to love Presidents so well we wish to set them up outside the political structure we depend upon to restrain them? Do we hate them so much we wish to separate them from sources of party support in the states and in Congress, which they will need in hard times?

What should be done? The defects of the electoral college are its anachronistic appearance, its complexity, and the possibility it can produce a minority candidate. Obviously, a simple and more modern method would be

[1] V. O. Key, Jr., Southern Politics, Alfred A. Knopf, Inc., New York (1949).

[2] This and the next two paragraphs are taken from Aaron Wildavsky and Nelson W. Polsby, Presidential Elections, 4th Edition, Charles Scribner's Sons, New York (1976).

desirable. Equally obviously, direct election, as it is called, is worse. One change would be desirable: requiring electors to vote for the candidate to whom they are pledged. This would eliminate skullduggery even as a threat. The disappearance of this remote eventuality would enable us to ask whether we want federal elections or unitary elections. Debate could focus on the consequences of different voting rules for power, politics, and people. Instead of having to defend the electoral college, one would be defending federalism. And, instead of opposing the electoral college, one would have to oppose the federal principle in presidential elections. Then the question of who benefits from a plebiscitary presidency might receive the attention it deserves.

Mr. HATCH. Mr. President, I yield the floor.

Mr. BAYH. Mr. President, I yield to the Senator from Massachusetts as much time as he may feel is required.

The PRESIDING OFFICER (Mr. BRADLEY). The Senator from Massachusetts is recognized.

Mr. KENNEDY. I thank the Senator from Indiana.

Mr. President, the late Robert Maynard Hutchins, distinguished president of the University of Chicago, once said that:

> Democracy is the only form of government that is founded on human dignity; not the dignity of some people, of rich people, of educated people, of white people, but of all people.

This is the ideal which pervades our history—it derives from our Declaration of Independence, with its ringing proclamation:

> We hold these truths to be self evident, that all men are created equal; that they are endowed by their creator with certain unalienable rights.

The 200-year course of American history has been occupied with the long and often difficult task of assuring an equal voice in government to each and every one of our citizens.

The United States, I am proud to say, is approaching that ideal. We are not yet there, but it is my hope that soon the day will come when every adult American, regardless of wealth, race, or place of residence will be able to vote and to have that vote counted equally and fairly. Forward strides toward political equality in the past two decades have brought Lincoln's government "Of the People" closer to reality. And yet we have failed to move toward that goal in the way we elect our President. The electoral college system clearly violates the principle of voter equality. Only the provisions of Senate Joint Resolution 28 can insure that the democratic tenet of one-man, one-vote is extended to the election of our President and Vice President. It is time to adopt the proposed amendment as another major step forward in the constitutional evolution of the right to vote.

Tracing the historical development of the right to vote in America illustrates how far we have come from the time when the electoral college was adopted by the Founding Fathers as a mechanism to permit the privileged few who were allowed to vote to select the President for all the rest of us.

At the inception of the Republic, the number of people who participated in elections was surprisingly small. In the Presidential contest of 1824, the first for which comprehensive national totals are available, a mere 9 percent of the adult population voted. The reason for this was twofold. First, the concept of public participation was, at best, underdeveloped; and secondly, the number of citizens allowed to cast their ballots was severely restricted by suffrage laws which required prospective voters to hold some type of property.

Gradually, property qualifications for voting eroded, due in large part to the emergence of political parties, which sought to broaden the voting rolls to extend their own political base of support. Unfortunately, this progressive expansion of the franchise did not include blacks. They were regarded as second-class citizens and were not allowed the privilege of the ballot box up to the time of the Civil War.

As a remedy, Congress passed the three great Civil War amendments abolishing slavery, guaranteeing due process of law and the equal protection of the laws, and prohibiting the denial of the right to vote because of race.

Tragically, however, the force of custom and a series of unfortunate judicial decisions deprived millions of black Americans of the full benefit of the franchise. It was another hundred years before the passage of the Voting Rights Act of 1965 would insure that suffrage for black citizens did indeed become a reality.

Another major area of progress was the 17th amendment, providing direct popular election of Senators. The election of Senators by State legislatures had been controversial almost from the beginning of the Nation. By the mid-19th century, it became increasingly clear that the difficulties arising from this indirect method of election should be remedied. The move for direct popular election of Senators was a natural plank in the reform movements associated with populism and progressivism at the end of the 19th century and the beginning of the present century. Presidents Roosevelt, Taft, and Wilson all supported the direct vote movement. By the early years of this century, more than half the States had urged direct popular election of Senators, and a serious drive had begun in the States to call a constitutional convention to adopt a constitutional amendment to achieve the goal. Finally, Congress yielded and submitted the direct election amendment to the States. It was ratified and became part of the Constitution in 1913, and it stands as an obvious precedent for the action we should take today.

The drive for women's suffrage was neither as difficult nor as long in coming as the black man's battle for the ballot box, but it represents another important milestone in the expansion of the franchise. The battle began in 1872, when Mrs. Virginia Minor applied to be registered as a voter in the State of Missouri, but was refused because she was not male. She sued the registrar, but to no avail. The Supreme Court decided that the "Constitution of the United States does not confer the right of suffrage upon any one," and thus the State laws which permitted only men to vote could not be declared unconstitutional. It was not until the second decade of the 20th century, the beginning of the modern-day demand for an expanded franchise, that the 19th amendment was ratified. Taking effect in 1920, it eliminated discrimination on the basis of sex with respect to the right to vote.

The 1960's witnessed several landmark judicial decisions with regard to voting rights. In 1964, the Supreme Court acted in Wesberry against Sanders to outlaw inequalities in the appointment of congressional districts. Relying on article I, section 2, of the Constitution, the Court held that:

> As nearly as is practical, one man's vote in a congressional election is to be worth as much as another's.

Following this pronouncement, Chief Justice Earl Warren handed down the far-reaching Reynolds against Sims decision. There the Court applied the "one person, one vote" doctrine to the States, and held that State legislatures must be fairly apportioned. As Chief Justice Warren stated:

> A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's equal protection clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of "Government of the people, by the people, (and) for the people." The equal protection clause demands no less than substantially equal State legislative representation for all citizens, of all places as well as of all races.

In the past century, therefore, the Nation has taken major strides to expand the right to vote and to prevent discrimination in the exercise of this basic right of our democratic society. The time has come to take a similar step for Presidential elections. The institution of direct popular election will eliminate the inequalities which exist under the present system and which would continue under any modification of it; it will remove the possibility of the faithless elector, it will eliminate the practice of allowing the House to choose the President if no candidate receives a majority of electoral college; and above all, it will insure that the person who is elected President of the Nation is the people's choice—the choice of a majority of the citizens who cast their votes on election day.

The obscure role of the electoral college can be seen in the fact that few voters have any grasp of its meaning. In the most recent Gallup poll on the issue, 51 percent of our citizens did not have the slightest idea how the the President is actually elected. Small wonder, when the ballot laws of most States require the listing of the names of candidates only, not the electors. As Justice Robert M. Jackson once observed, the electoral college "has suffered atrophy almost indistinguishable from rigor mortis."

The distinguished jurist stated:

> The demise of the whole electoral system would not impress me as a disaster. At best it is a mystifying and distorting factor which may resolve a popular defeat into an

election victory. At its worst it is open to local corruption and manipulation, once so flagrant as to threaten the stability of the country. To abolish it and substitute direct election of the President, so that every vote wherever cast would have equal weight in calculating the result, would seem to me a gain for simplicity and integrity of our governmental process.

Direct election of the President by the people was rejected by the Constitutional Convention because of doubts by the Founding Fathers that the citizens of the new Nation would be able to choose a President wisely. The electoral college was a product of its time—America in 1787.

It was designed for a different era, for a different society, with a different concept of public participation in the political process. With our current levels of education, political sophistication, mass transportation and communication, few would maintain that the average voter is too poorly informed to choose wisely between candidates for the Presidency. As President Lincoln declared in his first inaugural address:

This country, with its institutions, belongs to the people who inhabit it . . . why should there not be a patient confidence in the ultimate justice of the people? Is there any better or equal hope in the world?

Mr. President, the adoption of Senate Joint Resolution 28 would insure that each and every voter of this Nation would have an equal chance to affect the outcome of a Presidential election. It would mean that every vote must be sought and counted and won. No voter could be ignored or taken for granted, as is now the case in the great game of chance known as the electoral college.

As our respected colleague and my good friend, Senator Hubert Humphrey, remarked in 1953:

This is the final step in the constitutional evolution which began with the declaration that all men are created equal and continued with the assertion that no man or woman may be denied the right to vote for arbitrary reasons. Now we must make the suffrage an equal suffrage, and repudiate arbitrary and discriminatory geographical bases for denying or reducing the importance of the votes of some of our citizens.

The necessity for a change in the mode of electing our Presidents is compelling. Americans throughout history have refused to be governed without their consent. The concept of representative government through universal suffrage is a glorious ideal, and the step we can take today is long overdue in our efforts to reach the goal we share.

Mr. President, I strongly urge my colleagues to vote in favor of this important resolution.

Finally, Mr. President, I would mention just a few of the other actions taken by the Senate in recent times over the period of the last 15 years. I can recall the steps taken here in the Senate to abolish the poll tax. That issue came up in 1964.

I had the opportunity of offering an amendment to repeal the poll tax and, at that time, that amendment failed by just a few votes. But we were able to develop on the Civil Rights Act of 1964 an opportunity to expedite the challenge of the constitutionality of the poll tax. And we were able to see the poll tax struck down as an unconstitutional interference with the individual right to vote.

I can also recall our work here in the Senate to extend the right to vote to the 18-year-olds of this country. For many years, the House of Representatives had actually approved a constitutional amendment, but the Senate was reluctant to move.

States like Georgia and Kentucky had moved ahead in permitting the 18-year old vote. But still the Congress had been unwilling to permit young people who, at that time, were being drafted and were serving in Southeast Asia and fighting and dying, to be able to express their views at the ballot box in this country.

But, nonetheless, we were able to make that change by statute. Our action was eventually upheld, and we were able to extend the right to vote to the 18-year-olds of this country.

I can recall the action taken by this body to provide the right of franchise to the 700,000 citizens who live in the District of Columbia and who, until relatively recently, were denied the opportunity to express their choice in voting just in Presidential elections.

Now, in the last 2 years, we have agreed to provide voting representation in the House and the Senate. That amendment is now involved in the constitutional process with respect to State approval.

So the action we are considering here today is a natural continuum of what I think has been an extremely important and significant historical trend toward guaranteeing to the citizens of this Nation the reality that their vote, each and every vote, will be counted, and will be counted fairly and equitably in electing the Chief Executive.

My friend from Indiana, I think, has made the case for this amendment time and again in our Judiciary Committee, in the committee hearings, and here on the floor of the Senate. I would certainly hope that our colleagues will follow that record to its logical conclusion.

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

Mr. KENNEDY. I yield.

Mr. BAYH. Mr. President, I would just like to say to my distinguished colleague and friend the chairman of our Judiciary Committee how grateful I am for his thoughtful comments, and to emphasize the fact that whatever role I have been able to play as a member of the Judiciary Committee and subcommittee chairman with responsibility for constitutional matters has been aided tremendously by his support and his leadership, now, as chairman of the committee.

I would like to ask the Senator from Massachusetts, if he would, to deal with the procedural question. As is the case with every new suggestion that is made, I think quite rightly some of our colleagues are concerned about how this new procedure might work. There has been some concern expressed by certain Members, very well-intentioned, about procedural problems such as fraud and recounts. I would just like the Senator from Massachusetts to share his memory, because I think he was more personally involved in the 1960 campaign. I call to the attention of the Senator that some of these procedural questions—that are real questions to be asked—are the same questions that should be directed to the electoral college system. Will the Senator from Massachusetts refresh my memory: Was there not a recount involved in the 1960 election?

Mr. KENNEDY. There was no total recount called for, actually by Vice President Nixon in the 1960 election. In different States there were different actions taken in terms of recounts.

The Senator is familiar with the closeness of the total outcome of that election. But the Senator from Indiana, as one who has followed the matter, knows there is another issue which is somewhat related to the point that the Senator is making. Through efforts to initiate an open registration program, to try to reduce the major voting barriers to a mobile society, we know that there are a number of obstacles which are created in different communities. They exist in my own State of Massachusetts, because the courthouse is open only a certain number of hours, usually during the time when most people are working. In a number of instances the registration place is quite inaccessible to some of our citizens.

There has been, as a result of hearings in the Rules Committee, evidence that this country has been relatively free from individual incidents of voting fraud. There have been instances of voting fraud in the United States, but generally those have been the result of wholesale manipulation, not of individual votes.

Mr. BAYH. Yes. If the Senator from Massachusetts will yield, the Senator from Indiana should have been more specific with his question.

As I recall, in at least one of the recounts, in Hawaii in 1960 and not only was there a recount, but the result changed; and as I recall from reading newspapers, as late as December the recount was still taking place, and it was only in December when the Republicans in Illinois finally decided not to ask for a recount in that State.

So as to the suggestion that the present system is a fail-safe system so far as avoiding recounts is concerned, it is the contention of the Senator from Indiana that if we get into a situation where we have to have a recount, this can be done by each State at the same time, and the whole country can be recounted as quickly as one State is now under the electoral college system.

Mr. KENNEDY. I think the Senator's point is valid. The difference in Hawaii was extremely small. In Alaska it was also extremely close, and in other States.

But the point that the Senator has made is one I would completely subscribe to.

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

The PRESIDING OFFICER. On whose time?

Mr. KENNEDY. Charged equally to both sides.

The PRESIDING OFFICER. Is there objection?

Mr. HATCH. Mr. President, if I may, one of our problems here is, if the distinguished Senator from Indiana could have his people speak now, that we only have about 40 minutes remaining.

Mr. KENNEDY. I withdraw the request for a quorum call.

The PRESIDING OFFICER. The suggestion is withdrawn.

MAGISTRATE ACT OF 1979

Mr. KENNEDY. Mr. President, I ask that the Chair lay before the Senate a message from the House of Representatives on S. 237.

The PRESIDING OFFICER laid before the Senate the following message from the House of Representatives:

Resolved, That the bill from the Senate (S. 237) entitled "An Act to improve access to the Federal courts by enlarging the civil and criminal jurisdiction of United States magistrates, and for other purposes", do pass with the following amendment:

Strike out all after the enacting clause, and insert: That this Act may be cited as the "Magistrate Act of 1979".

SEC. 2. Section 636 of title 28, United States Code, is amended—

(1) by redesignating subsections (c) through (f) thereof as subsections (d) through (g), respectively; and

(2) by inserting immediately after subsection (b) thereof the following new subsection:

"(c) Notwithstanding any provision of law to the contrary—

"(1) Upon the consent of the parties, a full-time United States magistrate may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. When there is more than one judge of a district court, the designation shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

"(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall notify the parties of their right to consent. The decision of the parties shall be communicated to the clerk of court. No district judge shall be informed of the parties' response to this notice, nor shall he attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate.

"(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal on the record to the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal expeditious and inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

"(4) Cases in the district courts under paragraph (3) of this subsection may be reviewed by the appropriate United States court of appeals by writ of certiorari granted upon the petition of any party to any civil case, before or after rendition of judgment or decree. Nothing in this paragraph shall be construed to be a limitation on any party's right to seek review by the Supreme Court of the United States pursuant to section 1254 of this title.

"(5) Notwithstanding the provisions of paragraphs (3) and (4) of this subsection, at the time of reference to a magistrate by the clerk of court under paragraph (2) of this subsection, the parties may further consent to appeal directly to the appropriate United States Court of Appeals in the same manner as an appeal from any other judgment of a district court. In this circumstance the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation on any party's right to seek review by the Supreme Court of the United States pursuant to section 1254 of this title.

"(6) Any proceeding conducted by a United States magistrate under this subsection shall be taken down by a court reporter appointed pursuant to section 753 of this title, if a district judge in such a proceeding would have been provided a court reporter under section 753, unless the parties with the approval of the judge or magistrate agree specifically to the contrary. Reporters referred to in the preceding sentence may be transferred for temporary service in any district court of the judicial circuit for reporting proceedings under this subsection, or for other reporting duties in such district court.".

SEC. 3. (a) Section 631(a) of title 28, United States Code, is amended by adding immediately after the first sentence thereof the following: "All magistrates shall be appointed pursuant to standards and procedures established by law.".

(b) The first sentence of section 631(b) of title 28, United States Code, is amended (1) by inserting "reappointed to" immediately after "appointed or"; and (2) by striking out the colon after "unless" and inserting in lieu thereof "he has been a member of a bar of the highest court of a State, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands of the United States for at least five years: Provided also:".

(c) Paragraph (1) of section 631(b) of title 28, United States Code, is amended by striking after the word "requirements" the words "of the first sentence of this paragraph" and inserting in lieu thereof the words "of this subsection".

(d) Section 631(b)(2) of title 28, United States Code, is amended to read as follows:

"(2) He is selected pursuant to the recommendation of a Magistrate Selection Panel (hereinafter referred to as the 'Panel') established in each district by the district court:

"(A) The Panel shall be selected by the judges of the district court when a magistrate position is created or at a reasonable time before the term of such a position expires or an existing position becomes vacant. The Panel shall be composed of no fewer than five members, and its size shall be determined by the chief judge of the district court. A majority of the Panel shall be members of the bar, and at least one of the remaining members shall be a nonlawyer. Each member of the Panel shall be a resident of the district for which the appointment is to be made. In selecting members of the Panel, the judges of the district court shall insure that a cross section of the legal profession and the community is represented. The Chairman of the Panel shall be chosen by a majority vote of its members.

"(B) The Panel shall (i) give public notice in a manner designed to inform the widest possible segment of the legal profession of the vacancy throughout the district, inviting suggestions as to potential nominees; (ii) conduct inquiries to identify potential nominees; (iii) conduct inquiries to identify those persons among the potential nomineee who are well qualified to serve as magistrates; and (iv) report to the district court within ninety days after the Panel's creation the results of its activities and recommend at least three, and not more than five, persons whom the Panel considers best qualified to fill the vacancies, using the criteria established by this chapter and any such criteria as the conference may from time to time promulgate: *Provided, however*, a Panel may recommend, with the concurrence of the district judges, one individual who is a sitting magistrate up for reappointment. All decisions of the Panel shall be by majority vote of the members.

"(C) The district court shall select from the list provided by the Panel. However, a district court may, by majority vote, reject the first list submitted by the Panel. If such list is rejected, however, the Panel shall submit a second list in accordance with this section from which the district court shall then select its magistrate.

"(D) No person shall be considered by a Panel as a potential nominee while serving as a Panel member or during a period of one year after termination of such service.

"(E) All information made available to the members of the Panel in the performance of their duties and all recommendations made to the district court shall be kept confidential.

"(F) Congress (i) takes notice of the fact that women and minorities are underrepresented in the Federal judiciary relative to the population at large; and (ii) recommends that the Panel, in recommending persons to the district court, shall give due consideration to qualified women, blacks, Hispanics, and other minority individuals.

A district court which cannot meet the procedural requirements of this paragraph, for good cause shown, may appoint a part-time magistrate pursuant to its own publicized procedure, after having filed with the conference the reasons for not being able to comply with the requirements of this paragraph."

(e) The amendments made by this section shall take effect on the date of enactment.

SEC. 4. Section 633(c) of title 28, United States Code, is amended by striking the final sentence.

SEC. 5. (a) Section 633 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) REPORTS BY THE DIRECTOR.—The Director shall, within two years immediately following the date of enactment of the Magistrate Act of 1979, conduct a study and report to the Congress with respect to (1) the professional qualifications of individuals appointed under section 631 of this chapter to serve as magistrates, (2) the number of matters in which the parties consented to the exercise of jurisdiction by a magistrate pursuant to section 636(c) of this chapter, and (3) the number of appeals taken pursuant to paragraphs (3), (4), and (5) of such section 636(c), and the disposition of each such appeal. Thereafter, the Director shall conduct a study and report to each Congress with respect to the matters set forth in this subsection.".

(b) The heading for section 633 of title 288, United States Code, is amended by inserting "; Reports by the Director" immediately after "magistrates".

(c) The item relating to section 633 in the table of sections of chapter 43 of title 28, United States Code, is amended by inserting "; Reports by the Director" immediately after "magistrates".

SEC. 6. Section 1915(b) of title 28, United States Code, is amended to read as follows:

"(b) Upon the filing of an affidavit in accordance with subsection (a) of this section, the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.".

SEC. 7. Section 3401 of title 18, United States Code, is amended—

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

"(a) When specially designated to exercise such jurisdiction by the district court or courts he serves, any United States magistrate shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district.";

(2) in subsection (b)—

(A) by striking out "minor offense" and inserting in lieu thereof "misdemeanor";

(B) by striking out "such judge" and inserting in lieu thereof "a district judge or magistrate";

(C) by striking out "both"; and

(D) by striking out "and any right to trial by jury that he may have";

(3) by adding at the beginning of subsection (d) the following: "A magistrate may impose sentence and exercise all powers under chapter 402 of this title: *Provided, however*, That no such sentence shall include a commitment for a period in excess of one year for conviction of a misdemeanor or six months in other cases."; and

(4) by amending subsection (f) to read as follows:

"(f) For good cause shown the attorney for the Government may petition the district court to have proceedings in any misdemeanor case conducted before a district judge rather than a United States magistrate. Such petition should note the novelty, importance, or complexity of the case, or other pertinent factors, and be filed in accordance with regulations promulgated by the Attorney General. Nothing in this subsection shall be deemed to limit the discretion of the court to have any misdemeanor case tried by a district judge rather than a magistrate.".

SEC. 8. (a) The heading for section 3401 of title 18, United States Code, is amended by striking the words "Minor offenses" and inserting in lieu thereof "Misdemeanors".

(b) The item relating to section 3401 in the table of sections of chapter 219 of title 18, United States Code, is amended by striking the words "Minor offenses" and inserting in lieu thereof "Misdemeanors".

SEC. 9. No additional funds are authorized to be appropriated to implement the provisions of this Act for expenditure prior to October 1, 1980.

SEC. 10. Such sums as may be necessary to carry out the purposes of this Act are hereby authorized to be appropriated for expenditure on or after October 1, 1980.

Mr. KENNEDY. Mr. President, I move that the Senate disagree to the amendment of the House, that the Senate agree to the conference requested by the House on the disagreeing votes of the two Houses thereon, and that the Chair be authorized to appoint the conferees on the part of the Senate.

The motion was agreed to, and the Presiding Officer appointed Mr. KENNEDY, Mr. DECONCINI, Mr. HEFLIN, Mr. THURMOND, and Mr. DOLE as conferees on the part of the Senate.

DIRECT POPULAR ELECTION OF THE PRESIDENT AND VICE PRESIDENT

The Senate continued with the consideration of the joint resolution (S.J. Res. 28).

The PRESIDING OFFICER (Mr. MOYNIHAN). Who yields time?

Mr. BAYH. Mr. President, John Roche once described the electoral college as "merely a jerry-rigged improvisation which has subsequently been endowed with a high theoretical content. The future was left to cope with the problem of what to do with this Rube Goldberg mechanism." Despite its eccentricities, the electoral college is not a lovable old mechanism to be kept and treasured. Mr. President, the electoral college is not harmless. If, as its defenders like to say, it has worked, it has worked often times in strange ways. It carries with it always the risk that it may not work at all. As the Presidential election of 1980 approaches, I would hope that the Congress would take heed to the ominous rumblings we have had from this cumbersome counting machine in the past, and begin the amendment process that would provide the country with political protection from a breakdown which could occur any time in the future. To finally replace the electoral college with direct election is simply to give us insurance before it is needed.

The electoral college has given problems since it was first created. Speaking in Federalist 67 of the manner of electing a President which had been chosen by the 1787 Convention, Alexander Hamilton said:

> There is hardly any part of the system which could have been attended with greater difficulty in the arrangements of it than this. . .

The manner of electing the President was debated extensively during the summer of 1787. Debate centered mainly between those who believed in a direct popular vote and those who wanted election by the National Legislature. However, John Feerick, chairman of the American Bar Association Committee on Election Reform, reports from the historical records, that on July 25 the following proposals were all debated but none adopted:

> Among the proposals made, but not adopted were that he be chosen by: Congress and, when running for re-election, by electors appointed by the state legislatures; the chief executives of the states, with the advice of their councils, or, if not councils, with the advice of electors chosen by their legislatures, with the votes of all states equal; the people; and the people of each state choosing its best citizen and Congress, or electors chosen by it, selecting the President from those citizens.

A committee of 11 finally was appointed to break the deadlock over how votes for President would be apportioned in the National Legislature. The committee discarded the legislative election method, and in the final days of the Convention recommended a system of intermediate electors. Their recommendation was accepted.

Clearly, the electoral college system was neither the most obvious, the most popular, nor the most inspired of the Founding Fathers' great works in framing the Constitution. What is more, the Founders did not envision political parties, the unit rule, or popular election of electors. These aspects of the present system of electing a President evolved quickly and changed the system dramatically, but not by design of the delegates to the 1787 Convention.

James Madison wrote some 36 years later:

> The difficulty of finding an unexceptionable process for appointing the Executive Organ of a Government such as that of the U.S., was deeply felt by the Convention; and as the final arrangement took place in the latter stages of the session, it was not exempt from a degree of the hurrying influence produced by fatigue and impatience in all such bodies, tho' the degree was much less than usually prevails in them.

For its time, however, the electoral college made some sense. The Founding Fathers were dealing with a much different society and the electoral college was a device for that society. The land mass of the country was huge; communication was primitive; and education was limited at best. Lack of information about possible Presidential candidates was in fact a very real consideration. Direct election would have been a difficult proposition, a reality which James Madison, one of its strong proponents, acknowledged reluctantly. Added to this were the problems involving suffrage. Out of a total population of 4 million, almost 700,000 were slaves, almost 90 percent of the South. It was not possible to count the slaves along the lines of a three-fifths compromise type of solution in a direct popular vote system. This would have led to northern-dominated elections and would have been wholly unacceptable unless the slaves were permitted to vote which was equally unacceptable.

James Madison spoke to this problem on July 19, 1787:

> There was one difficulty however of a serious nature attending an immediate choice by the people. The right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes. The substitution of electors obviated this difficulty.

From the beginning the electoral college did not work as intended. By 1809, the first crisis occurred when Burr and Jefferson tied in the electoral vote for President. Thus, the election was put to the House of Representatives. After 36 ballots and 6 days, Jefferson finally won, but it was clear that an amendment was needed. In 1804 the 12th amendment was ratified, solving only the immediate problem of the 1800 election, but leaving the already outmoded electoral college in place.

In the beginning of course, popular votes were not counted. As the Founding Fathers intended, the State legislature chose the electors. Whether or not the system produced the winning can-

didate with the greatest popular mandate was totally irrelevant. As the new nation matured politically, however, it quickly became the rule that the people demanded the right to select the electors, and the possible consequences of the strange electoral college counting device which can distort the popular will first became a question.

How much of a question is it? What will be the reaction of Americans in the late 20th century if the Presidential election produces a "divided verdit"—a President with fewer votes—is an issue which we can and should rebate in the coming days, drawing on our own assessments of the political disaffection and disillusionment with which such a result would be greeted. The chances of a misfire occurring, however, are not speculative. They can and have been mathematically computed. Two studies are available to us today, and I think the Senators, as sober and reasonable men, should take good notice of them, much as they would weigh the odds of possible misfortune in buying an insurance policy. The odds are these:

If the winning candidate carries only 51 percent of the major party vote, there is a 50 percent chance that he becomes President with fewer votes than his opponent. Has this happened? It certainly has—in 1824, 1876 and 1888. Moreover, in 15 percent of the 39 elections we have had in which the popular vote has been recorded, there has been a 50 to 50 chance of a misfire. Three of the last five elections are among those near misses. Should we not as sober and reasonable men consider taking out an insurance policy on behalf of the Nation. That is, if, of course, we could find an insurance company which would consider issuing a policy with odds like these?

As I said previously, the system has backfired three times. In the elections of 1824, 1876 and 1888 the candidate who received the most votes did not win. That is 3 elections out of the 39 which have recorded popular votes, or a failure rate of 8 percent. Each of these elections has shown some peculiar flaw of the electoral college system.

The election of 1824 ended up in the House of Representatives. It taught us a lesson to be carried to this day. What happened then was remembered 144 years later and hovered behind the fears about George Wallace's third party candidacy in 1968. Despite a popular vote plurality of 40,000 votes out of almost 400,000 votes cast, Andrew Jackson did not receive sufficient electoral votes to win. During the period between the election and House action, the Nation was subjected to the spectacle of the asking and the suspected granting of every manner of favor as Jackson and Adams vied for the votes of House Members. Charges of a corrupt deal followed Adams through his Presidency and as a result of his anger over the election, Andrew Jackson formed our modern Democratic Party.

With direct election, no such deal-making or charges of deal-making ever would be possible. In the unlikely event that the leading candidate does not receive 40 percent of the popular vote, an event which has occurred only once in our history, the people themselves will get to choose the candidate they prefer in a run-off election.

The election of 1876 was the result of a system steeped in corruption before the election, a nation not yet recovered from the bitterness and division of a Civil War and a system that permitted fraud in a handful of States to decide an election. Even President Rutherford Hayes, in his diary, admits that Samuel Tilden, in fact, won the Presidency.

In 1876 the Republican Party bought the electoral votes in three States in the South, South Carolina, Louisiana and Florida. The price they paid was to sell out the newly enfranchised black citizens by promising to remove Federal troops. In this way the stage was set for the long period in which political participation by blacks in the South was a rarity, a situation finally addressed by Congress in the Voting Rights Act of 1965.

Fraud is an ever present possibility in the electoral college system, even if it rarely has become a proven reality. Tilden and Hayes forces struggled over two slates of electors—representing electoral votes. With the electoral college, relatively few irregular votes can reap a healthy reward in the form of a bloc of electoral votes, because of the unit rule or "winner take all" rule. Under the present system, fraudulent popular votes are much more likely to have a great impact by swinging enough blocs of electoral votes to reverse the election. A like number of fraudulent popular votes under direct election would likely have little effect on the national vote totals.

We may cite New York in 1976 as a modern example. Cries of voting irregularities arose on election night. At stake were 41 electoral votes—more than enough to elect Ford over Carter in the electoral college. Carter's popular margin was 290,000. The calls for recount were eventually dropped, but if fraud had been present in New York, Carter's plurality of 290,000 would have been enough to determine the outcome of the entire national election. Under direct election, Carter's entire national margin of 1.7 million votes would have had to have been irregular to affect the outcome.

Fraud was also involved in the election of 1888, but there is no question that Grover Cleveland won the popular vote by a 23,000 plurality and lost the electoral vote 219 to 182, simply because the electoral system allowed it to happen. There were thousands of disfranchised black voters in the South because of the electoral college sellout in 1876. There was also very likely fraud in Indiana and New York. Had Cleveland not been so willing to return to public life; had he, like Jackson, gone home and created a great storm of controversy, we have no way of knowing how the people would have reacted.

What happened in 1888 represents the greatest danger presented to us by the electoral college. Of course, no one can foretell with accuracy what would be the reaction in the United States in the second half of the 20th century if the duly elected President were not the popular vote winner. But we should be thinking about it. There have been three near misses in the last five elections. When we consider our present day increased suffrage, wide-spread education, ever-present communications systems, and perhaps most importantly, popular dissatisfaction with and distrust in the political process, it is reasonable to predict that there would be a political crises. Surely there is nothing speculative in the view that the mandate of the President to lead would be severely, perhaps irreparably, weakened.

Mr. President, I would like to emphasize once again that the danger that the electoral college will produce a President who is not the choice of the voters is not remote—it is not a speculative danger. On several occasions in this century, a shift of less than 1 percent of the popular vote would have produced an electoral majority for the candidate who received fewer popular votes because that relative handful of votes would have "swung" blocs of electoral votes. To reflect on recent years, in 1960, 1968 and 1976, the dangers have been all too close.

To this day we cannot be absolutely certain whether John Kennedy in fact won the popular vote or not in 1960. In the States of Alabama and Mississippi, States of unpledged Democratic electors were run and some of them won a position as Presidential elector. Many did not vote for President Kennedy when the electoral college met, yet the popular votes for these electors was included in the Kennedy tally by the television networks and the newspapers.

Most frightening in this election was an attempt by a Republic elector from Oklahoma to combine with other conservative electors, to disregard the popular vote and vote a Byrd-Goldwater ticket out of the electoral college.

Henry Irwin sent the following telegram in 1960 to his fellow electors:

> I am an Oklahoma Republican elector. The Republican electors cannot deny election to Kennedy. Sufficient conservative Democratic electors available to deny labor Socialist nominee. Would you consider Byrd President, Goldwater Vice President, or wire any acceptable substitute. All replies strict confidence.

In 1968 George Wallace entered the election and built a strategy based on the notion that he could deadlock the electoral college and broker the Presidency there:

> *Question.* If none of the three candidates get a majority, is the election going to be decided in the Electoral College or in the House of Representatives?
>
> WALLACE. I think it would be settled in the Electoral College.
>
> *Question.* Two of the candidates get together or their electors get together and determine who is to be President?
>
> WALLACE. That is right.

Wallace managed to get his name on the ballot in all 50 States and came within 54,000 votes of accomplishing his aim. We can only speculate how the American people at the height of the controversy over the Vietnam war would have reacted to the kind of deals that might well have taken place between

election day and the meeting of the electors.

In 1976 a change of less than 9,500 votes in Ohio and Hawaii would have made Ford the President while Carter had an almost 1.7 million vote plurality. Such a misfiring of the system in our present climate could have grave consequences for our system and for the person charged with carrying out the duties of the Presidency.

In a runaway election—like that of 1972—any system will produce an electoral victory for the popular vote winner. But in elections as close as that of 1960, I repeat, the present system offered only a 50 to 50 chance that the electoral result would agree with the popular vote. For an election as close as 1968, where some 500,000 popular votes separated the candidates, there was one chance in three that the electoral vote winner would not be the popular vote winner as well. Even in the 1976 election, where Mr. Carter's plurality was 1.7 million, the chance of misfiring was one out of four. According to the evidence, the danger of an electoral backfire is clear and present.

It is easy for us to forget, when a near miss is past, that we should prepare for the future. Not enough of us remember the flood of magazine and newspaper articles speculating on disaster when the possibility of an electoral college backfire was imminent in 1968. In the days just prior to the 1976 election, the cry began again, only to subside when all turned out to be safe. I would hope that we would not allow ourselves to wait until the electoral college actually does backfire again before we rouse ourselves to act. Insurance cannot be bought after the house has burned down.

Mr. President, the history of the electoral college is not significant simply because it has carried the threat of misfiring. Its very nature is contrary to the political ideals which we as a Nation have come to realize over the years. In a very basic way, the electoral college is inimical to our political life. Unlike any other election in the United States from county commissioner to U.S. Senator, in a Presidential election all votes do not count the same. Under the electoral college, one America's vote is not equal to another's, simply on the basis of where he happens to live. Only with the direct election system would all votes be equal. The electoral college's strange alchemy of apportioning electoral votes plus its "winner-take-all" rule produces the anomalous result that, for example, a citizen from Iowa's vote is actually worth less than his neighbor's in Illinois, but more than his neighbor's in Nebraska. This effect is contrary to our experience in all other elections and the principles behind our form of Government. I am sometimes told that with direct election, I am trying to make a major change in our political system. Far from it. With direct election, I think, we would simply be bringing our method of Presidential choice in line with all the rest of our voting process.

We worry a great deal nowadays about the "empty voting booth" in America. We speculate on why so few of us choose to take advantage of our right to vote. Mr. President, in my opinion, the inequities inherent in the electoral college are also inimical to voter participation. The electoral college system provides a disincentive to voter turnout, and this is reflected in the way Presidential campaigns are conducted. It makes no difference to a Presidential candidate how many people show up on election day in any State so long as he receives a plurality of one, for that one extra vote determines the outcome of the State's bloc of electoral votes. The votes constituting the plurality over the winner's vote of one are actually worthless. Conversely, all the votes for the loser are not simply lost; they are in effect recast for the winner along with the State's bloc of electoral votes.

These inequities are of great practical consequence to the way campaigns are run and thus on the degree of encouragement by candidates for voter participation. With the electoral college, some States are inherently more influential than others, helping a candidate to decide where he will spend his time and effort. Therefore, he will, in all likelihood, ignore much of the Plains and Mountain States and the South.

Look at the actual campaign trips, the actual expenditures of Presidential candidates. If he reasonably expects to either win or lose a State, however, he will probably write it off as well. Thus, few Democratic candidates go to Massachusetts or Rhode Island, or Republicans to Wyoming. The electoral college gives neither the candidate nor the national party any motivation to either work to turn out the vote in those States, or widen the margin of victory if he expects to win, or narrow it if he expects to lose.

There is no advantage in building significant margins of victory. As an example of what I mean, in 1976 Mr. Ford picked up 45 electoral votes in California with a 127,000 plurality; Mr. Carter earned 45 electoral votes in 5 Southern States with a 1,044,000 plurality. The difference in popular votes made no difference in the electoral votes. In effect, all those extra voters were disfranchised. They counted not at all.

Winning under direct election, however, depends precisely on a party's ability to get out the vote and to build sizable pluralities in every community simply because every vote counts and therefore no State nor population can easily be ignored.

Mr. President, there is little doubt that American citizens are ready to abolish the electoral college and establish direct election in its place. For over 10 years, polls have shown that support of direct election is over 75 percent, and that support comes from every region of the country, every political ideology, both parties and independents, all races and religions, all professions and economic strata, consistently across the board. The amendment is endorsed by an array of national organizations including the American Bar Association, the U.S. Chamber of Commerce, AFL–CIO, UAW, League of Women Voters, Common Cause, National Federation of Independent Business, the ACLU, National Small Business Association, the ADA, the American Federation of Teachers, and the National Farmers Union. In the 95th Congress it was cosponsored by 45 Senators, including 28 Senators from small States. It has broad support in the House where it passed by an 83 percent vote in 1969.

Back in the 1960's Senator BURDICK and Senator Griffin conducted polls of State legislators, to find out their thinking on direct election. They showed approval rates of 58.8 percent and 64 percent. But I am often told the State legislatures today, in 1979, would never ratify a direct election amendment. There are two other amendments out there before them, and they are sick of being sent amendments by Congress. I thought we should know. So I directed that a new study be made. Fourteen small States were chosen—because we thought that resistance was likely to be strongest in small States. We chose States that represented the different regions of the country. Mr. President, the response to the question. Would you vote to ratify a direct election amendment, was 61 percent yes; 25 percent undecided; and 14 percent no.

Majorities in each State voted yes. The answer was clear: State legislators are able to be selective and individual in their consideration of another amendment. More importantly, they share the belief of the rest of their countrymen that direct election is a proper and rightful addition to the Constitution.

Sometimes the question is asked, why change the electoral college after all these years? The answer is clear. George Mason, one of our Founding Fathers, was correct—the electoral college is a deception to the American people—"thrown out to make them believe they were to choose." Our history since 1787 has been a long journey to increase participation in the election process, and the changes have never been made easily or quickly. It was 83 years before the 15th amendment proclaimed that the right of citizens to vote should not be abridged on account of race. It was 133 years before women were entitled to vote. Reapportionment was constitutionally required after 177 years; the Voting Rights Act took 1 year more.

While it is important not to overstate the impact of direct election on the country, it is also important to recognize it for what it is: A way of counting the votes for President which insures that every vote and voter is of importance to the outcome of the election.

The fundamental case for direct election has been put simply for the Congress in our latest hearings in the statement of a man who in his own lifetime as a civil rights leader and the director of the implementation of the old struggle to increase citizen participation in the election process. John Lewis is now with ACTION, heading VISTA. His perception of direct election wipes out all the calculations of advantage and disadvantage which so often attend the electoral college as well as the unfounded fears of change to improve the system, and returns to the precept that everyone's vote should count and should count the same.

John Lewis told the Committee on the Judiciary:

That every person's vote should count the same is one of the fundamental principles which is bedrock in this country. Having won the long and difficult and dangerous struggle to win the right to vote, we cannot now accept the proposition that any one person's vote can count more than another. . . .

Mr. Chairman, I respectfully submit that the direct popular election of the President and Vice President is an idea whose time has not only come, but is long overdue.

Mr. President, I am sure that my 36 colleagues who have chosen to cosponsor the direct election amendment in the beginning of this 96th Congress agree with Mr. Lewis and join me in urging that in 1979 the time has come to replace the strange mode of Presidential election which was left to us in the last harried hours of the constitutional convention. It is time, Mr. President, that we in Congress take the action that a great majority of our constituents long have supported and for which many of our colleagues have labored, and pass the direct election amendment. As Mr. Lewis has said, it is long overdue.

In addition to my prepared remarks, Mr. President, I would like to elaborate on several points that I feel need emphasis.

To those who say, "If it ain't broke, don't fix it," I should like to ask them what they feel the necessary criteria for a system of electing a President are. I have always maintained that the Presidential election should meet the same three-point test that is applied to all other elections in this country. First of all, the winner should be the one who gets the most votes; second, each of those votes should count the same and be counted for the candidate for whom they were cast; and, third, the people who do the actual electing should be the ones who cast the votes.

I use those criteria for President because they are the same criteria used for electing Senators, Congressmen, Governors, State legislators, county sheriffs, all officials; every election, except, let me hasten to add, the President and the Vice President. So instead of establishing new criteria, radical criteria, as some editorials have said, the Senator from Indiana and those who support the direct popular vote are establishing the same criteria for President and Vice President as have been applied to all other offices.

At least by the definition of the Senator from Indiana, the crack or the breakdown in the system has resulted when on these three occasions we have elected a President who had fewer votes than the person he was running against. Of more concern to the Senator from Indiana than what happened back in 1888 is what nearly happened in three of the last five times. It makes about as much sense to say, "If the electoral college ain't broke don't fix it" as it does to say to the neighbor of an adjoining farm, "You are foolish for buying fire insurance for your barn because it is not on fire."

Three times in the last five elections we have had elections that were so close that with a change of a handful of votes we would have elected a President who had fewer popular votes than his opponent.

I will not go into great detail to describe all of these. I think we all recall the fact that Jimmy Carter, although almost a 2 million vote winner, came within less than 11,000 votes of being an electoral college loser.

We are all familiar with the narrow margin of victory in 1960.

Although there was a great deal of concern expressed in 1968 about the Wallace phenomenon at the time, apparently a lot of people who were concerned then have been mighty forgetful in the meantime. We came within a handful of votes of letting George Wallace with 46 electoral votes prevent the election from taking place at all as far as the population was concerned and thrust it into the House of Representatives or choose a President by bargaining off his 39 independent electors to the highest bidder.

The facts of 1968 are there to be read and hopefully remembered; if there had been a relatively small change in the popular vote total of three States, neither Vice President Humphrey nor Vice President Nixon would have won the electoral college majority necessary.

That is enough concern to me, Mr. President, to say, "OK, if it is not totally broken, if the barn is not on fire, if our institutions are not blazing, then let us take a little insurance policy out to try to keep somebody from striking sparks near the tinderbox."

We asked some mathematicians to conduct some analytical studies. "Run it through your analysis chart." We do this with insurance policies to determine what the actuarial probability of life is, what the actuarial possibility of an accident is. This is not a foreign custom.

We asked these mathematicians and those actuarial experts to estimate what the possibilities of malfunctioning might be given the recent history.

They reported back to us that in 1960 in a similar election, or tomorrow, there would be a 47 percent chance that the President who won would be the one without the most votes. In 1976, there would be a 23 percent probability, and on and on.

At this time, Mr. President, I ask unanimous consent to have printed at this point in the RECORD a letter from Dr. Samuel Merrill, III, and his colleagues in computer science, which points out that as reasonable men we ought to consider the odds of the system malfunctioning once again as it has in the past.

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

WILKES COLLEGE,
Wilkes-Barre, Pa., June 22, 1979.

Sen. BIRCH BAYH,
Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR BAYH: In response to your inquiry, let me summarize my findings concerning the likelihood of a divided verdict in a Presidential election, i.e., an election in which one candidate wins in the Electoral College while the other wins the popular vote. As you know, any decision concerning retention of the Electoral College system must take account of quantitative estimates of the many subtle effects of this method of choosing the President. Detailed documentation of these conclusions are published in "Empirical Estimates for the Likelihood of a Divided Verdict in a Presidential Election," which appeared in the journal Public Choice, Vol. 33 (1978), pp. 127–133.

My analysis, based on the state by state voting records for the period 1900–1976 indicates that in a race as close as the Carter-Ford contest, the likelihood of a divided verdict is about 23 percent. If the election is as close as the Kennedy-Nixon race, this likelihood is about 47 percent. Based on a more recent portion of the data, namely the period 1952–76, the corresponding likelihoods are 46 percent and 11 percent.

Thus, whereas the likelihood of a divided verdict has decreased somewhat as more states have come to reflect national trends, it is still very substantial and for very close election remains near 50 percent. Furthermore, the relationship between this likelihood and voting patterns is so subtle that we have no assurance that this likelihood will not increase in the future.

In a 3-way election with Electoral strength distributed in the proportions of the election of 1968, the probability that the popular vote winner fail to win the Electoral College is 63 percent (if based on 1900–76 data) and 56 percent (if based on data for only 1952–76).

For the national bonus plan, now under consideration by a subcommittee of the House Judiciary Committee, a similar analysis indicates that the likelihood of a divided verdict in races as close as the two described above would be about 3 percent (Carter-Ford) and about 11 percent (Kennedy-Nixon), respectively. Although the national bonus would, of course, reduce the likelihood of a divided verdict, it would by no means prevent it.

I am also enclosing a copy of a letter which I sent to each member of the House Judiciary Committee's Subcommittee on Monopolies and Commercial Law, which is currenly considering the national bonus plan. A similar letter was sent to the members of the Task Force on the Reform of the Presidential Election Process sponsored by the Twentieth Century Fund.

I hope that this material can be of use to you in the coming debate.

Sincerely,

SAMUEL MERRILL III,
Associate Professor of,
Mathmatics/Computer Science.

Mr. BAYH. Second, Mr. President, I would like to emphasize that one of the real problems we have today is disenchantment—disenchanment of our people with their institutions and their political leaders.

I must say I have sat here in amazement and have listened to some of the most eloquent opponents of direct election suggest that if we pass a direct popular vote system the people of the country are going to be disenchanted.

They have also said if we have a direct popular election, there is not going to be a very high vote turnout.

They have also said if we have direct popular election of the President there is going to be a lessening of confidence and a weakening of the political structure.

They have also said that if we have direct popular vote the emphasis in campaigns is going to be on television, that the media producers are going to be the major instruments of the campaign.

The amazement, Mr. President, in listening to these very eloquent and reasonable spokesmen is that those very fears they express as a result of the direct popular vote are happening now. They are happening at a time when we are governed by an electoral college system.

Mr. President, I would not be so devious as to suggest that all of these things are the result of the electoral college system, but it seems to me totally unreasonable to suggest that the direct popular vote is going to lead to worse conclusions and worse results than we have had under the electoral college system, as far as these factors are concerned.

(Mr. MOYNIHAN assumed the chair.)

Mr. BAYH. Mr. President, I do not believe there is any magic for restoring confidence and believability. But I must say that I am sure that this disillusionment will increase if we elect a President who is the electoral college winner and the popular vote loser.

We have heard the statistics on the fact that a majority of the people in this country do not understand the electoral college even exists, that they think they are working and voting for a President. How can it do anything but increase disillusionment if, on election night, they see a Carter sitting there with a 2 million vote plurality and a Ford going back to the White House an electoral college winner? Or can you say the same thing about a Nixon or a Humphrey. The fact of the matter is that it would increase disillusionment if we permit that kind of result.

Also, Mr. President, I point out that there have been concerns expressed by my colleagues about the possibility of certain malfunctions of a direct popular vote system. Mr. President, I cannot honestly say that any system that is run by human beings will be perfect. It will be imperfect. Depending upon the time and the circumstances, any election system can malfunction.

It is possible to have fraud under a direct popular vote system. Does anyone deny that we have had fraud under the electoral college system? If so, they are not very good students of history.

In the judgment of the Senator from Indiana, there are two ways to lessen the impact of fraud or the possibility of fraud. One is to provide for a more careful policing of the election mechanism, and the second is to lessen the fruits of fraud. Under the electoral college system, the fruits of fraud are very high. A handful of fraudulent votes in the second most populous State, that of our distinguished present Presiding Officer, can produce 41 electoral votes.

I am not suggesting, let me hasten to add, that there is any possibility of fraud in New York any greater than any place else, but a handful of fraudulent votes in California can produce an even larger number of electoral votes. So the incentive to participate in just a little fraud in those large electoral vote States is much greater because the fruits to be gained by the electoral votes procured from the fraudulent votes are a much higher percent of the total of the electoral college votes than the fraudulent votes are as a percentage of the total popular vote.

In a popular vote system, if you have a fraudulent vote, it will count as one. Theoretically, in an electoral college system, one fraudulent vote could count for 43 electors or 45 electors, or 28 electors, or 23 electors. So, I suggest that, although the direct popular vote does not provide a fail-safe mechanism to root out the evil that might still lurk in the hearts of our citizens to procure a fraudulent victory at the ballot box, a direct popular vote limits the impact of each fraudulent vote to one fraudulent vote.

Second, I believe the direct popular vote will provide an incentive to have a more careful policing mechanism at each precinct, because each vote that was cast would be counted. Under the present system, if a precinct committeeman, county organization, or State organization perceives that they are going to lose the State, there is no incentive, really, carefully to calculate or police each vote, because there is no incentive to cut down the size of the loss. By the same token, if the same organizational people conclude that they are going to win by a landslide, there is no incentive to increase the size of the landslide because, under a direct popular vote, each vote counts. The incentive would be to be careful and police each vote that was cast.

By the same token, in my judgment, there would be an invigoration of the party system at the precinct level in order to get out more votes, to register more voters, and to see that they are tallied properly because, under a direct popular vote system, each vote would count as part of the total, whether you lose a State or whether you carry it. Thus, it seems to me, Mr. President, that, although I cannot guarantee that direct popular vote is a panacea for the ills of our political institutions or our party structure, I do perceive very strongly that it will give a clear signal to the party structure at the grassroots level, and they will do a better job if the sixth ward, precinct 5A, is going to be counted in the national total. That is the way you create an incentive to build a stronger party; not by saying, "Well, Mr. President or Mr. Campaign Manager, it's alright if you do not come into our State; you are going to win here anyhow and we do not need the extra votes that you might convince to support you." Or, "Mr. President, with all respect, we would love to have you here, but we understand you do not have a prayer of carrying our State, even if you cut your loss in half; we are just not going to make a 100-percent effort here because you do not have a chance of carrying the State."

So, if I might, I suggest we look to the weakness that exists in our party structure under our present system. Wisdom would conclude, or at least strongly suggest, that direct popular election will give an additional incentive for the strengthening of grassroots party organizations.

Mr. President, we know there are weaknesses in the present system. We know the electoral college can misfire. We know that independent electors have ignored the wishes of their constituency and voted for whomever they wish. We know that in the electoral college votes are weighted. It all depends on where you live. If you are a candidate and you carry all 10 big electoral vote States plus the District of Columbia, you are elected President of the United States no matter how many popular votes you get nationwide. So in point of fact there is a real big-State advantage, with little incentive to campaign in the small States.

On the other hand, if, as is usually the case, the heavy emphasis on the large electoral-vote States results in an even division of those States, then those two extra electors, those two senatorial electors which are added to the number of electors entitled to a State because of population, begin to give an advantage to the small States.

So, Mr. President, it seems to me that the question is, Why should either large or small States have an advantage under any given system? Why do we not say that wherever you live, whatever the election, you have one vote and it is counted once, and it is counted for the candidate for whom it is cast.

My colleagues have heard me explain the concern I have for the disfranchisement effect of the electoral college resulting in an erosion of confidence when every black voter in the city of Gary, Ind., or every black voter in Detroit or Chicago or Los Angeles, or every Chicano voter—the minorities my opponents like to say they are protecting under the electoral college system—all those people who voted for candidate Carter in the last election—and a predominance of them did—had their votes counted under the electoral college system for candidate Ford, because he happened to carry those States in question. So it was with the Republican voters in Illinois and the Republican voters of the State of our distinguished present Presiding Officer, New York.

They had their votes counted for President Carter. So it is sort of a balancing act. It is a big gambling wheel. It is sort of an American roulette. Every 4 years we whirl the wheel, go in and vote, but we are never quite sure how it will be counted. We know who we cast it for, but who it is counted for depends on how the majority of the State votes.

Mr. President, I suggest that we as Senators have only to look at the experiences within our own States to know how the direct popular vote system works. Rather than destroying the two-party system in my State, and I assume in most States, we have strong two-party systems that flourish within a direct popular vote system for Senator, Governor, and the others I have mentioned.

We try our best to turn out every vote we can in a Senate race because we know that each vote counts.

It is true that there are some parts of our States where we go more frequently than others. It is the old story of picking cherries where the cherries are.

I suppose my good friend and colleague from New York does not spend quite as much time campaigning upstate and over in the western regions of the beautiful State of New York where there are not quite as many votes as he does in the more populous cities, probably more time in Buffalo than Jamestown.

But we know in our States, if we totally ignore areas, the other side can pile up a big margin as a result of it, because Senator X does not care enough to go there, that those big margins can off-

set what we tried to do in the more populated areas.

I do not think any of us as Senators would suggest we have an electoral college system in our State where we would carry the counties under an electoral vote system. We would not like that at all. Yet, that is what we have for our President.

I am suggesting we ought to use the same criteria for President we do for Senator, that the chances of his going to less populated areas are not as great as the chances of going to populated areas. But this decision will be based on the number of voters there and the chances of persuading them, not on the number of electoral votes that may be won.

Our evidence, as compiled in hearing after hearing, shows conclusively right now large population centers in small electoral vote States are often ignored, whereas small population centers in a large electoral State are treated with favor.

Let us see that the people of this country are treated equally and equitably and that the political process gives us a winner by the generally accepted definition of the political game in the United States of America.

It is in line with these democratic principles, that civil rights advocate John Lewis, who is one who led the charge to see that millions of previously disfranchised black voters are now on the voting rolls. In fact, he devoted most of his life to the effort of extending the right and opportunity to vote to minority citizens.

As John Lewis said:

> Having come the long and difficult and dangerous struggle to win the right to vote, we cannot now accept the proposition that any one person's vote can count more than another.

I guess that is what I am saying, Mr. President. Let us all see that our votes count the same. Let us try and see that the President at least starts his office with full credentials, the most significant of which is the knowledge both in his mind and in the people's mind that he is the choice of most of those he now must govern from that awesome post in the Oval Office.

UP AMENDMENT NO. 312

Mr. BAYH. Mr. President, I call up the amendment which was previously discussed with Senators THURMOND and HATCH which would take the 7-year limitation out of the preamble and put the 7-year limitation for ratification in the body of the amendment.

The PRESIDING OFFICER. The amendment will be stated.

The second assistant legislative clerk read as follows:

> The Senator from Indiana (Mr. BAYH) proposes an unprinted amendment numbered 312.

The amendment is as follows:

> On page 2, line 3, beginning with "States,", strike all down through "Congress:" On line 6, and insert in lieu thereof the following: "States:"
>
> On page 4, after line 5, insert the following new section:
>
> "SEC. 6. This article shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress."
>
> On page 4, line 6, strike "6" and insert "7".
>
> On page 4, line 8, strike "7" and insert "8".

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

The amendment (UP No. 312) was agreed to.

Mr. BAYH. Mr. President, I appreciate that and the courtesy of my colleagues.

Mr. HELMS addressed the Chair.

The PRESIDING OFFICER. The Senator from North Carolina.

Mr. HELMS. Mr. President, will the Senator yield me some time?

Mr. THURMOND. I yield the distinguished Senator from North Carolina such time as he may require.

Mr. HELMS. I thank the distinguished Senator.

Mr. President, I shall vote against Senate Joint Resolution 28 because I want to preserve a system of stable representation that has provided the American people with nearly 200 years of unparalleled participatory democracy.

Advocates of the abolition of the electoral college have repeatedly relied upon the assumption that the theory of one-man-one-vote necessarily provides a more democratic and therefore better President. But this is precisely the question on which much of the debate on Senate Joint Resolution 28 has been assumed and not answered: "would the direct election of a President provide the American people with a better president?"

I believe the answer to that question is "No." One-man-one-vote equality is not a synonym for democracy. If that were true there would be no more undemocratic institution than the U.S. Senate.

The proposal to abolish the electoral college cannot be separated from the fundamental nature of our Federal system and the idea of democracy the framers of the Constitution sought to attain.

Mr. President, throughout this debate I have thought of years gone by, and I remember the many eloquent speeches made on this floor by my former distinguished colleague from North Carolina (Mr. Ervin).

As he said many times, the American people should be aware that proposals to do away with the electoral college are not new. Since 1824, when Senator Thomas Hart Benton led the first efforts for its abolition, more than 500 constitutional amendments have been introduced in Congress to alter or eliminate it. While it is often denounced as an anachronism, the dangers which would follow its elimination have caused such distinguished constitutional scholars as Alexander Bickel, Philip Kurland, Charles Black, the late Martin Diamond, and Walter Berns to strongly oppose its abolition.

Mr. President, it is often forgotten that the Constitution is a contract between the States and that just as any contract or agreement is negotiated to provide certain compromises, concessions, and safeguards, the Constitution as well provides for such a resolution of often competing interests. Obviously one aspect of this resolution is the compromise between large States and small States as is reflected in the apportionment of Representatives and Senators in the Congress. And it is equally clear from history, that this compromise was a fundamental condition to a number of States agreeing to enter the Union and ratify the Constitution.

But the issue of the electoral college is much more profound than the resolution of potential conflicts between highly populated industrial States and sparsely populated rural States. The late Prof. Martin Diamond explained:

> The issue regarding the Electoral College is not democratic reform versus the retention of an undemocratic system but rather a matter of which kind of democratic reasoning is to prevail in presidential elections—the traditional American idea that channels and constrains democracy or a rival idea that wishes democracy to be its entirely untrammeled and undifferentiated national self.

Professor Diamond continued:

> Americans have always believed that there is more to democracy itself than merely maximizing national majoritarianism; our idea of democracy includes responsiveness to local majorities as well. America is a nation of minorities and all of us belong to one or more religious, racial, ethnic or regional minorities. For example, national minorities which happen to be regional majorities are protected because of the system of districted representation through the House of Representatives. Similarly, the approach of statewide representation in the Senate and through the Electoral College provides a practical, workable response to the dynamics of local democracy. Otherwise such local and regional interests may be completely neglected.

Mr. President, the authors of the Constitution understood, as did Edmund Burke, that the constitution of a nation is not a problem of arithmetic. Those men who sought a stable, constitutional framework for government in the United States perceived the people, Mr. Walter Lippmann suggests:

> As having many dimensions in space, in time, in weight, in quality . . . The American founders sought to represent this many-sided people and they thought of the people's will as an equilibrium of its many elements . . . And so in their practical arrangements they sought to make the government as nearly representative as possible of the many facets of the popular will, of the people acting as citizens of local communities, acting as citizens of regions (and) of states.

The central question in considering the electoral college is what method best reflects the national character and the national consensus. Are we willing to arrive at such a consensus at the price of failing to protect certain minorities? Are we willing to advance the interests of certain minorities in such a way as to frustrate a representatve majority? I believe that the abolition of the electoral college and its replacement with a system of direct national election inherently carries with it the prospect of both these grave dangers.

Mr. President, I am not much of a politician, but it seems to me that American politics is a politics of coalition. These coalitions exist under the present system of electing a President and they will exist if a direct election method is adopted. As the late Prof. Alexander Bickel has observed:

The only question is when and how coalitions are formed and compromises take place.

Under the present system coalitions are formed at the conventions of the two major political parties and the State primaries and conventions which precede them. This approach to the resolution of often competing interests is essentially an open and accessible one.

However, under a Presidential election system which provides for a runoff if no candidate receives 40 percent of the vote those factors which foster unity and coalition in the major parties before the general election will be replaced by a tendency toward fragmentation. Various special interest and single issue groups which now realize a necessity to reach agreement with the major party candidates by the time of the national convention or shortly thereafter will suddenly find their bargaining position increased if they are able to deprive either major party candidate of a 40-percent-plus-one margin and force a runoff election. Special interest groups will be encouraged to form political parties to maximize this political leverage.

Mr. President, in such a multiparty system, the formation of winning coalitions will be placed in the hands of a small group of candidates and their campaign managers during the time between the general and runoff election. Can there be much doubt that the process of compromise and coalition will be less open and with less popular access to the process under this procedure?

Professor Bickel responded to that in this way:

Governments will be weaker; less stable and less capable than our governments are now of taking clear and coherent actions. Where multiparty systems have been tried, they have been found costly in just these ways, and they have scarcely yielded the ultimate in participatory democracy and good government. Nor have they lasted.

Of course, the one country which elects its President substantially the way the United States would elect a President if the direct election method was adopted is France. This Senator thinks it would be very instructive to consider what has happened in French elections under this procedure. I believe that there were seven serious candidates for President during the 1974 election. Would this country benefit if we duplicated the quid pro quo bargaining that characterize French politics just prior to their runoff election? With the increasing proliferation of single-issue constituents, can we doubt the real possibility within the next few years of the emergence of 5 to 10 splinter parties in the United States? Indeed, rather than guarantee a President who is elected by the majority, this direct election proposal may guarantee a minority President or, at the very least, advance the interests of single-interest minorities at the expense of the interests of the majority.

Professor Bickel has suggested that the runoff provision would substantially affect the stability of the American political system:

The runoff would be, not an occasional occurrence, but the typical event. The major party nomination would count for much less than it does now, would count, in truth, for about as much as the State democratic committee designation of candidates for Governor and Senators in New York counts this year, and might even eventually begin to count against a candidate. There would be little inducement to unity in each party at or following the conventions. Coalitions would be formed not at conventions, but during the period between the general election and the runoff. All in all, the dominant position of the two major parties would not be suitable.

The electoral college prevents the fragmentation of the American political process by substantially denying splinter parties the ability to compete for electoral votes. Historically, only those third parties with an effective regional appeal have been able to carry any State electoral votes. The election of 1948, as a matter of fact, provides an excellent example of how the electoral college deals with splinter party movements. In that year both STROM THURMOND and Henry Wallace received approximately the same number of popular votes. However, Mr. THURMOND's Southern Party obtained 39 electoral votes while Wallace's Progressive Party received none and soon thereafter dissolved.

The knowledge that, almost without exception, third party efforts will be shut out of the electoral college has done much in modern times to curtail the development and spread of splinter parties in American politics. Now, it may be true that on a theoretical level, the electoral college does not necessarily prevent the spread of third parties, but the psychology of the electoral college suggests to the average voter that if the total vote in the electoral college will be zero, a new party is probably a futile undertaking and a vote for that party's candidate is probably wasted.

The President of the United States is the President of all the people of this country and, as such, should be responsive to more than just a narrow constituency or set of concerns. The electoral college reinforces this important aspect of the Presidency by distributing at least a minimum number of electoral votes across the country. However, under the direct election method, it is not the distribution of votes, but merely its size which matters.

The electoral college forces candidates for the Presidency to meet and respond to voters in areas whose importance to the Nation is much more than simply a matter of numbers. For example, in the United States today only 3 percent of the population grow enough food to feed the remaining 97 percent and additional millions around the world. It is the design of the electoral college to reflect in some measure the importance of the rural, agricultural States. Similarly, the votes of various minority groups within the heavily industrialized States can be decisive in the disposition of all of those States' electoral votes. Here too, the importance of such groups and their concerns often exceed their simple numbers. By thus requiring candidates to adopt a broadly based platform, the electoral college arrives at a national consensus while protecting important minority interests.

Mr. President, we have heard over and over again of the potential danger that a candidate might lose the popular vote in a close election and yet win the election on the basis of the electoral vote. However, there has been very little consideration of the real danger that with the abolishment of the electoral college a candidate might win with overwhelming majorities in two or three large States and then lose by narrow margins in the remaining 47 or 48. The Nation would then have a popularly elected President who had won majorities in only two or three States. Would such an outcome be more democratic than the election of a candidate who loses the popular vote by 50,000 or 100,000 votes, but wins in the electoral college?

Commented Bickel:

It is sheer illusion, a willful suspension of disbelief to pretend that there is no deadlock when a popular election produces a winner with under 50 percent of the total vote, and with a plurality of perhaps 25,000 or 50,000 or 100,000 out of upward of 70 million. That is deadlock, as much deadlock as when there is no absolute majority in the electoral college. . .

All methods of resolving deadlock, all methods of making a choice when there is no clear popular choice, are arbitrary and all that is needed is settlement in advance upon one sensible and well understood method. That is all that is needed, and that is all that is possible.

Mr. President, the electoral college system also acts to contain the extent of recounts much the same as the many watertight compartments of a ship act to contain flooding. Presently, recounts are compartmentalized by State and only a very close election in a State would tempt a candidate to ask for a recount and only if the electoral college vote were very close. However, under the Senate Joint Resolution 28 approach recounts would suddenly become nationalized and candidates who lost votes in a particular area would be tempted to gain votes in another. Even in States where a candidate lost by a wide margin, recount votes could still add to his nationwide total.

The real potential for danger regarding recounts can be seen by reviewing the close results in three of the last five Presidential elections: Kennedy and Nixon in 1960; Nixon and Humphrey in 1968; and Carter and Ford in 1976. Are we seriously considering subjecting the Nation to the protracted instability that a nationwide recount would have upon our political process? Can there be much doubt that a victory margin of 200,000 votes, such as Kennedy's in 1960 out of 70 million votes would not raise the strong possibility of a recount? And the specter of a recount arises not only to determine the President-elect, but also to determine which two out of three or

more candidates has the first and second highest vote totals thereby determining who would be included in the runoff election. The distinct possibility arises of not just one nationwide recount, but two before a President is finally selected.

Mr. President, Will Rogers was fond of saying that the problem with Congress is that it is always trying to fix something which is not broken. No better assessment could be made of the efforts of some to abolish the electoral college. It is argued that we must do away with the electoral system, because it is claimed that on three occasions it has thwarted the public will in electing a President.

However, a look at history indicates that the precedents prove nothing of the sort. In 1824, John Quincy Adams was elected by the House of Representatives as one of four candidates, none of whom enjoyed a majority of the popular votes. Although Andrew Jackson obtained a plurality of 37,000 popular votes, 6 States with 71 electoral votes at that time chose their electors by a vote of the legislature, not the people. In 1876, although the statistics state a popular majority for Tilden over Hayes, supporters for both candidates engaged in widespread vote fraud and thus undermined the validity of any claim as to the popular choice in that election.

This leaves the election of 1888 as the one historic example of the so-called "loaded electoral gun" pointed at the head of the Nation. But as Professor Diamond observed:

> Now the funny thing about this loaded pistol is that the last time it went off, in 1888, no one got hurt; no one even hollered. As far as I can tell, there was hardly a ripple of constitutional discontent, not a trace of dangerous delegitimation, and nothing remotely resembling the crisis predicted by present-day critics of the electoral college.

Here, too, vote fraud blurred the actual popular vote outcome.

It is also claimed that the electoral college must be abolished, because the individual electors are not bound to vote for the winner of the popular vote in their States. While numerous theoretical scenarios may be possible, the historical fact remains that less than 5 percent of the electors have voted for candidates other than those mandated by their States and that in no election has such an elector affected the final outcome of the election.

Mr. President, any electoral process has certain benefits and certain costs or disadvantages. Such is the case with the electoral college, but the historical record indicates that it has served the country well and enhanced the stability of our political system. Any existing or potential drawbacks to its operation are slight, when compared with the substantial difficulties inherent with Senate Joint Resolution 28.

Mr. President, I ask unanimous consent that a July 9 editorial of the New York Times, entitled "A Vote for the Federal President" be printed in the RECORD at this point.

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

[From the New York Times, July 9, 1979]

A VOTE FOR THE FEDERAL PRESIDENT

A strong alliance of reformers is again pushing the idea that we elect our Presidents by direct popular vote, without the filter of an Electoral College. Counting every vote equally sounds so simple and attractive that normally cautious politicians find it difficult to resist. A Constitutional amendment to abolish the College reaches the Senate this week with an outside chance of obtaining the necessary 67 votes.

One would think that the reformers' zeal for "one person, one vote" might as logically lead them to abolish the Senate. If any of our Federal institutions offends arithmetical justice it is the one that grants the same two votes to 22 million Californians and 650,000 Nevadans. For reasons that Senators should value, these United States have found it useful and in no sense undemocratic to retain some imbalance and geographical color in their Federal system. Simplicity is not the synonym of democracy. Voter parity is not the only source of stability. A Presidential election that is federal is not therefore unsound.

Every youngster understands our rules for electing a President. The winner of the popular vote in every state receives its total "electoral vote." Each state's electoral vote equals the size of its delegation in Congress; as in the Senate, this arithmetic favors smaller states. But in a close election, there is compensation for voters in more populous states. As urban minorities have recognized, winning a large state by a slight margin yields a richer prize than winning a small state by a landslide.

The unplanned effects of this system have been mostly good. It turns the contest for President into 52 races (including the District of Columbia and Puerto Rico). It makes it impossible for candidates to write off the less populous regions or overcrowded city slums; both count for slightly more than their numerical weight. Moreover, the system blunts single-issue fury. Citizens who oppose gun control or abortion cannot simply unite nationally to elect, or defeat, a President; they must join, state by state, with other voters moved by other passions.

This necessity for compromise, in turn, holds most voters inside our two federal parties, and the parties are thus held near the middle of the political road. To elect a President, even arrogant majorities must be solicitous of minorities; even alienated minorities must work with majorities. The system encourages moderation in radical times and protects against parochial passions. It discourages minor parties yet rewards their protest with major-party attentiveness. It is widely understood and accepted. It is a bond with history, a source of stability.

So why abandon it?

Because to many a "direct" and "popular" election sounds more democratic. They also want to avoid the largely theoretical risk that electoral votes might elect a candidate who lost the popular vote. That could happen—but it hasn't happened since 1888.

To guard against that small risk, Senator Birch Bayh and 38 cosponsors of his amendment would abandon all the advantages of federal voting and run dangerous new risks. Knowing that a direct election would encourage third and fourth and fifth parties to run their own candidates, they would let a vote of 40 percent determine the winner. Sensing that minor candidates might skim off enough votes to leave no one with even 40 percent, they would then run a *second* election between the two top contenders, who had maybe 37 and 32 percent of the original vote. Just imagine their sordid barter for the support of the first-round losers.

The clamor for abolition of the Electoral College was born in the fear of George Wallace in 1968. Some thought the strident Alabaman might parlay a mere 10 percent of the popular vote into enough electoral votes to deny Richard Nixon or Hubert Humphrey a majority. And because electoral votes are cast by real people in the Electoral College, he might have traded their ballots for a heavy price. Mr. Nixon, especially, might have paid well to avert a deadlock that threw the choice to a Democratic House of Representatives.

It didn't happen. And the chances are that Mr. Wallace would have won still more votes in the first round of a "direct" election—and thus enormous influence in the runoff. But that is only one of the flaws of the proposed reform. The danger of tawdry trading in the Electoral College is easily averted without any radical change. The desirable amendment would abolish the flesh-and-blood electors yet retain the counting of electoral votes. Why change what works?

Mr. THURMOND. Mr. President, I commend the able Senator from North Carolina for his remarks. The Senator from North Carolina has proved by his remarks that he is a scholar of the Constitution, that he is well versed in federalism, and that he realizes the importance of maintaining federalism in our constitutional structure of elections.

Mr. HELMS. I thank the Senator.

Mr. THURMOND. Mr. President, I yield to the distinguished Senator from North Carolina (Mr. MORGAN).

The PRESIDING OFFICER (Mr. PRYOR). The Senator from North Carolina is recognized.

NO NEED TO CHANGE

Mr. MORGAN. Mr. President, legislation now being debated in this Senate would do away with the electoral college system of choosing our President and Vice President and substitute direct popular elections.

I have opposed this legislation because for one thing I do not believe in tampering with the Constitution very much and I believe the electoral college has served this Nation well and it was the method the Founding Fathers intended we should use in national elections.

Someone has said, "When it is not necessary to change, it is necessary not to change." I think that applies in the case of the electoral college, as does the less elegant expression, "If it ain't broke, don't fix it."

We have majority rule in this country and the electoral college is but an extension of that. A majority of a State's voters favor a candidate for the Presidency, and consequently he gets the votes of that State's electors. They are but an extension of the will of the voters of their State.

To supplant the present system with direct popular vote would be a further erosion of States' rights.

When this matter was being argued in the Senate more than 20 years ago, John F. Kennedy, then a Senator from Massachusetts, said:

> If we are going to change that system (the Electoral College), it seems to me it would strike a blow at State's rights in major proportions. It would probably end States' rights and make this country one great unit.

To anyone who has studied the federalism championed by Thomas Jefferson, the thought of eroding the relation-

ship of the States with the Federal Government to this degree is not a welcome one.

Under the present system, the candidates for President must compete for the votes in the various States. In North Carolina, he would have to be concerned with the problems of the small farmer. Out West, he would have to have a program to help the water situation. In New England, he would have to address the cost of gas and oil.

But in direct popular elections, the candidates might be able to ignore the troubles of the smaller States and go after the votes in the popular urban centers. It has long been a rule of politics that you "hunt where the birds are."

Finally, the change would certainly increase the independence of the President from the States and the people. And I do not think we want this.

We have a two party system and it works well within the present framework. Changing our method of selecting our Presidents would certainly give rise to splinter parties that would, in some cases, represent fanatics.

There is nothing undemocratic about the electoral college system.

The framers of the Constitution created the system, and it has served the country well.

And I still do not believe in tampering with the Constitution unless there is a clear need.

Mr. THURMOND. Mr. President, I thank the able Senator from North Caroline. He spoke several days ago on this subject and delivered a masterful address. He is to be commended for the stand he has taken and for the splendid manner in which he has presented it to the Senate.

The PRESIDING OFFICER. Who yields time?

If neither side yields time, time runs equally against both sides.

Mr. THURMOND. Mr. President, I yield to the distinguished Senator from New Hampshire.

Mr. HUMPHREY. Mr. President, the New York Times, a newspaper which ordinarily, I suppose it is fair to say, would be in sympathy with our colleague from Indiana, printed this morning an excellent editorial on the question before the Senate today, entitled "A Vote For The Federal President." I shall read it into the RECORD:

A strong alliance of reformers is again pushing the idea that we elect our Presidents by direct popular vote, without the filter of an Electoral College. Counting every vote equally sounds so simple and attractive that normally cautious politicians find it difficult to resist. A Constitutional amendment to abolish the College reaches the Senate this week with an outside chance of obtaining the necessary 67 votes.

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The unplanned effects of this system have been mostly good. It turns the contest for President into 52 races (including the District of Columbia and Puerto Rico). It makes it impossible for candidates to write off the less populous regions or overcrowded city slums; both count for slightly more than their numerical weight. Moreover, the system blunts single-issue fury. Citizens who oppose gun control or abortion cannot simply unite nationally to elect, or defeat, a President; they must join, state by state, with other voters moved by other passions.

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To guard against that small risk, Senator Birch Bayh and 38 cosponsors of his amendment would abandon all the advantages of federal voting and run dangerous new risks. Knowing that a direct election would encourage third and fourth and fifth parties to run their own candidates, they would let a vote of 40 percent determine the winner. Sensing that minor candidates might skim off enough votes to leave no one with even 40 percent, they would then run a *second* election between the two top contenders, who had maybe 37 and 32 percent of the original vote. Just imagine their sordid barter for the support of the first-round losers.

The clamor for abolition of the Electoral College was born in the fear of George Wallace in 1968. Some thought the strident Alabaman might parlay a mere 10 percent of the popular vote into enough electoral votes to deny Richard Nixon or Hubert Humphrey a majority. And because electoral votes are cast by real people in the Electoral College, he might have traded their ballots for a heavy price. Mr. Nixon, especially, might have paid well to avert a deadlock that threw the choice to a Democratic House of Representatives.

It didn't happen. And the chances are that Mr. Wallace would have won still more votes in the first round of a "direct" election—and thus enormous influence in the runoff. But that is only one of the flaws of the proposed reform. The danger of tawdry trading in the Electoral College is easily averted without any radical change. The desirable amendment would abolish the flesh-and-blood electors yet retain the counting of electoral votes. Why change what works?

Mr. President, I support my colleagues who oppose abolition of the electoral college. It is a system that has worked well, one that has protected our country, our Nation, our Republic from becoming the victim of splinter party politics, which has been the ruination of many of our friends in Europe.

If we choose to amend the Constitution to allow for direct election of the President, it is conceivable for a candidate to come along who, for example, would propose to wipe out the debt of New York City, of Cleveland, of Los Angeles—if that city has one, and I hope it does not—and that person could well be on the road to winning a majority of the popular votes, simply by appealing to regional and highly sectional interests.

I acknowledge that hearings to reform the electoral college and our mode of electing our President, have been going on for a number of years. And this is as it should be. For the enactment of an amendment to our Constitution is no trivial matter.

I admit the task before the Senate is an enormous one. The difficult process of amending the Constitution requires a high degree of consensus—both in the Congress and the several States.

I am impressed by the fact that in recent years, Presidential elections have been decided by increasingly narrow margins, and that the possibility exists of course that ultimately it could result in the election of a President who has received a minority of the popular vote.

But there has also been a great deal of what I would call mere speculation about what might happen. It has happened three times in our history, and I fail to see that it has resulted in any dire consequences. From the casual reading which I have done on the subject, I get the distinct impression that no matter what formula we arrive at, there is always the possibility at least, that we could elect a Presidential candidate who has received less than a majority of the votes.

Mr. President, what I find disturbing about this proposal is that it would shift the emphasis away from the individual States and toward a so-called national election. That is, instead of having a Presidential candidate having to make his appeal to the distinct and unique interests that underlie our States with their various and competitive economic, social, and political interests, we would have a candidate forging a broad appeal that would transcend these particular interests.

I am not at all certain that this would be a salutary development.

I mean, could this not result, for example, in a weakening of the political parties of the respective States? I wonder if this question has been thoroughly thought through by the proponents of this legislation?

Then you have the problem of a large number of candidates, all contending for the runoff positions. Would this not lead to fragmentation and fractionalized multiparty systems of the kind that you have on the European continent?

I wonder if it might not leave our great political parties in a state of im-

potence and give rise to the multiparties with their fragmented voting and coalitions that frequently result in turnstile government in some nations.

As I indicated earlier, Mr. President, the genius, if I may, of our system is that candidates must take into consideration when campaigning, the very diverse and broad interests of our 50 States.

He must—if he is to succeed—put together a broad coalition of voters, without regard to one particular class or one interest. We are fortunate in our country in that we do have these competing interests.

In my own State of New Hampshire, we enjoy diverse economic and social interests. We have the great maritime industry, textiles, shoe manufacturing, wood products, and an emerging high technology complex.

Then there are our great mining industries in Appalachia and the Western States: Our prolific farm complex, the heavy industries of the northeast and our great chemical and energy areas—making up this great economic mosaic that is the United States.

It compels a candidate to go not only to the big cities, but to the towns and the villages that the people may determine themselves how his election might affect their interests.

But, Mr. President, I trust I can be pardoned if I construe this measure as one which would invite candidates to appeal to the broad masses—where the candidate could get the broadest television coverage, the largest crowds, because mere numbers are what counts.

Would the candidate perforce seek to make a broad national appeal of a decidedly populist nature, seeking to concentrate on the big cities because that is where the votes are?

I must say, Mr. President, that I am somewhat skeptical about the matter.

What I am deeply concerned about, is that this measure is no mere change in election procedure, but that it goes to the very heart of the Federal nature of our Government, and for this reason this body must proceed with the utmost caution and deliberation.

I believe that elimination of the electoral college would result in a further disruption of our Federal system.

Supporters of this measure have repeatedly pointed out the dangers inherent in the election of a candidate getting less than a majority of the popular vote.

But what is equally disturbing is the prospect of a candidate carrying one or two of the big States by, for example, a 2 million vote margin, and losing the remaining 48 States by a narrow margin. This contingency is just as likely to happen as the horror stories adduced by the supporters of this measure.

Mr. Chairman, the electoral college was the result of a compromise in the Constitutional Convention, and I believe it has served us well over the years.

I think it ought not to be abolished in the absence of overwhelming reasons to the contrary.

I am willing to concede that the nature of the electors themselves might be abolished, but not the principle itself. That is the elimination of the electors, but keeping the electoral college system with its allocation of votes among the various States.

This would take care of the "faithless elector."

But what I do fear, Mr. President, is a further blurring of the distinctions between our various States.

As it is, the basic nature of our dual system of Government has already been seriously eroded until many respects the States are mere subdivisions of the Federal Government.

There is hardly a Member in this body who is not being assailed—daily—by representatives of his State government—importuning him for help in receiving grants, or other forms of largesse. Who is not daily reminded of the problems being created for the States by the regulatory overkill of our Federal agencies, and the relief being sought therefor.

Why, in effect, our gargantuan spending programs have turned State and local officials into virtual beggars, as they wend their way toward Washington to beg for their "rightful" share of the bounty which Uncle Sam is dispensing.

If they are not appealing for their share—then they are seeking relief from the excesses and burdens of Federal regulatory bureaucrats.

Mr. President, I recall a quote from one of the New Deal court cases of the 1930's—I am not a lawyer, but those in this body who are will appreciate the observation: "it is hardly lack of due process for the government to regulate that which it subsidizes." And we are regulating today with a vengeance.

Do we, therefore, want to apply the coup de grace—as it were—by formally adopting direct election and wiping out those boundaries of those States which play a distinct and critical role in our system of government?

We only have but to look at the trend of recent national elections.

They are full blown Hollywood production jobs—national television, national issues designed to appeal to the big-city States—where the votes are.

What we would be doing is substituting for a carefully designed system of checks and balances which, in my opinion, our Founding Fathers handed us with due regard for the consequences of this system—we would be substituting raw naked appeals in exchange for votes.

Mr. President, we have an election system that has stood the test of time.

It is the system for which changes have been proposed on a number of occasions going back as far as Andrew Jackson, who proposed that electors be elected by congressional districts plus two from the State at large.

All the proposed plans for change have been brought out and have had their day before the Congress. But Congress has never seen fit to substitute any of those proposals, and they have been numerous.

The competing interests of the several States demanded a Federal system for the election of the Federal leader. The separate interests and ideas of the several States, and of their citizens, exist today identically as those separate interests and ideas existed at the formation of the federal system.

So, Mr. President, abolishing the electoral college would be a further disruption of our federal system.

Under the Constitution the relationship between States and Federal Government has been fine tuned. The electoral college is one of the great compromises between the large States and the small States that make our Constitution a great fundamental and basic law that has endured through changing times and through tremendous stresses and strains.

Proponents hold up the specter of a candidate getting the most popular vote, but losing in the electoral college.

Now that is not nearly as frightening to me as the prospect of a candidate carrying one or two of the big States by, let us say an average of 40,000 votes per State, and you have a winning candidate for President who was elected by receiving the majority in only two States, theoretically, it could happen.

I think that is bad. I think under this proposal you could easily have successful candidates with purely regional interests and backgrounds.

Mr. President, the proponents of direct election are fond of bringing up the specter of the possible stealing of an election by a conspiracy of "faithless electors" who do not follow the outcome of the election in their respective States, who are free under the law to vote as they please.

However, I believe it is unnecessary to destroy the electoral college as an institution to correct this perceived evil which has, in fact, never really been close to being visited upon us.

The remedy is simple.

Amend the Constitution to pledge the electors, make them automatic. It is time, however, to stop dragging this tired old herring around as an alleged reason to abandon the electoral system provided in the Constitution.

The real concern here is that, in fact, the case made for direct election is superficial.

It does not sustain the burden of proof which is on the supporters of the proposal.

The questions of critics of the plan are usually dismissed with a simple unamplified denial that the questions are valid, being mere doubts, and groundless.

However, I think there are a number of very fundamental problems that need to be faced, the answers to which are difficult, inconclusive, and speculative. These questions about the direct election amount to whether or not we wish to venture that distance into the realm of political reorganization that such a step will impel.

This is a philosophical question asking, in effect, what kind of a U.S. political system do we wish to carry forward?

Do we want, for example, to say that a simple head counting is all there ought to be in electing a President? Is the American system nothing more than mere majoritarianism?

Are there values in the Federal system created under the Constitution which are reflected in the electoral college that ought to be retained?

It is well accepted and generally clear that the big States have the greatest effect in presidential elections, having the most votes.

It is also suggested that this fact tends to balance off the small States' advantage in Congress. A part of our system of checks and balances as noted by competent political observers.

In the view of many, federalism remains high in this American "hierarchy" of values. To maintain it, the country must continue to vote as "States," in the election of the President, not as millions of individuals in a national plebiscite.

Mr. President, I respectfully urge my colleagues to stand by the Constitution. Do not lessen its magnificent virtues.

It has served us well for over 200 years, and our Founding Fathers had good reason to adopt the provisions respecting elections which they did.

Do not apply one more nail to the coffin of State sovereignty, already battered from almost daily incursions of the national government.

Let us have the courage to state that despite its imperfections, our electoral system is still the envy of the world.

I hope that my colleagues will consider this issue carefully. The proposed amendment has been described by many eminent scholars as the most radical change ever proposed to the Constitution, and I think we should weigh it in that light.

I add my endorsement to the old advice: "If it ain't broke, don't fix it."

Mr. THURMOND. Mr. President, I wish to commend the able Senator from New Hampshire. Although he is not a lawyer he has shown a rare knowledge of the Constitution and especially the election process and the importance of maintaining federalism.

Mr. President, I now yield 5 minutes to the able Senator from New York.

The PRESIDING OFFICER. The Senator from New York is recognized.

Mr. MOYNIHAN. I thank the Senator from South Carolina.

Mr. President, I rise to recapitulate the remarks I made earlier in this debate, as we now approach its conclusion. I offer the thought once again that what is at issue in the measure before us is whether or not we are going to continue the principle of majority government that is so carefully and intricately written into the Constitution and into the subsequent practices sanctified by time and the experience of the American politic.

In my first remarks on the measure, I tried to describe in some detail the idea of concurrent majorities which was central to the whole thinking of the Constitutional Convention and to the unparalleled success of the Constitution that emerged from it.

The American Constitution does not provide for one majority anywhere to govern. It requires a succession and balance of majorities, a majority in the electoral college for the President, a majority in each of the Houses for legislation, and a majority on the Supreme Court to review legislation. In the singular capacity of Congress to make the laws, there is a balance between the majority of the States implicit in a majority of this Chamber, and a majority of the people explicit in the majority of the House. In the Office of the President it was both conceived and has come into practice, that the Presidency is sought and achieved by persons seeking to assemble a regional majority, and an electoral majority within those regional majorities. That has been the experience.

This is precisely what my new friend, the distinguished Senator from New Hampshire, has said. It is the unique quality of this constitutional arrangement, the electoral college, that it can simultaneously be said to provide an advantage to small States and an advantage to larger States.

It has prevented at any moment in our history a regional Presidency, and yet it has given regions the great say in our politics as they necessarily have. The alternative before us would destroy that majority principle.

It is the irony of the amendment we are considering that right in the text it provides that 40 percent of the votes provides for the election of the President. Mr. President, should this happen, you will not again in your life see a majority President. Indeed, I doubt you will see one with as large a minority as 40. It is the inevitable and widely remarked condition of modern politics that candidates seek supporters around single, vibrant, stirring issues that produce the least amount of dissidence in their supporters.

Thus they gain leverage in the political system through a following which partakes in degrees of intensity to that of zealotry itself. If this measure is passed, we shall find our national politics fragmented by single party candidates, some desiring the defeat of another candidate, which is always easy to do by taking away certain critical vote blocks. Some will be drawn by an intense issue, and others will be mere venturers in politics seeing a field of 9 suggest a field of 10: Who knows? You might get 14 or 17 percent of the vote and that might bring you in second. You will be there in a runoff, and by the flip of a coin, become President.

You will not again see a person elected to the Presidency who obtains 50 percent of the popular vote the first time out. That is sufficient, Mr. President, if I may have an extra minute, to persuade me that a tested, a proven and revered system of government, surely will not be discarded in so casual a manner as we are doing.

I thank the Chair and I thank my friend from South Carolina.

Mr. THURMOND. Mr. President, I wish to commend the able Senator from New York for his splendid remarks.

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

Mr. MOYNIHAN. I have no time.

Mr. BAYH. Will the Senator permit one question?

Mr. THURMOND. On account of the shortage of time I suggest the able Senator from Indiana yield himself time.

Mr. BAYH. Mr. President, I yield myself 1 minute because I do not want to interrupt the Senator from Oklahoma who has been very patient and is one of our stronger supporters.

But I listened patiently for some compelling reason to support the logic of the Senator from New York, whom I greatly respect which he knows, where he says history will never again see a President that had 51 percent of the vote. Is that any reason for us not to try to see that every President has more votes than the person he is running against?

Mr. MOYNIHAN. No, it is not, per se, a reason, if I may respond. But it is a reason for avoiding a system which would have as one of its more probable outcomes the choice of a President who, in the first poll on the first Tuesday after the first Monday, received in the neighborhood of 35 percent of the vote. The chairman is right on his point. He is deeply learned and concerned in this matter and he addresses himself and brings to our attention a true problem in American government that has never been altogether satisfactorily resolved.

It has been the occasion of an amendment. It has brought about informal institutions such as political parties, now formal ones, to make it work.

My argument is simply that the arrangement we have has worked better and can reasonably be predicted to work better. No one can forecast with any accuracy the alternate one. I mean no denigration of the politics of the continent of Europe, but plebiscite candidates and issues have been its failing, and the runoff has characteristically contributed to the increasingly unfocused and poorly defined policy outcomes in those elections.

I am not so much a patriot as to think our own arrangement is either perfect or not capable of improvement, but I cannot think that the present instance provides such a prospect.

Mr. BAYH. I appreciate the response of the Senator from New York and I will yield what time the Senator from Oklahoma needs, but I hope he will permit me to just interject one observation as a result of our colloquy with the Senator from New York to the effect that all of those plebiscites that he cites as with disaster-provoking consequences are the result of popular vote primaries where a majority is required—50.01 percent. That is why the architects of the direct popular vote chose a lesser number, because the very fact that you have to get a majority is an incentive for parties to proliferate in order to get into the runoff.

But I yield to the Senator from Oklahoma who has been one of our stalwart supporters and has had a better chance, I think, to study this whole business as a member of the American Bar Association panel that started the very comprehensive study a number of years ago, and I am anxious to hear the persuasive argument by my distinguished friend and colleague from Oklahoma.

The PRESIDING OFFICER. The Senator from Oklahoma is recognized.

Mr. BELLMON. Mr. President, I thank the distinguished floor leader of the resolution.

The PRESIDING OFFICER. Will the Senator please suspend until there is or-

der not only in the Chamber but in the galleries. Let us have order in the Senate.

The Senator may proceed.

Mr. BELLMON. Mr. President, it has been a pleasure to be associated with the distinguished Senator from Indiana over many years as he has fought the battle of bringing this matter to the floor, and I commend him for the perseverance and the excellent leadership he has given over many, many years.

Mr. President, there can be no doubt that the offices of President and Vice President of the United States are the most important elective political positions in the world today. The manner of selecting these officials profoundly affects the power these individuals have after election to unite, to lead, and possibly to defend our country. Therefore, it is absolutely imperative that our system of selecting these officials be designed to reflect the will of the majority of our citizens. It must discourage diversionary exercises, eliminate manipulation, and assure every voter an opportunity to fully participate.

The present system, in my opinion, does none of these things.

I see he has left the floor, but I wanted to say to my friend from New Hampshire that the interest in changing the electoral college began in 1968; that he is a few years behind the time because it was not the threat of George Wallace and his throwing the electoral process into the House of Representatives that caused my interest at least in this question but rather following the 1960 elections I became intensely interested in the electoral system because during that campaign when I served as Republican State chairman for Oklahoma I was appalled when one of our electors, who had been chosen by Republican voters on the expectation that he would vote for Mr. Nixon, actually cast his vote for Senator Harry Byrd of Virginia.

I greatly admired and respected Harry Byrd, but this was an obvious breach of confidence, and it startled those who had worked actively in the campaign, and made us realize that the electoral system was an open invitation to political infidelity. In addition, the present system, or lack of system, with each State using a different means of choosing electors, selecting convention delegates, holding primaries, and reporting election results is confusing, complex, and uncertain.

Mr. President, in 1966, during my final year as Governor of Oklahoma, I was privileged to serve as a member of the American Bar Association Commission which was created to study electoral college reform. The ABA provided the commission with the services of an excellent staff which carefully researched all facts concerning operation of the electoral college and which, in addition, provided commission members with a valuable background in the processes used in choosing the chief executive of many countries.

When the consideration of the electoral college began—and I am a little embarrassed to admit this—I was convinced, as are many residents of smaller States, that the present system is a considerable advantage to less populous States such as Oklahoma, and that it was to the advantage of the small States for the electoral college concept be preserved.

I think if any Member of the Senate has that concept he would be greatly enlightened by the fact that the Members of the Senate from New York are now actively supporting the retention of the electoral college system.

Selfishly, I felt that the system needed to be strengthened and safeguards developed to assure electoral voting in accordance with the majority will of voters in the individual States, but I felt that the electoral college system should be retained.

Mr. President, as the deliberations of the American Bar Association Commission proceeded and as more facts became known, I came to the realization that the present electoral system does not give an advantage to the voters from the less populous States. Rather it works to the disadvantage of small State voters who are largely ignored in the general election for President.

It is true that the smaller States which are allowed an elector for each U.S. Senator and for each Congressman do, on the surface, appear to be favored; but in fact, the system gives the advantage to the voters in the populous States. The reason is simple as I think our friends from New York understand: A small State voter is, in effect, the means whereby a Presidential candidate may receive a half-dozen or so electoral votes. On the other hand, a voter in a large State is the means to 20 or 30 or 40 or more electoral votes. Therefore, Presidential candidates structure their campaigns to appeal to the States with large blocs of electors. This gives special and disproportionate importance to the special interest groups which may determine the electoral outcome in those few large States.

Here, Mr. President, let me say parenthetically that during 1967 and part of 1968 I served as the national campaign director for Richard Nixon, and I know very well as we structured that campaign we did not worry about Alaska, about Wyoming or about Nevada or about New Mexico or about Oklahoma or Kansas. We worried about New York, California, Pennsylvania, Texas, Michigan, Illinois, all of the populous States, where there were these big blocks of electors that we could appeal to, provided we chose our issues properly and provided we presented the candidates in an attractive way.

The result, Mr. President, is that the executive branch of our National Government has grown and is continuing to become increasingly oriented toward populous States, to the disadvantage of the smaller, less populous areas. An examination of past campaign platforms and campaign schedules of the major party candidates will bear out this position. Therefore, it is obvious that any political party or any candidate for President or Vice President will spend his efforts primarily in the populous States. The parties draft their platforms with the view in mind of attracting the voters of the populous States and generally relegate the needs of the smaller States to secondary positions.

This whole situation would change if we go for a direct election and, therefore, make the voters of one State equally important with the voters of any other State.

Mr. President, I am persuaded that direct popular vote will greatly strengthen grassroots political organization in this country. At present, a candidate receives a State's entire electoral vote whether the popular vote margin is 1 vote or 1 million. If we had election by direct popular vote, every precinct leader would campaign with the realization that each extra vote registered and cast would count in a meaningful way in the national total. In this way, the direct system of election would increase the incentive to vote and improve political activity.

This amendment would also strengthen—and I take this position knowing there are others who feel otherwise, but I believe this amendment would strengthen—our two-party system not only by causing the leaders of those parties to know every vote would count but also by discouraging rather than encouraging the formation of splinter parties.

At the present time, a splinter party leader may feel that by drawing off a sufficient number of votes in any one of a few States it may make it impossible for the candidate of either of the major parties to receive a majority and, therefore, the election will go into the House of Representatives, because the splinter party candidates can always hope they will have a considerable advantage in the way the House finally votes in a choice of the President.

But direct popular election would effectively eliminate the possibility of forcing the presidential election into the House of Representatives. The certainty that the President would be chosen in the election would provide incentive to coalesce around the two major parties. In addition, this amendment proposes a 40 percent plurality requirement as a further safeguard against a proliferation of the parties.

This requirement would encourage potential splinter groups to continue to operate within the framework of the two-party system, since no major party could reasonably hope to win 40 percent of the total popular vote. There is small likelihood that the total vote of all splinter parties would be large enough to force a runoff election.

Even if they did force a runoff election they would only have the same amount of power in the election as their actual vote entitled them to have.

Perhaps the greatest hazard of the electoral college, Mr. President, as this college now operates—and it is not a college, it is a facade, it is a group of people who theoretically at least meet to perform only a perfunctory purpose—but as it now operates it encourages the proliferation of single-issue parties which may disagree with the major parties on one subject. The hope of these groups is, that by denying either major party a majority of electoral votes, it will be able to force the choice of the President into

the House of Representatives. In such a case, these groups hope to exercise a disproportionate amount of influence upon the Presidential choice ultimately made by the House of Representatives.

Also, it is almost certain that if the selection of the President is made by the House, partisanship will dominate. Under these conditions, it is conceivable that a candidate would lose the election by millions of votes and yet be put into office by raw partisanship on the House side. There is a real question in my mind whether a President could effectively govern the country under such conditions.

Finally, Mr. President, I am most impressed by the testimony of Douglas J. Bailey, president of Bailey, Deardourff & Associates, Inc. of Washington, D.C., before the Judiciary Subcommittee on the Constitution. In 1976, Mr. Bailey and John Deardourff supervised the planning, creation, production, and placement of all general election advertising for President Ford. Mr. Bailey speaks from the vantage point of a political professional who is quite familiar with the influence of the electoral college. Part of his testimony is as follows:

> In my opinion, there are at least six separate reasons to support a direct election amendment:
>
> First, by ending the electoral college, we would also end the only function the electoral college can serve which is to impose a constitutional crisis upon the country.
>
> My second reason for supporting a direct election amendment is familiar and unnecessary to dwell on; the electoral college effectively disenfranchises millions of American voters.
>
> My third reason for favoring abolition of the electoral college is that it is an incentive to the expedient selection of otherwise unqualified Vice Presidential candidates.
>
> My remaining three reasons—and these are the ones that I think may be the reason my testimony may be of some help—are a product of the personal experience that we had in President Ford's general election campaign.
>
> Those reasons are these:
>
> One, direct election of the President in my opinion, would mean increased voting—now deterred by the electoral college system.
>
> Two, direct election, in my opinion, would mean a strengthening of the two-party system and the local apparatus of both political parties.
>
> And three, it would mean, in my opinion, a reduction . . . of the dominance of and the reliance on impersonal media communications and would significantly enhance participatory democracy.

Mr. President, Mr. Bailey's testimony is sound. He goes on with his testimony to point out that priorities for spending in a Presidential campaign will be changed under a direct election system. Spending priorities will be changed to include media and organizational efforts to swell local pluralities and cut losses through persuasion and voter turnout. There is no incentive under the electoral college system to increase voter turnout in those States where the candidate is perceived to be losing or winning heavily. A direct election would change this and, therefore, increase voting by the American people. Mr. Bailey also points out that more spending will be required for local organizational efforts such as canvassing, door-to-door, phone banks, voter turnout systems, transportation to the polls, election day baby sitting, and so forth. This coupled with the current spending limits, will mean less campaign funds for media persuasion. As Mr. Bailey concludes, direct election not only would mean that every vote and every voter counted, but it would help involve the people in the campaign process.

Mr. President, I support direct popular election of the President and Vice President of the United States and I urge my colleagues to approve House Joint Resolution 28. Experience in the United States with direct election of Governors, U.S. Senators, and Members of Congress has proven the workability and desirability of direct elections. The electoral college serves no useful purpose. Let us abolish this artificial barrier between voters and the highest offices in the land.

The PRESIDING OFFICER. Who yields time?

Mr. BELLMON. I suggest the absence of a quorum.

Mr. SIMPSON addressed the Chair.

The PRESIDING OFFICER. Will the Senator withhold that? I think the Senator from Wyoming seeks recognition.

Mr. THURMOND. Mr. President, I yield 5 minutes to the distinguished Senator from Wyoming.

The PRESIDING OFFICER. The Senator from Wyoming is recognized.

Mr. SIMPSON. Mr. President, it is a pleasure for me to join in the tenor of the remarks of the Senator from New Hampshire (Mr. HUMPHREY) and the Senator from New York (Mr. MOYNIHAN).

On June 26 I discussed at some length my views on the direct election controversy. Nevertheless, I want to make an additional short statement on a particular issue in this debate.

Our distinguished colleague from Indiana (Mr. BAYH) has several times during this debate stated that Senators, Representatives, Governors, State legislators, mayors, city councilmen, and other public officials of that type are elected by direct popular vote. He asks, "Why, then, do we not use that same method for electing the President?"

I believe this question really distills the entire debate.

The clear answer, of course, to Senator BAYH's question is that Senators, Representatives, Governors, State legislators, mayors, and city councilmen all represent constituencies that are from a single region of the country. This great Nation is, however, made up of many regions.

It was precisely in order to form one unified Nation out of many relatively sovereign States in many regions that the Founding Fathers set up our system as they did: a system that, above all, reflects balance—balance between the different branches of the Federal Government, balance between the Federal and State governments, and, most importantly to this debate, balance between different regions of the Nation.

The electoral vote system encourages national unity in two ways. First, it reduces the threat of a sectionalist President, who had received extraordinary support in one region or even one State, but had been vigorously opposed everywhere else. Under the electoral vote system, extra-wide margins in a few States cannot compensate for losses in other States with a greater total number of electoral votes. The electoral vote system is, therefore, biased in favor of candidates who receive geographically broad support.

The second way in which the electoral system encourages national unity is by giving slightly disproportionate influence to less populous States. The people of the less populous States feared they could be overwhelmed by a national Government controlled by large States, that their integrity as separate communities with their own laws, customs, economies, and priorities would be lost. Therefore, the small States were each given extra influence in both the legislative and executive branches of the Federal Government to which they were surrendering a very real degree of sovereignty. They were seeking balance.

In a small State, the group composed of the State's voting majority controls a total number of electoral votes that is disproportionate to that State's population. It is this group in each State which controls the State's government and which must be satisfied, in the interest of national unity. National unity: A very large aspect of this debate. The extra influence for small States was provided out of this concern for national unity.

Mr. President, our distinguished colleague from Indiana (Mr. BAYH), disregards, I think, the issue of national unity when he asks why we should elect our Presidents differently from our Governors, mayors, Senators, councilmen, and others.

Mr. President, we are a nation of many regions—and also a nation of many nations. This is one of the fundamental strengths and beauties of our Nation, but it is also the source of continuing tension and challenge. If we are not most careful to respect the differences between States and provide a reasonable influence over the central government for the majority view in each State, we risk doing great damage to the unity of our Nation.

Mr. President, I ask unanimous consent that a short colloquy between myself and Dr. Judith Best, presented at the time of hearings on this issue, be printed in the RECORD at the conclusion of my remarks. Dr. Best is the author of one of the most authoritative books on the electoral vote system.

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

(See exhibit 1.)

Mr. SIMPSON. I will close with a short quotation from my colloquy with Dr. Best. I asked Dr. Best to compare the possible crisis if a runnerup President were elected under the present system with the possible crisis if a sectionalist President were elected under direct election. She replied:

> There is really no comparison between the two situations, the "runner-up" Presidency is a mere technical violation of a simplistic democratic theory. * * *
>
> A truly sectional President would provoke a severe crisis. Such a Presidency would not

be a mere technical violation, it would be a substantive violation, a violation of the spirit and intent of the Constitutional system as a whole * * *. Sectional crises are in no way comparable to "technical" violations. One might as well try to compare a pinprick to a bleeding artery.

I trust that we may defeat this proposed constitutional amendment. Our country does not require it. Two hundred years of history give us no reason for it. Nothing has been presented to me in my first months in this remarkable place—nothing in the spirit of an effective argument as to the present worth or need of this dramatic adventure into the electoral unknown, when we have currently a very workable system.

I thank the Senator from South Carolina for yielding.

EXHIBIT 1

RESPONSES TO SENATOR SIMPSON'S QUESTIONS BY DR. JUDITH A. BEST

Question 1. Would you give me your speculations about what specifically would happen under modern conditions, if, through the electoral system, a candidate were elected President who had received fewer popular votes than one of his opponents?

Answer 1. I do not consider it likely that a candidate who had received fewer popular votes than one of his opponents would be elected President, unless his opponent waged a sectional campaign. Our current system magnifies the popular vote plurality winner's margin of victory in the Electoral College, unless the candidates' popular appeal is intensely concentrated in a few states. Geographic concentration of votes becomes unproductive at a certain point, and the parties and the candidates are well aware of this fact. Therefore, in my considered judgment, if a candidate were to be elected although a "runner-up" in the popular vote his electoral base would be broader than that of the popular vote winner, and this broad crosssectional base would counter-balance the charge of being a "runner-up". The cross-sectional base is a very strong argument for legitimacy because it is a constitutional requirement for constitutional amendments and it is the base required for the United States Congress. This is especially evident in the case of the Senate.

In the unlikely event that a runner-up were selected by the electoral system, a period of debate and discussion on the legitimacy of the President-Elect's mandate would follow, even as there was a debate and discussion regarding the legitimacy of Gerald Ford's mandate. Such a debate could have the salutary result of educating the people in the principles of the regime, leading to a rediscovery of the American idea of democracy. A few people might be seriously disaffected, but I believe their numbers would be small. After a relatively short period of some national soul searching, the country would turn its attention to issues of public policy, to the proposals of the new administration, to the wisdom of its proposed solutions to national policy and to the qualifications of its newly designated and appointed officials. Popular acceptance of such a President would turn on the President's own leadership capacity, his ability to sustain the broad base of his support, his ability to persuade the people of the prudence of his judgments. It is this capacity, after all, which is the sine qua non of all Presidential success and not the size of the President's popular vote margin. The lessons on history are clear on this point. The consent of the governed which is essential for ligitimacy must not only be broadly based, but also must be continuously re-earned and renewed. The size of his popular vote margin on election day, the highest ever achieved by a President, did not save Richard Nixon from the threat of impeachment. The size of his popular vote margin the second highest in history, did not save Lyndon Johnson from the disaffection of the people while engaging in the most unpopular war in the nation's history. Legitimacy is derived from the consent of the governed, but the consent of the governed cannot be equated with the choice of an arithmetical majority or plurality of that part of the people who record the preference they hold on *one* day in November every *four* years.

Question 2. What would happen if a President were elected under a direct election system because of a large popular vote victory in one section or even one state of the country even though he lost in closer elections everywhere else? Or if he were elected, as allowed in S.J. Res. 28, by a 40 percent plurality, winning no states and opposed by 60 percent of the voters?

Answer 2. If a truly sectional President were to be elected, the country would be ripe for civil discord or perhaps even civil war. If a President, let us say because of an overwhelming victory in the populous Eastern megalopolis, won a majority or plurality of the popular votes although receiving insignificant support in the other sections of the country, he would be considered "their" president, not our President by the rest of the country. He would have great difficulty governing. The fact of his majority or plurality over victory would do little to assuage the taint of sectionalism. Talk of secession would again be heard in the country and would be taken seriously by many.

Sectionalism and regionalism are the latent diseases of a continental heterogeneous democracy. Such diseases will prove fatal if not controlled, and abolishing the electoral college system is to abolish a most effective control on sectionalism. The more sectional the victory, the more questionable the legitimacy of the incumbent. The merest appearance of sectionalism in the 1976 election, when President Carter won only one state in the West, Hawaii, caused comment and consternation.

If a President were elected by a 40 percent plurality as provided for under the direct election plan, and if, further, his base was not sectional, which is what I assume would be most likely if he won no states, a different type of problem would have arisen, the problem of multifactionalism. The direct election plan is an open invitation to multifactionalism, party splits and the development of ideological candidacies. The more candidates that enter the race the greater the likelihood of a runoff, and in a runoff the greater the bargaining power of the factional leaders. The incentive to creat coalitions prior to the general election would be greatly decreased, compromise would be postponed, the flames of ideology would be fanned, and a dangerous polarization developed. The 40 percent President would be faced with a very volatile situation and would immediately have to begin to create a broad coalition in the most unpromising of conditions, conditions in which ideological passions had been released to the extreme. The unifying effect of the two party system would have broken down at least temporarily, and if the situation were not quickly corrected, the two party system would be in danger of dissolving into a multi-party system. We would be in a period of pronounced political instability. To be a successful President in these circumstances would call for the moral authority of a Washington and the statesmanship of a Lincoln. It would be more appropriate to offer the President-Elect condolences than congratulations.

Question 3. How would you compare the likelihood of a "runnerup" President—and the severity of the related crisis, if any—with the likelihood of a "sectionalist" President and the severity of the related crisis?

Answer 3. There is really no comparison between the two situations. The "runnerup" Presidency is a mere technical violation of a simplistic democratic theory. It occurs very rarely (only once in our 150 years of experience under the current system which evolved in 1832), and in circumstances when the margin between the leading candidates is extremely small, smaller than the statistical margin for error in the vote count. It is comparable to the technical violation of democratic theory found in the elections of our fifteen plurality Presidents for pure democratic theory would require that the President be selected by a majority and not a mere plurality of the people. It is also comparable to the technical violation in the selection of Presidents, such as Gerald Ford, under the provisions of the Twenty-Fifth Amendment, as pure democratic theory would require a popular election and not a congressional election of the President.

A truly sectional President would provoke a severe crisis. Such a Presidency would not be a mere technical violation, it would be a substantive violation, a violation of the spirit and intent of the constitutional system as a whole. It could trigger a "Fort Sumter" syndrome. While I have no doubt that the crisis that arose after the election of 1860 could not have been avoided for long because the problem of the nature of the union, unresolved by the Founders, had to be resolved (the nation could not continue half slave and half free) nonetheless, the fact remains that Lincoln was a sectional candidate. He was not even on the ballot in ten states, and it was the news of his election that was the proximate cause of the "Fort Sumter" syndrome. A civil war is the most serious crisis a nation can face. It is a crisis that pits father against son and brother against brother. Sectional crises are in no way comparable to "technical" violations. One might as well try to compare a pin prick to a bleeding artery.

Question 4. The legitimacy of a "runnerup" President would be strongly affected by what national political and opinion leaders had told the people about "legitimacy." This fact suggests to me that the rhetoric of direct election supporters about the risk of crisis is in a sense a self-fulfilling prophecy. Do you agree?

Answer 4. I do agree that there is an element of self-fulfilling prophecy in the rhetoric of direct election supporters. In addition, there is also the problem of demagogues waiting in the wings, ready to seize such an issue and fan the flames of irrationality. However, in the absence of serious and substantive public policy problems, I do not believe that a political crisis would be produced by the technical fact of a runner-up President. The common sense of the people is to be relied upon, and is attested to by their acceptance of the Presidency of Gerald Ford. It would, of course, be incumbent upon national political and opinion leaders to educate the people to the actual broad-cross sectional requirements of our constitutional system. Even though the leading supporters of direct election have a mistaken concept of the requirements of legitimacy in our system, they are responsible and honorable men, and I have no doubt that they too would act to restrain the less responsible elements of the polity.

Question 5. What do you regard as the one or two strongest arguments of direct election supporters? How would you refute them?

Answer 5. While there are several arguments used by the direct election supporters, the one that provokes the greatest response is the argument that a runner-up President is a severe anamoly in our system because numbers of votes are the only test for legitimacy. I think that this argument is completely rebutted by the following facts:

1. The Electoral College system is a paradigm of the American idea of democracy;

2. None of the major institutions and

procedures of our system are based on the simplistic and inappropriate theory of the simple arithmetical majority;

3. All of our fundamental institutions are based on the principle of the concurrent majority, which adds a distribution requirement to the majority vote requirement;

4. If we change the Presidency to conform with the principle of the simple arithmetical majority, our method of constitutional amendments, and the United States Senate (to mention just two of our fundamental institutions) should be changed, and in my opinion, eventually would be changed to conform to the same principle;

5. The direct election plan would be a fundamental change in our system of government.

There is one other argument of the direct election supporters that evokes a great response, and that is the "deadlock" argument that a third party candidate such as George Wallace could deadlock the Electoral College and then make "corrupt" bargains in exchange for his support in the college. There are two strong refutations for this argument. First, the system magnifies the plurality winner's margin of victory in the college thereby preventing a deadlock. We have never had a deadlock in the college under the current system; we have not even come close. Because of this magnification, the system has a strong bias against all third party candidates and reduces their potential to do damage, as it did with George Wallace when it reduced his 13.5 percent of the popular vote to a mere 8 percent of the electoral vote. Second, the provisions of the direct election 40 percent runoff rule would incite multi-candidate races, party splits and single issue ideological candidacies thereby greatly increasing the political power of George Wallace type candidates. The potential for corrupt bargains and wheeling and dealing increases in a runoff election system.

Mr. THURMOND. Mr. President, I commend the able Senator from Wyoming. He is one of the new Members of this body who has made an indelible impression since he has been here. His knowledge of the electoral system of this country is to be admired; I think it is very fine.

Mr. SIMPSON. I thank the able Senator from South Carolina.

The PRESIDING OFFICER. Who yields time?

Mr. THURMOND. Mr. President, I suggest the absence of a quorum, to be charged equally against both sides.

The PRESIDING OFFICER. Is there objection? Without objection it is so ordered. 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.

Who yields time?

Mr. BAYH. Mr. President, I yield to the distinguished Senator from Maryland as much time as he feels compelled to utilize to express to the world the issue he is about to discuss, whatever it may be.

The PRESIDING OFFICER. The Senator from Maryland is recognized.

Mr. MATHIAS. Mr. President, I thank my distinguished friend and colleague from Indiana, not only for the time he has yielded me but for the kind of confidence he has expressed in the manner in which he has yielded to me, and I will not betray his confidence. I will be very brief.

Mr. BAYH. The Senator from Maryland never has and never will.

Mr. MATHIAS. Mr. President. I would like to urge my colleagues to vote in favor of Senate Joint Resolution 28, the proposed constitutional amendment to abolish the electoral college and provide for the direct popular election of the President and Vice President of the United States.

In the course of the lengthy debate and hearings on this amendment, the argument most often used by opponents has reminded me of Bert Lance's quotation from Mark Twain, "If it ain't broke, don't fix it." In the case of our fundamental law, on which the entire framework for our Government rests, I question whether this is truly sound advice. Must we wait for a crisis in order to act? I think not.

Rather, we should look for the simplest, most democratic, and consistent method for choosing the leaders of our land. We must face the reality that the electoral college system is antiquated and unnecessary. In the political climate of the 18th century, the founders were anxious that the best informed citizens be responsible for the selection of the President and Vice President. Indeed, methods of communication were limited and illiteracy was widespread.

As political and social conditions have changed, however, so have our laws. Thus, we have seen many reforms in the electoral process over the past two centuries, including the direct election of Senators and the enfranchisement of blacks, women, and 18-year-olds.

Viewed in light of these democratizing electoral reforms, the electoral college stands out as an anachronism. Above all, the electoral college is inconsistent with the fundamental principle of equal treatment under the law for all Americans. Its flaws are widely recognized by legal scholars, Members of Congress, and many others. These include:

The uncertainty of whether the candidate who garners the most popular votes will ultimately prevail,

The State-by-State winner-take-all system,

The contingency election feature which, under certain circumstances, places with the House of Representatives the final decision in choosing the President instead of with the electorate at large, and

The faithless elector.

Concern over the deviation from democratic tenets is grounded in historical fact. Three times in our history, in 1824, 1876, and 1888, the winner of the popular election did not become President. Furthermore, a shift of less than 1 percent of the total popular vote cast could have produced a minority President 17 times.

Direct election is the most effective method to remedy these faults. As the late Senator Hubert Humphrey noted, only direct election insures that "the votes of the American people wherever cast (are) counted directly and equally in determining who shall be President of the United States." Only by direct election can the fundamental principle of equal treatment under the law for all Americans be incorporated into our Presidential selection process.

Fears have been expressed about electoral reform and its potential adverse effects on various blocs of voters as well as on the system as a whole. I do not find these dire forebodings persuasive.

One of the major indictments levelled at direct election is that it would weaken our system of federalism. It is contended that this proposal would have the effect of erasing State boundaries and shifting the overall strategy of a Presidential candidate from a State-by-State to a national one. I find this argument unconvincing. As former Senator Mike Mansfield stated in 1961 in reference to the electoral college:

> The Federal system is not strengthened through an antiquated device which has not worked as it was intended to work when it was included in the Constitution and which, if anything, has become a divisive force in the Federal system by pitting groups of States against groups of States.

Another important question many of my constituents have raised is how direct election would affect racial or ethnic minority influence. The widespread belief of minority groups that the electoral college benefits them stems from the contention that they are concentrated in States with the largest blocs of electoral votes. After extensive hearings on the subject, the Senate Judiciary Committee concluded that this is not true in many cases. Blacks, for example, are slightly underrepresented in the nine most populous States. Over 53 percent of the black community lives in the South, yet these voters are effectively disenfranchised through the unit rule if the white majority of their States votes for a different candidate.

Finally, I would like to clarify the effect of a runoff provision in this resolution. With direct election, a winning candidate would have to receive at least 40 percent of the national vote. This provision would discourage single-issue splinter parties and ultimately strengthen the two-party system. A runoff between the two top contenders would be required only when no candidate received 40 percent of the popular vote. In fact, only one President was ever elected with less than 40 percent of the popular vote. That was President Lincoln who, in 1860, received 39.76 percent of the vote. Moreover, in the unlikely event that no candidate receives the requisite 40 percent of the vote, a runoff is certainly a more democratic procedure than selection by the House of Representatives, as is now provided for with the electoral college system.

Over the past 13 years, the electoral college mechanism has been thoroughly scrutinized by the Congress. The time has come to act on our findings. Our history shows a record of an increasingly participatory democracy. I think it is essential to continue to move in that direction through the passage of Senate Joint Resolution 28, which provides for the direct, popular election of the President and Vice President of the United States.

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

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

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

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

Mr. BAYH. Mr. President, I yield to the distinguished Senator from Idaho.

How much time does the Senator desire?

Mr. CHURCH. Six or seven minutes.

The PRESIDING OFFICER. The Senator from Idaho is recognized.

THE PEOPLE SHOULD ELECT THE PRESIDENT

Mr. CHURCH. Mr. President, as the senior Senator of a sparsely populated State, I have examined the pending constitutional amendment over the years from the perspective of its political impact on Idaho. I have concluded that all of our people throughout the Nation must be given the same treatment in casting votes for the President, who represents us all, and that no political advantage for small States would be lost under such a system.

Under the present system, it is possible for one candidate to win the popular vote, only to find he has lost the electoral vote. If that should ever happen especially in present times, it would be the worst of worlds: The candidate who won the electoral vote would be called upon to govern without a mandate in a nation wracked by division, in an atmosphere of suspicion and hostility that could threaten the very survival of the Government itself.

Coming from a small State, I am well aware of the argument of those who maintain that popular election of the President would deprive the less populous States of the relative mathematical advantage they presently possess in the electoral college. In the real world, it simply does not work that way, and I can testify to that from my own experience as a Presidential candidate in 1976.

The present electoral college system for the general election actually gives the preponderant advantage to the big States. The importance of carrying them, if only by a handful of votes, in order to secure their entire electoral vote, is mandatory. Consequently, the big States have come to dominate our electoral process, unduly influencing our party platforms, and exercise an inordinate power over the election of the President.

On the other hand, if the President were elected by direct popular vote, such States as New York, California, Pennsylvania, and Illinois would not loom so large in the national political picture. A Presidential candidate could lose them all by several hundred thousand votes and easily make up the difference in the Intermountain West. Carrying the big States would be no longer be so essential, thus giving the smaller States a better break in the politics of the Nation.

But the issue before us transcends States' rights; it reaches the cardinal principle of popular sovereignty itself. In poll after poll, the American electorate overwhelmingly supports direct election of the President. The reason for the strong public sentiment favoring electoral reform stems from the uncertainties engendered by the closeness of recent Presidential elections, in which the people have witnessed the near possibility of a candidate winning the Presidency by capturing a majority of the electoral votes, while his principal opponent garners the largest number of popular votes.

Abolishing the electoral college would give every voter the same treatment, personalizing Presidential politics in harmony with the historic trend toward broadening the role of the people in their Government. It would do away with perhaps the most confounding specter of a third-party candidate being able to throw the election of the President into the House of Representatives, with all the mischief such an event could provoke with "deals" whereby the minority candidate, among candidates with indirectly determined vote totals, would throw his support to the highest bidder.

In the final analysis, the electoral college system has been, and remains, a loaded weapon: Every time we conduct a Presidential election, we spin the chamber, cross our fingers, pull the trigger, and wait for the explosion that could someday come. The question before the Senate is whether we will continue this foolhardy game of Russian roulette with the electoral college, or abandon it in favor of a sensible plan for direct, popular election of the President.

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

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. RANDOLPH. 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. RANDOLPH. Mr. President, I rise in support of the direct popular election proposal for President of the United States. I do not do this reluctantly or as a change of viewpoint. I have held to this process of equity in the use of the American ballot for many, many years.

I remember when Senator Spessard Holland from Florida was attempting to have a larger number of participants in the process of the American ballot by doing away with the poll tax which was essentially a deterrent in the South.

Mr. President, it was my privilege but a greater responsibility, in 1942, as a Member of the House, to offer the constitutional amendment for 18-, 19-, and 20-year-old voting. It was a long, long time in coming to fruition.

I reintroduced the legislation 11 times, and as the record will indicate it was not until 1971 that the Senate and the House of Representatives by the necessary two-thirds of the Members of both bodies present and voting brought this to the States for final disposition.

In connection with the 18-, 19-, and 20-year-old voting, we saw for the first time a constitutional amendment ratified in a matter of weeks. There had never been a constitutional amendment so quickly ratified by the States as the 26th amendment which is the last one upon our books. For the record, I state that in 90 days, time the necessary three-fourths of the States had ratified the action of Congress.

How different it was when I first presented the legislation in 1942. I felt then that the equity was there, that it should come to fruition. I remember the hearings so very well in the House of Representatives. If I were to count everyone, as I did, there was absolutely no interest in the subject matter. There were only 11 individuals in the room, including the chairman of the Judiciary Committee, the only Member besides myself.

So it was not only a matter of patience but also a continuing fight, and over and over again, as I have indicated, the matter was presented.

When I returned to Capitol Hill, after leaving here in 1947, I renewed the effort for 18-, 19-, and 20-year-old voting in our country. As I have indicated, finally it came to fruition in 1971 and for the first time in a Presidential election young people in that age bracket could go to the polls.

I am saddened, of course, to a degree that the participation of our youth in the use of the American ballot is not what it should be. In fact, it is not good. The ballot is not a piece of paper. The ballot is a franchise, a franchise of freedom, but even beyond freedom, responsibility as well.

There was a recent election in Fairfax County, across the river in Virginia. The matter then was $1 million for the improvement of schools in that county. A large portion of the population of Fairfax County is comprised of men and women who are university and college graduates, or at least a great majority of them have good educational backgrounds. These are men and women who work for salaries and wages that are higher percentagewise than most of the country. I would have thought that these parents would have taken the intense interest which I think they should have taken in connection with being at the polls in what was in a sense just a country election but for a very important reason.

I read in the Washington Post the day after the election that the voting had gone in favor of the $1 million bond issue by a small majority, but the shocking part of the story was that only 15 out of every 100 eligible voters were at the polls on election day.

I do not take the floor at this time in connection with the subject matter to berate the American public, but I do say and have a warning in these words that we are becoming a nation where it is the majority over not the minority calling the shots, but it is the majority of a minority over the minority calling the shots.

The Senator from Indiana has led so many successful efforts in this Chamber in connection with giving people the right and responsibility to vote. Certainly, he knows what I am talking about. In this country lumping all of our election processes together we are voting about 41 percent of the eligible registered electorate. So that means that

the majority is not winning over the minority. It is the majority of the minority that is winning.

I think this is a dangerous situation. I think it is one that needs the attention not only of Democrats or Republicans, but of every man and woman who is a citizen of this country.

I am not one to preach, I hope, in the Senate or anywhere else. That lady in the harbor east of New York with the raised arm is the symbol of freedom and liberty, and that is good.

Perhaps the time is here and long past when a lady should also be on the west coast out in the Pacific. In that hand there should be held "Duty and Responsibility," because liberty and freedom fail if duty and responsibility do not follow.

I hope if the vote is favorable here, I say to our Presiding Officer, that we will have a greater percentage of the American people at the polls. There may be—and I hope there can be—the feeling that if John Smith or Mary Jones go to the polls that their votes are to be counted directly in reference to the selection of the President of the United States; and that there is not another echelon or layer, as I would call it, between the final results within the State of West Virginia or any other State in reference to their conviction or viewpoint or preference expressed as they vote for the President of the United States.

Mr. President, I do not know what the result will be here this afternoon at 5 o'clock when we vote, but I think that, by and large, we will commit a grievous error if the Senate, in its judgment, fails to approve the direct vote for President of the United States.

I ofttimes have been counted in the minority, counted also often in the majority. But here this afternoon there perhaps is not the interest, intense interest, deep concern in this subject that there should be. But we are a people who believe that it is direct participation with the ballot, to use a trite expression, that should determine the future of our country.

On Easter morning I was in Prague, Czechoslovakia. I am not going to give the reasons for 80 percent of the churches being closed or boarded up, Catholic and Protestant. I am only saying that the Czechoslovakia I earlier knew was a country in which the people were participating with their ballots.

I am not attempting to draw the lines except to say that it is a proven fact that 30,000 Soviet troops are constantly marching—across, and back across, Czechoslovakia.

We say it cannot happen here, it cannot happen there. But if we do not use this American ballot—and I think the best way to use it for the Presidency is by a direct vote which is counted as another vote is counted—that we do a disservice to the Founding Fathers, even though they did not think of our democracy under our republican form of government exactly as we have expressed it.

Mr. President, I know of your leadership, and this is not a pleasantry in this matter, and I hope, I trust, that the Senate will approve the direct ballot, the individual voter preference, for the Chief Executive of our Republic.

Mr. BAYH. Mr. President, I would like to express my deep appreciation to the Senator from West Virginia who has been a stalwart supporter of all those efforts to try to extend the franchise and to try to make our elective process equitable, and his help means so much.

The Senator from Kansas wanted 3 minutes, and I yield 3 minutes to the Senator from Kansas.

The PRESIDING OFFICER (Mr. PRYOR). The Senator from Kansas is recognized.

Mr. DOLE. Mr. President, today we have an opportunity to discuss and to vote on a resolution proposing the direct election of the President and Vice President.

For many years I have supported the idea that the electoral vote system should be abolished and replaced with direct election. As a Member of the House of Representatives, I advocated this change, and as a Member of the Senate, I have testified before the Judiciary Committee several times. We need to realize that while once the electoral college was a young country's answer to selecting the President and Vice President, it is no longer the most appropriate system for the United States. Extensive campaigning, widespread media coverage, and a better educated electorate have nullified the need for the electoral college. I believe that the American electorate is capable of choosing its leaders directly. I hope that the Congress will take the proper action to set in motion this change.

HISTORY

Mr. President, a system of direct election is the most democratic system. If you review our history, I think you will see that our Founding Fathers were attempting to choose a democratic selection process also, although the definition and concept of democracy has changed considerably since that time. When the United States was being formed, monarchy was still an accepted form of government. In devising the electoral college system, our predecessors no doubt felt that they were taking a bold, step toward as much democracy as a new country could absorb. While much of the population was not allowed to vote—women, nonproperty owners, and slaves—the fact that a portion of the citizens selected their leaders was revolutionary. It was a democracy for its time. Today, however, we must realize that we deal with different circumstances and different considerations.

Today's voter is better educated. In the late 1700's, public education was neither common nor widespread. When printed material was available, many could not read it. There was no television, no radio, no telephones or airplanes to make possible an easy, fast exchange of news items. In short, most persons did not have access to the candidates, and had a system of direct election been approved, the voters most likely would have been voting without knowing either candidates or issues. Today's voter has the opportunity to make an informed, intelligent selection. Issues and candidate positions are well known.

Our forefathers shaped their political system to their needs, but also recognized that what seemed the best solution then, might not always be the best system in the future. So they provided for a means to amend the Constitution. Because of their foresight, we are able to debate constitutional amendments and question whether or not a practice needs to be changed. Over the years, many such changes have taken place, and I propose that now is the time to modify the method by which we select our President and Vice President.

1976 ELECTION

I believe it is basic to our system of democracy that the candidate who receives the largest number of popular votes should win the election. The electoral vote system does not hold this guarantee. In the 1976 election, a shift of fewer than 12,000 votes in Ohio and Delaware would have resulted in a tie in the electoral college. The same shift of 12,000 votes in Ohio and Hawaii would have given victory to the Republican ticket. In spite of Carter's 1.7 million vote plurality, Ford would have won the electoral college vote. Had this happened, the Republicans in effect would have profiteered from weaknesses in the electoral college. In past years it could have been the other party which benefited.

THE STRAIGHTFORWARD CASE FOR REFORM

The beauty of direct popular election really lies in its simplicity and straightforwardness. It just makes good commonsense. Complicated philosophical justifications for retaining the electoral college and maintaining its inherent potential to subvert the popular will do not make sense in practice. Direct election is easily understood, easily administered, promises the least delay and the minimum opportunity for outside factors to distort the will or voting citizens. The practical and predictable benefits of direct popular election can be sunmmarized as follows:

First. It would guarantee that the candidate with the most votes would be elected.

Second. It would count the vote of each citizen equally regardless of where he lived and how his neighbors voted.

Third. It would eliminate possible faithless electors who are free to disregard the will of the voter.

Fourth. It would reduce the premium on fraud in pivotal electoral vote States.

Fifth. It would strengthen the two-party system, even in present one-party States where there now is little incentive for the minority party to increase its turnout.

Sixth. It would remove the possibility of electors bargaining away their electoral votes in an electoral college stalemate, and it would remove the possibility of a partisan, contingency election of the President and Vice President by Congress.

Seventh. It would increase the confidence of the American people in their electoral system.

EFFECT ON TWO-PARTY SYSTEM

I know that some concern has been expressed that the direct election procedure would somehow weaken the two-party political system in this country by encouraging the formation of splinter parties with only narrow ideological appeal. Let me emphasize my unshakeable conviction that the two-party system as it has developed in America is one of the major influences for stability, order and rationality in our political processes. The "consensus politics" practiced by both major U.S. political parties is responsive to both majority and minority interests and certainly remains one of the most powerful influences against development of third parties. And, because Senate Joint Resolution 1 contains a contingency for a runoff election between only the two strongest national tickets in the event that neither captures a 40-percent plurality of the popular vote, it would be extremely unlikely that the revised system would encourage third-party candidacies.

Direct election would provide both major parties with even greater opportunities for their consensus-building efforts. It would make a likely voter in a Republican State like Kansas just as attractive to the Democrats as one of their dyed-in-the-wool stalwarts in Massachusetts. And it would give the Republicans the same incentive for going after a likely voter in the District of Columbia as one in Arizona.

The "unit rule" feature of the current electoral system facilitates the growth of ideologically oriented regional third parties—such as that of George Wallace in 1968—designed to deny either of the majority party candidates an electoral majority. In 1968, in States like Louisiana, Georgia, and Arkansas where Governor Wallace got approximately half the popular vote, he received all the electoral votes. That type of distortion would no longer be possible under the direct election system.

EFFECT ON STATES WITH SMALLER POPULATIONS

Direct election of the President could be expected to strengthen the political importance of smaller States by making the ballots of each of their voters just as valuable and deserving of pursuit by a candidate as any of the most populous States. The most populous States and their metropolitan centers would stand to lose the great strategic importance they have under the electoral college procedure, for elimination of the "unit rule" feature would eliminate the prize the major States can offer of a large bloc of votes available to the highest bidder.

It has even been suggested by some political analysts that the balance of power in Presidential elections would be tipped away from the more progressive metropolitan residents toward the conservatives, who tend to predominate in small towns and rural areas.

PROLIFERATION OF CANDIDATES?

Mr. President, some opponents to direct election have speculated that the 40-percent plurality requirement would encourage a proliferation of candidates due to the possibility of a run-off election. When considered seriously, I think such a fear can be dismissed as idle speculation. To begin with, a run-off election would be difficult to achieve since that candidate must keep the popular vote winner from receiving less than 40 percent of the total vote. Furthermore, if a run-off was needed, it would be between the two strongest candidates, not between all the hopefuls. Should a third party receive more votes than one of the two major parties, simple justice would include that candidate in the runoff.

Experience has shown that the electoral college system encourages regional third-party candidates. These candidates know that should they receive sufficient electoral support in a few States by gaining a slim margin in the popular vote, then in the electoral college they might have enough support to prevent either major party from receiving a majority, and thereby throw the election to the Congress. Or, just as disagreeable is the possibility that the third-party candidate would use his clout to bargin his electoral votes in such a way as to affect the outcome in the electoral college. To my way of thinking, the electoral vote system presents a greater threat to the proliferation of candidates and to weakening the two-party system than does popular election.

Some persons hold out the electoral college as the last vestige of our Federalist system. I disagree. From personal experience, I can tell you that the electoral vote system encourages Presidential and Vice Presidential candidates to concentrate their campaign efforts on a few closely contested States. In the process, many small or traditional one-party States are overlooked. During the 1976 Presidential campaign, no matter how much we wished to visit all parts of the country, in some instances it was simply impractical. Three thousand votes in California, Texas, Pennsylvania, or Ohio become much more important than 3,000 votes in Wyoming, Arkansas, Alaska, or even Kansas. Practically speaking the electoral college system, because it operates under the unit rule, forces candidates to concentrate on those large States which appear within their grasp.

It would be foolish of me to try and convince you that under a system of direct election Presidential candidates would cover the country evenly, for they would not. Commonsense tells you that candidates would still concentrate on large metropolitan areas, for the candidate is attracted to the voter. But, communities of like sizes would be equally attractive regardless of whether they fell in western Texas or Arizona. No longer could the candidates count on swing votes, pivotal States or sure States, for each single vote would be important, regardless of where it was geographically cast.

I will admit that I did not begin as a proponent of direct election, but in time the issue became more clear. For example, the American Bar Association reports that in 1976, both Utah and Hawaii had the same number of electoral votes. Yet, almost twice as many people voted in Utah as in Hawaii. Similarly, that same year Georgia cast almost 50 percent more electoral votes than Minnesota, regardless of the fact that about half a million more persons voted in Minnesota than in Georgia. Because each State receives a predetermined number of electoral votes regardless of voter turnout, a low turnout will allow a small number of persons to determine an equal number of electoral votes in a State of similar size but with high voter turnout.

Also, the electoral college system does not reflect population changes that take place between census counts. A sudden influx of persons to the Southwest, for instance will place those States at a disadvantage when it comes to selecting the President and Vice President.

Mr. President, while there may be no perfect system for selecting the President and Vice President, I firmly believe that selection by direct election is the most fair, the most democratic, and the best selection process for us to use. It assures that the person with the largest number of votes will win and that each person's vote will be of equal influence. Certainly, it is the most democratic method. For these reasons, I would urge my colleagues to listen closely to the debate on this issue, and to vote in support of replacing the electoral vote system with direct popular election.

I think it is fair to say, in summary, as someone who has been wrestling with the problem for a number of years, that I have supported various efforts, whether it be the district plan, the proportional plan, and years ago I think the distinguished Senator from Missouri (Mr. EAGLETON) and I had another plan, but finally I have decided that the proposal in Senate Joint Resolution 28 is probably the best, and I have advocated this change as a Member of the Senate.

I have testified before the Judiciary Committee several times. I think we need to realize that while once the electoral college was a young country's answer to selecting the President and Vice President, it is no longer the most appropriate system for the United States.

With all the extensive campaigning and widespread media coverage, and a better-educated electorate, we have nullified the need for the electoral college. I believe the American electorate is capable of choosing its leaders directly, and I hope Congress will take the proper action to set this change into motion.

As one who was directly involved in the 1976 election, which was a very close election, a change of 10,000 or 11,000 votes in a couple of States would have made President Ford the elected President, and Senator BOB DOLE the Vice President, even though we would have lost the popular vote by over 1½ million votes.

I think I could have learned to accommodate that. I mean, I think I could have recovered from that problem. [Laughter.]

But it just seems to me that in the final analysis, whether it is in an election for the President or the Vice President or a Member of Congress or anyone else, that the person receiving the most votes ought to be the winner.

I have tried to analyze all the argu-

ments for and against that it protects the small States, the faceless elector, and everything else that might be involved. When I look back on the 1976 example and the very things the distinguished Senator from Indiana has been telling us year after year might happen, it came very close to happening in 1976. Candidate Carter had a 1.7 million vote plurality. But, as I have indicated, with a shift of fewer than 12,000 votes in Ohio and Delaware it would have been an electoral college victory for Mr. Ford. Can I have 1 additional minute?

Mr. BAYH. One more minute.

The PRESIDING OFFICER (Mr. RANDOLPH). One additional minute to the Senator from Kansas.

Mr. DOLE. In that case the Republicans would have profited from weaknesses in the electoral college. But I have often wondered, even as I have suggested it would have been something I probably could have learned to live with, how we could have explained to the American people in January 1977 at the inaugural ceremony of President Ford why he was there instead of Candidate Carter, because Candidate Carter received about 1.7 million more votes.

It does not make a great deal of sense. It just seems to the Senator from Kansas—and I have read all the regional arguments, all the State arguments, and all the other arguments—that there are a number of straightforward reasons why we ought to reform the system, and they were all set forth in my statement, and it would seem to me it is going to guarantee one thing, and that is the candidate who gets the most votes is going to be elected, and that is important in our system.

It seems to me it is really a boon to small States because the candidate is going to go to the small States. A Republican is going to come to the District of Columbia to campaign because every vote is going to be important.

I thank my distinguished colleague from Indiana for yielding.

The PRESIDING OFFICER. Who yields time?

Mr. THURMOND. Mr. President, how much time is left for each side?

The PRESIDING OFFICER. The Senator from South Carolina has 12 minutes. The Senator from Indiana has 8 minutes. If neither side has a speaker, the time will run against the two sides equally.

Mr. THURMOND. Mr. President, I just wish to express appreciation to all who have participated in this debate. I think it concerns one of the most important questions to ever face this country, because it concerns the very fundamentals of our Constitution.

The question here is whether we are going to retain federalism as established by the Founding Fathers, or whether we are going to forgo it for a national election where the candidate receiving the largest number of votes becomes President of the United States.

There has been some question raised here that if you vote for Governor by direct vote, why should you not vote for the President that way?

It is altogether a different question. In the sovereign States, the candidate receiving the highest number of votes is elected. That is natural. But when it comes to electing a President, who is going to serve all the States and all the people, then there should be a concurrence throughout the Nation; it should not be a regional matter.

If we just had the direct election, then some sections with heavy populations would become very important, and other sections of the country would be neglected. That was the reason the system was set up like it is: To provide that in each State there will be an election for President. It will be by direct vote, as it is—by direct vote in each State. But we do not have a direct vote for the whole Nation, because we have a federated system, and we do not think we should change from a federated system to a national system.

Today we are thinking more about decentralizing. We are thinking about reversing the flow of power from the States to the Federal Government. This proposed system of election would bring more power to those in Washington. It would bring more power to those who control the election system of this country, which is one of the most important functions that could be imposed upon any agency of the government.

We feel that we should decentralize rather than centralize. If there is to be a change in the election system, the district system would preserve federalism, and the proportional system would preserve federalism, and they might be an improvement. I would not object to those. But to go to a direct vote does destroy federalism. It changes the whole system of government, and in my opinion, that would be very dangerous.

Mr. President, If we go to a direct vote, there will be many splinter parties. Blacks may organize a party, and we might have a prolife party, an antinuclear party, a prolabor party, a fundamentalist Christian party, a gun control party, a Socialist party, an antibusing party—you can visualize all different kinds of parties. That would probably prevent any candidate from getting 40 percent of the votes; then we would have a runoff, and we would have all kinds of trading of votes and corruption. I do not think we want that for this country.

I yield to the distinguished Senator from Illinois (Mr. PERCY). How much time does the Senator want?

Mr. PERCY. As much as the Senator can give me.

Mr. THURMOND. How much time do we have?

The PRESIDING OFFICER. The Senator from South Carolina has 8 minutes remaining.

Mr. THURMOND. I yield the Senator 3 minutes.

Mr. PERCY. Mr. President, I worked closely with my distinguished colleague from Indiana (Senator BAYH) on ERA but I find myself in a different position today. Because of my personal affection for him and what he has always stood for, I regret that we disagree on this amendment.

But the roots of my knowledge of constitutional issues really go back to an early tutor. While I was deciding to leave business to go into politics, I worked with a great friend and political scientist at the University of Chicago, Dr. Robert Goldwin, who is now a fellow at the American Enterprise Institute and is Director of a 10-year program to conduct conferences on the Federal Constitution and the Bill of Rights. I would have liked Dr. Goldwin's counsel on this matter, but it was not possible because he is out of the country. But I do feel confident that he would have approached this subject very cautiously and conservatively, however, as all of us should when it comes to changing a constitution that has stood us in such good stead for as long a period of time.

Nor I do not like to see our national agenda, during this period of crisis in energy, the economy and in other areas, crowded with too many things that are not germane to those immediate concerns. We must focus on what is ultimately important. I do not think that the American agenda needs to have direct election of the President added to it now, in all the States, with all the debate that would be carried on and all the emotion it would arouse, when we have so many other problems that need our urgent attention.

This Congress is distinguishing itself for not doing too much, but focusing instead on the most important issues of our day.

I am also concerned about a constitutional amendment providing for direct elections, in light of so much conservatism among minority groups, whose interests we wish to protect, and when so many of them have concluded that this amendment would have an unfavorable effect on them.

I would like to incorporate in the RECORD certain quotations from several distinguished opponents of the amendment. First, Dr. Alexander Bickel, a long-time friend of Dr. Goldwin's and mine, who said:

> The electoral college makes it impossible for a third-party candidate to have any sort of impact unless he has a strong regional base. Without such a regional base, his popular vote will not register in the electoral college. Hence, all he can hope to do is spoil the election for one or the other major candidates, but on election day and after he counts for nothing . . . Chiefly for this reason, it has not failed to produce a general election winner since 1824.

Dr. Bickel expresses concern about the possibility of third parties, and I share that concern. The two-party system has served us well, and I would be hesitant to venture now into a new format in our electoral process, that could aid and abet the establishment of a three-or-more-party system in the United States.

I have met personally with leaders of the American Jewish Congress, particularly those from my own State, and I would like to quote what their position is on this issue:

> By tending to inhibit the nomination of candidates likely to be objectionable to sizable minority groups, the electoral system assures attention to the needs and desires of groups whose interests might be given much less consideration under a system of direct election.

I quote also my own colleague from Illinois, CARDISS COLLINS, of the Congressional Black Caucus, as to the position that she has taken, because she has articulated and expressed certain important concerns shared by many floor leaders. She says:

Black Americans must remain extremely vigilant against measures which may either intentionally or inadvertently have the effect of reducing our power at the polls. The general consensus among Black leaders is that direct election of the President would most likely have the effect of reducing the significance of the Black vote.

Vernon Jordan, of the Urban League adds:

Direct election would inevitably mean the formation of black political parties, voting along racial lines and increasingly separated from the major parties who would themselves be weakened and dependent upon coalitions with splinter groups. This would not only weaken the political system, but would be a polarizating factor destructive of racial harmony.

The American Farm Bureau Federations, the largest farm organization in Illinois, says:

The abolition of the electoral college will destroy much of the effectiveness of minorities in Presidential politics . . . the adoption of a national plebiscite as the method of electing our President will swallow up agriculture in Presidential politics.

Prof. Jean Kirkpatrick, of Georgetown University speaks on behalf of ethnic groups and mentions the Polish voters of Milwaukee. But the second largest Polish city in the world is Chicago:

The smaller the electoral unit, the more important are all the people and groups which compose it. The Polish vote is more important in Milwaukee than in Wisconsin and more important in Wisconsin than in the Nation. . . . Under direct election, a national campaign strategy would scratch them off, write them off, forget about them . . . the electoral college forces politicians to take account of all minorities—urban, rural, ethnic, religious.

As the Washington Star editorializes:

Jews, Catholics, Blacks, farmers, and other minorities will suffer. The electoral college system gives minorities a chance to seize center stage in the battle for electoral votes of key states.

Finally, George Will, as quoted in the Washington Post:

The permanent problems of this Nation are race and regionalism; the electoral system serves, I believe, to ameliorate both problems.

I see no compelling reason for us to amend the Constitution to provide for direct election of the President.

Several Senators addressed the Chair.

Mr. BAYH. Mr. President, I yield 3 minutes to the distinguished minority leader.

Mr. BAKER. I thank the Chair, and I thank my friend from Indiana for his courtesy. It is my pleasure to rise once again to urge my colleagues to vote in favor of Senate Joint Resolution 28, which calls for the direct election of the President and Vice President of the United States. I am particularly pleased to be making this appeal not on a vote for cloture, but a vote for adoption of this long-awaited and much-needed constitutional amendment. I want to commend my colleagues for their tireless efforts in arriving at a compromise that will insure a final vote on this vital measure within this Chamber. This is an occasion I have awaited for more than a decade, and I will with greatest pleasure cast my vote in favor of this consitutional amendment.

Let me pay my respects as well to the Senator from South Carolina for his willingness to agree to the unanimous-consent request to vitiate the vote on cloture and to proceed directly to the disposition of this matter on its merits. The Senator from South Carolina and the Senator from Indiana have shown the very best cooperative spirit among Members of this body in trying to arrive at a fair and final judgment on this important matter.

It seems to me that there is no conscionable basis upon which one can say that in the selection of the highest elected officer in the United States, the people of one State should have any advantage over the people of another State. If equality of representation is not stated to be the fundamental purpose of democratic government, then there is something about the nature of federalism which I believe we should examine a little further. Because federalism, in the view of the Senator, does not represent discrimination by favoring one group over another.

Federalism as a generic term does not imply an advantage by one group over another. Federalism means a group of 50 States united for their mutual self-interest and for the creation and functioning of a central government. That is federalism as I know it, and it is that form of government that I rise in support of today.

It is this federalism that is protected, nourished, and perpetuated by the daily functions of the U.S. Senate. It does not require that voters of New York City have a greater voice in selecting the President than the voters of Omaha, Nebr. Unfortunately, this is precisely what happens today, according to many opponents of this amendment.

Mr. President, I come from a southern State. I come from a relatively small State. Scholars and observers have argued that Tennessee has an advantage in the electoral college system, and also that my State has a disadvantage under the electoral college system. My reply to both of these arguments is identical. If there exists a clear advantage, or an equally clear disadvantage to a single citizen in any State, then that is proof positive that the electoral college system should be abolished. Tennessee should not have one with more or one with less influence than any other region, section, or State of this country in electing its President and Vice President.

If we do not start with the basic premise of equality in the selection of a President, in the selection of the House of Representatives, and in the selection of the Senate—then we end up with a premise that does not, in my view, constitute a part of federalism.

The opponents of this amendment have said that the concept of "one man-one vote" does not apply in this instance. But I say to them that that is the central and fundamental question to be decided by their votes today.

The opponents say that a change in the electoral college system would disrupt the plans of our Founding Fathers. I say that this change is essential to complete the dream of our Founding Fathers.

The opponents say that this amendment will shift the advantage held by certain regions in determining national candidates and politics today. I say that if there presently exists an imbalance between a voter in one State and a voter in another, then this is an inequity, and the time for the Congress to correct this inequity has come.

Mr. President, I urge all of my colleagues to join me today in removing the imbalance that presently exists in the election of our Nation's highest officers. I urge my colleagues to expand the concept of "one man-one vote" by supporting this amendment today.

Mr. THURMOND. Mr. President, I yield 2 minutes to the distinguished Senator from Arkansas (Mr. BUMPERS).

Mr. BUMPERS. Mr. President, I will just offer a few remarks.

I would first like to say that my distinguished colleague from my State has done a magnificent job during the course of the debate championing the side opposite of that for which I will vote. Both sides have made very eloquent arguments on this resolution. Both sides have argued that if their side prevails it will eliminate splinter candidates. Both sides have argued that rural States will be hurt if that particular system is adopted. And certainly, both sides have argued that their cause is the one that will maintain and sustain the two-party system.

Mr. President, as I say, this is an issue on which good, commonsense people will have honest differences. I happen to belong to that school who believes that the Founding Fathers did not do this summarily or cursorily, but they did it after considerable debate, understanding that small rural States such as mine, Arkansas, do indeed need some additional clout in the election of the Presidential candidates.

Mr. President, I might say that one of the biggest arguments that has been made is we have had so many close calls and at least on one occasion a President has actually been elected with less than a majority vote. But there will be close calls under any system. I do not see that this particular system, the electoral college, is in any great need of repair. Because of my abhorrence of changing the Constitution of the United States in any way without a demonstrated need, without a demonstrated example of abuse and injustice, I simply cannot support Senate Joint Resolution 28.

Mr. President, we are voting today on a proposition to change one of the basic institutions of our Federal Government, the electoral college. Many critics of the electoral college system have insisted over the past several years that the electoral college is in bad shape because

there have been so many "close calls" where the popular vote winner in Presidential elections might have lost the election and that we need to change the system. One thing that the critics do not emphasize, however, is that these instances are just that, close calls, and that any system, no matter how excellent, will not be able to prevent all error or "close calls." Even under the direct election system, if there was an allegation of fraud or a demand for a recount in the runoff, problems and "close calls" could occur.

This issue has engendered much debate and both sides of the issue have many respected supporters. One of the problems with trying to assess the situation if the electoral college is abolished is that it is not clear how it will affect the party system. Whether it will result in many "third parties," whether urban States will profit at the expense of rural States and so forth. Both sides argue that abolition of the college or its retention will result in a regional candidate. Both sides argue that either abolition of the electoral college or keeping the electoral college will hurt small States, such as Arkansas. Both sides try to use the two-party system to prove that their type of election of the President will strengthen the two-party system. Both sides agree that abolishing the electoral college will have an effect on the two-party system and that it will encourage the already growing resort to the national media in Presidential campaigns.

One of the institutions of our system which the Founding Fathers did not plan for and in fact, wished to prevent was the evolution of a party system. Our federal system today is intertwined with our party system, so closely intertwined that it is difficult to determine what effect changing the methods of one will have on the other. The party system forces Presidential candidates to obtain support at the local level and to consider local needs. Because a candidate must win at least a good portion or all of a State's support, a proliferation of third parties or of numerous independent candidates is discouraged. In my own State of Arkansas the secretary of state last year received numerous applications from people wishing to file as candidates for President. These candidates did not qualify, but they are an indication of the trend among the American people right now toward identification with single issue groups. Many of these groups under the direct election system would appear on the ballot for President and although they might know they could not win, they might force other candidates into a runoff. This would obviously result in an inordinate power being granted to such groups, if they could trade their support for a promise from one of the two top candidates. While such things are not inherently bad, the proliferation of the problem could become terribly erosive of our two-party system and add to the trend of identification of Americans with single-issue groups.

One of the major arguments in favor of the direct election is that all voters in the United States should be able to cast votes of equal weight for the President of the United States. Proponents argue that under direct election this would be the case. However, the resolution which we are voting on today still leaves to the States the right to set all aspects of voter eligibility as long as they are the same as that of voters for the most numerous branch of the State legislature. States will also have the right to decide how candidates will be included on the ballot. Such differences from State to State will still mean that a voter in one State will not have a vote of the same weight as a vote in another State.

Because of the uncertainty of how the direct election of the President will affect our two-party system, how it will affect the rights of small rural States, and my normal resistance to changing a system that I consider to be in reasonably good repair, I cannot support Senate Joint Resolution 28.

Mr. THURMOND. Mr. President, I yield 2 minutes to the distinguished Senator from Nevada.

Mr. CANNON. First, I commend the distinguished Senator from Arkansas. He is absolutely right. I think a most compelling case has not been made to change the Constitution of the United States.

Mr. President, as you know, this body will soon vote on one of the most important issues that will come before us this year. The hour is late and much has been said already in this regard. I want to take but a couple of minutes to once again urge my colleagues to seriously consider the ramifications this proposed amendment would have on our form of government.

Ours is a federal system and one which came about as a result of an elaborate series of compromises at the Constitutional Convention. It is a system which is working well.

The proponents of direct election have been in my opinion, too prone to indulge in mathematical speculation which ignores political and historical realities. The case against federalism simply has not been made.

I remind my colleagues that no electoral system is neutral. Every system favors certain groups and interests. The question today is not whether the electoral college has biases, but rather whether the biases are more compatible with and supportive of our basic system of government than direct election. I believe it is.

I strongly urge that we defeat the direct election proposal, and I hope that we do. However, I would like to close my remarks by saying that the battle has been well fought on both sides. I do wish to compliment the efforts of the opposition, lead by Senator BAYH and also express my appreciation for the efforts of Senators THURMOND, HATCH, and SIMPSON.

The PRESIDING OFFICER. The Senator's time has expired.

The Senator from South Carolina.

Mr. THURMOND. Mr. President, I understand we have 1 minute remaining.

The PRESIDING OFFICER. A minute-and-a-half.

Mr. THURMOND. I yield 1 minute to the distinguished Senator from Utah.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, we are nearing the completion of one of the most important constitutional debates of our time. Senate Joint Resolution 28 proposes more than the sort of housekeeping amendment that has characterized recent efforts in constitutional revision. It proposes to alter some of the most basic and enduring foundations of our system of government.

I agree with Prof. Charles Black that direct election of the President would be the most radical amendment to the Constitution of the United States ever proposed. I would hope that all of our colleagues would consider that.

The burden of proof has not been met, as the distinguished Senator CANNON of Nevada has said. I compliment him for his leadership in opposition to Senate Joint Resolution 28 and Senator BAYH for his leadership on the proponents' side. I also wish to compliment Senator THURMOND and Senator SIMPSON for their effective leadership in opposition to Senate Joint Resolution 28.

Senate Joint Resolution 28 proposes a democratic caricature. It would introduce the notion into our structure of government that nothing is more important than "one-man, one-vote". Rather than the representation of a subtle and complex array of influences, it would transform our Constitution into a document with all the depth and richness of an abacus, an adding machine. In the process, some of the most permanent principles and guideposts of our system of government would be relegated into insignificance and irrelevance.

Federalism, checks and balances, separation of powers, the protection of minority rights, limited government, geographical balance, and concurrent majorities are all important themes of our Constitution that would be subordinated to the altar of "one-man, one-vote" as a result of direct election. The consensus and compromise and moderation that are promoted by the electoral vote system would be replaced by the divisiveness and extremism of the direct election notion.

While the present electoral system insures the achievement by sucessful Presidential candidates of "cross-sectional" majorities, or majorities which are reflective of the electorate as a whole, direct election insures nothing more than pure numerical majorities. The electoral system is concerned not simply with the mechanical distribution of majorities but also with the character of those majorities.

Threatening as direct election is, of and by itself, I am equally concerned by its long-term implications. Once the premises of direct election have been accepted, and adopted into the Constitution, how can other constitutional devices be justified. The executive veto is a non-"one-man, one-vote" institution. So is judicial review, the constitutional amendment process, and the Bill of Rights itself. The Bill of Rights dictates

expressly that there are limits and bounds to pure majoritarianism.

The composition of the legislative branch, as most of us well realize, is nonmajoritarian, particularly this body. How can Congress withstand the "one-man, one-vote" juggernaut if the concept is permanently incorporated in the method by which we select the President? Is the legislative branch any less important in our system of government? Does it deal with any less important issues? The implications of the direct election precedent for the legislative branch are overwhelming.

Mr. President, I call upon my colleagues to weigh the pending resolution as carefully as they have ever considered any proposal. I would like to close my statement with the profound observation of the late Professor Alexander Bickel of the Yale Law School:

> The sudden abandonment of institutions is an act that reverberates in ways no one can predict and many come to regret.

The PRESIDING OFFICER. The Senator from South Carolina is recognized.

Mr. THURMOND. Mr. President, as we come to the close of this important constitutional debate, I want to take this opportunity to thank those who participated on both sides of this issue.

Although the Senate has considered several constitutional amendments in the recent past, it will be rare that something more significant and having such a far-reaching effect on our system of government will be debated on this floor.

Realizing these far-reaching, and what we considered radical effects, Senators HATCH, CANNON, SIMPSON, and I formed a bipartisan group to coordinate opposition to this amendment. I want to thank them for their important efforts which contributed tremendously to the full consideration of Senate Joint Resolution 28. In addition to those who felt the need to offer their thoughts in opposition to this proposal, both during the hearings and during floor consideration, I commend you for your contribution to preserve our Federal system of government. Once again, this group is totally bipartisan, made up of such names as Senators GOLDWATER, MCCLURE, STENNIS, MORGAN, WARNER, WALLOP, MOYNIHAN, PERCY, and BUMPERS.

I also wish to thank my other colleagues who, although not speaking on this resolution, have studied the material on both sides and reached a conclusion which is the right one for them. Of course, I hope the decision is to oppose Senate Joint Resolution 28, but even if it is not, I commend them for doing their duties as Senators.

Mr. President, I commend those who have voiced their support for Senate Joint Resolution 28, not because I agree with their position, because I do not, but because of their admirable efforts for what they believe is right for the Constitution. In particular, I commend my colleague on the Judiciary Committee, Senator BIRCH BAYH, for the way he has conducted an interesting debate on a proposal that he has been advocating for 10 years.

Staff has worked very hard on this issue and I would like to thank them for their labors. Jim Lockemy, who coordinated staff efforts, of my staff; Steve Markman of Senator HATCH's staff, Frankie Sue Del Pappa of Senator CANNON's office, Charles Wood of Senator SIMPSON's office, and Dennis Shedd of my staff all put in long hours of assistance on this proposal. Mr. President, regardless of which side prevails here today, we have had a good debate.

I think the issue is well drawn. I think the Senate understands the question. It is whether we are going to retain federalism or not. It boils down to that.

With that, Mr. President, I hope the Senate will see fit to strike down this amendment and retain federalism as it was placed in the Constitution by our forefathers.

Mr. BAYH. Mr. President, I yield 20 seconds to the Senator from Ohio.

Mr. GLENN. Mr. President, the American people deserve to elect their top leaders—the President and Vice President of the United States—in a fair and equitable manner that ensures that the will of the majority prevails in filling these most important offices.

Today, despite more than a decade of debate and consideration, and even as the date nears for filling the 49th term of the Presidency, the needed assurance that the person elected to be our leader will represent the majority will of the people does not exist.

It does not exist because of the continuing existence of the electoral college, an arcane institution which did make sense to the 18th century framers of the Constitution, but is out of step with America at this point in our history. Our tradition is one of ever-expanding enfranchisement, of vast expansion in the education of the citizenry, and of a veritable explosion in the amount of information made available to voters before they exercise the most precious right of citizenship.

Americans no longer need a college of middlemen between the ballot box and the actual selection of their two primary leaders. Americans do deserve to have their votes count equally, no matter where they happen to live, in the election of their national leaders.

Americans should no longer face the threat of having a President elected—duly elected, mind you—contrary to the majority will of the people participating in the election. It is a very real threat, borne out by the history of our Presidency. It has happened three times. It could happen again, and I can see no advantage in a Presidential election again being thrown into the House of Representatives.

I am aware of the argument that because in 1824, 1876, and 1888, the winner-take-all electoral system resulted in Presidents being chosen who did not receive the most popular votes and because the Nation weathered those events without a grave constitutional crisis or rioting in the streets, we can do so again. But why take that chance?

Because of the developments I mentioned earlier, of ever-expanding suffrage for example, and because of the wealth of information made available to the public almost instantaneously, the circumstances have changed greatly in the past century. We have virtually universal suffrage now, of males and females of all races, creeds, and circumstances, of people 18 years of age and older. We have an informed electorate. To thwart its will now, in the 20th century, could indeed give rise to a grave situation in this country.

In poll after poll, surveys have shown that the people agree, and that they support the abolition of the electoral college and direct election of the President and Vice President of the United States.

Mr. President, the people understand what happens under the present system. That, perhaps, is one reason why Americans appear so relatively apathetic about their elections, turning out in numbers that should prove disgraceful to a nation with our traditions. Direct election, by insuring that each voter's ballot will count the same as all others, should significantly increase the interest of the public in the election of our President and Vice President.

Voters in small States which tend to be bypassed by candidates now because of their small weight in the electoral college, as well as voters in States which are ignored because they are perceived as being solidly in one camp or another, and are thus written off or taken for granted, will find themselves courted as never before, I believe, should direct election become a reality. Perhaps, then, more than the 54.4 percent of voting-age Americans who cast ballots in 1976 would turn out on election day.

When every voter's ballot counts equally, our political parties will have more incentive to seek the support of all kinds of people in all regions of the country. It will be good for the parties; good for our Government. Most of all, however, it will be a guarantee of fairness, both to the candidates and to the citizens.

I would like to quote from an Ohio colleague of mine, Congressman LOUIS STOKES. Congressman STOKES served on the House Judiciary Committee during the term in which that committee gave long and thorough consideration to this matter and voted out a similar proposal that was adopted by the House of Representatives.

Earlier this year, he appeared as a witness before the Senate Judiciary Subcommittee on the Constitution and after enumerating the weaknesses of the electoral college that we all know well, said there is a "final defect" in the present system which might be the most serious of all.

"The electoral college was based on a premise which has long since outlived its validity," he said, "That is, that the task of selecting our country's Chief Executive is too important a matter to be left to 'commoners.' "

Congressman STOKES added that, "In no other facet of our democratic voting system does this anachronism remain. We now recognize, at least legally, that the very foundation of our democracy is equal voting rights for all Americans. Exclusive voting by the 'landed gentry' is long since gone. Women are now afforded full and equal voting rights. And

continued efforts are being made to insure those same rights to the nonwhite minority groups of this Nation. Thus, the very existence of this idea in the Constitution is out-of-step with the trend of our history. For that reason alone, it should be removed."

Mr. President, as a cosponsor of Senate Joint Resolution 1, an identical proposal, I urge my colleagues to remove the threat of electoral mischief which will exist so long as there is opportunity for the will of the majority to be thwarted in our system. Let us not muddy this issue with unrelated concerns, but decide it on the merits and send it to the States for ratification. It is the next logical step in the ever-expanding tradition of wider democracy in America.

Mr. BAYH. Mr. President, I yield 20 seconds to the Senator from Montana.

Mr. BAUCUS. Mr. President, I would like to begin by quoting a distinguished American.

> First, we have reached that point in our continuing Constitutional evolution in which Americans should express their unity as a people, beyond state divisions, by selecting by equal vote throughout the land the President of the United States; and second, we have reached, as the people, that point of political enlightenment and maturity at which Americans are competent to fill the Presidential office by direct vote, without the faceless intermediaries of the Electoral College. My experience with my fellow Americans, not only in Montana but throughout the nation, leads me to subscribe to both propositions.

Mr. President, those observations were made by former Senate Majority Leader Mike Mansfield in January of 1961. They ring as true today as they did then, for Montanans and for all Americans. Those of my colleagues who served with him know that Senator Mansfield brought a no nonsense commonsense approach to public policy. It was that approach that led him to introduce the constitutional amendment to provide for the direct election of the President and Vice President the same week he was first elected the Senate majority leader.

It is that same commonsense approach that motivated the Montana Legislature in 1963 to petition the Congress for a constitutional amendment providing for the direct election of the President and Vice President.

As I talk to Montanans in 1979, the majority of them support the direct election of the President and Vice President because in their minds it is the commonsense approach to our national elections. In the final analysis they believe that regardless of all other arguments one can make, it just makes sense for a person to vote directly for the candidate that he or she wants. There just should not be a complicated apparatus to interpret the real will of the American people.

The commonsense approach dictates that we not tolerate a system that has produced American Presidents in 1824, 1876, and 1888, who were not the popularly elected choice of the American people. In 1976 a shift of less than 9,300 votes in Ohio and Hawaii would have changed the outcome of the election despite President Carter's popular vote margin of nearly 1.7 million votes.

With the American people's confidence in their Government at a very low level, it would be disastrous for our country to experience a national election that producted a nonpopularly elected President.

Furthermore, I believe that the current system destroys voter confidence in our Government by effectively disenfranchising nearly half of all voters. Under our current system, whatever candidate wins the popular vote in a State receives all of that State's electoral votes. Therefore, those Montanans that voted for Carter in 1976 did not have their vote reflected in the electoral college. In 1964 none of the Montanans who voted for my colleague BARRY GOLDWATER had their vote reflected in the electoral college. That lack of representation to my mind does not increase voter confidence and voter interest.

Under the current system, States with few electoral votes, such as Montana, are virtually ignored in Presidential campaigns. Elimination of the electoral college would mean that candidates would be willing to visit communities in the less populas States. Under the current system a candidate is more likely to visit a town of 50,000 in a State that has 30 electoral votes than he will be to visit a town of 50,000 in a State with four electoral votes.

Presidential campaigns would be encouraged to increase voter turnout in areas that they now ignore and thereby increase voting among Americans. Currently there is no incentive in Presidential campaigns to increase turnouts in States that are either "sure winners" or "sure losers." But under a direct election system there would be opportunities to increase pluralities and to minimize losses in all States. Local parties would be counted on to "get-out-the-vote" and therefore party organization and the two party system would be strengthened.

Furthermore, States like Montana that traditionally have among the highest voter turnout in the Nation would be benefited by direct elections. Montana would not be discriminated against as they were in the last election by having its vote treated the same way as those States whose turnout was very low.

Finally, I think it should be pointed out that the President and Vice President are the only elected officials in the Government directly responsible to all the people and yet they are the only officials not popularly elected. U.S. Senators are the elected officials in our Government responsible for protecting the interests of States.

Congressmen represent the interests of their congressional districts. Presidents and Vice Presidents should be responsible for representing the interests of the entire country, and therefore, they should be elected by all the people of the country voting directly for them.

Senate Joint Resolution 28, calling for the direct election of the President and Vice President has broad-based support. It is endorsed by the chamber of commerce, the American Bar Association, the League of Women Voters, the AFL–CIO, and Common Cause. These groups all support the concept of direct elections as a vehicle for increasing voter participation and restoring America's confidence in its election system.

I am convinced that when all is said and done Americans want a simple, straightforward system that is not complicated by frills. Americans no longer want to hide behind devices or electors who will not allow them to express their will directly. On this basis, Senate Joint Resolution 28 and the direct election of our President and Vice President makes commonsense.

Mr. BAYH. Mr. President, I yield 20 seconds to the Senator from Rhode Island.

Mr. CHAFEE. Mr. President, I pay tribute to Senator BAYH for the leadership he has given to this amendment. I vigorously support this amendment.

Mr. President, as we consider Senate Joint Resolution 28, which proposes an amendment to the Constitution providing for the direct popular election of the President and Vice President, I am struck by how closely this debate has come to resemble one held in this Chamber more than 68 years ago.

Virtually the same arguments advanced by the opponents of the direct election of the President today, were emphasized by those who, in May of 1911, led the fight against the direct election of U.S. Senators.

The two issues are not without differences, yet I believe a brief examination of the debate over the 17th amendment to the Constitution can provide us with a valuable perspective on today's question.

As all Senators are aware, before the ratification of the 17th amendment in 1913, U.S. Senators were chosen by State legislators and not by the American people. While not identical, this process of choice is analogous to our present electoral college system.

Mr. President, Senator Rockwood Hoar of Massachusetts, speaking in 1911 against the direct election of Senators made the following statement:

> Such a method of election would essentially change the character of the Senate as conceived by the Convention that framed the Constitution and the people who adopted it.

I submit that the essential character of the Senate remains unchanged and that few, if any, of my colleagues in this body today would prefer the character of a Senate chosen by State legislators.

Senator Hoar continues:

> It will create new temptations for fraud and other illegal practices.

Mr. President, it is abundantly clear that the potential for fraud is greatly diminished in a direct election. As a matter of fact, recounts in recent State elections have shown an infinitesimal net shift of five one-hundredths of 1 percent of the total vote. So, again Senator Hoar's fears were unfounded.

Echoing the sentiments of the good Senator from Massachusetts, Senator DePew of New York said the following:

> In this proposition we are called to disregard the overwhelming lessons of the past and enter upon an untried experiment, to adopt a thory which opens the door to innumerable possibilities of danger to the

sovereignity of the states and wise conservatism in the administration of government.

Mr. President, the direct election of U.S. Senators has not destroyed the sovereignty of the States. It has not meant increased fraud, and the other "innumerable possibilities of danger" of which Senator DePew spoke, have never surfaced.

Similarly, we should regard these arguments today with the benefit of our experience and perspective. Our decision ought to turn on the demonstrable inequities of the electoral system rather than on unwarranted and speculative forebodings about direct popular election.

Let us lay aside arguments of advantage. If the less populous States are mathematically more advantaged (and I do not believe they are), why preserve that? If urban voters presently are more influential, why should they be?

The fundamental principle on which any democracy is founded is that people governed shall have a controlling voice in their government. It is also inherent in any democracy that all citizens shall have an equal voice in choosing their public servants.

History has shown us that the country is strongest when the will of the people is heard. We have removed restrictions on suffrage six times by constitutional amendments 14, 15, 17, 19, 24, and 26. These amendments recognized the contradictions in our democratic system and removed them.

The question before us is thus less complicated, less ominous than either Senator Hoar or today's opponents would have us believe. The electorial college system is defective in guaranteeing the democratic equality of all voters, and that fault must be eliminated.

Mr. BAYH. Mr. President, how much time remains?

The PRESIDING OFFICER. The Senator from Indiana has 1½ minutes remaining.

Mr. BAYH. I yield a half minute to my distinguished colleague from Arkansas.

Mr. PRYOR. Mr. President, Senate Joint Resolution 28 stands for one principle, in my opinion. That principle is that every voter in this country will be treated equally if Senate Joint Resolution 28 becomes a part of our Constitution. Hopefully, our colleagues will vote in favor of this amendment.

I would like to salute the Senator from Indiana and also the Senators who led the opposition to this amendment for the splendid job each side has done. I yield back the remainder of my time.

The PRESIDING OFFICER. The Senator has 1 minute remaining.

Mr. BAYH. Every poll I have seen tells us that the people of this country do not trust their political leaders, that they have lost faith in their political institutions, that they have less faith in their Senators than in their garbage collectors.

The amendment before us will give us a chance, as Members of the Senate, to tell the people of this country that, at least, we trust them. We trust them to be able to vote for their President and know that each of their votes is going to count the same, that their votes are going to be counted for the candidate for whom they are cast and that, in the final analysis, the man who has the impossible job of governing this country and serving as the most important leader of the free world, as President of the United States, is at least the choice of most of the people he is called upon to govern.

● Mr. LAXALT. Mr. President, I am firmly opposed to Senate Joint Resolution 28, which would replace the electoral college with direct election of the President. To do away with the electoral college would be to destroy a very essential part of our federal system—a system that has allowed its people to enjoy a greater degree of freedom and liberty than any other form of government in the history of man. Do we want to change and possibly destroy this system? I think not. I realize that this is an emotional issue, but we must get beneath the emotion to the realities, something the proponents of Senate Joint Resolution 28 have failed to do.

Senator BAYH is mistaken when he diminished the importance of this proposed amendment. I concur wholeheartedly with Yale Prof. Charles L. Black, Jr.'s statement "if direct election passes, it will be the most deeply radical amendment which has ever entered the Constitution of the United States." In fact, as Dr. Judith Best has stated, if such amendment passes, our country will then operate under its 3d Constitution: The first being the Articles of Federation, the second being our present system.

INTRODUCTION

I will not go into detail on the particularities of what might happen or what could happen under the electoral college; my esteemed colleagues have adequately presented those issues. Nor will I spend much time arguing that these contingencies cannot and will not happen. The opponents of Senate Joint Resolution 28 have capably presented those arguments. Suffice it to say that the adoption of a system of direct election of the President would entail the trading away of a small and calculable uncertainty—that being a "runner-up" President—for a large and incalculable one.

No one can doubt that this system has worked well for almost 200 years. Therefore, to focus on abstract mathematical possibilities and attack the present system would, as Senator GOLDWATER once observed, "(fail to) take account of the human psychology which governs real-life politics." Surely we do not want change merely for change's sake. Therefore, the proponents of Senate Joint Resolution 28 come forth with an extremely heavy burden of proof which they, in my considered opinion, have failed to meet.

One of the main concerns of the proponents of this amendment is the possibility of a "runner-up" President. What they fail to bring to light is that under direct election it is possible that a person could become President with as little as 40 percent of the popular vote. This would mean that 60 percent of the populace would have voted against a candidate and yet he still would be President.

It appears to me that this would be a far graver danger than the remote possibility of a "runner-up" President. This is especially so if the hypothetical 40 percent President were to receive his votes from a specific section of the country, and would do far more to divide and destroy the country than any conceivable result from our present system.

However, the best argument against direct election of the President is the very nature of our Federal system itself. A thorough understanding of the concepts of federalism dispells any misgivings with the electoral college and destroys any arguments in favor of direct election.

THE FEDERAL SYSTEM

Mr. President, before we consider changing our Federal Constitution with so radical an amendment it would be wise to examine our history and look at the reasoning the drafters utilized in enacting a Constitution that established a federal system of government. If the reasoning is no longer compelling, then let us change the Constitution, but I am sure you realize that this is not the case. People who cherish freedom and liberty realize that in order to maintain them, power must be diffused and decentralized. A Federal Republic does this, majoritarian democracy does not and cannot. In defending our Federal system it is appropriate at this point to quote James Madison:

> The error . . . seems to owe its rise and prevalence chiefly to the confounding of a republic with a democracy. . . . A democracy will be confined to a small spot. A Republic may be extended over a large region.

The drafters of the Constitution were painfully aware of the dangers of both a monarchy and of a national "democracy" both of which result in powerful centralized governments. In "a pure democracy," wrote Madison.

> There is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been in as short in their lives as they have been violence in their deaths.

The drafters realizing the dangers of majoritarian democracy did not fashion the Constitution on such a principle. They knew that a majoritarian democracy would, by its very nature, diffuse and destroy the freedom and liberty that they had paid for so dearly.

Our Constitution was an "accommodation" between the fiercely independent States: The Colonies found they had trouble existing as sovereign nations yet at the same time they realized that to form a strong central government would be to shackle themselves in the same chains they had recently shrugged off. Because of this, our Constitution is unique.

The drafters had devised a method to protect the individual's liberty and freedom from both a dominant central government and the tyranny of the ma-

jority while at the same time including some of the desirable aspects of a democracy; to wit, citizen participation in the Government process. A democracy by its very nature results in a strong centralized government; the will of the majority deciding how the entire Nation is to be governed. There were many democracies before us, but ours was the first Federal Republic.

The federal system thus established was hostile to monopolization of power, by any group, in any form. This aspect of our form of government, rather than anything distinctive in the nature of Americans, is what makes our Federal Republic socially democratic. Socially democratic in the sense that differing, divergent groups and ideologies not only survive, but flourish. However, our system is at the same time politically undemocratic in the sense that the will of the majority is not able to suppress the voice and ideals of minority interests.

It is a basic tenancy of our system of government that democracy functions best when it is localized—(a federal republic if you will—and worst when centralized. What should be better appreciated, especially by the Washington establishment, is the fact that the further we get from the local community, the more gaudy and the less democratic our politics become. This accommodation, our Constitution, of which the electoral college is an integral part, was a hope to avoid majority tyranny, and fear of a majority faction so that we might possibly have both liberty and equality. As so aptly put by Dr. Judith Best—

> We are not, have never and were not intended to be a simple majoritarian democracy, the regime whose dedication to equality is so single-minded that it will readily sacrifice liberty to achieve its goal.

Any person present here, or anywhere else, who contends that we are, or should be, a simple majoritarian democracy is either ignorant of our past history or for selfish political designs is willing to forfeit the most noble experiment in self-government known to man.

FEDERALISM TODAY

Federalism has served us well up to today and will do so in the future. In fact a reversal of the trend of the past four decades of centralization and monopolization of power in the national government would go far to preserving individual freedom and liberties. Therefore, what we need today is a move toward giving power back to the States: Power that was usurped by the national government. We most certainly do not need an amendment to the Constitution that would further centralize power in Washington.

Diversification of power safeguards liberty and freedom, pitting power against power. The electoral college aspect of our federal form of government guarantees that each State will have a certain voice in the selection of a national leader, regardless of whether that State has a population of 600,000, as Nevada, or 600 million. This necessarily causes decentralization.

Each State, still retains an essential role in the selection of the Chief Executive. The political peculiarities and needs of each State must be encompassed in each candidate platform if he is to be assured of that State's electoral votes. Because of the importance of each State in the electoral process, a Presidential candidate must appeal to this cross-section of interests. The electoral college fosters this. On the other hand, direct election would allow a Presidential candidate to focus on specific factions, both geographically and politically. History has shown us that sectional candidacies breed civil strife and civil war. Factionalism unleashed is the fatal disease of democracy.

The proponents of Senate Joint Resolution 28 attack the electoral college as being "undemocratic" and ignoring the principle of "one-man, one-vote." The answer to this is simple. As stated above, this country is not an absolute majoritarian democracy, rather it is a democratic republic, a federation of States each separately exercising a republican form of government.

It should be clear to those present, as it was to the Founding Fathers, that democratic disorders would destroy the freedom that Americans prize, if the often ill-informed will of the majority were given free reign, without any of the checks and balances of our Constitution. The present system because of these checks and balances forces moderation and compromise.

By the adoption of arrangements strongly negative toward the power of Government, the Republic has, so far, permitted and encouraged its citizens to act affirmatively in their own interests. This has been our strength of our success. The unlimited, unrestrained, unqualified exercise of power by one, or the few, and yes even by the many is, according to the American principle of democracy, the very essence of tyranny.

Our whole system of Government incorporates the Federal principle. The Constitution itself, our amendment process of which we are now considering, and this august body each imposes a Federal-geographic limitation on the exercise of governmental power.

Our system is not attuned to "one-man, one-vote." As has been pointed out, this form of majoritarian democracy was disregarded by the Framers, who realized its destructive capabilities. Ours is far too large and too diverse a country, both ethnically and politically, to operate on the majoritarian democracy principle.

The supporters of direct election of the President speak in such lofty terms of true democracy and the over-used phrase "one man-one vote" failing to mention that the basic tenant of our form of government, the Constitution, established the entire National Government only one facet of which is based on a majoritarian democracy principle; that being the House of Representatives.

Nine men comprise the most powerful and most respected Court in the world, five of whom decide and interpret the laws of the land. Yet not a single one of the nine is elected on the basis of one man-one vote. Should we change that esteemed institution as well because it is undemocratic.

More close to home, this body, comprising one-half of the legislative branch of the National Government, is not based on one man-one vote. I seriously doubt if anyone here would so advocate. Yet, it is this Senate which represents par excellence the Federal basis of American Government. And the tradition that a Senator should not hesitate to place the welfare of his State, as he sees it, above that of the Nation as seen by the President, is still very much alive. And so it should be.

THE POTENTIAL DESTRUCTION OF FEDERALISM

Mr. President, I feel that this amendment would go far toward destroying our federal system as we know it today. In the opinion of Senator BAYH, the Senate is all the federal type of government we need. To do away with the electoral college in my considered opinion, would merely set the stage for yet another proponent of one man-one vote to put forth another amendment 20, 40, 100 years from now proposing to make the Senate "more democratic". Senate Joint Resolution 28 can be considered the Trojan Horse with Senator BAYH claiming that no Greek will ever enter Troy. Absurd? Possibly. Yet 40 years ago this very amendment was considered too absurd to become a reality by most constitutional scholars.

As has been illustrated, the beauty of our federal system lies in its decentralization. We would be mistaken to centralize yet another facet of our Government. By now we should realize that once centralization takes place it becomes too large and unwieldly to be responsive to the needs of the people. We should be reminded that it is not a President of the American people that is being chosen, rather it is a President of the United States.

Individuals may change but human nature does not as the drafters clearly understood in the late 18th century. In this aspect, our present situation is no different now than then. In fact, with the increase of technology, now more than ever, a federal form of government is essential in order to protect our personal liberties and freedoms from an encroaching central government.

Mr. President, it should be obvious that to amend the Constitution to provide for direct election of the President, would go far in destroying our Federal system and our constitutional system as we now know it. This is why I say that if Senate Joint Resolution 28 is enacted, the country would in fact be operating under our 3rd Constitution.

WHY CHANGE

Although the phrase, "if it ain't broke don't fix it" has been much criticized by proponents of Senate Joint Resolution 28, its applicability to the electoral college is justified. It is absurd to ponder the question of mathematic possibilities in the abstract. We must focus on the issue at hand: Do we want to transform our federal republic into a majoritarian democracy, with all of the problems related thereto?

Also, all of what I have put forth does not bring into account the logistical problems that would arise if the national government were to be in control of the elections throughout the States; it is not

disputed that if enacted Senate Joint Resolution 28 would require national control of all elections. I won't expand on these problems as my colleagues have done so already. However, I feel the present system should be left intact and the election of the President left up to the States and electoral college as designed by the Founding Fathers.

Mr. President, strict majority rule is not a key to providing better, more solid Presidents. Johnson and Nixon, both with the two highest majority of the popular votes in history, left office in other than favorable conditions. We should begin to perceive that the majority principle is not a panacea. Dictators frequently started with a majority of their people behind them. Strict adherence to majoritarian theory is by no means a guarantee of good government.

No system of government, nor its component parts is perfect. Some are, however, very much better than others. And governments of complex societies, such as the United States, are made up of many component parts which fit together in an extremely intricate manner. This I hope to have illustrated by my discussion above.

The process of electing the President of the United States is no exception. It may not be perfect, but it is the best system yet to be devised. We can only speculate on how another system might work, whether it would work at all, or what its consequences might be. Therefore, I ask; why change?

APPLICABILITY TO NEVADA

As I have continually reiterated, the electoral college is an integral part of the Federal system. More important to Nevada and other "small" States is the oft argued position that this system is one of the defenses we "small" States have in our system, giving each State, for its own sake, a certain voice in the Federal scheme of things. I will not belabor that point today since it has been adequately presented here before.

I will say, however, as one who comes from and represents a "small" State that I believe in that argument, and strongly feel it is one of the reasons for retaining the electoral college. In fact, it is because of this reason that I am firmly committed to the Federal system as defined by the drafters and the Constitution itself.

Similarly, Nevada's impact, as that of other small States, on Presidential elections is proportionately larger under the present system than it would be under direct election. In a recent study the Library of Congress found that under direct election Nevada would lose 55 percent of the impact it now has on Presidential elections. That impact has served Nevada well, and it has served the greater interest of the country well. I see no reason to change it.

I strongly urge my colleagues, both from large States and small, to reject Senate Joint Resolution 28, and preserve what semblance we have left of our Federal form of government.●

● Mr. TALMADGE. Mr. President, today I rise in opposition to Senate Joint Resolution 28, the proposal to abolish the electoral college system. There continues to this day a period of great controversy concerning the effectiveness and fairness of the present system of electing our President. Certain shortcomings in the electoral college system frustrate the intentions of the framers of the Constitution.

However, I feel that the current resolution proposing direct election of the President is an unnecessary and unwise attempt to eliminate a system which has provided stable government in this country for nearly 200 years.

The framers of the Constitution proposed the electoral college as a safeguard for federalism. The electoral college was designed to preserve the integrity of the States as determined by the Connecticut Compromise of 1787. The creation of a bicameral legislature based on a House of Representatives elected according to the population of the States, along with the Senate, elected to represent the States without regard to population serves as the basis for our republican form of government. Those who favor a direct popular election of the President therefore necessarily act to disregard a basic concept on which our Nation was founded.

As I am well aware, the concept of direct popular election of the President has tremendous popular appeal. The push for such a change has been well publicized and is easily understood. But, the adoption of such a system would have drastic effects. Implications are most dramatic as they relate to our federal system of government.

We are all aware of the importance of the preservation of a balance of power between the Federal Government and the States. Surely, the Senate cannot allow the total elimination of a system designed with such a balance in mind. The Federal system protect the less populated States from being engulfed by the more populous States. The system recognizes that each State must have at least three electoral votes.

This protects the interest of the small States. After all, the Presidency is a national office and must represent the States as well as the populous. Our "National" Government represents "an indestructable union of indestructable States," to quote Supreme Court Justice Chase.

What we have before us is a proposition to totally abolish the electoral college system and to rush in with a plan for altering the Constitution and electing the President, the practical effects of which we know little—and what we are able to ascertain, I find disturbing indeed.

Direct popular vote would deprive the States of their constitutionally recognized delegation of power in the electoral process and would additionally serve to create an imbalance between the large and small States which would threaten to engulf the small. Our highly successful two party system would be endangered, direct popular election would open the way for a carnival of ideological or regional splinter parties representing diverse interest groups. It cannot be denied that the strong two party system that has evolved in the United States has in large part been responsible for the success of our American system in providing majority rule while, at the same time, protecting minority rights.

This would be lost with a multiplicity of political parties in place of the two broadly based parties which recognize and protect the legitimate interest of all substantial economic, social, regional, religious, and racial groups.

One of the outstanding characteristics of the American political party system is that it is organized from the grassroots up—that is, from the States on up to the national party. Direct popular vote for the President would destroy the integrity of the States as integral parts of the federal system and participating agents in the electoral process.

The direct vote would deprive our smaller and less populous States of having an electoral vote divided according to the size of their Congressional Delegation. A State would, therefore, have no more weight in the Presidential election, and consequently in the conduct of national affairs, than the size of its popular vote.

Small and medium-size States would be virtually negated and ignored in the Presidential campaign. Candidates would naturally concentrate their efforts in the most populous States.

It can probably be safely predicted that if a direct vote for the President is instituted some States will never see a Presidential candidate on the campaign trail again. Moreover, the entire nature of Presidential campaigning would be drastically changed.

The nine largest States could elect a President, with almost total disregard for the other 41 States. On the other hand, the voting strength of 35 States, including Georgia, would be adversely affected by the direct popular vote. These States would lose much of their voting strength in the election of the President.

Another objection to the direct popular vote is that it no doubt would inevitably bring pressure for more uniform national laws governing election administration and procedures. In my judgment, the Federal Government should not intrude further on the rights of the individual States in this area. Rigid uniformity would necessarily become a part of direct popular election.

If the President were to be elected by a nationwide popular vote, State boundaries and jurisdictions would become meaningless as States conform their election laws to a uniform Federal standard.

The possibility of election fraud would increase and direct popular election would encourage vote challenges and recounts, making the transition period between administrations less orderly.

I recognize the legitimate need for some type of electoral college reform. I do not, however, believe total abolition of the electoral college system is the answer.

It is my opinion that the desire to revamp the present system lies not in the

structure of the electoral college itself, but in its effect on the individual citizen's vote. The present system can be amended in a manner which will not ignore the need to safeguard our current Federal system of government.

If we want to give each voter the individual, meaningful voice in elections to which he is entitled and honor the "one man one vote" concept, we can do so. If, at the same time we want to preserve and strengthen our traditional Federal system of Government, and maintain the integrity of the States and the ideal of unionism, we can do so.

We can adhere to both of these principles not by abolishing our current system, but by modifying the electoral college and alloting electoral votes on a proportionate basis. This concept, which I believe is the only viable proposal for electoral college reform, would give each candidate a percentage of a State's electoral vote equal to the percentage of the popular vote the candidate receives in that State. There is nothing new about this idea. It is, in fact, the only approach that has ever received the required two-thirds vote in the Senate. In 1950, the Senate passed a proportional electoral vote proposal, 64 to 27, but the measure died in the House. What this represents is the election reform which most closely provides for the mutual considerations of preserving the integrity of the States and the interests of minorities as well as insuring the maximum individual input into the Presidential election process.

I am confident that the problems associated with the electoral college system do not require its total elimination. Therefore, I urge my colleagues to vote in opposition to Senate Joint Resolution 28 and if we are to revise the present system we should do so only through the proportional plan which will maintain the framework of federalism so skillfully crafted by our Founding Fathers almost 200 years ago.●

● Mr. CHILES. Mr. President, I intend to vote no on Senate Joint Resolution 28, proposing an amendment to the U.S. Constitution for direct popular election of the President and Vice President of the United States. After weighing all the arguments pro and con I am not convinced that there is an overwhelming need for such an amendment to the Constitution. Amending the Constitution of the United States is an extraordinary action which is warranted only in those instances when there is a preponderence of evidence that a change is necessary to meet the goals of a democratic government and society. Such compelling evidence is wanting in the case of this amendment.

The direct election amendment certainly has a simple appeal when presented as a step toward a more democratic elective system. It is also evident to any student of American history that the electoral college is not a perfect system. On first consideration it is difficult to argue against this amendment which aims to equalize the importance of each citizen's vote for the Presidency.

The tremendous value we place on our Constitution stems from the fact that it has worked and worked well. In the world's history this claim cannot be made for too many constitutions. Over the last 200 years a political process has evolved under that Constitution which has enabled this Nation to enjoy stable Government and a consistent orderly transfer of power. The fact that our political process for choosing the President is a workable system is no insignificant virtue for this Nation. I for one have great trepidation about casting aside a successful if imperfect system for one that could well serve to restructure the entire electoral process, threaten the two party system, and raise problems of a magnitude well beyond those resulting from the electoral college.

Any fair reading of the debate regarding a system of direct election makes apparent that there are telling arguments on both sides of this issue and many serious unanswered questions concerning the potential effects of such an amendment. In the face of this uncertainty I must come down on the side of caution. The Constitution deserves the greatest degree of caution and prudence when Congress considers its amendment.

I do not feel, however, that the Congress should simply ignore the deficiencies of the electoral college. There are other approaches such as a proportional plan which may serve to remedy these defects without incurring a radical reworking of the Presidential electoral process. I fully support the Congress addressing these less sweeping electoral reforms.●

● Mr. NELSON. Mr. President, I rise in support of Senate Joint Resolution 28. After a careful consideration of the arguments on both sides of this question, I have concluded that the national interest would be served by the abolition of the electoral college and the institution of a system of direct popular election of the President.

Since 1966, attempts to abolish or alter the electoral college have repeatedly been made in Congress. Tens of thousands of pages of written documentation have been presented to the relevant committees. Every possible argument for and against abolition of the electoral college has been placed in the RECORD. And yet a basic uncertainty about what abolition of the college would mean to the American constitutional system persists, which may partially explain why, so far, all attempts to abolish or alter the college have failed.

The central argument which supports Senate Joint Resolution 28 is that each individual vote for President ought to be worth as much as any other vote. The present system effectively disenfranchises all those persons who vote for the candidate who fails to carry a given State, and this is felt to be unfair and undemocratic. Under the present system, it is possible that a Presidential candidate who lost in the popular vote could win in the electoral college. A shift of 9,000 votes in Ohio and Hawaii would have yielded precisely this result in 1976. Proponents argue that the moment such an election occurred, there would be an enormous outcry against the system which permitted such an anomalous result and that the system would eventually be changed. Why not, it is argued, avoid such a possibility by guaranteeing now that henceforward the person receiving the most votes will become President? If the present system is presumed to work only for so long as it produces the same result as would be yielded by direct election, why take the chance of a result which would be deemed a basic denial of democracy by a popular vote majority?

There are profound structural dangers inherent in the structure of the electoral college. Today, all the States and the District of Columbia choose their Presidential electors by direct popular vote. The laws of every State but Maine require that the party Presidential ticket which wins a statewide popular vote plurality be awarded all of the State's electoral votes. Four States require the electors to swear an oath to support their party nominees. Sixteen States have laws requiring electors to vote for the candidates of their party.

However, whether a State or even Congress could require an elector to actually vote for the nominees of his party despite his prior oath or a statute mandating such a vote is constitutionally dubious, given the freedom to vote for whichever Presidential candidate an elector may choose to support which is arguably granted by article II, section 1 of the U.S. Constitution. See *Ray* v. *Blair*, 343 U.S. 214, 230 (1951).

The problem of the "faithless elector" is more than a theoretical one. In 1968, an elector pledged to Nixon voted for Wallace. In 1972, a Nixon elector voted for the Libertarian Party candidate, John Hospers. In 1976, Ronald Reagan received a vote from a Ford elector. In 1977, Senator ROBERT DOLE testified to the Senate Judiciary Committee that on election night, 1976, when it appeared that Ford might carry Ohio and that the election might be decided by a handful of electoral votes, the Republicans began "shopping" for potentially faithless Democratic electors.

The structure of the college poses one additional, potentially crucial problem. Article II, section 2 of the Constitution, as amended by the 12th amendment, requires that the President and Vice President be chosen by a majority of the electors. If no candidate obtains a majority, then the President shall be chosen by the House of Representatives, with each State having one vote. Since the electors can probably vote for whomever they choose and since the electoral ballots are not cast for over a month after the popular vote, it would be quite possible for deals to be made before the electoral college balloting to enable one candidate to achieve a majority.

In 1968, George Wallace would have attempted precisely this kind of bartering of his pledged electoral votes if he had gotten enough electoral votes to potentially throw the election into the House.

The shattering political crisis which might ensue if the Presidency were obtained by enticing faithless electors or by

a deal with a third party candidate need not be described at length.

Opponents once again argue that those evils are merely conjectural, and are outweighed by the present benefits afforded us by the college.

Opponents of direct election believe that to remove the States from the process of electing a President would mark one more step away from the concept of the United States as a federal republic composed of States and one more step toward a centralized and tyrannical central government. This perhaps explains why the staunchest opponents of direct election tend to be traditional States' rights conservatives like our distinguished colleague, the late Senator Allen.

Proponents counter with the—to me—convincing arguments that the values of federalism would be amply protected by the continuing existence of State governments, State and local taxation, State courts, and congressional representation organized by States. Further, it is argued that the framers of the Constitution did not intend the college to be a bulwark of federalism, but rather it was a last-minute compromise provision not thought of as vital to the constitutional structure.

Opponents assume that the two-party structure ought to be preserved and argue that what determines the nature of the current two-party system is the present manner of electing Presidents. This reasoning is premised on the argument that Presidential elections are won by carrying States, which necessitates building broadly based coalitions at the State level. The system now has a built-in bias toward inclusionary, moderate politics well suited to the continuing existence of two broadly based national parties open to a wide spectrum of viewpoints.

Also, since the Presidency can only be won by carrying many different States, each with distinctive regional biases and interests, only ideologically moderate parties capable of assembling broad coalitions on the basis of compromise can hope to win.

Direct election, it is argued, would conduce toward ideologically-based third parties, seeking votes across State lines. Opponents also believe that the 40 percent minimum requirement for election would not be high enough to sustain present day two-party competition. While it is obvious from that requirement and from the provision for a runoff election if no one should attain 40 percent in the first round, that a reasonably broad coalition would have to be assembled to achieve victory, opponents maintain that the new system would impel substantial modifications in the two-party system.

Proponents reply that since most American voters in all States are ideologically moderate, any candidate wishing to win the Presidency must also be perceived as moderate. Further, the present system offers two incentives to ideological or regional third parties that direct election would not. First, at present, small ideological third parties can take away crucial votes from candidates in important States. In 1976, in four States, the votes received by Eugene McCarthy were greater than the margin by which Ford defeated Carter. Had McCarthy been able to get onto the ballot in New York, he might well have been able to deny its 45 electoral votes to Carter. Second, regional third parties, like George Wallace's 1968 vehicle, the American Independent Party, can have considerable impact by concentrating their strength in one region of the country where they are actually in a position to carry States and win electoral votes.

In addition, proponents of direct election plausibly maintain that since under direct election every vote would count, genuine two-party competition would be spurred in every State in the Union.

My own assessment is that conservative fears of an ideologized breakdown of American politics caused by direct election are not founded in reality due to the moderate nature of American voters in general and that the present system offers at least as much incentive to third parties as would direct election.

Opponents of direct election make much of the alleged advantages given by the present system to citizens of small States. Because each State, regardless of size, is guaranteed at least three electoral votes, it is believed that this constitutional provision acts as a safeguard to insure that the notorious big city "machines" will not dominate the election outcome.

If electoral votes were awarded proportionately, this argument would have some logic. But they are not. A 10,000 vote margin in Wyoming yields 3 electoral votes. The same margin in New York yields 45 votes. The great irony of this whole debate is that small State conservatives have fought to uphold a system which actually gives advantages to citizens of larger industrial States.

On the other hand, some liberals and liberal organizations, among them the late Alexander Bickel, the ADA, and the editors of the New Republic, have argued that the present system ought to be retained because it favors liberal and minority interests.

However, I do not believe that such considerations ought to be a consideration in making a constitutional decision.

I doubt that direct election would alter greatly either the contours of American politics or the essential nature of American federalism for the well-springs of both lie in sources other than the electoral college. The nature of American politics is determined ultimately by the middle-of-the-road attitudes and beliefs of the American people, and federalism, as noted above, rests on Federal governmental and court structures, not the electoral college.

Direct election would have the advantages of making the presidential selection transparently fair and equitable and would also eliminate the problems of potential faithless electors and popular vote/electoral vote conflict.

My own conclusion is that the systemic dangers inherent in the retention of the present system ought to outweigh any more narrowly-political considerations and that Senate Joint Resolution 28 ought to be supported.●

THE RISKS OF DIRECT ELECTION

● Mr. MUSKIE. Mr. President, I will oppose Senate Joint Resolution 28, the resolution proposing a constitutional amendment to provide for direct election of the President.

I will do so because I believe it is inappropriate to send any new constitutional proposals to the States while two amendments are under active consideration.

And I will do so because I believe direct election, far from being the "democratic reform" its sponsors intend, would have serious destabilizing and undemocratic effects.

We all have the responsibility, I believe, to move with extreme care when confronted with a proposal to change the basic document of our Government. In this case, the proposed amendment to our Constitution addresses the manner in which we choose the President of the United States. It has implications for the future of our federal system and for the shape and nature of our political parties and political activities. If we proceed with this amendment, we risk creating uncertainty in the institutions central to our democratic government and inviting more problems than we will resolve.

The climate for amending our Constitution is not healthy. I expressed my concerns in this regard in a letter to Senator BAYH earlier this year. They bear repeating here.

We live in a troubled political time. Over the past decade we have witnessed a dramatic decline in any popular consensus as to the appropriate role of government in our society. We have seen substantial, well-financed attempts by various narrow interest groups to amend the Constitution to accommodate their particular concerns. These two phenomena are related, of course, and together they pose a political challenge to the document on which our Government is based.

Given the disparate, highly emotional and fluid nature of public opinion toward the role and functions of government, we run a grave risk in sending a third proposed amendment to the State legislatures for confirmation. Legislatures have been debating the ratification of the equal rights amendment for 7 years, with resolution unlikely this year. Congressional action extending the deadline for consideration of that amendment, and attempts by some State legislatures to rescind their ratification, have raised questions about the amendatory process which may ultimately confront the Congress or the courts.

The amendment granting representation in Congress to the District of Columbia was only recently sent to the States for ratification. Debate on the District of Columbia amendment appears, unfortunately, to be influenced by the climate of distrust and disunity. In some cases, its consideration is being linked to proposals to call a constitutional convention.

Other amendments have been proposed to the Congress or the public relating to school busing, school prayer and abor-

tion, among others. While these proposals reflect deeply held beliefs, together they propose substantial changes in the life of our country.

If we send yet another proposal to the States, we will in effect endorse, or at least encourage, those who would take the route of constitutional amendment on any one of a number of narrow issues. And we will risk undermining the deliberation and seriousness which I believe should accompany any proposal to amend the Constitution.

For 200 years, the Constitution has proved to be a uniquely resilient and adaptable blueprint for governance. Has our society become so complex, and our Constitution so inadequate, that we must propose so many changes in such a short time? I think not. Yet we run the risk here of giving that impression to a country already disillusioned about the shape and performance of government.

What is proposed in Senate Joint Resolution 28 is not a simple reform of the process of electing a President, but a fundamental rejection of a major element in the federalist compromise struck when the Constitution was agreed to by the 13 original States.

It is easy perhaps in these days of big Government to forget that the checks and balances were not only applied to the three branches of Government. They were also applied to the individual States.

The Senate itself is designed to be a check on the power of States with large population. The electoral college carries that philosophy through to the process of choosing a President.

It is a system which preserves the rights of each by forcing all to compromise, to move toward the firm ground of an issue, upon which all can stand.

And just as compromise is the essense of legislating in the Senate, so compromise is the essence of Presidential politics.

Each of us can cite examples of the folly of conducting a Presidential campaign based on ideological purity or positions not rooted in the common ground of American thought.

The electoral college, by demanding not simply a majority of votes, but a majority of majorities, is thus a stabilizing influence in Presidential campaigns and in American politics.

A fundamental maxim of scientists concerned with the development of biological and social systems is that "the whole is greater than the sum of its parts." Translated simply to the issue before us, that axiom tells us that the election of a President, by virtue of the fact that we are a complex, organic society, will always involve more than just a simple tally of individual votes.

If we discard the electoral college system, it will not mean that ever. voter in the country will be given equal consideration in a Presidential campaign. The opposite is more likely.

Political campaigns will be structured around media markets and regional areas without any legitimate political role under our Constitution.

It is inevitable in the world of practical politics that Presidential candidates will "go where the ducks are" and concentrate their campaigns in those areas with greatest population at the expense of the areas and interests of those States and regions with less population.

If the point is simply to maximize the popular vote, candidates will spend their time where that vote can be found, which means the biggest urban centers, without regard to the State or region where they are found. In fact, a candidate would not look at New York, New Jersey, Maryland, Connecticut, Rhode Island, Massachusetts, and Pennsylvania as seven States. He would look at the New York City megalopolis stretching across the seven States and address it and its concerns at the expense of those concerns which are unique to each of the seven States.

Direct election would eradicate the State boundaries which characterize the federal system. This reduction of the State identity in the election of the President is inconsistent with the original constitutional theory which preserves small-State integrity. A natural extension of this theory would be to establish senatorial districts on the basis of population, irrespective of State boundaries, or even to adopt a unicameral.

Further, if the point is to maximize the popular vote, it is inevitable that political party organizations will bow to increased mass media advertising, a trend already in evidence today.

Political parties are particularly effective as a communications medium, reaching voters through local meetings, neighborhood conversations and door-to-door voter canvasses. They reach people in areas otherwise difficult to reach. Direct election would make it less important to reach them than to concentrate advertising dollars and promotional efforts elsewhere.

The fact that a Presidential election might be won in the popular vote, but lost in the electoral college, underscores the importance of the existing system for small States and sparsely populated regions. Of the eight post-World War II elections, four have been settled by a difference of less than 5 percent of the popular vote and three have been settled by a difference of less than 2.5 percent of the vote, including two which were decided by less than 1 percent. Yet none of these elections was decided by a close electoral college vote, which means that the candidates in these elections apparently took pains to gather their votes in as many States as they could.

Further, interest groups who define their political support for a candidate in terms of his stand on "their" issue alone will lose much of the incentive they have now to compromise. Any large minority in our country is now made up of smaller minorities in each State. Indeed, virtually every national majority includes many State-by-State minorities. The present system encourages each minority to broaden its interests, seek allies with other interests, and use political parties to advance their case. The result is stability, consensus and a process by which political goals are tempered and matured.

An inadvertent genius of the State system is the creation of a nation able to deal with national problems at a national level while preserving a sense of individual identification with a local unit of government, the State, which is supposed to address issues of fundamentally local concern. One need not venture far from Washington to encounter real cases of the difficulties which national solutions create when applied to what are essentially local problems.

The legitimate rich diversity of our people, customs, and laws is inextricably tied up in public consciousness with State identity. We speak of going to Florida for the winter or Montana or Colorado for the mountains, or New Mexico or Arizona for retirement. We think of Texas in a special way, as well as Maine. Other States have very special identities which both derive from their people, terrain, and culture, and reinforce those very values and identities by the existence of the State itself.

All of this diversity and local integrity will be eroded by a system for picking the Chief Executive of the country—the only national official for whom the people of all States vote—on a basis which pretends the States do not exist.

Mr. President, I have in the past supported the concept of direct election. I was wrong.

The Constitution is not perfect. But I am far from confident that our present vision of how it should be perfected is clearer than our Founding Fathers. I do not see the system of electors creating problems for our country. I do see problems ahead if we choose to abandon the current system. There is no reason to change, and less reason to change to direct election.

I will vote against Senate Joint Resolution 28.

Mr. President, I want to share with my colleagues an excellent editorial in the New York Times of Monday July 9, and ask that it be printed in the RECORD at this point.

The editorial follows:

A VOTE FOR THE FEDERAL PRESIDENT

A strong alliance of reformers is again pushing the idea that we elect our Presidents by direct popular vote, without the filter of an Electoral College. Counting every vote equally sounds so simple and attractive that normally cautious politicians find it difficult to resist. A Constitutional amendment to abolish the College reaches the Senate this week with an outside chance of obtaining the necessary 67 votes.

One would think that the reformers' zeal for "one person, one vote" might as logically lead them to abolish the Senate. If any of our Federal institutions offends arithmetical justice it is the one that grants the same two votes to 22 million Californians and 650,000 Nevadans. For reasons that Senators should value, these United States have found it useful and in no sense undemocratic to retain some imbalance and geographical color in their Federal system. Simplicity is not the synonym of democracy. Voter parity is not the only source of stability. A Presidential election that is federal is not therefore unsound.

Every youngster understands our rules for electing a President. The winner of the popular vote in every state receives its total "electoral vote." Each state's electoral vote equals the size of its delegation in Congress; as in the Senate, this arithmetic favors smaller states. But in a close election, there is compensation for voters in more populous states. As urban minorities have recognized, winning a large state by a slight margin yields a richer prize than winning a small state by a landslide.

The unplanned effects of this system have been mostly good. It turns the contest for President into 52 races (including the District of Columbia and Puerto Rico). It makes it impossible for candidates to write off the less populous regions or overcrowded city slums; both count for slightly more than their numerical weight. Moreover, the system blunts single-issue fury. Citizens who oppose gun control or abortion cannot simply unite nationally to elect, or defeat, a President; they must join, state by state, with other voters moved by other passions.

This necessity for compromise, in turn, holds most voters inside our two federal parties, and the parties are thus held near the middle of the political road. To elect a President, even arrogant majorities must be solicitous of minorities; even alienated minorities must work with majorities. The system encourages moderation in radical times and protects against parochial passions. It discourages minor parties yet rewards their protest with major-party attentiveness. It is widely understood and accepted. It is a bond with history, a source of stability.

So why abandon it?

Because to many a "direct" and "popular" election sounds more democratic. They also want to avoid the largely theoretical risk that electoral votes might elect a candidate who lost the popular vote. That could happen—but it hasn't happened since 1888.

To guard against that small risk, Senator Birch Bayh and 38 cosponsors of his amendment would abandon all the advantages of federal voting and run dangerous new risks. Knowing that a direct election would encourage third and fourth and fifth parties to run their own candidates, they would let a vote of 40 percent determine the winner. Sensing that minor candidates might skim off enough votes to leave no one with even 40 percent, they would then run a second election between the two top contenders, who had maybe 37 and 32 percent of the original vote. Just imagine their sordid barter for the support of the first-round losers.

The clamor for abolition of the Electoral College was born in the fear of George Wallace in 1968. Some thought the strident Alabaman might parlay a mere 10 percent of the popular vote into enough electoral votes to deny Richard Nixon or Hubert Humphrey a majority. And because electoral votes are cast by real people in the Electoral College, he might have traded their ballots for a heavy price. Mr. Nixon, especially, might have paid well to avert a deadlock that threw the choice to a Democratic House of Representatives.

It didn't happen. And the chances are that Mr. Wallace would have won still more votes in the first round of a "direct" election—and thus enormous influence in the runoff. But that is only one of the flaws of the proposed reform. The danger of tawdry trading in the Electoral College is easily averted without any radical change. The desirable amendment would abolish the flesh-and-blood electors yet retain the counting of electoral votes. Why change what works?●

The PRESIDING OFFICER. All time has expired.

The joint resolution 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 joint resolution.

The joint resolution was ordered to be engrossed for a third reading and was read the third time.

The PRESIDING OFFICER. The joint resolution having been read the third time, the question is, Shall it pass?

Mr. HATCH. 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 yeas and nays have been ordered. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. STEVENS. I announce that the Senator from Oregon (Mr. PACKWOOD) is necessarily absent.

I further announce that, if present and voting, the Senator from Oregon (Mr. PACKWOOD) would vote "yea."

The PRESIDING OFFICER (Mr. BAUCUS). Have all Senators voted?

The result was announced—yeas 51, nays 48, as follows:

[Rollcall Vote No. 161 Leg.]

YEAS—51

Armstrong	Exon	Matsunaga
Baker	Ford	McGovern
Baucus	Garn	Metzenbaum
Bayh	Glenn	Nelson
Bellmon	Gravel	Pell
Bentsen	Hart	Proxmire
Boren	Hatfield	Pryor
Burdick	Huddleston	Randolph
Byrd, Robert C.	Inouye	Ribicoff
Chafee	Jackson	Riegle
Church	Javits	Sasser
Cranston	Johnston	Stafford
Culver	Kennedy	Stevenson
Danforth	Leahy	Stewart
DeConcini	Levin	Tsongas
Dole	Magnuson	Williams
Durenberger	Mathias	Zorinsky

NAYS—48

Biden	Heinz	Roth
Boschwitz	Helms	Sarbanes
Bradley	Hollings	Schmitt
Bumpers	Humphrey	Schweiker
Byrd, Harry F., Jr.	Jepsen	Simpson
	Kassebaum	Stennis
Cannon	Laxalt	Stevens
Chiles	Long	Stone
Cochran	Lugar	Talmadge
Cohen	McClure	Thurmond
Domenici	Melcher	Tower
Durkin	Morgan	Wallop
Eagleton	Moynihan	Warner
Goldwater	Muskie	Weicker
Hatch	Nunn	Young
Hayakawa	Percy	
Heflin	Pressler	

NOT VOTING—1

Packwood

The PRESIDING OFFICER. On this vote there are 51 yeas and 48 nays. Two-thirds of the Senators present and voting not having voted in the affirmative, the joint resolution is not passed.

Mr. THURMOND. Mr. President, I move to reconsider the vote by which the joint resolution was rejected.

Mr. HATCH. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

DEATH OF ARTHUR FIEDLER—"MR. POPS"

Mr. KENNEDY. Mr. President, the death of Arthur Fiedler today at the age of 84 has deprived Massachusetts and the Nation of one of its best loved and most talented citizens.

In his long and brilliant career, Arthur Fiedler did more than any other American in this century to bring music out of the narrow confines of the concert halls and to make it available to the broad spectrum of the American people. He believed that it was not necessary to wear a tuxedo or formal gown to enjoy the great works of classical music. As he once eloquently explained:

> I believe people should have an opportunity to enjoy fine music without always having to dip into their pockets. They enjoy fine books at libraries and paintings at art centers—so why not music.

From their immensely popular beginning in 1929, exactly 50 years ago this summer, his summertime concerts, held outdoors on the Charles River and offered free to all who wanted to come, grew to be a symbol of the American spirit—the most democratic symphony concerts anywhere, he said.

Those concerts and the Boston Pops Orchestra itself will live as a perpetual monument to Arthur Fiedler's dedication to music, his zest for life, and his boundless energy.

My wife Joan and I, and all the other members of the Kennedy family have enjoyed countless hours of Arthur Fiedler's music. We share the sorrow of millions of Americans at his passing.

Mr. President, I ask unanimous consent to have printed in the RECORD an article from the Current Biography Yearbook for 1977 that paints a very warm and human portrait of Arthur Fiedler, and also an article by Mr. Fiedler himself, written over 30 years ago in the Atlantic Monthly, describing his philosophy and revealing a little of the magic of his music and his magnificent common touch.

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

[From Current Biography Yearbook 1977]

ARTHUR FIEDLER

A colorful personal style of gusto and polish and a flair for playing contemporary popular music with symphonic subtlety and volume have helped to make Arthur Fiedler, more familiarly known as "Mr. Pops," one of the most prominent personalities on the American music scene for almost half a century. Now an octogenarian, he is the country's longest-reigning permanent symphony orchestra conductor, having assumed directorship of the Boston Pops in 1930. Since that time Fiedler has developed an exceptionally wide-ranging repertoire of classical, semiclassical, and popular music and has aroused such spirited enthusiasm for his programs of light music in a convivial "Continental Cafe" atmosphere as to make the Boston Pops the archetype for many undertakings by orchestras throughout the United States. The energetic conductor rounds out his schedule of ten weeks of Boston-based concerts each spring and some 200 yearly guest appearances at home and abroad with recordings and radio and television presentations.

Arthur Fiedler was born in the Back Bay

section of Boston on December 17, 1894, the only son among the four children of Austrian-born Jewish parents, Emanuel and Johanna (Bernfeld) Fiedler. Because his ancestors included generations of musicians, primarily violinists, his family has acquired the surname Fiedler, derived from the German for "fiddler." His mother was an excellent amateur pianist; his father, a Gold Medal graduate of the Vienna Conservatory, had moved to the United States in 1885, played in the first violin section of the Boston Symphony Orchestra, and was an original member, as second violinist, of the famed Kneisel Quartet, a string ensemble founded in 1885. The Fiedlers named their son after a family friend, Arthur Nikisch, who conducted the Boston Symphony Orchestra from 1889 to 1893.

At this father's insistence Arthur took violin lessons in childhood, during the years that he attended the Prince School and Martin Grammar School. He had just completed his third year at the prestigious Boston Latin High School, in 1910, when his father, having retired from the Boston Symphony, returned to Vienna with his family. Within a year the Fiedlers had resettled in Berlin, where Arthur Fiedler accepted an apprenticeship in a publishing firm. Soon disenchanted with business, he took up his father's suggestion that he become a professional musician, at first reluctantly, as he recalled his early training in piano and violin. "It was just a chore, something I had to do, like brushing my teeth," he told Stephen Rubin in an interview for the New York *Times* (April 2, 1972).

In the fall of 1911 Fiedler was one of thirteen students—out of fifty-four applicants—accepted into Berlin's exclusive Royal Academy of Music. There he studied violin under Willy Hess, former Boston Symphony Orchestra concertmaster; chamber music under Ernst von Dohnanyi, the Hungarian pianist and composer, and conducting under Aro Kleffel, the conductor of the Cologne Opera House. At seventeen he made his debut as a conductor, leading an orchestra in a program of selections from Mozart and Mendelssohn. Appearances in his father's Berlin String Quartet, sporadic jobs in theatre orchestras and cafés, and teaching rounded out his musical experience.

When the outbreak of World War I brought the risk that, regardless of his citizenship, Fiedler as the son of a native Austrian might be drafted into the Austrian armed forces, he left Europe for the United States, arriving in Massachusetts in the summer of 1915. During the early fall he worked for a short time as a violinist in a Springfield hotel before accepting an invitation from the conductor Karl Muck to play second violin in the Boston Symphony Orchestra. He made his first Symphony Hall appearance on October 15, 1915. When Fiedler tried to enlist in the army after the United States entered World War I, he was rejected for being short-statured and underweight. Drafted in the spring of 1918, he served only about two weeks before he was discharged for flat feet. On his return to the Boston Symphony, he was assigned to the viola and afterward was switched from time to time to other instruments—piano, organ, violin, celesta, and percussion—so that he earned a reputation as the orchestra's "floating kidney." He once remarked to Edith Efron, who interviewed him for *TV Guide* (July 24, 1971), "I did everything except sweep the floors."

Even though Fiedler proved to be a superb instrumentalist, he continued to feel, as he had felt when he studied at the Berlin academy, that he would find his greatest satisfaction and excitement in conducting. In the mid-1920's he assumed the directorship of two respected Boston musical groups, the Cecilia Society Chorus and the MacDowell Club Orchestra. From the ranks of the Boston Symphony he drew twenty-two musicians to form in 1924 the Boston Sinfonietta, a chamber orchestra that from its opening concert in Plymouth, Massachusetts on October 30, 1925 through its many years of touring New England and the Eastern seaboard was acclaimed for its daring and virtuosity in performing seldom-heard compositions.

The unexpected resignation of conductor Agide Jacchia gave Arthur Fiedler the opportunity he wanted in early July 1926 to conduct a performance of the Boston Pops Orchestra. A music reviewer for the Boston *Herald* (July 5, 1926) was impressed by the "uproarious reception" accorded Fiedler, a "salvo of applause that lasted fully five minutes." But despite rumors of his forthcoming appointment as Pops leader, Fiedler was bypassed for an "international figure," the Italian conductor and composed Alfredo Casella.

Turning elsewhere, Fiedler began directing Boston University's student orchestra and supervising chamber music classes there. In 1927 he started a campaign to finance free open-air concerts that he promoted as programs of "symphonic music and popular tunes played by symphony musicians." He later explained in an interview for Newsweek (July 12, 1948), "I believed people should have an opportunity to enjoy fine music without always having to dip into their pockets. They enjoy fine books at libraries and paintings at art centers—so why not music?" Disregarding the skepticism of some government officials—and of the local police captain, who predicted, "This'll be nothing but a battlefield between the bums of the North and South Ends"—Fiedler assembled a forty-six-member orchestra from among his fellow Boston Symphony players and oversaw the construction of a crude $2,500 wooden shell along the Charles River Esplanade in the heart or Boston. Five thousand persons attended the opening concert on July 4, 1929, when strong winds made the musicians' scores fly about "like sea gulls," as the conductor recalled in an article he wrote for the Atlantic Monthly (September 1943). The five-week season through August 7 scored a success with audiences totaling some 208,000 persons.

Since 1929 the Esplanade Concerts have been an annual event, although the season was later shortened so that orchestra members would be free for the Berkshire Music Festival at Tanglewood. The programs originally consisted mostly of operatic overtures, marches, light classic, and excerpts from Broadway musicals, but over the years Fiedler gradually increased the proportion of serious music, occasionally including complete symphonies. In 1938 he established morning Esplanade Concerts for children that feature young soloist. The granite and teakwood Edward Hatch Memorial Shell was constructed in 1940 to serve as a permanent sounding board for the summer concerts.

One of the first Americans to challenge the "European conductor syndrome," Arthur Fiedler became in January 1930 the leader of the Boston Pops. Alfredo Casella's steady diet of Italian operatic overtures had failed to maintain public enthusiasm for the May–June seaon of "lighter music" that the Boston Symphony Orhcestra's founder, Major Henry Lee Higginson, had instituted in 1885 to assure his musicians—except for a few principal players—additional income. Music critics enjoyed Fiedler's first performance as permanent Pops conductor, on May 7, 1930, and by the close of the season he had become the toast of Boston.

For more than four decades the "Pops Potentate" has demonstrated his expertise in matching the repertory of the Boston Symphony Orchestra in its more festive aspect to Symphony Hall's informal spring setting, where the audience sits at tables for five and waitresses serve snacks, wine, beer, and purplish lemonade dubbed "Pop Punch." Discussing his efforts to achieve an imaginative combination of classical, semiclassical, and popular music, Fiedler wrote in the Atlantic Monthly (September 1943), "I often feel like a chef planning a meal. There should be hors d'oeuvres, a light course, a substantial entrée, and so on through the musical menu. Variety is the spice we want."

An astute showman who carefully notes selections that please his listeners, Fiedler varies the list of several hundred works the orchestra plays each season by introducing recent hits and new pieces by American composers, in whom he is always interested. Along with the music of Wagner, Chopin, and other classical composers he has presented surprises like Howard Cable's "Jingles All the Way" suite based on radio commercials, a symphonic arrangement of the Beatle's hit "I Want to Hold Your Hand" (complete with handclapping and "yeah, yeah, yeah" from the string section), and Joseph Raposa's songs from the children's television program *Sesame Street*. Fiedler made the Pops the first large orchestra in the country to perform rock 'n roll on a concert program. The music critic and composer Virgil Thompson once observed that the repertory of the Boston Pops "is the bridge between simple song and the high art realms of music. . . . [The musicians] just play *everything*, and play it beautifully, and everybody loves them."

Although, as Helen Herman pointed out in *Good Housekeeping* (March 1954), Arthur Fiedler is "as indigenous to Boston as the cod [and] the Cabots," he is much more than a local institution, having conducted many leading symphony orchestras in the United States and Canada since the 1930's. In the summer of 1951 he conducted several Pops concerts with the San Francisco Symphony in that city's Civic Auditorium with such success that he has returned there annually ever since. Determined to carry the Pops sound across America, he organized in 1952 a separate Boston Pops Tour Orchestra because his regular Pops-Esplanade players were committed to the Boston Symphony Orchestra season. During its first ten-week cross-country tour in early 1953 the newly created orchestra gave sixty-five concerts in sixty-one cities, a rugged pace that its leader emulated in later years.

Since 1957 the Pops maestro has appeared as guest conductor in Argentina, Israel, Japan, South Africa, and New Zealand. In the spring of 1971 the regular Boston Pops Orchestra performed abroad for the first time, touring the continent of Europe to somewhat mixed receptions. But in London, as Roy Hemming reported in *Retirement Living* (April 1976), "the audience rose to its feet to cheer a performance of a medley from the rock musical *Hair*." A year later the Pops embarked on its first tour of the United States, making its New York debut at Carnegie Hall on April 6, 1972.

Many thousands of listeners have heard Fiedler and the Boston Pops on radio and television, especially on the series of concerts, *Evening at Pops*, presented by National Educational Television for the past six years. He also appeared in a musical sequence of Louis de Rochemont's Cinemiracle film *Windjammer* (National Theatres, 1958), in which the Boston Pops performed Grieg's Piano Concerto in A Minor with a merchant marine cadet as soloist.

The conductor's vast discography has greatly increased the public's familiarity with the "Fiedler style." From July 1935, when he and the Pops began recording for what was then the RCA Victor Company to the early 1970's, when they switched to Deutsche Grammophon, their record sales totaled nearly 50,000,000 discs. The Pops' version of "Jalousie"—a hitherto unknown tango by the Danish composer Jacob Gade—became the first record by a symphony orchestra to surpass a million in sales.

Arthur Fiedler explained his great approval among younger listeners in his interview with Stephen Rubin: "You become a sort of Pied Piper of Hamelin. Kids follow your name. They think, if Fiedler's doing it, it may be good." For some of the Pops album covers he poses in appropriate eye-catching attire, as Santa Claus, Yankee Doodle Dandy, or some other recognizable figure. Among his best-selling recordings are *Tchaikovsky: The Nutcraker, Offenbach: Gaité Parisienne, Greatest Hits of the '70's,* and *Greatest Hits of the 20's.*

Despite his undisputed box-office success and worldwide abundance of fans, some critics, as well as several fellow conductors, regard Fiedler as a very able technician rather than a first-class interpreter of serious music; others even consider him a charlatan, a vulgar popularizer. Dubbing such musical purists "culture-vultures," Fiedler has retorted, as Edith Efron quoted him in *TV Guide,* "There's a great deal of snobbism in music, . . . as if you can only love Shakespeare and Proust, but not O. Henry, and even *Playboy!* Well, I have trained myself to understand all *kinds* of music. *I'm* not like a horse with blinders on!" On the other hand, the conductor told Rubin, "I am cursed that wherever I'm engaged they want a program like the Pops. It's rare that they want a real symphony program. And perhaps they're right. But every clown wants to play Hamlet."

America's highest civilian medal, the Medal of Freedom, presented to him by President Gerald R. Ford in January 1977, tops a long list of awards that Fiedler has collected. Special tribute was paid him in 1953 during his twenty-fifth anniversary year as Esplanade conductor when Massachusetts Governor Christian A. Herter named a footbridge over Boston's Storrow Drive in his honor. To commemorate his 1954 silver jubilee as "Mr. Pops," San Francisco made him an honorary citizen and France awarded him the Legion of Honor. A proclamation from the Boston Symphony Orchestra trustees hailed his fifieth anniversary year with that orchestra in 1965. The fanfare marking the musician's seventy-fifth birthday on December 17, 1969—proclaimed Arthur Fiedler Day in Massachusetts—included speches, the striking of a commemorative silver medal, and gifts ranging from a Dalmatian puppy from his orchestra to a full-sized late-1930's-vintage fire engine from his family. The Boston City Hall ceremony commemorating his eightieth birthday in 1974 featured a 500-pound cake. From the magazine *Stereo Review* he received a special award in 1977 for outstanding musicianship. He holds almost a score of honorary doctorates.

On January 8, 1942 Arthur Fiedler gave up what he once called "a very charming bachelorhood" to marry Ellen M. Bottomley, a debutante from a prominent Boston family who was twenty years younger than he and whom he had first met when she was six. The Fiedlers have two daughters, Johanna and Deborah, and a son, Peter, who became the third-generation Fiedler to play at Symphony Hall, leading his rock-band "Rubber Dog Revue" there in 1971. The Fiedlers' rambling house in the Boston suburb of Brookline includes rooms for the conductor separated by a thick soundproof door.

Chosen in the late 1930's as the first "Man of Distinction" in the Lord Calvert whiskey advertisement, Fiedler is a strikingly personable conductor who stands five feet eight inches tall and has dark eyes, white hair, and a military mustache. Stephen Rubin thought he resembled an "aging Ivy Leaguer" in his "Very Fifties Brooks Brothers" conservative clothes, and Helen Herrmann saw in him the "charm of a Parisian, the drive of a New Yorker, and the accent of Harvard Yard." After Gail Joyce Miller interviewed him for the *Christian Science Monitor* (July 6, 1973), she wrote, "There was a mellow kindness and an indomitable twinkle in his presence."

Arthur Fiedler's desire for excitement has various outlets aside from conducting—a love for auto racing, boxing matches, and especially "sparking" or fire-chasing, an avid interest since boyhood. He collects fire-fighting implements and hats and has been named an honorary fireman in over 350 cities. Other hobbies include collecting antiques, ship models, old woodwind instruments, and musical scores. One of the delights of traveling for him is sampling the finest cuisines all over the world.

[From the Atlantic Monthly, September 1943]

MUSIC AL FRESCO

(By Arthur Fiedler)

[NOTE.—Conductor of the Boston Pops Orchestra, as well as originator and conductor of the Esplanade Concerts, ARTHUR FIEDLER has the distinction of being the only conductor that everybody calls by his first name. A native of Boston, he attended the Boston Latin School and the Royal Academy of Music in Berlin.]

One summer day after the Esplanade Concerts had started, I was driving in Boston in an open car with Mrs. Fiedler. We had to stop at an intersection while a large and smelly garbage truck rolled by. A workman perched on top of the truck stared down at us. Then his stained face broke into a smile and he waved. "Hi, Arthur! How are you?"

Like uncounted thousands, he had been to our free concerts on the Charles River Embankment, and he was my friend. Mrs. Fiedler was a little startled, but now she has grown accustomed to having me recognized by all manner of men in all sorts of places. And I am glad to have it so, for the Esplanade Concerts are completely democratic—perhaps the most democratic symphony concerts anywhere. The concerts have always been free. We have permitted no ropes, walls, or gates. The listener can sit on the grass or he can rent a folding chair for a dime, but he has to place it himself.

On concert evenings the little sailboats draw in quietly toward the shore as the sunset tints the river and the sky. The people fall silent, the traffic noises seem to recede, and the music soars free on the evening air. As the light dims, the ducks and gulls circle lower, the evening star comes out, and the moon rises beyond the buildings. There is music in a beautiful setting.

In 1929, when I started these concerts, my friends were politely skeptical about the audience. "Free symphony concerts? People won't come to anything but band concerts out of doors."

The officials of the Metropolitan District Commission were more outspoken. A vivid memory is the day I went out with the chairman of the Commission and his captain of police to look over the site I had chosen. It was several acres of tree-bordered lawn between Embankment Road and the Charles River, in the heart of old Boston.

The captain who went with us—the late Albert Chapman—said gruffly, "I think your idea is half-crazy. This'll be nothing but a battlefield between the bums from the North and South Ends. We'll have to use the wood. I haven't enough men to handle it."

But in time he even came to boast that *his* crowds were different—the best-behaved and the most honest. "There's never been a pocket picked here," he would say. "When ladies get dreamy over the music and leave their purses, the finders turn 'em in to my men. Umbrellas get turned in, too. Imagine that!" And the crowds *are* different—because good music brings out the best in people.

"When are you going to play 'Turkey in the Straw'?" Captain Chapman was always asking. And I made sure his favorite piece turned up often.

In making up programs, I often feel like a chef planning a meal. There should be hors d'oeuvres, a light course, a substantial entree, and so on through the musical menu. Variety is the spice we want: after a bombastic piece, we play some little thing. I am always looking for contrasts. In the beginning I started with light and semi-classical programs. Then I began slipping in an occasional movement from a symphony—and I found that people liked it, even though they had never heard symphonies before. One year I played an entire Beethoven series, another year Brahms.

We can tell when a piece takes hold of the audience by the quiet and the attention they give just as much as by their applause. The applause escapes in the open, but the hush is like that in a cathedral. Even dogs and babies in perambulators stay quiet during the music—though the dogs will bark excitedly when the clapping starts.

For the very first Esplanade Concert of all—July 4, 1929—the wind was decidedly against us. It literally pitched our music into the river. The piece, I recall, was the "Merry Wives of Windsor," and its merry pages flew about like sea gulls. Though the audience scattered to retrieve the music, and some musicians had to rely on their memories, we continued to play without interruption.

One rainy night when the wind drove rain into the concert shell so that the violins were endangered, the wind players promptly moved down and formed a barrier in front of the strings. They played with their backs to the rain—and the audience. And even though the grouping was unconventional and they took a wetting, the concert went on.

On another occasion at concert time the rain was coming down hard, yet about five hundred listeners stood hopefully in the forepart of the grassy "platter." I sent someone out to thank the audience for its interest—and to say that I thought it best to cancel the concert. After the announcement someone in the dripping ranks called out. "We'll stay if you'll play." The rest took it up as a chant. Who could resist? We went on with the concert and before long the rain stopped.

I vividly remember the "invasion" nights, when we have visits from flying ants, midges, and mosquitoes. Possibly the music attracts them—or the bright lights. In my gasping moments I have swallowed many an insect. Players of wind instruments have found themselves munching mosquitoes as they press their lips to their mouthpieces. And when we turn the pages of our music, we find assorted pressed specimens as mementos of previous concerts on the riverbank.

Our first shell was a wooden structure that cost $2,500. We stored our instruments in a skating house. Our second shell was acoustically sound and beautiful under night lighting, but was ugly by day and inconvenient for the orchestra. It used to store up heat through the day and shed it at night: with the lights on, the stage was an inferno. But the audience enjoyed nature's air conditioning—cool breezes from the river. Today we have the $300,000 Hatch Memorial Shell of permanent construction: granite lined with teakwood. It still seems a little unreal to me.

The acoustical properties of the first shells were good but occasionally freakish. Wind and humidity cause some peculair effects. Sometimes we played a resounding chord, only to have it reflected back loudly to us in the next measure. Then there was the time when one of my flute players was announcing an encore—the introduction to the third act of Lohengrin. The text was in German. He started reading it, got stuck, and said in what he intended to be a sotto voce aside, "Oh hell! I don't know what it is." It came out *magno voce.* The audience laughed.

All our shells have pulled sounds in as well as sent them out. At certain points on the stage we can catch conversations from distant places in the audience. One night we

heard a clear voice commenting. "I can't see why those musicians play for him. I understand he doesn't even pay them."

Certain people manage to sit in the same spots night after night. I recall the eccentric elderly lady who, when we played the "Beautiful Blue Danube," got up and waltzed before the front row. The next night, in gratitude, she put a chocolate bar on every musician's chair. It was a hot night, and the chocolate melted. The cleaners had a good many pairs of flannel trousers the following day.

In the early years, so many youngsters used to steal up close to the shell and listen so attentively that in 1938 I planned a morning series especially for them. Each season since then we have run a weekly concert for children—the largest anywhere. We have had as many as ten thousand on those Wednesday mornings.

Because many of the children are too young to read a program, we have an announcer say a few words about each composition. But we want to avoid having the children consider this a school. After all, it is their vacation and we want them to enjoy it. I select lively, pictorial pieces, a Mozart minuet, a "Nutcracker Suite." Children prefer things like variations on "Pop Goes the Weasel," waltzes, and marches.

I used to do my own announcing for the children's concerts, but evidently I spoke too fast or not distinctly enough. One day when the children were crowded right up to the low foot of the second shell, I announced: "Now we'll play 'Up the Street'." Perhaps they thought it was a new game, or perhaps they thought I said "Up the Stairs." Anyhow they took it as an invitation. They promptly stood up and marched up the stairs and simply swarmed all over the stage—around my legs, in and out among the players. There were hundreds of them, and they got very much in our hair.

It is a delightful sight to see the children arrive. Over here come little slant-eyed dolls from Chinatown, over there a little black cloud of pickaninnies. Some groups of very young children come down the paths with hands linked or even tied together, so that they won't get lost.

In the first few years lost children were more frequent than they are now. We used to have the trumpeter play a fanfare and we would announce that so-and-so was lost. Then he always turned up.

Over the years I have come to know many of these children and have watched them grow up. I like to think that the Esplanade Concerts have been a valuable and entirely pleasant part of their education. Where else can children go to hear good symphony music outdoors and free? I wish there had been such concerts when I was young.

WHOSE CHILD IS THIS, ANYWAY?

Mr. HUMPHREY. Mr. President, most Americans these days are greatly disturbed at what seems to be the increasing usurpation of legislative and executive powers by the judiciary. Many American parents are greatly alarmed by the usurpation by the judiciary of what are generally known as parental rights and responsibilities.

I should like to read into the RECORD an editorial which appeared in this morning's Washington Post by Joseph Sobran which addresses this issue, entitled "Whose Child Is This, Anyway?"

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

WHOSE CHILD IS THIS, ANYWAY?

(By Joseph Sobran)

Why is it that every time somebody asserts a new right, all of us wind up less free than we were before?

The Supreme Court has now ruled unconstitutional a Massachusetts law requiring minors to get parental approval before obtaining an abortion. Though divided, the majority seems to think a girl should be able to get the necessary permission from a judge who deems her "mature." And if the judge deems her immature, he himself should be the one to decide whether the abortion is in her best interest.

Leave aside the ethics of abortion. Leave aside the question how these minutiae are quarried from the Constitution. Let us simply consider what the court's ruling implies about the rights of parents, the relations of parents and children, and the scope of state power.

In the first place, the court holds that the girl who wants an abortion owes no obedience to her own father and mother. In the second place, it holds that she does owe obedience to the court, which has the discretionary power of deciding whether she may or may not make the abortion decision for herself.

To put it another way: The court assumes the right to act in loco parentis—while denying parents themselves that right.

The girl herself has no new freedom. She has, it is true, a right to defy her parents, but not to defy the court. She has merely exchanged submission to her father and mother for submission to some judge who barely knows her.

Justice Byron White, the lone dissenter, asked how on earth the Constitution can be construed to deprive parents of the right to decide whether their minor child shall have surgery. It is a question that should give pause even to those who regard abortion as a valid freedom.

So-called children's rights mean, in practice, increased state power over parents. In Sweden, it is now illegal to spank your own children. Whether this makes children freer in any real sense is very doubtful. What is certain is that the state has a new jurisdiction over the home and the family. In effect, Swedish parents are being whittled down into minor-grade civil servants. That is the shape of things to come in the totally bureaucratized society our social reformers aspire to.

Every right requires some agency to enforce it. The perennial political problem is how to establish a power to protect our real rights, while ensuring that such power won't itself be used to violate our rights.

A peculiarly modern problem is this: that many of the so-called "rights" we enjoy—or are about to have inflicted on us—are not protections against power, but claims against the freedom of our fellow citizens for the discretionary use of their own property.

They do more. They create a power in the state to set explicit standards for what was formerly private behavior. Every citizen becomes answerable to some public authority, usually a federal bureaucrat, for an ever-broader range of personal decisions.

The last stronghold of private freedom is the family. A few weeks ago, the court recognized this when it held that parents have the right to commit their children to mental hospitals. In so ruling, it acknowledged that this is a decision better made by parents than by public officials. It would be unfair, therefore, to characterize the court simply as an enemy of the family as an institution.

Nevertheless, the court is afflicted by the general confusion about the public and private spheres. In limiting the range of private discretion—even in the name of "rights"—it limits our freeedom. This is nowhere more obvious than in its increasing tendency to treat the family as nothing but the lowest administrative level of the state.

By conferring on children so-called "rights," the state actually alters the structure of the family. Some think this is a fine thing: Reform should know no bounds. But we have come a long way from the days when it was assumed that there were some things no man could put asunder. And what has been the result of all our tampering with the traditional family? Soaring rates of divorce and abortion, a tripling of the number of children who grow up with a single parent. If there is any evidence of a corresponding increase in human happiness, I have yet to hear of it.

Mr. HUMPHREY. Mr. President, I have read that article into the RECORD, because of my own concern, and the very great concern of my constituents, about the growing activism of our court systems, not only the Supreme Court, but the inferior courts as well, growing concern about the activism, and the great concern about the tendency of this administration to nominate to the bench persons who describe themselves as child advocates and radical civil libertarians. As a matter of fact, Mr. President, in a recent issue of Newsweek magazine, I believe it was, or one of the major news magazines, it was reported that in addition to the usual screening by the American Bar Association, the White House is now subjecting its judicial nominations to a screening by a panel made up of members of Common Cause, of the American Civil Liberties Union, and various minority and women's rights organizations.

It is quite clear, Mr. President, that the administration is attempting to fill most of the seats newly created, some 150, approximately, with judicial activists, precisely what we do not need in this day and age given the recent usurpation by the courts of executive and legislative powers, and the invasion by the courts in matters that are properly the jurisdiction of the family.

I hope that what I have said will be taken to heart by my colleagues, because we are probably going to be deciding on nominations of this very kind within the next few weeks.

INSTANT CURES FOR INFLATION

Mr. HELMS. Mr. President, in Barron's Weekly on May 7, 1979, there was a splendid editorial by James Grant entitled "The 7-Percent Solution."

Mr. Grant offers some cogent observations concerning the rhetoric presently being used concerning the problem of inflation.

His particular target is the specious argument of universal restraint; that is, if everyone would just hold down prices and wages individually, inflation would go away. This is based on the false assumption that wages and prices go up, because of individual greed. In fact, of course, inflation is caused by no one individually, but by Government itself. Inflation is, by definition, an inordinate increase in the money supply. Period. It is caused not when wage or price levels rise.

Inflation causes those higher price levels. So-called restraint programs such as the present voluntary guides—which in fact are not voluntary—only serve to distort the economy and cause greater price level increases later on.

Mr. President, I ask unanimous consent that the editorial be printed in the RECORD at the conclusion of my remarks.

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

THE 7-PERCENT SOLUTION: THERE IS NO MAGIC POTION TO CURE INFLATION

(By James Grant)

General Motors, which knows a thing or two about making cars and trucks, lately has begun to manufacture essays for magazines. This is an odd bit of diversification, for the essay is a hand-made product which has never been satisfactorily mass-produced. It is true that the literary market is unregulated and that labor is abundant, if sometimes surly and raffish, but the trade is hard and grudging with money. In any case, General Motors recently published its views on the Administration's voluntary wage and price guidelines. The burden of the eassay, which evidently was drafted by press agents, revised by clergymen and polished by lawyers in the single hope of avoiding offense to any member of either side of the First Family, is that the company will play ball. ("Because the President wishes it so. . . .") The piece is headed "How to Slow the Rate of Inflation" and is crowned by the slogan "A voluntary program will work if everyone volunteers."

But it won't. Hardly anyone who bothered to get out of bed in the morning between 1971 and 1974 can doubt that mandatory controls did more harm than good. Yet voluntary controls, insofar as they hold down prices artificially, must in tme cause the same shortages and dislocations as the mandatory kind. If everyone volunteers, the effect is the same as if the scheme were compulsory, and guidelines overnight become indistinguishable from controls. Thus only an ineffective voluntary regime can hope to succeed—succeed in not making matters worse—whereas "effective" guidelines, because they so closely resemble mandatory controls, must necessarily work the same mischief.

Everyone, as we say, won't volunteer. The United Rubber Workers Union, which is locked in contract talks with Uniroyal, went to court last Friday to seek a restraining order against the Council on Wage and Price Stability. The union charged the Council with meddling and said that it would have made a deal already except for threats of reprisals from the White House. The Council, for its part, denied it had intervened but added significantly that if the final contract does exceed the allowable standards, "we will do everything we can to protect the public interest." The union's contract motion was denied. Meanwhile, George Meany, patriarch of the AFL–CIO, has called for an end to the guidelines and a return to full-fledged coercion, so that everyone can suffer together. The U.S. Industrial Council, which represents a free-market constituency of 5,000 corporations, has asked that it be included out.

But big business, by and large, has beaten a path to Washington. In February, some 300 of the nation's largest 500 firms hadn't endorsed the Council guidelines; by contrast, today all but 53 have agreed to comply. In general, the guidelines ask that firms hold their price increases to half a percentage point below the average annual increase in 1976–77, at the pain of public rebuke or the loss of government contracts. If "uncontrollable" costs make that impossible, a company may seek the alternative profits test, which restrains margins this year to the best two of the past three fiscal years. In the case of Girard Co., for example, parent of Girard Trust Bank in Philadelphia, the rules have obliged it to limit its future dividend hikes because it is bumping up against the Council's allowable margins for financial institutions. Sears Roebuck, which has been losing sales for eight months, basked in national publicity while bowing to a 5% cut in its catalogue prices. As for wages, the Council asks that they be held to a rise of 7% annually, which, if inflation rips along for the rest of the year at the same rate as in the first three months, implies a loss of real income of 6% in 1979.

That fact alone would explain the lack of union volunteers and the ominous growth of labor unrest. With each month through March, the number of strikes this year has increased, from 301 in January to 326 in February to 447 in March—in all, 1,074 as against 751 in the same span in 1978. Like the AFL–CIO, which has filed suit against the Council on the ground that the guidelines are not at all voluntary but are extra-legal and compulsory, the United Auto Workers Union rejects out of hand the 7% solution. So do growing numbers of white collar workers who are changing jobs to get the raise that their former company volunteered not to give them.

Plainly, then, if the Council is toothless, its gums are like a vise. A case in point is aluminum, which is an interestng study because it is an industry ostensibly rigged from Pittsburgh. If so, the argument runs, why not do the job from Washington, in the public interest? Thus, the Council has prevailed on Alcoa to trim a four-cent rise in the price of primary ingot by a penny, to 58½ cents a pound. Overseas, meanwhile, the white metal was heading toward 70 cents. Result: a heavy outflow of aluminum scrap to foreign markets, where the return is highest. Funds which might have otherwise gone to expand domestic smelting capacity, now running full-bore, are not available. Naturally, the trouble is more complicated than that: price controls on energy, as well as environmental opposition, have also played hob. But eventually, comments one close observer, "shortages will emerge, breaking the guidelines and driving domestic prices . . . above the levels which [would probably have prevailed in the Council's absence.]"

Guidelines, in fact, exacerbate nearly all the evils that inspired them in the first place. "The great mass of those who put their trust in the traditional order," wrote Thomas Mann of the German inflation of 1919–23, "the innocent and the unworldly, all those who do productive and useful work but don't know how to manipulate money . . . all these are doomed to suffer." Inflation makes cynics; guidelines, in failing, as they must fail, make them more bitter. Inflation stirs jealousies; guidelines, in pillorying an occasional scapegoat, stir them harder. Inflation distorts prices; gudelines, in trying to suppress that distortion, make a bad thing worse. This is the fundamental economic objection to any kind of controls—that prices, which have a lot to say, are throttled as bearers of bad news. "It might be helpful," commented Walter Wriston, chairman of Citicorp, last week, "to remember that prices and wages represent an essential form of economic speech and that money is just another form of information." In a changing economy, prices must change, and some must pierce a federally sanctioned average. But for the Council to make an exception to the rule is to risk the wrath of those not similarly favored.

Not to make the exception is to guarantee a shortage, which in turn will set off a chain of other dislocations. The Council's only hope is a timely recession and the dignity of a quiet retreat. Failing that dispensation, pressure will build for the government to "do something." Time and again the Administration has shunned mandatory controls; yet as recently as Sept. 19, 1977, it shunned guidelines, too—"It is our judgment," Stuart Eizenstat, assistant to the President for domestic affairs, said in a letter to Sen. John Tower (R., Texas), "that a program under which the Federal government promulgates formal numerical guidelines such as those of the early 1960s would not be a desirable or effective remedy for inflation."

Off and on now for 4,000 years, so a new historical survey relates (*Forty Centuries of Wage and Price Controls*, by Robert L. Schuettinger and Eamonn F. Butler, Heritage Foundation, Washington, D.C.), inflation-ridden governments have been rounding up the usual suspects. They have hanged and jailed them for keeping a black market, but the punishments have served no purpose except to gratify the rulers who meted them out. The book is morbid reading, because the same pageant is futiley played out, generation after generation. Now comes the Council, another chapter in the history of an unborn historian, who will amuse himself a hundred years from now to think that economic medicine men reigned in a nation that could create an IBM and split it 4-for-1. If inflation is a lie, then controls are the cover-up. The deceit is that the nation cannot pay its bills but prints the money to finance them. In this ancient process the Council is powerless. For a whole, some prices will not be raised, or will rise more slowly than they otherwise would, but monetary forces will out. It is the simple truth that the Federal Reserve Board has been making too much money and that Congress for years has been voting unconscionable deficits, and that this is the cause of inflation.

Last week, on the eve of the Conservative victory in control-bound Britain, the *Financial Times* printed a light-hearted letter from an Oxford don named Dr. P. J. Cuff. The letter suggested that government ministers should be made to put their assets into bonds, which they would hold throughout their term in office. In a time of runaway interest rates and soaring prices, of course, the bonds would suffer appalling market erosion, which would come out of the ministerial hide. We laughted before we saw in this jest the inspired reform it is. Inflation, to anyone in Washington with a fat income and a house in the District or one of its neighboring boom towns, is like the beat of the rain on a well-shingled roof. What better prod for a reduction in spending than for the guilty parties to see their life's savings go up in smoke? What surer road to the elusive balanced budget?

FEDERAL TRADE COMMISSION ACT AMENDMENT

Mr. ROBERT C. BYRD. Mr. President, I ask that the Chair lay before the Senate a message from the House of Representatives on H.R. 3978.

The PRESIDING OFFICER laid before the Senate H.R. 3978, an act to amend the Federal Trade Commission Act to exempt savings and loan institutions from the application of certain provisions contained in such act.

The PRESIDING OFFICER. Without objection, the bill will be considered as having been read twice by its title, and the Senate will proceed to its consideration.

Mr. FORD. Mr. President, H.R. 3978 amends the Federal Trade Commission Act to exempt savings and loan associa-

tions from the jurisdiction of the Federal Trade Commission. In doing so, it provides savings and loan associations with the same exemption which banks have had under the act for the 65 years since the inception of the FTC in 1914. When the Federal Home Loan Bank Board was created, Congress did not amend the act to exempt S. & L.'s as they did for banks. Congress later exempted air carriers and common carriers from the act after the formation of the CAB and the FCC in the 1930's. With this action today, we would simply be providing parity with respect to savings and loan associations.

This bill is noncontroversial in nature. It is strongly supported by the Federal Home Loan Bank Board which regulates savings and loan associations and is not opposed by the Federal Trade Commission. It was passed unanimously by both the House Subcommittee on Consumer Protection and Finance and the full House Commerce Committee. It passed without opposition in the House just a short time ago.

Last year, the provision which comprises H.R. 3978 was contained in section 3 of H.R. 3816, the FTC Improvements Act of 1977, and a variation of this provision was contained in S. 1288, the Senate version of the bill. The conference report to H.R. 3816 containing the provision in H.R. 3978 passed the Senate twice unanimously, although it was defeated last year as a result of some disagreement within the House of Representatives over an issue which was not related to the section 3 exemption for savings and loan associations. With its recent action, the House has simply ratified positions taken last year by both bodies on this noncontroversial measure. Indeed, the FTC has not had an active interest in savings and loan associations. The sole area of activity has involved director interlocks.

However, that particular avenue of FTC interest has been foreclosed by the action of the 95th Congress which passed the Financial Institutions Regulatory and Interest Rate Control Act of 1978. Title II of that law regulated director interlocks between financial institutions. It gave the bank and savings and loan regulators exclusive jurisdiction over director interlocks between financial institutions and apparently settled—although the single case brought by the Commission is still pending—the question of FTC jurisdiction over financial institutions.

The provisions of the bill are straightforward. Savings associations would like commercial, mutual, and cooperative banks be exempted from section 5 and section 6 of the Federal Trade Commission Act. In addition, under section 18 of the FTC Act, the 1974 authority provided to the Federal Reserve Board to review FTC rules to determine their applicability to banks is extended to the Federal Home Loan Bank Board. The FHLBB will write trade regulation rules which are "substantially similar" to those promulgated by FTC for nonfinancial entities within 60 days of such action. In doing so, the Federal Home Loan Bank Board could hold a parallel rulemaking proceeding pursuant to the Administrative Procedures Act on proposed FTC trade rules to determine their applicability to practices which may be unfair or deceptive with respect to the savings and loan industry.

The upshot of this provision is that it will eliminate unnecessary duplicative and burdensome rulemaking now shared by both the FTC and the Federal Home Loan Bank Board. In this connection, it should be more efficient and less costly, while preserving the important supervisory considerations which are not present. Thus, the Senate can reduce unnecessary regulation over the Nation's savings and loan associations. Mr. President, I again urge that this matter be taken up and favorably voted upon.

LEGISLATIVE PROGRAM

Mr. ROBERT C. BYRD. Mr. President, I am now attempting to schedule something for tomorrow.

The military construction bill is ready for action, and the managers on this side of the aisle are prepared to go forward with that bill. It is a bill that has to be disposed of at some point, and it has backed up behind it these three housing bills. So I suggest that this might be a good time to proceed with that bill.

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

Mr. ROBERT C. BYRD. I yield.

Mr. TOWER. Mr. President, as the ranking minority member of the Armed Services Committee, I must say to the Senator from West Virginia that I am not prepared to act on that bill tomorrow.

I have suggested already to the minority leader that I will be perfectly amenable to taking up that bill on Monday and spending as much time as necessary with it.

I think the Senator from West Virginia knows that I have always been cooperative with him and have tried to secure expeditious action on matters before this body, and I am not being deliberately dilatory. However, I do not feel at this point prepared, because I know what the major item is going to be on that bill. Therefore, I would prefer not to act on that bill until Monday.

Mr. ROBERT C. BYRD. Mr. President, I would like to accommodate the distinguished Senator from Texas (Mr. TOWER). He has been very cooperative in the past. My problem is that the Senate has very little that is ready to work on. We have to go with something.

How about nuclear regulation?

Mr. BAKER. Mr. President, will the Senator yield to me?

Mr. ROBERT C. BYRD. I yield.

Mr. BAKER. Mr. President, as we met earlier today, the majority leader and I, to try to see if we could put together a schedule of activities for the Senate this week, next week, and the week after, nuclear regulation was one we considered.

As I told the majority leader earlier, we have problems with that, I understand, not only on this side but also possibly on the Democratic side.

I would like to consult with the distinguished junior Senator from Wyoming (Mr. SIMPSON), and I will be glad to advise the majority leader in a moment whether or not we can proceed with NRC. Personally, I have no objection to that.

I notice that there are some Members who have made notations on my calendar with whom I will have to check first.

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

Mr. ROBERT C. BYRD. I yield.

Mr. HATFIELD. As the distinguished majority leader knows, we have had a nomination pending for many weeks now which was reported 9 to 0 by the Rules Committee—namely, Mr. Ritchie for the Federal Elections Commission.

The longer we go, the more difficult it will be for all the Presidential hopefuls and for everyone else running in 1980 to be able to get their machinery put together, because this Commission is shorthanded.

I simply indicate that, realizing there are a number of holds on this nomination, the sooner we can get to it, the sooner we face up to it, the better it is going to be for that Commission and its responsibilities, and as well, I believe, for the entire Senate.

So I ask the majority leader, if he is searching for items on the agenda, why not bring up the Federal Election Commission nomination?

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

Mr. ROBERT C. BYRD. I yield.

Mr. BAKER. My day has been this way all along. [Laughter.]

I do not see any prospect that things are improving.

I appreciate the suggestion by the distinguished senior Senator from Oregon. He was not aware of the fact that today, during policy luncheon, we had a rather extended and energetic conversation on this subject.

Mr. HATFIELD. The Senator knows where I was.

Mr. BAKER. I do know that the Senator from Oregon was in the Ethics Committee—and I am now in danger of having the Senator blame me once more for placing him on that committee, and I accept that responsibility.

Mr. HATFIELD. That is right.

Mr. BAKER. Mr. President, I say to my good friend from Oregon that there are 23 holds on that nomination on this side of the aisle; and notwithstanding that the distinguished Congressman from Arizona and I included this name on our list, obviously it has not met with overwhelming approval on this side of the aisle.

I requested, as a result of our policy luncheon today, that the majority leader withhold presenting that nomination until we could examine two or three other aspects of this matter in a day or two.

The majority leader, earlier today, put me on notice that notwithstanding the holds that were noted on the calendar, he intended to move to consideration of the nomination at an early time. I indicated to the majority leader that, notwithstanding that I had included the Ritchie name among several names sub-

mitted to the White House, I would not agree by unanimous consent to go into executive session for that purpose.

Mr. President, I do not know what might work out finally, but I do know that I am trying to honor requests made to me during policy luncheon today, to convey to the majority leader our hope that he will not proceed to the Ritchie nomination in the immediate future.

I hope we can work out something else for tomorrow instead of the Ritchie nomination, and we will see how it goes from there. It is on the calendar; it is the only item on the Executive Calendar.

I do not know that I have helped matters any by this dissertation, but at least I hope to have produced the results of having everybody understand my predicament.

Mr. HATFIELD. I want to express my appreciation for the frankness with which the minority leader has responded.

I only want to say this: I think that there are some very deep-seated principles here. One is an attempt to put a litmus paper test as to who is a good Republican and who is not a good Republican.

The facts of the case were carefully handled. We accommodated the Senator from New Hampshire on three different occasions beyond the whole time from in which the committee normally operates.

And I think that the longer we go the more this is going to create difficulty to be resolved on this side of the aisle.

Second, I wish to say to the minority leader that we have invited the gentleman to offer himself, in effect, for a public responsibility. He has severed his connections with his livelihood, his law firm, and that has been going on now for quite some time. In good faith he let his name be presented. In good faith he testified. He supplied all the answers by the committee and the Senator from New Hampshire. I think that we have some moral obligation to a gentleman who has family responsibilities rather than to tangle him along in his state of indecision while we try to churn up some more questions or some more ammunition to use against him.

I know what the play is. I have been around here long enough to understand exactly what the strategy is.

I say that the whole case will fall on the very merits of the qualifications of the man versus the charges and the innuendos and all the other issues that have been raised and have no foundation.

I am ready to start tonight and go through the night and go through August. I want to put the Senate on notice that I will not be a party to this kind of a procedure that is merely a strategy to bring the name down. I mean this from the very depths of my heart. There is a principle of morality here. There is a principle of ethics. There is a principle that is involved that involves the integrity of the Senate.

I respect anyone who wants to raise questions, and we have procedures built in the Senate for that through committee hearings. These questions were not raised in that way. The answers were provided page by page, delay by delay. And it is wrong for this Senate now to continue, when a man has been without a source of livelihood for weeks, and we say to him, "Yes, we are going to consider you, we are going to have you confirmed or not confirmed," but we delay and delay. And this man is without income.

I think we have a responsibility to tell this man: "No, we do not have the courage to stand up and decide it on its merits. We are going to use delaying tactics until somehow we hope the President will bring the name down."

That is why I want to make sure the Senator understands why the delay is here. And it is not my nomination. It is not my recommendation. I am merely trying to fulfill my responsibilities as a ranking minority member of the Rules Committee.

I have a responsibility to do my task on that committee, and we have done it. We have done it carefully, and we have tried to accommodate the Senator from New Hampshire.

Mr. BAKER. Mr. President, if the majority leader still has the floor, will he yield to me 1 additional minute?

Mr. ROBERT C. BYRD. Yes, I say to the distinguished minority leader.

FEDERAL TRADE COMMISSION ACT AMENDMENT

The Senate continued with the consideration of H.R. 3978.

Mr. ROBERT C. BYRD. Mr. President, let me inquire of the Chair if the Senate has completed action on the House bill?

The PRESIDING OFFICER. The Senate has not completed action on the House bill.

Mr. ROBERT C. BYRD. We should do that first since it is up now.

The PRESIDING OFFICER. The bill is before the Senate and open to amendment. If there be no amendment to be proposed, the question is on the engrossment and third reading of the bill.

The bill was ordered to a third reading and was read the third time.

Mr. METZENBAUM. Mr. President, will the Senator yield for a question in connection with this legislation?

Mr. FORD. I yield for the question.

Mr. METZENBAUM. I looked over H.R. 3978, and I note that all of the provisions seem to make savings and loans, conform with the language relative and adaptable to banks, but beginning on page 3 there is a paragraph that is a brandnew paragraph in the legislation and since I do not understand the import of that language I would appreciate being informed by the sponsor as to really what is intended by that language.

Mr. FORD. Where on page 3?

Mr. METZENBAUM. Line 21.

Mr. FORD. Although, the language may appear to be a new provision, it simply provides parallel authority for the Federal Home Loan Bank Board which is precisely the same authority the Federal Reserve Board now possesses for the banking institutions it regulates.

Mr. METZENBAUM. It does not seem to read that way. It talks about the fact that "compliance with regulations prescribed under this section shall be enforced,' and then it goes on to explain by whom they will be enforced. Then it goes on to talk about "* * * with respect to savings and loan institutions which are members of a Federal Home Loan Bank, by a division of consumer affairs to be established by the Federal Home Loan Bank Board pursuant to the Federal Home Loan Bank Act."

I do not rise to indicate my opposition to the proposal of my good friend, the Senator from Kentucky, but I frankly wonder if this bill does more than was originally discussed in its presentation.

Mr. FORD. It says that the Federal Home Loan Bank Board shall establish a separate division of consumer affairs and that it write substantially similar trade regulations and rules for savings and loan associations 60 days after they become effective at the Federal Trade Commission. Under the law, the Federal Reserve Board has already been required to establish a division of consumer affairs to write substantially similar trade regulation rules and the Federal Home Loan Bank Board will be required to do the same thing under the bill.

Mr. METZENBAUM. Where does that come from? I know the Senator is reading from a paper in his hand, but I do not find anything near that language in the legislation itself.

Mr. FORD. Mr. President, I suggest the absence of a quorum unless the majority leader has some time he wishes to use, so I can give him the answer. It is going to take me a while to look it up and give it to him, I think, to satisfy him.

Mr. ROBERT C. BYRD. Mr. President, I yield the floor for that purpose.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. FORD. 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. FORD. Mr. President, I think we are ready to move for passage of the legislation.

The PRESIDING OFFICER. The question is, Shall the bill pass?

(Putting the question).

The bill (H.R. 3978) was passed.

Mr. ROBERT C. BYRD. Mr. President, I move to reconsider the vote by which the bill passed.

Mr. FORD. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. ROBERT C. BYRD. Mr. President, I yield to the Senator from North Dakota.

A TRADE ASSOCIATION FOR FARM PROGRESS

Mr. BURDICK. Mr. President, 1979 is the 70th anniversary of the founding of the Agricultural Publishers Association (APA). The bylaws of this association best describe its purpose and functions, as follows:

. . . to develop the usefulness of farm publications, to promote a spirit of cooperation among them, to coordinate their efforts and to perform for them such common services as otherwise would be duplicated by their individual efforts, to use various means to promote a public understanding of the field they service, and to cooperate with other associations and/or individuals or firms in such research and promotional efforts as are to the common good of the membership.

Today, the APA is comprised of 28 national, State, and regional farm magazines with an average circulation per issue of 4,465,000 copies. These magazines are still fully dedicated to serving their readers in the science of agriculture to achieve on a continuing basis the betterment of agriculture in America. Many of them are over 100 years old. The record output of American agriculture reflects their widespread success.

The agricultural magazine has been described as a vital artery from the laboratory to the land. Government agencies have found farm magazines to be reliable and effective conduits of scientific information. In a recent survey, approximately 21 percent of agricultural articles appearing in farm magazines were provided by the State Cooperative Extension Service.

Given the world demands for food that American agriculture will face in the coming years, the vital role agricultural magazines play in disseminating information can only increase. In light of this ever-growing role, rising postal rates are indeed a threat. A 500-percent increase in postal rates since 1970 make it most difficult to bring this service to readers in remote areas of our Nation as subscription prices are forced higher and higher.

Yet there is no substitute for the science agricultural magazines bring to our farms. This tool of agricultural production has demonstrated its efficacy over the past century in America. In survey after survey conducted by colleges of agriculture, farmers have rated the agricultural magazine in first place as a source of information on the business of farming. It is in the public interest to preserve this tool of production, and recognition and support by our Federal Government will go a long way toward this end.

The agriculture magazines have served this Nation well and deserve a hearty congratulations on their 70th birthday. The future poses greater challenges to this segment of the publishing industry, and America should greatly encourage and support the agricultural magazines to meet these challenges.

MESSAGES FROM THE PRESIDENT

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

EMERGENCY BUILDING TEMPERATURE RESTRICTIONS—MESSAGE FROM THE PRESIDENT—PM 85

The PRESIDING OFFICER laid before the Senate the following message from the President of the United States, together with accompanying papers, which was referred to the Committee on Energy and Natural Resources:

To the Congress of the United States:

Pursuant to the authority vested in me by the Energy Policy and Conservation Act, I have found and proclaimed (copy of the Proclamation is enclosed) that a severe energy supply interruption currently exists with respect to the supply of imported crude oil and petroleum products and have implemented the authority vested in me to impose emergency building temperature restrictions as set forth in Standby Energy Conservation Contingency Plan No. 2.

The Plan will become effective as of July 16, 1979. A copy of the final Department of Energy regulations which more fully explain the manner for the exercise of the Plan is enclosed.

JIMMY CARTER.

THE WHITE HOUSE, *July 10, 1979.*

PRESIDENTIAL APPROVALS

A message from the President of the United States reported that he had approved and signed the following acts and joint resolution:

June 27, 1979:

S. 429. An act to authorize supplemental appropriations for fiscal year 1979 for procurement of aircraft, missiles, and naval vessels and for research, development, test, and evaluation for the Armed Forces, and for other purposes.

June 30, 1979:

S. 1317. An act to extend the existing antitrust exemption for oil companies that participate in the agreement on an international energy program.

July 7, 1979:

S. 984. An act to provide the Secretary of Agriculture with authority to reduce marketing penalties for peanuts.

July 10, 1979:

S.J. Res. 14. Joint resolution to amend the Public Health Service Act and related health laws to correct printing and other technical errors.

MESSAGE FROM THE HOUSE

At 11:03 a.m., a message from the House of Representatives delivered by Mr. Gregory, one of its reading clerks, announced that the House has passed the following bill, without amendment:

S. 927. An act to authorize the Smithsonian Institution to plan for the development of the area south of the original Smithsonian Institution Building adjacent to Independence Avenue at Tenth Street, Southwest, in the city of Washington.

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

H.R. 3919. An act to impose a windfall profit tax on domestic crude oil;

H.R. 4389. An act making appropriations for the Departments of Labor, and Health, Education, and Welfare, and related agencies, for the fiscal year ending September 30, 1980, and for other purposes;

H.R. 4394. An act making appropriations for the Department of Housing and Urban Development, and for sundry independent agencies, boards, commissions, corporations, and offices for the fiscal year ending September 30, 1980, and for other purposes; and

H.R. 4439. An act relating to sanctions against Zimbabwe-Rhodesia.

ENROLLED BILL SIGNED

At 1:05 p.m., a message from the House of Representatives delivered by Mr. Gregory, announced that the Speaker has signed the following enrolled bill:

S. 927. An act to authorize the Smithsonian Institution to plan for the development of the area south of the original Smithsonian Institution Building adjacent to Independence Avenue at Tenth Street, Southwest, in the city of Washington.

The enrolled bill was subsequently signed by the President pro tempore (Mr. MAGNUSON).

At 3:35 p.m., a message from the House of Representatives delivered by Mr. Gregory, announced that the House disagrees to the amendment of the Senate to H.R. 1786, an act to authorize appropriations to the National Aeronautics and Space Administration for research and development, construction of facilities, and research and program management, and for other purposes; requests a conference with the Senate on the disagreeing votes of the two Houses thereon; and that Mr. FUQUA, Mr. HARKIN, Mr. FLIPPO, Mr. WATKINS, Mrs. BOUQUARD, Mr. NELSON, Mr. WYDLER, Mr. WINN, and Mr. GOLDWATER were appointed managers of the conference on the part of the House.

The message also announced that the House disagrees to the amendments of the Senate to H.R. 2676, an act to authorize appropriations for environmental research, development, and demonstrations for the fiscal year 1980, and for other purposes; requests a conference with the Senate on the disagreeing votes of the two Houses thereon; and that Mr. FUQUA, Mr. AMBRO, Mr. BROWN of California, Mr. BLANCHARD, Mr. Walker, and Mr. RITTER were appointed managers of the conference on the part of the House.

The message further announced that the House has passed the following bills, in which it requests the concurrence of the Senate:

H.R. 2043. An act to amend the Water Bank Act for the purposes of authorizing the Secretary of Agriculture to adjust payment rates with respect to initial conservation agreements and to designate certain areas as wetlands, and for other purposes;

H.R. 2814. An act to authorize the Secretary of the Army to correct certain slope failures and erosion problems along the banks of the Coosa River; and

H.R. 3978. An act to amend the Federal Trade Commission Act to exempt savings and loan institutions from the application of certain provisions contained in such Act.

The message also announced that the House has agreed to the following concurrent resolution, in which it requests the concurrence of the Senate:

H. Con. Res. 10. A concurrent resolution to express the sense of Congress that a United Nations special investigatory commission should be established to secure a full accounting of Americans listed as missing in Southeast Asia.

At 6:27 p.m., a message from the House of Representatives delivered by Mr. Berry, one of its reading clerks, announced that the House has passed the

following bills, in which it requests the concurrence of the Senate:

H.R. 1825. An act to protect archaeological resources on public lands and Indian lands, and for other purposes;

H.R. 3292. An act to assist the States in developing fish and wildlife conservation plans, and for other purposes; and

H.R. 4249. An act to amend title 23 of the United States Code, the Surface Transportation Assistance Act of 1978, and for other purposes.

HOUSE BILLS AND CONCURRENT RESOLUTION REFERRED

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

H.R. 2043. An act to amend the Water Bank Act for the purposes of authorizing the Secretary of Agriculture to adjust payment rates with respect to initial conservation agreements and to designate certain areas as wetlands, and for other purposes; to the Committee on Agriculture, Nutrition, and Forestry.

H.R. 2814. An act to authorize the Secretary of the Army to correct certain slope failures and erosion problems along the banks of the Coosa River; to the Committee on Environment and Public Works.

H.R. 3292. An act to assist the States in developing fish and wildlife conservation plans, and for other purposes; to the Committee on Environment and Public Works.

H.R. 3919. An act to impose a windfall profit tax on domestic crude oil; to the Committee on Finance.

H.R. 4249. An act to amend title 23 of the United States Code, the Surface Transportation Assistance Act of 1978, and for other purposes; to the Committee on Environment and Public Works.

H.R. 4389. An act making appropriations for the Departments of Labor, and Health, Education, and Welfare, and related agencies, for the fiscal year ending September 30, 1980, and for other purposes; to the Committee on Appropriations.

H.R. 4394. An Act making appropriations for the Department of Housing and Urban Development, and for sundry independent agencies, boards, commissions, corporations, and offices for the fiscal year ending September 30, 1980, and for other purposes; to the Committee on Appropriations.

H.R. 4439. An act relating to sanctions against Zimbabwe-Rhodesia; to the Committee on Foreign Relations.

The following concurrent resolution was read by its title and referred as indicated:

H. Con. Res. 10. A concurrent resolution to express the sense of Congress that a United Nations special investigatory commission should be established to secure a full accounting of Americans listed as missing in Southeast Asia; to the Committee on Foreign Relations.

HOUSE BILL PLACED ON THE CALENDAR

The following bill was read twice by its title and placed on the calendar:

H.R. 1825. An act to protect archaeological resources on public lands and Indian lands, and for other purposes.

ENROLLED BILL PRESENTED

The Secretary of the Senate reported that on today, July 10, 1979, he presented to the President of the United States the following enrolled bill:

S. 927. An act to authorize the Smithsonian Institution to plan for the development of the area south of the original Smithsonian Institution Building adjacent to Independence Avenue at Tenth Street, Southwest, in the city of Washington.

COMMUNICATIONS

The PRESIDING OFFICER laid before the Senate the following communications, together with accompanying reports, documents, and papers, which were referred as indicated:

EC-1741. A communication from the Secretary of Agriculture, transmitting a draft of proposed legislation to amend Section 5924(4)(B) of title 5, United States Code; to the Committee on Agriculture, Nutrition, and Forestry.

EC-1742. A communication from the Assistant Secretary of Defense, reporting, pursuant to law, on transfers of funds appropriated to the Department of Defense; to the Committee on Appropriations.

EC-1743. A communication from the Administrator, Veterans Administration, reporting, pursuant to law, on a violation of Section 3679 of the Revised Statutes, as amended; to the Committee on Appropriations.

EC-1744. A communication from the Administrator, Veterans Administration, reporting, pursuant to law, on a violation of Section 3679 of the Revised Statutes, as amended; to the Committee on Appropriations.

EC-1745. A communication from the Deputy Assistant Secretary of Defense, transmitting, pursuant to law, a report of the January-June 1978 listings of Department of Defense contracts negotiated under authority of Section 2304(a)16, Title 10, U.S. Code; to the Committee on Armed Services.

EC-1746. A communication from the Assistant Secretary of the Army (Manpower and Reserve Affairs), transmitting a draft of proposed legislation to establish volunteers in military department museums' programs, and for other purposes; to the Committee on Armed Services.

EC-1747. 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 Egypt for Defense Articles estimated to cost in excess of $25 million; to the Committee on Armed Services.

EC-1748. A communication from the Comptroller General of the United States, transmitting, pursuant to law, a report entitled "NATO's New Defense Program: Issues for Consideration," July 9, 1979; to the Committee on Armed Services.

EC-1749. A communication from the Director, Defense Security Assistance Agency, reporting, pursuant to law, concerning the American Institute in Taiwan's proposed Letter of Offer to the Coordination Council for North American Affairs for Defense Articles estimated to cost in excess of $25 million; to the Committee on Armed Services.

EC-1750. A communication from the Director, Defense Security Assistance Agency, reporting, pursuant to law, concerning the Department of the Army's proposed Letter of Offer to Saudi Arabia for Defense Articles estimated to cost in excess of $25 million; to the Committee on Armed Services.

EC-1751. A communication from the First Vice President and Vice Chairman, Export-Import Bank of the United States, reporting, pursuant to law, concerning the Angra dos Reis Nuclear Power Plant, Brazil's first nuclear power plant, located on the coast between Rio de Janeiro and Sao Paulo; to the Committee on Banking, Housing, and Urban Affairs.

EC-1752. A communication from the Secretary of the Treasury, transmitting, pursuant to law, a report on the operations of the Exchange Stabilization Fund (ESF) for fiscal year 1978; to the Committee on Banking, Housing, and Urban Affairs.

EC-1753. A communication from the Comptroller General of the United States, transmitting, pursuant to law, a report entitled "The United States Refining Policy in a Changing World Oil Environment," June 29, 1979; to the Committee on Energy and Natural Resources.

EC-1754. A communication from the Chairman, Advisory Council on Historic Preservation, transmitting, pursuant to law, a report on "The Contribution of Historic Preservation to Urban Revitalization," January 1979; to the Committee on Energy and Natural Resources.

EC-1755. A communication from the Chairman, Advisory Council on Historic Preservation, transmitting, pursuant to law, a report from the Task Force on Archeology Policy; to the Committee on Energy and Natural Resources.

EC-1756. A secret communication from the Comptroller General of the United States, transmitting, pursuant to law, a report on factors affecting the withdrawal of U.S. ground combat forces from the Republic of Korea; to the Committee on Foreign Relations.

EC-1757. A communication from the Commissioner, Immigration and Naturalization Service, Department of Justice, transmitting, pursuant to law, orders suspending deportation, as well as a list of the persons involved; to the Committee on the Judiciary.

EC-1758. A communication from the Comptroller General of the United States, transmitting, pursuant to law, a report entitled "Job Corps Should Strengthen Eligibility Requirements and Fully Disclose Performance," July 9, 1979; to the Committee on Labor and Human Resources.

EC-1759. A communication from the Under Secretary of Defense, transmitting, pursuant to law, a report of Department of Defense Procurement from Small and Other Business Firms for October-November 1978; to the Select Committee on Small Business.

EC-1760. A communication from the Under Secretary of Defense, transmitting, pursuant to law, a report of Department of Defense Procurement from Small and Other Business Firms for October 1978; to the Select Committee on Small Business.

PETITIONS

The PRESIDING OFFICER laid before the Senate the following petitions and memorials, which were referred as indicated:

POM-331. A resolution adopted by the Council of the District of Columbia; to the Committee on Governmental Affairs:

"A RESOLUTION IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

"Resolved, by the Council of the District of Columbia, That this resolution may be cited as the "Transfer of Jurisdiction of Part of U.S. Reservation 520 for Highway Purposes Resolution of 1979".

"SEC. 2. The Council hereby accepts the transfer of jurisdiction over the areas shown in the records of the District of Columbia as part of U.S. Reservation 520, east of Bladensburg Road, N.E., from the National Park Service to the District of Columbia for highway purposes as shown on a plat (S.O. 74-253) on file in the Office of the Surveyor.

"SEC. 3. The Secretary to the Council of the District of Columbia shall transmit a copy of this resolution, upon its adoption, to the Mayor, the Surveyor of the District of Columbia, the Speaker of the U.S. House of

Representatives, the President Pro Tempore of the Senate and the Regional Director, National Capital Park, National Park Service.

"SEC. 4. This resolution shall take effect immediately upon its adoption by the Council of the District of Columbia."

POM-332. A resolution adopted by the Legislature of the State of Massachusetts; to the Committee on the Judiciary:

"THE COMMONWEALTH OF MASSACHUSETTS

"Whereas, legislation recodifying the Federal Criminal Code if agreed to by the United States Congress and signed into law by the President, will have far-reaching effects upon the rights of all Americans; and

"Whereas, such legislation is intended to revise the United States Criminal Code to maintain and preserve the principles of the Constitution; and

"Whereas, previous efforts, such as S. 1437, to recodify the Federal Criminal Code failed to maintain and preserve the constitutional rights of all Americans; and

"Whereas, S. 1437, which if enacted, would further the creation of a Nazi-like police state in America, and is thus inimical to the principles and freedoms upon which our country was founded, will again be brought under consideration by the present Congress; now, therefore be it

"Resolved, that the Massachusetts Senate respectfully requests the President of the United States and the Congress to disapprove the bill S. 1437 or a similar version thereof, and to conduct full and complete hearings regarding the revision of the Federal Criminal Code; and be it further

"Resolved, that the Massachusetts Senate respectfully urges the President and the Congress to enact a Federal Criminal Recodification Act which maintains and preserves the principles of the Constitution; and be it further

"Resolved, that copies of these resolutions be transmitted forthwith by the Clerk of the Senate to the President of the United States, the Presiding Officer of each branch of the Congress, the presiding heads of each branch of the Judiciary Committee, and to the Members of the Congress from this Commonwealth."

POM-333. A resolution adopted by the Legislature of the State of New York; to the Committee on Environment and Public Works:

"LEGISLATIVE RESOLUTION No. 613

"Whereas, Tourism is this State's second largest industry, directly generating over four billion dollars for the State's economy and providing approximately four hundred thousand jobs; and

"Whereas, The Senate Task Force on Critical Problems, in its 1976 report, "Vital Signs; Sustaining the Health of Tourism," estimated that at least $1.2 billion in State tourist-oriented commerce is dependent upon highway advertising signs; and

"Whereas, The Federal Highway Administration has previously threatened to penalize New York State by withholding ten percent of the State's highway moneys for failure to enforce the Federal Highway Beautification Act and amendments thereto; and

"Whereas, In passing the 1976 amendments to the Federal Highway Beautification Act, the Congress recognized that the removal of nonconforming signs in certain areas could cause a substantial economic hardship in those areas; and

"Whereas, Section 131(o) Title 23, United States Code, allows the U.S. Secretary of Transportation to exempt from removal certain nonconforming tourist-oriented directional signs the removal of which will cause a substantial economic hardship within defined areas; and

"Whereas, The New York State Department of Transportation has begun studies to determine which nonconforming signs would qualify for an exemption under Section 131 (o) Title 23, United States Code; and

"Whereas, Nonconforming signs which would qualify for an exemption under Section 131(o) Title 23, United States Code, but which are removed before completion of the study cannot be reerected under the current Federal Highway Beautification Act regulations, thereby causing irreparable damage to New York State's tourist industry; and

"Whereas, A report by the Comptroller General of the United States indicates that "In the light of the problems and limited progress by most States in removing nonconforming signs, it appears that the objectives of the Highway Beautification Act will not be accomplished in the near future"; and

"Whereas, The Federal Highway Administration, in recognition of the program's demonstrated ineffectiveness, has failed to request additional funding for this program in the 1980 United States Budget; and

"Whereas, The Federal Highway Administration, in recognition of the chaos, confusion and opposition caused in the several states by the rigid requirements of the Highway Beautification Act, has scheduled public hearings to determine how and if the program can be successfully continued; and

"Whereas, Legislation has been introduced in Congress to amend Section 131, Title 23, United States Code, by removing the penalty provisions of the Highway Beautification Act and allowing enforcement of the removal provisions to be voluntary on the part of the states; now, therefore, be it

"*Resolved*, That this Legislative Body memorializes the State Department of Transporation to stop immediately the removal of nonconforming tourist-oriented directional signs as being destructive to the tourist industry in New York State; and be it further

"*Resolved*, That this Legislative Body respectfully memorializes the Governor of the State of New York to take whatever steps may be desirable or necessary to convince President Carter that the actions of the Federal executive bureaucracy have had the effect of further depressing the economy of New York State; and be it further

"*Resolved*, That this Legislative Body memorializes the Federal Highway Administration of the United States Department of Transporation to cease the harassment of New York State businesses by requiring the removal of signs, and to suspend any further enforcement of the Highway Beautification Act until a determination is made as to how and if the program can be successfully continued; and be it further

"*Resolved*, That this Legislative Body respectfully memorializes the members of the New York State Congressional delegation to take all steps that may be desirable or necessary to prevent the continued activities of the Federal Highway Administration, and to actively support suitable legislation which would remove Federal authority to interfere with State and local government control of advertising under their police powers; and be it further

"*Resolved*, That copies of this resolution, suitably engrossed, be transmitted to the Governor, the Commissioner of the State Department of Transporation, the President and Vice President of the United States, the Secretary of Transporation, the President Pro Tempore and the Secretary of the Senate, the Speaker and Clerk of the House of Representatives and to each Member of the Congress of the United States from the State of New York."

POM-334. A joint resolution adopted by the Legislature of the State of Tennessee; to the Committee on the Judiciary:

"SENATE JOINT RESOLUTION No. 37

"Whereas, In 1945 the McCarren-Ferguson Act was enacted into law and codified in the United States Code, Title 15, Sections 1011 through 1015; and

"Whereas, In such act it was stated that 'congress declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest'; and

"Whereas, In the course of such regulation, the several states have encouraged and required continued improvements in insurance coverages and the provision of insurance at reasonable rates; and

"Whereas, The several states have continually reviewed, experimented with, and altered various approaches to regulation in an effort to assure the public of the availability of insurance at the lowest practicable cost; and

"Whereas, The business of insurance has developed a competitive structure; and

"Whereas, The public has benefited from the competitive structure of the insurance industry including at the retail level a wide variety of organizations, often small businesses, intensely competing, and from regulation of the industry by the several states; and

"Whereas, Federal regulation has repeatedly been shown not to be a panacea; and

Whereas, It is becoming increasingly clear that the establishment of federal regulation increases the cost of government, often increases the cost of products and services to the consumer, and often without providing offsetting benefits to the public; and

"Whereas, Federal regulation often adds confusion and delay; and

"Whereas, There has been no showing that the several states cannot continue to regulate the insurance industry; and

"Whereas, There has been no showing that federal regulation of the insurance industry by limiting state regulation and permitting the application of the federal anti-trust laws will have a salutory effect upon the industry or otherwise benefit the public; and

"Whereas, It is often necessary, subject to state regulations, to pool the resources of several insurance companies in order to provide for coordinated actions to provide effective insurance coverage of certain risks; and to provide the public with reasonable prices, efficiency in which the services are rendered at reasonable cost, and innovation in which new products and services are made available; and

"Whereas, Officials of the federal government have publicly, although unofficially, recommended amending the McCarren-Ferguson Act so as to limit state regulation of the business of insurance; now, therefore,

"Be it resolved by the Senate of the Ninety-First General Assembly of the State of Tennessee, the House of Representatives concurring, That the General Assembly of the State of Tennessee respectfully memorialize the Congress of the United States to reject any legislation amending the McCarren-Ferguson Act, 15 U.S.C. sections 1011 through 1015, 59 Stat. 33 (1945).

"Be it further resolved, That copies of this resolution be forwarded to the secretary of the United States Senate, the clerk of the United States House of Representatives, and to each member of Congress from the State of Tennessee."

POM-335. A joint resolution adopted by the Legislature of the State of Illinois; to the Committee on Governmental Affairs:

"SENATE JOINT RESOLUTION No. 33

"Whereas, the federal government of the United States, by actions of both the Legislative branch and the Executive branch, re-

quires the states to implement new programs and provide increased levels of service under existing programs; and

"Whereas, In order to implement new programs and provide increased levels of service as required by the federal government, the states must incur significant costs which must be paid for out of state revenues, existing or to be raised by the imposition of additional taxes; and

"Whereas, There exists, throughout the United States, a growing resentment of the heavy burden of taxation and an active rejection of existing and proposed levels and methods of revenue raising; and

"Whereas, The public outcry against taxation makes it increasingly difficult for the states to raise the revenues necessary to finance the programs and services which the states are required to provide by the federal government; and

"Whereas, It is a matter of simple equity that a level of government which establishes programs or services in the public interest should provide the means for financing those programs and services; therefore, be it

"Resolved, by the Senate of the Eighty-First General Assembly of the State of Illinois, the House of Representatives concurring herein, that the General Assembly of the State of Illinois respectfully memorializes the President and the Congress of the United States to undertake such actions as may be necessary to ensure that the federal government reimburses each state for all costs incurred with respect to implementing new programs or providing increased levels of service under existing programs pursuant to any law enacted by the United States Congress after January 1, 1980, or any executive order or regulation issued by the President of the United States after January 1, 1980; and be it further

"Resolved, That the Secretary of State 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 Illinois in the Congress of the United States."

POM-336. A resolution adopted by the Cheektowaga Town Board, Cheektowaga, New York, regarding Federal payment of AWT (Advanced Wastewater Treatment) and increased State O&M Aid; to the Committee on Environment and Public Works.

POM-337. A resolution adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to Title V Funding; to the Committee on Governmental Affairs.

POM-338. A resolution adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to RARE II; to the Committee on Energy and Natural Resources.

POM-339. A resolution adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to Cost Sharing Legislation (H.R. 4127); to the Committee on Environment and Public Works.

POM-340. A resolution adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to Snow Survey Programs in the Western United States; to the Committee on Agriculture, Nutrition, and Forestry.

POM-341. A resolution adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to a Convention on the Conservation and Migratory Species of Wild Animals; to the Committee on Foreign Relations.

POM-342. A resolution adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to Alaska Lands; to the Committee on Energy and Natural Resources.

POM-343. A policy statement adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to Assistance to Small Business; to the Select Committee on Small Business.

POM-344. A resolution adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, in support of U.S. Congress actions on mental health programs for Native American Pacific Islanders Populations; to the Committee on Energy and Natural Resources.

POM-345. A resolution adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, to aid in the potential economic development of Canton Island in the Central Pacific for the benefit of the people of the Kiribati Republic (Gilbert Islands), State of Hawaii and Territory of American Samoa; to the Committee on Energy and Natural Resources.

POM-346. A policy statement adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to Pacific Basin Economic and Social Development; to the Committee on Governmental Affairs.

POM-347. A resolution adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to Mortgage Bonds; to the Committee on Finance.

POR-348. A policy statement adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to Biomass-Derived Alcohol Fuel; to the Committee on Energy and Natural Resources.

POM-349. A resolution adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to the Petroleum Fuels Crisis; to the Committee on Energy and Natural Resources.

POM-350. A resolution adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to Petroleum Allocation Adjustments Based Upon Population Increases; to the Committee on Energy and Natural Resources.

POM-351. A resolution adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to Mandatory Allocation Program for Middle Distillates; to the Committee on Energy and Natural Resources.

POM-352. A resolution adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to Utilizing Renewable Resources in the Production of Liquid Fuels; to the Committee on Energy and Natural Resources.

POM-353. A policy statement adopted at the 1979 Annual Meeting of the Western Governor's Conference, Elkhorn at Sun Valley, Idaho, relating to Wind Loan Guaranty Program; to the Committee on Energy and Natural Resources.

POM-354. A resolution adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to Geothermal Resources Assessment and Definition; to the Committee on Energy and Natural Resources.

POM-355. A resolution adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to Nuclear Wastes; to the Committee on Energy and Natural Resources.

POM-356. A resolution adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to Amtrak Rail Passenger Service in the West; to the Committee on Commerce, Science, and Transportation.

POM-357. A resolution adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to Funding for Off-System Roads; to the Committee on Commerce, Science, and Transportation.

POM-358. A resolution adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to the Preservation and Improvement of Rangeland Resources; to the Committee on Energy and Natural Resources.

POM-359. A resolution adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to Federal Funding for States and Regional DOE Offices; to the Committee on Energy and Natural Resources.

POM-360. A policy statement adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to Passive Solar Design; to the Committee on Energy and Natural Resources.

POM-361. A policy statement adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to Appropriate Energy Technology; to the Committee on Energy and Natural Resources.

POM-362. A resolution adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to Oil Shale; to the Committee on Energy and Natural Resources.

POM-363. A resolution adopted at the 1979 Annual Meeting of the Western Governors' Conference, Elkhorn at Sun Valley, Idaho, relating to Uniform Weight and Length Laws; to the Committee on Environment and Public Works.

POM-364. A petition from a private citizen, relating to Nicaragua; to the Committee on Foreign Relations.

REPORTS OF COMMITTEES

The following reports of committees were submitted:

By Mr. KENNEDY, from the Committee on the Judiciary, with an amendment:

S. 300. A bill to restore fair and effective enforcement of the antitrust laws (together with minority and additional views) (Rept. No. 96-239).

By Mr. HEFLIN, from the Committee on the Judiciary, without amendment:

S J. Res. 77. A joint resolution congratulating the men and women of the Apollo program upon the tenth anniversary of the first manned landing on the Moon and requesting the President to proclaim the period of July 16 through 24, 1979, as "United States Space Observance" (Rept. No. 96-240).

EXECUTIVE REPORTS OF COMMITTEES

The following executive reports of committees were submitted:

By Mr. JACKSON, from the Committee on Energy and Natural Resources:

John T. Rhett, of Virginia, to be Federal Inspector General for the Alaska Natural Gas Transportation System.

(The above nomination from the Committee on Energy and Natural Resources was reported with the recommendation that it be confirmed, subject to the nominee's commitment to respond to requests to appear and testify before any duly constituted committee of the Senate.)

Mr. JACKSON. Mr. President, today the Committee on Energy and Natural Resources ordered reported favorably the nomination of John T. Rhett, of Virginia, to be Federal Inspector for the Alaska Natural Gas Transportation System.

I ask unanimous consent that his biography be printed in the RECORD.

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

BIOGRAPHICAL INFORMATION ON JOHN T. RHETT

John T. Rhett joined the Environmental Protection Agency in March 1973 as the Deputy Assistant Administrator for Water Program Operations following his retirement as a Colonel in the U.S. Army Corps of Engineers. He is responsible for administering EPA's major operating programs in the water pollution contol field: specifically, the multibillion dollar grant program for Construction of Municipal Wastewater Treatment Facilities; the National Operator Training and Maintenance Program for Municipal Wastewater Treatment Facilities; the Federal National Response Program (in conjunction with the U.S. Coast Guard) for Oil and Hazardous Materials Spills into Waters of the United States; the National Ocean Dumping and Discharge Programs; and the Environmental Emergencies.

A commissioned officer with the Corps of Engineers since 1945, Colonel Rhett served at posts both here and abroad. His assignments included two years with SHAPE; Chief of the Engineering Division of the U.S. Army Construction Agency in Vietnam; District Engineer of the Louisville Engineering District; and Resident Member, Board of Engineers for Rivers and Harbors.

Receiving his B.S. degree from the U.S. Military Academy, Colonel Rhett also has a Masters degree in Engineering from the University of California and a Masters in International Relations from George Washington University. He is a member of Chi Epsilon Honorary Engineering Fraternity; (Fellow) American Society of Civil Engineers; (Diplomate) American Academy of Environmental Engineers; (Member) Society of American Military Engineers; (Member) Water Pollution Control Federation; and a Registered Professional Engineer in both Florida and the District of Columbia. He has received EPA's highest award, the Gold Medal for Exceptional Service (1976), as well as Outstanding Performance awards—1978 and 1979.

Born in 1925, Colonel Rhett and his wife Helen reside in Arlington, Virginia.

By Mr. WILLIAMS, from the Committee on Labor and Human Resources:

Thomas Patrick Bergin, of Indiana, to be a Member of the National Council on the Arts.

(The above nomination from the Committee on Labor and Human Resources was reported with the recommendation that it be confirmed, subject to the nominee's commitment to respond to requests to appear and testify before any duly constituted committee of the Senate.)

By Mr. KENNEDY, from the Committee on the Judiciary:

Maurice Rosenberg, of New York, to be an Assistant Attorney General.

(The above nomination from the Committee on the Judiciary was reported with the recommendation that it be confirmed, subject to the nominee's commitment to respond to requests to appear and testify before any duly constituted committee of the Senate.)

By Mr. KENNEDY, from the Committee on the Judiciary:

Thomas M. Reavley, of Texas, to be U.S. Circuit Judge for the Fifth Circuit.

Henry A. Politz, of Louisiana, to be U.S. Circuit Judge for the Fifth Circuit.

Carolyn D. Randall, of Texas, to be U.S. Circuit Judge for the Fifth Circuit.

Joseph W. Hatchett, of Florida, to be U.S. Circuit Judge for the Fifth Circuit.

Albert J. Henderson, of Georgia, to be U.S. Circuit Judge for the Fifth Circuit.

R. Lanier Anderson III, of Georgia, to be U.S. Circuit Judge for the Fifth Circuit.

Reynaldo G. Garza, of Texas, to be U.S. Circuit Judge for the Fifth Circuit.

Francis D. Murnaghan, Jr., of Maryland, to be U.S. Circuit Judge for the Fourth Circuit.

FOREIGN CURRENCY REPORTS

In accordance with the appropriate provisions of law, the Secretary of the Senate herewith submits the following reports of standing committees of the Senate, certain joint committees of the Congress, delegations and groups, and select and special committees of the Senate, relating to expenses incurred in the performance of authorized foreign travel:

CONSOLIDATED REPORT OF EXPENDITURE OF FOREIGN CURRENCIES AND APPROPRIATED FUNDS FOR FOREIGN TRAVEL BY MEMBERS AND EMPLOYEES OF THE U.S. SENATE ENERGY AND NATURAL RESOURCES COMMITTEE, FROM APR. 14, TO JUNE 21, 1979

Name and country	Name of currency	Per diem		Transportation		Miscellaneous		Total	
		Foreign currency	U.S. dollar equivalent or U.S. currency	Foreign currency	U.S. dollar equivalent or U.S. currency	Foreign currency	U.S. dollar equivalent or U.S. currency	Foreign currency	U.S. dollar equivalent or U.S. currency
David C. Russell: Switzerland	Swiss franc	1,201.90	700.00		757.00			1,201.90	1,457.00
Thomas L. Laughlin: Switzerland	Swiss franc	1,030.20	600.00		757.00			1,030.20	1,357.00
Jon M. DeVore: Germany	Deutsche mark	1,848.88	968.00		1,284.00			1,848.88	2,252.00
Total			2,268.00		2,798.00				5,066.00

June 28, 1979.

HENRY M. JACKSON,
Chairman, Committee on Energy and Natural Resources.

CONSOLIDATED REPORT OF EXPENDITURE OF FOREIGN CURRENCIES AND APPROPRIATED FUNDS FOR FOREIGN TRAVEL BY MEMBERS AND EMPLOYEES OF THE U.S. SENATE, U.S. DELEGATION TO PARIS AIR SHOW, SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION, FROM JUNE 7 TO JUNE 16, 1979

Name and country	Name of currency	Per diem		Transportation		Miscellaneous		Total	
		Foreign currency	U.S. dollar equivalent or U.S. currency	Foreign currency	U.S. dollar equivalent or U.S. currency	Foreign currency	U.S. dollar equivalent or U.S. currency	Foreign currency	U.S. dollar equivalent or U.S. currency
Assuras, Janene: France	French franc	3,132	720.00					3,132	720.00
Barclay, Charles M.: France	French franc	3,132	720.00					3,132	720.00
Cannon, Howard W.: France	French franc	1,822	418.85					1,822	418.85
Krebs, Frank X.: France	French franc	3,132	720.00					3,132	720.00
McAuliffe, Mary E.: France	French franc	3,132	720.00					3,132	720.00
Ris, William K., Jr.: France	French franc	3,132	720.00					3,132	720.00
Sarvis, Aubrey L.: France	French franc	3,132	720.00					3,132	720.00
Semos, William: France	French franc	3,132	720.00					3,132	720.00
Sobsey, Chester B.: France	French franc	3,132	720.00					3,132	720.00
Stewart, John G.: France	French franc	3,132	720.00					3,132	720.00
Total			6,898.85						6,898.85

June 29, 1979.

HOWARD W. CANNON,
Chairman, Committee on Commerce, Science, and Transportation.

Note: Transportation from Washington, D.C., to Paris, France, and return, furnished by Department of Defense.

CONSOLIDATED REPORT OF EXPENDITURE OF FOREIGN CURRENCIES AND APPROPRIATED FUNDS FOR FOREIGN TRAVEL BY MEMBERS AND EMPLOYEES OF THE U.S. SENATE, COMMITTEE ON FOREIGN RELATIONS, FROM APRIL 1, TO JUNE 30, 1979

Name and country	Name of currency	Per diem		Transportation		Miscellaneous		Total	
		Foreign currency	U.S. dollar equivalent or U.S. currency	Foreign currency	U.S. dollar equivalent or U.S. currency	Foreign currency	U.S. dollar equivalent or U.S. currency	Foreign currency	U.S. dollar equivalent or U.S. currency
Senator Joseph R. Biden, Jr.:									
Federal Republic of Germany	Mark	320.88	168.00	62.80	32.88			383.68	200.88
United States	Dollar				1,227.00				1,227.00
Senator Claiborne Pell:									
Norway	Kroner	1,301.35	252.00	450	87.05			1,750.88	339.05
Sweden	Kroner	1,116.50	252.00					1,116.90	252.00
Switzerland	Franc	60.879	35.00					60.879	35.00
United States	Dollar				575.00				575.00
Senator Jacob K. Javits: Sudan	Pound	103.295	207.00					103.295	207.00
William B. Bader:									
United Kingdom	Pound	174.16	364.00	37.32	78.00			121.48	442.00
United States	Dollar				752.00				752.00
Geryld B. Christianson:									
Czechoslovakia	Crown	1,431	136.00		366.00			1,431	502.00
Austria	Schillings	1,338	96.00					1,338	96.00
Switzerland	Franc	517	300.00					517	300.00
Netherlands	Guilders	329	160.00					329	160.00
Norway	Kroner	1,301.35	252.00	450	87.05			1,751.35	339.05
Sweden	Kroner	746.9	168.00					746.9	168.00
Switzerland	Franc	520.2	300.00					520.2	300.00
United States	Dollar				575.00				575.00
Alfred Friendly, Jr.:									
United Kingdom	Pound	131.4	265.00					131.4	265.00
Federal Republic of Germany	Mark	481	252.00	62.80	32.88			523.8	284.88
Belgium	Franc	6,600	214.00					6,600	214.00
France	Franc	1,980	450.00					1,980	450.00
United States	Dollar				837.00				837.00
Clifford P. Hackett: France	Franc	1,109.4	258.00					1,109.40	258.00
Edward E. Kaufman:									
Federal Republic of Germany	Mark	320.88	168.00	62.80	32.88			383.68	200.88
United States	Dollar				1,227.00				1,227.00
Albert A. Lakeland, Jr.:									
Sudan	Pound	75.05	150.40					75.05	150.40
Morocco	Dirham	300	75.00					300.00	75.00
John B. Ritch:									
Norway	Kroner	1,084.44	210.00	555.13	107.55	113.28	22.00	1,752.85	339.05
United Kingdom	Pound	131.40	265.00					131.40	265.00
Federal Republic of Germany	Mark	420	220.00	104.80	54.88	19	10.00	543.80	284.88
France	Franc	1,672	380.00	264	60.00	44	10.00	1,980	450.00
Belgium	Franc	6,013.8	195.00	462.6	5.00	123.60	4.00	6,600	214.00
United States					673.00				673.00
Patrick A. Shea:									
Sudan	Pound	103.295	207.00					103.295	207.00
Morocco	Dirham	300	75.00					300	75.00
Garry V. Wenske:									
People's Republic of China	Yuan	475.89	300.00					475.89	300.00
Hong Kong	Hong Kong dollar	382.50	75.00					382.50	75.00
Total			6,449.40		6,819.67		46.00		13,315.07

June 28, 1979.

FRANK CHURCH,
Chairman Committee on Foreign Relations.

INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

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

By Mr. DURENBERGER:

S. 1470. A bill to limit oil imports; to the Committee on Energy and Natural Resources.

S. 1471. A bill to redesignate the Department of Commerce as the Department of Commerce and International Trade, to consolidate in such department various functions of the Government with respect to international trade, and for other purposes; to the Committee on Governmental Affairs.

By Mr. DECONCINI:

S. 1472. A bill to amend title 28 of the United States Code to provide for special venue provisions in cases relating to the environment; to the Committee on the Judiciary.

By Mr. METZENBAUM (for himself, Mr. WILLIAMS, Mr. RIEGLE, Mr. CRANSTON, Mr. PELL, Mr. JAVITS, Mr. RANDOLPH, Mr. DECONCINI, Mr. LEVIN, Mr. KENNEDY, Mr. HART, and Mr. DURKIN):

S. 1473. A bill to amend the National Labor Relations Act to provide that the duty to bargain collectively includes bargaining with respect to retirements benefits for retired employees; to the Committee on Labor and Human Resources.

By Mr. INOUYE:

S. 1474. A bill to establish a national merchant marine policy, to create a Cabinet level coordinating Council to implement such policy, and for other purposes; to the Committee on Governmental Affairs.

By Mr. BENTSEN:

S. 1475. A bill to amend the Internal Revenue Code of 1954 to provide tax incentives to encourage the creation and growth of new and innovative firms; to the Committee on Finance.

By Mr. CRANSTON:

S. 1476. A bill to prohibit certain territorial restrictions in professional sports, and for other purposes; to the Committee on the Judiciary.

By Mr. KENNEDY (for himself and Mr. DECONCINI):

S. 1477. A bill to provide for improvements in the structure and administration of the Federal courts, and for other purposes; to the Committee on the Judiciary.

By Mr. DURKIN (for himself, Mr. LEAHY, and Mr. STAFFORD):

S. 1478. A bill entitled the "Home Heating Oil Supply Protection Act of 1979"; to the Committee on Energy and Natural Resources.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. DURENBERGER:

S. 1470. A bill to limit oil imports; to the Committee on Energy and Natural Resources.

MANDATORY OIL IMPORT CONTROL ACT OF 1979

Mr. DURENBERGER. Mr. President, I rise today, to introduce the Mandatory Oil Import Control Act of 1979. The events of the past 24 hours have further convinced me of the urgent need for such a drastic measure. Less than 2 weeks ago, the President agreed with the leaders of six other nations that we must limit our imports. And yet, yesterday, from his mount at Camp David the President anounced he had received personal assurances from Saudi Arabia that they will increase its crude oil production "for a significant and specific period of time." I am deeply concerned that this indicates the President will grasp at this straw as a quick fix to our energy shortages. That we will be misled into believing our problems can be solved by importing more. This is precisely what we cannot and must not do.

The measures contained in this legislation are necessary to insure our national economy and the economies of our closest allies from ruinous energy inflation, and to put American energy policy in the hands of American policymakers once again.

The bill I am introducing takes the form of an import quota which will be used to restrict the amount of crude oil and petroleum products that can be brought into the United States each year. Import quotas are usually introduced to protect an American industry from low-priced foreign competition and

to guarantee an artificially high domestic price. This bill is intended to have the reverse effect.

Unlike other commodities subject to quota, the world supply of crude oil is not sufficient to meet demand at current prices. And the world price of petroleum creates windfalls rather than bankruptcy for domestic producers. These circumstances occur because pricing and production decisions are made by a cartel of OPEC ministers and not within an international commodity market. So long as demand for crude oil continues to grow and the OPEC nations have the power to restrict supply, the world price of crude oil will continue to escalate at rates that spell disaster for the nations of the West.

These facts were recognized by the leaders who recently met at a seven-nation summit conference in Tokyo, Japan. They agreed that restricting demand for petroleum was the best weapon to fight the high cost of OPEC oil. I commend the President for seeing the wisdom of this policy and for promising American participation in this effort.

Although the President has the power to fulfill his commitment under existing law, I will work for passage of the Mandatory Oil Import Control Act, because I believe that Congress should take this opportunity to shape the energy policy of the United States. Import restrictions will require the allocation by license of the available crude oil and petroleum products to refineries, petrochemical plants and utilities. Through legislative design of the licensing process, the Congress can guarantee equitable distribution of the limited imports and restore competitive practices in the domestic market.

Although a limitation on oil imports is an important and necessary step to a more certain energy future, we should not be misled into believing that it is a cure-all for our energy problems. It is more inoculation against future crisis than remedy for our current ills. As the result of an oil embargo, we went through a period in 1974 which was similar in most respects to the current crisis. There were gas lines. There was a shutdown by the independent trucking industry. We suffered a permanent loss of $60 billion in GNP growth. A worldwide recession followed the dramatic and disastrous OPEC price increase.

However, we climbed out of that crisis. We did it not by conserving enough energy to balance supply and demand. We did it not by increasing domestic petroleum production. We did not create huge new supplies of synthetic fuels. We did not switch to abundant alternative energy resources. We did not become a solar society relying on new and renewable energy resources. Had we done any of these things, had we even taken a few steps in those directions, we would not have the energy crisis of 1979.

We got out of the crisis of 1974 by doubling our imports of OPEC oil. In 1973 we imported an average of 2,993,000 barrels of OPEC oil per day. In 1978 we imported 5,619,000 barrels of oil per day. We achieved this remarkable result despite an avowed policy to become independent from foreign oil and despite all the legislation and regulation directed toward that end.

Mr. President, I have described the Oil Import Control Act as a form of inoculation. It is designed to prevent us from becoming even more dependent on foreign oil and thus even more susceptible to economic ruination in the future. But I have also stated that it is not a remedy for our current ills.

In fact, unless we take the tough actions necessary to curb demand, it may represent the institutionalization of gas lines. Unless we act to increase the domestic supply of petroleum and alternative fuels and to restore competitive practices to the oil industry, it may cause the price of domestic crude to exceed the world price. The Mandatory Oil Import Control Act cannot stand alone in an energy crisis. It must be combined with measures that would achieve significant conservation, encourage new supplies, develop alternative resources, protect those who are economically disadvantaged, and insulate the American petroleum market from the market price of foreign crude. Seen in this light, the bill I introduce today is a modest part of an extensive and necessary program to cure our energy ills.

The Mandatory Oil Import Control Act of 1979 was not drafted as the final form of an oil import quota. Rather it was designed as a simple and clean bill to be used as a starting point in the discussion and debate on import restrictions.

However, if we keep in mind that two key objectives of this bill are to insure equity and introduce competitive practices in the marketplace, then it is clear that our deliberations should include a number of other points.

For example, one of the questions we will have to deal with is whether the program should be administered by the Department of Energy or whether a new agency, a nonprofit public corporation, should be created to control imports.

I would like to suggest several additional factors which I believe should be considered in the drafting of the final bill. First, although I am proposing that the aggregate amounts of crude oil and refined products be limited to those imported in 1978, I do not necessarily believe that the full amount should be allocated or that the allocations should go only to those importers of record in 1978. Additionally, we should review the advisability of omitting from the ceiling any crude oil and petroleum products imported for use in the Strategic Petroleum Reserve.

Second, we should be certain that licenses and allocations go only to direct users, not resellers; and that the licensees could not sell or exchange their allocations or licenses with others unless approved by the Federal Government and only for certain unusual and necessary cases. At the same time, we must recognize and preclude situations where licensees can cut off supplies to historical users.

Third, we should avoid a number of other pitfalls which have plagued other quota and allocation programs. These include: we should not allow the creation of carryovers, or borrowing, or "banking" practices; we need to allow for new entries and hardship cases, but the rules for exceptions should be specific enough so that all sectors of American society and economy know the program will be constant and they can plan accordingly.

In this legislation the import level is tied to the daily average imports for 1978. According to the Monthly Energy Review of May 1979, a publication of the Department of Energy, crude oil and petroleum product imports averaged 8,038,000 barrels per day in 1978. This level is somewhat below the 8.5 MMB/d agreed to by President Carter at the recent summit, but would begin us upon a path toward reducing our dependence on foreign oil.

Mr. President, I ask unanimous consent that the text of my bill be printed in the RECORD and recommend the Mandatory Oil Impact Control Act of 1979 to the consideration of my colleagues.

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

S. 1470

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Mandatory Oil Import Control Act of 1979".

PURPOSE

SEC. 2. It is the purpose of this Act to—

(1) safeguard national security,

(2) reduce dependence on imported fuels,

(3) strengthen the United States dollar,

(4) encourage energy conservation,

(5) encourage domestic development of energy supplies, and

(6) accelerate the development and use of alternative energy sources such as synthetic fuels, oil shale, biomass, geothermal, wind, solar, tidal, and ocean currents.

DEFINITIONS

SEC. 3. For purposes of this Act the term—

(1) "United States" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, and the United States Virgin Islands or any other territory or possession of the United States;

(2) "crude oil" includes natural gas condensates, but excludes methane;

(3) "petroleum products" includes all products refined or manufactured from crude oil and residual oil, with the exception of petrochemicals and manufactured products containing petrochemicals;

(4) "qualified buyer" means a citizen of the United States, or a corporation, or any department, agency, or other instrumentality of the United States or any State;

(5) "person" includes any individual, corporation, governmental agency, department, or instrumentality, or other entity;

(6) "Secretary" means the Secretary of Energy; and

(7) "license" means a permit to purchase crude oil or petroleum products issued by the Secretary under section 7.

LIMITATIONS ON IMPORTATION

SEC. 4. (a) On and after the effective date of this Act, no person shall import into the United States any crude oil or petroleum products unless—

(1) such crude oil or petroleum products have been purchased under a license issued by the Secretary, and a copy of such license accompanying the bill of sale verifying such purchase is submitted to the customs officer at the point or port of entry, or

(2) such petroleum product is manufactured from crude oil purchased under a license issued by the Secretary and an affidavit

attesting to such manufacture, together with a copy of the bill of sale verifying the original purchase of crude oil, is submitted to the customs officer at the point or port of entry.

(b) Any person who imports crude oil or petroleum products into the United States except in accordance with this Act shall be punished by a fine not exceeding $1,000,000 or by imprisonment not exceeding one year, or both.

ALLOCATION

SEC. 5. (a) The Secretary shall promulgate regulations for the fair and equitable allocation by sale of all crude oil and petroleum products imported into the United States under licenses issued under this Act taking into account—

(1) the need to maximize efficiency of the distribution system;

(2) the necessity to encourage competitive practices;

(3) changes in the refining and production system that would require changes in distribution; and

(4) the need to adjust regional and State imbalances.

(b) The provisions of title V of the Department of Energy Organization Act shall apply to any rule or regulation, or any order having the applicability and effect of a rule as defined in section 551(4) of title 5, United States Code, issued pursuant to this Act.

LICENSES

SEC. 7. (a) Licenses issued by the Secretary under this Act shall not permit the importation of crude oil or petroleum products in any year in excess of the aggregate number of barrels by category of crude oil and petroleum products which were imported into the United States during the calendar year 1978.

(b) Each license shall specify by category the amount of crude oil and petroleum products a licensee may import during a given calendar year.

(c) No license shall be issued to a person other than a person who—

(1) is an end user of; or

(2) shall directly refine crude oil or market petroleum products.

(d) No license may be transferred by a licensee without the written approval of the Secretary. The Secretary shall not approve the transfer of a license except for unusual or essential purposes.

INCREASES OF LICENSED IMPORT AMOUNTS

SEC. 8. In cases of national emergency, as determined by the President, the Secretary shall issue permits for the importation of crude oil and petroleum products to the extent necessary to insure access by the Armed Forces of the United States to needed supplies of crude oil and petroleum products.

REDUCTIONS OF LICENSED IMPORT AMOUNTS

SEC. 9. The President may reduce the amounts of crude oil and petroleum products which may be imported into the United States below the 1978 level under licenses issued pursuant to this Act if such reduction is made to conform with the provisions of a treaty or international agreement which has been ratified by the Senate or approved by the Congress.

TERMINATION

SEC. 10. The provisions of this Act shall terminate December 31, 1985.

By Mr. DURENBERGER:

S. 1471. A bill to redesignate the Department of Commerce as the Department of Commerce and International Trade, to consolidate in such Department various functions of the Government with respect to international trade, and for other purposes; to the Committee on Governmental Affairs.

DEPARTMENT OF COMMERCE AND INTERNATIONAL TRADE ORGANIZATION ACT

Mr. DURENBERGER. Mr. President, today I am introducing a bill to redesignate the Department of Commerce as the Department of Commerce and International Trade, and to consolidate various international trade functions in this Department. This bill is identical to the one introduced in the House by Congressmen FRENZEL of Minnesota and JONES of Oklahoma. As the Governmental Affairs Committee begins hearings this week on reorganization of trade activities, I believe we should examine the Jones-Frenzel alternative along with others offered by Senators RIBICOFF and ROTH, and Senator BYRD.

This bill is designed to achieve the same goals as S. 377 introduced by Senators ROTH and RIBICOFF, and S. 891 introduced by Senator BYRD, that is, to consolidate essential trade functions and enhance our competitive position in world markets. The bill would use a different approach, however. Instead of establishing a new Cabinet level Department, this bill would expand the functions of the Commerce Department and rename it the Department of Commerce and International Trade. It would not alter the Office of Special Trade Representative because of the belief that this office has functioned quite well in the White House.

Essentially, the bill would consolidate in one department jurisdiction over four trade functions:

First, industry affairs related to international trade;

Second, export promotion and financing activities;

Third, formulation and implementation of U.S. policy with respect to unfair international trade practices; and

Fourth, trade reporting and monitoring.

The new Department would also coordinate the activities of the Export-Import Bank and OPIC. It would not be responsible for trade and export promotion programs of the Agriculture Department, the adjustment assistance programs currently being administered by the Labor Department, the economic policymaking functions of the State and Treasury Departments, or the quasi-judicial functions in import relief and unfair trade practices handled now by the International Trade Commission.

As we begin this important discussion of how to reorganize our trade activities to strengthen our world position, I urge a careful look at the Jones-Frenzel alternative.

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. 1471

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

SHORT TITLE

SECTION 1. This Act may be cited as the "Department of Commerce and International Trade Organization Act".

DEFINITION

SEC. 2. As used in this Act, the term "function" includes any duty, obligation, power, authority, responsibility, right, privilege, activity, or program.

TITLE I—FINDINGS AND PURPOSES

FINDINGS

SEC. 101. The Congress finds that—

(1) the output of approximately one-third of the crop acreage of the United States is exported and about one out of every nine manufacturing jobs depends, directly or indirectly, on exports;

(2) it is in the national interest to maintain and promote the export of United States goods and services and thereby contribute to the health of our domestic economy;

(3) it is in the national interest to assure continued access to foreign markets by United States producers of goods and services; and

(4) the capability of existing Federal Government departments and agencies to deal with issues of international trade is fragmented and dispersed, resulting in inadequate and uncoordinated attention being given to these important issues.

PURPOSE; FUNCTIONS

SEC. 102. (a) The purpose of this Act is to establish in the executive branch of the Federal Government a coherent organizational structure to promote the international economic interests of the United States through the consolidation of separate existing agencies which share jurisdiction over—

(1) industry affairs relating to international trade;

(2) export promotion and financing activities;

(3) the formulation and implemenation of United States policy with respect to unfair international trade practices; and

(4) trade reporting and monitoring.

(b) The functions vested in the Department of Commerce under this Act are—

(1) to formulate and implement policy on international trade matters which will promote the export of United States agricultural commodities, industrial and service products, and raw materials in order to strengthen the international trade position of the United States and ensure that American business and labor are protected from unfair international trade practices;

(2) to direct a comprehensive program of collecting and analyzing information on domestic and foreign business, labor, and commercial trends;

(3) to seek and provide new trade and commercial opportunities for United States businesses abroad;

(4) to assist small businesses in developing export markets;

(5) to direct long-range planning on international trade matters;

(6) to facilitate and aid in financing exports of goods and services in cooperation with other appropriate Government agencies;

(7) to consult with other departments and agencies where appropriate to assure the effective administration of programs which have international trade impact;

(9) to administer export controls, including controls on export of strategic goods and technology;

(10) to gather and disseminate information on imports, including their effects on domestic production, employment, and consumption, in order to help ensure appropriate and prompt responses to changing import trends;

(11) to act to ensure adequate supplies at competitive prices of critical materials necessary for national security and the continued functioning of the Nation's economy; and

(12) to conduct such studies and investi-

gations as may be requested by the President or Congress.

(c) The functions vested in the Special Trade Representative under this Act are—

(1) to direct United States participation in multilateral and bilateral trade negotiations;

(2) to direct and coordinate with other appropriate departments and agencies the enforcement of United States law and policy on trade matters;

(3) to negotiate and implement commercial and trade agreements with foreign nations, including commodity agreements; and

(4) to oversee the conduct of international energy negotiations.

TITLE II—REORGANIZATION OF INTERNATIONAL TRADE FUNCTIONS

REDESIGNATION

SEC. 201. The Department of Commerce is hereby redesignated the Department of Commerce and International Trade (hereinafter in this Act referred to as the "Department"), and the Secretary of Commerce or any other official of the Department of Commerce is hereby redesignated the Secretary or official, as appropriate, of Commerce and International Trade.

PRINCIPAL OFFICERS

SEC. 202. There shall be in the Department an Under Secretary for Domestic Commerce and an Under Secretary for International Trade, each of whom shall be appointed by the President, by and with the advice and consent of the Senate. Either Under Secretary, as designated by the Secretary, shall act for and exercise the functions of the Secretary during any period of absence or disability of the Secretary or in the event of a vacancy in the Office of the Secretary. The Secretary shall prescribe the sucession to the functions of the Secretary in the event of absence or disability of or vacancy in the office of each such Under Secretary.

DUTIES OF THE SECRETARY

SEC. 203. (a) The Secretary of Commerce and International Trade (hereinafter in this Act referred to as the "Secretary") in carrying out the purposes of this Act shall promote and undertake the development, collection, and dissemination, of technical, statistical, economic, and other information relative to domestic and international trade and investment; consult and cooperate with other executive agencies in gathering information regarding the status of international trade and investment in which the United States or other countries may be participants; and consult and cooperate with State and local governments and other interested parties, including, when appropriate, holding informal public hearings.

(b) Order and actions of the Secretary in the exercise of the functions transferred under this Act, and orders and actions of any entity the responsibilities of which are transferred to the authority of the Secretary and vested in the Secretary pursuant to the functions specifically assigned to any such entity by this Act or any other Act of Congress, shall be subject to judicial review to the same extent and in the same manner as if such orders and actions had been by the department or agency or other authority exercising such functions immediately preceding their transfer. Any statutory requirements relating to notice, hearings, actions upon the record, or administrative review that apply to any functions transferred by this Act shall apply to the exercise of such functions by the Secretary.

(c) In the exercise of the functions transferred under this Act, the Secretary shall have the same authority as that vested in the department, agency, or authority exercising such functions immediately preceding their transfer, and their actions in exercising such functions shall have the same force and effect as when exercised by such department, agency, or authority.

(d) In carrying out the functions transferred under this Act, the Secretary shall consult, exchange information, and carry on joint planning, research, and other activities with the Secretary of the Treasury, the Secretary of State, the Secretary of Agriculture, and the heads of such other executive agencies as the Secretary deems appropriate.

(e) The Secretary shall jointly study, with the Secretary of State, the Secretary of the Treasury, the Secretary of Agriculture, and the heads of such other executive agencies as the Secretary deems appropriate, how Federal policies and programs can ensure that international trade and investment systems most effectively serve both national and international economic needs. The Secretary shall include in the annual report required by section 307 of this Act an account of the studies and activities conducted under this subsection, including any legislative recommendations which the Secretary determines desirable.

TRANSFER OF FUNCTIONS AND AGENCIES TO THE DEPARTMENT

SEC. 204. (a) There are transferred to and vested in the Secretary—

(1) such functions of the Secretary of State, the Department of State and officers and components of such Department as relate to—

(A) commercial affairs and business activities, including export promotion, but not including the reporting of economic conditions in foreign countries; and

(B) international investment policy;

(2)(A) All functions of the Secretary of the Treasury, the Department of Treasury, and any officer or component thereof which are carried out through the Assistant Secretary of the Treasury for International Affairs, except those functions of such Assistant Secretary which relate to monetary policy, international exchange, international investment, Saudi Arabian affairs, and United States membership in bilateral and multilateral monetary institutions;

(B) all functions of the Secretary of the Treasury relating to dumping and countervailing duties;

(C) all functions of the Secretary of the Treasury administered through the office known as the Office of Foreign Assets Control;

(3) all functions of the Special Representative for Trade Negotiations, the Office of the Special Representative for Trade Negotiations, and all officers and components thereof with respect to relief from unfair trade practices under chapter 1 of title II of the Trade Act of 1974 or under the Trade Agreements Act of 1979;

(4) the functions of the International Trade Commission (A) with respect to uniform statistical data under section 484(e) of the Tariff Act of 1930 and section 608 of the Trade Act of 1974; (B) with respect to tariff schedules and summaries under sections 332 and 484(e) of the Tariff Act of 1930 and section 201 of the Tariff Classification Act of 1962; (C) with respect to investigatory functions under sections 337 and 341 of the Trade Act of 1974; and (D) conducted through the office known as the Office of Industries;

(5) the functions of the Secretary of Labor with respect to determinations of worker eligibility for assistance under chapter 2 of title II of the Trade Act of 1974; and

(6) the functions of the Secretary of the Interior conducted through the office known as the Division of Interindustry and Economic Analysis.

(b)(1) The Export-Import Bank is transferred to and established in the Department as an agency and instrumentality of the United States under the general supervision and direction of the Secretary, as provided in section 2 of the Export-Import Bank Act of 1945 as amended by section 310(j) of this Act.

(2) The Overseas Private Investment Corporation is transferred to and established in the Department as an agency and instrumentality of the United States under the general supervision and direction of the Secretary, as provided in section 233 of the Foreign Assistance Act of 1961 as amended by section 310(h) of this Act.

(3) The International Trade Commission is transferred to and established in the Department as an independent entity. In the performance of their functions (other than the functions which are transferred to the Secretary by subsection (a)(4) of this section), the members, employees, and other personnel of the Commission shall not be responsible to the supervision or direction of any officer, employee, or agent of any other part of the Department.

(4) In each annual authorization and appropriation request under this Act, the Secretary shall identify the portion thereof intended for the support of the Export-Import Bank, the Overseas Private Investment Corporation, and the International Trade Commission and include a statement by the board of directors or commission, as appropriate, of each such entity (A) showing the amount requested by such entity in its budgetary presentation to the Secretary and the Office of Management and Budget, and (B) an assessment of the budgetary needs of such entity.

TRANSFER OF FUNCTIONS TO THE SPECIAL TRADE REPRESENTATIVE

SEC. 205. There are transferred to and vested in the Special Representative for Trade Negotiations the functions of the State Department with respect to the negotiation and implementation of commercial agreements and trade agreements with foreign nations, including commodity agreements.

TITLE III—MISCELLANEOUS PROVISIONS

ADMINISTRATIVE PROVISIONS

SEC. 301. (a) The Secretary is authorized to appoint and fix the compensation of such officers and employees, including attorneys and investigators, as may be necessary to carry out the functions transferred by this Act to the Secretary and the Department, except that the number of individuals which may be so appointed shall not exceed the number of individuals which were performing such functions on the day preceding the effective date of this Act, unless otherwise provided by a provision of law enacted after the date of enactment of this Act. Except as otherwise provided by law, such officers and employees shall be appointed in accordance with the provisions of title 5, United States Code, governing appointments in the competitive service, and compensated in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of such title.

(b) The Secretary may obtain the services of experts and consultants in accordance with the provisions of section 3109 of title 5, United States Code, and may compensate such experts and consultants at rates not to exceed the daily rate prescribed for GS-18 of the General Schedule under section 5332 of such title.

(c)(1)(A) The Secretary is authorized to accept voluntary and uncompensated services without regard to the provisions of section 3679(b) of the Revised Statutes (31 U.S.C. 665(b)) if such services will not be used to displace Federal employees employed on a full-time, part-time, or seasonal basis.

(B) The Secretary is authorized to accept volunteer service in accordance with the provisions of section 3111 of title 5, United States Code.

(2) The Secretary is authorized to provide for incidental expenses, including but not limited to transportation, lodging, and subsistence for such volunteers.

(3) An individual who provides voluntary services under paragraph (1)(A) of this subsection shall not be considered a Federal employee for any purpose other than for purposes of chapter 81 of title 5, United States Code, relating to compensation for work injuries, and of chapter 171 of title 28, United States Code, relating to tort claims.

(d) In the exercise of the functions transferred under this Act, the Secretray shall have the same authority as the officer, agency, or office, or any part thereof, exercising such functions immediately preceding their transfer, and the actions of the Secretary in exercising such functions shall have the same force and effect as when exercised by such officer, agency, or office, or part thereof.

(e) Except as otherwise provided in this Act, the Secretary may delegate any of the functions under this Act to such officers and employees of the Department as the Secretary may designate, and may authorize such successive redelegations of such functions within the Department as may be necessary or appropriate. No delegation of functions by the Secretary under this section or under any other provision of this Act shall relieve the Secretary of responsibility for the administration of such functions.

(f) The Secretary is authorized to prescribe, in accordance with the provisions of chapter 5 of title 5, United States Code, such rules and regulations as may be necessary or appropriate to carry out the functions transferred to the Secretary or the Department by this Act.

(g)(1) The Secretary is authorized to enter into and perform such contracts, grants, leases, cooperative agreements or other similar transactions with Federal departments and agencies, public agencies, State, local, and tribal governments, private organizations, and individuals, and to make such payments, by way of advance or reimbursement, as the Secretary may deem necessary or appropriate to carry out the functions transferred to the Secretary or the Department by this Act.

(2) Notwithstanding any other provision of this Act, no authority to enter into contracts or to make payments under this Act shall be effective except to such extent or in such amounts as are provided in advance under appropriation Acts. This subsection shall not apply with respect to the authority granted under subsection (h).

(h) The Secretary is authorized to accept, hold, administer, and utilize gifts, bequests and devises of property, both real and personal, for the purpose of aiding or facilitating the work of the Department in the performance of the functions transferred by this Act. Gifts bequests, and devises of money and proceeds from sales of other property received as gifts, bequests or devises shall be deposited in the Treasury in a separate fund and shall be disbursed upon the order of the Secretary. Property accepted pursuant to this section, and the proceeds thereof, shall be used as nearly as possible in accordance with the terms of the gift, bequest, or devise donating such property. For the purposes of Federal income, estate, and gift taxes, property accepted under this section shall be considered as a gift, bequest, or devise to the United States.

REORGANIZATION

SEC. 302. The Secretary is authorized to allocate or reallocate the functions transferred to the Secretary or the Department by this Act among the officers of the Department, and to establish, consolidate, alter, or discontinue such organizational entities within the Department as may be necessary or appropriate. The authority of the Secretary under this section does not extend to the abolition of organizational entities established by this Act or the reallocation of functions among the officers of the Department as specifically designated by this Act.

TRANSFER OF PERSONNEL

SEC. 303. (a) Except as otherwise provided in this Act, the personnel employed in connection with, and the assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available to or to be made available in connection with the functions and agencies transferred to the Secretary or the Department by this Act, subject to section 202 of the Eudget and Accounting Procedures Act of 1950, are transferred to the Secretary for appropriate allocation. Unexpended funds transferred pursuant to this subsection shall be used only for the purposes for which the funds were originally authorized and appropriated.

(b) Positions specified by statute or reorganization plan to carry out functions and agencies transferred by this Act, personnel occupying those positions on the effective date of this Act, and personnel authorized to receive compensation in such positions at the rate prescribed for offices and positions at level II, III, IV, or V of the Executive Schedule contained in sections 5312 through 5316 of title 5, United States Code, on the effective date of this Act, shall be subject to the provisions of section 304.

(c) Except as otherwise provided in this Act, the transfer pursuant to this title of full-time personnel (except special Government employees) and part-time personnel holding permanent positions shall not cause any such employee to be separated or reduced in grade or compensation for one year after such transfer or after the effective date of this Act, whichever is later.

(d) Any person who, on the day before the effective date of this Act, held a position compensated in accordance with the Executive Schedule prescribed in chapter 53 of title 5, United States Code, and who, without a break in service, is appointed in the Department to a position having duties comparable to the duties performed immediately preceding such appointment shall continue to be compensated in such new position at not less than the rate provided for such previous position for the duration of the service of such person in such new position.

AGENCY TERMINATIONS

SEC. 304. Except as otherwise provided in this Act, whenever all of the functions of any agency, commission, or other body, or any component thereof, have been terminated or transferred by this Act from that agency, commission, or other body, or component thereof, such agency, commission, or other body, or component shall terminate. If an agency, commission, or other body, or any component thereof, terminates pursuant to the provisions of the preceding sentence, each position and office therein which was expressly authorized by law, or the incumbent of which was authorized to receive compensation at the rates prescribed for an office or position at level II, III, IV, or V of the Executive Schedule contained in sections 5313 through 5316 of title 5, United States Code, shall terminate.

INCIDENTAL DISPOSITIONS

SEC. 305. The Director of the Office of Management and Budget, at such time or times as such Director shall provide, is authorized and directed to make such determinations as may be necessary with regard to the transfer of functions and agencies which relate to or are utilized by an officer, agency, commission or other body, or component thereof, affected by this Act, and to make such additional incidental dispositions of personnel, assets, liabilities, grants, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds held, used, arising from, available to, or to be made available in connection with the functions and agencies transferred by this Act, as may be necessary to carry out the provisions of this Act. The Director of the Office of Management and Budget shall provide for the termination of the affairs of all agencies, commissions, offices, and other bodies terminated by this Act and for such further measures and dispositions as may be necessary to effectuate the purposes of this Act.

SAVINGS PROVISIONS

SEC. 306. (a) All orders, determinations, rules, regulations, permits, grants, contracts, certificates, licenses, and privileges—

(1) which have been issued, made, granted, or allowed to become effective by the President, any Federal department or agency or official thereof, or by a court of competent jurisdiction, in the performance of functions which are transferred under this Act to the Department or the Secretary, and

(2) which are in effect at the time this Act takes effect,

shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with the law by the President, the Secretary, or other authorized official, a court of competent jurisdiction, or by operation of law.

(b)(1) The provisions of this Act shall not affect any proceedings, including notices of proposed rulemaking, or any application for any license, permit, certificate, or financial assistance pending on the effective date of this Act before any department, agency, commission, or component thereof, the functions of which are transferred by this Act; but such proceedings and applications, to the extent that they relate to functions so transferred, shall be continued. Orders shall be issued in such proceedings, appeals shall be taken therefrom, and payments shall be made pursuant to such orders, as if this Act had not been enacted; and orders issued in any such proceedings shall continue in effect until modified, terminated, superseded, or revoked by the Secretary, by a court of competent jurisdiction, or by operation of law. Nothing in this subsection shall be deemed to prohibit the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that such proceeding could have been discontinued or modified if this Act had not been enacted.

(2) The Secretary is authorized to promulgate regulations providing for the orderly transfer of proceedings continued under paragraph (1) to the Department.

(c) Except as provided in subsection (e)—

(1) the provisions of this Act shall not affect suits commenced prior to the effective date of this Act, and

(2) in all such suits, proceedings shall be had, appeals taken, and judgments rendered in the same manner and effect as if this Act had not been enacted.

(d) No suit, action, or other proceeding commenced by or against any officer in the official capacity of such individual as an officer of any department or agency, functions of which are transferred by this Act, shall abate by reason of the enactment of this Act. No cause of action by or against any department or agency, functions of which are transferred by this Act, or by or against any officer thereof in the official capacity of such officer shall abate by reason of the enactment of this Act.

(e) If, before the date on which this Act takes effect, any department or agency, or officer thereof in the official capacity of such officer, is a party to a suit, and under this Act any function of such department, agency, or officer is transferred to the Secretary or any other official of the Department, then

such suit shall be continued with the Secretary or other appropriate official of the Department substituted or added as a party.

(f) Orders and actions of the Secretary in the exercise of functions transferred under this Act shall be subject to judicial review to the same extent and in the same manner as if such orders and actions had been by the agency or office, or part thereof, exercising such functions, immediately preceding their transfer. Any statutory requirements relating to notice, hearing, action upon the record, or administrative review that apply to any function transferred by this Act shall apply to the exercise of such function by the Secretary.

ANNUAL REPORT

SEC. 307. The Secretary shall, within thirty calendar days after the end of each calendar year, make a report to the President for submission to the Congress on the activities of the Department during the preceding calendar year.

REFERENCE

SEC. 308. With respect to any functions transferred by this Act and exercised after the effective date of this Act, reference in any other Federal law to any department, commission, or agency or to any officer or office the functions of which are so transferred shall be deemed to refer to the Secretary or the Department.

TRANSITION

SEC. 309. With the consent of the appropriate department or agency head concerned, the Secretary is authorized to utilize the services of such officers, employees, and other personnel of the departments and agencies of the executive branch for such period of time as may reasonably be needed to facilitate the orderly transfer of functions and agencies under this Act.

TECHNICAL AND CONFORMING AMENDMENTS

SEC. 310. (a) Section 19(d)(1) of title 3, United States Code, is amended by striking out "Secretary of Commerce" and inserting in lieu thereof "Secretary of Commerce and International Trade".

(b) Section 101 of title 5, United States Code, is amended by inserting "and International Trade" immediately after "Commerce".

(c) Section 5312(8) of such title is amended by inserting "and International Trade" immediately after "Commerce".

(d) Section 5313 of such title is amended by adding at the end thereof the following: "(25) Under Secretaries, Department of Commerce and International Trade (2).".

(e) Section 5314(4) of such title is repealed.

(f)(1) Section 5315(12) of such title is amended by striking out "Commerce (8)" and inserting in lieu thereof "Commerce and International Trade (10)".

(2) Section 5315(39) of such title is amended by inserting "and International Trade" immediately after "Commerce".

(g) Section 5316(145) of such title is amended by inserting "and International Trade" immediately after "Commerce".

(h) Section 102(10) of the Department of Energy Organization Act is amended by inserting "Commerce and International Trade," before "State,".

(i)(1) The first paragraph of section 231 of the Foreign Assistance Act of 1961 is amended—

(A) by inserting "and to promote the international trade position of the United States" after "development assistance objectives of the United States"; and

(B) by striking out all after "agency of the United States".

(2) Section 233 (b) of such Act is amended by striking out "Administrator of the Agency for International Development" and inserting in lieu thereof "Secretary of Commerce and International Trade".

(j) Section 341(c) of the Export-Import Bank Act of 1945 is amended—

(1) by striking out the first sentence and inserting in lieu thereof the following: "There shall be a Board of Directors consisting of the Secretary of Commerce and International Trade, who shall serve as Chairman, the President and First Vice President of the Export-Import Bank, and three additional persons appointed by the President, by and with the advice and consent of the Senate."; and

(2) by striking out "five" in the second sentence of such section and inserting in lieu thereof "six".

AUTHORIZATION OF APPROPRIATIONS

SEC. 311. Subject to any limitation on appropriations applicable with respect to any function transferred to the Secretary, there are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act and to enable the Secretary to administer and manage the Department.

SEPARABILITY

SEC. 312. If any provision of this Act or the application thereof to any person or circumstance is held invalid, neither the remainder of this Act nor the application of such provision to other persons or circumstances shall be affected thereby.

EFFECTIVE DATE

SEC. 313. (a) The transfer of functions and agencies pursuant to sections 204 and 205 of this Act shall take affect one hundred and twenty days after the Secretary first takes office, or on such earlier date as the President may prescribe and publish in the Federal Register, except that at any time after the date of enactment of this Act—

(1) any of the officers provided for this Act may be nominated and appointed as provided in this Act, and

(2) the Secretary may promulgate regulations pursuant to section 301(f) of this Act.

(b) Funds available to any department or agency (or any official or component thereof), the functions of which are transferred to the Secretary by this Act, may, with the approval of the Director of the Office of Management and Budget, be used to pay the compensation and expenses of any officer appointed pursuant to this Act until such time as funds for that purpose are otherwise available.

INTERIM APPOINTMENTS

SEC. 314. (a) In the event that one or more officers required by this Act to be appointed by and with the advice and consent of the Senate shall not have entered upon office on the effective date of this Act and notwithstanding any other provision of law, the President may designate an officer in the executive branch to act in such office for ninety days or until the office is filled as provided in this Act, whichever occurs first.

(b) Any officer acting in an office in the Department pursuant to the provisions of subsection (a) shall receive compensation at the rate prescribed for such office under this Act.

By Mr. DECONCINI:

S. 1472. A bill to amend title 28 of the United States Code to provide for special venue provisions in cases relating to the environment; to the Committee on the Judiciary.

● Mr. DECONCINI. Mr. President, I am introducing today a bill to insure that environmental cases are brought in the court of the district where the environmental impact or injury occurs. This bill amends title 28 of the United States Code by adding two new special venue provisions.

One is directed to civil actions in the district courts, and the other to the review of agency actions in the courts of appeals. Both venue provisions require that the court in the area affected hear the case.

The role of the court in environmental cases is to protect the public interest and to balance social and economic factors along with environmental considerations. No court is better equipped to achieve a fair result in this task than the court which is familiar with the local setting, resources, and concerns.

Furthermore, the district or circuit court embracing the area affected is usually the most convenient forum for parties, witnesses, and others who will be affected by the action. In short, the local district court is the logical court to hear the issue.

The bill, thus, is intended to decentralize judicial decisionmaking and review of environmental matters. In a sense, it reflects the principles of federalism upon which our Founding Fathers built our Government. It simply allows a local Federal court the opportunity to speak to the issues affecting its district.

In doing so, it also allows difficult issues to mature through consideration by various Federal courts rather than to be decided by one centralized court such as the U.S. Court of Appeals for the District of Columbia. It thereby recognizes the wisdom of providing the Supreme Court with the opportunity to evaluate different resolutions of the same issue before a final national decision is made.

By making a general legislative statement in favor of local venue in environmental cases, I also hope to rationalize what is now a confusing element in environmental litigation. There are a multitude of statutes throughout the United States Code which regulate environmental quality. Many of these statutes already contain specific venue provisions. And, in fact, it is not uncommon for a substantive statute to have two or three venue provisions, depending on the type of suit that is brought.

In some statutes there is a specific venue provision for citizen enforcement suits, a different venue provision for government enforcement actions, and still another provision for actions reviewing agency orders.

The bill I introduce today will not radically alter existing practice. Many environmental statutes already provide for review by the "local" district court. The 1978 annual report of the administrative office of the U.S. Courts indicates that of the 519 environmental cases commenced in the district courts during the 12-month period which ended June 30, 1978, only 37 were brought in the District of Columbia.

Similarly, of the 155 cases filed in the U.S. Court of Appeals for review of orders of the environmental protection agency during the same 12-month period, 33 were in the District of Columbia.

Nevertheless, many of these venue provisions are duplicative, overlapping and confusing. They have been drawn without a clear-cut pattern, and they have generated tremendous threshold litiga-

tion on the question of appropriate venue. As Prof. David Currie noted in his article which analyzed judicial review of Federal pollution laws:

"Sorting out who may take which cases to what courts and when they may do so under these provisions has already yielded a bumper crop of litigation." Currie, judicial review under federal pollution laws, 62 Iowa Law Review 1221, 1225 (1977).

My legislation attempts to reconcile these various venue provisions and to make a clear statement of congressional intent that environmental cases be heard in the district or circuit courts embracing the area affected. This bill does not represent the final solution, but it is a starting point. Thus, I look forward to holding a day of hearings in July on this bill and on S. 739 which my distinguished colleague from Nevada, Senator LAXALT, has introduced.

These two bills will begin what I hope will be a thorough exploration of the issue. I hope they will also force a case-by-case analysis of existing venue provisions and a reevaluation of the general practice of inserting venue provisions in substantive statutes—a practice which I believe undermines the effectiveness of title 28 of the United States Code which was intended to govern venue. And, of course, Mr. President, ultimately I hope that we will arrive at a solution which will serve public policy, promote efficient judicial administration and protect the interests of all the parties affected by these cases.

Mr. President, in order to facilitate review of this bill, I have compiled a survey of some of the environmental statutes and their venue provisions. I ask unanimous consent that it be inserted in the RECORD, together with the text of the bill.

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

S. 1472

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a)(1) chapter 87 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 1409. Environmental litigation

"A civil action arising under the National Environmental Policy Act, under any Act of Congress pertaining to land management, wildlife protection, energy conservation, or air, water, hazardous or solid waste, pesticide, radiation, toxic substances, or noise pollution, or under any other Act of Congress relating to environmental quality, in which the issue raised or the impact or injury alleged is less than nationwide in scope, may be brought only in a judicial district in which such issue arises or in which a substantial portion of the alleged impact or injury occurs.".

(2) The table of sections for chapter 87 is amended by adding at the end thereof the following:

"1409. Environmental litigation.".

(b)(1) Chapter 83 of that title is amended by adding at the end thereof the following new section:

"§ 1295. Appeal from agency actions relating to the environment

"Appeals from reviewable agency actions, decisions, or orders, arising under the National Environmental Policy Act, under any Act of Congress pertaining to land management, wildlife protection, energy conservation, on air, water, hazardous or solid waste, pesticide, radiation, toxic substances, or noise pollution, or under any other Act of Congress relating to environmental quality, in which the issue raised or the impact or injury alleged is less than nationwide in scope, shall be taken to the court of appeals for the judicial circuit in which such issue arises or in which a substantial portion of the alleged impact or injury occurs.".

(2) The table of sections for chapter 83 is amended by adding at the end thereof the following new item:

"1295. Appeals from agency actions relating the environment.".

SEC. 2. The amendments made by this Act supersede any provision of law of the United States, or any decision, rule or regulation made pursuant to any such law, which is inconsistent with, or contrary to, such amendments to the extent such provision, decision, rule, or regulation differs from the requirements set forth in such amendments.

SELECTED STATUTES AFFECTING ENVIRONMENTAL QUALITY

I. Administrative Office of the United States Courts definition of environmental law: cases filed under the National Environment Policy Act "and any other environmental allegations pertaining to AIR, WATER, SOLID WASTE, PESTICIDES, RADIATION AND NOISE POLLUTION."

Clean Air Act, 42 U.S.C. §§ 7401–7642.

Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1376.

NEPA of 1969, 42 U.S.C. §§ 4321–4361.

Noise Control Act of 1972, 42 U.S.C. §§ 4901–4918.

Solid Waste Disposal Act, 42 U.S.C. §§ 6901–6987.

Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451–1464.

Radiation Control for Health and Safety Act, 42 U.S.C. §§ 263b–63n.

Federal Environmental Pesticide Control Act, 7 U.S.C. § 136.

II. Other statutes and areas that might be considered for "environmental" regulation.

A. Energy:

Energy Conservation and Production Act, 42 U.S.C. §§ 6801–6892.

Energy Conservation in Existing Buildings Act 42 U.S.C. §§ 6851–6392.

Energy Conservation Standards for New Buildings Act, 42 U.S.C. §§ 6831–6840.

Energy Policy and Conservation Act, 42 U.S.C. §§ 6201–6422.

Energy Supply and Environmental Coordination Act, 15 U.S.C. §§ 791–798.

Federal Coal Leasing Amendment Act of 1975, 30 U.S.C. §§ 201–209.

Federal Energy Administration Act of 1974, 15 U.S.C. §§ 761–790h.

Federal Non-Nuclear Energy Research and Development Act of 1974, 42 U.S.C. §§ 5901–5915.

Oil Pollution Act of 1961, 33 U.S.C. §§ 1001–1016.

Federal Power Act of 1970, 16 U.S.C. § 791a.

Atomic Energy Act of 1970, 42 U.S.C. § 2011.

B. Wildlife legislation:

Anadromous Fish Conservation Act, 16 U.S.C. §§ 757a–757f.

Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668–668d.

Endangered Species Act, 16 U.S.C. §§ 1531–1543.

Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 121–136y.

Fish and Wildlife Coordination Act of March 10, 1934, 16 U.S.C. §§ 661–666c.

Fur Seal Act of 1966, 16 U.S.C. §§ 1151–1186.

Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1407.

Marine Protection, Research & Sanctuaries Act of 1972, 33 U.S.C. §§ 1401–1444.

Migratory Bird Treaty Act, 16 U.S.C. §§ 703–711.

National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668dd–668ee.

Wild and Free-roaming Horses and Burros Act, 16 U.S.C. §§ 1331–1340.

C. Transportation:

Department of Transportation Act of 1970, 49 U.S.C. § 1655.

Federal Aviation Act of 1970, 49 U.S.C. § 1301.

Airport & Airway Development Act of 1970, 49 U.S.C. § 1701.

Federal Highways Act of 1970, 23 U.S.C. § 101.

Urban Mass Transportation Act of 1964, 49 U.S.C. §§ 1602, 1610.

(See also Selected Federal Statutes on Environmental Impact of Transportation Programs, E.L.R. 41601.)

D. Land, water and air management and use:

National Parks Act, 16 U.S.C. § 1.

Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. §§ 1600–1614.

Historical Sites Buildings and Antiquities Act, 16 U.S.C. § § 461–4591.

Land and Water Conservation Fund Act of 1965, 16 U.S.C. §§ 4601–4—4601–11.

Mineral Leasing Act of 1920, 30 U.S.C. § 185.

Mining Law of 1872, 30 U.S.C. § 22.

National Forest Organic Legislation, 16 U.S.C. §§ 471–475.

National Park System Mining Regulation Act, 16 U.S.C. § § 1901–1912.

National Historic Preservation Act, 16 U.S.C. § 470–470t.

Organic Act of the National Park Service, 16 U.S.C. § 1.

Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1343.

Pickett Act (withdrawal of public lands) of 1910, 43 U.S.C. §§ 141, 142.

Ports and Waterways Safety Act of 1972, 33 U.S.C. §§ 1221–1227.

Resources Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6987.

Submerged Lands Act, 43 U.S.C. §§ 1301–1343.

Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201–1328.

Taylor Grazing Act of 1934, 43 U.S.C. §§ 315, 315a, 315e, 315f.

Wilderness Act of 1964, 16 U.S.C. §§ 1131–1136.

Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1782.

Water Resources Planning Act of 1970, 42 U.S.C. § 1962.

Safe Drinking Water Act, 42 U.S.C. §§ 330f–300j–9.

Wild and Scenic Rivers Act, 16 U.S.C. § § 1271–1287.

Air Quality Act of 1970, 42 U.S.C. § 1857.

E. Others:

Federal Highway Act, 23 U.S.C. §§ 109, 128, 138.

Toxic Substance Control Act, 15 U.S.C. §§ 2601–2629.

Federal Common Law: U.S. Constitution, Art. IV § 3(2).

Aircraft Noise Abatement Act of 1970, 49 U.S.C. § 1431.

SPECIAL VENUE PROVISIONS IN SELECTED STATUTES AFFECTING ENVIRONMENTAL QUALITY

1. Clean Air Act, 42 U.S.C. §§ 7401–7642; calls for setting of air quality standards and emission standards by an Administrator. § 7604(c)(1) permits a citizen's suit against a stationary source violating either emission standards or an order of the E.P.A. or a state, to be brought only in the judicial district in which such source is located. § 7607(b)(1) provides for appellate court review of prior rulings only in the local circuit court if issues are "locally or regionally applicable" or in the U.S. Court of Appeals for the District of Columbia if issues are "nationwide (in) scope."

2. Traffic and motor vehicle safety stand-

ards Act, 15 U.S.C. §§ 1381–1431; calls for setting Federal motor vehicle safety standards. § 1415(a)(1) provides that civil actions for violations of these standards may be brought only in the district court for the District of Columbia or the district court of the state of incorporation.

3. Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1543; calls for regulatory steps to conserve various species of fish, wildlife and plants facing extinction. § 1540 (a)(3)(A) states that citizens' suits arising under this statute "may be brought" in the judicial district in which the violation occurs.

4. Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668–668d; regulates commercial trafficking in these types of eagles by permit. § 668(b) provides that the Attorney General may sue to collect civil penalties assessed for permit violations in any district in which the violator is found, resides or transacts business.

5. Deepwater Port Act of 1974, 33 U.S.C. §§ 1501–1524; requires the Secretary of Transportation to perform certain duties to protect the environmental and navigational safety of deepwater ports through licensing and environmental impact statements and other means. § 1515(a)(2) provides that citizens' civil actions under this statute "shall be brought" in the district court of the District of Columbia or the district court of the "appropriate adjacent, coastal state." § 1516 provides that a litigant "may . . . seek" review in the circuit court of appeals within which the nearest adjacent coastal state is located.

6. Federal Energy Administration Act of 1974, 15 U.S.C. §§ 761–790h; commands the regulation of energy resources to conserve scarce energy resources excepting petroleum products regulated under the Emergency Petroleum Allocation Act. § 766(i)(2)(A) permits judicial review of administrative actions "of general and national applicability" only in the District of Columbia's Court of Appeals. Actions of "less than national applicability" may be reviewed only in the "appropriate" circuit court. The appropriate circuit court is defined as that containing the area or the greater part of the area within which the rule, regulation or order is to have effect.

7. Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 121–136y; regulates interstate commerce in poisons designed to kill insects, fungi and rodents such as specified labelling requirements and shipping requirements. Under § 135b(d), persons adversely affected by orders under this statute "may obtain" review in the circuit court where they reside, have their principal place of business or the District of Columbia circuit court. § 135g(a) states that poisons transported interstate in violation of these regulations "shall be liable" to suit in any district where it is found and seized for confiscation.

8. Environmental Pesticide Control Act, 7 U.S.C. §§ 136–136y; requires registration of pesticides with an Administrator. § 136n(b) permits appellate review of administrative actions under this title in the appellant' district of residence or where he has a place of business.

9. Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1407; regulates the taking and import of marine mammals through permits. § 1374(d)(6) provides that an applicant for a permit may obtain judicial review in the district court where he resides or has a principal place of business, or in the district court for the District of Columbia. § 1376(b) provides for suits against vessels violating these regulations in the district court having jurisdiction over the vessel (for vessels under U.S. jurisdiction).

10. Mineral Leasing Act of 1920, 30 U.S.C. § 185; establishes a duty of care in the operation of oil and gas pipelines commensurate with obligations as a common carrier. § 185 (r)(5) permits the Attorney General to prosecute violators before the I.C.C., F.P.C., etc., or the district court in the district where the pipeline or any part of it is located.

11. Toxic Substances Control Act, 15 U.S.C. §§ 2601–2629; regulates the manufacture and processing of new chemical substances or the new use of a known chemical substance through registration and notification requirements and various provisions for enforcement, assessment of penalties and the promulgation of rules under this title by an Administrator. § 2604(f) authorizes the Administrator to take action protecting the public from imminent risk before the notification period has run. Under § 2604(f)(3)(A)(ii) he may apply to enjoin activities which pose such imminent risk in the district court for the District of Columbia or the district court for any district where the manufacturer or processor of such a substance is found, resides or transacts business. § 2606 dealing with imminent hazards authorizes the Administrator to commence civil actions in the appropriate district court to seize imminently hazardous material or seek relief against persons trafficking in such materials. Under § 2606(c), *Venue and Consolidation*, the appropriate court is defined as the district court in the district where the defendant is found, resides or transacts business. § 2615 authorizes the Administrator under this title to assess civil penalties against violators. § 2615(a)(3) allows a grievant assessed a fine under this provision the right to judicial review of such a penalty in the U.S. Court of Appeals for the District of Columbia or any other circuit in which the appellant resides or transacts business. § 2616 enables district courts with jurisdiction over civil actions arising under this statute to specifically enforce their orders and seize property found to be in violation of the provisions of this title. § 2616(a)(2) provides that civil suits arising under this statute "may be brought" in the district court for the district in which any act, omission or transaction constituting a violation occurred or where the defendant is found or transacts business. § 2618(a) allows for judicial review of any rule promulgated under this statute in the U.S. Court of Appeals for the District of Columbia or a circuit where the appellant resides or has his principal place of business.

12. Intervention of the High Seas Act, 33 U.S.C. §§ 1471–1487; provides for navigational incidents producing damage or threatening damage to the U.S. coastline or marine resources. § 1479(b) provides that actions against the U.S. "may be brought" in the U.S. Court of Claims or in any district court of the U.S. in addition to the courts listed at 28 U.S.C. § 460.

13. Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1343; provides for cases and controversies arising from operations on the outer Continental shelf, exploring, developing, removing or transporting by pipeline, resources of the subsoil and seabed. § 1333 (b) provides that proceedings under this title "may be instituted" in the defendant's district of residence or the district where he may be found or the district court of the adjacent state nearest the place where the cause of action arose.

14. Sustained Yield Forest Management Act, 16 U.S.C. § 583; authorizes the Secretary of Agriculture and the Secretary of the Interior to contract with private landowners for the purpose of stabilizing the forestry industry. § 583e confers the right to sue for breach of contract "in the proper district court of the United States" upon the Attorney General.

15. Mineral Lands and Mining Act, 30 U.S.C. § 1201; regulates surface mining operations to protect the invironment and the interests of other surface landowners and to insure an adequate coal supply. § 1270(c)(1) establishes venue in actions regarding violations of this chapter providing such cases "may be brought only in the judicial district in which the surface coal mining operation complained of is located."

16. Safe Drinking Water Act, 42 U.S.C. §§300f–300j–9; authorized establishment and enforcement of national drinking water standards. § 300g–3(b) grants the Administrator under this title the right to sue for enforcement of these standards "in the appropriate United States District Court."

17. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1376; sets standards and limitations on discharges into navigable waters to protect the environment of those waters. § 1319(b) authorizes the Administrator under this title to commence civil actions against violators of these standards and limitations, stating "(these actions) may be brought in the district court of the district where the defendant is located, resides or is doing business." § 1369(b) provides for judicial review of certain federal standards and limitations regulating the discharges of pollutants of federal action in passing upon state permit programs, and of federal issuance or denial of permits, upon the filing of an application by "any interested person" in the "Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts any business" within ninety days after the challenged action is taken.

18. Federal Aviation Act of 1970, 49 U.S.C. 1301; establishes the C.A.B. and other extensive regulatory provisions controlling the planning and development of air, space and navigational facilities. Some of the sections under which environmental litigation might be brought include: section 1348 providing airspace and control facilities; sections 1349–1350 giving the Board power over the location of airports, navigational facilities and missile and rocket sites; and section 1351 creating the meteorological service. Section 1473 entitled "Venue and Prosecution of Offenses; Procedures in respect of Civil and Air Piracy Penalties" requires that trial for any offense under this chapter resulting in the assessment of either type of penalty "shall be in the district in which such offense is committed" or if outside the jurisdiction of a state or district of the U.S. other venue provisions are given. Section 1486(b) dealing with any order of the Board of the Administrator provides that they are subject to review in the court of appeals where the petitioner has his residence or principal place of business or the U.S. Court of Appeals for the District of Columbia.

19. Solid Waste Disposal Act of 1970, 42 U.S.C. 6901; provides for the treatment, management and other regulation of solid waste materials for conservation and health purposes. Section 6972 authorizing citizens' suits under this legislation requires that they "shall be brought in the district court for the district in which the alleged violation occurred." Suits against the Administrator under this title "may be brought in the district court for the district in which the alleged violation occurred or in the district court for the District of Columbia." Section 6976 allows for judicial review of final regulations promulgated under this chapter only in the U.S. Court of Appeals for the District of Columbia.●

By Mr. METZENBAUM (for himself, Mr. WILLIAMS, Mr. RIEGLE, Mr. CRANSTON, Mr. PELL, Mr. JAVITS, Mr. RANDOLPH, Mr. DECONCINI, Mr. LEVIN, Mr. KENNEDY, Mr. HART, and Mr. DURKIN):

S. 1473. A bill to amend the National Labor Relations Act to provide that the

duty to bargain collectively includes bargaining with respect to retirements benefits for retired employees; to the Committee on Labor and Human Resources.

● Mr. METZENBAUM. Mr. President, Senators WILLIAMS, RANDOLPH, PELL, KENNEDY, CRANSTON, RIEGLE, JAVITS, DECONCINI, LEVIN, DURKIN, and HART join me today in introducing the Retired Employee Benefits Act of 1979. This legislation is designed to restore to retired workers in this country their right to have their interests represented in the collective-bargaining process.

The high rates of inflation that we have experienced in recent years has taken its toll on all Americans. But for those who are retired on fixed incomes, inflation has meant tragedy. It has meant a constant, losing struggle against price increases that threaten to place necessities like food, housing, medical care, and utilities beyond the reach of millions of our people. In fact, fewer than 2 percent of those who now receive pension benefits are eligible for cost-of-living adjustments.

Recent hearings before the House Subcommittee on Labor-Management Relations turned up examples of individuals forced to live on $87 a month after providing years of service to their companies. These examples are not isolated. They are all too common. And they represent an injustice that must be reversed.

A recent Washington Post article provided additional insight into the conditions of retired employees living on fixed company pensions. In the article is an extremely gripping example of one retired employee. The employee retired and received $72.84 a month after working for 40 years at Westinghouse Air Brake Division of American Standard. This employee retired in 1963. His company pension now pays $101.01 per month—while the cost of living has gone up 130 percent over the same period. I believe this article accurately portrays the horror faced by many older Americans. The horror, as described in the article is of being "eaten alive by inflation."

Until 1971, retiree benefits were a common topic at the bargaining table. But in that year, the Supreme Court held in Allied Chemical and Alkali Workers against Pittsburgh Plate Glass that retirees cannot be considered as employees or as members of a bargaining unit as defined by the National Labor Relations Act. As a result, benefits for retired workers cannot be considered a mandatory subject of collective bargaining.

This decision placed a severe and unfair burden upon the very people whose personal sacrifices built the union movement and whose financial contributions formed the basis for today's powerful pension funds. And it has condemned thousands who contributed in good faith toward pensions during their working years to poverty during retirement.

Mr. President, this legislation does not require any increase in retiree benefits. It says merely if labor brings up the subject, management must discuss those benefits. And it says that retirees may in the future have reason to hope that their legitimate interest will be represented at the bargaining table.

Mr. President, I ask unanimous consent that the text of this bill along with the Washington Post article be printed in the RECORD.

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

S. 1473

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of section 8(d) of the National Labor Relations Act is amended—

(1) by inserting after "other terms and conditions of employment" the following: ", including retirement benefits for retired employees", and

(2) by inserting after "all the terms and conditions" in paragraph (4) of the proviso the following: "(including terms and conditions relating to retirement benefits for retired employees)".

[From the Washington Post]

BEING "EATEN ALIVE" BY INFLATION, PRIVATE PENSIONERS COMPLAIN

(By Spencer Rich)

When Howard Kaufman retired in 1968 after 35 years at Packaging Corp. of America in Rittman, Ohio, he got a $74.83 monthly pension in addition to his Social Security.

Since then, the cost of living has more than doubled. Kaufman's Social Security benefits, which have an automatic cost-of-living escalator, have gone up repeatedly.

But his company pension "has never gone up a nickel in the past 11 years. It's still $74.83. You can see where a man is dropping behind just a little bit all the time," Kaufman said in an interview.

Tony Trink, who worked at the Westinghouse Air Brake Division of American Standard for 40 years, has also found the value of his private pension eroded by inflation, with few comp ny increases to keep pace.

When he retired in 1963 his company pension was $72.84 a month. Today it's $101.01—while the cost of living has gone up 130 percent over the same period.

The experience of Kaufman and Trink is shared by millions of retired workers who receive private pensions to supplement their Social Security.

Government and private studies show that only a handful of private pension systems have automatic cost-of-living increases and most of these have a ceiling of 3 percent a year.

Millions of retirees get no increases at all or must depend on occasional one-shot boosts volunteered by the company or negotiated by a union.

"People on fixed incomes are being eaten alive by inflation," said a pension expert on Capitol Hill.

"People are damned worried," said Mike Romig, a pension spokesman for the Chamber of Commerce.

The cruel bite of inflation was described recently by Alicia Munnell, vice president and economist of the Federal Reserve Bank of Boston.

"With an inflation rate of 6 percent," said Munnell, "a private pension benefit of $2,100, the average in 1975 is reduced to a real value of $1,171 in 10 years." Since 1973, the inflation rate has been well over 6 percent—today it's nearly 13 percent.

Many pension experts say this failure to keep benefits up in the face of today's high inflation rates threatens the very existence of the entire private pension system in the United States.

The basic purpose of a private pension plan is to "provide a retirement income that will enable the pensioner to maintain a certain relative standard of living," said Social Securitys former chief actuary, Robert J. Myers, now a professor and consultant.

If pensions lose their value through inflation and no steps are taken to provide cost-of-living adjustments, there will inevitably be pressure to increase Social Security benefits to compensate, Myers said in a book on pensions.

Private pensions will then shrivel in importance and "they will be faced with extinction in the long run."

Munnell said, "In a highly inflationary environment, total Social Security payments would probably expand beyond current projections and private pensions would become relatively unimportant."

Only half the active labor force works in jobs covered by private pensions, and only 8.6 million retirees in the entire country are actually receiving private pensions (at the less-than-princely average of about $217 a month).

On top of that, study after study shows that increases to meet the cost of living are few and far-between:

A 1975 survey by Bankers Trust Co. of 271 pension plans run by big, affluent firms showed that a worker retiring in 1970 in one sample group of these firms would have received only 11 percent overall in pension boosts from 1970 to '75, while the cost of living was rising three times as fast. Eight plans had automatic cost-of-living features, but every one had a 3 percent annual ceiling. A recent update based on 103 firms shows that about four-fifths did give some increases to retirees from 1970 to 79, but "virtually none" gave enough to maintain the purchasing power of the original pension.

A survey by Gayle B. Thompson, of the Social Security Administration, showed that the real value of a sample group of retirees' private pensions declined 14 percent between 1970 and '74 because they didn't get cost-of-living increases sufficient to match soaring prices. In another sample, less than one-fifth of the private pensions went up enough in 1972-'74 to match inflation, 27 percent went up some but not at a pace with inflation, while "the largest group of pensioners received the same benefit in both years."

A Labor Department study by Mathtech of Princeton shows that, in one sample, about one-third of private pensions kept pace with inflation in 1970–'72, but less than a fifth kept pace in 1972–'74, when inflation was much higher.

A large group of surveys cited by Myers confirms that very few pensioners get increases that keep pace with the cost of living. Many plans do volunteer one-shot or sporadic boosts, but these seldom match current inflation rates.

If inflation is decimating the value of private pensions, why don't the firms simply provide for automatic cost-of-living adjustments (this is called "indexing") the way the government does with Social Security and civil service pensions?

There are lots of answers, but the main one is money. It costs big bucks to "index" private pensions.

"It's a very expensive proposition," said the Chamber's Roming. "It's an expensive game to play catchup ball on inflation. You try to keep feeding that little lion that keeps roaring."

Donald Grubbs, a leading actuary formerly with the Internal Revenue Service and now with the George Buck consulting firm, estimated that to keep pace with a 4 percent cost-of-living increase, the typical company in the long run would have to increase its private pension outlays by 33 percent.

If inflation were running at 8 percent,

Grubbs said in an interview, the cost of a typical plan would go up at least 77 percent.

Myers estimated that, at inflation of 5 percent, fully indexing a pension plan would add 30 to 40 percent to its costs.

Another respected actuary, Everett Allen of Towers, Perrin, Forster and Crosby, said that while added costs from cost-of-living features can vary according to the type of plan, level of benefits, composition of the workforce, etc., "one rule of thumb is that pension costs will increase by about 10 percent for each 1 percent annual increase in pensioner benefits."

Vetter Price's George Pantos, a spokesman for the ERISA Industry Committee, which consists of about 100 of the largest private company plans in the country, said the members are extremly apprehensive of automatic cost-of-living formulas because "companies don't want to be locked into any formula. They don't know what their profits and business conditions are going to be in the future."

They don't want to be tied into commitments which are open-ended and uncertain, because nobdy knows just what the future rate of inflation will be, Pantos said.

"You often hear the remark: Benefit dollars are not infinite; they're finite," Pantos said.

He quoted an official of one large plan: "Any attempt to legislate an escalator, even a modest one, would bankrupt many plans."

Despite the clear problem, there isn't very wide support for a possible federal law mandating cost-of-living increases for private pensioners.

Grubbs indicated he would favor some form of mandated private pension increase, once pensions cover everybody. But he said the fact that only half the labor force is pension-covered is a problem with greater priority.

Myers said he favors providing automatic boosts but not necessarily up to the full inflation rate, but stopped short of endorsing a federal requirement now.

Mike Gordon, a pension expert, said he favors the concept but would want more information on costs and impact. Putting extra money into cost-of-living increases for those who have high pensions might distort the overall income picture for the aged, he said.

Karen Ferguson of the Pension Rights Center, saying costs are a serious problem, suggested that some "cap" on the income might be considered.

Betty Duskin of the National Council of Senior Citizens said, "Unitil we're ready to mandate pension plan coverage, how can we mandate cost-of-living increases?"

Jim Hacking of the American Association of Retired Persons also shied from endorsing a federal mandate at this time: "It's sort of like the rock and the hard place. If you mandate even within limits of 5 or 6 percent a year, the costs are just tremendous and you're going to get employers dropping plans."

Fear that costs would induce firms to junk their plans, or discourage other firms from starting them, was cited by many as a reason to go slow on requiring cost-of-living features.

Myers, Grubbs and others pointed out that it would be possible to write cost-of-living proposals that would limit gross unexpected costs and make outlays predictable.

For example: you could write a system covering only the first 3 to 4 percent of inflation. Or ignoring the first 3 percent of inflation each year but providing boosts for perhaps the next 5 percent, with a ceiling at 8 percent. Or giving the pensioner half the inflation rate. Or cover only retirees with lower pensions.

That is all in the future. Meanwhile, most pensioners will have to wait and watch their purchasing power dribble away.

One possibility is that the government would sell to pension funds a new form of security called "index bonds" whose redemption value (and perhaps interest as well) would rise with inflation. This would allow pension fund assets to keep pace with inflation and provide the money to boost benefits. But this proposal presents broader economic problems and whether it will ever be adopted isn't clear.

Kaufman, from his trailer home in Dalton, Ohio, said that at 76 he really doesn't think it is fair to ask him to wait too long for a solution to the pension-indexing problem.

After all, he said, the firm he worked for is the sister company of a big contractor that makes ships for the government—and gets compensated when it has big cost overruns.

"I've got a cost overrun on my living expenses, but on my side of the fence it's a different story," he declared ruefully.●

● Mr. RIEGLE. Mr. President, in this time of rampant inflation outstripping pensions negotiated years ago, I am pleased to join with the Senator from Ohio (Mr. METZENBAUM) in introducing a bill to make retirees' benefits a mandatory subject of collective bargaining under the National Labor Relations Act. As the buying power of pensions shrinks, labor organizations should be able to protect the rights of their retirees through the bargaining process.

For the 2 million retired workers now receiving collectively bargained pensions, this change will not provide any quick solutions to their financial problems. All of us will continue to suffer from inflation, and those on fixed or nearly fixed incomes will suffer most. But at least these retirees can turn to their union with the knowledge that their interests may be represented at the bargaining table.

I think it is important to recognize that this bill, if successfully implemented through collective-bargaining sessions across the country, may provide an alternative to expanded Federal regulation. The Federal Government, through the Employee Retirement Income Security Act of 1974, has accepted responsibility for assuring that eligible retirees will receive the benefits they had anticipated; under this bill, employers and labor organizations together can continue to assure that the benefits are realistic in view of current inflation levels.

This bill does not call for a major change on the collective-bargaining process. In many industries—including autos, steel, aluminum, and canning—benefits for retired workers are already a subject of voluntary bargaining. And, since labor organizations can maintain support of current workers only by keeping faith with those who have already retired, unions are well able to represent the interests of former employees.

The support which this proposal has gathered to date is impressive. Since the Supreme Court's 1971 determination in Allied Chemical Workers against Pittsburgh Plate Glass Co., numerous senior citizens' and labor organizations have endorsed legislation clarifying congressional intent that retirees' benefits are mandatory subjects of bargaining. Because of today's inflation, it has become urgent that Congress act now to correct this interpretation.●

By Mr. INOUYE:

S. 1474. A bill to establish a national merchant marine policy, to create a Cabinet-level coordinating Council to implement such policy, and for other purposes; to the Committee on Governmental Affairs.

NATIONAL MERCHANT MARINE POLICY ACT

● Mr. INOUYE. Mr. President, on Monday of this week I introduced seven maritime bills addressed to both regulatory and promotional problems afflicting our national shipping policy.

While all of these problems—and others—need to be remedied I believe there is another, more basic one, which is not addressed by any of these bills; namely, all of the agencies having policy and program responsibilities affecting our maritime program are not acting together. In other words, often an agency fails to take into account the objectives of our maritime policy, or follows a course of action which contradicts or thwarts those objectives.

For example:

The State Department and the Justice Department recently joined the Soviets in the court of appeals to oppose FMC efforts to enforce our shipping laws.

Buses financed by Department of Transportation funds move on Russian ships despite our cargo-preference laws requiring that at least 50 percent of Government-financed cargo move on U.S. ships.

The Department of Justice enforces our antitrust laws against American carriers, while foreign flags in effect get a green light for many of the same activities.

A substantial portion of U.S. originated international mail moves on foreign flags.

Most of these cases, where agencies either ignore the objectives of our maritime policy, or pursue a contradictory course do not, I believe, arise because the different agencies have statutory mandates which conflict with the mandates of our shipping laws.

Rather, it is the way in which these agencies understand and interpret their mandates that causes the conflict with the shipping laws and their objectives.

In any event, I believe it is a working hypothesis worth testing in the hearing process. Because if it proves to be the case, the objectives of whatever substantive maritime measures we enact will be frustrated.

To remedy these problems of contradiction and lack of coordination, and to assure that our merchant marine interests get a "fair shake" in the councils of our Government I am today introducing legislation to create a Cabinet-level National Merchant Marine Policy Council.

The Policy Council would be charged with monitoring Federal agencies' compliance with national merchant marine policy and coordination of that policy's interpretation with other national interests. The Council's activities would include coordination responsibilities and consideration of policies, programs, or issues which relate to merchant marine matters and which involve two or more Federal agencies. Specific Policy Council

functions would include: Continuous refinement of merchant marine-related Federal policies; coordination of merchant marine activities and policies with related activities and policies in various Federal agencies; concentration of Federal efforts for maximum benefit to the public; resolution of program and policy conflicts that involve two or more Federal agencies; and reporting to the Congress on Council activities.

The Merchant Marine Policy Council would consist of those departments and agencies which have responsibilities affecting maritime matters, and four members from the private sector of the maritime industry.

The chairman of the Policy Council would be the President's Special Trade Negotiator, and the Council members would be Cabinet members or their immediate subordinates.

Mr. President, the Cabinet-level Policy Council I am recommending would not involve relocation of the authority or jurisdiction of any agency of Government. Nor, would it create a new bureaucracy. The Council would be supported by a small staff of about 15, and a budget of about $500,000 a year.

This concept, I might add, is not new to the Senate. In May, after 5 years of intensive study, the Senate unanimously passed S. 1097, the National Tourism Policy Act. Title II of the act creates a Cabinet-level Tourism Policy Council which is the model for the legislation I am introducing today.●

By Mr. BENTSEN:

S. 1475. A bill to amend the Internal Revenue Code of 1954 to provide tax incentives to encourage the creation and growth of new and innovative firms; to the Committee on Finance.

VENTURE CAPITAL TAX REFORM ACT

● Mr. BENTSEN. Mr. President, I am today introducing the Venture Capital Tax Reform Act to encourage the creation of new and innovative firms that are indispensable to a healthy, competitive economy.

Economic growth in our Nation depends upon the availability of a sufficient supply of capital for the risktakers and entrepreneurs who have the initiative to start new businesses and to develop imaginative new ideas. That capital is often referred to as venture capital.

During the last Congress I was involved in two successful efforts to help increase the availability of venture capital in our economy. First, the capital gains tax was reduced as part of the 1978 Revenue Act. Second, the so-called "prudent man" rule of ERISA was clarified to insure that this rule does not unintentionally prevent private pension investments in smaller firms. However, further efforts are needed in the 96th Congress.

Many products, unheard of a few years ago, which now benefit our daily lives, were developed by small innovative businesses. Minicomputers, semiconductors, handheld calculators, and sophisticated lifesaving medical devices are but a few examples. The companies that created these products provided new jobs for our growing work force, provided competition to established firms, and increased exports to help with our balance of trade.

The Venture Capital Tax Reform Act will promote the creation of innovative businesses. This proposal has four major provisions:

First, favorable tax treatment would be provided to a new category of stock which would be referred to as "venture capital stock." The favorable treatment would take the form of tax deferral on certain gains and liberalized deductions on certain losses. These incentives will encourage the flow of capital to risky new enterprises.

Second, stock option incentives would be made available for venture capital stock to attract competent management.

Third, the net operating loss carryforward of existing law would be increased to 10 years for new firms.

Fourth, the existing limitation on investment interest deductions in our tax law would be repealed in order to encourage entrepreneurs to enter new fields to create new jobs and provide greater competition in our economy.

Mr. President, it is essential that the needs of venture capital be specifically addressed during consideration of tax reduction and tax reform legislation in the 96th Congress. I have introduced my proposals to provide a starting point for discussion of these issues during the Ways and Means Committee and Finance Committee tax hearings. There is no question that the formulation of fair and effective tax incentives to encourage venture capital is a difficult task. However, with the input of the Treasury Department and outside experts, I am confident that provisions along the lines that I have suggested can be incorporated in tax legislation during this Congress.

Mr. President, I would now like to describe these proposals in greater detail.

First, tax incentives would be provided to encourage individuals to invest in venture capital investments which are often very risky but provide a great deal of promise for our economy. These incentives are needed to increase the availability of external investment capital for innovative firms which will become the "new IBM" or the "new Xerox."

Under my proposal, a taxpayer who invests in qualified venture capital stock would be eligible to deduct as much as $100,000 of losses from such investment against ordinary income. This compares to the present limitation of only $3,000 on the capital losses that can be offset against ordinary income and the $50,000 limitation on deductible losses for so-called section 1244 stock.

In addition, under my proposal, gain from the sale of qualified venture capital stock would qualify as a nontaxable exchange provided the gain was reinvested within 2 years of sale in other qualified venture capital stock.

Under existing law, the owner of a successful new business who sells out to a major corporation and takes stock in the big business has to pay no taxes until the stock is sold. On the other hand, if he sells his business to his children or to his employees or to another small business, he is taxed on any gains he realizes. In other words, our tax laws encourage venture capitalists to sell their firm to a large corporation.

My proposal would remedy this inequity by allowing a venture capitalist to sell a business without an immediate tax liability if the proceeds of the sale are reinvested in a new venture.

Venture capital stock is narrowly defined to limit the amount of revenue loss to the Treasury. Under my bill, venture capital stock would be defined to include stock issued by newly formed, domestic, unaffiliated corporations engaged in manufacturing, research, or extraction. The favorable treatment would be limited to the first $5 million of stock issued by that firm. Furthermore, favorable tax treatment would apply only if the stockholder held such stock for at least 10 years.

Second, this bill would provide favorable stock option treatment for employees of new ventures. Today it is difficult for an entrepreneur with a new idea to attract good management because new firms cannot afford the high salaries paid by larger companies. In addition, risky ventures cannot offer the long-term job security provided by established companies.

My bill would repeal the changes enacted in the 1976 Tax Reform Act with respect to stock options for qualified "venture capital stock."

Prior to the 1976 Tax Reform Act, no income was recognized on the grant to a corporate employee, or on his exercise of, a qualified option to receive employer stock. The stock acquired by the exercise of the option was a capital asset in the hands of the employee and the income realized from the eventual sale of the stock was generally treated as long-term capital gain or loss.

By contrast, the value of a nonqualified stock option constituted ordinary income to the employee if the option itself had a readily ascertainable fair market value at the time it was granted to the employee. If the option did not have a readily ascertainable value it would not constitute ordinary income at the time it was granted; when the option was exercised, however, the spread between the option price and the value of the stock at that time constituted ordinary income to the employee.

Thus, qualified options had this advantage: An executive was not required to pay any ordinary income tax on the value of the option as such when the company granted it to him, or on any bargain element which may have existed if and when he decided to exercise the option and purchase stock in the company. The bargain element is the excess of the fair market value of a share of stock over its purchase price. The employee was only required to pay tax when he sold the shares purchased under the option.

Further, if he held the shares for at least 3 years—as required for the option to remain qualified—he was entitled to pay tax at capital gains rates on the full amount of his gain over the price which he originally paid.

Although an employee did not have to pay tax under the qualified stock option rules at the time he exercised the option

and received stock worth more than he paid for it, the bargain element was treated as an item of tax preference in the minimum tax.

Under the 1976 Tax Reform Act, if an employee receives an option which has a readily ascertainable fair market value at the time it is granted, this value—less the price paid for the option, of any—constitutes ordinary income to the employee at that time.

On the other hand, if the option does not have a readily ascertainable fair market value at the time it is granted, the value of the option does not constitute income to the employee at that time, but it would be taxable to the employee only when the option is exercised. The ordinary income recognized at that time is the spread between the option price and the value of the stock—unless the stock is nontransferable and subject to a substantial risk of forfeiture.

Current law unduly penalizes key employees of smaller companies who often must sell optioned stock at the time of option exercise in order to pay the required tax, yet are unable to sell the stock obtained from exercising the option due to the limited or illiquid market for the stock. My bill would reinstate the favorable pre-1976 stock option treatment for new risky ventures to enable these firms to attract and motivate key employees. Innovative companies require appropriate incentives to attract capable management away from the high salaries and long-term security provided by mature companies.

Third, this bill would increase the net operating loss carryforward for new businesses. For the first 10 years of operation of a new business the period over which net operating losses may be carried forward and deducted aganist profits would be increased from the present limit of 7 to 10 years. New enterprises are generally more dependent on internally generated capital for growth and the current limit on the net operating loss carryover can have an adverse effect on growth. Since new businesses are frequently unprofitable for their first few years, operating losses incurred in these early stages often cannot be recovered in the carryforward period now permitted. Thus, although well established companies can usually utilize the net operating loss deductions, newer enterprises often cannot. My proposal would help eliminate this tax inequity.

Fourth, the existing limitation—generally $10,000 plus net investment income—on investment interest deductions would be repealed. Repeal of this very counterproductive limitation would encourage entrepreneurs to enter new fields—with borrowed funds—to bootstrap their way up. This change will facilitate the ability of entrepreneurs to raise capital to start a new business which can provide many new jobs and provide competition to the established firms. Investment interest expenses are real out-of-pocket expenses and should be deductible, particularly since this would encourage competition in our economy.

The present limitation discriminates in favor of persons with established wealth compared to new entrepreneurs. For example, a person who receives interest income of $100,000 per year from a trust is entitled to an investment interest deduction of $110,000. In comparison, a young entrepreneur with no interest income is limited to only $10,000 of investment interest deduction. Furthermore, our tax laws impose no limitations with respect to loans for the purchase of private airplanes or yachts but impose limitations on investment loans even though the establishment of a new business creates many new jobs for our economy.

Mr. President, I would like to provide some examples which illustrate the importance of venture capital to our entire economy.

Venture capital was essential in the creation of transistors. It is the transistor which made possible the large central computer industry and the military instrumentation industry. The development of the minicomputer industry depended on the availability of venture capital. The minicomputer industry not only provides substantial jobs and tax revenues but has also been a major factor in improving the productivity of industry. Everyone is familiar with pocket calculators. Pocket calculators are solely the product of American technology and venture capital.

A venture capital enterprise funded by risk investments developed the know-how for miniaturized semiconductors called MOS's. With this know-how and technology an entire new industry was created. The total initial risk capital investment was relatively small, especially when compared to recent total industry sales.

Indeed, venture capital has had an important impact on any number of high-growth industries—semiconductors, minicomputers, all kinds of other computer-related products, hand-held calculators, automatic editing typewriters, CATV, hifis, new medical instruments and a wide variety of others.

Even frozen orange juice was developed through venture capital. A great many jobs have been brought back to the United States from Japan through the development of the small chips that are used in handheld calculators, and this type of advance is now being applied to electronic watches. These were developments by small companies that were not subject to the restrictions of a large company environment and could attract the bright young scientist, production manager, and marketing people to move the product into the marketplace. And it is also the result of venture capitalists who were willing to risk their capital to build new companies to better serve the public.

We cannot maintain a healthy, competitive and growing economy unless there is enough capital available for the risktakers and entrepreneurs who want to develop their ideas into businesses.

In addition, we must avoid encouraging investors to sell new ventures to large firms.

The Federal Trade Commission's 1975 report on mergers and acquisitions states:

> As in the previous years, acquired firms that fell into the smallest asset size class accounted for the highest proportion of recorded acquisitions. Acquisitions of firms in the under $1 million and unknown asset size class represented 935, or 76.1 percent of the total number of recorded completed and pending acquisitions. For many of the acquired companies in this category, asset figures were unavailable—most likely because the acquired company was quite small. The $1 to $9.9 million asset size class had the second highest proportion of acquired companies (11.5 percent).

Limitations on the ability of private investors in successful small businesses to sell their shares to other investors have resulted in large companies being able to take over successful small companies at a discounted price because the businesses and their individual owners have little alternative in meeting their financing and liquidity needs. This is a force increasing concentration and diminishing competition in the American economy today.

Very often mergers are a legitimate means of developing liquidity. Frequently, a growing business needs the capital and management expertise of a larger partner for continued growth. On the other hand, many mergers in the past years have resulted from an environment that offered the small businessman no alternative methods of acquiring capital and liquidity.

Mr. President, the Venture Capital Tax Reform Act will provide a more favorable economic climate for the creation and growth of innovative firms. It will help remove artificial incentives for new firms to sell out to giant corporations.

The key building blocks for the emerging innovative company are capital and management. Without adequate incentives for both, the ongoing formation of these vitally important businesses will simply not happen.●

By Mr. CRANSTON:

S. 1476. A bill to prohibit certain territorial restrictions in professional sports, and for other purposes; to the Committee on the Judiciary.

TERRITORIAL RESTRICTIONS IN PROFESSIONAL SPORTS

● Mr. CRANSTON. Mr. President, I am introducing legislation today to call further attention to an issue addressed in S. 1303 introduced by me, as a companion measure to H.R. 2129, on June 7.

My principal purpose in introducing S. 1303 was to limit the ability of a professional team owner to veto any other league member from locating in the same metropolitan market area.

S. 1303, the Sports Antitrust Reform Act, contains an additional provision directed at the antitrust exemption enjoyed by organized baseball. This is a difficult problem, and frankly I do not want to see the prohibition against unfair territorial restrictions bogged down in Congress historic inability to resolve the baseball problem.

I have a strong interest in assuring that the city of Los Angeles have a fair city-owned Los Angeles Memorial Coliseum to replace the Rams professional

football team which will move next year to Anaheim in Orange County. As matters now stand, the Rams' owners can prevent any other professional football team from locating in the coliseum. In a market as large as Los Angeles, it is unreasonable to deny any other team an opportunity to play in the coliseum.

The departure of the Rams from the coliseum will have an adverse impact on efforts to upgrade the downtown area of Los Angeles. The move hurts the earnings of hundreds of families who live in the coliseum area and who depend upon jobs incident to events held there. Just a single game provides work for 1,000 persons, virtually all of whom live in the central city.

The coliseum also will be the central arena for the 1984 Olympic games. Rental income earned by the coliseum is expected to help pay for refurbishing the stadium. Loss of this income due to the move of the Rams may endanger the Olympics.

For these reasons, I feel strongly that the territorial restrictions limitation in the Sports Antitrust Reform Act ought not to be caught in the decades-long struggle to end organized baseball's antitrust exemption. To this end I am introducing legislation incorporating these provisions.

The prohibition against unreasonable territorial restraints in professional sports is of urgent concern not only to the city of Los Angeles but to all urban areas hosting professional sports teams. Enactment of this provision would eliminate an unfair advantage which professional sports team owners have held over municipalities when negotiating terms for stadium rentals.

I urge my colleagues to join with me in supporting this legislation.●

By Mr. KENNEDY (for himself and Mr. DECONCINI):

S. 1477. A bill to provide for improvements in the structure and administration of the Federal courts, and for other purposes; to the Committee on the Judiciary.

FEDERAL COURTS IMPROVEMENT ACT OF 1979

● Mr. KENNEDY. Mr. President, today I join with the distinguished Senator from Arizona, Senator DECONCINI, in introducing the latest version of the Federal Courts Improvement Act of 1979. The bill introduced today constitutes the amended version of two bills—S. 677 and S. 678, introduced on March 15, 1979. Under the very capable, dedicated leadership of Senator DECONCINI, 5 days of hearings have been held on these two bills. Various witnesses representing the judicial branch of Government, the practicing legal profession and the academic community testified concerning the strengths and weaknesses of S. 677 and S. 678. The bill introduced today is the direct result of testimony elicited at these hearings.

This bill has been developed in close conjunction with the Department of Justice and Congressman ROBERT KASTENMEIER. As I noted in introducing the original legislation, these reforms "would make long overdue changes in the structure and administration of our Federal judicial system. The legislation is the culmination of many decades of debate over the nature and structure of the Federal courts. For too long all three branches of Government have been unable or unwilling to confront the structural and procedural defects which obstruct and inhibit the effective and efficient administration of justice; the Federal Courts Improvement Act is designed to deal with some of the myriad problems which have plagued the Federal judicial system—this bill should be viewed as an important step in the direction of broadening access to the Federal courts while improving the quality of our Federal court system."

The legislation introduced today deals primarily with the structure, governance, and administration of our Federal court system. Highlights of the bill include:

First. The creation of an appellate court with exclusive jurisdiction over all Federal civil tax appeals;

Second. The creation of the court of appeals for the Federal circuit with exclusive jurisdiction over all patent and trademark appeals;

Third. Limitations on the tenure of a chief judge of a Federal district court or court of appeals;

Fourth. A clarifying provision mandating that a majority of the members of a three-judge circuit panel be judges of the circuit on which the panel sits;

Fifth. Changes in the membership and structure of circuit judicial councils;

Sixth. Implementation of a new Federal judicial retirement and resignation formula;

Seventh. A provision permitting temporary assignment of a Federal judge to accept appointment as Administrative Assistant to the Chief Justice as well as Director of the Administrative Office of the U.S. Courts or Director of the Federal Judicial Center;

Eighth. A provision allowing immediate appeals of interlocutory orders in cases of "extraordinary importance";

Ninth. A provision facilitating the transfer of any case inadvertently commenced in the wrong Federal court to the proper court without loss of a litigant's rights; and

Tenth. A provision modernizing rules for the judicial award of equitable interest on claims and judgments.

Mr. President, this new version combining the best features of S. 677 and S. 678 follows literally months of deliberation by the Subcommittee on Improvements in Judicial Machinery. It benefits from broad bipartisan support and will go a long way in improving the structure and administration of our Federal judicial system.●

● Mr. DECONCINI. Mr. President, together with the distinguished chairman of the Judiciary Committee, Senator KENNEDY, I am introducing the Federal Courts Improvement Act of 1979. This bill reflects the consensus reached by the members of the Subcommittee on Improvements in Judicial Machinery after extensive hearings and informal consultations with all interested parties.

Originally, there were two versions of this legislation, S. 677 and S. 678. The bill we introduce today is an amalgam of these two approaches together with new ideas that were generated by the hearings. Our purpose in introducing a new bill is to make it clear that what we now have is an evolutionary step in our goal of improving the Federal courts. A new bill also eliminates much of the technical complexity associated with the vast number of changes and revisions we have been led to make.

On March 15, Senator KENNEDY and I cosponsored S. 678, the Federal Courts Improvement Act of 1979, and Senator KENNEDY introduced separately by request S. 677, the Judicial Improvement Act of 1979. The two bills were referred to the Senate Subcommittee on Improvements in Judicial Machinery, and 7 days of hearings were held during May and June, at which time we heard from a broad spectrum of witnesses. Witnesses included such distinguished persons as Judge Henry Friendly of the U.S. Court of Appeals for the Second Circuit; Bernard Wolfman, professor of law at Harvard Law School; A. Leo Levin, Director of the Federal Judicial Center, and Stuart E. Seigel, Chief Counsel for the Internal Revenue Service. We have solicited opinions from bar associations such as the tax section of the New York State Bar Association, the Patent Law Association of Chicago, and the U.S. Trademark Association. We have solicited comments from many others.

On the basis of hearings and discussions with expert witnesses in the areas of tax law, patent law, and court improvements, Senator KENNEDY and I have prepared the bill we are introducing today, a bill which I believe has the strong support of most interested parties and will be a boon to the American court system.

Highlights of this bill are more specifically detailed in Senator KENNEDY's statement. However, the legislation has three major thrusts: First, it creates a new national court of tax appeals; second, it abolishes the present Court of Claims and Court of Customs and Patent Appeals and creates in its place a court with nearly identical jurisdiction, known as the Court of Appeals for the Federal Circuit; and third, it makes a series of amendments that affect the other courts of appeal, especially concerning the makeup of their judicial councils, the makeup and size of their panels, and provisions affecting the requirements for the resignation of an article III judge. In addition, there are several other provisions that should aid in the administration of justice.

I am deeply indebted to Senators SIMPSON, DOLE, KENNEDY, and ROBERT C. BYRD for their assistance in creating this bill, and I share the chairman's desire to bring the bill through the committee at the earliest opportunity and then to bring it before the full Senate. In addition, I appreciate all the help rendered to the subcommittee by the Department of Justice and the Administrative Office of the U.S. Courts.●

By Mr. DURKIN (for himself, Mr. LEAHY, and Mr. STAFFORD):

S. 1478. A bill entitled the Home Heating Oil Supply Protection Act of 1979;

to the Committee on Energy and Natural Resources.

HOME HEATING OIL SUPPLY PROTECTION ACT OF 1979

Mr. DURKIN. Mr. President, the State of New Hampshire and New England as a whole face a very serious problem. The last figures we had show the home heating oil supplies were 15 million barrels behind what was in reserve at this time last year. On June 30, Shell Oil Co. informed a number of its suppliers that they were going to pull out of the Northeast market. One Shell distributor in particular supplies oil to 45,000 residences.

Mr. President, the potential shortage of home heating oil supplies in New Hampshire and other parts of the country this coming winter portends a disaster. Lives will be disrupted, people will suffer, business will plummet, if people are not able to obtain enough fuel to heat their homes and businesses. I have been telling the President this regularly for months, and I will continue to deliver that message until we have sufficient home heating oil stocks for the winter.

But a new problem has arisen that poses just as much of a threat to the people of my State and the residents of all other States who depend on home heating oil. One of the major multinational oil companies, Shell, has announced that it will no longer supply home heating oil to one of the major distributors in my State. This distributor, C. H. Sprague & Son Co., of Portsmouth, N.H., supplies some 45,000 residential homes in the Granite State. A cutoff of supplies by Shell will create substantial problems for C. H. Sprague and ultimately the consumers who are dependent on the home heating oil they have so faithfully supplied. I ask unanimous consent that a letter from Mr. Henry Powers, president of C. H. Sprague to me explaining the cutoff, be printed in the RECORD following my statement.

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

(See exhibit 1.)

Mr. DURKIN. Because of the problem of supply cutoff by multinational oil companies of home heating oil to distributors, and because of the danger this poses to the health and welfare of the people of my State and other States which use home heating oil, I am today introducing on behalf of myself, Mr. LEAHY, and Mr. STAFFORD the Home Heating Oil Supply Protection Act of 1979, which will prohibit the cutoff by refiners of supplies to dealers of home heating oil unless the Governors in the affected States certify that alternative supplies are available for the dealers. Under by bill, a refiner will not be allowed to terminate a marketing arrangement with fuel oil dealers unless adequate alternative supplies are guaranteed for the dealers and consumers.

My bill also provides that the Secretary of Energy may order a marketing arrangement to be continued for at least 90 days following a petition to do so by home heating oil dealers unless he finds good cause not to do so. This guarantees that home heating oil dealers will not be faced with sudden decisions, but will have some breathing period to find new suppliers.

Three years ago, the former administration decided to decontrol the price of home heating oil. As a result, prices skyrocketed, and, contrary to predictions by the advocates of decontrol, supplies dropped. But also as a result of that decision, the multinational oil companies lost their legal responsibility to continue supplying dealers. The worst results of that decision are now beginning to emerge as the greedy multinationals, without respect to the basic needs of the citizens of New Hampshire, are cutting off or are threatening to cutoff supplies so that they can increase their exorbitant profits even more. This is unconscionable.

The Home Heating Oil Supply Protection Act of 1979 will prevent the ever more powerful oil companies from being able, at the nod of a corporate executive, to ruin the lives of citizens. This bill requires that big oil has to sell its product to those who need it. These corporations have a responsibility, which they refuse to accept, to make decisions based on fundamental human needs and based on a reasonable level of profit, and not on the latter without any regard to the former. The only result of that policy will be more obscene profits for the oil companies and a cold, dark winter for the people of New Hampshire.

This legislation is needed now, before more big oil companies decide to pull out of the markets in New Hampshire and New England to satisfy their greed. If the President and the Congress do not act to stop them, the home heating oil shortage will become more than a threat. It will become a catastrophe.

I ask unanimous consent that the legislation be printed in the RECORD at this point.

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

S. 1478

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Home Heating Oil Supply Protection Act of 1979."

DECLARATION OF POLICY

SEC. 2. Competition, nondiscriminatory practices, and equal access to supplies for all retailers and distributors are essential to the fair and efficient functioning of a free market economy. Middle distillates (including Number 2 home heating oil) and other refined petroleum products should be produced, distributed, and marketed in the manner most beneficial to the consumer. It is the policy of the Congress to assist consumers and marketers of refined petroleum products to achieve these goals.

DEFINITIONS

SEC. 3. As used in this Act, the term—

(1) "petroleum products marketing relationship" means any contractual or supply arrangement or commitment—

(i) between a refiner and a distributor,

(ii) between a refiner and a retailer,

(iii) between a distributor and another distributor,

(iv) between a distributor and a retailer, under which a refiner or distributor (as the case may be) supplies a retailer with refined petroleum products, or by which a refiner supplies a distributor with refined petroleum products, if a petroleum products marketing relationship, as defined in this paragraph, was in effect between such retailer and such distributor (or such refiner), or between such distributor and such refiner in the corresponding month of the preceding year;

(2) "branded independent marketer" means a person who is engaged in the marketing or distributing or refined petroleum products, as that term is defined in section 1 of the Emergency Petroleum Allocation Act of 1972 (15 U.S.C. 752);

(3) "nonbranded independent marketer" means a person who is engaged in the marketing or distributing of refined petroleum products, as that term is defined in section 2 of the Emergency Petroleum Allocation Act of 1973 (15 U.S.C. 752);

(4) "distributor" or "distributorship" means a person who is engaged in commerce in any State in the marketing of petroleum products to wholesale or retail outlets (whether or not that person owns, leases or in any way controls such outlets) under a petroleum products marketing relationship for the sale, consignment, or distribution of refined petroleum products to his own accounts or to accounts of his suppliers;

(5) "refiner" means any person who is engaged in the refining of crude oil to produce refined petroleum products and includes any affiliate of such person;

(6) "retailer" or "retail establishment" means a person who or a place at which one purchases the refined petroleum products for sale to the general public for ultimate consumption;

(7) "refined petroleum product" means gasoline, kerosene, distillates (including Number 2 heating fuel oil), refined lubricating oils, or diesel fuel;

(8) "supply means the amount of refined petroleum product as distributed, consigned or sold by the refiner, distributor, or retailer (as the case may be) in the corresponding month of the preceding year;

(9) "relevant geographic market area" includes a State, a State's nonmetropolitan areas, or a standard metropolitan statistical area as periodically established by the Office of Management and Budget;

(10) "termination" includes cancellation;

(11) "fail to renew" or "nonrenewal" means, with respect to any marketing relationship, a failure to reinstate, continue, renegotiate or extend the marketing relationship;

(12) "commerce" means any trade, traffic, transportation, or exchange (A) between any State and any place outside of such State, or (B) which affects any trade, traffic, transportation, or exchange described in subparagraph (A) of the paragraph;

(13) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and any other commonwealth, territory, or possession of the United States.

MARKETING RELATIONSHIP; TERMINATION AND NONRENEWAL

SEC. 4. (a) Except as provided in subsection (b) no refiner or distributor (as the case may be) engaged in the sale, consignment or distribution of refined petroleum products in commerce may—

(1) terminate any marketing relationship (entered into or renewed on or after the date of enactment of this Act) prior to the conclusion of the term, or the expiration date, in the marketing relationship; or

(2) fail to renew any marketing relationship (without regard to the date on which the relevant marketing relationship was entered into or renewed); or

(3) withdraw from or otherwise reduce the allocated supply of refined petroleum products in the relevant geographic market area.

(b) Any refiner or distributor (as the case may be) may terminate any marketing rela-

tionship (entered into on or after the date of enactment of this Act) or may fail to renew any marketing relationship, if—

(A) the notification requirements of section 5 are met; and

(B) such termination, failure to renew, withdrawal, or other reduction in allocated supply is based upon good cause; and

(C) the Governor of each State which contains a portion of the relevant geographic marketing area certifies that alternative refiners or distributors (as the case may be) are available and have arranged to provide adequate supplies, and to enter new marketing relationships.

NOTIFICATION OF TERMINATION OR NONRENEWAL

SEC. 5. (a) A refiner or distributor shall not cancel, fail to renew, or otherwise terminate a petroleum products marketing relationship, or establish nonuniform allocations within the State or otherwise reduce the deliverable supply of the marketing relationship below the established allocation fractions unless he provides notification of such termination, nonrenewal nonuniform allocations or withdrawal to the respective parties and in the manner described in sections (b) and (c).

(b) (1) In the case of nonrenewal or termination of the marketing agreement, or establishment of nonuniform allocations, the retailer or distributor (as the case may be) shall—

(A) furnish notification to the distributor or retailer (as the case may be) not less than one hundred and eighty days prior to the date on which such termination on nonrenewal or nonuniform allocation takes effect; and

(B) promptly provide a copy of such notification, together with a plan describing the schedule and conditions under which the marketing agreement will be nonrenewed or terminated, to the Governor of each State which contains a portion of the relevant geographic marketing area.

(2) In the case of a withdrawal from the relevant geographic marketing area or further reduction in the established allocation fraction within a State, the refiner or distributor (as the case may be) shall—

(A) furnish notification to the distributor or retailer (as the case may be) not less than eighteen months prior to the date on which the withdrawal or reduction takes effect and

(B) promptly provide a copy of such notification, together with a plan describing the schedule and conditions under which the refiner or distributor (as the case may be) will withdraw from the relevant geographic marketing area or otherwise reduce the allocation of refined petroleum product supply within the marketing area or to a particular distributor or retailer (as the case may be), to the Governor of each State which contains a portion of the relevant geographic marketing area.

(C) Notification under this section—

(1) shall be in writing

(2) shall be posted by certified mail or personally delivered to the distributor or retailer (as the case may be); and

(3) shall contain—

(A) a statement of intent to terminate or not renew the marketing agreement, or to withdraw from or otherwise reduce the allocated supply in the marketing area, together with the reasons therefor; or

(B) the date on which such termination or nonrenewal, or withdrawal or reduction in allocated supply takes effect.

(D) Not later than thirty days after the date of enactment of this Act, the Secretary of Energy shall prepare and publish in the Federal Register a simple and concise summary of the provisions of this title, including a statement of the respective responsibilities of, and the remedies and relief available to, any refiner, distributor, or retailer under this Act.

ENFORCEMENT AND CIVIL REMEDY

SEC. 6. (a) If a refiner or distributor (as the case may be) engages in conduct prohibited by Section 4 of this Act, the retailer or distributor (as the case may be) may petition the Secretary of Energy to order a minimum 90 day continuance of existing marketing relationship. The Secretary of Energy is required to make a determination on this petition within 24 hours of its submission. Unless the Secretary finds good cause, he is required to order the 90 day or longer continuance.

ENFORCEMENT AND CIVIL REMEDY

(b) If a refiner or distributor (as the case may be) engages in conduct prohibited by section 4 of this Act, the retailer or distributor (as the case may be) may maintain a civil action against such refiner or distributor.

(c) A civil action under this section may be brought, without regard to the amount in controversy, in the district court of the United States for any judicial district in which the person against whom such action is maintained resides, is found, or is doing business. No such action shall be maintained unless it is commenced within three years of the commencement of conduct prohibited by section 4 of this Act.

(d) The court shall grant such relief as is necessary or appropriate to remedy the effect of conduct that it finds to exist if such conduct is prohibited under section 4 of this Act. Such relief may include, but is not limited to, declaratory judgments, mandatory or prohibitive injunctive relief, interim equitable relief, and actual and exemplary damages in an amount equal to three times the actual damages suffered as a result of such action. The court may also enjoin the refiner or distributor (as the case may be) from marketing the equivalent amount of refined petroleum product in controversy within that relevant geographic marketing area or other marketing area. The court may, unless such action is frivolous, direct the costs, including reasonable attorney and expert witness fees, be paid by the defendant.

RELATIONSHIP TO OTHER LAWS

SEC. 7. (a) Nothing in this Act shall be deemed to convey to any individual, corporation, or other business organization immunity from civil or criminal liability, or to create defenses to actions under the antitrust laws.

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

(1) the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (15 U.S.C. 1 et seq.), as amended;

(2) the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 12 et seq.), as amended;

(3) the Federal Trade Commission Act (15 U.S.C. 41 et seq.), as amended;

(4) sections 73 and 74 of the Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", approved August 27, 1894 (15 U.S.C. 8 and 9), as amended; and

(5) the Act of June 19, 1936, chapter 592 (15 U.S.C. 13, 13a, 13b, and 21a).

(c) No provisions of this Act shall be construed as limiting or in any way affecting any remedy or penalty that may result from any legal action or proceeding arising from any acts or practices that occurred—

(1) prior to the date of enactment of this Act;

(2) outside the scope and purpose, or not in compliance with, the terms of this Act; or

(3) subsequent to the repeal of this Act.

SEPARABILITY

SEC. 8. If any provision of this Act or the application of such a provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such a provision to any other person or circumstance, shall not be affected thereby.

EXHIBIT 1

C. H. SPRAGUE & SON CO.,
Portsmouth, N.H., July 2, 1979.

Hon. JOHN A. DURKIN,
U.S. Senate, Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR DURKIN: C. H. Sprague & Son Company (Sprague Energy), has been a major supplier of No. 2 Home Heating Oil to resellers and distributors in the State of New Hampshire for the past 22 years. Our historic supplier for a substantial amount of this supply since the early 1960's has been Shell Oil Company.

The volume of No. 2 Home Heating Oil that we have supplied to the marketplace over the last ten years has averaged 70 million gallons per annum, of which 44 million gallons has been supplied to us by Shell, and for the last five years, approximately 26 million gallons have been supplied from our wholly-owned refinery in Newington, New Hampshire. Nearly 90 percent of our total supply has been consumed in New Hampshire. This means that some 45,000 residential homes in your State have depended on Sprague for their heating requirements.

As you may be aware, Shell Oil Company announced on June 30, 1977, that they were leaving the No. 2 Heating Oil market in the Northeast portion of the United States in order to utilize their No. 2 oil as petrochemical feedstock in the Gulf Coast. The basic reason why Shell has continued to supply up to this date has been due to the Department of Energy's Allocation Program, which forced them to maintain historic supplier/customer relationships. That program no longer exists and Shell has notified us that beginning immediately, they will no longer supply No. 2 Home Heating Oil to Sprague Energy.

We have for some time been attempting to locate a substitute supplier but with no success. Our only real alternative to obtaining supplies would be to purchase quantities in the spot market where the price levels are currently twice the price of what our normal contract price would be. If we are forced into this situation in order to supply our customers, we would have to charge a price substantially in excess of the current price for deliveries of home heating oil, or alternately suggest to our customers that they attempt to obtain supplies from other terminal operators. Due to the shortage of No. 2 Home Heating Oil, we do not think our current customers would be succesful in obtaining a new supply source, and, therefore, the health and safety of your constituents are in serious jeopardy at this time.

We have recently heard from Washington that the Department of Energy has no current intention of re-establishing mandatory allocations. Therefore, we request assistance in bringing this particular problem to the attention of your Congressional associates and, if necessary, the White House, in order to assist us in obtaining our required supplies at reasonable price levels to supply our historic customers.

Sprague Energy personnel will be happy to meet with you at your earliest convenience in order to help resolve this difficult and potentially hazardous problem.

Very truly yours,

HENRY M. POWERS,
President.

ADDITIONAL COSPONSORS

S. 104

At the request of Mr. SCHMITT, the Senator from Colorado (Mr. ARMSTRONG)

was added as a cosponsor of S. 104, the Regulatory Reduction and Congressional Control Act.

S. 300

At the request of Mr. KENNEDY, the Senator from Missouri (Mr. DANFORTH) was added as a cosponsor of S. 300, the Antitrust Enforcement Act of 1979.

S. 596

At the request of Mr. DANFORTH, the Senator from Pennsylvania (Mr. HEINZ) was added as a cosponsor of S. 596, the Congressional Anti-Gerrymandering Act of 1979.

S. 643

At the request of Mr. KENNEDY, the Senator from Delaware (Mr. BIDEN) was added as a cosponsor of S. 643, a bill to amend the Immigration and Nationality Act to revise the procedures for the admission of refugees, to amend the Migration and Refugee Assistance Act of 1962 to establish a more uniform basis for the provision of assistance to refugees, and for other purposes.

S. 949

At the request of Mr. BURDICK, the Senator from Idaho (Mr. MCCLURE) and the Senator from Kentucky (Mr. HUDDLESTON) were added as cosponsors of S. 949, a bill to amend the National Environmental Policy Act to provide a 180-day statute of limitations on judicial challenge of the adequacy of an environmental impact statement.

S. 1215

At the request of Mr. SCHMITT, the Senator from New York (Mr. MOYNIHAN) was added as a cosponsor of S. 1215, the Science and Technology Research and Development Utilization Policy Act.

S. 1346

At the request of Mr. STONE, the Senator from Michigan (Mr. RIEGLE) was added as a cosponsor of S. 1346, a bill to amend the Food Stamp Act of 1977 to eliminate certain restrictions on excess shelter expense deductions with respect to households that contain a member who is 60 years of age or over or who receives benefits under title XVI of the Social Security Act and to allow a deduction for certain medical expenses in the computation of the income for these families.

S. 1377

At the request of Mr. DOMENICI, the Senator from Alabama (Mr. STEWART) was added as a cosponsor of S. 1377, the Synthetic Fuels Production Act of 1979.

S. 1384

At the request of Mr. HATFIELD, the Senator from Michigan (Mr. LEVIN) was added as a cosponsor of S. 1384, a bill to amend the Internal Revenue Code of 1954 to allow a credit against the contribution of certain crops by farmers to certain tax-exempt organizations.

S. 1411

At the request of Mr. CHILES, the Senator from Delaware (Mr. ROTH) was added as a cosponsor of S. 1411, a bill to improve the economy and efficiency of the Government and the private sector by improving Federal information management.

S. 1465

At the request of Mr. TALMADGE, the Senator from South Carolina (Mr. THURMOND) and the Senator from Mississippi (Mr. COCHRAN) were added as cosponsors of S. 1465, a bill to amend the Farm Credit Act of 1971 to permit farm credit system institutions to improve their services to borrowers, and for other purposes.

SENATE JOINT RESOLUTION 28

At the request of Senator BAYH, the Senator from Tennessee (Mr. BAKER), the Senator from Oklahoma (Mr. BELLMON), the Senator from North Dakota (Mr. BURDICK), the Senators from Rhode Island (Mr. PELL and Mr. CHAFEE), the Senator from California (Mr. CRANSTON), the Senator from Missouri (Mr. DANFORTH), the Senator from Arizona (Mr. DECONCINI), the Senator from Kansas (Mr. DOLE), the Senator from Minnesota (Mr. DURENBERGER), the Senator from Kentucky (Mr. FORD), the Senator from Utah (Mr. GARN), the Senator from Alaska (Mr. GRAVEL), the Senators from Oregon (Mr. PACKWOOD and Mr. HATFIELD), the Senator from Hawaii (Mr. INOUYE), the Senators from Washington (Mr. JACKSON and Mr. MAGNUSON), the Senator from New York (Mr. JAVITS), the Senators from Massachusetts (Mr. KENNEDY and Mr. TSONGAS), the Senator from Wisconsin (Mr. PROXMIRE), the Senators from Vermont (Mr. LEAHY and Mr. STAFFORD), the Senator from Maryland (Mr. MATHIAS), the Senator from Arkansas (Mr. PRYOR), the Senator from West Virginia (Mr. RANDOLPH), the Senator from Connecticut (Mr. RIBICOFF), the Senators from Michigan (Mr. RIEGLE and Mr. LEVIN), the Senator from Illinois (Mr. STEVENSON), the Senator from New Jersey (Mr. WILLIAMS), the Senator from Nebraska (Mr. ZORINSKY), and the Senator from Louisiana (Mr. JOHNSTON), were added as cosponsors of Senate Joint Resolution 28, to provide for the direct popular election of the President and Vice President.

SENATE RESOLUTION 135

At the request of Mr. JAVITS, the Senator from Connecticut (Mr. WEICKER) was added as a cosponsor of Senate Resolution 135, concerning William James Taskanikas and the Congressional Medal of Honor.

SENATE RESOLUTION 184

At the request of Mr. HELMS, the Senator from Idaho (Mr. CHURCH), the Senator from Minnesota (Mr. BOSCHWITZ), the Senator from Oregon (Mr. HATFIELD), and the Senator from Wyoming (Mr. WALLOP) were added as cosponsors of Senate Resolution 184, expressing the sense of the Senate with respect to the matter of Josef Mengele.

AMENDMENT NO. 212

At the request of Mr. SCHMITT, the Senator from Colorado (Mr. ARMSTRONG) was added as a cosponsor of Amendment No. 212 intended to be proposed to S. 1020, the Federal Trade Commission authorization bill.

AMENDMENTS SUBMITTED FOR PRINTING

AMTRAK IMPROVEMENT ACT OF 1979—S. 712

AMENDMENTS NOS. 301 THROUGH 307

(Ordered to be printed and to lie on the table.)

Mr. WEICKER submitted seven amendments intended to be proposed by him to S. 712, a bill to amend the Rail Passenger Service Act to extend the authorization of appropriations for Amtrak for 3 additional years, and for other purposes.

FEDERAL TRADE COMMISSION AUTHORIZATIONS—S. 1020

AMENDMENTS NOS. 308 THROUGH 311

(Ordered to be printed and to lie on the table.)

Mr. JEPSEN submitted four amendments intended to be proposed by him to S. 1020, a bill to authorize appropriations for the Federal Trade Commission.

NOTICES OF HEARINGS

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT

● Mr. LEVIN. Mr. President, I wish to announce that the Subcommittee on Oversight of Government Management, of which I am chairman, will hold oversight hearings on hazardous waste management on July 19, 1979, at 9:30 a.m. in room 357, Russell Senate Office Building and on July 23, 1979, at 9:30 a.m. in room 6226, Dirksen Senate Office Building.●

SUBCOMMITTEE ON ANTITRUST, MONOPOLY AND BUSINESS RIGHTS

● Mr. METZENBAUM. Mr. President, the Subcommittee on Antitrust, Monopoly and Business Rights has scheduled hearings on the Family Farm Antitrust Act of 1979 to be chaired by Senator BIRCH BAYH on July 17, 1979, at 11 a.m. in room 2228 of the Dirksen Senate Office Building.

Any persons wishing to submit statements for the hearing record should send them to Mike Egan, suite 102-B, Russell Senate Office Building, Washington, D.C. 20510.●

AUTHORITY FOR COMMITTEES TO MEET

COMMITTEE ON FINANCE

Mr. BAYH. Mr. President, I ask unanimous consent that the Committee on Finance be authorized to meet during the session of the Senate today beginning at 2:30 p.m. to hold a hearing on H.R. 3919, the Crude Oil Windfall Profits Tax Act of 1979.

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

COMMITTEE ON ENERGY AND NATURAL RESOURCES

Mr. BAYH. Mr. President, I ask unanimous consent that the Committee on Energy and Natural Resources be authorized to meet during the session of the Senate today to hold a business meeting.

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

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

Mr. BAYH. Mr. President, I ask unanimous consent that the Committee on Environment and Public Works be authorized to meet during the session of the Senate today beginning at 2 p.m. to hold a markup session on the extension of Public Works and Economic Development Administration.

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

ADDITIONAL STATEMENTS

RHODESIA

● Mr. HEINZ. Mr. President, the July 8 edition of the Washington Star featured a very thoughtful article on the Rhodesia problem by Bayard Rustin, an article which bears close reading by Senators and others concerned with this troubled part of the world. The article, which is adapted from one which originally appeared in Commentary, is entitled "America's War vs. Democracy in Zimbabwe" and is written by one of this country's long time leaders in the field of civil rights who has followed closely for an extended period the independence movements in Africa.

While it is clear that most Americans share the same goal for Zimbabwe Rhodesia—a peaceful transition to majority rule—the Senate debate over the past months has made clear that there remains a great deal of disagreement over how to achieve that objective. It has been my view for some time that the administration's policy has had the effect, regardless of its intent, of "tilting" in favor of the guerrillas operating outside Rhodesia's borders; and that the result of this policy has been to prevent the Muzorewa government from having the chance it deserves to achieve such a peaceful transition to true majority rule, a transition which has begun, but which is by no means finished.

In his article, Mr. Rustin makes some penetrating comments about the election which brought Muzorewa to power, about his policies and plans for Zimbabwe Rhodesia, and about the practical effects of the Carter administration's policy.

I submit the article to be printed in the RECORD. Senators on both sides of this issue would be well served by a close reading of the article, and I commend it to their attention.

The article follows:

AMERICA'S WAR VS. DEMOCRACY IN ZIMBABWE

(By Bayard Rustin)

No election held in any country at any time within memory has been more widely or vociferously scorned by international opinion than the election conducted last April in Rhodesia, now Zimbabwe Rhodesia. In scores of other countries, non-democratic governments periodically stage elections whose predetermined results are never challenged or questioned, even by the world's democracies.

In contrast to the silent acquiescence in what passes for elections in the world's tyrannies, the outcry against the Rhodesian election has been deafening. The United Nations Security Council immediately passed a resolution condemning it and calling upon all countries not to lift economic sanctions against Zimbabwe Rhodesia. And the New York Times, urging no change in the Carter administration's Rhodesian policy, announced that it would be a "moral and diplomatic disaster" for the United States to recognize the legitimacy of the election or of the government resulting from it. The Time's wish since has been granted.

Few critics have even pretended to have an open mind on the subject. United Nations Ambassador Andrew Young, who had earlier described as "neofascist" both the interracial transitional government in Rhodesia and anyone who supported it, announced that the election was "rigged" and called for "new elections without pressures."

Contrary to such opinions, however, the people of Zimbabwe did vote in an election that was freer than most held in the developing world—freer, certainly, than elections held anywhere in Africa with the exception of Gambia, Botswana, and possibly several other small countries. Moreover, not only did they not vote with "a gun to their heads," many voted with genuine, unmistakable enthusiasm. The contrast between how the election was viewed by most Zimbabweans and how it was described by critics outside the country is nothing less than extraordinary.

To be sure, the election was held under extraordinary circumstances. The Patriotic Front had vowed to use violence to disrupt the voting—Joshua Nkomo, the leader of one wing of the Front, had predicted a "bloodbath" at the polls, and so martial law was in force throughout most of the country. The security forces at the polls protected voters. Their presence may also have had a coercive effect, but we saw no evidence that they compelled people either to vote or to vote for a particular candidate.

This is not to say that the government took a passive role in the election. Everyone 18 and older was allowed to vote, and the government encouraged participation through publicity. But these actions were not inappropriate in a situation where most people were voting for the first time in their lives; and their overall effect was to increase majority control over the results.

At the same time, the government sharply curtailed the nonviolent expression of opposition to the election, though such expression was allowed in some places. White employers encouraged people to vote, as did the local militias (the security forces organized by the black political parties).

No one can say with certainty what influence these different pressures had on the voters. But clearly a very large proportion of the population felt free to participate or not participate in the election. The turnout was well over 50 per cent and most likely nearer the official figure of 64.5 per cent.

While the election did not meet the rigorous standards that one would apply to elections in Western democracies, it was remarkably free and fair, especially considering that a civil war was in progress and that most of the population had never before participated in an election. But the opponents of the election—not just the Patriotic Front, the frontline states (Zambia, Mozambique, Botswana, Tanzania, and Angola), the Communist world, and the United Nations, but also political leaders and publicists in Western democracies, including the United States—have not shown the least interest in the question of how democratic the voting process was. As the New York Times put it, "The real issue is not how the election was conducted, but what it was about."

In this connection, two major objections have been raised, the first having to do with the new constitution. It is charged that this constitution was never submitted to the black voters for approval; that it reserves, for a period of ten years, 28 of the 100 parliamentary seats for the 4 per cent white minority; and that it preserves white domination over the army, police, judiciary, and civil service.

The second objection is that the internal settlement, under which the constitution was adopted and the election was held, did not include the Patriotic Front, and so would not end the civil war but lead to its escalation, with the likely involvement of Cuban troops.

Summing up these objections, the Times has charged that the internal settlement is "little more than a device for keeping real power in the hands of Rhodesia's small white minority" and is, therefore, "rightly suspect in black African eyes" and "a recipe for civil war."

Here again, the views of outside opponents of the election and the views of the people inside the country diverge in a most extraordinary way. The Zimbabweans participated in the election with enthusiasm precisely because they felt it marked the beginning of real majority rule and would also bring an end to the war. Virtually all the people I spoke with gave these reasons to explain why they were voting.

The "internal leaders" who negotiated the settlement with Ian Smith felt that the agreement reached on March 3, 1978 established, in the words of Bishop Muzorewa, "the machinery for dismantling the structures and practices of colonialism and racism and of minority rule." They went into the negotiations with the objectives of destroying the legal foundations for institutionalized racial discrimination and winning the transfer of power from the minority to the majority in an election based on the principle of one person/one vote.

The first objective was achieved on Oct. 10, 1978 with the abolition of all statutory discrimination, including the I and Tenure Act which reserved lands for white ownership. The second objective was achieved with the election in April.

The argument that the constitution was never submitted to the black voters for their approval is weak. Throughout the talks, black negotiators reported back to the executive bodies of their respective parties to get their approval for any agreements that were made. At one point in the negotiations, when Bishop Muzorewa walked out in a dispute over the number of white seats in the new parliament, a special meeting of the Provincial Council of the United African National Council was called which was attended by 800 delegates from all over the country. These delegates represented local constituents who were kept informed about the progress of the talks. In the view of the black parties, a referendum on the constitution would simply have delayed independence and exposed their party workers to increased guerrilla violence. And it would have been redundant, they felt, since participation in the election was itself a vote in favor of the constitution and the internal settlement—a point implicitly recognized by those who opposed the election because of "what it was about."

The black negotiators compromised on the issue of the 28 white seats; they were, after all, *negotiating*, and they did not feel that they had sacrificed their fundamental position. In the first place, such an arrangement was in the tradition of Britain's African decolonization policy of "multiracialism." (In Zambia, for example, the special allotment of parliamentary seats to the non-African minority was not discontinued until 1968, four years after independence.)

Then, too, all the plans that have been introduced for a negotiated transition to majority rule have made a special provision for white representation in parliament. Even the now obsolete Anglo-American plan, which is vigorously defended by Andrew Young, re-

serves 20 of the 100 seats for the white minority. During Nkomo's bilateral talks with Smith in 1976, he proposed an election with three different voting rolls which would have assured the whites a substantial minority of legislative seats. He did so, as he said, "to meet fears expressed by the Rhodesian Front" (Smith's party) and "in a spirit of compromise." In the talks leading to the internal settlement, Smith wanted 34 seats for the whites. Muzorewa wanted the number limited to 20 but reluctantly compromised at 28 after his black negotiating partners, Sithole and Chirau, accepted that figure.

The blacks agreed to this arrangement for a ten-year period; they also agreed to clauses in the constitution which protect the institutional interests of whites for an equal period, in order to reassure the white minority that its political and economic position would be stabilized under an African-dominated government. The alternative to this kind of settlement would have meant the inevitable flight of whites from the country and the collapse of the economy, as happened recently in Angola and Mozambique.

Muzorewa has made the point that if independence is not to be a "hollow shell," Zimbabwe must not repeat the mistakes of other African countries which drove out indigenous skilled whites, and then in desperation rehired, at three times the cost, "economic mercenaries who were inevitably failures in their own countries and who came to Africa for what they could milk out of their hosts."

The internal settlement, then, was designed to provide a period of stable transition during which blacks could acquire the experience and skills they were denied under white rule. Muzorewa has promised training programs for Africans to achieve "both . . . the necessary efficiency and the necessary orientation to black majority rule." He is not impatient, since black control over the institutions now dominated by whites in inevitable in a country 96 per cent black. Already the army is 85 per cent black and the police force is 75 per cent black, and the cabinet minister responsible for each force is also black. Moreover, all white officials are now answerable to a black head of state and to a parliament and cabinet which have over a two-thirds black majority.

While Muzorewa and the other internal black leaders have expressed a practical interest in retaining the skills and energies of the whites for Zimbabwe, expediency has not been their only consideration. Whites who have been four generations in Zimbabwe, Muzorewa has said, and who have no other home, must not be "driven out to nowhere." In an open letter to American blacks, Muzorewa has emphasized that Zimbabweans had never "fought the white man's skin. We fought his evil system. We fought his racism." Some people, he said, feel that we should "be ruthless with the white race. But I wish to warn against the reversal of discrimination . . . it makes us hypocrites to turn into black racists ourselves. It makes us oppressors and not liberators."

Ordinarily one might expect such sentiments to be applauded by Western liberals. But in fact, as Bishop Muzorewa said recently, while Zimbabweans" are prepared to forget the past and work together with our white brethren . . . some people in Britain, America, Africa, and other parts of the world appear unwilling to allow us to do so." Little attempt has been made even to understand the practical and moral aspects of the bishop's position, which is viewed as a rationalization for continued white control of Zimbabwe Rhodesia. As a result, we have the paradoxical situation that a settlement which has been accepted by most people inside Zimbabwe Rhodesia as the best and only realistic course for their country is opposed by foreign advocates of "majority rule"!

What alternative do they urge on us? A role for the Patriotic Front, the paper alliance of the organizations of Joshua Nkomo and Robert Mugabe (which have adopted as uncompromising an attitude toward each other as toward the internal settlement). Nkomo, given his narrow base, could only rule through force. And his close ties to Russia and Cuba make it inevitable that both countries would have a decisive influence in any government he headed. Mugabe, even more than Nkomo, favors totalitarianism out of idealogical conviction. He has made no secret of his belief that "the multiparty system is a luxury," and he has announced that if the blacks of Zimbabwe do not like his ideology, "then we will have to reeducate them."

Both have said they would only consider holding elections *after* power had been transferred to the Patriotic Front. This, if anything, is a sure recipe for civil war, since an election policed by the two guerrilla forces of the Patriotic Front would quickly degenerate into a war between them.

It is especially interesting that the excommunication of Zimbabwe has been decreed in the name of racial self-determination, but in total disregard of the views of that country's black majority; and that the Patriotic Front is favored by outsiders in the name of majority rule, but in total disregard of that group's anti-democratic outlook. Thus, we have the unedifying spectacle of the United Nations denying a platform to an "illegitimate" black African leader (as it did to Muzorewa), who is then greeted upon his return home by a cheering throng of over 150,000 blacks; and of the New York Times, ordinarily a proponent of political democracy, asserting that for the U.S. to "pressure" the Patriotic Front to come to terms with the newly elected black government "would be a betrayal of American support for majority rule."

One can account for such anomalies only if it is understood that the issue in not whether or not there shall be rule by the black majority, but what form such rule shall take. And here the alternatives are as clear as they were at an earlier time between white minority and black majority rule. For if the presidents of Zambia, Mozambique, Tanzania, and Angola have their way, majority rule will take a form more or less similar to what exists in their own countries; which is to say that it will be a dictatorship by a small black elite over a destitute black population. It is, of course, precisely this kind of "majority rule" that Muzorewa has said would be a betrayal, for it would have "the mere trappings of independence—a brand new flag, sleek and shiny limousines, black faces in parliament, the OAU, and the United Nations—while those in power are not accountable to the governed for their actions.

In fact, it has been Muzorewa's rejection of "worn-out ideologies," of "political philosophies which could make people secondary to the state—which would regard people as expendable" which constitutes his indictment of the post-colonial experience in much of Africa, and which accounts for the antagonism to him and to Zimbabwe Rhodesia among those who cling to such ideologies and who rule uneasily over the increasingly disillusioned and discontented black masses. And it is, not least, the need to conceal the betrayal of independence and the self-infliction of poverty and political oppression which explains why the struggle for "majority rule" is proclaimed with such strenuous devotion.

Into the essentially internal African debate have stepped the Soviet Union and its Cuban and East German proxies, seeking to exploit African conflicts and frustrations to advance Moscow's geopolitical ambitions. And into it also has wandered the United States, newly sensitive, as it would like to think, to the aspirations of black Africa and determined, as Secretary of State Vance has put it, not to "mirror Soviet and Cuban activities." The foremost U.S. objective has been to preserve American "credibility" in black Africa.

With respect to Zimbabwe Rhodesia, the price for maintaining American credibility among the frontline presidents and with Nigeria has been that we support—or at the very least, do nothing to oppose—the Patriotic Front. As a result, we have found ourselves, until now, tacitly aligned with groups armed by Moscow, hostile to America, antagonistic to democracy, and unpopular within Zimbabwe Rhodesia itself. And we have opposed the internal parties which look to us for support, share our professed belief in an open multiracial society, and have genuine popularity within the country.

That fact is that this has not been the only practical course open to us. The psychology of appeasement is now so deeply rooted among most American officials and political commentators that they have, almost as a matter of course, underestimated our own strengths and the strengths of our friends, as well as the weaknesses of the Soviet position. U.S. officials tremble at the thought of a Nigerian oil embargo, forgetting the fact that Nigeria needs American capital and technology at least as much as America needs Nigerian oil. Most importantly, within Zimbabwe Rhodesia itself, there is now less sympathy for the guerrillas than ever before. If this government takes steps, as it has promised, to improve the social and economic position of the black population, the rate at which guerrillas will defect could increase dramatically. Moreover, Zambia and Mozambique, which have suffered badly from the fighting and are heavily dependent on the much stronger economies of Zimbabwe Rhodesia nad South Africa, are already under pressure internally to end their support of the Patriotic Front and to accommodate to the new reality.

The point is that it should not be our policy to create opportunities for the Russians and to encourage the guerrillas to continue fighting, which is what U.S. repudiation of the Muzorewa government has done.

Beyond this is the larger question of whether we will do anything to help the new black government to survive and continue to evolve in a democratic direction; or whether, by our inaction and failure of nerve, we will embolden its enemies and thus destroy any hope for democracy in the country. If we take the latter course, we will have done nothing to increase the credibility of the United States either in Africa or elsewhere. On the contrary we will have raised a signal to all the world that this country no longer has the capacity to defend or even understand its interests, or to help those who, unlike ourselves, continue to believe in freedom. ●

TRIBUTE TO ARTHUR FIEDLER

● Mr. DOLE. Mr. President, America has lost one of her most beloved national figures, a man who epitomized Boston, whose entire life was spent in the rarified circles of the serious music world, yet who reached out beyond those confines to touch the lives of millions.

To many who knew him only as a televised image, Arthur Fiedler was still a friend, a grandfatherly image who somehow softened the harsh genius they had come to associate with great music. He never settled for anything less than the best, he managed to raise us to his level.

He brought dead notes to life, and he

will live in our memories as long as music itself. We will admire his personal qualities, his persistence, and brilliance into his eighties, and call him back whenever we ponder the necessity for life's finer things in making our days more tolerable.

Arthur Fiedler entertained us. He also moved us, by making great music more accessible and good music more distinguished. He was both serious artist and exuberant showman. He was fun, the professor who managed to teach a course without resorting to boredom or self-importance.

He will be missed. But we have the record of his life preserved, on thousands of phonograph records and millions of feet of television tape. And we have his example from which to draw inspiration.

He bridged the worlds of classical music and popular entertainment, and we followed him across the bridge to a richer, more fulfilled life. I extend my deepest sympathy to Mrs. Fiedler and the maestro's children. Their grief must be mingled with pride, pride that all Americans share in having produced—and appreciated—so unique and towering an artist.●

STONE REVIEWS CALL FOR U.S. PURCHASE OF MEXICAN NATURAL GAS SUPPLIES

Mr. STONE. Mr. President, as President Carter continues his work at Camp David on the development of a national energy policy, I believe it is important for Members of Congress to assist the President by suggesting possible approaches and policies which will lead the country out of the energy crisis we presently face. In this spirit I want to share with the President and with the Congress a specific initiative which I believe would greatly help America overcome our energy problems.

Yesterday I wrote the President a letter expressing my hope that his administration would pursue with new determination the successful completion of negotiation with Mexico for the purchase of natural gas and new amounts of petroleum. I have urged the Carter administration on previous occasions to encourage Pemex, the Mexican National Oil Co., and the consortium of six American companies which almost reached agreement in principle with Pemex 3 years ago, to resume their negotiations. New natural gas supplies from our neighbor Mexico can be an important contribution to a secure, adequate overall supply of energy to meet our country's energy needs. I again call on the administration to encourage these negotiations and ask that the text of my letter to President Carter of yesterday and the text of a previous letter to Secretary of Energy Schlesinger on the same subject be printed in the RECORD.

The letters follow:

WASHINGTON, D.C.,
July 9, 1979.

The PRESIDENT,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: I was most encouraged by press reports of Vice-President Mondale's speech before the National Governor's Conference to the effect that the Administration will pursue negotiations with Mexico for natural gas supplies for America. I have urged this course upon the Administration for several years and believe it can be an important part in an effective national energy program. I want to encourage this project in every way and am willing to assist in any way I can.

Warm personal regards.

Most cordially,

RICHARD "DICK" STONE.

WASHINGTON, D.C.,
February 28, 1979.

Hon. JAMES R. SCHLESINGER,
Secretary of Energy,
Department of Energy,
Washington, D.C.

DEAR MR. SECRETARY: Because the turmoil in Iran has caused serious energy supply problems and in view of the Administrations forthcoming energy conservation proposals, I am writing to call your attention to several basic suggestions, including special concerns relating to Florida.

It now appears that the reduction in Iranian imports may require the adoption of some stringent energy conservation measures. While I agree that energy conservation is a necessary part of an effective national response to the immediate situation confronting the United States, it is imperative that the sacrifices required be shared equitably among different segments of the population and among different regions of our country. Given present economic uncertainties, energy conservation measures must also be implemented in a way which does not threaten a recession.

In this connection I am specifically concerned about the Administration's proposed "weekend gasoline sales restrictions" plan which would prohibit retail gasoline stations from selling gasoline during certain weekend hours. This proposal would severely damage the tourist industry, adversely affecting thousands of businesses and hundreds of thousands of citizens. Its impact on Florida will be particularly severe as tourism constitutes over 20 percent of the State's economy. Weekend closings would have a devastating impact on long-distance travel upon which Florida's tourist industry depends.

Such a result would clearly mean that one business segment, tourism, and one part of the country, namely Florida, would be disproportionately affected by this conservation measure. Therefore, I would specifically urge the Administration to reconsider weekend closings as part of an energy conservation program. It is my understanding that the State of Florida is presently developing alternative plans to weekend closings that would be equally effective. I trust that the Administration would give Florida's proposals and other state alternative proposals full and careful consideration.

My second suggestion is that the immediate crisis requires the adoption and implementation of policies which will bring forth greater domestic plus added, more reliable foreign energy production, the events in Iran having again shown the danger of continuing American dependence on imported energy from unreliable imports. Since coming to the Senate I have actively supported several major legislative efforts, including incentives for greater domestic production of oil and natural gas, to reduce American dependence on unreliable sources. Now as never before, the Administration should utilize presently existing authority to provide incentives for maximum domestic energy production and the Congress and Administration should look toward new, effective production incentives.

The United States has a special opportunity to alleviate the immediate supply shortage by approving a purchase agreement for Mexican natural gas. As you know from our previous conversations, I have long advocated that the consortium of six American natural gas companies be allowed by our government to complete these negotiations. In my opinion our government should rely as much as possible on these companies—which have specialized experience and knowledge in negotiating and marketing Mexico's natural gas—to conclude an agreement. I would hope that our government's role would be limited primarily to the consideration of the price range for such purchases. I understand that, if such an agreement were reached soon, as much as 500,000 mcfs per day of natural gas could immediately be brought into the United States market—an equivalent of 50,000 barrels of oil per day. This means that the Mexican natural gas purchase, if completed, would assist the United States with its short-term supply problem in addition to developing important long-term opportunities for U.S./Mexican energy cooperation.

Obtaining an early agreement on purchase of natural gas from Mexico and encouraging immediate greater domestic energy production should be principle elements in our government's plan to meet the present situation. Such additional supplies may even make unnecessary the adoption of stringent, economically disruptive restraint plans. I respectfully urge your Department to review these suggestions and I am anxious to be of assistance in any way possible in this connection.

Most cordially,

RICHARD "DICK" STONE.●

UNITED STATES-UNITED KINGDOM TAX TREATY

● Mr. HAYAKAWA. Mr. President, as I indicated last June 1978, I favored the United States-United Kingdom Tax Treaty with article 9(4) included, because I am opposed to the application of combined reporting to multinational corporations. When applied in a multicorporate setting, the doctrine of combined reporting requires that a corporation with a business location in the State include in its apportionable tax base not only the entire income of such corporations within the State, but also the income of such of its worldwide affiliates as are found by the State to participate with the corporation in a single business unit. This broad approach to corporate taxation by a State of the income of corporations that have no real contact or connection with the State can result in more than 100 percent of a company's income being subjected to State taxation or can result in a company paying tax or an allocable portion of the entire income of another corporation, even though there is not complete unity of ownership between the two corporations. I also feel that such taxation doctrine impinges on the foreign relations of the United States.

During our deliberations concerning this treaty last summer, much was said about legislatively involving both Houses of Congress. Now that we have removed article 9(4) from the treaty we have an opportunity as provided by section 303 of Senator MATHIAS' Interstate Taxation Act, S. 983, to address the situation legislatively and I am glad that we did so yesterday with due deliberation.●

THE SUSAN B. ANTHONY DOLLAR COIN

● Mr. KENNEDY. Mr. President, on July 2, our Nation honored Susan B. Anthony with the issuance of the new Anthony dollar coin. In so doing, we not only honor the great spirit of this remarkable woman—who, I am proud to say, was a native of Massachusetts—but also give recognition to her lifelong struggle on behalf of the rights of women.

In calling for including women in the Constitution's guarantees, Susan B. Anthony said:

> We ask justice, we ask equality, we ask that all the civil and political rights that belong to the citizens of the United States be guaranteed to us and our daughters forever.

The right to vote for women was secured with the ratification of the 19th amendment; yet full equality for women under the law remains an unfinished part of America's agenda for justice. The need for ratification of the Equal Rights Amendment is clear. Only a constitutional amendment will provide the permanent guarantee of legal equality for the women of our Nation. The ERA is more than a maxim; more than rhetoric. ERA gives vitality to the principles of social justice, economic rights, and political equality. We cannot afford to waste the enormous talents of the women of our society, whether they be in the labor force or in the home; in the private sector or in the public sector.

But the Equal Rights Amendment is not just an issue of women's rights. Every citizen of our Nation will benefit from this renewed pledge to protect our basic rights and liberties and responsibilities, and our dignity as individuals.

Susan B. Anthony provided the impetus for the constitutional amendment guaranteeing women the right to vote. The new Anthony dollar will serve to remind us that full equality for women under the law will be achieved only with the ratification of the Equal Rights Amendment.●

SYNTHETIC FUELS FROM COAL

● Mr. DOMENICI. Mr. President, earlier this month, the Congressional Research Service of the Library of Congress issued an important report, "Synthetic Fuels From Coal: Status and Outlook of Coal Gasification and Liquefaction." This report, coordinated by Dr. Paul F. Rothberg, analyst in physical sciences, of the Science Policy Research Division, is a comprehensive evaluation of the potential energy that Americans can expect from coal in the form of liquids and in the form of gases. The report is especially timely in light of my bill, S. 1377, the Synthetic Fuels Production Act of 1979, which emphasizes commercial production of hydrocarbon fuels from such sources as coal, oil shale, tar sands, biobass, methanol from a variety of sources, and similar resources now in abundance in the country.

The report concludes on a note that truly cuts through the highly-technical discussions surrounding the feasibility of synthetic fuels with this paragraph:

> The technology for initial synfuels production is available. Several improved processes may be technologically ready for the marketplace before 1985. Many of the environmental problems of commercialization can be controlled, but much remains to be learned. The costs of constructing and operating many synfuels plants would indeed be large; but, the costs of not having the synfuels option could be larger.

We can argue until the cows come home about the exact per barrel price of oil that will allow synfuels to become competitive, but two factors make that kind of argument silly: first, all such estimates based upon theoretical analyses, not in-the-field work; and, second, such cost analyses fail to include the extraordinary risk that the Nation now runs because of our inordinate dependency on foreign energy sources. Indeed, "the costs of not having the synfuels option could be larger" than anyone now imagines.

The report by CRS calls for a "national synthetic fuels policy" that would devise a plan to promote commercialization of processes before 1986, to accelerate demonstration plant work, to aid in reducing economic problems facing potential investors in syn-plants, to expedite obtaining permits and clearances, to encourage private enterprise, and to reduce adverse social and environmental impact of synfuels commercialization. My bill, S. 1377, would do much for the commercialization process of synfuels. I believe that we could learn from the plants envisioned under my measure—we could learn what the real environmental risks are, what the economic pitfalls are, and what, if any, adverse social impact such plants might have. We cannot, Mr. President, hold progress towards commercialization of syntheic fuels hostage to theoretical dangers. What we should do is build plants, examine the empirical data we get from them, and devise the appropriate environmental and regulatory standards from such data. In short, I think we should get the synthetic fuels show on the road and not await a fuels policy that might take a commission years to develop, although I support such an overall policy.

I should note that this report contends that the principle reasons for the pursuit of a synfuels option are "the positive effects synfuels production would have on the national security and balance of trade considerations." In light of the recent explosion at the very large Iranian refinery, and the extremely volatile situation in several nations that sell us crude oil, these national security considerations take on overwhelming importance. I am glad the report acknowledges the Nation's dangerous dependence and the relationship of that dependence to our security.

To those who wonder if the state of the synthetic fuels art is sufficiently advanced to consider the massive effort I advocate, this report should be reassuring. The report notes that the coal gas processes for commercialization already exist. It points out that during the past 15 years, industry-Government research has produced several highly efficient forms of coal gas and coal liquids processes. Other nations, such as Scotland, Germany, South Africa, and Canada, have already demonstrated that synthetic fuels are feasible.

On the environmental front—an important consideration—the report explains that synfuels can be dirty, but that the product they give us is so low in pollutants—such as sulfur and n-oxides—that the tradeoff leads to lower overall pollution than present coal-fired plants found all over America. The report demonstrates that synfuel plants cause less environmentally destructive pollutants than oil refineries or coal-burning plants; water requirements for a synfuels plant is considerably less than the water required for thermal electric power generation by about one-third; new technologies in the field are much less wasteful of water for synfuels plants; and, using best available control technology, would offer Federal and State agencies a chance to see what really needs to be done with synfuels plants to make them most environmentally acceptable.

We can now say, as many of us have been saying for months now, that the biggest barrier to synthetic fuels commercialization is economic: An economic situation caused in large part by the delays attributable to regulatory agencies and Federal leasing and construction policies. The report by CRS concludes that Federal financing involvement is critical. Again, we see strong support for the kind of overall approach that S. 1377 would take. Even a moderate Federal involvement, CRS' report concludes, could produce enough synfuels by the year 2000 to reduce our petroleum import bill by $11 billion in 1978 dollars.

The report also acknowledges that problems still exist with the synthetic fuels commercialization effort. We are talking about plants larger than any plants of their kind in this Nation. Questions about the right technologies still exist. Scientists working in laboratories in the country may discover state-of-the-art breakthroughs that will have to be incorporated into commercial plants. But, these kinds of events occur every year in already-existing endeavors—we see new transistors, new stereo equipment, new drill bits, new chemical processes. American ingenuity has never been thwarted merely because its inventions might make obsolete existing processes. Indeed, the very existence of a process fires the imagination of inventors and entrepreneurs to find a better process. I believe this kind of continual improvement and inventive competition will bring about better, and cheaper, synthetic fuels processes. In the meantime, I find the preponderance of evidence, as summarized by this CRS report and by other information, supports a massive Federal effort in bringing synthetic fuels on board in a commercial manner, as soon as possible. The longer we wait, the more risk we take.●

OPERATION CALIFORNIA—PRIVATE INITIATIVE

● Mr. HAYAKAWA. Mr. President, I would like to take this time to praise the initiative of two of my constituents

in California. Richard Walden of Los Angeles, and Llewellyn Werner of Sacramento have organized an emergency airlift to aid the Vietnamese refugees in Malaysia. The airlift, called Operation California, is being conducted with the assistance of the American National Red Cross and its counterpart, the Malaysian Red Cresent Society. It is being done without any State or Federal Government backing.

The plight of the Indochinese refugees is a terrible one, and one which has captured international sympathy. Understandably, the outcry from my constituents regarding this situation has been a loud one. I have received many phone calls, telegrams and letters demanding to know what the Government intends to do to help these people. I tell them in response about the resolution the Senate passed asking the United Nations to convene an emergency session; about the President's decision to admit more refugees into the United States; about the amendment to the supplemental appropriations bill which made additional money immediately available to finance assistance to the Indochinese refugees. But I want to ask them: What is your church or synagogue doing to help? How about your Rotary Club, your garden circle, the PTA? What about your children and their Girl Scout and Boy Scout clubs? Your teenagers and their school and social organizations? College fraternities and sororities? The YMCA? The Kiwanis, the Masons, the Knights of Columbus?

It is indeed heartening to see private citizens responding to this crisis. The situation of homeless refugees who are starving and drowning at sea, and crammed into refugee camps without adequate supplies when they do find land, is a humanitarian problem as much as it is a political one. The United States participated in the Tokyo Summit which worked on the Indochina refugee problem, and has agreed to take part in the international conference the United Nations will convene in Geneva on July 20, but meanwhile, desperate individuals are floating on boats in the South China Seas. I commend Mr. Walden and Mr. Werner for their immediate efforts to help the Indochinese refugees. They prove beyond argument that when an individual wants to help another, no matter how far away the need may be, they can do so, without waiting for bureaucracies, presidents, nations, or "someone else" to act first.

I submit for the RECORD the following article describing their activities from the Washington Post:

AID FOR REFUGEES: TWO CALIFORNIANS ORGANIZE AIRLIFT TO HELP "BOAT PEOPLE"

(By Jeffrey Kaye)

LOS ANGELES, July 8—Two Californians, moved by the plight of the Indochinese "boat people," are organizing an emergency airlift of six to eight tons of supplies to Vietnamese refugees in Malaysia.

The provisions—mostly dehydrated food, drugs and tarpaulins—are to be transported on a Boeing 707 scheduled to leave this week for Kuala Lumpur, where it will pick up refugees destined for resettlement in the United States.

The organizers are Richard M. Walden of Los Angeles and Llewellyn Werner of Sacramento.

Both strongly emphasize that their effort is "strictly a private person enterprise," undertaken without state or federal government backing.

The airlift, dubbed Operation California, is being planned with the cooperation of the American National Red Cross and its counterpart, the Malaysian Red Crescent Society.

Werner said the provisions are to be distributed by the MRCS to transit and beach camps in Malaysia currently holding an estimated 73,000 Vietnamese.

Werner and Walden, who hope to accompany the shipment, said that theirs is the first cargo of emergency supplies to be sent to the refugees in Malaysia from the United States.

The two have during the past two weeks quietly solicited donations from California corporations and individuals. In addition, the Vietnamese community in Southern California—estimated at 70,000—has been asked for supplies.

Airlines have donated drinking glasses, eating utensils and high-protein nuts. Pharmaceutical companies have supplied drugs to protect against cholera, malaria and dehydration. Others firms have contributed water containers, rice bowls and dehydrated vegetables. Plastic tarps will be provided as protection during the approaching summer monsoon season.

Walden said the expenses, expected to total between $10,000 and $12,000, will cover travel, fuel, moving and storage.

The plane transporting the goods is being chartered by the Geneva-based Intergovernmental Committee for European Migration, which has been flying out refugees from Kuala Lumpur to Travis Air Force base in northern California.

Walden and Werner said they believe if their effort is successful, it will demonstrate that private individuals can aid the refugees.

"Unfortunately, there is a noticeable resistance by government and the professionals in the refugee arena to private individuals striking out in an attempt to help," Werner said. ●

IEB STATEMENT ON NUCLEAR ENERGY

● Mr. KENNEDY. Mr. President, it is a pleasure for me to place in the CONGRESSIONAL RECORD today a statement on nuclear energy adopted by the International Executive Board of the UAW on June 20, 1979. The International Executive Board, after studying the issue, concluded that:

It is time for a complete reassessment of the role of nuclear power. While that is being done, no new plants should be started and extreme caution should apply to all operation and construction activities.

I have recently introduced S. 1178, the Nuclear Reassessment Act of 1979, which halts the issuance of new construction permits for nuclear powerplants pending a reassessment of their safety. I am happy that the International Executive Board of the UAW has decided to support a similar position.

I ask that the statement be printed in the RECORD.

The statement follows:

IEB STATEMENT ON NUCLEAR ENERGY—JUNE 20, 1979

It is time for a complete reassessment of the role of nuclear power. While that is being done, no new plants should be started and extreme caution should apply to all operation and construction activities.

The UAW supports the new plant moratorium actions of the Nuclear Regulatory Commission (NRC) and the Congress; we also welcome examination of nuclear power issues by the Three Mile Island Commission, Congressional Committees, and others. However, there is little reason to believe that those actions will resolve the debate about nuclear power.

The accident at Three Mile Island, and recent reports of problems at other plants, are obvious causes of concern, but they are not the only ones. The problem of nuclear waste disposal has been under study for many years—especially since most of that waste comes from military operations—but the projected date for demonstrating a solution constantly slips further into the future. The cost and reliability advantages claimed for nuclear power have consistently fallen short of projections.

There surely will continue to be valid concerns about the possibility of a disastrous accident, and about the ability to contain wastes during the hundreds and thousands of years that they will be dangerously radioactive. It is equally certain there will be assurances that those problems can be solved. Until now, the nation has assumed that those problems would be solved someday, and has moved forward with the use of nuclear power.

It is time to change that approach.

We should not become further dependent upon nuclear power unless its viability—that is, its safety and its economy—is more clearly established. The advocates of nuclear power must prove that they are right, rather than expecting others to go along in the hopes that everything will work out somehow.

We do not expect proof that nothing can go wrong ever, but we do insist that the nuclear power advocates should have to answer satisfactorily every reasonable question. Furthermore, we recognize that there are various forms of nuclear technology, and that conclusions with respect to any particular technology do not automatically determine the viability of others. As in any area, new developments and discoveries may mean that previous decisions have to be changed.

Thus some mechanism must be established to evaluate the conflicting evidence and claims that can be expected. It must not be single-purpose, or short-term, but instead must be able to consider a broad range of issues and to reconsider matters when there are new developments. To satisfy these requirements, and because nuclear power has such important implications for people's physical and mental well-being, and for the economic and social structure, we suggest that a permanent high-level Commission be established. It should include members of the Administration and the Congress, as well as a balanced group of people not in government. Its role should be to consider those issues—such as safety, waste disposal, and economics—which are generally applicable to nuclear power, rather than matters that apply only to a specific plant.

Until that Commission can conclude—without reasonable doubt—that all of the general issues and concerns about nuclear power are answered, no further nuclear plant construction permits should be issued by the NRC.

The NRC would rely upon the conclusions of the new Commission, but should also seek out and evaluate any additional concerns that apply at any specific plant. If there is any reasonable doubt about such matters at a specific plant, the NRC should prevent, halt, or otherwise restrict construction and operation. In view of recent developments, any

errors by the NRC should be in the direction of too much, rather than too little, caution.

At the moment, doubts outweigh the confidence about nuclear power's viability. Nevertheless, the potential for its successful use still exists. Therefore, the UAW supports continuing aggressive research into all nuclear energy technologies, as well as other energy sources and technologies. We also call for equally aggressive research regarding possible undiscovered problems with technologies already in use.

The government must insure that sufficient effort is mounted to solve the problems of nuclear power. Because that effort may not succeed, however, the government must also develop contingency plans that allow the nation to do without that technology.

Nuclear power may be an important energy source for the future, but those who claim that must prove their case.●

THE NEW PATRIOTISM

● Mr. PRESSLER. Mr. President, as the historic congressional engagement over SALT draws closer, a question which has nagged at me since my arrival in Congress becomes more troublesome and demanding of attention.

Why are there no "historic" or "great" debates in the current Congress over health care, the unflagging inflation which has sullied the confidence of the public in our Government, the impact of economic concentration and monopoly on the consumer and small businessperson, the implications for a society which is aging out of proportion to its taxpaying wage earners?

The index of the CONGRESSIONAL RECORD expands each year with references to speeches, debates, and extensions of remarks concerning foreign policy. The references to our domestic difficulties are conspicuous by their absence of notation.

Congress has come to see its historic moments, its opportunities for excellence, the personal achievement and recognition of its Members, and old-fashioned high drama, in its debates over our economic, political, and military relationships with other states.

It is not only a question of how much time Congress is dedicating to the foreign enterprise; it is also a question of emphasis. Congress as an institution is preoccupied with foreign affairs out of proportion to our ability to influence these events or the significance of these events to the principal distractions of Americans.

The problems of this Nation are serious and worsening. The Nation is suffering from the failure of Congress to regard domestic problems with the same urgency or look upon them as providing the same opportunities for leadership and the demonstration of statesmanship which are believed to be afforded by the foreign policy debates.

The American public feels that the quality of American life is declining while the costs of maintaining an inferior lifestyle is increasing. Public expectations, forged by a history of affluence, have not acquiesced to the discovery of scarcity in fossil fuels or inflation rates which give families less real income while pushing them into higher tax brackets.

The public's expectations of our public and private institutions, including the Congress, may be exceeding the capability of those institutions, as presently constituted, to respond in a way which instills confidence in the present or optimism for the future.

Why has the Congress failed to rivet its attention on our domestic problems? The public has not misled the Congress as to its priorities. When George Gallup audited American public opinion in October of 1978, 86 percent named the economy and energy as principal concerns against 5 percent who selected international problems. In spite of the tremendous attention paid by the media to the imminent SALT debate, the Februray 1979, Gallup audit certified that 76 percent of the American public still ranked the cost of living and energy against a preoccupation with international problems, 18 percent. The proportion selecting international problems in February was the highest recorded since the end of the Vietnam war.

The focus of congressional debate was not always on foreign affairs. The American experiment was underwritten by successive Congresses which gave extraordinary attention to the vast, internal enterprise of nation-building, assimilatons, and the maintenance of conditions conducive to social and economic mobility. As late as the mid-20th century the great enthusiasms of Congress were spent in debate and formulation of domestic policies. Congress experienced its high moments, saw its opportunities for excellence, and opportunities for the self-advancement of its Members in the inspirational domestic debate. The speeches of Congress, the party platforms, did not make perfunctory references to domestic problems but addressed them with a vigor and sincerity with which the Congress now tackles foreign policy.

The explanation for current congressional behavior lies in that institution's changed understanding of the national interest.

American politics revolves around the national interest and how best to serve it. However, the national interest cannot be measured with a ruler. It means different things to different people. It means the cost of gasoline which subverts the lifestyles of lower- and middle-income working men and women. It means the father with the retarded child desperately seeking adequate residential care of his daughter. It means the black youth who still cannot get a job. It means the senior citizen whose social security check is swallowed by the high cost of prescription drugs. It means the American family who will sit down to dinner wondering if they can afford to eat this week what they were eating last week.

But Congress has been acting on the premise that the national interest requires that foreign policy take precedence over the hopes and aspirations of Americans struggling to make ends meet. It has reached the point in Congress where it is institutionally more attractive to command an understanding of the intricacies of the cruise missile than it is to exhibit an appreciation of the effect of unemployment on the mental health of the American public. If you stay on Capitol Hill for any reasonable amount of time, you hear it, you sense it, you observe it.

Until America's entry into World War II the true measure of a politician's patriotism was his devotion to building what Lyndon Johnson was later to describe as a "great society." The political rhetoric of this patriotism was unabashedly concerned with the quality of American life. The first priority of Congress was preservation of those features unique to American society—the opportunity for employment at a decent wage, upward economic and social mobility, confidence in our institutions of self-government.

What is needed in Congress today is a new patriotism: an intellectual and social idea which restores the domestic focus to congressional debate. Congress needs to be invigorated with an awareness that its attention span for domestic problems has been deficient. It needs to recognize that what is worth fighting for and preserving in America is only minimally threatened from abroad.

The young farmer who begins to think he may not make as much as his father or that his parents lived in an America with better opportunities is more dangerous than a foreign army.

What is needed in Congress is a reassessment of its priorities. Congress needs to become a forum for a series of analytical debates on the domestic challenges to American institutions. The public needs to see Congress working on their problems with the same vigor it devotes to our foreign enterprise. The true measure of the Congress and its Members should be the level of attention paid to the management of domestic problems, problems which require the emphasis and enthusiasm of that institution, and which, if left unattended, pose the greatest danger to the survival of our institutions.

As the curtain goes up on the SALT debate, Congress must not be detoured by the high drama of the moment, from pulling up its socks, rolling up its sleeves, and wading waist deep into a series of historic debates and Camp Davids on the principal distractions of American life.

The public expects it. The national interest requires it. A mature patriotism demands nothing less.●

WILL THE CIVEX PROCESS WORK?

● Mr. KENNEDY. Mr. President, over the past year, a process known as the CIVEX, which is designed to reduce the proliferation dangers of nuclear power, has been widely disseminated and discussed. I would like to have printed in the RECORD today a summary of a paper prepared by Dr. Bernard J. Snyder, the Assistant Director for Policy Review of the Office of Policy and Evaluation of the U.S. Nuclear Regulatory Commission. His study concerns the nonproliferation characteristics of radioactive fuel. The

paper represents his own conclusions. His central conclusion is that the CIVEX fuel cycle will not render the plutonium breeder fuel cycle proliferation proof or increase its proliferation resistance to any significant degree.

The summary follows:

SUMMARY

A systematic examination of the proliferation resistance of radioactive forms of potentially weapons-usable materials contained in both spent fuel and CIVEX fuel has been made. Results have been presented in terms of REM/Hour, which are meaningful from a health hazard perspective to assure materials are inherently self-protecting.

The study basically covered an investigation of whether—(1) spent fuel from LWR's, and (2) fresh LMFBR fuel fabricated from recycled fissile materials with some of the fission products retained (the EPRI/UKAEA proposed "CIVEX" fuel cycle)—can be self-protecting against diversion due to the inherent radiation. Some consideration was also given to the influence of radiation on the ease or difficulty of separating plutonium from either spent fuel or CIVEX fuel. In addition, an evaluation of some of the advantages claimed for the CIVEX proposal is provided.

CONCLUSIONS

The following general conclusions were drawn from the study.

Both LWR and LMFBR spent fuels retain adequate radioactivity to be considered proliferation resistant for perhaps as long as 50 years (assuming high burnup) unless the diverter (whether national or subnational) can perform complex operations. This tends to counter the claim that spent fuel in storage represents in the near-term a "plutonium mine", i.e., an easily source of plutonium.

CIVEX–LMFBR fuel rapidly loses its self-protecting character within 1.25 to 3 years after initiation of the cycle with discharge of spent fuel from the reactor.

Since the fuel reprocessing, fabrication and reinsertion time is estimated to take at least 1 year, the CIVEX concept does not appear to provide adequate operational flexibility to be inherently proliferation resistant.

The present supply of LWR spent fuel will not be amenable to protection by use of the CIVEX recycling scheme.

Compared to "clean" fuel, CIVEX fuel suffers from the same shortcomings as any "spiked" fresh fuel, including:

The radioactive containment can be removed with proven and well-known technology;

A significant potential health hazard is introduced for both industry workers and the public;

Fabrication, inspection, shipping and charging to a reactor will be more complex and expensive.●

TRIBUTE TO KAY FOLGER

● Mr. WILLIAMS. Mr. President, for nearly as many years as I have been a Senator, Kay Folger has been one of the most effective and highly valued assistants in the State Department Office of Congressional Relations. But, after 18 years on Capitol Hill, Kay is leaving to begin her well-deserved retirement. I would, therefore, like to take this opportunity to join my colleagues in expressing sincere admiration for a job very well done.

Kay joined the staff of the Congressional Relations Office in October 1961. With diplomatic aplomb, good humor, and careful preparation, Kay handled Congressional Relations for the Middle East for 14 years. About 16 months ago, she assumed primary responsibility for the Bureau of Cultural Affairs, confirmation of Presidential Nominees, Office of Protocol, Bureau of Public Affairs, Office of Press Relations, and Office of the Special Assistant to the Secretary for Narcotics Matters.

Over the years, Kay has earned a reputation for political adroitness and effectiveness. Her career is remarkable because she belongs to that vanguard of women who achieved early recognition in professions long dominated by men. She has been scrupulously nonpartisan, despite her previous long history of tireless efforts on behalf of the Democratic Party. It was no easy accomplishment, but Kay has always enjoyed the bipartisan support of all who dealt with her on the Hill. I wish Kay the very best. I know she will be sorely missed.●

AMERICA'S ENERGY FUTURE

● Mr. PERCY. Mr. President, I bring to the attention of my colleagues a recent speech given by Mr. Harvey Kapnick, the very able chairman of Arthur Andersen & Co., at the recent financial and accounting conference of the American Petroleum Institute.

In his address, Mr. Kapnick vividly demonstrates why we must attempt to develop a comprehensive national energy plan in order to effectively deal with the energy dilemma that our Nation presently faces.

So that my colleagues might have the benefit of reviewing this address, I ask that Harvey Kapnick's speech, "America's Energy Future: A Time for Decision", be printed in the RECORD.

The speech follows:

AMERICA'S ENERGY FUTURE: A TIME FOR DECISION

(A speech by Harvey Kapnick)

Energy problems in the United States have been, and will continue to be, critical unless we as a nation develop a coordinated national energy policy. Since 1973 three American presidents have stressed our need for a coordinated national energy policy and, longer term for energy independence. Still we have no energy policy worthy of the name.

As our problems continue to intensify, the political rhetoric accelerates. We are told that the American oil industry has schemed to stage "the biggest ripoff in history" and that the industry has excessive profits. We are told how best to allocate current short supplies by government decree.

Meanwhile, the public protests the high price of gasoline, which to many typifies the entire energy issue. None of this helps solve the problem of making more energy available or of developing the needed national energy policy. In fact, not only have we failed over the last six years to develop a coordinated national energy policy that would lead us toward a solution to our immediate and long-term problems, but in many ways we have lost ground. Since 1973 we have increased our dependence on foreign oil by nearly 50 percent, and we have brought the construction of urgently needed nuclear power facilities to a virtual standstill.

Politicians and the media have led Americans to believe that oil and energy are virtually synonymous. This is wrong on two counts. First, we should have been accentuating the positive—that ours is a strong nation with vast energy resources, fully capable of solving its energy problems. Second, we should have been centering the public dialog not only on oil but on energy in the broadest sense—coal, natural gas, nuclear energy, hydrogen, oil shale, solar power and other energy sources.

However, during the last 20 years we have had no energy policy of any depth or substance. Worse, those most closely involved in energy matters have stood silently by while various self-interest groups espousing narrow, and often reactionary, views have gained the overwhelming attention of the public.

Lacking a national energy policy, U.S. has doubled oil consumption since 1955 with foreign oil accounting for 80 percent of growth.

This lack of a well-defined energy policy has contributed in large measure to our growing dependence on foreign oil. In 1955, Americans consumed somewhat less than 9 million barrels of oil per day, and domestic production supplied 86 percent of that need. By 1978, however, consumption had grown to nearly 19 million barrels daily, and domestic production was able to meet only about half of the demand. Thus, about 80 percent of our increased consumption during that 23-year period came from imported oil. Such statistics alone should have alarmed our national leaders and led them to adopt a coordinated energy policy, but they wasted that time pretending—and leading the American public to believe—that no crisis existed.

Today nothing is more critical to our society than the availability of an adequate energy supply—but that does not necessarily mean adequate oil. Even though oil and natural gas account for the major portion of the world's energy consumption, there are other options, as we all know. However, to move from imported oil as our major source of energy to alternate sources requires a highly coordinated national program backed by the understanding and support of the American public. Since such a program must make difficult tradeoffs that involve energy, the economy and the environment, we must make every effort to gain the support and understanding of various self-interest groups such as the environmentalists and nuclear critics.

Government regulation is source of energy problem, preventing normal operation of free market system and restricting development of alternate energy sources.

Before suggesting a possible direction for a national energy program, let me touch on what I consider to be the basic cause of our current problems. It seems clear that our problem began with government regulation, has been compounded by government regulation and exists today chiefly because of government regulation. The bottom line for our energy problems is that regulation of the energy industry has prevented our free market economy from functioning as it should have over the past 25 years and has thus restricted the development of economical alternate energy sources.

Our firm recently conducted a study on the cost of government regulation in cooperation with The Business Roundtable. In terms of excessive government regulations, we were able to quantify the impact on our society of the direct incremental costs of certain government regulations. Several leading companies in the energy industry participated in this study based on a well-reasoned methodology to pinpoint direct incremental costs of complying with regulations. This study has received increasing support from both critics of government regulation and senior government regulators. In terms of the energy industry, however, the more significant costs to our society are the secondary costs which accrue because regulations impede the normal functioning of the free market system.

Let me cite an example of this. Americans

have enjoyed artificially low energy prices because of government regulation for so long that any type of increase is painful. With the average price of gasoline creeping toward $1 a gallon, the public is responding angrily, but American gasoline is still underpriced when compared to pump prices of $2.50 to $3.00 a gallon in certain other countries. In fact, in most countries energy prices represent a larger portion of spendable income than they do in the United States.

Our maintenance of artificially low oil prices through regulatory intervention has been a major contributor to our present dependence on foreign oil. As long as domestic oil prices were held down, sound economics did not justify the development of alternate domestic energy sources. On the other hand, if we had allowed oil and gas to find their replacement cost price levels, it seems reasonable to presume that we would now have more efficient automobiles, the technology to reduce our consumption of other types of petroleum products and more adequate supplies from alternate sources.

Also, we almost certainly would have progressed much further in developing our coal and nuclear-generating capacity. But because of government intervention, it now takes as long as 10 years to build a coal-fired electric generating facility in this country and up to 14 years to build a nuclear facility. European nuclear plants, however, can be built to meet exacting safety standards in half that time. Such delays, which are painfully disruptive to the national economy, are by no means limited to nuclear plants. Despite the urgent need to expand the nation's power capacity, virtually every proposed for a new energy facility draws fire from environmentalists and others who seek to kill or, at the very least, stall construction of such new facilities.

Comprehensive national energy program operating in free market system is needed. OPEC is not to blame. We have had six-year breather but no action. Oil industry financial results trail all-industry average.

Instead of continual delay, what is needed is a comprehensive national energy program that allows the free market system to operate efficiently, that provides an effective, quick process for decision-making and that creates incentives for the development of alternate energy sources to correct the abuses and remedy the neglect of the past.

But we Americans tend to blame others for our economic and energy problems—the European bankers who control the flow of some of the world's hardest currencies, the Arab leaders who control the flow of Middle Eastern oil, and the American oil companies that have run short of oil. The bankers aren't the villains—the strength of the mark and the Swiss franc can be attributed more to the mismanagement of our economy and energy problems than to the inherent power of the German and Swiss currencies. OPEC is not the villain—the OPEC nations have given us six years to develop alternate energy sources—six years we have squandered in aimless and disjointed pursuit of energy independence.

Nor are the oil companies the villains. U.S. oil companies operate within our private enterprise society and must allocate their economic resources to discharge their responsibilities to literally thousands of individual shareholders. They must also live within the parameters of government regulation. So, if oppressive regulation penalizes the companies for making the investments they should make, then they must look to other types of investments to protect their shareholders.

Certainly, no one would contend that government should dictate the use of shareholder funds. If that happened, such funds would soon evaporate, leaving government as the only source of additional financial support. This would, in effect, illegally nationalize such industries and confiscate private individuals' assets. Many countries that have legally nationalized their industries have learned the hard way that government cannot operate such companies as efficiently as private entrepreneurs can in a free market society.

Political rhetoric and government regulators would lead the public to believe that the oil industry makes excessive profits. According to the Chase Manhattan Bank analysis, 27 oil companies earned $15 billion in 1978. That compares with an $11 billion budget of the Department of Energy. While oil industry profits were increasing by 29 percent between 1973 and 1978, U.S. industry profits in total were increasing by 76 percent. In the same period, return on equity for the oil industry declined from 14.7 percent to 13.2 percent, while the all-industry average return on equity was rising from 12.8 percent in 1973 to 15.1 percent in 1978. Thus, the oil industry cannot legitimately be accused of making excessive profits. Further, if we were to adjust for inflation, we would find that reported oil company profits are significantly overstated.

It would appear that certain political leaders are now going beyond the bounds of propriety in accusing the oil companies of profiteering. To public accountants and financial executives, this is perhaps the most disturbing aspect of the current debate on energy policy. Without question, the limitations of our approaches to financial reporting have contributed to the public's misunderstanding of the industry. Because of the importance of financial reporting in shaping the public's perception of the industry and, therefore, the political framework within which energy policy is to be designed, all of us must direct renewed and enlightened efforts to improved financial reporting for the petroleum industry. Nevertheless, the improper use of financial data to prove a biased point of view does not contribute to solving our immediate problem.

Finger-pointing and blame-placing at this stage are clearly counterproductive. A prerequisite for an effective national energy program is to recognize that we are all to blame to one degree or another—the government for failing to recognize the long-term nature of the supply problem and launching a program of positive action; the oil industry (although I recognize that there have been certain notable exceptions) for taking a defensive posture and not making a real issue of government intervention and political tunnel-vision; the public for ignoring the problem; and our politicians for not developing a dialog with their constituencies on the real issues involved. In many ways, we have all taken the easy way out!

So much for the nature of the problem and how we worked ourselves into the present predicament. What of the future? Is the situation likely to change? The answer is "no" if we continue our present course—but the answer could be "yes" if we replace our sense of public outrage at rising oil and gas prices with a sense of public commitment to take positive action to solve the energy problem.

The critical issue is that we rely excessively on imported oil as our primary energy source. This is a matter of serious concern, since our present sources of supply of imported oil are by no means secure. The Iranian revolution underscored that fact, triggering the current emergency. But the situation in Iran may be only a portent of things to come in the volatile and militarily vulnerable Middle East and Africa. Any near-term political crisis in the Middle East could create even more dramatic problems. This situation is not within our power to control, and thus we must face reality that we are at the mercy of those countries which supply us our required oil needs.

In any economic confrontation, our growing dependence on foreign oil can have an impact on our nation equal in importance to the defense-related concerns of SALT II. Just as we seek to remain independent of foreign military domination, so must we seek to remain independent of any foreign economic domination caused by our dependence on imported oil. To achieve such a goal requires that our nation act now to adopt a coordinated national economic policy and, because of the pervasive impact energy has on our economy, a comprehensive national energy policy.

Growing dependence on vulnerable foreign oil is critical concern. Time-phased action program could meet short- and long-term needs. In developing a national energy policy, we need to recognize that our big failure to date has been in our process of decision-making, not necessarily our dedication to the need for action. And yet we can't continue to paper over the potential economic problems that can be caused by our failure to have a national energy policy or stop the bleeding with bandaids. A massive national effort is required. At stake is our economic ability to survive as a nation, and it's time the public and the politicians recognized a sense of urgency regarding the future availability of energy.

It is obvious that our political process has failed to develop an effective, consensus-based response to the nation's increasingly critical energy problem. Therefore, perhaps now is the time to consider a new approach.

Phase one of national energy program should focus on conservation to help avert potential "Energy Bankruptcy".

If we take a detached, unemotional view of the situation, it becomes apparent that our problem of future energy availability is a traditional business problem—one of threatened bankruptcy. In the case of potential "energy bankruptcy," as in the case of a business facing potential financial bankruptcy, we must begin by taking action to avoid such a catastrophe in the short term while we devise a long-term solution.

Businesses generally do not go broke because they lack assets but because they have inadequate cash flow. A number of now-defunct companies have gone bankrupt while rich in assets but lacking the necessary cash flow to survive. Thus handicapped, they could not convert assets into cash quickly enough to avoid economic disaster. Given the unstable nature of foreign oil supplies, it is not beyond the realm of possibility that the flow of our major energy source—imported oil—could become suddenly and catastrophically inadequate, thereby courting the equivalent of "energy bankruptcy."

Actually, our nation is rich in economic resources and energy assets but, because of events outside our control, we are experiencing a squeeze on the natural flow of imported oil to meet our energy requirements. We have proven oil and natural gas reserves of some 35 billion barrels in addition to vast reserves of coal, which is by far the world's most common fossil fuel. In addition, the oil-producing potential of western U.S. oil shale is 10 times greater than the proven reserves beneath the sands of Saudi Arabia. But, having the assets is one thing; converting them quickly into usable form, as many bankrupt businesses have learned to their sorrow, is quite another.

If we are to approach the threat of "energy bankruptcy" as a traditional business problem, we should develop a three-phase program for solving the problem. In phase one we should begin by marshaling available resources to meet immediate needs to contain the problem at the present level. Phase two should be to develop an intermediate-

term solution, using present and quick conversion-type energy assets, to relieve the current supply pressures. Phase three should be expansion of domestic energy sources and development of the long-term solutions necessary to preclude future problems for the 21st century.

Phase one calls for a comprehensive, coordinated, incentive-based conservation program. One way to encourage conservation is by allowing the price of gasoline and heating oil—our immediate problem—to seek its replacement cost level. To achieve this would require accelerating the decontrol of domestic oil and gas prices. Imbalances caused in other areas of our society would have to be dealt with separately.

American industry, including utilities, consumes oil at a rate of about 5 million barrels a day and natural gas at a daily rate of about 6 million barrels of oil equivalent. Since industry and utilities can switch to other fuels more readily than can homes or vehicles, it would seem appropriate to provide massive incentives to encourage industry to convert to another form of energy as quickly as possible. This is doable, since already significant efforts have produced meaningful savings in industry as the costs of energy have escalated. This process should be accelerated.

Conservation alone is not enough. At best, it is a stopgap until we can implement longer-range approaches to balance and consolidate our energy supplies. We cannot conserve our way to a balanced energy program, so we need a simultaneous effort to expand domestic energy production over an intermediate period such as the next three to five years.

Phase two: Rapid expansion of existing domestic energy sources. Industry has much room for further investment. Real windfall would accrue to government.

In terms of phase two of the program, the experts tell us we can realistically rely on only five primary energy sources over the balance of this century—oil, gas, coal, hydropower and nuclear energy. The domestic oil industry also has much room for further exploration. Here again price decontrol becomes a factor, since current restrictions and talk of windfall profits taxes will limit the funds available for such purposes.

If the decontrol program is to provide for a high rate of tax on excess oil and gas proceeds, that tax rate should be limited to proceeds not reinvested in exploration, development, research for new energy supplies or construction of much-needed facilities. Such a plowback provision would encourage petroleum companies to invest their excess proceeds in needed long-range projects. Only this kind of balanced approach will truly serve the nation's best interests. We should stop talking about a windfall tax, as such, since it misleads the public and detracts from solving the real problems. The real windfall, if there is any, from decontrol of oil prices accrues to government, since government would receive about 60% of all additional revenues through sources such as taxes, royalties and lease payments.

Several major companies already have indicated their intention to invest whatever proceeds they get from decontrol in further exploration, research and construction of refinery, pipeline or other energy facilities. This is consistent with past practices where, as a Chase Manhattan Bank analysis shows, 27 oil companies spent $126 billion on the exploration and development of domestic oil and gas in the years 1973 through 1977—$59 billion more than their total net income during that period.

Coal is the logical candidate to meet immediate needs. Although coal accounts for 90 percent of the nation's conventional energy reserves, it supplies less than 20 percent of our energy needs That clearly is an imbalance, caused to a considerable degree by environmental restrictions. Greater use of readily available coal could help relieve the demand for imported oil.

Coal gasification and liquefaction are other possibilities for the future. Coal gas certainly is nothing new; it was used extensively as a fuel source for 150 years until electricity and natural gas replaced it. Both Germany and South Africa have been active in converting coal to oil and gas, and the technology presently exists for large-scale production. The only question has been economics. But how much economic risk should our nation take where the tradeoff is economics vs. adequate supply? Tax incentives and other approaches already suggested can minimize the economic considerations in developing a viable program for these potential sources, but to date private sector efforts, such as the North Dakota project, have been stymied by government regulators.

As another step in mobilizing our efforts for an intermediate program, the nation simply cannot afford to turn its back on nuclear power. That remains our best option in terms of fuel availability and cost. Something on the order of 50 nuclear generating plants have been canceled over the last several months because of regulatory and legal delays, thus severely crippling efforts to meet expanding energy requirements. Given the known energy needs of the future, we must turn again to nuclear power if we are to avoid brownouts, establish a better national energy balance and reduce our reliance on foreign oil.

The U.S. Atomic Industrial Forum reports that the nation's nuclear power plants generated 276 billion kilowatt-hours of electricity in 1978. This translates to a saving of nearly 470 million barrels of oil to produce equivalent energy by conventional means. Thus, if nuclear capacity were doubled, our reliance on imported oil could drop by 15 percent.

I understand, and share, the legitimate concerns of those who worry about the safety of nuclear power plants. Surely we can do even more in terms of nuclear research and upgrading of safety standards to minimize the possibility of accidents, but such steps should not be used as excuses to further stretch out the schedule between design and startup of needed generating facilities. The Three Mile Island incident should reinforce our confidence that very critical conditions can be controlled, much more so than even air transportation with its recent accident.

A key consideration for any national energy program is that there must be some pragmatic compromises with national environmental goals. We must find ways to achieve short-term energy self-sufficiency without sacrificing the long-term interest in clear skies, clean streams and unspoiled wilderness.

Action needed now to meet 21st century energy demand. Phase three would focus on development of alternate energy sources. Nation has great energy assets but must convert them into usable form.

The national energy program, further, must stimulate action in the 1980s to meet the energy needs of the 21st century. This would be phase three. The alternatives for major additions to the nation's energy supply must resolve the critical issues with regard to the fast-breeder reactor, nuclear fusion, solar power, hydrogen, tar sands and geothermal energy. Such alternatives should be fully explored, but it would be premature at this point to suggest that any of these can provide economical relief to our immediate energy demand.

Oil shale conversion also draws on known technology, but again, the stumbling block has been economics and environmental concerns. If the price of crude continues to rise, however, more attention may soon be focused on shale, which some experts estimate will become economically feasible when the price of conventional oil rises to $18-$26 a barrel. Spot prices already exceed that level. Also scientists seem to agree that solar power should be commercially useful and ready to contribute significantly to the nation's energy pool in the 21st century. Much developmental work already is occurring in this area and, as a matter of public policy, should be accelerated at an early point.

Another alternate energy source that cries for further development is the fast-breeder reactor, which is designed to produce more nuclear fuel than it consumes. After endless months of delay, the General Accounting Office recently recommended completing the Clinch River Breeder Project in Tennessee. After analyzing all the issues with great care, the GAO concluded that the "weight of evidence" favors continuing congressional funding of this high-potential project. Hydrogen could also be an excellent source for the 21st century.

Rather than look at our problems negatively, we should look positively at the fact that we have great energy assets. In fact, we undoubtedly have more potential energy assets than any other nation. Thus our challenge is to convert them to usable resources.

Serious though our energy problem is, it need not be a cause for embarrassment or long-term concern for Americans if we act promptly to develop a coordinated national energy policy. I spend a great deal of time abroad each year in my capacity s chief executive of our firm. This exposure to foreign views of the United States has convinced me that many of our international economic and political problems would ease significantly if we could come forward promptly with a meaningful national energy program.

Ours is a great nation that has shown repeatedly that it can rise to a challenge. In our lifetime, the United States has mobilized its industrial resources to serve as the "arsenal of democracy" for Europe in time of war . . . it has mobilized its manpower to win the major war of this generation . . . it has mobilized its scientific resources to tame the atom . . . and it has mobilized its financial and technological resources to put men on the moon. Now we must mobilize our best efforts to solve the energy problem.

I have already indicated my belief that the process by which we develop a national energy policy is the critical issue. The energy industry cannot act alone, the President's program has been unacceptable, Congress has refused to act, and we do not have time to wait for another national election for the people to speak as they have in Proposition 13 on tax issues and large government spending. Thus, we must face the fact that the present approach for resolving a national issue has not provided an answer. The reason for such impasse is less important than recognizing the fact that such impasse exists.

Nation must mobilize resources of manpower, technology, and dollars to resolve crisis. Congressional action patterned after Trade Act of 1974 is one approach to breaking political impasse.

Therefore, we must mobilize the nation to deal with the energy crisis just as we have done in past national emergencies. We face not simply the "moral equivalent of war," as President Carter said more than two years ago, but now the reality that potential economic warfare could occur centering around energy. Our response should be appropriately bold and urgent, as in the Manhattan Project during World War II and in the moon landings during the 1960s. Then we mobilized our full economic, scientific and technical resources to ensure that we met our national goals. The great defect of democracy, as we all know, is delay and endless compromise that elevate parochial special interests above the urgent national interest. Sometimes even Congress recognizes this de-

fect and arranges to avoid it by changing the normal legislative process.

For example, several years ago Congress recognized that it would have difficulty in resolving the many complex and conflicting issues involved in international trade, so it enacted the Trade Act of 1974 authorizing the President to negotiate a draft trade agreement and to present it for informal consideration during a limited period of review. Congress also agreed in advance to vote the entire package up or down without any amendments.

I believe a similar process is needed to break the energy policy impasse. Therefore, I propose that Congress enact the National Energy Mobilization Act of 1979 authorizing the President to draft a comprehensive national energy program and to present it for informal review during a 90-day period, and commit itself in advance to vote on the entire program without amendment at that time. If Congress failed to act within 60 days, the program would automatically take effect.

Of course, not everyone will accept such a bold approach, and surely not everyone will applaud a really tough, truly effective comprehensive national energy program, but the issue is not popularity. The issue ultimately is our national security and survival of the free nations we lead. The penalty for further drift and delay is potential "energy bankruptcy." Reaching agreement on the process by which our energy problems can be resolved and then working within that process to develop a national energy program represent our best hope for quickly regaining control over our national destiny and that of the free world.●

SOLUTION TO ENERGY CRISIS REQUIRES STRAIGHT ANSWERS

● Mr. PRESSLER. Mr. President, I recently received a letter on the energy situation from a constituent and good friend, Leland N. Schoenhard of Chamberlain, S. Dak.

His letter did a good job of enunciating the problem and provides a specific course of action. I commend it to the attention of my colleagues.

Mr. Schoenhard has sent the letter to a number of people in Congress and in the executive branch. Because what he says makes such good sense, I request that it be printed in the RECORD.

The letter follows:

LEE'S MOTOR INN,
Chamberlain, S. Dak., June 27, 1979.

GENTLEMEN: I am writing to give you my views of the current energy crisis, and what should be done about it.

One of the major problems seems to be the inability of the Government and the Oil Companies to convince the people that there really is a shortage of oil. Little wonder in view of the many inconsistent and conflicting statements and reports that have been given out by people who are supposed to be responsible and know better.

In its issue of May 15, 1978, Time Magazine reported that a severe "oil glut (was) building west of the Rockies." Paradoxically, while the surplus reportedly was causing some California oil men to close or "shut in" some wells, the West Coast was continuing to import 400,000 bbl. a day from Indonesia! Time suggested that this "bizarre" situation should be adjusted to assist East Coat States which are heavy importers.

Now, a year later, we find the California area to be suffering severe energy shortages. When asked the cause of the shortages about ten days ago, Mr. O'Leary of the Department of Energy suggested that the shortage was probably due to the Iranian Oil situation! This is an incredible statement in view of the Time article, plus the governmental warnings of only a few months ago that the Iranian oil loss would be felt primarily in the New England states.

It is little wonder that the people have no confidence at all in their leadership, and they do not believe that there is a real shortage. The Department of Energy has done little but employ people and spend money for no apparent purpose.

The question is, what should be done about the situation? Number one, of course, is to gain the confidence and the support of the people by giving them straight, intelligent, reliable answers.

Next, in my opinion, we have to utilize every available source for the production of energy, something we have completely failed to do. Existing hydro-electric plants should be enlarged, and more built where possible. We must get to work on development of our extensive oil shale deposits which hold more oil than all of the Arab countries. We have to research and develop natural sources such as wind, solar, nuclear, and tidal power, plus, we must study the attributes of Gasahol. We will have to do this eventually against the day when fossil fuels will be exhausted, and we might as well get on with it now. Naturally, this will require reasonable control by environmentalists.

By converting coal to liquid fuel, we could triple the use of coal and still have at least 200 years of known reserves. During World War II, Germany depended 60 percent on liquid fuel made out of coal. We could produce easily 5 million barrels a day out of coal and still have 200 years supply. With the extra use of coal and river dam power across the country, we could be self-supporting in five years. We must remember that the peace treaty with Israel and Egypt has caused bitterness in the Arab world and they are getting back at us with continued oil increases, fully expecting to strangle industrialized countries. Atomic power is another avenue that must be considered. As yet, no lives have been lost and even though there has been much controversy heard, we could still get a lot of power with no crude oil. This may be cheaper in the long run than a risk of atomic war over oil, which would be devastating.

According to an article in the Wall Street Journal on June 15, 1979:

"In Iran, a White House official says, the Ayatollah Khomeini is 'really interested in only one thing—the establishment of an ideal Islamic state.' Clearly, he has little respect for Washington. He recently denounced the U.S. as a 'defeated and wounded snake' and proclaimed: 'We don't need America. It is they who need us. They want our oil.'"

This supports my theory that if we fail to act, we will see oil prices at least 50 percent higher in the next two years.

I also believe that a war over energy is inevitable in the next five to ten years, if we don't do something now and I question whether we can get our boys to fight another war if our congressmen fail to realize our position and continue their incessant bickering. By using our resources, we can be a self-supporting country and tell the Arabs to keep their oil. Our nation's wealth is too great to let it go to waste in these great times of need.

All of this cannot be done without adequate incentive to private enterprise. The Government has already demonstrated its inability to handle this situation, and so it should be left to private enterprise to solve the problem. This will require the lifting of punitive Governmental taxes and controls, but with adequate safeguards to assure that any excess profits will be actually utilized for research and development of existing and alternative energy sources. There is no reason why this type of control cannot be exercised if Congress can forget the special interest groups and areas long enough to develop proper legislation.

In addition to today's problems, we have to remember that there are serious international problems coming in the future. Reports have it that Russia will begin to suffer a severe shortage by 1986. Even before that happens we can expect them to be more than active in attempting to manipulate the OPEC countries to their benefit, and it is entirely possible that some of the present troubles are Russian inspired. It is my belief that when the real energy crunch comes world-wide, which it will shortly, there is the very real prospect of a major war over the energy rich areas of the world. We would be far better off to recognize this possibility by getting our house in order so that we can deal from a position of strength rather than of weakness, and hopefully prevent such a tragedy from happening.

I am sure that you may have heard some or all of the above suggestions previously. Nonetheless, I feel that I should add my voice so that you will know that we in the middle of the country are deeply disturbed by all of this, and are doing our best to study solutions.

Therefore, I urge all of our Representatives and Senators who have overlooked Energy since 1973, while they have been involved in the Watergate and Hayes cases, the FBI/CIA activities, and Tungson Park cases, among others, to get busy and take steps to rectify this situation. If everyone got involved in the betterment of our country, some of the above mentioned corruptions might not have occurred.

One thing that should not be overlooked is the ability of the American people to weld together in a common front once they are given proper, convincing information. We have licked tougher battles, and we will lick this one if we can get the leadership to pull us together.

Your attention is appreciated.

Sincerely yours,

LELAND N. SCHOENHARD.●

OPPOSITION TO SENATE RESOLUTION 140

● Mr. KENNEDY. Mr. President, I rise in opposition to Senate Resolution 140, which expresses disapproval of the administration's reorganization plan for U.S. development assistance programs. Although I have several reservations about the reorganization plan, I feel that it is an important first step in providing greater effectiveness in our overseas development programs—at minimal extra expense, and with no additional bureaucracy.

Development experts have increasingly come to recognize that economic development is a multifaceted process. A successful nutrition program may well be undermined by the absence of health facilities. AID's bilateral economic assistance may be unnecessarily offset by a Commerce Department decision on trade policy. For development assistance to be successful, all aspects of development assistance must be addressed.

I believe by uniting our development efforts under the International Development Cooperation Agency as the administration proposes, some of the current problems of bureaucratic duplication and working at cross-purposes might be eliminated. Through the establishment of a single IDCA Director, the representation of development efforts in the Congress, before the President, and among

the relevant agencies will be focused and coordinated by one office.

Furthermore, I welcome the increasingly high profile that this proposal will give to our developmental programs by uniting it under a central director, and I strongly support the increased developmental, as opposed to the political orientation that it will give to our assistance programs.

Again, while I support the administration's proposal, I do so only by regarding the reorganization as a first step. For I believe the administration's plan is inadequate regarding two of the most important issue areas of development assistance: Our food programs under the Department of Agriculture, and of our monetary policies with our bilateral assistance programs.

Mr. President, I look forward to working with the administration in the future to increase the role of IDCA in these areas.●

TIME FOR LEADERSHIP ON INFLATION

● Mr. MUSKIE. Mr. President, Robert Samuelson recently discussed in the National Journal the fundamental questions this country faces in attempting to slow inflation.

Mr. Samuelson's view parallels my own. His article carries a message I have tried to deliver myself to audiences around the country. It is unpleasant news. But I believe inflation will not come under control until each citizen gets the message, and understands it. The message is simple: Our standard of living goes up only as our productivity increases. If each citizen applies himself only to catching up to inflation, there will be no end to inflation.

Whether it is a businessman using higher prices to preserve his profit margin, or a wage earner who pickets for pay higher than productivity increases dictate, each contributes to inflation. And each, if he restrained his own actions, could contribute to ending inflation.

Each of us, as elected representatives, has an obligation to do our part in the inflation fight by bringing this message to the people we represent. If we fail to conquer inflation, it will be in large part a failure of leadership. If each of us can contribute to a better understanding of the problem and its real solutions, then a victory over inflation is possible, and it will be in part our victory.

Mr. President, to share Mr. Samuelson's analysis with my colleagues, I ask that the reprint of his article published in the June 26, 1979, edition of the Washington Post be printed in the RECORD.

The article follows:

[From the Washington Post, June 26, 1979]

WHO'S TO BE HONEST ON ECONOMIC WOES?

(By Robert J. Samuelson)

The Carter administration's anti-inflation guidelines are collapsing, and unless President Carter is willing to commit his body and soul to curbing inflation—something he has shown no willingness to do—they probably aren't worth picking up.

The settlement between the rubber workers and B. F. Goodrich Co. seems to have put the last nail in the coffin. Even at an assumed inflation rate of 6 percent (used in estimating the effect of a cost-of-living clause), the contract reportedly provides a 27 percent cost increase over three years. At a 9 percent inflation rate, the increase would probably total 35 to 36 percent; there's no way this can be squeezed inside the 7 percent wage guideline.

Nor can the government do much about it. The power to withdraw federal procurement—a power upheld last week in a Court of Appeals decision—is more a feather than a stick. Consider rubber. The government buys about $20 million to $25 million of tires annually, but few—if any—of the purchases exceed the $5 million contract minimum subject to the program.

The price side of the program is also beginning to disintegrate. Initially, the administration had hoped that companies would reduce their average price increases half a percentage point below the 1976–77 average. But companies experiencing "uncontrollable" cost increases could apply a "profit margin" standard. Price increases could exceed the guideline as long as profit margins—profits as a percentage of selling price—didn't increase over those in a "base" period. Though the rule has been toughened, more and more companies (including, recently, the U.S. Steel Corp.) are choosing this option.

Inflation, of course, is the immediate cause of the anti-inflation program's eclipse. For the first four months of the year, consumer prices have increased at an annual rate exceeding 13 per cent. Oil prices have jumped spectacularly. Food prices—heavily influenced by reduced beef supplies—have risen sharply. Likewise, an unexpectedly strong economy early this year increased many raw material prices.

So both unions and companies passed these costs along in higher prices and wages that, of course, simply perpetuate the inflationary spiral. With cost-of-living adjustment clauses and legislated changes in government programs (Social Security, food stamps), the process has become semi-automatic.

All this simply highlights the deeper cause of failure. Americans are living a collective fantasy. There is still no widespread understanding that higher living standards ultimately stem only from higher productivity. The fact is that today's productivity gains (less than 1 per cent last year) are tiny, while a number of factors will take more and more output away from the average worker—whether a secretary, auto worker or executive.

These are worth repeating if only because everyone wants to forget them. High energy imports, for example, mean that more of our output must ultimately go to oil countries as exports. Government regulations—to lower pollution, improve product reliability or reduce worker hazards—all raise costs, but not output. There are also pressures for higher tax rates (especially (Social Security taxes) to support the growing over-65 population and higher "real" defense spending.

Not all these pressures reduce the nation's "living standard." Environmental controls clearly improve them, as does better care for the elderly. But they all tend to reduce workers' purchasing power, which is what people watch. Unless productivity goes up, wage increases must come down or inflation simply intensifies.

Economic policy today ought to put people more in touch with these realities and attempt to improve the realities. This requires an intellectual grasp of the problem and the political ability to translate it into practice. In short, leadership. Carter hasn't provided it.

His failure, of course, is understandable. The process by which investment and innovation lead to higher productivity and rising living standards is an invisible, imprecise one for which no politician can easily claim credit. Who knows when today's "incentive" will yield results? Meanwhile, everyone hopes to stay ahead of inflation, and no political leader wants to deliver the bad news that such self-advancement isn't automatic.

Government is caught in contradiction. People correctly believe that their individual behavior has no national impact and blame any collective problem—a recession, energy shortage or inflation—on the obvious agency of collective action, government. But government is not omnipotent. It can succeed at mastering these problems only by influencing collective individual actions.

The government needs to create a sense of collective responsibility. The guidelines attempt to do this. But, human nature being what it is, the guidelines won't work unless backed by threat—recession. The government must declare that it won't print the money to support extravagant wage settlements. Otherwise, people have no real reason to adhere to the standard.

That doesn't mean wage increases should be uniform. Short of wage and price controls, which don't endure except during periods of national emergency, a democratic government cannot police every wage agreement in the country. At best, guidelines can only create a sense of proportion.

Around a general wage standard, larger increases may be justified by higher productivity increases; lower increases ought to result from lower productivity or fierce competition. Labor unions and companies that have the market power to ignore such pressures ought, at least, to be seen as causing both more inflation and lower growth. Only then is anyone likely to ask fundamental questions of why such market power should continue.

The choices cannot forever be wished away: High inflation is now pushing the country into slowdown and recession. Ultimately, someone is going to have to be honest with the public. Carter has not been, but, to be fair, there is not a politician of national stature—not Edward Kennedy, not John Connally, not Ronald Reagan—who is, either.●

ORDER OF BUSINESS

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. DURKIN. 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. DURKIN. Mr. President, a very serious situation is developing in New Hampshire and the Northeast.

The PRESIDING OFFICER. The Chair informs the Senator that there is no business pending before the Senate.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Senator may speak for not to exceed 5 minutes notwithstanding.

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

Mr. DURKIN. I thank the Senator.

(The remarks of Mr. DURKIN at this point in connection with the introduction of legislation are printed under Statements on Introduced Bills and Joint Resolutions.)

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

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

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

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

LEGISLATIVE PROGRAM

Mr. ROBERT C. BYRD. Mr. President, there are three housing bills on the calendar, Calendar Order No. 155, S. 903. Mr. STEWART is here and is ready to manage that bill. I would propose that the Senate come in tomorrow at, say, 11 o'clock. We will have one special order, probably have some morning business, and then by noon be ready to proceed with that bill.

I understand it will only take 20 or 30 minutes on that bill. There should not be much difficulty with it.

There is another housing bill, Calendar Order No. 169, which could follow that bill, and that piece of legislation should not require too long.

On the third housing bill, which Mr. WILLIAMS will manage, the major housing bill, Calendar Order No. 176, we could be ready, probably, by 1 o'clock or a little after on that bill.

So that I would propose those three measures for the business for tomorrow.

Mr. BAKER. Mr. President, will the Senator yield to me?

Mr. ROBERT C. BYRD. Yes.

Mr. BAKER. Mr. President, the distinguished Senator from Utah (Mr. GARN) is the ranking member of the jurisdictional committee. He is not here. He is on his way to another place to engage in an important debate with another Member of the Senate on the SALT treaty.

I would hope we could forgo scheduling those three items until we convene in the morning.

Originally, as the majority leader knows, these items had notations from our side with the request that they be held until after the disposition of the military construction bill. The distinguished Senator from Texas has released us from that responsibility, and we are prepared to proceed, except I cannot reach the Senator from Utah to try to clear it with him.

I would represent to the majority leader that I will try later this evening to reach Senator GARN and urge him to be present and prepared, because I know the problem the majority leader has in trying to find suitable business for the Senate tomorrow.

But I hope the majority leader could leave the record in this shape, with everyone on notice it is the intention in the morning to do this, and then give me an opportunity to discuss the matter with our ranking member.

Mr. ROBERT C. BYRD. I will do that, and I hope the distinguished minority leader will be able to work this out with Mr. GARN.

The Senate just simply cannot afford to be stalled. The managers on my side of the aisle are ready to go with the housing bills, they are ready to go with the military construction. The distinguished Senator from Texas does not want to go with the military construction until Monday. It is all right with me to wait until Monday, but I have a responsibility to try to keep the Senate busy until then and, in an effort to try to cooperate with the Senator from Texas, I am trying to get the housing bills up.

As I say, the people on my side who manage the bills are ready, they are willing, and they are able.

The holds on the nomination, the one nomination on the calendar, Mr. Frank Reiche, of New Jersey, all the holds are on the other side of the aisle, between 20 and 30 holds, and that cannot be held up forever.

So I say to the distinguished minority leader that I appreciate his cooperation, but come tomorrow we are just going to have to go with our business.

Mr. BAKER. I thank the majority leader.

If he will yield further, I am especially grateful that he would agree to my request that we leave the matter in this state until in the morning, and I will make every effort to try to schedule these items and to work with him to provide suitable business for the Senate for the balance of this week.

Mr. TOWER. If the Senator will yield, am I to understand that the only bills on the calendar are those on which Republicans have holds?

The Senator has gone through a litany of bills and——

Mr. ROBERT C. BYRD. Mr. President, I do not yield for that.

I will say to the distinguished Senator, I know about as much as anybody knows about the calendar.

Mr. TOWER. I was just asking for information.

Mr. ROBERT C. BYRD. I was just saying, there are bills on the calendar we cannot go with because of budget waivers, there are bills we cannot go with which are waiting on House bills, there are bills we cannot go with because of the fact the administration is sending up new data, and if the Senator wants me to go down the entire litany, I can explain one by one what the problem is.

I will enumerate the bills we can go on. The housing bills, the nuclear regulatory bill, the military construction bill, and the nomination. Come next week, some of these bills will be open. There will be appropriations bills ready, but as of now, I have outlined those available.

Mr. TOWER. I am not trying to needle the Senator from West Virginia.

Mr. ROBERT C. BYRD. I can stand a little needling.

Mr. TOWER. I think the Senator from West Virginia knows the Senator from Texas never needled him about anything.

Mr. ROBERT C. BYRD. Of course not. He is not doing that now.

I am simply answering the Senator's question.

Mr. BAKER. I thought it was better before. I wonder if we can discontinue at this point.

Mr. TOWER. If the Senator will yield, I am sorry I opened my big fat mouth.

Mr. ROBERT C. BYRD. All right.

I will accede to the distinguished minority leader's request.

THE JOURNAL

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

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

ORDER FOR RECESS TO 11 A.M.

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 11 o'clock tomorrow morning.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

ORDER FOR RECESS FROM WEDNESDAY, JULY 11, 1979, TO 10 A.M. ON THURSDAY, JULY 12, 1979

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that when the Senate completes its business tomorrow, it stand in recess until the hour of 10 o'clock on Thursday morning.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

ORDER FOR RECESS FROM THURSDAY, JULY 12, 1979, TO 10 A.M. ON FRIDAY, JULY 13, 1979

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that when the Senate completes its business on Thursday, it stand in recess until the hour of 10 o'clock on Friday morning.

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

ORDER FOR RECESS FROM FRIDAY, JULY 13, 1979, TO 9 A.M. ON SATURDAY, JULY 14, 1979

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that when the Senate completes its business on Friday, it stand in recess until 9 o'clock on Saturday morning.

The PRESIDING OFFICER. Is there objection?

Mr. BAKER. I would if I could.

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

ORDER FOR CONVENING OF THE SENATE AT 10 A.M. ON MONDAY, JULY 16, 1979

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that when the

Senate meets on Monday, it meet following a recess, and that it convene at 10 a.m.

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

ORDER FOR RECOGNITION OF SENATOR BENTSEN TOMORROW

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that on tomorrow, after the two leaders have been recognized under the standing order, Mr. BENTSEN be recognized for not to exceed 15 minutes.

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

PROGRAM

Mr. ROBERT C. BYRD. Mr. President, I wish to state for the benefit of the managers of the bills on my side of the aisle, I would like for them to be ready and be available to proceed with Calendar Order No. 155, S. 903; Calendar Order No. 169, S. 1064; Calendar Order No. 176, S. 1149; Calendar Order No. 195, S. 1020; Calendar Order No. 226, S. 1319, the military construction authorization bill.

I would hope our managers will be ready to go with those measures because the Senate has a responsibility to get on with the business of the people and tomorrow morning I hope that these items will be cleared.

I hope also that the Senate will be able to proceed not only tomorrow, but also Thursday and Friday and Saturday.

RECESS UNTIL 11 A.M. TOMORROW

Mr. ROBERT C. BYRD. Mr. President, if there be no further business to come before the Senate, I move that the Senate stand in recess until 11 o'clock tomorrow morning.

The motion was agreed to; and at 6:29 p.m. the Senate recessed until tomorrow, Wednesday, July 11, 1979, at 11 a.m.

HOUSE OF REPRESENTATIVES—*Tuesday, July 10, 1979*

The House met at 12 o'clock noon.

Rev. William R. Downing, Ph. D., D.D., pastor, Lakewood Baptist Church, Sunnyvale, Calif., offered the following prayer:

Almighty God, our creator, lawgiver, moral governor and sustainer; of whom, through whom and to whom are all things, we thank Thee for Thy great mercies to us as a people.

We now beseech Thee for Thy guidance. Grant wisdom and mercy to this, our representative assembly, as it meets this day. Guide this House, O Lord, as it represents our people and conducts the business of our country.

Continue to be merciful is our prayer, which we ask in the name of Jesus Christ our Lord. Amen.

THE JOURNAL

The SPEAKER. The Chair has examined the Journal of the last day's proceedings and announces to the House his approval thereof.

Pursuant to clause 1, rule I, the Journal stands approved.

MESSAGE FROM THE SENATE

A message from the Senate by Mr. Sparrow, one of its clerks, announced that the Senate failed to agree to Senate Resolution 140, entitled "Resolution Disapproving Reorganization Plan Numbered 2.".

REV. WILLIAM R. DOWNING

(Mr. MICA asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. MICA. Mr. Speaker, I would like to take a brief moment and say, "Thank you, and welcome," to our guest chaplain today, the Reverend William Downing.

Reverend Downing comes from California, and being a Floridian I take special note in welcoming him here today and the fine job he did with the invocation, because Reverend Downing is my brother-in-law. He and his family are here visiting with us. We really appreciate him being with us.

COMMUNICATION FROM SECRETARY OF DEPARTMENT OF ENERGY

The SPEAKER laid before the House the following communication from the Secretary of the Department of Energy, which was read and referred to the Committee on Interstate and Foreign Commerce and ordered to be printed:

DEPARTMENT OF ENERGY,
Washington, D.C., July 9, 1979.

Hon. THOMAS P. O'NEILL, Jr.,
Speaker of the House of Representatives, Washington, D.C.

DEAR MR. SPEAKER: At the request of the President, there is herewith submitted to the House of Representatives all the data called for in House Resolution 291, which passed the House on June 15, 1979. In addition to the material transmitted under cover of this letter, each Member of the House of Representatives receives the Monthly Energy Review, the Monthly Petroleum Statistics Report and the Quarterly Report to Congress, all routinely prepared and provided by the Department of Energy.

Sincerely,

JAMES R. SCHLESINGER,
Secretary.

APPOINTMENT OF CONFEREES ON H.R. 1786, NASA AUTHORIZATION, 1980

Mr. FUQUA. Mr. Speaker, I ask unanimous consent to take from the Speaker's table the bill (H.R. 1786) to authorize appropriations to the National Aeronautics and Space Administration for research and development, construction of facilities, and research and program management, and for other purposes, with a Senate amendment thereto, disagree to the Senate amendment and request a conference with the Senate thereon.

The SPEAKER. Is there objection to the request of the gentleman from Florida? The Chair hears none, and appoints the following conferees: Messrs. FUQUA, HARKIN, FLIPPO, and WATKINS, Mrs. BOUQUARD, and Messrs. NELSON, WYDLER, WINN, and GOLDWATER.

APPOINTMENT OF CONFEREES ON H.R. 2676, ENVIRONMENTAL RESEARCH, DEVELOPMENT, AND DEMONSTRATION AUTHORIZATION ACT OF 1980.

Mr. FUQUA. Mr. Speaker, I ask unanimous consent to take from the Speaker's table the bill (H.R. 2676) to authorize appropriations for environmental research, development, and demonstrations for the fiscal year 1980, and for other purposes, with Senate amendments thereto, disagree to the Senate amendments, and request a conference with the Senate thereon.

The SPEAKER. Is there objection to the request of the gentleman from Florida? The Chair hears none, and appoints the following conferees: Messrs. FUQUA, AMBRO, BROWN of California, BLANCHARD, WALKER, and RITTER.

CONFERENCE REPORT ON H.R. 2729, NATIONAL SCIENCE FOUNDATION AUTHORIZATION ACT FOR FISCAL YEAR 1980

Mr. FUQUA submitted the following conference report and statement on the bill (H.R. 2729) to authorize appropriations for activities of the National Science Foundation, and for other purposes:

CONFERENCE REPORT (H. REPT. No. 96-321)

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 2729) to authorize appropriations for activities of the National Science Foundation, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate to