SENATE—*Friday, September 17, 1982*

(Legislative day of Wednesday, September 8, 1982)

The Senate met at 9:30 a.m., on the expiration of the recess, and was called to order by the President pro tempore (Mr. THURMOND).

PRAYER

The Chaplain, the Reverend Richard C. Halverson, D.D., offered the following prayer:

God of Abraham, Ishmael, Isaac, and Israel, as Jewish people through America and the world anticipate the High Holy Days which celebrate their new year, we pray for the peace of Jerusalem and the Middle East. Grant to the leadership of those peoples the will to peace. Give them transcendent wisdom in their decisions and actions. Help our President, Secretary of State and others involved in the situation to fulfill our Nation's role in establishing peace.

May the prophecy of Micah soon come to pass:

And they shall beat their swords into plowshares, and their spears into pruninghooks: nation shall not lift up a sword against nation, neither shall they learn war any more.—Micah 4: 3.

On this 195th birthday of the Constitution of the United States, we thank Thee for this remarkable political document on which our Nation is based. We thank Thee for the radical concept "We the people of the United States in order to form a more perfect union." We thank Thee for the strength and flexibility of the Constitution which still works 200 years after its framing.

Thank Thee, O God. Amen.

RECOGNITION OF THE ACTING MAJORITY LEADER

The PRESIDENT pro tempore. The acting majority leader is recognized.

THE JOURNAL

Mr. STEVENS. Mr. President, I ask unanimous consent that the Journal of the proceedings of the Senate be approved to date.

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

ORDER FOR PERIOD FOR THE TRANSACTION OF ROUTINE MORNING BUSINESS

Mr. STEVENS. Mr. President, I ask unanimous consent that following the recognition of the two leaders under the standing order and the special order for Senator CHILES, that there be a period for the transaction of routine morning business not to extend beyond 10:30 a.m. today in which Senators may make speeches for not to exceed 5 minutes each.

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

SENATE SCHEDULE

Mr. STEVENS. Mr. President, today the Senate will continue consideration of the amendments to House Joint Resolution 520, the debt ceiling bill.

Under a previous order, following the special order for the Senator from Florida (Mr. CHILES) and a period for routine morning business, the Senator from Montana (Mr. BAUCUS) will be recognized to continue debate on his amendment.

There has been no order preventing rollcall votes, so Senators are reminded that there is still a possibility of votes.

On yesterday, however, the majority leader did indicate to the Senate that we would recess today by approximately 2 p.m.

Mr. President, after the session today the Senate will have but 9 working days left until the beginning of the new fiscal year. Thus far, out of the 13 annual appropriation bills necessary to keep the Government operating, the Senate has received only two appropriation bills from the other body, the military construction bill which passed the House on August 19, and the HUD appropriation bill which passed the House last Wednesday.

We face the problem of having to function the majority of the Government, including defense, under a continuing resolution. In my opinion, the country cannot afford to operate under a formula that is sewn together in just a few days, the complications of which are difficult to understand in such a short time.

In my role as chairman of the Defense Appropriations Subcommittee I have been attempting this past week to mark up the Defense appropriation bill for fiscal year 1983.

Some people accuse our committee of trying to spend too much; other people accuse our committee of not spending enough. As a practical matter, the reason why I bring this to the attention of the Senate at this time, is to ask the Senate to do everything it can to avoid having the Defense appropriation bill become a part of a continuing resolution that lasts for just a few months. It will literally cost the taxpayers of this country hundreds of millions of dollars each month if we operate on a month-to-month basis in the largest procurement department of the Federal Government. It is not possible to properly plan and execute the procurement programs and the defense strategy of the United States on a month-to-month basis.

Last year almost on a daily basis my good friend from West Virginia, the distinguished minority leader, asked the Republican leadership when the Senate planned to act on the appropriation bills for fiscal year 1982. The difficulty now is, and my friend has nothing to ask really, because we have only two bills here in the Senate now from the other body for fiscal year 1983. The Appropriations Committee marked up three Senate bills yesterday and we will move as rapidly as possible on those bills.

I am not trying to belabor the point, Mr. President, except to say that there is great frustration brewing in the Senate, and I think it is over the appropriation and budget processes. Members of the Senate still have a chance to make this system work in the next 2 weeks, and one of the ways to make it work is to insist that the defense appropriation bill ought to be a full annual bill in order to save the taxpayers of this country the money that can be saved by acute congressional oversight of the very extensive program of the Department of Defense in this period of modernization.

Mr. President, much remains to be done in the next 2 weeks. I hope the Senate will assist those of us who are trying to do it right.

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

Mr. STEVENS. I am happy to yield.

Mr. CHILES. I notice the distinguished minority leader is not here today, and he did trigger the remarks that he made last year.

I was a little confused with the Senator's statement. I certainly agree with the Senator that we should have an annual defense bill, and we ought to take that bill up. I am a little bit confused as to why we do not have that bill. On the one hand, we do not have a bill over from the House but, on the other hand, the distinguished Senator from Alaska has been saying we cannot mark up the bill we have now because he cannot get the administration to give us any figures as to where the cuts should go.

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

So what is the problem? Is the problem with the House or with the administration or is it with both places?

Mr. STEVENS. I say to my friend the problem of not having a bill rests with the other body, but the problem of not having an agreement as to the levels of defense to be achieved under the budget process rests with OMB and the Budget Committee.

That has been resolved and we will start marking up the defense appropriation bill on Tuesday.

There was a legitimate dispute. It arose, Mr. President, out of the fact that the Department of Defense was the only Department that was asked to absorb a portion of the pay increase that will come about because of the 4-percent cost-of-living adjustment before the request had been received from the President to increase pay in a supplemental appropriation request. Under the budget procedure, the Defense Department was asked to absorb $1.2 billion before the request had been received. We have now worked that out so they will absorb that cost, as all other departments will, when the supplemental is received next year. We will proceed to mark up the defense bill on that basis. That was a legitimate issue between the Office of Management and Budget and the Budget Committee. The Defense Subcommittee had the unfortunate situation of being in the middle, and so did the Department of Defense.

The Department of Defense was instructed by OMB and the Appropriations Subcommittee, the Defense Appropriations Subcommittee, was instructed by the Budget Committee in the Senate, and we had to get those two bodies that were issuing instructions together so that the rest of us could do our work.

I am happy to report to the Senator from Florida and to the Senate that that matter has been resolved. We are still going to have disputes, though, over the defense bill. I do not think anyone will misunderstand that, but we will not be involved in this basic dispute as to the $1.2 billion.

Mr. CHILES. I thank my friend.

Mr. STEVENS. I meant no disparaging remark with respect to my good friend, the Senator from West Virginia. I meant it is not possible for him to ask these questions this year concerning action on appropriation bills, because we do not have the bills on which to act. We do hope that in the course of considering the continuing resolution the Senate will insist that the defense portion of that bill be for a full year and have the details, in fact, of a full defense bill. That is my goal. I hope it is the goal of the Senate.

I thank the Senator from Florida and the Senate.

RECOGNITION OF THE ACTING MINORITY LEADER

The PRESIDING OFFICER (Mr. ABDNOR). The acting Democratic leader is recognized.

Mr. PROXMIRE. Mr. President, in the absence of Senator BYRD, I will take only a minute and then yield back the floor and reserve the remainder of his time for his later use if he wishes to use it.

MICHAEL GOLDBERG: A LIFE SCARRED BY GENOCIDE

Mr. PROXMIRE. Mr. President, today I bring to the attention of the Senate the spiritual wounds genocide inflicted upon a young child, Michael Goldberg. Goldberg's book, "Namesake," which recounts his lifelong odyssey toward peace of mind, was reviewed in the New York Times on September 5, 1982.

According to the review, Michael Goldberg was born in France in the late 1930's, the worst possible time to be a Jew in Europe. His father was deported during the war and died in a gas chamber at Auschwitz. His mother remarried, and to save her son from the Nazis, gave him his stepfather's non-Jewish surname. She did not tell Michael that he was of Jewish origin. Hence Michael Goldberg became Michael Cojot, a change that saved his life, but scarred his soul.

Why did Michael's name change damage his soul? His ignorance of his ethnic heritage allowed him to fall prey to the Nazi culture and propaganda of occupied France. He became anti-Semitic, and developed other Nazi traits, such as sadism, destructive ambition, and contempt for others.

The later discovery that he was Jewish aroused a strong sense of self-hatred in Goldberg, which he carried with him for years. His personality was a paradox that only genocide could produce: he was a Jewish Nazi.

When Goldberg was an adult, he lived and worked in a bank in La Paz, Bolivia. He discovered that the Nazi war criminal who caused his father's death at Auschwitz was also living in Bolivia. To avenge his father's death, Goldberg decided to murder the man.

Goldberg posed as a reporter to gain the man's confidence. After an interview, he had the man at bay and was on the verge of pulling the trigger when he had a sudden revelation:

Something tells me that to kill is not the right solution.

In fact, Goldberg did kill a Nazi, but it was not the one he meant to kill. By choosing not to murder another man, he killed the Nazi in himself. He finally triumphed over the evil that had grown within him, but the battle was never easy.

Mr. President, nobody should have to endure that kind of mental agony. Nobody. But Michael Goldberg is just one of millions of people in our time who has lived—or died—under the spectre of genocide.

What we must do to help prevent what happened to Michael Goldberg from happening to others, Mr. President, is make genocide a crime under international law. I therefore call upon the Senate to ratify the Genocide Convention.

CLINCH RIVER

Mr. PROXMIRE. Mr. President, Wednesday, Senator BUMPERS and Representative COUGHLIN sponsored a forum on the Clinch River breeder reactor. The speakers included some of the most knowledgeable scientists and economists to study this program.

Their evidence against the program was overwhelming—huge cost overruns, obsolete technology, ample substitute fuels at dramatically lower costs, and increased danger of nuclear proliferation.

But that is not the worst part. According to Dr. Theodore Taylor, former Deputy Director of the Defense Atomic Support Agency, if just one breeder reactor were bombed, emissions of strontium-90 and cesium-137 would equal the radiation produced by the explosion of all the nuclear bombs in the world. That is right, all the nuclear bombs.

Is this risk worth taking? No way. According to Congressman OTTINGER the true cost of the project is about $10 billion, and this expense is to demonstrate a technology which, according to the Department of Energy's own figures, will not be competitive until at least 2040.

There is not one good reason to fund this project now when we have had to severely cut back on so many worthwhile programs.

Even the Department of Energy's own Energy Research Advisory Board has a low opinion of the Clinch River plant. They rated Clinch among the worst of the Department of Energy's current energy supply programs.

I urge my colleagues to stop funding this project now.

EXCUSES, EXCUSES FOR LACK OF ARMS CONTROL

Mr. PROXMIRE. Mr. President, three critically important treaties—representing years of arms control negotiations and the best product of our military experts—lie languishing in the Senate. I refer to the Threshold Test Ban Treaty of 1974, the Peaceful Nuclear Explosions Treaty of 1976, and the 1979 SALT II Treaty.

At a time when the world is desperate for progress in the arms control arena, three major advances rest peacefully unattended in the Senate. For this state of affairs, there are a

number of excuses. The Carter administration, for one, did not push for the Peaceful Nuclear Explosions Treaty out of fear that it would upset preparations for a Comprehensive Test Ban Treaty. SALT II died initially due to aggressive Soviet actions and it has been ruled out by the present administration.

The Senate, as an institution, has a responsibility to take some action on these treaties instead of letting them remain here with no prospect of attention.

The alternatives facing the Senate have been cogently spelled out in an excellent article on this subject by Carl Marcy—the longtime chief of staff of the Senate Foreign Relations Committee who now is codirector of the American Committee on East-West Accord.

Mr. Marcy notes that the Senate could:

First. Consent to ratification of the treaties and send them to the President, who would then have the option of ratification.

Second. Consent to the treaties with suitable reservations and understandings.

Third. Return the treaties to the President after having failed in a two-thirds vote.

Fourth. Or allow them to remain in legislative limbo—an unacceptable alternative.

Mr. President, I think Mr. Marcy is exactly right in his assessment. The Senate should hold to its obligation under the Constitution and take action on these treaties—be they modified, accepted or rejected. That is our duty.

Mr. President, I ask unanimous consent that the Carl Marcy article be printed in the RECORD.

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

[From the New York Times, Sept. 15, 1982]

ADVICE? CONSENT? WHAT?

(By Carl Marcy)

WASHINGTON.—Whatever happened to the Senate? The Constitution endows it with the power to give its advice and consent to treaties. Yet it has given neither to three of the most important treaties ever negotiated and that are now physically and legally pending before it.

Senators have not accepted the opportunity to discharge their obligation to stand up and be counted on the Threshold Test Ban Treaty of 1974, the Peaceful Nuclear Explosions Treaty of 1976 and the 1979 treaty limiting strategic arms. Why?

As the November election approaches, how come the electorate does not know, by the evidence of recorded votes, how the senators stand on a treaty limiting underground nuclear tests to 150-kiloton explosions, on a treaty regulating the use of nuclear explosives for peaceful purposes, and, most important of all, on SALT II—the only treaty signed by the President of the United States and the Chairman of the Presidium of the Soviet Union that would limit the number of nuclear weapons on each side?

The reason the Senate has not acted on all three was well put recently by Fred Ikle, Under Secretary of Defense for Policy and formerly Director of the Arms Control and Disarmament Agency. Referring to the threshold and the peaceful nuclear explosion treaties, he said, in an interview in The Washington Post: "The Senate Foreign Relations Committee was about to vote out favorably the recommendation for ratification when the Carter Administration pulled the package back because they felt it would divert from the effort to get a Comprehensive Test Ban Treaty." As for SALT II, negotiated by Presidents Gerald R. Ford and Jimmy Carter. Mr. Ikle said: "The treaty was pulled back from ratification by the Carter Administration."

Use of the phrase "pulled back" does not mean the treaties were returned to the President: it means rather that Mr. Carter decided to leave the treaties pending before the Senate in the expectations that the Senate would do nothing if he so asked. He was right. The Senate did nothing. As for President Reagan he didn't need to ask the Senate to do anything. His statement that SALT II was "totally flawed" was enough to deter that body from any action.

There you have it. The Senate, at the request of the President, has utterly failed to exercise its constitutional prerogative to give or withhold, its advice or consent on three treaties dealing with the most devastating weapon ever devised.

Consider the alternatives.

1. The Senate, by a two-thirds vote, could have consented to ratification of the three pacts. Even if it did, the President would not have been required to exchange documents of ratification with the other party—the formality that would bring these treaties into effect. (There have been past instances when the Senate has approved treaties and Presidents have failed to ratify them.) But at least it would be the President who would have to accept the onus for failure to bring the treaties into effect.

2. The Senate, by a two-thirds vote, could have sent the treaties to the President with its consent to ratification contingent on such reservations and understanding as the Senate might have adopted by a majority vote. This procedure would have given the President the benefit of the Senate's advice on how the treaties might have been changed to obtain the necessary consent to ratification. The Senate would have done its duty: The President would have been advised.

3. The Senate, by less than a two-thirds vote, could have failed to consent to ratification, and the rejected treaties would have been returned to the President. The Senate would have spoken, and the public would now know how each senator voted. This is generally accepted as a significant exercise of the democratic process.

4. The last and most undesirable alternative is what the Senate has in fact done. By leaving these three treaties pending, in limbo, on its calendar, it has abandoned its role in the treaty process. The President can now decide, without Senate action, to honor these treaties—as he is doing with much ambiguous language—or can decide to reject them, as he has threatened.

There are, incidentally, some dozen other treaties upon which the Senate has not acted, including the Genocide Convention, pending for 33 years. In some instances, there may be justification for letting sleeping dogs lie. But treaties involving the control of nuclear weapons should not fall into that category.

Perhaps the time has come for the Senate to amend its rules to require that all treaties submitted by the President be voted on within a certain time. The American people would then know where the Senate stands.

RECOGNITION OF SENATOR CHILES

The PRESIDING OFFICER. Under the previous order, the Senator from Florida is recognized for not to exceed 15 minutes.

REFORM OUR CRIMINAL JUSTICE SYSTEM

Mr. CHILES. Mr. President, I rise again today to speak out on the the need for the Senate to act promptly to pass legislation to fight crime, and to reform our criminal justice system. I have been speaking out here on the Senate floor now for almost 4 months, along with Senator NUNN, on the urgent need for the Senate to take action to solve one of the most pressing problems this Nation faces. Senator NUNN and I introduced a package of crime fighting proposals, S. 2543, and were able to have the bill placed onto the Senate Calendar. Soon afterward, Senator THURMOND and Senator BIDEN, the chairman and the ranking member of the Senate Judiciary Committee, introduced another crime package, S. 2572, which Senator NUNN and I cosponsored. That bill was also placed on the Senate Calendar, and, like S. 2543, it could be called up for consideration by the Senate at any time. What is disturbing is that the Senate has not acted, despite 3 months of opportunity, and now has as few as 12 days in which to act. I believe that we still have enough time to pass anticrime proposals before this session comes to an end, but only if we act promptly.

One of the most important things we do by acting to pass anticrime legislation is to send a message to people all across the country that the Senate, and the Federal Government, is concerned about crime and is committed to the fight against crime. We set an example for State legislatures, and for local governments by passing laws which they in turn can pass on the State and local level. By our inaction, we send out the wrong kind of signals. Yet today, even with our failure to act, we can see State governments that are moving on their own to pass new laws aimed at fighting crime.

Earlier this week, Florida Gov. Bob Graham, Attorney General Jim Smith and other law enforcement officials kicked off a campaign to get the people of Florida to support two anticrime amendments to the Florida State constitution. The two amendments will come before the voters in November's election.

The first of the two amendments would modify the Florida constitution so as to limit the reach of the exclusionary rule. After the Supreme Court first made the exclusionary rule applicable to the States back in 1961, Florida amended its constitution to include the language of the exclusionary rule within the body of the Florida constitution. Over the last 10 years, the U.S. Supreme Court, in a series of decisions, has cut back on the reach of the exclusionary rule. In many instances, the State of Florida was unable to follow the lead of the Supreme Court because the provision in the Florida constitution prevented a more narrow reading of the exclusionary rule. The proposal now before the voters of Florida would specify that the exclusionary rule, as it applies to cases in Florida, shall be interpreted consistently with the more restrictive recent Supreme Court decisions. Mr. President, that would help assure that the operation of the exclusionary rule is brought more into line with its purpose, which is to deter willful police violations of the search and seizure rules. Today, the exclusionary rule is often applied in a mechanical way, so that technical violations of the search and seizure rules are used to exclude crucial evidence at trial. As a result, prosecutors do not bring cases because they know that the exclusionary rule will be used to prevent crucial evidence from being used at trial. Earlier this week, Ed Austin, Florida's State attorney for Jacksonville reported that Jacksonville prosecutors have had to drop 79 felony cases this year because of technical search and seizure violations. It is no wonder that the American public has such little confidence in the ability of the courts to convict and sentence criminals.

The second proposed amendment that will be presented to the people of Florida modifies the bail provisions of the State constitution to allow a person who has been arrested to be held without bail pending trial if the court determines that the person's release would pose a danger to the community. Floridians are all too familiar with today's revolving door bail system, in which a person who is arrested gets out on bail practically before the police are able to fill out his arrest forms. Under current laws, the judge is unable to consider how dangerous it would be to let the person who has been arrested out on bail. He simply applies a rather mechanical rule, which asks whether or not the person is likely to show up for later proceedings. If we allow the judge to consider whether or not release on bail poses a danger to the community, we will give the court system more flexibility to protect society against dangerous criminals who have been arrested.

Mr. President, there are counterparts here in the Senate to both of the ballot questions that will be before the voters of Florida this year. Earlier this week, the President submitted a bill to the Congress that would make changes in the exclusionary rule to prevent the rule from being used to exclude evidence, where the police violation of the search and seizure rules was technical and the police acted in good faith. The President's proposal, which is now pending on the Senate Calendar, is similar to a bill proposed by Senator DECONCINI and cosponsored by myself. Bail reform provisions similar to those before the voters of Florida are contained in both the anticrime packages, S. 2543 and S. 2572, now pending on the Senate Calendar. We in the Senate have the opportunity in the remaining days to pass the kinds of changes on the Federal level that the State of Florida is considering adopting. If we act before we adjourn, we will send a message to people from Florida, and to people from around the country, that the Senate is in tune with the concerns and desires of the public to do something to reform our courts and to stop the crime which is plaguing this country. Both S. 2543 and S. 2572 can be taken off the calendar and passed at any time. Both bills would reform our bail laws, and would make other important changes to help in the fight against crime. The people of Florida are doing their part to make their communities safe once again. It would be tragic if the Senate did not try to do its part on the Federal level to fight crime, especially since we have this unique opportunity to take positive action. I urge my colleagues not to let this opportunity slip away. The fight against crime is too important.

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

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

The PRESIDING OFFICER. Without objection it is so ordered.

ROUTINE MORNING BUSINESS

The PRESIDING OFFICER. Under the previous order, there will be a period for the transaction of routine morning business.

The Senator from Alabama is recognized.

SESQUICENTENNIAL OF RANDOLPH COUNTY, ALA.

Mr. HEFLIN. Mr. President, as the senior Senator from the State of Alabama, I am quite pleased and proud to congratulate the citizens of Randolph County, Ala., on the approaching occasion of the 150th anniversary of their being a part of Alabama.

In the 1830's, people poured west across the border between Alabama and Georgia to settle the fertile, mineral-rich territory which would become Randolph County.

Randolph County was created by the State legislature on December 18, 1832, and was formed from the last Creek Indian cession. It bears the name of John Randolph of Virginia, a prominent Member of Congress around the beginning of the 19th century.

The first county seat was created at Hedgeman Triplett's Ferry, on the west bank of Big Tallapoosa River. Two years later, it was moved about 10 miles west, to Wedowee, located in the central part of the county. This was named for an Indian chief whose village stood near the present site of the town.

Through the years, Randolph County has had a full and rich history—from the days of the Indians through the settling by early pioneers and the battles of the Civil War and on into the present day.

Walking through local pine forests, one finds remnants of Creek Indian towns, including a stonehenge-like circular structure of stone, some 2 or 3 feet high, with entrances on the east and west. These remains were found just a few miles from Wedowee. Some years ago, a row of stone piles or pillars, extending over a distance of more than 1 mile, at intervals of 100 yards, were found at the same site. No one knows why they were placed there.

Randolph County is blessed with outstanding natural resources—rich mineral beds, fertile farmland, pure and plentiful water. In fact, the name of the county seat, Wedowee, means "rolling water," and the name is certainly justifiable. There is scarcely a square 40-acre tract of land in all of Randolph County that is not penetrated by a stream, creek, or river.

All of this contributes to its reputation of being a healthy environment. In fact, during the national census of 1880, the census official assigned to Randolph County turned his report in to his Washington headquarters, only to have it returned to him for correction. The officials at the headquarters had declared the death rate as too small to be true. The original report, however, was returned to Washington unchanged, as there had been no mistake in figures.

Mr. President, Randolph County does have a grand history, outstanding natural resources, and a pleasant climate. I believe, however, that the most important attribute the county has is its people. I must admit that I may be somewhat biased in saying that—for I do have some close ances-

tral ties to Randolph County. Two of my great grandfathers were early settlers of this county—Wyatt Heflin and Harrington Phillips. I have many relatives today residing there including those that bear the names of Phillips, Gay, Blake, Stell, Poole, McMurray, Daniels, and Heflin. Randolph County has a warm spot in my heart. I do sincerely believe that all the citizens of Randolph County, through the years, have shown themselves to be great Alabamians and Americans. Together, they have weathered many storms, always demonstrating a great sense of community pride and determination.

It is a true pleasure representing Randolph County in the Senate, and even more of a pleasure to congratulate the people of Randolph County on their approaching 150th birthday.

AN AMENDMENT TO THE SOCIAL SECURITY ACT

Mr. HEFLIN. Mr. President, I was shocked when I learned that almost $1 billion each year in social security benefits are going to illegal aliens and foreign nationals. This loophole in the social security system is inexcusable at a time when the system is straining to meet its commitments to the millions of elderly Americans who have worked hard to earn their benefits.

It is unbelievable that, at the present time, there are more than 300,000 persons living abroad in more than 60 countries who receive $962 million annually in social security benefits, 70 percent of these recipients are not American citizens. An example of the abuse to the social security system which has resulted from this loophole is the case of a foreigner who moved to the United States and worked here for a number of years and then returned to his homeland at the age of 70. Upon returning to his native country, he married a 17-year-old girl and subsequently had three children before he died at the age of 75. After his death, his newly acquired family, who had never been to the United States, began collecting thousands of dollars annually in social security benefits. It is unfair that this sort of abuse is allowed to exist during a time when American elderly citizens who have worked hard all of their lives to earn social security benefits have been threatened with potential cuts in those benefits.

If we do not act to close this loophole and stop this type of abuse to the social security system, those elderly Americans who have earned and truly deserve social security benefits will be the ones who suffer. To remove this unneeded burden on our social security system and for the benefit of elderly Americans who have retired in reliance upon our social security system I have cosponsored an amendment offered by my distinguished colleague from Indiana (Mr. LUGAR), and I urge all of my colleagues to join me in support of this measure to insure that social security benefits continue to go to those truly deserving American citizens.

THE PRESIDENT IS RIGHT

Mr. HARRY F. BYRD, JR. Mr. President, I think the President of the United States is exactly right in demanding a special session of Congress to handle the appropriations bills. Congress has not yet passed a single one of the 13 appropriations bills. This fiscal year ends in less than 2 weeks, yet Congress has done nothing in regard to passing the necessary appropriations bills.

The President said it is bad economics and bad management of the Government's finances. I agree with that. I support his demand for a special session. I hope that it means that he is determined also to force a reduction in the excessive spending that Congress has been engaged in for so long.

It is time for Congress to act on these appropriations bills, it is time for Congress to reduce runaway and excessive Government spending. I hope that is what the President had in mind when he issued his call for a special session in November.

Mr. HEFLIN. Mr. President, I wish to associate myself with the remarks of the distinguished Senator from Virginia.

ONE-LEGGED CLIMBER

Mr. JACKSON. Mr. President, hundreds and hundreds of people from all over the world attempt to climb Mount Rainier in my native State of Washington every year. It is a tremendous test of one's physical and mental condition and endurance. For those who reach the top of this 14,410-foot volcanic peak, it is an exhilarating accomplishment.

In fact, even young people in good condition train for weeks and even months before trying to climb Mount Rainier. It often is described by those who are successful, as well as those who are unsuccessful, as the most grueling physical test of their lives.

I mention this, and draw my colleagues' attention to it, because I recently had occasion to meet a man, Mr. Donald H. Bennett, Mercer Island, Wash., who become the first amputee in the world to climb to the top of Mount Rainier. He was aided only by one leg and his crutches.

Mr. Bennett—and the members of his climbing team, John Skirving, Vashon Island; Rick Hanika, Seattle; Bob Hartz, Federal Way; Cy Perkins, Enumclaw; and Al Shelley, Tacoma—made the climb to emphasize what people can do if they lose a limb. Their climb was sponsored by the Seattle Chapter of the National Handicapped Sports and Recreation Association.

Mr. Bennett uses an artificial leg in his daily life, but used specially rigged ski poles as crutches to help him with the climb. To prepare for the rugged climb, he hopped 5 miles a day for 2 months prior to the climb.

A documentary film entitled "Hop to the Top" is being made about the climb.

Mr. President, the commendable success of Mr. Bennett and his team members can serve as an inspiration to all handicapped persons—as well as all Americans. His motto is "can do" and it serves us well to reflect upon his philosophy and share it with others.

An article about the climb appeared in the Bellevue Journal American and I ask unanimous consent to have printed in the RECORD the text of the article.

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

ONE-LEGGED CLIMBER: NEVER A MAYBE

(By Barbara Winslow)

The 52-year-old one-legged man who hopped his way to the top of Mount Rainier last weekend never doubted that he could make it.

"I think it was one of the greatest experiences of my life," Don Bennett of Mercer Island told reporters Monday morning. But he said he has no plans to climb any other mountains.

Bennett, who is believed to be the first one-legged climber to reach Mount Rainier's summit without use of an artificial leg, said there was never a "maybe" as he and his five-member team trekked up the mountain that beat him a year ago. The tanned, lean mountain climber described the trip as "really good" and said the weather cooperated with the expedition.

Bennett arrived home about 2 a.m. Monday after a small celebration of fried chicken and pitchers of beer on Crystal Mountain Sunday night.

"I should be tired, but I'm really not," he said. "I'm still up on the mountain!"

It was just one year ago that the handicapped man tried to conquer the mountain, but gave up when bad weather struck. He had come within 400 feet of the top when a blinding snow storm, known as a whiteout, struck and he was told he had to turn around.

"I couldn't believe what I was hearing," Bennett recalled of that try. "You could just see the summit."

He vowed that he wouldn't try again, but two or three months later when the soreness of his limbs was just about to fade, he was planning another attempt.

Bennett uses an artificial leg in his daily life, but did not take it with him to Mount Rainier. He used specially rigged ski poles as crutches to help him up the mountainside.

The poles have a seal-skin circular base and hand grips half-way down the shaft.

The physical conditioning Bennett did prior to this trip made a difference in his strength, he said. For the past two or three months, he hopped five miles a day and swam.

"I felt physically much better," he said.

The expedition departed Thursday and hit the rim of the mountain crater about 5:30 p.m. Saturday, where they slept that night.

"It's a fantastic sight," Bennett said.

There was fog in the crater that evening, but the next morning the team members were exclaiming that the sun was shining. The whole team shared the thrill of making the summit, he said.

"You're up like you're on top of the world," Bennett said.

Fifteen or 20 minutes later they began their descent, eventually deciding to come all the way down in one day. The team, which climbed the north side of the mountain, arrived at White River campground at about 9 p.m.—12 hours after leaving the summit.

The purpose of the trip was to emphasize to people what they can do if they lose a limb, not what they can't do, Bennett said. He lost his leg in an accident 10 years ago.

He played tennis and jogged before he lost his leg. Now he swims and pilots a kayak.

"That's the 'can do,' " he said.

When he awoke after his accident he wasn't remorseful over the loss of his leg, he said.

"I was so damn glad to be alive," Bennett said. His trip was sponsored by the Seattle chapter of the National Handicap Sports and Recreation Association and some commercial sponsors.

Sunday's success was Bennett's second time at the top of the mountain. He made it to the summit two years before he lost his leg.

For now at least, Bennett says he isn't planning another trip up Mount Rainier or any other peak.

"I definitely do not have another mountain to climb," he said.

WATT'S SELLING; NOBODY'S BUYING

Mr. JACKSON. Mr. President, I share with my colleagues George F. Will's column which appeared in the August 19 Washington Post.

Mr. Will suggests that the administration's plan to help reduce the public debt by leasing oil tracts, selling coal leases, increasing timber cutting, and selling off the public lands is not only ill-conceived but ill-timed. He reports that recent polls increasingly confirm the country's concern for environmental protection and its unwillingness to sacrifice its natural resources for narrow economic gain.

I ask unanimous consent to have printed in the RECORD Mr. Will's remarks.

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

WATT'S SELLING; NOBODY'S BUYING

(By George F. Will)

ASPEN, Colo.—Having worn a look of patient suffering through seven summers while wearing heavy leather hiking boots, I note bitterly that now there are boots of feather-light fabric and cushiony soles that are comfortable from the first step. Thus does American capitalism produce comforts that subvert the Calvinist spirit that produced American capitalism in the first place.

This does not mean that hiking trails will suddenty be congested. Many, perhaps most, Americans feel as the Rev. Tom Marshfield does. The protagonist of John Updike's splendid novel, "A Month of Sundays," says: "Athletic fields and golf courses excepted, the out-of-doors wears an evil aspect, dominated as it is by insects and the brainless proliferation of vegetable forms."

But America will not soon be paved over or otherwise manicured. The amount of standing forest is about what it was 50 years ago, and 75 percent of what it was in 1620. And in spite of rhetoric about getting government "off the back of" and "out of" this and that, poll after poll reveals a national consensus for governmental activism concerning environmental protection.

Indeed, if the Reagan years become locust years that will be because a few strategically placed persons recognize and regret that consensus. The administration's plan to offer for lease, quickly, one billion acres of offshore oil tracts looks like an attempt to seize a fleeting opportunity. It is economically improvident to dump tracts onto a depressed market; it is environmentally rash to do so at a pace likely to overwhelm the capacity for supervision.

At a first sale, held two weeks ago, bids were received on only 40 of the 554 available tracts. The 40 high bids totaled just $12.3 million, the lowest yield per acre in the 28 years of federal offshore leasing. Recent leasing on Alaska's North Slope brought $70 million. At least $500 million had been anticipated.

A recent sale of coal leases in the Powder River Basin of Montana and Wyoming brought such disappointing revenues that the sale may be challenged in court as a violation of the law requiring that the public get fair market value for coal. Of the 13 tracts for lease, eight attracted one bidder, three tracts attracted two bidders, and two tracts attracted one. The Interior Department plans to lease 5 billion tons of coal over the next two years. Critics say the market is already glutted: given the current rate of mining, two centuries worth of coal land had already been leased.

Congress' fiscal 1983 budget resolution anticipates $13.7 billion in revenues as a result of administration "management initiatives." these executive branch initiatives are the most important deficit-reducing measures. The biggest component of the package of initiatives is supposed to be bonus bids royalties and rents from offshore oil exploration. Yields from these sources are supposed to double in fiscal 1983. They will not.

James Watt, the interior secretary, plans to sell up to 35 million acres of public lands—a chunk of America about the size of Iowa. The administration is eager to increase timber cutting in national forests, in spite of the fact that today there are 30 billion board-feet of cut but unsold timber. The administration is nothing if not reverent about the law of supply and demand, but it seems careless about increasing supply in a period of slack demand. The explanation probably is that the administration thinks such sales are good for the nation's soul, regardless of economic results, because shrinking the public sector is inherently good.

Watt is the administration's most vigorous (some would say lurid) exponent of this doctrine. He is the only person conspicuous in the upper reaches of the administration who tends to confirm the cartoon of Ronald Reagan as an immoderate ideologue. He has the sharpest tongue and the bluntest policical instincts in Washington. In a city of subtleness and nuances, many of the most effective operators have public personalities as pale as candles. Watt is a blowtorch.

That is one reason why, after 19 months of doing battle with Watt, environmentalists are merry as crickets. they are holding their own, in Congress and courts, regarding the Clean Air Act, pesticide controls, leasing in wilderness areas, offshore leasing and other matters.

This is not because most American closets contain hiking boots (either the old, character-building kind or the new decadent sort). Rather, it is because even Americans who resemble the Rev. Marshfield—who think, with reason, that the story of civilization is the story of mankind's long hike from the heath to concrete—know that acid rain falls on golf courses, too.

ACID RAIN

Mr. FORD. Mr. President, yesterday I had printed in the RECORD the statement of Mrs. Kathleen Bennett, Assistant Administrator for Air, Noise, and Radiation of the U.S. Environmental Protection Agency, presented before a Senate Energy Committee hearing on acid rain and congressional attempts to control it. Today I offer for my colleagues' information the statement of Mr. Jan W. Mares, Acting Under Secretary of Energy, which was given at the same forum.

Mr. Mares' testimony is particularly incisive in its criticism of the acid rain control strategy that has been adopted by the Committee on Environment and Public Works. He hits on the head one of the most glaring flaws in the proposal when he points out that the legislation would single out sulfur dioxide emissions for massive reductions when "[T]here are a number of other pollutants that are believed to be potential precursors of acid rain or which may play important roles as catalysts in the atmosphere." The examples he offers are nitrogen oxides which "not only contribute to rainfall acidity but also may play a critical role in the atmospheric chemistry of sulfur oxide."

Mr. Mares also echoes Mrs. Bennett's concern about this particular control strategy:

> While our estimates of the cost of proposed controls for acid rain reduction are admittedly uncertain, these cost uncertainties are small compared to the uncertainties in our understanding of the benefits, if any, that will be obtained. We have no estimate of the reduction in acidic deposition that would result from a reduction in emissions . . . further research is required before the modeling work can be considered as relevant for decisionmaking.

I hope my colleagues are beginning to realize how precipitous and limited in scope the Environment Committee proposal is, and I ask unanimous consent that Mr. Mares' statement be printed in full in the RECORD.

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

STATEMENT OF JAN W. MARES, ACTING UNDER SECRETARY

Mr. Chairman and Members of the Committee, thank you for inviting the Department of Energy to testify on the issue of acid rain. This subject is of great importance to us; the Department has committed a significant amount of its resources to this problem and is working closely with a number of other Federal departments and agencies. Specifically, the Department is an active participant in the Interagency Task Force on Acid Precipitation established pursuant to Title VII of the Energy Security Act of 1980. In addition, the Department is continuing to support the State Department in the on-going negotiations with Canada concerning Transboundary Air Pollution.

We recognize, and are concerned about, the claims of environmental damage attributed to acid rain and other forms of acidic deposition. We are equally concerned, however, with the manner in which this issue is being addressed. We are concerned that rhetoric is too often outweighing balanced deliberation; that there are efforts underway to seek an immediate legislative solution; and that massive costs are involved in proposals currently receiving Congressional consideration. This is especially disconcerting in light of the fact that major scientific uncertainties abound in the area of acid rain and that we have little understanding of the benefits, if any, that would result from the current legislative proposals. For these reasons, Mr. Chairman, the Department of Energy welcomes the interest being shown by this Committee.

The United States has an unparalleled record of accomplishment in reducing air pollution. Our Clean Air Act is among the toughest in the world. We have accomplished more and expended more dollars in total as well as more dollars per capita in this area than virtually any other Nation on earth. For example, the Environmental Protection Agency has estimated that the United States spent some $150 billion dollars over the last 11 years on air pollution controls. This does not include the billions of dollars exported to oil-producing countries as a result of the conversion of many of our powerplants from coal to oil, primarily for environmental reasons, during the last 20 years.

Over the past few years, the American public has been barraged with stories of how acid rain is destroying the lakes, forests, and agriculture of major portions of North America. Those responsible for these predictions point an accusing finger at the Nation's older coal-fired power plants—those prior to the air quality regulations that now govern new electric and industrial powerplants. They propose a massive pollution control program beyond that provided for in the Clean Air Act. This approach to the acid rain issue is embodied in the proposed acid rain legislation approved by the Senate Committee on Environment and Public Works.

One of the primary targets of this proposed legislation, older coal-fired plants, will not be with us forever. Retirements are going to cause almost every one of them to be taken out of service and replaced by new powerplants incorporating Best Available Control Technology between the years 1995 and 2020. As a result, we anticipate that during that period, sulfur oxide emissions will decrease by roughly the same amount or even more than what is called for in the current legislative proposal. The proposed legislation will not add to this decrease, but simply accelerate it by a few to at most 30 years.

I would also point out that the proposed legislation singles out sulfur oxide emissions for massive reductions. There are a number of other pollutants that are believed to be potential precursors of acid rain or which may play important roles as catalysts in the atmosphere. For example, nitrogen oxides not only contribute to rainfall acidity but also may play a critical role in the atmospheric chemistry of sulfur oxide.

I make these points because too often we hear the issue of controlling emissions from older powerplants portrayed as an "all or nothing" affair. That is not the case. The structure of the current Clean Air Act will eventually accomplish the same results as the proposed acid rain legislation. Therefore, the issue is quite straightforward: Are the costs of accelerating the reduction of sulfur emissions balanced by the benefits?

COST OF EMISSION CONTROLS

The Department of Energy has undertaken a number of studies of the costs that would be incurred if such a massive control program were legislated with the intent of reducing rainfall acidity. The most recent of these studies is a staff analysis entitled "Costs to Reduce Sulfur Dioxide Emissions," which I have provided to the Committee. This analysis also summarizes the results of earlier Department of Energy studies.

As you are aware, the proposal now pending before the Senate would mandate a reduction in annual sulfur dioxide emissions in 31 eastern states by 8 million tons below 1980 levels. However, by the time the control program is fully in force, additional industrial and electric utility growth will have taken place so that the total level of reduction required by the proposed legislation is probably closer to 10 million tons annually. According to the Department's best estimate, a reduction of annual sulfur dioxide emissions by 10 million tons will require a minimum, average annual expenditure of $3.5 to $4.6 billion.

These cost projections are average annualized costs and have been calculated assuming that the extra controls would be used for 30 years. Therefore, over the lifetime of the proposed legislation, some $100 to $140 billion, in 1982 dollars, would be expended, again at the very minimum.

In conducting its cost analyses, the Department of Energy reviewed the various technical means currently available to achieve sulfur dioxide reductions. The choices are limited: switching from a higher to a lower sulfur coal, flue gas desulfurization, and coal cleaning. No single method was found to be the least expensive in all cases; costs will vary, depending upon the location of the powerplant and site specific constraints. Coal switching, however, appears on the average to be the method of economic choice. Moreover, due to the inherent sulfur removal limitations of currently available coal cleaning technology, most of the reductions would have to come from either switching coals or installing flue gas desulfurization equipment.

It is important to recognize that the $3.5 to $4.6 billion range of annual costs represents the minimum costs anticipated from the proposed legislation. Actual costs will probably be significantly higher. One reason is that calculations performed in Washington often underestimate the complexities frequently encountered in the real world that tend to raise costs. Second, these costs were calculated assuming that the legislation would be implemented through a set of near perfect, economically efficient regulations. Past history has shown that this will almost surely not be the case. Third, the calculations assume that the entire market place will be at equilibrium; that is, the selling price of low-sulfur coal will be strictly proportional to mining costs. In contrast, the market for coal is likely to be seriously disrupted, as I will discuss in a moment. These three assumptions are not unique to the Department of Energy analyses, but are inherent in all the analyses we have seen which attempt to estimate the costs of reducing sulfur oxide emissions. Taking these points into consideration, it would not be unreasonable to estimate that the actual costs of the proposed legislation are in the range of $5 to $7 billion annually.

These dollar costs translate directly into increased utility bills for consumers. Subject to the same caveats associated with cost estimating, the Department has calculated a 3 to 10 mills per kwh increase in electricity generation costs. This, in turn, will cause electricity rates to rise by between 4 and 25 percent depending upon the specifics of the utility serving a particular customer. Moreover, since utilities don't average their costs over a 30 year period, significantly higher cost increases are probable during the initial implementation period.

There are also indirect costs associated with the proposed legislation. By far, the greatest will be incurred by our Nation's coal supply sector; i.e., coal firms, the miners employed by those firms, their families, and the regions in which they work and live.

To achieve the proposed level of sulfur dioxide reduction more than 200 million tons of coal per year will have to be either switched or subjected to flue gas desulfurization. Two hundred million tons is approximately one fourth of our entire Nation's present annual coal use. If we assume that two thirds of the reduction will be achieved by switching and one third by flue gas desulfurization, we are talking about idling more than 160 million tons of the annual production of eastern higher sulfur coals and putting an equivalent amount of stress on low sulfur coal supplies. While overall net coal mine employment is likely to remain stable, some 40,000 miners will be looking for new jobs.

Unfortunately, the mines that will be required to supply lower sulfur coals will generally not be in the same geographical area as the mines that are shut down. Many miners will face not only unemployment but also the likelihood of moving their families to new areas. The average miner's family consists of about 2.6 persons, in addition to the miner, so the impact would adversely affect the lives of about 150,000 citizens. On top of this, local businesses and the communities in which these miners live will undoubtedly experience substantial economic and social disruption.

The imbalance in our Nation's coal supply infrastructure will cause the demand for premium low sulfur eastern coals to significantly increase, with the result that the market equilibrium, which I referred to earlier, will be lost. Higher prices for lower sulfur coals will adversely affect more than the large number of utility and industrial powerplants that would be forced to switch from higher sulfur coals. Current users of low sulfur coal will also see higher coal prices. In addition the economics of coal conversion, especially by industrial boiler users, will be adversely impacted.

Ultimately the cost increases will be passed to consumers and industrial users of electricity and coal. Initially, however, electric utility industry will bear a major financial and regulatory burden. The Nation's utility industry is already experiencing severe difficulties in raising capital necessary to meet growth projections. Additional financial requirements, such as the capital costs for flue gas scrubbing equipment and/or plant modifications necessary for receiving low sulfur coals, will significantly add to the financial stress of our Nation's utilities.

BENEFITS OF INCREASED SULFUR DIOXIDE REDUCTIONS

While our estimates of the costs of proposed controls for acid rain reduction are admittedly uncertain, these cost uncertainties are small compared to the uncertainties in our understanding of the benefits, if any, that will be obtained. We have no estimate of the reduction in acidic deposition that would result from a reduction in emissions. Attempts have been made to model how sulfur compounds are transported in the atmosphere and transformed into acidic species. Unfortunately, our current knowledge of the chemistry of sulfur oxides and other chemicals contributing to acid transformation in the atmosphere and in clouds is insufficient. As a result, further research is required before the modelling work can be considered as relevant for decisionmaking. I would like to emphasize here that I am not talking about reducing scientific uncertainties by a few percentage points; the scientific uncertainties I am discussing cover a broad range of possible outcomes. We cannot even rule out the possibility that the proposed massive emission reductions would have an insignificant impact on acidic deposition in Eastern North America.

The transport and chemistry of acidic pollutants in the atmosphere is only one area that is dominated by major scientific uncertainties. We also have an extremely poor scientific understanding of how changes in rainfall acidity would lessen the damages currently being attributed to acidic deposition. In fact, we have a highly incomplete understanding of what damages are taking place today because of present levels of rainfall activity.

Acid deposition has been blamed for the accelerated decay of manmade materials and structures, and damage to agricultural crops, forests and fresh water ecosystems. At present, the largest percentage of economic damage caused by acid deposition is being related to the decay of manmade materials and structures. There is no doubt that manmade pollution contributes to this decay; however, most of the damages are occurring primarily in urban areas. Studies in both this country and in Europe generally agree that this is a short range pollution problem and that the vast majority of the pollutants responsible are of local origin, coming from the combustion of fossil fuels within the same urban areas receiving the damage. These pollutants are exactly those covered under the Clean Air Act. States currently have the authority to modify their State Implementation Plans to deal with this problem. No new legislation is necessary. In fact, the proposed acid rain legislation is unlikely to significantly affect decay of manmade materials and structures.

Present environmental damage to agricultural crops is known to largely result from ozone, a pollutant that also can travel great distances from both industrial and urban sources. Ozone formation has been related to nitrogen oxides and hydrocarbons, not sulfur oxides. There have been some laboratory tests in which crops have been exposed to various levels of rainfall acidity. These experiments are difficult to perform and, at present, results are mixed: some crop yields diminish while other improve.

For forests, the Europeans have reported evidence of damage; however, their results have not been corroborated by similar observations in North American forests.

For aquatic ecosystems, there is evidence of adverse effects due to excessive water acidity, primarily in certain high-altitude lakes. The extent to which this problem is correlated to acidic deposition is still uncertain. The economic damage to aquatic ecosystems is expected to be small, however.

To understand the benefits of the legislative proposal, we require more than a knowledge of what damage is actually being incurred. We need to know what portion of these damages would be alleviated by reducing the level of emissions. We have no knowledge, at present, of the benefits that would accrue due to the implementation of any proposal to substantially reduce sulfur dioxide emissions in a geographically board area, such as the region covered by the 31 eastern states.

RESEARCH INITIATIVES

This Administration, in recognition that sufficient technical information is not available now, has proposed an accelerated research program. This, of course, responds to the Congressional initiatives in the Energy Security Act of 1980.

Even in these times of tight Federal budgets, Federal agencies nearly doubled the acid rain research budget from fiscal year 1981 levels to $22 million in fiscal year 1983. Much of this work follows initial directions set by DOE and ERDA in the mid 1970s. DOE also actively participates on the Interagency Task Force on Acid Rain and we conduct approximately $2 million in acid rain research, about 10 percent of the Federal budget for such research. Further, our National laboratories continue to play a major role in advancing our state of knowledge through a comprehensive program of research and technical assessments.

CONCLUSION

We share the concerns of those who value our environment and our Nation's natural resources. The Department of Energy will continue to fully support and participate in the Administration's program of accelerating research into the causes, effects and alternative means of controlling acidic precipitation. The scientific insights which will be forthcoming over the next few years should place both the Administration and the Congress in a position to intelligently address alternative courses of action. We will be in a position to know better if accelerated action is required or whether we can wait for the natural retirements of older coal-fired powerplants. If action is deemed necessary, we will understand which pollutants should be controlled. Control of sulfur oxides may be less effective than focusing controls on other atmospheric pollutants, especially those capable of converting sulfur dioxide to acidic compounds. We will also have a much better understanding of which control strategies are most effective. The geographically broad, massive emissions reduction strategy currently being proposed is but one approach. Effective results might be obtained with a less expensive program, for example, focused on local sources that may be contribution to acidic deposition.

In summary, Mr. Chairman, the Department of Energy finds that acid rain control measures currently being proposed represent a premature move towards legislation mandating a massive control program. In essence, we are being asked to set aside billions of our Nation's wealth to obtain benefits that have yet to be quantified. These proposals are all the more disturbing considering the current state of the Nation's economy and the importance of coal in meeting our Nation's energy security objectives.

STATES, LABOR, ENVIRONMENTALISTS, AND HEALTH GROUPS OPPOSE CHANGES IN FIFRA

Mr. CRANSTON. Mr. President, as I announced to my colleagues on September 15, I oppose the changes approved by the Senate Agriculture Committee to section 24(a) of the Federal Insecticide, Fungicide and Rodenticide Act. Section 24(a) authorizes a State to regulate the sale or use of federally registered pesticides as long as the State does not permit use or sale prohibited by the Environmental Protection Agency. The FIFRA legislation, H.R. 5203, approved by the Senate Agriculture Committee earlier this week makes a number of changes which would significantly restrict a State's authority to regulate pesticide use. I strongly believe that section 24(a) should remain unchanged so that States can protect the health and safety of their citizenry.

Since the committee action, I have heard from numerous State government organizations, labor, environmental, and health groups who share my concerns. These groups have objections to the bill in its present form and all oppose any changes in section 24(a). I want to bring to my colleagues attention the names of these groups:

National Association of State Departments of Agriculture.
National Governors Association.
Council of State Governments.
Southern Legislative Conference.
Southern Governors Association.
State of California.
AFL-CIO.
Longshoremen's Union.
The National Grange.
National Farmers Union.
Migrant Legal Action.
The National Coalition Against the Misuse of Pesticides.
The National Audubon Society.
Friends of the Earth.
The Sierra Club.
March of Dimes.
American Public Health Association.

S. 2853, THE HATTERS' FUR TARIFF ACT OF 1982

Mr. BAKER. Mr. President, I rise today to join my distinguished colleague from Illinois, Senator PERCY, in supporting a modest change in the tariff laws. Presently, a 15 percent duty is imposed on hatters' fur that is imported from abroad. I should point out, Mr. President, that there are vir-

tually no domestic suppliers of hatters' fur and therefore the present tariff is not protecting an American industry. While that alone may be reason enough to suspend the tariff, a more egregious inequity exists. Finished, or partially finished imported products which contain hatters' fur are subject to a maximum tariff of 5.3 percent—and in many cases, none at all. Therefore, a domestic producer of hats pays an additional 15 percent on a major raw material while its foreign competitors pay little or no tax on the fur used for hats and related items.

S. 2853, Mr. President, would temporarily suspend this tariff—until 1985—and relieve domestic manufacturers of this burden. A companion bill (H.R. 5386) has been introduced in the House, where hearings were held. The Ways and Means Trade Subcommittee has favorably reported the bill to the full committee. The administration favors this temporary suspension of the tariff. It is my hope, Mr. President, that this measure may be incorporated in the miscellaneous tariff bill presently in markup in the Senate Finance Committee.

MESSAGES FROM THE PRESIDENT

Messages from the President of the United States were communicated to the Senate by Mr. Saunders one of his secretaries.

EXECUTIVE MESSAGES REFERRED

As in executive session, the Acting President pro tempore laid before the Senate messages from the President of the United States submitting sundry nominations which were referred to the appropriate committees.

(The nominations received today are printed at the end of the Senate proceedings.)

ANNUAL REPORT ON THE DEVELOPMENT OF SYNTHETIC FUELS UNDER THE DEFENSE PRODUCTION ACT OF 1950—MESSAGE FROM THE PRESIDENT—PM 179

The PRESIDING OFFICER laid before the Senate the following message from the President of the United States, together with an accompanying report; which was refered to the Committee on Energy and Natural Resources:

To the Congress of the United States:

In accordance with Section 106 of the Energy Security Act (P.L. 96-294), I transmit herewith the second annual report on activities undertaken by the United States Synthetic Fuels Corporation and the Department of Energy to implement the development of synthetic fuels under the Defense Production Act of 1950, as amended. The report covers the period from December 1, 1981, through June 30, 1982.

RONALD REAGAN.

THE WHITE HOUSE, *September 17, 1982.*

ANNUAL REPORT OF THE DEPARTMENT OF EDUCATION FOR FISCAL YEAR 1981—MESSAGE FROM THE PRESIDENT—PM 1980

The PRESIDING OFFICER laid before the Senate the following message from the President of the United States, together with an accompanying report; which was referred to the Committee on Labor and Human Resources:

To the Congress of the United States:

In accordance with Section 426 of the Department of Education Organization Act (P.L. 96-88), I transmit herewith the second annual report of the Department of Education which covers fiscal year 1981.

RONALD REAGAN.

THE WHITE HOUSE, *September 17, 1982.*

MESSAGE FROM THE HOUSE

At 9:41 a.m., a message from the House of Representatives, delivered by Mr. Berry, one of its reading clerks, announced that the House has passed the following bill, in which it requests the concurrence of the Senate:

H.R. 5658. An Act to authorize the use of education block grant funds to teach the principles of citizenship.

HOUSE BILL PLACED ON CALENDAR

The following bill was read the first and second times by unanimous consent and placed on the calendar:

H.R. 5658. An Act to authorize the use of education block grant funds to teach the principles of citizenship.

PETITIONS AND MEMORIALS

The following petitions and memorials were laid before the Senate and were referred or ordered to lie on the table as indicated:

POM-1184. A joint resolution adopted by the Northern Marianas Commonwealth Legislature; to the Committee on Energy and Natural Resources:

SENATE JOINT RESOLUTION No. 3-11, H.D. 1

"Whereas, Section 601(a) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America provides that "the income tax laws in force in the United States will come into forece in the Northern Mariana Islands as a local territorial income tax on the first day of January following the effective date of this Section, in the same manner as those laws are in force in Guam"; and

"Whereas, by Presidential proclamation, these income tax laws were to have come into effect on January 1, 1979, in the Commonwealth; and

"Whereas, the Commonwealth of the Northern Mariana Islands established a local tax system in its Public Law 1-30, effective January 1, 1979, which rebated the local territorial income taxes due under Section 601 of the Covenant on all income from sources within the Commonwealth; and

"Whereas, the United States Government in its Public Laws 95-348, 96-205, and 96-597 delayed the effective date for implementation of Section 601 of the Covenant to January 1, 1983; and

"Whereas, the Commonwealth of the Northern Mariana Islands has established new tax legislation in Public Law 3-11 which repeals Public Law 1-30, but incorporates a similar local tax system and rebate provision, but with an addition in Section 821 that local business gross revenue and employee wage and salary taxes "shall terminate upon midnight, December 31, 1982; PROVIDED, that the Commonwealth has adopted a local income tax and sales tax system for individuals and businesses by the date"; and

"Whereas, Section 601 of the Covenant is based upon the mirror-image application of the United States Internal Revenue Code, a concept which has been thoroughly discredited by two studies prepared by the United States Department of the Treasury:

"(1) 'Territorial Income Tax System's prepared by the United States Department of the Treasury in October, 1979, discussing the tax systems in the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa;

"(2) 'United States Federal Tax Policy Towards the Territories' prepared by Karla Hoff, International Economist on the Department of Treasury staff, in August, 1981, analyzing and critiquing the income tax systems in Puerto Rico, the Virgin Islands, and Guam; and

"Whereas, the mirror-image application of the Internal Revenue Code would disasterously affect the economic development of the Commonwealth at a time when the Commonwealth is seeking to achieve economic development on a par with that enjoyed by the continental United States; and

"Whereas, pursuant to Section 601 of the Covenant and U.S. Public Law 96-597, the provisions of the Internal Revenue Code will apply in the Commonwealth as of January 1, 1983; and

"Whereas, by House Joint Resolution No. 6, the Legislature of the Commonwealth of the Northern Mariana Islands has indicated its desire that Section 601 of the Covenant be modified to allow the Commonwealth to develop an alternative income tax system for individuals and businesses residing in the Commonwealth; and

"Whereas, by the same House Joint Resolution No. 6, the Government of the United States was asked to enact legislation to modify Section 601 of the Covenant for this purpose; and

"Whereas, House Joint Resolution No. 6 also requested financial and technical assistance from the United States to develop an alternative income tax system for the Commonwealth; and

"Whereas, best estimates are now that it may require up to two years to develop a satisfactory alternative tax system and modify Section 601 of the Covenant as requested; now, therefore,

"Be it resolved, That the Commonwealth of the Northern Mariana Islands hereby expresses its desire that the United States Government act to amend U.S. Public Law to defer the implementation date of the United States Internal Revenue Code income tax system in the Commonwealth

from January 1, 1983 until January 1, 1985; and

"Be it further resolved, That the Governor and the Washington Representative to the United States for the Commonwealth of the Northern Mariana Island are hereby authorized to take all steps necessary to facilitate a deferral of the implementation date of the United States Internal Revenue Code for income taxes to January 1, 1985 within the Commonwealth; and

"Be it further resolved, That the President of the Senate and the Speaker of the House of Representatives shall certify and the Senate Legislative Secretary and House Clerk shall attest to the adoption of this resolution and the Senate Clerk shall thereafter transmit a certified copy to the Governor who shall endorse the resolution and forward copies of it to the President of the United States, the Secretary of the Department of the Treasury, the Commissioner of the Internal Revenue Service, the President of the United States Senate, and the Speaker of the United States House of Representatives."

POM-1185. A joint resolution adopted by the Legislature of the State of California; to the Committee on Environment and Public Works:

"SENATE JOINT RESOLUTION No. 27

"Whereas, The oceans of the world are vital to all life on the continents; and

"Whereas, The oceans waters off the shore of California are the basis for the state's commercial and recreational fisheries which are a source of food for the people of California and are important to coastal recreation and tourism economies; and

"Whereas, The marine environment is a fragile ecosystem that may be significantly altered or contaminated by shortsighted disposal of radioactive wastes; and

"Whereas, Radioactive wastes have been dumped in the coastal waters off the shore of California and some samples of ocean sediment have been found to be contaminated with radioactive materials, including plutonium; and

"Whereas, The consequences of nuclear wastes in the marine environment are poorly understood and pose a threat to the human food chain; and

"Whereas, Congress is considering HR 6113 by Representative Norman D'Amours of New Hampshire to extend and amend the Marine Protection Research and Sanctuaries Act; and

"Whereas, Representative Glenn Anderson of California has proposed an amendment to HR 6113 to require that any federal agency proposing to dump radioactive wastes in the ocean shall provide Congress and the public with site-specific information about the full health, environmental, and economic consequences of the proposed dumping; and

"Whereas, The Anderson amendment also would allow either house of Congress to veto any permit the Environmental Protection Agency might issue for ocean dumping of radioactive waste; and

"Whereas, The United States Environmental Protection Agency is preparing regulations to lift the current moratorium on ocean dumping of radioactive wastes in United States territorial waters, which has been in effect since 1970, and the United States Department of Energy is developing the option of seabed disposal of radioactive wastes; and

"Whereas, The United States Navy is considering plans to scuttle decommissioned nuclear submarines in the ocean, possibly off the shore of Cape Mendocino; and

"Whereas, Japan is considering plans to dump high-level radioactive wastes in the Pacific Ocean north of Micronesia, a United States trust territory; and

"Whereas, The Pacific Marine Fisheries Commission, formed by interstate compact of the Pacific states, is scheduled to meet in Monterey, California, on November 15, 16, and 17, 1982, and is scheduled to discuss radioactive waste dumping in the Pacific Ocean; now, therefore, be it

"Resolved by the Senate and Assembly of the State of California, jointly That the Legislature of the State of California respectfully memorializes the President and Congress to ban the scuttling of nuclear submarines off the coast of California and all other radioactive waste disposal in Pacific Ocean waters under the control of the United States until and unless future valid and reliable scientific studies prove it is safe; and be it further

"Resolved, That the Legislature supports the Anderson amendment to the Marine Protection Research and Sanctuaries Act as a reasonable interim measure while further scientific research is conducted; and be it further

"Resolved, That the Legislature proposes an international treaty to ban the disposal of radioactive wastes anywhere in the Pacific Ocean until and unless future vaild and reliable scientific studies prove it safe, and requests that the Congress and the President work diplomatically to oppose any disposal of radioactive wastes anywhere in the Pacific until the treaty takes effect; and be it further

"Resolved, That the Legislature respectfully memorializes the Congress to conduct an investigation of the effects of all radioactive contamination of the oceans from all sources to determine the effects of the contamination and to prevent repetition of radioactive waste dumping done without public notice or in violation of laws; and be it further

"Resolved, That the Legislature finds and declares that regular monitoring of marine life in the vicinity of the existing radioactive waste dumpsites off the shore of California, including those near the Farallon Islands, is necessary to protect the public health of the people of California; and be it further

"Resolved, That the Legislature requests that the Congress, the President, the Environmental Protection Agency, the National Marine Fisheries Service, and the National Oceanic and Atmospheric Administration provide for this needed regular monitoring and provide full information from the monitoring to the California Legislature and to the California State Department of Health Services; and be it further

"Resolved, That the Legislature requests that the Congress and the President require the Environmental Protection Agency to provide Pacific coast state and local governments with advance notice prior to publication in the Federal Register of any changes in ocean dumping regulations, and require the Environmental Protection Agency to consult with Pacific coast state and local governments and to conduct public hearings on the Pacific coast before adoption of any changes in ocean dumping regulations; and be it further

"Resolved, That the Legislature respectfully requests the Pacific states and United States Pacific territories to join California in opposing all radioactive waste disposal in the Pacific until and unless future valid and reliable scientific studies prove it is safe, and invites the Pacific states and United States Pacific territories to a meeting in Monterey, California, on November 15, 16, and 17, 1982, in connection with the meeting of the Pacific Marine Fisheries Commission, to plan common strategy for this opposition; and be it further

"Resolved, That the Secretary of the Senate transmit copies of this resolution to the President and Vice President of the United States, to the Speaker of the House of Representatives, to each Senator and Representative from California in the Congress of the United States, to the Administrator of the Environmental Protection Agency, to the Director of the National Marine Fisheries Service, to the Administrator of the National Oceanic and Atmospheric Administration, and to the Governors and presiding officers of the Legislatures of Alaska, Hawaii, Idaho, Oregon, and Washington, and to the Governor of each of the United States Pacific territories."

POM-1186. A joint resolution adopted by the Legislature of the State of California; to the Committee on Environment and Public Works:

"SENATE JOINT RESOLUTION No. 41

"Whereas, At a time when Californians are vitally concerned about their ever-increasing utility bills, the New Melones Dam is completed, but remains unfilled, denying a less expensive source of a clean, renewable hydroelectric power; and

"Whereas, In July 1973, the Legislature of the State of California, by adoption of Assembly Joint Resolution No. 7, urged Congress to proceed with construction of New Melones Dam as quickly as possible; and

Whereas, In 1974, the people of California, by means of a statewide vote on an initiative measure, expressed their desire not to keep the Stanislaus River as a wild and scenic river; and

"Whereas, In May 1980, the Legislature, by adoption of Assembly Joint Resolution No. 58, reaffirmed its position by urging Congress to proceed to fill the New Melones Reservoir to its maximum operating level; and

"Whereas, Nearly 350 million dollars have been expended to construct this major project which is now fully operational and will provide the people of California extensive benefits, including fish and wildlife enhancement, water quality protection, hydroelectric power, irrigation water storage, and flood control prevention; and

"Whereas, New Melones Dam will significantly help to restore the Stanislaus River fisheries run to its historical levels; and

"Whereas, A fully operational reservoir would help to foster and maintain environmentally beneficial water quality standards for the southern portion of the Sacramento-San Joaquin Delta; and

"Whereas, New Melones Dam is vitally needed to prevent unnecessary flooding and seepage damage to prime farmlands along the Lower Stanislaus River and the Sacramento-San Joaquin Delta; and

"Whereas, The average annual generation by the New Melones Dam over a long period of years is 455 billion watt hours of electricity, which would conserve an average of 750,000 barrels of fuel oil, and the State Water Resources Control Board's decision restricting the dam's water level at 844 feet denies the public the benefit of 275 billion

watt hours, causing the consumption of an additional 455,000 barrels of fuel oil; and

"Whereas, The lost watts of renewable energy amounts to 24 million dollars that the public must absorb and replace with more expensive, less desirable, oil-generated power; and

"Whereas, New Melones Dam, with a capacity of 2.4 million acre-feet, has the potential to provide over 222,000 acre-feet of irrigation water, a supply sufficient to serve 80,000 acres, with revenues of over 40 million dollars annually from farmland productivity; now, therefore, be it

"Resolved by the Senate and Assembly of the State of California, jointly, That the Legislature of the State of California supports the Secretary of the Interior in his efforts to operate the New Melones Reservoir at its maximum capacity to fully achieve all the benefits envisioned by Congress when the project was authorized; and be it further

Resolved, That the Secretary of the Senate transmit copies of this resolution to the President and Vice President of the United States, to the Secretary of the Interior, to the Speaker of the House of Representatives, and to each Senator and Representative from California in the Congress of the United States."

POM-1187. A joint resolution adopted by the Legislature of the State of California; to the Committee on Finance:

ASSEMBLY JOINT RESOLUTION No. 86

"Whereas, Public utilities providing gas and electric energy to consumers in California have historically been governed by the "flow-through" method of accounting for current tax reductions in ratemaking; and

"Whereas, The "flow-through" method of accounting allows the utilities' current tax reductions to be immediately reflected in lower rates to utility customers; and

"Whereas, The federal Economic Recovery Tax Act of 1981, proposed and signed into law by President Reagan, provides that in order to be eligible for the investment tax credit and accelerated cost recovery tax reductions provided by that act, public utilities must use the "normalization" method of accounting in ratemaking; and

"Whereas, The "normalization" method of accounting does not allow the utilities' current tax reductions to be immediately reflected in lower rates to utility customers; and

"Whereas, This federal act therefore has the effect of granting windfall tax breaks to investor-owned utilities and prohibits them from passing the savings on to the ratepayers; and

"Whereas, Gas and electric utility rates have increased extraordinarily rapidly in California in recent years, causing severe financial burdens and economic dislocations for utility customers; and

"Whereas, In 1982, 687 million dollars in gas and electric utility rate increases for California consumers are directly attributable to the use of the "normalization" method of accounting as required by this federal act, and 844 million dollars in 1983 gas and electric utility rate increase will occur as a direct result of the provisions of that act; and

"Whereas, Failure to pass the tax relief on to consumers is, in effect, a utility rate increase of a magnitude such as was recently experienced in the 909 million dollar rate increase granted to Pacific Gas and Electric Company, approximately 20 percent of the increase being due to the effects of the Economic Recovery Tax Act of 1981; now, therefore, be it

"Resolved by the Assembly and Senate of the State of California, jointly, That the Legislature of the State of California respectfully memorializes the President and the Congress of the United States to revise the federal Economic Recovery Tax Act of 1981 to provide that the tax benefits to investor-owned electric and gas utility companies resulting from changes in accelerated depreciation rules, investment tax credits and other tax deductions be passed through to the utilities' ratepayers; and be it further

"Resolved, That the Chief Clerk of the Assembly transmit copies of this resolution to the President and Vice President of the United States, to the Speaker of the House of Representatives, to each Senator and Representative from California in the Congress of the United States, and to the Chairman of the House and Senate Committees on Taxation."

POM-1188. A joint resolution adopted by the Legislature of the State of California; to the Committee on Finance:

"SENATE JOINT RESOLUTION No. 46

"Whereas, The California State Lands Commission administers trust lands containing crude oil reserves and provides by contractual arrangements with private firms for development of these reserves; and

"Whereas, The development of these reserves produces revenues for the state which are dedicated to public purposes and which are intended to be exempt from the windfall profit tax on crude oil; and

"Whereas, The state is using net profits contracts for the development of the crude oil reserves on its trust lands; and

"Whereas, The United States Treasury Department and the Internal Revenue Service have interpreted the Crude Oil Windfall Profit Tax Act of 1980 as requiring allocation of crude oil production to net profits interests in a manner which imposes an unintended windfall profit tax burden on a property with an exempt state net profits interest that, if the tax is treated as a reimbursable expense, is borne by the state net profits interest, thereby diverting to the United States Treasury oil revenues that would have been used for public purposes in the State of California; and

"Whereas, Congress did not intend for any state interest, including a net profits interest, to bear the burden of the windfall profit tax; and

Whereas, Senators Cranston and Hayakawa have introduced S. 753, Congressman Glenn Anderson has introduced H.R. 3044, and Congressman Rostenkowski has introduced H.R. 6056, the Technical Corrections Act of 1982 which has been amended by Congressman Matsui and joined by Congressmen Stark and Rousselot, before the 97th Congress which are bills amending the Crude Oil Windfall Profit Tax Act of 1980 to provide for allocation of crude oil production to net profits interests in proportion to their respective percentage shares of net profits, thereby eliminating the unintended windfall profit tax burden placed on the state's net profits interest by the interpretation of the act's present language by the United States Treasury Department and the Internal Revenue Service; now, therefore, be it

"Resolved by the Senate and Assembly of the State of California, jointly, That the Legislature of the State of California respectfully memorializes the Congress of the United States to enact and the President to approve S. 753 by Senators Cranston and Hayakawa, H.R. 3044 by Congressman Glenn Anderson, and H.R. 6056 by Congressman Rostenkowski amending the Crude Oil Windfall Profit Tax Act of 1980 to provide for allocation of crude oil production, for the purpose of assessing the windfall profit tax, among the holders of net profits interests in proportion to their respective shares of net profits, so that states employing or intending to employ net profits contracts for development of crude oil reserves in their trust lands may enjoy a complete exemption from the windfall profit tax; and be it further

"Resolved, That the Secretary of the Senate transmit copies of this resolution to the President and Vice President of the United States, to the Speaker of the House of Representatives, to each Senator and Representative from California as well as other appropriate members in the Congress of the United States, to the Secretary of the Department of the Treasury, and to the Commissioner of the Internal Revenue Service."

POM-1189. A joint resolution adopted by the legislature of the State of California; to the Committee on Finance:

"SENATE JOINT RESOLUTION No. 70

"Whereas, There are more than 4 million Californians over the age of 60, and more than 2.5 million Californians over the age 65; and

"Whereas, More than 3.1 million Californians who are aged or disabled, or who are the survivors or dependents of persons eligible for Social Security benefits, depend for their economic security on the integrity of the Social Security System; and

"Whereas, Social Security System expenditures to and on behalf of citizens of California are currently approximately as much as 80 percent of the budget of the government of the State of California each year; and

"Whereas, In May of 1981 the President presented Congress with a set of proposals for reforming the benefit structure and financing of the Social Security System; and

"Whereas, Those proposals were found to be so onerous and unacceptable by the community of senior citizens of this country that the President withdrew them from consideration by Congress and instead appointed a National Commission on Social Security Reform, which is directed to report to the President and Congress on or before December 31, 1982; and

"Whereas, The 97th Congress has authorized interfund borrowing between the Old Age and Survivors Insurance Fund, the Disability Insurance Fund, and the Health Insurance Fund, which collectively constitute the financial bases of the Social Security System; and

"Whereas, The interfund borrowing authorization, which will be essential to permit continued payment of Social Security benefits beginning in the last calendar quarter of 1982, expires on December 31, 1982; and

"Whereas, There is great fear and concern among members of the senior citizens community and among other groups whose economic security is vitally linked to the integrity of the Social Security System that the pending expiration of the interfund borrowing authority will be used as an excuse to recall the 97th Congress in a "lame duck" session after the November 1982 elections and, in such a session to attempt to adopt the President's original drastic and strin-

gent revisions of the Social Security Act that would provoke extreme political opposition if attempted prior to the November 1982 elections; and

"Whereas, It would be highly inappropriate for any major action to change the Social Security System to be taken in a lame duck session of Congress, but would be entirely appropriate for such decisions, if any, to be left to the deliberations of the 98th Congress, which will convene in January of 1983 and will have two full years in which to grapple with the problems of Social Security; and

"Whereas, It is possible that significant numbers of Members of Congress meeting in a lame duck session would, in fact, themselves be "lame ducks" by virtue of retirement or defeat in the elections and therefore not appropriately accountable to the electorate for major policy decisions enacted under such circumstances; and

"Whereas, A lame duck session would not be necessary if the 97th Congress were to extend the interfund borrowing authority beyond December 31, 1982, before it adjourns for the November 1982 elections; now, therefore, be it

"Resolved by the Senate and Assembly of the State of California, jointly, That the Legislature of the State of California memorializes the President and the Congress of the United States to extend the provisions of Public Law 97-123, which authorized interfund loans and transfers, to at least the first two calendar quarters of 1983; and be it further

"Resolved, That the President and the leadership of the Senate and the House of Representatives be urged to assure the senior citizens of this state and this country that no efforts will be made to enact major changes in the benefit or financing structure of the Social Security System during the balance of the 97th Congress; and be it further

"Resolved, That the Secertary of the Senate transmit copies of this resolution to the President and Vice President of the United States, to the Speaker of the House of Representatives, and to each Senator and Representative from California in the Congress of the United States."

POM-1190. A joint resolution adopted by the Legislature of the State of California; to the Committee on Finance:

SENATE JOINT RESOLUTION No. 68

"Whereas, The California raisin industry, one of the oldest industries in our state, is currently facing damaging and unfair competition in world trade as a result of the European Economic Community subsidization of Greek raisin sales; and

"Whereas, The lack of a strong international trade policy on the part of the United States government has already resulted in serious economic injury to California's canning fruit and vegetable industry; and

"Whereas, If the common market policy continues to be extended, trade with most of California's agricultural products will be similarly adversely affected; and

"Whereas, The common market unfair trade actions have caused, and are expected to continue to cause, substantial economic losses to our California farm families and the thousands of farm laborers, packinghouse employees, and other persons engaged in related industries, such as wine, transportation, banking, real estate, and numerous others; and

"Whereas, It has been determined that the California raisin industry alone does not have sufficient capital resources to survive the unfair common market attack on California raisin markets; now, therefore, be it

"Resolved by the Senate and Assembly of the State of California, jointly, That the Legislature of the State of California respectfully memorialize the Congress and President of the United States to immediately take whatever action is necessary to promptly protect our California raisin industry's established markets and restore fair world trade in light of unfair practices being engaged in by the European economic community; and be it further

Resolved, That the Secretary of the Senate transmit copies of this resolution to the President and Vice President of the United States, to the Speaker of the House of Representatives, and to each Senator and Representative from California in the Congress of the United States."

POM-1191. A resolution adopted by the International Typographical Union opposing the contemplated changes by the Reagan Administration on our social security system; to the Committee on Finance.

POM-1192. Joint resolution adopted by the Legislature of the State of California; to the Committee on Foreign Relations:

"SENATE JOINT RESOLUTION No. 62

"Whereas, People throughout California are concerned about the rise in social and cultural hostilities, the increasing incidence of violent conflicts among nations and peoples, and the ever-present threat of nuclear war; and

"Whereas, There is a need to promote nonviolent methods of resolving human conflict; and

"Whereas, Conflict resolution techniques have repeatedly been demonstrated to provide a constructive, cost-effective means of resolving potentially violent human conflicts; and

"Whereas, Legislation is now pending in Congress which would establish the United States Academy of Peace and Conflict Resolution, which would serve to advance international peace through the development and implementation of programs to promote the use of conflict resolution techniques in international conflicts; now, therefore, be it

"Resolved by the Senate and Assembly of the State of California, jointly, That the Legislature of the State of California supports the passage of the "United States Academy of Peace and Conflict Resolution Act," H.R. 5088; and be it further

"Resolved, That the Legislature of the State of Califorina respectfully memorializes the California delegation to the Congress of the United States to work to secure that bill's passage; and be it further

"Resolved, That the Secretary of the Senate transmit copies of this resolution to the President and Vice President of the United States, to the Speaker of the House of Representatives, and to each Senator and Representative from California in the Congress of the United States.

POM-1193. Joint resolution adopted by the Legislature of the State of California; to the Committee on the Judiciary:

"ASSEMBLY JOINT RESOLUTION No. 103

"Whereas, 1982 marks the 10th year of Title IX becoming law; and

"Whereas, Women now comprise over 50 percent of the student population of the elementary, secondary, and postsecondary educational institutions in the State of California; and

"Whereas, The State of California has demonstrated a long standing history and commitment to equal opportunity in education; and

"Whereas, Equal opportunity in education is assured to women students in educational institutions in the State of California by Title IX of the Federal Education Amendments of 1972; and

"Whereas, The 1975 Title IX regulations and the 1979 Intercollegiate Athletics Policy Guidelines define the effect of Title IX and address concerns of collegiate athletics; and

"Whereas, Title IX is necessary to present and future generations of students to promote and ensure sex equity in education; and

"Whereas, The Administration of President Reagan as represented by the Secretary of the Department of Education, has expressed its intent to rewrite Title IX, weakening and limiting the equity protection afforded by the law and the regulations implementing it; now, therefore, be it

"Resolved by the Assembly and Senate of the State of California, jointly, That the Legislature of the State of California respectfully memorializes each Senator and Representative from California in the Congress of the United States to preserve the scope and strength of Title IX and to work for the defeat of any legislation which would weaken or dismantle Title IX; and be it further

"Resolved, That the Chief Clerk of the Assembly transmit copies of this resolution to the President and Vice President of the United States, to the Speaker of the House of Representatives, and to each Senator and Representative from California in the Congress of the United States; and be it further

"Resolved, That the Assembly and Senate of the State of California jointly proclaim June 23, 1982, Title IX Day."

POM-1194. Joint resolution adopted by the Legislature of the State of California; to the Committee on the Judiciary:

SENATE JOINT RESOLUTION No. 67

"Whereas, The Constitution of the United States of America is an inspired document 'of the people, by the people, and for the people', and

"Whereas, The people's freedom of religion, of speech, of the press, to peaceably assemble, and to petition, of their own free will and accord, are inspired ideas set forth in the Constitution of the United States; and

"Whereas, The Constitution has sheltered the pursuit of free enterprise, resulting in the extraordinary availability of jobs, food, clothing, and shelter in every community in America; and

"Whereas, On September 17, 1787, one hundred and ninety-five years ago, George Washington, the chairman of the constitutional convention, Benjamin Franklin, and thirty-seven other great Americans approved this immortal instrument of government; now, therefore, be it

"Resolved by the Senate and the Assembly of the State of California, jointly, That the President of the United States of America, the Congress of the United States, the Governor of the State of California, the governors of the several states, and the legislatures thereof be respectfully urged to join with all Americans in proclaiming our fidelity to the principles contained in the Constitution of the United States; and be it further

"Resolved, That every citizen of the United States is urged to actively participate in the observance of this anniversary and advance in understanding of the Consti-

tution so that we shall 'secure the blessings of liberty to ourselves and our posterity', and be it further

"Resolved, That the Secretary of the Senate transmit copies of this resolution to the President of the United States, to the Speaker of the House of Representatives, to each Senator and Representative from California in the Congress of the United States, to the Governor of California, and to the governors and legislatures of each of the 50 states."

POM-1195. A petition from a citizen of Kansas City, Mo. urging Congress to reject "the Gay Bill of Rights"; to the Committee on the Judiciary.

POM-1196. A concurrent resolution adopted by the Legislature of the State of Michigan; to the Committee on Labor and Human Resources:

"SENATE CONCURRENT RESOLUTION No. 731

"Whereas, The Senior AIDES Program is an employment program for senior citizens which is funded under Title V of the Older Americans Act. This program, along with all others under Title V, is scheduled for elimination. This program has been particularly effective in enabling low-income seniors the opportunities they need to supplement their incomes and provide them with meaningful activities. Its elimination would be devastating to countless senior citizens throughout Michigan and the country as as a whole; and

"Whereas, Title V programs provide employment to approximately 54,000 of the nation's senior citizens. The AIDES of the Senior AIDES Program honors older workers for their alert, industrious, dedicated, and energetic service. The people who work under this program's auspices must be at least fifty-five years of age, willing and able to work, and at or below the U.S. Department of Labor's low-income guidelines. They work in nonprofit organizations approximately twenty to twenty-five hours per week and earn an average of $3.50 per hour. Such employment may include driving senior citizens, delivering food to homebound seniors, or helping in various other aspects of senior services; and

"Whereas, Seniors benefit not only financially, but find their work rewarding, stimulating, and interesting. Through their work they meet people and participate in the mainstream of American life rather than sitting by on the sidelines and being spectators in life. We cannot allow these critically needed employment opportunities to disappear; now, therefore, be it

"*Resolved by the Senate (the House of Representatives concurring),* That the Congress of the United States be memorialized to maintain funding for the Senior AIDES Program for 1983; and be it further

"*Resolved,* That a copy of this resolution be transmitted to the President of the United States Senate, the Speaker of the United States House of Representatives, each member of the Michigan delegation to the Congress of the United States, and the President of the United States."

MEASURE PLACED ON CALENDAR

The Committee on the Budget was discharged from the further consideration of the resolution (S. Res. 447) waiving section 402(a) of the Congressional Budget Act of 1974 with respect to the consideration of S. 1606; and the resolution was placed on the calendar.

REPORTS OF COMMITTEES

The following reports of committees were submitted:

By Mr. THURMOND (for Mr. SIMPSON), from the Committee on Veterans' Affairs, without amendment:

S. 2913. A bill to amend title 38, United States Code, to increase the rates of disability compensation for disabled veterans, to increase the rates of dependency and indemnity compensation for surviving spouses and children of disabled veterans, and to modify and improve the education and vocational rehabilitation programs administered by the Veterans' Administration and veterans employment programs administered by the Department of Labor, and for other purposes (Rept. No. 97-550).

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. HEFLIN:

S. 2922. A bill relating to defense of insanity, and for other purposes; to the Committee on the Judiciary.

By Mr. ROBERT C. BYRD:

S. 2923. A bill for the relief of Joseph Benjamin Pearson, formerly of South Africa; to the Committee on the Judiciary.

By Mr. MOYNIHAN (for himself and Mr. D'AMATO):

S. 2924. A bill to modify Federal land acquisition and disposal policies carried out with respect to Fire Island National Seashore, and for other purposes; to the Committee on Energy and Natural Resources.

By Mr. RANDOLPH:

S. 2925. A bill to amend the National Labor Relations Act to give employers and performers in the performing arts rights given by section 9(e) of such act to employers and employees in similarly situated industries, and to give to employers and performers in the performing arts the same rights given by section 8(f) of such act to employers and employees in the construction industry, and for other purposes; to the Committee on Labor and Human Resources.

By Mr. MOYNIHAN (for himself, Mr. HART, Mr. RANDOLPH, Mr. KENNEDY, Mr. LUGAR, Mr. BRADLEY, and Mr. CRANSTON):

S. 2926. A bill to create a National Commission on the Rebuilding of America which will conduct an inventory of our Nation's water and sewer systems, bridges, highways, and roads; develop a 10-year investment plan to rebuild the public improvements essential to economic development; make recommendations concerning changes in Federal laws and regulations that influence the pattern of Federal expenditures for public improvements; and for other purposes; to the Committee on Environment and Public Works.

By Mr. NICKLES:

S. 2927. A bill provide for the disposition of certain undistributed judgment funds awarded the Creek Nation; to the Select Committee on Indian Affairs.

By Mr. HATFIELD:

S. 2928. A bill to provide for equal access to public secondary schools; to the Committee on Labor and Human Resources.

By Mr. NICKLES (for himself, Mrs. HAWKINS, Mr. HUMPHREY, Mr. LAXALT, Mr. EAST, Mr. GRASSLEY, Mr. MATTINGLY, and Mr. THURMOND):

S. 2929. A bill to amend the Davis-Bacon Act; to the Committee on Labor and Human Resources.

By Mr. HATCH (for himself, Mr. QUAYLE, Mrs. HAWKINS, and Mr. HELMS):

S. 2930. A bill to provide for the protection of migrant and seasonal agricultural workers and for the registration of contractors of migrant and seasonal agricultural labor, and for other purposes; to the Committee on Labor and Human Resources.

By Mr. GORTON (for himself and Mr. JACKSON):

S. 2931. A bill to provide for the disposition of funds appropriate to pay a judgment in favor of the Cowlitz Tribe of Indians in Indian Claims Commission docket No. 218 and for other purposes; to the Select Committee on Indian Affairs.

By Mr. D'AMATO:

S.J. Res. 248. Joint resolution to proclaim Ukranian Insurgent Army Day; to the Committee on the Judiciary.

SUBMISSION OF CONCURRENT AND SENATE RESOLUTIONS

The following concurrent resolutions and Senate resolutions were read, and referred (or acted upon), as indicated:

By Mr. MATHIAS (for himself and Mr. SARBANES):

S. Res. 468. Resolution to pay tribute to Earl Weaver; considered and agreed to.

By Mr. PERCY (for himself, Mr. BURDICK, Mr. HELMS, Mr. LUGAR, Mr. NUNN, Mr. QUAYLE, Mr. GRASSLEY, Mr. PRESSLER, Mr. DIXON, Mr. SASSER, Mr. HUDDLESTON, Mr. BOSCHWITZ, and Mr. ABDNOR):

S. Con. Res. 122. Concurrent resolution relating to the processed product share of U.S. agricultural exports; to the Committee on Finance.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. HEFLIN:

S. 2922. A bill relating to defense of insanity, and for other purposes; to the Committee on the Judiciary.

FEDERAL INSANITY DEFENSE BILL

Mr. HEFLIN. Mr. President, the Hinckley verdict has caused a tremendous amount of discussion on the issue of insanity and its relationship to the criminal justice system. A large number of American citizens followed the accounts of the trial of John Hinckley and were shocked when the jury returned the verdict of not guilty by reason of insanity. This has evoked indignation on the part of many citizens that the criminal justice system is not living up to its responsibilities.

The Judiciary Committee has had extensive hearings on the relationship of the defense of insanity in the criminal justice system. I would like to commend Senator THURMOND, Senator SPECTER and their able staffs for the capable and thorough review in the hearings. It is a complex issue and the

hearings have brought forth scholarly and enlightening views from many diverse corners.

Five of the jurors in the Hinckley case appeared voluntarily before the committee. These jurors stated in substance that they heard testimony from the defense psychiatrists that Hinckley was insane and therefore not responsible for his acts; then they heard testimony from the prosection psychiatrists that Hinckley was sane and therefore responsible for his acts. After hearing this conflicting testimony, the trial judge charged the jury that the burden of proof was on the prosecution to prove beyond a reasonable doubt that Hinckley was sane. The judge's charge was the deciding factor in their decision.

My home State of Alabama and other States have statutes that recite in substance that every person over 14 years of age charged with crime is presumed to be responsible for his acts and that the burden of proving a defense of insanity is upon the accused, not the prosecution. The U.S. Supreme Court has upheld a similar statute from the State of Oregon.

I am convinced from hearings that the most important thing that can be done to prevent Hickley verdicts in the future is to change the burden of proof to the accused. Today, I am introducing a bill to toughen our Federal law regarding the insanity defense. Most significantly, my bill will place the burden of proving insanity squarely on the defendant. I believe this is the most important structural change that this Congress can make relative to the issue of insanity as a defense. My bill will basically follow the Alabama statute and create a presumption that every person over 14 years of age is presumed to be mentally responsible for his acts and change the burden of proof from the prosecution to the defendant when the defendant raised the defense of insanity.

My bill als provides for an automatic Federal commitment for one who is acquitted by reason of insanity, followed by a court determination of whether the person presents a risk of bodily injury to himself and others. Had John Hinckley been acquitted in Alabama in a Federal district court, he could have walked out of the courtroom until such time as the State could file a commitment proceding. The situation would be the same in most States which do not have automatic commitment procedures themselves. My bill will insure the public safety through an immediate commitment. It will insure the rights of the acquitted by a timely court determination, not more than 45 days after the verdict is rendered.

My bill also provides for direct commitment to the custody of the Department of Health and Human Services, or if the person is a veteran, to the Veterans' Administration. I believe that Federal commitment is imperative for those acquitted by reason of insanity under Federal law. While proposals have been made to turn custody of these individuals over to the State in which the Federal proceeding occurred, I do not believe this is proper policy.

The States should not be expected to take the care, custody, and responsibility for those who have been charged under Federal law, and I am not certain that the Federal Government has the power to force the States to do so. Furthermore, as Federal courts, and not State courts, will retain jurisdiction to review whether the acquittee can be released, it is more appropriate for a Federal facility to retain control.

Also, without a definite commitment to a Federal facility, the acquitted individual, who is in need of psychiatric treatment, runs the risk of being juggled back and forth between Federal and State facilities, or even possibly released, while the Federal and State entities wrangle over custody. A Federal disposition will insure Federal control, Federal treatment, and Federal responsibility.

Finally, my bill will maintain the issue of insanity as a separate affirmative defense. I realize that some of my distinguished colleagues have advocated the elimination of a separate insanity defense and, instead, allowing evidence of mental disease to go only to the issue of state of mind. But I have previously raised my concerns to this body that this test will only expand the insanity defense and probably permit a thousand Hinckleys to go loose.

Now, having heard the testimony of Federal judges, defense lawyers, psychiatrists, and State legislators, I am more than ever convinced that a mens rea test will only liberalize the insanity defense and open the door to unlimited psychiatric evidence. It would be used to reduce charges and to plea bargain on lesser included offenses and punishment.

I, therefore, advocate that the separate insanity defense be maintained with the burden of proof on the accused for the issue of insanity.

In closing, I am hopeful that Congress can move forward with this legislation, or some measure to shift the burden of proof. The American people are shocked, indignant, and disturbed. I believe it is incumbent on this Congress to rectify our Federal law and restore the confidence of the public.

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. 2922

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

SECTION 1. (a) Chapter 1 of title 18 of the United States Code is amended by adding at the end thereof the following new section:

"Sec. 16. Insanity defense

"(a) It is an affirmative defense to a prosecution for an offense against the United States that, at the time of the conduct alleged to constitute the offense, the defendant, as a result of severe mental disease or defect, lacked the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

"(b) As used in this section, the terms 'mental disease or defect' do not include an abnormality manifested primarily by repeated criminal or otherwise antisocial conduct.

"(c) "Every person over 14 years of age charged with crime is presumed to be mentally responsible for his acts, and the burden of proving that he is mentally irresponsible is cast upon the accused. The accused shall have the burden of proving the defense of insanity by clear and convincing evidence."

(b) The table of sections at the beginning of chapter 1 of title 18 of the United States Code is amended by adding at the end the following: "16. Insanity defense.".

SEC. 2. (a) The first sentence of paragraph (a) of Rule 12 of the Federal Rules of Criminal Procedure is amended by adding after "guilty" the following: ", not guilty by reason of insanity".

(b) Rule 12.2 of the Federal Rules of Criminal Procedure is amended by deleting "defense of insanity" in subdivision (a) and inserting in lieu thereof "affirmative defense of insanity".

(c) If the issue of insanity is raised as provided by law, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find, the defendant—

"(1) guilty;

"(2) not guilty; or

"(3) not guilty only by reason of insanity."

SEC. 3. Add to chapter 313 of title 18 of the United States Code the following new section:

"SEC. 4249. COMMITMENT OF PERSONS FOUND NOT GUILTY BY REASON OF INSANITY

"(a) In any case in which a person is charged with a federal offense in the course of which he caused, threatened to cause or created a substantial risk of serious injury to the person of another, and is found "not guilty by reason of insanity", he shall be committed by the trial court to a suitable facility of the Department of Health and Human Services, or if the person is a veteran, of the Veteran's Administration, for examination and treatment.

"(b) Within 45 days of the date of confinement for examination and treatment, the superintendent of the facility shall forward to the committing court an evaluation of the mental condition of the committed person and the court shall promptly thereafter hold a hearing to determine whether the person presents a risk of bodily injury to himself or others and whether the person is in need of treatment.

"(c) If the court finds by clear and convincing evidence that the committed person will not in the reasonable future pose a risk of bodily injury to himself or others, and is no longer in need of treatment, the court shall order such person unconditionally re-

leased from further confinement. If the court does not so find, the court shall order such person shall remain committed to a suitable facility of the Department of Health and Human Services or if the person is a veteran, the Veterans' Administration for treatment.

"(d) Where any person has been committed to a suitable facility of the Department of Health and Human Services or the Veterans' Administration, pursuant to subsection (c) of this section, and thereafter the superintendent of such facility certifies that: (1) the person is no longer in need of treatment; (2) in the opinion of the superintendent, the person will not in the reasonable future pose a risk of bodily injury to himself or others; and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital; and such certificate is filed with the clerk of the committing court and a copy thereof served on the Untied States Attorney who prosecuted the person; the court shall, after due notice, hold a hearing on the mental condition of the person. If the court finds by clear and convincing evidence that the person is no longer in need of treatment and will not in the reasonable future pose a risk of bodily injury to himself or others, the court shall order such person unconditionally released from further confinement. If the court does not so find, the court shall order such person returned for treatment.

"(e) Where, in the opinion of the superintendent of the facility a person confined under subsection (b) of this section does not pose a risk of bodily injury to himself or others and may be effectively treated if released under supervision, the superintendent shall so certify and file and serve such certificate as provided in subsection (d) of this section. The court shall, after due notice, hold a hearing on the mental condition of the person. If the court finds by clear and convincing evidence that the person will not in the reasonable future, pose a risk of bodily injury to himself of others, the court may order the release of such person under such conditions for supervision as the court sees fit.

"(f)(1) A person committed or conditionally released pursuant to the provisions of this section may file a motion before the committing court for release or other relief concerning his custody.

(2) A motion for relief may be made at any time after a hearing has been held pursuant to subsection (b) of this section.

(3) Unless the motion and the files and records of the case conclusively show that the person is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting authority, grant a prompt hearing thereon, determine the issues, and make findings of fact and state conclusions of law with respect thereto. On all issues raised by his motion, the person shall continue to have the burden of proof. If the court finds that the person is entitled to his release from confinement, either conditionally or unconditionally, a change in the conditions of his release or other relief, the court shall enter such order as may be appropriate.

(4) A court shall not be required to entertain a second or successive motion for relief under this section more often than once every 6 months.

(5) An appeal may be taken from an order entered under this section to the court having jurisdiction to review final judgments of the court entering the order.

By Mr. MOYNIHAN (for himself and Mr. D'AMATO):

S. 2924. A bill to modify Federal land acquisition and disposal policies carried out with respect to Fire Island National Seashore, and for other purposes; to the Committee on Energy and Natural Resources.

FIRE ISLAND NATIONAL SEASHORE AMENDMENTS ACT OF 1982

● Mr. MOYNIHAN. Mr. President, I rise today, along with my distinguished colleague from New York, Senator D'AMATO, to introduce legislation to amend the Fire Island National Seashore Act (Public Law 88-587). This bill is similar to a bill (H.R. 6771) introduced in the House of Representatives on July 15, 1982, by Congressman THOMAS DOWNEY.

The Fire Island National Seashore was established by Congress in 1964 for the purpose of "conserving and preserving for use of future generations certain relatively unspoiled and undeveloped beaches, dunes, and other natural features within Suffolk County, N.Y., which possess high values to the Nation as examples of unspoiled areas of great natural beauty in close proximity to large concentrations of urban population * * *." Fire Island, located just 50 miles east of New York City, is composed of sandy beaches, salt marshes, and sand dunes, which are among the highest in the Northeast. Within the boundaries of the seashore there are 18 small, heavily developed communities, primarily consisting of single-family homes and cottages and the businesses serving them and day visitors.

The 1964 act grants the Secretary of the Interior limited powers of condemnation in order to further the purposes of preserving the natural features of the seashore. In 1980, I joined Senator Jacob K. Javits, one of the prime sponsors of the legislation creating the seashore, in requesting that the General Accounting Office (GAO) review the Nation Park Service's land acquisition and management policies and practices for the Fire Island National Seashore. The GAO report (CED 81-78) issued on May 8, 1981, made several suggestions concerning ways to improve land acquisition and management policy at the seashore.

The legislation I introduce today is designed to perfect certain provisions of Public Law 88-587. The bill allows the Secretary of the Interior to sell certain acquired property, with covenants to insure future conforming uses, and to retain the proceeds from such sales for additional seashore acquisitions. Second, it permits the Secretary to apply for an injunction or temporary restraining order to prevent any use of, or construction upon, property after the commencement of a condemnation action taken pursuant to the Seashore Act. Finally, it clarifies the power of the Secretary to condemn property, in the seashore's developed communities, that becomes the subject of a variance or exception under any applicable zoning ordinance.

The bill specifically implements two of the recommendations contained in the May 1981 GAO report. First, the GAO suggested that the National Park Service should sell unneeded land. This bill adds a new subsection to the law that provides for a "turn around" provision that would direct that certain lands in the developed communities, acquired as nonconforming properties and not needed to further the purposes of the act, be sold. Properties thus sold would carry with them restrictions to insure that their use conforms to all applicable seashore regulations. The Park Service is currently in the process of identifying which of its present holdings may be eligible for such a turnaround. The revenues from the sale of these properties would be used to create a "revolving fund" to pay for future Park Service acquisitions within the seashore.

Second, the GAO pointed out a need to clarify land acquisition policy within the seashore's developed communities. This bill addresses that issue by amending section 3(e) of the current law. The new language provides that the Secretary's authority to condemn property in the developed communities with approved zoning ordinances would be reinstated only if a property becomes the subject of a zoning variance or exception and the Secretary finds that such an exception or variance results in the property being used in a manner that is inconsistent with the Secretary's guidelines issued pursuant to section 3. Currently, the Secretary does not make the latter finding. As the GAO observed, existing law "does not create a variance process that would permit the Park Service to certify if a nonconforming structure might harm the resource or not." The GAO went on to say, "The Secretary's authority to suspend condemnation is not discretionary." The new language in the bill will make it clear that a zoning variance is not, in and of itself, cause for condemnation. Instead, only a zoning variance that results in a use inconsistent with the purposes of the act would be cause for condemnation. This would put the Park Service back into the business of resource protection, where it belongs.

Mr. President, as I previously stated, the intent of this bill is to simply perfect the existing law (Public Law 88-587). This is necessary not only to make the operations of the seashore more efficient but also to help alleviate some very real concerns being expressed by Fire Island landowners about land acquisition policies within

the seashore. It is for these reasons that I am today introducing this bill.

Mr. President, I should add that this matter was brought to my attention by the Honorable Thomas J. Schwarz, mayor of the village of Ocean Beach. Mayor Schwarz has long been dedicated to preserving the beauty of the natural features and comfortable settings that abound on Fire Island. I am confident that his legislation will serve to further such purposes.●

By Mr. RANDOLPH:

S. 2925. A bill to amend the National Labor Relations Act to give employers and performers in the performing arts rights given by section 8(e) of such act to employers and employees in similarly situated industries, and to give to employers and performers in the performing arts the same rights given by section 8(f) of such act to employers and empoyees in the construction industry, and for other purposes; to the Committee on Labor and Human Resources.

PERFORMING ARTS LABOR RELATIONS AMENDMENTS

● Mr. RANDOLPH. Mr. President, today I am introducing the performing arts labor relations amendments, legislation which amends the National Labor Relations Act to provide necessary changes with regard to the performing and entertainment industry. My bill would extend to the entertainment industry the same provisions currently covering workers in the apparel and industry. The performing industry and professional musicians are similar to the apparel and construction trades in that workers experience hardships and instabilities associated with short-term employment, often with many different employers, minimal job security, and additionally must travel frequently in order to find employment. These circumstances do not fit neatly into the work experience generally addressed by the National Labor Relations Act (Taft-Hartley). Because of this, organized individuals in the performing industry have had a difficult time with purchasers of their services. Under interpretations by the National Labor Relations Board, the purchasers of music, for example, cannot be compelled to recognize the musicians' collective bargaining agent, and the musicians are compelled to bargain individually since the purchasers under the National Labor Relations Board's interpretation, are not considered the employers of the musicians, even though the purchasers exercise the rights of employers in setting working conditions. The definitions of "employer" and "employee" are key to the Taft-Hartley Act. By denying that the purchasers are employers under the meaning of the act, this denies the workers the rights of employees.

My bill will correct these inequities by clarifying the employer under the National Labor Relations Act, as purchaser of musical performance services. It will also allow a performers union to collect dues after 7 days of employment, just as the construction industry may do now, as a recognition of the brevity of employment experiences. Under current law, the period is 30 days. The legislation would also authorize prehire agreements and legitimate collective bargaining.

I believe these amendments to the National Labor Relations Act are long overdue. I am pleased that there is similar legislation pending in the House of Representatives. I believe the unique circumstances of the performing industry must be recognized under the labor laws of the Nation. Musicians and other performers must be afforded fair and equitable treatment under the laws, not be penalized simply because the work experience is not of a permanent nature.●

By Mr. MOYNIHAN (for himself, Mr. HART, Mr. RANDOLPH, Mr. KENNEDY, Mr. LUGAR, Mr. BRADLEY, and Mr. CRANSTON):

S. 2926. A bill to create a National Commission on the Rebuilding of America which will conduct an inventory of our Nation's water and sewer systems, bridges, highways, and roads; develop a 10-year investment plan to rebuild the public improvements essential to economic development; make recommendations concerning changes in Federal laws and regulations that influence the pattern of Federal expenditures for public improvements; and for other purposes; to the Committee on Environment and Public Works.

REBUILDING OF AMERICA ACT OF 1982

Mr. MOYNIHAN. Mr. President, today I introduce, on behalf of myself and my distinguished colleagues from Colorado (Mr. HART), West Virginia (Mr. RANDOLPH), Massachusetts (Mr. KENNEDY), and Indiana (Mr. LUGAR), the Rebuilding of America Act of 1982. The purpose of the bill is to begin one of the most important tasks facing us in the coming two decades—rebuilding the public works infrastracture of our Nation.

The bill we introduce today would lead to the development of a national investment plan, setting priorities to guide Federal expenditures for public improvements over the succeeding 10 years. The national investment plan would be predicated on the facts and findings contained in a national inventory of public improvements.

To conduct the inventory and develop the plan, a National Commission on the Rebuilding of America would be established. The Commission would have 2 years to complete its work. As part of its responsibilities, the Commission would draw up a list of proposed changes in Federal statutes and regulations which would be necessary to implement the investment plan.

For some years, as our economic ills have come more and more apparent, there has been discussion of the need to reindustrialize America, to modernize the equipment and facilities of private manufacturing. Only recently, however—really within the past year—has attention begun to focus on the need to rebuild and recapitalize America, to repair, replace, and modernize the public improvements such as roads, bridges, and water supply systems without which productive economic activity cannot take place. And, surely, this rebuilding must accompany any attempt at reindustrialization.

A sampling of the past year's articles on the state of our public works infrastructure will suffice to underscore the alarm with which those who look even cursorily at the problem come to view it:

Time magazine, April 27, 1981, "The Crumbling of America."

The New York Times, July 18, 1982, "Alarm Rises Over Decay in U.S. Public Works."

Business Week, October 26, 1981, "The Decay That Threatens Economic Growth."

Newsweek magazine, August 2, 1982, "The Decaying of America."

I ask unanimous consent that the texts of these and several other articles on this topic be printed in the RECORD after my remarks.

Perhaps the most persuasive case for rebuilding America was made in a 1981 publication of the Council of State Planning Agencies, "America in Ruins," by Pat Choate and Susan Walter. These authors state the problem succinctly:

America's public facilities are wearing out faster than they are being replaced. Under the exigencies of tight budgets and inflation, the maintenance of public facilities essential to national economic renewal has been deferred. Replacement of obsolescent public works has been postponed. New construction has been cancelled.

The deteriorated condition of basic facilities that underpin the economy will prove a critical bottleneck to national economic renewal during this decade unless we can find ways to finance public works.

The following facts suggesting the magnitude of the problem emerge from "America in Ruins":

The 42,500 mile Interstate Highway System is deteriorating at a rate requiring reconstruction of 2,000 miles of road per year. Because of inadequate funding in the 1970's, over 8,000 miles of the system and 13 percent of its bridges are now beyond their designed service life and must be rebuilt.

The costs of rehabilitation and new construction necessary to maintain existing levels of service on non-urban highways will exceed $700 billion during the 1980's.

One of every five bridges in the U.S. requires either major rehabilitation or reconstruction. ($33 billion)

The 756 urban areas with populations over 50,000 will require between $75 billion and $110 billion to maintain urban water systems over the next 20 years. Approximately one-fifth of these communities will face investment shortfalls.

Over $25 billion in government funds will be required during the next five years to meet existing water pollution control standards.

Despite unmistakable evidence of such deterioration, the nation's public works investments, measured in constant dollars, fell from $38.6 billion in 1965 to less than $31 billion in 1977—a 21 percent decline. On a per capita basis, public works investments in constant dollars dropped from $189 per person in 1965 to $140 in 1977—a 29 percent decline. When measured against the value of the nation's Gross National Product, public works investments declined from 4.1 percent in 1965 to 2.3 percent in 1977—a 44 percent decline.

At least one half—and possibly up to two-thirds—of the nation's communities are unable to support modernized development until major new investments are made in their basic facilities that undergird the economy.

There can be no doubt that this problem is public in nature, national in scope, and appropriately attended to by the Federal Government. Geography, economics, and history all argue for Federal leadership.

Our public works infrastructure, or public improvements, as Jefferson so much more elegantly termed them, constitute an economic investment that is peculiarly public. These facilities epitomize what the economists call a "public good"—a commodity that everyone values, but that private enterprise is loath to supply because it is difficult or impossible to sell the goods in discrete units and to deny the benefits of the good to those who do not pay for them.

Our national experience, both remote and recent, demonstrates that public improvements are matters for the Federal Government. In 1807, the Senate, at the prompting of President Jefferson, asked the Secretary of the Treasury to prepare a plan "for the application of such means as are constitutionally within the power of Congress, to the purpose of making roads, for removing obstructions in rivers, and making canals; together with a statement of the undertakings of that nature now existing within the United States which, as objects of public improvement, may require and deserve the aid of Government." The following year, Secretary Albert Gallatin produced the landmark "Report on Roads and Canals," a 10-year plan calling for a federally supported system of roads and canals.

In 1824, the Congress directed Secretary of War John C. Calhoun to prepare surveys and plans for roads and canals. This legislation initiated the meritorious service of the Army Corps of Engineers in extending the development of the Nation.

The Federal Government is now responsible for fully one-half of all public works investment in the United States through grants and direct investment. We are therefore well-beyond the 19th century arguments about whether the Federal Government should be involved with "internal improvements." Extensive Federal involvement is an indisputable fact. However, our failure to coordinate planning and expenditure of these sums—nearly $25 billion annually—is also an indisputable fact.

A 1980 Commerce Department study, "Public Works Investment in the United States," made several interesting observations with regard to the regional allocation of Federal funds for public works:

The western and southern regions of the U.S. received over three-fourths of all direct Federal public works investment in 1972 and 1977.

On a per capita basis, the Mountain region received $97 per capita in 1977 and the New England region received $3 per capita.

From the Federal perspective, public works projects fall into three basic categories: First, federally owned; second, federally assisted but owned by a State or local government; and third, totally non-Federal projects. Most public works projects in the north-eastern region of the United States fall into the third category. Cities and States in the Northwest traditionally have built their canals, highways, and water systems without assistance from the Federal Government.

Clearly, the Federal programs through which the $25 billion is spent each year are not meeting the needs of a significant portion of our population. Those areas are instead struggling to meet their own needs, and in most cases, they are failing to do so.

It is not the purpose of this legislation to preempt State and local prerogatives in the matter of roads and water systems, but rather to help focus and coordinate Federal assistance.

I shall ask that hearings on this legislation be scheduled at the earliest opportunity in the Committee on Environment and Public Works. I would hope that even at this late date in this Congress, we can begin receiving comments on the legislation.

I ask that a copy of a summary of the bill and the bill itself be printed in the RECORD following my remarks.

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

S. 2926

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act shall be cited as the "Rebuilding of America Act of 1982."

FINDINGS

SEC. 2. The Congress finds and declares that—

(a) highways, roads, bridges, and water supply and sewer systems are public improvements vital to national development and prosperity;

(b) public works investment in the United States has declined at an alarming rate over the last decade and has resulted in the poor condition of much of our public improvements;

(c) the national costs of deteriorated public improvements are significantly higher than the costs of repairing, rehabilitating, improving or replacing existing facilities;

(d) the Federal government is responsible for one half of all public works investment in the United States through grants in aid and direct investment;

(e) the Federal government has no institutional means of formulating a comprehensive national public improvements plan and ordering national priorities; and

(f) direct Federal public works investment has been spread unevenly throughout the regions of the Nation.

POLICY

SEC. 3. It is the policy of the Congress that—

(a) states and local governments shall retain their traditional primacy in decisions affecting the use of land and water within their jurisdictions;

(b) the Federal government shall adopt practices and procedures that will lead to regionally balanced economic development;

(c) prior Federal involvement in a national public improvement shall be a primary consideration but not sole determinant in establishing future national priorities; and

(d) disincentives for maintaining, repairing, rehabilitating and replacing deteriorating national public improvements that now exist in Federal laws and regulations shall be corrected to encourage the most economically efficient pattern of investment in public improvements by the Federal government.

NATIONAL INVENTORY OF PUBLIC IMPROVEMENTS

SEC. 4. The National Commission on the Rebuilding of America, established pursuant to Section 7 and hereinafter referred to as the "Commission", shall conduct an inventory of existing major public improvements by region, state, and major metropolitan area of the United States and by type of facility, surveying especially—

(i) age and condition of the facility;

(ii) trends in the condition of the facility over the last twenty years and the relation of those trends to usage and maintenance schedules;

(iii) means of financing the maintenance, repair, rehabilitation, replacement, and new construction of facilities;

(iv) comparison of condition of public improvements within a region, state, or major metropolitan area and the pattern of economic development over the last twenty years; and

(v) trends in public expenditures for maintenance, repair, rehabilitation, replacement, and new construction of public improvements by region, state, and major metropolitan area and by level of government.

DEVELOPMENT OF A NATIONAL PUBLIC IMPROVEMENTS PLAN

SEC. 5. (a) The Commission shall develop a National Public Improvements Plan, hereinafter referred to as the "Plan", listing in priority order, needed maintenance, repair, rehabilitation or replacement of public im-

provements in each region, for the next ten and twenty years, or such other time periods as the Commission may deem appropriate, to sustain regionally balanced national economic development. Priorities shall be listed by type of facility for the Nation as a whole and for each region, and shall further consider the relative priorities among the various types of facilities. The Plan shall include recommended means of financing the needed maintenance, repair, rehabilitation and replacement, taking into account the least-cost life-cycle costs of developing and maintaining national public improvements and the appropriate mix of Federal, state and local resources to implement the Plan. The Commission shall consider prior Federal involvement, level of prior maintenance, and regional equity in its recommendations on financing the Plan.

(b) As an integral part of the Plan, the Commission shall suggest specific revisions in Federal laws, regulations and policies and further suggest alterations in the current responsibilities of Federal, state and local governments that may be necessary to reverse the pattern of disinvestment in national public improvements and sustain econmic development. The Commission shall include analyses and recommendations in accordance with policies set forth in Section 3 concerning:

(i) the establishment of the Federal capital budget;

(ii) changes in the imposition or allocation of excise taxes, user fees, other sources of public revenue, and borrowing authorities;

(iii) statutory or regulatory revisions in grants-in-aid, direct construction, or subsidy programs that would eliminate corruption, waste, and delay; that would encourage consideration of least-cost life-cycle costs in developing and maintaining facilities; and that would correct regional imbalances and disincentives for maintenance of facilities in Federal programs; and

(iv) the desirability and feasibility of scheduling public improvements construction and major renovation work in a manner counter to national or regional economic cycles in order to reduce the cost of such work and to dampen economic fluctuations.

PROCEDURES

SEC. 6. (a) The Commission shall submit to Congress and the President, not later than one year from the date of enactment of this Act, the national inventory of public improvements required pursuant to Section 4.

(b) Not later than 18 months after the enactment of this Act, the Commission shall submit to Congress and the President a draft Plan required pursuant to Section 5. For purposes of soliciting and considering public comment, the Commission shall further distribute the draft Plan to Federal agencies, all Members of Congress, major public interest groups, the Governors of the states, local officials, and make the report generally available to the public. All affected Federal agencies must submit written comments to the Commission.

(c) Not later than 24 months after the enactment of this Act, the Commission shall submit to the Congress and the President the final version of the Plan pursuant to Section 5.

(d) Unless the Congress enacts a joint resolution of disapproval of that portion of the Plan required pursuant to subsection 5(a) within 120 calendar days of receipt of the final Plan, that portion of the Plan shall be deemed to be approved by the Congress and shall be the policy of the Federal government; provided, however, that no statute or regulation of the Federal government, of a state or political subdivision thereof shall be in any way altered by Congressional approval of that portion of the Plan pursuant to subsection 5(a).

(e) The Senate Environment and Public Works Committee and House Public Works and Transportation Committee shall hold hearings on the proposed changes in existing law pursuant to Section 5 and shall report legislative proposals to the Senate and House of Representatives regarding such changes within 180 days of receipt of the Plan to permit full Federal implementation of the Plan.

ESTABLISHMENT OF THE COMMISSION

SEC. 7. (a) There is hereby established a National Commission on the Rebuilding of America which shall assess the condition of the national public works infrastructure, analyze causes of disinvestment on the national public works infrastructure, and evaluate the need to repair, maintain, replace, and expand the national public works infrastructure to support balanced development of the national economy.

(b) The Commission shall be composed of—

(1) the Secretary of the Army, the Secretary of Transportation, and the Secretary of Commerce; in the event the Secretary is unable to attend a meeting of the Commission, he may designate a representative but in no case may the designee be of a rank lower than assistant secretary;

(2) representatives of each of the following organizations: the National Governors Association, the National Conference of State Legislatures, the National League of Cities, U.S. Conference of Mayors, and the National Association of Counties; and

(3) five individuals from the private sector selected by the President who among them have experience in and knowledge of public investment financing, civil engineering, state and local budgeting practices, and regional planning.

(c) The President shall designate one of the five individuals as Chairman of the Commission. The Chairman shall be an individual of national recognition with experience in both public affairs and private enterprise. The Chairman shall be confirmed by the Senate.

(d) The Secretary of Housing and Urban Development, the Secretary of Labor, the Secretary of Agriculture, the Secretary of the Interior, and the Administrator of the Environmental Protection Agency or their designees shall attend the meetings of the Commission as non-voting members.

(e) The Commission shall be convened within 30 days of enactment of this Act.

DEFINITIONS

SEC. 8. For the purposes of this Act—

(a) The term "national public improvement" means the nation's systems of highways, roads, bridges, main water supply and distribution systems, and sewer systems;

(b) the term "facility" means any physical structure such as a highway, road, or bridge, or structure related to a water supply storage, treatment, and distribution system or sewage treatment and collection system which is owned and operated by the Federal government, a state, municipality, or other public agency or authority organized pursuant to State or local law;

(c) the term "maintenance" means routine and regularly scheduled activities intended to keep the facility operating at its design specifications;

(d) the term "repair" means the correction of a structural flaw in the facility without adding significantly to the design life of such a facility;

(e) the term "rehabilitation" means the correction of structural flaws in a facility so as to extend the engineered design life of such a facility;

(f) the term "replacement" means the reconstruction of an existing facility;

(g) the term "life cycle cost" means the total cost of constructing, operating, and maintaining a facility, including the interest on any borrowed funds, over the design engineered life of the facility;

(h) the term "State" means any State of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, the Northern Marianas Trust Territories, or the Virgin Islands, and

(i) the term "region" means one of the nine geographical groups of states defined by the Bureau of the Census in the Statistical Abstract of the United States.

AUTHORIZATION OF APPROPRIATIONS

SEC. 9. (a) There shall be a staff for the Commission consisting of no more than 30 full-time employees of the Federal Government, who shall be detailed by the various agencies upon request of the Chairman of the Commission: *Provided*, That nothing in this section shall be construed to permit an increase in the level of total Federal employment.

(b) The Army Corps of Engineers shall assign a Civilian employee as staff director for the Commission, with the concurrence of the Chairman of the Commission, and shall also provide office space, supplies, equipment, and necessary contracting and other support services to the Commission and its staff.

(c) The heads of all Federal agencies are directed to cooperate with the Commission to the maximum extent possible, and to provide, on a timely basis, such information as the Commission may request.

(d) There is hereby authorized to be transferred or reprogrammed from appropriations otherwise available to the Army Corps of Engineers, the Department of Transportation, and the Department of Commerce, the total of five million dollars to carry out the duties of the Commission during its tenure, said sum to be exclusive of salaries for staff.

(e) The private members of the Commission shall be compensated for their time engaged on Commission business at the daily rate established for employees at grade 18 of the general schedule.

THE REBUILDING OF AMERICA ACT OF 1982—SUMMARY OF THE BILL

The "Rebuilding of America Act" would establish a National Commission on Rebuilding America to devise a program for reconstructing and rehabilitating the nation's public improvements—the system of roads, bridges, water supply and sewer systems without which industry and business cannot function.

The bill states the Congress's findings that national public improvements have been deteriorating at an alarming rate, that there is a serious regional imbalance in the capability of such facilities to support economic activity and growth, and that the Federal Government has failed to develop a response to the problem.

Accordingly, the bill would establish a National Commission on the Rebuilding of America that would be required to:

(1) conduct an inventory of national public improvements by region, state, and

metropolitan area and by type of facility, with attention to the condition of the facilities, their sufficiency to support economic growth, and recent patterns of investment and deterioration (Section 2 of the bill); and

(2) develop a national public improvements plan, setting priorities and detailing the means of financing needed public improvements over the next ten and twenty years and further recommending changes in Federal laws, regulations, and policies that would permanently insure adequate investment, and clarifying the relationship among Federal, state, and local responsibilities for development and maintenance of public improvements (Section 3).

The 13-member Commission would be composed of five distinguished individuals from the private sector who are conversant with infrastructure needs, one of whom would be Commission chairman; the Secretaries of the Army, Transportation and Commerce; and representatives of the five major organizations of state and local elected officials (section 5).

The Commission would have two years and a budget of five million dollars to complete its work (Section 6). The $5 million would be drawn from existing appropriations and no new spending would be required to fund the Commission. The Commission's recommendations regarding investment priorities would become binding unless disapproved by the Congress within 120 days of their submission (Section 4).

The Army Corps of Engineers, which spearheaded the development of the Nation's public improvements in the 19th and early 20th centuries, would provide principal administrative support to the Commission. The Commission would be restricted to no more than thirty full-time employees, drawn from and paid by various Federal agencies. No new Federal employees would be hired.

[From the Washington Post Aug. 11, 1982]

HOW TO KEEP AMERICA FROM CRUMBLING

(By Roger J. Vaughan)

America is falling apart. Our roads are crumbling, our bridges are impassable and our sewers are backing up. Politicians have always believed in the talismanic power of public works to generate jobs and to gather votes, and the sheer size of the "infrastructure problem" presents an unprecedented opportunity to do both.

One study, provocatively titled "America in Ruins," estimates that we must quadruple our annual public spending from the present total of $70 billion if we are to prevent further deterioration. This would mean a 40 percent increase in all state and local taxes—a prospect that would drive the beleaguered taxpayer to something less democratic than a tax limitation referendum. It would grossly inflate construction costs, expose local governments to massive fraud and abuse and lead to inhumane cuts in other public services.

Fortunately, there are some solutions to this crisis that do not require an impossible increase in public expenditure. First, local governments can stop using scarce tax-exempt bond revenues to subsidize private investments. Last year, less than half of the revenues from bond issues were used for public works projects. The rest were used to finance private projects, including hospitals ($5.4 billion), pollution control for private corporations ($4.5 billion), industrial development ($3.2 billion). Cut these subsidies out and we could double public construction spending for public purposes. Private investment was generously encouraged under the 1981 Tax Recovery Act. Further public aid is redundant.

Second, state and local governments can start charging for the services they provide. There is no reason why citizens at large should pay for expensive water supply systems unless they use the water. Yet, in most states, gereral obligation bonds are used to pay for irrigation systems for farmers, orewashing for mining companies and green lawns in new suburban subdivisions. A water user fee will encourage greater cconservation, reducing the need for new reservoirs and water treatment facilities. Those who would argue that "user fees" are hard on the poor should compare them with the alternative of cutting back on social service spending to continue the present subsidies for inefficient development.

Third, we can stop giving away the local tax base through tax abatements and exemptions to attract business. There is no evidence that the $1 billion given away annually by states and cities to lure business has had any real effect. The resources would be better used repairing streets, improving the local education system and modernizing our ports.

These are not easy steps to take. But local officials must face some painful facts. It should be clear by now that the federal government will not help. While Washington wrestles with its own enormous deficits, it is unlikely to bail out states and cities from the results of their profligate subsidies to local businesses. Second, the tax-exempt bond market will not be a source of low-cost money in the foreseeable future. Interest rates will remain high, and investors will carefully scrutinize new issues. Fiscal gimmicks—from zero-coupon bonds to the tax leasing of public facilities to private corporations—will prove little more than placebos. With no cheap sources of funds, local governments will have to make some painful decisions about which projects really require a public subsidy.

Public infrastructure investments are an important ingredient for successful economic recovery. The past level of underinvestment is endangering growth. But we should use this "crisis" as an opportunity to define new priorities. Public funds should not be used to build convention centers, industrial parks and buildings for large corporations. A sound fiscal strategy and a clear allocation of responsibility between the public and private sectors are much more powerful development incentives than speculative projects and tax subsidies. Construction activities may provide local politicians with photo opportunities. But, in the long run, the local voters will be more impressed with a leader who can fill their potholes, hold down the cost of local debt and lay the foundation for sustained economic growth. And that will require saying "no" to a lot of pork-barrel projects and making the users of public facilities pay for the privilege.

(The writer is a consultant to the Council of State Planning Agencies.)

[From the Wall Street Journal, Aug. 11, 1982]

HOW NEW YORK DEALS WITH PERILOUS PROBLEM OF CRUMBLING BRIDGES

(By Bill Paul)

NEW YORK.—George Zaimes, in the five years that he has been this city's chief engineer, has become a skilled practitioner of urban triage.

Put bluntly, his main task is to keep New York's hundreds of decaying bridges from collapsing. Like a medic at wartime, he moves among the wounded and dying, assessing which patients can be saved, which need attention first, and which must be left to die. Ordering a wooden buttress here, a batch of plastic there, he buys time and sets priorities. The critical—but salvageable—cases come first.

It is one of the world's most-impossible—and thankless—jobs.

If he were to make a serious mistake in judgment, hundreds or even thousands of people might die. Yet those people whose safety he fights for complain loudly when he inconveniences them. And the politicians who would be held accountable if an accident occurred keep cutting his funds, making catastrophe no longer unthinkable.

The balding, 54-year-old Mr. Zaimes is a soldier in what is perilously close to a losing battle: The fight to save the nation's crumbling highways and bridges. Old age, neglect and continual battering by today's larger trucks have taken a heavy toll on America's roads and bridges. Nearly half of all highway bridges are deficient or obsolete, according to the Transportation Department. About half of the 43,000-mile interstate highway system, if not soon repaired, will have to be rebuilt. Thousands of miles of less-traveled roads have already been allowed to revert to a natural state by counties and towns. In all, the Federal Highway Administration estimates it will cost more than $230 billion over the next 13 years to rehabilitate the nation's primary roads and bridges.

. . . than in the aging and financially pressed city of New York. After more than 50 years of abject neglect, city officials awoke to the imminent dangers in 1977: Bridges and highways, some more than 75 years old, were rapidly deteriorating, with only a handful of untrained ironworkers regularly inspecting them. Mr. Zaimes, a state employee, was summoned to head a new city-state task force on bridge rehabilitation. His mandate: Rebuild, repair and, above all, prevent disaster.

But even with the hard-charging Mr. Zaimes, a beefed-up staff of 200 and hundreds of outside consultants now inspecting and repairing New York's 2,000-plus bridges, the city is still uncomfortably close to a major accident. The roads and bridges are decaying faster than money and manpower can be found to make needed repairs.

SAVING THE DAY

"I'd say we've headed off eight catastrophies in the last five years," Mr. Zaimes says matter-of-factly, chomping on a cigar in his World Trade Center offices.

Perhaps the most chilling near-miss involved the Queensboro Bridge, which carries motor vehicles and subway trains over the East River between Manhattan and Queens. Shortly after stepping in as head of the task force, Mr. Zaimes conducted the first inventory ever of all New York bridges. During that survey, he discovered that the two outer lanes of the Queensboro were about to collapse. "There were heavy trucks riding in those lanes and any one of them could have caused the roadway to give," he recalls. He immediately ordered the lanes closed and repairs begun. "We were very lucky no one died," he says.

Since then, Mr. Zaimes has built extensive files on all of the city's bridges. Each file contains a detailed report on the condition of the bridge made within the last two years by one of the 450 or so engineers Mr. Zaimes employs as consultants, as well as

photographs of the structure from every considerable angle. If a bridge has a serious defect requiring immediate attention, the file is pulled and placed with over 300 other "red flag" files.

STOPGAP MEASURES

It is one thing to identify problems, however, and quite another to correct them. At last count, Mr. Zaimes had been forced to close 19 bridges. At least 100 others aren't receiving the immediate attention they need. Dozens more are getting at best only "Band-Aid" repairs, such as the application of plastic sealants to retard erosion or the installation of wooden supports to reinforce cracked concrete columns. Sometimes all that can be done is to bore a hole at the end of a developing crack in a bridge's steelwork; this keeps the crack from spreading but doesn't prevent new cracks from forming.

Such half-measures are costly, Mr. Zaimes says. Right now, for example, seven viaducts on seven different expressways could be preserved if $30 million were spent to chip away and replace the top layer of pavement. Acid from snow-melting salt is leaking through the worn pavement and corroding the underlying steelwork. Instead, Mr. Zaimes settled for a cheaper asphalt repaving, which gives a smoother ride but still allows acid to leak. Mr. Zaimes figures that if he can't fix the viaducts properly for another 10 years, it will cost $150 million to replace all the steel rotted by then. "This is agony," he says. "Agony."

Quite likely, Mr. Zaimes says, many other bridges will be closed over the next couple of years for lack of repair funds. He says he could do the needed work in a decade, given $250 million a year. (When he first came to town, he was give that much to work with. But today, thanks primarily to cuts in federal funding, his budget has been more than halved.)

The chief culprit is an "obligation ceiling," imposed for the past two years by the Reagan administration, that limits state spending on road and bridge repair to roughly half the level appropriated by Congress. In New York City's case, if has meant a loss of $100 million in federal funds in the current fiscal year.

"If we can't spend it, what the hell good is allocating it?" Mr. Zaimes fumes.

For a while this spring, Mr. Zaimes thought he could recover part of that lost federal money. Drew Lewis, the Transportation Secretary, had proposed a five-cent-a gallon gasoline tax increase, with four of those five cents earmarked for road and bridge repair. New York City's share would have amounted to about $35 million.

His hopes were dashed in April, when the president tabled the plan, deciding he couldn't ask Congress to raise taxes at a time he was urging it to trim the federal budget.

New York State's fiscal problems have forced it, too, to cut back funding for bridge and road repair. The combined effect has meant Mr. Zaimes has had to cannibalize, his own programs. This year, for example, he received only $6 million of the $24 million in federal money needed to fix viaducts on the Henry Hudson Parkway north of Manhattan. To make up the difference, he postponed repairs on half a dozen other bridges

"RACE AGAINST TIME"

Repairs on the Henry Hudson couldn't wait. The parkway is at the northern end of the West Side Highway, one of Manhattan's two north-south arteries, and it must be fixed before problems on Franklin D. Roosevelt Drive, the other artery, become critical. It will take at least two years to complete work on the Henry Hudson, by which time the FDR Drive viaduct between 79th and 96th Streets will be becoming unsafe. "I'm in a race against time," Mr. Zaimes says. "If I gut the FDR viaduct before I've got the Henry Hudson fixed, I'll strangle the city."

He shudders at the thought of beginning the FDR Drive work, which will entail closing some lanes and rerouting traffic onto city streets that crisscross some of the world's most expensive real estate, "I know that residents aren't going to like it and there"ll be a big stink at City Hall," Mr. Zaimes says.

The city is so strapped for funds that Mr. Zaimes is giving serious consideration to a scheme that would have done P.T. Barnum proud. Next year, the centennial of the Brooklyn Bridge, he proposes cutting up all the rotten wire that he plans to replace on the bridge and selling small mounted lengths of it as souvenirs. If he cut 500,000 pieces of wire and charged $50 each, he figures he could garner $25 million. So far, city officials have been cool to the plan, but he keeps pushing. "I'll do anything to raise money," he says, "I'm fighting a war here."

DIFFICULT CIRCUMSTANCES

Mr. Zaimes's 54th-floor office at the World Trade Center in some respects resembles a war room. A hard hat is always within reach. A blackboard stands next to his desk so that he can diagram logistical problems. The desk itself is weighted with paper—mostly communiques from Washington and Albany. A slogan on the wall attests to his frustration: "When all is said and done," it reads, "more is said than done."

Mr. Zaimes's colleagues in and out of government credit him with doing the best job possible under the circumstances. "George is an excellent man, but even Superman would have a difficult time if he were up against what George is," says Arthur Asserson, the city's construction coordinator for transportation. Janet Weinberg, executive director of a citizens' group, Transportation Alternatives, adds, "I wouldn't want his job for anything."

Mr. Zaimes' wouldn't argue with that assessment. "I'm burning out and so is my staff," he says. "I don't know how much more I can take."

At any moment in his typical 12-hour days, a crisis can erupt, and he is on 24-hour call for emergencies. A few weeks ago, for example, a dangerous crack appeared on the Manhattan Bridge which carries vehicles and subway trains between Manhattan and Brooklyn. The fissure was in a vertical steel beam, directly under the subway tracks. Mr. Zaimes faces a tough decision. Should he remove the subway trains, the vehicles—or both—from the bridge until the beam is fixed? Given the city's traffic problems on even a normal day, he knew that any rush-hour diversion would cause massive snarls.

After consulting with transit officials, he rerouted the subways but allowed the cars to continue traveling over the bridge. "I was very close to taking the cars off, too," he recalls.

The Manhattan Bridge is a textbook case of the physical decay Mr. Zaimes's task force must contend with. While the bridge is still safe to use, it is notably weaker than the day it opened over 73 years ago. Years of neglect have resulted in the hopeless clogging of the drains that once siphoned rain-water and melting snow off the bridge. As acid from the salt spread on the pavement collects, it eats into the steel structure.

Compounding the acid corrosion—a problem shared with all other city bridges—is weakening caused by the subway trains traveling in the Manhattan Bridge's outer lanes. Their weight causes excessive twisting of the steel work and eventually, cracking. To help lessen the strain, Mr. Zaimes's crews have begun padding the bridge with neapreme, a sort of super-sturdy "Silly Putty."

Between crises, Mr. Zaimes presses on with the drudgery of paper work and public relations. He personally answers complaints from citizens—such as bike riders protesting the closing of their lane during repairs on the Queensboro Bridge. He also plays host to local Congressmen, pitching for more federal funds.

When pressures get too great, Mr. Zaimes retreats to the Bronx delicatessen that his 87-year-old father still owns. "Sometimes I just go up there and whack hell out of the meat," he says. "It helps."

More often, he grabs his hard hat and tours trouble spots. On a recent outing he bobbed out on the East River in a rubber dinghy to view the underbelly of the decaying FDR Drive viaduct. There, steel rods that should span the roadway hung down into the murky water like rusty Spanish moss. Then, on to the Williamsburg Bridge to examine anchorage cables buried in cement at the base of the bridge's Manhattan side. When he was out of earshot, one of the workmen said of Mr. Zaimes: "The guy cares, you know what I mean? It's more than a job to him."

[From Newsweek, Aug. 2, 1982]

THE DECAYING OF AMERICA

(No one noticed the spidery crack inching its way along the concrete casing of New York City's 65-year-old water tunnel No. 1. But one weekday morning, 600 feet below the Bronx, the steady torrent of water loosened one chunk of concrete, then another, then another, until an underground landslide closed the tunnel off. Manhattan's water trickled to a stop. Within minutes pumps in high-rise buildings, trying to compensate for the loss of pressure, caused a widespread blackout. Elevators stopped at mid-floor. Subways rolled dead, their antiquated electrical backup systems unable to handle the sudden load. Sewers backed up. Fires raged. Before rescue workers could come to their aid, thousands of panic-stricken New Yorkers headed for the only means of escape—the city's dilapidated bridges. Overloaded with humanity and cars, the 73-year-old Queensboro bridge cracked, groaned and toppled into the East River.)

That vision of urban apocalypse isn't farfetched. America's infrastructure—the vast, vital network of roads, bridges, sewers, rails and mass-transit systems—is heading toward collapse. The decay is most acute in older industrial cities, but clogged highways and strained water systems also threaten to strangle booming Sun Belt towns, and even in dusty rural communities, potholes batter chassis and jangle motorists' nerves. Two weeks ago, in one 24-hour period, an 80-year-old earthen dam burst in Colorado, sending a wall of water through the town of Estes Park, and a major aqueduct broke in Jersey City, N.J., leaving nearly 300,000 residents without drinkable water for six days. Says Robert Harpster, executive director of the Iowa League of Municipalities, "Our sewers leak like sieves, our mass transit is in

bad shape and our roads look like the Ho Chi Minh trail."

Ever since the canal boom of the 1800's, public works have shaped the nation's character and accommodated its growth. But today one-quarter of the interstate-highway system is worn out and needs resurfacing. One-half of Conrail's rails and roadbeds are seriously decayed. Half of all American communities cannot expand because their water-treatment systems are at or near capacity. One-fifth of the nation's bridges are so dangerously deficient they are either restricted or closed. "We're living on our laurels of the 1950s and 1960s," says Transportation Secretary Drew Lewis. Agrees Pat Choate, co-author of "America in Ruins," a study of the crisis for the Council of State Planning Agencies: "We've been squandering a major part of our national wealth."

All told, the cost of needed repairs around the country could run as high as $3 trillion. But the bills are coming due at a time when there is little money to spare. The Reagan Administration favors cutting Federal aid for highways, bridges and pollution-control projects and plans to phase out mass-transit operating subsidies by 1985, leaving state and local governments to pick up the slack. For their own part, many states and cities are already in fiscal extremis and will be forced to spend more and more scarce funds for simple operating costs as Federal aid to other programs diminishes. Money is even tighter where strict local tax-cut measures are in effect. Under Proposition 2½, for example, Massachusetts is devoting only .5 percent of its budget this year to maintenance and repair—a policy one expert on the state's budget, Mark Ferber, calls "pennywise and pothole foolish."

At the same time, record interest rates have driven the cost of issuing municipal bonds—the traditional means of raising capital funds—prohibitively high. And other recent Federal policies have hardly helped. All Savers certificates, Individual Retirement Accounts, accelerated depreciation and "safe harbor" leasing laws have all reduced the incentives for individuals and corporations alike to invest in tax-exempt municipal bonds. "The U.S. Treasury is slowly choking the ability of states to raise money," charges Massachusetts bond counsel Francis X. Meany. Some economists warn that Reagan's plan to stimulate the growth of the private sector through tax cuts could backfire if the roads, bridges, rails and water systems that businesses depend on are allowed to collapse from too little government support.

Human toll: Already the nation's decaying physical plant is costing Americans dearly. In Houston, for example, city planners estimate that motorists pay a "traffic congestion tax" of $800 a year in time and gasoline wasted on the city's snarled expressways. U.S. Steel spends an extra $1 million a year detouring its trucks around a closed bridge in Pittsburgh. TRIP (The Road Information Program), a highway-in-industry group, estimates that the aggregate cost of the private sector of bad roads and bridges is $30 billion a year-for everything from broken axles to lost business. Even worse, the infrastructure crisis is exacting a heavy human toll. A recent Federal Highway Administration study found that spending an extra $4.3 billion to fix dilapidated bridges and roads could save 480,000 injuries and 17,200 lives over fifteen years.

There are nearly as many reasons for infrastructure decay as there are potholes. Some of it stems simply from old age. Built largely in the 1950's, the interstate-highway system, for example, was designed to last only 25 years. Many roads, bridges and water systems are also bearing far greater burdens than they were ever expected to accommodate. Boston's six-lane Southeast Expressway, built in 1959 for 75,000 cars a day, is now an axle-crunching obstacle course that carries 150,000 cars daily. And everywhere, age and abuse have been compounded by neglect. Investment in public works by all levels of government has dropped by more than 25 percent since 1972 (chart, page 18). As the fiscal crises of the 1970s hit, many local officials balanced budgets by canceling preventive maintenance and deferring needed repairs. "In the choice between laying off police or maintaining sewers," says Lincoln, Neb., Mayor Helen Boosalis, "the sewers always lose."

Although billions of dollars have been spent on public works in recent years, the vast bulk of expenditures has gone not to maintain old facilities but to build ambitious new pork-barrel projects, often determined more by politics than actual need (page 18). Says E. S. Savas, Assistant Secretary for Housing and Urban Development, "Have you ever seen a politician presiding over a ribbon-cutting for an old sewer line that was repaired?" All too often the cost of such projects is wildly inflated by corruption on the part of construction firms, labor unions, public officials and organized crime—all at the taxpayers' expense (page 17). Meanwhile, the longer the repairs are put off, the costlier they become. "Deferred maintenance becomes reconstruction," says Choate's co-author, Susan Walter.

One big obstacle to good infrastructure maintenance is the very system that controls it. Responsibility for maintaining public facilities rests with more than 100 Federal agencies, as well as the 50 states, more than 3,000 counties and thousands of local agencies. In Cleveland four separate municipal departments share authority over hundreds of dilapidated bridges. In Eaton Rapids, Mich., city manager Dennis Craun has compiled a 120-page booklet of all the Federal regulations that pertain to a 90-year-old one-lane bridge that is not strong enough to carry trucks or buses—but is nevertheless listed in the National Register of Historic Places, and therefore cannot be destroyed. "I'm about at the point where I'd consider driving an 80,000-pound tanker over it," he says. "That would do the trick."

Citizen opposition has also stood in the way of preventive maintenance, since road, bridge and water-main work can be inconvenient as well as costly. But as the decay worsens, some citizens are taking the lead—and some deteriorating facilities have become key political issues. Last March women in Grosse Pointe Farms, Mich., got so fed up with the potholes on Detroit's Lakeshore Road that they donned hard hats and hockey helments and fixed them. U.S. Representatives Barney Frank and Margaret Heckler are fighting a re-election battle over a 76-year-old bridge in redistricted Fall River, Mass. Frank recently brought the chairman of the House Public Works and Transportation Committee to visit the bridge; Heckler brought Drew Lewis. "If this is what it takes to get action, I'll take it," says bemused Fall River Mayor Carlton Viveiros.

"Bumpy Rug": Aware of the growing potency of pothole politics and the genuine dangers of serious breakdown, many city officials are belatedly fighting to save their public facilities—at no small cost to city coffers. Chicago's Mayor Jane Byrne has announced a two-phase, $187.5 million plan to rebuild 22 bridges and viaducts, 90 intersections and 46 railroad crossings. New York City has embarked on a ten-year, $34.7 billion program to renovate streets, bridges and mass transit and work has begun on a third water tunnel. In Pittsburgh Mayor Richard Caliguiri is devoting $60 million of his city's $225 million budget this year to maintenance projects—deferring work on recreation programs. "We can no longer sweep these problems under the rug," says Cleveland's director of public utilities, Edward R. Richard. "The rug is getting too bumpy."

A sampling of the nation's worst infrastructure problems:

Highways. Still 1,500 miles short of completion, the once proud 40,500-mile interstate-highway system will need $33 billion worth of repairs in the next decade. But the Federal Highway Trust Fund, which supported the system throughout the 1960s on ever-burgeoning revenues from the 4-cent-a-gallon Federal gasoline tax, has been sorely depleted with the advent of smaller, more fuel-efficient cars. Conditions are even worse on the larger network of primary and secondary roads. The U.S. Department of Transportation (DOT) estimates that the work needed to keep nonurban highways at current levels will cost more than $500 billion over the next ten years—more than Federal, state and local governments combined spent on all public works in the 1970s.

City streets. It takes 100 pounds of asphalt to fill the average pothole, and the record-cold winter of 1982 left a plague of them—1 million, by some counts, in Chicago alone. But city officials are finding that it can also be costly to leave them unrepaired. Two years ago, after paying $20 million in negligence claims, New York City enacted a pothole "prior notice" law, exempting it from responsibility for accidents caused by any street defect not reported at least fifteen days earlier. Not to be thwarted, a citizens group called Big Apple Pothole and Sidewalk Protection Corp. sent an army of workers out to document every crack and rut in Manhattan, Brooklyn and the Bronx.

Bridges. Nationwide, 248,500 bridges—45 percent of the total—are structurally deficient or functionally obsolete. But DOT estimates that needed repairs could cost as much as $47.6 billion. Meanwhile, two Federal programs are supposed to provide for periodic inspections and aid to the most dangerous bridges, but a 1981 General Accounting Office report found that many national safety standards were not being met. Heavy trucks continue to barrel over the Mountain Avenue Bridge in Malden, Mass., for example, even though it was "posted" at a maximum of 6 tons in 1977.

Mass transit. Believe it or not, conditions on subways and buses are actually improving in many cities. Since 1979, when two Philadelphia buses caught fire on the road and only 26 of 108 subway cars were operating on the Broad Street line one night, the Southeastern Pennsylvania Transportation Authority (SEPTA) has raised capital spending from $17 million to $110 million and even brought aged repairmen out of retirement to teach a new generation of mechanics how to fix its 1920s car motors. New York City's Metropolitan Transportation Authority (MTA) has embarked on a five-year, $5.8 billion renovation program, though frequent glitches with its new buses and subway cars have actually compounded maintenance problems in the vintage repair

shops. Meanwhile, critics remain leery of the rescue plan, since the financing includes $1.6 billion in bonds to be paid off by farebox revenues. MTA Chairman Richard Ravitch "may be known in the future for two things," says Gene Russianoff of the watchdog group Straphangers Campaign, "rebuilding the system and the $3 fare."

Railroads. Tempers have been rising along with fares on U.S. commuter rails. In 1980 half the ridership of the Long Island Rail Road joined in a one-day strike, refusing to show their tickets. "We pay ransom for the privilege of being hermetically sealed in dirty, smelly cars," says Lorraine Pirro, a citizen adviser to New York's commuter rails, which will spend $1.3 billion on capital improvements over the next five years. Many systems are saddled with ancient equipment never designed for stop-and-go commuter service. "Edison Cars," dating back to 1923 when Thomas A. Edison threw the first switch, still make up 10 percent of the New Jersey Transit Corp.'s fleet.

Commuter headaches will be compounded later this year when Conrail gets out of the commuter-rail business, leaving local transit agencies completely responsible for 210,000 riders daily. SEPTA officials warn that unless contracts and work rules are renegotiated (the average Conrail worker earns $40,000 a year), they may have to close down the area's thirteen commuter lines. The precedents set by public takeover of bankrupt freight lines are not encouraging. In Michigan, for instance, half of the 931 miles of freight track run by the state lies dormant in disputes over subsidies.

Water and sewage systems. Every day more than 1 million gallons of tap water disappear through leaks beneath the streets of Berwyn, Ill. In Milwaukee there were 170 water-main breaks in January alone. And in New York City, though the complete failure of one of the two giant water tunnels is unlikely, neither has ever been inspected. Experts say a breakdown of some kind is all but certain within the next twenty years. Sometimes made of brick, wood or cast iron and often more than 100 years old, America's sewer and water systems are subterranean time bombs. Choate estimates that 756 major urban areas will have to spend $75 billion to $110 billion to maintain their water systems over the next twenty years, and just meeting pollution-control standards will cost $25 billion over the next five years.

Dams. Like the earthen dam that burst in Colorado earlier this month, many U.S. dams are tiny, aged and privately owned—yet their collapse would jeopardize hundreds of lives and homes. State and Federal officials didn't even know where many of the dams were until the 1977 collapse of a dam in Toccoa, Ga., spurred Jimmy Carter to send the Army Corps of Engineers out to survey them. In a four-year study the Corps counted 68,000 non-Federal dams. The Corps inspected nearly 9,000 dams in highly populated areas and found roughly one-third to be unsafe, with 130 in danger of imminent collapse. But even where repairs were ordered, they have often not been carried out, because the dams' owners either couldn't afford them or couldn't be found.

Public buildings. "Hardly a week goes by that we don't have some kind of roof problem at one of our 29 fire stations," says St. Louis budget director Jack Webber, whose city-hall roof nearly fell in on him last year. In New York City nearly half of the 1,087 public schools are at least 50 years old and many suffer rotted windows and outdated plumbing and electrical systems. Worse still are the nation's 3,500 prisons, as many as 3,000 of which need substantial renovation or expansion. In Texas 3,800 inmates of the state penal system sleep in tents for lack of space. In some states prisoners are being paroled early to ease overcrowding.

Growing pains. Public works in Sun Belt cities have not kept up with population growth. In sprawling Phoenix a scant 36 miles of freeway now serve a population of 1.5 million, 97 percent of whom travel by car. Every day between 1970 and 1980, roughly 250 more cars joined Houston's expressways, and traffic there has become so chronically awful—with "rush periods" lasting twelve hours a day—that some executives now commute by helicopter (page 53). Texas planners figure it will take 300 miles of new freeway and 1,400 miles of streets, costing $16.2 billion, to bring traffic conditions back to what they were in 1975.

Water is also a serious problem in the West and Sun Belt, where overtapping of ground resources causes more and more giant fissures and sinkholes. Meanwhile, the nation's ports have not kept up with the increasing demand for coal exports. At one point, 15 percent of the world's bulk coal was sitting useless at the port in Hampton Roads, Va., due to congestion in unloading.

Solutions: How will the staggering infrastructure needs be met? Proposed solutions range from a gigantic New Deal-style public-works program to increased user fees, but none will be easy. One of the most sensible ways of raising highway revenues, for example, would be to boost the Federal gas tax, which has been 4 cents a gallon since 1959. Transportation Secretary Lewis has proposed doubling the gas tax and raising levies on heavy trucks, to generate $5 billion annually. But the powerful automobile and trucking lobbies oppose Lewis's plan to use $1 billion of that revenue for mass transit, and President Reagan has vetoed the idea for now.

On their own, 31 states have raised state gas taxes and other fees in recent years and several are considering more road tolls. By charging an average of 2.4 cents per mile, for example, the 40-year-old Pennsylvania Turnpike pays for resurfacing 30 to 50 miles a year. Many communities are also raising rates for water and sewer services—systems experts say should be self-supporting. Often that requires creating a separate local agency, such as Boston's acclaimed five-year-old Water and Sewer Commission. The danger, critics warn, is that the proliferation of local agencies will diffuse accountability and multiply administrative costs.

Private businesses are also assuming a greater share of the burden—voluntarily or not. At the Sycamore housing development in Danville, Calif., where Proposition 13 prohibits raising taxes to pay for basic services, a local approval board is asking the developer to provide two new water tanks, a freeway interchange, a new elementary school and a new fire engine. The cost, of course, ultimately gets passed on to consumers: the town's decree is raising the cost of each new home there by $15,000. Private donors are helping to renovate the crumbling Statue of Liberty and restore San Francisco's 107-year-old cable cars, which will shut down this September for twenty months of repairs. And in some cities business leaders are donating management expertise. "If Cleveland goes to hell, we all go to hell with it," says attorney Carlton Schnell, chairman of a coalition advising the city on its infrastructure needs.

Dabbling: In desperation, local officials are experimenting with a wide variety of other revenue-raising schemes, including selling off public buildings. The Port Authority of New York and New Jersey is considering leasing vacant office space to raise funds for a "bank for regional development" that would lend money to local governments for infrastructure needs. Others are dabbling in "leveraged leasing." New York's MTA sold 620 buses and ten commuter-rail cars to Metromedia, Inc., at $15.5 million over the cost. Metromedia will take the tax depreciation on the equipment and lease it back to the MTA, which will use the net gain for operating costs. Atlanta. Officials are considering an even more complicated plan. A local Lockheed plant would build a plane for a Japanese trading company, take payment in Japanese-made subway cars, then sell the cars to the transit agency for less than their usual cost.

On a larger scale, New York investment banker Felix Rohatyn has suggested a revival of the Reconstruction Finance Corp., which would issue $25 billion in federally backed loans to cities to help maintain their facilities. Aware that the infrastructure crisis coexists with record-high unemployment, the House Education and Labor Committee has proposed a massive five-year, $11 billion public-works program to provide jobs ranging from painting bridges to patching potholes. And a growing number of economists lawmakers are calling for creation of a "national capital budget" that would fund infrastructure projects outside the Federal budget, where they are currently vulnerable to spending cuts.

Whatever the mechanism—higher taxes, higher user fees or higher consumer prices—the cost of repairing the nation's physical plant will inevitably come out of citizens' pockets. Already, the problems of decay and growth have pitted East against West, rural residents against city dwellers, truckers against straphangers and almost everyone against the Federal government.

Canoes? Federal allocation formulas currently favor building urban, not rural, highways—even though the expense of clearing city land can push the cost per mile as high as $500 million. Allocation formulas also favor "multiple use" waterways, rather than city water and sewer systems. "If I could fugure out a way to put canoeists down there, maybe our problems would be solved," jokes New York Mayor Ed Koch. Reagan's plan to phase out mass-transit operating subsidies while continuing to fund transit capital needs has angered people on both sides of the issue. And because of opposition, the Administration is likely to table its New Federalism plan for roads that would have returned to the states their share of Federal gas taxes—along with the responsibility for maintaining highways. "Based on the amount of money it generates in gas taxes, Montana would barely pay for the signs on its highways, let alone the highways," says Lewis. "You can say fine, don't build any interstates in Montana, but what do you do when you get to the Montana border—get a horse and wagon?"

In general, the Reagan Administration believes that state and local governments rely far too heavily on the Federal government for their infrastructure needs. "The fact that there are potholes all over America doesn't mean that it's time for the Federal government to pay for filling them," says HUD's Savas. Historically, the pattern has been for the Federal government to build major public works, but leave them to states

and cities to repair—and some local officials are beginning to decide that they can't afford the Federal largesse. Cincinnati, for example, has adopted a policy of "planned shrinkage" of its physical plant where possible—even turning down Federal grants to concentrate its own funds on maintaining what it has.

Scaling back: As the national budget debate increasingly becomes one of guns vs. butter vs. asphalt, planned shrinkage may become the public-works policy of the future. Already, officials doubt that the interstate-highway system, as originally conceived, will ever be completed. The Federal government has indefinitely postponed building the once planned $3 billion rail and road system for the congested Houston area and the proposed $2.1 billion "people mover" in Los Angeles. Not a single road links Juneau to the rest of Alaska, but the cost of building one may be too high even for that oil-rich state.

What will such decisions mean for the boom towns of the future? And if older cities are allowed to decay and contract, can citizens who "vote with their feet," as Reagan has suggested, hope to find better conditions anywhere else? In past decades public works made America a nation of highways, of automobiles, of vital cities and water systems that are the envy of the world. Today's hard choices will determine the shape of America in the decades to come.

[From the New York Times, July 18, 1982]

ALARM RISES OVER DECAY IN U.S. PUBLIC WORKS

(By John Herbers)

In Pittsburgh, the United States Steel Corporation contends that it is paying at least $1 million a year to detour its trucks 26 miles around a major bridge that the state closed two years ago for lack of repair.

In Albuquerque, motorists are up in arms because sewer lines are crumbling under the streets, many of which have become impassable as the city struggles to make piece-by-piece replacements.

In Houston, the magazine Texas Monthly asserted that it had counted 1.5 million potholes in a city that is a center of great wealth.

In New York, broken water mains, subway failures and the deterioration of other facilities above ground and below have become so common that the seemingly mundane subject of "the infrastructure" has become a prominent issue for both the city and state governments.

News of a neglected and decaying infrastructure—public facilities such as water systems, sewers, streets, highways, bridges and rails, which undergird life and commerce in every community—has taken on a new prominence on the national scene at a time when the country is suffering from a recession, high unemployment, decline of much of its basic industry and the reduction of public services by governments at all levels.

The situation is similar to that of a family whose income has been cut, that is behind on the mortgage payments and unable to buy shoes for the children, and then learns that tree roots have plugged the drainage pipes, the furnace must be replaced and termites have weakened the foundation of the house.

In the urban policy report the Administration made public last week, President Reagan said he wanted to do something about the infrastructure problem but had not decided what.

Meanwhile, a bipartisan coalition is growing in Congress to force action by the national Government, partly on the ground that Mr. Reagan's goal of revitalizing American industry cannot be reached until something is done about inadequate public facilities. Many Democrats say that repairing public works would provide jobs for many of the unemployed.

One difficulty is that public works projects have been so fragmented between the various levels of governments that no one knows the extent of the decay, or how much money would be needed for repairs and new construction necessary to support the economy and quality of life at reasonable levels.

Only in the past year or so has the concern of policy makers about the neglect of basic public works grown urgent. Studies by George E. Peterson of the Urban Institute and by Pat Choate and Susan Walter of the Council of State Planning Agencies documented the inadequacy of public facilities, not only in older, fiscally troubled cities such as New York and Boston but in suburban and rural communities in every region of the nation.

Their findings have been confirmed and expanded by a number of Government agencies and by Congressional investigations. These are some of the more serious deficiencies cited:

Obsolete and decaying bridges. The Transportation Department recently classified 45 percent of the nation's 557,516 highway bridges as "deficient or obsolete." Replacement or repair could cost $47.6 billion, the department said.

Crumbling highways. The 42,000-mile interstate system, begun in the 1950's and not yet completed, is deteriorating at a rate that would require reconstruction of 2,000 miles a year, in addition to a backlog of 8,000 miles in need of rebuilding that accumulated because of cuts in financing in recent years. The condition has contributed to costly traffic jams on the expressways of most major urban areas.

Deteriorated rail facilities. The condition of roadbeds and rolling stock of Conrail and other rail systems is so poor that some officials say there are no reliable estimates available on the cost of replacement and repair. But frequent derailments and delays in shipments attest to the need, according to a range of officials.

Leaking water and sewer mains. The Urban Institute, in a survey of 28 cities, found that 10 of them, Cleveland, St. Louis, Pittsburgh, Tulsa, Philadelphia, Hartford, Kansas City, Mo., Cincinnatti, Buffalo and Baltimore, were losing 10 percent or more of their treated water because of deteriorated pipes. And the survey did not include New York and Boston, with two of the leading all-time water-leaking systems. Probably a larger problem, from the standpoint of waste, is leaky sewers in which ground water flows into the pipes, adds to the volume of sewage and greatly increases the cost of treatment.

Shortage of capacity of many facilities. A survey conducted by the Economic Development Administration in 1978 showed that half of the nation's communities had wastewater treatment systems operating at full capacity, meaning they could not support new economic or population growth without costly new construction.

The estimates of need tend to become astronomical. Nationally the figures run into the trillions. Last fall, the New York State Legislature estimated that $8 billion to $10 billion a year would be needed in New York State for repairs, replacement and construction of the infrastructure, which would double current expenditures.

A more precise expression of need was published by the Joint Economic Committee of Congress, which said that New York City alone over the next few years would have to service, repair or replace 1,000 bridges, two aqueducts, one large water tunnel, several reservoirs, 6,200 miles of streets, 6,000 miles of sewers, 6,000 miles of water lines, 6,700 subways cars, 4,500 buses, 25,000 acres of parks, 17 hospitals, 19 city university campuses, 950 schools, 200 libraries and several hundred fire houses and police stations.

The causes of neglect and decay are more easily documented than the extent of need. Mr. Choate, an economist and a former Federal official who is now the senior analyst for a giant corporation, said in a paper prepared for the House Wednesday Group, made up of moderate Republican representatives, that investments in capital projects had declined sharply.

The nation's public capital investments fell from $33.7 billion in 1965 to less than $24 billion in 1980, a 30 percent decline," he wrote. "Public works investments dropped from $174 per person in 1965 to less than $110 per person in 1980, a 36 percent decline, and shrank from 3.6 percent of the gross national product in 1965 to less than 1.7 per cent in 1980, a 54 percent decline."

In the 1960's and 70's public works projects frequently were delayed so that the Government could finance such endeavors as the Vietnam War, social programs, education and space exploration. Nevertheless, the Federal Government assumed a much larger share of public works costs, which previously had been borne by state and local governments. In 1957, the Federal Government paid 10 percent of the costs. By 1980 its share had risen to 40 percent.

RESPONSIBILITY FRAGMENTED

The responsibility for maintaining public facilities, Mr. Choate pointed out, was fragmented between 100 Federal agencies, 50 state governments, 3,042 counties, 35,000 general-purpose governments, 15,000 school districts, 26,000 special districts, 2,000 areawide units of government, 200 interstate compacts and nine multistate regional development organizations.

But the Federal Government, the dominant player, never achieved any rational method for allocating the funds. Mr. Choate said Federal laws favored new construction over repairing of existing facilities.

Public works money, which often has been handed out for purposes of politics rather than need, became increasingly subject to waste and fraud, according to Mr. Choate and others. In 1980 alone, 219 state and local public officials were convicted of criminal abuse of public funds, a figure three times greater than the 1970 level.

At the same time environmental requirements enacted in the 1970's increased the need for higher expenditures for public works.

Many authorities say they believe, however, that the greatest cause for inadequacy of public facilities lies in the spread of the population and industry out of the central city to suburbs and remote communities around the nation.

Retired people moved in large groups into new communities, many in rural recreational areas; factories settled along the freeways

and new urban development sprang up near them; state governments spread their colleges over once remote areas; people migrated from the old industrial cities to the South and West, where urban and rural sprawl was greatest; after the 1980 census the Federal Government designated 36 former small towns as metropolitan areas. All this new development required enormous amounts of capital investment for streets, curbs, water and sewer facilities, airports and other facilities.

DEMAND IN CITIES REMAINED

But the new growth did not lessen the demand in the thinned-out central cities. The infrastructures in old cities, which sufferd heavy population losses, serve many vacant lots, half-empty buildings and closed factories and warehouses. But the facilities must usually be maintained as though they were being used at capacity.

At a recent conference on land use sponsored by the Engineering Foundation in Rindge, N.H., Philip Finkelstein of the Center for Local Tax Research in New York pointed out that when the city government suggested that it could no longer afford to maintain basic facilities in the South Bronx, where many buildings had been abandoned, there was a storm of protest and the suggestion was dropped.

"I don't think there is any way to do that with any degree of acceptability," he said, in reference to a suggestion that there be a contraction of public facilities in the cities.

Americans in 1982 are separated as never before by great stretches of pavement, communication and electric lines and water and sewer pipes. Many authorities are questioning whether the nation can any longer afford to maintain what it already has built and continue to provide for new communities.

LAND USE AT THE HEART

Harry E. Pollard, president of the Henry George School of Social Science of Los Angeles, said the way it is now, "A bus driver in order to collect one acre of people has to drive five acres to find them. And he has to drive past five miles of sewer pipe instead of one. It is a land-use problem. If you have to finance five miles for every one you will forever be in financial trouble."

According to a number of authorities, no national administration has succeeded in bringing order to the chaos of public works spending. The Carter Administration, they said, was beginning to coordinate Federal spending so that priorities could be established.

The Reagan Administration, according to those officials, abandoned the coordination but to some extent has stopped the use of Federal funds for capital projects in new areas. For example, it refused to finance water treatment plants in new communities around Orlando, Fla. The rationale was that if people there wanted new communities they could finance them themselves.

FUTURE OF FEDERAL ROLE

Yet even high White House officials acknowledged that the Reagan Administration had no comprehensive policy on public works, except that it intends to drastically reduce the Federal role. Richard S. Williamson, assistant to the President for intergovernmental relations, said Mr. Reagan wanted to help the cities with their infrastructure problems, and he ordered that this concern be put in the Administration's urban policy report that went to Congress.

The report, however, sought to show that the picture was not so bleak as had been depicted. It pointed out that demand had lessened for schools and new highways and said many cities were moving on their own to step up capital projects. And it pointed to local innovations. New York, for example, had switched emphasis from new buildings to repairing streets, bridges, mass transit, water and sewage systems. Other cities, such as Boston, were putting the authority for public works in the hands of independent commissions for greater efficiency, while others, such as Cleveland, were enlisting private interests for help.

The Federal Government's role, the report said, was to gather information about more cost-effective methods of financing public works while "other aspects of Federal aid remain to be determined."

Meanwhile, members of Congress have stepped into the void. Some have been spurred by such reports as bridges being closed for long periods in Kansas City, Mo., while motorists drive blocks out of their way and school children in Altoona, Pa., having to leave their bus, walk across a bridge and wait for the empty bus to follow because the bridge can no longer support the weight of both children and bus.

PROPOSAL BY HOUSE MEMBERS

Two Pennsylvania Representatives, William S. Clinger Jr., a Republican, and Robert W. Edgar, a Democrat, have been pushing legislation for a capital budget that would require the Administration to take an inventory of capital needs and assign priorities for spending on public works, as a first step toward long-term recovery.

They were joined in their effort by such diverse leaders as Speaker Thomas P. O'Neill Jr. and Representative Jack Kemp, the conservative Republican from Buffalo, who were among a number of Congressmen signing a letter to Mr. Reagan asking him to consider the idea. A similar bill has been introduced in the Senate by Christopher J. Dodd, Democrat of Connecticut.

Meanwhile, a number of Democrats around the country have taken up the issue on ground that rebuilding the nation's capital plant would fight unemployment.

In New York, Assembly Speaker Stanley Fink has made repairing of the infrastructure one of his major concerns and Governor Carey, in the recent legislative session, proposed increases in taxes and fees to help pay the costs. The tax legislation, however, was defeated, in part because it was an election year. Officials on the national and state levels predict the issue will become more heated in the years ahead.

In response to questions about how the nation could let basic facilities decay to the extent that many authorities say they have, Maury Seldin, president of the Homer Hoyt Institute, a nonprofit foundation in land economics, and a professor at American University, said, "We as a nation are accustomed to living on uppers and downers."

He said that in recent years the nation had become accustomed to "taking a fix" for whatever bothers it without much thought to the long-range consequences, especially in response to various special interests that can command support for narrow goals, and policy is fragmented.

He called for a maturing of the political processes so that various interests could reach compromises for the overall good and "be willing to settle for a fair shake."

[From the New York Times, June 16, 1982]

STUDY SEES PERILS FOR ROAD SYSTEM

(By Ernest Holsendolph)

WASHINGTON, June 15.—The national highway program. Is plunging deeply into the red, requiring an urgent and complete overhaul in the next year, the Congressional Budget Office reported today in a 94-page study.

In a separate action not prompted by the report, a bipartisan group of House members introduced a bill to require the Federal Government, for the first time, to set priorities for rebuilding roads, bridges, sewers and other major capital projects in a coordinated public works program. The group was led by Representative William F. Clinger, Jr., a Republican, and Representative Robert W. Edgar, a Democrat, both of Pennsylvania.

The budget office study said the costs of completing the Interstate System and doing essential renovation work were huge: The remainder of the Interstate alone could cost $38 billion in 1979 dollars, and the cost of renovating existing roads is estimated at $16 billion from now to 1990.

Although only 1,579 miles remain to be completed in the Interstate System, construction projects and maintenance programs now scheduled will cost $8 billion additional a year, the study said. Clearly what is needed, it said, is a scaling back of present plans, retaining only the completion of the open-road portions of the Interstate plan and leaving the rest to local construction programs.

AID FOR LOCAL PROJECTS

The Government will help to finance these local projects only where they are of a high priority, the budget office said, adding that only about 50 percent of such projects are likely to get Federal help.

"All of these developments," said the report, "portend a major review of highway programs, and the Interstate program in particular, during the coming year."

Even if the highway programs were changed in order to reduce the Federal financing burden, the programs would require an additional annual outlay of $3.9 billion to $5.8 billion, according to the study, which was ordered by the Senate Committee on Environment and Public Works.

Whatever the choice, new revenues in some measure, such as gasoline taxes, will be needed soon to meet the highway program's minimal needs, the study said.

[From Business Week, Oct. 26, 1981]

STATE AND LOCAL GOVERNMENT IN TROUBLE

How well will the Reagan economic revolution work? Most attempts to answer that question so far have focused on the overall U.S. economy and on the financial markets. But the true test of Reaganomics will come at the state and local level. The President is shifting more of the burden of government away from Washington at a time when the local infrastructure is decaying, when the ability of states and cities to borrow is withering, and when state and local revenues are shrinking. The problems are so severe as to constitute a crisis for state and local government. In the pages that follow, the editors of Business Week document the extent of the crisis and examine its implications for economic growth and for the growing rivalry between regions, as well as its probable political and social impact.

THE DECAY THAT THREATENS ECONOMIC GROWTH

While high interest rates have led in recent weeks to doubts over the prospects for President Reagan's economic program, Americans at large still seem to be committed to its central premise—that a revolutionary curtailment of the government's role in the economy should release resources to the private sector and create a new era of noninflationary growth. Vast tax and spending cuts have been passed that are intended as enabling legislation for unleashing the private sector. But in its zeal to put the U.S. back on a fast-growth track, the Reagan Administration may unwittingly have created a barrier to the success of its program.

Falling revenues are now combining with an inability to borrow in a way that is making it extremely difficult for Washington's great partner in the federal system, state and local government, to fill its traditional role of producing the basic government infrastructure for growth—such elementary things as bridges, roads, sewage, water, and mass transit. So serious is the decay of the nation's infrastructure and so poor the prospects for its refurbishment that many sophisticated businessmen and economists believe the U.S. is entering a period of severe crisis for state and local government.

The nation's physical infrastructure is only part of the state and local authorities' problem. Compounding the crisis are cuts in federal funding in the no less important area of human capital—job training, vocational education, and health care. Letting such public services decline could have high costs not only in social and political terms but also in terms of the operating environment for business.

Acceptance of decay

To a nation that has already experienced the virtual bankruptcy of New York City in 1975, the forced reorganization of Cleveland's finances in 1978, and the recurring difficulties of many cities and states, including Michigan and Missouri, in meeting their payrolls, the idea that local governments are once again in dire straits may seem like nothing to get alarmed about. Indeed, as the passage of Proposition 13 in California and similar tax-spending-limitation moves in 18 other states has shown, the American public is sick and tired of paying high local taxes, even if tax relief means accepting a reduction in services and living with potholes in the streets, bridges that are on the verge of collapse, and an interstate highway system that is about 95% complete but already needs $26 billion in repairs.

But the current crisis is far more severe than in the past. For a series of forces is now at work that calls into question the ability of local governments throughout the nation—not only in the traditionally depressed Northeast and Midwest but even in the fast-growing Sunbelt—to provide the infrastructure needed for economic growth. These forces are:

Massive Cuts in Federal Aid to State and Local Government

After growing almost fourfold in the 1970s, federal grants-in-aid will be drastically reduced, falling from $88 billion in 1980 to $78.6 billion in 1983.

A Reduced State and Local Tax Base

With the cut in federal taxes—especially for business—some 30 states that tie their taxes to federal taxes will face declining revenues.

Record-Breaking Interest Rates

The rates that states and cities have had to pay for money have almost doubled since 1977. The average municipality now has to pay 85% of what the U.S. Treasury has to pay for long-term money; only two years ago it was 70%. So prohibitive have borrowing costs become that even such financially sound states as California have recently suspended new bond offerings.

A Reduction in the Attractivenss of State and Local Bonds

To spur private saving and investment, the Reagan Administration has lightened the tax load, particularly in the upper brackets, and has provided special tax-exempt investment vehicles as the All Savers certificates and has broadened the scope of Individual Retirement Accounts. This has reduced the attractiveness of tax-exempt municipals to the rich, who have been their traditional purchasers.

The effect of these four forces is to put municipal finance in an unprecedented vise at a time of growing need.

According to the Urban Institute, neglect in maintaining the country's existing infrastructure will push maintenance investment alone to over $660 billion in the next 15 years. This is as much as state and local government has spent on new investment in the past 20 years; it is equal to 20% of the entire U.S. gross national product in 1980.

If state and local government cannot find a way out of this bind, the effects will be devastating. It is perfectly true that the private sector has carried the responsibility for economic growth throughout the history of this nation. But at virtually every stage of the nation's history, growth was dependent on a balance between private and public investment.

The great canal boom of the early 19th century was financed mainly by private sources, but public subsidies provided a favorable investment climate. This was even more true of the railroad boom of the late 19th century. The growth of the nation's great manufacturing centers, with their dense concentrations of population, was dependent on public spending for streets, bridges, and mass transit. The great auto boom of the 20th century could never have occurred without huge public investment in roads and highways. Similarly, the great post-World War II airliner boom was dependent on complementary public investment. There is no reason to believe that this historical necessity for balanced investment has come to an end. So even if, initially, President Reagan's economic program does unleash a surge of private investment, it would be likely to abort if state and local government cannot find the wherewithal to build the public facilities needed for support.

In the past decade, the crisis of state and local government has occurred mainly in the Frostbelt. But it would be a serious mistake to infer that the states of the Sunbelt will therefore be immune to the infrastructure crisis of the 1980s. For just as New York City needs a $5 billion investment in mass transit to prevent a further erosion of jobs and population, Houston needs to invest heavily in new freeways or mass transit in order to prevent the traffic congestion that threatens to strangle its growth.

The crisis of the 1970s became highly visible because some cities and states were hanging by their financial fingernails and had to reduce expenditures sharply and restructure debt. Bankruptcies and near-bankruptcies may also occur during the 1980s. But these lurid financial episodes only serve to worsen the real growth problem. For in the past local politicians have responded to financial stress by postponing the maintenance of existing capital plant and deferring the building of new plants, much the same way an executive in the private sector acts when his company is in a financial bind. Says New York State Comptroller Edward V. Regan, "You can always delay public investment, but in the end it catches up with you."

A wave of anxiety

The Reagan Administration argues that, until now, a good part of the infrastructure crisis has been the result not of insufficient spending but of inefficient, wasteful spending. It maintains, for example, that subsidies to mass transit are not cost-effective and that the sewerage-treatment program, which cost $3.4 billion in 1980, is in need of overhaul. It believes that federal spending for roads should be confined to major highways essential for national defense. These arguments reflect the Administration's basic philosophy that more and more federal functions should be shifted to state and local government. And the Administration maintains that it has taken a large step in that direction by consolidating 57 separate federal programs into 9 new or modified categories of block grants.

Although many state and local officials may have welcomed the added flexibility in the way they can spend federal money, the Reagan-imposed austerity, particularly the proposed second round of budget cuts, is now stirring a wave of anxiety among local officeholders, including many key Republican governors and mayors. They fear that the states and cities have been set adirift, because there may simply not be enough money from any source. They say that Reagan's new federalism has assigned them a role that they plainly do not have the resources to fill. As a consequence, a desperate hunt is on for new ways for cities and states to raise revenues and to increase the borrowing power needed to attack the infrastructure crisis. But no one thinks funding solutions will be easy.

INFRASTRUCTURE: A NATIONWIDE NEED TO BUILD AND REPAIR

For years cities and states have neglected their basic life support systems. Voters demanded more policemen and teachers and a cap on transit fares. • • •

Recently, however, growing numbers of bursting water mains, flooding basements, creaking bridges, collapsing roads, and stalling buses have awakened the public and elected officials alike to the problem of the deteriorating infrastructure. Yet the Reagan Administration's $35 billion first-round budget cuts and proposed $13 billion second round, coming when the municipal capital markets are in chaos, could prevent this new awakening from being translated into effective action. If that occurs, the result would be supremely ironic. For the economic expansion Reagan is predicting requires a strong and healthy public infrastructure. Industry cannot expand without adequate water and sewage systems and well-maintained roads, bridges, and mass transit systems to get its employees to work and its goods to market.

Says Pat Choate, author of *America in Ruins* and currently an economist at TRW Inc.: "I don't want to sound like the Joe Granville of public works, but the fact is that much of America's infrastructure is on the verge of collapse." The problem is so

widespread, he says, that "three-quarters of America's communities can't participate in Reagan's economic growth program."

The decay is evident in all parts of the nation's stock of public capital:

Streets and Highways

More than 8,000 mi. of the interstate highway system's 42,500 mi. and 13 percent of its bridges are now beyond their designed service life and must be rebuilt. And just to maintain current service levels on the roads and highways outside urban areas that are not part of the interstate system will require more funds for rehabilitation and reconstruction during the 1980s—$700 billion—than all levels of government spent on all public works investments during the 1970s.

Bridges

It will cost $41.1 billion to replace or rehabilitate the more than 200,000 deficient bridges—two out of every five—in the nation.

Sewers

To meet existing water pollution control standards, federal and local governments will have to invest more than $31 billion in sewer systems and wastewater treatment plants over the next five years.

Water

The 756 urban areas with populations over 50,000 will have to spend up to $110 million over the next two decades just to maintain their water systems. Even more money will be required to develop more water sources for fast-growing areas in the Southwest and West.

Mass Transit

Spurred by the Administration's proposed elimination of operating subsidies and other pressures, up to one-quarter of the country's 300 metropolitan transit systems might have to cease operation by 1985. The New York City Transit Authority must raise $5 billion to rebuild its rusty, dilapidated rail and bus systems. Chicago's system raised its fare to 90 cents from 60 cents this year, and scheduling, maintenance, and financial problems still abound.

Deterioration of the infrastructure hurts growth because its costs must be borne by America's businesses. U.S. Steel Corp. is losing $1.2 million per year in employee time and wasted fuel rerouting trucks around the Thompson Run Bridge, in Duquesne, Pa., which is posted for weight restrictions because it is in such disrepair. Companies wanting to locate in certain parts of downtown Boston must bear the additional cost of a sewage holding tank to avoid overloading the sytem in peak hours. And companies in Manhattan lost $166 million a year for each additional five-minute delay on the subways and buses.

In real terms, Reagan's first-round budget cuts represent a 25 percent reduction in state and local aid, and a substantial part of that will come straight out of spending for roads, bridges, mass transit systems, and sewers. Morever, there is a danger that these first-round federal cuts will induce state and local governments to shift their own funds to services and out of infrastructure. And while Reagan's second round of cuts—12 percent across the board—is being resisted by Congress, there is little doubt that the final result will be to shrink even further the money available for upkeep of local public capital.

Not only older cities

The blow these cuts will deal to older cities will be especially severe, for that is where the problems are most advanced. Financially strapped New York City must spend $40 billion to repair and rebuild its 6,000 mi. of streets, 6,200 mi. of sewers, the 775 bridges it owns, and the 1.5 billion gal.-per-day water system. Cleveland needs $124 million to rehabilitate more than 40 of its 490 bridges. And Chicago is seeking $3.3 billion—half from the feds—over the next five years to rehabilitate everything—roads, bridges, sewers, and mass transit.

But even the cities in the Sunbelt, which have newer physical plants and rapidly expanding tax bases, face problems with their infrastructure. Fast-growing Dallas must raise some $700 million for water and sewage treatment facilities over the next decade and more than $109 million to repair deteriorating streets. And booming Denver has begun informally delaying its repair and maintenance schedules.

Obviously youth and growth do not guarantee sound and adequate infrastructures any more than age and stagnation necessarily condemn the physical plant to decay. Maintenance, management, and revenues explain why Cincinnati's infrastructure is stronger than Cleveland's and why the bridges run by the Port Authority of New York and New Jersey are better kept than those controlled by New York City. And sophisticated maintenance management is why Dallas' infrastructure, while not perfect, is in better shape than most.

The lack of maintenance has inflicted severe damage on the roads, bridges, and mass transit systems that form the life-line of the nation's business. Bad roads and bridges keep some 25% of America's communities out of the growth business, says Choate. Even the relatively new interstate highway system is spotted by dilapidation. The federal government, which did not provide funds for "the three Rs"—resurfacing, restoration, and rehabilitation—until 1976, blames the states for failing to keep the highways in good repair. The states complain of the federal government once again saddling them with the responsibility of maintaining whatever Washington builds. The Reagan approach is to take most of its overall cuts in funds for secondary and urban roads and to use them for the interstate program, which will require $53.8 billion through 1990 to complete and repair. This would leave the states and localities to bear the entire cost of local roads. The federal govenment now pays 75% of that.

This proposal retreat from aid for local roads means that the potholes that already dominate many local roads will only proliferate. In New York City, where street repair slowed to a near standstill in the late 1970s, streets, which engineers say have about a 25-year life, are being replaced at a 700-year rate; the replacement rate is 49 years in Cleveland, 50 years in Baltimore, and 100 years in Oakland.

The deterioration of the mass transit systems that move people to and from work has been even more profound. Nowhere is this more evident than in New York City. The Metropolitan Transportation Authority of the State of New York "literally stopped preventive maintenance in 1975," when the city's fiscal crisis hit, says City Council President and MTA board member Carol Bellamy. The results were stark: The number of serious breakdowns en route rose to 12,291 in 1977 and tripled to an estimated 36,000 this year; and the number of miles traveled by the average subway car before having to be laid up for major repairs dropped from 13,627 in 1977 to 6,500 in 1981.

The MTA's plans to borrow some $5 billion to rebuild its system have been set back by high interest rates and will suffer further from Reagan's proposed cuts, which could reduce captial aid by $30 million and operating assistance by $165 million over three years, forcing higher taxes or a 15¢ fare increase, to 90¢, says Steve Polan, special counsel at the MTA. And if the rebuilding is delayed, transit failures will choke the economic vitality of the region even further.

In Massachusetts, federal operating subsidies will decline $13 million in fiscal 1982 and $28 million more over the next two years. "The first third that goes we can cope with," says James F. Carlin, Massachusetts' Transportation Secretary. "But when the cuts go up to $20 million, we could have some problems. One of their problems will be caused by Conrail's consolidation, which will leave the communities in the southeast of the state without service. "The state is going to have to come in and acquire the railways and then get some carrier to come in and run those lines," explains Carlin.

Since fast-growing cities in the Sunbelt have avoided reliance on federal help for their still small transit systems, the cuts will not hurt them as much. The Metro bus system in Houston does not use federal money for operating expenses, so it will not be affected immediately by any budget cuts. Most of the federal money for two bus maintenance facilities has already been committed. And work on contraflow lanes and raised tracks for buses will continue with local money. Nevertheless, Houston's plans to develop a rail line to link southwest Houston with downtown will be slowed, even though the city will continue to fund engineering studies with some $10 million in local taxes.

The vital connections

Similarly, Dallas, which has been slow in reacting to the need for a sophisticated system, is now faced with bearing the full burden of financing its future mass transit needs unless the state helps. Although the voters just last year rejected the establishment of a regional transportation authority, mass transit like sewers, is vital for growth. If growth continues at its present rate, without the development of a mass transit system, cities like Dallas and Houston could eventually be paralyzed.

Inadequate and dilapidated sewer lines and wastewater treatment plants are also stalling economic activity both in stagnating cities that have to bring their systems up to congressionally mandated standards and in growing areas that need additional capacity. Wastewater treatment plants in 47% of the communities surveyed by the Commerce Dept. in 1978 were operating at 80% or more of capacity, while the generally accepted effective full capacity utilization rate is 70%. That means that new plants and homes could not be hooked up to those systems. The Florida Environmental Protection Dept., for example, recently prohibited Orlando, one of the fastest-growing areas in the U.S., from adding more homes to its overloaded sewer system. The moratorium was lifted only when Orlando signed court decrees promising to build more sewage treatment plants.

If the Administration's plans for distributing treatment plant funds go through—it wants to limit funds to the cities' needs as of 1980—Orlando and other growing cities and suburbs will have to build capacity for new population without federal money. Capital spending for wastewater treatment

facilities by all levels of government has tripled since the Clean Water Act was passed in 1972, making it the largest single public works program now underway. The Administration wants to cut the estimated remaining federal costs for treatment plants to $24 billion from $90 billion. And Reagan would slice annual federal expenditures from $3.5 billion to $2.4 billion.

Water and the West

If Reagan's changes become law, there will be less money to spend overall, but changes in the allocation formula will benefit some cities and cost others. It could end up penalizing growing areas and helping older cities. Baltimore, for example, needs to spend nearly $1.5 billion, or $1,880 per capita, to get its sewers and waste treatment system in shape, according to estimates by the U.S. Environmental Protection Agency. With current levels of federal aid, it has been spending around $35 per capita per year, according to the Washington-based Urban Institute, which has made a major study of infrastructure needs. Reagan's proposals are expected to give Baltimore more money. But in the Chicago area, where the sewer systems overflow raw sewage into homes and lakes and rivers alike with a disturbing regularity, the Metropolitan Sanitary District is less likely to get the funds it wants to build a $3.4 billion, 131-mi. "deep tunnel" to upgrade its system. It has already sunk $1.2 billion into pollution control and will probably have its flood control moneys slashed by Washington.

Reagan's approach could also reduce grants going south of the Mason-Dixon Line and west of the Mississippi. Right now there is little concern among local officials, partly because the spending requirements to meet standards on these newer systems are low: $3 per capital for Tulsa, Tucson, San Jose, and Dallas.

But over the long run the cuts could create problems. Houston is receiving 75% federal matching funds for a large sewage plant, which the city needs to meet federal clean water standards. Once that is spent, City Controller Kathryn J. Whitmire does not expect any more federal funds. "If we don't have federal assistance, we'll finance as much as is feasible through revenue bonds based on user fees," she says. "But for large additional projects, we'll have to turn to the developers; we've already seen developers ready to participate." But some experts point out that this will raise the cost of new construction, and that could slow growth.

Huge investments also will be required in water systems over the next two decades to maintain economic vitality. "The history of much of the West is the history of its water projects," says Choate. "And water will determine its future." The water systems in much of the West have not been well maintained, and they will require additional spending in the 1980s. Since the federal government does not support local water systems, Reagan's cuts will have no direct impact. But where water is controlled by cities instead of independent authorities, the cuts in other areas could force politicians to divert funds that would normally go to maintain the water system, and that could increase problems in the future.

In the East, too, money will have to be spent on water, but there the problem is storage, treatment, and distribution. "One half of the water lines are so decrepit that they need to be replaced," says Choate. New York City, for example, loses 100 million gal. of water per day because of leaks.

The squeeze on state and local governments is not coming only from Reagan's austerity push. Even while federal capital aid is being slashed, court-mandated improvements in jail conditions are requiring many cities and states to upgrade their prisons. "If the federal government doesn't give the local governments and states the money for jail and prison construction," says Susan Walters, an infrastructure expert at the Council of State Planning Agencies, "the trend of mandating jail replacement by the judiciary means that streets, water systems, and schools will go.

Cities and states are scrambling to find ways to buffer their infrastructures from these revenue shortfalls. One approach being considered by cities that still control their sewers and water supplies and other facilities is to turn these over to independent operating authorities that have pricing and bonding power. Experts have noted that, since they have their own revenue sources, the authorities' maintenance programs have been insulated from the fiscal squeeze that has led many municipalities to skimp on maintenance. They "generally maintain their capital plants better and have healthier financing," says Urban Institute economist George E. Peterson. "There's not a pothole in the George Washington Bridge," says Peter C. Goldmark, Jr., executive director of the Port Authority of New York & New Jersey, the largest multipurpose operating authority in the U.S. "We resurfaced it two years ago." The City of New York, by contrast, has so neglected maintenance on the Manhattan Bridge that it must sharply limit traffic there for several years while it rebuilds.

A long recovery

Yet independent authorities have their drawbacks: Every time one is set up, it limits the flexibility of the government to shift funds to meet its most pressing priorities. There is no way city officials can subsidize street repair out of water fees, for example, if the water system is operated by an independent authority. Says Peterson, head of UI's infrastructure study: "If you generalize that model so every service has its own financing and operating authority, it eliminates all trade-offs between services. How far can you go?"

The crisis in America's infrastructure has been building for decades, and its resolution will take decades. "This is not a crisis for the short-winded," says former New York City Budget Director David A. Grossman. "Most rebuilding will take a decade or decade and a half," adds TRW's Choate. Yet even with such a long horizon, there is no doubt that the cuts Reagan has made and the cuts he has proposed portend a major setback to the rebuilding of America's infrastructure.

[From the New York Times, Sept. 11, 1981]

PUBLIC FACILITIES HELD FACING CRISIS

(By B. Drummond Ayres, Jr.)

WASHINGTON, Sept. 10.—A national crisis is developing because the nation's transportation, sewage, water and other public works facilities are wearing out faster than they are being repaired or replaced, urban affairs and economic development specialists warned Congress today.

They placed much of the blame on the Federal Government and Congress, asserting that capital aid programs and monetary policy had often been misdirected.

"It is national policy that is the principal deterrent to action," Alan Beals, executive director of the National League of Cities, told the House Subcommittee on Economic Stabilization. The subcommittee is holding hearings on revitalizing the national economy, which Mr. Beals said "simply cannot succeed" without massive aid to rebuild the nation's public works systems.

Mr. Beals said the tight monetary policy of the Federal Reserve Board had made a "shambles" of the municipal credit market. He added that recent changes in Federal tax laws would make matters worse because many investors would be encouraged to put their money into the tax-free savings certificates to be offered beginning Oct. 1 instead of investing in municipal bonds.

CURRENT AID PLANS ASSAILED

As for current Federal aid programs, Mr. Beals said that too many supported new construction of public facilities rather than maintenance and repair of existing facilities.

Asked to assess the overall status of the nation's streets, highways, bridges and water and sewer systems, Mr. Beals replied, "In some communities, it may be characterized as a crisis."

The subcommittee chairman, Representative James J. Blanchard, Democrat of Michigan, agreed with Mr. Beals, saying, "Unchecked, the situation threatens the health, safety and quality of our citizens' lives."

Details about the extent of the deterioration of public facilities were provided to the committee by Pat Choate, author of "America in Ruins," a recent study of the state of the nation's public facilities. He said that tight budgets, inflation and bad public policy had caused a 28 percent drop in public works investment over the last 15 years, adding:

"Today, one of every five bridges requires major rehabilitation or total reconstruction. The nation's Interstate Highway System has deteriorated to the point that almost one of every four miles requires replacement. Conrail faces the prospect of abandoning half of its lines. One-quarter of the nation's 3,500 prisons are so antiquated, crowded and inadequate that riots are a constant hazard, or, as in Florida, judges are forcing the early release of some criminals to allow the jailing of new inmates."

WATER LOSSES IN NEW YORK

New York loses about 100 million gallons daily because of leaks in aging water lines, Mr. Choate continued. He said that in Albuquerque, New Mexico, a third of the city's sewer lines have decayed to the point that they are often crushed when trucks pass over them and added that half of the water mains in Washington needed to be replaced. In all, Mr. Choate said, the deterioration of vital public facilities "afflicts" three of every four American communities.

Mr. Choate estimated that half the nation's cities could not allow substantial industrial expansion because of inadequate water and sewage systems. Another quarter of the nation's communities, he said, could not improve their economies because their roads, streets and certain other public facilities were worn out, obsolete or already operating at full capacity.

"We have a major problem," he concluded, calling upon Congress and the Federal Government to establish a national public works budget to bring "coherence" to the rehabilitation task ahead.

Another witness at today's hearings, Eugene P. Foley, former Assistant Secretary of Commerce for economic development in

the Kennedy and Johnson Administrations, agreed that the Federal Government needed to give more direction to its public works expenditures and plans. Referring to the tendency of Congress to appropriate funds for new construction, he said, "It's ridiculous budgeting to put all this money into new facilities when we could rebuild and repair for so much less."

PROBLEMS IN BOND MARKETS

Melvin Mister, deputy director of the United States Conference of Mayors, told the subcommittee that the municipal bond market had become so hectic and confused that even the booming Sun Belt cities were finding it difficult to raise funds. "You can have a good bond rating but still not be able to carry out the needed functions," he said.

Attempting to sum up the situation his committee was studying, Representative Blanchard told of a recent visit he made to Detroit to make a speech on urban revitalization. While being driven to the speech site, he said, he attempted to drink a cup of coffee while studying an outline of his remarks.

"But there were so many potholes in the streets of Motor City," he continued, "that I couldn't get it down."

Mr. HART. Mr. President, America—it is reported—is crumbling all around us. Streets are cracking, dams are breaking, bridges are collapsing, sewers are overflowing, and water mains are leaking.

America's "infrastructure"—the stock of public facilities that underpin our national economy—has so deteriorated as to impede efforts to restore our economic health. And it continues to deteriorate faster than we can repair or replace it. It makes little sense for us to worry about the decline in investment in private capital, such as industrial plant and equipment, while we disregard chronic underinvestment in the vital public facilities—roads, bridges, ports, and dams—that support our Nation's commerce.

Because I consider rebuilding our national infrastructure essential for revitalizing our economy—and particularly our distressed communities—I join the distinguished Senator from New York (Mr. MOYNIHAN), in introducing the Rebuilding of America Act of 1982.

This bill would take a crucial first step toward establishing a comprehensive Federal policy for rebuilding the infrastructure in all regions of the country. It would establish a National Commission on Rebuilding America to: First, inventory the existing major public facilities by region, State, and major metropolitan area; and Second, develop within 2 years a National Facilities Investment Plan (NFIP) to develop priorities for the needed repairs, improvements or expansions of specific public facilities over the next 10 years. The NFIP would become the infrastructure policy of the Federal Government, unless disapproved by joint resolution of the Congress.

This bill assumes, as its major premise, that simply throwing money into any public works project that comes along will not necessarily improve the Nation's infrastructure. We cannot continue the failed "pork barrel" politics of the past. Rather, we must spend our limited resources on those projects that will provide the greatest benefit to the public.

Just as the strength of our military depends not on how much we spend but rather on how effectively we spend, so the strength of our infrastructure depends on how closely our spending follows an effective infrastructure strategy like the one the NFIP would include.

Mr. President, the Senator from New York has done an excellent job in explaining the details and logic of the bill. I will not repeat that effort. I would like to discuss, however, the three issues this bill addresses that I consider particularly important. First, the bill directs the National Commission on Rebuilding America, as part of the NFIP, to make recommendations on establishing a Federal capital budget. Virtually all major corporations, all State governments, and most local government use capital budgets as a basic policy and administrative tool. It is amazing that the Federal Government does not also have a capital budget to guide national policy for investing in public works. For that reason, I offered an amendment to the balanced-budget constitutional amendment resolution (S.J. Res. 58) that would have directed the President to prepare and submit to the Congress a capital budget as part of the annual budget process.

The administration opposes a capital budget because it would present "formidable accounting problems" and raise questions about whether to classify certain expenditures as capital or noncapital. These arguments are not persuasive. The Federal Government already includes 11 special analyses in its annual budget to highlight specified program areas and enable it to coordinate policy. Moreover, accounting always presents difficult choices in classification, yet accountants make those choices knowing that even some classification will improve the budget process. Some capital budgeting is certainly better than none at all.

A Federal capital budget would reverse years of uncoordinated investment and management practices by Federal public works agencies that now make policy decisions "flying blind." It would permit the administration and the Congress to conduct a comprehensive review of the Federal Government's capital expenditures and to consider public works activities in light of other national needs.

Second, this bill requires the National Commission to consider life cycle costs in evaluating public facilities and setting investment priorities. Too often, government agencies consider only the front-end construction costs in deciding whether to fund a project. As a result, to make a facility more politically acceptable, an agency may try to reduce front-end costs by "cutting corners" in construction and design that actually increase the costs of operation and maintenance. Life-cycle costing would minimize this problem by taking into account all the estimated costs of a facility—construction, operation, and maintenance—throughout its life.

Finally, the bill requires the National Commission to address the serious problem of waste and fraud in public works programs. Fraud costs the taxpayer inestimable amounts of money through increased project costs and deficient construction. Many States and communities have virtually institutionalized the process of awarding government contracts on the basis of political contributions. In 1980, the Justice Department obtained indictments against 34 companies and 41 persons in four States for conspiring to raise prices and allocate highway construction contracts. The establishment of an independent inspector general corps as part of a comprehensive Federal infrastructure policy would go a long way toward stopping fraud in projects receiving Federal funds. In addition, government agencies should set standards for construction of various types of public facilities and notify the public of all contracts they propose to let.

Waste also drains the funds available for rebuilding the national infrastructure. Waste occurs, in part, because so many government agencies have responsibility for funding public facilities. For example, 100 separate Federal agencies, 50 State governments, the District of Columbia, Puerto Rico, the protectorates, 3,042 counties, 35,000 general-purpose local governments, 15,000 school districts, almost 26,000 special districts, 2,000 areawide units of government, over 200 interstate compacts, and nine multistate regional development organizations have responsibility for public works. This fragmentation of the Nation's public works activities prevents the most efficient use of funds and leads to costly delay in project approvals; duplication of some facilities and services and omission of others; fragmented regulatory activities and conflicting program procedures; and uncertainty over which agencies have responsibilities for financing, constructing, rehabilitating, maintaining, and operating a facility.

Mr. President, the Rebuilding of America Act would establish for the first time a coherent national strategy for attacking the problem of a deteriorating national infrastructure. But, we should not underestimate the enormity of the challenge before us. Experts predict we will have to spend between

$2.5 and $3 trillion simply to maintain our infrastructure in its current condition. The additional improvements necessary for sustaining a growing economy will cost billions more. Yet, we cannot afford to wait:

One of every five bridges in the United States requires major rehabilitation or reconstruction.

The Interstate Highway System requires reconstruction at a rate of 2,000 miles each year.

A Commerce Department survey of 6,870 communities found that 3,000—or 46 percent—had wastewater treatment facilities operating at over 80 percent of capacity and thus could not accommodate any further industrial expansion.

The Nation's 756 urban areas with populations over 50,000 will need between $75 and $110 billion to maintain their water systems over the next 20 years.

A large number of the Nation's 43,500 dams require additional investment to reduce hazardous deficiencies.

The Corps of Engineers has inspected 9,000 of these dams and found many needing safety improvements.

We need a major program of expanding our ports if we hope to increase significantly our exports of coal and other products.

Mr. President, the rapid deterioration of the national infrastructure is a timebomb waiting to explode. If we do not act now to reverse this trend, we may soon find our public facilities can no longer support a modern industrial economy. I urge the Senate to consider and pass this bill as one weapon in the fight to revitalize our economy.

Mr. President, I ask unanimous that an article from the AFL-CIO American Federationist follow my statement in the RECORD.

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

[From the AFL-CIO American Federationist, August 1981]

PUBLIC FACILITIES: KEY TO ECONOMIC REVIVAL

(By Pat Choate and Susan Walter)

For nearly a decade, the critical public facilities that underpin many community services have been wearing out faster than they have been replaced. Today, one in every five bridges requires major rehabilitation or total reconstruction. The nation's interstate highway system has deteriorated to the point where almost one of every four miles requires replacement. In Albuquerque, New Mexico, a third of all sewer lines are so deteriorated that trucks traveling over them frequently cause the collapse of lines and covering streets. Half the water mains in the District of Columbia require replacement. In New York City, approximately 100 million gallons of water are lost daily through leaks in old water lines.

These are not isolated or extreme examples. America's public works are wearing out in every part of the country—North, South, East, West, suburb and core urban areas. Unless these trends are markedly reversed, and soon, the nation will end this decade with substantially fewer public facilities in usable condition—fire stations, prisons, parks, libraries, reservoirs, aqueducts, bridges, paved streets, street lights, highways and community buildings—than exist today.

More ominously, the deteriorated condition of essential public facilities that undergird the economy threatens the Administration's program for national economic renewal. Half the nation's communities cannot permit major expansions of existing firms or new plant locations because community wastewater and water treatment facilities are operating at or near full capacity. Another quarter of the nation's communities are unable to improve their economies because other public facilities such as roads, streets and industrial waste disposal sites are either worn out, obsolete or operating at full capacity. Overall, three-quarters of America's communities will be unable to participate in whatever economic renewal program the Reagan Administration gets through Congress until major improvements are made in their public facilities. Revitalization of these facilities is the keystone to renewal.

The primary source of America's public works decline is long-term massive underinvestment. Under the exigencies of tight budgets and inflation, maintenance of vital public facilities has been deferred. Replacement and rehabilitation of obsolescent public works have been postponed. New construction has been cancelled or "stretched out."

Despite unmistakable evidence of deterioration, the nation's public works investments, measured in non-inflated purchasing power, fell from $33.7 billion in 1965 to less than $25 billion in 1979—a 28 percent decline. On a per capita basis, public works investments in constant dollars dropped from $174 per person in 1965 to $111 in 1979—a 36 percent decline. Measured against the value of the nation's Gross National Product, public works investments declined from 3.6 percent of GNP in 1965 to 1.7 percent in 1979—a 53 percent decline.

Yet unbelievable as it may seem, the federal government does not have or use a capital budget for its public works expenditures. National public works decision making has been dominated by the Congress, whose attention to public works is fragmented among numerous committees. The disorder in federal policies and administrative procedures, in turn, creates major obstacles to effective state and local public works policymaking and management.

Well-conceived public works are not pork-barrel projects. Investment in public facilities is as essential for national and local economic renewal as investment in our industrial plant. Indeed, public works, along with education and research and development expenditures, are the only "supply-side" investments that government makes.

In addition to facilitating private sector investment, public works expenditures can be used to assist in (1) achieving a desired level of employment, output, income and prices; (2) stabilizing state and local budgets; and (3) eliminating problems of economic obsolescence for specific geographic areas, economic sectors and population groups. To date, however, little attention has been given these uses of public works expenditures.

FIRMS AND EMPLOYMENT IN CONSTRUCTION, 1977

[In thousands]

Industry	Establishments	Employees	
		Total	Construction workers
Contract construction	473	4,210	3,550
General building contractors	154	1,160	960
Heavy construction contractors	30	890	740
Special trade contractors	289	2,160	1,850
Plumbing, heating, air-conditioning	57	460	370
Painting, paperhanging, decorating	27	130	120
Electrical	37	370	310
Masonry and stonework	25	150	140
Plastering, drywall, insulation	17	190	160
Carpentering	24	120	110
Roofing and sheet metal	21	170	150
Concrete work	18	140	130
Excavating, foundation work	16	100	90
Other	47	290	250
Subdividers and developers	5	40	20
Total	478	4,250	3,570

Note: Data have been rounded.

Source: Bureau of the Census. Statistical Abstract of the United States: 1979, U.S. Department of Commerce, Washington, D.C., 1979.

Public works and jobs. The construction industry is a major sector in the U.S. economy. In 1977, nearly 478,000 firms employing more than 4.2 million, were directly engaged in construction activity. Some 3.5 million of these persons, earning more than $43 billion, were construction workers (see Table 1).

Public works investments account for a substantial share of construction activity. Of the $228 billion in new construction put in place in 1980, over $56 billion was for public works—almost 24 percent of the total investment. Furthermore, the public sector investd an additional $30 billion in the purchase of right-of-ways, existing buildings and equipment.

Nor is the impact of the construction industry and its public works component limited to the several millions directly employed in construction activities. It is closely linked with a wide range of industry and service institutions which are subject to expansions and contractions in construction industry activity. The Rand Corporation and the U.S. Department of Labor traced these industrial linkages for 22 types of public works projects and drew the following conclusions:

The most significant short-term impacts of public works projects are found not in on-site construction but in equipment, materials and other industries. For every on-site construction job created by public works projects, three additional jobs are created in the overall economy.

There are substantial variations in the number of on-site construction jobs generated by different types of public works projects. Public school construction requires almost 25 percent less on-site labor than does college housing construction. Highway construction uses less than half the on-site labor required for dam, levee and local flood control projects.

Substantial variations exist in the quantities and types of materials and equipment used in different types of public works projects.

Such variations are important because we can take advantage of them to tailor public works investments to meet a number of objectives, including stabilizing the economy, alleviating structural unemployment and helping distressed areas to adapt to new economic development possibilities.

Public works and communities. A large and growing number of communities are now hamstrung in their economic revitalization efforts because their basic public facilities—streets, roads, water systems and sewerage treatment plants—are too limited, obsolete or worn out to sustain a modernized industrial economy. A Department of Commerce survey of the wastewater treatment capacities of 6,870 communities found that over 3,000—46 percent—of these systems were operating at 80 percent or more of capicity. A system operating at this level of capacity generally cannot accommodate additional industrial load. The same survey indicated that water treatment and distribution systems were operating at effective full capacity in a third of these communities.

When the condition of other public facilities essential to private sector investment are also considered, it becomes clear that most of the nation's communities are unable to support modernized development until major new investments are made in the basic public facilities that undergird their economies.

A number of studies have attempted to measure the influence of public works on the location and investment decisions of individual firms. The most comprehensive was a Census Bureau survey conducted in the mid-1970s for the Economic Development Administration. Over 2,000 firms operating in 254 distinct product classes were examined. For virtually all 254 categories studied, the survey found that the availability of public works facilities was either of critical or significant importance to location decisions. Moreover, public facilities were almost always a more important locational consideration than were local tax incentives or industrial revenue bond financing.

VALUE OF NEW CONSTRUCTION TRENDS AND PROJECTIONS, 1978–81

[In millions of current dollars]

Type of construction	1978	1979	1980	1981	Percent change 1980–81
Total new construction	205,460	228,950	228,300	270,330	18
Private construction	159,560	179,950	171,600	206,700	20
Public construction	45,900	49,000	56,700	63,600	12
Buildings	15,240	15,860	18,100	20,100	11
Housing and redevelopment	1,050	1,210	1,600	2,000	28
Industrial	1,180	1,410	1,800	2,300	30
Education	6,260	6,900	7,700	8,500	10
Hospital	1,820	1,650	1,600	1,600	0
Other public	4,920	4,680	5,400	5,700	5
Highways and streets	10,710	11,920	15,500	17,800	15
Military facilities	1,510	1,640	1,700	2,000	20
Conservation and development	4,460	4,590	5,000	5,500	10
Other public construction	13,990	15,000	16,400	18,200	11
Sewer systems	6,770	7,300	7,700	8,500	10
Water supply facilities	2,660	2,490	3,500	4,200	20
Miscellaneous	4,560	5,220	5,200	5,500	5

Source: U.S. Department of Commerce. 1961 U.S. Industrial Outlook, Washington, D.C. 1961.

Note: Figures for 1976 and 1978 have been rounded. Figures for 1980 and 1981 are estimates by the Bureau of Industrial Economics.

It has long been assumed that public works investments could be modulated to help stabilize the ups and downs of the economy. In practice, however, the United States has given little attention to such uses of public works expenditures.

The current recession is the sixth such decline in the economy since the end of World War II. As with previous recessions, the 1980–81 economic decline has created substantial unemployment and underutilization of production capacities in the construction, materials and equipment industries. In 1980, the unemployment rate in the construction industry averaged 17 percent nationwide and as high as 40 percent in some regions. The steel industry, closely linked to construction, operated at about 50 percent of capacity throughout 1980, idling some 80,000 steelworkers.

Economic policy might reduce the harsh impacts of a severe recession by using the nation's $80 billion of annual public works investments as a countercyclical tool to provide employment in the construction, materials and equipment industries. But precisely the opposite has occurred. Public works investments in the United States have long been made in a perverse pattern, increasing during expansions in the economic cycle and decreasing during contractions. Such "procyclical" management of public works investments creates adverse consequences:

Increasing public works investments during periods of economic expansion makes the costs of materials, equipment and labor artificially high and contributes to inflation: and

Decreasing public works investments during economic downturns exacerbates underutilization of labor and industrial facilities in the construction, materials and equipment industries, and worsens the recession.

WASTEWATER TREATMENT CAPACITIES

State	Communities surveyed	Using 80 plus percent of capacity
Alabama	156	40
Alaska	11	55
Arizona	62	47
Arkansas	112	51
California	369	62
Colorado	95	47
Connecticut	90	38
Delaware	11	27
Florida	231	37
Georgia	215	39
Hawaii	29	21
Idaho	41	44
Illinois	363	52
Indiana	133	54
Iowa	124	48
Kansas	144	46
Kentucky	114	48
Louisiana	155	43
Maine	57	51
Maryland	76	29
Massachusetts	92	33
Michigan	203	(1)
Minnesota	117	36
Mississippi	96	26
Missouri	186	38
Montana	39	48
Nebraska	59	47
Nevada	22	36
New Hampshire	33	52
New Jersey	242	52
New Mexico	45	33
New York	363	52
North Carolina	163	45
North Dakota	23	48
Ohio	400	53
Oklahoma	166	39
Oregon	96	21
Pennsylvania	461	43
Rhode Island	14	29
South Carolina	202	52
South Dakota	27	59
Tennessee	136	41
Texas	486	59
Utah	48	63
Vermont	45	56
Virginia	137	47
Washington	102	35
West Virginia	77	51
Wisconsin	176	57
Wyoming	26	31
Total	6,870	46

[1] Not available.

Source: Report on Municipal and Industrial Wastewater Treatment Systems: A Statistical Compendium, Norman, Okla., 1978.

Since 1960, Congress has enacted three countercyclical public works programs—the $1.9 billion Accelerated Public Works Program (APW) in 1961–62: the $130 million Public Works Impact Program (PWIP) in 1972–83; and the $6 billion Local Public Works Impact Program (LPW) in 1976–77. Studies of the latter two programs concluded that they fell far short of meeting stated objectives, that is, stimulating employment for the structurally unemployed in distressed areas during an economic downturn. Evidence suggests that these shortcomings lay in the timing and administration of these expenditures and in the narrowness of program goals.

The temporary countercyclical LPW program of 1976–77 did nothing to relieve the 1974–77 recession until late in 1976. Over 80 percent of the employment generated directly by LPW projects did not occur until the recovery phase of the cycle had begun. This time lag reflects less on the efficiency of public works as a countercyclical device than on the sclerosis of the executive and legislative process. Lags occurred because of delays in securing passage of legislation. Presidential approval, appropriation of funds, selection of projects and construction. For two years after the onset of the 1974 recession, until the summer of 1976, the use of countercyclical public works for economic stabilization continued to be rejected in favor of traditional fiscal and monetary measures.

Occasional recessions are inevitable. And federal public works expenditures can exert major economic stabilizing influences. Thus, it is both timely and prudent to devise policies and administrative techniques for managing public works investments in anticipation of the economic cycle.

Using public works funds as a countercyclical tool has many potential advantages. The first, perhaps most important, is to reduce the adverse consequences of the current pro-cyclical pattern of these investments. In many ways, these pro-cyclical investment patterns are akin to loose cargo in a ship in turbulent waters. As the ship sways from side to side, the cargo shifts and accentuates the sways. A permanent countercyclical public works policy would directly address this issue, something temporary programs cannot, by their very nature, accomplish.

If delays are eliminated, a large portion of the benefits of countercyclical public works projects can be generated during contractions in the economic cycle. Also, recovery can be accelerated at the beginning of the economic expansion. After all, there is little merit in having massive unemployment and unused production capacity during a slow recovery period.

A number of reforms are worth discussion, including (1) standby authorities for public works construction; (2) identification of a backlog of projects which would serve both countercyclical purposes and long-term national and local development; and (3) creation of purchasing techniques that would permit stockpiling of materials and equipment for use in future projects.

By careful planning, government can target benefits to help both people and specific industries. Currently, for example, the steel, aluminum, fabricated metals, concrete, equipment and related industries are all operating well below full capacity. To counter this economic sluggishness, the current $100 billion backlog of appropriated, but unspent, public works funds could be used to purchase needed materials and equipment in advance of actual construction.

This would produce many benefits. For example, purchasing steel when the industry is operating at only half its capacity would avoid ensuing price rises: permit the industry to operate closer to normal levels of production: improve conditions of certainty in that sector: create jobs for laid-off workers, many of whom reside in distressed areas; and eliminate almost $10 million per week in unemployment payments. A range of industries could be similarly assisted.

Targeting specific sectors can be an effective means for addressing major regional variations in the economic cycle. Pre-purchasing would also stimulate basic industries operating at low capacity in distressed areas.

At this time, it is difficult to even estimate the range of potential investments that will be required for public facilities. This reflects

(a) the absence of national capital budgeting;

(b) the absence of common standards for public works facilities and the services they provide;

(c) inadequate information on the inventory and condition of existing facilities and costs of repair; and

(d) lack of potential consensus on what types of projects should be given priority.

Even though the magnitude of the problem cannot now be specified public works investment requirements for the 1908s clearly will be enormous. For example, the costs of rehabilitation and new construction necessary to maintain existing levels of service on non-urban highways will exceed $700 billion during the 1980s. Even excluding the estimated $75 billion required to complete the final 1,500 miles of the interstate system, the balance required for rehabilitation and construction is still greater than all public works investments made by all units of government during the 1970s.

Clearly not all needed projects can be funded. Because so many other compelling public and private uses of capital exist, difficult strategic choices must be made. The first is to determine how much of the Gross National Product is to be allocated to consumption and how much encouraged into savings for new capital investment. The second is to determine how much of that capital investment will be used by the public sector and how much by the private sector. The third set of choices involves the allocation of what will inevitable be limited public works funds among places and classes of projects.

Financing the nation's public works in the foreseeable future will require better use of existing financing techniques as well as the creation of new financing approaches. The most basic financing challenge is how to cope with federal fiscal retrenchment at a time when almost half of all public works funds come from federal programs. Rapid withdrawal of federal support would devastate the capital programs of most communities. Such a withdrawal must be preceded by a careful reassessment of the allocation of authorities and responsibilities within our federal system.

Applying user charges. In addition to redefining their federalist roles, state and local governments will increasingly be forced to apply user charges to public works related services. By reducing pressures on general revenue sources, fee-for-service charges will improve a community's access to capital markets if a dedicated, guaranteed flow of revenues can be shown. User charges also have the virtue of more directly relating prices to consumption and real costs. Although user charges have been rejected in some places because of their adverse impact on low-income citizens, special income adjustments for the poor could make such financing equitable.

The General Accounting Office, in a series of analyses on federal aid for urban water distribution systems, found that management and financing were better where fee-for-service financing existed. In these communities, actions had been taken to improve conservation, reduce leakage and control other nonrevenue-producing water uses, such as meter underregistration. Applicable user charges can be tailored and applied to virtually every type of public facility.

Shifting from public to private. Still another financing alternative is private operation of some facilities that in recent decades have been the responsibility of the public sector. Competition in garbage collection, fire protection, street cleaning and parcel delivery are examples. Although this approach is not an option in all circumstances, it can be applied to the construction and operation of many kinds of public facilities.

Reducing costs of delay and fraud. Another important way to increase purchasing power for public facilities is to reduce the enormous costs of delay, waste projects. The nation can get much more from its public works dollars than it has been getting.

The time required to build major projects, for example, is continually being expanded by government regulations and administrative procedures. Many of these delays are unnecessary and are reducing real capital investment as funds are diverted to the nonproductive task of financing increased interest charges generated when projects take longer to put into operation. Additional funds are also required to keep pace with inflation-devalued public works purchasing power as delays put off construction. About 20 percent of the nation's annual public works appropriations are now used to finance delay—a major waste of shrinking public capital.

The magnitude of funds lost through fraudulent practices or poor construction is impossbile to estimate. The number of indictments and convictions for public works related fraud suggests that it is widespread. Actions to reduce fraud, such as requiring public announcements on bidding, warranties on construction and more rigorous oversight, are possible and needed to increase usable funds for public works projects.

The federal, state and local governments have long used budgets as a device for bringing policy and administrative coherence to their operations. Virtually all major corporations, all state governments and most local governments use capital budgets as basic policy and administrative tools. Some states such as Pennsylvania and some cities such as Cincinnati, Ohio now include lifecycle costing in their capital budgets.

A major flaw in federal public works policymaking and program administration is the absence of national public works investment policies and a supporting capital budget. This omission is no accident and in fact is the consequence of explicit decisions not to have a capital budget.

The annual federal budget submitted to Congress contains three fundamental components: (1) the basic budget in overview; (2) a detailed budget appendix; and (3) the special analyses. The special analyses of the Office of Management and Budget are designed to highlight specified program areas or provide other significant presentations of budget data. These analyses help bring together policy and administrative overviews of areas of major federal concern.

The special budget analysis of federal credit programs, for example, demonstrates how useful a comprehensive annual accounting of fragmented federal activities can be. An assessment of the federal government's numerous credit activities was not possible until the special analysis was created. Now that the magnitude of these credit activities is clear, OMB is better able to manage them.

The creation of a national capital budget analysis would permit a similar overview of the federal government's capital expenditures and commitments. It would also permit consideration of public works activities in light of other national needs, as well as explicit consideration of construction, rehabilitation, maintenance and operation requisites.

The OMB's technical success in creating other complex special budget analyses demonstrates that it can surmount the accounting and classification problems that might arise in creating a national public works capital analysis and a national public capital budget.

A national capital budget would consist of three essential components: (1) current and projected capital needs and expenditures; (2) current and projected operation and maintenance needs and expenditures; and (3) sources of financing. Such a budget would bring new coherence to public works policymaking and program management by providing a framework for legislative and administrative decisions. It would also provide a framework for systematic analysis of a number of issues:

One: The aggregate potential for domestic nondefense public works investments relative to other potential claims such as national defense and social programs.

Two: The impacts of government regulatory actions on public works investments and operations. For example, mandated investments to assist the handicapped on public transportation threaten to bankrupt some public transportation systems such as those in New York City.

Three: The consequences of allocations of limited public works funds as between new construction, rehabilitation of existing facilities and operation/maintenance.

Four: The social and equity issues associated with the distribution of public works funds among and between various regions.

Five: The sources, consequences and alternative financing sources of public works projects and their operation.

Capital budgeting is ultimately a political process through which resources are allocated. Advocates of federal public works investments would negotiate potential expenditures against other uses of federal funds; funds would be allocated among programs such as transportation, water treament, navigation, and so forth; and funds would be allocated among construction, operation, maintenance and rehabilitation activities.

A capital budget would serve as a device by which the President and the Congress could bring necessary control to the present "free form" investment and management practices of the various federal public works agencies. It would also permit effective congressional management, especially of congressional committee actions which have contributed substantially to duplication and inconsistency.

Public works investments reflect a history of choices, decisions, bargains, compromises and allocations which provide a foundation for present and future actions. A capital budget could chronicle this information. It could also articulate a statement of the future, specifying goals and resources needed to attain those goals. States and communities, now dependent on federal public works funding, operate on a year-to-year basis with the ever present possibility that federal "commitments" will be altered or regulations changed. State and local governments need more certaintly than is provided in a one-year federal budget. The private sector would likewise profit from more certainty.

The deteriorated condition of the basic facilities that underpin the economy will prove a critical bottleneck to national economic renewal during this decade unless we can find ways to finance critical public facilities. Our success in this effort hinges on the willingness of the Executive Branch to share responsibility for creating and managing public works policy more coherently than in the past. Specifically:

Congress should require the preparation of an annual special analysis outlining the nation's public works needs as they affect national economic performance.

Congress should direct the Executive Branch to undertake an inventory of national public works needs as they affect the economy.

With the inventory as a starting point, Congress should require presentation of a capital budget that proposes phased capital investments matched with both short-term cyclical and long-term national economic needs. The budget would display preconstruction, construction, maintenance and operating costs.

Congress should direct the Executive Branch to report steps for reducing delays in public facilities construction through reforms in federal, state and local administrative procedures. Similiar efforts in reducing other regulatory delays are already underway at the direction of the President.

Congress and the Executive Branch should consider undertaking a series of reforms designed to minimize the corruption and waste connected with public works expenditures.

The Executive Branch should undertake an administrative evaluation of the scattered public works activities of the federal government and be prepared to consummate consolidated reforms simultaneous with the proposed public works report to Congress.

Congress or the Executive Branch should direct the Advisory Commission on Intergovernmental Relations or a new body constituted for the purpose to review the public works responsibilities of each level of government and propose appropriate guidelines for allocating functions and responsibilities.

It would be tempting to avoid disentangling the knotted threads of intergovernmental complexity and to assume that federal public works expenditures must be drastically curtailed in the face of current economic conditions. But such a course would thwart the very purpose of economic policy now being formulated.

Economic renewal must be the major focus of domestic policy in this decade. Our public infrastructure is strategically bound up in that renewal. We have no recourse but to face the complex task at hand of rebuilding our public facilities as an essential prerequisite to economic renewal.

Mr. RANDOLPH. Mr. President, I am pleased to join with my colleagues in introducing the Rebuilding of America Act of 1982.

For most of our 206 years as a nation the United States has placed great emphasis on building. From a wilderness we have constructed a strong and prosperous nation which provides to its citizens the highest standard of living in the world. Our economy and our way of life were created and are supported by a public infrastructure representing investments of billions of dollars. We are becoming increasingly aware, however, that the public facilities on which we depend so greatly are wearing out faster then they are being replaced. In recent years our investments in public works have declined dramatically. It is necessary only to drive on some of our roads, ride our trains, examine our water systems, or calculate the need for sewage treatment to know that we cannot continue to ignore these underpinnings of America.

We have failed to keep pace with growing needs for transportation, sewer and water facilities, waste disposal, and the other elements of infrastructure that contribute to sound economies and healthy communities.

A reliable report indicates that total investments in public works by Federal, State and local governments declined by two-thirds in constant dollars over a recent 10-year period. The study also reported that between one-half and two-thirds of our Nation's communities are unable to support modernized development until major new investments are made in their basic facilities.

Public works are too often mistakenly considered unnecessary "pork barrel" projects. When opportunities are sought to slash budgets, funds for these basic necessities are often the first targets.

In this era when we look for ways to revitalize our economy, we must look to new investments in public facilities if we are to be successful.

Mr. President, I believe that the situation we face is a result of several factors. In recent years we have recognized the need for Government involvement in many new programs. With limited resources at our disposal we have reduced public works expenditures in order to support these new needs. Inflation has limited the return we receive from these reduced investments and the situation has been exacerbated by efforts in the past 2 years to reduce Federal spending in general.

Mr. President, the measure we introduce today is the first step in reordering priorities to assure that the development and maintenance of vital public facilities receive adequate attention. This bill establishes the procedure for an inventory of our public infrastructure and its needs. It provides for considering Federal public facilities spending on a unified overall basis.

Mr. President, we do not anticipate that the Congress will act on this legislation during the short time remaining in the 97th Congress. Rather, we introduce it as another means of bringing attention to the critical situation which exists. I would hope that hearings can be scheduled this fall or early in 1983 to allow us to examine in detail our needs for public facilities and the ways in which we meet these needs.

By Mr. HATFIELD:

S. 2928. A bill to provide for equal access to public secondary schools; to the Committee on Labor and Human Resources.

(The remarks of Mr. HATFIELD on this legislation appear earlier in today's RECORD.)

By Mr. NICKLES (for himself, Mr. EAST, Mr. GRASSLEY, Mrs. HAWKINS, Mr. HUMPHREY, Mr. LAXALT, Mr. MATTINGLY, and Mr. THURMOND):

S. 2929. A bill to amend the Davis-Bacon Act; to the Committee on Labor and Human Resources.

DAVIS-BACON ACT AMENDMENTS

Mr. NICKLES. Mr. President, today, I am introducing legislation—along with Senators EAST, GRASSLEY, HAWKINS, HUMPHREY, LAXALT, MATTINGLY, and THURMOND, to reform the Davis-Bacon Act. Speaking for myself, I believe that the act has long outlived its usefulness and currently is so outmoded that it cannot be administered fairly absent statutory changes. Frequently, the result reached by the Labor Department's predetermined prevailing wage calculations are inequitable to the very persons the act is designed to protect—local construction craftsmen and their employers.

To its credit, the Reagan administration has tried to bring the 50-year-old act into the late 20th century, but has been stymied by a court-imposed restraining order obtained by the real beneficiaries of artificially determined prevailing wages—the building trade unions. I suspect that if the Congress delays action on Davis-Bacon until this legal dispute is finally resolved by the courts, then additional years will pass and several billion dollars more will be wasted on inaccurate wage determinations.

I believe the Congress has a responsibility to clean up the act quickly so that the taxpayers may benefit forthwith.

The legislation I am submitting today mirrors the administration's key proposed changes in all but one provision—the threshold level. The four changes I am proposing are:

First, for the first time a definition of "prevailing wages" would be written into the act. Currently, in the absence of a statutory definition, the Labor Department uses the notorious 30 percent rule. This legislation requires the DOL to use a majority rule or, if a majority wage rate cannot be identified, a weighted average.

Second, an outright ban on importing urban wage rates into rural civil subdivisions and vice versa.

Third, the addition of a helper classification would be formally written into the act. This practice is not new. For years the Department of Labor has recognized helper classifications in several States and has issued wage determinations accordingly. But this recognition needs to be expanded. The use of helpers is common in the construction industry and the Labor Department's failure to take helpers into account leads to numerous situations where indigenous contractors and their employees lose work to outside, higher priced competition.

Fourth, the current $2,000 threshold is upped to $100,000. This modest increase is long overdue and will give greater latitude to the contracting officers of the various Federal agencies in awarding small contracts more quickly and efficiently.

If enacted today, the Congressional Budget Office calculates that these four changes will save the taxpayer some $3.5 billion over the next 5 fiscal years—with savings of over $1 billion per year thereafter. Copies of the CBO estimate are available from the Senate Labor Subcommittee upon request.

This legislation is designed to retain the rationale behind the Davis-Bacon Act—that prevailing wage scales and practices should not be undercut by the Federal Government's construction program. However, these four changes will bring the act back into balance by permitting and encouraging indigenous contractors to bid on Federal work—a practice frequently denied to them because the Davis-Bacon Act forces up the true prevailing wage scale in an area and/or precludes the efficient use of their work force as utilized on private sector projects. Davis-Bacon changes are long overdue and I believe that the Congress will eventually accept these statutory changes.

Mrs. HAWKINS. Mr. President, I am pleased to support Senator NICKLES' bill amending the Davis-Bacon Act. It seems to me that times have changed, our economy has changed, most labor and management laws have changed, but the Davis-Bacon Act has remained the same. To put it simply, the Davis-Bacon Act is out of date—and it is costing our constituents a lot of money.

The Davis-Bacon Act was first adopted in 1931 to promote fairness and consistency in the construction industry. I am all for fair wages and consistent treatment of laborers, but I believe the Davis-Bacon Act is now counterproductive. The act now provides the prevailing excuse for unfairness and inconsistency in the construction industry as well as an empty pocketbook for taxpayers.

The Davis-Bacon Act was designed to insure that laborers on Federal and federally assisted construction projects were paid the prevailing wage. The formula that the Department of Labor now uses to determine prevailing wage is rightfully under suspicion, however. Briefly, the prevailing wage is now defined as the rate paid to 30 percent or more of construction workers, mostly union workers, in a given classification. In theory the act appears fair. But let us get back to the realities of space and time here. Fifty years ago a determination of a prevailing wage was a necessary tool to protect workers. But, today, workers are protected from exploitation by the Taft-Hartley Act, the Fair Labor Standards Act, the Walsh-Healy Act, and scores of State and local laws. Fifty years later, the act inflates the cost of Federal and private construction. In an effort to curb excessive construction costs, our bill defines prevailing wage as the rate paid to 50 percent or more of the construction workers in a given classification. By doing so, the "prevailing wage" formula will more closely measure the actual earnings of average workers.

Clearly, the Davis-Bacon Act also makes no allowances for changes in time—or in space. Currently, for example, the Department of Labor makes prevailing wage determinations in urban areas but also uses them in rural areas—where the cost of living is considerably lower. Our bill requires more localized wage-rate surveys to prevent this.

It may seem impossible to save the taxpayers over $1 billion a year in unnecessary construction costs without eliminating a single construction job or canceling a single construction project. But Senator NICKLES has done just that in his amendments to the Davis-Bacon Act. And I urge my colleagues to support them.

By Mr. HATCH (for himself, Mr. QUAYLE, Mrs. HAWKINS, and Mr. HELMS):

S. 2930. A bill to provide for the protection of migrant and seasonal agricultural workers and for the registration of contractors of migrant and seasonal agricultural labor and for other purposes; to the Committee on Labor and Human Resources.

MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT

● Mr. HATCH. Mr. President, I am today introducing, with the cosponsorship of my distinguished colleagues, Senator QUAYLE, Senator HAWKINS, and Senator HELMS, a bill to supercede the Farm Labor Contractor Registration Act (FLCRA). This bill, which will be cited as the "Migrant and Seasonal Agricultural Worker Protection Act," (MSPA) was recently submitted to the Congress by the administration. For the past 18 months the Department of Labor has engaged in extensive negotiations with the various interest groups to develop new legislation that would strengthen enforcement over labor contractors as well as enhance labor standard protections for migrant and seasonal agricultural workers. Among the representative groups consulted were the American Farm Bureau Federation, the AFL-CIO and its affiliate, the United Farm Workers of America, the migrant legal action program, the National Cotton Council, the National Council of Agricultural Employers, the National Food Processors Association, the United Fresh Fruit and Vegetable Association, and the Western Growers Association. As Secretary Donovan indicated in the letter transmitting the measure, "the bill represents a consensus among the parties who are most directly affected."

Congress enacted the current law FLCRA in 1963 to curb the exploitation of migrant agricultural workers and their employers by irresponsible farm labor contractors. Known commonly as crew leaders, these contractors typically traveled the country, following the planting and harvesting season. They recruited, transported, supervised, handled pay arrangements, and otherwise acted as intermediary between migrant workers and agricultural employers. Congressional hearings, however, revealed sordid abuses in many instances. Migrant workers were commonly promised higher wages and more work than they eventually received; they were transported long distances in unsafe vehicles and under degrading conditions; they were housed in hovels; they were subjected to physical abuse and kept in virtual slavery. The hearings also showed that itinerant crew leaders at times victimized agricultural employers. Lured by a more lucrative arrangement in the interim, a crew leader might break a previously made contract to supply labor to a farmer, who would then face financial ruin if he could not get help to harvest his crop in time.

The 1963 act regulated these crew leaders through a system of Federal registration and the imposition of affirmative obligations with respect to vehicle liability insurance, recordkeeping, and disclosure of prospective terms and conditions of employment. However, the act proved ineffective. After a decade of experience and several congressional studies, the Congress in 1974 adopted sweeping amend-

ments. The amendments provided an express private right of action to migrant workers; it extended coverage to intrastate contracting activities; It extended registration requirements; it imposed affirmative duties on the Secretary of Labor to monitor and investigate the activities of contractors; and, It imposed substantive duties on a contractor with respect to transportation and housing. The amendments also imposed on farmers and other employers the requirement of confirming that a contractor in properly registered and the requirement to maintain payroll redcords on migrant workers furnished by the contractor.

Unfortunately, the experience under the 1974 amendments has been anything but satisfactory. Newspapers and the news magazines still periodically report on continuing exploitation of migrant workers, on squalid housing, and on unscrupulous crew bosses. At the same time, strong criticism has been directed against the Department of Labor, particularly against its expansive interpretation of the act and its enforcement policies. Congressional hearings have confirmed that the Department in the past concentrated its scarce resources on securing the registration of every employer who might conceivably be construed a farm labor contractor. In an inordinate number of cases, farmers and other agricultural employers—basically fixed situs employers, who were easy targets for Government enforcement—were cited for technical violations dealing with registration requirements. The impact of this enforcement policy has not been the improvement of the migrant workers' lot in the workplace.

The overriding result has been the harassment of agricultural employers. They have expended valuable time and energy in attempting to comply with burdensome registration requirements which in fact are of little utility when it comes to stationary employers. They have wasted resources fighting legal battles over technical violations. If anything, the whole enforcement philosophy of the past has undermined cooperation between the Government and the agricultural employer community in curbing the exploitation of migrant workers.

The bill introduced today seeks to rectify these fundamental problems with current law. It eliminates redtape, paperwork, and administrative burdens. Yet the bill preserves the rights of migrant and seasonal farm workers against abusive employment practices. As outlined in the Secretary's transmittal letter, this consensus measure follows certain basic principles.

First, unlike FLCRA, the bill distinguishes between the traditional, itinerant crewleaders and fixed situs agricultural employers by totally eliminating the obligation of fixed situs employers to register as crewleaders. Second, it maintains the basic farmworker protections under the present FLCRA and has made clear that these protections are to be provided by the appropriate agricultural employer or association, irrespective of whether that employer is a crewleader or a fixed situs employer; those protections pertain to vehicle safety, adequate housing, disclosure of wages, and working conditions, and maintenance of certain records. Third, the bill distinguishes between migrant agricultural workers and seasonal agricultural workers; under the bill migrant agricultural workers are those who are working away from their home overnight, while seasonal agricultural workers are those who live at home and commute to agricultural employment. Fourth, exemptions are provided for labor unions, family businesses and small businesses. Fifth, ambiguous words and phrases which have caused extensive litigation under FLCRA have been eliminated.

I am hopeful that the Congress can give this legislation prompt attention. It is my understanding that the House Education and Labor Committee held hearings on an identical measure, H.R. 7102, 3 days ago. Moreover, because the measure has been reviewed by many eyes—the Department of Labor, representatives of the various agricultural employer groups, and employee representatives—we have a measure of confidence that it has been well crafted. What remains is the need to review it carefully, so as to assure both that it is free of technical flaws and ambiguities and that the policy decisions inherent in the bill are fully understood by all.

I include here a section-by-section analysis of the bill and I ask unanimous consent that the text of the bill be printed in the RECORD; I also want to include in the RECORD the statement of the Department of Labor which was presented to the House Labor Standards Subcommittee on September 14, 1982. The statement sets forth an analysis of the bill, which will be useful for purposes of legislative history. I ask unanimous consent that that document be printed in the RECORD.

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

SECTION-BY-SECTION ANALYSIS

Section 1.—This section provides the table of contents for this Act and that the Act may be cited as the "Migrant and Seasonal Agricultural Worker Protection Act".

Section 2.—This section states that the purpose of this Act is to remove the restraints on commerce caused by activities deterimental to migrant and seasonal agricultural workers; to require farm labor contractors to register under this Act; and to assure necessary protections for migrant and seasonal agricultural workers, agricultural associations, and agricultural employers.

Section 3.—This section provides for the definitions of terms to be used for the purpose of this Act.

(1) The term "agricultural association" is defined as "any nonprofit or cooperative association of farmers, growers, or ranchers, incorporated or qualified under applicable State law, which recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker."

(2) The term "agricultural employer" is defined as "any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker."

(3) The term "agricultural employment" is defined as "employment in any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), or section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)) and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state."

(4) The term "day-haul operation" is defined as "the assembly of workers at a pick-up point waiting to be hired and employed, transportation of such workers to agricultural employment, and the return of such workers to a drop-off point on the same day."

(5) The term "employ" is defined as "having the meaning given such term under section 3(g) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(g)) for the purposes of implementing the requirements of that Act."

(6) The term "farm labor contracting activity" is defined as "recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker."

(7) The term "farm labor contractor" is defined as "any person, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity."

(8) The term "migrant agricultural worker" is defined as "an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence." Specifically excluded from the definition of a migrant agricultural worker are any immediate family member of an agricultural employer or a farm labor contractor and any temporary nonimmigrant agricultural H-2 alien worker.

(9) The term "person" is defined as "any individual, partnership, association, joint stock company, trust, cooperative, or corporation."

(10) The term "seasonal agricultural worker" is defined as "an individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence—(i) when employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations; or (ii) when employed in canning, packing, ginning, seed conditioning or related research, or processing oper-

ations, and transported, or caused to be transported, to or from the place of employment by means of a day-haul operation." Specifically excluded from the definition of a seasonal agricultural worker are any migrant agricultural worker, any immediate family member of an agricultural employer or a farm labor contractor, and any temporary nonimmigrant agricultural H-2 alien worker.

(11) The term "Secretary" is defined as "the Secretary of Labor or the Secretary's authorized representative."

(12) The term "State" is defined to include "any of the States of the United States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, and Guam."

Section 4.—This section addresses the applicability of this Act and specifically excludes certain persons.

Subsection (a) enumerates the persons who are not subject to this Act.

(1) The family business exemption applies to any individual who engages in a farm labor contracting activity on behalf of a farm, processing establishment, seed conditioning establishment, cannery, gin, packing shed, or nursery, which is owned or operated exclusively by such individual or an immediate family member of such individual, if such activities are performed only for such operation and exclusively by such individual or an immediate family member, but without regard to whether such individual has incorporated or otherwise organized for business purposes.

(2) The small business exemption applies to any person, other than a farm labor contractor, for whom the man-days exemption for agricultural labor provided under section 13(a)(6)(A) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(6)(A)) is applicable.

(3) Other exemptions include—

(A) Any common carrier which would be a farm labor contractor solely because the carrier is engaged in the farm labor contracting activity of transporting any migrant or seasonal agricultural worker.

(B) Any labor organization, as defined in section 2(5) of the Labor Management Relations Act (29 U.S.C. 152(5)) (without regard to the exclusion of agricultural employees in that Act) or as defined under applicable State labor relations law.

(C) Any nonprofit charitable organization or public or private nonprofit educational institution.

(D) Any person who engages in any farm labor contracting activity solely within a twenty-five mile intrastate radius of such person's permanent place of residence and for not more than thirteen weeks per year.

(E) Any custom combine, hay harvesting, or sheep shearing operation.

(F) Any custom poultry harvesting, breeding, debreaking, desexing, or health service operation provided the employees of the operation are not regularly required to be away from their domicile other than during their normal working hours.

(G) Any person whose principal occupation or business is not agricultural employment, when supplying full-time students or other individuals whose principal occupation is not agricultural employment to detassel, rogue, or otherwise engage in the production of seed and to engage in related and incidental agricultral employment, unless such full-time students or other individuals are required to be away from their permanent place of residence overnight or there are individuals under eighteen years of age who are providing transportation on behalf of such person. The exemption is further extended to certain persons to the extent that they are supplied with the specified workers.

(H) Any person whose principal occupation or business is not agricultural employment, when supplying full-time students or other individuals whose principal occupation is not agricultural employment to string or harvest shade grown tobacco and to engage in related and incidental agricultural employment, unless there are individuals under eighteen years of age who are providing transportation on behalf of such person. The exemption is further extended to certain persons to the extent that they are supplied with the specified workers.

(I) Any employee of any person described in subparagraphs (A) through (H) when performing farm labor contracting activities exclusively for such person.

Subsection (b) states that Title I of this Act does not apply to any agricultural employer or agricultural association or to any employee of such an employer or association.

TITLE I—FARM LABOR CONTRACTORS

Section 101.—This section requires that no person shall engage in any farm labor contracting activity unless the person has a certificate of registration from the Secretary specifying which farm labor contracting activity is authorized. This section further prohibits a farm labor contractor from hiring, employing or using any individual to perform farm labor contracting activities unless such individual has a certificate of registration, or a certificate of registration as an employee of a farm labor contractor, which authorizes the activity. The section states that a farm labor contractor shall be held responsible for violations of this Act by any employee regardless of whether the employee possesses a certificate based on the contractor's certificate of registration.

The section also requires the farm labor contractor and the farm labor contractor employee to carry the certificate of registration at all times while engaging in farm labor contracting activities and to exhibit the certificate, upon request, to all persons with whom he is dealing as a contractor.

The section would deny the use of the State employment service system, as provided through the Wagner-Peyser Act, to any contractor who refused or failed to produce, when asked, a certificate of registration.

Section 102.—This section authorizes the Secretary, after appropriate investigation, to issue a certificate of registration or a certificate of registration as an employee of a farm labor contractor to any person who has filed a written application which contains the following information: a declaration stating the applicant's permanent place of residence and the contracting activities for which the certificate is requested, and any other relevant information; a statement identifying each vehicle to be used to transport migrant or seasonal workers and the appropriate documentation concerning ownership or control and compliance with the motor vehicle safety requirements of section 401; a statement identifying each facility or real property to be used to house migrant workers and the appropriate documentation concerning ownership or control and compliance with the safety and health standards of housing under section 203; a set of fingerprints; and a declaration consenting to the designation of the Secretary as an agent available to accept service of summons if the contractor has left the jurisdiction in which the action is commenced, or is otherwise unavailable.

Section 103.—This section provides for determinations with respect to a certificate of registration. In accordance with regulations, the Secretary may refuse to issue or renew, or may suspend or revoke, a certificate if the applicant or holder: has knowingly made any misrepresentation; is not the real party in interest and the real party in interest has been refused a certificate, or has had a certificate suspended or revoked, or does not qualify for a certificate; has failed to comply with this Act or the regulations; has failed to pay a court judgment under the Farm Labor Contractor Registration Act of 1963 (FLCRA) or to comply with a final order issued by the Secretary, as a result of a violation under this act or FLCRA; or has been convicted within the preceding five years, or a crime relating to gambling or to the sale, distribution or possession of alcoholic beverages, in connection with any farm labor contracting activity, or of any felony involving robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, prostitution, peonage or smuggling or harboring individuals who have entered the country illegally.

Any person who is refused the issuance or renewal of a certificate or whose certificate is suspended or revoked will be afforded an opportunity for an agency hearing, upon request made within 30 days after the date of issuance of the notice of the refusal, suspension, or revocation. The hearings are held in accordance with the Administrative Procedures Act and the agency determination shall be made by final order.

If no hearing is requested, the refusal, suspension, or revocation shall constitute a final and unappealable order. If a hearing is requested, the initial agency decision shall be made by an administrative law judge and the decision shall become the final order unless the Secretary modifies or vacates the decision. Notice of an intent to modify or vacate the decision shall be issued to the parties within 30 days after the decision of the administrative law judge.

Any person against whom a final order has been entered after an agency hearing may obtain review by the district court by filing a notice of appeal within 30 days from the date of such order, simultaneously sending a copy to the Secretary. The Secretary shall certify the record to the court. The findings of the Secretary shall be set aside only if found to be unsupported by substantial evidence. Any decision, order or judgment of the United States District Court shall be subject to appeal to the appropriate circuit courts.

Section 104.—This section provides that a certificate of registration may not be transferred or assigned. Unless suspended or revoked, a certificate shall expire 12 months from the date of issuance, except that certificates issued between December 1, 1982 and November 30, 1983 may be issued for a period of up to 24 months to provide for an orderly transition. Certificates may also be temporarily extended by filing an application with the Secretary at least 30 days prior to its expiration date. The Secretary may renew a certificate for additional 12-month periods or for periods in excess of 12 months but not greater than 24 months. The eligibility for renewals of periods in excess of 12 months shall be limited to contractors who have not been cited for a viola-

tion of this Act or FLCRA during the preceding 5 years.

Section 105.—The section requires each farm labor contractor to provide to the Secretary, within 30 days, a notice of each change of permanent place of residence. The section also authorizes the Secretary to amend a certificate whenever a contractor intends to: engage in another farm labor contracting activity; use another vehicle to transport migrant or seasonal workers; or use another facility or real property to house migrant workers.

Section 106.—This section states that no farm labor contractor shall recruit, hire, employ, or use, with knowledge, the services of any illegal alien. The contractor will be considered to have complied with this provision if he demonstrates that he relied in good faith on documentation prescribed by the Secretary and that he had no reason to believe that the individual was an illegal alien.

TITLE II—MIGRANT AGRICULTURAL WORKER PROTECTIONS

Section 201.—This section provides for informing migrant agricultural workers of their wages and working conditions and for the maintenance of records.

The section requires each farm labor contractor, agricultural employer and agricultural association which recruits migrant workers to ascertain and disclose to the worker the following information in writing at the time of the worker's recruitment: the place of employment; the wage rates to be paid; the crops and kinds of activities on which the worker may be employed; the period of employment; the transportation, housing and other employee benefits and their costs; the existence of a strike or other concerted work stoppage, slowdown, or interruption of operations at the place of employment; and the existence of any arrangements under which the farm labor contractor, agricultural employer or association is to receive a commission as a result of any sales to the workers.

The section requires each farm labor contractor, agricultural employer and agricultural association which employs migrant workers to post in a conspicuous place a poster provided by the Secretary setting forth the rights and protections afforded the workers under this Act, including their right to receive, upon request, a written statement of the information described in the preceding paragraph.

If housing is provided by a farm labor contractor, agricultural employer or agricultural association, they must post or present to the migrant workers a statement of the terms and conditions, if any, of occupancy.

The section requires, with respect to each worker, that each farm labor contractor, agricultural employer and agricultural association which employs migrant workers make, keep and preserve, for three years, records of the following: The basis on which wages are paid; the number of piecework units earned; the number of hours worked; the total pay period earnings; the specific sums withheld and the purpose of each withholding; and the net pay. The above information must also be provided through an itemized written statement to each migrant worker for each pay period.

If a farm labor contractor furnishes migrant workers to another contractor, agricultural employer or association, the farm labor contractor must provide copies of all records with respect to the above information for the workers so provided; the recipient of the records must keep them for a period of three years from the end of the period of employment.

The section further provides that no farm labor contractor agricultural employer or association shall knowingly provide false or misleading information to any migrant worker concerning the terms, conditions, or existence of employment required to be disclosed by the preceding paragraphs.

The information required to be disclosed to migrant workers when recruited, employed or housed must be in written form in English, or as necessary and reasonable, in Spanish or other fluent or literate in English. The Department will provide forms in English, Spanish and other languages, as necessary, which may be used in providing migrant workers with the required information.

Section 202.—This section provides for further protections for migrant workers with respect to wages, supplies and other working arrangements.

This section requires each farm labor contractor, agricultural employer and association to pay the wages owed to the migrant workers when due. The section also prohibits the contractor, employer or association from requiring migrant workers to purchase any goods or services solely from them. Finally, the section states that no contractor, employer or association shall, without justification, violate the terms of any working arrangements made with any migrant worker.

Section 203.—This section provides for the safety and health of housing. This section requires that each person who owns or controls a facility or real property which is used as housing for migrant workers shall be responsible for ensuring that the housing complies with substantive Federal and State safety and health standards applicable to that housing.

The section prohibits the occupancy of such housing by migrant workers unless the housing has been certified by an appropriate State or local health authority that it meets the applicable safety and health standards, and a copy of the certification of occupancy is posted at the site. The section notes that the receipt of such a certification does not relieve any person of the responsibilities of ensuring that the housing complies with substantive Federal and State safety and health standards. The owner of the housing is required to retain the original certification for a period of three years.

If a request for inspection and certification of a facility or real property is made to the appropriate State or local health agency at least 45 days prior to the anticipated date of occupancy by migrant workers and the agency has not conducted the investigation, this section permits the housing to be occupied, although occupancy would not relieve any person of the responsibilities of ensuring that the housing complies with substantive Federal and State safety and health standards.

Finally, this section does not apply to any person who, in his ordinary course of business, regularly provides housing on a commercial basis to the general public, such as an innkeeper.

TITLE III—SEASONAL AGRICULTURAL WORKER PROTECTIONS

Section 301.—This section provides for informing seasonal agricultural workers of their wages and working conditions and for the maintenance of records.

The section requires each farm labor contractor, agricultural employer and agricultural association which recruits seasonal workers, other than day-haul workers, to ascertain and disclose to the worker, upon request, the following information in writing when an offer of employment is made to such worker: the place of employment; the wage rates to be paid; the crops and kinds of activities on which the worker may be employed; the period of employment; the transportation and other employee benefits and their costs; the existence of a strike or other concerted work stoppage, slowdown, or interruption of operations at the place of employment; and the existence of any arrangements under which the farm labor contractor, agricultural employer or association is to receive a commission as a result of any sales to the workers.

In the case of day-haul workers, the information shall be required to be disclosed at the place of recruitment.

The section requires each farm labor contractor, agricultural employer and agricultural association which employs seasonal workers to post in a conspicuous place a poster provided by the Secretary setting forth the rights and protections afforded the workers under this Act, including their right to receive, upon request, a written statement of the information described in the preceding paragraphs.

The section requires, with respect to each worker, that each farm labor contractor, agricultural employer and agricultural association which employs seasonal workers make, keep and preserve, for three years, records of the following: the basis on which wages are paid; the number of piecework units earned; the number of hours worked; the total pay period earnings; the specific sums withheld and the purpose of each withholding; and the net pay. The above information must also be provided through an itemized written statement to each seasonal worker for each pay period.

If a farm labor contractor furnishes seasonal workers to another contractor, agricultural employer or association, the farm labor contractor must provide copies of all records with respect to the above information for the workers so provided; the recipient of the records must keep them for a period of three years from the end of the period of employment.

The section further provides that no farm labor contractor, agricultural employer or association shall knowingly provide false or misleading information to any seasonal worker concerning the terms, conditions, or existence of employment required to be disclosed by the preceding paragraphs.

The information required to be disclosed to seasonal workers when recruited or employed must be in written form in English, or as necessary and reasonable, in Spanish or other language common to the seasonal workers who are not fluent or literate in English. The Department will provide forms in English, Spanish and other languages, as necessary, which may be used in providing seasonal workers with the required information.

Section 302.—This section provides for further protections for workers with respect to wages, supplies and other working arrangements.

This section requires each farm labor contractor, agricultural employer and association to pay the wages owed to the seasonal workers when due. The section also prohibits the contractor, employer or association from requiring seasonal workers to purchase any goods or services solely from them. Finally, the section states that no contractor, employer or association shall, without justi-

fication, violate the terms of any working arrangements made with any seasonal worker.

TITLE IV—FURTHER PROTECTIONS FOR MIGRANT AND SEASONAL AGRICULTURAL WORKERS

Section 401.—This section provides for motor vehicle safety and applies to the transportation of any migrant or seasonal agricultural worker. The section does not apply to transportation of any migrant or seasonal agricultural worker on a tractor, combine, harvester, picker, or other similar machinery and equipment while such worker is actually engaged in the planting, cultivating, or harvesting of any agricultural commodity or the care of livestock or poultry.

The section requires each farm labor contractor, agricultural employer and agricultural association to ensure that any vehicle used to transport a migrant or seasonal agricultural worker conforms to certain standards to be prescribed by the Secretary and other applicable Federal and State safety standards. The section would also ensure that the driver of each vehicle possess a valid and appropriate license and provides for the existence of an insurance policy or liability bond insuring against liability for damage to persons or property arising from the ownership or operation of the vehicle. The Secretary is required to issue regulations which would prescribe standards to protect the health and safety of migrant and seasonal agricultural workers and in issuing the standards for the protection of those workers, consider, among other factors, the type of vehicle used, the passenger capacity in the vehicle, the distance which such workers will be carried in the vehicle, the type of roads and highways on which such workers will be carried in the vehicle, and the extent to which a proposed standard would cause an undue burden on agricultural employers, agricultural associations, or farm labor contractors.

The standards prescribed by the Secretary shall be in addition to, and shall not supersede or modify, any standard under the Interstate Commerce Act relating to the transportation of migrant workers which is independently applicable. A violation of these standards shall also constitute a violation under this Act.

In the event the Secretary fails to prescribe the standards by the effective date of this Act, the standards prescribed under the Interstate Commerce Act relating to the transportation of migrant workers shall be deemed to be the standards prescribed by the Secretary and shall, as appropriate and reasonable in the circumstances, apply: (1) without regard to the mileage and boundary line limitations of that Act, and (2) until superseded by standards actually prescribed by the Secretary.

The level of insurance required by this section should be at least the amount required for common carriers under the Interstate Commerce Act.

If the farm labor contractor, agricultural employer or association is the employer of any migrant or seasonal worker for the purposes of State workers' compensation law and thus provides coverage for the workers in the case of bodily injury or death, the section would excuse the requirement of an insurance policy or liability bond if the workers are only transported under circumstances where there is coverage under State law. An insurance policy or liability bond will be required for those circumstances where there is no coverage under State law.

Finally, the section requires the Secretary to promulgate regulations, not later than the effective date of this Act and in accordance with section 511 of this Act.

Section 402.—This section requires that prior to utilizing the services of a farm labor contractor all persons should take reasonable steps to determine that the contractor posseses a valid certificate of registration which authorizes the activity to be performed. The section states that the person may rely on the possession of a certificate of registration or on confirmation by the Department of Labor. The section also requires the Secretary to maintain a central public registry of all persons issued a certificate of registration.

Section 403.—This section requires each farm labor contractor to obtain at each place of employment and make available for inspection to the workers he furnishes a written statement of the conditions of employment described in sections 201 and 301.

Section 404.—This section states that no farm labor contractor shall violate, without justification, the terms of any written agreements made with agricultural employers or associations pertaining to any contracting activity or worker protection under this Act. The provision also notes that written agreements under this section do not relieve the parties of any responsibilities that they would otherwise have under the Act.

TITLE V—GENERAL PROVISIONS

Part A—Enforcement provisions

Section 501.—This section provides for criminal sanctions of a fine of not more than $1,000 or a prison term not to exceed three years, or both, for willful and knowing violations of this Act. The section also provides for a fine of not more than $10,000 or a prison term not to exceed three years, or both, for any person who has been denied a certificate, or has failed to obtain a certificate or has had his certificate suspended or revoked and such person has been found to have recruited, hired, employed or used, with knowledge, the services of an illegal alien.

Section 502.—This section provides for judicial enforcement by permitting the Secretary to petition any appropriate district court for temporary or permanent injunctive relief if the Secretary determined that this Act, or any regulation, has been violated. This section also permits the Solicitor of Labor to appear for, and represent, the Secretary in any civil litigation brought under this Act, subject to the direction and control of the Attorney General.

Section 503.—This section provides for administrative sanctions of a civil money penalty of not more than $1,000 for each violation of this Act or the regulations. In determining the amount to be assessed the Secretary must take into account the previous record of the person in terms of compliance with this Act and with comparable requirements of FLCRA, and the gravity of the violation. Any person assessed a civil money penalty will be afforded an opportunity for an agency hearing, upon request made within 30 days after the date of issuance of the notice of assessment. The hearings are held in accordance with the Administrative Procedures Act and the agency determination shall be made by final order.

If no hearing is requested, the assessment shall constitute a final and unappealable order. If a hearing is requested, the initial agency decision shall be made by an administrative law judge and the decision shall become the final order unless the Secretary modifies or vacates the decision. Notice of an intent to modify or vacate the decision shall be issued to the parties within 30 days after the decision of the administrative law judge.

Any person against whom a final order has been entered after an agency hearing may obtain review by the district court by filing a notice of appeal within 30 days from the date of such order, simultaneously sending a copy to the Secretary. The Secretary shall certify the record to the court. The findings of the Secretary shall be set aside only if found to be unsupported by substantial evidence. Any decision, order or judgment of the United States District Court shall be subject to appeal to the appropriate circuit courts.

All penalties collected under the authority of this section shall be paid into the Treasury of the United States.

Section 504.—This section provides for a private right of action by any person aggrieved by a violation of this Act, or the regulations, by a farm labor contractor, agricultural employer, agricultural association or other person. The aggrieved party may file suit in any district court having jurisdiction of the parties, without respect to the amount in controversy and without regard to the citizenship of the parties and without regard to exhaustion of any alternative administrative remedies. The court is authorized to appoint an attorney for such complainant, upon application, and may authorize the commencement of the action.

If the court finds that the respondent has intentionally violated any provision of this Act, or the regulations, it may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of up to $500 per plaintiff per violation, or other equitable relief. Multiple infractions of a single provision of this Act, or the regulations, shall constitute only one violation for purposes of determining statutory damages due a plaintiff. If a complaint is certified as a class action, the court shall award no more than the lesser of up to $500 per plaintiff per violation, or up to $500,000 or other equitable relief.

In determining the amount of damages to be awarded, the court is authorized to consider whether an attempt was made to resolve the issues in dispute before resort to litigation.

Civil actions brought under this section shall be subject to appeal to the appropriate circuit courts.

Section 505.—This section prohibits the discrimination against any migrant or seasonal agricultural worker and provides that no person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against such worker because the worker has filed a complaint or caused a complaint to be filed under this Act, or has exercised any rights or protections afforded by this Act.

A worker who believes that he has been discriminated against by any person in violation of this section, may within 180 days after the violation occurs, file a complaint with the Secretary. The Secretary shall investigate the complaint and if he determines that the provisions of this section have been violated, he shall bring an action in any appropriate district court against such person. The courts shall have jurisdiction, for cause shown, to restrain the violation and to order all appropriate relief, including rehiring or reinstatement of the worker, with back pay, or damages.

Section 506.—This section states that agreements by employees purporting to

waive or to modify their rights under this Act shall be void as contrary to public policy, except for waivers or modifications in favor of the Secretary which shall be valid for purposes of enforcement of this Act.

Part B—Administrative provisions

Section 511.—This section authorizes the Secretary to issue rules and regulations as are necessary to carry out this Act.

Section 512.—This section authorizes the Secretary to investigate and pursue complaints, including the inspection of places and records and the questioning of persons and gathering of information to determine compliance with the Act or its regulations. The provision authorizes the Secretary to issue subpoenas requiring the attendance of witnesses or the production of evidence. The provision extends to the Secretary the authority contained in sections 9 and 10 of the Federal Trade Commission Act relating to the attendance of witnesses and the production of documents. The provision also makes it a violation of this Act for any person to interfere in any manner with an official during the performance of his investigation or law enforcement function under the Act.

Section 513.—This section permits the Secretary to enter into agreements with Federal and State agencies to use their facilities, and to delegate authority, other than rulemaking, as may be useful in carrying out this Act to a State agency pursuant to a written State plan. The State plan must include a description of the functions to be performed, the methods of performance and the resources to be devoted to the performance of such functions. The State plan must also provide assurances that the State agency's performance of functions so delegated will be at least comparable to the performance of such functions by the Department. The provision also permits the allocation or transfer of funds to the agencies for expenses incurred pursuant to such agreements.

Part C—Miscellaneous provisions

Section 521.—This section states that the Act is intended to supplement State action and therefore does not excuse anyone from compliance with State law or regulation.

Section 522.—This is a transition provision which permits the Secretary to deny a certificate of registration to any farm labor contractor who has a judgment outstanding against him under FLCRA or is subject to a final order of the Secretary under FLCRA assessing a civil money penalty which has not been paid. The provision also permits the use of any findings under FLCRA to be applied to determinations of willful and knowing violations under this Act.

Section 523.—This section repeals FLCRA.

Section 524.—This section establishes December 1, 1982 as the effective date of this Act and provides for its classification in title 29, United States Code.

S. 2930

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

SECTION 1. This Act, together with the following table of contents may be cited as the "Migrant and Seasonal Agricultural Worker Protection Act."

TABLE OF CONTENTS

Sec. 1. Short title; table of contents.
Sec. 2. Purpose.
Sec. 3. Definitions.
Sec. 4. Application of Act.

TITLE I—FARM LABOR CONTRACTORS
Sec. 101. Certificate of registration required.
Sec. 102. Issuance of certificate of registration.
Sec. 103. Registration determinations.
Sec. 104. Transfer or assignments; expiration; renewal.
Sec. 105. Notice of address change; amendment of certificate of registration.
Sec. 106. Prohibition against employing illegal aliens.

TITLE II—MIGRANT AGRICULTURAL WORKER PROTECTIONS
Sec. 201. Information and recordkeeping requirements.
Sec. 202. Wages, supplies, and other working arrangements.
Sec. 203. Safety and health of housing.

TITLE III—SEASONAL AGRICULTURAL WORKER PROTECTIONS
Sec. 301. Information and recordkeeping requirements.
Sec. 302. Wages, supplies, and other working arrangements.

TITLE IV—FURTHER PROTECTIONS FOR MIGRANT AND SEASONAL AGRICULTURAL WORKERS
Sec. 401. Motor vehicle safety.
Sec. 402. Confirmation of registration.
Sec. 403. Information on employment conditions.
Sec. 404. Compliance with written agreements.

TITLE V—GENERAL PROVISIONS
PART A—ENFORCEMENT PROVISIONS
Sec. 501. Criminal sanctions.
Sec. 502. Judicial enforcement.
Sec. 503. Administrative sanctions.
Sec. 504. Private right of action.
Sec. 505. Discrimination prohibited.
Sec. 506. Waiver of rights.
PART B—ADMINISTRATIVE REGULATIONS
Sec. 511. Rules and regulations.
Sec. 512. Authority to obtain information.
Sec. 513. Agreements with Federal and State agencies.
PART C—MISCELLANEOUS PROVISIONS
Sec. 521. State laws and regulations.
Sec. 522. Transition provision.
Sec. 523. Repealer.
Sec. 524. Effective date.

PURPOSE

SEC. 2. It is the purpose of this Act to remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers; to require farm labor contractors to register under this Act; and to assure necessary protections and migrant and seasonal agricultural workers, agricultural associations, and agricultural employers.

DEFINITIONS

SEC. 3. As used in this Act—

(1) The term "agricultural association" means any nonprofit or cooperative association of farmers, growers, or ranchers, incorporated or qualified under applicable State law, which recruits, solicits, hires, employes, furnishes, or transports any migrant or seasonal agricultural worker.

(2) The term "agricultural employer" means any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.

(3) The term "agricultural employment" means employment in any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), or section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)) and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.

(4) The term "day-haul operation" means the assembly of workers at a pick-up point waiting to be hired and employed, transportation of such workers to agricultural employment, and the return of such workers to a drop-off point on the same day.

(5) The term "employ" has the meaning given such term under section 3(g) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(g)) for the purposes of implementing the requirements of that Act.

(6) The term "farm labor contracting activity" means recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker.

(7) The term "farm labor contractor" means any person, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.

(8)(A) Except as provided in subparagraph (B), the term "migrant agricultural worker" means an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.

(B) The term "migrant agricultural worker" does not include—

(i) any immediate family member of an agricultural employer or a farm labor contractor; or

(ii) any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United Staes under sections 101(a)(15)(H)(ii) and 214(c) of the Immigration and National Act.

(9) The term "person" means any individual, partnership, association, joint stock company, trust, cooperative, or corporation.

(10)(A) Except as provided in subparagraph (B), the term "seasonal agricultural worker" means an individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence—

(i) when employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations; or

(ii) when employed in canning, packing, ginning, seed conditioning or related research, or processing operations, and transported, or caused to be transported, to or from the place of employment by means of a day-haul operation.

(B) The term "seasonal agricultural worker" does not include—

(i) any migrant agricultural worker;

(ii) any immediate family member of an agricultural employer or a farm labor contractor; or

(iii) any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under sections 101(a)(15)(H)(ii) and 214(c) of the Immigration and Nationality Act.

(11) The term "Secretary" means the Secretary of Labor or the Secretary's authorized representative.

(12) The term "State" means any of the States of the United States, the District of

Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, and Guam.

APPLICABILITY OF ACT

SEC. 4. (a) The following persons are not subject to this Act:

(1) FAMILY BUSINESS EXEMPTION.—Any individual who engages in a farm labor contracting activity on behalf of a farm, processing establishment, seed conditioning establishment, cannery, gin, packing shed, or nursery, which is owned or operated exclusively by such individual on an immediate family member of such individual, if such activities are performed only for such operation and exclusively by such individual or an immediate family member, but without regard to whether such individual has incorporated or otherwise organized for business purposes.

(2) SMALL BUSINESS EXEMPTION.—Any person, other than a farm labor contractor, for whom the man-days exemption for agricultural labor provided under section 13(a)(6)(A) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(6)(A)) is applicable.

(3) OTHER EXEMPTIONS.—(A) Any common carrier which would be a farm labor contractor solely because the carrier is engaged in the farm labor contracting activity of transporting any migrant or seasonal agricultural worker.

(B) Any labor organization, as defined in section 2(5) of the Labor Management Relations Act (29 U.S.C. 152(5)) (without regard to the exclusion of agricultural employees in that Act) or as defined under applicable State labor relations law.

(C) Any nonprofit charitable organization or public or private nonprofit educational institution.

(D) Any person who engages in any farm labor contracting activity solely within a twenty-five mile intrastate radius of such person's permanent place of residence and for not more than thirteen weeks per year.

(E) Any custom combine, hay harvesting, or sheep shearing operation.

(F) Any custom poultry harvesting, breeding, debeaking, desexing, or health service operation provided the employees of the operation are not regularly required to be away from their domicile other than during their normal working hours.

(G)(i) Any person whose principal occupation or business is not agricultural employment, when supplying full-time students or other individuals whose principal occupation is not agricultural employment to detassel, rogue, or otherwise engage in the production of seed and to engage in related and incidental agricultural employment, unless such full-time students or other individuals are required to be away from their permanent place of residence overnight or there are individuals under eighteen years of age who are providing transportation on behalf of such person.

(ii) Any person to the extent he is supplied with students or other individuals for agricultural employment in accordance with clause (i) of this subparagraph by a person who is exempt under such clause.

(H)(i) Any person whose principal occupation or business is not agricultural employment, when supplying full-time students or other individuals whose principal occupation is not agricultural employment to string or harvest shade grown tobacco and to engage in related and incidental agricultural employment, unless there are individuals under eighteen years of age who are providing transportation on behalf of such person.

(ii) Any person to the extent he is supplied with students or other individuals for agricultural employment in accordance with clause (i) of this subparagraph by a person who is exempt under such clause.

(I) Any employee of any person described in subparagraphs (A) through (H) when performing farm labor contracting activities exclusively for such person.

(b) Title I of this Act does not apply to any agricultural employer or agricultural association or to any employee of such an employer or association.

TITLE I—FARM LABOR CONTRACTORS

CERTIFICATE OF REGISTRATION REQUIRED

SEC. 101. (a) No person shall engage in any farm labor contracting activity, unless such person has a certificate of registration from the Secretary specifying which farm labor contracting activities such person is authorized to perform.

(b) A farm labor contractor shall not hire, employ, or use any individual to perform farm labor contracting activities unless such individual has a certificate of registration, or a certificate of registration as an employee of the farm labor contractor employer, which authorizes the activity for which such individual is hired, employed, or used. The farm labor contractor shall be held responsible for violations of this Act or any regulation under this Act by any employee regardless of whether the employee possesses a certificate of registration based on the Contractor's certificate of registration.

(c) Each registered farm labor contractor and registered farm labor contractor employee shall carry at all times while engaging in farm labor contracting activities a certificate of registration and, upon request, shall exhibit that certificate to all persons with whom they intend to deal as a farm labor contractor or farm labor contractor employee.

(d) The facilities and the services authorized by the Act of June 6, 1933 (29 U.S.C. 49 et. seq.), known as the Wagner-Peyser Act, shall be denied to any farm labor contractor upon refusal or failure to produce, when asked, a certificate of registration.

ISSUANCE OF CERTIFICATE OF REGISTRATION

SEC. 102. The Secretary, after appropriate investigation and approval, shall issue a certificate of registration (including a certificate of registration as an employee of a farm labor contractor) to any person who has filed with the Secretary a written application containing the following:

(1) a declaration, subscribed and sworn to by the applicant, stating the applicant's permanent place of residence, the farm labor contracting activities for which the certificate is requested, and such other relevant information as the Secretary may require;

(2) a statement identifying each vehicle to be used to transport any migrant or seasonal agricultural worker and, if the vehicle is or will be owned or controlled by the applicant, documentation showing that the applicant is in compliance with the requirements of section 401 with respect to each such vehicle;

(3) a statement identifying each facility or real property to be used to house any migrant agricultural worker and, if the facility or real property is or will be owned or controlled by the applicant, documentation showing that the applicant is in compliance with section 203 with respect to each such facility or real property;

(4) a set of fingerprints of the applicant; and

(5) a declaration, subscribed and sworn to by the applicant, consenting to the designation by a court of the Secretary as an agent available to accept service of summons in any action against the applicant, if the applicant has left the jurisdiction in which the action is commenced or otherwise has become unavailable to accept service.

REGISTRATION DETERMINATIONS

SEC. 103. (a) In accordance with regulations, the Secretary may refuse to issue or renew, or may suspend or revoke, a certificate of registration (including a certificate of registration as an employee of a farm labor contractor) if the applicant or holder—

(1) has knowingly made any misrepresentation in the application for such certificate;

(2) is not the real party in interest in the application or certificate of registration and the real party in interest is a person who has been refused issuance or renewal of a certificate, has had a certificate suspended or revoked, or does not qualify under this section for a certificate;

(3) has failed to comply with this Act or any regulation under this Act;

(4) has failed—

(A) to pay any court judgment obtained by the Secretary or any other person under this Act or any regulation under this Act or under the Farm Labor Contractor Registation Act of 1963 or any regulation under such Act, or

(B) to comply with any final order issued by the Secretary as a result of a violation of this Act or any regulation under this Act or a violation of the Farm Labor Contractor Registration Act of 1963 or any regulation under such Act; or

(5) has been convicted within the preceding five years—

(A) of any crime under State or Federal law relating to gambling, or to the sale, distribution or possession of alcoholic beverages, in connection with or incident to any farm labor contracting activities; or

(B) of any felony under State or Federal law involving robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, prostitution, peonage, or smuggling or harboring individuals who have entered the United States illegally.

(b)(1) The person who is refused the issuance or renewal of a certificate or whose certificate is suspended or revoked under subsection (a) shall be afforded an opportunity for agency hearing, upon request made within thirty days after the date of issuance of the notice of the refusal, suspension, or revocation. In such hearing, all issues shall be determined on the record pursuant to section 554 of title 5, United States Code. If no hearing is requested as herein provided, the refusal, suspension, or revocation shall constitute a final and unappealable order.

(2) If a hearing is requested, the initial agency decision shall be made by an administrative law judge, and such decision shall become the final order unless the Secretary modifies or vacates the decision. Notice of intent to modify or vacate the decision of the administrative law judge shall be issued to the parties within thirty days after the decision of the administrative law judge. A final order which takes effect under this paragraph shall be subject to review only as provided under subsection (c).

(c) Any person against whom an order has been entered after an agency hearing under this section may obtain review by the United States district court for any district

in which he is located or the United States District Court for the District of Columbia by filing a notice of appeal in such court within thirty days from the date of such order, and simultaneously sending a copy of such notice by registered mail to the Secretary. The Secretary shall promptly certify and file in such court the record upon which the order was based. The findings of the Secretary shall be set aside only if found to be unsupported by substantial evidence as provided by section 706(2)(E) of title 5, United States Code. Any decision, order or judgment of the United States District Court shall be subject to appeal as provided in Chapter 83 of title 28, United States Code.

TRANSFER OF ASSIGNMENT; EXPIRATION; RENEWAL

SEC. 104. (a) A certificate of registration may not be transferred or assigned.

(b)(1) Unless earlier suspended or revoked, a certificate shall expire twelve months from the date of issuance, except that (A) certificates issued under this Act during the period beginning December 1, 1982, and ending November 30, 1983, may be issued for a period of up to 24 months for the purpose of an orderly transition to registration under this Act, (B) a certificate may be temporarily extended by the filing of an application with the Secretary at least thirty days prior to its expiration date, and (C) the Secretary may renew a certificate for additional 12-month periods or for periods in excess of 12 months but not in excess of 24 months.

(2) Eligibility for renewals for periods of more than 12 months shall be limited to farm labor contractors who have not been cited for a violation of this Act, or any regulation under this Act, or the Farm Labor Contractor Registration Act of 1963, or any regulation under such Act, during the preceding 5 years.

NOTICE OF ADDRESS CHANGE; AMENDMENT OF CERTIFICATE OF REGISTRATION

SEC. 105. During the period for which the certificate of registration is in effect, each farm labor contractor shall—

(1) provide to the Secretary within 30 days a notice of each change of permanent place of residence; and

(2) apply to the Secretary to amend the certificate of registration whenever the farm labor contractor intends to—

(A) engage in another farm labor contracting activity,

(B) use, or cause to be used, another vehicle than that covered by the certificate to transport any migrant or seasonal agricultural worker, or

(C) use, or cause to be used, another real property or facility to house any migrant agricultural worker other than that covered by the certificate.

PROHIBITION AGAINST EMPLOYING ILLEGAL ALIENS

SEC. 106. (a) No farm labor contractor shall recruit, hire, employ, or use, with knowledge, the services of any individual who is an alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment.

(b) A farm labor contractor shall be considered to have complied with subsection (a) if the farm labor contractor demonstrates that the farm labor contractor relied in good faith on documentation prescribed by the Secretary, and the farm labor contractor had no reason to believe the individual was an alien referred to in subsection (a).

TITLE II—MIGRANT AGRICULTURAL WORKER PROTECTIONS

INFORMATION AND RECORDKEEPING REQUIREMENTS

SEC. 201. (a) Each farm labor contractor, agricultural employer, and agricultural association which recruits any migrant agricultural worker shall ascertain and disclose in writing to each such worker who is recruited for employment the following information at the time of the worker's recruitment:

(1) the place of employment;

(2) the wage rates to be paid;

(3) the crops and kinds of activities on which the worker may be employed;

(4) the period of employment;

(5) the transportation, housing, and any other employee benefit to be provided, if any, and any costs to be charged for each of them;

(6) the existence of any strike or other concerted work stoppage, slowdown, or interruption of operations by employees at the place of employment; and

(7) the existence of any arrangements with any owner or agent of any establishment in the area of employment under which the farm labor contractor, the agricultural employer, or the agricultural association is to receive a commission or any other benefit resulting from any sales by such establishment to the workers.

(b) Each farm labor contractor, agricultural employer, and agricultural association which employs any migrant agricultural worker shall, at the place of employment, post in a conspicuous place a poster provided by the Secretary setting forth the rights and protections afforded such workers under this Act, including the right of a migrant agricultural worker to have, upon request, a written statement provided by the farm labor contractor, agricultural employer, or agricultural association, of the information described in subsection (a). Such employer shall provide upon request, a written statement of the information described in subsection (a).

(c) Each farm labor contractor, agricultural employer, and agricultural association which provides housing for any migrant agricultural worker shall post in a conspicuous place or present to such worker a statement of the terms and conditions, if any, of occupancy of such housing.

(d) Each farm labor contractor, agricultural employer, and agricultural association which employs any migrant agricultural worker shall—

(1) with respect to each such worker, make, keep, and preserve records for three years of the following information:

(A) the basis on which wages are paid;

(B) the number of piecework units earned, if paid on a piecework basis;

(C) the number of hours worked;

(D) the total pay period earnings;

(E) the specific sums withheld and the purpose of each sum withheld; and

(F) the net pay; and

(2) provide to each such worker for each pay period, an itemized written statement of the information required by paragraph (1) of this subsection.

(e) Each farm labor contractor shall provide to any other farm labor contractor, and to any agricultural employer and agricultural association to which such farm labor contractor has furnished migrant agricultural workers, copies of all records with respect to each such worker which such farm labor contractor is required to retain by subsection (d)(1). The recipient of such records shall keep them for a period of three years from the end of the period of employment.

(f) No farm labor contractor, agricultural employer, or agricultural association shall knowingly provide false or misleading information to any migrant agricultural worker concerning the terms, conditions, or existence of agricultural employment required to be disclosed by subsection (a), (b), (c), or (d).

(g) The information required to be disclosed by subsections (a) through (c) of this subsection to migrant agricultural workers shall be provided in written form. Such information shall be provided in English or, as necessary and reasonable, in Spanish or other language common to migrant agricultural workers who are not fluent or literate in English. The Department of Labor shall make forms available in English, Spanish, and other languages, as necessary, which may be used in providing workers with information required under this section.

WAGES, SUPPLIES, AND OTHER WORKING ARRANGEMENTS

SEC. 202. (a) Each farm labor contractor, agricultural employer, and agricultural association which employs any migrant agricultural worker shall pay the wages owed to such worker when due.

(b) No farm labor contractor, agricultural employer, or agricultural association shall require any migrant agricultural worker to purchase any goods or services solely from such farm labor contractor, agricultural employer, or agricultural association.

(c) No farm labor contractor, agricultural employer, or agricultural association shall, without justification, violate the terms of any working arrangement made by that contractor, employer, or association with any migrant agricultural worker.

SAFETY AND HEALTH OF HOUSING

SEC. 203. (a) Except as provided in subsection (c), each person who owns or controls a facility or real property which is used as housing for migrant agricultural workers shall be responsible for ensuring that the facility or real property complies with substantive Federal and State safety and health standards applicable to that housing.

(b)(1) Except as provided in subsection (c) and paragraph (2) of this subsection, no facility or real property may be occupied by any migrant agricultural worker unless either a State or local health authority or other appropriate agency has certified that the facility or property meets applicable safety and health standards. No person who owns or controls any such facility or property shall permit it to be occupied by any migrant agricultural worker unless a copy of the certification of occupancy is posted at the site. The receipt and posting of a certificate of occupancy does not relieve any person of responsibilities under subsection (a). Each such person shall retain the original certification for three years and shall make it available for inspection and review in accordance with section 512.

(2) Notwithstanding paragraph (1) of this subsection, if a request for the inspection of a facility or real property is made to the appropriate State or local agency at least 45 days prior to the date on which it is occupied by migrant agricultural workers and such agency has not conducted an inspection by such date, the facility or property may be so occupied.

(c) This section does not apply to any person who, in the ordinary course of that person's business, regularly provides housing on a commercial basis to the general public and who provides housing to migrant agricultural workers of the same character and on the same or comparable terms and

conditions as is provided to the general public.

TITLE III—SEASONAL AGRICULTURAL WORKER PROTECTIONS

INFORMATION AND RECORDKEEPING REQUIREMENTS

SEC. 301. (a)(1) Each farm labor contractor, agricultural employer, and agricultural association which recruits any seasonal agricultural worker (other than day-haul workers described in section 3(10)(A)(ii)) shall ascertain and, upon request, disclose in writing the following information when an offer of employment is made to such worker:

(A) the place of employment;

(B) the wage rates to be paid;

(C) the crops and kinds of activities on which the worker may be employed;

(D) the period of employment;

(E) the transportation and any other employee benefit to be provided, if any, and any costs to be charged for each of them;

(F) the existence of any strike or other concerted work stoppage, slowdown, or interruption of operations by employees at the place of employment; and

(G) the existence of any arrangements with any owner or agent of any establishment in the area of employment under which the farm labor contractor, the agricultural employer, or the agricultural association is to receive a commission or any other benefit resulting from any sales by such establishment to the workers.

(2) Each farm labor contractor, agricultural employer, and agricultural association which recruits seasonal agricultural workers through use of a day-haul operation described in section 3(10)(A)(ii) shall ascertain and disclose in writing to the worker at the place of recruitment the information described in paragraph (1).

(b) Each farm labor contractor, agricultural employer, and agricultural association which employs any seasonal agricultural worker shall, at the place of employment, post in a conspicuous place a poster provided by the Secretary setting forth the rights and protections afforded such workers under this Act, including the right of a seasonal agricultural worker to have, upon request, a written statement provided by the farm labor contractor, agricultural employer, or agricultural association, of the information described in subsection (a). Such employer shall provide, upon request, a written statement of the information described in subsection (a).

(c) Each farm labor contractor, agricultural employer, and agricultural association which employs any seasonal agricultural worker shall—

(1) with respect to each such worker, make, keep, and preserve records for three years of the following information:

(A) the basis on which wages are paid;

(B) the number of piecework units earned, if paid on a piecework basis;

(C) the number of hours worked;

(D) the total pay period earnings;

(E) the specific sums withheld and the purpose of each sum withheld; and

(F) the net pay; and

(2) provide to each such worker for each pay period, an itemized written statement of the information required by paragraph (1) of this subsection.

(d)(1) Each farm labor contractor shall provide to any other farm labor contractor and to any agricultural employer and agricultural association to which such farm labor contractor has furnished seasonal agricultural workers, copies of all records with respect to each such worker which such farm labor contractor is required to retain by subsection (c)(1). The recipient of these records shall keep them for a period of three years from the end of the period of employment.

(e) No farm labor contractor, agricultural employer, or agricultural association shall knowingly provide false or misleading information to any seasonal agricultural worker concerning the terms, conditions, or existence of agricultural employment required to be disclosed by subsection (a), (b), or (c).

(f) The information required to be disclosed by subsections (a) and (b) of this section to seasonal agricultural workers shall be provided in written form. Such information shall be provided in English or, as necessary and reasonable, in Spanish or other language common to seasonal agricultural workers who are not fluent or literate in English. The Department of Labor shall make forms available in English, Spanish, and other languages, as necessary, which may be used in providing workers with information required under this section.

WAGES, SUPPLIES, AND OTHER WORKING ARRANGEMENTS

SEC. 302. (a) Each farm labor contractor, agricultural employer, and agricultural association which employs any seasonal agricultural worker shall pay the wages owed to such worker when due.

(b) No farm labor contractor, agricultural employer, or agricultural association shall require any seasonal agricultural worker to purchase any goods or services solely from such farm labor contractor, agricultural employer, or agricultural association.

(c) No farm labor contractor, agricultural employer, or agricultural association shall, without justification, violate the terms of any working arrangement made by that contractor, employer, or association with any seasonal agricultural worker.

TITLE IV—FURTHER PROTECTIONS FOR MIGRANT AND SEASONAL AGRICULTURAL WORKERS

MOTOR VEHICLE SAFETY

SEC. 401. (a)(1) Except as provided in paragraph (2), this section applies to the transportation of any migrant or seasonal agricultural worker.

(2) This section does not apply to transportation of any migrant or seasonal agricultural worker on a tractor, combine, harvester, picker, or other similar machinery and equipment while such worker is actually engaged in the planting, cultivating, or harvesting of any agricultural commodity or the care of livestock or poultry.

(b)(1) When using, or causing to be used, any vehicle for providing transportation to which this section applies, each agricultural employer, agricultural association, and farm labor contractor, shall—

(A) ensure that such vehicle conforms to the standards prescribed by the Secretary under paragraph (2) of this subsection and other applicable Federal and State safety standards,

(B) ensure that each driver has a valid and appropriate license, as provided by State law, to operate the vehicle, and

(C) have an insurance policy or a liability bond that is in effect which insures the farm labor contractor, the agricultural employer, or the agricultural association against liability for damage to persons or property arising from the ownership, operation, or the causing to be operated, of any vehicle used to transport any migrant or seasonal agricultural worker.

(2)(A) For purposes of paragraph (1)(A), the Secretary shall prescribe such regulations as may be necessary to protect the health and safety of migrant and seasonal agricultural workers.

(B) To the extent consistent with the protection of the health and safety of migrant and seasonal agricultural workers, the Secretary shall, in promulgating regulations under subparagraph (A), consider, among other factors—

(i) the type of vehicle used,

(ii) the passenger capacity of the vehicle,

(iii) the distance which such workers will be carried in the vehicle,

(iv) the type of roads and highways on which such workers will be carried in the vehicle, and

(v) the extent to which a proposed standard would cause an undue burden on agricultural employers, agricultural associations, or farm labor contractors.

(C) Standards prescribed by the Secretary under subparagraph (A) shall be in addition to, and shall not supersede or modify, any standard under part II of the Interstate Commerce Act (49 U.S.C. 301 et seq.), or any successor provision of subtitle IV of title 49, United States Code, or regulations issued thereunder, which is, independently applicable to transportation to which this section applies. A violation of any such standard shall also constitute a violation under this Act.

(D) In the event that the Secretary fails for any reason to prescribe standards under subparagraph (A) by the effective date of this Act, the standards prescribed under section 204(a)(3a) of the Interstate Commerce Act (49 U.S.C. 304(a)(3a)), relating to the transportation of migrant workers, shall, for purposes of paragraph (1)(A), be deemed to be the standards prescribed by the Secretary under this paragraph, and shall, as appropriate and reasonable in the circumstances, apply (i) without regard to the mileage and boundary line limitations contained in such section, and (ii) until superseded by standards actually prescribed by the Secretary in accordance with this paragraph.

(3) The level of the insurance required by paragraph (1)(C) shall be at least the amount currently required for common carriers of passengers under part II of the Interstate Commerce Act (49 U.S.C. 301 et seq.), and any successor provision of subtitle IV of title 49, United States Code, and regulations prescribed thereunder.

(c) If an agricultural employer, agricultural association, or farm labor contractor is the employer of any migrant or seasonal agricultural worker for purposes of a State worker's compensation law and such employer provides worker's compensation coverage for such worker in the case of bodily injury or death as provided by such State law, the following adjustments in the requirements of subsection (b)(1)(C) relating to having an insurance policy or liability bond apply:

(1) No insurance policy or liability bond shall be required of the employer, if such workers are transported only under circumstances for which there is coverage under such State law.

(2) An insurance policy or liability bond shall be required of the employer for circumstances under which coverage for the transportation of such workers is not provided under such State law.

(d) The Secretary shall, by regulations promulgated in accordance with section 511 not later than the effective date of this Act, prescribe the standards required for the purposes of implementing this section. Any

subsequent revision of such standards shall also be accomplished by regulation promulgated in accordance with such section.

CONFIRMATION OF REGISTRATION

SEC. 402. No person shall utilize the services of any farm labor contractor to supply any migrant or seasonal agricultural worker unless the person first takes reasonable steps to determine that the farm labor contractor possesses a certificate of registration which is valid and which authorizes the activity for which the contractor is utilized. In making that determination, the person may rely upon either possession of a certificate of registration, or confirmation of such registration by the Department of Labor. The Secretary shall maintain a central public registry of all persons issued a certificate of registration.

INFORMATION ON EMPLOYMENT CONDITIONS

SEC. 403. Each farm labor contractor, without regard to any other provisions of this Act, shall obtain at each place of employment and make available for inspection to every worker he furnishes for employment, a written statement of the conditions of such employment as described in sections 201(b) and 301(b) of this Act.

COMPLIANCE WITH WRITTEN AGREEMENTS

SEC. 404. (a) No farm labor contractor shall violate, without justification, the terms of any written agreements made with an agricultural employer or an agricultural association pertaining to any contracting activity or worker protection under this Act.

(b) Written agreements under this section do not relieve a person of any responsibility that such person would otherwise have under this Act.

TITLE V—GENERAL PROVISIONS

PART A—ENFORCEMENT PROVISIONS

CRIMINAL SANCTIONS

SEC. 501. (a) Any person who willfully and knowingly violates this Act or any regulation under this Act shall be fined not more than $1,000 or sentenced to prison for a term not to exceed one year, or both. Upon conviction for any subsequent violation of this Act or any regulation under this Act, the defendant shall be fined not more than $10,000 or sentenced to prison for a term not to exceed three years, or both.

(b) If a farm labor contractor who commits a violation of section 106 has been refused issuance or renewal of, or has failed to obtain, a certificate or registration or is a farm labor contractor whose certificate has been suspended or revoked, the contractor shall, upon conviction, be fined not more than $10,000 or sentenced to prison for a term not to exceed three years, or both.

JUDICIAL ENFORCEMENT

SEC. 502. (a) The Secretary may petition any appropriate district court of the United States for temporary or permanent injunctive relief if the Secretary determines that this Act, or any regulation under this Act, has been violated.

(b) Except as provided in section 518(a) of title 28, United States Code, relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under this Act, but all such litigation shall be subject to the direction and control of the Attorney General.

ADMINISTRATIVE SANCTIONS

SEC. 503. (a)(1) Subject to paragraph (2), any person who commits a violation of this Act or any regulation under this Act, may be assessed a civil money penalty of not more than $1,000 for each violation.

(2) In determining the amount of any penalty to be assessed under paragraph (1), the Secretary shall take into account (A) the previous record of the person in terms of compliance with this Act and with comparable requirements of the Farm Labor Contractor Registration Act of 1963, and with regulations promulgated under such Acts, and (B) the gravity of the violation.

(b)(1) The person assessed shall be afforded an opportunity for agency hearing, upon request made within thirty days after the date of issuance of the notice of assessment. In such hearing, all issues shall be determined on the record pursuant to section 554 of title 5, United States Code. If no hearing is requested as herein provided, the assessment shall constitute a final and unappealable order.

(2) If a hearing is requested, the initial agency decision shall be made by an administrative law judge, and such decision shall become the final order unless the Secretary modifies or vacates the decision. Notice of intent to modify or vacate the decision of the administrative law judge shall be issued to the parties within thirty days after the decision of the administrative law judge. A final order which takes effect under this paragraph shall be subject to review only as provided under subsection (c).

(c) Any person against whom an order imposing a civil money penalty has been entered after an agency hearing under this section may obtain review by the United States district court for any district in which he is located or the United States District Court for the District of Columbia by filing a notice of appeal in such court within thirty days from the date of such order, and simultaneously sending a copy of such notice by registered mail to the Secretary. The Secretary shall promptly certify and file in such court the record upon which the penalty was imposed. The findings of the Secretary shall be set aside only if found to be unsupported by substantial evidence as provided by section 706(2)(E) of title 5, United States Code. Any decision, order or judgment of the United States District Court shall be subject to appeal as provided in Chapter 83 of title 28, United States Code.

(d) If any person fails to pay an assessment after it has become a final and unappealable order, or after the court has entered final judgment in favor of the agency, the Secretary shall refer the matter to the Attorney General, who shall recover the amount assessed by action in the appropriate United States district court. In such action the validity and appropriateness of the final order imposing the penalty shall not be subject to review.

(e) All penalties collected under authority of this section shall be paid into the Treasury of the United States.

PRIVATE RIGHT OF ACTION

SEC. 504. (a) Any person aggrieved by a violation of this Act or any regulation under this Act by a farm labor contractor, agricultural employer, agricultural association, or other person may file suit in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy and without regard to the citizenship of the parties and without regard to exhaustion of any alternative administrative remedies provided herein.

(b) Upon application by a complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action.

(c)(1) If the court finds that the respondent has intentionally violated any provision of this Act or any regulation under this Act, it may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of up to $500 per plaintiff per violation, or other equitable relief, except that (A) multiple infractions of a single provision of this Act or of regulations under this Act shall constitute only one violation for purposes of determining the amount of statutory damages due a plaintiff; and (B) if such complaint is certified as a class action, the court shall award no more than the lesser of up to $500 per plaintiff per violation, or up to $500,000 or other equitable relief.

(2) In determining the amount of damages to be awarded under paragraph (1), the court is authorized to consider whether an attempt was made to resolve the issues in dispute before the resort to litigation.

(3) Any civil action brought under this section shall be subject to appeal as provided in chapter 83 of title 28, United States Code.

DISCRIMINATION PROHIBITED

SEC. 505. (a) No person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any migrant or seasonal agricultural worker because such worker has, with just cause, filed any complaint or instituted, or caused to be instituted, any proceeding under or related to this Act, or has testified or is about to testify in any such proceedings, or because of the exercise, with just cause, by such worker on behalf of himself or others of any right or protection afforded by this Act.

(b) A migrant or seasonal agricultural worker who believes, with just cause, that he has been discriminated against by any person in violation of this section may, within 180 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this section have been violated, the Secretary shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown, to restrain violation of subsection (a) and order all appropriate relief, including rehiring or reinstatement of the worker, with back pay, or damages.

WAIVER OF RIGHTS

SEC. 506. Agreements by employees purporting to waive or to modify their rights under this Act shall be void as contrary to public policy, except that a waiver or modification of rights in favor of the Secretary shall be valid for purposes of enforcement of this Act.

PART B—ADMINISTRATIVE PROVISIONS

RULES AND REGULATIONS

SEC. 511. The Secretary may issue rules and regulations as are necessary to carry out this Act, consistent with the requirements of chapter 5 of title 5, United States Code.

AUTHORITY TO OBTAIN INFORMATION

SEC. 512. (a) To carry out this Act the Secretary, either pursuant to a complaint or otherwise, shall, as may be appropriate, investigate, and in connection therewith, enter and inspect such places (including

housing and vehicles) and such records (and make transcriptions thereof), question such persons and gather such information to determine compliance with this Act, or regulations prescribed under this Act.

(b) The Secretary may issue subpenas requiring the attendance and testimony of witnesses or the production of any evidence in connection with such investigations. The Secretary may administer oaths, examine witnesses, and receive evidence. For the purpose of any hearing or investigation provided for in this Act, the authority contained in sections 9 and 10 of the Federal Trade Commission Act (15 U.S.C. 49, 50), relating to the attendance of witnesses and the production of books, papers, and documents, shall be available to the Secretary. The Secretary shall conduct investigations in a manner which protects the confidentiality of any complainant or other party who provides information to the Secretary in good faith.

(c) It shall be a violation of this Act for any person to unlawfully resist, oppose, impede, intimidate, or interfere with any official of the Department of Labor assigned to perform an investigation, inspection, or law enforcement function pursuant to this Act during the performance of such duties.

AGREEMENTS WITH FEDERAL AND STATE AGENCIES

SEC. 513. (a) The Secretary may enter into agreements with Federal and State agencies (1) to use their facilities and services, (2) to delegate, subject to subsection (b), to Federal and State agencies such authority, other than rulemaking, as may be useful in carrying out this Act, and (3) to allocate or transfer funds to, or otherwise pay or reimburse, such agencies for expenses incurred pursuant to agreement under clause (1) or (2) of this section.

(b) Any delegation to a State agency pursuant to subsection (a)(2) shall be made only pursuant to a written State plan which—

(1) shall include a description of the functions to be performed, the methods of performing such functions, and the resources to be devoted to the performance of such functions; and

(2) provides assurances satisfactory to the Secretary that the State agency will comply with its description under paragraph (1) and that the State agency's performance of functions so delegated will be at least comparable to the performance of such functions by the Department of Labor.

PART C—MISCELLANEOUS PROVISIONS

STATE LAWS AND REGULATIONS

SEC. 521. This Act is intended to supplement State law, and compliance with this Act shall not excuse any person from compliance with appropriate State law and regulation.

TRANSITION PROVISION

SEC. 522. The Secretary may deny a certificate of registration to any farm labor contractor, as defined in this Act, who has a judgment outstanding against him under the Farm Labor Contractor Registration Act of 1963 (7 U.S.C. 2041 et seq.), or is subject to a final order of the Secretary under that Act assessing a civil money penalty which has not been paid. Any findings under the Farm Labor Contractor Registration Act of 1963 may also be applicable to determinations of willful and knowing violations under this Act.

REPEALER

SEC. 523. The Farm Labor Contractor Registration Act of 1963 (7 U.S.C. 2041 et seq.), is repealed.

EFFECTIVE DATE

SEC. 524. The provisions of this Act shall take effect on December 1, 1982, and shall be classified to title 29, United States Code.

STATEMENT OF ROBERT B. COLLYER, DEPUTY UNDER SECRETARY OF LABOR

Mr. Chairman and Members of the Subcommittee: Thank you for your invitation to appear before the Subcommittee today to describe the Administration's proposed legislation to replace the Farm Labor Contractor Registration Act (FLCRA).

The Administration's bill was developed because of concerns raised about FLCRA in the Congress and in the agricultural community among both employer and worker groups. In response to these concerns, we entered upon a cooperative effort to replace FLCRA with a new law better designed to provide needed protections for farmworkers and, at the same time, eliminate unnecessary regulatory requirements that FLCRA has placed on agricultural employers.

This cooperative effort has now resulted in a consensus bill, endorsed by the AFL-CIO, the Migrant Legal Action Program and by major agricultural employer organizations, such as the American Farm Bureau Federation, the National Food Processors Association and the National Council of Agricultural Employers. While none of these groups believes the bill to be ideal from its individual standpoint, there is important agreement that the bill materially improves the law. As a public administrator, there is no doubt in my mind that it does. Therefore, the Administration urges the Congress to give our proposal careful consideration and expedite its enactment.

Before describing our bill, I want to provide the Subcommittee with a brief background sketch of current law. FLCRA was enacted in 1964, following considerable media attention about the conditions of migrant agricultural workers. That concern was centered on crewleaders, who are the middlemen between agricultural workers and farm operators. In this capacity, crewleaders often transport agricultural workers to jobsites; they may also have some supervisory responsibility for these workers in the fields; they may act as a paymaster for the workers or furnish and maintain farmworker housing, collect rent or occasionally supply meals.

Evidence was developed at the time of the original Congressional hearings that crewleaders did not always provide these services to farm operators or to farmworkers in an honest way. The original Act was designed, therefore, to prevent exploitation by crewleaders engaged in interstate activities and to improve working conditions of migrant farmworkers who were employed by crewleaders. The Act required all farm labor contractors covered by its provisions to register with the U.S. Department of Labor and to observe certain requirements in dealing with farmworkers and farm operators.

In 1974—ten years after enactment of the original statute—Congress reviewed farmworker conditions and determined that an expansion of coverage was appropriate. These 1974 amendments to FLCRA had the effect of broadening coverage of individuals and entities other than the traditional crewleader by including any person who, for a fee for himself or another, recruited, solicited, hired, furnished, or transported any migrant worker for agricultural employment, either within a State or across State lines. One result of this broadening language was that large numbers of fixed-situs agricultural employers such as growers and processors were included as farm labor contractors and are now required to register as contractors under the Act. The situations however, under which these fixed-situs employers must register were not clearly stated in the amendments, and the exemptions from registration were even less clear.

The 1974 amendments dealt with other issues as well. For example, they eliminated the requirement pertaining to the recruitment of 10 or more workers and extended the Act's application to intrastate farm labor contracting activities. They also provided greater protection for workers injured while being transported in a contractor-owned or controlled motor vehicle, by increasing motor vehicle insurance requirements. Applicants for registration were required to have proof of a liability insurance policy equivalent to that required for vehicles transporting passengers under the Interstate Commerce Act. The amendments also strengthened the statutory enforcement machanisms.

Thus, it is clear that the 1974 amendments made several important improvements in the law, but it is also clear that the amendments created substantial uncertainty about the status of fixed-situs agricultural employers and have resulted in great numbers of these employers being treated as if they were crewleaders with no fixed addresses or financial integrity. As a result, the Labor Department's administration of the 1974 amendments with regard to fixed-situs agricultural employers has become controversial, and our efforts to register fixed-situs employers have led to a great deal of litigation.

These matters have caused substantial concern in the Congress. In late 1979, the Department received a letter signed by 52 United States Senators expressing their concern about the issues I have just discussed. In 1980, legislation passed the Senate which would have substantially amended FLCRA. Soon after the Reagan Administration took office in 1981, the Department, therefore, set out to resolve these problems. Our guiding principle, as I have stated, Mr. Chairman, was to develop consensus legislation which would provide essential protections for farmworkers within a rational statutory structure that eliminated unnecessary paperwork and reduced the constant litigation which has been the hallmark of current law. We have achieved that goal.

Now, Mr. Chairman, let me describe this consensus bill.

We are proposing a completely new statutory structure. Our proposal repeals FLCRA and creates a new law, the "Migrant and Seasonal Agricultural Worker Protection Act"—MSPA. The bill encompasses five basic principles:

First, it distinguishes between the traditional crewleader and the fixed-situs agricultural employer, eliminating the fiction that fixed-situs employers are crewleaders and thus must register as such with the Labor Department.

Second, it provides important worker protections, irrespective of whether the worker is employed by a crewleader, a fixed-situs employer or both: vehicle safety, housing safety and health requirements, disclosure of wages, hours and working conditions,

maintenance of necessary records, and provision to workers of itemized information concerning pay and withholding.

Third, the bill distinguishes between migrant workers, seasonal workers and day-haul workers. Day-haul workers are included within the seasonal worker category.

Fourth, the bill provides exemptions for both family businesses and small businesses.

Fifth, the bill deletes the ambiguous words and phrases which have caused extensive litigation under the current law.

In examining these five principles, I want to emphasize the importance of distinguishing between fixed-situs employers and traditional crewleaders. Nothing under the current law has caused more bitterness—not to mention more litigation—than the failure to do so. Under MSPA, therefore, we have excluded fixed-situs employers from the definition of farm labor contractor. Agricultural employers and associations—and the employees of both—would not be required to register as farm labor contractors or carry out the requirements designed specifically for contractors under the Act, such as being fingerprinted. However, as we have emphasized in our second principle, these fixed-situs employers and associations would be required to comply with the substantive labor protections provided in the new law when they are the employers of migrant or seasonal agricultural workers. Of course, traditional crewleaders would also be required to comply with all of these worker protection provisions and would be required, in addition, to adhere to registration requirements, such as designating the farm labor contracting activities to be performed, providing the address of their permanent place of residence, providing documentation on housing and vehicle compliance, providing a set of fingerprints, and consenting to have the Secretary accept service of summons in certain instances. Agricultural employers and associations are specifically excluded from these registration requirements which apply to farm labor contractors.

As noted in our third principle, the bill would establish two categories of covered farmworkers. The term "migrant agricultural worker" has been redefined so it includes only those farmworkers who are away from their home overnight for purposes of agricultural employment. A new category of covered worker is established, namely "seasonal agricultural worker", to include persons who are employed on a farm or ranch but do not live away from their permanent residence. A seasonal agricultural worker employed on a farm or ranch to perform field work relating to planting, cultivating or harvesting operations is covered by the bill; but the bill does not cover local "in-plant" workers who commute daily to their jobs and are not part of a day-haul operation. "Field work" would typically be hand-work such as setting out plants, hoeing, or picking, but could also include loading baskets on a truck or riding on a potato harvester to sort the potatoes. It would not, for example, include tractor drivers, operators of complex or major farm machinery or truck drivers.

The bill would fully cover day-haul workers, including those employed by canneries, processing plants and similar agricultural employers, as listed in the bill. Day-haul is defined to mean the assembly of workers at a pick-up point where they are waiting to be hired and employed, transported to the agricultural employment, and then returned to a drop-off point at the end of the same day. Experience has shown that protection is needed for day-haul agricultural workers, irrespective of whether they are living away from home, as they are often highly vulnerable individuals who can be easily subjected to abuse.

As stated in our fourth basic principle, the bill contains a separate section which enumerates various exemptions from the Act. Included are exemptions for family and small businesses. The family business exemption applies where all farm labor contracting activity is performed exclusively by the owner (or owners) or a member of the immediate family, whether or not the family business is incorporated. The small business exemption is structured to exempt those employers who are also exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act by reason of the "500 man-day" test for small agricultural employers under the FLSA.

Other exemptions in FLCRA are retained in MSPA—for example, the exemption for any custom combine, hay harvesting or sheep shearing operations. In the past, the Department has limited the custom combine exemption to grain combining. This interpretation will be continued.

The current exemption for employment of full-time students in the production of seed corn and sorghum has been clarified to include all seed production and to eliminate the four-week limitation on employment. A similar exemption has been provided for the employment of full-time students in the stringing and harvesting of shade grown tobacco.

To resolve the paradox concerning employees of otherwise exempt entities, the bill provides an exemption to ensure that employees of exempt employers are not subject to the new Act.

The exemption provision also provides a specific coverage exclusion for labor unions.

Finally, in order to deal with the potentially ambiguous situation where workers may be jointly employed by a farm labor contractor and an agricultural employer, the bill adopts the definition of the term "employ" used under the Fair Labor Standards Act (FLSA) as that term has been interpreted by the courts over the years for joint-employment circumstances. For example, under the FLSA regulations a worker may be an employee of two or more employers. That determination is based on the facts of the individual case. Joint employment includes situations where there is an arrangement between employers to share the service of an employee or where one employer is acting directly or indirectly in the interest of another employer in relation to the employee. For example, crew members would be considered jointly employed by the labor contractor and farmer if the crewleader assembles a crew and brings them to the farm, and the farmer exercises the power to direct, control or supervise the work or to determine the pay rates and the methods of payment.

Our goal in dealing with "joint employer" issues was very simple: if a fixed-situs agricultural business "employs" a covered farmworker for FLSA purposes, it also "employs" that farmworker for MSPA purposes. The exact same principles will be used to define the term "employ" in MSPA "joint employment" situations as are used under FLSA.

As a related matter, the current definition of "agricultural employment" in the FLCRA would be retained under the new law.

Now, Mr. Chairman, I would like to describe the employer responsibility and worker protection provisions in the bill. Title I of the bill establishes the basic obligations of farm labor contractors—traditional crewleaders—beginning with the requirement that they be registered with the U.S. Department of Labor. There is a clear statement in the bill that this title will not apply to other types of agricultural employers or agricultural associations. The registration of employees of farm labor contractors who perform farm labor contracting activities for their employer remains unchanged. We intend that contractors should be fully responsible for the farm labor contracting activities of their employees.

Title II of the bill sets out the specific protections for migrant agricultural workers—those working away from their permanent residence. Title III sets out specific protections for seasonal workers. Title IV sets out protections for both.

For migrant workers, information about wages and working conditions must be provided in writing at the time of recruitment. For seasonal workers this basic information must be available, upon request, at the time employment is offered. Employers are required to keep certain payroll records, and employees must be given an itemized statement of earnings and deductions for each pay period. Each employer is also required to post at the place of employment a poster which sets forth the rights of workers under the Act, such as wage rates, period of employment, crops and activities on which the worker will be employed, the existence, if any, of a strike or work stoppage at the place of employment, and the right of a worker to have, upon request, a written statement pertaining to work and conditions of work. When there is joint employment, compliance by either employer will satisfy any requirement.

The bill also would expand the protections related to housing for migrant agricultural workers. For example, when more than one entity is involved in providing the housing, such as when the grower owns it and the farm labor contractor operates it, both will be responsible for the safety and adequacy of the housing. This is a significant change from the present law which fixes responsibility only on the farm labor contractor who may or may not own the housing. Substantive Federal and State housing health and safety standards must be complied with at all times. The bill provides for State and local health authorities to certify that the housing meets these standards based on inspection prior to occupancy. The bill, however, also provides sufficient enforcement flexibility so that employers will not be cited for mere technical or non-substantive violations that do not impact worker safety and health.

An exemption to the housing requirement is provided for hotels and motels that may provide accommodations to migrants and others in the general course of doing business. We do not, of course, intend that migrant labor camps would qualify for this "innkeeper exemption" simply by offering lodging to the general public.

The MSPA transportation provisions differ in several respects from the current FLCRA. MSPA recognizes that standards now in place under the Interstate Commerce Act are not always appropriate with respect to transportation of agricultural workers under certain circumstances, particularly on farms and for other local travel. The bill directs the Secretary to develop regulations that will apply to the transportation of farmworkers not covered by De-

partment of Transportation regulations. The Department of Labor regulations will take into account the distances traveled, the type of vehicle used, the number of passengers, the types of roads to be traveled and the extend to which any standards would impose an undue burden on the person providing the transportation, while continuing to provide for the health and safety of migrant and seasonal agricultural workers.

The transportation standards will not be applied to farm equipment or machinery when used for its intended purpose, but use of such equipment or machinery purely for the transportation of workers from place-to-place will be regulated. The vehicle insurance requirement of the current FLCRA will be retained, except that no additional insurance will be required where transportation is fully covered by a State workers' compensation law and the employer provides such coverage.

The bill prohibits the using of services of a farm labor contractor without first taking reasonable steps to determine that a contractor is properly registered. Unlike the current law, the bill would not penalize farmers who do take those reasonable steps.

The enforcement provisions of the bill retain FLCRA's civil and criminal penalties, and the investigative authority of the Department of Labor. A new provision makes it unlawful to interfere with officials of the Department in the performance of their duties under the bill. This section has been added as a result of the increasing number of incidents involving threats of bodily harm to our compliance officers.

The bill would change the current Act's provisions on private rights of action. It is our basic intent to encourage resolution of differences without resorting to litigation, while retaining full access to the Federal courts by injured private parties. Currently, however, FLCRA exposes employers to substantial monetary awards for highly technical violations, especially those related to registration status, when there may be very little actual damages. Where an intentional violation of the Act has been committed, the bill would allow courts to award up to $500 per plaintiff, per violation, as statutory damages in a private lawsuit with an upper limit of $500,000 for a class action. However, there is no limit on the amount of actual damages that can be awarded by a court.

Multiple infractions of a single provision, however, would be counted as only one violation. For example, failure to keep accurate hours-worked records over a period of several weeks would be considered one violation for each worker involved. In determining the amount of damages, the Federal courts are authorized to consider whether an attempt was made to resolve the issues in dispute before resorting to litigation. The provision in the bill prohibiting individuals from waiving their rights is not intended to preclude their entering into settlements under the private right of action section in order to avoid litigation and reach resolution.

The bill also retains the current FLCRA provision prohibiting discrimination with respect to individuals who have filed a complaint or have testified in any proceeding under the Act. The Secretary of Labor will continue to have authority to investigate complaints alleging such discrimination and may seek redress in the Federal courts. The bill expands upon the provision of the FLCRA allowing for agreements with Federal and State agencies in order to ensure that those functions delegated, especially to the States, are performed with adequate resources and in a manner comparable to Federal enforcement efforts.

There will, of course, be the matter of the transition from the application of the current statute to the new one. With regard to enforcement and compliance, the bill provides that for the purposes of determining appropriate action under the new law, the record of violations under the current FLCRA will be a factor to be considered if that individual or entity violates this Act.

Certificates of registration may be denied under this bill if the applicants under FLCRA have either failed to pay their court judgments obtained under FLCRA or failed to comply with a final order issued by the Secretary under FLCRA. Registration under the new Act will also require a phase-in. It is our intention to use a 12-month period for each certificate of registration based on the applicant's date of birth rather than the current calendar year method which creates an unnecessary administrative burden upon the Department at the close of each calendar year.

Mr. Chairman, in concluding my statement, I want to reemphasize two major points. First, the revised farm labor statute that we are proposing today greatly enhances the Labor Department's ability to protect migrant and seasonal agricultural workers. Second, the bill eliminates the unnecessary, burdensome and costly regulation of fixed-situs agricultural employers which has been so troublesome under current law. Enactment of the bill will, therefore, enable the Department to concentrate its enforcement efforts on those areas of farmworker employment where the most egregious violations of workers' rights occur.

I also want to again thank all those persons and organizations who participated in the cooperative effort over the past 18 months to develop this legislation. Without their thoughtful assistance—not to mention their vigorous advocacy—we would not be here, today.●

By Mr. GORTON (for himself and Mr. JACKSON):

S. 2931. A bill to provide for the disposition of funds appropriate to pay a judgment in favor of the Cowlitz Tribe of Indians in Indian Claims Commission docket No. 218 and for other purposes; to the Select Committee on Indian Affairs.

DISPOSITION OF COWLITZ INDIAN JUDGMENT FUNDS

● Mr. GORTON. Mr. President, today I am pleased to introduce a bill that will provide for the disposition of funds appropriate to pay a judgment in favor of the Cowlitz Tribe of Indians in Indian Claims Commission docket No. 218.

The bill provides for the distribution of money which was appropriated to the Cowlitz Tribe and its members more than 9 years ago. The money is in compensation for the taking by the Federal Government more than 100 years ago of the tribe's aboriginal lands which today constitute several counties in the State of Washington.●

ADDITIONAL COSPONSORS

S. 2309

At the request of Mr. CHAFEE, the name of the Senator from Wyoming (Mr. SIMPSON) was added as a cosponsor of S. 2309, a bill to amend the Endangered Species Act of 1973, to authorize funds for fiscal year 1983, and for other purposes.

S. 2837

At the request of Mr. GARN, the name of the Senator from Texas (Mr. TOWER) was added as a cosponsor of S. 2837, a bill to unify the export administration functions of the U.S. Government within the Office of Strategic Trade, to improve the efficiency and strategic effectiveness of export regulation while minimizing interference with the ability of engage in commerce, and for other purposes.

S. 2902

At the request of Mr. THURMOND, the name of the Senator from Florida (Mrs. HAWKINS) was added as a cosponsor of S. 2902, a bill to define the affirmative defense of insanity and to provide a procedure for the commitment of offenders suffering from a mental disease or defect, and for other purposes.

SENATE JOINT RESOLUTION 220

At the request of Mr. QUAYLE, his name was added as a cosponsor of Senate Joint Resolution 220, a joint resolution to authorize the erection of a memorial on public grounds in the District of Columbia to honor and commemorate members of the Armed Forces of the United States who served in the Korean war.

SENATE CONCURRENT RESOLUTION 122—CONCURRENT RESOLUTION RELATING TO AGRICULTURAL EXPORTS

Mr. PERCY (for himself, Mr. BURDICK, Mr. HELMS, Mr. LUGAR, Mr. NUNN, Mr. QUAYLE, Mr. GRASSLEY, Mr. PRESSLER, Mr. DIXON, Mr. SASSER, Mr. HUDDLESTON, Mr. BOSCHWITZ and Mr. ABDNOR) submitted the following concurrent resolution; which was referred to the Committee on Finance:

S. CON. RES. 122

Whereas without ignoring other concerns in the trade field, the American economy urgently needs the stimulus of increased agricultural markets to create jobs, increase personal income, improve our balance of payments position, and broaden and expand the tax base for needed Government revenue; and

Whereas the efficient productivity of the agricultural sector provides one of the greatest opportunities for such expanded exports; and

Whereas it is in the best interest of American agriculture and economy that export expansion include processed, as well as unprocessed agricultural products; and

Whereas export of value-added processed agricultural products has not shared proportionately in the growth of world demand for

such products as has the export of unprocessed products; and

Whereas economic studies by the United States Department of Agriculture show export value-added agricultural products creates a great multiplier of economic benefits in terms of jobs and income and increased revenue to the Government; and

Whereas expanding exports of such value-added processed agricultural products increases Government revenues from the broadened tax base of the resulting stimulated economy and increase in employment and personal income; now, therefore, be it

Resolved, by the Senate (the House of Representatives concurring), That it is the sense of this Congress that the President should take every possible action to encourage increasing the processed product share of United States agricultural exports, including but not limited to:

(1) Urging our negotiators to attempt to include a quantity of value-added processed agricultural products in any further extension or renewal of grains agreements with the Soviet Union, or other non-market economy countries;

(2) Seeking the elimination of unfair trade practices by foreign competitors, through vigorously pursuing international trade negotiations to assure fair competition for United States agricultural processors in world markets;

(3) Utilizing the authority of Public Law 480 to encourage inclusion of a greater share of processed products under both title I concessional sales and title II food aid programs; and

(4) Utilizing authorities of the Commodity Credit Corporation of the United States Department of Agriculture and the Export-Import Bank to ensure that credit arrangements for agricultural and agricultural product exports are on terms equal to those offered by other countries to assure fair competition.

Mr. PERCY. Mr. President, I send to the desk a concurrent resolution on behalf of myself and Senators BURDICK, HELMS, LUGAR, NUNN, QUAYLE, GRASSLEY, PRESSLER, DIXON, SASSER, and HUDDLESTON, and ask for its appropriate referral.

The PRESIDING OFFICER. Is there objection to the unanimous-consent request? Without objection, the concurrent resolution will be appropriately referred.

Mr. HELMS. Mr. President, I wonder if the Senator from Illinois will be willing to yield to me.

Mr. PERCY. I yield.

The PRESIDING OFFICER. The Senator from North Carolina.

Mr. HELMS. Mr. President, I join with the Senator from Illinois in urging the distinguished majority leader to act promptly on this resolution. At the same time, I think it would be appropriate for us to take note of the remarkable efforts by the distinguished Secretary of Agriculture, one of Senator PERCY's fellow Illinoisans, who has dedicated a tremendous amount of his time to this problem. He has traveled the world over urging purchases of American products.

Mr. President, the distinguished Senator from Illinois is exactly right. For a long time, we have engaged in a bipartisan folly of not pressing the interests of the U.S. farmers and workers in terms of exports. We have, too often, as the saying in North Carolina goes, taken a "dumb pill" each morning on this question. We have let other countries ride roughshod over us. It is time for the United States to exercise some backbone. Jack Block is doing that and Bill Brock is doing that. The President of the United States, as recently as Tuesday of this week, gave absolute assurance to a group of us who went there on an identical problem relating to textiles.

I commend the Senator from Illinois on his fine statement, and I join with him wholeheartedly in the legislation that he is offering. I thank him very much for allowing me to be a cosponsor.

Mr. PERCY. Mr. President, I am delighted that the chairman of the Committee on Agriculture, Senator HELMS is in the Chamber. A growing number of American businessmen in the community from which I come, labor leaders and policymakers, are concerned about increasing U.S. exports of processed agricultural products because of the sizable potential economic benefit which could be realized if a greater proportion of our agricultural exports were processed or finished at home.

My colleague, Senator BURDICK, and I are submitting a Senate concurrent resolution which expresses the sense of Congress that the President should take every possible action to encourage the increase of U.S. exports of processed or value-added agricultural products.

The American food system is a mainstay of the U.S. economy, accounting for 20 percent of the gross national product (GNP), 23 percent of all U.S. employment, and 19 percent of all U.S. export earnings. America's agribusiness is the largest contributing factor to the U.S. balance of payments. Its economic benefits extend far beyond the farm into farm supply industries, food processing distribution, and other agribusiness. These processing and service activities, accompanying the flow of agriculture commodities from farm to consumer, directly raise U.S. employment and income.

Agricultural exports are vital to the economic health of this Nation. It is only appropriate that we capitalize on our abundance to insure that the maximum economic benefits are being generated to the U.S. economy.

As one of our distinguished Senators said to us yesterday, and I believe Senator HELMS might have been in the room at the time, there are three principal issues facing this country: jobs, jobs, and jobs. That is all I will hear about when I go to Illinois this afternoon. I am sure it is what the distinguished Senator from North Carolina hears about every time he returns, as he does so frequently, to North Carolina.

This is what our job is, to create jobs in the United States of America, and we can, through the proposal that we will be making, a number of us, in this resolution.

I am delighted that the chairman of the Agriculture Committee, Senator HELMS, is a cosponsor of this concurrent resolution.

Encouraging exports of processed or value-added commodities makes sound economic sense. According to a U.S. Department of Agriculture study, if even 10 percent of current raw exports of wheat, corn, and soybeans were shipped as processed products, the GNP would increase by nearly $16 million, personal income would rise by over $3 billion—that personal income would go just where it is most needed—and more than 300,000 new U.S. jobs would be created.

Our colleague in the House, Congressman TIP O'NEILL, the Speaker of the House, is introducing a measure which would cost the American taxpayer $1 billion. It would create 200,000 dead-end jobs. In other words, they are made jobs. They are Government jobs. There is no guarantee they will continue unless we continue to put more billions into those jobs.

Here is a proposal that will create 300,000 new U.S. jobs. They will be continuing jobs. They will be jobs that will create income that can be taxed both at the personal and the corporate level.

This proposal, we think, is a fundamentally sound proposal in line and in keeping with the philosophy of this administration that private sector jobs, not public sector jobs, are the most important thing.

As a last resort, you can always consider that, but we have not gone to the last resort because there are many things that can be done.

I might add that by encouraging exports of value-added agricultural commodities, this legislation does not seek to decrease U.S. exports of raw materials; rather, the goal to increase value-added exports is an additional effort to enhance and expand U.S. export markets to insure that processed food products share in the future growth of food exports.

Last year I was pleased to help launch the Export Processing Industry Coalition (EPIC). EPIC is a unique coalition uniting labor and industry to strengthen the American agricultural processing and export economies.

The cross-section of support EPIC has received is an indication of the urgency of the resolution we are submitting today.

The organizations that are supporting this resolution include:

National Association of State Departments of Agriculture;

National Governors' Association;

Poultry and Egg Institute of America;

American Farm Bureau Federation;

Wine Institute;
American Association of Port Authorities;
Potato Chip/Snack Food Association;
National Cattlemen's Association;
Protein Grain Products International;
Western Great Lakes Maritime Association;
North Dakota Agricultural Products Utilization Commission;
National Broiler Council;
Food Processing Machinery and Supplies Association;
Rice Millers Federation;
National Turkey Federation;
National Farmers Organization;
National Conference of State Legislatures;
Independent Bankers Association;
National Rural Electric Cooperative Association; and
National Sunflower Association.

At a time when our markets for raw agricultural products have been reduced, we must think of innovative ways of marketing our agricultural abundance overseas.

We have quality products that can benefit consumers in both the developed and lesser developed countries. In the past, we have placed a low priority on the establishing of our presence in these markets for processed or value-added food. By value-added, I simply mean improving the quality of the product as it moves from farm to market. In Illinois, for instance, value-added processors have added billions of dollars to the State economy. As an example, the sugar and confectionary industry in Illinois employ 160,900 employees and generates $674 million in income, according to the latest census data. Yet candy manufacturers have to overcome a variety of tariff and nontariff barriers, when they try to expand their markets overseas.

Let us just take, for instance, the second industrial giant in the world, the economy of Japan, the second most powerful economic nation on Earth. Yet here they are, after we had given a tremendous amount of help in the postconstruction period, after the war—here they are protecting—what do they call it, an infant industry?

Candy manufactured in Illinois is subject to a 7-percent tariff or duty at our borders. We let in candy from all over the world, including Japan, Switzerland, and other countries, and charge 7-percent duty, which is not a protective tariff at all. It is an income-bearing measure.

What does Japan do? Thirty-one percent. What if we put a 31-percent duty on automobiles? You would not have Datsuns, you would not have Toyotas, driving around our streets. We would just shut them off.

That is why a wave of protectionism is going through these Chambers, the House and the Senate, and across this country.

The House and the Senate, across this country—I have never heard so much anti-Japanese talk as I have on the trade issue. They must recognize this. A Los Angeles Times survey, a nationwide survey released just a few days ago, indicated that Americans feel imports are one of the greatest causes of lost jobs and the depressed economy in the United States today. That means we all have to stop, look, and listen, all of our friends, and I speak to Japan as a friend.

I have been a friend of Japan since the war. We have worked together. I have manufactured in Japan, we have shipped to it and bought from it. I have led the fight for years in industry and here to have an era of freer trade. But we certainly cannot countenance a disparity of 7 percent and 31 percent and try to say that we have fairness in trade today.

Processed meats offer another promising area for exports, yet our processors are faced with rigid sanitary requirements that go beyond commonly accepted health standards in the United States.

In some cases, in order to sell specialty foods in certain European countries, the vendor must belong to a particular trade association. For U.S. manufacturers, this is an impossibility because membership is only open to domestic firms in those countries. Therefore, U.S. firms are effectively excluded from the marketplace.

The list of these nontariff barriers is quite long. To keep the trade lanes open, it is critical that nations that export processed food items to the United States understand that they must give equal treatment to processed food items from the United States. The supermarkets of America are bulging with wine, cheeses, crackers, distilled water, and other specialty food items from other countries, yet it has been pointed out that it is very difficult to locate a U.S.-origin processed product on a supermarket shelf in those countries that sell to us.

Almost a year ago, I announced the formation of EPIC at a Senate hearing in Urbana, Ill. Urbana is right in the heart of east central Illinois, where raw corn and soybeans are processed into such valuable byproducts as high fructose corn sweeteners, ethanol, soybean meal and oil, starch, corn gluten feed, and distillers dried grains.

We must begin a well-organized program, utilizing all sectors of the economy, to export these and other products to potential buyers. There are a number of ways that the public and private sectors can work together to accomplish this. For example, I commend the actions taken by the National Soybean Processors Association in educating Soviet agricultural officials on the benefits of soybean meal. Instead of waiting for the Soviets to show interest in this value-added product, NSPA officials have traveled directly to Moscow to provide personal briefings. This is the type of direct industry marketing effort that is required to get the message out about the benefits of value-added products. I would like to see it supplemented by the Government making the sale of soybean meal and other protein feed ingredients a part of any new grain agreement with the Soviet Union.

I ask unanimous consent to print a statement on value-added exports that was made by Mr. Larry Werries, director of the Illinois Department of Agriculture. Mr. Werries describes the promise of value-added exports and some of the major obstacles that must be removed if the United States is to market processed foods in overseas markets.

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

STATEMENT OF ILLINOIS DEPARTMENT OF AGRICULTURE, MR. LARRY A. WERRIES, DIRECTOR, BEFORE THE SUBCOMMITTEE ON ENERGY, NUCLEAR PROLIFERATION AND GOVERNMENT PROCESSES, U.S. SENATE, OCTOBER 16, 1981

The vital importance of American agricultural products in world trade is well-known, especially in regard to raw commodities such as wheat, feed grains, and soybeans. American agricultural exports have grown to more than $40 billion, generating new demand for farm products and income for farmers, and greatly offsetting America's negative balance of trade. In 1981, anticipated agricultural exports of $46 billion are expected to create $94 billion of activity throughout the United States economy, and jobs will be provided for 1.2 million full-time equivalent workers.[1]

This hearing focuses on the increasingly protectionist moves of the European Economic Community (EEC) against processed agricultural products from the United States. Since the particular products in question are soybean oil and corn gluten meal, the immediate impacts of protectionist moves against these products will be felt in the Illinois economy. The Illinois Department of Agriculture is concerned about expanding international agriculture trade, and supports open access to markets such as the EEC.

Since the particular questions in regard to soybean oil and corn gluten meal are being addressed in other testimony; I would like to discuss the importance of value added exports in general. In spite of impressive export figures, the question can always be asked, "Are we fully exploiting our competitive advantage in production of food and agricultural products?"

It has been the posture of the Illinois Department of Agriculture for several years to support the concept that the United States take fuller advantage of world demand for our food and agricultural products. The Illinois Department of Agriculture developed and maintained a program of services to aid farmers, agribusinesses and food processors in exporting their products. This program continues to serve the needs of large and small exporters of agricultural products from Illinois.

Illinois is a populous and industrialized state, and is also the leading agricultural export state, ranking first in exports of feed grains, soybeans, protein meals, and soybean oils. Economic activity resulting from agricultural exports greatly benefit this state's economic health.

Almost all of the agricultural products exported from the United States undergo a series of processing steps before reaching the ultimate consumers. Economic activity resulting from these processes is substantial. The theoretical gains to be had from further processing of our agricultural products will be more farm income and industry revenues, higher employment, and economies of scale in agricultural processing. Much of the marketing effort by state departments of agriculture, along with federal and regional groups, has been to support value added exports. While raw agricultural commodities are exported by relatively few, highly competent and efficient companies, the processing of agricultural commodities into a tremendous array of products is carried on by thousands of firms. The Illinois Department of Agriculture facilitates exports from any of these sources.

Few attempts have been made to quantify the domestic economic and employment benefits that are implied by adding more value to our agricultural exports. Social, political, and economic trade realities greatly affect the attainment of our potentials.

By looking at the Illinois census data from 1977, one can see the importance of value added by manufacture of agricultural products to the state's economy. The following table [2] summarizes some of this activity for domestic and export consumption:

Illinois industry	Total number of establishments	Total number of employees [1]	Value added by manufacturer [2]
Food and kindred products	1,270	103.9	4,725.6
Meat products	218	14.6	426.9
Dairy products	154	6.6	340.8
Preserved fruits and vegetables	119	10.8	456.4
Grain mill products	146	14.4	921.8
Bakery products	173	16.1	584.6
Sugar and confectionary	93	16.9	674.2
Fats and oils	51	5.3	194.2
Beverages	142	10.9	717.5
Miscellaneous	174	8.2	409.1

[1] Times 1,000.
[2] Times dollars in millions.

These data give an indication of the absolute size of the food products manufacturing activity in Illinois without showing any trends or analysis of its effect on exports.

Schluter and Clayton recently developed a net agricultural exports model that isolated the differential impacts of processed products, and they were able to present some preliminary estimates of the economic activity and employment associated with exports of raw versus processed agricultural commodities.[3] They concluded that certain sizable benefits do exist for the United States economy and employment situation from having a greater proportion of processed products in our agricultural export mix. Both direct and indirect advantages result from exporting processed commodities, since an export market is enlarged for the services required to assemble, process, and distribute the processed products. Greater employment prospects and new disposable income generated have indirect impacts on the economy, seen as a sequence of economic activity in the demand chain.

Table 2 shows a summary of Schluter's and Clayton's work with examples of the effects of processing on three economic indicators.

Net increases in gross output, employment, and income reflects a range of impacts from exporting certain processed products in place of the raw commodities. Dressed poultry exported in place of corn has considerably greater impact than the differential between raw and processed soybean exports.

Schluter and Clayton point out that due to the usual location of processing plants near the sources of raw commodity supplies, the net effects of exporting processed products tends to be concentrated in the same regions as the effects of exporting the raw products. New expansions of processing capacity could cause some regional shifts.

Problems are encountered with attempts to change the proportion of processed products in the agricultural export mix.

External factors are very important in determining the nature of United States agricultural exports including: (1) trade and agricultural policies of major importing and exporting countries, (2) level of agricultural production, (3) the pace of economic activity, (4) demographic trends, (5) the international exchange value of the United States dollar, and (6) market acceptance of processed products.[4]

An increasing number of countries today pursue policies that are designed to stimulate high levels of agricultural production and to encourage the development of their own domestic processing industries. The desire for food self-sufficiency, for favorable balances of payment situations, and for domestic employment and income benefits provide the impetus for countries to develop a variety of policies for price and income support, for resource use, and for new technologies. Various degrees of governmental intervention in foreign trade have developed and are increasing, serving to insulate national food and agricultural sectors from foreign competition. Policies that keep agricultural prices above world market levels can be maintained only by restricting the terms of entry of competitive products through tariff and nontariff barriers.[5] In general, trade barriers are lower for products that serve as inputs to a further stage of processing i.e., raw commodities. A variety of nontariff barriers also are faced by United States agricultural exporters; licensing, state valuations, state trading, special duties on imports for port improvement, special standards, and health regulations.[6] As a leading export state and a major processing state, Illinois is very vulnerable to increased trade barriers.

By nature, further processing diversifies and expands the product mix offered for export. By purchasing value added products, additional demands are often placed on a country's limited foreign exchange earnings. Market demand is more selective and complex requiring more sophistication in meeting those demands, however, a country can derive long-term benefit from processed product imports. For example, if the Soviet Union were to import more protein concentrates, such as soybean meal, their ration formulations in animal feeds could be less dependent on imported feed grains.

External factors are not alone in holding down growth of processed agricultural product exports. Domestic considerations also influence American ability to increase the proportion of processed products in the export mix. Processed products require greater marketing efforts and expenditures per unit of sales than do raw materials, so incentives for individuals or firms to pursue these markets must be greater. Profit potential and long-term market consistency are necessary to our exporters. Continued expansion of our exports in processed agricultural products requires more investments in transportation and infrastructure to handle more specialized and diverse products. Small, medium, and large sized processors require the availability of credit and export aids. Increased processed food exports mean a greater need for qualified international marketing people. To commit the necessary resources, United States firms must see open market opportunities that will not be constantly threatened by new restrictions, external or domestic.

The agricultural community is concerned today about declining farm prices, in the face of rising interest rates. A stronger dollar is reflected in higher prices overseas for our agricultural products. Perhaps it is time to reevaluate some of our strategies and policies for international agricultural trade. In the present climate, it is unlikely that any massive new supports or subsidies will be instituted for American agricultural exports.

The United States has always been at a psychological disadvantage in international trade, simply because we are blessed with a huge domestic market and have not been forced to acquire international trade skills or to develop a coherent, long-term agricultural trade policy. Times have changed. In the past couple of decades, the United States has taken an ever greater role in world agricultural trade. Consequently, we have become more vulnerable to the fluctuation of world markets and changes in trade restrictions.

As a first step toward realizing our potential, farmers, businessmen, labor, promotional organizations, and government must come together to lobby for national agricultural export policies. A favorable export credit policy, providing competitive credit terms that are accessible to all exporters, would encourage more export activity. Production and investment in processing could be encouraged through tax incentives for exporting. Tax incentives that are competitive with other major exporting nations would encourage more companies to hire American personnel for their overseas positions, and would encourage more companies to acquire international trade management expertise. American firms need the management skills that will enable them to put their international marketing efforts on a par with their domestic efforts.

We wish to adhere as much as possible to the principles of free trade. American agricultural policies should insure American reliability as a supplier and should institute some systematic measures that would discourage protectionist actions overseas. If our buyers and competitors were certain that their actions would be followed by an American reaction, perhaps the doors would open more widely to the vast array of American food and agricultural products.

Finally, marketing efforts, especially in the case of processed products, are of paramount importance. Orders will not fall in our laps without first perceiving the needs of the world's diverse customers and marketing our products to them in a way that will provide the buyers with clear benefits. Systematic and readily available market research is necessary for up-to-date information on market potentials, buyers, and trade barriers.

Export promotion are presently carried on at several levels; industry and industry groups, commodity associations, chambers of commerce, and federal, state, and municipal government programs. Each of these efforts needs the support of the others to define their functions, avoid duplication of services, and to develop reliable supplier-overseas buyer relationships.

TABLE 2.—NATIONAL NET EFFECTS OF RAW VERSUS PROCESSED EXPORTS [1]

[Dollars in millions]

	Gross output			Gross employment (workers)			Personal income		
	Raw product	Processed product	Net change	Raw product	Processed product	Net change	Raw product	Processed product	Net change
Flour for wheat	$5.42	$14.26	$8.84	143	335	192	$1.54	$3.45	$1.91
Dressed poultry for corn	5.32	50.22	44.90	147	1,300	1,153	1.40	10.69	9.29
Soybean oilmill products for soybeans	5.21	8.00	2.79	135	183	48	1.48	1.91	.43
Cottonseed mill products for cottonseed	5.61	13.28	7.67	209	372	163	1.36	2.96	1.60
Wet corn milling products for corn	5.32	14.21	8.89	147	337	190	1.40	3.37	1.97

[1] Based on million dollars in sales of raw commodity exports and equivalent amount of processed product.

FOOTNOTES

[1] Gerald Schluter and Kenneth C. Clayton, "Expanding the Processed Product Share of U.S. Agricultural Exports", ERS Staff Report No. AGESS 810701, National Economies Division, ERS, USDA, Washington, D.C., July 1981, Pg. 2.

[2] U.S. Department of Commerce, Bureau of the Census, 1977 Census of Manufactures, Geographic Area Series, Illinois, Table 5, "Statistics by Selected Industry Group and Industry for the State: 1977 and 1972", Pg. 14-13.

[3] Stephen C. Schmidt, "International Trade and Illinois Agriculture", AERR 166, Department of Agricultural Economies, University of Illinois, Urbana, Illinois, September 1979, Pg. 18.

[4] Ibid, Pg. 22.

[5] Ibid.

[6] G. Schluter & K. C. Clayton, Pg. 3.

Mr. PERCY. I thank my colleague very much. It would have sounded parochial if I had, once again, lauded the distinguished Secretary of Agriculture, Jack Block, who was formerly Secretary of Agriculture of Illinois under Governor Thompson. I was with him last Sunday, and with the Governor. I agree that he has been absolutely outstanding in protecting the interests of agriculture and also looking after the value that we can contribute to the economies of the world.

When I say that, I mean that, in Japan, they pay 70 percent more for food—every Japanese, on the average, pays 70 percent more than the people of New York, primarily because of the protectionist policies imposed upon them by 10 percent. That means the other 90 percent are paying the bill and reducing their standard of living and increasing their cost of living. Jack Block is just trying to point out around the world that the great abundance of American agriculture can bring down the cost and improve the quality of life for all over the world if we just have access to markets and if they would not try to protect those markets in such a way that they protect inefficiency.

We should reward efficiency all over the world. Certainly, we are a model—agriculture is the clearest demonstration we have that the Communist system has failed in the most basic thing mankind has tried to do for itself, just feed itself. Communism has failed miserably in that regard. We have such an abundance that we produce for ourselves and then export more than all other countries combined and still have abundance left over. It is to get that left over out to people so that a billion people do not go to bed hungry at night, that they have access to this food, that we are trying to work together.

I appreciate very much the way in which the distinguished chairman of the Committee on Agriculture has worked so closely with the Secretary of Agriculture in working for the American farmer. Not just the farmers of North Carolina—they are really protected by my distinguished colleague. All the farmers in this country owe him a debt of gratitude for what he has done.

Mr. HELMS. I thank the Senator.

SENATE RESOLUTION 468—RESOLUTION TO PAY TRIBUTE TO EARL WEAVER

Mr. MATHIAS (for himself and Mr. SARBANES) submitted the following resolution; which was considered and agreed to:

S. RES. 468

Whereas Earl Weaver, manager of the Baltimore Orioles for the past 13½, years, has led the Birds to six eastern division championships, four American League pennants and one world championship, and

Whereas Earl's won-lost percentage ranks third on the all time list, and he is tied with the Yankees' great Joe McCarthy and trails only the immortal Connie Mack in winning 100 games or more per season, and

Whereas Earl's intensity for inspiring Oriole victories by feisty finagling and limitless legerdemain has won the unflagging support of Oriole fans and the ire of umpire and opponent, and

Whereas Earl has achieved distinction in alternate careers as author, Shakespeare scholar and nurturer of prize Maryland tomatoes, which in yonder bullpen groweth, and

Whereas Earl has managed the same team for a longer period than any current manager: Now, therefore, be it

Resolved, That the United States Senate wishes to honor and pay tribute to Earl Weaver on the occasion of "Thanks Earl Day" Sunday, September 19, 1982, at Memorial Stadium, Baltimore, Maryland.

SEC. 2. The Secretary of the Senate shall transmit a copy of this resolution to Earl Weaver.

AMENDMENTS SUBMITTED FOR PRINTING

TEMPORARY EXTENSION OF PUBLIC DEBT LIMIT

AMENDMENT NO. 3279

(Ordered to be printed and to lie on the table.)

Mr. SYMMS (for Mr. HATCH, for himself, Mr. SYMMS, Mr. EAST, Mr. DENTON, Mr. BOREN, and Mr. ZORINSKY) submitted an amendment intended to be proposed by them to the joint resolution (H.J. Res. 520) to provide for a temporary increase in the public debt limit.

AMENDMENT NO. 3280

(Ordered to be printed and to lie on the table.)

Mr. SYMMS (for himself, Mr. RANDOLPH, Mr. STAFFORD, and Mr. BENTSEN) submitted an amendment intended to be proposed by them to the joint resolution (H.J. Res. 520), supra.

AMENDMENT NO. 3281

(Ordered to be printed and to lie on the table.)

Mr. SYMMS (for himself, Mr. ABDNOR, Mr. ANDREWS, Mr. ARMSTONG, Mr. BENTSEN, Mr. BOREN, Mr. BOSCHWITZ, Mr. CANNON, Mr. CHILES, Mr. COCHRAN, Mr. COHEN, Mr. D'AMATO, Mr. DANFORTH, Mr. DECONCINI, Mr. DENTON, Mr. DOLE, Mr. DOMENICI, Mr. EAST, Mr. GARN, Mr. GOLDWATER, Mr. GRASSLEY, Mrs. HAWKINS, Mr. HAYAKAWA, Mr. HEFLIN, Mr. HELMS, Mr. HOLLINGS, Mr. HUDDLESTON, Mr. HUMPHREY, Mr. JEPSEN, Mr. JOHNSTON, Mr. KASTEN, Mr. LAXALT, Mr. LONG, Mr. LUGAR, Mr. MCCLURE, Mr. MATTINGLY, Mr. MELCHER, Mr. MURKOWSKI, Mr. NICKLES, Mr. NUNN, Mr. QUAYLE, Mr. PRESSLER, Mr. PRYOR, Mr. RANDOLPH, Mr. ROTH, Mr. SASSER, Mr. SCHMITT, Mr. STEVENS, Mr. THURMOND, Mr. WALLOP, Mr. WARNER, Mr. ZORINSKY, and Mr. RUDMAN) submitted an amendment intended to be proposed by them to the joint resolution (H.J. Res. 520), supra.

AMENDMENT NO. 3282

(Ordered to be printed and to lie on the table.)

Mr. SYMMS (for himself, Mr. ABDNOR, Mr. ANDREWS, Mr. ARMSTRONG, Mr.

BENTSEN, Mr. BOREN, Mr. BOSCHWITZ, Mr. CANNON, Mr. CHILES, Mr. COCHRAN, Mr. COHEN, Mr. D'AMATO, Mr. DANFORTH, Mr. DECONCINI, Mr. DENTON, Mr. DOLE, Mr. DOMENICI, Mr. EAST, Mr. GARN, Mr. GOLDWATER, Mr. GRASSLEY, Mrs. HAWKINS, Mr. HAYAKAWA, Mr. HEFLIN, Mr. HELMS, Mr. HOLLINGS, Mr. HUDDLESTON, Mr. HUMPHREY, Mr. JEPSEN, Mr. JOHNSTON, Mr. KASTEN, Mr. LAXALT, Mr. LONG, Mr. LUGAR, Mr. MCCLURE, Mr. MATTINGLY, Mr. MELCHER, Mr. MURKOWSKI, Mr. NICKLES, Mr. NUNN, Mr. QUAYLE, Mr. PRESSLER, Mr. PRYOR, Mr. RANDOLPH, Mr. ROTH, Mr. SASSER, Mr. SCHMITT, Mr. STEVENS, Mr. THURMOND, Mr. WALLOP, Mr. WARNER, Mr. ZORINSKY, and Mr. RUDMAN) submitted an amendment intended to be proposed by them to the reported amendment to the joint resolution (H.J. Res. 520), supra.

AMENDMENT NO. 3283

(Ordered to be printed and to lie on the table.)

Mr. SYMMS (for himself, Mr. ABDNOR, Mr. ANDREWS, Mr. ARMSTRONG, Mr. BENTSEN, Mr. BOREN, Mr. BOSCHWITZ, Mr. CANNON, Mr. CHILES, Mr. COCHRAN, Mr. COHEN, Mr. D'AMATO, Mr. DANFORTH, Mr. DECONCINI, Mr. DENTON, Mr. DOLE, Mr. DOMENICI, Mr. EAST, Mr. GARN, Mr. GOLDWATER, Mr. GRASSLEY, Mrs. HAWKINS, Mr. HAYAKAWA, Mr. HEFLIN, Mr. HELMS, Mr. HOLLINGS, Mr. HUDDLESTON, Mr. HUMPHREY, Mr. JEPSEN, Mr. JOHNSTON, Mr. KASTEN, Mr. LAXALT, Mr. LONG, Mr. LUGAR, Mr. MCCLURE, Mr. MATTINGLY, Mr. MELCHER, Mr. MURKOWSKI, Mr. NICKLES, Mr. NUNN, Mr. QUAYLE, Mr. PRESSLER, Mr. PRYOR, Mr. RANDOLPH, Mr. ROTH, Mr. SASSER, Mr. SCHMITT, Mr. STEVENS, Mr. THURMOND, Mr. WALLOP, Mr. WARNER, Mr. ZORINSKY, and Mr. RUDMAN) submitted an amendment intended to be proposed by them to the amendment of Mr. HELMS concerning school prayer to the joint resolution (H.J. Res. 520), supra.

AMENDMENT NO. 3284

(Ordered to be printed and to lie on the table.)

Mr. SYMMS (for himself, Mr. ABDNOR, Mr. ANDREWS, Mr. ARMSTRONG, Mr. BENTSEN, Mr. BOREN, Mr. BOSCHWITZ, Mr. CANNON, Mr. CHILES, Mr. COCHRAN, Mr. COHEN, Mr. D'AMATO, Mr. DANFORTH, Mr. DECONCINI, Mr. DENTON, Mr. DOLE, Mr. DOMENICI, Mr. EAST, Mr. GARN, Mr. GOLDWATER, Mr. GRASSLEY, Mrs. HAWKINS, Mr. HAYAKAWA, Mr. HEFLIN, Mr. HELMS, Mr. HOLLINGS, Mr. HUDDLESTON, Mr. HUMPHREY, Mr. JEPSEN, Mr. JOHNSTON, Mr. KASTEN, Mr. LAXALT, Mr. LONG, Mr. LUGAR, Mr. MCCLURE, Mr. MATTINGLY, Mr. MELCHER, Mr. MURKOWSKI, Mr. NICKLES, Mr. NUNN, Mr. QUAYLE, Mr. PRESSLER, Mr. PRYOR, Mr. RANDOLPH, Mr. ROTH, Mr. SASSER, Mr. SCHMITT, Mr. STEVENS, Mr. THURMOND, Mr. WALLOP, Mr. WARNER, Mr. ZORINSKY, and Mr. RUDMAN) submitted an amendment intended to be proposed by them to the amendment of Mr. HELMS concerning school prayer to the joint resolution (H.J. Res. 520), supra.

AMENDMENT NO. 3285

(Ordered to be printed and to lie on the table.)

Mr. SYMMS (for himself, Mr. ABDNOR, Mr. ANDREWS, Mr. ARMSTRONG, Mr. BENTSEN, Mr. BOREN, Mr. BOSCHWITZ, Mr. CANNON, Mr. CHILES, Mr. COCHRAN, Mr. COHEN, Mr. D'AMATO, Mr. DANFORTH, Mr. DECONCINI, Mr. DENTON, Mr. DOLE, Mr. DOMENICI, Mr. EAST, Mr. GARN, Mr. GOLDWATER, Mr. GRASSLEY, Mrs. HAWKINS, Mr. HAYAKAWA, Mr. HEFLIN, Mr. HELMS, Mr. HOLLINGS, Mr. HUDDLESTON, Mr. HUMPHREY, Mr. JEPSEN, Mr. JOHNSTON, Mr. KASTEN, Mr. LAXALT, Mr. LONG, Mr. LUGAR, Mr. MCCLURE, Mr. MATTINGLY, Mr. MELCHER, Mr. MURKOWSKI, Mr. NICKLES, Mr. NUNN, Mr. QUAYLE, Mr. PRESSLER, Mr. PRYOR, Mr. RANDOLPH, Mr. ROTH, Mr. SASSER, Mr. SCHMITT, Mr. STEVENS, Mr. THURMOND, Mr. WALLOP, Mr. WARNER, Mr. ZORINSKY, and Mr. RUDMAN) submitted an amendment intended to be proposed by them to the amendment of Mr. WEICKER (No. 2039) to the joint resolution (H.J. Res. 520), supra.

AMENDMENTS NOS. 3286 THROUGH 3421

(Ordered to be printed and to lie on the table.)

Mr. WEICKER submitted 135 amendments intended to be proposed by him to the joint resolution (H.J. Res. 520), supra.

NOTICES OF HEARINGS

COMMITTEE ON RULES AND ADMINISTRATION

Mr. MATHIAS. Mr. President, I wish to announce that the Committee on Rules and Administration will hold a meeting to consider pending legislative and administrative business on Wednesday, September 22, 1982, at 9:30 a.m., in room 301, Russell. The agenda for the meeting will include death gratuities, printing resolutions, and requests for equipment.

For further information concerning this meeting, please call Rules Committee staff at extension 40278.

COMMITTEE ON THE BUDGET

Mr. DOMENICI. Mr. President, the Senate Committee on the Budget will hold a hearing on budget act reform on Tuesday, September 21, beginning at 10 a.m. in room 6202, Dirksen Senate Office Building. Dr. Alice Rivlin, Director, Congressional Budget Office, and Mr. Charles A. Bowsher, Comptroller General of the United States will testify.

ADDITIONAL STATEMENTS

HERITAGE FOUNDATION PAPER SUPPORTS MILITARY REFORM VIEW

● Mr. HART. Mr. President, I would like to bring to the attention of my colleagues an excellent paper recently published by the Heritage Foundation, "Close Air Support and the Soviet Threat," by Dr. Jeffrey G. Barlow of the Heritage Foundation staff.

Dr. Barlow's paper builds on a viewpoint held by many military reformers; namely, that for airpower to be effective in combat, it must be closely linked to the action of ground forces. This means that the missions of close air support and battlefield interdiction take on great importance. Unfortunately, the U.S. Air Force has tended to downgrade these missions, instead focusing on deep interdiction—what was called strategic bombing in World War II—against enemy supply lines, infrastructure, industry, and so on.

After Vietnam, the Air Force did become interested in close air support, and procured an aircraft, the A-10, specially designed for the mission. Now, however, there are disturbing signs the Air Force is reverting to its traditional emphasis on deep interdiction, and is planning to neglect close air support. The clearest evidence was the acquiescence of the Air Force in the Congressional cancellation of the A-10 program in the fiscal year 1983 authorization bill—a cancellation done with the Air Force's approval, even though the President's budget request included 20 additional A-10's.

Even more significant is the failure to move forward with a replacement for the A-10. As Dr. Barlow's study notes, two major improvements could be made over the A-10 in a new aircraft: the size, and thus the vulnerability and cost, could be reduced, and the aircraft could be made more agile. In its VISTA 1999 study, the National Guard has called for such an aircraft. But the Air Force apparently has no plans to develop one.

Mr. President, the Heritage Foundation study does a good job of bringing these issues to the fore. They are important issues for the Senate, because they relate directly to the question of whether our investment in tactical aviation will prove effective in combat. I strongly urge my colleagues to read the study, and to join with me in urging the Air Force to begin development of the new close support aircraft recommended by the National Guard.

Mr. President, I ask that Dr. Barlow's paper, "Close Air Support and the Soviet Threat," be printed in the RECORD.

The paper follows:

Close Air Support and the Soviet Threat

INTRODUCTION

Close air support (CAS) is defined by the Joint Chiefs of staff as "air attacks against hostile targets which are in close proximity to friendly forces and which require detailed integration of each air mission with the fire and movement of those forces." Thus, for an air mission to qualify as close air support, it must be in direct support of engaged troops and be coordinated with the ground commander. Although known by a number of different names over the decades, the CAS mission has officially existed for some sixty years.[1] For much of its existence, however, it had been neglected by airpower proponents, in favor of air missions that have promised to provide a more decisive application of military force. It is a mission in direct support of one service (the Army), but it is a mission which is the responsibility of another service (the Air Force) with vastly different priorities and strategic conceptions. In a very real sense, then, it is a mission destined by circumstances to be neglected except in times of most immediate need.

Following its experiences with tactical airpower in Southeast Asia and its subsequent analysis of the emergency conventional force disparities in Central Europe, the Air Force, to its credit broke with tradition and procured an aircraft designed specifically for close air support. This aircraft, the A-10 Thunderbolt II (immediately nicknamed the Warthog), has been operational in Europe since 1979. Moreover, the Air Force has perfected a series of low-level flying tactics that will help the A-10 perform its tank-killing mission during a Central Front war, even in the face of the Soviet Army's formidable air defenses.

Now, however, there are disturbing signs that budget constraints are prompting the Air Force to weaken its commitment to CAS and concentrate once again almost exclusively on air superiority and interdiction as the roles for tactical airpower.[2] This could be a serious mistake, since effective CAS could well make the difference in allowing NATO to maintain a viable defense on the Central Front in the first, crucial days of a Warsaw Pact invasion. The Warsaw Pact invasion. The Air Force now has an A-10 force that will peak in strength at just over 700 aircraft in 1984. With peacetime attrition, this specially designed CAS force will begin declining in fighting effectiveness just when it is needed more than ever.

CLOSE AIR SUPPORT: A DOCTRINAL HISTORY

During America's participation in the First World War, air warfare was completely controlled by ground commanders, and the support of ground forces was seen as the predominant offensive mission for military aviation, once air superiority had been achieved. The close air support mission began in October 1918, during the latter stages of the Meuse-Argonne Offensive, when Brigadier General William "Billy" Mitchell, commander of the Air Service, Army Group, AEF, recognized the important role that Army pursuit aircraft were playing in keeping the German forces continually off balance during the offensive (at one point disrupting German reserves poised for a counterattack) by bombing and strafing enemy troop concentrations in the battle zone.[3] Accordingly, just before the hostilities ended, the Air Service, AEF, began planning for a number of designated ground attack squadrons.

Between the Wars, the fate of the close air support mission was very much intertwined with the attempts by the Air Service to carve out an an independent role for itself. During the early inter-war period, the theory of General Guilio Douhet (Command of the Air), Lord Trenchard and Count Gianni Caproni—that strategic bombardment of enemy industrial centers would prove to be the decisive factor in future wars—gained increasing credence from American airpower enthusiasts. The doctrine of strategic bombardment not only offered a belief in the decisive role of airpower but, in light of this belief, lent the Air Corps as a whole a significant argument to use in favor of its eventual autonomy from the Army. On the other hand, the ground attack mission merely enhanced the Air Corps' existing subordinance to the ground army.[4] The result was a diminution of the role of attack and other tactical aviation in doctrine and planning. As one author remarked in connection with the Air Corps Tactical School: "Attachment to this commitment [strategic bombardment] was, however, so inflexible that it inhibited the development of tactics for escort, for air defense, for support of ground forces and for reconnaissance and transport aviation."[5] The first attack group was formed in 1921 and this was followed by the formation of only one additional attack group more than a decade later.[6] Thus, where in 1922 there had been four attack and seven bombardment squadrons, by 1932 there were still only four attack squadrons, but the number of bombardment squadrons had increased to twelve.

The mission of these attack squadrons, as defined at the time, was: "To assist the ground troops in their action against enemy positions; to attack hostile front line troops, supports, reserves, troop concentrations, road traffic of whatever nature, tanks, airdromes, and hostile batteries."[7]

During the Second World War, the close air support mission continued to suffer relative to the strategic bombardment and interdiction missions. Wartime Army Air Forces trends in doctrinal support of "independence of control and operations" reached their zenith in mid-1943, with the publication of Field Manual 100-20—Command and Employment of Air Power—which set forth the new doctrine that "Land power and air power are co-equal and interdependent forces; neither is an auxiliary of the other."[8] This document noted:

"Massed air action on the immediate front will pave the way for an advance. However, in the zone of contact, missions against hostile units are most difficult to control, are most expensive, and are, in general, least effective. . . . Only at critical times are contact zone missions profitable."[9]

In operational practice, Army Air Force units in the Mediterranean, European, and Pacific Theaters flew thousands of direct support missions for Allied troops and with some spectacular results—witness the XIX Tactical Air Command's success in protecting the exposed right flank of Patton's Third Army along the Loire River in 1944. In looking back, however, it becomes apparent that the AAF's primary interest lay in strategic bombardment and secondarily in interdiction missions.

The Army Air Force's principal interest in strategic airpower continued to dominate the postwar Air Force, garnering the bulk of the attention and most of the available funding. Though the Korean and Vietnam Wars demonstrated the need for adequate tactical air support, particularly CAS, in neither situation was the Air Force prepared at the outset with the proper mix of aircraft for tactical missions involving close support of ground forces.[10] In fact, the Air Force was forced, at the start of its combat deployment in South Vietnam, to use World War II-design Navy A-1E and A-1H Skyraider aircraft in order to provide reliable close air support to the South Vietnamese troops.[11]

The Air Force's general lack of interest in the CAS mission was to change by the time that the war in Vietnam was winding down for the United States. One reason was perception of tactical air needs on the NATO Central Front.

THE THREAT TO NATO'S CENTRAL FRONT

The central front

The forward edge of NATO's Central Front stretches south from the Elbe-Trave Canal in the West German State of Lower Saxony to Germany's southern border with Austria—a line about 650 miles long. Some twenty-six NATO divisions are deployed in this area. Adding in the in-country European forces earmarked for the Central Front (including those in Great Britain) brings the total to thirty-two divisions, equipped with 7,150 tanks and about 3,470 artillery pieces and mortars.[12] The aircraft deployed with these NATO forces number 1,869 fixed-wing planes, including fighter/bombers, interceptors, and reconnaissance types.

The bulk of NATO's forces on the Central Front are deployed close to the intra-German border because of political necessity. Such "forward defense" serves to reassure Bonn that, if war breaks out, NATO forces will endeavor to protect against the loss of any West German territory by forming a coherent defense line as far forward as possible, holding back the Warsaw Pact forces while awaiting the release of tactical nuclear weapons, and confining collateral damage to a minimum. NATO's supply lines, of necessity, run near and parallel to the intra-German border, making it likely that initial Warsaw Pact penetrations of NATO's defense will disrupt or even sever the supply lines.

Warsaw pact strength

Of the four groups of Soviet forces deployed in Eastern Europe, two are oriented directly toward operations against the NATO Central Front.[13] These are the Group of Soviet Forces, Germany (GSFG), headquartered in Zossen-Wünsdorf, near Berlin, and the Soviet Central Group of Forces (CGF), headquartered in Milovice, Czechoslovakia, northeast of Prague. Together, they have twenty-six Soviet Category I divisions, twelve of them tank divisions.[14] If the Soviet armies deployed within the USSR which would be used in direct support of Central Front operations and the available Eastern European forces are included, NATO faces on the Central Front a formidable Warsaw Pact military force of about ninety divisions, about half of which are capable of an unreinforced, standing-start attack. The tanks alone in this unreinforced offensive force number over 13,000,[15] while an additional 7,000 tanks are readily available in Soviet Central Front-committed Military Districts. Over two-thirds of the tanks deployed in Eastern Europe and over one-half deployed in the USSR's Western Military Districts are modern design T-62s

---

Footnotes at end of article.

and T-64/T-72s, while the rest are obsolescent T-54s and T-55s.

The offensive

The Soviet Army practices three primary forms of offensive action—the meeting engagement, the breakthrough attack (now primarily the breakthrough attack from the march, in contrast to the World War II-derived steamroller breakthrough attack from contact), and the pursuit. The meeting engagement, which occurs when both the attacking and defending forces are on the move, is considered by the Soviets to be the most important form of offensive action. As David Isby describes it:

"The advance guard of a Soviet unit will attack upon encountering the enemy, seize the initiative, penetrate the enemy covering forces, and pin down the enemy main body while simultaneously covering the deployment of the Soviet main body, which will attempt to envelop or outflank the enemy. The Soviets will fully exploit the cross-country mobility of their vehicles and their willingness to take advantage of any path or track to carry out their outflanking or enveloping maneuvers.[16]

At the operational level, it is expected that Soviet commanders would launch a series of thrusts across the length of the Central Front. NATO military responses to these thrusts would determine how each effort would be followed up. Those attacks successfully contained by NATO troops would be converted into holding actions by the Soviets, keeping just enough pressure on the engaged NATO forces to prevent their being readily shifted to other positions. However, those attacks that pushed through the initial defenses would be augmented by reinforcements as rapidly as possible.[17]

Rapid rates of advance would be essential to the Soviet plan for a short war. Soviet military commanders estimate that under such circumstances their forces would need to make advances of 70-100 kilometers a day in nuclear conditions and 25-35 kilometers a day in conventional warfare.[18] The aim would be to quickly breach the NATO defenses, wedging open gaps sufficient for Soviet second echelon tank formations to penetrate deep into NATO rear areas.[19] Thus, tanks are the key to the successful exploitation of the offensive penetration and the Warsaw Pact's maintenance of rapid rates of advance.

Clearly then, one of the essential tactics for delaying the Warsaw Pact's offensive timetable and for giving the overextended and maldeployed NATO forces additional time to respond to the enfolding Soviet offensive would be early employment of NATO's tactical airpower.[20] In the short-war-structured offensive, given the NATO Central Front's numerical inferiority and the linear nature of its defensive preparations, close air support and battlefield air interdiction (BAI) would be crucial to a successful NATO defense.[21]

By picking off the tanks in large numbers and by creating bottlenecks that canalize Soviet movement, these close support aircraft could impede the offensive, perhaps giving NATO Commanders the time to patch together a coherent defense until reinforcements arrive.

THE A-10 AND CLOSE AIR SUPPORT

A-10 program development

The U.S. air effort in Vietnam was in full swing in 1966 when Air Force Chief of Staff John McConnell proposed that his service procure a specialized close air support aircraft, which would embody the best characteristics of the A-1 Skyraider and the soon-to-be-flown A-7D Corsair II. In March 1967, the Air Force sent out Request for Proposals (RFP) for design studies to twenty-one companies; in May, it awarded study contracts to four of these companies for the aircraft then designated A-X.[22] Three years later, RFPs for competitive prototype development were issued to twelve companies. By August 1970, six companies, including Boeing and Lockheed, had responded with proposals. This number, in turn, was whittled down to a final two—Northrop and Fairchild—by that December.

The fact that by 1970 the Air Force leadership was on the verge of contracting for a specialized close air support aircraft illustrated the pronounced change that had overtaken earlier attitudes. As General William Momyer, commander of the Tactical Air Command, explained to the members of the Senate subcommittee in October 1971:

"In the past, the Air Force has developed its aircraft on the principle of multipurpose systems. As a result[,] all current fighter and attack aircraft have varying capabilities for close air support. However, several factors have developed which impinge significantly on the force structure of tactical air forces. These factors establish a requirement for a large number of airframes and tend to emphasize specialization." [23] Among the factors were the high cost of the technology required to overcome the enemy's defenses and the requirement for the Air Force to employ its tactical fighter forces in widely divergent missions simultaneously.

Northrop and Fairchild each built two prototypes of their version of the A-X, designated by the Air Force the A-9 and the A-10, respectively. Service testing began in October 1972 and was completed two months later, with Fairchild's A-10 emerging as the winner. As both the Department of Defense and the Air Force saw it, tanks were to be the CAS aircraft's primary target, and the A-10 had been shown to be almost twice as effective at tank-killing as Northrop's A-9. In March 1973, Fairchild Republic Company was awarded a cost-plus-incentive-fee contract for continued prototype testing and for the pre-production aircraft. Earlier, the Air Force had settled upon 733 aircraft as the total A-10 buy.

General Electric and Philco-Ford competed for the contract for the A-10's principal armament, designed especially for tank-killing, the GAU-30mm gun. In June 1973, the Air Force awarded the contract to General Electric.

Following the six pre-production aircraft funded in fiscal year 1974, fifty-two production models were contracted for FY 1975 and 1976A. Equipping the first training wing with A-10s—the 355th Tactical Fighter Wing at Davis-Monthan Air Force Base, Arizona—was completed in March 1976. Air Force follow-on operational testing (FOT&E) of the production A-10s began in August of that year and lasted through the following February. Test results showed that despite deficiencies noted in system components—such as the head-up display, the stability augmentation system, and the fuel system—the A-10 was superior to other USAF aircraft for the close air support mission.

The tests, among other things, judged the aircraft's capability in nine CAS mission subareas. Some of the Evaluations noted:

Troops in Contact— ". . . The A-10A can provide effective, accurate, and timely support to ground forces in direct contact with the enemy. . . ."

Armed escort— ". . . AE of a ground column/convoy is a mission well-suited for the A-10A. The maneuverability, firepower, and escort time offered by the A-10A is unmatched by any other aircraft in the inventory. . . ."

Low visibility operations— ". . . The capability of the A-10A to operate in low ceiling/visibility is unmatched by any other aircraft in the inventory today. . . ." [24]

The first operational squadron was activated in June 1977 and achieved operational status that October. In August 1978, the 354th Tactical Fighter Wing at Myrtle Beach Air Force Base, South Carolina, became the Air Force's first fully combat-ready A-10 wing. Five months later, a squadron of the 81st Tactical Fighter Wing, based at RAF Bentwaters/Woodbridge, Great Britain became the first European stationed A-10 squadron, followed eight months later by the first delivery of A-10s to the Air National Guard.

In the fiscal year 1981 Five Year Defense Program, the Department of Defense increased the number of A-10s to be procured from the original 733 to 825 to provide for peacetime attrition and to maintain the aircraft's required force-level life.[25] At the beginning of 1981, however, the Carter Administration's outgoing fiscal year 1982 defense budget, because of fiscal considerations, reduced the number to 687. The Reagan Administration's fiscal year 1982 defense budget restored the original procurement level of 733 A-10As and added fourteen two-seat A-10Bs, for a total of 747 aircraft.[26] This later was reduced during Pentagon budget cuts to 727. The fiscal year 1983 budget originally requested funding for the last twenty of these 727 aircraft of the program, but in May the Pentagon, suddenly claiming that it did not need any additional A-10s, acquiesced to the Senate's decision to cut the funding for these last twenty. As it now stands, the total A-10 production will remain at 707 aircraft.

THE A-10 AND THE CENTRAL FRONT

When the last of the A-10 production aircraft have entered Air Force inventory in February 1984, the Service will have fully equipped six CAS wings.[27] Only the 81st Tactical Fighter Wing at RAF Bentwaters/Woodbridge, with it six squadrons and 108 aircraft, is forward deployed in Europe. In wartime, these A-10s will fly into West Germany to operate out of German airbases, designated Forward Operating Locations, close to the battle area. Eight-aircraft CAS detachments from the 81st are familiarizing themselves with the operational technique by operating for short periods of time alternately out of each of the four Forward Operating Locations that are active in peacetime—Ahlhorn, Noervenich, Sembach, and Leipheim.[28]

Once in combat, the A-10s should prove themselves extremely capable close air support aircraft. The foremost characteristics of a good CAS aircraft are lethality, survivability, reliability, and responsiveness. The A-10 meets all four.

The A-10's high lethality against the whole variety of armored vehicles and soft targets derives from a number of factors—its deadly accurate GAU-8/A, seven-barrel, 30mm gun; its heavy payload-carrying capacity, which enables it to carry a large (up to 16,000 pounds), mixed-ordnance payload of optimized CAS munitions; and, because of its relatively slow-speed approach, its ability to deliver its free fall munitions with reasonably small mean miss distances.

The 30mm gun is the key to its superior lethality against armored vehicles compared to weapons fired by faster and more sophisticated aircraft such as the F-15 and F-16. The GAU-8/A is mounted internally, along the centerline of the aircraft, which gives the gun excellent stability. Armed with 1,174 rounds of depleted uranium penetrator ammunition—each penetrator weighing .66 pound—the gun has muzzle velocities of 3,280 feet per second and is capable of firing at rates of 2,100 or 4,200 rounds per minute. The 30mm gun produces bursts capable of killing tanks now in the Soviet arsenal at a slant range of 4,000 feet. Lightly armored vehicles can be destroyed as far away as two miles.[29]

The A-10's high survivability rating is due to the aircraft's design and the low-level penetration tactics employed in flying it. The plane carries 3,177 pounds of survival provisions, including armor plate and foam for the fuel tank. The pilot is protected by a titanium armor plate "bathub" weighing over 1,400 pounds, which can stop direct hits from Soviet 23mm and 57mm shell.[30]

The A-10's low altitude tactics were developed primarily by the 66th Fighter Weapons Squadron at Nellis Air Force Base, Nevada. Their characteristics include: very low altitude ingress to the target (100 feet above ground level); short exposure above terrain masking while jinking (three seconds or less exposure while flying at 300-400 feet above ground level) to locate the target; short attack exposure while jinking; and very low altitude egress and maneuver for reattack.[31] Because of its slower approach speed, the A-10 can turn faster than a higher-performance aircraft, making it easier for it to reacquire the target and reattack. Using these low altitude tactics, the A-10 is able to counteract and defect formidable anti-aircraft missile defenses and major low-level, anti-aircraft gun threats, such as the Soviet ZSU-23-4 system, with its radar-controlled, quadruple 23mm guns.[32] The short exposure times prevent radar lock-on, necessitating the use of manual aiming. In addition, the A-10's GAU-8/A gun outranges the ZSU-23-4.

The A-10 is designed for easy maintenance, including such things as the large doors and panels provided for ready access to aircraft equipment and the onboard auxiliary power unit. And with its short scramble time and its low ceiling and visibility flying capability, the A-10 can operate from short fields, close to the forward edge of the battle area.

THE NEED FOR MORE CAS AIRCRAFT

In sum, the A-10 is an extremely capable CAS aircraft, well-suited to the vital role of engaging and killing Soviet first and second echelon armored vehicles. The problem is that there are not nearly enough aircraft available to NATO, which like the A-10, are dedicated to the close air support and battlefield air interdiction missions and can be used in the early stages of a possible Warsaw Pact offensive to blunt the armored onslaught.

The planned size of the force currently envisioned by the Air Force will see peacetime attrition decrease before 1987 the available aircraft below the Service's reduced Required Force Level.[33] Once that point is reached, such attrition will begin eating away at the aircraft in the operational inventory at a gradual rate. The planned procurement level of 825 aircraft called for in the Carter FY 1981 Five Year Defense Program would have kept the A-10 force above the Required Force Level until 1993, given the continuance of the present attrition rate.[34]

The Air Force's response to this situation recalls its earlier, pre-Vietnam views of the value of the CAS mission. Having decided that it has enough A-10 aircraft (given the tight budget situation), commanders have begun looking to the possibility of converting models of the more complex and much faster F-16 and F-15 into true multi-role aircraft, by equipping them for the long-range interdiction mission. The lure of F-15E Strike Eagles and F-16Es or XLs seems hard for senior Air Force generals to resist.

Although such aircraft would undoubtedly be capable of handling a variety of air superiority and interdiction missions, they could not handle the close air support mission nearly so well as could the A-10. For example, lethality studies conducted during the Carter Administration, comparing the A-10 with such aircraft as the A-7 and F-16, showed that the A-10 achieved almost three times the armored vehicle kill rate of the A-7 and F-16.[35] And, it should be noted, neither the F-15 nor the F-16 has the level or armor protection in the A-10. Of equal import, the CAS and BAI missions will have a more significant impact in the early stages of a short-war-structured, Soviet combined-arms offensive.

CONCLUSION

In the short term, the Air Force should increase procurement of A-10s to the 825 level called for in 1980, even at the expense of additional fighter assets. This increase at least would provide a stable A-10 force until the mid-1990s. Fulfilling requirements for additional close air support squadrons or for bringing National Guard and Reserve squadrons up to full strength would necessitate increases above this minimum benchmark. Over the longer term, however, it is clear that a new CAS aircraft will be needed.

The A-10 simply has become too expensive for the Air Force to afford in the large quantities needed for augmenting NATO's ground force strength on the Central Front. Since FY 1978, the A-10's flyway unit cost has climbed from $5 to $12 million (in FY 1982).[36] And once the cost of a close air support aircraft reaches or surpasses that of a first-line fighter such as the F-16, the Air Force will always choose to spend the money on the "more capable" plane. Of course, much of the A-10's cost increase has had to do with the low and uneconomical rates of the aircraft's recent procurement, the cost of equipment add-ons, and the increases caused by inflation. A good portion of the increased costs, however, are related to the aircraft's size: the A-10 is too big. Larger, heavier aircraft, over time, tend to become more costly to procure than smaller, lighter aircraft. A big aircraft, moreover, presents larger targets. In this case, admittedly, Fairchild was following the Air Force's lead—it wanted a heavily-armored aircraft capable of carrying a large ordnance payload.[37]

Exactly what the follow-on CAS aircraft should look like is still an issue of intense debate. However, several design aspects appear to be relevant. It should be smaller than the A-10, with a maximum external payload only a quarter to a third that of the A-10. It should be powered by engines designed for low fuel consumption in low-level cruising. And it should retain the internally-mounted 30mm gun that has proved so successful in the A-10, although, if judged necessary, the GAU-8/A's 4,000 pound weight penalty could be reduced by going with the lighter, four-barreled GAU-13/A.

The Air National Guard came out with its proposal for a "combined forces fighter" to eventually take the place of the A-10, in its March 1982 report. Paralleling many of the design concepts espoused by TacAir consultant Pierre Sprey, the Air National Guard called, among other things, for a smaller aircraft than the A-10, which would have better maximum Gs (the gravitational pull on the pilot), much better acceleration, and better roll/pitch transients (particularly in the 150 to 350 knots region) and which could operate from roads and grassfields.[38]

Precisely because such a new development project will be very prolonged, if past history is any judge, the Air Force should immediately begin increasing its procurement of A-10s to ensure an adequate close air support force until the mid-1990s. The A-10A is still the best CAS aircraft in the inventory and one that can have a major role in the event of a Soviet invasion of Europe during the next decade.

From the early days of its existence as a component element of the Army to times as recent as a decade ago, the U.S. Air Force has almost continually ignored the value of the close air support mission as a decisive factor in the land battle. Preferring to concentrate its efforts on loftier missions, such as strategic bombardment and deep interdiction, which promise an early end to wars, Air Force leaders have slighted those aspects of tactical aviation that hearken back to their Service's earlier subservience to the Army.

The changed Air Force thinking of the 1970s, which owed its rationale to the lessons of Vietnam and the emerging reality of the dangers facing NATO's Central Front and produced service support for the A-10, seems now to be reverting to traditional channels of thought. At a time when the gap between NATO's and the Warsaw Pact's deployed military power is growing larger, it is vital to maintain sufficient close air support assets to help reduce the disparities in the military capability now favoring the Soviets. This can be done only if the leadership of the Air Force reaffirms the essential nature of this long disparaged mission.

JEFFREY G. BARLOW, Ph.D.,
Policy Analyst.

FOOTNOTES

[1] The term "mission" as it is used in this case and as it is most often used throughout this paper means: "Any particular business, service, or duty assigned to be accomplished by a person, organization, office, detachment, or the like with the object of contributing functionally to an overall objective." Woodford Agee Heflin, ed., The United States Air Force Dictionary (Maxwell Air Force Base, Alabama: Air University Press, 1956), p. 329.

[2] Air superiority refers to obtaining control of contested airspace.

[3] For example, the First Army Air Service's Battle Order No. 44 of November 3, 1918, noted: "1. The Allied Armies have forced the enemy into a precipitate retreat . . . . The aviation of the enemy has been destroyed or driven back wherever found, his balloons have been burned, and our air planes continually harry and demoralize his ground troops with bombs and machine guns . . . . (emphasis added). "48. Battle Orders Air Service, First Army September-November 1918," in The U.S. Air Service in World War I, Volume II: Early Concepts of Military Aviation, edited and compiled by Maurer Maurer (Washington, D.C.: The Office of Air Force History, Headquarters USAF, 1978), p. 249.

[4] Perry McCoy Smith, The Air Force Plans for Peace 1943-1945 (Baltimore: Johns Hopkins Press, 1970), p. 27.

[5] Quoted in ibid., p. 33.

[6] Maurer Maurer, ed., Air Force Combat Units of World War II: History and Insignia (Washington,

D.C.: Zenger Publishing Company, Inc., reprinted 1980), pp. 29-30, 61.

[7] "32. Attack aviation," in Other Arms—Air Service (Fort Riley, Kansas: Department of Tactics, The Calvary School, 1923-1924), copy of a mimeographed document, p. 27.

[8] Quoted in James A. Huston, "Tactical Use of Air Power in World War II: The Army Experience," Military Affairs, Vol. 14 (Winter 1950), p. 167.

[9] Quoted in ibid., p. 168.

[10] Perry McCoy Smith noted: "The doctrinal dedication to strategic bombardment at the expense of close air support and interdiction led to difficulties, among them lack of adequate support for ground forces during the Korean conflict, deemphasis of tactical training, and lack of development of tactical weapons systems and tactical munitions (much of the development in these areas was done by the Navy in the two decades following World War II). Smith, Air Force Plans for Peace, p. 28.

[11] The AD/A-1 Douglas Skyraider was first produced in 1945 for the Navy, as a replacement for the SB2C and TBM torpedo bombers. The last attack version of the A-1 was retired in April 1968. "Appendix IV. U.S. Navy Airplanes, 1911-1969," in Dictionary of American Naval Fighting Ships, Volume 5 (Washington, D.C.: Naval History Division, Navy Department, 1970), p. 546. For comments on the Air Force's procurement of A-1s, see General William W. Momyer, USAF (Ret.), Air Power in Three Wars (WW II, Korea, Vietnam) (Washington, D.C.: Government Printing Office, 1978), pp 263-264.

[12] The totals are derived from subtracting the (approximately) two Danish divisions and the German VI Armored Infantry Division assigned to Allied Forces Northern Europe (AFNORTH) for the defense of Schleswig-Holstein and Jutland from the combined AFNORTH/AFCENT totals given in NATO and the Warsaw Pact: Force Comparisons (Brussels: North Atlantic Treaty Organization, 1982), figure six, p. 29.

[13] The four are the Group of Soviet Forces, Germany, the Soviet Northern Group of Forces (based in Poland), the Soviet Central Group of Forces (based in Czechoslovakia), and the Soviet Southern Group of Forces (based in Hungary). Although the Northern Group and Southern Group could support offensive operations on NATO's Central Front, it is apparent that their Primary responsibilites would be to the Baltic area and Southern Europe, respectively.

[14] "Soviet Army order of battle," in David C. Isby, Weapons and Tactics of the Soviet Army (London: Jane's Publishing Company Limited, 1981), p. 24; and Friedrich Weiner and William J. Lewis, The Warsaw Pact Armies (Vienna: Carl Ueberreuter Publishers, 1977), pp. 62-63.

[15] Total derived by comparing and adding tank figures (for GSFG, CGF, East German Army and first-line Czech units) from "Estimated Soviet tank inventory (mid-1979)," in Isby, Weapons and Tactics of the Soviet Army, p. 30.; Weiner and Lewis, Warsaw Pact Armies, pp. 25 and 31; and Military Balance 1981-1982, pp. 18-19. NATO's most recent published estimate for the Warsaw Pact forces—lumping together the first and follow-on echelon divisions together and including some forces that would be deployed against the southern portion of AFNORTH's territory—is ninety-five divisions and 25,500 tanks. NATO and the Warsaw Pact, figure six, p. 29.

[16] Isby, op. cit., p. 35.

[17] See Steven L. Canby, A Comparative Assessment of the NATO Corps Battle ([Potomac, Maryland: C&L Associates ?], November 24, 1978), copy of a typescript document, pp. 19-22.

[18] Isby, Weapons and Tactics of the Soviet Army, p. 33. John Erickson commented: "The duration of these [Soviet high-speed] operations depends critically on early initial success and the reduction of NATO as an effective military entity before the arrival and deployment of reserve forces, a requirement which necessitates striking to a depth of 600 km within 10 to 14 days." John Erickson, "Trends in the Soviet Combined-Arms Concept," Strategic Review, Vol. 5 (Winter 1977), p. 46.

[19] Soviet tactics are tank tactics writ large. As David Isby remarked: "Their mission is to outflank, envelop and pursue, defeating the enemy through maneuver rather than by frontal attack." Isby, ibid., p. 71.

[20] As Air Force General William Momyer noted: ". . . we recognize that there is a deficiency in the NATO armored forces to counter the anticipated massive ground thrust. The application of air power is the only possible military action that could constrain or reduce the Communist ground forces to a level that the NATO ground forces could contain." "Statement of General William W. Momyer, USAF, Commander, Tactical Air Command, U.S. Air Force," in Congress, Senate, Committee on Armed Services, Special Subcommittee on Close Air Support: Hearings, 92nd Congress, 1st session, October 22, 26, 28, 29; November 1, 3, 8, 1971, USGPO, 1972; p. 180.

[21] The purpose of battlefield air interdiction is "to bring airpower to bear on those enemy forces not yet engaged but positioned to directly effect the land battle." Thus BAI missions would be directed against enemy second echelon regiments and divisions. "Allied Tactical Publication (ATP) 27 (B), Offensive Air Support," quoted in Lieutenant Colonel Donald J. Alberts, "An Alternate View of Air Interdiction," Air University Review, Vol. 32 (July-August 1981), p. 40.

[22] Lou Drendel, A-10 Warthog in Action (Carrolton, Texas: Squadron/Signal Publications, 1981), P. 4.

[23] "Statement of General William Momyer, USAF," in Senate Armed Services Committee, Close Air Support: Hearings, p. 179.

[24] A-104 FOT&E Phase I Final Report (Kirtland Air Force Base, New Mexico: Air Force Test and Evaluation Center, May 1977), copy of a typescript document, pp. 13, 15 and 19, respectively.

[25] A-10 Force Life (Fairchild Republic Company, March 24, 1981), p. [4].

[26] Ibid.

[27] The delivery date for the 707th aircraft comes from A-10 Program Status (Fairchild Republic Company, [1982], copy of a printed document, graph, p. [4].

[28] "Statement of Brigadier General Perry M. Smith, Deputy Director of Plans, Deputy Chief of Staff Operations, Plans and Readiness," in Congress, Senate, Committee on Armed Services, Department of Defense Authorization for Appropriations for Fiscal Year 1982: Hearings, Part 3—Tactical Warfare, 97th Congress, 1st Session, February 19, 23, 27, March 3, 5, 10, 12, 1981, USGPO, 1981, p. 1247. Two additional forward operating locations would be available in wartime.

[29] A-10A (Fairchild Republic Company, [1981]), pp. [10] and [27]; and Drendel, A-10 Warthog, pp. 14 and 20.

[30] Weights obtained by converting from kilograms to pounds. A-10A, pp [59-60]; and Drendel, ibid., p. 14.

[31] Testimony of General Alton D. Slay, Commander, Air Force Systems Command, in Congress, House, Committee on Armed Services, Hearings on Military Posture and H.R. 5068 [H.R. 5970], Part 2: Procurement of Aircraft, Missiles, Tracked Combat Vehicles, Torpedoes, and Other Weapons—Title I, 95th Congress, 1st Session, February 3, 7, 8, 9, 18, 23 and 24, 1977, USGPO, 1977, pp. 778-784' and Tactical Aircraft Survivability (Fairchild Aircraft Company, [1982]), p. [25]. In jinking, the aircraft makes use of frequent and random maneuvering to throw off the accurate prediction of the aircraft's future position by enemy anti-aircraft guns.

[32] For detailed information on the ZSU-23-4's capabilities and tactical employment, see Isby, Weapons and Tactics of the Soviet Army, pp. 237-241.

[33] A-10 Program Status, graph, p. [14]. The A-10's current rate of attrition is 5.9 aircraft per 100,000 flying hours. Ibid., p. [9].

[34] Ibid., p. [14].

[35] Information from International Defense Review, 2/1979; quoted in A-10A, p. [26].

[36] A-10 Program Status, p. [10]. The estimates for fiscal year 1983 are between $14 and $16 million per aircraft.

[37] See the testimony of General Momyer, in Senate Armed Services Committee, Close Air Support: Hearings, pp. 181-182.

[38] Vista 1999: A Long-Range Look at the Future of the Army and Air National Guard (Vista 1999 Task Force, March 1982), pp. 62-63.

CREDIT SCORING SYSTEMS: A CRITICAL ANALYSIS

● Mr. MATHIAS. Mr. President, the statistical and factual bases on which many current economic and fiscal decisions are founded are being widely questioned. If our assumptions are in error, can our judgment be accurate?

Our colleague and friend, Jacob Javits of New York, has called my attention to a study by Noel Capon, associate professor of business, Graduate School of Business, Columbia University, which deals with credit scoring practices.

In the present economic climate this is a serious subject for borrowers whose business survival depends on the availability of credit. It has implications for the economic future of the country.

I agree with Senator Javits that the article merits wide attention and I ask that it be inserted in the RECORD.

The article follows:

[From the Journal of Marketing, Spring 1982]

CREDIT SCORING SYSTEMS: A CRITICAL ANALYSIS

(By Noel Capon)

"Our society has been taught to believe that an individual's creditworthiness is primarily related to their personal credit history. I feel certain that for anyone who has any regard for the concept of individuality, reviewing the credit-scoring systems of some of our major national creditors would be a chilling experience." [1]

The importance of consumer credit in the U.S. economy has grown markedly through the 20th century. A combination of growth in the supply and form of credit and increased consumer demand has led to an average annually compounded rate of growth in consumer credit outstanding of 7.5 percent from 1919, the first year for which Federal Reserve figures are available, to the present. This figure is much greater than the average growth rate of GNP for the same period (Board of Governors of the Federal Reserve System 1976a, 1976b, 1980).

The ever-increasing ability to offer credit has important sales and profit implications for marketers, just as the ability to obtain credit has important quality-of-life implications for consumers. However, despite the growth in credit availability, many consumers are unable to gain access to the credit that they need and believe they deserve. The importance of this issue was recognized by Congress, which in 1974 passed the Equal Credit Opportunity Act prohibiting discrimination in the granting of credit on the basis of sex and marital status (ECOA 1975). In 1976 the Act was amended to include race, color, religion, national origin, receipt of income from a public assistance program, and age as proscribed characteristics. Further, in 1977, the Federal Trade Commission decided to devote a significant percentage of its then increased resources to the handling of all forms of credit abuse problems (Advertising Age 1977).

The federal legislation was directed largely at abuses in judgmental methods of granting credit. However, at that time judgmental methods that involve the exercise of individual judgment by a credit officer on a case-by-case basis were increasingly being replaced by a new methodology, credit scoring. William Fair has recently estimated that between 20 and 30% of all consumer credit decisions are now made by credit scoring, and that most of the very large credit granters including banks, finance compa-

[1] Opening Statement of Senator PAUL E. TSONGAS (D., Mass.). See *Credit Card Redlining* 1979, p. 2.

nies, oil companies, retail merchants, and travel and entertainment cards now score their applicants (Credit Card Redlining 1979, p. 183–184).

This paper provides a critical analysis of credit scoring and may be viewed in part as a response to Nevin and Churchill's (1979) paper in this journal, which generally endorsed credit scoring systems. It will be shown that not only has their adoption led to major changes in the manner in which credit decisions are made but that these changes and the methodologies employed raise significant public policy issues.

CREDIT DECISION METHODS

The conceptual framework for judgmental credit decisions has endured for many decades. This framework consists of the three "c's" of credit, character, capacity and capital, often joined by collateral and conditions, and indicated primarily by credit history and such other characteristics as income, occupation and residential stability. However, for such reasons as credit officer error, inconsistency in application of credit policies across credit officers, and high costs both in training and employing credit officers and in purchasing credit reports, innovative creditors have long sought more automated ways of making credit decisions.

Numerical scoring systems, first developed in the mail order industry in the 1930s and later used by large personal finance companies, were an attempt to address these concerns (Smalley and Sturdivant 1973, p. 229; Wonderlic 1952). In a typical system a number of predictor characteristics were chosen for their ability to discriminate between those who repaid their credit (goods) and those who did not (bads), and points were awarded to different levels of each characteristic. An individual applicant was judged on the relationship between his/her summated score across characteristics and independently set accept/reject cut-off values. Early systems employed such characteristics as occupation, length of employment, credit bureau clearance, personal references, marital status, bank account, neighborhood, collateral, length of residence, income, rent, life insurance ownership, sex and race. Although the Spiegel system (Smalley and Sturdivant 1973, p. 229) and a major study for the National Bureau of Economic Research (Durand 1941) used statistical procedures (one characteristic at a time) to determine the point assignments, most systems were based on trial and error.

Although the ability to make credit decisions on a quantitative rather than a judgmental basis represented an important advance, the widespread diffusion of quantitative methods did not occur until development of the necessary computer technology in the early 1960s. In computer-based systems, hereafter termed *credit scoring systems*, the computational power of the computer is employed to identify, from a creditor's own historic files, those characteristics that best discriminate between the goods and the bads and to determine the point values for the various levels of each selected characteristic.

CREDIT SCORING SYSTEMS: DEVELOPMENT

The basic procedure for developing credit scoring systems involves the selection of samples of goods and bads from the creditor's files. Upwards of 50, and as many as 300 (Duffy 1977) potential predictor characteristics are obtained from the application blank. A multivariate statistical technique such as regression or discriminant analysis (see, for example, Beranek and Taylor 1976; Chatterjee and Barcun 1970; Long 1976; Myers and Forgy 1963) is employed, frequently in a stepwise manner, to identify those predictor characteristics, typically from eight to twelve, which contribute most to separation of the two groups. These selected characteristics, determined in part by the initial set of characteristics available from the application blank and in part by the data, and their point values are unique to an individual system. An example of a regionally based system of a major national retailer is shown in Table 1.

An applicant for credit is evaluated in a credit scoring system by simply summing the points received on the various application characteristics to arrive at a total score. This score may be treated in a number of ways depending on the system design. In the single cut-off method, the applicant's total score is compared to a single cut-off point score. If this score exceeds the cut-off, credit is granted; otherwise the applicant is rejected. More complex systems are based on a two-stage process. For example, the applicant's total score may be compared to two cut-off figures. If the score exceeds the higher cut-off, credit is awarded automatically, while if it falls below the lower cut-off, credit is automatically denied. If the score is between the two cut-offs, credit history information is obtained, scored, and the points added to the total score obtained from the application blank. If this new score is above a new higher cut-off, credit is awarded; if not, credit is denied.

The creditor sets his/her cut-off values on the basis of the probabilities of repayment and nonpayment associated with the various point scores and the trade-offs between type I and type II errors. The higher an acceptance cut-off is set, the lower the type I error (accepting applicants who fail to repay), while the lower a rejection cut-off value, the lower the type II error (failing to accept applicants who would have repaid).

Table 1.—Major national retailer's final scoring table for application characteristics

Zip code:	
Zip Codes A	60
Zip Codes B	48
Zip Codes C	41
Zip Codes D	37
Not answered	53
Bank reference:	
Checking only	0
Savings only	0
Checking and Savings	15
Bank name or loan only	0
No bank reference	7
Not answered	7
Type of housing:	
Owns/buying	44
Rents	35
All other	41
Not answered	39
Occupation:	
Clergy	46
Creative	41
Driver	33
Executive	62
Guard	46
Homemaker	50
Labor	33
Manager	46
Military enlisted	46
Military officer	62
Office staff	46
Outside	33
Production	41
Professional	62
Retired	62
Sales	46
Semi-professional	50
Service	41
Student	46
Teacher	41
Unemployed	33
All other	46
Not answered	47
Time at present address:	
Less than 6 months	39
6 months to 1 year 5 months	30
1 year 6 months to 3 years 5 months	27
3 years 6 months to 7 years 5 months	30
7 years 6 months to 12 years 5 months	39
12 years 6 months or longer	50
Not answered	36
Time with employer:	
Less than 6 months	31
6 months to 5 years 5 months	24
5 years 6 months to 8 years 5 months	26
8 years 6 months to 15 years 5 months	31
15 years 6 months or longer	39
Homemakers	39
Retired	31
Unemployed	29
Not answered	29
Finance company reference:	
Yes	0
Other references only	25
No	25
Not answered	15
Other department store/oil card major credit card:	
Department store only	12
Oil card only	12
Major credit card only	17
Department store and oil card	17
Department store and credit card	31
Major credit card and oil card	31
All three	31
Other references only	0
No credit	0
Not answered	12

Since the early 1960s the use of credit scoring systems has expanded enormously, as journals serving practitioners have been filled with articles extolling their virtues (e.g., Churchill, Nevin and Watson 1977a, b; Cremer 1972; Long and McConnell 1977; Main 1977; Myers 1962; Weingartner 1966). Further, passage of the Equal Credit Opportunity Act Amendments (*Federal Register* 1976) offered further endorsement of credit scoring systems when instructions regarding their use were specifically included in Regulation B, which implements the Act (*Federal Register* 1977).

In the hearings on the amendments creditors argued that adherence to the law would be improved if credit scoring systems were used. They contended that whereas credit decisions in judgmental systems were subject to arbitrary and capricious behavior by credit evaluators, decisions made with a credit scoring system were objective and free from such problems. Regulation B thus envisioned two categories of credit decision systems, statistically sound and empirically derived credit scoring systems, and all others not satisfying the criteria of statistical soundness and empirical derivation, which are termed judgmental systems. This distinction has practical importance. For example, although age is a proscribed characteristic under the Act, if the system is statistically sound and empirically derived, it can be used as a predictive characteristic, provided that the elderly receive the maximum points awarded to any age category. The appropriate manner in which both types of

systems should be used was spelled out in the Regulations.

Presently credit scoring systems are used extensively, especially among major credit granters. It is claimed that their use reduces bad debt losses, that more consumers are granted credit, and that organizational consistency in decision making is achieved. Further, the costs of granting credit are reduced, since less skilled personnel are required and fewer credit reports need be purchased (*Credit Card Redlining* 1979, pp. 234–240; Fair, Isaac and Company 1977). However, despite the torrent of words endorsing credit scoring systems, when they are subject to detailed analysis many troubling issues of a consumer and public policy perspective can be identified.

ANALYSIS OF CREDIT SCORING SYSTEMS: VARIABLES AND POINTS

The critical distinction between extant credit scoring systems and other methods of credit evaluation is the absence, in credit scoring, of an explanatory model. While judgmental systems are based, however imperfectly, upon a credit evaluator's explanatory model of credit performance, credit scoring systems are concerned solely with statistical predictability. Since prediction is the sole criterion for acceptability, any individual characteristic that can be scored, other than obviously illegal characteristics, has potential for inclusion in a credit scoring system. A partial list of characteristics used by creditors in the development of their systems is presented in Table 2. Few of these variables bear an explanatory relationship to credit performance. At best they might be statistical predictors whose relationship to payment performance can exist only through a complex chain of intervening variables. The overwhelming concern of creditors for prediction and a total unconcern for other issues was perhaps most tellingly demonstrated in the exchange between Senator Carl Levin (D., Michigan) and William Fair, chairman of Fair, Isaac and Company, the leading developer of credit scoring systems, at the Senate hearings on S. 15. Senator Levin asked Mr. Fair whether he *should be allowed* to use certain characteristics in the development of credit scoring systems (*Credit Card Redlining* 1979, p. 221):

Table 2.—Partial list of factors used to develop credit scoring systems

Telephone at home	First letter of last name
Own/rent living accommodations	Bank savings account
Age	Bank checking account
Time at home address	Zip code of residence
Industry in which employed	Age of automobile
Time with employer	Make and model of automobile
Time with previous employer	Geographic area of U.S.
Type of employment	Finance company reference
Number of dependents	Debt to income ratio
Types of credit reference	Monthly rent/ mortgage payment
Income	Family size
Savings and Loan references	Telephone area code
Trade union membership	Location of relatives
Age difference between man and wife	Number of children
Telephone at work	Number of other dependents
Length of product being purchased	Ownership of life insurance
	Width of product being purchased

Senator Levin: "You feel that you should be allowed to consider *race?*" (emphasis added)

Mr. Fair: "That is correct."

Senator Levin: "Would the same thing be true with *religion?*"

Mr. Fair: "Yes."

Senator Levin: "Would the same thing be true with *sex?*"

Mr. Fair: "Yes."

Senator Levin: "Would the same thing be true with *age?*"

Mr. Fair: "Yes."

Senator Levin: "The same thing be true with *marital status?*"

Mr. Fair: "Yes."

Senator Levin: *"Ethnic origin?"*

Mr. Fair: "Yes."

This exchange demonstrates very clearly that in the development of credit scoring systems, for Fair, Isaac and Company at least, no issue other than statistical predictability is of any consequence.[2] Although professing a commitment to obey the law, Fair, Isaac and Company, if statistical predictability were found and it were so able, would provide its customers with credit scoring systems that discriminated on the basis of race, religion, sex, age, marital status and ethnic origin.

The result, for consumers, of such a focus on prediction can be seen by examining two scoring tables which, in the author's experience, are typical of those in general use today. Table 1 presents the scoring table of the major national retailer. Of particular note are the following items:

There are no economic variables such as income, debts, living expenses and the like.

There are no variables for credit history.

Zip code is a very important characteristic, and a "bad" residential location can put the applicant at a tremendous disadvantage.

Applicants score fewer points if they rent their accommodations than if they own or are buying their home.

The length of time the applicant has been at his/her present address or has been with his/her current employer are important characteristics. However, rather than greater residential and employment stability being worth an increasing number of points, as stability increases, the points awarded first decrease and then later increase.

An applicant's occupation is an important characteristic. However, to be gainfully employed in the categories of driver, labor, or outside gains no more points than being unemployed.

If the applicant fills out the application honestly and admits that he/she borrowed money from a finance company, he/she is severely penalized. Whether or not the loan was satisfactorily repaid is irrelevant.

For many of the characteristics more points are awarded if the question goes unanswered than are awarded for many of the possible answers. Thus, the second most favorable way to score on the zip code characteristic is not to provide the information.

A second system, developed and used by the finance subsidiary of a major consumer durables manufacturer, is noted in Table 3. The following items are of interest:

Income is an important variable. However, the points relationship does not increase monotonically; rather, the points fluctuate wildly as income increases.

There are no variables for credit history.

Applicants who own their own home score many more points than those with other arrangements.

Increasing residential and employment stability are worth increasing numbers of points.

The points awarded for age have a curvilinear relationship.

Occupation is an important characteristic, and the unemployed category achieves the highest possible point score.

Honestly providing a small loan reference results in being penalized.

Many points are awarded for maintenance of either a checking or savings account, irrespective of the balances.

Though Congress embraced credit scoring systems, believing that their claimed objectivity offered advantages in enforcement of the Equal Credit Opportunity Act, the key goal of the Act was to:

". . . establish(ed) as clear national policy that no credit applicant shall be denied the credit he or she needs and wants *on the basis of characteristics that have nothing to do with his or her creditworthiness . . .*" (*Equal Credit* 1976, p. 3) (emphasis added)

Congress insisted that creditors advise applicants of the reasons for adverse action since it was concerned with the educational value of such knowledge:

". . . rejected applicants will now be able to learn where and how their credit status is deficient and this information should have a pervasive and valuable educational benefit . . ." (*Equal Credit* 1976, p. 4)

In identifying a set of proscribed characteristics (enumerated in ECOA), the clear intent of Congress was that acceptable characteristics are those that related to creditworthiness. While "relationship to creditworthiness" was not spelled out, many of the characteristics noted in Tables 1 and 3 do not evince a face valid relationship, for instance, those variables whose values are fluctuating—time at present address, time with employer (Table 1), and unpaid cash balance, age and income (Table 3). Given the concern for consumer education, it is difficult to believe that Congress would have accepted the fact that increased income (Table 3) and greater residential and employment stability (Table 1) should be regarded as indicators of *reduced* creditworthiness.[3]

Many other problems concerning the variables used and the points awarded exist with credit scoring systems. There is a real question of misleading the applicant. One might expect that provision of a financial reference would be reviewed positively, yet in both systems noted above, honesty is penalized. Also, there is the possibility that characteristics actually employed act as surrogates for proscribed characteristics. Thus the Senate has heard testimony that a zip code acts as a surrogate for race (*Credit Card Redlining* 1979, p. 20–63, 261–264, 314–317). Accordingly, discrimination can result when zip code is used as a predictor charac-

[2] A logical extension of Mr. Fair's position would allow the inclusion of such characteristics as color of hair (if any), left or right-handedness, wear eyeglasses, height, weight, early morning drink preference (tea, coffee, milk, other), first digit of social security number, last digit of social security number, sexual preference (none, same, different, both), educational level, sports preference (football, baseball, tennis, soccer, golf, other), and favorite movie star (select from list), if it could be shown that they were statistically related to payment performance.

[3] The Senate Committee report asserts that: ". . . consumers particularly should benefit from knowing, for example, that the reason for their denial is their *short residence in the area, or their recent change of employment . . .*" (emphasis added).

teristic, when different cut-off values are employed for different zip codes, or when credit scoring systems are developed at the individual zip code level. Differential treatment of types of income, such as that from part-time employment, alimony, child support and separate maintenance payments, discriminates against women. Furthermore, own/rent accommodation may discriminate against minorities as a result of historical discrimination in granting of mortgage loans, just as occupation and length of time with employer may discriminate against women because of historic employment practices and reduced employment stability due to pregnancy and childbearing, respectively. In the same way, age of automobile may discriminate against the handicapped.[4]

Since credit history information only enters credit scoring systems at a second stage, if at all, many applicants are denied credit despite the fact that they had excellent credit records (Chandler and Ewert 1975; *Credit Card Redlining* 1979, p. 63-70). Their reputations are unjustly injured, and severe psychological trauma may also ensue (*Credit Card Redlining* 1979, p. 135-136). The use of mere statistical prediction to make decisions may violate the constitutional guarantees of the equal protection and due process clauses of the 5th and 14th Amendments (*Credit Card Redlining* 1979, p. 137-138). The equal protection clause addresses the question of making decisions on individuals on the basis of characteristics that are both "irrelevant and unchangeable," while due process states that "individual cases must be decided on their own merits." In passing ECOA, Congress proscribed characteristics that were either immutable (race, color, national origin, sex) or central to the individual's life (religion, marital status). Characteristics still frequently employed in credit scoring systems such as number of dependents, age, occupation and place of residence appear to have many similarities to these proscribed characteristics, both in terms of being "irrelevant and unchangeable" and having little or nothing to do with "merit" in the case of a credit decision.[5]

ANALYSIS OF CREDIT SCORING SYSTEMS: DEVELOPMENT

The focus of the previous section was on problems involving the selection of predictor characteristics and the award of point values. In this section a series of methodological issues in the development of credit scoring systems is addressed. It will be shown that there are real questions as to whether credit scoring systems satisfy the legal requirements of empirical derivation and statistical soundness. The areas of concern are several and are discussed below.

Bias

The correct way to develop a credit scoring system is to sample randomly an historic applicant population. Creditors typically do not sample in this manner, however, for only data from those applicants previously awarded credit can provide samples of goods and bads. Since a considerable percentage of applicants was historically denied credit, systems based only on a population of accepted applicants where there is a corresponding population of denied applicants must be biased. Indeed, it has been shown that not only are biased estimates obtained, it is not possible to estimate in which direction the bias lies (Avery 1977). This problem is more severe in those systems that were originally developed before enactment of ECOA, when variables that are now illegal were used to make credit decisions. Despite revalidation, these systems are both biased and contaminated by illegal discrimination.

Developers of credit scoring systems are aware of the problem of using biased samples and have developed techniques in attempts to solve it. In the augmentation method, a sample of denied applicants is separated into goods and bads on the basis of the relationship of their application characteristics to those of the actual goods and bads. The actual and denied goods are then grouped, as are the actual and denied bads, and the credit scoring system is developed from the augmented sample. However, as Shinkel (1977) has shown, biased estimates are still obtained with this and alternative procedures.[6]

Multicollinearity

Credit scoring systems are developed from a large group of contender characteristics. In stepwise procedures the characteristic that explains the greatest variance enters the discriminatory function first, followed by other characteristics which in turn explain the greatest residual variance. However, there is no requirement that despite their ability to explain residual variance, subsequently entered variables are not correlated with variables previously entered. Thus, the coefficients of variables entered early to the equation are continually modified as successive variables are entered. The final point values assigned are far from being a true reflection of the discriminatory power of the single variable and are contaminated by a host of intercorrelations (Hsia 1978). A variable with good predictive ability but highly correlated to an entered variable will not enter the final equation. No greater concern for multicollinearity is shown in systems where the characteristics are preselected.[7]

An associated problem of intercorrelation of variables arises in the development of the second stage of two-stage systems in which the potentially discriminating credit history variables act only on the residual variance. Because of the intercorrelation between credit history variables and those variables already entered, the effect of credit history is severely circumscribed.

Sample size

Credit scoring systems are frequently developed with insufficiently large samples to achieve reliability in the assignment of point values. Thus, for the occupation characteristic of a credit scoring system employed by a major oil company, the occupations of farm foremen and laborers, enlisted personnel, clergymen, entertainers, farmers and ranchers, and government and public officials received few points. However, the sample sizes on which the point scores are based were, respectively, three, twenty-three, four, four, three and three. The point values are clearly unreliable. Similar patterns occur when zip code is used as a characteristic. Thus, for a regional trading area with hundreds of zip codes, the use of sample sizes of 3,000 or fewer subjects results in the point scores for many zip codes being based on very few data points. The system described in Table 3 was developed from a mere 640 data points (which may in part explain the strange income relationship).[8]

Judgmental aggregation

The empirical requirement for credit scoring systems is vioated when credit scores attempt to overcome the reliability problem. Then they aggregate individual units of a variable but in a nonempirical, arbitrary manner. The geographic unit, for example, may be defined not as a small unit such as zip code but as a state or regional grouping of states under no rationale other than, perhaps, geographic contiguity.[9] In the system described in Table 1, the 20 gross occupation categories were developed from 300 or more fine level occupations (*Credit Card Redlining* 1979, p. 166-168).

Not only are the occupation categories developed in an arbitrary manner, they are not a mutually exclusive set: an individual applicant could be assigned to a number of different categories. Thus, for example, a sales manager could be assigned as executive (62 points), manager (46 points), office staff (46 points), professional (62 points) or sales (46 points). A U.S. Senator might be classified as executive (62 points), professional (62 points), manager (46 points) or all other (46 points).

Judgmental system constraints

Since the methodology used to develop credit scoring systems is brute force empiricism, point value assignments to levels of characteristics in the final scoring table are often absurd, as indicated in the previous section. To overcome the consequent problems of credit scoring personnel ignoring the system, developers impose constraints on point assignments a priori (Churchill, Nevin and Watson 1977b; Fair, Isaac and Company 1977). While final scoring tables may thus be less absurd than otherwise, the impact of this procedure is to violate the empirical requirement of ECOA.

---

[4] Whether or not such surrogate variables could legally be employed in a credit scoring system would depend upon the results of application of an "Effects Test." See *Griggs v. Duke Paper Co.*, 401 U.S. 424 (1971), and *Albermarle Paper Co., v. Moody*, 422 U.S. 405 (1975).

[5] Nevin and Churchill (1979) present empirical support for the proposition that if characteristics correlated with proscribed characteristics were disallowed in credit scoring systems, the predictive ability of the model would be reduced. On the basis of an example in which "we have tried to make the assumptions realistic with respect to industry experience" (p. 102), they show that not only would the fictional consumer finance company earn less profit, fewer applicants would be awarded credit, using a restricted model. They fail to note that a profit maximizing finance company should award credit to all applicants, in which case profits would be $1.9M versus $1.78M and 9,000 versus 6,019 "good" applicants would be granted credit.

[6] Eisenbeis (1978) has discussed a number of statistical problems relating to the use of discriminant analysis in credit scoring. They include violations of the assumption about the underlying distributions of the characteristics, use of linear instead of quadratic discriminant functions when group dispersions are unequal, difficulty in demonstrating the significance of each characteristic included in the system, and estimation of classification error rates.

[7] The multicollinearity problem could perhaps be addressed by factor analysis and the use of factor scores. However, such a procedure would run into the problem of a legal requirement to disclose reasons for adverse action, where the "reason" would now be a factor score correlated to a greater or lesser extent with many original variables.

[8] The zip code analysis for the Table 1 system was based on between 500 and 600 individual zip codes, which, at an estimated maximum sample size in the 3,000 to 5,000 range, implies that many zip codes contained very few data points.

[9] For a worked example of the problems of aggregation with geographic units, see *Credit Card Redlining*, p. 122-125. Also see p. 384-86 for a discussion of aggregation and homogeneity problems in the use of zip codes.

Table 3.—Final scoring table for finance subsidiary of consumer durables manufacturer

Unpaid cash balance:	
0–$299	26
$300–$499	16
$500–$599	20
$600–$699	15
$700 and above	4
Time at present address:	
Less than 1 year	4
1–2 years	6
3–9 years	8
10 years or longer	10
Time with present employer:	
Less than 1 year	2
1–2 years	10
3–5 years	12
6–9 years	16
10 years or longer	22
Residence:	
Own	17
Rent or live with relative	0
Age:	
26–29	5
30–34	0
35–39	4
40–49	9
50–54	14
55 and above	17
Income (monthly):	
0–$599	37
$600–$699	47
$700–$799	40
$800–$899	36
$900–$1,099	44
$1,100–$1,299	39
$1,300 and above	49
Coapplicant: Employed	6
Financial:	
Major credit card	22
Small loan reference	(7)
No checking or savings account	(18)
Occupation: *	

Group 1–19

Accountants, Auditors	Machinists
Architects, Designers	Physicians, Dentists
Bank tellers/clerks	Pilots (nonmilitary)
Business executives	Postal employees
College professors	Real estate personnel
Computer programmers	Reporters, newsmen
Engineers, Chemists	Salesmen (not department store)
Factory inspectors	Supervisors, nonoffice
Factory workers (semi-skilled)	Supervisors, office
Farm owners	Systems analysts
Field representatives	Teachers, instructors
Firemen, Rangers	Unemployed
Insurance agents, Appraisers	

Group 2–13

Building superintendents	Medical and Dental assistants
Carpenters, Craftsmen	Office managers
Clergymen	Plumbers, Pipefitters
Clerical workers, Bookkeepers	Policemen, Detectives
Computer operators	President/Owner of small firm
Electricians	Printers, Pressmen
Foremen, factory	Railroad employees
Government employees	Registered nurses
Guards	Repairmen
Installers	Sales clerks
Lawyers, Judges	Seamen (nonmilitary)
Maintenance men	Secretaries, Stenographers
Managers, other than office	Shipping and stock clerks
Mechanics	Stewards, Stewardesses
Taxi drivers, Chauffeurs	Technicians, Researchers

Group 3–0

Artists, Entertainers, Writers	Hospital employees (unskilled)
Assemblers	Hotel and Restaurant employees
Bartenders	Laborers (unskilled)
Construction workers	Machine operators
Contractors, Builders	Painters
Cooks, Bakers, Butchers	Social workers
Delivery and Route men	Tailor/Seamstress
Dishwashers	Truck and Bus drivers
Domestics, Janitors	Waiter/Waitress
Heavy equipment operators	Warehousemen
	Welders

Group 4–0

Other—Not directly related to Groups 1, 2 or 3 above.

* All self-employed should be investigated.

Overriding

The overriding procedure is also a violation of the empirical requirement. Overriding exists when a declined applicant calls to complain and, either on the basis of no information other than the protest or on the basis of some extra information, the decision is reversed and credit is awarded. Not only is use of the overriding procedure a statement that the system is not doing the job it was designed to do, it is descriminatory procedure against those who are less vociferous following credit denial.

Histogram error

When continuous characteristics such as time are used, serious errors may be introduced to the scoring table by using a series of discrete categories rather than the underlying continuous characteristic. Thus, for the characteristic "time at present address" in the scoring system described in Table 1, there are a series of histogram errors. For instance, an applicant with a residency of seven years and five months scores 30 points and one month later scores 39 points, a "present" of nine points. Conversely, a person with a residency of five months scores 39 points and one month later "loses" nine points. Errors of over 25 percent misclassification have been noted because of this histogram effect (The Sorites Group 1978).

In this section, seven areas of methodological concern have been noted. Not only were troubling statistical issues raised, it was shown that the procedures employed for the development of credit scoring systems may violate the legal requirements of ECOA that they be empirically derived and statistically sound. Certainly, the institution of careful procedures may obviate some problems, for example, overriding, but fatal methodological flaws may render some insoluble.

DISCUSSION

In this paper the background, development and rationale of credit scoring systems have been described. The benefits to creditors of such systems have been so vigorously promoted that regulations concerning their use have been specifically written into the law, and their adoption has been extremely widespread, especially among major creditors. Thus, within the past 20 years a major change in credit granting practice affecting millions of consumers has occurred in the United States. However, public debate has been virtually absent on this topic.

This paper redresses the balance and focuses a critical eye on credit scoring systems. When subject to intensive examination, a very different picture emerges from that portrayed by the multitude of credit scoring boosters.

An examination of the development of credit scoring systems reveals a host of statistical issues that may pose severe legal problems for creditors. Statisticians have only recently begun to investigate these systems, yet their early findings are very troubling. It is perhaps not unlikely that 20 years of intensive study of these systems paralleling the 20 years of development just past may lead to conclusions even more serious than are justified by our present knowledge.

The more troubling aspect, however, has less to do with statistical issues than with conceptual ones. The brute force empiricism that characterizes the development of credit scoring systems leads to a treatment of the individual applicant in a manner that offends against the traditions of our society. When predictive decisions regarding individuals have to be made, they are based typically on variables that bear an explanatory rather than a statistical relation to the behavior being predicted, notably the actual historic performance in a similar or related area. For instance, job promotion rests heavily on job performance; selection for college is based on high school grades and aptitude tests. Yet credit scoring developers use any characteristic that discriminates as long as they can get away with it; they have even used the first letter of a person's last name.[10]

As far as individuals not yet in the credit marketplace are concerned, who have no credit history, the characteristic of extant systems that they ignore credit history is no argument for their use. It is arbitrary and unfair to make decisions on these applicants on the basis of points awarded arbitrarily for the characteristics of those already in the market. Experience of enterprising retailers suggests that a system characterized by low initial credit limits and tight controls is a better way to treat new applicants.

What is needed, clearly, is a redirection of credit scoring research efforts toward development of explanatory models of credit performance and the isolation of variables bearing an explanatory relationship to credit performance. Such variables are likely related to economic factors (ability to pay) and credit history factors (demonstrated willingness to pay). In present systems, economic factors do not always enter the credit scoring tables, in part because they are highly correlated with other entering variables, for instance, zip code and income. Furthermore, since creditors are unwilling to pay the cost of credit reports, credit history factors are relegated to the second stage and their use is thus minimized, despite ample evidence that they provide the strongest relationship to future credit performance (Chandler and Ewert 1975; *Credit Card Redlining* 1979, p. 376; Long and McConnell 1977).

It is, of course, possible that well-developed explanatory models would be less predictive overall and more costly to implement than currently employed credit scoring systems. Even if this were true, and it may not

[10] Disclosure by Morton Schwartz, General Credit Manager, J. C. Penney Company, at a meeting of the Trustees of the Credit Research Center, Atlanta, Ga., November 10, 1977.

be so, such increased costs should be weighed against the social cost of employing systems such as those described in this paper that provide a dispassionate observer with "a chilling experience."

This analysis should not be construed as advocacy for traditional judgmental systems nor as argument against the thrust toward objectivity and consistency in credit decision making. Such a direction is clearly a positive one. What is critical, however, is treatment of the individual in a fair and just manner and his/her protection from arbitary treatment. The individual should be judged on characteristics that are ultimately related to the decision under consideration; brute force empiricism has no place in decisions of such importance to individual citizens.●

THE CONSTITUTION AND FREEDOM—ADDRESS BY FORMER SENATOR SAM J. ERVIN, JR.

● Mr. EAST. Mr. President, on April 30, 1982, the Sam J. Ervin, Jr., program in public affairs was dedicated at the School of Humanties and Social Sciences at North Carolina State University. The renaming of the program in public affairs at this outstanding university is a fitting tribute to North Carolina's favorite son. While he was always a loyal Democrat, Senator Ervin earned the respect and love of all North Carolinians for his outspoken defense of constitutional liberties as he understood them. I ask that former Senator Ervin's remarks given at the dedication ceremony be printed in the RECORD for the edification of my colleagues and as another small tribute to this remarkable man.

THE CONSTITUTION AND FREEDOM

(Remarks prepared by Sam J. Ervin, Jr. for delivery at North Carolina State University at Raleigh at 2 p.m. April 30, 1982. For release at that time)

IMPLICATIONS OF TODAY'S EVENTS

Words cannot adequately express my gratitude to former aides and the other friends whose generosity made the painting of my portrait and today's events possible; to Marcos Blahove whose artistic genius and charity of heart enabled him to paint this outstanding portrait of me; to North Carolina State University at Raleigh, one of earth's most useful institutions of learning and research, for accepting my portrait, and naming a significant program of its School of Humanities and Social Seciences "The Sam J. Ervin, Jr. Program in Public Affairs;" and to my ever young sweetheart, Margaret Bell Ervin, for gracing this occasion by her presence, and for standing beside me in sunshine and shadow with inspiration and love for fifty eight years.

Today's events have a portent for the future which vastly transcends in importance the high honor they accord to me. These events reveal these things:

1. Those who made them possible share my abiding conviction that the causes I have cherished and championed, namely the government of laws ordained by the Constitution and the freedoms enshrined in the North Carolina Declaration of Rights and the Bill of Rights, must prevail if America is to enjoy constitutional government and Americans are to be free; and,

2. The State University is determined that the yound men and women who come to her for intellectual enlightment in the years ahead are to have the opportunity to know the truth that can keep America and Americans free, that is to say, the truth about constitutional government and freedom.

MY REVERENCE FOR CONSTITUTIONAL GOVERNMENT AND FREEDOM

As a citizen, I have cherished and championed constitutional government and freedom all my life; and as a public servant for some fifty years, I have endeavored to preserve them and make them realities in our land at all times between my service in the days of my youth in the North Carolina Legislature through my last week in the United States Senate, when I piloted to enactment the Speedy Trial Act and the Privacy Act.

My motivation has been my certainty that "whatever government is not a government of laws is a despotism, let it be called what it may";[1] that "the condition upon which God hath given liberty to man is eternal vigilance";[2] and that "a frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty."[3]

Despite the *Miranda Case*, I will make a confession that while serving in the North Carolina Legislature I made a concession to the enemies of freedom. While opposing the resolution to prohibit the teaching of evolution in North Carolina's schools and colleges, I conceded its adoption would delight the monkeys in the jungle because it would absolve them from responsibility for the conduct of the Legislature in particular and the human race in general.

MY OFFICIAL ACTIVITIES

During my 20 years in the Senate, I sought to preserve constitutional government and freedom by opposing the concentration of power in the federal government; the abdication of state power to that government; confiscatory taxes, deficit financing, and unbalanced budgets; taxation to finance religious institutions; proposals to amend the First Amendment to confer on school boards the power to teach religion by prescribing prayer in public schools; compulsory unionism to enable unions to obtain members by legal coercion rather than by voluntary persuasion; preventive detention imprisoning Americans for crimes they had not committed and might never commit; no-knock proposals nullifying Fourth Amendment prohibitions of unreasonable governmental searches and seizures; the withholding by President and federal departments and agencies of information necessary to enable Congress to legislate wisely, and non-security information necessary to enable Americans to know what their government is doing; presidential evasion of the treaty making power of the Senate under the Constitution by executive agreements; wanton invasions of the privacies of Americans by Presidents and federal departments and agencies; encroachments by Presidents and federal departments and agencies on the freedom of thought, speech, and association, and the private lives of federal employees; the use of the army to spy on Americans exercising their First Amendment rights of freedom of thought, speech, association, and peaceable assembly; congressional suspension of the power to legislate reposed in the States by the Constitution; and the tyranny of federal bureaucrats and judges who order forced busing of helpless children to integrate them in the schools in racial proportions pleasing to them.

Unhappily my opposition and that of like-minded senatorial colleagues did not outlaw some of these tyrannies. Happily, however, we were able to forestall some of them, or at least ameliorate their most evil consequences.

During my years in the Senate, I sought to promote and protect constitutonal government and freedom in America in a positive way by proposing and seeking adoption of bills, resolutions, and amendments drafted by me to achieve that objective. Unfortunately, some of them were defeated by national legislators more concerned with magnifying the power of the federal government than with making it just and the people free.

Fortunately, however, Congress did add to the laws of the land proposals sponsored by me to secure constitutional rights to mentaly ill persons in the District of Columbia; rights to Indians residing on reservations comparable to those conferred on other Americans by the Bill of Rights; rights to poor people unable to give monetary bail to freedom while awaiting trial on charges of crime in federal courts; rights to representation by law trained counsel to poor people charged with crime in federal courts; rights to procedural and other safeguards in administrative proceedings and courts-martial to persons serving in the armed forces; prohibitions of unwarranted invasions by federal departments and agencies of the privacies of the people; rights to speedy trials in federal courts to persons charged with crime; and nullification of the inexcusable agreement made by the Administrator of General Services with former President Nixon and revealed on the day the pardon was granted by President Ford which empowered former President Nixon to hinder historical truth by destruction of the Watergate tapes.

COMMENTS ON CURRENT NEGATIONS OF CONSTITUTIONAL GOVERNMENT AND FREEDOM

My devotion to constitutional government and freedom impels me to comment on prevalent negations of them, which are popular in many quarters. These comments are likely to prompt persons whose sincerity I do not question to charge me with racism.

I make these comments solely on my own authority and without the known approval of any institution or any other than myself participating in today's events.

I am no racist. Like Abou Ben Adhem, I love all men whom the Tennessee poet, Walter Malone, rightly calls fellow travelers to the tomb. I esteem the Constitution for this reason.

The Constitution in its present form is color blind. It confers on all Americans of all races equality of constitutional and legal rights, and forbids government at any level to nullify this objective by using race as a criterion for the bestowal of rights or the imposition of responsibilities.

I wholeheartedly applaud the legitimate endeavors of Americans of all races to make of themselves everything their ambition, talent, industry, and Creator gave them any possibility of becoming.

Many persons of undoubted sincerity labor under the honest delusion that the federal government has a paramount obligation to banish all racial discrimination and even all racial preference from America by any means available, and that the most ef-

[1] Daniel Webster: *Speech at Bangor, Me.*, 25 August, 1835.

[2] John Philpot Curran: *Speech Upon The Right of Election*, 10 July, 1790.

[3] North Carolina Constitution of 1776, *A Declaration of Rights*, Section.

fective means of achieving this objective is for it to heap new racial discriminations on Americans, including those in no wise reponsible for any discrimiation, past or present.

I deny the validity of this obsession. Government negates constitutional government, and freedom, when it subjects the basic rights of any Americans to the personal demands of members of any particular race.

THE FIRST AMENDMENT

I revere the First Amendment. It was added to the Constitution to make and keep Americans politically, economically, intellectually, and spiritually free.

The federal government is now practicing racial discrimination in reverse. By affirmative action programs, it requires the establishment of racial quotas, which it euphemistically calls goals, and which command employers to employ specified numbers of blacks before they employ any whites; and by substituting race for merit, it requires the employment of blacks in preference to whites in industry and educational institutions, and the admission of blacks in preference to whites to colleges and professional schools.

This is not all by any means.

GOVERNMENTAL ORTHODOXY

The Supreme Court interpreted the First amendment aright in *West Virginia State Board of Education v. Barnette,* when it ruled:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."[4]

This constitutional declaration is now being flouted by Congress, the President, the Supreme Court, and federal departments and agencies. They usurp and exercise the power to establish governmental oxthodoxies which decree what truth is in respect to matters in controversy among Americans. I cite three exemples.

The Internal Revenue Service establishes as its criterion for granting or withholding exemptions from income taxation of contributions of individuals to educational institutions the acceptance or rejection by such institutions of its determinations of truth in respect to race and what religion teaches about race.

The Department of Health and Welfare spends tax moneys to influence the private habits of Americans, and induce them to stop smoking cigarettes in obedience to the Surgeon General's determination of what truth is in respect to that habit.

Acting under distortions by the Supreme Court of the Thirteenth Amendment and the Civil Rights Act of 1866, which began in 1968 in the case of *Jones v. Alfred H. Mayer Company,*[5] federal courts are now compelling individual white persons against their wills to make personal contracts with blacks, to convey private property to them, to employ them in private undertakings, and to admit them to private white schools and social clubs operated entirely at their own expense.

Irrespective of whether this judicial compulsion is righteous, it negates constitutional government and freedoms Americans have always enjoyed, finds no support in the Thirteenth Amendment and the Civil Rights Act of 1866, and conflicts with every Supreme Court decision antedating the *Jones Case* which interprets them.

The most peculiar offspring of the *Jones Case* is the recent pronouncement of the Supreme Court in *McDonald v. Santa Fe Trail Transportation Company,*[6] where a majority of the Justices adjudged that the Amendment and Act as revamped by them made it illegal for an employer to fire two white employees for misappropriating goods they were hired by him to transport safely because he did not fire their black accomplice as well. The majority of the Justices reached this conclusion, notwithstanding white persons have never been slaves in the United States and notwithstanding the Civil Rights Act of 1866 does not confer any right on any white person.

CONCLUSION

Justice Brandeis, one of the wisest men who ever sat on the Supreme Court, made this comment on the dangers of governmental contempt for constitutional government and freedom in his illuminating dissenting opinion in *Olmstead v. United States:*

1. "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient. Men born to freedom are naturally alert to repel invasion of their liberty by evil minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning, but without understanding."

2. "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipotent, teacher. For good or ill, it teaches the whole people by its example. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[7]

My remarks end with this observation: The tides of distrust of government are rising. The anchors of faith in it are dragging. It is at such a time America needs constitutional government and freedom the most.●

[4] 319 U.S. 624, 87 L. Ed. 1628, 63 C. St. 1178, 147 A.L.R. 1674.

[5] 392 U.S. 409, 20 L.Ed.1189, 88 S.Ct. 2186.

[6] 427 U.S. 273, 49 L.Ed.2d 493, 96 S.Ct. 2574.

[7] 277 U.S. 438, 72 L.Ed. 944 (957, 960), 48 S.Ct. 564.

DEFENSE SPENDING EDITORIAL

● Mr. LEAHY. Mr. President, one of the leading newspapers in Vermont, the Times Argus of Montpelier, has provided an excellent analysis of the recent veto of the supplemental appropriations bill. The editorial reveals the inconsistency in President Reagan's claim that the supplemental was a budget buster and yet his seeming unconcern with waste and sky-high cost overrides in the Defense Department. I urge all of my colleagues to pay careful attention to this thoughtful article written by Nicholas Monsarrat, the editor of the Times Argus. I ask that the editorial be printed in the RECORD.

The editorial follows:

BEYOND THE VETO OVERRIDE

President Reagan tried last week to tar the $14.1 billion supplemental appropriations bill and anyone supporting it with the labels "budget buster" and "big spender". The truth is, however, that nobody has been recommending more spending, with less careful investigation of what the money might be spent for, than President Reagan in the area of defense spending.

The congressional decision last week to override the president's veto of this supplemental appropriations bill seems a perfect time for Congress to start doing something about this gross imbalance in the Administration's budget-making.

The president has no leg to stand on when, despite huge and mounting federal budget deficits, he continues to refuse to pare significantly his preposterous plan to spend $1.5 trillion in the next five years on new weapons systems and other defense related projects. He magnifies his credibility problems when be demands; cajoles and pleads with members of Congress to kill a supplemental appropriations bill that would benefit necessary human service programs that are already reeling from earlier cuts. And members of Congress have looked like perfect patsies when they have failed to deal critically, carefully or prudently with the massive defense budget proposals that keep pouring in from the White House.

You would think there had never been a cost-overrun in the history of defense spending, instead of a litany of massive and disgraceful cost-overruns over the years. Yet Congress has had to approve laws protecting federal employees from government reprisals for speaking up when they see gross mismanagement and outright thievery in the defense spending area—priorities backwards as usual

It's as if one member of a family, in trying to prepare a new household budget, said to the rest of the family: "We're going to cut mom's spending for food drastically, junior's spending for gas drastically, and sis's spending for clothes, but we're going to double our spending for dad's beer budget and life insurance policy."

We would like to think that the congressional override of the president's veto of the supplemental appropriations bill was not just an election-eve appeal for votes by Congress, although it was surely that in part. We would like to believe that it was also a long overdue acknowledgement by Congress of two things:

1. That there is a limit to how far the federal government can go in cutting federal spending for people programs.

2. That no budget, particularly for defense spending, can be above criticism and cuts.

As for the charge of "budget busting," the fact remains that the bill vetoed by the president was actually $1.3 billion less than the bill the president himself had originally asked Congress to pass. The real difference was that, once again, the president had wanted still more money spent on the military and less on people programs than the bill approved by Congress.●

SOCIAL SECURITY DISABILITY

● Mr. HEINZ. Mr. President, the problems surrounding the current social security disability review system have been well documented. The Senate Finance Committee recently held hearings on this subject. And just this week, a number of our colleagues in the House communicated to our distinguished chairman of the Finance Committee, BOB DOLE, their conviction, which I and other Senators share, that Congress must take urgent action to alleviate these problems.

The goal of reviewing the disability status of individuals on the social security rolls is a sound and necessary principle. But when Congress mandated, in 1980, a 3-year review of individuals on the disability rolls, no one foresaw the high rates of termination and the poor quality of reviews that we are witnessing today. The Social Security Administration has been terminating 45 percent of the beneficiaries it reviews. When Congress passed the Disability Amendments of 1980, the periodic disability reviews were not expected to produce any net savings during the first 3 years of operation; fiscal years 1982 through 1984. And, during the 4-year period fiscal year 1982 through fiscal year 1985, the periodic reviews were projected to save only $10 million. Yet, the President's fiscal year 1983 budget indicates that the program of periodic reviews will now save $3.25 billion in fiscal year 1982-84—or 325 times the original estimate.

On the front page of today's Los Angeles Times, there appears a troubling story relating the tales of 11 individuals who have died from disabilities which the Social Security Administration denied their having. I submit this article for the RECORD and urge my colleagues to read it with care. It emphasizes the need to continue working with the administration to enact legislation at the earliest opportunity to redress this sorry situation.

The article follows:

[From the Los Angeles Times, Sept. 17, 1982]

PURGED AS FIT TO WORK—11 Denied Social Security Disability Die of Illnesses

(By Doug Brown)

Four Californians who were cut off from or denied long-term Social Security disability payments during current federal cutbacks—ostensibly because they were well enough to work—have died within the last four months of the same disabilities that sidelined them in the first place.

These deaths and at least seven others across the nation are the first to be documented since the Reagan Administration began its purge of the Social Security disability rolls in an attempt to cut costs and reduce abuse of the $22-billion-a-year disability insurance system.

The deaths have raised angry cries from congressional critics who were already aroused by stories of what they considered cold and arbitrary decision-making in the removal of 200,000 people from the Social Security disability payment rolls during the past fiscal year.

The benefit cutoffs have not been medically blamed for any of the deaths. But critics of the way the purge has been conducted insist that the circumstances are far more than coincidental, and say the facts form a persuasive argument that the benefits should have been continued—at least while the cases were still under appeal.

All but one of the 11 people who died had filed appeals seeking reinstatement of benefits. Slightly more than half of cases that are appealed end with the benefits being reinstated.

The Californians who died were:

Thomas A. Alvey, 47, of La Habra. He died Aug. 16 of heart disease six months after he had been declared fit for work and no longer eligible for disability benefits. After his benefits were cut off, the former supermarket manager was forced to subsist on an $81.67 monthly federal stipend and help from his mother, whose only income was from Social Security.

Ernestina Orozco, 45, of La Puene. A mother of two teenagers, she was to have been informed by the Social Security Administration that her two types of cancer were not sufficiently serious to keep her from working. But on Aug. 9—two days before the notification was mailed—Orozco died of cancer of the colon.

Willie Simmons, 47, of Reseda. He was purged from the disability rolls in February because his extremely painful "multiple neurological degenerative diseases" were not considered debilitating enough to keep him from working as a hospital clerk. He died of those multiple ailments in May.

Victor Graf, 59, of Stockton, who had been receiving disability benefits because of a heart condition. He received a letter from Social Security in July saying his disability payments would cease in September. He visited his cardiologist on Aug. 2 to get more medical evidence in an attempt to show disability evaluators they had erred in his case. But within six hours after he left the doctor's office, Graf died of a heart attack. "That letter killed him," his widow said.

Besides the Californians, four people from Oklahoma, two from Ohio and one from Arkansas have died since April of ailments after having been denied further disability benefits, according to medical and legal records provided by congressmen, their aides, and the victims' attorneys.

To be eligible for Social Security disability benefits, an individual must be unable to engage in "substantial gainful activity" by reason of a medically determinable physical or mental impairment that is expected to last at least 12 months.

"What these deaths shows is that the Social Security Administration is cruel and without any compassion," said Rep. Michael L. Synar (D-Okla.), a member of the House Select Committee on Aging, noting that four of his constituents were among those who died. "Their insensitivity is so incomprehensible that you would think that they have never sat at a table across from a disabled person and seen what it means to be unable to work."

A conservative Republican member of the same committee, Rep. John Paul Hammerschmidt of Arkansas, said, "We've got to change the law. . . . There's going to be a lot more damage to people's lives unless things are corrected."

Hammerschmidt has a bill pending in Congress that would slow the continuing disability review, allow recipients to continue to receive benefits until the appeal process has been completed and allow recipients to meet the disability evaluators face to face. Nearly all reviews of medical records and other documents have been done by mail.

Meanwhile, reacting to complaints from Hammerschmidt and other Congressmen, the Social Security Administration last week announed it is slowing the pace of eligibility reviews and making other changes.

In addition, Social Security officials said that at the outset of future eligibility reviews there will be face-to-face interviews between disability evaluators and recipients facing termination of benefits.

Social Security Administrator John Svahn, a Reagan appointee who was among the inner circle of officials who designed an overhaul of welfare programs in California when Reagan was governor, refused to be interviewed about the deaths, but John Trollinger, a deputy press secretary in the agency, defended the cutoff policy.

"Our evaluations are based on the best evidence available at the time," Trollinger said. "The fact that a recipient dies following our review doesn't mean our evaluations were incorrect.

"We may not have had all the evidence on the medical condition of the recipient at the time," he said. "And their conditions could have worsened after the evaluation."

But Trollinger also said, "We have made some mistakes, with some people being taken off the rolls who should not have been."

Trollinger said he has ordered Thomas Alvey's disability file sent to Washington for review by the Social Security Administration.

"We can't respond to the 11 documented cases . . . without more information on their particular cases," Trollinger said.

Trollinger said that before inquiries by The Times, he had been aware of only one death related to the loss of disability benefits, and that case was far less direct than those found by The Times. It involved a virtually blind Michigan man who took a cemetery job after his benefits were cut off, and was then hospitalized for gangrene. He subsequently died of a heart attack.

The Social Security Administration runs two separate disability programs: Disability Insurance, which is financed through payroll taxes and pays benefits to disabled workers and their families based on the worker's past earnings, and Supplemental Security Income (SSI), which is funded by general revenues and pays benefits to low-income, blind and disabled people based on proven need.

It is the operation of the Disability Insurance program that has come in for the heaviest criticism.

In the fiscal year ending last June 30, 200,000 workers, their spouses or their children were trimmed from the Disability Insurance rolls, bringing the level down to 4.2 million people. The Social Security Administration said this meant a saving of $372 million in fiscal 1981-82, but Trollinger acknowledged that $156 million of this was eaten up by administrative costs, lowering the net savings to $216 million.

In announcing that it will slow the pace of its disputed eligibility reviews, Social Security said the number of planned reviews in the next year is to be reduced by 20%, down to 640,000 cases from the previously announced target of 806,000 cases.

However, Hammerschmidt and Synar said the new administrative changes will not prevent them from pushing to revise disability review laws. They said the changes announced last week by the Social Security Administration will not guarantee against situations in which people with terminal illnesses are cut off from disability benefits.

PLEADING LETTER

Carolyn Jones, an Orange County Legal Aid Society attorney, who had represented Alvey, said Alvey had written to Social Security imploring that he not be cut off from benefits.

Alvey presented the Social Security Administration with extensive medical records and recommendations from his doctor that

his "chronic obstructive pulmonary disease" precluded him from returning to work.

Rejecting his evidence, Social Security sent Alvey a letter on March 10 that stated: "Medical evidence reveals that you are post myocardial infarction (heart attack) with objective medical evidence no longer reflecting an impairment of sufficient severity to preclude you from returning to your past work.

"Medical data further reflects no changes per your electrocardiogram and it is felt your pulmonary condition to be of a mild nature. Your overall condition is no longer of a severe nature to prevent you from performing your usual duties." His benefits were cut off.

Alvey, who had been receiving $437 a month in disability benefits based on his past earnings as a supermarket manager, appealed the ruling but was receiving no benefits pending his hearing. He died less than two months before the hearing was to be held.

"He used to call me twice a week about his case," said Legal Aid's Jones, who had been helping him with his appeal. "He was a very nice man, but the stress was getting to him and every time he talked he would get more and more upset."

There were similar tales in the cases of three other Californians who died.

The notice denying Ernestina Orozco's request for disability payments arrived at her La Puente home Aug. 13. It said: "You said you could not work because you have cancer of the neck and cancer of the colon. The medical evidence shows that your cancer is currently under control and being treated. We have concluded, therefore, that your condition does not restrict you from doing your usual activities."

But Mrs. Orozco never read the letter. She had died four days earlier of cancer of the colon. Mrs. Orozco was the only one of the 11 recorded deaths who applied for disability benefits but had not yet received any.

She had not worked since February at her job on an assembly line making blood bags at a Covina hospital supply manufacturing company. Both Mrs. Orozco's employer of 11 years and her doctor said her mobility was limited by the cervical collar she was forced to wear because the cancer had made her neck bones brittle.

"She really tried to work," said her husband, Fred Orozco, "but the chemotherapy really drained her. She had to do a lot of sitting on a stool on her job and that was really hard to do eight hours a day."

Mrs. Orozco was not the only disabled person to find that the pain of sitting for long periods of time on the job was beyond endurance.

Willie Simmons, who had been on disability for five years, was terminated in February because Social Security believed his condition would allow him to take work as a hospital records clerk. But Simmons found sitting for long periods to be extremely painful. He died in May of the multiple neurological degenerative diseases that had caused him such extreme discomfort.

Victor Graf, a construction worker who had been on disability since December, 1976, received a letter in July from an evaluator saying a review of his medical records showed he had recovered sufficiently from his heart aliment to allow his return to work.

"The medical evidence shows that you had a heart attack in 1978 but your condition has improved," the evaluator wrote.

"You have responded well to treatment and medication. You are considered able to carry out the following work activities: lift 50 pounds maximum, stand/walk six to eight hours per eight-hour workday."

Graf, who had been treated by Stockton cardiologist Edward Caul and heart specialists at Stanford University in Palo Alto, was confused and angered by the letter, his wife, Myrtle, recalled.

DOCTOR'S FINDINGS

On Aug. 2, Graf went to Caul's office in Stockton to try to find out if Social Security had made a mistake. In his notes on the visit, Caul said, "Social Security office has totally misunderstood the significance of the patient's problem. He has marked damage of his left ventrical from cardiovascular diseases resulting in a large akinetic heart proved by echocardiographic studies.

"The patient gets along well in a relative sense by restricted physical activity," Caul continued. "He requires multiple medications and is constantly at risk for sudden death and determination in the future of congestive heart failure.

"In no way can the patient return to remunerative work conducive to his background, education and training."

Within six hours after leaving Caul's office, Graf died of a heart attack.

In a letter to Social Security after Graf's death, Caul labeled the decision to end Graf's benefits "arbitrary and without attention to the facts of record."

In an ironic footnote, two weeks after Graf died and 10 days after Caul's letter, Social Security sent a letter addressed to Graf announcing that since it had received no additional medical information showing that Graf was still disabled, it was going forward with its plans to terminate benefits.●

PROPOSED ARMS SALES

● Mr. PERCY. Mr. President, section 36(b) of the Arms Export Control Act requires that Congress receive advance notification of proposed arms sales under that act in excess of $50 million or, in the case of major defense equipment as defined in the act, those in excess of $14 million. Upon such notification, the Congress has 30 calendar days during which the sale may be prohibited by means of a concurrent resolution. The provision stipulated that, in the Senate, the notification of proposed sales shall be sent to the chairman of the Foreign Relations Committee.

In keeping with the committee's intention to see that such information is immediately available to the full Senate, I ask to have printed in the RECORD at this point the notification which has been received. The classified annex referred to in the covering letter is available to Senators in the office of the Foreign Relations Committee, room 4229 of the Dirksen Building.

The notification follows:

DEFENSE SECURITY ASSISTANCE AGENCY,
Washington, D.C., September 14, 1982.

In reply refer to: I-03569/82ct.

Hon. CHARLES H. PERCY,
Chairman, Committee on Foreign Relations, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN. Pursuant to the reporting requirements of Section 36(b) of the Arms Export Control Act, we are forwarding herewith Transmittal No. 82-90 and under separate cover the classified annex thereto. This Transmittal concerns the Department of the Army's proposed Letter of Offer to Pakistan for defense articles and services estimated to cost $27 million. Shortly after this letter is delivered to your office, we plan to notify the news media of the unclassified portion of this Transmittal.

Sincerely,

PHILIP C. GAST,
Director.

[Transmittal No. 82-90]

NOTICE OF PROPOSED ISSUANCE OF LETTER OF OFFER PURSUANT TO SECTION 36(b) OF THE ARMS EXPORT CONTROL ACT

(i) Prospective Purchaser: Pakistan.

(ii) Total Estimated Value:

	Million
Major defense equipment [1]	$18
Other	9
Total	27

[1] As defined in Section 47(6) of the Arms Export Control Act.

(iii) Description of articles or Services Offered: Five AN/TPO-36 radar systems with spares, support equipment, technical assistance, and training.

(iv) Military Department: Army (VCH).

(v) Sales Commission, Fee, etc., Paid, Offered, or Agree to be Paid: None.

(vi) Sensitivity of Technology Contained in the Defense Articles or Defense Services Proposed to be Sold: See Annex under separate cover.

(vii) Section 28 Report: Case not included in section 28 report.

(viii) Date Report Delivered to Congress: September 14, 1982.

POLICY JUSTIFICATION

Pakistan—AN/TPQ-36 radar systems

The Government of Pakistan has requested the purchase of five AN/TPQ-36 radar systems with spares, support equipment, technical assistance, and training at an estimated cost of $27 million.

This sale will contribute to the foreign policy objectives of the United States by enabling Pakistan to increase its capability to provide for its own security and defense, particularly in view of the increased threat resulting from the Soviet invasion of Afghanistan.

The Government of Pakistan requires these Firefinder weapon locating radar systems as a primary means of countering hostile mortar fire. This sale is a part of Pakistan's overall force modernization plan.

The sale of this equipment and support will not affect the basic military balance in the region.

The prime contractor will be the Hughes Aircraft Corporation of Fullerton, California.

Implementation of this sale will require the assignment of four additional U.S. Government personnel and one contractor representative to Pakistan for four months.

There will be no adverse impact on U.S. defense readiness as a result of this sale.●

PRELIMINARY NOTIFICATION PROPOSED ARMS SALES

● Mr. PERCY. Mr. President, section 36(b) of the Arms Export Control Act requires that Congress receive advance notification of proposed arms sales

under that act in excess of $50 million or, in the case of major defense equipment as defined in the act, those in excess of $14 million. Upon receipt of such notification, the Congress has 30 calendar days during which the sale may be prohibited by means of a concurrent resolution. The provision stipulates that, in the Senate, the notification of proposed sales shall be sent to the chairman of the Foreign Relations Committee.

Pursuant to an informal understanding, the Department of Defense has agreed to provide the committee with a preliminary notification 20 days before transmittal of the official notification. The official notification will be printed in the record in accordance with previous practice.

I wish to inform Members of the Senate that such a notification was received on September 15, 1982.

Interested Senators may inquire as to the details of this preliminary notification at the offices of the Committee on Foreign Relations, room 4229 Dirksen Building.

The notification follows:

DEFENSE SECURITY ASSISTANCE AGENCY,
Washington, D.C., September 15, 1982.
In reply refer to: I-24160/82.
Dr. HANS BINNENDIJK,
Professional Staff Member, Committee on Foreign Relations, U.S. Senate, Washington, D.C.

DEAR DR. BINNENDIJK: By letter dated 18 February 1976, the Director, Defense Security Assistance Agency, indicated that you would be advised of possible transmittals to Congress of information as required by Section 36(b) of the Arms Export Control Act. At the instruction of the Department of State, I wish to provide the following advance notification.

The Department of State is considering an offer to an Asian Country tentatively estimated to cost in excess of $50 million.

Sincerely,

PHILIP C. GAST,
Director.●

PROPOSED ARMS SALES

● Mr. PERCY. Mr. President, section 36(b) of the Arms Export Control Act requires that Congress receive advance notification of proposed arms sales under that act in excess of $50 million or, in the case of major defense equipment as defined in the act, those in excess of $14 million. Upon such notification, the Congress has 30 calendar days during which the sale may be prohibited by means of a concurrent resolution. The provision stipulates that, in the Senate, the notification of a proposed sale shall be sent to the chairman of the Foreign Relations Committee.

In keeping with my intention to see that such information is available to the full Senate, I ask to have printed in the RECORD at this point the notifications which have been received.

The notifications follow:

DEFENSE SECURITY ASSISTANCE AGENCY,
Washington, D.C., September 13, 1982.
In reply refer to: I-02848/82ct.
Hon. CHARLES H. PERCY,
Chairman, Committee on Foreign Relations, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to the reporting requirements of Section 36(b) of the Arms Export Control Act, we are forwarding herewith Transmittal No. 82-74, concerning the Department of the Air Force's proposed Letter of Offer to France for defense articles and services estimated to cost $275 million. Shortly after this letter is delivered to your office, we plan to notify the news media.

Sincerely,

PHILIP C. GAST,
Director.

[Transmittal No. 82-74]

NOTICE OF PROPOSED ISSUANCE OF LETTER OF OFFER PURSUANT TO SECTION 36(b) OF THE ARMS EXPORT CONTROL ACT

(i) Prospective Purchaser: France.
(ii) Total Estimated Value:

	Millions
Major defense equipment[1]	0
Other	$275
Total	275

[1]As defined in Section 47(6) of the Arms Export Control act.

(iii) Description of Articles or Services Offered: Incremental purchase and installation of 11 modification kits consisting of all hardware items, to include CFM-56 engines, necessary to accomplish the Class V modification of the 11 French C-135F aircraft.

(iv) Military Department: Air Force (YAD).

(v) Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: None.

(vi) Sensitivity of Technology Contained in the Defense Articles or Defense Services Proposed to be Sold: None.

(vii) Section 28 Report: Two of these Class V modification kits were included in the report for the quarter ending 30 June 1982.

(viii) Date Report Delivered to Congress: September 13, 1982.

POLICY JUSTIFICATION

France—Class V modification of French C-135F aircraft

The Government of France has requested the incremental purchase and installation of 11 modification kits consisting of all hardware items, to include CFM-56 engines, necessary to accomplish the Class V modification of the 11 French C-135F aircraft at an estimated cost of $275 million.

This sale will contribute to the foreign policy and security objectives of the United States by improving the defensive capabilities of an ally. Although French forces are not now committed to NATO command, France nevertheless bases its defense on cooperation and interoperability with NATO. As a further potential benefit, this sale will contribute to the standardization and interoperability of French and U.S. equipment, as well as demonstrate the seriousness of the U.S. commitment to cooperative arms programs with alliance partners. France's commitment to this program may well have positive effects on French willingness to participate in other multinational, cooperative arms programs.

France intends to re-engine all 11 of their C-135F tanker aircraft with CFM-56 turbo fan engines. The 11 engine production kits will be installed by Boeing Aircraft Company; The CFM-56 is a commercially available engine produced by CFM International, a General Electric (U.S.)/SNECMA (France) joint owned company. Re-engining the tankers will reduce fuel consumption, improve take-off performance, lower operating and support costs, improve fuel off-load capability, enhance aircraft survivability, and reduce smoke and noise pollution.

The sale of this equipment and support will not affect the basic military balance in the region.

The prime contractor will be the Boeing Military Airplane Company of Wichita, Kansas.

Implementation of this sale will not require the assignment of any additional U.S. Government or contractor personnel to France.

There will be no adverse impact on U.S. defense readiness as a result of this sale.

DEFENSE SECURITY ASSISTANCE AGENCY,
Washington, D.C., Sepetmber 15, 1982.
In reply refer to: I-03191/82ct.
Hon. CHARLES H. PERCY,
Chairman, Committee on Foreign Relations, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to the reporting requirements of Section 36(b) of the Arms Export Control Act, we are forwarding herewith Transmittal No. 82-81, concerning the Department of the Air Force's proposed Letter of Offer to Turkey for defense articles and services estimated to cost $76 million. Shortly after this letter is delivered to your office, we plan to notify the news media.

You will also find attached a certification as required by Section 620C(d) of the Foreign Assistance Act of 1961, as amended, that this action is consistent with Section 620C(b) of that statute.

Sincerely,

PHILIP C. GAST,
Director.

[Transmittal No. 82-81]

NOTICE OF PROPOSED ISSUANCE OF LETTER OF OFFER PURSUANT TO SECTION 36(b) OF THE ARMS EXPORT CONTROL ACT

(i) Prospective Purchaser: Turkey.
(ii) Total Estimated Value:

	Millions
Major defense equipment*	0
Other	$76
Total	76

* As defined in Section 47(6) of the Arms Export Control Act.

(iii) Description of Articles or Services Offered: Cooperative logistics supply support (FMSO II) for follow-on spares and supplies in support of C-130H, F-4E, F/RF-5A, F-100C/D/F, RF/F-104G, T-33, T-37C, and T-38 aircraft and other systems and subsystems of U.S. manufacture.

(iv) Military Department: Air Force (KBN).

(v) Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: None.

(vi) Sensitivity of Technology Contained in the Defense Articles or Defense Services Proposed to be Sold: None.

(vii) Section 28 Report: Case not included in Section 28 report.

(viii) Date Report Delivered to Congress: September 15, 1982.

POLICY JUSTIFICATION

Turkey—Cooperative logistics supply support

The Government of Turkey has requested the purchase of cooperative logistics supply support (FMSO II) for follow-on spares and supplies in support of C-130H, F-4E, F-/RF-5A, F-100C/D/F, RF/F-104G, T-33, T-37C, and T-38 aircraft and other systems and subsystems of U.S. manufacture at an estimated cost of $76 million.

This sale will contribute to the foreign policy and national security objectives of the United States by improving the military capabilities of Turkey in fulfillment of its NATO obligations; furthering NATO rationalization, standardization, and interoperability; and enhancing the defense of the Western Alliance.

Turkey needs these logistics support systems to maintain the readiness of the Turkish Air Force weapon systems of U.S. origin. The cooperative logistics support will be provided in accordance with, and subject to the limitations on use and transfer provided for under the Arms Export Control Act, as embodied in the terms of sale. This sale will not adversely affect either the military balance in the region or U.S. efforts to encourage a negotiated settlement of the Cyprus question.

Procurement of these items and services will be from the many contractors providing similar items and services to the U.S. forces.

Implementation of this sale will not require the assignment of any additional U.S. Government or contractor personnel to Turkey.

There will be no adverse impact on U.S. defense readiness as a result of this sale.

U.S. DEPARTMENT OF STATE, UNDER SECRETARY OF STATE FOR SECURITY ASSISTANCE, SCIENCE AND TECHNOLOGY,

Washington, D.C., September 10, 1982.

Pursuant to section 620C(d) of the Foreign Assistance Act of 1961, as amended (the Act), and the authority vested in me by Department of State Delegation of Authority No. 145, I hereby certify that the provision to Turkey of cooperative logistics supply (FMSO II) is consistent with the principles contained in section 620C(b) of the Act.

This certification will be made part of the certification to the Congress under section 36(b) of the Arms Export Control Act regarding the proposed sale of the above named articles and is based on the justification accompanying said certification, and of which such justification constitutes a full explanation.

JAMES L. BUCKLEY.●

Mr. HEFLIN. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Is there further morning business? If not, morning business is closed.

TEMPORARY INCREASE IN THE PUBLIC DEBT LIMIT

The PRESIDING OFFICER. The Senate will resume consideration of the unfinished business, which the clerk will state by title.

The assistant legislative clerk read as follows:

A joint resolution (H.J. Res. 520) to provide for a temporary increase in the public debt limit.

The Senate resumed consideration of the joint resolution.

AMENDMENT NO. 2040

The PRESIDING OFFICER. The pending question is the Baucus amendment No. 2040.

Under the previous order, the Senator from Montana (Mr. BAUCUS) is now recognized.

Mr. BAUCUS. Mr. President, I rise once again in support of the pending amendment, which declares that the Federal courts must remain open to citizens who wish to litigate their constitutional rights.

I also rise to express my fierce opposition to the underlying Helms amendment.

Mr. President, I guess that labeling these days is a fact of life in our society. Particularly for those of us in public life labeling is something we have to learn to live with.

However, I continue to be distressed that the underlying Helms amendment and the debate here in the Chamber continue to be labeled as a school prayer amendment and a school prayer debate.

The underlying Helms amendment does not alter the Supreme Court's school prayer decisions. It simply prevents the Supreme Court from hearing future school prayer cases. This is a court stripping, not a school prayer amendment.

Mr. President, if the Senate, for example, were considering legislation that prevented the Supreme Court from hearing taxation cases, would that be considered tax reform? Absolutely not. That would be court stripping.

If the Senate were considering legislation that prevented the Supreme Court from hearing cases involving the right to bear arms, would that be considered gun control legislation? Again, no. That would be court stripping.

Mr. President, in the same vein, we do not have the school prayer legislation before us today. We have court stripping.

Mr. President, I believe that what is being missed by many who are involved or are observing the debate is that the Senate is being asked to totally alter the rules by which we have protected constitutional rights in this country for 200 years.

Today constitutional rights are protected by the Supreme Court, and if Congress or the people want to alter a constitutional right or the Court's interpretation of such rights, that alteration requires approval by two-thirds of the Congress and three-quarters of the States.

However, the proposal before us would permit Congress by a simple majority vote to dilute or entirely remove constitutional protections.

If this Helms revision, this provision, is passed by Congress and upheld as constitutional, each of our constitutional rights will be hanging on the slenderest of threads—that is, on a mere majority acting according to the whims of the times.

If freedom of the press is no longer the order of the day, let us pass a statute and get the President to sign it. That is all it would take, and the Supreme Court could no longer enforce the constitutional guarantee of freedom of the press.

If freedom of religion is no longer the order of the day, let us pass a statute and get the President to sign it. That is all that would take, and the Supreme Court would no longer enforce any constitutional guarantee of freedom of religion.

If the Government decides that citizens can now have the privacy of their homes invaded by Government officials operating without a warrant, let us pass a statute and get the President to sign it. That is all it would take, and the Supreme Court could no longer enforce the constitutional protection against unwarranted searches and seizures.

The pattern is clear. What is being proposed here is a fundamental change in the rules by which constitutional protections are guaranteed. What is more, this can happen here on the floor of the Senate by a simple majority vote. That is all it takes.

If the proponents of these measures want us to begin to dismantle the Constitution by simple majority vote, then let them put together a national consensus of two-thirds of the Congress and three-quarters of the States to permanently alter the rules by which constitutional protections are guaranteed. Let them propose a constitutional amendment, but let us not permit them to make the kind of fundamental change in our form of government by a simple majority vote that is being offered here as "school prayer legislation."

Mr. President, it is important to remind this body that President Reagan and his Attorney General understand the necessity for responding to constitutional decisions of the Court by constitutional amendment. This adminstration has proposed a constitutional amendment involving school prayer, and the President has reiterated his support for that proposal. He did so just yesterday. That pro-

posal is pending before the Senate Judiciary Committee. A third day of hearings on that proposal was held yesterday afternoon.

I might add, Mr. President, that the Attorney General has stated often that he is not in favor of this approach pending today, the statutory approach, because, as the country's highest legal officer, he knows that the way to change Supreme Court decisions, the way to change fundamental constitutional rights, is by proposing and enacting constitutional amendments. It is not by prohibiting Supreme Court jurisdiction over review of such rights.

The Attorney General by letter and in various forms has indicated that the administration advocates the constitutional rather than the statutory approach, I believe the administration takes such a position because it knows full well that to set the precedent of prohibiting Supreme Court review of Federal constitutional issues will begin a process of undermining the Constitution and thereby will undermine our form of government as we know it, in such a way that American citizens will no longer have Federal constitutional guarantees.

I do not wish to discuss the merits of the school prayer issue today. This is another matter, but I do know the constitutional amendment process is the correct way of resolving the school prayer issue, and I commend the administration for advocating that process because it is the process that our framers provided for. It is the right process; it is the process by which we would continue to have strong constitutional guarantees.

I believe the Attorney General's assessment of the serious dangers of the court-stripping proposal pending before us is what led to the administration's decision to support a constitutional amendment—not only the amendment itself, but the whole process as well. I think it is important to review that analysis, and I now wish to read it for the benefit of my colleagues.

Before I read that analysis contained in the letter from the Attorney General, I would like to point out that today, September 17, is the 195th anniversary of the signing of the Constitution. Just think of that, 195 years ago today on September 17, 1787, our Constitution was signed, and I think it is particularly appropriate and particularly fitting for us here today to stand up on that anniversary, the 195th anniversary, in defense of and in support of our Constitution because it has served us so well.

For nearly 200 years our Constitution has withstood assaults of various kinds, of various forms, and I think, Mr. President, that we again should stand up today on the 195th anniversary to protect our Constitution.

I now have before me, Mr. President, a letter from the Attorney General of the United States, Attorney General William French Smith. This letter is to the chairman of the Senate Judiciary Committee, the Honorable STROM THURMOND, Senator from South Carolina. This letter concerns the court-stripping proposal before us and, in particular, school prayer. This letter is dated May 6 of this year:

DEAR MR. CHAIRMAN: This letter is written to you as Chairman of the Committee on the Judiciary. It is written in response to a number of earlier inquiries from members of your Committee concerning S. 1742, a proposal which would withdraw jurisdiction from the Supreme Court to consider "any case arising out of any State statute, ordinance, rule, (or) regulation . . . which relates to voluntary prayers in public schools and public buildings." A second provision of the bill would withdraw the jurisdiction of the district courts over any case in which the Supreme Court has been deprived of jurisdiction. This bill raises fundamental and difficult questions regarding the role of the Supreme Court in our constitutional system, as well as the power of Congress to define and circumscribe that role. The issues involved have been the subject of intense scholarly debate and prominent constitutional scholars have differed as to the extent of congressional power to limit Supreme Court jurisdiction.

This is perhaps to be expected since the question of congressional power over the appellate jurisdiction of the Supreme Court implicates in a basic way the relations between Congress and the Supreme Court, two co-equal branches of government. Relations between the different branches in our tripartite system are generally governed by the doctrine of separation of powers. Neither the Constitution nor the decisions of the Supreme Court have attempted to define the precise contours of this doctrine. As two astute students of our constitutional system have noted:

"The accommodations among the three branches of government are not automatic. They are undefined, and in the very nature of things could not have been defined, by the Constitution. To speak of *lines* of demarcation is to use an inapt figure. There are vast stretches of ambiguous territory." Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts*, 37 Harv. L. Rev. 1010, 1016 (1924) (emphasis in original).

The doctrine of separation of powers touches fundamentally on how the Nation is governed, and, as the Supreme Court noted last term in a separation of powers case, "it is doubtless both futile and perhaps dangerous to find an epigrammatical explanation of how this country has been governed." *Dames & Moore* v. *Regan*, 101 S. Ct. 2972, 2977 (1981). In this area more than any other, we must heed Justice Holmes' wise admonition that "(t)he great ordinances of the Constitution do not establish and divide fields of black and white." *Springer* v. *Philippine Islands*, 277 U.S. 189, 209 (1928) (dissenting opinion).

There is no doubt that Congress possesses some power to regulate the appellate jurisdiction of the Supreme Court. The language of the Constitution authorizes Supreme Court appellate jurisdiction over enumerated types of cases "with such Exceptions, and under such Regulations as the Congress shall make." The Supreme Court has upheld the congressional exercise of power under this clause, even beyond widely accepted "housekeeping" matters such as time limits on the filing of appeals and minimum jurisdictional amounts in controversy. See *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869).

Congress may not, however, consistent with the Constitution, make "exceptions" to Supreme Court jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers.

Think of that, Mr. President. That is a statement of Attorney General William French Smith in a letter, dated May 6, 1982, to the chairman of the Judiciary Committee. Let me repeat that paragraph from Attorney General William French Smith:

Congress may not, however, consistent with the Constitution, make "exceptions" to Supreme Court jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers.

Continuing in that letter, the Attorney General goes on to say:

In determining whether a given exception would intrude upon the core functions of the Supreme Court, it is necessary to consider a number of factors, such as whether the exception covers constitutional or non-constitutional questions, the extent to which the subject is one which by its nature requires uniformity or permits diversity among the different states and different parts of the country, the extent to which Supreme Court review is necessary to ensure the supremacy of federal law, and whether other forums or remedies have been left in place so that the intrusion can properly be characterized as an exception.

Concluding that Congress may not intrude upon the core functions of the Supreme Court is not to suggest that the Supreme Court and the inferior federal courts have not occasionally exceeded the properly restrained judicial role envisaged by the Framers of the Constitution. Nor does such a conclusion imply an endorsement of the soundness of some of the judicial decisions which have given rise to various of the legislative proposals now before Congress. The Department of Justice will continue, through its litigating efforts, to urge the courts not to intrude into areas that properly belong to the State legislatures and to Congress. The remedy for judicial overreaching, however, is not to restrict the Supreme Court's jurisdiction over those cases which are central to the core functions of the Court in our system of government.

To repeat:

The remedy for judicial overreaching, however, is not to restrict the Supreme Court's jurisdiction over those cases which are central to the core functions of the Court in our system of Government. This remedy would in many ways create problems equally or more severe than those which the measure seeks to rectify.

Those are the words of our Attorney General, William French Smith:

With respect to other pending legislation, the Department of Justice has concluded that Congress may, within constraints imposed by provisions of the Constitution

other than Article III, limit the jurisdiction or remedial authority of the inferior federal courts. See letter from the Attorney General to Chairman Rodino concerning S. 951. The question of congressional power over lower federal courts is quite different from the question of congressional power over Supreme Court jurisdiction, and the two issues should not be confused.

The letter now goes into various sections. I shall now begin the first section, roman numeral I.

I.

Proponents of Congressional constitutional authority to limit the Supreme Court's entire appellate jurisdiction have contended that such authority exists under the "Exceptions Clause" of Article III of the Constitution. Article III provides, in pertinent part:

Section 1

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish . . .

Section 2

The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.* (Emphasis Added.)

The language of the Exceptions Clause, underscored above, does not support the conclusion that Congress possesses plenary authority to remove the Supreme Court's appellate jurisdiction over all cases within that jurisdiction. The concept of an "exception" was understood by the Framers, as it is defined today, as meaning an exclusion from a general rule or law. An "exception" cannot, as a matter of plain language, be read so broadly as to swallow the general rule in terms of which it is defined.

The Constitution, unlike a statute, is not drafted with specific situations in mind. Designed as the fundamental charter of our political system, its most important provisions are phrased in broad and general terms. As eloquently expressed by Justice Holmes in *Missouri v. Holland,* 252 U.S. 416, 433 (1920):

"(W)hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being a development of which could not have been foreseen completely by the most gifted of begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in light or our whole experience and not merely in that of what was said a hundred years ago."

For example, a literal interpretation of Article III as a whole would seem to mandate that Congress vest the full judicial power of the United States either in the Supreme Court or in an inferior federal court. Under such an interpretation, Congress could make "exceptions" to the Supreme Court's appellate jurisdiction only if it vested the jurisdiction at issue either in an interior federal court or in the Supreme Court's original jurisdiction. This interpretation, which would require the conclusion that any measure which entirely ousted the federal courts from exercising any portion of the judicial power of the United States and vested that authority in state courts would be unconstitutional, is rejected by all authorities today.

The Constitution contains a number of other pronouncements which, although seemingly unambiguous and absolute, have necessarily been interpreted as limited in their applicability. See e.g., *Home Building & Loan Ass'n.* v. *Blaisdell,* 290 U.S. 398 (1934) (Contract Clause); *Everson* v. *Board of Education,* 330 U.S. 1 (1947) (Establishment Clause); *Reynolds* v. *United States,* 98 U.S. 145 (1878) (Free Exercise Clause); *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969) (per curiam) (Free Speech Clause). The Supreme Court has also recognized that even when a statute is otherwise within a power granted to Congress by the Constitution, extrinsic limitations on congressional power contained in the Bill of Rights or elsewhere may nevertheless render the statute unconstitutional. See. e.g., *National League of Cities* v. *Usery,* 426 U.S. 833 (1976) (limitations on Commerce Clause); *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 421 (1819) (limitations on Necessary and Proper Clause).

In light of these principles of constitutional interpretation, the Exceptions Clause may not be analyzed in a vacuum, but must be understood in terms of Article III as a whole, as evidenced by the history of its framing and ratification, its place in the system of separation of powers embodied in the structure of the Constitution, and its consistency with external limitations on congressional power implicit in the Constitution and contained in The Bill of Rights. The construction of the Exceptions Clause that is most consistent both with the plain language of the Clause and with other evidence of its meaning is that Congress can limit the Supreme Court's appellate jurisdiction only up to the point where it impairs the Court's core functions in the constitutional scheme.

The events at the Constitutional Convention support a construction of the Exceptions Clause that would preclude Congress from interpreting with the Supreme Court's core functions. The framers agreed without dissent on the necessity of a Supreme Court to secure national rights and the uniformity of judgments. The resolves which were agreed to by the Convention and given to the Committee of Detail provided, simply, that "the jurisdiction (of the Supreme Court) shall extend to all cases arising under the Natl. Laws: And to such other questions as may involve the Natl. peace & harmony." No mention was made of any congressional power to make exceptions to the Court's jurisdiction. The Committee of Detail, charged with drafting a provision to implement these Resolves, proposed the language of the Exceptions Clause. It seems unlikely that the Committee of Detail could have deviated so dramatically from the Convention's Resolves as to have given Congress the authority to interfere with the Supreme Court's core functions without considerably more attention to the subject at the Convention.

This inference is strengthened by the events surrounding the adoption of the Judicial Article by the full Convention. In determining the scope of the Court's jurisdiction, the Convention agreed to provisions expressly confirming that the jurisdiction included cases arising under the Constitution and treaties; but it rejected, by a 6-2 vote, a resolution providing that, except in the narrow class of cases under the Court's original jurisdiction, "the judicial power shall be exercised in such manner as the legislature shall direct."

To repeat, the committee rejected, by a 6-to-2 vote, a resolution providing that, except in a narrow class of cases under the court's original jurisdiction, "the judicial power shall be exercised in such manner as the legislature shall direct."

That resolution, rejected by a 6-to-2 vote, is what the proponents of the underlying amendment want, in effect—that the judicial power shall be exercised in such manner as the legislature shall direct.

To adopt such a measure here today would mean that Congress, willy-nilly, according to its discretion and in the manner it provides, would limit the Supreme Court's jurisdiction, effectively nullifying the Supreme Court of the United States and thereby also effectively nullifying one of the three coequal branches of Government.

To continue with the letter, Mr. President, from Attorney General William French Smith in opposition to the statutory approach of limiting the Supreme Court jurisdiction:

The Convention thus rejected a clear statement of plenary congressional power over the Court's appellate jurisdiction. Nevertheless, on the same day—without any recorded debate or explanation—the Framers adopted the Exceptions and Regulations language now contained in Article III. In light of the value placed on the Supreme Court's appellate jurisdiction, as evidenced by other actions of the Convention, it seems highly unlikely that the Framers would have agreed, without the slightest hint of controversy, to a provision that would authorize Congress to interfere with the Court's core constitutional functions.

There are additional reasons why the lack of controversy surrounding the adoption of the Exceptions Clause supports the inference that no power to intrude on the Court's core functions was intended. First, the historical materials show the great importance which the Framers attached to these functions. They envisaged that the Supreme Court was a necessary part of the constitutional scheme and believed that the Court would review state and federal laws for consistency with the Constitution. These sentiments were echoed by the authors of the *Federalist Papers,* a work which is justly regarded as an important guide to the meaning of the Constitution. In light of this explicit recognition by the Founding Fathers of the Court's vital role in the con-

stitutional scheme, it seems unlikely that they would have adopted, without controversy, a provision which would effectively authorize Congress to eliminate the Court's core functions.

A second reason for inferring a more limited construction of the Exceptions Clause from the lack of discussion at the Convention concerns the compromise agreed to by the Framers regarding the establishment of inferior federal courts. While the necessity of a Supreme Court was accepted without significant dissent among the Framers, there was vigorous disagreement over whether inferior federal courts should be provided. The Convention first approved a provision calling for mandatory inferior federal courts, then struck this provision by a divided vote, and finally determined to leave to Congress the question whether to establish inferior federal courts. The Supreme Court was viewed as a necessary part of the constitutional structure and was established by the Constitution itself; Congress was given no control over whether the Court would be created. The inferior federal courts, however, were viewed as an optional part of the Government and were authorized but not estabished by the Constitution.

The decision whether to create them was given to Congress. This distinction, and the role explicitly assigned to Congress with respect to the inferior federal courts implies that the powers of Congress were to be quite different with respect to the Supreme Court and the inferior federal courts.

If the Exceptions Clause authorized Congress to eliminate the Supreme Court's appellate jurisdiction, thus limiting it to the exercise of original jurisdiction, the power Congress over the Supreme Court would be virtually indistinguishable from its power over inferior federal courts. Just as Congress could decline to create inferior federal courts it could, in the guise of creating "exceptions" to the Supreme Court's appellate jurisdiction, deny the Supreme Court the vast majority of the judicial powers which the Framers insisted "shall be vested" in the federal judiciary. Congress could not eliminate Supreme Court, but it could reduce it to a position of virtual impotence with only its limited original jurisdiction remaining. Such an interpretation cannot be squared with the stark difference in treatment which the Framers accorded to the Supreme Court and the inferior federal courts. Given the intensity of the debate regarding inferior federal courts, and the compromise arrived at by the Framers, it seems highly unlikely that the Convention would have adopted without comment a provision which, for most practical purposes, would place the Supreme Court and the inferior federal courts in the same poition vis-a-vis Congress.

A third reason to infer a limited construction of the Exceptions Clause from the lack of debate accompanying its adoption is found in the theory of separation of powers which formed the conceptual foundation for the system of government adopted by the Convention. The Framers intended that each of the three branches of Government would operate largely independently of the others and would check and balance the other branches. The purpose of this approach was to insure that governmental power did not become concentrated in the hands of any one individual or group, and thereby to avoid the danger of tyranny which the Framers believed inevitably accompanied unchecked governmental power.

I might add, Mr. President, parenthetically, that our framers had much experience with respect to unchecked tyrannical governmental power.

Continuing with the letter from the Attorney General to the chairman of the Committee of the Judiciary:

Indeed, it is not an exaggeration to say that the single greatest fear of the Founding Fathers was tyranny, and that concentration of power was, in their minds, "the very definition of tyranny."

Essential to the principle of separation of powers was the proposition that no one branch of government should have the power to eliminate the fundamental constitutional role of either of the other branches. As Madison stated in Federalist No. 151:

(T)he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary consitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack.

This basic principle of the Constitution—that each branch must be given the necessary means to defend itself against the encroachments of the two other branches—has special relevance in the context of legislative attempts to restrict judicial authority. The Framers "applaud(ed) the wisdom of those states who have committed the judicial power, in the last resort, not to a part of the legislature, but to distinct and independent bodies of men." Federalist No. 81 (Hamilton). They believed that, by the inherent nature of their power, the legislature would tend to be the strongest and the judiciary the weakest of the Branches.

This insight is reflected in the very structure of the Constitution: the provisions governing the legislature are placed first, in Article I; those establishing and governing the Judicial Branch are in the third position, in Article III. Madision recognized the great inherent power of the Legislative Branch in Federalist No. 48. Drawing extensively from Jefferson's Notes on the State of Virginia, Madison concluded that in a representative republic "(T)he legislative department is everwhere extending the sphere of its activity and drawing all power into its impetuous vortex." See also Federalist No. 51 (Madison).

It was in no sense a derogation on the concept of governance responsive to popular will that the Founding Fathers desired checks on the power of the Legislature they were creating. The Acts of Parliament as well as those of the King formed the litany of grievances which produced the Revolution. The Founding Fathers believed in the voice of the people and their elected representatives and placed substantial power in the Legislature. At the same time, however, they were acutely sensitive to the rights of individuals and minorities. Most of them had first-hand experience with persecution. The idea of a written Constitution was precisely to place a check on the popular will and, in large part, to restrain the most powerful branch. They crafted a representative republic with restraints on the legislature. "(A)n elective *depotism* was not the government we fought for. . . ." *Federalist* No. 48 (Madison), quoting Jefferson's *Notes on the State of Virginia* (emphasis in original).

The Supreme Court was viewed as a part of this restraint, but, nonetheless, inherently as the last dangerous branch. Hamilton, in a famous passage from Federalist No. 87, eloquently testified to the inherent weakness of the Judicial Branch:

Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. If may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments. As a consequence of this view, Hamilton believed that it was necessary for the judiciary to remain "truly distinct from the Legislature and the Executive. For I agree that 'there is no liberty, if the power of judging be not separated from the Legislative and executive power'." Id., quoting Montesquieu's Spirit of Laws. Thus, he concluded: "The complete independence of the courts of justice is peculiarly essential in a limited Constitution."

Mr. President, I now ask unanimous consent that I might yield to the Senator from Vermont without losing my right to the floor, and that upon being rerecognized a continuation of my speech not be counted as a second speech under rule XIX, and that I be allowed to leave the Chamber while I have so yielded.

I also ask unanimous consent that the Senator from Vermont be permitted to yield the floor under the same circumstances.

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

Mr. BAUCUS. I thank the Chair.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. I thank the Chair and the distinguished Senator, my friend from Montana, for yielding under these curcumstances.

Mr. President, I stand here 195 years after the Constitution was signed. However necessary it may be, it is always a little sad when the Members of this body are compelled to rise to defend the most obvious, most fundamental features of our constitutional system of Government, and the present rider to the debt ceiling on school prayer should bring true sadness to anyone who sees the strength of the Constitution arising from the way it disperses power among the branches of Government and the zeal with which it protects individual liberties. The debate over the school prayer rider is not only a debate over religion. We are also debating the temptation of one branch of Govern-

ment to subdue another branch by relieving it of its authority.

Ironically enough, Mr. President, the most conservative of the Members of this body should be the ones in the forefront seeking the rejection of this rider, because this is nothing more than a device for stripping the courts of their authority. It is nothing less than a wholesale rejection of what the framers of the Constitution intended 195 years ago.

The ongoing debate over limiting Federal court jurisdiction to make changes in the nature and quality of rights declared by the Supreme Court under the Constitution is not new. It seems that every generation is bound to test the strength and the limits of the principles of an independent judiciary and the separation of powers. I compare the current assault on Federal court jurisdiction to attacks through our history on the first amendment. It is by now a truism that the first amendment is most ardently embraced when there is relatively little dissent in the society and most challenged when unpopular views seem to disturb the placid consensus.

Much the same can be said of our courts, the branch of government devoted to interpreting our Constitution and laws, free of the pressures of the passing majority. A healthy and independent judiciary is never more necessary than at a time when there is impatience and discontent with the way the Supreme Court chooses to interpret the Constitution.

In addition to the present school prayer rider to the debt ceiling bill, there are numerous other bills before the Senate that seek to limit or eliminate the jurisdiction of the Federal courts on issues like abortion, school prayer, and busing. On some of the issues a majority of this body will agree with the underlying social goals of particular bills. This Senate was willing to adopt a measure that would limit the jurisdiction of both the lower Federal courts and the Supreme Court in order to limit busing. But much more than busing, school prayer, and abortion are at stake, and much more than court jurisdiction will be limited if we let expediency become the engine of change.

In all of these examples, the right involved is a right declared and protected by the courts. The impatience and outrage of some Americans is directed to the fact that the courts move more slowly than legislative bodies, and a change in the law is brought about not in response to a public outcry for change but as a byproduct of a legal dispute arising under our laws—that is, a case or controversy.

In normal times we all perceive a great personal stake in the independence of the courts. No one can safely predict whose rights will depend on that independence in the future.

Mr. President, I say to all my colleagues, all 99 of them, can any one of us say at what time it might be our individual rights that are protected by the independence of these courts? Is there any one of us who is willing to strip the courts of that independence and tell our constituents in each of the 50 States that someday their rights may be lost because we, in a moment of passing fancy, stripped the courts of the independence they need to protect the rights not just of the 100 men and women who serve in this body but of the 220 million Americans we represent?

How many of us can vote for this knowing that someday we may have to answer honestly what we did; that someday we may have to go beyond the direct mail appeals for funds that may go out from some who support this amendment and answer honestly about what these court-stripping measures do; that would require each one of us to go back to our 50 States and stand before our constituents and say, "I voted to give away some of your rights; I voted to give away rights that you have had for 195 years; I gave away your right to independent and free courts; I gave away your right for one last chance. I gave it away in a moment of political passion on a vote"?

Mr. President, I cannot do that. I cannot vote that way, and I hope that my colleagues will not.

We favor a strong judiciary, under law, rather than a judiciary that bends first in one popular direction, then in another. But to make this system work, no one has the right to look to the courts for a quick fix. No one has a stake in courts that can be easily persuaded to follow the howls rather than the law.

The amendment before us would seek to use the exceptions clause in article III, section 2, clause 2 of the Constitution to justify eliminating Supreme Court appellate jurisdiction in cases reviewing State enactments on school prayer. Article III gives the court appellate jurisdiction "with such exceptions, and under such regulations as the Congress shall make." Cases from the Court itself and nearly two centuries of legal scholarship have not defined the limits of this congressional power. And I doubt that it is within the realm of likelihood that the scope of the power is about to become the subject of complete agreement among the branches of Government or among legal scholars. I believe that every one of us has a duty to read the Constitution as a living document and to pass on matters before us as if the responsibility for the perpetuation of its genius fell to each one of us, because, quite frankly, it does.

David R. Brink, former president of the American Bar Association, made this point very well in a statement that Senator BAUCUS presented to this body in observance of Law Day last spring. Mr. Brink said, as Senator BAUCUS quoted:

> Sometimes in the press of current problems we forget the origin of our system of government and the source of our liberties. We must never forget the well-springs of our heritage and our progress. But the Constitution is not self-executing. To make its grand policies a reality, it needs interpretation and enforcement by the courts and wise implementation and extension by the legislative and executive branches. It needs the coordinated work of all three branches of government.

In order to conclude that article III of the Constitution permits the Congress in the guise of carving exceptions, to carve up the Supreme Court itself, much of the rest of the Constitution has to be ignored.

Article V of the Constitution lays down very explicit rules for the amendment process. The process is long and arduous, and the Consititution has been amended very few times as a result. It is difficult to believe that the authors of the Constitution, as politically astute a group of people as one might imagine, would have framed a careful mechanism for amendment and then would have permitted a simple statute to work as an amendment by eliminating review of that statute by the Supreme Court. Prof. Leonard Ratner of the University of Southern California Law School argues in a compelling manner that the Constitutional Convention considered and rejected alternative language to the exceptions clause which would have read:

> In all the other cases before mentioned the judicial power shall be exercised in such manner as the legislature shall direct.

Professor Ratner concluded that:

> (H)ad the Convention desired to give Congress (plenary control over Supreme Court appellate jurisdiction), the reasonable course would have been to adopt the unequivocal language of the amendment in place of the more ambiguous phrasing of the Committee's draft. The defeat of the amendment thus may reasonably be construed as a rejection by the Convention of plenary congressional control over the appellate jurisdiction of the Court and as indicating that the purpose of the clause was to authorize exceptions and regulations by Congress not incompatible with the essential constitutional functions of the Court.

I do not accept the proposition that if Congress creates lower Federal courts, it must endow them with unlimited authority to vindicate every federally created right. There have been limitations on Federal court jurisdiction such as increases in the jurisdictional amount, changes in the nature of diversity and removal jurisdiction, and a few—very few—instances where Congress has limited Federal court jurisdiction altogether, such as the Norris LaGuardia Act and the Tax Injunction Act of 1937.

But not even the few instances where Congress limited the jurisdiction of the Federal courts in specific subject areas did Congress ever go so far as to remove from the total protection of the Federal courts rights guaranteed under the Constitution. Through this lengthy and sometimes tumultuous history of Congress, many bills have been introduced to do just that, and none has ever passed. Through that long history the power of Congress to establish lower Federal courts and to make exceptions to the appellate jurisdiction of the Supreme Court has been exercised to adjust the scope and authority of the judiciary to better serve the needs of the litigants, to promote efficiency, to maintain a healthy balance between the State and Federal systems.

But there should be a clear distinction in the minds of every Senator between legislation to improve the courts and legislation to use the courts to accelerate changes in substantive constitutional law. The thrust of the court-stripping bills now before the Senate is to short circuit the normal processes for amending the Constitution, which are difficult and time consuming. But they are difficult and time consuming for a reason. The Constitution should reflect the wise resolve of the people, tested over time.

In the Constitution Subcommittee hearings on court jurisdiction conducted in May and June 1981, we observed the Nation's finest legal scholars in a sincere and technically complex discussion of the constitutionality of various proposals to limit lower and appellate Federal court jurisdiction on an issue-by-issue basis. It is hard to predict the outcome of that same debate in the courts, simply because there is a scarcity of precedents truly on point. The scarcity, however, results from the devotion of past Congresses to the principle of shared powers and an unwillingness to buy fast changes in law at a steep constitutional price.

Among the eminent law professors who appeared before the Constitution Subcommittee some believed that there were few limitations imposed by the Constitution on Congress under article III and that an underlying purpose of Congress to extinguish particular rights did not, in general, signal a violation of the Constitution. But it is interesting that most of the scholars who read article III broadly—and that includes all of those who appeared before the committee besides two committed supporters of S. 158, the Human Life Statute, also believe that it would be a tradegy for Congress to forgo the self-restraint that has united each generation with the next.

One witness, Prof. Martin Redish of Northwestern University Law School, believed that Congress has a broad authority under article III and that the court-stripping bills may be constitutional. But he ended his visit with us on a very different note:

> In past years, previous Congresses were also disturbed with many substantive decisions of the Supreme Court. They, too, considered legislation to curb that Court's jurisdiction. But, with rare exception, those Congresses declined to take such drastic action. I strongly urge you to exercise similar restraint, both for the good of the nation and for the rule of law.

The hearings and the opinions can only help us to decide if we have the authority to act. We must answer the question of whether we ought to act. It is that issue which must concern us all. The current debate on stripping the Federal court jurisdiction gives us an interesting look at how the judicial branch can be both underestimated and overestimated in the loose talk of politics. The court's power and responsibility are overestimated when the court is made the repository of our unsolved social agenda. The courts did not create the deep division in this country over issues like abortion and school busing. The courts did not create the environmental and poverty problems that have resulted in statutes which institutionalize difficult and complex judicial decisions interpreting these laws. The courts did not create racial discrimination and did not set into motion the two-century old conflict between the Federal Government and the States, two other problems that have spawned controversial litigation. Mr. Brink of the ABA put it well in his Law Day statement:

> It must be remembered, first, that, unlike the executive and the legislative, the courts do not initiate policy on their own motion; they simply decide actual cases between opposing parties that have not been resolved by the other branches. What has happened, I think, is that the executive and legislative branches have either failed to develop constitutional solutions to state or federal problems, have failed to enforce laws already on the books, or have left policies unclear so that they require court interpretation. In some instances they have dumped implementation of policies in controversial areas on the courts, which have to decide the cases and which have no means to defend themselves from the attacks by the public and but other branches of government that follow their decisions.

At the same time, the flexibility and resourcefulness of the institution of the Supreme Court have been underestimated. The Court is never locked into a mode of thought that ignores developments in the other branches and in the public generally. The growth of law is never static, but can always evolve if the stimulus to evolution is proper and change is needed in light of the historical development of our constitutional law. Professor Ratner in a recent law review article pointed out a number of ways in which the power of the courts in judicial review is overestimated. Criticism from elected officials, private citizens, and the media is not without weight. Congress can affect unpopular decisions with statutes where the Constitution is not contravened. The power to appoint judges has an immense role to play in the direction of future courts. Amendments and the threat of amendments to the Constitution have a part in shaping the norms that inevitably affect the courts.

If changes may be brought about through such means, it may be asked why many of us in the Senate express such intense interest in bills that simply bring about the same substantive changes, but through other means; namely, the limitation of court jurisdiction.

Nothing less than the rule of law is at stake. It may be shocking to think that not every syllable of every word necessary to protect the rights of citizens under the Constitution is located within the four corners of that document, that so much of the quality of constitutional government rests with the judgment of the fallible men and women who serve in Government.

Limiting the jurisdiction of the courts as a means of reversing particular decisions or limiting their effects is a grave and protential threat to our system of checks and balances.

The separation of powers has never been absolute in our system of government. The three branches overlap. The lines of authority are at times unclear.

Underlying the success of the system over nearly 200 years is a strong notion of comity and accommodation among the branches. The self-restraint exercised by each branch is strengthened by genuine concern about destroying that sense of comity, just as one is careful to nurture a faithful relationship with a good neighbor.

The 75th Congress was faced with a dilemma not unlike our own when it considered and rejected President Roosevelt's court-packing proposal. The Senate Judiciary Committee rose to the occasion, despite the great pressure to speed along legislation that was designed to ease the pains of the Great Depression. The words of that committee could be our own today:

> Let us, of the Seventy-fifth Congress, in words that will never be disregarded by any succeeding Congress, declare that we would rather have an independent court, a fearless court, a court that will dare to announce its honest opinions in what it believes to be the defense of liberties of the people, than a court that, out of fear or sense of obligation to the appointing power or factional passion, approves any measure we may enact. We are not the judges of the judges. We are not above the Constitution.

Mr. President, I said earlier that each one of us has a responsibility not only to our constituents but to every American. How many of us could vote

for these court-stripping bills and then go back and look our constituents in the eye and have to tell them, "We removed some of your freedom; we removed the freedoms that Americans have enjoyed for all these years; we cut back on your freedom"?

Mr. President, I am not going back to Vermont to say that. I will oppose every one of these court-stripping bills.

I applaud the distinguished Senator from Montana for the efforts that he has made and I applaud the rather lonely fights in this Chamber which he and the distinguished Senator from Connecticut (Mr. WEICKER), have conducted. It is in the finest tradition of the Senate, but even more so, it is in the finest tradition of protecting the freedoms our country has always treasured.

CLOTURE MOTION

(The following proceedings occurred during Mr. LEAHY's remarks and are printed at this point by unanimous consent:)

Mr. BAKER. Mr. President, I send a cloture motion to the desk and ask that it be reported.

The PRESIDING OFFICER (Mr. SYMMS). The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The legislative clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, hereby move to bring to a close debate on amendment number 2031, as modified, to the committee substitute to House Joint Resolution 520, a joint resolution to provide for a temporary increase in the public debt limit.

Jesse Helms, Jeremiah Denton, Paul Laxalt, Paula Hawkins, Orrin G. Hatch, James A. McClure, Roger W. Jepsen, Jake Garn, Howard Baker, John P. East, Steve Symms, Strom Thurmond, Charles E. Grassley, Don Nickles, Gordon Humphrey, William Armstrong, and Edward Zorinsky.

(NOTE.—The above cloture motion was subsequently withdrawn and a replacement therefor filed. See later proceedings in today's RECORD.)

Mr. BAKER. Mr. President, this is a cloture motion against further debate on the Helms prayer amendment which will occur on Tuesday, if cloture is not invoked on Monday. There will be a vote on Monday on a cloture motion filed yesterday.

I call the attention of Senators to the fact that there is no time agreement by unanimous consent for that vote, and the vote will occur 1 hour after we convene, to follow the establishment of a quorum, under the provisions of rule XXII.

ORDER FOR RECESS UNTIL 2 P.M. ON MONDAY NEXT

Mr. BAKER. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in recess until 2 p.m. on Monday next.

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

ORDER FOR RECOGNITION OF SENATOR NUNN ON MONDAY NEXT

Mr. BAKER. Mr. President, after the recognition of the two leaders under the standing order on Monday next, I ask unanimous consent that the distinguished Senator from Georgia (Mr. NUNN) be recognized on special order for not to exceed 15 minutes.

It is anticipated that after the execution of the special order, there may be a brief period for the transaction of routine morning business; but, in any event, it will not interfere with the establishment of a quorum under the provisions of rule XXII and the cloture vote to follow thereafter.

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

Mr. BAUCUS. Mr. President, will the majority leader yield?

Mr. BAKER. I yield.

Mr. BAUCUS. Would it be in order for the Senator from Montana to request that the majority leader ask unanimous consent that when the Senate returns to the debt limit bill on Monday, after the cloture vote, the Senator from Montana be recognized?

Mr. BAKER. I am sure that will be all right, and I will be pleased to put such a request. Let me first do one check on our side as to a notation on our calendar, which I think is not a problem. But as soon as that is done, I will be happy to make that request.

Mr. BAUCUS. I thank the Senator.

(Conclusion of earlier proceedings.)

Mr. LEAHY. Mr. President, I ask unanimous consent that I be allowed to yield the floor at this point without this being construed as the end of a speech for the purposes of the two-speech rule and to yield back to the Senator from Montana under the unanimous-consent agreement, originally entered into.

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

Mr. BAUCUS. Mr. President, I thank the Senator from Vermont from the bottom of my heart.

The Senator from Vermont in all the time I have known him—and it has been several years—has continually and consistently stood up for basic principles of our constitutional form of government, and he has consistently stood up for honesty and got what is right. Over the long haul he has been able, I think, more than most people I have ever known, to withstand temptations that sometimes occur in political life to immediately satisfy some short-term whim where over the longer haul to do so would be to jeopardize or undermine some longer goal or gain.

I very much thank the Senator from Vermont for his efforts in these regards.

Mr. President, in that same vein, the Senator from Vermont has touched on the difference between the temptation to vote for this underlying amendment because it is sometimes characterized as a "school prayer amendment," on the one hand, and, on the other hand, need to withstand that temptation and instead protect the Constitution.

Mr. President, I might ask those who were supporting this amendment, What is really more important? Is it more important to vote for a statute which at some level apparently but not in reality satisfies those who disagree with the Court's decision in school prayer; or is it more important—and I am not exaggerating this one bit—to vote against such a statute in order to protect the Constitution of the United States?

I suggest perhaps presumptuously that those who think they would be pleased with a favorable vote on this underlying statute would actually be very displeased and very unhappy with the consequences of the action taken—the jeopardizing of their own rights, as well as the rights of others, under the Constitution. That is the issue here today.

It is a matter of education. It is a matter of understanding. If Americans realize that the underlying Helms school prayer amendment, which is essentially a courtstripping amendment, in fact would not give what they think they are getting but rather would take away their constitutional rights, I doubt that they would ask their Senators and Representatives to vote for it.

That is the issue up here today.

Mr. President, I see the distinguished Senator from Connecticut in this Chamber.

I ask unanimous consent that I might yield to the Senator from Connecticut without losing my right to the floor and upon being rerecognized the continuation of my speech not be counted as a second speech under rule XIX and that I be allowed to leave the Chamber while I have so yielded and that the Senator from Connecticut be permitted the floor under the same conditions.

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

Mr. BAUCUS. Mr. President, before I completely yield, I again commend the Senator from Connecticut for his yeoman efforts here. He has been a stalwart in protecting the Constitution of the United States. I admire his efforts very much.

Mr. WEICKER. I thank my distinguished colleague and good friend, the Senator from Montana. He is out there in the forefront, at the constitutional wall, and were it not for his efforts a long time ago the result might be quite different than it is today, and the result today is that the Constitution is as good today as it was yesterday. How long that is going to last, I do not know. Everyone seems to be taking a pretty good run at it. There is only a handful out here who are protecting it. I would hope we would have even more of our colleagues stand up on these issues.

Let me say at the outset that I could not help but note that there was comment in the paper that possibly it might be that the record vote should be taken on the matter of school prayer so it could be used against those who are up for reelection in the sense that they are not for prayer and are somewhat lacking in their enthusiasm for religion.

I use this occasion to point out it really should not have anything to do with the argument, that men who are standing up here and arguing on behalf of the Constitution, more particularly the first amendment, who are arguing against the establishment of any religion are not an irreligious group. Indeed, there are many of us who are of very deep faith. But it is that very fact, the fact that we believe in all prayer and all faith, we do not want a state prayer and we do not want a state religion.

That is what is at issue, pure and simple. It has nothing to do with being religious. It has nothing to do with belief in prayer.

I would hope that everyone prays mightily. I hope everyone prays his particular faith with overwhelming enthusiasm daily.

But all this to be done and can be done only in a free society. As soon as the society dictates as to what is going to happen in religious terms or more specifically the words that apply to that religion, then our freedom is whittled just that much and is something a good deal less than it is at present.

Mr. President, today is the 195th anniversary of the signing of the Constitution of the United States of America at the Constitutional Convention of September 17, 1787. So it has been about 200 years probably since as much attention has been paid to that document as is the case right now, as we have a flood of amendments seeking to alter or end-run it.

We are right now debating an amendment to the debt limit bill. An amendment, as I understand it, falls in the category of legislation. If the amendment is adopted, such adoption is concurred in by the House of Representatives, and signed by the President, it then becomes law.

The first amendment to the Constitution of the United States is as follows:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

Without even getting into the substance, we are in violation of the Constitution. Nobody is going to deny that this certainly has to do with religion. It does not have anything to do with the economy; it does not have anything to do with housing; it does not have anything to do with the labor unions; it does not have anything to do with minorities; it does not have anything to do with railroads. It has to do with religion.

Do we have a copy of the amendment here on the desk? Let us just see what we are talking about. Here is the amendment:

> Notwithstanding the provisions of sections 1253, 1254, and 1257 of this chapter, the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any case arising out of any State statute, ordinance, rule, regulation, or any part thereof, or arising out of any act interpreting, applying, or enforcing a State statute, ordinance, rule, or regulation, which relates to voluntary prayers in public schools and public buildings.

The Senator from Montana has eloquently argued the constitutional principle involved in stripping the Supreme Court of its jurisdiction. I will leave those arguments to him because he does it very well. But is there anybody who is going to argue that this amendment deals with religion? Yet the Constitution of the United States is very precise on the point:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

I would ask the question next, what salutary result is going to stem from all this official prayer, this state prayer, this state intrusion into religion? What is going to happen? Is the interest rate going to go down 5 or 6 points? Right now small businesses are going belly-up about 600 a week; is that going to stop? Are the conflicts in the Middle East, in Northern Ireland, throughout this world, Central America, and so forth, going to cease?

Is the fact that only 3 percent of this country can buy homes right now going to stop? What is it? The problem is, in this debate, that I have yet to hear why anybody wants this amendment, and probably in the explanations you will find the best reason for its defeat.

There is nothing wrong with the Constitution of the United States. There is a lot wrong with the economy, a lot wrong with unemployment, a lot wrong with housing, a lot wrong with the world, but there is nothing wrong with the Constitution. There is nothing wrong with my religion, nothing wrong with somebody else's. I do not even know what the religion is. If there was anything wrong about it I would not know about it.

Religions—you know, they belong in another category. I do not see what we are trying to do out here when we cannot even take care of the United States in terms of its secular problems and its secular needs. All of a sudden now we have become great theologians. We cannot even be great politicians. I do not think we are needed in terms of what resides in the human spirit, in terms of that which is in each of us and in what we believe, to whom we look as being our superior and our supreme being. I do not need to help anybody on that score.

Believe me when I say it that even there I have got all I can do to handle myself, and in that regard I am probably very inadequate in the expression of my faith. So why am I going to go around and start urging somebody else as to what he should or should not do?

Then I always appreciate the fact that, "Well, believe me this will be innocuous, it won't offend anybody, this prayer." Well, if I were a minister or priest or rabbi or however the shepherd of the flock is termed in whatever the faith happens to be, I think the last thing I would accede to would be to something that would be innocuous. At least, as I understand religion, it is not supposed to be innocuous. It is supposed to stand for something. Indeed even to a far greater extent in the ecclesiastical sense than that which mankind professes in a secular sense, it is supposed to be the ideal, the zenith of excellence, the epitome of courage. All of these things, as I understand it, apply to any faith regardless of what the specific belief.

But what we are going to have is an innocuous state prayer. It seems to me that is not only an insult to the Constitution but an insult to religion.

Mr. President, I ask unanimous consent that I be allowed to yield the floor to the distinguished Senator from Maryland (Mr. MATHIAS) at this point without its being construed as the end of a speech for the purposes of the two-speech rule, and I ask that upon the conclusion of his remarks that I then be recognized.

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

Mr. WEICKER. Mr. President, before the Senator from Maryland speaks, I just want to express my great admiration for all he has stood for over the years as being a man of great courage, great perception, and certainly one of those who has proven in a lifetime's work of his adherence to and his advocacy of the Constitution of this Nation.

The PRESIDING OFFICER (Mrs. KASSEBAUM). The Senator from Maryland.

Mr. MATHIAS. Madam President, I want to thank the Senator from Con-

necticut for yielding to me, and to thank him for his generous words. He has undertaken an important battle and I hope Senators will rally to his cause and that citizens will rally to his cause because it is important. I join with him in opposition to the amendment offered by the Senator from North Carolina (Mr. HELMS) which, in my view, would deprive the Supreme Court and all Federal courts of jurisdiction to consider voluntary school prayer cases.

Today's debate is the latest step in a determined and sustained effort in the 97th Congress to restrict the remedial powers or the jurisdiction of Federal courts.

Never before in my 20 years in Congress have I witnessed such a concerted assault on the Federal judiciary as has been mounted in the 97th Congress. In fact, Senator HELMS' amendment is just one of more than 30 such proposals that are before us. And, on March 2 of this year, one of these legislative proposals was actually passed by the Senate. At that time the Senate adopted the most extensive restrictions on the power of Federal judges to issue remedial busing orders ever passed by either House of Congress.

I have opposed such jurisdictional and remedial limitations in the past; I will continue to do so today and I will continue to do so in the future. They are, in my opinion, contrary to the letter and to the spirit of the Constitution and, beyond that, they are unwise as a matter of public policy.

This is certainly not the first time court curbing has been a hot topic in America. In fact, it goes back to at least 1793, when the U.S. Supreme Court ruled that States could be sued in Federal court in the case of Chisholm against Georgia. That decision raised a hue and cry of really dreadful proportions. One newspaper said it "involved more danger to the liberties of America than the claims of the British Parliament to tax us without our consent." The Georgia House of Representatives reacted even more violently. It passed a bill providing that anyone who executed any process issued in the case would be "guilty of a felony, and shall suffer death, without benefit of clergy, by being hanged." Fortunately for the citizens of Georgia, that bill died in the Georgia Senate.

The Chisholm decision was in fact overturned, in 1978, but it was done according to the procedures specified in the Constitution, specifically by an amendment, the 11th, to the Constitution. Nevertheless, since then literally hundreds of legislative proposals have been introduced in Congress and in State legislatures to counteract controversial court decisions or to preclude unwanted judicial pronouncements, frequently to do so by means other than the amending process laid out in the Constitution. President Franklin D. Roosevelt's abortive attempt in 1937 to pack the Supreme Court with justices who would support his New Deal was only the most flamboyant in a long line of efforts to curb the Court. Some of these court-curbing proposals called for constitutional amendments to rebuke the Court, but others followed a straight statutory route. Most were prompted by a single decision by the Court, a few by a series of judicial rulings. Neither liberals nor conservatives have been immune to the temptation to curb the Court, so it is not an ideological question. Lawmakers of every political coloration have introduced such measures. Despite their political differences, they were all motivated by a single desire: to undo the work of the Court.

In the past, Congress has considered constitutional amendments that would not simply change the effect of a Court decision, but rather would change our constitutional scheme by allowing Congress to review and veto certain high court rulings. It has contemplated amendments that would require more than a simple majority of the Supreme Court to invalidate an act of Congress. It has entertained a bill that would require unanimous court agreement to void any act of Congress, State law, or State constitutional provision. And it has even deliberated over a resolution that called for a constitutional amendment providing that Supreme Court Justices would be appointed by a panel composed of one judge from each of the highest State tribunals.

Since the Supreme Court's decision in Brown vensus Board of Education in 1954, almost every controversial high court ruling has provoked a legislative response aimed at limiting the Court's jurdisdiction. Rulings on reapportionment, obscenity, criminal confession, school segregation, and Communist subversion have all triggered such proposals. But not one of these post-Brown bills became law. On a few occasions, these legislative efforts got off to a fast start; but, each time, people on Capitol Hill and perhaps more importantly people off Capitol Hill, took a hard look at the proposal and realized the grave threat it posed to our constituional system of government; and, each time, Congress backed off. I hope history will repeat itself now. Although the proponents of the court jurisdiction bills seem to have had the early momentum in the 97th Congress, the tide is shifting. A number of developments bear this point out:

In August 1981, the American Bar Association overwhelmingly adopted a resolution opposing congressional curtailment of the jurisdiction of the Supreme Court or inferior Federal courts for the purpose of effecting changes in constitutional law.

On January 30, 1982, the Conference of State Chief Justices expressed its "serious concerns" about the court jurisdiction bills and characterized them as "a hazardous experiment with the vulnerable fabric of the Nation's judicial systems * * *."

In hearings before subcommittees of both the House and Senate Judiciary Committees, the overwhelming majority of legal scholars urged Congress not to enact any of these court jurisdiction proposals.

On March 17, 1982, 14 Members of this body took the floor of the Senate to express grave concern over the court-stripping bills. Among those speakers was the distinguished Senator from Arizona (Mr. GOLDWATER), who worried about the impact these proposals would have on the independence of the Federal judiciary and termed them "destructive of our federal system" and "contrary to the will of the Framers (of the Constitution)."

On May 6, 1982, Attorney General William French Smith strongly suggested that S. 1742, the school prayer court jurisdiction bill, was unconstitutional and expressed concern over such proposals as a matter of public policy.

In July 1982, a message was sent to Congress by 25 prominent lawyers calling on Congress to reject "all efforts to remove Federal court jurisdiction over constitutional rights and remedies." And this message was signed not just by 25 rank-and-file, garden-variety members of the bar, but by four former Attorneys General, four former Solicitors General, and by a former Justice of the Supreme Court of the United States.

So clearly, I think, we who oppose amendments of this kind are gaining momentum. Nonetheless, supporters of the court jurisdiction bills persist both in their legislative efforts and in their belief that these bills are a constitutional and wise response to controversial Supreme Court decisions.

The supporters of the Helms amendment are quite candid about their opposition to the Supreme Court's school prayer decisions and their intention to bypass these constitutional rulings. When Senator HELMS introduced his school prayer jurisdiction bill, early last year, he laid his cards right on the table. After condemning the Supreme Court's school prayer decisions as a distortion of "the intent and language of the (first) amendment," Senator HELMS stated:

> The limited and specific objective of this bill is, then, to restore to the American people the fundamental right of voluntary prayer in the public schools.

The proponents of the amendment of the Senator from North Carolina do not question its legitimacy under the Constitution. They argue that the amendment is a valid exercise of con-

gressional authority set forth in two provisions of article III of the Constitution:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original jurisdiction. In all other Cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

It is obvious that these provisions mean something. They give Congress some authority to regulate the jurisdiction of both the Supreme Court and the lower Federal courts. But, it is equally obvious that they do not deprive our entire Federal court system of the jurisdiction to decide certain types of constitutional issues. Clearly they do not give Congress free license to alter unpopular Supreme Court interpretations of the Constitution. Court decisions may be changed either by the means provided within the Constitution itself—in this case by invoking article V—or by the Court itself when it alters one of its prior constitutional holdings. There is no question in my mind that what this amendment is seeking to do is to find a back door for changing the organic law of the land. That is not our constitutional system of government. Nor should it be.

By approving the amendment now before us, Congress would preclude the Supreme Court and lower Federal courts from dealing with an important issue. Once Congress starts down this road, there is no area of human endeavor that could not be reached by a simple act of Congress altering the jurisdiction of the Federal courts to control the outcome of cases. Tomorrow, our most basic constitutional protections could be at stake. The entire Bill of Rights, it is not too much to say, could literally be "up for grabs."

David Brink, former president of the American Bar Association, told the House Judiciary Committee that proponents of the Court jurisdiction bills read the relevant portions of article III "as though they were the sole provisions of the Constitution." Supporters of these proposals ignore what Mr. Brink called our "total plan of government." They gloss over several key elements of our constitutional scheme, including the doctrines of separation of powers, judicial independence and judicial review, the supremacy clause of article VI and the constitutional amendment procedures set forth in article V. Above all, they fail to acknowledge the radical and deleterious alteration this amendment and related proposals would work on our constitutional edifice.

The Constitution's division of power among three branches of Government is hardly a product of happenstance. Rather, it is the keystone to the Founding Fathers' deliberate development of a theory of government. The authors of the Constitution were worldly men. They were scholars steeped in the history of civilization. Having no television to watch, they read history books. They knew how the human race had dealt in the past with problems of government, authority, power, and conflict. They knew what had been successful and what had failed. And they distilled this knowledge of the history of mankind into the Constitution. I feel confident that a majority of them had read Montesquieu's The Spirit of the Laws and adapted his conception of the appropriate division of governmental powers to fit their own ideas, to fit this climate, this geography. Thus the Founding Fathers constructed strong and independent branches of Government specifically to prevent the concentration of too much power in one branch, and in the words of Justice Louis Brandeis, "to save the poeple from autocracy." Then, to make sure that no one branch would dominate the others, they added some institutional checks and balances. One was judicial review—the power given to the Supreme Court to void State and Federal laws that it judged as violating the Constitution.

Alexander Hamilton pointed out the fundamental importance of this power in Federalist 78. "Without this," he wrote, "all the reservations of particular rights or privileges would amount to nothing." Yet it is precisely this check—the power of judicial review—that this amendment would emasculate.

Of all the concepts that we should conserve, that we should be conservative about, this is surely one.

Moreover, this diminution of the scope of judicial review would undermine both the uniformity in constitutional interpretations provided by the Supreme Court and the constitutional requirement of the supremacy of the Constitution and laws of the United States. There would no longer be a single tribunal to act as the final arbiter as to the meaning of certain provisions let us say, of the first amendment. Each State would be able to determine the meaning of this constitutional language in its own way.

I would predict that we would soon have 50 interpretations.

The result, as a distinguished Marylander, a former Secretary of State, a former Attorney General, William Rogers warned over 20 years ago would be that a person's constitutional rights would depend on where a person lived, in which State he happened to have his residence.

Enactment of this amendment would also make a mockery of the supremacy clause set forth in article VI, clause 2, of the Constitution:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

This constitutional command would be, as Prof. Leonard G. Ratner told the Senate Judiciary Subcommittee on the Constitution, "no more than an exhortation," if there were no tribunal with nationwide authority to interpret and apply the supreme law, over a century ago, Chief Justice Roger Taney, of Frederick, Md., made this very point.

He began his historic career as a member of the bar in Frederick County, Md., the bar to which I also belong. When he was Chief Justice, he made this same point. He said:

> But the supremacy thus conferred on this Government could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; . . . Without such a tribunal, it is obvious that there would be no uniformity of judicial decision; and that the supremacy (which is but another name for independence), so carefully provided in the clause of the Constitution above referred to, could not possibly be maintained peacefully, unless it was associated with this paramount judicial authority.

But the danger is not limited to this. These bills also undermine the doctrine of judicial independence, which is a principle worth preserving. It is not a new principle; it is an ancient one. Its origin can be traced back long before the Constitution of the United States was written. Herodotus, the historian of ancient Greece, has passed down to us this description of the Persian legal system of his day:

> These royal judges are specially chosen men, who hold office either for life or until they are found guilty of some misconduct; their duties are to determine suits and to interpret the ancient laws of the land, and all points of dispute are referred to them.

I am sure our Founding Fathers had read Herodotus. They were aware that by grafting judicial independence into the Constitution they were embodying the wisdom of the ages into our organic law. In this area, they were not creating a new experiment in government.

In addition, they were all too familiar personally with the abuses associated with a dependent judiciary, and they were determined to avoid them. In fact, one of the principal grievances listed against the British in the Declaration of Independence was that the King had made the colonial judges "dependent on his will alone, for the tenure of their offices, and the

amount and payment of their salaries."

As a result, the Constitutional Convention adopted a system of life tenure for Federal judges, subject only to the power of impeachment, and protected their salaries from diminution. It also specifically rejected the concept of legislative control over the judiciary by defeating a proposal to create "a national judiciary * * * to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature to hold office during good behavior." As one scholar has written, the Founding Fathers "hoped to make Judges free from popular pressure and legislative control. Their purpose was to create a truly independent judiciary limited only by the cumbersome process of impeachment."

Clearly, the framers conferred on Federal judges a degree of independence unprecedented in the annals of history. As the Supreme Court noted in United States against Will:

> A judiciary free from control by the Executive and legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.

But, we may ask ourselves how independent and free from domination from the legislature are our Federal judges, if they must constantly be fearful that their decisions may offend a majority of the Congress and result in enactment of a proposal like the one before us? As Whitney North Seymour, distinguished New York lawyer and former Assistant Solicitor General, told the Senate Judiciary Subcommittee on Internal Security 24 years ago:

> It is imperative in our system of government, that no branch of government can be subservient to other branches and that the courts retain the ultimate freedom to exercise independent judgment. No court can be completely independent if it is forced to feel that, when its decisions are unpopular, it may be stripped of its right to hear and decide similar cases. In the field of individual rights, such a shadow on the independence of courts might seriously jeopardize those rights.

Finally, the amendment now before the Senate is wholly inconsistent with the clear and unambiguous language of article V which sets forth the constitutionally permissible means of amending our organic law.

To be sure, the Founding Fathers realized there would be need periodically to change our organic law, and they wanted the procedures for amending the Constitution to be more flexible than those in the Articles of Confederation, which required the unanimous agreement of the States. But they did not want to make the process too easy. Only after lengthy debate was a compromise struck that, to quote James Madison:

> Guards equally against that extreme facility, which would render that Constitution too mutable; and the extreme difficulty, which might perpetuate its discovered faults.

This amendatory procedure set forth in article V of the Constitution was designed specifically to deal with the types of changes in the Constitution sought by the proponents of this amendment. But they want no part of the constitutionally prescribed procedures. They prefer, I regret to say, to substitute congressional legislation for the carefully crafted procedures set forth in article V. With all due respect to my colleagues in the Senate, I side with our Founding Fathers on how to go about altering our organic law. Their approach has stood the test of time and has served us well. It should be conserved.

It is inconceivable to me that the authors of the Constitution, who took such pains to construct a delicate balance between the coordinate branches of Government, who conferred on Federal judges a degree of independence unparalleled in the annals of history, and who devoted so much time and care to devising a method of amending the Constitution, would today endorse a method of circumventing constitutional rulings by a simple majority vote of both Houses of Congress. The fact is, they would not.

Constitutional considerations aside, there are other undesirable side effects to this amendment. It is advertised as a simple and easy way of undoing the effect of controversial Supreme Court decisions. It is suggested that a cure for "judicial tyranny" has been discovered. A discovery—eureka! But, I think that, in the end, these expectations will surely be dashed for one or more good reasons.

First, the amendment, if enacted, could be ruled unconstitutional—and I believe it would be. That, of course, would end the issue for once and for all. Court opponents would be back at square one, with no option but to follow the route they should have used in the first place: the constitutional amendment process.

Second, even if sustained by the courts, there is no certainty that this amendment would achieve the desired result. The Supreme Court's interpretations of the Constitution are the law of the land. As the Supreme Court stated in Cooper against Aaron:

> Article VI of the Constitution makes the Constitution the "supreme Law of the Land." . . . (*Marbury* v. *Madison*) declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunicated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

Thus, Madam President, for this amendment to achieve the ends which its proponents seek, State judges would have to ignore their oath to support the Constitution and render decisions counter to the prevailing Supreme Court rulings on school prayer. Understandably, this very point was quite troubling to the Conference of State Chief Justices:

> First these proposed statutes give the appearance of proceeding from the premise that state court judges will not honor their oaths to obey the United States Constitution, nor their obligation to follow Supreme Court decisions interpreting and applying that Constitution, thus breaking with a 200 year practice and tradition. So viewed, these efforts to transfer jurisdiction to the state courts for these purposes neither enhance the image of those institutions, nor demonstrate confidence that state court judges will do their duty.

I think that the Senator from North Carolina and other advocates of this amendment misjudge the loyalty that State jurists feel to the Constitution. I am certain that these judges would observe the supremacy clause and continue to follow Supreme Court precedent. Thus, the net effect of this entire venture might be to perpetuate the very decisions that prompted all the fuss in the first place.

Even though State judges are surely loyal to the Constitution, this amendment would work a great—indeed, a cruel—hardship on the exercise of that loyalty because it would shift the legal battleground for a controversial social issue from the Federal to the State courts. Unlike their colleagues on the Federal bench, most State judges are elected to office. They do not have the security of life tenure, and they are not free from political pressures. They are, in fact, very vulnerable to the public mood and the tyranny of the majority. Thus, as the American Bar Association has noted, proposals like the one before us would "subject State judges to often hard choices between oath and career."

Last September, we saw a strenuous attempt in the Senate Judiciary Committee to force a Supreme Court nominee to commit herself, prior to confirmation, to voting to overturn the Court's 1973 decision on abortion. It does not take much imagination to picture the pressures that would be brought to bear to elicit such assurances from State judges during election campaigns.

One of the great strengths of the American system is that we have not allowed our Constitution to be pulled and hauled with each ebb and flow of the tide of public opinion. Today, however, the tug-of-war in Congress over these court-curbing bills threatens to rend the fabric of our Constitution—"the most wonderful work ever struck

off at a given time by the brain and purpose of man."

We must not let that happen.

Madam President, at the time he announced his retirement from the Supreme Court, former Justice Potter Stewart had the following conversation with a reporter:

He was asked the question:

(T)here are numerous proposals in Congress that would strip the Supreme Court of jurisdiction in subject matter areas. Without asking you about the constitutionality of this, does that concern you as a procss and as a prospect?

Justice STEWART. Yes; it does concern me. There is nothing new about having such bills in Congress. I think there have been such bills in Congress ever since I've been here, in fact long before that. The reason that people are concerned about it nowadays is that there seems to be considerably more of a possibility that one or more of such bills might be enacted. If they were enacted, if any such bill were enacted, it would present immediately very difficult constitutional questions. I'm glad I am not going to be here to have to wrestle with those, and I hope this Court will never have to wrestle with such questions because I hope that no such legislation will be enacted. So yes, I am concerned.

Madam President, I share Justice Stewart's concern. I do not share his sense of relief that he is not there to wrestle with it. I wish, in fact, he were there to wrestle with it because his service on the Court was of great distinction and of great value to the country, I do share with him the hope that the Court will never have to rule on the constitutionality of one of these Court jurisdiction bills. Obviously we in the Senate have much to say about whether or not the Court will ever have to render such a decision. And, by defeating the amendment now before us decisively and overwhelmingly, we can send out a clear signal that these proposals have no place in our constitutional government and that they should be shelved for once and for all. I urge my colleagues to join me in doing that and to defeat this amendment.

Madam President, I ask unanimous consent that I may be allowed to yield the floor at this point to the Senator from Ohio without such action being construed as the end of a speech for the purpose of the two-speech rule.

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

The Senator from Ohio.

Mr. METZENBAUM. Madam President, I think we have here a situation that goes far beyond the matter before us. We are dealing with a proposal specifically spelling out that and I quote:

The Supreme Court shall not have jurisdiction to review by appeal, writ of certiorari, or otherwise, any case arising out of any State statute, ordinance, rule, regulation or any part thereof, or arising out of any act interpreting or applying or enforcing a State statute, ordinance, rule or regulation—and there we talk about what the bill is all about—which relates to voluntary prayers in public schools and public buildings.

If this measure is accepted by the Congress of the United States and signed into law by the President, then we have truly made a grave mistake in our Nation's approach to the separation of powers—its approach to the question of whether or not the Congress of the United States is going to say what the Supreme Court can hear and what they cannot hear. If we can enact legislation of this kind, which this Senator believes is patently unconstitutional, and if it is held valid and it succeeds in depriving the Court of jurisdiction relating to voluntary prayers in public schools and public buildings, then what is to keep us from going further and including within the prohibition any laws, regulations, ordinances, rules, or statutes relating to free speech? It would totally destroy the magnificent rights of free speech that we in this country have by saying that the Court could not rule in such cases.

What about the right of a free press? What would be the attitude of the people of this Nation if we were suddenly to say that the Court could not deal with any cases having to do with a free press? What would the newspapers, the radio, and the TV—say if some of us in Congress determined that we ought to limit the Court's jurisdiction as it pertains to the issues of a free press or the guarantees provided in the Bill of Rights and the Constitution?

Looking further, what about the right of freedom of assembly, the right of trial by jury, the question of slavery or involuntary servitude? What about the question of equal protection of the laws, the deprivation of life, liberty, or property without due process of law, the taking of property without just compensation? How about that particular right?

If we offered an amendment to this proposal that the Court could not have jurisdiction of any cases relating to the taking of property without just compensation, would some of those who are the great advocates of this particular proposal feel the same way about the Court's jurisdiction? Or would they start to concern themselves about the proper rights of individuals as those rights are protected by the Constitution of the United States?

We have to examine our consciences, examine where we are coming from and what our concerns are.

Once we have broken down that barrier and taken away from the Supreme Court of the United States the right to hear cases having to do with voluntary prayer in public schools and public buildings, then we have made the fateful inroad. The dike has been broken, and it is thereafter possible to enact legislation which would deprive the people of this country of the rights they truly treasure as provided in the Constitution of the United States.

This is a proposal that says, in essence, that the Consititution of the United States should no longer be followed. That is the whole issue before the Congress of the United States. There are those who, for political purposes, would attempt to make the issue of voluntary prayer in schools an issue on the merits, but you cannot look at the issue in that way so far as the measure before us is concerned; because this measure does not deal with the question of voluntary prayer in schools as an issue itself, but, rather, deals with the denial of the court's jurisdiction to hear cases pertaining to that particular subject.

If you can open the door, if you can take the lock off the gate guarding the courts' jurisdiction in one area there is no question that you have opened a Pandora's box, and you have probably totally destroyed the Constitution of the United States in the process.

A vote for this measure, in this Senator's opinion, is a vote to destroy the efficacy and the effectiveness of the Constitution of the United States.

Take other subjects: unreasonable searches and seizures; the question of slavery, involuntary servitude; the right of citizens to vote. Should we take away jurisdiction in any of those areas? If we enact this particular measure, have we not truly then said that the Court may be deprived of jurisdiction in any area in which we disagree with that particular part of the Constitution of the United States?

The issue here is the integrity of the court system and our constitutional way of government. Either you believe in that constitutional way of government, either you believe in the integrity of the court systems, or you do not. If you believe in the integrity of the court system, if you believe in the Constitution of the United States, then this proposal cannot be supported. This proposal goes further than the language of the proposal itself, and the implications of this proposal are totally unlimited. The implications are that the Constitution can be broken indirectly when the people of the country would not be willing to undo any of the constitutional provisions by the normal procedures as provided in that document, and that is by amending the Constitution.

The issue before the people of the country on these measures which would deny the courts jurisdiction is not an issue having to do with the matter of abortion or busing or school prayer or any of the other very emotional issues. All of these are issues it is fashionable these days to deal with through court-stripping legislation.

But, stripping the Federal courts of jurisidiction because transient political majorities do not like the court's constitutional interpretations undermines our society's democratic framework. It is bad public policy, and it is shortsighted. Simply stated, if you do not like the court's decisions, then use the procedures that we have in the constitution to change them. Do not do it by an amendment depriving the court of jurisdiction.

Madam President, such court-stripping amendments do not make sense. I find it hard to believe that the Members of this body support that approach. That simply cannot be the position of any person who believes that our constitutional system of Government is a sacred system and is one that we all want to protect.

Let me read what the Attorney General of the United States himself said on this subject:

> Congress may not, however, consistent with the Constitution, make "exceptions" to Supreme Court jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers.
>
> The remedy for judicial overreaching, however, is not to restrict the Supreme Court's jurisdiction over those cases which are central to the core functions of the Court in our system of government. This remedy would in many ways create problems equally or more severe than those which the measure seeks to rectify.
>
> Essential to the principle of separation of powers was the proposition that no one branch of government should have the power to eliminate the fundamental constitutional role of either of the other branches.
>
> It is appropriate to note, however, that even if it were concluded that legislation in this area could be enacted consistent with the Constitution, the Department would have concerns as a policy matter about the withdrawal of a class of cases from the appellate jurisdiction of the Supreme Court. History counsels against depriving that Court of its general appellate jurisdiction over Federal questions. Proposals of this kind have been advanced periodically, but have not been adopted since the civil war. There are sound reasons that explain why Congress has exercised restraint in this area and not tested the limits of constitutional authority under the exception clause.

Madam President, I ask unanimous consent that I be allowed to yield the floor at this point without this being construed as the end of the speech for the purpose of the two-speech rule, and I yield to the Senator from Oregon.

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

Mr. HATFIELD. Madam President, I wish to share with our colleagues my impression of one of the real issues in this debate, which I fear has been overlooked, and that is as it relates to the first amendment to the Constitution and the way in which the first amendment today is being applied that infringes upon the rights of students to free speech and which discriminates against them because of the religious content of their speech.

I am introducing statutory language which will accomplish this goal without utilizing the ill-advised method of stripping the Federal court jurisdiction over school prayer.

In Widmar against Vincent the Supreme Court held that, absent a compelling purpose, a public university may not deny the use of its facilities to student groups who wish to meet and speak on religious subjects if it makes its facilities generally available to student groups for meetings on nonreligious subjects. The Court based this holding not on the free exercise of religion clause but on the freedom of speech clause of the first amendment as made applicable to the States through the 14th amendment, for once the university "created a forum generally open for use by student groups," the Court said the university could not "discriminate against student groups and speakers based on their desire to . . . engage in religious worship and discussion * * *."

I recall that while I was Governor of my State a well-known Communist speaker by the name of Gus Hall was making a round of college and university campuses across the country. There was a great outcry by many in my State for me to prevent Gus Hall from the use of the public universities from which to make his statements relating to Karl Marx. I could not and would not, due to the constitutional guarantee of free speech, in any way attempt to intervene to prohibit Gus Hall from speaking on our campuses.

However, that being the case, not only in Oregon but other States to have had Billy Graham come to the campus or any other prominent religious leader and speak in the same forum about Jesus Christ would have been interpreted to violated the establishment of religion" clause and thereby a violation of separation of church and state.

Madam President, I find this ridiculous in a free society dedicated to the principles of free thought.

The denial of opportunities to exercise free speech because of its religious content is now occurring throughout the country today.

Let me cite a few examples:

At Guilderland High School in New York, Christian students sought and have been denied the right to meet before classes for prayer and Bible study. The meetings were strictly voluntary, required no school announcements, no school sponsorship, but a Federal district court and appeals court have upheld the school board's refusal to allow the group to meet.

And yet students can voluntarily associate themselves in that school for other purposes, philosophical societies, camera-photography societies or clubs, all the kinds of clubs in which they voluntarily associate themselves there because of mutual interest and have open and freedom of discussion, but they cannot meet to study the Bible.

I do not support the school prayer amendment. I oppose the idea of any kind of mandated prayers in schools. I do not believe that is in line with our constitutional separation of church and state.

Frankly, I do not have time to write all the prayers, and I do not trust anyone else to. So consequently I have to oppose the whole concept.

But I am speaking today not on the right of religious exercise but I am speaking on the freedom of speech, the first amendment of the Constitution, that is being denied under this ridiculous interpretation by the courts relating to freedom of religious activity.

In Lubbock, Tex., the school board drafted a careful policy that accommodated student initiated religious activity on an equal basis with other student groups in the use of school facilities for meetings before and after school. The U.S. Court of Appeals for the Fifth Circuit struck down this school board policy and forced a total ban of voluntary, student-initiated religious activity. *Lubbock Civil Liberties Union* v. *Lubbock Independent School District*, 669 F.2d 1308 (5th Cir. 1982) is the citation of that case.

And yet in that same school district they could meet and probably have a political discussion on any part of political philosophy they wanted to. They could have a meeting on economic philosophy. They could have a meeting on social philosophy, but not on religion.

Madam President, once a school board establishes the forum for the pursuit of information or knowledge then that forum cannot discriminate on the content of that association or voluntary organization. That is what the Supreme Court ruled as it related to universities and colleges.

What I want to do in my bill is to apply that same constitutional principle the Court applied to the colleges and universities to the elementary and secondary school systems of this country.

Let me cite a third example.

In Williamsport, Pa., the public high school allows students to participate in student clubs and groups such as Student Government, Key Club, Language Clubs, Future Homemakers, music and publication groups. The clubs allow students to exchange ideas and personal opinions on a broad range of topics, subjects, and issues, and no one attempts to intervene to determine the content of those discussions. The clubs meet from 7:55 a.m. to 8:23 a.m. each Tuesday and Thursday

mornings during a regularly scheduled activity period. The clubs may also meet before and after school hours.

In September 1981, a group of students at Williamsport High School requested permission to form a student club to be called Petros which would meet voluntarily during the regularly scheduled activity period on Tuesday and Thursday mornings. The purpose of this student club was for students to aid one another in their personal, social, emotional, and intellectual growth and development by studying the Bible, discussing religious subjects, praying together, and sharing personal experiences. The principal of the high school and the superintendent of the district denied the request on the ground that the meetings would be religious in content. In January 1982, at a meeting of the school board, the request by the students was denied on the same ground.

Hopefully, the students will prevail in their complaint that they are being denied their first amendment rights of free speech because of the religious content of the proposed meetings. However, if the Brandon and Lubbock decisions are followed by the court, a further unfortunate precedent would be set.

The bill I introduce today extends the principle of the Widmar decision to the public secondary school. When a school generally allows groups of students to meet during a noninstructional part of the school day, that school cannot discriminate against any meeting because of the religious content of the speech at the meeting.

What would it be if we had a political club meeting and the students decided they wanted to discuss Karl Marx and communism? I would defend that right of that student group to engage in that discussion as I would defend anyone's right but I also say I would defend their right to have a meeting to study the Bible and discuss the person of Jesus Christ, or Buddha, or Mohammed, or any other religious leader.

School boards and school administrations have no right to abridge the first amendment, freedom of speech, by declaring what the contents of those meetings are or will be only in the case of religion.

The legislation that I introduce also insures that school officials will continue to have discretion to insure that the meetings are voluntary, orderly, lawful, do not in any way engage in illicit or illegal or inappropriate activity. That is the right of administering any school organization. But it should be applied across the board.

Most importantly, this language specifically states that no student can be forced to participate in prayer or any religious activity. It has to be strictly voluntary.

Moreover, State or school officials will have no authority to influence the form or content of any prayer or other religious activity that such clubs may engage in. This language is similar to the amendment suggested by the National Association of Evangelicals in testimony with respect to the President's prayer amendment to the Constitution.

What needs to be addressed is the recent series of lower court decisions that have singled out religious speech as the one form of speech unworthy of protection in the schools. It is even more alarming to see school officials throughout the country deciding to ban all religious speech from public schools. By protecting the free speech rights of students in public high schools the bill is consistent with the Widmar decision.

In prohibiting State sponsorship or influence in formulating the content of prayer or other religious activities, the legislation is consistent with the original Supreme Court decisions of Engel against Vitale and Abington against Schempp.

Madam President, I ask unanimous consent to have printed in the RECORD a copy of my testimony before the Senate Judiciary Committee on this issue and the memorandum mentioned in the statement.

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

STATEMENT OF SENATOR MARK HATFIELD

In 1962 the Supreme Court invalidated a non-denominational prayer that had been written by the New York Board of Regents and approved by local school boards. By imposing a "watered down" prayer on young students, the New York Regents adopted a useless gesture that was neither "spiritual" nor "prayer."

Since that decision, the Supreme Court's ruling has been blamed for the deteriorating quality of public education, for the breakdown of the American family, for the decay in moral principles and abdication of governmental institutions to the norm of secular humanism. The school prayer decision has served as a symbol for all that is wrong in America. "Prayer Amendments" to the U.S. Constitution, legislative initiatives and even attempts to remove the jurisdiction of the U.S. Supreme Court have been vigorously pursued in the Congress. Most recently, President Reagan submitted his proposed Constitutional Amendment which would allow "Voluntary Prayer" in public schools.

Mr. Chairman, I strongly believe that this nation needs to have a spiritual renaissance—one that begins in the hearts and minds of individuals and works its way through our churches, schools and public institutions. The First Amendment to the U.S. Constitution is a limitation on the power of government to promote, establish, or discourage religion but it sets no limit on private initiated prayer, observances of religious customs or political action that stems from moral beliefs. Instead of concentrating our attention on initiatives like a School Prayer Amendment, I would urge my Colleagues to devote their energies to rooting out ridiculous barriers that have been erected to forbid voluntary meetings of students who seek to meet and pray in non-disruptive ways.

Let me give you two examples that demonstrate the problems that vibrant believing students are facing across the country.

(1) At Guilderland High School in New York, Christian students sought and have been denied the right to meet before classes for prayer. The meetings were voluntary, required no school announcements or sponsorship. A federal district court and Appeals Court have upheld the school board's refusal to allow the group to meet. *Brandon* v. *Guilderland Control School District*, 635 F.2d 971 (2d Cir. 1980), Cont. denied, 102 S.Ct. 970 (1981).

(2) In Lubbock, Texas the school board drafted a careful policy that accommodated student initiated religious activity on an equal basis with other student groups in the use of school facilities for meetings before and after school. The United States Court of Appeals for the 5th Circuit struck down this school board policy and forced a total ban of voluntary, student-initiated religious activity. *Lubbock Civil Liberties Union* v. *Lubbock Independent School District*, 669 F.2d 1308 (5th Cir. 1982)

Mr. Chairman, it is unduly restrictive actions like those in Lubbock and Guilderland High School to which the Congress should devote its attention. By chilling sincere efforts to pray for God's grace, and forgiveness in voluntary meetings that do not disrupt the academic functions of a public school, we do far more damage to the nation's moral fiber than through any Supreme Court decision that invalidates a routine, formalistic, and spiritually bankrupt prayer that the New York Regents drafted in the 1960s.

Because of these concerns, I asked the Christian Legal Society to provide me with a legal memorandum outlining the problems that have developed in restricting the religious freedom which may be enjoyed by students on public campuses. CLS has done some extraordinary work in researching, litigating and advocating on behalf of religious freedom. I would like to have the Committee consider the CLS memorandum and recommendations for legislative initiatives as a realistic alternative to the School Prayer Amendment.

MEMORANDUM OF JULY 13, 1982

To: Samuel E. Ericsson.
From: Stephen H. Galebach and Lowell V. Sturgill, Jr.
Question Presented: What is the best legislative means to apply the principles of the *Widmar* v. *Vincent* decision to the context of public schools?

President Reagan recently introduced an amendment to overturn the Supreme Court's controversial decisions of the early 1960's against state-initiated prayer and Bible-reading in public schools. Some of the most serious obstacles to religious activity by students in public schools, however, have received little public attention. In recent years many school administrators, and some lower courts, have begun to prohibit even those forms of religious speech by high school students that are purely voluntary and initiated by students with no sponsorship by the state. Administrators and judges have prohibited student clubs that are religious in nature, and have banned before and after school small-group meetings—thus

going beyond any prohibitions the Supreme Court has required.

Because these more extreme measures against religious expression are not mandated by the Supreme Court, they can be remedied more quickly than by constitutional amendment. While the President's amendment would protect such purely voluntary student meetings, it is possible at the same time for Congress to pass a stop-gap statute to provide immediate protection for those forms of student religious activity that are most clearly voluntary and removed from state sponsorship.

The more extreme actions of school administrators and judges are especially subject to persuasive attack, because they are contrary to the reasoning of the Supreme Court's *Widmar* v. *Vincent* decision of December, 1981. That decision rested on the principle that states may not discriminate against forms of speech that are religious in content. Many of the more extreme restrictions on student religious speech are precisely discriminations based on content. This memorandum considers the possible legislative means to apply the Widmar principle not only to state universities (as the Supreme Court did in that case), but also to state secondary schools.

I. THE PRINCIPLE OF *WIDMAR* V. *VINCENT*

In *Widmar* v. *Vincent*, 102 S. Ct. 269 (1981), a student group called "Cornerstone" requested access to public facilities on the campus of the University of Missouri, for the purpose of holding religious meetings. Id. at 272. Cornerstone sought access on the same terms that applied to the use of university facilities by more than 100 other student groups. The University denied the request pursuant to a university policy prohibiting religious meetings on campus. Id. The Supreme Court ruled against the University, holding that it could not deny use of its facilities for religious meetings if it allowed similar use by non-religious groups on a general basis. Id. at 278.

In so ruling, the Supreme Court reaffirmed the First Amendment principle that regulation of speech must be "content-neutral." See *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981). This principle means that a state may not discriminate against a particular type of speech based on the content of the speech, without offering a compelling interest in justification. See *Carey* v. *Brown*, 447 U.S. 455 (1980).

The Widmar decision confirms that the principle of "content-neutrality" governs state action in the context of a state university. Widmar holds that once a state university creates an "open forum" for speech—for instance, by allowing student groups to meet freely on campus—it may not discriminate against meetings where the speech has religious content or any other particular content. The Widmar Court left open, however, the question of how the principle of content neutrality will apply to state action in the context of student meetings in public secondary and elementary schools.

II. THE PROBLEM: PUBLIC SCHOOL AUTHORITIES AND LOWER FEDERAL COURTS HAVE REFUSED TO ENFORCE THE WIDMAR CONTENT-NEUTRALITY PRINCIPLE WITH RESPECT TO PUBLIC SECONDARY SCHOOLS

A. The Supreme Court decisions on "prayer in school."

In the context of public schools, the Supreme Court has struck down only forms of prayer and religious activity that are initiated in various ways by the state. Specifically, the Court has ruled unconstitutional state policies that initiated student recitation of the Lord's Prayer in class, *Engel* v. *Vitale*, 370 U.S. 421 (1962); reading from the Bible over a school intercom, *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963); bringing a religious teacher on campus to do class instruction, *McCollum* v. *Board of Education*, 333 U.S. 203 (1948); and posting of the Ten Commandments on school walls, *Stone* v. *Graham*, 449 U.S. 39 (1980). The Supreme Court thought these practices violated the principle of state neutrality toward religion, because the state initiated the religious activity, the context indicated state sponsorship of the religious activity, and the students could avoid the religious activity only by taking the affirmative step of asking to be excused. The Supreme Court has never held against religious activity which is purely voluntary, initiated by students, and merely *allowed* by the school on the same basis as student-initiated non-religious activities.

B. Actions of school authorities and lower courts.

A limited sampling of public schools across the country by the Christian Legal Society has already uncovered the following examples of actions by school authorities which are contrary to the content-neutrality principle of Widmar:

1. In Williamsport, Pennsylvania, a student group applied to the local school board for permission to start a club called "Petros", which planned to hold religious meetings before school, after school, or during a school club period. The school board refused the request, forcing the students to file suit in federal district court to seek protection of their rights of freedom of speech and freedom of assembly.

2. In Anderson, South Carolina a public high school opens its doors one-half hour early each day for peaceable student meetings in vacant rooms. For some time, a group of students has used this opportunity for voluntary meetings to pursue Bible study, prayer, and worship. Recently, the local representative of the American Civil Liberties Union has publicly threatened to file suit against the local school board to require it to police the content of student speech by banning any meetings with religious content.

3. For several years prior to the 1980-81 school year, students at North Allegheny High School in Pittsburgh, Pennsylvania, had met on school grounds to study the Bible and pray. The meetings occurred during a twenty-five minute period of time after the arrival of school buses and before the beginning of homeroom period. When this practice was brought under question, high school administrators and then the superintendent of the school district denied a formal request made by the students to use a classroom before school hours began.

4. In Dixon, Illinois (the hometown of President Reagan), a local school board has voted to ban all voluntary religious activities of students on school grounds. Also, the same school board will allow outside community groups only four opportunities per year to rent or reserve school facilities for meetings after school hours if these groups intend religious speech; non-religious groups enjoy after-hours access without this restriction.

5. In *Brandon* v. *Guilderland Central School District*, 635 F.2d 971 (2d Cir. 1980), cert. denied, 102 S. Ct. 970 (1981), the United States Court of Appeals for the Second Circuit upheld the decision of the Guilderland Board of Education to ban voluntary, student-initiated religious meetings from school property during, before, and after school hours with language implying that no religious activity whatsoever is permissible in public schools. The Second Circuit said that an "adolescent may perceive 'voluntary' school prayer in a different light if he were to see the captain of the school's football team, the student body president, or the leading actress in a dramatic production participating in communal prayer meetings in the 'captive audience' setting of a school." 635 F.2d at 978. This language would logically lead school officials to prevent students from bowing their heads to say a prayer before lunch, carrying their Bible to school, or doing any other overt religious act of free exercise of religion within the boundaries of the school. The Supreme Court declined to review this decision in December, 1981, shortly after deciding Widmar.

6. In *Lubbock Civil Liberties Union* v. *Lubbock Independent School District*, 669 F.2d 1308 (5th Cir. 1982), the United States Court of Appeals for the Fifth Circuit went even farther than the Second Circuit did in Brandon, by forcing a total ban of voluntary, student-initiated religious activity in a school district that wanted to accommodate the free exercise of religion and freedom of speech rights of public school students. The Fifth Circuit upset a carefully drafted school board policy, adopted after public deliberation, which purported only to treat all student-initiated groups equally with regard to access to school facilities for meetings before and after school.

III. CONGRESSIONAL LEGISLATION TO ADDRESS THE PROBLEM

The basic question is whether Congress can legislate to apply the Widmar principle of content-neutrality to public schools, without violating the Establishment Clause. The Widmar decision held that a content-neutral policy of equal access to state university facilities did not violate the Establishment Clause, because any religious meetings would be student-initiated and would receive only incidental benefits from the state on the same basis as non-religious meetings, with no appearance of state sponsorship.

In a footnote, however, the Widmar Court carefully reserved the question whether the Establishment Clause prevents application of the content-neutrality principle to protect religious speech at the secondary and primary school levels. 102 S. Ct. at 276 n.14.

A. The Establishment Clause As Applied to Public Schools.

In *Widmar* v. *Vincent*, the Supreme Court declined to consider whether an open forum policy in a public elementary or secondary school, allowing students to meet equally in religious and non-religious groups, is neutral toward religion vs. non-religion. The Court suggested, however, that the neutrality of such a policy will turn at least partly on the "impressionability" of students in the public schools. 102 S. Ct. at 276 n.14. In other words, the Court thought that the immaturity of younger students might cause those students to perceive state sponsorship of religion from an open forum policy, even though the same policy would not connote state sponsorship in a university setting.

Therefore, the application of the Establishment Clause to public schools will turn at least partly on the fact question of whether the students involved are significantly less mature than college students. A

further important question will be, given the maturity level of the students, will they be likely to perceive an equal access policy as state favoritism or sponsorship toward religion, or will they be likely to perceive discrimination against meetings with religous content as a form of state hostility toward religion?

B. The Appropriate Role for Congress.

The maturity of public school students and the relationship of maturity to the impression of state sponsorship of religion are factual questions that Congress is well-able to resolve through its investigatory and factfinding powers. Congress is well-suited to exercise its legislative fact-finding capacity to solve the problem at issue here, by investigating relevant facts and deciding at what grade level students are mature enough to choose freely among various types of extracurricular student group activities, both religious and non-religious, without danger of student perception of state sponsorship of religion. For example, Congress might very well decide that secondary school students are mature enough to choose freely among the types of voluntary student activities in which they will participate, while elementary students are not sufficiently mature.

IV. CONGRESS HAS AUTHORITY TO PROVIDE A SOLUTION TO THE PROBLEM

A. Congressional Power Under Section Five of the Fourteenth Amendment.

The Fourteenth Amendment's due process and equal protection clauses incorporate several individual constitutional rights as binding on the states, including the freedom of speech, *Fiske* v. *Kansas*, 274 U.S. 380 (1927), and the freedom of assembly, *DeJonge* v. *Oregon*, 229 U.S. 353 (1937). Section Five of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Therefore Congress has general authority to enact legislation requiring states to respect constitutional rights of free speech and free association.

The content-neutrality requirement, a fundamental incident of the right of freedom of speech, also falls within the due process and equal protection obligations imposed on the states by the Fourteenth Amendment. See *Widmar* v. *Vincent*, 102 S. Ct. 269 (1981). Therefore, Congress has authority pursuant to Section Five of the Fourteenth Amendment to enforce the content-neutrality principle upon state administered public schools, by appropriate legislation.

Congress should not be deterred from applying Widmar to public schools merely because of the refusal of two circuit courts to do so. See *Lubbock Civil Liberties Union* v. *Lubbock Independent School District*, 669 F.2d 1308 (5th Cir. 1982); *Brandon* v. *Guilderland Central School District*, 635 F.2d 971 (2d Cir. 1980), cert. denied 102 S. Ct. 970 (1981). A recent Congressional Research Service memorandum commenting on Senator Jepsen's proposed Widmar bill concludes that since the Supreme Court has not ruled on this issue, Congress has authority under Section Five to make its own determination and legislate accordingly. Congressional Research Service Memorandum at 12. See *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). The lower federal courts are split on this issue; a district court in the Sixth Circuit has allowed student-initiated religious expression during non-instructional hours. *Reed* v. *Van Hoven*, 237 F. Supp. 48 (W.D. Mich. 1965). Thus, Congress could supply clarity where the lower courts have created confusion.

B. Congressional Authority Over The Appropriations of the Federal Government.

A bill applying the Widmar principle to public schools is independently supported by Congressional authority over federal government appropriations. Congress has broad power to attach conditions to its grant-in-aid programs, as long as those conditions are themselves constitutional. See, e.g. *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980); *Steward Machine Co.*. v. *Davis*, 301 U.S. 548 (1973); cf. *Harris* v. *McRae*, 448 U.S. 297, reh. den. 448 U.S. 917 (1980).

Again, the absence of any definitive statement by the Supreme Court on whether content-neutrality at the public secondary school level violates the Establishment Clause as applied to religious speech has led the Congressional Research Service to conclude that this "proposed condition cannot at this time be said to impose an unconstitutional condition on federal assistance to such schools." See Congressional Research Service memorandum at 6. In sum, Supreme Court silence on the Establishment Clause question in the public secondary school context leaves the Congress free to enact a statute that would apply the Widmar principle of content-neutrality to public schools in a manner consistent with the Establishment Clause according to the view of Congress.

V. WHAT WOULD BE THE RELATIONSHIP OF A BILL EXTENDING THE WIDMAR PRINCIPLE TO PUBLIC SCHOOLS WITH THE PRESIDENT'S PROPOSED PRAYER AMENDMENT?

The President's Prayer Amendment, under its most likely interpretation, would solve the problem addressed by a bill extending Widmar to public schools, that is, the failure of lower courts and school boards to so apply the Widmar free speech principle of content-neutrality.

The President's proposed Prayer Amendment reads as follows:

"Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No persons shall be required by the United States or by any State to participate in prayer."

The proposed amendment would seem to address the failure of lower courts and school officials to allow voluntary, student-initiated religious group meetings on the same basis as non-religious groups as required by the Widmar content-neutrality principle.

The essence of the prayer amendment is to correct the current judicial and public misconception that the First Amendment Establishment Clause bars religion from any influence on public life in general, and public schools in particular. The effect of the amendment's reaffirmation of an earlier understanding would be to allow reinstatement of non-coerced individual and group prayer in all public institutions insofar as the First Amendment has been considered a bar. But it would not require such reinstatement, if states construed such a bar from state laws or constitutions.

As a corollary effect, the prayer amendment would elminate use of the Establishment Clause as a justification for discrimination against meetings and speech of public school students when religious in nature. Thus, the prayer amendment in part pursues the same objective as would a bill applying the Widmar content-neutrality rule to public secondary schools.

In addition to being compatible with the prayer amendment, a bill applying content-neutrality to public secondary schools enhances the cause of that amendment in several ways. First, Administration and Congressional support of a bill extending the Widmar principle to public secondary schools would demonstrate the resolve of those branches to deal with the loss of voluntary religious activity from public schools. Second, while the President's Amendment will take at least several years to enact, a statute could correct relatively quickly the most recent and perhaps the most extreme of the judicial distortions at which the amendment is aimed. Third, a Widmar bill, within its sphere of impact, could make an affirmative requirement of neutrality, rather than just removing the federal Constitution as the asserted reason for discrimination against religious activity.

Furthermore, a statute extending Widmar to public schools focuses attention on those violations of freedom of speech and association that are most offensive to the overwhelming majority of American people. This has been indicated in informal conversations between Christian Legal Society attorneys and representatives of several groups which normally express reservations about state-sponsored prayer, but which endorse the content-neutrality principle.

Congressional hearings on this bill could easily be consolidated with hearings on the President's Prayer Amendment. They are simply two mutually consistent answers to the same problems. A bill would be only a temporary solution to a part of the problem; thus, it would in no way eliminate the need for an amendment.

VI. PROPOSED LANGUAGE FOR A BILL EXTENDING THE WIDMAR PRINCIPLE TO THE PUBLIC SCHOOLS

Several good proposals have already been offered for such a bill, including proposals by Senator Jepsen, Senator Helms, and the law firm of Ball and Skelly. The only question is which is best. Copies of each proposal are attached to this memorandum for references as appendices.

A. Christian Legal Society Also Has Drafted Language for a Widmar Bill in Public Schools. It Reads As Follows:

"No public secondary school receiving federal financial assistance, which generally allows groups of students to meet during non-instructional periods, shall discriminate against any meeting of students on the basis of the content of the speech at the meeting, provided that the meeting shall be voluntary and orderly and that no activity which is in and of itself unlawful need be permitted." [1]

B. Explanation of Terms of Christian Legal Society Proposal.

1. The proposed statute limits the application of Widmar content-neutrality to secondary schools. The statute omits reference to primary schools. This is in recognition that Congress, and perhaps the Supreme Court as well, might consider the danger of perceiving state sponsorship from equal treatment of religious activity too great for primary-age children.

2. The statute applies only against those schools that receive federal financial assistance. This self-limitation should satisfy those who defend the rights of local schools that do not accept federal funds to administer their programs free from federal intervention. Regarding the time period during

[1] An alternative proposal might add the word "religious" before the word "content" in this statute. See infra at 15.

which a school must have accepted federal funds to come within the requirements of this statute, the statute leaves this matter open as the subject of reasonable and appropriate regulation by proper federal administrative officials, in light of legislative history that should be clearly established after hearings.

3. The statute applies to schools that "generally" allow student meetings. Use of the term "generally" conforms to the decision of the Supreme Court in *Widmar* v. *Vincent*, 102 S. Ct. 269, 277 (1981). The significance of the term is that by its use, the statute applies not to schools which have allowed one or two groups to meet on a one-time basis, but to schools that allow many student groups to meet in general. *Cf.* Congressional Research Service memorandum (arguing that Senator Jepsen's proposal has a weakness in its omission of the term "generally.")

4. Use of the term "groups" of students also comports with the Supreme Court's decision in Widmar. See 102 S. Ct. at 273. The statute by its terms does not require content-neutrality regarding the isolated religious speech of one student absent a listener. (Students are already allowed to pray silently by themselves.)

5. The statute limits application of content-neutrality to "students". Thus, the statute does not address whether faculty, staff, or school administrators may engage in religious group meetings on a public school campus. Again, this limitation comports with Widmar, where the Court expressly limited its holding to students. 102 S. Ct. at 273 n.5.

6. The statute demands that the state must not discriminate against any student "meeting" on the basis of speech. Use of the limiting term "meeting" mirrors the holding in Widmar, which precluded content-based discriminations only against student "meetings". 102 S. Ct. at 273. Of course, the statute incorporates the Widmar Court's implicit teaching that not only may states not discriminate against student meetings on a content basis, but also that the state may not regulate speech occurring in a meeting on a content basis.

7. By use of the term "non-instructional periods", the statute intends to mean any period of time, either before, during, or after the school day, during which the students who wish to meet as a group for religious purposes do not have classes or other scheduled activities. A time period unscheduled for class for several group members constitutes a "non-instructional period" allowing those members to meet for purposes of this statute, even though other members officially part of the group have classes scheduled, and therefore cannot meet at that time.

8. The statute uses the term "discrimination" instead of the word "exclusion" as used in *Widmar* v. *Vincent* for several reasons. First, the term "discrimination" better represents the hostility toward religion that a school board shows by denying meeting privileges to student religious groups on an equal basis with non-religious groups. Second, "discrimination" is a broader term than "exclusion". The term "discrimination" includes a prior restraint policy of total refusal of access to meeting facilities as was the case in Widmar, as well as after-the-fact penalties against students who chose to attend a religious meeting, and subtler forms of discrimination against student religious groups falling short of a total exclusion from meeting privileges.

9. "Content of the speech at the meeting" is a broad phrase precluding school officials from discriminating against many forms of speech, including educational, ethical, religious or vocational speech but not to the exclusion of speech of other subject matter. Any speech "at the meeting" is subject to the content-neutrality requirement against state discrimination, no matter whether the discrimination would occur before the meeting would be held, during the pendency of the meeting, or after the meeting had ended.

10. The statute's requirement that student meetings must be "voluntary" ensures that a public school will neither use student meetings as a means of infringing the free exercise of religion rights or freedom of speech "right to hear" rights of students, nor as a vehicle for state initiated religious or non-religious activity of the sort that would violate the Establishment Clause.

11. The statute requires that student meetings must be "orderly". The term "orderly" is intended to summarize and represent the right and duty of school officials to administer an educational program without material disruption by students, as established in the case of *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503 (1969).

12. The statute used the phrase "in and of itself unlawful" to designate those types of speech that are not normally protected forms of speech under the First Amendment, such as criminal speech. A school could prevent students from meeting to discuss illegal narcotics deals.

13. Finally, it is important to note that the proposed language of this statute, in contrast to the language of other similar proposed statutes, does not use the word "religious", or purport to "guarantee the rights of religious speech on the same basis as non-religious speech" for several reasons. First and foremost, a statute drawn in strictly neutral terms should draw the support of a number of groups engaged in many different forms of speech better than would a statute drawn on religious terms. Second, the Fifth Circuit seized upon the religious focus of a school board's equal access policy in *Lubbock Civil Liberties Union* v. *Lubbock Independent School District*, 669 F.2d 1308 (5th Cir. 1982) to strike down that policy as having an impermissible religious purpose condemned by the Establishment Clause.

On the other hand, there are good reasons for drafting the statute to ban discrimination based on the religious content of speech, rather than banning all content-based discriminations. Banning all content-based discriminations may be undesirable if it precludes school officials from protecting students against influence from witchcraft or other harmful activities and ideas.

14. One possible miscellaneous objection to the proposed bill is that, by requiring public secondary schools to treat speech in a content-neutral manner, the bill might open school doors to the influence of unsavory groups such as religious cults or the communist party. The proposed bill should not fall to this objection, however, for two reasons. First, the fear of undue influence by unpopular groups in the public schools is in large part a fear that adult representatives will use access to school facilities as a means to convert unsuspecting and impressionable students. In contrast, the proposed bill leaves intact the authority and discretion of school officials to regulate the access of adult outsiders to school facilities. The bill requires equal treatment of speech only for student initiated groups with student membership.

Second, unpopular groups already have substantial rights on the public school campus as a matter of constitutional law. For example, at least one court has held the public school officials may not discriminate against communist speech in the school campus because of its content. See *Danskin* v. *San Diego Unified School District*, 28 Cal.2d 536, 171 P.2d 885 (1946). Thus, in actual effect the proposed bill would merely extend to religious speech those privileges that courts now require for other forms of student speech.

QUESTIONS AND ANSWERS CONCERNING A BILL REQUIRING NONDISCRIMINATION AGAINST RELIGIOUS SPEECH IN PUBLIC HIGH SCHOOLS

1. Why should Congress act to ensure equal treatment of religious speech with non-religious speech on public secondary school campuses?

American public schools have a tradition of instilling in our young citizens the value of free exchange of ideas. Our schools have taught that robust debate between differing views leads toward mutual understanding, and fuels the search for truth and meaning. Veneration for the right of free speech has even led one court to require a public school to allow a Communist speaker to lecture students in the public school environment. *Danskin* v. *San Diego Unified School District*, 28 Cal. 2d 536, 171 P.2d 885 (1946).

Yet, for some reason, a recent line of court decisions have singled out religious speech as the one form of speech unworthy of protection in the public schools. Worse, these decisions are only the tip of the iceberg. School officials throughout the country are deciding to ban all religious speech from public schools at an alarming rate.

These officials have banned purely voluntary student-initiated meetings for prayer or Bible study during school club periods or before or after schools. Many officials wrongly believe that such prohibitions are required by Supreme Court decisions forbidding school-initiated, state-sponsored forms of prayer in the schools.

Congress must act to correct this error by school administrators and lower courts, by requiring equal treatment of religious and nonreligious speech under the constitutional principle of content-neutrality.

2. What is the free speech principle of content-neutrality, as it applies to public schools?

The idea of content-neutrality in public schools is that once school officials have created a forum generally open to student speech, they may not discriminate against any person or group regarding use of that forum on the basis of the content of speech. For example, in *Widmar* v. *Vincent*, 102 S. Ct. 269 (1982), the United States Supreme Court said that a public university had created a forum generally open for use by student groups by accommodating group meetings on campus, and having done so, could not deny equal access to religious groups.

3. Why cannot students who want to engage in religious speech, merely go off campus to do so?

This question, while often heard, arises from an assumption which is contrary to the First Amendment. A state facility may not justify a content-based ban on speech on grounds that other forums are available. If this theory were tolerated, religious speech could be restricted to church buildings, as in many Soviet-run countries.

4. To what degree will public school teachers be involved in student religious activity guaranteed by the content-neutrality principle?

To begin, the proposed bill does not purport to guarantee the rights of teachers to engage in religious activity in public schools. It refers only to student rights. Therefore, participation of teachers in student religious meetings will remain subject to the discretion of local school officials.

On the other hand, many public schools may require faculty supervision of student religious meetings. Other schools may allow parents to provide the necessary supervision, or may require no supervision at all. In any event, faculty or parent supervision of student religious groups is perfectly proper under the Establishment Clause as long as the school is not undertaking the shaping of the religious content of the meeting through the supervision process.

5. Does the proposed content-neutrality bill mean that school officials will have to let students engage in religious discussions whenever and wherever they please?

No. The Supreme Court has said that public schools and other state agencies always have discretion to limit the expression of protected forms of free speech by reasonable time, place, and manner restrictions. See *Heffron* v. *ISKCON,* 101 S. Ct. 2559 (1981). The proposed bill would have this discretion intact in public schools, as long as school officials promulgate time, place and manner restrictions in content-neutral terms. See id at 2564.

6. How does the bill apply to public schools that allow no student clubs to use school facilities for club meetings?

The bill would allow any public school to adopt a policy allowing no student group, religious or non-religious, to use school facilities. Schools would simply have to treat religous and non-religious groups the same.

7. What are the "non-instructional periods" during which the content-neutrality principle limits state regulation of student speech?

A non-instructional period is any time, either before or after classroom hours or during the school day, during which students are not scheduled for classroom instruction. Non-instructional periods might include recess, lunch time, study hall, club period, or any other time when a public school allows student clubs or groups to meet in general. By contrast, the principle of content-neutrality would not apply during periods when students are undergoing instruction in or out of the classroom.

8. Why does the proposed bill apply the content-neutrality principle only to public secondary schools, and not to elementary schools?

The proposed bill applies the content-neutrality requirement only to secondary schools in recognition that the immaturity of elementary students may cause them to misperceive a public school's accommodation of religious discussion on an equal basis as non-religious speech as state sponsorship of religion. See *Widmar* v. *Vincent,* 102 S. Ct. 269, 276 n.14. Students in secondary schools generally are accustomed to choosing among a variety of student groups in which to participate; elementary school students generally are not.

Mr. HATFIELD. Now, Madam President, although I have no intention of offering this language as a substitute or as an amendment to the court-stripping proposal before the Senate, which I oppose, I believe it is a sound approach to protecting the first amendment free speech rights of public high school students.

Madam President, I only hope some of my good liberal friends, such as in the American Civil Liberties Union, who are always so anxious to protect people's rights of freedom of speech when it comes out of the left and all the Communist organizations and everything else that they are always anxious to jump up and protect that freedom of speech, will demonstrate a little interest in protecting the freedom of speech of people who want to speak on religious subjects. I see no consistency in all this pious outpourings of protecting the rights of speech when it comes out of the left of the political spectrum, but little interest demonstrated once in a while when the same abridgement of constitutional rights happens to come out of conservative areas.

If such groups as the ACLU and other liberal groups, that I associate with and consider as my friends, would have been just as concerned about the rights, constitutional rights, of the people in the area of freedom of speech on religious subjects, we would not be having this issue here today. We would not have all of these efforts to strip the Supreme Court and other courts of their rightful jurisdiction. We would not have these efforts to amend the Constitution to require a kind of balkanization of the prayer issue, to provide mandatory prayer in States like Alabama, that are at least efforts being made in States like Alabama.

I just do not feel that we can any more ignore the abridgement of the right of freedom of speech when it happens to be a religious subject than we can when it happens to be a political subject.

I want to reemphasize that I put my own political future on the line, put it at stake, when I defended the right of Gus Hall to speak as an American Communist on the campuses of my State universities when, at the same time, people who wanted to speak about Jesus Christ or have a Bible study could not even meet on some of these campuses in this country. That is why we had the Widmar decision of the Supreme Court saying that once those forums are established in any school for the pursuit of information or knowledge on a voluntary basis, the school boards have no right to limit it to nonreligious subjects. The first amendment does not exempt religious subjects from the right of free speech. That is why I offered the amendment because of some of the efforts made by these same school administrators to limit the right of speech on religious subjects, and they have provided forums for nonreligious subjects.

I ask unanimous consent to have my legislative proposal printed in the RECORD.

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

S. 2928

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no public secondary school receiving Federal financial assistance, which generally allows groups of students to meet during non-instructional periods, shall discriminate against any meeting of students on the basis of the religious content of the speech at the meeting, if (1) the meeting is voluntary and orderly, and (2) no activity which is in and of itself unlawful is permitted.

SEC. 2. Nothing in this Act shall be construed to permit the United States, or any State or political subdivision thereof to (1) influence the form or content of any prayer or other religious activity and (2) require any person to participate in prayer or other religious activity.

SEC. 3. (a) Any individual aggrieved by a violation of this Act may bring a civil action in the appropriate district court of the United States, or in any State court of competent jurisdiction, for damages or for such equitable relief as may be appropriate, or both.

(b) The district courts of the United States shall have jurisdiction of actions brought under this Act without regard to the amount in controversy.

(c) Each district court of the United States, and each State court of competent jurisdiction, shall provide such equitable relief, including injunctive relief, as may be appropriate to carry out the provisions of this Act.

(d)(1) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge), who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(2) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing within thirty days after the filing with the court. A hearing of a case shall be held within one hundred and eighty days after the proper filing of the case with the court.

SEC. 4. The provisions of this Act shall supersede all other provisions of Federal law that are inconsistent with the provisions of this Act.

The PRESIDING OFFICER (Mr. KASTEN). The Senator from Connecticut.

Mr. WEICKER. Mr. President, will the distinguished Senator yield for a question?

Mr. HATFIELD. Yes.

Mr. WEICKER. I agree in terms of voluntary associations, in terms of courses that teach comparative religion, and so forth. It is not my understanding that this in any way is

touched upon by the substance of the amendment we have before us.

It is not the contention of the Senator from Oregon, is it, that a voluntary prayer or rather a prayer in the public schools is something that would be beneficial by its establishment as it relates to the Constitution? I am finding a little difficulty. I agree with all the Senator says, and I am a very dear friend of his, and I think most of the time we see exactly alike, and I agree with him as to the matter of association and discussion and total freedom in this area of religion.

But really the issue before us is whether or not you are going to have a State prayer in our schools and, of course, I believe anything like that cannot be voluntary because merely the nature of having to attend school makes it involuntary.

Mr. HATFIELD. No; I would respond I am sorry the Senator was not on the floor at the beginning of my remarks. I am making the case under the first amendment based upon the Widmar case handled by the Supreme Court recently, that whenever an institution of education establishes a forum for voluntary associations to rise among the students, political societies, fraternal organizations, whatever they might be, music societies, publication societies, that then that institution has no right to say any voluntary association will be permitted outside of a religious one. They cannot use the facilities of that campus for a religious club. I am not talking about voluntary prayers being offered at the beginning of class or anything like that.

So when the Supreme Court recently ruled that the universities and colleges of this Nation cannot discriminate under the first amendment by determining the content of those organizations, I am trying to apply this to the secondary school programs wherein a secondary school establishes an activities hour that is not in any way intruding into the classwork or the other commitments of the school, but an activity hour where students are permitted to voluntarily organize political clubs, music clubs, drama clubs, and so forth.

I cited three specific cases and two court opinions that have said those forums can be organized for anything but a religious club. They are verboten. I am saying that under the Widmar decision of the Supreme Court that is a violation of the freedom of speech right for those students who want to voluntarily associate themselves in an orderly way under the rules and regulations governing any other club, but in which the school association or board or administration has determined the content and said, "We do not permit that kind of association that has a religious commitment or a religious purpose."

I am saying that this is an example of why we are dealing with this subject today because local school boards have overreacted. The Supreme Court never ruled voluntary prayer out of our public schools in the first instance, as the Senator knows.

But because of the nervous Nellies and the overreaction by a lot of local school boards, they got up and said they cannot do this and they cannot do that and they have swung that pendulum so far that it has gone beyond the question of the right of religious freedom.

I am saying now, as proven by the Widmar case, we have seen that pendulum swing so far it is now a question of the right of freedom of speech, the first amendment, is being violated. I think there is a very direct relationship between them, because it is part of the same overall cultural, political, and social reaction against the Court's action that did not really rule out the right of voluntary prayer but only mandated prayer, which I fully support the Court's ruling on that case. And I fully support the position today that we have no right to strip the Court of that jurisdiction and that we have no practical purpose in trying to balkanize it by directing it as to the State's right to decide whether we will have mandated prayer or not.

I do not want mandated prayer in any school of this country. But, by the same token, I believe that there is a right, freedom of speech, together voluntarily to have an association to discuss religious subjects, whether it is Buddhism or Christianity, or Judaism, or whatever religion it may be.

Mr. WEICKER. I thank the distinguished Senator from Oregon. My query was not in the nature of being antagonistic to what the Senator from Oregon has said, but rather agreeing with the premises he laid forth there and having it fully explained.

As I recall, when I attended Yale University, I remember the Hillel Foundation, which represented the Jewish community and the Thomas Moore Society, representing the Catholics, et cetera. They were part of the structure of these organizations that had the opportunity to get together to pursue their particular faiths. And I could not agree more, because I think the point we are trying to make on the floor is that in no way do any of us want to restrict freedom of religion. We want to expand freedom of religion, it only being my opinion that any time you have a state-dictated prayer, that is restrictive of freedom of religion.

Mr. HATFIELD. That is restriction and not expansion.

Mr. President, I ask unanimous consent that I may be allowed to yield the floor to the Senator from Montana at this point without this being construed as the end of a speech for the purposes of the two-speech rule.

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

Mr. BAUCUS. Mr. President, I wish to thank the Senator from Oregon for his most recent series of contributions to this subject. I find the latest proposal by the Senator from Oregon very attractive.

I, too, have been bothered by the trend and direction of Supreme Court decisions which go so far in protecting the establishment clause in the first amendment that it is beginning to impinge upon the free exercise clause as well as the free speech provisions of that amendment. I see nothing wrong with activity periods or after school periods when students can come together to exercise their religious prerogatives. I want to commend the Senator from Oregon for taking that approach. I think it is a very salutary and very valuable contribution to resolving some of these dilemmas. I thank the Senator from Oregon.

Mr. HATFIELD. I thank the Senator from Montana.

Mr. BAUCUS. Mr. President, when I last spoke this morning, I was reading into the RECORD portions of a letter from Attorney General William French Smith written to the chairman of the Senate Judiciary Committee on May 6, 1982. I was referring to those portions of the letter which argue against statutes which limit Supreme Court jurisdiction over Federal constitutional questions. The letter pointed out the branches of Government, the executive and the legislative.

The Attorney General was pointing out that, as a matter of essential functions, the judicial branch is probably inherently more weak than the other two branches; that it has less to protect itself with, less to defend itself with from onslaughts of pursuit of the other two branches of Government.

In that regard, the Attorney General quoted Alexander Hamilton in Federalist No. 78 on this very point, the underlying point that our Founding Fathers certainly intended to build into the Constitution measures to protect the judicial branch from onslaughts from the executive and the legislative and that they attempted to prevent the legislative branch from undermining the core functions of the judicial branch, particularly the core functions of the U.S. Supreme Court.

This is the quotation from Alexander Hamilton in Federalist No. 78 pointing out the inherent weakness of the judicial branch and, therefore, the need to strengthen the judicial branch from efforts on the part of the other two branches to undermine that judicial branch.

Whoever attentively considers the different departments of power must perceive

that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

That is Alexander Hamilton in Federalist No. 78 pointing out the essential weaknesses of the judicial branch compared to the other two branches of Government, therefore implying that our Founding Fathers intended to strengthen the judiciary, to make it truly a coequal branch of Government; that is, not to allow the Congress to willy-nilly, in its own discretion, undermine the power of the Supreme Court's right to decide constitutional questions.

Continuing in the letter, Mr. President, from Attorney General William French Smith to Senator THURMOND on May 6, 1982:

As a consequence of this view, Hamilton believed that it was necessary for the judiciary to remain truly distinct from the Legislature and the Executive. For I agree that "There is no liberty, if the power of judging be not separated from the legislative and executive power." *Id.*, quoting Montesquieu's *Spirit of Laws*. Thus, he concluded: "The complete independence of the courts of justice is peculiarly essential in a limited Constitution."

It was in recognition of the inherent weakness of the judiciary, particularly as contrasted with the inherent power of the legislature, that the farmers determined to give special protections to the judiciary not enjoyed by officials of the other branches. Federal judges were given lifetime positions during good behavior, and were protected against siminution of salary while in office. The purpose of these provisions was largely to provide the judiciary, as the weakest Branch, with the necessary tools for self-protection against the encroachments of the other branches.

The notion that the Exceptions Clause grants Congress plenary authority over the Supreme Court's appellate jurisdiction cannot easily be reconciled with these principles of separation of powers. If Congress had such authority, it could reduce the Supreme Court to a position of impotence in the tripartite constitutional scheme. The Court could be deprived of its ability to protect its core constitutional functions against the power of Congress. The salary and tenure protections so carefully crafted in Article III could be rendered virtually meaningless in light of the power of the Congress simply to eliminate appellate jurisdiction altogether, or in those areas where the Court's decision displeased the legislature.

It is significant that while the Framers did not focus on the Exceptions Clause, they did point to the impeachment power as "a complete security" against risks of "a series of deliberate usurpations on the authority of the legislature," *Federalist* No. 31.

To repeat, it is significant that while the framers did not focus on the exceptions clause, they did point to the impeachment power as "a simple, complete, security" against risks of "a series of deliberate usurpations of the authority of the legislature."

That is, the framers felt that the impeachment power was in itself a proper route to follow in trying to overturn what would influence decisions on the Supreme Court rather than giving the legislature the power to overturn such Supreme Court decision.

In light of these basic considerations, it seems unlikely that the Framers intended the Exceptions Clause to empower Congress to impair the Supreme Court's core functions in the constitutional scheme. Even if some of the Framers could have intended this, it is improbable that the Exceptions Clause could have been approved by the Convention without debate or controversy, or indeed without any explicit statement by anyone associated with the framing or ratification of the Constitution that such a deviation from the carefully crafted separation of powers mechanisms provided elsewhere in the Constitution were intended.

Look at that, Mr. President. There was no debate about how much power to give to the legislative branch, except as I pointed out earlier, a 6-to-2 vote the Committee on Detail expressly voted against giving the legislature discretion to undermine the Constitution.

Mr. PERCY. Mr. President, will my distinguished colleague mind yielding to me without losing his right to the floor so that I can introduce a bill on behalf of myself and a number of our colleagues who wanted this legislation introduced today?

Mr. BAUCUS. Mr. President, I will be happy to so yield to the Senator from Illinois so long as the continuation of my speech will not be considered as a second speech and that I will be recognized upon the termination of the remarks by the Senator from Illinois.

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

(The remarks of Mr. PERCY at this point in connection with the introduction of legislation are printed under "Routine Morning Business," later in today's RECORD.)

The PRESIDING OFFICER. The Senator from Montana is recognized.

Mr. BAUCUS. Mr. President, before the last interlude, I was commenting on a letter from the Attorney General, William French Smith, which he sent to the chairman of the Senate Committee on the Judiciary in opposition to these court-stripping bills, particularly the school prayer bill. The portion of the letter that I was referring to points out how the judiciary branch, among our three branches of Government, is inherently more weak than the other two branches of Government. I quoted, as did the Attorney General, a portion of the Federalist Papers where Alexander Hamilton pointed out this essential weakness. At this point, I would like to continue with the letter.

Mr. BAKER. Mr. President, will the Senator yield to me without losing his right to the floor and without counting this as a second speech?

Mr. BAUCUS. Yes, Mr. President.

The PRESIDING OFFICER. The majority leader is recognized.

Mr. BAKER. Mr. President, I am prepared to go off this bill shortly and go into a period for the transaction of routine morning business if the Senator is agreeable.

Mr. BAUCUS. That will be fine, Mr. President, as far as this Senator is concerned.

Mr. BAKER. Mr. President, the Senator had indicated to me earlier that he would like to have a unanimous-consent request that he be next recognized. I regret to advise him that we cannot clear that at this time, but I urge the Senator to be on the floor. I expect he probably would not have trouble being recognized. I know of no effort to deprive him of recognition, which, of course, no Senator could do in any event.

Mr. BAUCUS. I thank the Senator for making the inquiry and informing the Senator. Yes; I will be on the floor and will be seeking recognition as soon as we return to this bill.

Mr. BAKER. I thank the Senator.

WITHDRAWAL OF CLOTURE MOTION

Mr. BAKER. Mr. President, earlier there was a technical mixup in the cloture motion that was filed. I have cleared this with the minority leader.

I ask unanimous consent that the cloture motion filed earlier today on the Helms amendment, 2031, as modified, be withdrawn.

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

CLOTURE MOTION

Mr. BAKER. Mr. President, I send a new cloture motion to the desk and ask the clerk to report.

The PRESIDING OFFICER. The clerk will report the motion.

The legislative clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, hereby move to bring to a close debate on amendment number 2031, as modified, to the committee substitute to House Joint Resolution 520, a joint resolution to provide for a temporary increase in the public debt limit.

Jesse Helms, John P. East, Roger W. Jepsen, Jeremiah Denton, Paul Laxalt,

Paula Hawkins, Orrin G. Hatch, Bob Kasten, Harry F. Byrd, Jr., Steve Symms, S. I. Hayakawa, Don Nickles, Strom Thurmond, Charles E. Grassley, Jake Garn, Malcolm Wallop, and Howard Baker.

ROUTINE MORNING BUSINESS

Mr. BAKER. Mr. President, I now ask unanimous consent that there be a period for the transaction of routine morning business to extend not past 2 p.m. in which Senators may speak.

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

Mr. BAKER. Mr. President, before we do the wrapup, I understand that the distinguished Senator from Maryland may seek recognition for the introduction of a matter.

TRIBUTE TO EARL WEAVER

Mr. MATHIAS. Mr. President, I send a resolution to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The resolution will be stated by title.

The legislative clerk read as follows:

A resolution (S. Res. 468) to pay tribute to Earl Weaver.

The PRESIDING OFFICER. Is there objection to the present consideration of the resolution?

Mr. ROBERT C. BYRD. Mr. President, there is no objection to the request to proceed to the immediate consideration of the resolution as far as this side is concerned.

There being no objection, the Senate proceeded to consider the resolution, which was submitted by Mr. MATHIAS, for himself and Mr. SARBANES.

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

The resolution (S. Res. 468) was agreed to.

The preamble was agreed to.

The resolution, with its preamble, reads as follows:

S. RES. 468

Whereas, Earl Weaver, manager of the Baltimore Orioles for the past 13½ years, has led the Birds to six eastern division championships, four American League pennants and one world championship, and

Whereas, Earl's won-lost percentage ranks third on the all time list, and he is tied with the Yankees' great Joe McCarthy and trails only the immortal Connie Mack in winning 100 games or more per season, and

Whereas, Earl's intensity for inspiring Oriole victories by feisty finagling and limitless legerdemain has won the unflagging support of Oriole fans and the ire of umpire and opponent, and

Whereas, Earl has achieved distinction in alternate careers as author, Shakespeare scholar and nurturer of prize Maryland tomatoes, which in yonder bullpen groweth, and

Whereas, Earl has managed the same team for a longer period than any current manager: Now, therefore, be it

Resolved That the United States Senate wishes to honor and pay tribute to Earl Weaver on the occasion of "Thanks Earl Day" Sunday September 19, 1982 at Memorial Stadium, Baltimore, Maryland.

SEC. 2 The Secretary of the Senate shall transmit a copy of this Resolution to Earl Weaver.

Mr. MATHIAS. Mr. President, are we now in morning business?

The PRESIDING OFFICER. We are now in routine morning business.

TRIBUTE TO JOSEPH MEYERHOFF

Mr. MATHIAS. Mr. President, in the Book of Genesis we are told the story of Joseph, and one of the first things that we learn about Joseph is that he was resplendent in a coat of many colors, a coat so famous that its description has lasted for 5,000 years. During that period of time, people have talked and read about Joseph and his coat of many colors.

We have in Maryland, in the city of Baltimore, another Joseph who also wears a coat of many colors, a coat not of wool or cotton or linen but a coat fashioned by himself out of the fabric of life and consisting of the many contributions that he has made during a long and fruitful life. The colors of this coat consist of philanthropy in many parts of the world, charities in the United States, schools and hospitals in the State of Israel. They include the homes that he has helped to construct where families now gather and community facilities that serve daily neighborhood needs.

Most recently, they include a great symphony hall which was dedicated last night in the city of Baltimore. The Baltimore Symphony acquired its own hall largely as a result of the personal efforts of Joseph Meyerhoff.

His is a coat of many colors, more glorious than that of the original Joseph. I suspect that the reason that Joseph of the Bible is remembered is not solely because of his coat but because of the kind of man who wore the coat, and that is why Joseph Meyerhoff will be remembered, because of the kind of man that he is, a man of dedication and vision and commitment. He is in many ways a Biblical figure.

He and his wife Rebecca, who have worked so hard together for the Baltimore Symphony and for the arts, are patriarchal in the Biblical sense; they lead a large family of children and grandchildren and nieces and nephews, each of whom makes a personal and varied contribution to the community.

Like the Joseph in Genesis, we will long remember Joseph Meyerhoff.

Mr. President, I ask unanimous consent that an editorial which appeared in the Baltimore Sun this morning be included 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:

[From the Baltimore Sun, Sept. 17, 1982]

MEYERHOFF HALL

The Joseph Meyerhoff Symphony Hall that had its gala opening last night enlarges and enriches Baltimore. It is a better—and may prove an ideal—place to present symphony music. It will improve the dynamic between players and audience. The result should be finer music from a better orchestra enjoying greater public support.

The departure of the Baltimore Symphony in turn frees the Lyric Theater to fulfill its destiny as a fully equipped large musical theater for opera, musical comedy and dance. That is a function no other house in Baltimore can provide. The Lyric's reopening later in the season, delayed by a strike at the seat manufacturer, will make clear that Baltimore is getting two large performance halls, each better than the old Lyric.

Together, they will present an array of performing arts in coming years that could not have been contemplated earlier. More world class companies will come. More people will attend them. Baltimore will grow in amenities and in reputation. Too much can be made of how much higher Baltimore will rise in some cultural pecking order, however. Other cities are also adding to cultural plant. For Baltimoreans, the absolute improvement here is what matters most.

Meyerhoff Hall is a tribute to the relentless determination of Joseph Meyerhoff to see it built, as well as to his boundless generosity. The large state contribution resulted from the statesmanship of legislators from every part of Maryland who understood the value of the Baltimore Symphony to their communities.

The hall is one pudding the proof of which is in the hearing. Both planners and architects got the priorities right. Other halls are more expensive, prepossessing outside, grander in their lobbies. Meyerhoff Hall does not overwhelm its neighbors. It complements their rectangularity with its ovals. From a distance, it seems almost small.

Inside, in the great room designed for performing and hearing symphony music, Meyerhoff Hall seeks greatness. This building was designed for one purpose and from the inside out. Acoustics dictated the shape of that room, the size and shape of the balconies as well as the clouds. Its pleasing, somewhat Art Deco style is a happy byproduct.

Acoustics is rapidly becoming more than an occult art. The day is past when a fabled conductor could say, "I don't understand acoustics; neither do architects." Meyerhoff Hall is built for sound in ways that the halls of Lincoln Center in New York and Kennedy Center in Washington were not. Baltimore is a greater city than it was yesterday.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

The Senator from Alabama.

A METHODIST DAY OF PRAYER FOR THE WORLD

Mr. HEFLIN. Mr. President, on Sunday the 19th of September, this very weekend, millions of people from all corners of the globe will be praying that the walls of division which stand between the countless peoples of the world will fall.

The World Methodist Council and the religious publication, "The Upper Room," have called for Sunday to be a day of "Prayer for the World." More than a quarter of a million Methodist congregations spanning the world are expectd to answer the call by observing special prayer services on this day.

In places which are particularly symbolic of the tragedy caused by divisions among people, such as Berlin and Belfast, special prayer events have been planned. In West Berlin, the site of the prayer service will be the Church of the Wall, the "Ruferkirche." This church itself is particularly symbolic for this purpose, for it was formed and built by Methodists in West Berlin who were cut off from their chosen places of worship in East Berlin by the infamous Berlin Wall.

According to Rev. Eddie Fox, North American Regional Secretary for World Evangelism for the World Methodist Council, the millions of Methodists observing the day of prayer will be joined by more than 8 million readers of "The Upper Room."

This daily devotional guide is published in many languages around the world, and has chosen to focus on the theme of "Prayer for the World" during the time leading up to the ceremonies on Sunday in an attempt to fully express the world's needs in prayer.

The day of "Prayer for the World" will focus on four specific issues which serve to divide mankind. These four issues are poverty, racism, war, and spiritual darkness.

I believe it is important for each of us to realize that, although a Berlin or a Belfast may be a more dramatic illustration of the divisions of people, these four issues are also a tragic and divisive influence in this very country, and, indeed, in all areas of our country. These are problems of the world, not of any particular nation or nations—men and women and children in all corners of the world are suffering, and are all in need of help through prayer.

With economic problems and unemployment seeming to increase everywhere, the pains of poverty are naturally increasing. Hunger and physical suffering are multiplying. Countless people continue to suffer from racial and political persecution and oppression. I cannot believe that there is a member of this body, or a person anywhere who would not pay a great price to see an end put to all this suffering.

As the son of a Methodist minister, I have long been a believer in the positive power of prayer.

I hope that on this coming Sunday millions will answer the call of the World Methodist Council, and remember the millions of tragically divided people around the world—and remember them not only in their thoughts but also in their prayers.

Mr. BAKER. Mr. President, I have a few routine matters to take care of unless somebody is seeking recognition.

Mr. President, both of these items I believe have been cleared by the minority leader, and I make the request now for the benefit of the Senate and the acting minority leader and others.

CORRECTIONS IN ENROLLMENT OF H.R. 3517

Mr. BAKER. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of House Concurrent Resolution 405.

The PRESIDING OFFICER. The bill will be stated by title.

The legislative clerk read as follows:

A concurrent resolution (H. Con. Res. 405) directing the Clerk of the House of Representatives to make corrections in the enrollment of H.R. 3517.

The PRESIDING OFFICER. Is there objection to the present consideration of the concurrent resolution?

There being no objection, the concurrent resolution was considered and agreed to.

Mr. BAKER. Mr. President, I move to reconsider the vote by which the concurrent resolution was agreed to.

Mr. BAUCUS. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

BOUNDARY OF CIBOLA NATIONAL FOREST

Mr. BAKER. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 778, S. 2405.

The PRESIDING OFFICER. The bill will be stated by title.

The legislative clerk read as follows:

A bill (S. 2405) to further amend the boundary of the Cibola National Forest to allow an exchange of lands within the city of Albuquerue, N. Mex.

The PRESIDING OFFICER. Is there objection to the present consideration of the bill?

There being no objection, the Senate proceeded to consider the bill, which had been reported from the Committee on Energy and Natural Resources with an amendment to strike out all after the enacting clause and insert the following:

That, in order to expedite the acquisition of land authorized by the Act of November 8, 1978 (92 Stat. 3095, as amended), that Act is hereby amended as follows:

(a) Amend section 1 to read as follows:

"A tract of land containing that part of the land described in the Elena Gallegos Grant, illustrated on maps on file with the Chief of the Forest Service, Department of Agriculture, lying east of a line depicted on plat of survey dated April 1982, prepared under the supervision of A. Dwain Weaver, N.M.P.L.S. No. 6544, and further described as beginning at the closing corner between sections 35 and 36 of township 11 north, range 4 east, New Mexico principal meridian, on the south boundary of said grant and extending north 00 degrees 03 minutes 21 seconds east, 2,670.40 feet to a point; thence north 00 degrees 03 minutes 21 seconds east, 1,244.73 feet to the projected section corner common to sections 25, 26, 35, and 36; thence continuing along section line common to said sections 25 and 26, north 00 degrees 17 minutes 37 seconds east, 1,346.11 feet to a point; thence leaving said section line and continuing south 84 degrees 40 minutes 00 seconds east, 178,00 feet to a point; thence south 53 degrees 20 minutes 00 seconds east, 218.00 feet to a point; thence north 52 degress 50 minutes 00 seconds east, 364.00 feet to a point; thence east 225.00 feet to a point; thence north 66 degrees 00 minutes 00 seconds, east, 1,244.14 feet to a point; thence north 06 degrees 12 minutes 25 seconds west, 1,765.08 feet to a point; thence north 07 degrees 27 minutes 00 seconds west, 2,008.00 feet to a point; thence south 80 degrees 38 minutes 00 seconds west, 984.00 feet to a point; thence south 64 degrees 45 minutes 00 seconds west, 621.00 feet to the projected section corner common to sections 23, 24, 25, and 26; thence north 00 degrees 44 minutes 22 seconds west, 1,382.97 feet to the southeast corner of Sandia Heights South, unit 14, as the same is shown and designated on the plat filed in the office of the county clerk of Bernalillo County, New Mexico on February 12, 1975; thence continuing along the easterly boundary of said unit 14, north 00 degrees 04 minutes 20 seconds east, 1,951.63 feet to the notheast corner of said unit 14, said corner also being the southeast corner of Sandia Heights South, unit 10 as the same is shown and designated on the plat filed in the office of the county clerk of Bernalillo County, New Mexico on March 11, 1974; thence continuing along the easterly boundary of said unit 10, north 00 degrees 02 minutes 31 seconds east, 1,493.53 feet to the northeast corner of said unit 10, said corner also being the southeast corner of Sandia Heights South, unit 3, as the same is shown and designated on the plat filed in the office of the county clerk of Bernalillo County, New Mexico on August 3, 1971; thence continuing along the easterly boundary of said unit 3, north 00 degrees 03 minutes 29 seconds east, 1,867.10 feet to the northeast corner of said unit 3, said corner also being the southeast corner of Sandia Heights South, unit 2, as the same is shown and designated on the plat filed in the office of the county clerk of Bernalillo County, New Mexico on October 20, 1970; thence continuing along the easterly boundary of said unit 2, north 00 degrees 03 minutes 29 seconds east, 1,869.70 feet to the northeast corner of said unit 2, said corner also being the southeast corner of Sandia Heights South, as the same is shown and designated on the plat filed in the office of the county clerk of Bernalillo County, New Mexico on June 20, 1966; thence continuing along the easterly boundary of said Sandia Heights South, north 00 degrees 03 minutes 29 seconds east, 1,725.76 feet to the northwest of the tract herein described, said

corner being a point on the northerly boundary of the Elena Gallegos Grant; thence continuing along said Grant boundary, south 81 degrees 06 minutes 04 seconds east, 1,983.01 feet to a point; thence south 81 degrees 06 minutes 04 seconds east, 481.50 feet to the 7½-mile corner on the north boundary of said Grant; thence south 81 degrees 06 minutes 04 seconds east, 213.67 feet to the southeast corner of the Sandia Pueblo Grant; consisting of 7,935.84 acres, more or less:"."

(b) Add a new section 5 to read as follows:

"SEC. 5. (a) Notwithstanding any other provision of law, the Secretary of Agriculture, in cooperation with the Secretary of the Interior, is authorized and directed to acquire the lands described in section 1 in lieu of purchase as authorized by section 4 of this Act by exchanging with the city of Albuquerque so much of the Federal lands administered by the Forest Service and Bureau of Land Management in the State of New Mexico and consisting of approximately 32,800 acres, more or less, as the Secretary of Agriculture and the Secretary of the Interior determine are needed to equal the value of the land conveyed by the city of Albuquerque.

"(b) The lands to be conveyed are subject to valid existing rights.

"(c) Transactions necessary to effect the exchange authorized by this section shall be made pursuant to the provisions of the Federal Land Policy and Management Act of 1976 (90 Stat. 2743) and other applicable law except to the extent necessary to expeditiously carry out the provison of ths section and shall be made within 90 days of enactment of this Act: Provided, That the rights and responsibilities of the respective owners shall remain with such owners until such time as the conveyances are executed.".

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

The committee amendment was agreed to.

UP AMENDMENT NO. 1263

(Purpose: Technical amendment to S. 2405, as reported)

Mr. BAKER. Mr. President, I have a technical amendment which I send to the desk.

Mr. LONG. Mr. President, will the Senator explain the nature of the committee amendment? Is it similar to the bill or something different?

The PRESIDING OFFICER. The committee amendment struck the language of the original bill and inserted new committee language.

Mr. LONG. Mr. President, will the majority leader give me some idea what the new language to be inserted is?

Mr. BAKER. Mr. President, the Senator from Louisiana has me at a disadvantage, because this was cleared for action on both sides by unanimous consent.

I withdraw my request for consideration of this matter.

Mr. LONG. Does the Senator have a memorandum which would show what this is?

Mr. President, I suggest that we return to this in a few minutes.

Mr. BAKER. Mr. President, this is all I have, so I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BAKER. 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. BAKER. Mr. President, I understand that the Senator from Louisiana now has examined the amendment which is at the desk. Is he prepared now to proceed?

Mr. LONG. Yes.

Mr. BAKER. I send the amendment to the desk.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

The Senator from Tennessee (Mr. BAKER), for Mr. MCCLURE, proposes an unprinted amendment numbered 1263.

Mr. BAKER. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

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

The amendment is as follows:

On page 3, delete lines 4 through 25 and on page 4, delete lines 1 through 25, and on page 5, delete lines 1 through 23, and insert in lieu thereof:

Delete all of section 1 and insert the following language in lieu thereof:

All that portion of the Elena Gallegos Grant, lying east of a line depicted on a subdivision plat entitled "Summary Plat of a Portion of the Elena Gallegos Grant", (the "Summary Plat") recorded in the office of County Clerk of Bernalillo County, New Mexico, on June 29, 1982, in Volume C19, Folio 183, consisting of eight (8) pages, said line being the western limits of the tract described herein being further described as follows:

Beginning at the closing corner between secs. 35 and 36 of T. 11 N., R. 4 E., NMPM, on the south boundary of said Grant; thence N. 00°03'21" E., 2,670.40 feet to a point; thence N. 00°03'21" E., 1,244.73 feet to the projected section corner common to secs. 25, 26, 35, and 36; thence continuing along the projected section line common to said secs. 25 and 26, N. 00°17'37" E., 1,346.11 feet to a point; thence leaving said section line and continuing S. 84°40'00" E., 178.00 feet to a point; thence S. 53°20'00" E., 218.00 feet to a point; thence N. 52°50'00" E., 364.00 feet to a point; thence East 225.00 feet to a point; thence N. 66°00'00" E., 1,244.14 feet to a point; thence N. 06°12'25" W., 1,765.08 feet to a point; thence N. 07°27'00" W., 2,008.00 feet to a point; thence S. 80°38'00" W., 984.00 feet to a point; thence S. 64°45'00" W., 621.00 feet to the projected section corner common to secs. 23, 24, 25, and 26; thence N. 00°44'22" W., 1,382.97 feet to the southeast corner of Sandia Heights South, Unit 14, as the same is shown and designated on the plat filed in the office of the county clerk of Bernalillo County, New Mexico, on February 12, 1975; thence continuing along the easterly boundary of said Unit 14, N. 00°04'20" E., 1,951.64 feet to the northeast corner of said Unit 14, said corner also being the southeast corner of Sandia Heights South, Unit 10, as the same is shown and designated on the plat filed in the office of the County Clerk of Bernalillo County, New Mexico, on March 11, 1974; thence continuing along the easterly boundary of said Unit 10, N. 00°02'31" E., 1,493.53 feet to the northeast corner of said Unit 10, said corner also being the southeast corner of Sandia Heights South, Unit 3, as the same is shown and designated on the plat filed in the office of the County Clerk of Bernalillo County, New Mexico, on August 3, 1971; thence continuing along the easterly boundary of said Unit 3, N. 00°03'29" E., 1,867.10 feet to the northeast corner of said Unit 3, said corner also being the southeast corner of Sandia Heights South, Unit 2, as the same is shown and designated on the plat filed in the office of the County Clerk of Bernalillo County, New Mexico, on October 20, 1970; thence continuing along easterly boundary of said Unit 2, N. 00°03'29" E., 1,869.70 feet to the northeast corner of said Unit 2, said corner also being the southeast corner of Sandia Heights South, as the same is shown and designated on the plat filed in the office of the County Clerk of Bernalillo County, New Mexico on June 20, 1966; thence continuing along the easterly boundary of said Sandia Heights South, N. 00°03'29" E., 1,725.76 feet to the Northwest corner of the tract herein described, said corner being a point on the northerly boundary of the Elena Gallegos Grant: *Provided, however,* That the tract of land described in this section not be included within the Cibola National Forest until the Secretary of Agriculture determines that the City of Albuquerque, New Mexico, has acquired a tract of land containing approximately 640 acres located in such tract for open space or city park use."

● Mr. McCLURE. Mr. President, subsequent to the Senate Energy and Natural Resources Committee ordering S. 2405 as amended reported (Senate Report No. 97-539), the following letter was received from the U.S. Forest Service on August 25, 1982. I ask that the letter be printed in the RECORD.

The letter follows:

U.S. DEPARTMENT OF AGRICULTURE,
FOREST SERVICE,
Washington, D.C., August 25, 1982.

Hon. JAMES A. MCCLURE,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: On June 3, 1982, the U.S. Department of Agriculture provided reports on S. 2021 and S. 2405, two bills pertaining to Federal acquisition of a portion of the Elena Gallegos Grant east of Albuquerque, New Mexico.

Our reports offered technical and clarifying amendments in the form of a substitute bill, a copy of which is enclosed. Of major concern was the need to amend Section 1 of P.L. 95-614 amending the boundary of the Cibola National Forest. Section (a) of our substitute bill included a metes and bounds survey description as illustrated on a plat of survey dated April 1982, prepared under the supervision of A. Dwain Walker, N.M.P.L.S. No. 6544.

Subsequent to our June 3 report and to the May 27 hearing before the Public Lands and Reserved Water Subcommittee, Mr. Weaver's plat of survey was revised on a subdivision plat entitled "Summary Plat of a Portion of the Elena Gallegos Grant" and

recorded in the Office of the County Clerk of Bernalillo County, New Mexico, on June 29, 1982, in Volume C19, Folio 183.

The revised June 1982 plat was used in the description of the property conveyed from the City of Albuquerque to the United States. A copy of the deed signed on July 23, 1982, and recorded in Bernalillo County Record Book D166-A, pages 180-184 is enclosed.

The June 1982 plat and the July 23 deed describe the same lands as shown on the April 1982 plat and in our substitute bill. The proposed amended boundary of the Cibola National Forest does not change. The on-the-ground monuments have not changed. The surveyor merely made some technical changes in the plat.

To ensure that there is uniformity in the pending legislation, in the plat recorded with the county clerk in Volume C19, Folio 183, and in the deed to the United States recorded in Book D166-A, pages 180-184, we recommend that Section (a) of our June 3 substitute bill be revised by using the description used in the 2nd and 3rd paragraphs of the deed to the United States. We have identified this description in the enclosed copy of the Special Warranty Deed.

We regret any inconvenience this may have caused; however, at the time of the hearing the technical changes in the plat were not known.

Sincerely,

GARY E. CARGILL,
Associate Deputy Chief.

Enclosures.

SPECIAL WARRANTY DEED

The city of Albuquerque, a New Mexico municipal corporation, Grantor, acting pursuant to the General Exchange Act of March 20, 1922 (42 Stat. 465, as amended; 16 U.S.C. 485-486) and the Federal Land Policy and Management Act of October 21, 1976 (90 Stat. 2756; 43 U.S.C. 1716-1717), and in consideration of an exchange of certain public and National Forest lands equal in value to the lands herein conveyed, hereby grants to the United States of America, c/o USDA Forest Service, 517 Gold Avenue S.W., Albuquerque, New Mexico 87102, Grantee, and its assigns, the following described real estate situated in Bernalillo County, New Mexico:

All that portion of the Elena Gallegos Grant, lying east of a line depicted on a subdivision plat entitled "Summary Plat of a Portion of the Elena Gallegos Grant", (the "Summary Plat") recorded in the office of the County Clerk of Bernalillo County, New Mexico, on June 29, 1982, in Volume C19, Folio 183, consisting of eight (8) pages, said line being the western limits of the tract described herein being further described as follows:

Beginning at the closing corner between secs. 35 and 36 of T. 11 N., R. 4 E., NMPM, on the south boundary of said Grant; thence N. 00°03'21" E., 2,670.40 feet to a point; thence N. 00°03'21" E., 1,244.73 feet to the projected section corner common to secs. 25, 26, 35, and 36; thence continuing along the projected section line common to said secs. 25 and 26, N. 00°17'37" E., 1,346.11 feet to a point; thence leaving said section line and continuing S. 84°40'00" E., 178.00 feet to a point; thence S. 53°20'00" E., 218.00 feet to a point; thence N. 52°50'00" E., 364.00 feet to a point; thence East 225.00 feet to a point; thence N. 66°00'00" E., 1,244.14 feet to a point; thence N. 06°12'25" W., 1,765.08 feet to a point; thence N. 07°27'00" W., 2,008.00 feet to a point; thence S. 80°38'00" W., 984.00 feet to a point; thence S. 64°45'00" W., 621.00 feet to the projected section corner common to secs. 23, 24, 25, and 26; thence N. 00°44'22" W., 1,382.97 feet to the southeast corner of Sandia Heights South, Unit 14, as the same is shown and designated on the plat filed in the office of the County Clerk of Bernalillo County, New Mexico, on February 12, 1975; thence continuing along the easterly boundary of said Unit 14, N. 00°04'20" E., 1,951.64 feet to the northeast corner of said Unit 14, said corner also being the southeast corner of Sandia Heights South, Unit 10, as the same is shown and designated on the plat filed in the office of the County Clerk of Bernalillo County, New Mexico, on March 11, 1974; thence continuing along the easterly boundary of said Unit 10, N. 00°02'31" E., 1,493.53 feet to the northeast corner of said Unit 10, said corner also being the southeast corner of Sandia Heights South, Unit 3, as the same is shown and designated on the plat filed in the office of the Count Clerk of Bernalillo County, New Mexico, on August 3, 1971; thence continuing along the easterly boundary of said Unit 3, N. 00°03'29" E., 1,867.10 feet to the northeast corner of said Unit 3, said corner also being the southeast corner of Sandia Heights South, Unit 2, as the same is shown and designated on the plat filed in the office of the County Clerk of Bernalillo County, New Mexico, on October 20, 1970; thence continuing along easterly boundary of said Unit 2, N. 00°03'29" E., 1,869.70 feet to the northeast corner of said Unit 2, said corner also being the southeast corner of Sandia Heights South, as the same is shown and designated on the plat filed in the office of the County Clerk of Bernalillo County, New Mexico on June 20, 1966; thence continuing along the easterly boundary of said Sandia Heights South, N. 00°03'29" E., 1,725.76 feet to the Northwest corner of the tract herein described, said corner being a point on the northerly boundary of the Elena Gallegos Grant.

Together with rights of ingress and egress for National Forest administration and for public access to and across the property herein conveyed, along and within a fifty (50) foot access it identified on the Summary Plat as Tracts D and E from Tramway Boulevard easterly to the westerly boundary of the 640-acre tract identified as Excepted Parcel 1 following:

Less and excepting therefrom;

Parcel 1—A certain tract of land situated within the boundaries of the parcel being conveyed, depicted on the Summary Plat as "Tract B, 640 Acre Park Site", and being more particularly described by New Mexico State plane grid bearings (Central Zone) and ground distances as follows:

Beginning at the northwest corner of the tract herein described, the TRUE POINT OF BEGINNING, from whence the mile post 7½ on the northerly boundary of the Elena Gallegos Grant bears N. 00°47'56" E., 3,720.65 feet and S. 81°06'04" E., 481.50 feet; thence, N. 87°59'21" E., 1,331.79 feet to a point; thence, S. 21°17'39" E., 2,458.70 feet to a point; thence, N. 88°22'21" E., 3,212.50 feet to a point; thence, S. 02°20'39" E., 1,677.40 feet to a point; thence, S. 40°25'21" W., 4,494.50 feet to a point, thence, S. 01°05'39" E., 572.07 feet to the southeast corner of the tract herein described, thence continuing along the southerly boundary of the tract herein described, S. 88°54'21" W., 2,505.78 feet to the southwest corner of the tract herein described; thence, N. 00°41'29" W., 7,870.84 feet to the TRUE POINT OF BEGINNING, containing 640 acres, more or less.

Parcel 2—A certain tract of land situated within the boundaries of the parcel being conveyed, depicted on the Summary Plat as "Tract C. Bear Canyon Scenic Easement Area", and being more particularly described by New Mexico State plane grid bearings (Central Zone) and ground distances as follows: Beginning at the southwest corner of the tract herein described, the TRUE POINT OF BEGINNING, from whence the closing corner of secs. 35 and 36, T. 11 N., R. 4 E., NMPM (having New Mexico State plane coordinates, Central Zone, X = 431,287.46; Y = 1,504,207.17) on the south boundary of the Elena Gallegos Grant, bears S. 40°02'20" W., 7,105.15 feet; thence N. 01°05'39" W., 860.00 feet to the northwest corner of the tract herein described, thence continuing along the northerly boundary of the tract herein described, N. 77°27'19" E., 1,447.55 feet to a point; thence, S. 64°18'38" E., 2,801.07 feet to a point; thence, N. 43°01'28" E., 3,065.96 feet to a point; thence, N. 77°27'19" E., 500.00 feet to the northeast corner of the tract herein described; thence S. 07°24'44" W., 1,923.59 feet to a point; thence, S. 39°56'46" W., 4,099.01 feet to the most southerly corner of the tract herein described; thence, N. 29°36'19" W., 2,409.57 feet to a point; thence, N. 75°08'13" W., 2,514.52 feet to the TRUE POINT OF BEGINNING, containing 270 acres, more or less.

Containing, after recognizing the exceptions, 7,025.84 acres, more or less, with special warranty covenants.

Subject to:

1. Reservation to the Albuquerque Academy or its assigns of all interest in and to all mineral rights (other than those reserved by the United States of America by Patent) and all oil and gas rights which mineral and oil and gas rights are subject to the regulations of the Secretary of Agriculture (35 CFR 251.15) "Conditions, Rules and Regulations to Govern Exercise of Mineral Rights Reserved in Conveyances to the United States" as the same may be amended from time to time; provided that no surface occupancy for the purpose of extracting minerals or oil and gas shall occur in the exercise of the rights reserved in this paragraph 1 on the portion of the lands herein conveyed that are included within the Sandia Mountain Wilderness so long as such lands within the Sandia Mountain Wilderness are withdrawn from all forms of surface entry or apropriation under the mining laws and from the operation of the mineral leasing laws of the United States, but the preceding clause shall not prohibit Grantor from nonmotorized entry at any time upon the lands conveyed within the Sandia Mountain Wilderness to explore and prospect for minerals, oil, and gas using non-surface disturbing methods, or from appropriating minerals or oil and gas from such lands within the Sandia Mountain Wilderness by methods other than actual surface entry from the Sandia Mountain Wilderness lands; and provided further that if the mining and/or mineral leasing laws at any time permit entry onto and appropriation from the Sandia Mountain Wilderness lands for the purpose of mining or mineral oil and gas extraction, Grantor, its successors and assigns may enter upon such lands of the Sandia Mountain Wilderness for the purpose of mining or extracting minerals and oil and gas to the extent permitted by law.

2. Reservation by the City of Albuquerque, Grantor, of a fifty (50) foot access road, depicted on the Summary Plat as Tract E, across a portion of the land herein conveyed

to provide public access to the 640-acre parcel identified as Excepted Parcel 1, described preceding, subject to the rights granted the United States identified preceding.

3. Rights of ingress and egress to the 270-acre parcel identified as Excepted Parcel 2, described preceding, within and along the roadway depicted on the Summary Plat as the Bear Canyon Access Road Easement, as previously reserved by the Albuquerque Academy.

4. An easement, outstanding in the City of Albuquerque, for the existing Empedito Canyon training dike, as recorded on September 26, 1978, Misc, Bk. 641, pages 101-104, records of the County Clerk of Bernalillo County.

5. An easement, outstanding in the Albuquerque Metropolitan Arroyo Flood Control Authority, for construction and maintenance of the Upper Bear Canyon Training Dike, as recorded on April 25, 1979, Misc. Bk. 684, pages 789-792, records of the County Clerk of Bernalillo County, together with rights of access along the Access Road Easement to the Training Dike as depicted on the Summary Plat.

6. Reservation by the City of Albuquerque, Grantor, of an easement for a City water reservoir site, depicted on the Summary Plat as Tract F, a twenty (20) foot easement for an associated water line, and a fifty (50) foot easement for an associated service road, both as depicted on the Summary Plat.

7. Rights of the United States and third persons, if any, under the following reservations contained in the patent for the Elena Gallegos Grant:

a. "* * * title to any gold, silver, or quicksilver mines or minerals of the same, but all such mines and minerals shall remain the property of the United States with the right of working the same."

b. "* * * limitations and terms of the act of Congress of March 3, 1891."

8. Rights if any, of claimants under mesne mining claims.

● Mr. DOMENICI. Mr. President, the purpose of S. 2405 as reported, with the technical amendment, is to expedite the acquisition of a 7,985.84 acre portion of the Elena Gallegos grant so that a portion may be added to the Sandia Mountain Wilderness in the Cibola National Forest, N. Mex. The bill corrects the acreage figure and the forest boundary as established in Public Law 95-614; and it directs the Secretary of Agriculture in cooperation with the Secretary of the Interior to exchange approximately 32,800 acres of Federal lands in New Mexico with the city of Albuquerque for the 7,935.84 acre area to be added to the Cibola National Forest. This is to be accomplished within 90 days of the date of enactment of this act.

I should like to compliment the city of Albuquerque, including both the city officials and the citizens of the Duke City, for the numerous actions they have taken during the last year to insure that this acquisition takes place. This bill is the product of their continued support.

First, Albuquerque is purchasing 640 acres of the tract at a cost of over $5 million. Also, the city purchased the remainder of the tract by establishing a quarter-cent sales tax. This tax was supported by almost every organization in the city of Albuquerque.

Several years ago the Government Accounting Office issued a report, "The Drive to Acquire Lands by the Federal Government Should be Reassessed." The report and others called on the Federal Government to find new and innovative ways to acquire lands other than the typical straight purchase at appraised value. In 1978, in response to this report, the Congress authorized the addition and acquisition of the tract to the Cibola National Forest in Public Law 95-614. In 1980, the Congress amended that law by making the tract an addition to the approximately 30,000 acre wilderness. The Congress did this in Public Law 96-248. Last year the Public Lands and Reserved Water Subcommittee of the Energy and Natural Resources Committee held a 2-day workshop on the subject of Federal land acquisition policies.

The city of Albuquerque has come up with an innovative method of land acquisition that allows the Federal Government to acquire a very important parcel of land. In addition it puts over 30,000 acres of unneeded Federal land to use by both city government and the private sector. This is a significant accomplishment in light of the fact that we have had a moratorium on land purchases and the fact that even before that moratorium, these purchases were being criticized.

I again point out that the Forest Service, the city of Albuquerque, the State of New Mexico, which contributed money for the acquisition, enthusiastically support this measure. Environmental groups, civic organizations, countless thousands of New Mexico citizens agree that this bill is a good idea. The Committee on Energy and Natural Resources, which voted unanimously to report the bill, supports this legislation. This is an impressive coalition. I only wish we could reach this type of agreement on all of the legislation we face.

In these difficult economic times the people involved in this Elena Gallegos tract acquisition have shown us a way we can continue to acquire special lands for preservation.

In closing, I thank Senator MALCOLM WALLOP of Wyoming, chairman of the Public Lands and Reserve Water Subcommittee of the Energy and Natural Resources Committee. His assistance in this Wilderness System has been invaluable.

I also thank the chairman of the Energy and Natural Resources Committee, JAMES MCCLURE, as well as committee staff members for their help on this bill which I believe will have longlasting significance far beyond the borders of New Mexico.●

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

The amendment (UP No. 1263) was agreed to.

The PRESIDING OFFICER. The bill is open to further amendment. If there be no further amendment to be proposed, the question is on the engrossment and third reading of the bill.

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

S. 2405

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to expedite the acquisition of land authorized by the Act of November 8, 1978 (92 Stat. 3095, as amended), that Act is hereby amended as follows:

(a) Delete all of section 1 and insert the following language in lieu thereof:

"All that portion of the Elena Gallegos Grant, lying east of a line depicted on a subdivision plat entitled "Summary Plat of a Portion of the Elena Gallegos Grant," (the "Summary Plat") recorded in the office of the County Clerk of Bernalillo County, New Mexico, on June 29, 1982, in Volume C19, Folio 183, consisting of eight pages, said line being the western limits of the tract described herein being further described as follows: Beginning at the closing corner between sections 35 and 36 of township 11 north, range 4 east, New Mexico principal meridian on the south boundary of said grant; thence north 00 degrees 03 minutes 21 seconds east, 2,670.40 feet to a point; thence north 00 degrees 03 minutes 21 seconds east, 1,244.73 feet to the projected section corner common to sections 25, 26, 35, and 36; thence continuing along the projected section line common to said sections 25 and 26, north 00 degrees 17 minutes 37 seconds east, 1,346.11 feet to a point; thence leaving said section line and continuing south 84 degrees 40 minutes 00 seconds east, 178.00 feet to a point; thence south 53 degrees 20 minutes 00 seconds east, 218.00 feet to a point; thence north 52 degrees 50 minutes 00 seconds east, 364.00 feet to a point; thence east 225.00 feet to a point; thence north 66 degrees 00 minutes 00 seconds east, 1,244.14 feet to a point; thence north 06 degrees 12 minutes 25 seconds west, 1,765.08 feet to a point; thence north 07 degrees 27 minutes 00 seconds west, 2,008.00 feet to a point; thence south 80 degrees 38 minutes 00 seconds west, 984.00 feet to a point; thence south 64 degrees 45 minutes 00 seconds west, 621.00 feet to the projected section corner common to sections 23, 24, 25, and 26; thence north 00 degrees 44 minutes 22 seconds west, 1,382.97 feet to the southeast corner of Sandia Heights South, unit 14, as the same is shown and designated on the plat filed in the office of the County Clerk of Bernalillo County, New Mexico, on February 12, 1975; thence continuing along the easterly boundary of said unit 14, north 00 degrees 04 minutes 20 seconds east, 1,951.64 feet to the northeast corner of said unit 14, said corner also being the southeast corner of Sandia Heights South, Unit 10, as the same is shown and designated on the plat filed in the office of the County Clerk of Bernalillo County, New Mexico, on March 11, 1974; thence continuing along the easterly boundary of said Unit 10, north 00

degrees 02 minutes 31 seconds east, 1,493.53 feet to the northeast corner of said Unit 10, said corner also being the southeast corner of Sandia Heights South, Unit 3, as the same is shown and designated on the plat filed in the office of the County Clerk of Bernalillo County, New Mexico, on August 3, 1971; thence continuing along the easterly boundary of said Unit 3, north 00 degrees 03 minutes 29 seconds east, 1,867.10 feet to the northeast corner of said Unit 3, said corner also being the southeast corner of Sandia Heights South, Unit 2, as the same is shown and deisgnated on the plat filed in the office of the County Clerk of Bernalillo County, New Mexico, on October 20, 1970; thence continuing along easterly boundary of said Unit 2, north 00 degrees 03 minutes 29 seconds east, 1,869.70 feet to the northeast corner of said Unit 2, said corner also being the southeast corner of Sandia Heights South, as the same is shown and designated on the plat filed in the office of the County Clerk of Bernalillo County, New Mexico, on June 20, 1966; thence continuing along the easterly boundary of said Sandia Heights South, north 00 degrees 03 minutes 29 seconds east, 1,725.76 feet to the northwest corner of the tract herein described, said corner being a point on the northerly boundary of the Elena Gallegos Grant: *Provided, however,* That the tract of land described in this section not be included within the Cibola National Forest until the Secretary of Agriculture determines that the city of Albuquerque, New Mexico, has acquired a tract of land containing approximately six hundred forty acres located in such tract for open space or city park use.".

(b) Add a new section 5 to read as follows:

"SEC. 5. (a) Notwithstanding any other provision of law, the Secretary of Agriculture, in cooperation with the Secretary of the Interior, is authorized and directed to acquire the lands described in section 1 in lieu of purchase as authorized by section 4 of this Act by exchanging with the City of Albuquerque so much of the Federal lands administered by the Forest Service and Bureau of Land Management in the State of New Mexico and consisting of approximately 32,800 acres, more or less, as the Secretary of Agriculture and the Secretary of the Interior determine are needed to equal the value of the land conveyed by the City of Albuquerque.

"(b) The lands to be conveyed are subject to valid existing rights.

"(c) Transactions necessary to effect the exchange authorized by this section shall be made pursuant to the provisions of the Federal Land Policy and Management Act of 1976 (90 Stat. 2743) and other applicable law except to the extent necessary to expeditiously carry out the provision of this section and shall be made within 90 days of enactment of this Act: *Provided,* That the rights and responsibilities of the respective owners shall remain with such owners until such time as the conveyances are executed.".

Mr. BAKER. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. BAUCUS. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

ORDER FOR RECOGNITION OF SENATOR BRADLEY ON MONDAY NEXT

Mr. BAKER. Mr. President, I believe there is a special order in favor of the Senator from Georgia (Mr. NUNN) for Monday next. Is that correct?

The PRESIDING OFFICER. The Senator is correct.

Mr. BAKER. I add to that a unanimous-consent request that the distinguished Senator from New Jersey (Mr. BRADLEY) be recognized after the Senator from Georgia, on special order, for not to exceed 15 minutes.

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

PROGRAM

Mr. BAKER. Mr. President, the Senate will convene at 2 p.m. on Monday next.

Under the provisions of rule XXII, 1 hour after convening there will be an automatic quorum call. As soon as a quorum is established, the vote on cloture will occur, pursuant to the cloture motion that has been filed against further debate on the Helms amendment.

RECESS UNTIL 2 P.M. ON MONDAY, SEPTEMBER 20, 1982

Mr. BAKER. Mr. President, I inquire of the acting minority leader if he has any further matter he wishes to address to the Senate.

Mr. BAUCUS. Mr. President, so far as I know, we have no other business on this side at this time.

Mr. BAKER. I thank the Senator.

Mr. President, as I have indicated previously, it is desirable that the Senate stand in recess early today because of the religious observance which requires that certain Members leave the floor prior to sundown, to travel to their hometowns.

At this time, I move, in accordance with the order previously entered, that the Senate stand in recess until 2 p.m. on Monday next.

The motion was agreed to; and at 1:54 p.m. the Senate recessed until Monday, September 20, 1982, at 2 p.m.

NOMINATIONS

Executive nominations received by the Senate September 17, 1982:

DEPARTMENT OF AGRICULTURE

Orville G. Bentley, of Illinois, to be an Assistant Secretary of Agriculture, new position.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

L. Clair Nelson, of Virginia, to be a Member of the Federal Mine Safety and Health Review Commission for a term of 6 years expiring August 30, 1988, vice Marian Pearlman Nease, resigned.

DEPARTMENT OF STATE

David Joseph Fischer, of Texas, a Career Member of the Senior Foreign Service, class of Counselor, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the Republic of Seychelles.

DEPARTMENT OF JUSTICE

James K. Stewart, of California, to be Director of the National Institute of Justice, new position.

COMMODITY FUTURES TRADING COMMISSION

Fowler C. West, of Texas, to be Commissioner of the Commodity Futures Trading Commission for the term expiring April 13, 1987, vice David Gay Gartner, term expired.

NATIONAL MEDIATION BOARD

Walter C. Wallace, of New York, to be a Member of the National Mediation Board for the term expiring July 1, 1984, vice George S. Ives, term expired.

FOREIGN SERVICE

The following-named Career Members of the Senior Foreign Service for promotion in the Senior Foreign Service to the classes indicated:

Career Members of the Senior Foreign Service of the United States of America, class of Career Minister:

Robert L. Barry, of New Hampshire.
Frederic L. Chapin, of New Jersey.
Joan M. Clark, of New York.
Peter Dalton Constable, of New York.
Morris Draper, of the District of Columbia.
Henry Allen Holmes, of the District of Columbia.
Robert V. Keeley, of Florida.
George W. Landau, of Maryland.
Loren E. Lawrence, of Maryland.
Thomas P. Shoesmith, of Pennsylvania.

Career Members of the Senior Foreign Service of the United States of America, class of Minister-Counselor:

Donald Milton Anderson, of the District of Columbia.
George M. Barbis, of California.
Robert D. Blackwill, of Maryland.
Donald J. Bouchard, of Maine.
M. Lyall Breckon, of Oregon.
Elinor Greer Constable, of New York.
John R. Countryman, of Florida.
Edmund DeJarnette, of Virginia.
Thaddeus J. Figura, of Ohio.
Charles Wellman Freeman, Jr., of Rhode Island.
Frank M. Fulgham, of Maryland.
Charles Wyman Grover, of New Hampshire.
Robert Gordon Houdek, of Illinois.
George Fleming Jones, of Texas.
William E. Knepper, of California.
George E. Knight, of Pennsylvania.
Shepard Cherry Lowman, of Virginia.
Robert W. Maule, of Washington.
Sherrod McCall, of Illinois.
Richard L. McCormack, of Florida.
James M. Montgomery, of New Jersey.
Ernest Andrew Nagy, of California.
Chester E. Norris, Jr., of Maine.
Nancy Ostrander, of Indiana.
William Thornton Pryce, of Pennsylvania.
Alexander L. Rattray, of Washington.
Elmore Francis Rigamer, M.D., of Louisiana.
Fernando Enrique Rondon, of Virginia.
Charles A. Schmitz, of Missouri.
Roger C. Schrader, of Arizona.
William T. Shinn, Jr., of Maryland.
Walter John Silva, of Texas.
Thomas W. Simons, Jr., of the District of Columbia.
N. Shaw Smith, of Virginia.
Walter Edward Stadtler, of New York.
Paul K. Stahnke, of Illinois.

Gordon L. Streeb, of Colorado.
William Lacy Swing, of North Carolina.
Clyde Donald Taylor, of Maine.
Frank G. Trinka, Jr., of Florida.
James Rodney Wachob, of Maryland.
Howard Kent Walker, of New Jersey.
W. Robert Warne, of Virginia.
La Rae Herring Washington, M.D., of Maryland.
Joseph A. B. Winder, of Maryland.
Arthur Hamilton Woodruff, of Florida.
Donald Robert Woodward, of California.

The following-named Career Members of the Foreign Service for promotion into the Senior Foreign Service, and Consular Officer and Secretary in the Diplomatic Service appointments, as indicated:

Career Members of the Senior Foreign Service of the United States of America, class of Counselor:

Alvin P. Adams, Jr., of Virginia.
Charles R. Baquet III, of Louisiana.
Frank C. Bennett, Jr., of California.
David L. Blakemore, of Maryland.
John A. Boyle, of New York.
Charles F. Brown, of Nevada.
John Eignus Clark, of Maryland.
Anthony S. Dalsimer, of Florida.
Charles F. Dunbar, Jr., of Maine.
Clarke N. Ellis, of California.
Robert Duncan Emmons, of California.
Paul L. Engle, of California.
Vincent J. Farley, of New York.
Ronald D. Flack, of Minnesota.
Alan H. Flanigan, of Tennessee.
Anthony G. Freeman, of New Jersey.
Roger R. Gamble, of New Mexico.
John Charles Garon, of Georgia.
Charles A. Gillespie, Jr., of California.
Harry J. Gilmore, of Pennsylvania.
Larry C. Grahl, of Ohio.
Robert T. Grey, Jr., of Connecticut.
Scott S. Hallford, of Tennessee.
Frederick H. Hassett, of Florida.
Irvin Hicks, of Maryland.
Richard C. Howland, of New York.
Arthur H. Hughes, of Nebraska.
Larry Craig Johnstone, of Washington.
John P. Jurecky, of Arizona.
Dalton V. Killion, of California.
John C. Kornblum, of Michigan.
Vladimir Lehovich, of New York.
Mark C. Lissfelt, of Pennsylvania.
George Quincey Lumsden, Jr., of Maryland.
Hugh Cooke MacDougall, of New York.
Robert A. Martin, of Pennsylvania.
James A. Mattson, of Minnesota.
George A. McFarland, Jr., of Texas.
Thomas E. McNamara, of New York.
Gerald Joseph Monroe, of New Mexico.
Robert B. Morley, of New Jersey.
Day Olin Mount, of Massachusetts.
Jerome C. Ogden, of New York.
Robert A. Peck, of California.
Miles S. Pendleton, Jr., of Washington.
John H. Penfold, of Colorado.
Dale M. Povenmire, of Florida.
Donald Fraser Ramage, of California.
Mary A. Ryan, of Texas.
John J. St. John, of Pennsylvania.
P. Peter Sarros, of New York.
Frank M. Schroeder, of Virginia.
William E. Spruce, of Texas.
John Todd Stewart, of California.
David H. Swartz, of Illinois.
Peter Tomsen, of Ohio.
Theresa A. Tull, of New Jersey.
John R. Vought, of New York.
Douglas K. Watson, of California.
James A. Weiner, of California.
Philip C. Wilcox, of Colorado.
Brooks Wrampelmeier, of Ohio.

Career Members of the Senior Foreign Service, class of Counselor, and Consular Officers and Secretaries in the Diplomatic Service of the United States of America:

John H. Clemmons, of Texas.
Kenneth A. French, of Virginia.
Wallace H. Gilliam, of New Jersey.
Frank L. Hart, M.D., of Oklahoma.
James B. Lackey, of Maryland.
Bernard C. Meyer, M.D., of Florida.
Arthur J. Rollins, M.D., of California.
Emmett N. Wilson, Jr., M.D., of Texas.

IN THE ARMY

The following-named officer to be placed on the retired list in grade indicated under the provisions of title 10, United States Code, section 1370:

To be lieutenant general

Lt. Gen. Harold F. Hardin, Jr., xxx-xx-xxxx [redacted] age 54, U.S. Army.

The following-named officer under the provisions of title 10, United States Code, section 601, to be assigned to a position of importance and responsibility designated by the President under title 10, United States Code, section 601:

To be lieutenant general

Maj. Gen. Donald M. Babers, xxx-xx-xxxx U.S. Army.

HOUSE OF REPRESENTATIVES—*Friday, September 17, 1982*

CONFERENCE REPORT ON H.R. 6133

Pursuant to the order of September 16, 1982, Mr. JONES of North Carolina submitted the following conference report and statement on the bill (H.R. 6133) to authorize appropriations to carry out the provisions of the Endangered Species Act of 1973 for fiscal years 1983, 1984, and 1985, and for other purposes.

CONFERENCE REPORT (H. REPT. No. 97-835)

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 6133) to authorize appropriations to carry out the provisions of the Endangered Species Act of 1973 for fiscal years 1983, 1984, and 1985, 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 the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

That this Act may be cited as the "Endangered Species Act Amendments of 1982".

SEC. 2. LISTING PROCESS.

(a) Section 4 of the Endangered Species Act of 1973 (16 U.S.C. 1533) is amended as follows:

(1) Subsection (a) is amended—

(A) by redesignating subparagraphs (1) through (5) of paragraph (1) as subparagraphs (A) through (E), respectively;

(B) by amending that part of paragraph (1) which precedes subparagraph (A) (as so redesignated) by inserting "promulgated in accordance with subsection (b)" immediately after "shall by regulation";

(C) by striking out "sporting," in paragraph (1)(B) (as so redesignated) and inserting in lieu thereof "recreational,";

(D) by striking out the last two sentences in paragraph (1); and

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

"(3) The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable—

"(A) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

"(B) may, from time-to-time thereafter as appropriate, revise such designation.".

(2) Subsection (b) is amended to read as follows:

"(b) BASIS FOR DETERMINATIONS.—(1)(A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

"(B) In carrying out this section, the Secretary shall give consideration to species which have been—

"(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

"(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

"(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

"(3)(A) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States Code, to add a species to, or to remove a species from, either of the lists published under subsection (c), the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

"(B) Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

"(i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.

"(ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).

"(iii) The petitioned action is warranted, but that—

"(I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action in accordance with paragraphs (5) and (6) is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and

(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) and to remove from such lists species for which the protections of the Act are no longer necessary,

in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

"(C)(i) A petition with respect to which a finding is made under subparagraph (B)(iii) shall be treated as a petition that is resubmitted to the Secretary under subparagraph (A) on the date of such finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.

"(ii) Any negative finding described in subparagraph (A) and any finding described in subparagraph (B)(i) or (iii) shall be subject to judicial review.

"(D)(i) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States Code, to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register.

"(ii) Within 12 months after receiving a petition that is found under clause (i) to present substantial information indicating that the requested revision may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

"(4) Except as provided in paragraphs (5) and (6) of this subsection, the provisions of section 553 of title 5, United States Code (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this Act.

"(5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3), the Secretary shall—

"(A) not less than 90 days before the effective date of the regulation—

"(i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and

"(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;

"(B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species

---

□ This symbol represents the time of day during the House proceedings, e.g., □ 1407 is 2:07 p.m.

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

on the high seas, and invite the comment of such nation thereon;

"(C) give notice of the proposed regulation to such professional scientific organizations as he deems appropriate;

"(D) publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur; and

"(E) promptly hold one public hearing on the proposed regulation if any person files a request for such a hearing within 45 days after the date of publication of general notice.

"(6)(A) Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register—

"(i) if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either—

"(I) a final regulation to implement such determination,

"(II) a final regulation to implement such revision or a finding that such revision should not be made,

"(III) notice that such one-year period is being extended under subparagraph (B)(i), or

"(IV) notice that the proposed regulation is being withdrawn under subparagraph (B)(ii), together with the finding on which such withdrawal is based; or

"(ii) subject to subparagraph (C), if a designation of critical habitat is involved, either—

"(I) a final regulation to implement such designation, or

"(II) notice that such one-year period is being extended under such subparagraph.

"(B)(i) If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than 6 months for purposes of soliciting additional data.

"(ii) If a proposed regulation referred to in subparagraph (A)(i) is not promulgated as a final regulation within such one-year period (or longer period if extension under clause (i) applies) because the Secretary finds that there is not sufficient evidence to justify the action proposed by the regulation, the Secretary shall immediately withdraw the regulation. The finding on which a withdrawal is based shall be subject to judicial review. The Secretary may not propose a regulation that has previously been withdrawn under this clause unless he determines that sufficient new information is available to warrant such proposal.

"(iii) If the one-year period specified in subparagraph (A) is extended under clause (i) with respect to a proposed regulation, then before the close of such extended period the Secretary shall publish in the Federal Register either a final regulation to implement the determination or revision concerned, a finding that the revision should not be made, or a notice of withdrawal of the regulation under clause (ii), together with the finding on which the withdrawal is based.

"(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that—

"(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

"(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

"(7) Neither paragraph (4), (5), or (6) of this subsection nor section 553 of title 5, United States Code, shall apply to any regulation issued by the Secretary in regard to any emergency posing a significant risk to the well-being of any species of fish or wildlife or plants, but only if—

"(A) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary; and

"(B) in the case such regulation applies to resident species of fish or wildlife, or plants, the Secretary gives actual notice of such regulation to the State agency in each State in which such species is believed to occur.

Such regulation shall, at the discretion of the Secretary, take effect immediately upon the publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240-day period following the date of publication unless, during such 240-day period, the rulemaking procedures which would apply to such regulation without regard to this paragraph are complied with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best appropriate data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.

"(8) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this Act shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation; and if such regulation designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation.".

(3) Subsection (c) is amended—

(A) by amending paragraph (1) by striking out ", and from time to time he may by regulation revise," in the first sentence thereof, and by adding at the end thereof the following new sentence: "The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent determinations, designations, and revisions made in accordance with subsections (a) and (b).",

(B) by striking out paragraphs (2) and (3) thereof; and

(C) by redesignating paragraph (4) thereof as paragraph (2).

(4) Such section 4 is further amended—

(A) by amending subsection (d) by striking out "section 6(a)" and inserting in lieu thereof "section 6(c)";

(B) by striking out subsection (f) thereof;

(C) by redesignating subsections (g) and (h) as subsections (f) and (g), respectively;

(D) by amending the second sentence of subsection (f) (as redesignated by subparagraph (C)) by striking out "recovery plans," and inserting in lieu thereof "recovery plans (1) shall, to the maximum extent practicable, give priority to those endangered species or threatened species most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other developmental projects or other forms of economic activity, and (2)";

(E) by amending subsection (g) (as redesignated by subparagraph (C))—

(i) by striking out "subsection (c)(2)" in paragraph (1) and inserting in lieu thereof "subsection (b)(3)",

(ii) by striking out "for listing" in paragraph (3) and inserting in lieu thereof "under subsection (a)(1) of this section", and

(iii) by striking out "subsection (g)" in paragraph (4) and inserting in lieu thereof "subsection (f)"; and

(F) by inserting at the end thereof the following new subsection:

"(h) If, in the case of any regulation proposed by the Secretary under the authority of this section, a State agency to which notice thereof was given in accordance with subsection (b)(5)(A)(ii) files comments disagreeing with all or part of the proposed regulation, and the Secretary issues a final regulation which is in conflict with such comments, or if the Secretary fails to adopt a regulation pursuant to an action petitioned by a State agency under subsection (b)(3), the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.".

(b)(1) Any petition filed under section 4(c)(2) of the Endangered Species Act of 1973 (as in effect on the day before the date of the enactment of this Act) and any regulation proposed under section 4(f) of such Act of 1973 (as in effect on such day) that is pending on such date of enactment shall be treated as having been filed or proposed on such date of enactment under section 4(b) of such Act of 1973 (as amended by subsection (a)); and the procedural requirements specified in such section 4(b) (as so amended) regarding such petition or proposed regulation shall be deemed to be complied with to the extent that like requirements under such section 4 (as in effect before the date of the enactment of this Act) were complied with before such date of enactment.

(2) Any regulation proposed after, or pending on, the date of the enactment of this Act to designate critical habitat for a species that was determined before such date of enactment to be endangered or threatened shall be subject to the procedures set forth in section 4 of such Act of 1973 (as amended by subsection (a)) for regulations proposing revisions to critical habitat instead of those for regulations proposing the designation of critical habitat.

(3) Any list of endangered species or threatened species (as in effect under section 4(c) of such Act of 1973 on the day before the date of the enactment of this Act) shall remain in effect unless and until determinations regarding species and designations and revisions of critical habitats that require changes to such list are made in accordance with subsection (b)(5) of such Act of 1973 (as added by subsection (a)).

(4) Section 4(a)(3)(A) of such Act of 1973 (as added by subsection (a)) shall not apply

with respect to any species which was listed as an endangered species or a threatened species before November 10, 1978.

SEC. 3. COOPERATION WITH THE STATES.

Section 6 of the Endangered Species Act of 1973 (16 U.S.C. 1535) is amended—

(1) by striking out "66⅔ per centum" in subsection (d)(2)(i) thereof and inserting in lieu thereof "75 percent"; and

(2) by striking out "75 per centum" in subsection (d)(2)(ii) thereof and inserting in lieu thereof "90 percent".

SEC. 4. INTERAGENCY COOPERATION AND COMMITTEE EXEMPTIONS.

(a) Section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536) is amended as follows:

(1) Subsection (a) is amended by redesignating paragraph (3) as paragraph (4), and by inserting immediately after paragraph (2) the following new paragraph:

"(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.".

(2) Subsection (b) is amended to read as follows:

"(b) OPINION OF SECRETARY.—(1)(A) Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

"(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

"(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

"(I) the reasons why a longer period is required,

"(II) the information that is required to complete the consultation, and

"(III) the estimated date on which consultation will be completed; or

"(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

"(2) Consultation under subsection (a)(3) shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

"(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a), the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.

"(B) Consultation under subsection (a)(3), and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2), and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

"(4) If after consultation under subsection (a)(2), the Secretary concludes that—

"(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection; and

"(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

"(i) specifies the impact of such incidental taking on the species,

"(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact, and

"(iii) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clause (ii).".

(3) Subsection (c) is amended by amending the penultimate sentence in paragraph (1) by inserting ", except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor" immediately after "agency" and before the parenthesis.

(4) Subsection (e)(10) is amended by striking out the first sentence thereof.

(5) Subsection (g) is amended as follows:

(A) The sideheading is amended to read as follows: "APPLICATION FOR EXEMPTION AND REPORT TO THE COMMITTEE.—".

(B) The second sentence of paragraph (1) is amended to read as follows: "An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) after a report is made pursuant to paragraph (5).".

(C) Paragraph (2) is amended—

(i) by striking out the first sentence of subparagraph (A) and inserting in lieu thereof the following: "An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f), not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term 'final agency action' means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review."; and

(ii) by amending subparagraph (B)—

(I) by inserting "(i)" immediately after "promptly",

(II) by striking out "to the review board to be established under paragraph (3) and", and

(III) by inserting "; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed" immediately before the period.

(D) Paragraphs (3), (4), (9), and (11) are repealed.

(E) Paragraph (5) is redesignated as paragraph (3) and is further amended to read as follows:

"(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary—

"(A) determine that the Federal agency concerned and the exemption applicant have—

"(i) carried out the consultation responsibilities described in subsection (a) in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2);

"(ii) conducted any biological assessment required by subsection (c); and

"(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d); or

"(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5, United States Code.".

(F) Paragraph (6) is redesignated as paragraph (4) and is further amended to read as follows:

"(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A)(i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b)(1) and (2) thereof) of title 5, United States Code, and prepare the report to be submitted pursuant to paragraph (5).".

(G) Paragraph (7) is redesignated as paragraph (5) and is further amended—

(i) by striking out that part which precedes subparagraph (A) and inserting in lieu thereof "Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutu-

ally agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing—";

(ii) by striking out the period immediately after "by the Committee" in subparagraph (C) and inserting in lieu thereof "; and"; and

(iii) by adding at the end thereof the following:

"(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d).".

(H) Paragraph (8) is redesignated as paragraph (6).

(I) Paragraph (10) is redesignated as paragraph (7) and is amended to read as follows:

"(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.".

(J) Paragraph (12) is redesignated as paragraph (8) and is further amended by striking out "of review boards" and inserting in lieu thereof "resulting from activities pursuant to this subsection".

(6) Subsection (h)(1) is amended—

(A) by striking out "90 days of receiving the report of the review board under subsection (g)(7)" in the matter preceding subparagraph (A) and inserting in lieu thereof "30 days after receiving the report of the Secretary pursuant to subsection (g)(5)";

(B) by striking out "review board" in subparagraph (A) and inserting in lieu thereof "Secretary, the record of the hearing held under subsection (g)(4)";

(C) by striking out "and" at the end of subparagraph (A)(ii);

(D) by inserting immediately after subparagraph (A)(iii) the following:

"(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d); and".

(7) Subsection (o) is amended to read as follows:

"(o) Notwithstanding sections 4(d) and 9(a)(1)(B) and (C) or any regulation promulgated to implement either such section—

"(1) any action for which an exemption is granted under subsection (h) shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

"(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iii) shall not be considered to be a taking of the species concerned.".

(b) Paragraph (11) of section 3 of the Endangered Species Act of 1973 (16 U.S.C. 1532(11)) is repealed.

SEC. 5. CONVENTION IMPLEMENTATION.

Section 8A of the Endangered Species Act of 1973 (16 U.S.C. 1537a) is amended—

(1) by amending subsection (c) by inserting "(1)" immediately after "SCIENTIFIC AUTHORITY FUNCTIONS.—", and by adding at the end thereof the following new paragraph:

"(2) The Secretary shall base the determinations and advice given by him under Article IV of the Convention with respect to wildlife upon the best available biological information derived from professionally accepted wildlife management practices; but is not required to make, or require any State to make, estimates of population size in making such determinations or giving such advice.";

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

"(d) RESERVATIONS BY THE UNITED STATES UNDER CONVENTION.—If the United States votes against including any species in Appendix I or II of the Convention and does not enter a reservation pursuant to paragraph (3) of Article XV of the Convention with respect to that species, the Secretary of State, before the 90th day after the last day on which such a reservation could be entered, shall submit to the Committee on Merchant Marine and Fisheries of the House of Representatives, and to the Committee on the Environment and Public Works of the Senate, a written report setting forth the reasons why such a reservation was not entered."; and

(3) by amending subsection (e) to read as follows:

"(e) WILDLIFE PRESERVATION IN WESTERN HEMISPHERE.—(1) The Secretary of the Interior (hereinafter in this subsection referred to as the 'Secretary'), in cooperation with the Secretary of State, shall act on behalf of, and represent, the United States in all regards as required by the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (56 Stat. 1354, T.S. 982, hereinafter in this subsection referred to as the 'Western Convention'). In the discharge of these responsibilities, the Secretary and the Secretary of State shall consult with the Secretary of Agriculture, the Secretary of Commerce, and the heads of other agencies with respect to matters relating to or affecting their areas of responsibility.

"(2) The Secretary and the Secretary of State shall, in cooperation with the contracting parties to the Western Convention and, to the extent feasible and appropriate, with the participation of State agencies, take such steps as are necessary to implement the Western Convention. Such steps shall include, but not be limited to—

"(A) cooperation with contracting parties and international organizations for the purpose of developing personnel resources and programs that will facilitate implementation of the Western Convention;

"(B) identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend, and the implementation of cooperative measures to ensure that such species will not become endangered or threatened; and

"(C) identification of measures that are necessary and appropriate to implement those provisions of the Western Convention which address the protection of wild plants.

"(3) No later than September 30, 1985, the Secretary and the Secretary of State shall submit a report to Congress describing those steps taken in accordance with the requirements of this subsection and identifying the principal remaining actions yet necessary for comprehensive and effective implementation of the Western Convention.

"(4) The provisions of this subsection shall not be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate resident fish or wildlife under State law or regulations.".

(b) The amendment made by paragraph (1) of subsection (a) shall take effect January 1, 1981.

SEC. 6. EXPERIMENTAL POPULATIONS AND OTHER EXCEPTIONS.

Section 10 of the Endangered Species Act of 1973 (16 U.S.C. 1539) is amended as follows:

(1) Subsection (a) is amended to read as follows:

"(a) PERMITS.—(1) The Secretary may permit, under such terms and conditions as he shall prescribe—

"(A) any act otherwise prohibited by section 9 for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j); or

"(B) any taking otherwise prohibited by section 9(a)(1)(B) if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

"(2)(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies—

"(i) the impact which will likely result from such taking;

"(ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

"(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and

"(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

"(B) If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that—

"(i) the taking will be incidental;

"(ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

"(iii) the applicant will ensure that adequate funding for the plan will be provided;

"(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

"(v) the measures, if any, required under subparagraph (A)(iv) will be met;

and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.

"(C) The Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.".

(2) Subsection (d) is amended by striking out "subsections (a)" and inserting in lieu thereof "subsections (a)(1)(A)".

(3) Subsection (f) is amended—

(A) by amending paragraph (1)(B) by inserting "substantial" immediately before "etching" and before "carving", and by adding at the end thereof the following new sentence: "For purposes of this subsection, polishing or the adding of minor superficial markings does not constitute substantial etching, engraving, or carving."; and

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

"(9)(A) The Secretary shall carry out a comprehensive review of the effectiveness of the regulations prescribed pursuant to paragraph (5) of this subsection—

"(i) in insuring that pre-Act finished scrimshaw products, or the raw materials for such products, have been adequately ac-

counted for and not disposed of contrary to the provisions of this Act; and

"(ii) in preventing the commingling of unlawfully imported or acquired marine mammal products with such exempted products either by persons to whom certificates of exemption have been issued under paragraph (4) of this subsection or by subsequent purchasers from such persons.

"(B) In conducting the review required under subparagraph (A), the Secretary shall consider, but not be limited to—

"(i) the adequacy of the reporting and records required of exemption holders;

"(ii) the extent to which such reports and records are subject to verification;

"(iii) methods for identifying individual pieces of scrimshaw products and raw materials and for preventing commingling of exempted materials from those not subject to such exemption; and

"(iv) the retention of unworked materials in controlled-access storage.

The Secretary shall submit a report of such review to the Committee on Merchant Marine and Fisheries of the House of Representatives and the Committee on the Environment and Public Works of the Senate and make it available to the general public. Based on such review, the Secretary shall, on or before October 1, 1983, propose and adopt such revisions to such regulations as he deems necessary and appropriate to carry out this paragraph. Upon publication of such revised regulations, the Secretary may renew for a further period of not to exceed three years any certificate of exemption previously renewed under paragraph (8) of this subsection, subject to such new terms and conditions as are necessary and appropriate under the revised regulations; except that any certificate of exemption that would, but for this clause, expire on or after the date of enactment of this paragraph and before the date of the adoption of such regulations may be extended until such time after the date of adoption as may be necessary for purposes of applying such regulations to the certificate. Notwithstanding the foregoing, however, no person may, after January 31, 1984, sell or offer for sale in interstate or foreign commerce any pre-Act finished scrimshaw product unless such person has been issued a valid certificate of exemption by the Secretary under this subsection and unless such product or the raw material for such product was held by such person on the date of the enactment of this paragraph.".

(4)(A) Subsection (h)(1) is amended—

(i) by striking out "(other than scrimshaw)"; and

(ii) by amending subparagraph (A) to read as follows:

"(A) is not less than 100 years of age; ".

(B) The amendment made by subparagraph (A) shall take effect January 1, 1981.

(5) Subsection (i) is amended to read as follows:

"(i) NONCOMMERCIAL TRANSSHIPMENTS.—Any importation into the United States of fish or wildlife shall, if—

"(1) such fish or wildlife was lawfully taken and exported from the country of origin and country of reexport, if any;

"(2) such fish or wildlife is in transit or transshipment through any place subject to the jurisdiction of the United States en route to a country where such fish or wildlife may be lawfully imported and received;

"(3) the exporter or owner of such fish or wildlife gave explicit instructions not to ship such fish or wildlife through any place subject to the jurisdiction of the United States, or did all that could have reasonably been done to prevent transshipment, and the circumstances leading to the transshipment were beyond the exporter's or owner's control;

"(4) the applicable requirements of the Convention have been satisfied; and

"(5) such importation is not made in the course of a commercial activity,

be an importation not in violation of any provision of this Act or any regulation issued pursuant to this Act while such fish or wildlife remains in the control of the United States Customs Service.".

(6) At the end thereof insert the following new subsection:

"(j) EXPERIMENTAL POPULATIONS.—(1) For purposes of this subsection, the term 'experimental population' means any population (including any offspring arising solely therefrom) authorized by the Secretary for release under paragraph (2), but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species.

"(2)(A) The Secretary may authorize the release (and the related transportation) of any population (including eggs, propagules, or individuals) of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species.

"(B) Before authorizing the release of any population under subparagraph (A), the Secretary shall by regulation identify the population and determine, on the basis of the best available information, whether or not such population is essential to the continued existence of an endangered species or a threatened species.

"(C) For the purposes of this Act, each member of an experimental population shall be treated as a threatened species; except that—

"(i) solely for purposes of section 7 (other than subsection (a)(1) thereof), an experimental population determined under subparagraph (B) to be not essential to the continued existence of a species shall be treated, except when it occurs in an area within the National Wildlife Refuge System or the National Park System, as a species proposed to be listed under section 4; and

"(ii) critical habitat shall not be designated under this Act for any experimental population determined under subparagraph (B) to be not essential to the continued existence of a species.

"(3) The Secretary, with respect to populations of endangered species or threatened species that the Secretary authorized, before the date of the enactment of this subsection, for release in geographical areas separate from the other populations of such species, shall determine by regulation which of such populations are an experimental population for the purposes of this subsection and whether or not each is essential to the continued existence of an endangered species or a threatened species.".

SEC. 7. ENFORCEMENT.

Section 11 of the Endangered Species Act of 1973 (16 U.S.C. 1540) is amended as follows:

(1) Subsection (e) is amended by adding at the end thereof the following new paragraph:

"(6) The Attorney General of the United States may seek to enjoin any person who is alleged to be in violation of any provision of this Act or regulation issued under authority thereof.".

(2) Subsection (g) is amended—

(A) by amending paragraph (1)—

(i) by striking out "any State." in subparagraph (B) and inserting in lieu thereof "any State; or",

(ii) by inserting immediately after subparagraph (B) the following new subparagraph:

"(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 4 which is not discretionary with the Secretary.", and

(iii) by amending the first sentence following subparagraph (C) (as added by clause (ii) of this subparagraph), by inserting "or to order the Secretary to perform such act or duty," immediately after "any such provision or regulation,"; and

(B) by amending paragraph (2) by adding the following new subparagraph immediately after subparagraph (B) thereof:

"(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.".

SEC. 8. AUTHORIZATION OF APPROPRIATIONS.

Section 15 of the Endangered Species Act of 1973 (16 U.S.C. 1542) is amended to read as follows:

"AUTHORIZATION OF APPROPRIATIONS

"SEC. 15. (a) IN GENERAL.—Except as provided in subsections (b), (c), and (d), there are authorized to be appropriated—

"(1) not to exceed $27,000,000 for each of fiscal years 1983, 1984, and 1985 to enable the Department of the Interior to carry out such functions and responsibilities as it may have been given under this Act;

"(2) not to exceed $3,500,000 for each of fiscal years 1983, 1984, and 1985 to enable the Department of Commerce to carry out such functions and responsibilities as it may have been given under this Act; and

"(3) not to exceed $1,850,000 for each of fiscal years 1983, 1984, and 1985 to enable the Department of Agriculture to carry out its functions and responsibilities with respect to the enforcement of this Act and the Convention which pertain to the importation or exportation of plants.

"(b) COOPERATION WITH STATES.—For the purposes of section 6, there are authorized to be appropriated not to exceed $6,000,000 for each of fiscal years 1983, 1984, and 1985.

"(c) EXEMPTIONS FROM ACT.—There are authorized to be appropriated to the Secretary to assist him and the Endangered Species Committee in carrying out their functions under section 7(e), (g), and (h) not to exceed $600,000 for each of fiscal years 1983, 1984, and 1985.

"(d) CONVENTION IMPLEMENTATION.—There are authorized to be appropriated to the Department of the Interior for purposes of carrying out section 8A(e) not to exceed $150,000 for each of fiscal years 1983 and 1984, and not to exceed $300,000 for fiscal year 1985, and such sums shall remain available until expended.".

(b) Sections 6(i) and 7(q) of such Act of 1973 are repealed.

SEC. 9. MISCELLANEOUS AMENDMENTS.

(a) Section 2(c) of the Endangered Species Act of 1973 (16 U.S.C. 1532(c)) is amended—

(1) by inserting "(1)" immediately before "It is"; and

(2) by adding the following new paragraph:

"(2) It is further declared to be the policy of Congress that Federal agencies shall coop-

erate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.".

(b) Section 9 of the Endangered Species Act of 1973 (16 U.S.C. 1538) is amended—

(1) by amending subsection (a)(2) by redesignating subparagraphs (B), (C), and (D) as subparagraphs (C), (D), and (E), respectively, and by inserting the following new subparagraph immediately after subparagraph (A) thereof:

"(B) remove and reduce to possession any such species from areas under Federal jurisdiction;";

(2) by amending subsection (b)(1) to read as follows:

"(b)(1) SPECIES HELD IN CAPTIVITY OR CONTROLLED ENVIRONMENT.—The provisions of subsections (a)(1)(A) and (a)(1)(G) of this section shall not apply to any fish or wildlife which was held in captivity or in a controlled environment on (A) December 28, 1973, or (B) the date of the publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 4 of this Act: Provided, That such holding and any subsequent holding or use of the fish or wildlife was not in the course of a commercial activity. With respect to any act prohibited by subsections (a)(1)(A) and (a)(1)(G) of this section which occurs after a period of 180 days from (i) December 28, 1973, or (ii) the date of publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 4 of this Act, there shall be a rebuttable presumption that the fish or wildlife involved in such act is not entitled to the exemption contained in this subsection."; and

(3) by amending subsection (b)(2)(A) by striking out "This section shall not apply to" and inserting in lieu thereof "The provisions of subsection (a)(1) shall not apply to".

(c) Section 11(a)(1) and (b)(1) of such Act of 1973 are each amended by striking out "or (C)" immediately after "(a)(2)(A), (B)," and inserting in lieu thereof "(C), or (D)".

And to the Senate agree to the same.

That the House recede from its disagreement to the amendment of the Senate to the title of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment to the title of the bill, insert the following: "An Act to authorize appropriations to carry out the provisions of the Endangered Species Act of 1973 for fiscal years 1983, 1984, and 1985, and for other purposes."

And the Senate agree to the same.

WALTER B. JONES,
JOHN BREAUX,
GERRY E. STUDDS,
DAVID R. BOWEN,
GENE SNYDER,
EDWIN B. FORSYTHE,
DAVE EMERY,

Solely for consideration of section 4 of the House bill and modification committed to conference:

DON BONKER,
JIM LEACH,
Managers on the Part of the House.

ROBERT T. STAFFORD,
JOHN H. CHAFEE,
SLADE GORTON,
JENNINGS RANDOLPH,
GEORGE J. MITCHELL,
Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 6133) to extend the authorization for appropriations for the Endangered Species Act of 1973, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report.

The Senate amendment to the text of the bill struck out all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment which is a substitute for the House bill and the Senate amendment. The House also recedes from its disagreement to the title of the bill. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

SECTION-BY-SECTION ANALYSIS

Section 1. Title

The short title of this bill is the "Endangered Species Act Amendments of 1982."

Section 2. Listing of species

Section 2 of the Conference substitute amends section 4 of the Act in several ways. The principal purpose of these amendments is to ensure that decisions in every phase of the process pertaining to the listing or delisting of species are based solely upon biological criteria and to prevent non-biological considerations from affecting such decisions. These amendments are intended to expedite the decisionmaking process and to ensure prompt action in determining the status of the many species which may require the protections of the Act.

Section 2(a)(1) adopts provisions which amend section 4(a) of the Act and which appear in both the House bill and the Senate amendment. Section 4(a) is first amended by substituting the word "recreational" for the word "sporting" in the summary of factors that are to be considered by the Secretary when determining whether a species is endangered or threatened. Section 4(a) is further amended by changing the requirement that the Secretary, to the maximum extent prudent, must designate critical habitat at the time a species is listed. New section 4(a)(3) will require such designation only to the maximum extent prudent and determinable.

Section 2(a)(2) adopts provisions appearing in both the House bill and the Senate amendment. This provision amends Section 4(b) of the Act and sets forth the standards and procedures that must be used by the Secretary when determining whether a species is an endangered or threatened species and when designating critical habitat.

The Committee of Conference (hereinafter the Committee) adopted the House language which requires the Secretary to base determinations regarding the listing or delisting of species "solely" on the basis of the best scientific and commercial data available to him. As noted in the House Report, economic considerations have no relevance to determinations regarding the status of species and the economic analysis requirements of Executive Order 12291, and such statutes as the Regulatory Flexibility Act and the Paperwork Reduction Act, will not apply to any phase of the listing process. The standards in the Act relating to the designation of critical habitat remain unchanged. The requirement that the Secretary consider for listing those species that states or foreign nations have designated or identified as in need of protection also remains unchanged.

The Committee adopted, with modifications, the Senate amendments which combined and rewrote sections 4(b) and (f) of the Act to streamline the listing process by reducing the time periods for rulemaking, consolidating public meeting and hearing requirements and establishing virtually identical procedures for the listing and delisting of species and for the designation of critical habitat.

Section 4(b)(1), as amended, sets forth the standard that shall be used to determine whether any species is an endangered species or a threatened species. Section 4(b)(2), as amended, sets forth the standard that shall be used to designate critical habitat.

The petition process (currently found in section 4(c)(2) of the Act) is amended by merging the House bill and the Senate amendment and by redesignating the section 4(b)(3). Section 4(b)(3), as amended, alters the evidentiary standard petitioners must satisfy to warrant a status review of the species proposed for listing or delisting. The Act previously required the Secretary to determine whether a petitioner had presented substantial evidence justifying a status review. The amendment clarifies that petitioners are not required to present economic information relevant to the proposed listing or delisting of species. Petitioners are required to present only scientific or commercial information that is, biological information or trade data. The amendments do not change the amount of information needed to warrant a status review of the species. As under the existing law, the petitioners need only present information sufficient to indicate that addition to, or removal from, the list may be warranted and, thus, that a status review of the species should be conducted.

In several ways, these amendments will replace the Secretary's discretion with mandatory, nondiscretionary duties. For example, under current law, if a petition presents substantial evidence warranting a review of the status of a species, the Secretary is to undertake such a review. However, the statute imposes no deadlines within which such review is to be completed. In practice, such status reviews have often continued indefinitely, sometimes for many years. The amendments will force action on listing and delisting proposals by requiring that the Secretary, to the maximum extent practicable, within 90 days after receiving a petition, publish a finding whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. The Secretary must begin a status review when he publishes a finding that a petition to list or delist a species presents such substantial information.

The phrase "to the maximum extent practicable" addresses the concern that a large influx of petitions coupled with an absolute requirement to act within 90 days would force the devotion of staff resources to petitions and deprive the Secretary of the use of those resources to list a species that might be in greater need of protection. The phrase is not intended to allow the Secretary to

delay commencing the rulemaking process for any reason other than that the existence of pending or imminent proposals to list species subject to a greater degree of threat would make allocation of resources to such a petition unwise. The listing agencies should utilize a scientifically based priority system to list and delist species, subspecies and populations based on the degree of threat, and proceed in an efficient and timely manner. Distinctions based on whether the species is a higher or lower life form are not to be considered.

If a petition presents substantial information indicating that the petitioned listing or delisting may be warranted, the Secretary must, within 12 months after receiving the petition, make one of three findings and, depending upon which finding is made, promptly publish in the Federal Register certain items. Specifically, the Secretary must find:

(a) That the petitioned action is not warranted; or

(b) That the petitioned action is warranted; or

(c) That the petitioned action is warranted but that ongoing work on other listing and delisting actions precludes the proposal of a regulation to implement the petitioned action at that time.

The Secretary is required to publish notice of all such findings in the Federal Register. If he finds that a listing is warranted, the Secretary must also publish the text of the proposed regulation to implement the action or a description and evaluation of the reasons why he is precluded from proceeding with the proposal.

If the Secretary determines (a) that a petition does not present substantial information indicating that the petitioned action may be warranted, or (b) that the petitioned action is not warranted, such negative determinations shall be subject to judicial review. The object of such review is to determine whether the Secretary's action was arbitary or capricious in light of the scientific and commercial information available concerning the petitioned action.

If, within 12 months of receiving a petition that warrants the publication of a proposed regulation, the Secretary determines that he is unable to propose such action at that time or, if able to propose the action, unable to make a final determination within the statutorily specified and judicially enforceable time frame, he will be excused temporarily from publishing a proposed regulation at that time provided he satisfies several, limited conditions.

First, the Secretary must be actively working on other listings and delistings and must determine and publish a finding that such other work has resulted in pending proposals which actually preclude his proposing the petitioned action at that time. Second, the Secretary must determine and present evidence that he is, in fact making expeditious progress in the process of listing and delisting other species. These determinations are subject to judicial review under the same standard dicussed above. In cases challenging the Secretary's claim of inability to propose an otherwise warranted petitioned action, the court will, in essence, be called on to separate justifications grounded in the purposes of the Act from the foot-dragging efforts of a delinquent agency.

If the Secretary s excused from publishing a proposed regulation to implement a petitioned action within 12 months after receiving the petition, the Secretary must continue to consider the petition and shall publish the proposed regulation as soon as possible. For the purposes of the 12-month deadline referred to above, a petition for which implementing action is delayed shall be deemed to have been resubmitted and received on the date that notice of such delay is published. It will not be necessary for the Secretary to make and publish another finding whether the petition presents substantial information. The Secretary must, within twelve months, make one of the findings required to be made pursuant to section 4(b)(3), as amended, at the end of the initial twelve month period. Specifically, he must (a) publish a proposed regulation to implement the petitioned action, or (b) make a finding that the petitioned action is not warranted, or (c) make a new finding that he is unable to propose such action at that time or to make a final determination within the statutorily specified time frame and evidence that he is continuing to make progress in the process of listing and delisting other species.

Petitions to revise critical habitat designations may be treated differently. As with petitions to revise the lists of endangered and threatened species, the Secretary shall, to the maximum extent practicable, within 90 days after receiving the petition, make, and promptly publish, a finding whether the petition presents substantial information indicating that the petitioned action may be warranted. Petitioners are not required to present economic information relevant to the proposed revision. If such substantial information is found to be present, the Secretary shall, within 12 months after receiving the petition, determine, and promptly publish a notice indicating, how he intends to proceed with respect to the petitioned action.

New section 4(b)(5) sets forth the procedures that shall be used to promulgate regulations concerning determinations of any species' status as endangered or threatened and designations or revisions of critical habitat. The Secretary is required to allow the public a minimum 60-day comment period on a proposed regulation and an opportunity to request, within 45 days after the date of the general notice of proposed rulemaking, a public hearing on the action. If one or more requests are made in a timely manner, the Secretary must promptly conduct a public hearing on the proposed action. A single hearing may satisfy multiple requests although the Secretary is not precluded from having more than one hearing if, in his judgment, circumstances so require.

The requirement that a summary of the proposed regulation be published in at least one newspaper of general circulation in each area in which the species is believed to occur is limited to areas and newspapers within the United States.

As part of the public comment process, the Secretary is required to provide to the state agency responsible for the conservation of fish or wildlife or plants in each state in which the species is believed to occur, and to the chief officer of each county or equivalent jurisidiction in which the species is believed to occur, actual notice of a proposed regulation concerning the listing or delisting of such species or the designation or revision of critical habitat.

To ensure that proposals, whether developed initially by the Secretary or by petition, are acted upon quickly, the Committee adopted a provision, new section 4(b)(6)(A), to shorten the allowable time for final action on section 4 proposals to list or delist a species from 2 years to one year from date of proposal. The one-year period after proposal within which the Secretary must make a final determination is also applicable to revisions of critical habitat and may, under limited circumstances, be extended to eighteen months. New section 4(b)(6)(B) provides that such extension is permissible only if the Secretary finds that there is substantial disagreement among specialists regarding the sufficiency or accuracy of the information received concerning the determination or revision. This extension shall apply only in those instances where the biological information is being questioned by scientists knowledgeable about the species. Extensions to allow additional time to conduct the economic or other analyses relating to the designation of critical habitat are not permissible.

Within such one-year period (or 18 month period, if an extension occurs), the Secretary must make a final determination with respect to proposals to list or delist a species or to revise critical habitat. He must determine, on the basis of the information then available, either that the species should be listed or delisted, or that the proposal for listing or delisting should not be promulgated as a final regulation. A similar determination must be made with respect to proposals to revise critical habitat designations.

If the Secretary determines that a final regulation is not warranted because of insufficient information to promulgate the proposed action, the proposal shall be withdrawn. A determination to withdraw a proposal shall be subject to judicial review to determine whether the Secretary's decision was arbitrary or capricious in light of the information available concerning the proposed action. If the Secretary determines that a final regulation is warranted, he must promptly publish the final regulation.

Section 4, as amended, requires that the Secretary make various findings within specified periods of time. Such mandatory findings are usually to be followed by "prompt" publication of such findings, a proposed regulation, or a final regulation. Unless explicitly qualified, the time periods set forth in section 4, as amended, must be strictly adhered to by the Secretary. The requirement that certain findings be followed by "prompt" publication in the Federal Register does not authorize the Secretary to delay decisions or actions. Use of the word "prompt" is intended to account for the fact that the exact timing of Federal Register notices are not within the control of the Secretary.

New section 4(a)(3) provides that the Secretary must, to the maximum extent prudent and determinable, designate critical habitat at the time a species is listed. If a critical habitat designation accompanies the listing, or if the Secretary determines that the designation of critical habitat would not be prudent, the listing may be made final, in accordance with new section 4(b)(5), at any time within the one-year period (or 18 month period) provided for in new section 4(b)(6). New section 4(b)(6)(c) restates the general requirement of concurrent listing and designation but authorizes the Secretary to make a listing proposal final without the concurrent designation of critical habitat in limited circumstances.

The first such circumstance is when the designation of critical habitat would not be prudent because the designation would identify the location of the species. The second is where the scientific and commercial information indicates that it is essential for the

conservation of the species that it be promptly listed but the analysis necessary to determine and designate critical habitat has not been completed. When such a situation occurs *within* the one-year period, the Secretary may make the listing proposal final without designating critical habitat. Although the Secretary must justify listing a species without designating critical habitat, findings such as those required by new section 4(b)(7) regarding emergencies posing significant risks to the well-being of species are not required.

The third circumstance addressed in new section 4(b)(6)(C), is similar to the second. If at the end of the one-year period (or 18 month period) provided for in new section 4(b)(6) the scientific and commercial information indicates that the species should be listed but the analysis necessary to determine and designate critical habitat has been completed, the Secretary must comply with the new section 4(b)(6) time requirement and promulgate the proposal to list as a final regulation.

If critical habitat is not designated at the same time that a listing is made final because the Secretary deems that such habitat is not then determinable, the Secretary may extend the one-year period provided for in new section 4(b)(6)(A) by not more than one year. At the end of that second year, however, or sooner if possible, the Secretary must designate to the maximum extent prudent, on the basis of such data as may be available at that time, critical habitat of such species. As new information becomes available, revisions of critical habitat designations may be made by regulation.

New section 4(b)(7) restates the existing emergency regulation provision with a minor modification to clarify that emergency designations of critical habitat are also authorized.

Section 2(a)(3) of the Conference substitute adopts several technical and conforming amendments.

Section 2(a)(4) of the Conference substitute adopts several technical and conforming amendments as well as provisions appearing in the House bill and the Senate amendment.

Paragraph (D) of section 2(a)(4) modifies and adopts a provision appearing in the House bill which would have required the Secretary to give priority in the preparation of recovery plans to those species that are, or may be, in conflict with construction or other development projects. This requirement is designed to ensure that such conflicts, or potential conflicts, will receive priority attention from the Secretary so as to limit the occasions upon which major problems under Section 7 of the Act may arise. The conferees modified this provision to ensure that this requirement will not divert attention from critically endangered species that benefit from recovery plans but are not threatened with conflicts with human activity.

Paragraph (E)(ii) of section 2(a)(4) amends section (4)(h) of the Act to clarify that the mandate to prepare and publish agency guidelines establishing a ranking system for identifying species that should receive priority review, applies for listings and delistings.

Paragraph (F) of section 2(a)(4) modifies and adopts a provision appearing in the Senate amendment. As modified, written justification for the Secretary's failure to adopt regulations consistent with a state agency's comments or petitions must be submitted to the state agency. The term "state agency" is defined in section 3(18) of the Act.

Section 2(b) of the Conference substitute contains provisions regarding the transitional effect of the amendments made by section 2 of the Conference substitute to section 4 of the Act.

Paragraph (1) of section 2(b) provides that all pending petitions and proposals to revise either of the lists published under section 4(c) of the Act or to designate or revise designations of critical habitat shall be treated as having been filed or proposed on the date of enactment of the Conference substitute. The procedural requirements that are set forth in Section 4(b) as amended by the Conference substitute shall be deemed to be complied with to the extent that similiar requirements set forth in section 4 of the Act were complied with before the date of enactment of the Conference substitute. All such petitions and proposals shall be subject to the standards and the mandatory, judicially enforceable time periods contained in the Conference substitute.

Section 3. Cooperation with the States

This section follows the analogous provisions of both the House bill and the Senate amendment to increase the maximum share of grants to States from 66⅔ percent to 75 percent for single state projects and from 75 percent to 90 percent for multi-state projects.

Section 4. Interagency cooperation and the exemption process

Section 4 of the Conference substitute makes several amendments to the consultation and exemption provisions of Section 7 of the Act.

Section 4(a)(1) of the Conference substitute adopts the House amendment to Section 7(a) of the Act to authorize the Secretary to consult on any project requiring a permit prior to the applicant filing for such permit. However, where the House bill provided for direct consultation between the Secretary and the permit applicant, the Committee agreed to an amendment requiring that the consultation be between the Secretary and the Federal agency that issues the permit. This consultation will be initiated at the request of the permit applicant and it is the clear intention of the Committee that the applicant should be involved in every aspect of the consultation process. Restricting the actual consultation to the Secretary and the Federal agencies involved is appropriate in light of the fact that it is the Federal agency which issues the permit and which, under the provisions of section 7(a)(2) of the Act, must ensure that the issuance of the permit does not jeopardize the continued existence of an endangered or a threatened species or adversely modify its critical habitat. This early consultation is, however, subject to such guidelines as the Secretary may establish. In these guidelines, the Secretary should define the types of activities eligible for early consultation. The Secretary should exclude from such early consultation those actions which are remote or speculative in nature and include only those actions which the applicant can demonstrate are likely to occur. The guidelines should require the prospective applicant to provide sufficient information describing the project, its location, and the scope of activities associated with it to enable the Secretary and the Federal agency to carry out a meaningful consultation.

New section 7(b)(3)(B) provides that a biological opinion issued by the Secretary following an early consultation undertaken pursuant to section 7(a)(3), as amended, is to be treated as an opinion issued pursuant to section 7(a)(2), as amended, if the Secretary reviews the action before the permit is issued and finds that there have been no significant changes with respect to both the activity planned and the information used during the initial consultation.

Section 7(b) of the Act is also amended to provide that promptly after the conclusion of consultation, whether it is a consultation provided for under section 7(a)(2), as amended, with a Federal agency or an early consultation provided for in section (7)(3), as amended, the Secretary shall provide the Federal agency and the applicant, if any, a written statement detailing whether the proposed action will jeopardize the continued existence of the endangered or threatened species involved or result in the destruction or adverse modification of the species' critical habitat.

Both the House bill and the Senate amendment amend section 7(b)(1) of the Act to limit the period for which section 7(a)(2) consultation involving Federally permitted actions can be extended. The Committee adopted the Senate timetable, which authorizes the Secretary and the Federal agency to agree to one extension of up to 60 days without the agreement of the permit applicant. The only condition for such an extension is that the Secretary, before the close of the original 90 day period, must submit to the applicant a written statement that specifies the reasons why a longer period is needed, what additional information is needed to complete consultation and the estimated date on which the biological opinion will be rendered. Extensions of the consultation period for longer than 60 days beyond the original 90 day period require the consent of the permit applicant. If the initial extension will be for more than 60 days, the Secretary must obtain the applicant's consent before the close of the original 90 days. If, during an initial extension, it becomes clear that a second extension is needed, the Secretary must obtain the applicant's consent before the close of the initial extension period.

These limitations on the consultation period will only apply to consultations undertaken pursuant to section 7(a)(2), as amended. Consultations initiated at the instigation of a prospective permit applicant pursuant to section 7(a)(3), as amended, are to be concluded within such period as is mutually agreeable to the Secretary, the Federal agency and the applicant concerned.

Under the existing provisions of the Act, Federal agencies that receive favorable biological opinions which conclude that the agency action would not violate section 7(a)(2) remain subject to the section 9 prohibition against taking individual specimens of endangered or threatened species of fish or wildlife. Should a taking occur, therefore, the offending party may be subjected to citizen suits or civil or criminal penalties for violating section 9 of the Act. The House bill and the Senate amendment contained similar language to address this problem. New section 7(b)(4) and section 7(o), as amended, adopt the House provisions.

Section 4(a)(3) of the Conference substitute adopts the House amendment to section 7(c) of the Act which provides that the 180-day period allowed for biological assessments may not be extended unless the Secretary provides the permit or license applicant, if any, with a written statement of the

reason for the extension and the length of the extension.

Section 4(a)(4) of the Conference substitute adopts the Senate amendment to section 7(e)(10) to delete the requirement that representatives of members of the Endangered Species Committee be Presidential appointees subject to Senate confirmation.

Both the House bill and the Senate amendment streamline the exemption process. Sections 4(a)(5) and (6) of the Conference substitute reflect this basic consensus and contain a series of provisions to resolve the areas where inconsistencies existed.

Whereas the House bill allowed permit applicants access to the exemption process when the permitting agency informed them they were likely to be denied a permit for reasons related to endangered species, the Senate amendment required final action on the permit before an application for an exemption would be ripe for review. The Committee resolved this issue by authorizing permit applicants to enter the exemption process only after being denied a permit. However, the permit applicant need not exhaust his administrative remedies prior to applying for an exemption, but is eligible to seek an exemption after receipt of a permit denial that is subject to administrative review, whether or not it is subject to judicial review. If the project concerned requires several Federal permits, the denial of one permit primarily because of the application of section 7(a) of the Act qualifies the applicant to enter into the exemption process. Projects which are not denied permits primarily because of the application of section 7(a) of the Act may not be considered for an exemption. Persons denied permits may seek administrative review of the denial prior to applying for an exemption if they so choose. However, an applicant denied a permit may not seek administrative review and begin the exemption process simultaneously.

Sections 4(a)(5) and (6) of the Conference substitute provide that the Secretarial report to the Endangered Species Committee will be prepared by the Secretary that issued the biological opinion. The Secretarial report is to be prepared in consultation with the members of the Endangered Species Committee. However, to ensure that the reports will be nonbiased and that proponents and opponents of the exemption have the opportunity to present their views, new section 7(a)(6) requires that a formal adjudicatory hearing be held. It should be noted that this hearing must be conducted by an administrative law judge within the time frame allocated for preparation of the report. This requirement in no way alters the responsibilities of the Secretary in preparing the report. The formal hearing, presided over by an administrative law judge, will provide the record on which the report is to be based. It is not intended to interject the administrative law judge into the report writing process. Endangered Species Committee decisions shall be based on the report of the Secretary, the record of the hearing, and such other testimony or evidence as the Endangered Species Committee may receive.

Sections 4(a)(5) and (6) of the Conference substitute adopt a compromise time frame which provides that the initial findings set forth in section 7(g)(3), as amended, are to be made by the appropriate Secretary within 20 days of receiving the application; the report completed within 140 days after the Secretary makes the initial findings or within such time as is mutually agreeable to the Secretary and the exemption applicant; and the final decision made within 30 days after receipt of the Secretarial report.

The Conference substitute adopts provisions of the Senate amendment which deleted the requirement that the Secretary make a threshold finding that an irresolvable conflict exists before proceeding through the exemption process. This requirement was deleted because all conflicts are "resolvable" whether by accommodation, exemption or otherwise. The other threshold requirements of good faith consultation, completion of the biological assessment and no irretrievable or irreversible commitment of resources by the applicant would continue to apply. However, because of the often complex nature of the finding regarding the commitment of resources and the short time frame allocated to making the initial findings, the Committee agreed to language requiring the Secretary to make this finding only if it is determinable in the time period provided for making the decision. In the event it is not so determinable, the issue of commitment of resources shall be included in the Secretarial report and the Endangered Species Committee must determine, prior to granting an exemption, whether there has been any such commitment of resources.

Section 5. Convention implementation

Section 5 of the Conference substitute adopts provisions of the House bill amending Section 8A of the Act. Section 5 adds a new paragraph to Section 8A of the Act to overrule the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Defenders of Wildlife, Inc.* v. *Endangered Species Scientific Authority*, 659 F. 2d 168 (D.C. Cir. 1981); amends Section 8A(d) of the Act to abolish the International Convention Advisory Commission; provides that if the United States votes against including any species in Appendix I or Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flura, and if the United States elects not to enter a reservation pursuant to Article XV of the Convention with respect to that species, the Secretary shall, within 90 days after the last day on which the reservation could be entered, submit to the Congress a written report specifying the reasons why a reservation was not entered; and amends Section 8A(e) of the Act to implement the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere.

With respect to new Section 8A(c)(2), if population estimates are available for a particular species, such information shall be considered with other data in making export decisions.

Section 6. Experimental populations and other exemptions

Section 6 of the Conference substitute amends section 10 of the Act. Sections 6(1) and (2) give the Secretary more flexibility in regulating the incidental taking of endangered species. Sections 6(2) and (4) adopt provisions of the House bill to continue, subject to certain important qualifications, the exemption from trade restrictions for certain finished scrimshaw products; to refine the definition of "scrimshaw product" found in section 10(f)(1)(B) of the Act; and to amend the antique articles exemption contained in section 10(h) of the Act. Section 6(5) adopts a provision of the Senate amendment concerning noncommercial transshipments of fish or wildlife. Section 6(6) adopts provisions appearing in both the House bill and the Senate amendment to give greater flexibility to the Secretary in the treatment of experimental populations.

Sections 6(1) and (2) adopt, with amendments, a provision appearing in the House bill to give the Secretary more flexibility in regulating the incidental taking of endangered and threatened species. This provision establishes a procedure whereby those persons whose actions may affect endangered or threatened species may receive permits for the incidental taking of such species, provided the action will not jeopardize the continued existence of the species. This provision addresses the concerns of private landowners who are faced with having otherwise lawful actions not requiring Federal permits prevented by section 9 prohibitions against taking.

As amended, section 10(a) of the Act will authorize the Secretary to permit any taking otherwise prohibited by section 9(a)(1)(B) of the Act if the taking is incidental to, and not the purpose of, an otherwise lawful activity. An applicant for such a permit must submit to the Secretary a conservation plan that specifies the impacts which will likely result from such taking, what steps the applicant will take to minimize and mitigate those impacts, what other alternatives that would not result in the takings were analyzed, and why those alternatives were not adopted. The Secretary will base his determination as to whether or not to grant the permit, in part, by using the same standard as found in section 7(a)(2) of the Act, as defined by Interior Department regulations, that is, whether the taking will appreciably reduce the likelihood of the survival and recovery of the species in the wild. Use of the regulatory language adopted by the Secretary of the Interior to implement section 7(a)(2) rather than the language of the provision itself eliminates the implication that other permits issued under section 10 do not require consultation and biological opinions issued pursuant to section 7. To issue the permit, the Secretary would also have to find that the taking would be incidental, that the applicant will minimize and mitigate the impacts of the taking, and that the applicant will ensure that there will be adequate funding for the conservation plan.

As with all section 10 permits, the legislation provides that the Secretary shall prescribe terms and conditions to ensure that appropriate measures are taken by the applicant and shall revoke the permit if the permittee is not complying with those terms and conditions. Because this provision contains its own exlicit and detailed standards for the issuance of permits, it is exempted from the general permit conditions specified in section 10(d) of the Act.

Although the conservation plan is keyed to the permit provisions of the Act which only apply to listed species, the Committee intends that conservation plans may address both listed and unlisted species.

In enacting the Endangered Species Act, Congress recognized that individual species should not be viewed in isolation, but must be viewed in terms of their relationship to the ecosystem of which they form a constitutent element. Although the regulatory mechanisms of the Act focus on species that are formally listed as endangered or threatened, the purposes and policies of the Act are far broader than simply providing for the conservation of individual species or individual members of listed species. This is consistent with the purposes of several other fish and wildlife statutes (e.g. Fish

and Wildlife Act of 1956, Fish and Wildlife Coordination Act) which are intended to authorize the Secretary to cooperate with the states and private entities on matters regarding conservation of all fish and wildlife resources of this nation. The conservation plan will implement the broader purposes of all of those statutes and allow unlisted species to be addressed in the plan.

The Committee intends that the Secretary may utilize this provision to approve conservation plans which provide long-term commitments regarding the conservation of listed as well as unlisted species and long-term assurances to the proponent of the conservation plan that the terms of the plan will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan. In the event that an unlisted species addressed in an approved conservation plan is subsequently listed pursuant to the Act, no further mitigation requirements should be imposed if the conservation plan addressed the conservation of the species and its habitat as if the species were listed pursuant to the Act.

To the maximum extent possible, the Secretary should utilize this authority under this provision to encourage creative partnerships between the public and private sectors and among governmental agencies in the interest of species and habitat conservation.

A comprehesive conservation plan prepared pursuant to section 10(a) would be developed jointly between the appropriate Federal wildlife agency and the private sector or local or state governmental agencies. This provision is modeled after a habitat conservation plan that has been developed by three Northern California cities, the County of San Mateo, and private landowners and developers to provide for the conservation of the habitat of three endangered species and other unlisted species of concern within the San Bruno Mountain area of San Mateo County.

This provision will measurably reduce conflicts under the Act and will provide the institutional framework to permit cooperation between the public and private sectors in the interest of endangered species and habitat conservation.

The terms of this provision require a unique partnership between the public and private sectors in the interest of species and habitat conservation. However, it is recognized that significant development projects often take many years to complete and permit applicants may need long-term permits. In this situation, and in order to provide sufficient incentives for the private sector to participate in the development of such long-term conservation plans, plans which may involve the expenditure of hundreds of thousands if not millions of dollars, adequate assurances must be made to the financial and development communities that a section 10(a) permit can be made available for the life of the project. Thus, the Secretary should have the descretion to issue section 10(a) permits that run for periods significantly longer than are commonly provided for under current administration practices. In this regard the Committee notes that the existing permit regulations of the Department of the Interior contained in 50 CFR, Parts 13 and 17, do not establish a limit on the acceptable duration of section 10(a) permits. No particular time limit should be implied.

The Secretary is vested with broad discretion in carrying out the conservation plan provision to determine the appropriate length of any section 10(a) permit issued pursuant to this provision in light of all of the facts and circumstances of each individual case. Permits of 30 or more years duration may be appropriate in order to provide adequate assurances to the private sector to commit to long-term funding for conservation activities or long-term commitments to restrictions on the use of land. It is recognized that in issuing such permits, the Secretary will, by necessity, consider the possible positive and negative effects associated with permits of such duration.

The Secretary, in determining whether to issue a long-term permit to carry out a conservation plan should consider the extent to which the conservation plan is likely to enhance the habitat of the listed species or increase the long-term survivability of the species or its ecosystem.

It is also recognized that circumstances and information may change over time and that the original plan might need to be revised. To address this situation the Committee expects that any plan approved for a long-term permit will contain a procedure by which the parties will deal with unforseen circumstances.

Because the San Bruno Mountain plan is the model for this long term permit and because the adequacy of similar conservation plans should be measured against the San Bruno plan, the Committee believes that the elements of this plan should be clearly understood. Large portions of the habitat on San Bruno Mountain are privately owned. Prior to the discovery of two species of endangered butterflies, the landowner planned to develop much of its land. The butterflies face threats to their existence, however, even in the absence of any development. The primary threats to the species consist of insufficient regulation of recreational activities and encroachment on the species' habitat by brush and exotic species.

Prior to developing the conservation plan, the County of San Mateo conducted an independent exhaustive biological study which determined the location of the butterflies, and the location of their food plants. The biological study also developed substantial information regarding the habit and life cycles of the butterflies and other species of concern. The biological study was conducted over a two year period and at one point involved 50 field personnel.

The San Bruno Mountain Conservation Plan is based on this extensive biological study. The basic elements of the plan are the following:

1. The Conservation Plan addresses the habitat throughout the area and preserves sufficient habitat to allow for enhancement of the survival of the species. The plan protects in perpetuity at least 87 percent of the habitat of the listed butterflies;

2. The establishment of a funding program which will provide permanent ongoing funding for important habitat management and enhancement activities. Funding is to be provided through direct interim payments from landowners and developers and through permanent assessments on development units within the area;

3. The establishment of a permanent institutional structure to insure uniform protection and conservation of the habitat throughout the area despite the division of the habitat by the overlapping jurisdiction of various governmental agencies and the complex pattern of private and public ownership of the habitat; and

4. A formal agreement between the parties to the plan which ensures that all elements of the plan will be implemented.

Section 6(5) adopts a provision of the Senate amendment concerning noncommercial transshipments of fish or wildlife. Section 11 of the Act authorizes the seizure and forfeiture of any fish or wildlife or plant that has been imported in violation of the law. As noted in a Fish and Wildlife Service Law Enforcement Memorandum dated April 30, 1982, however, discretion must be applied to avoid unnecessarily harsh forfeiture actions in certain noncommercial importation violations. Seizure for the purpose of seeking forfeiture will not always be appropriate where the conduct providing the grounds for seizure and forfeiture involves a noncommercial importation violation which is also non-culpable, that is, where there is no indication of fraud, negligence, or intent to violate the law.

Game trophies in transit through the United States were specifically addressed in the above-referenced memorandum. It was properly noted that noncommercial shipments of endangered species in transit through the United States should not be seized where such shipments were lawfully exported from the country of origin and of re-export, may be lawfully imported into the country of destination, and the exporter (or owner) gave explicit instructions not to ship through the United States or did all that could have reasonably been done to prevent transshipment and the circumstances leading to the property's transshipment were beyond the exporter's (or owner's) control. This exception, however, does not authorize the importation for the purpose of processing wildlife products or mounting of trophies in the United States and subsequent exportation without proper permits.

Section 6(5) codifies the above-stated policy. Civil and criminal penalties as well as forfeiture will be affected. However, the burden of proof will be on the person claiming the applicability of this exception. The Government will not have to offer proof that the numerous elements of this affirmative defense have not been satisfied.

Because it is impossible to differentiate commercial from noncommercial shipments without inspection, the amendment will maintain the ability of the Fish and Wildlife, National Marine Fisheries, and Customs Services to inspect all shipments of fish or wildlife. The exception created by this amendment is a narrow one. Among the conditions that must be satisfied is a requirement that the importation be accidental. The United States must not become a free port for endangered species. The amendment does not authorize the shipment of wildlife into the United States for storage in a warehouse under customs control until a foreign recipient can be located and reexport can occur.

Section 6(6) adopts provisions appearing in both the House bill and the Senate amendment. This section gives greater flexibility to the Secretary in the treatment of populations of endangered or threatened species that are introduced into areas outside their current range.

Section 6(6) adds a new subsection (j) to section 10 of the Act. Paragraph (1) of new section 10(j) defines the term "experimental population." To qualify for the special treatment afforded experimental populations, a population must have been authorized by the Secretary for release outside the current range of the species. Populations resulting from releases not authorized by the Secretary are not considered "experimental

populations" entitled to the special provisions of this subsection.

To protect natural populations and to avoid potentially complicated problems of law enforcement, the definition is limited to those introduced populations that are wholly separate geographically from nonexperimental populations of the same species. If an introduced population overlaps with natural populations of the same species during a portion of the year, but is wholly separate at other times, the introduced population is to be treated as an experimental population at such times as it is wholly separate. Such a population shall be treated as experimental only when the times of geographic separation are reasonably predictable and not when total separation occurs as a result of random and unpredictable events.

Under paragraph (2) of new section 10(j) the Secretary may authorize the release of populations of endangered or threatened species outside their current range if he determines by regulation that doing so will further the conservation of the species. Before authorizing the release of an experimental population, the Secretary must also determine by regulation whether the population is essential to the continued existence of an endangered or threatened species. In making the determination, the Secretary shall consider whether the loss of the experimental population would be likely to appreciably reduce the likelihood of survival of that species in the wild. If the Secretary determines that it would, the population will be considered essential to the continued existence of the species. The level of reduction necessary to constitute "essentiality" is expected to vary among listed species and, in most cases, experimental populations will not be essential.

The purpose of requiring the Secretary to proceed by regulation, apart from ensuring that he will receive the benefit of public comment on such determinations, is to provide a vehicle for the development of special regulations for each experimental population that will address the particular needs of that population. Among the regulations that must be promulgated are regulations to provide for the identification of experimental populations. Such regulations may identify a population on the basis of location, migration pattern, or any other criteria that would provide notice as to which populations of endangered or threatened species are experimental.

The Secretary, acting through the Fish and Wildlife Service of the National Marine Fisheries Service, as appropriate, may avoid the need for step-by-step review and promulgation of specific regulations concerning Federal actions by entering into written agreements or memoranda of understanding with other Federal land managing agencies to develop long-term programs for the conservation of experimental populations.

Paragraph (3) of new section 10(j) clarifies that any population now in existence which may meet the definition of an experimental population shall be treated as such only when determined by regulation. Thus, until such time as the Secretary makes an affirmative determination that a particular population is an experimental population, it shall remain subject to the same protections as any other population of the same species.

All experimental populations, once determined to be such, are to be treated as though they have already been separately listed as threatened species. This provision obliges the Secretary to issue such regulations as he deems necessary and advisable to provide for the conservation of the experimental populations, just as he now does under section 4(d) of the Act for any threatened species.

The Conference substitute restricts the application of section 7 of the Act as it pertains to experimental populations. As noted above, whenever the Secretary determines that a particular population, whether it is already established or proposed to be established, is an experimental population, he is also to determine, as part of the same rulemaking, whether the population is essential to the continued existence of the species. If he determines that it is, then the experimental population remains subject to the full protection of section 7 of the Act. If he determines that it is not, then solely for the purposes of section 7 of the Act the population is subject only to those protections of section 7(a)(1) of the Act and those of section 7 of the Act that apply to species proposed to be listed as an endangered or threatened species. Critical habitat may not be designated for such nonessential populations. However, any experimental population that is found on any unit of the National Wildlife Refuge System or the National Park System remains subject to the full protection of Section 7 of the Act.

Section 7. Enforcement

Section 7 of the Conference substitute adopts provisions of the Senate amendment amending Section 11 of the Act. Section 7 explicitly provides to the Attorney General the authority to seek injunctive relief. Section 7 also amends the citizen suit provision of the Act to authorize actions against the Secretary for failure to perform the acts and duties that are imposed by Section 4, as amended.

Section 8. Authorization

Section 8 of the Conference substitute adopts provisions appearing in both the House bill and the Senate amendment. Section 8 adopts the authorization levels and duration recommended by both the House and the Senate. A separate authorization for implementation of the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere is also adopted. The authorization provisions appearing in Sections 6, 7 and 15 of the Act are consolidated and will now appear in Section 15, as amended.

Section 9. Miscellaneous

Section 9 of the Conference substitute adopts provisions of the Senate amendment. Section 9 adds a new paragraph to subsection 2(c) of the Act, the statement of Congressional policy; amends Section 9 of the Act by adding a provision to prohibit the removal and reduction to possession of any endangered plant that is on Federal land; resolves a conflict between two Federal circuit court opinions regarding the applicability of the prohibitions of Section 9 of the Act to pre-Act wildlife held in the course of a commercial activity after December 28, 1973; and clarifies the scope of the Section 9(b)(2) exception to the prohibition contained in Section 9 of the Act.

WALTER B. JONES,
JOHN BREAUX,
GERRY E. STUDDS,
DAVID R. BOWEN,
GENE SNYDER,
EDWIN B. FORSYTHE,
DAVE EMERY,

Solely for consideration of section 4 of the House bill and modification committed to conference:

DON BONKER,
JIM LEACH,
Managers on the Part of the House.

ROBERT T. STAFFORD,
JOHN H. CHAFEE,
SLADE GORTON,
JENNINGS RANDOLPH,
GEORGE J. MITCHELL,
Managers on the Part of the Senate.