SENATE—*Tuesday, September 10, 1985*

(Legislative day of Monday, September 9, 1985)

The Senate met at 2 p.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:

Let us pray.

God of truth and justice, in these perilous days the Nation's welfare deserves the total dedication of its public servants to selfless and, if necessary, sacrificial service. We are the United States and we desperately need leadership that is united in purpose and in action. Grant to all leadership—legislative, executive, and judicial—the will to unity. We do not pray for uniformity, Lord, for we know that unity in its essence is diverse. We rejoice in the diversity which has and must characterize our unitedness. But, dear God, deliver us from attitude and action which polarize, fragmentize and destroy. God of our fathers, protect the unity which is the foundation of our greatness, our strength, our influence nationally. In His name whose mission was to unite all things. Amen.

RECOGNITION OF THE MAJORITY LEADER

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

RESERVATION OF LEADERSHIP TIME

Mr. DOLE. Mr. President, I reserve my time under the standing order and also the time of the distinguished minority leader.

SCHEDULE

Mr. DOLE. Mr. President, there will be special orders in favor of Senators COHEN, MATTINGLY, SYMMS, and PROXMIRE not to exceed 15 minutes each, then routine morning business not to extend beyond 3:30. Then we will turn to Senate Joint Resolution 31. I thought we completed Senate Joint Resolution 31 yesterday, "National Family Week."

The PRESIDING OFFICER (Mr. PRESSLER). It is the pending business.

Mr. DOLE. It is the pending business. Following disposition of National Family Week, we will turn to S. 47, the school prayer bill, and rollcall votes can be expected later in the day.

RECOGNITION OF SENATOR COHEN

The PRESIDING OFFICER. Under the previous order, the Senator from Maine [Mr. COHEN] is recognized for 15 minutes.

U.S. TRADE POLICY

THE U.S. SHOE INDUSTRY

Mr. COHEN. Mr. President, less than 2 weeks ago, the President confirmed my belief that this administration has no coherent international trade policy. With his decision to ignore the recommendation of the International Trade Commission to provide import relief to the American shoe industry, the President has written off yet another U.S. industry crippled by foreign imports.

In the face of footwear imports rising to nearly 80 percent of the U.S. market, 21 percent unemployment in the footwear industry, over 125 plant closings in the past year and a half, and a unanimous injury finding by the bipartisan ITC, the President turned his back on the remaining 100,000 American shoeworkers and told them he just does not care enough to help.

As my colleagues know, there exists a mechanism for the objective hearing of an industry's trade grievances and the means to provide assistance to that industry when it can prove that it has been injured by imports. Section 201 of the Trade Act was designed by the Congress to address precisely the crisis faced by the U.S. shoe industry. The President's decision on August 28 has clearly made a mockery of this entire process.

Frankly, the domestic shoe industry could have bypassed the established trade procedure. They could have come directly to Congress, but instead they were encouraged to follow the law, follow the procedure that Congress has set up for industries such as shoes, textiles, or any other industry. They spent hundreds of thousands of dollars pursuing this course of action only to have the President say, "the facts do not matter." I wish he had spoken earlier saying, "Save your money, save your time, because we don't intend to grant relief under any circumstances."

If section 201 of the Trade Act is not a remedy for shoes, where there is almost 78 percent market penetration, then it cannot help any other industry in this country. What we have to recognize is that the administration has said, for all practical purposes, "Don't bother bringing any more 201 actions because even if injury is found, even if the ITC proposes a remedy, you will get no relief from us."

From an ITC which only last year determined that this industry had suffered no injury from imports came a unanimous finding this year that serious injury had occurred. From that same Commission came a majority recommendation for temporary import quotas as the only effective remedy which would allow this industry to recapitalize and modernize, and again become competitive in the world marketplace. Yet the President cast aside the recommendations of his trade policy experts and told the shoe industry that the facts of the case do not matter, and that the industry has wasted its time and money.

In announcing his decision to abandon the American footwear industry, the President directed the Secretary of Labor to work with the affected shoe producing States in developing retraining programs for the thousands of shoe workers whose livelihoods have been shattered by imports.

The cruelest irony, Mr. President, is that this same administration, which has told American workers to sacrifice their jobs at the altar of free trade, has also actively sought the elimination of the very retraining programs it is now promoting.

I say to the President, you cannot have it both ways. Either use your existing authority to combat unfair trading practices and massive import surges which threaten the very existence of our basic industries, or support the programs designed to ease this painful transition.

Mr. President, I come before this body today with a number of my colleagues to tell the President and the American people that there are many in Congress who do care and are prepared to take the necessary actions to insure that a coherent American trade policy is developed for the United States. Absent any substantive action by the President, we in the Congress will step into this void created by the President's inaction and develop a responsible international trade policy which does not sacrifice the jobs of our workers in favor of an abstruse devotion to a trade dogma which ignores the reality of our world trading system. It is a sad commentary on America, Mr. President, when our greatest export is American jobs.

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

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

As we in the Congress begin the trade debate, I will be meeting with Senator RUDMAN, who wishes to be associated with my remarks, Senator MITCHELL, Senator DANFORTH, Senator KASTEN, and other members of the Senate footwear caucus to seek to enact legislatively what the administration refused to do under our existing trade relief laws. I had hoped that this would not be necessary. Nevertheless, we have reached an impasse, and I am committed to bringing substantive relief to the American footwear industry.

There was an interesting item in today's Washington Post in reference to some of the complaints being leveled against unfair trade practices by Japan. Japanese officials, for example, have a method of taxing foreign cigarettes based on the sum of their cost plus the average 20-percent tariff paid upon entering Japan. This constitutes a tax on a tax. In responding to this charge, the Japanese officials said:

The tax-on-a-tax system is deeply rooted in the Japanese legal and financial system. It wasn't created as a trade impediment. We need the revenue.

Another item in this particular story concerns Japan's highly protective trade barriers to leather goods coming from the United States. The Japanese argue that their leather industry, like much of their agricultural sector, qualifies for protection because it is composed of large numbers of small, inefficient businesses that could never compete with the United States and other foreign providers.

So here we have a major trading partner, with which we have a trade deficit approaching $50 billion this year, continuing to erect trade barriers. The Japanese justify these trade barriers as necessary to protect their small, inefficient businesses from competition. I would like to know where the administration has been for the last 4 years. We have lost 100,000 jobs in the footwear industry during this past decade. Last year, we saw over 100 plants close, throwing thousands upon thousands of American workers out of their jobs, and suddenly the administration says, "Well, maybe it is time to do something. Now we have to get tough on our trading partners." Mr. President, it comes very late and is awfully little.

Mr. President, I ask unanimous consent to have printed in the RECORD an article published in today's Washington Post.

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

[From the Washington Post, Sept. 10, 1985]

REAGAN TRADE DEMANDS SEEN TESTING JAPAN

(By John Burgess)

TOKYO, September 9.—Politics and Japanese tax law will make it extremely difficult for Japan to meet demands voiced by President Reagan this weekend for reforms in its market for cigarettes and leather, Japanese officials said today.

But the officials suggested that Reagan's call might turn out to be positive news if it helps reduce pressure in Congress for far-reaching legislation to cut Japan's mounting trade surplus by hindering its exports to the United States.

On Saturday, Reagan announced he had decided to implement "countermeasures" against Japan, the European Community, South Korea and Brazil if they did not stop "unfair trade practices" in a variety of product lines.

Japanese officials expressed surprise at the categories Reagan specified in Japan's case: cigarettes, leather and leather shoes. They have been the subject of negotiations between Washington and Tokyo for years.

In the Japanese view, the market for cigarettes was almost totally liberalized on April 1, when distribution and promotion of cigarettes was thrown open to competition after decades of control by a government monopoly.

However, foreign cigarette companies, which now account for only about 2.3 percent of Japan's $10 billion-a-year market for cigarettes, contend that significant impediments remain. They argue that, in a truly free market, they could build up to about one-quarter of the sales.

In particular, they point to Japan's practice of taxing foreign cigarettes based on the sum of their cost plus the average 20 percent tariff paid upon entering Japan. This constitutes a "tax on a tax" they say and makes their products too expensive.

They complain that the former monopoly agency, now recast as a private company, retains sole rights to produce cigarettes in Japan and contend that it still has a de facto monopoly on distribution.

Japanese officials respond that the tax-on-a-tax system is deeply rooted in the Japanese legal and financial system. "It was not created as a trade impediment," a Foreign Ministry official said. "We need the revenue."

Any shift in tobacco policy comes slowly in Japan, in part because of the influence of Japan's 75,000 tobacco farmers within the ruling Liberal Democratic Party. Tobacco is Japan's second-largest cash crop, after rice.

Officials here concede, however, that leather is a highly protected market. Strict import quotas are in place. Last year, officials of the General Agreement on Tariffs and Trade ruled that quotas on leather were illegal.

Japan pledged to remove them. However, the United States has protested Japanese suggestions that the new system will be a dual-tariff schedule in which anything imported after a certain target level had been reached would be assessed tariffs at a higher rate. "It would be at least as effective a restriction," said one U.S. official here.

The Japanese argue that the leather industry, like much of the agricultural sector, qualifies for protection because it is composed of large numbers of small inefficient businesses that never could compete with U.S. and other foreign producers.

Mr. PRYOR. Mr. President, shock and outrage are the words I would use to describe my reaction to the President's failure to approve global quotas on imported footwear. The glaring absence of any meaningful White House trade policy has once again been demonstrated, this time at the expense of the Nation's footwear workers and their families.

Arkansas is 10th in producing footwear in the United States, and footwear ranks first among all manufacturing industries in 7 Arkansas counties, 5 having a population under 25,000. Arkansas shoe workers want to keep their jobs, and I intend to do everything I can to see that factory doors stay open.

Congress must act now—since the administration has shirked its responsibility—to give the footwear industry a chance to survive and prosper. The American Footwear Industry Recovery Act, of which I am an original cosponsor, accomplishes this important goal and is pending in the Senate Finance Committee. Under the bill, S. 848, quotas would be implemented for 8 years. Although I consider the substance and duration of import relief under this legislation negotiable, the absolute and substantial reduction of imported shoes is not.

Mr. President, it is a continuing mystery to me how a President who claims to advocate a day's work for a day's pay can so easily dismiss the futures of thousands of American citizens who only wish to work hard, provide for their families, and stay on the job. And what does the President do when these workers come to him asking their leader for help? He turns his back, opens every door but the one with the shoe worker behind it, and welcomes a flood of imports into our country.

Shoe workers across this country have a right to demand their government acknowledge and respond to their plight. With imaginative spirit they symbolized the despair prevalent in the industry by sending partial shoes to Members of Congress, this representing the small portion of the domestic market which remains open to American industry. Later, they sent soles of shoes with passionate pleas inscribed on them, asking us to convey to the President the need for positive action on imports. Today, empty shoe boxes, emphasizing that the President gave the footwear industry nothing in his recent decision, arrive in my office to insure that we not forget the seriousness of the situation.

Well, Congress let the President know. I have lost track of the letters I have signed to the White House asking for help, asking only for a change—and the President and his advisers ignored these requests. It is clear now that the solution to this problem is not going to come through administrative action. Real progress can result, however, if Congress taps the creative spirit of the shoe workers of America, adopts their passion and persistence, and enacts a trade law which addresses their problems.

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Mr. President, I look forward to meeting in the coming weeks with other members of the Senate footwear caucus and with representatives of the footwear industry to discuss a coordinated legislative strategy to respond to this critical situation. Let those of us in Congress who believe in a future for this proud and important American industry stand up now and act.

Mr. SASSER. Mr. President, will the distinguished Senator from Maine yield?

Mr. COHEN. I yield to the Senator from Tennessee.

Mr. SASSER. I thank the Senator from Maine for yielding.

U.S. TRADE POLICY NONEXISTENT

Mr. President, I rise today to express my shock and frustration at the insensitivity shown by the President in rejecting the advice of the International Trade Commission and refusing to grant import relief to the domestic footwear industry.

Two points emerge crystal clear from this announcement. The first is that this administration has no coherent trade policy and the second is that our trade laws are not working.

This administration is so blinded by the illusion of free trade they cannot see that they are presiding over the deindustrialization of America in the name of ideological purity. There is no such thing in today's international marketplace as free trade and it is time the administration recognizes it. Virtually every country in the world assists its domestic industries with subsidies, with currency manipulation, or with quotas.

It is time for this administration to wake up from its dreamworld of completely free and unfettered trade. There is a real world out there of tough practical choices. We simply must not be afraid to enter the real world marketplace and take steps to preserve our domestic manufacturing industries. We can enforce reasonable and effective trade laws without raising impenetrable trade barriers or evoking the specter of the disastrous Smoot-Hawley Tariff.

While the administration remains wedded to an outmoded economic theory, my constituents are losing their jobs—and this decision means more of them will lose their jobs.

The administration's action on the question of shoe imports is a signal, I think, a signal to our trading partners and trading adversaries around the world that they can continue to eat our lunch, and it is a free lunch so far as they are concerned.

I think it is a signal to my colleagues in Congress that if something is to be done to save the jobs of American workers and to save American industries and to stop the deindustrialization of this country, it will be up to us in Congress to address this problem in a reasonable and moderate fashion.

As I travel around my State, I continually see the effects of shoe imports on our citizens. Seven shoe facilities were closed in Tennessee last year. In these towns, shoe workers are already out of work or will be put out of work in the near future due to plant closings. I talked to individuals who have lost their jobs in the communities where they have lived and worked for years—and they face the future with no prospects of new jobs.

There were over 100 communities across the Nation who shared this devastating experience in the last year.

The second fact apparent from this decision is that our trade laws are simply not working. If ever an example were needed of what constitutes serious injury due to imports, the nonrubber footwear industry provides it.

Between 1968 and 1984, imports increased 233 percent. The net decline in the number of plants totaled 507, costing over 112,700 workers their jobs. Production has fallen to the lowest levels since the Depression. Last year in Tennessee alone, seven shoe plants closed.

The footwear industry followed the procedures laid down in our trade laws to prove injury—and they proved it to the satisfaction of every single Commissioner on the International Trade Commission. They also offered a comprehensive 5-year plan which the industry agreed to undertake during the quota period. If the trade laws will not work for this industry, it is doubtful they will work for any industry.

When Congress wrote the trade laws it intended they be used. We did not intend them as a rhetorical statement whose practical application was to be avoided at all costs.

Far more is at stake here than the fate of a single industry. Frankly, we are dealing with the credibility of our entire system of trade law, with the viability of our most basic American industries, and with the future health of our national economy.

In the next few weeks the Senate will be conducting an extensive trade debate. If we cannot rely on our trade laws to protect our industrial base, then those laws need to be changed. If the administration has no trade policy, then the Congress will write one for them.

The belief that there is no middle ground between absolute free trade and absolute protectionism is largely responsible for the trade crisis we face today—a crisis that has put literally millions of working Americans on the unemployment rolls and has thrown our agricultural sector into its sharpest nosedive since the Great Depression.

It is time we deal with the trade issue as it exists in the real world. We can assist our industries—as other nations do—without starting an international trade war. I intend to be an active participant in the upcoming trade debate as we work to level the playing field for our Nation's industries.

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

Mr. COHEN. I yield to the distinguished Senator from Arkansas.

CHALLENGE FOR THE SENATE ON FOOTWEAR IMPORTS

Mr. BUMPERS. Mr. President, I thank the Senator from Maine for arranging this time for some of us who are deeply concerned about the prospects for the U.S. footwear industry in light of the President's recent refusal to provide sorely needed trade relief for that industry.

I am appalled that the President failed to provide any relief whatsoever. The International Trade Commission proposed to limit shoe imports to 63 percent of the market, and that was the very least figure that should have been adopted. If anything, the President should have strengthened this remedy. Rather, the President has made it clear to the rest of the world that the United States will continue to be a dumping ground for their products, no matter how many of our own workers and industries may be hurt.

Just 2 days after the President refused to help the import-battered domestic shoe industry, the Commerce Department released figures showing that footwear imports continued to flood the American market in July. So far this year, shoe imports have risen 13.4 percent over 1984 levels. In July, 79 million pairs of shoes entered the United States and that was down slightly from 85 million pairs in July 1984, the second highest monthly level ever recorded. As of this moment, 77 percent of all shoes sold in this country are imported.

At the same time that imports have been dramatically increasing, our own domestic industry has been disintegrating. In 1984, which was a banner year for national economic growth, domestic production of footwear fell by over 13 percent, and so far this year, domestic production has declined 22 percent. Since 1979, domestic production has fallen from 400 million pairs to under 300 million pairs in 1984, a decline of 25 percent. The most recent year, other than 1984, that domestic production fell below 300 million pairs was 1921.

In 1984, over 100 footwear plants closed nationwide—1 year, 100 plants. This represents a direct job loss of 7,000 footwear employees in 1984 alone, and nearly 23,000 since 1980. Indirect job losses, a continuously falling work week and growing "temporary" layoffs further exacerbate the hardships imposed on footwear employees. Are these 23,000 people who have lost their jobs since 1980 not as important

as the roughly 1,000 people the President chose to protect who work for the Harley-Davidson Motorcycle Co.? Where is the difference?

In my home State of Arkansas, the shoe industry directly employs about 5,600 people. The footwear industry is the first or second largest employer in 12 Arkansas counties. Since 1980, we have lost eight plants and three were closed just this past year. We have lost over 1,000 direct footwear jobs in Arkansas since 1980, and 2,600 jobs since 1976. Counting indirect employment effects, we have lost nearly 4,500 Arkansas jobs in the past 8 years.

For the rural Arkansas communities that are involved, the impact of a plant closing can be catastrophic in the local economy. The people who are displaced in these rural communities simply have no alternative sources of employment. Of the 12 Arkansas counties where footwear is a leading industry, 8 have populations of less than 25,000. Almost two-thirds of all footwear workers are female, more than one-half are age 50 or older, and less than half have completed high school. They simply have nowhere to go when a plant shuts down.

The footwear industry is in serious trouble, and the President does not seem to care.

If we cannot provide relief when 77 percent of all the shoes in this country are being imported, then no other industry need apply to the International Trade Commission. It is discouraging in the extreme.

If the President does not care whether imported shoes decimate the U.S. shoe industry, the U.S. Senate can vote to impose the quotas recommended by the International Trade Commission; not a good solution, and not one which I wish we had to take.

But if we have to do it, we should do it, and we can fill some of the loopholes that the International Trade Commission left in its order.

The President has challenged Congress to do something, and we should accept the challenge.

I thank the Senator again for yielding.

Mr. COHEN. Mr. President, I thank the Senator for his statement and support for this entire measure.

Mr. President, I shall ask a couple of simple questions.

Is there any other nation in the world that would tolerate a 77-percent import penetration of its market?

Is there any other nation in the world whose leaders would look at a major industry over the years that is now in the process of dying and say: "Too bad. Tough luck. That is the way the world works"?

Is there any other nation in the world whose leadership would say: "Go vote with your feet. Just get out of Maine, get out of Arkansas, leave Missouri. Go out west"?

Mr. BUMPERS. Vote with your bare feet.

Mr. COHEN. "Go out west in bare feet and go to Silicon Valley. Perhaps you can pick up some computer training jobs there."

The difficulty with the vote-with-your-feet type of argument, as the Senator from Arkansas just pointed out, is, there is no place to go. These people are basically low income and the low scale of education the Senator from Arkansas has pointed out. More than half of them are women. Most are over the age of 50. They have no place to go and no jobs to get when they go there.

So for the administration to adopt the posture of "go vote with your feet," it would seem to be the essence of callousness, indifference, and disregard for the over 100,000 people who have lost their jobs and the 100,000 remaining who will lose their jobs in this industry as a result of the President's decision.

Mr. KASTEN. Mr. President, I rise today to voice my support, not only for an American industry which is in deep trouble because of imports, but also for the 22,000 Americans and 4,000 Wisconsinites who are in danger of losing their jobs.

There was a time in America when everything we purchased was made or crafted in the United States, right down to our shoes; 10 years ago, domestic shoes accounted for the major share of the American market. What was a robust industry only 10 years ago is now struggling to stay alive.

Today, you will rarely find the words, "Made in the U.S.A." on the soles of your shoes. You are more apt to find that your shoes were made in Brazil or Spain or Italy, because we have allowed the flood of imported footwear to go unchecked. To make matters worse, these nations have imposed tough quotas on American-made shoes that make it virtually impossible for us to export to them. Now, those imports account for a staggering 77 percent of the domestic market.

Some would argue that American products are no longer as well made. Well, although my colleagues may disagree with the specifics, I know that the best shoes in the world are made in Wisconsin. The reason why the American shoe industry is in peril is because we have not had a balanced and fair trade policy.

I have always been a firm believer in free trade, but I also strongly believe that trade must be fair. Certainly, free trade must not come at the expense of fair trade. And until other nations are willing to trade freely with us by allowing American products in without restrictions, we must literally put our foot down.

Mr. President, as I stated earlier, it is not just a great industry that is at stake here. We are talking about the livelihood of 22,000 Americans and their families. Already, this imbalance of trade has resulted in the loss of thousands of jobs in Wisconsin. Thousands more will be lost if nothing is done.

Over the past 10 years, 14 shoe factories in Wisconsin alone have closed their doors for good. Most recently, hundreds of workers were left jobless by the closing of Chippewa Shoes in Chippewa Falls, WI, at the end of last year. Now, other factories in the State face a similar fate. There is no time to lose.

The administration had a real opportunity to solve this problem when the ITC recommended protection of the domestic industry through import limitations. But on August 28, the White House refused to act.

The ball is now in our court. Congress must act to make the difference while there is still time. I am happy to lend my support to legislative relief.

Mr. President, only by reintroducing fairness into American international footwear trade will we be able to save the jobs of thousands around the United States that will otherwise be lost.

Mr. GORE. Mr. President, I join with my colleagues today to discuss the President's recent decision to refuse relief to the American footwear industry.

The International Trade Commission's May recommendation to the President has been ignored. The Commissioners had overturned previous rulings and by a vote of 5 to 0, they found that the footwear industry had been seriously injured by foreign imports.

The Commission, an independent, bipartisan group, is required to engage in extensive research, conduct specialized studies and maintain a high degree of expertise in all matters relating to the commerce and international trade policies of the country. The Commission evaluates appeals for import relief from affected industries and determines whether an article is being imported in such increased quantities as to be a substantial cause or threat of serious injury to the domestic industry.

In the case of the footwear industry, the Commission found that such relief was warranted. Indeed, their unanimous ruling in favor of the industry reflects their firm conviction that import relief is both necessary and desirable.

Why, then, are these laws on the books? This is a textbook example of a situation that qualifies for section 201, Trade Act, relief.

Without this relief, the collapse of this vital industry is almost assured. An additional 220,000 jobs may be lost, many of them in my own State of Tennessee, which is the fifth most impor-

tant footwear-producing State in the Nation.

We must not turn our backs on this important industry at this crucial juncture. Otherwise, it will soon cease to exist. I urge my colleages to think long and well about the administration's disregard of our trade laws and the grave effects such policy will have on one of our most important basic industries.

IMPORTED FOOTWEAR QUOTA LEGISLATION

Mr. MITCHELL. Mr. President, I am pleased to join my Senate colleagues today in voicing the imperative need for immediate action on the import surge that is destroying the domestic footwear industry.

Since 1981, when the President made his first decision against the footwear industry and its workers by rejecting the recommendation of the International Trade Commission that the modest import relief then in place be continued for a couple of years, the industry has been subjected to one blow after another.

Developing nations targeted footwear manufacture and export to the American market as a quick way to industrialize and provide their own people with jobs and stepped in to take up the slack during the period of orderly marketing agreements.

When that modest relief measure was allowed to expire, the market was wide open at a time when other nations were closing their own markets and aggressively targeting the American consumer as their final purchaser. Imports soared immediately to some 60 percent of the domestic market and slacked off only in the face of the 1982 recession. That recession saw shoe workers join millions of others thrown out of jobs many had held for decades. It saw many shoe companies close as the surge of corporate bankruptcies reached new records.

But the difference was that in the economic recovery that followed the recession, the closed factories did not reopen. The lost jobs were not recovered. And domestic footwear production shrank, even as imports surged to take advantage of the economic recovery.

With footwear imports reaching an unprecedented three-quarters of the domestic market, with the governments of virtually every other potential market nation limiting imports either directly or by indirect trade barriers, this Nation has become virtually the world's only free market for footwear manufacture.

And given that the vast bulk of footwear manufactured in the world is manufactured for export markets, not domestic consumption, our markets have been flooded with products that can find no other outlet.

It is precisely such a situation that our domestic trade laws were designed to address. The footwear industry took its case to our International Trade Commission, exactly as envisaged by law, argued it there and won the recognition of the Commission that imports were a major cause of its problems.

That determination of fact is required by our trade laws to be made before policy is established. That is as it should be.

But what our trade laws do not assure—and what I am certain no Congress has ever intended—is that following a clear determination of fact, no policy is established.

Yet, that is exactly the stance President Reagan took when he directly rejected any import relief whatsoever for this beleaguered industry.

It is clear that in the absence of White House concern about jobs lost, companies bankrupted and entire communities economically threatened, Congress has a responsibility to act.

We cannot and should not ask one small sector of our population—the people who work in shoe factories, the companies that employ those workers, and the community where shoe manufacturing is an economic mainstay—to pay the entire price for a national policy.

During the 1982 recession, the war on inflation was won, not by supply-side economic theory, but purely on the backs of the men and women thrown out of jobs.

During this 1985 trade crisis, the administration is apparently again willing to wage war on the trade deficit with the livelihood of ordinary working people and the families that depend on those paychecks.

There is only one answer. We must act now to change the law before the administration's total lack of any coherent trade policy plunges even more people into economic disaster.

The 1974 Trade Act, which the President has refused to invoke, was purposefully designed to give the executive branch the freedom it needed to manage international trade relations to the benefit of our Nation by encouraging other nations to lower tariff barriers to imports and relax nontariff import barriers of various sorts.

But instead of using that freedom during its 5 years in office to open other markets and move toward a worldwide regime of free trade, this administration has encouraged imports as a way to hold down inflation, regardless of the cost in American jobs and long-term economic health.

We are witnessing and have been witnessing for 5 years the not-so-very gradual dismantling of our manufacturing economy, as our jobs and production are exported overseas.

Trade policy by this administration has consisted of a series of reluctant and belated actions taken only in the face of the most overwhelming and protracted public concern.

But that is not good enough. Thousands of workers can be idled before public concern is aroused. Hundreds of companies can close plants and go out of business before this administration will act. And if the industry in question is a small and regionalized one—as is the case with footwear manufacture—not even the most protracted and painful crisis has proven to be enough to catch the President's attention.

In these circumstances, it is clear that Congress must recapture an element of its control over the trade policy area that the administration cannot be relied on to exercise.

We must change our laws to make mandatory that which is now discretionary, to narrow the options available so that factual circumstances, not individual preferences, will dictate actions, to ensure relief when the conditions warrant relief, not to raise false hopes.

This Senate and this Congress must act and must act soon, not only on direct relief for the footwear industry, but on a wider scale to make our trade laws reflect the will of the Congress and the realities of the international trading world.

PROTECTIONIST MEASURES FOR THE FOOTWEAR INDUSTRY

Mr. HUMPHREY. Mr. President, in recent weeks the plight of shoe producers and employees has received great attention in Washington, in the press and around the country. More specifically, the question of granting relief, in the form of protectionist measures, to the ailing footwear industry has been considered by policymakers within the administration and legislators on Capitol Hill. I am gratified that so much energy has been devoted to a consideration of what, if anything, can be done to save shoe-worker jobs threatened by import competition. Nevertheless, I applaud the President's decision to refrain from granting quotas to the industry.

This assessment was certainly not an easy one for me to make. In New Hampshire, the nonrubber footwear firms rank first in jobs among all manufacturing industries. It ranks first among all manufacturing in Strafford County and among the top three industries in five of the other nine counties. As of May of this year, the nonrubber footwear industry employed 7,900 people in 28 plants. The footwear industry historically has been important to New Hampshire's economic health; opposing quotas for the industry does not win one many friends.

Much has been said about the International Trade Commission's report to the President on the footwear industry, but little has been mentioned about the dissenting view of Vice Chairman Susan Liebeler. I recommend to my colleagues and all who

have an interest in this issue her views on remedy options for the industry. Vice Chairman Liebeler argues against protectionism for a very simple reason: given the results of protectionism for the industry in the past; the long-term outlook for the industry's competitiveness vis-a-vis low cost foreign producers, and the extent to which domestic manufacturers can be expected to invest in state-of-the-art machinery, the footwear industry does not meet the very stringent criteria set forth by the Congress in section 201 of the Trade Act.

Those criteria stipulate that "import relief actually prevent or remedy serious injury." If protectionism only delays the injury, then relief is not in order. Based on the above-mentioned factors—precedent, long-term outlook and investment predictions—Ms. Liebeler concludes that protectionism is neither an effective nor socially beneficial solution to the footwear industry's woes.

Additionally, it is important to remember, that there is another constituency out there, whose needs and interests are just as important as those of the footwear industry. I am speaking of consumers—230 million Americans including the 1 million who live in New Hampshire. Their needs in this case are affordable shoes at the lowest price. This is especially true for lower income Americans, who desperately need to watch and control the cost of everything they buy, including necessities such as shoes. Economic studies included in Ms. Liebeler's opinion indicate that each $14,000 shoe job saved would incur siocietal costs upwards of $35,000, and that consumers in this country would pay an additional $832 million per year for shoes. Clearly, protectionism is not in the interest of the country at large. In the case of the shoe industry, President Reagan has spoken out in favor of the consumer.

Once again, I commend this Ms. Liebeler's assessment to the attention of my colleagues. Mr. President, I ask unanimous consent that a copy of her opinion be included in the RECORD immediately following my remarks.

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

REMEDY VIEWS OF VICE CHAIRMAN SUSAN W. LIEBELER

(Part Two—Remedy)

I. INTRODUCTION

The Commission has made a unanimous affirmative determination in the injury phase of this investigation, thus I must now consider what remedy recommendation to make to the President. The purpose of the escape clause is to provide "temporary relief for an industry suffering from serious injury, or the threat thereof, so that the industry will have sufficient time to adjust to the freer international competition." [1] Section 201 authorizes a petition for import relief "for the purpose of facilitating orderly adjustment to import competition." [2] An industry seeking escape clause relief "must include a statement describing the specific purpose for which import relief is being sought, which may include such objectives as facilitating the transfer of resources to alternative uses and other means of adjustment to new conditions of competition." [3]

The operative language of section 201(d)(1) is as follows:

"If the Commission finds with respect to any article, as a result of its investigation, the serious injury or threat thereof described in subsection (b) of this section, it shall—

"(A) find the amount of the increase in, or imposition of, any duty or import restriction on such article which is necessary to prevent or remedy such injury, or

"(B) if it determines that adjustment assistance under parts 2, 3, and 4 of this subchapter can effectively remedy such injury, recommend the provision of such assistance, and shall include such findings or recommendations in its report to the President." [4]

The statute makes it clear that an affirmative determination by the Commission does not open the door to unrestrained relief. Any import relief [5] recommended can only be the amount "necessary to prevent or remedy such injury."

Section 201 contemplates two bases upon which relief can be granted. First, the domestic industry can seek relief to facilitate the "more orderly" transfer of resources out of the industry than would otherwise take place. In such a case, the domestic industry will still have to shrink, and any relief granted is intended only to make the transition more orderly.

The second basis on which relief can be granted is to prevent or remedy serious injury or threat to the domestic industry. The domestic footwear industry has not argued that it wants a more orderly exit from the industry. Instead it argued that relief will enable it to make new investment so that the market share of domestic producers will increase after the relief has expired.

Import relief can always delay the injury during the period of relief. The statute, however, requires that the import relief actually prevent or remedy serious injury. If import relief would not enable the industry to be competitive in the marketplace after relief expires, then there is no import relief that the Commission can recommend to the President.

II. MY RELIEF RECOMMENDATION

The domestic footwear industry is experiencing a major contraction. Thus, any relief must prevent or remedy such a contraction by enabling the industry to achieve a long-run equilibrium at a level of output substantially above what it could have achieved without import relief.

No import relief

The problem of the domestic footwear industry, however, is the long-run comparative advantage held by foreign producers. Thus, the only import relief that would prevent serious injury to the domestic industry is a permanent import restriction. The Commission is only empowered, however, to recommend temporary relief.[6] It is not, however, the purpose of Section 201 to establish permanent barriers against fairly-traded imports. Rather, its purpose is to provide a domestic industry with temporary relief to adjust to new conditions of competition from imports. Temporary import relief can prevent or remedy injury caused by short-run problems.

Imported shoes are less costly to produce than domestic shoes and they are likely to remain so.[7] This is a result of our nation's unmatched productivity and growth. Nations will, and should, specialize in the production of those commodities in which they have a comparative advantage. Fortunately, our country has a large capital stock which tends to provide labor with many productive employments. Our comparative advantage is in the production of goods that use a high ratio of capital to labor. Shoes, however, are produced with a low ratio of capital to labor. Therefore, American footwear cannot be produced as cheaply as foreign footwear.

The availability of inexpensive imports permits consumers to purchase less expensive shoes, and allows the valuable capital and labor used in the footwear industry to shift to more productive pursuits.[8] The decline of the American footwear industry is part of a dynamic but sometimes painful process. Congress, by only providing for temporary relief, has recognized that our continued prosperity depends on our willingness to accept such adjustments.

The industry has sought so-called temporary import relief before. The Commission has conducted approximately 170 investigations relating to this industry. In addition to 155 adjustment assistance investigations conducted between 1963 and 1974 under Section 301 of the Trade Expansion Act of 1962, the Commission has conducted one escape clause investigation under the predecessor to Section 201, two Section 701 investigations, two section 731 investigations, and five section 751 investigations. In 1982 the industry also initiated investigations with the U.S. Trade Representative under Section 301 of the 1974 Trade Act.

This is the fourth footwear case under section 201 and so far the industry has obtained relief twice. The 1975 petition resulted in adjustment assistance, the 1976 case resulted in Orderly Marketing Agreements (OMS's) with Taiwan and Korea, the two major suppliers of imported footwear. Although the industry tried to postpone the expiration of those OMA's,[9] President Reagan did not seek to extend them and they expired in 1981.

The escape clause is aimed at giving temporary relief to an industry so that it will have enough time to adjust to freer international competition.[10] This industry has had ample time and opportunity to adjust to freer international competition. In its 1976 brief to the Commission in Investigation No. TA-201-7, *Nonrubber Footwear*, petitioners, represented by the same law firm that represents the domestic industry in the current proceeding, made essentially the same plea for "temporary" relief:

"Petitioners recognize that the Trade Act of 1974 only authorizes temporary relief from the influx of imports for the purposes of permitting an industry to adjust to new conditions of competition. The imposition of temporary mandatory quotas for the full period permitted under the terms of the Act would do just that by enabling the domestic industry the respite necessary to regain its economic health and provide more vigorous competition to foreign produced footwear at the termination of such relief.

"In the interim, increased orders to domestic producers would not only generate

Footnotes at end of article.

increased profits because of the sheer rise in the volume of sales but additional orders would also enable domestic producers to return to efficient levels of capacity utilization, thereby increasing productivity. Such profits could then be ultilized for capital expansion and additional research and development, thereby leading to greater technological and marketing strength.

"In addition, normal economic forces would work to the benefit of the domestic industry so that it would be more competitive in terms of price by the time the quotas were removed." [11]

Speaking through the same counsel in the next footwear case, petitioners again argued that "temporary" relief would enable them to become more productive and competitive:

"On the assumption that the industry is given the quota relief for the five-year period, what actions can be expected of domestic shoe manufacturers to enable them to become more competitive with imports once the transitional period of restraint is terminated?

"In specific terms, we would suggest that domestic footwear manufacturers, restored to greater confidence over their economic future, would make new investments in plant and equipment thereby making the industry even more productive and efficient.

"Greater sales can be anticipated under the quota program which will lead to a return to efficient levels of capacity utilization with longer runs resulting in economies of scale and lower unit production costs which would thus strengthen the industry's overall competitive position. This should also result in a strengthened financial position for companies in the industry, permitting them to attract more capital and more reasonable interest rates, thus enabling them to invest in new plant and equipment and to pay for additional research and development—both technical and marketing. Greater technological and marketing strength will, thus, be an inevitable result improving the industry's competitive position even further. At the same time, there will be a narrowing of price gap between domestic and foreign shoes." [12]

The industry is once again arguing that during the period of import relief they will modernize their plants and equipment and increase productivity. The domestic nonrubber footwear industry has presented an ambitious five-year $697 million plan to reduce costs and become more competitive with imports by developing and applying new technologies throughout the industry. The industry claims that by implementing technologies already within its grasp it will improve domestic productivity by 25 percent, thereby eliminating the 15 percent price advantage of imported footwear.

If I believed that: (1) import relief would allow the industry to implement this plan; (2) the industry would not be able to implement this plan without import relief: and (3) that the plan would allow the industry to achieve a long-run equilibrium characterized by significantly greater production than it would have without relief, then the statute would compel me to recommend the import relief necessary to realize the plan.

The success of the domestic industry's plans rests on several questionable assumptions. First, the petitioners assume that the price advantage of imported footwear that the domestic industry must overcome is only 15 percent [13] but respondents have suggested that the price advantage runs closer to 25 percent.[14] The price advantage enjoyed by foreign footwear producers appears to be considerably higher than 15 percent.[15] Under such a cost advantage, domestic footwear producers may not regain a competitive advantage even if they make the proposed modernization expenditures and even if these expenditures reduce costs by the amount indicated by the petitioners. Second, the petitioners claim that the effects of their proposed modernization efforts will reduce domestic producters' costs by 11 percent and, thereby, allow domestic producers to eliminate most of the 15 percent price advantage of imported footwear.[16] This prediction comes from the Kaplan report, however, which was based on the production of five types of leather shoes only,[17] not on nonleather shoes which account for a significant portion of the United States nonrubber footwear market, especially in the low cost segment which is supplied primarily by imports. Because the major nonleather upper materials are much cheaper than leather, neither the material savings nor labor savings suggested by results of the Kaplan report may apply to nonleather footwear like plastic and fiber shoes. Third, the petitioners assume that the foreign producers will not improve their productivity over the next five years, while domestic productivity will jump by 25 percent as a result of import relief.[18] It is more likely, however, that foreign production will continue to increase. Productivity in the Taiwan and Korean footwear industries, the two largest foreign suppliers of footwear to the United States market, has reportedly increased by 4 to 7 percent annually during the last several years while domestic productivity has remained relatively unchanged. It is not clear why one would not expect this trend to continue. Fourth, the petitioners assume that the domestic industry will spend about $697 million in efforts to reduce their production and distribution costs. Although it is difficult to predict how much the industry will actually spend to modernize, individual firm responses to the Commission's confidential questionnaires indicate that domestic producers plan to spend only about $100 million on these efforts during the requested relief period.[19]

Finally, there is a fundamental question of what connection there is between import relief for the footwear industry and investment in new plant and equipment that will make the industry competitive. If good investment opportunities are available, they will be exploited regardless of any relief provided for this industry. It might be argued that the domestic footwear industry could become more competitive if it could modernize; and that it needs the more favorable cash flow generated by quotas to reinvest in the industry and to encourage financial institutions to lend to the footwear industry.

If modernization of plant and equipment presents favorable investment opportunities for the footwear industry, the capital market would provide financing. Although the increased cash flow which could result from import relief would be likely to improve the equity portion of the footwear producers' balance sheets and make it more likely that they could borrow funds or reinvest, there are other means by which these producers could obtain investment funds. They could issue additional equity or merge with an equity-rich firm. Alternatively, if the market believes that good investment opportunities exist in the footwear industry, but that the managers of some footwear firms are not up to their task, then such firms would be ripe for takeover.

If there is investment in plant and equipment that can be expected to generate a competitive rate of return, then someone, whether it is the current producers or others, will find it in their self-interest to make those investments. To believe that the revenues generated by import relief are necessary to finance this new investment reflects a fundamental misunderstanding of the way in which capital markets operate. If the investment is worthwhile, it does not matter whether the funds used to purchase the investment come from retained earnings, new debentures, bank loans, or new equity ownership. In our highly sophisticated capital market, a project which would ensure the profitable survival of the footwear industry would not go unfunded.

If investment in the domestic industry is not rational because expected costs are likely to exceed expected revenues, then: (1) it is not in the industry's interest to make such investment; and (2) it is not in the nation's interest that the industry do so. If a firm cannot profitably make such an investment, it means that the resources can more productively and profitably be employed elsewhere in the economy.[20] In spite of the efforts by the domestic industry to suppress imports, in spite of the "temporary" relief, in the form of OMA's with Korea and Taiwan, and in spite of the present 9 percent tariff on nonrubber footwear, the industry has been shrinking. Between 1981 and 1984, 207 plants closed (gross), 94 of these closing occurred last year. The closing of unprofitable plants is a necessary adjustment. Import relief at this stage will retard this process and encourage entry into a shrinking industry.

I do not believe the domestic industry's investment plan is credible or viable. The market has already indicated that additional investment or growth in this industry is unwise. Because there is no temporary relief which would prevent or remedy serious injury. I recommend that no import relief be given to this industry.

III. ADJUSTMENT ASSISTANCE

I do, however, recommend that the President provide adjustment assistance [21] to the domestic footwear industry under Parts 2 and 4 of Chapter Twelve of the Trade Act of 1974 (Adjustment Assistance For Workers and Communities).[22] "The Commission shall . . . (B) if it determines that adjustment assistance under parts 2, 3 and 4 of this subchapter can effectively remedy such injury, recommend the provision of such assistance . . ."[23]

The Senate Report clarifies a number of points about the adjustment assistance program. First, it states that the Commission cannot recommend both import relief and adjustment assistance.[24] Second, the Committee states that the addition of the provision concerning adjustment assistance was intended "to permit the Commission to recommend adjustment assistance . . . in circumstances in which the Commission determines that such assistance would be a more effective remedy . . . than import relief.[25] Since the provision of certain types of adjustment assistance encourages workers and firms to exit from an industry, it would appear that Congress intended to give adjustment assistance to ease the pain of exit from an industry. This is a far more effective remedy for industries such as footwear which face irreversible decline.

In providing for Trade Adjustment Assistance, Congress has decided it is appropriate to redistribute wealth from the rest of socie-

ty to participants in import-competing industries.[26] The statute does not permit me to consider the costs of such programs. It is, however, appropriate for me to consider the effect of the various programs on the domestic footwear industry, since the President may decide to provide trade adjustment assistance.[27]

A declining industry presents its participants with new decisions. An unemployed worker must decide whether to (1) retire; (2) wait to be recalled to work; (3) relocate; (4) obtain training in a new skill in a different industry; (5) seek and accept alternate employment; or (6) withdraw from the work force.

Each affected individual is best placed to weigh the costs and benefits of the various alternatives and make the choice that maximizes his or her expected welfare. There is no reason to believe that all workers should obtain retraining or seek relocation, or any of the other alternatives. The life circumstances of each individual differ, and consequently, their optimal choices differ. Government programs distort the underlying costs and benefits of the choice set faced by displaced workers by paying them for certain choices rather than others.

The adjustment assistance program offers unemployed workers several types of payments, including Trade Readjustment Allowances (Supplementary Unemployment Benefits);[28] employment services;[29] training;[30] job search allowances;[31] and relocation allowances.[32]

The critics of adjustment assistance[33] note that less than 1 percent of individuals affected received either job search or relocation assistance[34] and treat that as evidence of the failure of the program. The program is designed to help people find new work. It has clearly failed to do that, and in fact, with its heavy emphasis on supplementary unemployment benefits, it undoubtedly has encouraged workers to remain unemployed longer than they would otherwise.[35] This result is certainly perverse if the program's purpose is the rapid re-employment of the displaced workers.

Since Congress intended for Trade Adjustment Assistance to help displaced workers find new employment, I recommend that it be aimed at that purpose in this case. Employment services, training, job search cost reimbursement allowances and relocation allowances should be provided for footwear workers.[36] These forms of adjustment assistance are least costly and encourage workers to find new employment.

I also recommend adjustment assistance to communities under Part 4 of Chapter 12 of the Trade Act of 1974.[37] Such assistance would provide loan guarantees to private parties to invest in production facilities in a community in which footwear plants have had to cut back or close operations. Particularly in Maine, where footwear firms are often the major employer in small, somewhat isolated communities, such loan guarantees will diminish the likelihood that whole communities would be injured by the closing of a shoe factory.[38]

I do not recommend adjustment assistance for firms under Part 3 of Chapter 12 of the Trade Act of 1974.[39] This provides for technical assistance, loans and loan guarantees to firms. Payments to firms will retard rather than encourage the industry's adjustment to import competition, and would work at cross purposes to adjustment assistance to workers.

IV. IMPORT RELIEF

A. Available forms of relief

Although I have determined that there is no relief that would prevent or remedy the serious injury to the domestic nonrubber footwear industry, the Commission majority has recommended quotas. Since the Commission has made an affirmative determination in the injury phase of these proceedings and since the Commission majority has recommended quotas, the President now has the option of providing import relief.

If the President decides to provide import relief, he can use any one or more of the following tools:

(1) Proclaim an increase in, or imposition of, any duty on the article causing or threatening to cause serious injury to such industry;

(2) Proclaim a tariff rate quota on such article;

(3) Proclaim a modification of, or imposition of, any quantitative restrictions on the import into the United States of such articles;

(4) Negotiate, conclude and carry out orderly marketing agreements with foreign countries limiting the export from foreign countries and the import into the United States of such articles.[40]

Because the President may decide to impose some form of import relief. I provide my views on its most appropriate form.[41] In so doing, I note that the relief recommended by the majority is intended to restore the industry to its condition at the end of 1983.[42] I will assume that this is the desired level of benefit to the domestic industry. In designing a remedy one should try to find the least costly remedy which will provide the desired benefit. There are less costly and more efficient ways to provide the desired benefit to the domestic industry than the quotas recommended by the majority. I will now discuss the various forms of import relief available to the President.

B. Tariffs

If the President decides to provide import relief, I recommend a system of tariffs, instead of quotas. There are several reasons why a system of tariffs is preferable to a system of quotas.[43]

The first reason for using a tariff instead of a quota is uncertainty about the success of the industry's plan. The domestic industry claims that the foreign cost advantage is only 15 percent, a figure which has been disputed by a number of respondents, and that with five years of import relief it will reduce the foreign cost advantage to 2 percent.[44] If the President accepts the industry's plan and provides relief, he can impose a system of tariffs based on the industry's assumptions that will provide as much protection as the proposed quota. Thus, if the industry's projections are correct and they are able to reduce the cost gap, they will benefit as much from the tariff as from the equivalent quota. On the other hand, if the industry cannot reduce the gap, in which case their plan will almost certainly fail, then the tariff will provide less protection than the quota and the cost to society will be lower. The tariff also has the benefit of taking petitioner's plan at its word.[45]

A related reason for choosing tariffs over quotas is that tariffs will not insulate the industry as much from the discipline of the marketplace. The goal of the statute is to facilitate the adjustment to import competition. Competition from imports is felt through the presence of equivalent imports at competitive prices. If there are changes in the relative costs of producing domestic and foreign shoes, a tariff will allow those changes to be felt in the market, while a quota will not.

Another reason for preferring a tariff is that an ad valorem tariff, as opposed to a unit tariff, does not cause an upgrading of imports and a downgrading of domestic production.[46] With a quota or unit tariff, the cost of a quota right used to import a pair of shoes is the same regardless of the price.[47] Shoes, however, are not fungible. They vary in quality and, therefore, in price. A quota will increase the relative price of inexpensive imported shoes and encourage importers to upgrade their imports. It will thereby encourage domestic production of relatively inexpensive shoes more than it will encourage domestic production of relatively expensive shoes. With an ad valorem tariff, however, the prices of all shoes are increased by the same percentage, although by a different absolute amount; and accordingly, the relative prices of all pairs of shoes remain the same.[48]

Thus, the ad valorem tariff encourages domestic manufacturers to produce all shoes without influencing their choice between inexpensive and expensive shoes. Such an incentive is important in light of the temporary nature of the relief granted under Section 201. It would be a peculiar remedy indeed that for five years encouraged the nonrubber footwear industry to produce precisely those shoes for which it suffers the greatest comparative disadvantage and where improved technology is likely to be least effective in reducing costs.

Therefore, I believe that the President should impose a system of tariffs, preferably ad valorem tariffs if he decides to grant import relief.

C. Tariff-rate quotas

If the President decides to impose some form of a quota, I recommend a tariff-rate quota.[49] With a tariff-rate quota the units specified in the quota can enter the United States without paying the tariff, whereas units above the quota limit have to pay the additional tariff.[50] The benefit of the tariff-rate quota over the quota is that with the tariff-rate quota there is a limit on the distortion that can be caused by the relief.

For every quota there is an equivalent tariff. I suggest that the President set a tariff two or three percentage points above the tariff which would be equivalent to the quota as the tariff portion of the tariff-rate quota. Such a system will give the industry the benefits of the quota if it is correct, but it will limit the costs of relief to society if it is wrong.

D. Auctioned quotas

There are significant benefits of an auctioned quota over quotas or Orderly Marking Agreements allocated to importers or importing nations.[51] When quota rights are simply given away, or are sold at prices substantially below their value, the revenue[52] the Treasury would receive if the quota rights were sold is given to the parties who receive the quota rights.[53]

There is an additional benefit from selling as opposed to assigning quota rights.[54] When quota rights are assigned and are not transferable.[55] then there is no way to be sure that the parties with the rights are the providers of the shoes consumers value most.[56] When the rights are sold, the importers that will be able to pay for the quota rights will be the ones that have the shoes consumers value most.

E. Orderly marketing agreements

The fourth option available to the President is to negotiate orderly marketing agreements (OMA's).[57] This form of relief was granted in 1977 following a previous Section 201 investigation.[58] The effects of an OMA are equivalent to the effects of assigned quotas.

F. Market segment quotas

Assuming the President decides to impose a quota, he must decide whether to impose one quota covering all imported shoes or different quotas covering different market segments. In addition, he must decide whether to exclude specific segments of the market from any quota. There are a number of benefits and problems associated with market-segmented relief. It is my purpose here to discuss them in order to bring them to the President's attention. I make no recommendation on whether market-segmented relief is appropriate.

The intended beneficiaries of any quota presumably are the domestic producers of shoes. U.S. production is not significant in every segment of the nonrubber footwear market. For example, foreign producers have such a large comparative advantage in the production of athletic footwear that domestic manufacturers are unlikely to engage in its production unless extremely high barriers to trade are erected. Most domestic production of nonrubber footwear is of high value-added shoes. Thus, if the purpose of import relief is to stimulate domestic production during the relief period, a higher tariff or lower quota should be provided to the segments of the market where domestic production is most highly concentrated and where supply is relatively elastic. Thus, theoretically at least, athletic footwear should either be excepted from any system of quotas or entitled to a generous quota to reflect the high market share of imports and the relatively low cross-elasticity of demand between athletic footwear and domestic nonrubber footwear.

Theoretically, it is possible to design a quota structured to provide the greatest amount of help to the domestic industry at the least cost to the rest of the nation. Crafting such a remedy is in some respects similar to creating an optimal sales tax. In taxation theory, if the goal is to maximize the revenues that the government receives while distorting economic allocation as little as possible, the optimal taxation scheme entails placing the highest taxes on those commodities with the most inelastic supply and demand curves.[59]

There are a number of problems in applying this technique here. The primary theoretical problem is that unlike the taxation case in which the maximum is the revenues collected by the state, the maximum of our import barrier has a more ineffable character. We seek to provide the greatest prospect for the future viability of the domestic industry. The connections among that viability, the shapes of the relevant supply and demand curves, and the incentives to invest the revenue generated by import relief in the industry are obscure.

Even assuming that one could theoretically specify a least burdensome tariff or quota, there are a number of practical problems that prevent its effective implementation. Although shoes are neither fungible nor identical, neither are they neatly separable into clearly distinct groups. Thus, it is doubtful that we could devise subcategories that Customs could administer at reasonable cost and which clever profit maximizing importers or manufacturers could not circumvent.

The Commission majority has recommended the exclusion of footwear with a customs value $2.50 or below, and Chairwoman Stern and Commissioner Rohr and have recommended separate quotas for shoes based on their customs value. These attempts reflect the laudable goal of not overburdening the consumer by restricting shoes that American firms do not produce, and attempting to limit the distortions that a quota would otherwise generate. However, the exclusions and categorizations present the problems I just discussed. The definition of athletic footwear and its distinction from non-athletic footwear is not clear. Therefore, excluding or segmenting athletic footwear would place a large burden on Customs and would induce product characteristics and labeling changes by manufacturers in order to fall within the excepted category. Similarly, price segmentation of the quota will burden commerce and lead to creative attempts by manufacturers to get around the quota, such as importing shoes without boxes or laces. The world is a complicated place inhabited by people who seek their own welfare. The straightforward distinctions we contemplate in our offices can lead to unanticipated results.

G. Summary

I recommend that if the President imposes quotas they should be global ones and auctioned to the public. The auction held for Treasury bills can serve as a model for any quota auctions. The quota rights should be divided into commercially practical units and all purchasers of rights in the same quota should pay the same price.

IV. COST-BENEFIT ANALYSIS

In making my remedy recommendation I did not consider the costs of import relief or adjustment assistance. Section 201 does not permit the Commission's recommendation to be based on consideration of consumer welfare or social welfare costs. The U.S. Trade Representative has, however, asked the Commission to analyze these costs in all Section 201 cases because they are relevant to the President in deciding whether to give relief. The parties extensively briefed the costs and benefits of relief to us. I shall briefly address these issues.

The consulting firm retained by the domestic industry, ICF Inc., provided the Commission with an economic analysis of the costs and benefits of the domestic industry's proposed quota[60] which yields a net benefit to the United States from the quota.

ICF estimates that 48,000 jobs will be saved and 23,200 to 28,700 jobs will be created by the proposed quota. According to ICF, the quota benefits are the employment gains computed by multiplying the number of jobs saved (and created) by the annual salary.

ICF also used a macro-economic approach to measure the quota benefits. According to ICF, the proposed quota would transfer approximately $900 million to the U.S. economy each year. Using an income multiplier of 2.0, ICF estimates the direct benefits of the quota to be about $1.8 billion a year.

The economic costs of the propossed quota include the increase in consumer prices and a consumption distortion effect (that is to say, a welfare loss to consumers who would forego purchasing footwear as a result of quota induced price increases). In the first three quota years these costs exceed $400 million a year. As a result of anticipated price declines, these costs then drop significantly and are positive in the last year of the quota and thereafter. Comparing the costs and benefits of the quota, ICF claims that the proposed quota will produce large net benefits to the United States economy.

The flaws in this analysis were explained by the Federal Trade Commission (FTC) in their helpful and informative Posthearing Brief.[61] In Appendix A of the FTC brief, the FTC's economic expert, Dr. Morris Morkre, laid bare the methodological flaws that underlie the ICF approach. According to Dr. Morkre, the problem is that ICF ignores the opportunity cost of labor, assuming instead that workers will be permanently unemployed and that those who retire from the work force place no value on their lifestyle. In 1984, however, the mean duration of unemployment among unemployed nonrubber footwear workers was 17.4 weeks. Therefore, the direct employment benefits of the quota are short-lived, equal only to the unemployment costs saved by the quota.[62]

The flaw with the macro-economic approach, according to the FTC, is that it is based on a fundamental misunderstanding of international trade. According to ICF, the quota will transfer funds to the United States that would otherwise go abroad. The response of the FTC is as follows:

"This interpretation of the effect of a reduction in spending abroad ignores the fact that individuals in the United States choose to purchase foreign-made footwear and, as a consequence, they also choose to exchange dollars for foreign shoes. That is, consumers are not wasting or throwing away income or wealth in this transaction. They are obtaining goods that they value at least as highly as the money spent (or else they would not purchase the shoes in the first place). Moreover, using the concept of consumer surplus (see the FTC's Prehearing Brief, Appendix C, p. 21), consumers derive a benefit from such purchases over and above the amount spent.

"In contrast to Mr. Reilly's [the ICF economist] assertion, the quota does not lead to a transfer of wealth (or income) to the United States; the true situation is just the reverse. As a consequence, the foundation of Mr. Reilly's macro-economic approach, the injection of wealth into the United States, evaporates. The quota does not transfer wealth to the United States; rather it implies a destruction of real income in the form of reduced consumer surplus. The rest of his analysis, i.e., the multiplier operation, is meaningless".[63]

I find the cost-benefit analysis of the FTC and of our own Office of Economics to be more rigorous and reliable than that of the domestic industry.

Our office of Economics has estimated the costs of various forms of import barriers, assuming no retaliation by any of our trading partners.[64] It evaluated the effects of the majority's quota proposal. One estimate by our economists is that under such a quota, shoe prices would increase on average 15 percent for imported shoes and 5 percent for domestic shoes. Consumers would pay an extra $832 million each year for shoes. The gain to those in the domestic shoe industry from such a quota would be $681 million, and 24,000 new jobs would be created. A translation of this sum into the cost per job reveals that consumers would pay approximately $35,000 each year for each $14,000 a year job saved. These costs estimates are being provided as part of this report. I believes that these estimates are conservative. Using a slightly lower domes-

tic elasticity of supply figure, the price increases to 8.2 percent for domestic shoes and 17 percent for imported shoes and consumer costs exceed $1 billion a year. The added domestic employment shrinks to 17,500 jobs, which translates into a cost per job of $60,000. These estimates do not include any additional costs due to retaliation. This is a net social welfare cost of $680 million in the first year. Where does the $680 million go? Nearly all of it, $600 million, would go to foreign shoe producers.[65] The remainder is lost as a result of interfering with the market process.[66]

V. CONCLUSION

In summary, I recommend that the President place no additional restraints on nonrubber footwear imports. Because the statute appears to require adjustment assistance in circumstances such as these, I recommend adjustment assistance designed to re-employ displaced footwear workers as rapidly as possible. If the President decides to raise import barriers, I recommend a tariff. If the President chooses a quota, I recommend that it be a global one and that it be auctioned.

APPENDIX A [67]

Increased imports must be a substantial cause of the serious injury or threat thereof to the industry. Subsection 201(b)(4) defines "substantial cause" as a cause "which is important and not less than any other cause." In defining a separate "cause," one must not compare a genus with a species or subspecies.

There are only three types of causes at this level of generality that can inflict serious injury or threat thereof to the domestic industry. They are (1) a decline in demand, represented by an inward and leftward shift of the demand curve (fig. A); (2) a decline in domestic supply, represented by an inward and leftward shift of the domestic supply curve (fig. B); and an increase in foreign supply, represented by an outward and rightward shift of the supply curve (fig. C).

The consequence of these adverse shifts will result in either a fall in the price or quantity of footwear produced by domestic producers, or both.

FOOTNOTES

[1] S. Rep. 1298, 93d Cong., 2d Sess. 119 (1974).

[2] 19 U.S.C. 2251(a)(1) (1982).

[3] Id.

[4] 19 U.S.C. 2251(d)(1) (1982).

[5] The term import relief is more narrow than the term remedy. Import relief includes all direct restraints on imports: tariffs, quotas, tariff-rate quotas, and orderly marketing agreements. Trade adjustment assistance is a remedy but it is not a form of import relief.

[6] The erection of permanent barriers to import is in the hands of Congress and the President alone.

[7] Prehearing Brief of Footwear Industries of America, Inc., Amalgamated Clothing and Textile Workers Union, AFL-CIO and United Food & Commercial Workers International Union, AFL-CIO, at 53-57, U.S. Int'l Trade Comm., Inv. No. TA-201-55 (1985) (hereinafter FIA Prehearing Brief).

[8] This situtation is not unique to the footwear industry. The classic example is agriculture, where the share of the labor force engaged in farming declined from 50 to 3 percent over the last one hundred years. This shift did not produce a 47 percent unemployment rate; it freed labor to produce cars and computers, etc. Such changes have made our country the richest nation in the world.

[9] After another investigation the Commission advised the President that the termination of the OMA with Taiwan would adversely affect the domestic industry.

[10] S. Rep. No. 1298, 93d Cong., 2d Sess. 119 (1974).

[11] Brief on behalf of the American Footwear Industries Association, Boot and Shoe Workers' Union and United Shoe Workers of America, at 81, U.S. Int'l Trade Comm., *Nonrubber Footwear*, Inv. No. TA-201-7 (1976) (hereinafter *Footwear I*).

[12] Brief on behalf of the American Footwear Industries Association, Boot and Shoe Workers' Union and United Shoe Workers of America, at 57-58, U.S. Int'l Trade Comm., *Nonrubber Footwear*, Inv. No. TA-201-TA-18 (1977) (hereinafter *Footwear II*).

[13] According to the domestic industry's brief, however, the Korean cost advantage in producing the typical ladies' pump is over 30 percent of the cost in the U.S. FIA's Prehearing Brief at 55-56.

[14] Posthearing Brief of Korean Footwear Exporters Association, at 16-17, U.S. Int'l Trade Comm., *Nonrubber Footwear*, Inv. No. TA-201-55 (1985) (hereinafter, KFEA Posthearing Brief): Posthearing Brief of Volume Shoe Corporation in Opposition To A Finding That Increased Imports Are A Substantial Cause of Serious Injury Or Threat Thereof at 22-23, U.S. Int'l Trade Comm., *Nonrubber Footwear*, Inv. No. TA-201-55 (1985) (hereinafter, Volume Shoe Posthearing Brief).

[15] Based on actual purchase experience verified by invoices, the wholesale price advantage of the imported footwear is probably closer to the 25 percent figure. The respondents estimated an average 25 percent import price advantage based on actual wholesale price comparisons or directly competing domestic and imported footwear, whereas the petitioners estimated the 15 percent figure based on the average unit value comparison of all domestic and imported footwear. Aggregate unit value comparisons involving a highly differentiated product like footwear are potentially misleading.

[16] The specific modernization expenditures and their effects in reducing domestic producers' costs are based entirely on findings of the Kaplan report. The Kaplan study was financed by domestic nonrubber footwear producers to determine what their industry must do to become competitive with imported footwear.

[17] The five leather shoes used in the Kaplan study appear to have a simple upper design and do not require the greater labor content of more intricate designs. As a result, the calculated cost savings may not apply to more complex shoe designs requiring intricate handwork. Volume Shoe Posthearing Brief at 24-25.

[18] KFEA Posthearing Brief, at 16-17; Volume Shoe Posthearing Brief, at 27.

[19] Report at A-96, Table 57.

[20] Thus, if the President should provide this industry with import relief, it would be unwise to condition it on reinvestment in the industry.

[21] I am aware that the adjustment assistance program has been sharply curtailed and may be eliminated. Nothing in this opinion should be construed as a statement in support of the existence of such a program. Section 201 requires me to make certain "recommendations" to the President. This language supports the popular misconception that Commissioners play advisory roles. Section 201 does not permit me to consider many factors, such as the costs of my recommendation and its effect on consumers, which are relevant to making informed recommendations.

[22] 19 U.S.C. 2271-2322 (1982).

[23] 19 U.S.C. 2251(d)(1) (1982).

[24] The Commission can "recommend adjustment assistance *in lieu* of import relief." S. Rep. 1298, 93d Cong., 2d Sess. 123 (1974) (emphasis added).

[25] *Id.* (emphasis added).

[26] Adjustment assistance transfers wealth to displaced workers in import competing industries from the rest of society. In a dynamic economy such as ours, we are all subject to the vagaries of the marketplace. Changes in demand, technology, or imports, can result in a loss of our current employment. Displaced shoe workers are no different than the slide-rule makers or the hatters. Each has a once valuable skill for which there is no longer a market. If would be impossible to identify all the individuals who suffer dislocations because of one or more market phenomena. Trade adjustment assistance draws distinctions between those individuals who are injured by imports and those whose injury may be even more severe but are either the victims of something other than increased imports.

[27] Section 201(a)(1)(B) of the Trade Act of 1974, 19 U.S.C. 2252 (1982).

[28] 19 U.S.C. 2292 (1982).

[29] 19 U.S.C. 2295 (1982).

[30] 19 U.S.C. 2296 (1982).

[31] 19 U.S.C. 2297 (1982).

[32] 19 U.S.C. 2298 (1982).

[33] *See, e.g.*, Charnovitz, *Trade Adjustment Assistance: What Went Wrong?*, The Journal/The Institute for Socioeconomic Studies Vol. IX, No. 1, Spring 1984, at 26; Ramseyer, *Letting Obsolete Firms Die: Trade Adjustment Assistance in the United States and Japan*, 22 Harv. Inter. Law J. 595 (1981); *Worker Adjustment Assistance: The Failure & The Future*, 5 Northwestern J. of Inter. Law & Bus. 394 (1983).

[34] *Restricting Trade Acts Benefits to Import-Affected Workers Who Cannot Find A Job Can Save Millions*. Report to Congress by the Comptroller General at 22 (Jan. 15, 1980).

[35] One critic wrote: What no one counted on was the side effects associated with such generous long-lasting income replacement. Givern the circumstances, it is hardly surprising that TAA could cause them to defer training and relocation. Barth, *Dislocated Workers*, The Journal/The Institute for Socio Economic Studies, Vol. VII, No. 1, at 27, (Spring 1982).

[36] I do not recommend that trade adjustment allowances be provided.

[37] See 19 U.S.C. 2371-2374 (1982).

[38] Community adjustment assistance programs may cause sub-optimal investment and result in inefficient use of resources. The fact that firms in other industries have not located in communities on their own suggests that it is not advantageous to do so. Congress, however, has decided to subsidize communities adversely impacted by import competition and I, therefore, recommend adjustment assistance for communities.

[39] 19 U.S.C. 2341-2354 (1982).

[40] 19 U.S.C. 2253(a)(1)-(4) (1982).

[41] I do not, however, recommend that any import relief be granted.

[42] See supra at 130. (Additional Remedy Views of Chairwoman Paula Stern).

[43] For every unit tariff there is a quota that will produce the same equilibrium under conditions of no uncertainty. Comparisons between tariffs and quotas are made assuming this sort of equivalence. This is shown in my general discussion of tariffs and quotas set forth in Appendix B tomy views.

[44] FIA Prehearing Brief, at 16-17 of Appendix 4, U.S. Int'l Trade Comm., *Nonrubber Footwear*, Inv. No. TA-201-55 (1985).

[45] The domestic industry's unwillingness to accept a tariff instead of a quota suggests that they do not think their plan is credible.

[46] There are two kinds of tariffs: unit tariffs and *ad valorem* tariffs. With a unit tariff, the amount of the tariff is the same for all units regardless of price. For example, a tariff of $2.00 on a pair of shoes is a unit tariff. With an *ad valorem* tariff, the amount of the tariff is a fixed percentage of the price, so the amount of the tariff varies with the price. For example, a 15 percent tariff on a pair of shoes is an *ad valorem* tariff.

[47] This is true for both auctioned quotas and allocated quotas.

[48] See Falvey, The Composition of Trade Within Import Restricted Product Categories, 87 J. Pol. Econ. 1105 (1979).

[49] If the President imposes tariff-rate quotas, I recommend that the quota portion be auctioned.

[50] All imports have to pay the current tariff which is 9 percent.

[51] *See Copper*, at 70 n. 14 (Views of Vice Chairman Susan W. Liebeler).

[52] The Commission's Office of Economics estimates that if the majority's recommendation is adopted, the value of the quota rights will be $519 million in the first year alone.

[53] There is at least a theoretical possibility because of the large market share of imports that some enterprising entrepreneur could make a profit by bidding for the entire quota allocation, only use part of that allocation, and thereby raise prices. Such an attempt to monopolize would be actionable under the Sherman Act.

[54] One advantage of an *ad valorem* tariff over a quota is that the tariff does not cause foreign suppliers to change their mix of shoes. An auctioned quota will not cause an upgrading if importers bid for the quota rights not by making a bid in dollars per pair of shoes, but as a percentage of the Custom's value of the shoes. With such a system, there would be a market price for the quota rights as a percentage of price, and the auction winners would pay for their quota rights only when their shoes are imported and valued by Customs. A quota where the bids are a percentage of the value of the imported product is more restrictive than one where the bids are in fixed dollar amounts because the former prevents the upgrading of imports. Thus, if such a bidding system is selected, the quota should be expanded for it to be equally restrictive.

[55] I recommend that if quota rights are assigned that they be transferable.

[56] J. Hirshleifer, Price Theory and Applications 216-20 (2d ed., 1980).

[57] With OMA's the United States does not owe compensation under the GATT.

[58] *Footwear II.* OMA's were negotiated with Taiwan and Korea.

[59] In the technical economic literature of public finance, distortion minimizing tariffs, or quotas, and taxes, are known as Ramsey prices.

[60] FIA Prehearing Brief at 85-91.

[61] Federal Trade Commission, Posthearing Brief (hereinafter, FTC Posthearing Brief).

[62] *Id.* (Appendix A), at 13-15.

[63] FTC, Posthearing Brief, Appendix A, at 15-16.

[64] A summary of their analysis is set forth in Appendix C to my views.

[65] Import relief which benefits foreign producers more than domestic firms would be a peculiar remedy indeed. If either a tariff is used or quota rights are sold, the U.S. Treasury gets the $600 million.

[66] There is one other important effect of import barriers. They generally raise the value of the dollar, an unwelcome event to participants in export industries and other import-competing industries. As conditions in import-competing industries worsen because of any additional import restraints on footwear, they will seek their own relief and impose still greater costs on consumers.

[67] This analysis was originally developed in *Copper* at 60-65 (Views of Vice Chairman Susan W. Liebeler) As in the copper report, I am indebted to the Federal Trade Commission for presenting this analysis. See 19 U.S.C. 1334 (1982) instructing the Commission to cooperate with other federal government agencies including the Federal Trade Commission.

The PRESIDING OFFICER. The 15 minutes of the Senator from Maine have expired.

The Senator from Georgia is recognized.

Mr. MATTINGLY. Thank you, Mr. President.

THE TRADE CRISIS

Mr. MATTINGLY. Mr. President, the return from the August recess traditionally marks the end of what is considered one of the busiest and, hopefully, most substantive recess periods of Congress. Members are able to take advantage of the longer length of this particular recess to gain deeper insight into how our constituents are faring. What we learn during this particular period becomes all the more valuable because Members immediately return to Washington for the final legislative period of the session.

I wish my colleagues to hear what I heard in reference to trade while I was at home. In addition, I wish to lay before you several ideas that could serve as the basis for future legislation and action. It is evident that the recess just reinforced what I, and a few others, have been stressing for the past 4½ years I have served in this esteemed body and with little reaction until recently.

Trade is part of every facet of our economic life. That is it, pure and simple. That was, and is, the concern of everyone and it should be. Textile workers, footwear workers, retailers, farmers, high technology technicians, machine tool makers, bankers, corporate executives, importers, exporters, local and State officials, retirees, housewives, and many others are all impacted by the current international trade crisis and let us not kid ourselves—we are smack dab in the middle of a trade crisis that will make the early 1930's look like a bad day at the track. The United States is still racing along toward a 1985 trade deficit that could exceed $150 billion. We are watching our export markets erode due to fair as well as unfair competition. And we are watching able-bodied and able-minded U.S. workers sitting idle while their families' standard of living deteriorates. Such a situation makes excellent fodder for the media and political demagogues; sometimes the desire for news or political gain is more powerful than the desire for constructive answers. The adverse impact of imports and trade restrictions on American jobs and profits is easily documented, at last making our trade ills a front burner and national issue. I have long held the outspoken opinion that trade policy should receive the same attention as tax spending, or foreign policy.

It has not in the recent past, but you can bet it will from now on. Maybe the 1986 election obsession and the political search for an issue has surfaced to where something constructive can now occur.

We have a serious problem and our instinct to act is strong. It is indeed critical that action be taken and I believe Congress has an important role to play, but contrary to the view of many of my colleagues I am hesitant about encouraging Congress to set what would probably be 535 different trade policies.

We must speak with a single voice on trade and that voice must follow a unified and coherent policy that affords long, not short, term economic growth and well-being for this country as a whole. That voice must firmly seek the establishment of a fair and open market system that provides the trade access necessary to all trading nations. We, in Congress, should guide that voice—in effect serving as the trade conscience of our trade policy. We in Congress should work to firmly provide a well-thought out framework within which our trade officials can and must act.

My interest and involvement in international trade is well-known and well-documented and my preference has been to listen and learn and then suggest practical ways in which to improve U.S. trade policy. My assessment, then, as toward what direction we need to move vis-a-vis international trade policy is the result of 4½ years of practical, hands-on experience. I attended the November 1982 ministerial meeting of the General Agreement on Tariffs and Trade as an official U.S. Government representative. I have been a member of the Canada-United States Interparliamentary Group. In addition, I have been a participant in the Mexico-United States Interparliamentary Conferences.

When I examined this country's trade policy framework I found that there largely existed those who advocated more or less purely free trade policies and those who supported specific protectionist solutions to existing trade ills. One—free trade—forced the policymaker to see a world trade arena that simply does not exist while the second—protectionism—shrouded U.S. trade policy in a negative, circle-the-wagons type mentality. I am not comfortable with either view. It was becoming obvious to me that our trade focus was either black or white and reeked of naivete or negativism depending on what day of the week it was and who you happened to be talking to. We were heading straight toward the type of conflict in trade philosophy that dominated the early 1930's with such disastrous results. I discovered that there are several givens in the global trade environment that I feel must always be kept in mind:

First, protectionism has a negative effect;

Second, unfair trading practices must be eliminated;

Third, U.S. competitiveness is slipping and must be eliminated;

Fourth, multilateralism is giving way to bilateralism; and

Fifth, unlike every other major trading nation, the United States speaks with not one, but several voices on international trade.

Protectionism is negative. As we invoke protectionist measures to save important jobs, we will just as surely lose others equally important as retaliation and increased prices affect other sectors of the U.S. economy. The most notable example is the Smoot-Hawley Tariff Act of 1930. 1,028 economists petitioned then-President Hoover to veto Smoot-Hawley; they were ignored until 1933. An esteemed fellow Georgian who preceded me in service in this body, in 1936, Senator Richard B. Russell, had the following to say about the 1930 Tariff Act:

> The passage of the Smoot-Hawley Tariff Act did more to demoralize the commerce of the world than any other single act which has ever been passed by the Congress of the United States and signed by the President of the United States. It not only dried up our foreign market for agricultural commodities but it eventually paralyzed industrial production in this country. By reason of its passage there grew up all over the world a complicated system of quotas, embargoes, trade agreements, and restrictions which obstructed all of the normal channels of commerce . . .

The question is, is history going to repeat itself? The situation is too similar and thus it is all the more important to avoid the same results—results that I think can best be described as

"boomerang trade legislation," policies quickly tossed out that look good during their initial flight, but that can be guaranteed to return and unintentionally hit some other part of the U.S. economy.

I recognize, however, that in order to return American trade to a level playing field and to force fair trade practices on other nations, tough action is needed. I am certain that some of you may not agree with what I propose, but I ask you to give what I have to say serious consideration. From an international trade standpoint these are difficult and desperate times. Let us try to act in a constructive way.

First, the President must immediately take a direct role in trade policy issues. As leader of the premier global economic power, the President of the United States is in a unique position to influence the creation of an open and fair world trading system. U.S. trade policy is addressed by 25 different U.S. Government agencies. Only the President can consolidate administration initiatives on trade. Without the involvement of the President it will be nearly impossible to cure the problem.

Second, we must focus our energies in a more positive direction—rebuilding the competitive strength of the United States by a commitment to new technologies and their commercial applications to new as well as traditional production.

Third, our competitiveness would be enhanced if, for instance, a personal effort were to be made to purchase domestically-produced goods and services by American consumers. Through good old American purchasing power, consumers can have an impact. I am simply saying that one way to positively help our domestic industries is to pay closer attention to what we buy. I am not saying we should no longer buy foreign-made products, but I am saying, where possible or practicable, think "U.S.A." and then buy the U.S. product. Such an effort can and would make a difference.

Fourth, use of domestic trade laws is perhaps the most effective signal that this country can send to its trading partners that we absolutely will no longer tolerate unfair trading practices and intend to pursue previously agreed upon legal means of remedy to the fullest extent. There are sufficient U.S. laws to accomplish any Presidential initiative to resolve current problems. Some are ineffective or cumbersome and need to be strengthened or streamlined for better useability. Most recently, the Congress passed, and the President signed into law, the Trade and Tariff Act of 1984. Under the provisions of the act, the concept of reciprocity, or equitable market access, became law. That provision has not been utilized. Enforcement of this trade law and others would go a long way toward giving U.S. businesses an even chance on the trade playing field. We must do whatever it takes to make the laws we have useable and enforceable. The President, with the advice of the U.S. Trade Representative and the Secretary of Commerce, should provide the Congress with their ideas on revisions to U.S. trade laws.

Fifth, existing international trade laws are in desperate need of modernization and reform. Multilateral trade agreements such as the General Agreement on Tariffs and Trade [GATT] or the Multifiber Arrangement [MFA] should be revised so as to address emerging trade problems as trade increasingly is occurring outside of these agreements. I urge my colleagues to join me in supporting a new round of multilateral trade negotiations within the context of a reformed GATT.

Sixth, the underlying reasons for exchange rate disparity and instability, including lagging economic growth, should be examined; alternative methods of calculating currency valuations thoroughly investigated; and appropriate reforms enacted. The disparity between the dollar and other currencies makes it difficult for U.S. exports of goods, services and commodities to remain competitive. I suggest that serious thought be given to a Bretton Woods-type of conference on the current situation; much has changed in the international currency exchanges in the last 42 years.

Seventh, we cannot allow our support of U.S. export efforts to stagnate. We must rediscover that "Yankee Trader" spirit that led this country to become the most powerful trading nation on Earth. Creative financing and aggressive marketing strategies are vital in that respect.

Eighth, reduction of Federal expenditures must remain the top priority because it is only in a responsible fiscal environment that international economic opportunity for long-term growth in the United States will be fostered. This is an area in which bipartisanship can have an immediate impact.

I hope that our recent experiences in our home States have assured trade policy and trade issues the highest priority. Consumers and businesses alike are at the mercy of a fragmented trade policymaking apparatus. We must keep in mind the impact of budget, regulatory, and other domestic policy decisions in the competitive position of the United States. Our trade problems are as numerous and diverse as our many producers. Trade must be a joint, and I emphasize the word "joint," effort between the President, the Congress, and the people. The time to act is now, but we must work together and act in a manner that will produce results, positive results, for our country and not one that will boomerang on consumers, business, and our country.

RECOGNITION OF SENATOR PROXMIRE

The PRESIDING OFFICER. Under the previous order, the Senator from Wisconsin [Mr. PROXMIRE] is recognized for not to exceed 10 minutes.

NUCLEAR ARMS CONTROL STALLED

Mr. PROXMIRE. Mr. President, last month in a column on nuclear war in the Milwaukee Sentinel, Ellen Goodman concluded that in the 40 years since Hiroshima "* * * those who lead the superpowers have done nothing, absolutely nothing, to still" the fears of world destruction in nuclear war. How about that? Have the eight Presidents who have led this country in the past 40 years done "absolutely nothing to still our fears?" Ellen Goodman offers a provocative and eloquent challenge. Certainly our leaders have not done nearly enough. But absolutely nothing? Consider what they have and have not done in concert with Soviet leaders to control nuclear arms. They have negotiated five major arms control treaties. Here they are: A limited test ban treaty; an antiballistic missile treaty; a treaty limiting the megatonnage of underground nuclear weapons explosions; and two strategic arms limitation treaties—SALT I and SALT II—limiting the nuclear arsenals of both superpowers. Some would apply the Goodman conclusions to all of these treaties, and call them meaningless. They would have a strong case for that viewpoint. After all, what was the prime purpose of the two treaties limiting nuclear weapons tests? Answer: It was to design an agreement that would stop the technological progress toward even more destructive weapons. Did they succeed? Obviously, they failed and failed dismally. Since those limits on testing, each superpower has engaged in hundreds of nuclear weapons tests. Each has greatly increased the killer efficiency of their weapons. They have increased megatonnage, throw-weight, accuracy, and penetration. Obviously, the limitations on testing and research have to date failed in their mission. So far it is true they have accomplished absolutely nothing. How about the two SALT treaties? Have they not succeeded in limiting the nuclear weapons of both superpowers? The answer is that each superpower has about 10,000 strategic nuclear weapons. Each also has about 15,000 tactical nuclear weapons. There is now a superpower total of 50,000 nuclear weapons. Some limit. The numbers are absolutely ridiculous. Each superpower has sufficient nuclear capability to weather an all-out nuclear

attack from the other side and still totally devastate the adversary several times over. The SALT nuclear weapon limitation treaties are in place but the arms race speeds on. So far the Goodman challenge—that superpower leaders have done nothing to still our fears of nuclear destruction, as far as offensive nuclear weapons are concerned—seems right. Finally, there is the Antiballistic Missile Treaty of 1972—the ABM Treaty. That treaty limited the production and deployment of systems that defended against nuclear attack. Now the United States is engaged in the beginning of what promises to be the most costly single military program in history to build a massive defense against nuclear missiles at a cost that could exceed a trillion dollars. Obviously, this effort will make a complete and conspicuous nullity out of the ABM Treaty. The ABM Treaty was expressly drafted to prevent precisely what the United States is prepared to do.

So, are all five of the arms control treaties useless pieces of paper? Have all been swamped by the arms race? The answer is that every one of those treaties began a process that is critical to a peaceful nuclear world. Continuation of that process could indeed greatly lessen the prospect of nuclear war. Each treaty depended on follow-up treaties. Superpower leaders have dismally failed to pursue those follow-up treaties. The Limited Test Ban Treaties of 1963 and 1974 actually pledged—solemnly promised—both superpowers to negotiate a comprehensive verifiable ban on all nuclear weapons testing. Those treaties recognized that unless all testing ended the arms race would zoom on to Armageddon. The newest Star Wars Program has killed the rest of arms control. SALT I and II could only succeed with subsequent treaties that ended production and deployment of strategic missiles and began a cutback. Obviously, the U.S.S.R. will not agree to such a limitation if the United States presses ahead with an antimissile defense system—Star Wars—that can only succeed if the Soviets reduce the number of these offensive missiles. It is equally obvious that the ABM Treaty cannot provide an assured deterrence for both superpowers—if Star Wars threatens the credibility of the Russian deterrent. So Ellen Goodman may be right. We may now have arrived at a point where the arms control efforts of the nuclear age have been nullified by an administration that refuses to negotiate an end to nuclear testing and is pushing hard a Star Wars Program which, if it succeeds, will destroy both deterrence and any prospect for negotiating a limitation or reduction on nuclear missiles.

Mr. President, I ask unanimous consent that the article to which I have referred by Ellen Goodman be printed in the RECORD at this point.

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

NUCLEAR FEAR HOLDS WORLD IN BONDAGE

(By Ellen Goodman)

The 40-year-old newspapers on my desk chart the terrible plot line, day by day, toward its horrific climax.

On June 20, 450 planes drop 3,000 tons of incendiary bombs on three Japanese cities, leaving behind "one solid mass of flames."

On July 27, 350 planes drop 2,200 tons of firebombs on cities with populations of 377,000.

On July 29, 550 planes drop 3,500 more tons of firebombs.

Finally, on Aug. 6, 1945, a single plane drops a single bomb, the bomb they call, "Little Boy."

In the dry words of the New York Times news summary, "One bomb hit Japan . . . but it struck with the force of 20,000 tons of TNT. Where it landed had been the city of Hiroshima; what is there now has not yet been learned."

It is hard for those of us, raised in the nuclear age, to imagine what Americans thought when they read the news 40 years ago. I have asked my elders, elders who were younger then than I am now. One, a bombardier who flew over Europe, struggles to remember: "I just thought it was a bigger bomb." Another, a Marine in the Pacific waiting to invade Japan, answers: "I thought, well, I guess I'm going to live."

Still others who read the papers on that distant summer day, with eyes glazed by years of war news, must have turned from the news to the ads that bordered it: "Looking forward to fall and a fine fall suit? Come to our third floor and select, in air-conditioned comfort, the wool suit you'll need."

The casualties may have sounded less awesome after four years of death statistics. World War II had already smudged the lines that distinguished soldier from civilian, front line from city. Some 40,000 Britons had died in the Blitz, 135,000 Germans in the firebombing of Dresden, 70,000 Japanese in one night's firebombing of Tokyo.

The 130,000 killed those first minutes in Hiroshima may have been more numbers to those already numbed. We did not yet know about skin that peeled off and faces that melted, about radiation sickness and the silent leukemia that struck years, even generations, later. We hadn't yet heard the stories of the hibakusha, the survivors.

In the first days of the atomic age, the scientists talked about their accomplishment and the military about cost-effective killing. A colonel said at a press conference that since the bomb had done the work of 2,000 planes, "That makes atomic energy far cheaper than any other way of bombing."

Yet in this seamless daily flow of history, there was also an abrupt awakening, an immediate, often subliminal, understanding that the atomic bomb had changed everything. Dailiness couldn't dull the early rumblings of existential dread.

The sounds of it were there in President Harry S. Truman's dramatic announcement: "The force from which the sun draws its power has been loosed against those who brought war to the Far East." They were in solemn cadences in the Vatican's lonely moral judgment: "The last twilight of the war is colored by mortal flames never before seen on the horizons of the universe from its heavenly dawn to this infernal era."

They were in the rush to proclaim that this bomb could be a force for good, could portend a new dawn of energy or, at least, a "club for peace."

But now the newspapers have yellowed. Even the microfilm is hard to read. We have learned in intimate detail what happened on the ground at Hiroshima and Nagasaki. Yet in mad competition with the Soviets, we collectively produced some 50,000 bombs that do indeed make the first seem like a "little boy."

The etiquette books tell us to give rubies for a 40th anniversary. But we have given far more than that in this bondage of two generations. We have given the wealth of nations to the bomb. We have sacrificed peace of mind.

On this Aug. 6, in Washington and Moscow, men will get up, eat breakfast, kiss their families goodbye and go to the office, to spend the day at nuclear war games. Diplomats will argue: How many bombs are enough? Who has more?

And all across the world, people who may not be able to explain fission, people who cannot imagine an argument that would justify extinction, will for a moment think about Harry Truman's "rain of ruin" and nuclear winter.

They'll remember that the mushroom shape of their deepest fears first rose 40 years ago over a place called Hiroshima. They will surely wonder why, in all these years, those who lead the superpowers have done nothing, absolutely nothing, to still that fear.

HOW AMERICA SINKS UNDER ITS DEBT BURDEN

Mr. PROXMIRE. Mr. President, years ago—as a matter of fact, when I first came to the Senate, I remember talking to Alvin Hansen right out here outside the Capitol—Alvin Hansen, the great Harvard expert on business cycles, argued that in the economic history of the United States there had been a remarkable, compensating symmetry in the accumulation of debt. Professor Hansen was writing at the time of the Great Depression and World War II. He contended that the alarm about the Federal Government's debt was based on a peculiar myopia. In Hansen's view critics failed to put debt in perspective. He contended that throughout America's economic history when the Federal debt increased State and local debt tended to decrease and vice versa. On occasions where overall public debt did grow rapidly, Hansen argued that private debt enjoyed a compensating decline.

It is too bad Professor Hansen is not around today. If he were, it is hard to see how he could explain the growth of debt in the past 7 or 8 years and especially in the past 2 or 3 years based on his theory of "debt-symmetry" Every member of this body—it seems that every American who has any concern for our country's economic future—is aware of the immense growth of the Federal Government's debt. We all know that within a few weeks we in the Congress will be called

on to raise the national debt limit, perhaps to more than $2 trillion. Those of us, who have been in this body since 1980 or earlier, will recall that it was less than 4 short years ago that we were called on by President Reagan to increase the debt limit to a then-shocking $1 trillion. This Senator remembers talking all night, in fact, for 16 hours consecutively on September 30, 1981, in protest against what seemed to this Senator at that time to be an outrageous collapse of the Congress, fiscal responsibility.

Mr. President, can we find any solace in the Hansen symmetry argument in 1985 as we prepare to sink the Federal Government under a further debt deadweight? The answer is not just negative. It is shockingly negative. Two trillion dollars is a nice, fat, round figure that should frighten all of us. But it is only part of the whole picture. Is there a compensating drop in this country in corporate debt or individual consumer debt? For those Senators who have not taken a look at the overall, that is, the total public and private debt problem of America, prepare for a shock. The sad fact is that the total public and private debt of this country not only has failed to compensate for the explosion of the Federal Government's debt by providing a corresponding reduction, it has actually exploded far more than the Federal Government's debt. In two excellent articles in the New York Times on September 4 and 6, Leonard Silk discusses this mammoth economic problem. He points out:

> Total outstanding debt in the United States has more than doubled in the past seven years, increasing from $3.3 trillion at the end of 1977 to $7.1 trillion at the end of 1984. While the federal debt was rising by $754 billion during that period, private debt was climbing by $2.3 trillion.

Now, Mr. President, we should not let those trillions bowl us over with these nominal dollars. Between 1977 and 1984 the country suffered an inflation of about 70 percent. Let us correct the nominal growth in debt to measure the increase in real terms. If we do so, we find that both the public and private debt increased steadily and sharply but by far less than the nominal figures suggest. Nevertheless, on any basis the debt of the U.S. citizen has increased. It has increased in every form—public, corporate, and for individuals. It has increased sharply in relation to the gross national product, in relation to personal income or corporate income. The typical American not only is finding that his taxes are going more and more to pay interest on the Federal Government's debt. He finds the corporation which may employ him or whose stock he may own is also more burdened by debt and is becoming increasingly more fragile and subject to collapse in the event of recession because of its increasing debt. He is also increasingly finding his big burden is likely to be the interest he must pay every month on his own mortgage, the interest payments on his car, or on the appliances he has bought for his home.

At the moment Americans except for farmers feel relatively little of this debt burden pressure. We are lulled by the blessed moderation of inflation. The immediate outlook for prices seems comforting. Because the inflation outlook is good, interest rates are also behaving like a well-trained dog. This pleasant interval of ease in meeting our interest obligations may continue for a year or two, maybe even more. But, Mr. President, make no mistake about it. Our country is riding for a fall and a big one. Every country in history that has lived far beyond its means has eventually suffered sharply accelerating inflation. Private corporations and individuals who have consistently spent more than they have taken in have run into trouble. The longer the spending beyond income has gone on, the bigger the problem. Our Federal Government is now into its fourth year of mega-deficits. Private debt has increased even more than the Federal debt in the same period.

What kind of trouble does this spell? At this very moment Israel, Argentina, and Bolivia offer vivid examples. It means inflation—big inflation—in fact very big inflation. And that means very high interest rates. And when high interest rates coincide with a massive and growing debt what does that mean? It means the cost of servicing the national debt will rise to $200 or $300 billion and far more. It means thousands of corporations and millions of individual Americans will not be able to pay interest on their debts. So what do we need? It is plain and simple. This country needs a massive infusion of good old fashioned thrift on every level and we need it now.

Mr. President, I ask unanimous consent that the two articles by Leonard Silk to which I have referred be printed at this point in the RECORD.

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

[From the New York Times, Sept. 4, 1985]

THE EXPLOSION OF PRIVATE DEBT

(By Leonard Silk)

The rapid growth of the Federal Government's debt has been the focus of a great deal of public concern in recent years. But much less attention has been paid than is due to the even greater explosion of private debt.

Total outstanding debt in the United States has more than doubled in the past seven years, increasing from $3.3 trillion at the end of 1977 to $7.1 trillion at the end of 1984. While the Federal debt was rising by $754 billion during that period, private debt was climbing by $2.3 trillion.

In just the past two years, total debt outstanding increased by nearly $1.5 trillion. In the final quarter of 1984, total debt, private and public, was climbing at an annual rate of $1 trillion for the first time in history. Last year the Federal Government borrowed $198.8 billion to finance its deficit while private businesses and households added $535 billion to their debts.

What are the forces behind the explosion of private debt?

James J. O'Leary, economic consultant to the United States Trust Company, observes that, in the late 1970's, inflation and inflationary expectations were a driving force. Borrowers thought the rising value of the assets they brought, and the declining value of the money with which they would repay their loans, would move than justify the high interest rates they had to pay. And lenders and investors were willing to take big risks in the belief that inflation would bail out unsound loans and investments.

The drop in inflation resulting from the sharp United States and world recession of 1980-82 uncovered the unsoundness of a lot of those loans that were made in an inflationary era. Many farmers who had expanded their operations in the belief that prices of farmland, foodstuffs and fibers would keep on climbing indefinitely were caught with debts they could not handle when commodity prices dropped. Likewise, the oil glut and declining energy prices made a lot of oil loans go bad—and caused some oil producers and banks that had lent to them to go broke.

Farmers and oil producers are not the only ones caught in a bind. Deflation combined with the overexposed financial position of many businesses has resulted in the greatest failure rate since the Great Depression of the 1930's.

From 1931 through 1935 the average number of business failures per year was 20,860, for a failure rate of 126 per 10,000 concerns. During the early postwar years from 1946 through 1950, the average annual number of business failures was only 5,301, and the failure rate was 21 per thousand. But during two years, 1983 and 1984, the average annual number of failures climbed to 29,610 and the failure rate to 104 per 10,000—rate four-fifths as high as occurred during the worst years of the Great Depression.

What is remarkable and disturbing about so high a failure rate now is that it has taken place during the period of business-cycle expansion, not depression. This reflects the weakened financial structure of United States business, and it could foreshadow an even more serious wave of bankruptcies if the business cycle should turn down.

Nevertheless, the tidal wave of increasing debt rolls on. What is keeping it going with the rate of inflation down—and deflation hitting many markets around the world and here? Among the major forces for expanding debt, Mr. O'Leary observes, are these: the vast borrowings to finance mergers and acquisitions—and in some cases by corporate managements to fight off unwanted mergers or acquisitions; aggressive lending by financial institutions to achieve a positive spread between their current rate of return and their current cost of money, to restore profitability; the drive of banks and thrift institutions to lend at floating or variable rates, thereby pushing interest rate risk onto borrowers, and the interest rate "buy-downs" offered by auto companies and home builders in an effort to make sales in a time of persistently high real interest

rates that would otherwise discourage their customers.

The expansion of mortgage credit, much of it on a minimum down-payment basis, has brought on a big increase in delinquencies and foreclosures on both homes and commercial properties, as real estate prices have declined in some parts of the country. The Home Loan Bank Board reports that outstanding foreclosed loans of savings and loan associations jumped 27 percent in the first quarter, with most of the increase involving commercial properties.

In a study for United States Trust, Mr. O'Leary concludes that the large increase in delinquencies and foreclosures, together with the losses incurred by lenders in all sectors of the private market, is undoubtedly a result in part of too fast an expansion of private debt and of the assumption by lenders of excessive risks.

Similarly, a study by Mel Colchamiro and William C. Freund for the New York Stock Exchange concludes that the health of American corporations has been endangered by excessive debt. As of the end of last year, 68 percent of all corporate debt financing was short-term, bringing the share of short-term debt up to 51 percent, its highest level in the past 25 years. Further, the study notes, the "quick ratio" (liquid assets as a percent of short-term liability) fell to its lowest postwar level. The so-called interest coverage ratio (pretax corporate profits to interest payments) remained at historically low levels, as did manufacturing corporations' equity-to-debt ratios.

Yet the buildup of debt goes on at the fastest rate of the postwar period. The implications of this debt explosion will be considered in another column.

[From the New York Times, Sept. 6, 1985]

PREVENTING DEBT DISASTER

(By Leonard Silk)

The huge expansion of private debt of recent years poses a threat to the financial health of major sectors of the American economy.

The most immediately threatened sector is agriculture—and the banks that have lent heavily to farmers. The Farm Credit Administration now has 402 farm banks on its problem list, and the entire farm credit system is facing a potential debacle, which could deal a heavy blow not only to the farm economy but also to the national economy and banking system. Farmers owe their creditors a total of $213 billion. A critical issue facing the Reagan Administration is whether to prepare for what could become a bailout amounting to billions of dollars in bad loans, if the depression in agriculture continues.

But is agriculture only the most conspicuously endangered sector resulting from the debt explosion? Nonfinancial business corporations have also been increasing their debts at a rapid pace. A study by the New York Stock Exchange notes that 1984 witnessed an outbreak of "mergermania" with the retirement of an estimated $84 billion to $100 billion worth of equity in merger exchanges of debt or cash for equity. Although $12 billion in equities were issued in 1984—one of the biggest years ever—the corporate equity base declined by at least $72 billion. Mergers—or canceled mergers—last year offset all the equity financing of the last half-dozen years.

Some economists fear that debt-financed mergers and leveraged buyouts withdraw credit from the rest of the economy. But Henry C. Wallich, a member of the Federal Reserve Board, argues that such fear is misplaced, maintaining that such operations do no more than reshuffle assets. The real danger, in his view, is the resulting change in the balance-sheet structure of corporations, causing a deterioration of their debt-equity ratios.

Henry Kaufman, executive director and chief economist of Salomon Brothers, interviewed by telephone in London, expressed his anxiety over the weakened financial base of corporations. "In the past year and a half," he said, "the outstanding equity of nonfinancial corporations shrank by $53 billion, but the debts of the same corporations increased by more than $250 billion." The Fed's Flow of Funds data show a net increase of nonfinancial corporations' debt by $256.9 billion in 1984 alone, bringing their net outstanding debt to more than $2 trillion, more than double its level in 1977. Their short-term debt has soared to 51 percent of their total liabilities.

Just how dangerous is this situation? Some economists contend that the danger has been overblown, arguing that the traditional ratios of debt-equity and corporate liquidity no longer hold because of the internationalization of credit markets, tax laws that encourage debt rather than equity and financial deregulation. But another school says the danger is all too real, holding to the principle that the only valid measure of a corporation's debt capacity is whether it could service its debt in a period of adversity.

For much of American agriculture, the ex post facto answer is that it went far too deeply into debt. Obviously, nobody can simulate just what the cash flow of business corporations will be in the recession or, perhaps, in the next inflation. But business failures have been rising despite almost three years of economic expansion, and a downturn could only aggravate the financial vulnerability of corporations.

What can be done now, other than for the Government to prepare for huge bailouts? One constructive step would be to reduce the Federal budget deficit that, together with the Treasury's effort to lengthen the public debt, has pushed up long-term interest rates, leading corporations to go increasingly into short-term debt. However, the outlook now is that the Federal deficits will remain high and may even worsen. The effort of banks to protect themselves by setting variable interest rates on long-term loans also means greater danger for the borrowers if inflation returns.

Another way to strengthen the corporations would be to encourage greater internal financing. Here the New York Stock Exchange study charges that President Reagan's proposed tax revisions would have a damaging effect by eliminating the Accelerated Cost Recovery System and the Investment Tax Credit, cutting company cash flows.

Mr. Kaufman urges increased Federal regulation to keep the growth of debt under better control. He would enhance the powers of the Federal Reserve System and set up a new National Board of Overseers to supervise all institutions that create credit, not just commercial banks. Indeed, he wants greater international financial oversight to cope with the immense and accelerating growth of international debt. Mr. Kaufman was in London this week pressing his case for such international oversight upon the Group of 30, a body of leading financial authorities.

He is also calling for a new official credit-rating system. He contends that the private rating concerns cannot get as much information as can the Government to do an adequate rating job. If the Government published such reports, he contends, such disclosure would push managements to take strong remedial actions and preventative steps.

Do such ideas come too late? No one can be sure, but remedial measures may be crucial if they are to prevent what is happening in agriculture from becoming a general condition of financial vulnerability.

ERIC STROM'S BAR MITZVAH

Mr. PROXMIRE. Mr. President, on September 7 Eric Strom of Stamford, CT, had his bar mitzvah in Cracow, Poland. According to the New York Times, Eric was the first boy to have a bar mitzvah in Cracow since the end of World War II.

The bar mitzvah was planned as a celebration for the Jews of Cracow. The New York Times reports that those Jews who remain in Cracow are just a few elderly, impoverished survivors of the Holocaust.

During World War II, the Nazis sent the entire population of Cracow's Jewish community to die in Auschwitz.

The Federation of Jewish Philanthropies planned and raised the expenses for the trip, and Eric was chosen for his Polish heritage.

The inspiration for the trip came last spring when an old woman in Cracow remarked to American visitors, "There's never going to be another birth, wedding, or bar mitzvah."

Mr. President, the Jewish community of Cracow still lives under the shadow of the Holocaust. It has been over 40 years since some of the most common of Jewish ceremonies were performed in Cracow's ancient Remu synagogue.

Before leaving for his bar mitzvah, Eric said, "I want to bring joy to them. I want them to know they're not forgotten."

Mr. President, in a broad sense, the survivors of the Holocaust have not been forgotten. Interest in the Holocaust is perhaps greater now than at any recent period.

But, often we forget about the suffering of the individual survivors, like the Jews of Cracow.

We should be proud of Eric Strom and the Federation of Jewish Philanthropies. They have filled an empty space left in the lives of these people by the Holocaust. They have healed, in part, a wound that was over 40 years old.

Mr. President, ratifying the Genocide Treaty would be a symbol that the United States remembers the victims of the Holocaust.

Ninety-six nations have already signed this document which pledges them to punish the perpetrators of genocide.

I urge my colleagues to vote for ratification to show survivors of the Holo-

caust that we have not forgotten what they endured.

MYTH OF THE DAY: TOO MANY INEFFICIENT FARMERS ARE A CAUSE OF OUR AGRICULTURAL WOES

Mr. PROXMIRE. Mr. President, a myth abounds in our Nation that a prime cause of our agricultural woes is an overabundance of inefficient farmers. Nothing could be farther from the truth. A look at the facts makes this clear.

The farm population as a percent of the total U.S. population has fallen from 15.3 percent in 1950 to a mere 2.4 percent in 1982, the latest year for which U.S. census data are available. For Wisconsin, the comparable figures are 21.1 percent in 1950 and 6.9 percent in 1980, the latest figures available.

These figures spell out the hard reality that we have already weeded out the inefficient farmers in America. What is left are the superefficient farmers whose efforts result in the agricultural productivity that is the envy of the world.

And it is this agricultural productivity that provides our clearest advantage over the Soviet Union. No group in American society is more productive and efficient than the farmer. Our farmers are producing more food than ever before—at the same time that our population is growing and we are working on ways to export more of our agricultural output.

Our taxpayer dollars are not going to prop up inefficient farmers—that is for sure. Here are additional data that support this conclusion and help to destroy the myth that says otherwise. In 1950, there were 5,388,437 farms in America. By 1982, that number had plunged to 2,240,976, a decline of 58.4 percent.

The same story holds true for Wisconsin. The total number of farms in Wisconsin in 1950 was 166,561. By 1982, that number had fallen to 82,199, which represents a drop of 51.2 percent.

Does the picture change for dairy farmers? No way. In 1950, there were 602,093 commerical dairy farms in the United States But in 1982, the figure was 163,963, or a whopping 72.8 percent dive. And in Wisconsin, there were 116,529 commercial dairy farms in 1950. By 1982, this number had dwindled to 40,088, a decrease of 65.6 percent.

Much needs to be done to improve the farm situation today. The immediate challenge facing the Senate is to produce a 1985 farm bill that will help get the job done. But in looking for the causes of our agricultural difficulties, we should dispel the myth that mounting numbers of inefficient farmers are a contributing factor.

Mr. President, I yield the floor.

ROUTINE MORNING BUSINESS

The PRESIDING OFFICER. Under the previous order, there will now be a period for the transaction of routine morning business, not to extend beyond the hour of 3:30 p.m., with statements therein limited to 5 minutes each.

LABOR DAY—AN AMERICAN TRADITION

Mr. DOLE. Mr. President, the second day of September marked this country's official celebration of Labor Day. It is, traditionally, a day for parades, picnics, and speechmaking, commemorating and reinforcing one of America's most valuable commodities—the strong work ethic of our people.

Despite America's humble beginnings, this Nation has risen to a level of preeminence in the world economy that would have astounded our forefathers. They could not have known that their simple formula for survival in a new world would spawn the productivity and prosperity of an economic giant. But, these are the results of a people committed to achieving their personal best at whatever they choose to do in an economic system that allows them to set any goals, reach any heights, and receive their just rewards.

I grew up believing that, "if you work hard, you get ahead"; that "your only limitations are those you place on yourself"; and, in the true spirit of American optimism, "the sky's the limit." The reason you were "early to bed and early to rise" was so that you could get in a full day's work between rising and going to bed. Well, Mr. President, we have gotten ahead. We have done it through sheer, hard work. In no other place have so many people started with so little and, through their own labors, prospered.

The work ethic runs deeply through the collective spirit of Americans and continues to be a source of pride that is celebrated every year on Labor Day. Moreover, the motivating force behind a holiday of this sort is uniquely American. I believe most Americans share the belief that work is more than a means to a paycheck; for many, it is a means of personal satisfaction, identity, and moral achievement. Self-sufficiency and industriousness are their own rewards. It is not the country that has inspired the people, but the other way around. For millions of immigrants, this was the place to "make something of yourself," and it still is.

There is no better time to recognize the achievements of American workers than on Labor Day, Mr. President. I am pleased that so many Americans took the time to celebrate the day and rededicate themselves to the ideals and ambitions that will sustain this Nation for many years to come.

U.S. JAYCEES HEALTHY AMERICAN FITNESS LEADERS AWARDS CONGRESS

Mr. DOLE. Mr. President, September 14 marks the fourth annual U.S. Jaycees Healthy American Fitness Leaders Awards Congress, sponsored by Allstate Life Insurance and carried out in cooperation with the President's Council on Physical Fitness and Sports. These awards honor 10 individuals who have made an outstanding contribution to the promotion of physical fitness, health or nutrition.

This year's recipients have exhibited notable leadership in areas very diverse from one another, such as the media, education, and active participation in athletic sports. Their bond is the impact each has made on the Nation's awareness of the importance and merits of a wholesome lifestyle. Mr. President, at this time, I would like to recognize each recipient individually:

Edward W. Bradley, 57, is the chief executive officer of the New Jersey Governor's Council on Physical Fitness and Sports. Mr. Bradley designed and established all 21 county councils on physical fitness in New Jersey.

John Burstein, 35, has had great success with his creation of a health and fitness role model for children named "Slim Goodbody." Mr. Burstein has also recorded four record albums and authored several books dealing with fitness and health.

Irv Cross, 45, is a CBS sportscaster as well as the cohost of "NFL Today." As president of the American Running and Fitness Association, Mr. Cross is a writer for Running and Fit News, and frequently serves as a guest speaker or moderator at health and sports-related functions.

Susan Smith Jones promotes health and physical fitness as a consultant, researcher, and lecturer, and is the author of more than 150 internationally published articles on fitness and health.

Dr. Charles T. Kuntzleman, 44, is the national director of both Living Well and Feelin' Good, a cardiovascular health and fitness program for children between the ages of 5 and 9. Dr. Kuntzleman has also authored more than 50 books on fitness.

After winning four gold medals for swimming at the 1976 Olympic games, and capturing the title of Amateur Athlete of the Year in 1977, 29-year-old John Phillips Naber is now the honorary head swimming coach of the National Special Olympics. Mr. Naber also runs more than 100 swimming clinics throughout the country.

Jo-Ann Louise Owens-Nausler, 36, is the State director of health and physical education for the Nebraska Department of Education. In this capacity, Ms. Owens-Nausler presents numerous speeches and conducts seminars, workshops and clinics on health and fitness for the educational community.

Kari Anne Swenson came away from the 1984 World Biathlon Championships with two medals, only to be kidnapped 1 month later. Although Ms. Swenson was shot and wounded during this harrowing experience, she demonstrated that being physically fit is a valuable asset in the face of such adversity. Since her rescue, Ms. Swenson, 24, has resumed her athletic training.

In addition to being a physician, Michael Paul Woods holds the vice presidency of the Wisconsin Olympic Ice Rink Foundation and the U.S. International Speed Skating Association. Dr. Woods is well qualified to serve in both offices, as he is himself an Olympic speedskating competitor and coach.

Lastly, I take special pride in announcing that our distinguished colleague from Indiana, Senator RICHARD LUGAR, is one of this year's recipients of the HAFL awards. Senator LUGAR is honored for his initiative in founding the Dick Lugar Fitness Festival, which promotes fitness and informs the public of fitness programs available to them.

Mr. President, I salute and congratulate each of these 10 individuals for their contribution and leadership, and thank the U.S. Jaycees for their commendable endeavors over the years.

NATIONAL SIGHTSAVING MONTH

Mr. DOLE. Mr. President, I would like to take this opportunity to bring the attention of my colleagues and the American public that the National Society to Prevent Blindness has designated September as "National Sightsaving Month."

At no time is the saying, "An ounce of prevention is worth a pound of cure" more true than in our attitude toward blindness prevention.

This year, 50,000 Americans will lose their vision. An alarming statistic, for sure, particularly when we realize that half of all blindness can be prevented through the use of sound eye health and safety practices.

While one might get the impression that Americans are taking better care of themselves than ever before, watching calories, cholesterol, and calcium intake; jogging, cycling swimming, working out at a health club; the reality is that most people seldom see a doctor until something is wrong. In a recent survey undertaken by the National Society to Prevent Blindness, it was revealed that while 9 out of 10 Americans support the idea of having their eyes checked regularly, nearly 4 out of 10 adults indicated that they have not seen an eye doctor in the past 2 years. The survey further pointed up widespread misconceptions and ignorance about eye diseases and, in particular, about glaucoma, the leading cause of blindness in adults. Few realize that though this disease rarely sends out warning signals, it can be controlled if caught in time.

Moreover, adults carry over this same pattern of indifference in the care of their children's eyes. Statistics show that 1 out of every 20 children, ages 3 to 6, is already coping with vision problems, which if left untreated, may prevent them from reaching their maximum potential.

And, for those of us blessed with no eye problems, let us ensure that we continue to protect our eyesight through eye safety on the job, around the home, and in sports.

I know that all of my colleagues will want to join with me in saluting the efforts of the National Society to Prevent Blindness, who for the last 77 years has been pointing out that our vision is truly a treasure to guard.

HAROLD H. VELDE

Mr. DOLE. Mr. President, last Monday, Harold Himmel Velde died at the age of 75. His death represented an unexpected and tragic loss for his family, friends, and loved ones. Those of us who have served in the Congress for many years knew of Harold Velde through his tenure in the House of Representatives from 1949-57. Still others of us knew Harold through his son, Richard "Pete" Velde, who has worked for me and other Members of the Senate as a staff member and consultant, and who also headed the LEAA.

Harold Velde was an Illinois farm boy who devoted most of his adult life to public service. He graduated from Northwestern University in Evanston, IL, in 1931, and then from the University of Illinois Law School at Champaign in 1937. After being admitted to the Illinois bar, Harold practiced law for a few years, but with the advent of World War II, he joined his fellow countrymen to fight for the cause of freedom and democracy. From 1941-43, he served in the Signal Corps of the U.S. Army, and from 1943-46, he undertook the dangerous occupation of special agent for the FBI, working in the sabotage and counterespionage division.

With the conclusion of the war, he returned to his native Tazewell County and was elected county judge in 1946. Pleased with his service as the local magistrate, his constituents sent him to Washington as their Congressman in 1949. Though his service in Congress included membership on the controversial House Unamerican Activities Committee, Harold was a survivor, being reelected to three succeeding terms. In 1957, however, he decided to return home and practice law. In 1969, he returned to public service to become regional counsel to the General Services Administration. In recent years, he had been living in retirement in Sun City, AZ, with his wife, the former Dolores B. Harrington.

Mr. President. History has not kindly treated all the things Harold Velde did as a Member and, for 2 years, as chairman of the House Unamerican Activities Committee. But anyone who knew Harold Velde knew that he was a good man, a decent may—a true patriot. Though there can be legitimate dispute over his actions, there can be no dispute over his motivations. He was guided by what he felt was right, just, and in the best interests of America—a country he loved as dearly as life itself.

A frequent visitor to Washington, he will be missed in this town. With his easygoing style and unique approach to politics, talking to him was always a real pleasure. I was proud and honored to have made his acquaintance and I urge all my colleagues to join me in extending our heartfelt condolences to his wife, Dolores; son, Pete; and daughter, Jan Ketelsen.

THE NEED FOR A COMMON TONGUE

Mr. SYMMS. I wish to insert into the RECORD one of the most salient articles that I have seen to date on the English language amendment [ELA]. It appeared as a guest editorial in the Idaho Press Tribune on August 28, 1985, and was authored by the member of the Idaho State Legislature who sponsors the English language amendment for the State of Idaho, Representative RON CRANE.

Representative CRANE says that the "liberals" thrive on a "victim" class of people in our society. But in the case of maintenance-style bilingual education, the liberals have made a permanent victim class among the very people they purport to help. Representative CRANE charges that "politically ambitious liberals" do not want assimilation, but rather they want a permanent "victim" class "which will provide a dependable source of votes and power for this generation and beyond."

Representative CRANE's article may offend some, but he has the integrity to call a spade a spade and tell it just is it is. I recommend that my colleagues read this very well written article.

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

NEED FOR A COMMON TONGUE

(EDITOR'S NOTE: Several weeks ago Caldwell resident Camilo Lopez authored a Guest Opinion outlining his opposition to an English Language Amendment sponsored at the federal level by Sen. Steve Symms. In Idaho, the Legislature has been asked to adopt a position supporting English as the nation's official language. Today's Guest Opinion is written by the sponsor of the Idaho amendment.)

(By Representative Ron Crane)

Liberals, by and large, love bilingual education, bilingual ballots and other assorted bilingual programs—not because they assist non-English speaking minorities into full fledged membership in the American mainstream, but because they prevent it.

Liberals have long thrived upon the votes of the so-called "victim" classes. Whether that be the housewife who is a "victim" of male chauvinism, or the steelworker who is a "victim" of the so-called Robber Barons.

Unfortunately for the liberals, as their "downtrodden masses" begin to achieve the American dream and enter mainstream middle class America, they also cease to be "victims" and tend to become more and more self-reliant.

Witness the nearly open rebellion in the labor unions when their leadership attempts to march the rank and file in lock-step to the voting booth. Similarly, most women now reject the shrill shrieks of the National Organization of Women.

With Hispanics, however, the liberals think they have found a virtual eternal fountain of "sufferers." Hispanics also represent (surprise, surprise) an already large and constantly increasing source of political power.

To alleviate this suffering (and to bind the loyalties of the sufferers) the liberals have invoked their time-honored, foregone solution to every problem—throw money at it (other people's money, naturally). In this case, the enormously expensive programs of bilingualism.

Aside from supposedly helping the non-English speaking minorities, bilingualism has the side benefit of bringing a multitude of brand new bureaucrats into the federal system. This mushrooming of bureaucracy swells the ranks of the liberals in that the economic survival of each new bureaucrat becomes dependent upon the continuation of the program in which he is involved.

Unfortunately the bilingual programs also tend to make permanent the very "victim" classes they purport to help.

Bilingual education is a good example. First, the name "bilingual" education is in itself a misnomer. This particular program has been besieged from its inception by complaints that many of the Spanish-speaking teachers hired for it were themselves unable to speak English.

What it and the other government bilingual programs have actually developed is a system in which Hispanics perceive they need never learn English.

The rush to promulgate bilingualism has resulted in the creation of an environment in which a permanent Hispanic subculture can flourish. A subculture in which neither the first generation immigrants nor the generations which follow will be able to gain entry to the American mainstream.

In fact, we have created a liberal's paradise—an already large and continuously increasing group of "victims" which will be unable to stand on their own and thus who will be permanently dependent upon bilingual interpreters and the handouts of big government.

Not only is this permanent Spanish-speaking subculture bad for Hispanics, but it is bad for the nation.

In the words of former U.S. Sen. S.I. Hayakawa (himself the son of Japanese immigrants), "What is it that has made a society out of the hodgepodge of nationalities, races and colors represented in the immigrant hordes that people our nation? It is language of course, that has made communication among all these elements possible. It is with a common language that we have dissolved distrust and fear. It is with language that we have drawn up the understandings and agreements and social contracts that make a society possible."

Virtually every other immigrant group, the Irish, the Germans, the Arabs, the Jews, the Koreans—all of them not only adopted America as their new nation, but English as their new language. Further, they learned the language through their own initiative.

As a result these groups have been assimilated into the society. But Camilo Lopez and his fellow liberals want it different this time.

Again quoting Sen. Hayakawa, "The 'Hispanic Caucus' and their fellow travelers look forward to a destiny for Spanish-speaking Americans separate from that of Anglo-, Italian-, Polish-, Lebanese-, Chinese-Americans and all the rest of us who rejoice in our ethnic diversity."

Camilo Lopez and other politically ambitious liberals don't want assimilation. They want a permanent "victim" class which will provide a dependable source of votes and power for this generation and beyond.

We need a state and a nation whose citizens, even if they differ in their means, methods and aspirations, at least retain the ability to talk to one another in the same language.

Theodore Roosevelt once stated "We have room for but one language here, and that is the English language, for we intend to see that the crucible turns out people as Americans . . . not hyphenated Americans."

I agree.

EXCELLENCE IN EDUCATION

Mr. HATCH. Mr. President, the renewed commitment to excellence in education this country is demonstrating is one I strongly support. As chairman of the Committee on Labor and Human Resources, I commend efforts to provide incentives to students to achieve high academic goals. An example of such a worthwhile program is the Presidential Academic Fitness Award which was announced by President Reagan at the National Forum on Excellence in Education in December 1983. I applaud the President for initiating a timely program that will motivate students to excel academically.

The pilot program for graduating seniors which was directed by Secretary Bell in the Department of Education resulted in over 10,000 high schools choosing to participate. These schools presented awards to more than 229,000 students in the spring of 1984. The success of the program generated recommendations to expand the Presidential Academic Fitness Award [PAFA] to other school levels.

For the 1984-85 school year, these awards were presented to students in the exit grade of elementary and middle or junior high school, as well as to high seniors school. Secretary Bennett has been delighted with the number of students who received the Presidential Academic Fitness Award this year, over 763,000 in more than 32,500 public and private schools across the Nation. Schools participating were from every State, the District of Columbia, Puerto Rico, the Trust Territories, Department of Defense dependent schools, Bureau of Indian Affairs schools, and the Department of State overseas assisted schools. In my home State of Utah, there were 218 schools which presented PAFA awards to 7,159 students.

The students who receive the PAFA award must qualify based on grade point average and their score on a nationally recognized standardized test. Recipients graduating from high school must also have completed a solid core of academic courses. I commend those students who received the Presidential Academic Fitness Award and encourage them to continually pursue high academic goals.

I am optimistic that even more superintendents and principals will choose to reinforce academic efforts of their students through this Presidential award in the coming school year.

THE GRANITE SCHOOL DISTRICT AWARDS

Mr. HATCH. Mr. President, I have just learned that the Granite School District in my great State of Utah has been awarded two citations for outstanding educational efforts in the field of home and family living. As you know, Mr. President, I have been one who has constantly championed the home as the basic unit of our society. We are all aware that the moral fibre of our society is determined more by the hearthside values of the home than by any other force.

Moreover, Mr. President, I have also promoted the notion that the private sector can do more than the Federal Government in assisting schools achieve excellence in many fields—the preservation of and the integrity of the home being one.

The Granite School District in Salt Lake City, UT, has just been recognized by the American Vocational Association and others as having achieved the distinction of developing exemplary programs in parenthood/child development programs. The Granite School District's kindergarten through high school parent education program, which includes one elementary school, two junior high schools, and two high school courses is one

from a field of 79 selected for this honor. This award, sponsored by the W.K. Kellog Foundation, is one of the most prestigous awards in the field which acknowledges the home as the basic unit in our society.

Mr. President, the second recognition of the Granite School District is the National Dairy Board Award which is awarded after looking at outstanding programs in nutrition education in the public schools. Here again, the Granite School District was chosen as one of six from a field representative of every State in the Nation.

I ask unanimous consent that the statement on "Nutrition in Good Taste," which outlines the Granite program, along with the Voc Ed Special Report which discusses the parenthood education curriculum in the Granite School District be printed in their entirety in the CONGRESSIONAL RECORD immediately following my remarks. These two programs can serve as a model for other school systems to emulate in developing programs with resources other than Federal.

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

(See exhibit 1.)

Mr. HATCH. Mr. President, I would also like to say at this time that J. Reed Call, superintendent of the Granite School District, and Almina Barksdale, coordinator for home economics education, should be commended for the outstanding contribution they are making in fostering better cooperation between school systems and the private sector where promoting the family and its importance as a unit in society is concerned.

EXHIBIT 1

NUTRITION WITH GOOD TASTE—GRANITE SCHOOL DISTRICT'S ELEMENTARY SCHOOL NUTRITION PROGRAM

Elementary school teachers generally do not take a college class in nutrition. This would indicate a limited knowledge of nutritional concepts and how to effectively teach them. This lack of training is one reason why few teachers in the elementary schools get involved in teaching nutrition.

With this information in mind, Granite School District, Salt Lake City, Utah, began a nutrition program in the elementary schools in 1973. One teacher with a degree in home economics was hired to develop and teach the course. It was organized so that the nutrition teacher taught a series of six 30-45 minutes lessons, one per week, for six weeks to each classroom. A worksheet, or a related puzzle, was a follow-up activity for each lesson. Optional inservice workshops were provided for elementary classroom teachers.

Presently there are four nutrition specialists serving 30 of the 60 elementary schools. Schedules are rotated each year to accommodate the entire district. This means about 14,000 students are taught nutrition by a qualified teacher each year.

The curriculum is called "Nutrition With Good Taste." A highlight in each lesson is a tasting experience that reinforces the concept taught in that lesson. In some cases the children help with the food preparation. All teaching must be done with portable equipment because the nutrition specialist moves from room to room carrying her equipment on a utility cart.

The curriculum is designed so that learning is sequential. Level "A" is for grades K-2, and focuses on acquainting the children with a wide variety of foods. Each food group is introduced, and learning activities help students identify which foods belong in each group. Other topics, such as good breakfasts, dental hygiene, cleanliness, and manners are also discussed.

The focus in Level "B", for grades 3-4, elaborates on the Basic 4 guide to good nutrition. Planning balanced meals, learning the simple functions of six nutrients (Vitamins A, C, D, Calcium, Iron, and Protein), and the food sources of these nutrients are the topics emphasized.

The focus of Level "C", for grades 5-6, is to expand the knowledge of nutrients and their functions. Planning balanced menus for a whole day and learning the six nutrient categories (protein, carbohydrates, fats, vitamins, minerals, and water) and their functions, are topics that are covered.

All concepts are taught at the cognitive levels of the students involved.

This program has been well received by students, teachers, principals and parents. The students look forward to the "nutrition lady." Some teachers have commented that there is increased attendance on nutrition days. Principals welcome the program in their school, and parents are impressed and influenced by it. The nutrition specialists must be flexible in order to accommodate the school's ongoing schedule.

Granite School District has also published a 287 page book called "Classroom Nutrition—Ideas and Projects by the Teachers of Granite School District." This is a compilation of ideas that were developed as part of the teacher inservice workshops. These workshops were held each year for elementary classroom teachers who wanted more background and ideas for teaching nutrition. The book contains ideas for worksheets, bulletin boards, food experiences, projects, etc. This publication is an excellent resource for any elementary teacher who wants new ideas for teaching nutrition.

ORGANIZATIONS UNITE TO PROMOTE PARENTING

The comprehensive K-12 parenthood education curriculum for the Granite School District in Salt Lake City, Utah, was developed by the home economics department with special state and federal funds.

The project was initiated as a result of action by the national PTA and the March of Dimes. Additional research by the Utah state and Granite District PTAs ascertained that parents want schools to do more to prepare students to be responsible parents and adults.

The four-year project resulted in the development of a five-part curriculum that includes "Parenthood Education" and "Family Life" at the senior high school level, "Teen Living" and "Family Life Units" in the junior high and middle school, and "All About Families" for grades K-6.

The PTA study found three areas of concern common to all curriculum levels. They are: interpersonal relationships, family resource management and child rearing. These areas of concern are the connecting link and focus of the project.

Objectives targeted by the PTA include:

Improving the quality of family life by developing student skills and positive attitudes dealing with self, family and peer relationships.

Identifying values and goals and recognizing their importance in the decision-making process.

Developing positive attitudes toward the care of children.

Identifying critical nurturing and parenting skills.

Developing resource management abilities.

The senior high and junior high/middle school programs also include sections on issues of immediate concern to the adolescent. These include: where to find help in crisis situations; how to cope with stress, loneliness and rejections; how to help others.

The elementary school curriculum is designed to be infused into the teacher's subject areas, rather than being a self-contained unit of study. The family focus concept encourages the students to share the lesson learnings with their families. Parents are asked to feed back to the teacher the results of this interaction.

INNER-CITY PROGRAM HELPS NEW PARENTS

The Akron family life programs have been developed to meet the needs of inner-city families with children under the age of 3. The typical client or student is an ADC recipient and undereducated. She has few positive parenting skills and has unrealistic expectations for her child's developmental progress. The typical parent is a woman in her very early 20s.

Referrals to the family life office may be from one of many community agencies or from a friend or relative of the family. Many times, the parent herself calls to ask for services.

Basic information is taken over the phone and the referral is given to the parent/child teacher, who makes a home visit within five days. She interviews the parent(s), observes the child(ren) and discusses with the parent the purpose of the program and suggests the service that seems most appropriate for the family.

Home visits are provided for the parent with a very young infant who needs help with basic infant care and with providing a stimulating learning environment. The home visits, which are funded by Title XX, Ohio Department of Public Welfare, are scheduled once a week on the same day and at the same time. The home visitors are paraprofessionals who know the community and who have been trained through extensive inservice. They provide information about community agencies and help parents make contacts.

HISPANIC HERITAGE WEEK

Mr. RIEGLE. Mr. President, September 16 marks both the beginning of National Hispanic Heritage Week, and the 162d anniversary of Mexico's independence from Spain.

This week of commemoration provides us an important opportunity to pay tribute to the Hispanic Americans—celebrating the tremendous contributions they have made to the growth of our Nation, and refocusing attention on the special needs of this important community.

Hispanic Americans have long played an important role in the devel-

opment of our society. This is particularly evident in the political arena, where the number of Hispanics holding public office, at both the local and national level, has greatly increased in recent years.

Today, Hispanic Americans have been elected as mayors, Governors, Members of Congress, and councilmembers. Prominent individuals from the Hispanic community in Michigan include Gumecindo Salas, who served until 1984 on the State board of education. Tony Benavides, Paul Vasquez, and Lee Silva are three outstanding Hispanic Americans who have been elected as city council members in the cities of Lansing, Flint, and Ecorse. Other members of the Hispanic community include George Suarez, mayor of Madison Heights, Federal Judge George La Plata, Detroit District Judge Isidoro Torres, and school board member David Rodriguez of Grand Rapids.

On the national level, Hispanic Americans in Congress, through the Hispanic Congressional Caucus, focus special attention on issues of concern to the Hispanic community. Other prominent Hispanic-Americans holding public office include Mayor Henry Cisneros of San Antonio, Federico Pena from Denver, and Governor Tony Anaya of New Mexico.

In part, the political achievements of these individuals were made possible by the support provided by the Hispanic community. Voter registration records indicate that voting among Hispanics has increased substantially over the past 4 years. It is clear that, as a voting bloc, Hispanic Americans can play a critically important role in determining the outcome of elections.

The contribution of Hispanic Americans to the cultural growth and development of this country is also significant. Their unique culture and talents have added to the diversity of our Nation in the fields of art, music, sports, and cuisine.

In acknowledging the important contributions and achievements of Hispanic Americans, we must not overlook the many problems which threaten to prevent Hispanic Americans from participating fully in our society.

Statistics from a 1983 Report of the Committee on Public Works and Transportation reveal that Hispanics are still victims of inadequate opportunity in employment, housing, and education. The median income for Hispanic families is $16,228, as compared to the national average of $23,433. Unemployment for Hispanics also remains 3 percent higher than the national average, and there are twice as many Hispanics living below the Federal poverty level than average.

In the area of education, Hispanic Americans remain one of the least educated groups in our country. Only 44.5 percent of Hispanic Americans ever complete high school, and of those who do, only 7.7 percent continue on to college.

As the fastest-growing minority group in our country today, we must pay special attention to the challenges facing Hispanic Americans. As we work together to overcome the obstacles which make it difficult for Hispanic Americans to participate fully in our society, we build an America which can offer greater opportunity to all Americans.

AMERICAN SUCCESS STORY—M. JACOB & SON

Mr. LEVIN. Mr. President, on September 24, 1985, the M. Jacob & Sons Co. will celebrate the beginning of its second century in Detroit.

The history of this company, and its founder, is a typical story of immigrant hopes, dreams, and success in a free society.

The legacy left by the founder Max Jacob is rich, not in power and wealth, but in terms of hard work, innovation, commitment, and quality of service to customers.

In 1885, American industry was quickly moving forward. For 21-year-old Max Jacob, a recent immigrant from Lithuania, anything was possible. He was a rugged individualist who recognized bottles as his key to success in America.

In the beginning, Max Jacob bought used bottles; he washed, sorted, sold, and delivered them—a need no other business filled at that time—establishing the first bottle distributorship in the country.

The company was a one-man operation. Patent medicines and prescriptions remedies required bottles. There were 21 breweries in Detroit; there were plenty of bottles for Jacobs and his new company. His customer list grew quickly, he bought a fine horse and wagon and his profits began to rise. In the beginning, bottles were hand-blown. But, the development of automatic machinery changed the industry and the scope of Max Jacob's enterprise.

By the time he was 45, Max Jacob's sons were joining his business. They diversified the company and began to supply their containers and closures to companies other than breweries, up to then their major customers.

As the company grew and progressed, a grandson added plastic containers to the glass line; this was a huge step forward for the firm. And today, there is a great-grandson who has moved the firm further ahead by creating a division which supplies major mass merchandisers across America.

Four generations of the Jacob family have established M. Jacob & Sons as the oldest and one of the largest container suppliers in the United States. Each new generation has contributed its talents, and the firm has experienced those ups and downs which go with economic depressions and recessions, national crisis, and changes in technology.

But, Mr. President, there is more to this story than just a successful business venture.

In the best tradition of community service, M. Jacob & Sons this year received the "Contractor of the Year" award from the Jewish Vocational Service and Community Workshop of Detroit. The award is given annually to the firm with "outstanding cooperation in the advancement of a rehabilitation program for the vocationally handicapped workers" served by this agency.

And, in the best tradition of historical endowment, the ceremonies on September 24 will be highlighted by the company's presentation of its antique bottle collection to historic Greenfield Village.

Finally, it should be noted that the ceremonies on the 24th will take place at the Max Jacob House located on the campus of Wayne State University. Mr. Jacob lived in this home in the second decade of this century, and the home has been renovated with the help of his descendants and today houses the offices of the art history department of the University and its extensive slide library.

Mr. President, I am pleased to bring the story to the attention of my colleagues in the Senate. It is with pride that the citizens of Detroit help M. Jacob & Sons into its second century. I want to congratulate the descendants, the proud family members who will gather on September 24 to remember the past, celebrate the present, and plan for a bright future.

THE SCHOOL PRAYER AMENDMENT

Mr. PROXMIRE. Mr. President, it is my understanding that a little later in the day the distinguished Senator from North Carolina, Senator HELMS, will offer a proposal to provide for a school prayer amendment. The amendment, as I understand it, would strip the courts of their authority with respect to school prayer.

Mr. President, this Senator strongly believes in school prayer, very strongly. I think school prayer makes sense. If anybody disagrees with the notion that it makes sense, they should recall what happens here, what happened this morning, what happens whenever the Senate comes into session. The Chaplain leads off with a prayer. That is the high point of the day. I have been listening to those prayers for 28 years. They are always inspiring, uplifting.

Mr. President, they are like other prayers. I have heard thousands and thousands of prayers. In fact, I went to a prep school in my childhood where we had prayers at every meal, we had prayers in the chapel, which we had every single night and twice on Sunday. We always had different ministers give the prayer. I was a Catholic; it was a Protestant school.

I cannot remember a single prayer that was not an inspiration and good. I think we are all better off if we are exposed as much as possible to prayer. I think many, many people do not get that opportunity.

Having said that, Mr. President, I must say I am going to strongly oppose the Helms position. I do so because what he is proposing, in stripping the courts of authority, would have an appalling effect on the Constitution and set a precedent which, it seems to me, would provide a very, very bad situation in which, if Congress disagreed or the Senate disagreed with the Supreme Court, we would strip it of authority. It would certainly leave a shambles of the Constitution.

So, for that reason, I will oppose the Helms position, and I hope that we can find a form in which we can vote on school prayer without devastating the Constitution in the process.

Mr. President, I yield the floor.

(Mr. DENTON assumed the chair.)

TAMPERING WITH CONSTITUTIONAL PROCEDURES

Mr. MOYNIHAN. Mr. President, I should like to join with my distinguished and very senior friend [Mr. PROXMIRE] whose early exposure to school prayer obviously has done him nothing but good; I share so many of his views in this matter, most particularly the view that we should not tamper with the constitutional procedures of the United States of America as it approaches its third century. Nor should we attempt to strip from the Supreme Court its right to hear whatever cases are brought before it, which it decides have constitutional merit.

The importance of the matter of Court-stripping derives in singular measure from the fact that it is arguably within the powers of the Congress to do so. The Constitution does provide that Congress can restrict the appellate jurisdiction of the Court, and the Court accepted this in Ex parte McCardle, a Civil War case having to do with a Mississippi editor who was arrested on charges of publishing incendiary and libelous articles.

Legal scholars since have differed on this question, but as my distinguished and learned friend from Wisconsin knows, no less a person than Justice Owen Roberts, after his retirement from the bench in an address in New York City before the New York Bar Association, suggested that while he was the last person to favor tinkering with the Constitution, it might well be in order to amend the Constitution to deal with this ambiguity. There is no question that in judicial practice, as it has emerged from the time of Marbury versus Madison, the Court's independence of the Congress with respect to what matters it will or will not consider has been complete, with the one exception of 1868. For us to stand here and frivolously strip the Court of a power to decide what cases to hear would be to impose upon the separation of powers and the balance within the constitutional system, in a manner that has not been contemplated in a century. Surely, the framers of the Constitution did not intend this consequence; they shared John Marshall's interpretation, later accepted by Presidents and accepted by Congress, that in the end, the Court would and should determine what the Constitution says.

If we do this, would the Senator from Wisconsin dare to suggest where we might stop, if we strip the Court of the power to hear cases in regard to school prayer?

Do we next strip it of the power to take issues concerning free speech? Do we strip it of the power to consider all first amendment rights, freedom of the press, religion, and assembly, and then move to the right of the search and seizure? Find a provision in the Bill of Rights which is not endangered. It would required no more than a majority of this Congress, this body and the other body, to say no, that a particular right as contemplated by the Constitution cannot be adjudged by the Court. In such a world, the Constitution could be violated and there would be no sure remedy.

Mr. President, is there a better formula for bringing chaos to a system that has endured two centuries? That we contemplate this is baffling.

I say to my distinguished and learned friend, it is not surprising that along with the distinguished Presiding Officer, there are only three of us on the floor of the Senate. I dare suggest that there are Members too appalled to come and speak or too embarrassed to come and speak. We are an empty Chamber as we contemplate a measure of the most profound constitutional consequence.

The Senator has been kind to sit and hear me out, but may I ask him, does he not consider that if we were to adopt this measure today, we would put in jeopardy every right contained in the Bill of Rights?

Mr. PROXMIRE. Mr. President, I wholeheartedly agree with my good friend from New York. I am so happy that he was on the floor when I made my brief statement. he has very generously referred to me as learned, which is not the case, but I am delighted to be flattered. The Senator from New York obviously has an understanding and a grasp of this situation that exceeds that of virtually every other Member of the Senate. I think his point is indisputable. There is no question about it. regardless of how a person may feel about this particular provision, school prayer—some favor it, some oppose it. As I say, I enthusiastically favor it—there is no way—no way—that you can justify stripping the Supreme Court. As the Senator has said so well, if we start there, there is no end to it—freedom of speech, the entire Bill of Rights, the whole Constitution is vulnerable. I think that completely must overweigh any consideration we may have for the immediate advantage we might achieve.

So I am delighted my good friend from New York has spoken with such force and eloquence and knowledge. I thank him.

Mr. MOYNIHAN. I thank my friend from Wisconsin.

It is staggering. We have dealt with this measure. We had it on the floor in 1982. We have debated it year after year.

It is something beyond my imagination that this matter, having been debated and having been disposed of in 1982, should be back here 4 years later.

I said earlier, and I repeat, that the particular peril and poignancy of this issue and the measure before us is that there is an arguable constitutional basis.

Article III, section 2, of the Constitution, describing the jurisdiction of the U.S. Supreme Court, states:

> . . . 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.

In the aftermath of the Civil War, Congress did move to restrict the jurisdiction of the Court in a habeas corpus matter. The Court, in ex parte McCardle, acknowledged its lack of jurisdiction, based on the law. Later, the Court affirmed that it would hear the same matter in other circumstances. So you might say that the Court did not, in the end, submit to the will of Congress—as in my judgment it ought not to have done.

I said earlier, and I repeat, that the framers at the Philadelphia convention who wrote article III, section 2, had a number of matters in mind. We all do accept the fact that the exact intention of many of the procedural measures in the Constitution is not known. There is no record of the debate. No notes were taken. But have no doubt about what the Constitution means in all its essential provisions. It means what it says.

However, it is also the case that in trying to contemplate the workings of the new Supreme Court, there was a matter to be dealt with in the context

of the existing courts of 13 States, and they thought it would be wise simply to let Congress work out the details.

They did not at that point foresee the actions of the Court under John Marshall, who made the necessary and wholly happy judgment that, in the end, somebody would have to decide what the Constitution says, and that the proper role of the Court is to declare what the law is—including the highest law, the law of the Constitution itself.

So we began the practice of the Supreme Court ruling on what is constitutional and what is not. It was a slowly evolving practice, beginning with Marbury versus Madison.

If I am not mistaken—the distinguished Presiding Officer [Mr. DENTON], were he free to speak from his podium, might correct me—I do not believe that the Court ruled a measure unconstitutional thereafter for a long period, until the Dred Scott decision. But we have developed a system in which the Court rules on matters of constitutionality with great frequency and changes its mind, ruling a matter unconstitutional in one decade and finding differently in another; as was true most recently with the Court's decision on February 19 of this year in San Antonio Transit Authority versus Garia overruling the 1976 National League of Cities versus Usery decision; There was also a case, not distant, in which an issue was resolved as unconstitutional in one year and the Court changed its mind the following year, and so stated. I believe the two decisions were Carter versus Carter Coal Co., in 1936, and NLRB versus Jones & Laughlin Steel Corp., in 1937. Any human institution is subject to that kind of correction. And why not? The system serves.

Here we are in the 99th Congress, approaching the 200th anniversary of the constitutional system, a written constitutional system. No constitution in the history of the world has persisted as ours has done. And here we put it all in jeopardy with the chaos, the bitterness, the confusion, the contention, and the catastrophe that would emerge from the sudden discovery that there was no place in our system which could rule what are the rights of the citizen under the Constitution—rules decided and settled.

The very proposition that we can deny the Supreme Court the right to hear cases brought under the first amendment puts in jeopardy every entitlement of the Bill of Rights—every provision.

With respect to the powers of government, as described in the respective articles of the Constitution that delineate what exactly it is that Congress may do, the President may do, and the courts may do, I do not in any way lessen their significance to our system of government. They describe it. But I remind this Chamber that the precise question of individual rights was omitted from the final test of the American Constitution, under the theory that the framers were drawing up a list of the powers that were to be made available to a central government, limited and specified powers.

It followed in logic and law that no grant of authority not given could be exercised. In logic, that was a compelling argument. In reality, that was the grasp of reality that so marked the genius of our framers. It was not a good argument, for the simple reason that what was implicitly understood by one generation might not be understood by the next and could not be disproved in the absence of written evidence.

So the first question to which the Senate and the House of Representatives addressed themselves was the specific designation of rights of citizens that this Congress could not infringe upon, even though in logic it had no right to begin with.

Let us not be too dependent on logic, said the men who had fought a revolution and struggled with a confederation, and were learned beyond anything we could hope for today in the realities of government and the history of governments.

Say it right there and start out with the first amendment, which says Congress shall make no law—and it lists—with respect to freedom of speech, freedom of assembly, the establishment of religion, and the freedom of the press.

I do not claim to be as much an authority as a historian or a parliamentarian would be, but to my knowledge we have never until this last decade begun to discuss whether we should strip the Court of its specific appellate jurisdiction with regard to a first amendment issue. The legislation under which the ex parte McCardle case came forward was not such legislation. It was legislation having to do with powers of government in the Civil War, a war between the States.

The first amendment affirms the right of speech, the right of assembly, the right of freedom of religion, Congress shall make no law respecting the establishment of religion or restricting the free exercise thereof. After removing jurisdiction here, shall we then go the 2, and to the 3, the 4, the 5, the 6, the 7, the 8, the 9, and the 10th amendments. The 10th amendment simply reaffirms the original understanding of the framers that no power shall be exercised save that which is granted by the Constitution. Those that remain are reserved to the States or to the people themselves.

The imagination is all but stilled at contemplating what might happen if this legislation should pass. It is a thought that has not occurred to us as a people. It is a proposal that has not been judged in this body save once before as memory serves me, and that was in 1982, in August of that year, when we discussed a similar measure.

At that time, Mr. President, I took the liberty of calling attention to one of the inscriptions on the walls of our Chamber which is also on our great seal: Novus Ordo Seclorum, a new cycle of the ages, a new standard of Government. We set up something special in Philadelphia in 1787. It has served us as no people could ever have hoped to have been served. It has preserved the freedom of speech. It has preserved the freedom of the press. Go around the world and find where else they exist as here.

Sometimes the Court has preserved our rights against the efforts of the Executive and the efforts of the legislative body to infringe on those freedoms. In the end it has been the Supreme Court of the United States that has upheld them, and Congress and the Executive in their wisdom and prudence have acceded it that role.

It is a role as imbued in our constitutional fabric as any practice in this Nation. And here we are contemplating stripping it from our liberties. Strip the power of the Supreme Court to judge whether the liberties of the American people and their institutions have been infringed upon in violation of the Constitution, and you have for practical purposes stripped those liberties and rights from that Constitution.

I do not wish to be apocalyptic. I recognize that what begins as something potential need not in the end reach an extreme; Yet it might.

I ask, Mr. President, would anyone come to the floor of the U.S. Senate and propose to abolish freedom of the press? No. We would not ever start that; besides, the first thing that would be said is that it would be unconstitutional.

We will take the equivalent step if we adopt this measure.

I might just draw attention, Mr. President, to one matter particularly troubling to this Senator, and that is the growing atmosphere which somehow seems to want to call network television news to account for the things it reports about the world, as if somehow the bearer, the messenger, was responsible for the message.

We have had a year of unprecedented charges made against network news.

I might interrupt here to note that in the effort to get us news, two brave and extraordinarily skilled and professional television journalists, Neal Davo and William Latch, were shot down in cold blood in a tinhorn rebellion coup, a military coup in Thailand just 2 days ago. In using the word "tinhorn," I use the words of Mr. Tom Brokaw of "NBC News," who was speaking with sadness and poignancy on behalf of

his fellow journalists at NBC, about the death of two of their colleagues, a concern shared throughout the profession.

If we can strip the Supreme Court of its authority to hear cases on the free exercise of religion under the first amendment or the establishment of religion under the first amendment, we can strip from television news the first amendment rights of freedom of the press which they enjoy, and which we need as a nation and the Court will protect as an institution—but which in the hysteria of the moment present just a little bit in this Chamber today could be taken away.

Mr. President, I have nothing to add to what I have said, save to plead with this body to be faithful to the oath each of us takes. We take an oath to uphold and defend the Constitution of the United States. It is not an oath to ensure that tobacco allotments are continued and flourish. It is not an oath to see that mass transit funds are appropriated, or commodity prices for wheat are maintained, or any of the other things which necessarily preoccupy us in the day-to-day work of the Senate. Our oath is to uphold the Constitution, to protect the Constitution, and that is the decision we are going to make in this body before this day is closed.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Is there further morning business? If not, morning business is closed.

NATIONAL FAMILY WEEK

The PRESIDING OFFICER. The clerk will report the pending business.

The legislative clerk read as follows:

A House message on Senate Joint Resolution 31 to designate the week of November 24 through November 30, 1985 as National Family Week.

The Senate resumed consideration of the joint resolution.

Mr. SIMPSON. Mr. President, I move that the Senate concur in the House amendments to Senate Joint Resolution 31.

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

The motion was agreed to.

SCHOOL PRAYER

Mr. SIMON. Mr. President, I wish to speak briefly on this because it is an issue that does concern me. I have great respect for the sincerity of the sponsors of this amendment. My father happens to be a Lutheran minister; my brother is a Lutheran minister. I understand the yearning that people have for a sense of ideals and idealism and moral values.

But there are things that a government can do well and there are things that government cannot do well. Government is good at providing aid to students who want to go to college. These pages who one of these days are going to be going to college, I hope we can have good student aid programs for that. We are good at that. We are good at constructing highways, including highways in North Carolina and Illinois.

But I think there are areas where government has to be careful, where we would have to be cautious. One of the distinguished predecessors of the Senator from North Carolina was Senator Sam Ervin, who warned us that we have to be very careful about this entanglement of Government in religion.

There are areas where we can encourage, where there is no problem; for example, giving tax exempt status. We give it to the Lutheran Church or the Baptist Church or the Catholic Church or the Jewish Synagogue or to the Society of Atheists or anyone else who has religious conviction. But when government starts to promote religion, I think we have to be very, very careful.

I remember when I was stationed in the Army in Germany. I happened to be in a community that was Lutheran; and in Germany every community is, by tradition, either Luthern or Catholic. I attended the local Lutheran services there and you had a handful of people. It was the official religion, it was encouraged, received State support, financial support, but it did not have the vitality that it does in a community in Illinois or a community in North Carolina. So I think we have to be careful.

There is a second thing that bothers me in this area. I have a colleague over in the House, DAN GLICKMAN, a Member of the House from Wichita, KS. When DAN GLICKMAN was in the fourth grade, every morning he was excused from the fourth grade classroom while they had a school prayer. Then, every morning he was brought back in. DAN GLICKMAN happened to be Jewish in a community that is overwhelmingly non-Jewish. Every morning little DANNY GLICKMAN was being told, "You are different." All the other fourth graders were being told, "DANNY GLICKMAN is different."

I do not think that is a very healthy thing. I think we have to be very, very careful as we move ahead in this area of church-state relations.

Again, as I said in opening my remarks, I respect the sincerity of my colleague from North Carolina, and those who are supporting this. But this is an area where I think we have to be very, very careful. We do not want Government running religion, and we do not want religion running the Government. We need a healthy mix but we have to be awfully careful on that mix. We have a prayer by a Chaplain that opens this session. But it is completely voluntary. In fact, it is so voluntary there are not too many of us here when we have that opening prayer by the Chaplain ordinarily in the morning.

But I think that is the way it has to be. We have to set it up in such a way that things can be completely voluntary, and that we do not demand that fourth-graders make decisions in the matter of religion that the Government imposes on them.

So, with all due respect to my distinguished colleague from North Carolina, I am going to be voting against his amendment.

I will be pleased to yield to my colleague from North Carolina.

Mr. HELMS addressed the Chair.

The PRESIDING OFFICER. The Senator from North Carolina.

Mr. HELMS. I thank the Chair.

Mr. President, PAUL SIMON knows me personally. He is the most delightful gentleman I have ever met. He is persuasive, he is a hard worker, and he is dedicated to what he believes. I do not find a great deal wrong with what the distinguished Senator from Illinois has said. In the first place, I agree with him. I do not think the Government should promote religion. I have never proposed that. Second, we have to decide, however, whether we are talking about freedom of religion or freedom from religion. I think that is the question.

The Supreme Court, whether the Senator wishes to acknowledge it or not, has gotten this Government involved in religion with a very unwise and unneeded decision. It was promoted by a woman named Madalyn Murray. She is now Madalyn Murray O'Hair. I do not know whether the Senator has ever met the man who was then the little boy around whom this controversy centered. His name is Bill Murray. Bill Murray is going around this country today apologizing for what his mother did to him—using him. He will tell you, if you ask him, that one of the most important things that needs to be done in this country is to get our priorities straight, and to restore the right of voluntary prayer to the schoolchildren of America.

What I am proposing is not a constitutional amendment. It is not "court stripping" as is so often charged. It is simply the implementation of article III of the Constitution of the United States. I am sure the Senator is familiar with that. Article III of the Constitution provides the Congress of the United States with the authority, and I think the duty, to limit the jurisdiction of the Supreme Court and/or the other Federal courts when in the judgment of the Congress of the United States the Supreme Court has exceeded its purview. That is all I am seeking to do—to take this matter out of the

Federal Government and put it back where it was for all the years since this Republic was established—put it in the hands of the individual States. There was not any problem until Madalyn O'Hair and others initiated lawsuits which resulted in the unfortunate decisions by the Supreme Court.

We ought to get the Government out of it. I agree with the Senator. I certainly do not believe that the Government should promote any religion. Nor do I believe the Government ought to forbid religion. The question is freedom of religion. It is not a question of freedom from religion.

Mr. President, I yield the floor.

Mr. SIMON addressed the Chair.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. SIMON. Mr. President, I thank the Chair.

If I may just respond very briefly, the Court got involved originally with this issue when the New York Board of Regents said every schoolchild in the State of New York will recite this prayer. It seems to me the Supreme Court ruled properly that Government cannot be dictating what the people pray. I have never met Madalyn Murray O'Hair or her son. Their original case was in Champaign County, IL, as a matter of fact—in my State. But the first Supreme Court ruling came in that New York Board of Regents case. It seems to me that that Court ruling is sound.

When we say voluntary prayer, the question comes up: Whose prayer? I happen to be a Lutheran. Do we take Lutheran prayer; do we take Baptist prayer? We have a State represented in this Senate where a good percentage of the population is Buddhist. I do not know how many people in North Carolina would like to have a Buddhist prayer opening the school in the morning. I think we are getting into quicksand that we are better off avoiding. Again, I have great respect for the Senator from North Carolina and his sincerity on this thing. But I think there are things the Government can properly do to encourage religion, like having tax-exempt status. I think there are things that we ought to avoid. I think the Senator from North Carolina, with all due respect, has touched on one of those things that we ought to avoid.

Mr. HELMS. Will my friend yield?

Mr. SIMON. I am pleased to yield.

Mr. HELMS. I thank the Senator most sincerely.

One of the byproducts of the campaign to preserve this unfortunate series of Supreme Court decisions is that a myth has grown up that the people of various denominations and faiths cannot get along. My children are out of school. I have five grandchildren. I will not go into how great they are. But three of them are in school. I hope the day never comes when anybody suggests that they should leave the classroom because some prayer may be offensive. I would want them to listen to the Jewish prayer, or Catholic prayer, or whatever. I happen to be a Baptist. And I am convinced that the Baptist Christian faith, as long as it is faithful to the truth, has nothing to fear.

Let me tell the Senator what I did for a week in August. I do not know whether you know this or not. But I may be the only Baptist deacon who participated in the dedication of a Jewish synagogue in Jerusalem. I went to Jerusalem the first week in August to help dedicate a synagogue which was built by the father of the distinguished Senator from Nevada [Mr. HECHT].

I believe Mr. Hecht, Sr., is 95 or 96 years old. He has devoted a great deal of resources to building things in Israel—hospitals, orphanages, a synagogue.

I would say to the Senator that while I always intend to be true to my Baptist upbringing, I was never more impressed than I was on the occasion of the dedication of that synagogue.

So rather than to imagine that we are going to pull ourselves apart by restoring to little children the right to prayer in school, I say let us examine the Jewish faith, the Christian faith, Catholicism, whatever, because presumably all of us worship the same God.

The prayer to which the Senator alluded, which has been regarded as horrendous, the one prepared by the New York regents, let me read it. It is a terrible thing that they propose for the little children as prayer. I will read you verbatim exactly what they propose:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country.

This is the prayer recommended by the New York State Board of Regents to local school districts which was struck down as unconstitutional by the U.S. Supreme Court in the infamous case of Engel versus Vitale in 1962. The Court held that, even when recited by students on a voluntary basis, this simple prayer was unconstitutional in American public schools.

Mr. President, almost a quarter century has now passed since the Supreme Court first banned voluntary group prayer in the public schools. A generation of Americans has now grown up without the basic freedom to pray at school—a freedom enjoyed by every previous generation of Americans.

As we begin a new school year in September 1985, the time has come to end this gross deprivation of religious liberty and to restore the fundamental right to engage in voluntary school prayer.

Fortunately, the framers of the Constitution gave Congress explicit authority to provide a check on usurpations of power by the Supreme Court. My legislation uses this authority, contained in article III of the Constitution, to withdraw Federal court jurisdiction over school prayer cases, thereby returning the issue to the States, localities, and parents where it belongs and where it was before the Supreme Court rulings of the early 1960's.

Mr. President, religious liberty is too important to leave exclusively in the hands of judicial elites more concerned about imposing their own political views on the Nation than in objectively interpreting the words of the Constitution. My legislation will effectively replace the nonsense of Federal judges on school prayer over the previous two decades with the common sense and practical experience of the American people over the prior 170 years.

Mr. President, the legislation I propose today is substantially similar to the legislation that twice passed the Senate in 1979, only to die in the House Judiciary Committee without ever reaching the House floor for a vote. It is also substantially similar to the amendment I offered in 1982 which received 53 votes in favor of it on a tabling motion before later being set aside on another procedural motion.

The point here, Mr. President, is that this legislation is familiar to the Senate and has received substantial support in the recent past.

Mr. President, the purpose of this legislation is to restore freedom to the States to allow voluntary prayer, Bible reading, and religious meetings in public schools. Through a series of Supreme Court decisions, this freedom—elementary to the drafters of the Constitution—has been taken away from the States. It is time we in Congress restored this fundamental American liberty.

Mr. President, my legislation takes advantage of the congressional authority, given explicitly in article III, sections 1 and 2, of the Constitution, to regulate the general jurisdiction of the inferior Federal courts and the appellate jurisdiction of the Supreme Court. It curtails such jurisdiction so that Federal courts no longer have the power to hear cases involving voluntary prayer, Bible reading, and religious meetings in the public schools.

The result is that such cases become exclusively a matter for the States to handle as they see fit. In effect, prayer would be a local option. This result is fully consistent with the original purpose of the establishment clause of the first amendment, which was to prohibit the establishment of a national church and to leave the remaining

issues of church-state relations strictly with the States.

Mr. President, some of my friends have advocated that we adopt a constitutional amendment to correct the courts and restore the freedom to pray in the schools. This is one approach among many which the Constitution allows, and it is an approach that I have supported in the past and still favor today.

But, Mr. President, it is not the only way for Congress to correct erroneous Federal court rulings, nor in my opinion is it the best. The Constitution provides several other more direct ways for Congress to check abuses of the judicial branch, including control of jurisdiction, Senate confirmation of judicial appointments, specific congressional enforcement of constitutional provisions, and impeachment.

As is well known, the constitutional amendment process was intentionally set up to be difficult. The normal procedure is for a two-thirds vote in both Houses of Congress followed by ratification by three-quarters of the State legislatures. This procedure presents an extremely heavy burden to meet. The framers of the Constitution specifically wanted it this way to protect the constitutional text from constant change.

If, however, Congress relegates itself solely to the amendment process to correct judicial errors and usurpations, then the very difficulty of the amendment process will be used to protect, not the constitutional text, but distortions of it. Thus, in the face of usurping Federal judges, the amendment process would serve to subvert the Constitution rather than to preserve it.

In this school prayer matter, Mr. President, the problem has arisen, not because of the text of the Constitution, but because of outright judicial distortions of that text. The text is fine, and the text never prohibited voluntary prayer in the public schools, as American history and experience before the Supreme Court's first prayer decision in 1962 so clearly attest. The text leaves the matter of school prayer, along with other matters of church-state relations, exclusively up to the States. Thus, although we could add a specific constitutional amendment on school prayer, we need not do so in order to restore this fundamental freedom.

The problem in the prayer matter, as in so many areas of constitutional law, is runaway Federal judges bent on imposing their own personal views of good public policy on the American public irrespective of the Constitution. More often than not in recent years, these views have been hostile to both the Constitution and longstanding American traditions. It is no understatement to say that American society has been radically altered in the recent past because of activist Federal judges.

We in Congress have tolerated this judicial usurpation long enough in many areas of the law, and particularly in the area of school prayer. It is time to put a stop to this usurpation and school prayer is a good place to start.

Mr. President, there is at least one Federal judge in this country who has given the correct interpretation of the Constitution with respect to the first amendment and school prayer. Although his judicial brethren higher up overturned his ruling, his opinion will stand for years to come as the definitive statement of how the first amendment was actually intended to work in this area of the law.

I am referring, of course, to the decision of Judge Brevard Hand of Alabama in *Jaffree* v. *Board of School Commissioners of Mobile County*, 554 F. Supp. 1104 (S.D. Alabama 1983). It clearly demonstrates the errors of the Supreme Court in banning voluntary group prayer. I ask unanimous consent that the Hand opinion, including footnotes, be printed in the RECORD at this point.

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

[U.S. District Court, S.D. Alabama, S.D.]

JAFFREE *v.* THE BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY

Jan. 14, 1983

CIV. A. NO. 82-0554-H

MEMORANDUM OPINION

Hand, Chief Judge.

Prelusion

If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.

Farewell Address by George Washington, reprinted in R. Berger, Government by Judiciary 299 (1977).

Ishmael Jaffree, on behalf of his three (3) minor children, seeks declaratory and injunctive relief. In the original complaint Mr. Jaffree sought a declaration from the Court that certain prayer activities initiated by his children's public school teachers violated the establishment clause of the first amendment to the United States Constitution. He sought to have these prayer activities enjoined.

A trial was held on the merits on November 15-18, 1982. After hearing the testimony of witnesses, considering the exhibits, discovery, stipulations, pleadings, briefs, and legal arguments of the parties, the Court enters the following findings of fact and conclusions of law.

Footnotes at end of article.

I. Findings of Fact

Ishmael Jaffree is a citizen of the United States, a resident of Mobile County, Alabama, and has three (3) minor children attending public schools in Mobile County, Alabama; Jamael Aakki Jaffree, Makeba Green and Chioke Saleem Jaffree.

Defendants, Annie Bell Phillips (principal) and Julia Green (teacher) are employed at Morningside Elementary School, where Jamael Aakki Jaffree attended school during the 1981-82 school year. Defendants Betty Lee (principal) and Charlene Boyd (teacher) are employed at E.R. Dickson Elementary School where Chioke Saleem Jaffree attended during the 1981-82 school year. Defendants, Emma Reed (principal) and Pixie Alexander (teacher) are employed at Craighead Elementary School where Makeba Green attended school during the 1981-82 school year. Each of these defendants is sued individually and in their official capacity. Each of the schools is part of the system of public education in Mobile County, Alabama.

Dan Alexander, Dr. Norman Berger, Hiram Bosarge, Norman Cox, Ruth F. Drago and Dr. Robert Gilliard are members of the Board of School Commissioners of Mobile County, Alabama. As commissioners, each of these defendants collectively is charged by the laws of the State of Alabama with administering the system of public instruction for Mobile County, Alabama. These defendants are sued only in their official capacity.

Dr. Abe L. Hammons is the Superintendent of Education for Mobile County, Alabama. Defendant Hammons has direct supervisory responsibilities over all principals, teachers and other employees of the Mobile County Public School System. This defendant is sued only in his official capacity.

Defendant Boyd, as early as September 16, 1981, led her class at E.R. Dickson in singing the following phrase:

God is great, God is good,
Let us thank him for our food,
bow our heads we all are fed,
Give us Lord our daily bread.
Amen!

The recitation of this phrase continued on a daily basis throughout the 1981-82 school year.

Defendant Boyd was made aware on September 16, 1981, that the minor plaintiff, Chioke Jaffree, did not want to participate in the singing of the phrase referenced above or be exposed to any other type of religious observances. On March 5, 1982, during a parent-teacher conference, Ms. Boyd was told by Chioke's father that he did not want his son exposed to religious activity in his classroom and that, in Mr. Jaffree's opinion, the activity was unlawful. Again, on March 11, 1982, Ms. Boyd received a handwritten letter from Mr. Jaffree which again advised her that leading her class in chanting the referenced phrase was unlawful. This letter further advised Ms. Boyd that if the practice was not discontinued that he would take further administrative and judicial steps to see that it was. Finally, Ms. Boyd was made aware of the contents of a letter drafted by Mr. Jaffree, dated May 10, 1982, which had been sent to Superintendent Hammons complaining about the prayer activity in Ms. Boyd's classroom. Notwithstanding Mr. Jaffree's protestations, the recitation of the prayer continued.

Defendant Lee learned on March 8, 1982, that Mr. Jaffree had complained about the

prayer activities which were being conducted in defendant Boyd's classroom. Ms. Lee directly spoke with Mr. Jaffree on March 11, 1982, and learned from him that he was opposed to the prayer activities in Ms. Boyd's class and that he felt the same to be unconstitutional. On the same day, Ms. Lee called Mr. Larry Newton, Deputy Superintendent, who informed her that the prayer activity in Ms. Boyd's class could continue on a "strictly voluntary basis."

Defendant Pixie Alexander has led her class at Craighead in reciting the following phrase:

God is great, God is good,
Let us thank Him for our food.

Further, defendant Pixie Alexander had her class recite the following, which is known as the Lord's Prayer:

Our Father, which are in heaven, hallowed be Thy name. Thy kingdom come. Thy will be done on earth as it is in heaven. Give us this day our daily bread and forgive us our debts as we forgive our debtors. And lead us not into temptation but deliver us from evil for thine is the kingdom and the power and the glory forever. Amen.

The recitation of these phrases continued on a daily basis throughout the 1981-82 school year.

Defendant Pixie Alexander learned on May 24, 1982, that Mr. Jaffree had complained, through a letter dated May 10, 1982, to defendant Hammons, about her leading her class in the above-referenced prayer activity. After Ms. Alexander learned of Mr. Jaffree's May 10, 1982 letter, she continued to lead her class in reciting the referenced phrases.

Ms. Green admitted that she frequently leads her class in singing the following song:

For health and strength and daily food, we praise Thy name, Oh Lord.

This activity continued throughout the school year, despite the fact that Ms. Green had knowledge that plaintiff did not want his child exposed to the above-mentioned song. *See* defendant Green's response to plaintiffs' Interrogatories Nos. 21, 22, 50 and 51.

Upon learning of the plaintiffs' concern over prayer activity in their schools, defendants Reed and Phillips consulted with teachers involved, however, neither defendant advised or instructed the defendant teachers to discontinue the complained of activity.

Prior to the 1981-82 school year, defendants Reed, Phillips, Boyd, and to a lesser extent, Green, each knew the Board of School Commissioners of Mobile County had a policy regarding religious activity in public schools. However, not one of the teachers sought or received advice from the board or the superintendent prior to the plaintiff's initial complaint regarding whether their classroom prayer activities were consistent with the policy.

The policy on religious instruction adopted by the Board of School Commissioners of Mobile County reads as follows:

Religious instruction

Schools shall comply with all existing state and federal laws as these laws pertain to religious practices and the teaching of religion. This policy shall not be interpreted to prohibit teaching about the various religions of the world, the influence of the Judeo-Christian faith on our society, and the values and ideals of the American way of life.

School attendance is compulsory in the State of Alabama. Alabama Code § 16-28-3 (1975).

The complaint in this case was later amended to include allegations against Governor Fob James and various state officials. The claims against the state officials were severed, Fed.R.Civ.P. 21, and they are the subject of a separate order which the Court entered today.

This recitation of the findings of fact is not intended to be an all-inclusive statement of the facts as they were produced in this case. Because of the following opinion the Court is of the impression that the facts above-recited constitute a sufficient recitiation for deciding this case. However, in the event there is a disagreement with the conclusions reached by this Court, the Court does not desire to be precluded from a further recitation of appropriate fact as may be essential to further conclusions in the case. Examples of what the Court alludes to is the factual bases for consideration of the questions of freedom of speech, whether or not secular humanism is in fact a religion, and the propriety of the free exercise of religion.

II. Conclusion of law

A. Subject-Matter Jurisdiction

[1, 2] This action is brought under 42 U.S.C. § 1983.[1] The complaint alleges that the subject-matter jurisdiction of the Court "is evoked pursuant to Title 28, Sections 1343(3) and (4), and Sections 2201 and 2202 of the United States Code." *See* Complaint at 2 (filed May 28, 1982). Neither of the two amended complaints add anything to this jurisdictional allegation.[2]

[3, 4] The complaint alleges that rights guaranteed to the plaintiffs under the first and fourteenth amendments have been violated.[3] The subject-matter jurisdiction of a federal court over a claim arising under 42 U.S.C. § 1983 rests upon 28 U.S.C. § 1343(3). While the complaint does not allege that subject-matter jurisdiction is vested in the court under the general, federal-question jurisdictional statute, 28 U.S.C. § 1331, certainly subject-matter jurisdiction is vested under that provision since a federal district court has "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, exclusive of the amount-in-controversy. Thus, the Court concludes that it has subject-matter jurisdiction over the claims alleged by the plaintiffs.[4]

B. School-Prayer Precedent

The United States Supreme Court has previously addressed itself in many cases to the practice of prayer and religious services in the public schools. As courts are wont to say, this court does not write upon a clean slate when it addresses the issue of school prayer.

Viewed historically, three decisions have lately provided general rules for school prayer. In *Engel* v. *Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962), *Abington* v. *Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963), and *Murray* v. *Curlett*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963), the Supreme Court established the basic considerations. As stated, the rule is that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." *Everson* v. *Board of Education*, 330 U.S. 1, 18, 67 S.Ct. 504, 513, 91 L.Ed. 711 (1947) (per Black, J.).

In *Engel* v. *Vitale* parents of public school students filed suit to compel the board of education to discontinue the use of an official prayer in the public schools. The prayer was asserted to be contrary to the beliefs, religions, or religious practices of the complaining parents and their children. In *Engel* the board of education, acting in its official capacity under state law, directed the principals to cause the following prayer to be said aloud by each class at the beginning of the day in each homeroom: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." 370 U.S. at 422, 82 S.Ct. at 1262. This prayer was adopted by the school board because it believed the prayer would help instill the proper moral and spiritual training needed by the students.

The parents argued that the school board violated the establishment clause of the first amendment when it directed that this prayer be recited in the public schools. The first amendment provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. The Supreme Court found "that by using its public school system to encourage recitation of the Regent's prayer, the State of New York ha[d] adopted a practice wholly inconsistent with the Establishment Clause." *Id.* at 422, 82 S.Ct. at 1262. The Court found this prayer to be a religious activity. The prayer constituted "a solemn avowal of divine faith and supplication for the blessing of the Almighty. The nature of such prayer has always been religious . . . ." *Id.* at 424-25, 82 S.Ct. at 1264-65. The Court noted that "[i]t [wa]s a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America." *Id.* at 425, 82 S.Ct. at 1264. Therefore, according to the Court, the prayer "breache[d] the constitutional wall of separation between Church and State." *Id.*

Citing historial documents, the Court observed that [b]y the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the danger of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services . . . . The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support, or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the pressures of government or change each time a new political administration is elected to office. Under the Amendment's prohibition against governmental establishment of religion, as *reinforced by the prohibitions of the Fourteenth Amendment, government in this country, be it state or federal,* is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity. *Id.* at 429-30, 82 S.Ct. at 1266 (emphasis added).

The assertion by the Court that the establishment clause of the first amendment applied to the states was unaccompanied by any citation to authority. This conclusion

was reached supposedly upon its examination of historical documents.

In dissent, Mr. Justice Stewart argued that the majority in *Engel* misinterpreted the first amendment. As Mr. Justice Stewart saw it, an official religion was not established by letting those who wanted to say a prayer say it. To the contrary, Mr. Justice Stewart thought "that to deny the wish of those school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation." *Id.* at 445, 82 S.Ct. at 1274-75. As Mr. Justice Stewart saw the problem, our country is steeped in a history of religious tradition. That religious tradition is reflected in countless practices common in our institutions and governmental officials. For instance, the United States Supreme Court has always opened each day's session with the prayer "God save the United States and this Honorable Court." *Id.* at 446, 82 S.Ct. at 1275. Each President of the United States has, upon assuming office, sworn an oath to God to properly execute his presidential duties. Our national anthem, "The Star-Spangled Banner," contains these verses:

Blest with the victory and peace, may the heav'n rescued land

Praise the Pow'r that hath made and preserved us a nation!

Then conquor we must, when our cause it is just,

And this be our motto "In God is our Trust." *Id.* at 449, 82 S.Ct. at 1277. The Pledge of Allegiance to the Flag contains the words "one Nation *under God*, indivisible, with liberty and justice for all." *Id.* (emphasis in original). Congress added this in 1954. Mr. Justice Stewart believed that the Regent's prayer in New York had done no more than "to recognize and to follow the deeply enriched and highly cherished spiritual traditions of our Nation—traditions which came down to us from those who almost two hundred years ago avowed their 'firm Reliance on the Protection of divine Providence' when they proclaimed the freedom and independence of this brave new world." *Id.* at 450, 82 S.Ct. at 1277.

Following the decision by the Supreme Court in *Engel*, the Court decided *Abington* v. *Schempp* and *Murray* v. *Curlett*. In *Abington*, a state law in Pennsylvania required that [a]t least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian. 374 U.S. 205, 83 S.Ct. 1562. The Schempp family, husband and wife and two of their three children, brought suit to enjoin enforcement of this statute. The Schempps contended that their rights under the fourteenth amendment of the United States Constitution were being violated.

Each morning at the Abington Senior High School between 8:15 a.m. and 8:30 a.m., while students were attending their homerooms, selected students would read ten verses from the Holy Bible. These Bible readings were broadcast to each room in the school building. Following the Bible readings the Lord's Prayer was recited. As with the Bible readings, the Lord's Prayer was broadcast throughout the building. Following the Bible readings and the Lord's Prayer, a flag salute was performed. Participation in the opening exercises, as directed by the Pennsylvania statute, was voluntary.

No prefatory statement, no questions, no comments, and no explanations were made at or during the exercises. Students and parents were advised that any student could absent himself from the classroom or, should he elect to remain, not participate in the exercises.

In *Murray v. Curlett*, the Board of School Commissioners of Baltimore City adopted a rule which "provided for the holding of opening exercises in the schools of the city, consisting primarily of 'reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer.' " 374 U.S. at 211, 83 S.Ct. at 1565. An athiest, Mrs. Madalyn Murray, objected to the Bible reading and the recitation of the Lord's Prayer. After receiving the objection the board specifically provided that the Bible reading and the use of the Lord's Prayer should be conducted without comment and that any child could be excused from participating in the opening exercises or from attending them upon the written request of his parent or guardian.

Because of the similarity of the issues in both the *Abington* case and the *Murray* case the Supreme Court consolidated both cases on appeal and decided them together. The Court recognized that "[i]t is true that religion has been closely identified with our history and government. . . . 'The history of man is inseparable from the history of religion. And . . . since the beginning of that history many people have devoutly believed that "More things are wrought by prayer than this world dreams of." ' " *Abington School District v. Schempp*, 374 U.S. at 212-13, 83 S.Ct. at 1566 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 72 S.Ct. 679, 683, 96 L.Ed. 954 (1952)). Notwithstanding this recognition by the Court that the early history of this country, together with the history of man, was inseparable from religion the Court found the Bible reading and the recitation of the Lord's Prayer to be an unconstitutional abridgement of the first amendment prohibition that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.

The Court noted that the first amendment prohibited more than governmental preference of one religion over another. Rather, the first amendment was intended " 'to create a complete and permanent separation of the spheres of religious activity in civil authority by comprehensively forbidding every form of public aid or support for religion.' " *Id.* 374 U.S. at 217, 83 S.Ct. at 1568 (quoting *Everson* v. *Board of Education*, 330 U.S. 31-2, 67 S.Ct. 519 (1947)). The Court reviewed several of its precedents which touched on the establishment of religion, and concluded that " '[t]here cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute.' " *Id.* 374 U.S. at 219-20, 83 S.Ct. at 1569-70 (quoting *Zorach v. Clauson*, 343 U.S. 306, 312, 72 S.Ct. 679, 683, 96 L.Ed. 954 (1952)). The Court in *Abington* reasoned from its own precedent rather than independently reviewing the historical foundation of the first and the fourteenth amendments. The Court held that the Bible reading and the recitation of the Lord's Prayer in both cases were religious exercises. The "rights," *id.* at 224, 83 S.Ct. at 1572. of the plaintiffs were being violated. The religious character of the Bible reading and the recitation of the Lord's Prayer were not mitigated by the fact that students were allowed to absent themselves from their homerooms upon request of their parents. "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent . . . ." *Id.* at 225, 83 S.Ct. at 1573.

The principles enunciated In *Engel* v. *Vitale*, *Abington* v. *Schempp*, and *Murray* v. *Curlett* have been distilled to this: "To pass muster under the Establishment Clause, the governmental activity must, first, reflect a clearly secular governmental purpose; second, have a primary effect that neither advances nor inhibits religion; and third, avoid excessive government entanglement with religion. *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 773, 93 S. Ct. 2955, 2965, 37 L.Ed.2d 948 (1973)." *Hall* v. *Board of School Commissioners*. 656 F.2d 999, 1002 (5th Cir. 1981). "If a statute [or official administrative directive] violates *any* of these three principles, it must be struck down under the Establishment Clause." *Stone* v. *Graham*, 449 U.S. 39, 101, S.Ct. 192, 193, 66 L.Ed.2d 199 (1980) (holding that a Kentucky statute requiring posting of copy of Ten Commandments on walls of each public school classroom in state had pre-eminent purpose which was plainly religious in nature, and statute was thus violative of establishment clause and that avowed secular purpose was not sufficient to avoid conflict with first amendment; emphasis added).

Indeed, in this circuit, prayer in public schools is per se unconstitutional. "Prayer is an address of entreaty, supplication, praise, or thanksgiving directed to some sacred or divine spirit, being, or object. That it may contemplate some wholly secular objective cannot alter the inherently religious character of the exercise." *Karen B.* v. *Treen*, 653 F.2d 897, 901 (5th Cir. 1981).

In sum, under present rulings the use of officially-authorized prayers or Bible readings for motivational purposes constitutes a direct violation of the establishment clause. Through a series of decisions, the courts have held that the establishment clause was designed to avoid any official sponsorship or approval of religious beliefs. Even though a practice may not be coercive, active support of a particular belief raises the danger, under the rationale of the Court, that state-approved religious views may be eventually established.

Although a given prayer or practice may not favor any one sect, the principle of neutrality in religious matters is violated under these decisions by any program which places tacit government approval upon religious views or practices. While the purpose of the program might be neutral or secular, the effect of the program or practice is to give government aid in support of the advancement of religious beliefs. Thus the programs are held invalid without any consideration as to whether they excessively entangle the state in religious affairs.

In contrast, the Supreme Court has permitted the use of the Bible in a literature course where the literary aspects of the Bible are emphasized over its religious contents. *Abington School District v. Schempp*, 374 U.S. 203, 225, 83 S.Ct. 1560, 1573, 10 L.Ed.2d 844 (1963). So long as the study does not amount to prayer or the advancement of religious beliefs, a teacher may discuss the literary aspects of the Bible in a secular course of study. Finally, the Supreme Court permits religious references in official ceremonies, including some school

exercises, on the basis that these references are part of our secularized traditions and thus will not advance religion. *Engel v. Vitale,* 370 U.S. 421, 435 n. 21, 82 S.Ct. 1261, 1269 n. 21, 8 L.Ed.2d 601 (1962).

In the face of this precedent the defendants argue that school prayers as they are employed are constitutional. The historical argument which they advance takes two tacks. First, the defendants urge that the first amendment to the U.S. Constitution was intended only to prohibit the *federal government* from establishing a *national* religion. Read in its proper historical context, the defendants contend that the first amendment has no application to the states. The intent of the drafters and adoptors of the first amendment was to prevent the establishment of a national church or religion, and to prevent any single religious sect or denomination from obtaining a preferred position under the auspices of the federal government.

The corollary of this historic intent, according to the defendants, was to allow the states the freedom to address the establishment of religions as an individual prerogative of each state. Stated differently, the election by a state to establish a religion within its boundaries was intended by the framers of the Constitution to be a power reserved to the several states.

Second, the defendants argue that whatever prohibitions were initially placed upon the federal government by the first amendment that those prohibitions were not incorporated against the states when the fourteenth amendment became law on July 19, 1868. The defendants have introduced the Court to a mass of historical documentation which all point to the intent of the Thirty-ninth Congress to narrowly restrict the scope of the fourteenth amendment. In particular, these historical documents, according to the defendants, clearly demonstrate that the first amendment was never intended to be incorporated through the fourteenth amendment to apply against the states. The Court shall examine each historical argument in turn.

In the alternative, the defendant-intervenors argue that if the first amendment does bar the states from establishing a religion then the Mobile County schools have established or are permitting secular humanism, *see infra* note 41 (discussion of secular humanism), to be advanced in the curriculum and, being a religion, it must be purged also. Such a purge, maintain the defendant-intervenors, is high impossible because such teachings have become so entwined in every phase of the curriculum that it is like a pervasive cancer. If this must continue, say the defendant-intervenors, the only tenable alternative is for the public schools to allow the alternative religious views to be presented so that the students might better make more meaningful choices.

C. First Amendment as Forbidding Absolute Separation [5]

"'[T]he real object of the [F]irst amendment was not to countenance, much less to advance Mohammedanism, or Judaism, or infidelity, by prostrating Christianity, but to exclude all rivalry among *Christian* sects and to prevent any *national* ecclesiastical establishment which would give to an hierarchy the exclusive patronage of the *national* government.'" [6] The establishment clause was intended to apply only to the federal government. Indeed when the Constitution was being framed in Philadelphia in 1787 many thought a bill of rights was unnecessary. It was recognized by all that the federal government was the government of enumerated rights. Rights not specifically delegated to the federal government were assumed by all to be reserved to the states. Anti-Federalists, however, insisted upon a Bill of Rights as additional protection against federal encroachment upon the rights of the states and individual liberties. Excerpted testimony of James McClellan at 5-6 (trial testimony).

The federalists, who were the proponents of the Constitution, acceded to the demand of the Anti-Federalists for a Bill of Rights since, in the opinion of all, nothing in the Bill of Rights changed the terms of the original understanding of the federal convention. It was thought by all that the Bill of Rights simply made express what was already understood by the convention: namely, the federal government was a government of limited authority and that authority did not include matters of civil liberty such as freedom of speech, freedom of the press, and freedom of religion. *Id.* at 8-13.

The prohibition in the first amendment against the establishment of religion gave its states, by implication, full authority to determine church-state relations within their respective jurisdictions. "Thus the establishment clause actually had a dual purpose: to guarantee to each *individual* that Congress would not impose a national religion, and to each *state* that it was free to define the meaning of religious establishment under its own state constitution and laws. The federal government, in other words, simply had no authority over the states respecting the matter of church-state relations."[7]

At the beginning of the Revolution established churches existed in nine of the colonies. Maryland, Virginia, North Carolina. South Carolina, and Georgia all shared Anglicanism as the established reglion common to those colonies. *See* McCellan, *Supra* note 6, at 300. Congregationalism was the established religion in Massachusetts, New Hampshire, and Connecticut. New York, on the other hand, allowed for the establishment of Protestant religions. [8] Three basic patterns of church-state relations dominated in the late eighteenth century. In most of New England there was the quasi-establishment of a specific Protestant sect. Only in Rhode Island and Virginia were all religious sects disestablished. "But all of the states still retained the Christan religion as the foundation stone of their social, civil and political institutions. Not even Rhode Island and Virginia renounced Christianity, and both states continued to respect and acknowledge the Christian religion in their system of law."[9] At the time the Constitution was adopted ten of the fourteen states refused to prefer one Protestant sect over another. Nonetheless, these states placed Protestants in a preferred status over Catholics, Jews, and Dissenters.[10]

The pattern of church-state relations in new states entering the Union after 1789 did not differ substantially from that in the original fourteen. By 1860—and the situation did not radically change for the next three quarters of a century—the quasi-establishment of a specific Protestant sect had everywhere been rejected; quasi-establishment of the Protestant religion was abandoned in most but not all of the states; and the quasi-establishment of the Christian religion still remained in some areas. A new pattern of church-state relations, the multiple or quasi-establishment of all religions in general, i.e., giving all religious sects a preferred status over disbelievers (the No Preference Doctrine) became widespread throughout most of the Union. Thus at the turn of the century, for example, no person who denied the existence of God could hold office in such states as Arkansas, Mississippi, Texas, North Carolina, or South Carolina.[11]

[5] The first amendment in large part was a guarantee to the states which insured that the states would be able to continue whatever church-state relationship existed in 1791. Excerpted testimony of James McClellan at 13 (from trial).

D. Washington, Madison, Adams, and Jefferson

The drafters of the first amendment understood the first amendment to prohibit the federal government only from establishing a national religion. Anything short of the outright establishment of a national religion was not seen as violative of the first amendment. For example, the federal government was free to promote various Christian religions and expend monies in an effort to see that those religions flourished. This was not seen as violating the establishment clause. R. Cord, *Separation of Church and State* 15 (1982).

The intent of the framers of the first amendment can be understood by examining the legislative proposals offered contemporaneously with the debate and adoption of the first amendment. For instance, one of the earliest acts of the first House of Representatives was to elect a chaplain. James Madison was a member of the congressional committee who recommended the chaplain system. On May 1, 1789 the House elected as chaplain, the Reverend William Linn. $500.00 was appropriated from the federal treasury to pay his salary. Even though the first amendment did not become part of the Constitution until 1791, has James Madison believed in the absolute separation of Church and State as some historians have attributed to him. James Madison would certainly have objected on this principle alone to the election of a chaplain.[12] At the Constitutional Convention on June 28, 1787 Dr. Benjamin Franklin suggested that a morning prayer might speed progress during the debates. Franklin told the Convention and its President, George Washington, that he had lived a long time. The longer he lived the more persuaded he was *"that God Governs in the affairs of men."*[13] Franklin "therefore beg[ged] leave to move—that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the clergy of this City be required to officiate in that Service—"[14] Franklin's motion was not adopted for political reasons. Alexander Hamilton and others thought that the motion might have been proper at the beginning of the convention but that if the motion were adopted during the convention the public might believe that the convention was near failure. For this reason, which was wholly political, the issue was resolved by adjournment without any vote being taken.[15]

Presidential proclamations, endorsed by Congressman James Madison when Washington was President, dealing with Thanksgiving, fasting, and prayer are all important in understanding Madison's views on the proper role between church and state.[16] Congress proposed a joint resolution on September 24, 1789, which was intended to

allow the people of the United States an opportunity to thank Almighty God for the many blessings which he had poured down upon them. The resolution requested that President George Washington recommend to the citizens of the United States a day of public thanksgiving and prayer. Congress intended that the people should thank Almighty God for affording them an opportunity to establish this country.[17] This proclamation was submitted to the President the very day after Congress had voted to recommend to the states the final text of what was to become the first amendment to the United States Constitution.[18] As President, Madison issued four prayer proclamations. Excerpted testimony of James McClellan at 19.

Thomas Jefferson is often cited along with James Madison as a person who was absolutely committed to the separation of church and state. The historical record, however, does not bear out this conclusion.

While Jefferson undoubtedly believed that the church and the state should be separate, his actions in public life demonstrate that he did not espouse the absolute separation evidenced in the modern decisions by the United States Supreme Court. For example, on October 31, 1803, President Jefferson proposed to the United States Senate a treaty with the Kaskaskia Indians which provided that federal money was to be used to support a Catholic priest and to build a church for the ministry of the Kaskaskia Indians. The treaty was ratified on December 23, 1803. As Professor Cord points out in his book,[19] President Jefferson could have avoided the explicit appropriation of funds to support a Catholic priest and a Catholic church by simply leaving a lump sum in the Kaskaskia treaty which could have been used for that purpose. However, President Jefferson was not at all reluctant—for ought that appears on the historical record—to specifically appropriate money for a Catholic mission.

Unlike Presidents Washington, Madison, and Adams, when Jefferson was President he broke with the tradition of issuing executive religious proclamations. In Jefferson's view the establishment clause and the federal division of power between the national government and the states foreclosed executive religious proclamations. While refusing to issue executive religious proclamations, President Jefferson recognized that "no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government. It must then rest with the States, as far as it can be in any human authority." [20] Thus, of the first four Presidents, all of whom were close to the adoption of the Federal Constitution and the first amendment, only President Jefferson did not issue executive religious proclamations, and only President Jefferson thought that executive religious proclamations were not constitutional.

But even President Jefferson signed into law bills which provided federal funds for the propagation of the gospel among the Indians.[21] Based upon this historical record Professor Cord concludes that Jefferson, even as President, did not interpret the establishment clause to require complete independence from religion in government.

In sum, while both Madison and Jefferson led the fight in Virginia for the separation of church and state, both believed that the first amendment only forbade the establishment of a state religion by the *national* government. "Jefferson was neither at the Constitutional Convention nor in the House of Representatives that framed the First Amendment. The two Presidents who were at the Convention, Washington and Madison, and the President who framed the initial draft of the First Amendment in the House of Representatives, James Madison, issued Thanksgiving Proclamations." [22] The Court agrees with the studied conclusions of Dr. Cord that "it should be clear that the traditional interpretation of Madison and Jefferson is historically faulty if not virtually unfounded . . . ." [23]

One thing which becomes abundantly clear after reviewing the historical record is that the founding fathers of this country and the framers of what became the first amendment never intended the establishment clause to erect an absolute wall of separation between the federal government and religion. Through the chaplain system, the money appropriated for the education of Indians, and the Thanksgiving proclamations, the federal government participated in secular Christian activities. From the beginning of our country, the high and impregnable wall which Mr. Justice Black referred to in *Everson* v. *Board of Education*, 330 U.S. 1, 18, 67 S.Ct. 504, 513, 91 L.Ed. 711 (1947), was not as high and impregnable as Justice Black's revisionary literary flourish would lead one to believe.

Yet, despite all of this historical evidence, only last month the Supreme Court wrote that the purpose of the first amendment is twofold: to foreclose state interference with the practice of religious faiths, and to foreclose the establishment of a state religion familiar in other Eighteenth Century systems. Religion and government, each insulated from the other, could then coexist. *Jefferson's idea of a "wall," see Reynolds* v. *United States*, 98 U.S. (8 Otto) 145, 164 [25 L.Ed 244] (1878), *quoting* Reply from Thomas Jefferson to an address by a committee of the Danbury Baptist Association (January 1, 1802), *reprinted in* 8 Works of Thomas Jefferson 113 (Washington ed. 1861), *was a useful figurative illustration to* emphasize the concept of separateness. Some limited and incidental entanglement between church and state authority is inevitable in a complex modern society, *see, e.g., Lemon* v. *Kurtzman*, 403 U.S. 602, 614 [91 S.Ct. 2105, 2112, 29 L. Ed.2d 745] (1971); *Waltz v. Tax Commission*, 397 U.S. 664, 670 [90 S.Ct. 1409, 1412, 25 L.Ed.2d 697] (1970), *but the concept of a "wall" of separation is a signpost.*

Larkin v. Grendel's Den, Inc., —— U.S. ——, ——, 103 S.Ct. 505, 510, 74 L.Ed.2d 297 (1982) (emphasis added). Enough is enough. Figurative illustrations should not serve as a basis for deciding constitutional issues.

[6] For this Court, Professor Robert Cord, *see supra* note 5, irrefutably establishes that Thomas Jeffersons address to the Danbury Baptist Association cannot be relied upon to support the conclusion that Jefferson believed in a *wall* between church and state. "By this phrase Jefferson could only have meant that the 'wall of separation' was erected 'between Church and State' in regard to possible federal action such as a law establishing a national religion or prohibiting the free exercise of worship." *Id.* at 115. Overall the conduct of Thomas Jefferson was consistent with the conclusion that he believed, like all the other drafters of the Constitution and the Bill of Rights, that the states were free to establish religions as they saw fit.[24]

E. First Amendment as Applied to the States

[7, 8] As has been seen up to this point the establishment clause, ratified in 1791, was intended only to prohibit the federal government from establishing a national religion. The function of the establishment clause was two-fold. First, it guaranteed to each individual that Congress would not impose a national religion. Second, the establishment clause guaranteed to each state that the states were free to define the meaning of religious establishment under their own constitution and laws.

The historical record clearly establishes that when the fourteenth amendment was ratified in 1868 that its ratification did not incorporate the first amendment against the states. The debates in Congress at the time the fourteenth amendment was being drafted, the re-election speeches of the various members of Congress shortly after the passage by Congress of the fourteenth amendment, the contemporaneous newspaper stories reporting the effect and substance of the fourteenth amendment, and the legislative debates in the various state legislatures when they considered ratification of the fourteenth amendment indicate that the amendment was not intended to apply the establishment clause against the states because the fourteenth amendment was not intended to incorporate the federal Bill of Rights (the first eight amendments) against the states.

At the beginning the Court should acknowledge its indebtedness to Professor Charles Fairman, then a professor of law in Political Science at Stanford University, for the scholarly article which he published in 1949[25] Professor Fairman examined in detail the historical evidence which Mr. Justice Black relied upon in *Adamson v. California*, 332 U.S. 46, 47, 67 S.Ct. 1672, 1673, 91 L.Ed. 1903 (1947), where Mr. Justice Black concluded that the historical events that culminated in the adoption of the fourteenth amendment demonstrated persuasively that one of the chief objects of the fourteenth amendment was to make the Bill of Rights applicable to the states.[26]

1. Debates

The paramount consideration in defining the scope of any constitutional provision or legislative enactment is to ascertain the intent of te legislature. The intention of the legislature may be evidenced by statements of the leading proponents.[27] If statements of the leading proponents are found, those statements are to be regarded as good as if they were written into the enactment. "The intention of the lawmaker is the law." *Hawaii v. Mankichi*, 190 U.S. 197, 212, 23 S.Ct. 787, 788, 47 L.Ed. 1016 (1903).

Looking back, what evidence [i]s there . . . to sustain the view that Section 1 was intended to incorporate Amendments I to VIII? [C]ongressman Bingham . . . did a good deal of talking about "immortal bill of rights" and one spoke of "cruel and unusual punishments." Senator Howard, explaining the new privileges and immunities clause, said that it included the privileges and immunities of Article IV, Section 2—"whatever they may be"—and also "the personal rights guarantied [*sic*] and secured by the first eight amendments. . . ." That is all. The rest of the evidence bore in the opposite direction, or was indifferent. Yet one reads in Justice Black's footnote that, [*Adamson* v. *California*, 332 U.S. 46, 72 n. 5 [67 S.Ct. 1672, 1686 n. 5, 91 L.Ed. 1903] (1947)].

A comprehensive analysis of the historical origins of the Fourteenth Amendment, Flack, The Adoption of the Fourteenth Amendment (1908), 94, concludes that "Congress, the House and the Senate, had the following objects and motives in view for submitting the first section of the Fourteenth Amendment to the States for ratification:

1. To make the Bill of Rights (the first eight Amendments) binding upon, or applicable to, the States.

2. To give validity to the Civil Rights Bill.

3. To declare who were citizens of the United States.

We have been examining the same materials as did Flack, and have quoted far more extensively than he. How can he on that record reach the conclusion that Congress proposed by Section 1 to incorporate Amendments I to VIII?

Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 Stan.L. Rev. at 65-66 (1949). Porfessor Flack explained that the incorporation was based upon remarks of Congressman Bingham and Senator Howard at the time the Thirty-ninth Congress voted upon the fourteenth amendment. Only those two said anything which could be construed as suggesting the result reached by Justice Black and the modern Supreme Court decisions.

Throughout the debates in the House over the meaning of the fourteenth amendment Professor Fairman shows convincingly that Congressman Bingham had no clear concept of what exactly would be accomplished by the passage of the fourteenth amendment. The explanations offered by Congressman Bingham to his colleagues were inconsistent and contradictory.[28]

Together with Congressman Bingham's statements which suggested incorporation were remarks by Senator Howard. Senator Howard spoke with more preciseness than Congressman Bingham. Thus, his interpretation carries much greater weight than that of Congressman Bingham. Yet, because of the circumstances under which he spoke, his statements are subject to question when held out as representative of the majority viewpoint. By sheer chance Senator Howard acted as spokesman for the joint committee when explaining the purpose of the fourteenth amendment to the Senate. The joint committee had been chaired by Senator Fessenden. Chairman Fessenden became sick suddenly and Senator Howard thus became the spokesman for the Joint Committee. "Up to this point [Senator Howard's] participation in the debates on the Civil Rights Bill and the several aspects of the Amendment had been negligible. Poles removed from Chairman Fessenden, who 'abhorred' extreme radicals. Howard . . . was 'one of the most . . . reckless of the radicals,' who had 'served consistently in the vanguard of the extreme Negrophiles.'"[29] Professor Raoul Berger notes with some sarcasm that it is odd that a radical such as Senator Howard should be taken as speaking authoritatively for a committee in which the conservatives outnumbered the radicals and where there was a strong difference of opinion between the radicals and the conservatives. R. Berger, *supra* note 26, at 147.

On May 23, 1866, Senator Howard rose in the Senate, referred to the illness of Fessenden, and stated that he would "present 'the views and the motives which influenced the committee, so far as I understand [them].' After reading the privileges and immunities listed in *Corfield v. Coryell*, [6 Fed.Cas. 546, No. 3230 (C.C.E.D.Pa.1823),] he said, 'to these privileges and immunities . . . should be added the personal rights guaranteed and secured by the first eight amendments.' That is the sum and substance of Howard's contribution to the 'incorporation' issue."[30]

Raoul Berger notes in his analysis of the incorporation question that the remark of Senator Howard was tucked away in the middle of a long speech, that Howard was a last minute substitution for the majority chairman, that Howard was in the minority on the committee, and that after Howard was through speaking Senator Poland stated that the fourteenth amendment secured nothing beyond what was intended in the original privileges and immunities clause of Article IV Section 2. R. Berger, *supra* note 26, 148-49. Senator Doolittle followed Senator Poland with some additional remarks which were designed to reassure those whose votes had already been won in favor of passage of the fourteenth amendment that indeed the amendment was limited to known objectives, which objectives were not intended to encompass the federal Bill of Rights.

The scholarly analyses of Professors Fairman and Berger persuasively show that Mr. Justice Black misread the congressional debate surrounding the passage of the fourteenth amendment when he concluded that Congress intended to incorporate the federal Bill of Rights against the states. *See infra* p. 42-44 (discussion of Blaine Amendment). So far as Congress was concerned, after the passage of the fourteenth amendment the states were free to establish one Christian religion over another in the exercise of their prerogative to control the establishment of religions.

2. Popular Understanding

An examination of popular sentiment across the country reveals that the nation as a whole did not understand the adoption of the fourteenth amendent to incorporate the federal Bill of Rights against the states. Inferentially, that is to say that the people understood that each state was free to continue to support one Christian religion over another as the people of that state saw fit to do. The leading constitutional scholar upon whom Justice Black relied in *Adamson v. California*,

Mr. Flack[,] examined a considerable number of Northern newspapers and reported (an admission against the thesis he was defending) the following observation: "There does not seem to have been any statement at all as to whether the first eight Amendments were to be made applicable to the States or not . . . ." Presumably this excluded the press reports of May 24 on Senator Howard's speech of the 23d: for the *New York Herald* and the *New York Times*, which Mr. Flack had before him, did quote in full the passage where it said that the personal rights guaranteed by the first eight amendments were among the "privileges and immunities."

Other newspaper files have been examined in preparing the [article of Professor Fairman] and no instance has been found to vary what has been set out above. Fairman, *supra* note 25, at 68 (footnotes omitted).[31]

Charles Fairman quotes at length from the campaign speeches of five senators who, presumably, heard Senator Howard's speech of May 23, 1866. Not one of the senators mentioned anything about the Bill of Rights when commenting to the electorate about Section 1. Likewise, the five Republicans, including Congressman Bingham, never mentioned that the privileges and immunities clause would impose the federal Bill of Rights upon the states. Along with Professor Fairman, the Court takes the historical record to conclusively show that the general understanding of the nation at large, as illustrated by contemporaneous newspaper reports, demonstrates that the people of this country did not understand the fourteenth amendment to incorporate the establishment clause of the first amendment against the states.

3. Campaign Speeches

After the submission of the fourteenth amendment to the states on June 16, 1866 the members of the Thirty-Ninth Congress began to busy themselves with the prospect of re-election in the fall. The statements which the members of Congress made during their campaign speeches are certainly relevant in ascertaining the intent of the Thirty-ninth Congress with regard to the scope and effect of the fourteenth amendment. All of these speeches were contemporaneous expressions of the intent of Congress. Professor Fairman provides many instances of speeches made on the campaign hustings. *See generally*, Fairman, *supra* note 25, at 68-78. None of the members of Congress indicated in their campaign speeches that the fourteenth amendment was intended to incorporate the federal Bill of Rights against the states. The general consensus with regard to the effect of the fourteenth amendment was that it covered the same ground as the Civil Rights Act of 1866. *Id.* at 72 (remarks of Senator Lyman Trumbull, the sponsor of the Civil Rights Bill).

4. *State-Legislative Debates*

The fourteenth amendment was submitted to the states for their ratification on June 16, 1866. By June, 1867, twelve legislatures had ratified the amendment. By July 28, 1868 the fourteenth amendment had been promulgated.

Professor Fairman combed the relevant legislative materials to see exactly what each state legislature thought the effect of the fourteenth amendment would be. Along with Fairman, the Court finds it important to note not only what was said but what was not said. Had the fourteenth amendment been understood to incorporate the federal Bill of Rights against the states in many instances states would have been required to make radical changes. For instance it was frequent in many states for people to be prosecuted for felonies without an indictment from a grand jury. It was equally common for a jury of less than twelve people to sit in judgment in a felony prosecution. Some states failed to preserve the right to a jury trial and suits at common law where the amount in controversy exceeded $20.00.

The Court will not repeat Professor Fairman's analysis in each state. Only a few states need to be highlighted to convey the popular understanding of the effect of the fourteenth amendment upon the right of states to establish a religion. In New Hampshire, only five months after the promulgation of the fourteenth amendment—in December, 1886—the Supreme Court of New Hampshire had occassion to interpret a provision of the state constituton which provided that the legislature could "authorize towns, parishes, and religious societies 'to make adequate provison . . . for the support and maintenance of public Protestant teachers of piety, religion, and morality.'"[32] Moreover, Article VI of the Bill of Rights from the New Hampshire Constitution encouraged "the public worship of the diety. . . ." The question before the Su-

preme Court of New Hampshire was whether certain parishioners of the First Unitarian Society of Christians in Dover could fire the preacher. The preacher had begun using text from Emerson interchange-ably with text from the Bible. While Wardens of the church supported the preacher, certain pew owners were outraged. The pew owners sought an injunction restraining the preacher from occupying the meeting house. The trial court granted relief.

On appeal, in a 276-page report neither the opinion of the court nor the dissent made a single reference to the fourteenth amendment. Both opinions, however, had much to say about New Hampshire's policy in ecclesiastical matters. The opinion of the court referred to the first amendment and quoted Story's *Commentaries:*

[T]he whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions . . .

Probably at the time of the adoption of the amendment now under consideration, the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as not incompatible with the private rights of conscience and the freedom of religious worship: Fairman, *supra* note 25, 87 (citations omitted).

As Professor Fairman notes: "[I]n December 1868—five months after the promulgation of the Fourteenth Amendment—the New Hampshire court regarded the matter of an establishment of religion as being still 'left exclusively to the State governments.'" *Id.*

[9] The historical record shows without equivocation that none of the states envisioned the fourteenth amendment as applying the federal Bill of Rights against them through the fourteenth amendment. It is sufficient for purposes of this case for the Court to recognize, and the Court does so recognize, that the fourteenth amendment did not incorporate the establishment clause of the first amendment against the states.[33]

5. Supreme Court Decisions

Decisions by the United States Supreme Court rendered contemporaneously with the ratification of the fourteenth amendment indicate that the Court did not perceive the fourteenth amendment to incorporate the federal Bill of Rights against the states. In *Twitchell* v. *Pennsylvania*, 74 U.S. (7 Wall.) 321, 19 L.Ed. 223 (U.S. 1869), the Supreme Court held that the fifth and sixth amendments of the Constitution do not apply to the states. This holding was consistent with the earlier, well-known holding in *Barron* v. *Baltimore*, 32 U.S. (7 Peters) 243, 8 L.Ed. 672 (1833).

In *Barron* v. *Baltimore* the question presented to the court was whether the City of Baltimore was required to compensate Barron under the fifth amendment for the taking of his property for public purposes. When the City of Baltimore paved some streets, streams of water had been diverted in the vicinity of Barron's wharf. The water had deposited large amounts of sand around the wharf. The sand deposits made these waters too shallow for ocean-going ships to load and unload cargo at the wharf. Chief Justice John Marshal held that Barron's claim raised no appropriate federal question because the fifth amendment was a constitutional limitation applied only against the federal government.[34]

Another decision of the United States Supreme Court, decided in 1870, recognized that the federal Bill of Rights did not control the states.[35] After much deliberation over the question whether jury findings made in state court were reviewable in federal court, the Supreme Court noted that it was "admitted" that the limitations of the seventh amendment [36] did not apply to the states.

F. Blaine Amendment

The discussion up to this point has focused upon the incorporation of the federal Bill of Rights generally through the fourteenth amendment. Events which postdated the adoption of the fourteenth amendment show that the lawmakers of the Thirty-ninth Congress did not intend that the establishment clause would become binding upon the states with the ratification of the fourteenth amendment. [A] conclusive argument against the incorporation theory, at least as respects the religious provisions of the First Amendment, is the Blaine Amendment proposed in 1875. McClellan, *Christianity and the Common Law*, in Joseph Story and the American Constitution 118, 154 (1971) (quoting O'Brien, *Justice Reed and the First Amendment*, 116 (n.d.). At the behest of President Grant, James Blaine of Maine introduced a resolution in the Senate in 1885 which read: "No *State* shall make any law respecting an establishment of religion or prohibiting the free exercise thereof." *Id.* at 154. (emphasis in original). Importantly, the Congress which considered the Blaine Amendment included twenty-three members of the Thirty-ninth Congress, the Congress which passed the fourteenth amendment.

Not one of the several Representatives and Senators who spoke on the proposal even suggested that its provisions were implicit in the amendment ratified just seven years earlier. Congressman Banks, a member of the Thirty-ninth Congress, observed: "If the Constitution is amended so as to secure the object embraced in the principle part of this proposed amendment, it prohibits the States from exercising a power they now exercise." Senator Frelinghuysen of New Jersey urged the passage of the "House article," which "prohibits the States for the first time, from the establishment of religion, from prohibiting its free exercise." Senator Stevenson, in opposing the proposed amendment, referred to *Thomas Jefferson: "Friend as he* [Jefferson] *was of religious freedom, he would never have consented that the States . . . should be degraded and that the Government of the United States, a government of limited authority, a mere agent of the States with prescribed powers, should undertake to take possession of their schools and of their* religion." Remarks of Randolph, Christiancy, Kernan, Whyte, Bogy, Easton, and Morton give confirmation to the belief that none of the legislators in 1875 thought the Fourteenth Amendment incorporated the religious provisions of the First. *Id.* (quoting O'Brien, *Justice Reed and the First Amendment* 116-17 (emphasis added)).

The Blaine Amendment, which failed in passage, is stark testimony to the fact that the adoptors of the fourteenth amendment never intended to incorporate the establishment clause of the first amendment against the states, a fact which Black ignored. This was understood by nearly all involved with the Thirty-ninth Congress to be the effect of the fourteenth amendment.

G. Proper Interpretative Perspective

[10,11] The interpretation of the Constitution can be approached from two vantages. First, the Court can attempt to ascertain the intent of the adoptors, and after ascertaining that attempt apply the Constitution as the adoptors intended it to be applied. Second, the Court can treat the Constitution as a living document, chameleon-like in its complexion, which changes to suit the needs of the times and the whims of the interpreters. In the opinion of this Court, the only proper approach is to interpret the Constitution as its drafters and adopters intended. The Constitution is, after all, the supreme law of the land. It contains provisions for amending it; if the country as a whole decided that the present test of the Constitution no longer satisfied contemporary needs then the only constitutional course is to amend the Constitution by following its formal, mandated procedures. Amendment through judicial fiat is both unconstitutional and illegal. Amendment through judicial fiat breeds disrespect for the law, and it undermines the very basic notion that this country is governed by laws and not by men. *See generally* Breast, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. Rev. 204 (1980) (discussing various approaches to constitutional interpretation).

Let us have faith in the rightness of our charter and the patience to persevere in adhering to its principles. If we do so then all will have input into change and not just a few.

H. Stare Decisis

[12] What is a court to do when faced with a direct challenge to settled precedent? [37] In most types of cases "it is more important that the applicable rule of law be settled than that it be settled right." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting). This general rule holds even where the court is persuaded that it has made a serious error of interpretation in cases involving a statute.[38] However, in cases involving the federal constitution, where correction through legislative action is practically impossible, a court should be willing to examine earlier precedent and to overrule it if the court is persuaded that the earlier precedent was wrongly decided. *Id.* at 407, 52 S.Ct. at 447. "A judge looking at a constitutional decision may have compulsions to reverse past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it." Douglas, *Stare Decisis*, 49 Colum.L.Rev. 735, 736 (1949).

Certainty in the law is important. Yet, a rigid adherence to stare decisis "would leave the resolution of every issue in constitutional law permanently at the mercy of the first Court to face the issue, without regard to the possibility that the revelant case was poorly prepared or that the judgment of the Court was simply ill-considered. The danger is particularly great where the court has moved too far in an activist direction; in such a situation, legislative correction of the error is liable to be virtually impossible." Maltz, *Commentary: Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wis.L.Rev. 476, 492 (1980).

[T]he "wall of separation between Church and State" that Mr. Jefferson built at the University [of Virginia] which he founded did not exclude religious education from the

school. The difference between the generality of his statements on the separation of Church and State and the specificity of his conclusions on education are considerable. A rule of law should not be drawn from a figure of speech. *McCollum* v. *Board of Education*, 333 U.S. 203, 247, 68 S.Ct. 461, 482, 92 L.Ed. 649 (1948) (per Reed, J., dissenting).

"[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." *Graves* v. *O'Keefe*, 306 U.S. 466, 491-92, 59 S.Ct. 595, 603-04, 83 L.Ed. 927 (1939) (Frankfurter, J., concurring). "By placing a premium on 'recent cases' rather than the language of the Constitution, the Court makes it dangerously simple for future Courts using the technique of interpretation to operate as a 'continuing Constitutional Convention.'" *Coleman* v. *Alabama*, 399 U.S. 1, 22-23, 90 S.Ct. 1999, 2010-11, 26 L.Ed.2d 387 (1970) (Burger, C.J.). "Too much discussion of constitutional law is centered on the Court's decisions, with not enough regard for the text and history of the Constitution itself." R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 296 (1977).[39]

This Court's review of the relevant legislative history surrounding the adoption of both the first amendment and of the fourteenth amendment, together with the plain language of those amendments, leaves no doubt that those amendments were not intended to forbid religious prayers in the schools which the states and their political subdivisions mandate.

I. Summary

"Th[e] mountain of evidence has become so high, one may have lost sight of the few stones and pebbles that made up the theory that the Fourteenth Amendment incorporated Amendments I to VIII." Fairman, *supra* note 25, at 134. Suffice it to say that the few stones and pebbles provide precious little historical support for the view that the states were prohibited by the establishment clause of the first amendment from establishing a religion.[40]

More than any other provision of the Constitution, the interpretation by the United States Supreme Court of the establishment clause has been steeped in history. This Court's independent review of the relevant historical documents and its reading of the scholarly analysis convinces it that the United States Supreme Court has erred in its reading of history. Perhaps this opinion will be no more than a voice crying in the wilderness and this attempt to right that which this Court is persuaded is a misreading of history will come to nothing more than blowing in the hurricane, but be that as it may, this Court is persuaded as was Hamilton that "[e]very breach of the fundamental laws, though dictated by necessity impairs the sacred reverence with ought to be maintained in the breast of the rulers towards the constitution." R. Berger, *supra* note 26, at 299 (quoting Federalist No. 25 at 158).

[13]. Because the establishment clause of the first amendment to the United States Constitution does not prohibit the state from establishing a religion, the prayers offered by the teachers in this case are not unconstitutional. Therefore, the Court holds that the complaint fails to state a claim for which relief could be granted.

J. Conclusion

There are pebbles on the beach of history from which scholars and judges might attempt to support the conclusions that they are wont to reach. That is what Professors Flack, Crosskey and the more modern scholars have done in attempting to establish a beachhead, as did Justice Black, that there is a basis for their conclusions that Congress and the people intended to alter the direction of the country by incorporating the first eight amendments to the Constitution. However, in arriving at this conclusion, they, and each of them, have had to revise established principles of constitutional interpretation by the judiciary. Whether the judiciary, inadvertently or eagerly, walked into this trap is not for discussion. The result is that the judiciary has, in fact, amended the Constitution to the consternation of the republic. As Washington pointed out in his Farewell Address, *see* p. 1 *supra*, this clearly is the avenue by which our government, can and ultimately, will be destroyed. We think we move in the right direction today, but in so doing we are denying to the people their rights to express themselves. It is not what we, the judiciary want, it is what the people want translated into law pursuant to the plan established in he Constitution as the framers intended. This is the bedrock and genius of our republic. The mantle of office gives us no power to fix the moral direction that this nation will take. When we undertake such course we trample upon the law. In such instances the people have a right to complain. The Court loses its respect and our institution is brought low. This misdirection should be cured now before it is too late. We must give no future generation an excuse to use this same tactic to further their ends which they think proper under the then political climate as for instance did Adolph Hitler when he used the court system to further his goals.

What is past is prologue. The framers of our Constitution, fresh with recent history's teachings, knew full well the propriety of their decision to leave to the peoples of the several states the determination of matters religious. The wisdom of this decision becomes increasingly apparent as the courts wind their way through the maze they have created for themselves by amending the Constitution by judicial fiat to make the first amendment applicable to the states. Consistency no longer exists. Where you cannot recite the Lord's Prayer, you may sing his praises in God Bless America. Where you cannot post the Ten Commandments on the wall for those to read if they do choose, you can require the Pledge of Allegience. Where you cannot acknowledge the authority of the Almighty in the Regent's prayer, you can acknowledge the existence of the Almighty in singing the verses of America and Battle Hymn of the Republic. It is no wonder that the people perceived that justice is myoptic, obtuse, and janus-like.

If the appellate courts disagree with this Court in its examination of history and conclusion of constitutional interpretation thereof, then this Court will look again at the record in this case and reach conclusions which it is not now forced to reach.[41]

III. Order

It is therefore ordered that the complaint in this case be dismissed with prejudice. Costs are taxed against the plaintiffs. Fed. R. Civ.P. 54(d).

Ishmael Jaffree, et al., Plaintiffs, v. *Fob James,* in his official capacities as Governor of the State of Alabama and ex officio member of the State Board of Education; Charles Graddick, in his official capacity as Attorney General for the State of Alabama; John Tyson, Jr., Ron Creel, S.A. Cherry, Ralph Higginbotham, Victor P. Poole, Harold C. Martin, James B. Allen, Jr., and Roscoe Roberts, Jr., in their official capacities as members of the Alabama State Board of Education, Defendants.

CIV. A. NO. 82-0792-H.

UNITED STATES DISTRICT COURT, S.D. ALABAMA, S.D.

Jan. 14, 1983.

Action was brought to challenge the Alabama "Prayer Law" as being in violation of Federal and State Constitutions. The District Court, Hand, Chief Judge, held that in view of fact that federal claims of unconstitutionality were dismissed short of trial, court in exercise of discretion would dismiss pendent claims under State Constitution.

All claims for relief dismissed, and injunction previously entered dissolved.

FEDERAL COURTS ⚷ 18

In view of fact that federal claims of unconstitutionality of state "Prayer Law" were dismissed short of trial, court in exercise of discretion would dismiss pendent claims under State Constitution. Ala.Code 1975, §§ 16-1-20, 16-1-20.1, 16-1-22.1; U.S.C.A. Const.Amend. 1.

Ronnie L. Williams, Mobile, Ala., for plaintiffs.

Anne Neamon, pro se and for petitioners as Friend of Court Citizens for God and Country.

Fob James, III, pro se.

Charles S. Coody, Counsel Director, Div. of Legal Services, Dept. of Education, Montgomery, Ala., for defendants, Tyson, Creel, Cherry, Higginbotham, Poole, Martin, Allen and Roberts.

Bob Sherling, Mobile, Ala., for intervenors.

Maury D. Smith, David R. Boyd, Montgomery, Ala., for Gov. James.

Order

HAND, Chief Judge.

The complaint in this case challenges Senate Bill 8, Alabama Act 82-735, popularly known as "the Prayer Law", Senate Bill 61 (1982), Ala.Code § 16-1-20 (silent meditation), and Ala.Code § 16-1-22.1.

I. The Allegations

The complaint in this case alleges that Senate Bill 61 (1982), Senate Bill 8 (1982) and Ala.Code § 16-1-20.1 violate the rights of the plaintiffs to be free from the state endorsement and establishment of any religion.

Senate Bill 61 (1982) provides:

To prescribe a period of time in the public schools, not to exceed fifteen minutes, for the study of the formal procedures followed by the United States Congress which study shall include the reading verbatum of one of the opening prayers given by either the House or the Senate Chaplain at the beginning of the meeting of the United States House or Senate.

Be it enacted by the Legislature of Alabama:

Section I. At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which said class is held shall, for a period of time not exceeding fifteen minutes, instruct the class in the formal procedure followed by the United States Congress. The study shall include, but not be limited to, the reading verbatim of one of the opening prayers given by either the House or the Senate Chaplain at the begin-

ning of the meeting of the House or Senate. Any student may select an opening House or Senate prayer from the Congressional Record for use by the class.

Senate Bill 8 (1982) provides as follows:

To provide for a prayer that may be given in the public schools and educational institutions of this state.

Be it enacted by the Legislature of Alabama:

Section I. From henceforth, any teacher or professor in any public educational institution within the State of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may lead the willing students in the following prayer to God:

Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools. In the name of our Lord. Amen.

Ala.Code Section 16-1-20.1 provides: At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activity shall be engaged in.

II. Claims for Relief

The state laws are challenged under two separate theories. First, the laws are attacked as being violative of the first amendment to the United States Constitution. The first amendment provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. Amend. I.

The second basis for attacking the laws rests upon a pendent, state-law claim. The amended complaint alleges that the laws in question violate the guarantee of religious freedom found in the Alabama State Constitution. The relevant section provides:

That no religion shall be established by law; that no preference shall be given by law to any religious sect, society, denomination, or mode of worship; that no one shall be compelled by law to attend any place of worship; nor to pay any tithes, taxes, or other rate for building or repairing any place of worship, or for maintaining any minister or ministry; that no religious test shall be required as a qualification to any office or public trust under this state; and that the civil rights, privileges, and capacities of any citizen shall not be in any manner affected by his religious principles. Ala. Const. art. I, § 3.

Today in the companion case, *Jaffree v. Board of School Commissioners of Mobile County*, 554 F.Supp. 1104, the Court holds that the establishment clause of the first amendment to the United States Constitution does not bar the states from establishing a religion. In light of the reasoning in that opinion the Court holds that the claims in this case fail to state any claim for which relief could be granted under the federal Constitution.

However, in this case, in addition to the claims for relief under the federal Constitution the plaintiffs have alleged claims under the Alabama State Constitution. Ordinarily, these claims would be within the pendent jurisdiction of the court. Pendent jurisdiction is discretionary. The usual rule is that a federal court should decide any state-law claims which arise from a common nucleus of operative facts and which could ordinarily be expected to be brought in the same action. One well-recognized exception to the exercise of pendent jurisdiction lies where the federal claim is dismissed short of trial. Here this case is being dismissed short of trial, and the Court holds that the better exercise of discretion which is consistent with the limited subject-matter jurisdiction of a federal court mandates that the claims in this case be dismissed.

III. Order

It is hereby ordered that the claims for relief under the federal Constitution be dismissed for failure to state a claim. It is further ordered that the pendent, state-law claims be dismissed.

The injunction which this Court previously entered is dissolved.

Costs are taxed against the plaintiffs.

FOOTNOTES

[1] 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2] Initially, it should be noted that neither 28 U.S.C. §§ 2201 nor 2202 afford any subject-matter jurisdiction to a federal court as the complaint alleges. These sections provide only a remedy.

The operation of the Declaratory Judgment Act is procedural only. By passage of the Act, Congress enlarged the range of remedies available in the federal courts but it did not extent their subject-matter jurisdiction. Thus there must be an independent basis of jurisdiction, under statutes equally applicable to actions for coercive relief, before a federal court may entertain a declaratory judgment action. 10 C. Wright and A. Miller, *Federal Practice and Procedure* § 2766. 841 (1973) (footnotes omitted)

Likewise, 28 U.S.C. § 1343(4) does not afford subject matter jurisdiction to a federal court over claims brought under 42 U.S.C. § 1983. Section 1343(4) affords subject matter jurisdiction to the federal court only over those claims which are brought under "any Act of Congress providing for the protection of civil rights . . ." "Standing alone. § 1983 clearly provides no protection for civil rights since . . . §1983 does not provide any substantive rights at all." *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 618, 99 S.Ct. 1905, 1916, 60 L.Ed.2d 508 (1979).

[3] In fact, the complaint alleges that "(t)his cause of action arises under the First and Fourteenth Amendments to the United States Constitution . . ." *See* Complaint at 2. This Court has previously explained that no implied cause of action exists under either the first or fourteenth amendments, at least when the first amendment is applied to persons acting under color of state law. The very purpose for enacting 42 U.S.C. § 1983 was to provide a remedy to vindicate the rights afforded by the federal Bill of Rights when persons acting under color of state law violated those rights. It would be incongruous to imply a remedy where Congress has expressly afforded a remedy. *See Strong v. Demopolis City Board of Education*, 515 F.Supp. 730, 732 n. 1 (S.D.Ala.1981)(per Hand, J.).

[4] "[T]he existence of a claim for relief under § 1983 is 'jurisdictional' for purposes for invoking 28 U.S.C. § 1343, even though the existence of a meritorious constitutional claim is not similarily required in order to invoke jurisdiction under 28 U.S.C. § 1331. *See Bell v. Hood*, 327 U.S. 678, 682 [66 S.Ct. 773, 776, 90 L.Ed. 939] (1946); *Mt. Healthy [City School District v. Doyle]*, 429 U.S. 274, 278-79 [97 S.Ct. 568, 571-72 (1977).]" *Monell v. Department of School Services*, 436 U.S. 658, 716, 98 S.Ct. 2018, 2048, 56 L.Ed.2d 611 (1978).

[5] At the start the Court should acknowledge its indebtedness to several constitutional scholars. If this opinion will accomplish its intent, which is to take us back to our original historical roots, then much of the credit for the vision lies with Professor James McClellan and Professor Robert L. Cord. Their work and the historical sources cited in their work have proven invaluable to the Court in this opinion. *See* R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (1982); P. McGuigan & R. Rader, *A Blueprint for Judicial Reform* (eds. n.d.); J. McClellan, *Joseph Story and the American Constitution*, 118-159 (1971) (Christianity and the Common Law).

[6] McClellan, The *Making and the Unmaking of the Establishment Clause, in Blueprint for a Judicial Reform* 295 (P. McGuigan & R. Radar eds. n.d.) (quoting J. Story, III, *Commentaries on the Constitution* § 1871 (1833) (emphasis added)).

[7] *Id.*

[8] *Id.* at 300. Professor McClellan documents in great detail the political struggle which raged through the various colonies during the Revolution and afterwards to disestablish certain religions throughout the colonies. The establishment of one religion over another in the respective colonies was purely a political matter. The political strength of the various followers determined which religion was established. Like any other political decision, when the political strength of the minorities reached that of the majority, the state disestablished what had formerly been the majority religion. *See e.g., id.* at 301-308.

[9] *Id.* at 307.

[10] *Id.*

[11] *Id.* at 311. Professor McClellan cites numerous examples in which the states required adherence to a Christian religion. For instance, witnesses were considered competent to testify only if they affirmed a belief in the existence of a Christian God. *Id.*

[12] R. Cord, *supra* note 5, at 23.

[13] R. Cord, *supra* note 5, at 24 (quoting *Debates in the Federal Convention of 1787* as reported by James Madison, *Documents Illustrative of the Formation of the Union of the American States* (Washington, D.C.: Government Printing Office, (1927) 295-96 (emphasis in original)).

[14] *Id.* at 24-25.

[15] *Id.*

[16] The views of James Madison are often cited by those who insist upon absolute separation between church and state. Madison was one of the drafters of the first amendment. An uncritical cursory examination of some of Madison's writings would lead one to the conclusion that Madison favored absolute separation between church and state. However, to reach this conclusion is to misunderstand the views of Mr. Madison.

As Professor Cord explains in his book, Madison was concerned only that the federal government should not establish a national religion. Nondiscriminatory aid to religion and support for various Christian religions was not viewed by Madison as unlawful. *See* R. Cord, *supra* note 5, at 25-26 (examining drafts of the establishment clause submitted by Madison).

[17] Professor Cord explains in great detail the circumstances surrounding this presidential proclamation. *See* R. Cord, *supra* note 5, at 27-29.

[18] Professor Cord discusses in detail a document which Madison wrote late in his life known as the *Detached Memoranda*. Some historians have taken the *Detached Memoranda* as a blanket condemnation of religious proclamations issued by Presidents Jefferson, Madison, and Jackson. From this, some historians argue that James Madison believed that absolute separation was mandated by the establishment clause. The Supreme Court has relied upon the *Detached Memoranda* to justify its position of absolute separation in *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963) ("[I]n the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.' ").

Professor Cord suggests that the *Detached Memoranda* reflected nothing more than a shift in Madison's views as he grew older. The *Detached Memoranda* was written long after Madison had left office and long after the first amendment had been drafted. R. Cord, *supra* note 5, 29-36.

The explanation of Professor Cord that Madison is an old man, no longer in office, who regretted some of his past actions, is, to the Court, reasonable. Not all historcial facts can easily be squared. Professor Cord emphasizes his point by analogizing to something which former President Nixon might write upon reflecting on his tenure as president. It would be odd, hypothesizes Professor Cord, if Mr. Nixon were to publish a book in his later years which concluded that taping conversations, without all parties being aware of the recording, is morally wrong and clearly a flagrant violation of the constitutional right to privacy. It would be nonsense, in

the view of Professor Cord, for a Nixon biographer to conclude that Richard Nixon believed that the surreptitious tapings of conversations in the Oval Office were immoral and unconstitutional. R. Cord, *supra* note 5, at 36. Similarly, it is faulty to judge what Madison believed to be the scope of the establishment clause at the time he drafted the clause by looking to views expressed late in his life when there are numberous expressions of his intent contemporaneous with the period in which the establishment clause was drafted.

[19] R. Cord, *supra* note 5, at 37-39.

[20] R. Cord, *supra* note 5, at 40 (quoting Letter to a Presbyterian Clergyman (1808)).

[21] Professor Cord chronicles the federal support provided to the Moravian Brethren at Bethlehem in Pennsylvania. The function of the Brethren was to civilize the Indians and to promote Christianity. First passed on July 27, 1787, the resolution supporting the Brethren was supported by every President, including Thomas Jefferson. The legislation supporting the Brethren was sectarian in character. Professor Cord reads this history to conclude that had this sort of interaction between church and state been thought to be unconstitutional then certainly the early Congresses and Presidents would not have authorized expenditure of federal money. R. Cord, *supra note* 5, at 39-46.

[22] R. Cord, *supra* note 5, at 47.

[23] *Id.*

[24] Since the states were historically free to establish a religion it follows that some irritation by non-believers or those in the religious minority was a necessary consequence of establishment. The complaint alleges that "[a]ll of the minor Plaintiffs are exposed to ostracism from their peer group class members if they do not participate in these daily devotional activities." Complaint at 5. The children "all have suffered and continue to suffer severe emotional distress from being forced to participate, via peer group pressure, in devotional observances orchestrated by the defendants." *Id.* at 7. This physchological pressure naturally flows anytime a state takes an official position on an issue. It does not make an establishment unconstitutional. For example, laissez-faire industrialists feel coerced when a state adopts tough environmental laws. Unemployed workers feel pressure from peer groups when the unemployed worker takes advantage of a state labor law which allows him to cross a union picket line to break a strike. Someone, somewhere, feels coerced or pressured anytime the state takes a position. The Constitution, however, does not protect people from feeling uncomfortable. A member of a religious minority will have to develop a thicker skin if a state establishment offends him. Tender years are no exception.

[25] Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 Stan L. Rev. 5 (1949).

[26] Mr. Justice Black spent nearly twenty years mulling over the criticisms leveled by Professor Charles Fairman. Finally, he had this to say:

What I wrote [in *Adamson v. California*, 332 U.S. 46, 47 [67 S.Ct. 1672, 1673, 91 L.Ed. 1903] (1947),] in 1947 was the product of years of study and research. My appraisal of the legislative history [which surrounded the adoption of the fourteenth amendment and upon which Mr. Fairman relied so heavily] followed 10 years of legislative experience as a Senator of the United States, not a bad way, I suspect, to learn the value of what is said in legislative debates, committee discussions, committee reports, and various other steps taken in the course of passage of bills, resolutions, and proposed constitutional amendments.

My brother Harlan's objections to my *Adamson* dissent history, like that of most of the objectors, relies most heavily on a criticism written by Professor Charles Fairman and published in the Stanford Law Review. 2 Stan.L.Rev. 5 (1949). I have read and studied this article extensively, including the historical references, and am compelled to add that in my view it has completely failed to refute the inferences and arguments that I suggested in my *Adamson* dissent. Professor Fairman's "history" relied very heavily on what was "not" said in the state legislatures that passed on the Fourteenth Amendment. Instead of relying on this kind of negative pregnant, my legislative experience has convinced me that it is far wiser to rely on what "was" said, and most importantly, said by the men who actually sponsored the Amendment in the Congress. I know from my years in the United States Senate that it is to men like Congressman Bingham, who steered the amendment through the House, and Senator Howard, who introduced it in the Senate, that members of Congress look when they seek the real meaning of what is being offered. And they vote for or against a bill based on what the sponsors of that bill and those who oppose it tell them it means. The historical appendix to my "Adamson" dissent leaves no doubt in my mind that both its sponsors and those who opposed it believed the Fourteenth Amendment made the first eight amendments of the Constitution (the Bill of Rights) applicable to the states. *Duncan v. Louisiana*, 391 U.S. 145, 165-66, 88 S.Ct. 1444, 1455-56, 20 L.Ed.2d 491 (1968) (Black J., dissenting).

Charles Fairman "conclusively disapproved Black's contention, at least, such as the weight of the opinion among disinterested observers." A. Bickel, *The Least Dangerous Branch* 102 (1962). Along with Alexander Bickel, Professor Raoul Berger agrees that Charles Fairman's analysis was right on the mark. R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment*, 137 n. 11 (1977).

[27] For example, Professor Raoul Berger cites several cases which recite this common principle of construction. See e.g., *Wright v. Vinton Branch*, 300 U.S. 440, 463, 57 S.Ct. 556, 562, 81 L.Ed. 736 (1937); *Wisconsin Railroad Commission v. C.B. & Q. RR. Co.*, 257 U.S. 563, 589, 42 S.Ct. 232, 238, 66 L.Ed. 371 (1922). *See* R. Berger, *supra* note 26, at 136-37 & 137 n. 13.

[28] Professor Fairman has quoted exhaustively from the Congressional Globe. The various speeches of Congressman Bingham made in support of the fourteenth amendment are quoted in detail. See Fairman. *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 Stan.L.Rev. 5, 24-25 (1949).

The analysis of Professor Fairman is attacked vigorously by William Crosskey, then a professor of law at the University of Chicago Law School. Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority* 22 U.Chi.L.Rev. 1 (1954). Crosskey quotes at length from the Bingham article and from the *Congressional Globe* in an effort to discredit the explanation offered the historical facts by Professor Bingham.

The debate between the two scholars was pitched. Much of Crosskey's analysis consisted of little more than *ad homineum* attacks on Professor Fairman. The attacks were answered in a reply article written by Professor Fairman. Fairman, *A Reply to Professor Crosskey*, 222 U.Chi.L.Rev. 144 (1954). After reading the original articles of both Fairman and Crosskey, the rebuttal of Fairman, and many other articles on the question, the Court is persuaded that the weight of the disinterested scholars supports the analysis of Professor Fairman. The work of Professor Crosskey impresses the Court as being designed to reach a result. Namely, Crosskey was interested in providing a constitutional basis to support the desegregation decision of the United States Supreme Court in *Brown v. Board of Education* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). For instance in an effort to explain a serious ambiguity in a Bingham speech, Professor Crosskey explains that the speech would make perfect sense if one assumes that Bingham had been reading directly from a text of the Constitution, that he had a copy of the document in his hand and that he was waiving the copy while he spoke in Congress. "You're fudging, Professor Crosskey! You don't know that Bingham had been *reading* from the Constitution." Fairman, *A Reply to Professor Crosskey*, 22 U.Chi.L.Rev.144, 152 (1949).

One scholar, Michael Kent Curtis, argues that Professor Raoul Berger had improperly analyzed the incorporation question by blindly following the lead of Charles Fairman and ignoring the work of William Crosskey. Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 Wake Forest L.Rev. 45 (1980). No lesser a light than Henry M. Hart, Jr., then a professor of law at Harvard Law School, remarked that "(t)he Don Quixote of Chicago breaks far too many lances in his on-slaughts upon the windmills of constitutional history to permit detailed review of each adventure." Hart Book Review, 67 Harv. L. Rev. 1456 (1954). While the comment was, strictly speaking, directed to a recently released book by Professor Crosskey, the thrust of the comment holds true for the scholarship of Professor Crosskey. Professor Henry Hart had little use for the typical analytical method employed by Professor Crosskey: slanderous, *ad homineum* attacks on those historical actors who supported views contrary to those which Professor Crosskey expected to find in a historical record. Professor Hart compared Professor Crosskey to Senator Joseph McCarthy from Wisconsin, *id.* at 1475 ("In the true hit-and-run style popularized by the Senator from the adjacent state to the north, [Wisconsin being north of Illinois] Professor Crosskey, having made th[e] ugly charge [That James Madison deliberately, not inadvertently, falsified some of his notes in 1836 to suit his own purposes at that time], promises to consider in a later volume whether it is true,") Professor Hart is of the general opinion that the scholarship of Professor Crosskey amounted to little more than a "confident tone, nice printing, and an abundance of notes and appendices referring to obsscure documents and esoteric word meanings." *Id.* at 1486.

[29] R. Berger, *supra* note 26, at 147 (footnotes omitted).

[30] R. Berger, *supra* note 26, at 147-48 (quoting *Congressional Globe* 2764-65).

[31] Crosskey, Charles Fairman, *"'Legislative History'" and the Constitutional Limitations on State Authority*, 22 U.Chi.L.Rev. 1 (1954). In particular, Professor Crosskey is critical of the newspaper examination conducted by Professor Fairman. By Crosskey's count, Fairman and Flack together examined ten newspapers. *Id.* at 100-101. Crosskey points out that there were nearly 5,000 newspapers in circulation in 1870. Thus, if Flack and Fairman examined only ten of these newspapers then, concludes Crosskey, the two ignored a substantial source of evidence in their inquiry. Certainly, at the least, accordingly to Crosskey, neither Flack nor Fairman are entitled to make any conclusions about what the newspapers of the day reflected as the popular understanding of the effect of the fourteenth amendment.

The Court has studied the Crosskey criticism of Professor Fairman and rejects it. The work of the two scholars serves as the cornerstone for both camps in the debate vel non whether the fourteenth amendment was intended to incorporate the federal Bill of Rights. Compare R. Berger, *supra* note 26, 134-156 (rejecting incorporation of the federal Bill of Rights) with Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 Wake Forest L.Rev. 45 (1980) (following Crosskey).

[32] C. Fairman, *supra* note 25 at 86 (quoting N.H. Const. art. 6 (1793)).

[33] It is always difficult to wade through the mass of historical research which has been done on both sides of the issue. For instance, while the defendant-intervenors introduced Professor Robert L. Cord's book, *Separation of Church and Stat: Historical Fact and Current Fiction* in support of the historical record upon which they are relying. Professor Cord concludes, in part, that a) the fourteenth amendment did incorporate the establishment clause against the states, *id.* at 101, and b) the Lord's Prayer, being distinctly Christian in character, or any other prayer which is readily identified with one religion rather than another is impermissible under the establishment clause, *id.* at 162-65.

The Court rejects the conclusion of Professor Cord that the fourteenth amendment incorporated the establishment clause against the states. Professor Cord uncritically adopted the analysis of the United States Supreme Court in reaching his conclusion. In only a footnote does Professor Cord refer to the scholarship of Professor Charles Fairman; then only does Professor Cord note that there has been some "controversy" surrounding the incorporation issue.

Assuming arguendo that the establishment clause had been incorporated against the states then Professor Cord would be correct in his conclusion that any activity which is religiously identifiable would be barred. *See infra* note 41 for the Court's discussion regarding secular humanism.

[34] In *Barron* v. *City of Baltimore*, the Court noted:

But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statemen who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted amendments to guard against the abuse of power were recommended. These amendments demanded security against the appre-

hended encroachments of the general government—not against those of the local governments.

In compliance with a sentiment thus generally expressed, the quiet fears were thus extensively entertained amendments were proposed by the required majority in congress, and adopted by the States. *These amendments contained no expression indicating an intention to apply them to the state governments.* The court cannot so apply them. *Barron* v. *City of Baltimore*, 32 U.S. (7 Pet.) 243, 250, 8 L.Ed. 672 (1883) (emphasis added).

[35] *Justices of the Supreme Court of New York* v. *United States*, 65 U.S. (9 Wall.) 274, 19 L.Ed. 658 (1870).

[36] In part the seventh amendment provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

[37] Abraham Lincoln once said, " 'Stand with anybody that stands *right*. Stand with him while he is right and *part* with him when he does wrong.' " Jaffa, *In Defense of Political Philosophy*, 34 National Review 36 (1982) (emphasis in original).

[38] While stare decisis has more force in cases which determine the meaning of statutes as opposed to interpreting the Constitution, the Supreme Court has frequently reversed itself where it thinks an earlier decision involving the construction of a statute is in error. In *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Supreme Court identified four factors which it considers when faced with the question whether to overrule a prior decision which involves a statute. The factors are: 1) whether the decisions in question misconstrued the meaning of the statute as revealed in its legislative history; 2) whether overruling the decisions would be inconsistent with more recent expressions of congressional intent; 3) whether the decisions in question constituted a departure from prior decisions; and 4) whether overruling these decisions would frustrate legislative reliance on their holdings. *Id.* at 695-701, 98 S.Ct. at 2038-2041.

[39] Mr. Justice Stevens recently addressed the problem whether a court should follow authority which it believes to have been incorrectly decided. In a case which involved the construction of a statute, parents of Negro school children sued under the Civil Rights Act of 1866 (now 42 U.S.C. § 1982) for alleged discriminatory admission to private schools, which discrimination was based solely upon race. *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). The statute upon which the suit was based, 42 U.S.C. § 1981, was passed prior to the adoption of the fourteenth amendment. It provides in part that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . as enjoyed by white citizens. . . ." In *Runyon* two children were denied admission to private schools in Virginia solely because they were Negro. The Supreme Court held that seciton 1981 prohibits private, commercially-operated, nonsectarian schools from denying admission to prospective students solely because of race. Mr. Justice Stevens concurred in the opinion of the Court, but his thoughts on stare decisis are noteworthy.

Mr. Justice Stevens felt compelled to join the opinion of the Court based upon a prior decision of the Court, *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968). However, the language of the Civil Rights Act of 1866 and its historical setting left "no doubt in [Mr. Justice Stevens'] mind that the construction of [42 U.S.C. § 1982] would have amazed the legislators who voted fo it." *Runyon* v. *McCrary*, 427 U.S. at 189, 96 S.Ct. at 2603. Given a clean slate Mr. Justice Stevens would have allowed private, commercially-operated, nonsectarian schools the right to deny admission to prospective students solely because of race. He would have reached this result not because he thought that it was socially preferable to the result reached by the Supreme Court, but simply because the intent of Congress and the legislative history surrounding the adoption of 42 U.S.C. § 1981 mandated such a result.

Where Mr. Justice Stevens was unwilling to dissent from his brethren in a case involving statutory construction, this Court feels a stronger tug from the Constitution which it has sworn to support and to defend.

[40] Professor Fairman has summarized concisely in several pages all of the stones and pebbles which could conceivably be relied upon to support the conclusion that the fourteenth amendment intended to incorporate the federal Bill of Rights against the states. See Fairman, *supra* note 25, 134-35.

[41] One of the first of these considerations is whether the teachers and those students who desire to express the simple prayers have any rights to freedom of speech. Compare what the Court observed in the order which granted the preliminary injunction in the companion case, 82-0792-H, against the state on the first amendment right of students to pray at school. 544 F.Supp. 727 at 732-33. The evidence in the case demonstrates that the school board took no active part in any decision made by the teachers to utilize the simple prayer that they have. The school board nor any of the official body of the school administration encouraged or discouraged these teachers from exercising their own will in the matter. Nor does the evidence indicate that those students who opted for this type of exercise were coerced into participating or not participating.

In dealing with matters religious the exercise of first amendment rights are highly circumscribed. The same does not appear to be true in dealing with first amendment rights in expressing one's opinions in all other matters whether they be expressions of moral concern or immoral concern.

The second major area that this Court must concern itself with should this judgment be reversed is that raised by the evidence produced by the intervenors dealing with other religious teachings now conducted in the public schools to which no attention has apparently been directed and to which objection has been lodged by the intervenors.

There are many religious efforts abounding in this country. Those who came to these shores to establish this present nation were principally governed by the Christian ethic. Other religions followed as the population grew and the ethnic backgrounds were diffused. By and large, however, the Christian ethic is the predominant ethic in this nation today unless it has been supplanted by secular humanism. Delos McKown, witness for the plaintiff, expressed himself as believing that secular humanism has been more predominant through the years than we have imagined and indeed was more akin to the beliefs of George Washington, Thomas Jefferson, Benjamin Franklin, and others of that era. Delos McKown also testified that secular humanism is not a religion, though he ultimately waffled on this point. The reason that this can be important to the decision of this Court is that case law deals generally with removing the teachings of the Christian ethic from the scholastic effort but totally ignores the teaching of the secular humanist ethic. It was pointed out in the testimony that the curriculum in the public schools of Mobile County is rife with efforts at teaching or encouraging secular humanism—all without opposition from any other ethic—to such an extent that it becomes a brainwashing effort. If this Court is compelled to purge "God is great, God is good, we thank Him for our daily food" from the classroom, then this Court must also purge from the classroom those things that serve to teach that salvation is through one's self rather than through a diety. Indeed, the Supreme Court in *Abington School District v. Schempp;* 374 U.S. 203, 225, 83 S.Ct. 1560, 1573, 10 L.Ed.2d 844 (1963) (quoting *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S.Ct. 679, 684, 96 L.Ed. 954) (1952), noted that "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to a religion, thus preferring those who believe in no religion over those who do believe."

That secular humanism is a religion within the definition of that term which the "high wall" must exclude is supported by the finding in *Torcaso* v. *Watkins*, 367 U.S. 488, 495 n. 11, 81 S.Ct. 1680, 1684 n. 11, 6 L.Ed.2d 982 (1961), which recognized that secular humanism is a religion in the traditional sense of the word and also in the statement of the 276 intellectuals who advocate the doctrine of secular religion as delineated in the *Humanist Manifesto I and II.* (Defendant-intervenors exhibit #10).

Textbooks which were admitted into evidence demonstrated many examples in the way this theory of religion is advanced. The intervenors maintain that their children are being so taught and that this Court must preclude the Mobile County School Board from continuing to advance such a religion or in the alternative to allow instruction in the schools that would give a child an opportunity to compare the ethics of each religion so as to make their own credibility or value choices. To this extent, this Court is impressed that the advocacy of the intervenors on the point of necessity makes them parties plaintiff and to this extent they should be realigned as such inasmuch as both object to the teaching of certain religions.

This Court is confronted with these two additional problems that must be resolved if the appellate courts adhere to their present course of interpreting history as did Mr. Justice Black. Should this happen then this Court will hunker down to the task require by the appellate decisions. A blind adherence to Justice Black's absolutism will result in an engulfing flood of other cases addressed to the same point raised by intervenors. The Court will be called upon to determine whether each book or any statement therein advances secular humanism in a religious sense, a never-ending task. Already the involvement of this Court with determining state activities in such things as prison cases, occupies one-third of its docket. This Court can anticipate no less of a burgeoning docket brought about by this incursion into what is legitimately a state concern.

The founding fathers were far wiser than we. They were content to allow the peoples of the various states to handle these matters as they saw fit and were patient in permitting the processes of change to develop orderly by established procedure. They were not impatient to bring about a change because we think today that it is the proper course or to set about to justify by misinterpretation the original intent of the framers of the Constitution. We must remember that "He, who reigns within Himself, and rules passions, desires, and fears, is more a king" Milton, *Paradise Regained.* If we, who today rule, do not follow the teachings of history then surely the very weight of what we are about will bring down the house upon our head, and the public having rightly lost respect in the integrity of the institution, will ultimately bring about its change or even its demise.

Mr. HELMS. Mr. President, it never fails that when I offer this prayer legislation the debate quickly turns from the substance of the school prayer issue to a discussion of the power of Congress to limit the Supreme Court's jurisdiction. Obviously, Senators are free to discuss any aspect of this issue that strikes their fancy. But, Mr. President, the power of Congress to enact my legislation is, in fact, clear and unassailable.

I direct my colleagues' attention to the article III, section 2, of the Constitution which provides in part:

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.

Although this provision prompts much discussion these days about "court stripping" and "threats to the independence of the judiciary," the framers of the Constitution had far different concepts in mind. In Federalist No. 80, Alexander Hamilton wrote about the judicial powers conferred in the Constitution. He said:

If some partial inconveniences should appear to be connected with the incorporation of any of them (judicial powers) into the plan, it ought to be recollected that the national legislature will have ample authority to make such exceptions and to prescribe such regulations as will be calculated to obviate or remove these inconveniences.

John Marshall, in the Virginia ratifying convention, said:

Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people. 3 Debates on the Federal Constitution 560 (J. Elliott 2d ed. 1888).

In talking about congressional checks on the judiciary, Hamilton and Marshall point directly to article III, section 2. Their commentary, along with other legislative history, affirms what a reading of the provision plainly indicates. That is, Congress has clear authority to restrict Supreme Court appellate jurisdiction.

An article in the William and Mary Law Review by Ralph A. Rossum eliminates any possible doubt on this point. Mr. Rossum goes to great lengths to refute every argument advanced against the power of Congress to limit Supreme Court appellate jurisdiction. Mr. President, I ask unanimous consent that the Rossum article, entitled "Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause," 24 William and May Law Review 385 (1983), be printed, including footnotes, at this point in the RECORD.

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

[From 24 William & Mary Law Review 385 (1983)]

CONGRESS, THE CONSTITUTION, AND THE APPELLATE JURISDICTION OF THE SUPREME COURT: THE LETTER AND THE SPIRIT OF THE EXCEPTIONS CLAUSE

(By Ralph A. Rossum)*

I. INTRODUCTON

Writing in a 1979 issue of *The Public Interest*, Senator Daniel Patrick Moynihan puzzled over the question, "What do you do when the Supreme Court is wrong?"[1] Short of impeachment, the only responses he could identify were "debate, litigate, legislate."[2] He never so much as acknowledged the existence, much less the possible employment, of Congress' power to curtail the appellate jurisdiction of the Court.[3] Events, however, have passed Senator Moynihan by. Over a score of bills were introduced in the Ninety-Seventh Congress to deprive the Supreme Court of appellate jurisdiction either to hear cases involving such issues as abortion rights and voluntary prayer in the public schools or to order school busing to achieve racial balance. Many of these same proposals were reintroduced in the Ninety-Eighth Congress.[4] These measures have in turn prompted considerable scholarly attention and controversy. Symposia in *Judicature*,[5] the *Villanova Law Review*,[6] and the *Harvard Journal of Law and Public Policy*,[7] seminars sponsored by the American Enterprise Institute[8] and the Free Congress Research and Education Foundation,[9] hearings before the Subcommittee on the Constitution of the Senate Judiciary Committee,[10] and the foreward to the *Harvard Law Review's* analysis of the 1980 Term of the United States Supreme Court[11] all have been devoted to the questions of whether and to what extent Congress can or should strip the Court of appellate subject matter jurisdiction.

On the surface, these measures would appear to be wholly within the constitutional authority of Congress.[12] After all, article III, section 2 of the United States Constitution provides that 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 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.[13]

For many students of constitutional law, the simple reading of these words ends the matter.[14] The language is clear and, for them, conclusive. As Justice Noah Swayne observed in the *United States* v. *Hartwell*[15] over a century ago: "If the language be clear it is conclusive. There can be no construction where there is nothing to construe."[16]

This understanding of Congress' power to curtail the appellate jurisdiction of the Supreme Court is reinforced by *Ex Parte McCardle*,[17] the only Supreme Court decision that has directly addressed this issue. In this post-Civil War case, the Court unanimously upheld a law that stripped the Court of authority to hear appeals from persons imprisoned during the Civil War who sought release from custody under an 1867 habeas corpus statute. Republican leaders in Congress feared that the Supreme Court, which had already indicated hostility toward the Reconstruction program, would use *McCardle* to hold much of that program unconstitutional. Consequently, Congress repealed the 1867 act on which McCardle's appeal was founded. This was an obvious attempt by Congress to use the exceptions clause to deprive the Court of its appellate power to review the substantive constitutionality of congressional acts. Moreover, the repealing act was not passed until after the case already had been argued before the Supreme Court. Nonetheless, the Court at once dismissed the case for want of jurisdiction. As Chief Justice Chase explained:

We are not at liberty to inquire into the motives of the Legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing Act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.[18]

For many scholars, then, the constitutional text, supplemented by the Court's reflections on it in *McCardle*, answers any questions concerning the constitutionality of measures restricting the jurisdiction of the Court. As they see it, the only real question raised by congressional initiatives diminishing the Court's appellate jurisdiction is "the wisdom of doing so."[19]

Not everyone, however, is willing to concede that these measures raise only policy questions.[20] Opinion on the constitutionality of congressional curtailment of the Court's appellate jurisdiction is divided, for there are those who argue that such a power could destroy the Court's power of judicial review and, ultimately, undermine our constitutional system of separation of powers.[21] They fear that if Congress had the power to deprive the Supreme Court of its appellate jurisdiction, Congress could constitutionally "deny litigants Supreme Court review in cases involving bills of attainder, ex post facto laws, freedom of speech, press and religion, unreasonable search and seizure, equal protection of the laws, right to counsel, and compulsory self-incrimination."[22] This parade of imaginary horrors convinces some commentators that Congress can no longer claim with good conscience the authority to curtail the Court's appellate jurisdiction,[23] and should Congress nevertheless proceed to exercise this authority, the Supreme Court ought not to tolerate it,[24] but rather ought to invalidate the offending measure.[25]

Those who argue against Congress' power to make exceptions to the Court's appellate jurisdiction find themselves in a most uncomfortable bind. They are forced to deny an explicit power of Congress, expressly granted by the Constitution, in order to protect the Court's implicit power of judicial review, a power which has no textual basis.[26] To extricate themselves from this bind, they commonly advance an argument that has much in common with the argument advanced by the Court in *United Steelworkers of America* v. *Weber*.[27] In that case, Justice Brennan observed that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit . . . ."[28] Similarly, those who would limit Congress' power to curtail the Court's appellate jurisdiction argue that congressional power to make exceptions may be within the letter of article III and yet not constitutional, because not compatible with the spirit of judicial review.[29] Justice Rehnquist, dissenting in *Weber*, remarked that Justice Brennan's line of argument was worthy "not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini . . . ."[30] The same criticism is appropriate with regard to the interpretation of the exceptions clause, and perhaps even more so. At least in *Weber*, if the Court were mistaken in preferring the statute's spirit over its letter, the mistake could be easily rectified, because "Congress may set a different [statutory] course if it so chooses."[31] A mistaken interpretation of the exceptions clause would be difficult to rectify, however, because a different course can be set only by constitutional amendment.

The debate over Congress' power to make exceptions has been curious. One side cites the letter of article III and concludes that Congress' power over the Court's appellate jurisdiction is absolute: "The power to make exceptions to Supreme Court appellate jurisdiction is a plenary power. It is given in express terms and without limitation, regardless of the more modest uses that might have been anticipated . . . . In short, the clause is complete exactly as it stands."[32] The opposition in this debate invokes the spirit of judicial review and insists that "the long accepted power of ultimate resolution of constitutional questions by the Supreme Court" must not be disturbed.[33] Given the nature of this debate, neither side can win, because each is talking past the other.[34] There is, however, a clear loser—the Constitution, which is presented as a fatally flawed document that neither says what it means nor means what it says. This Article asserts that the Constitution is not flawed in this respect and that the spirit of judicial review is altogether consistent with the letter of Congress' powers under article III. This Article will examine the arguments on behalf of Congress' power to make exceptions to the Court's appellate jurisdiction and systematically challenge the spirited objections of those who seek to protect the Court's power to interpret the Constitution by ignoring the Constitution.

II. THE ARGUMENT FOR PLENARY CONGRESSIONAL POWER

Those who argue that Congress has plenary power over the Court's appellate jurisdiction present a straightforward case based on three kinds of evidence: the text of the Constitution; the intention of the framers; and the firm, consistent, and unwavering understanding of the Supreme Court. Although further consideration of the clear and conclusive words of article III is unnecessary, an examination of what the framers meant when they used those words and how the Supreme Court has interpreted them is in order.

A. The intent of the framers

No evidence in the records either of the Federal Convention of 1787 or of the various state ratifying conventions would indicate that Alexander Hamilton's words in *The Federalist, No. 80* were not representative of the understanding of virtually the entire founding generation. In that essay, Hamilton reviewed in detail the powers of the federal judiciary and observed that "[i]f some partial inconveniences should appear to be connected with the incorporation of any of them into the plan, it ought to be recollected that the national legislature will have ample authority to make such *exceptions* and to prescribe such regulations as will be calculated to obviate or remove these inconveniences." [35]

The Federal Convention spent very little time debating the jurisdiction of the federal judiciary.[36] On July 24, nearly two months after the Convention began, the delegates agreed to submit the various resolutions they had approved to the Committee of Detail, so that it might "report a Constitution comfortable to the Resolutions passed by the Convention." [37] Their submission concerning the federal judiciary was most rudimentary: "[T]he jurisdiction of the national Judiciary shall extend to Cases arising under the Laws passed by the general Legislature, and to such other Questions as involve the national Peace and Harmony." [38] Nevertheless, the Committee of Detail transformed this vague resolution into language that is almost identical to article III, section 2. After defining the Supreme Court's original jurisdiction, the committee provided that "in all the other cases before mentioned, it [jurisdiction] shall be appellate, with such exceptions and under such regulations as the Legislature shall make." [39]

Although the Report of the Committee of Detail was presented to the Convention on August 6, 1787, the judicial article was not taken up for consideration until August 27. On that date, Dr. Samuel Johnson of Connecticut suggested that the power of the judiciary ought to extend to equity as well as law—and moved to insert the words "both in law and equity" after the words U.S.[40] This proposal was adopted. After an intervening discussion, "Mr. Governeur Morris [of Pennsylvania] wished to know what was meant by the words 'In all the cases beforementioned it (jurisdiction) shall be appellate with such exceptions &c,' whether it extended to matters of fact as well as law—and to cases of Common law as well as Civil law." [41] James Wilson, the principal architect of the draft reported by the Committee of Detail, answered that the committee meant "facts as well as law & Common as well as Civil law." [42] No comments were forthcoming from other members of the Committee, presumably indicating their agreement with Wilson's answer. To remove all doubt, however, Mr. Dickinson of Delaware moved to add the words "both as to law & fact" after the word "appellate," which was agreed to by unanimous consent.[43]

Acceptance of this addition concluded the discussion.[44] No questions were raised concerning Congress' plenary power to make exceptions. The conclusion is inescapable: both the words chosen by the delegates and the discussion surrounding their choice of these words suggest an unlimited congressional power over the Court's appellate jurisdiction. John Marshall accurately summarized the delegates' intentions when he declared in the Virginia Ratifying Convention that "Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people." [45]

B. The Court's consistent support for plenary congressional power

Although "the ultimate touchstone of constitutionality is the Constitution itself and not what [the judges] have said about it," [46] it is nevertheless significant to observe that the Supreme Court's holdings concerning the exceptions clause are altogether consistent with both the express words of article III, section 2, and the manifest intention of the framers.[47] The Court, of course, has addressed directly an actual congressional contraction of its appellate jurisdiction only once.[48] Nevertheless, it has on numerous occasions taken the opportunity to reflect more generally on the nature and extent of Congress' article III powers. A brief consideration of these reflections reveals the Court's firm and unwavering understanding from the opening days of the republic to the present.

In the first of the relevant cases, *Wiscart* v. *Dauchy*,[49] Chief Justice Oliver Ellsworth acknowledged that "even the [Court's] appellate jurisdiction is . . . qualified; inasmuch as it is given 'with such exceptions, and under such regulations, as Congress shall make.' " [50] He then drew what he considered to be the necessary conclusion from the Court's qualified jurisdiction: "If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it." [51] Ellsworth's opinion is especially weighty, as he had been a delegate to the Federal Convention and had served on the Committee of Detail that drafted the exceptions clause.

Ellsworth's conception of the Court's jurisdiction continued in an unwavering line through five consecutive chief justices. [52] Thus, Chief Justice John Marshall in *United States* v. *More* [53] argued that an affirmative grant of certain appellate power by Congress is an implied denial of all appellate power not mentioned: "[A]s the jurisdiction of the court has been described, it has been regulated by Congress, and an affirmative description of its power must be understood as a regulation, under the constitution, prohibiting the exercise of other powers than those described." [54] Marshall elaborated upon this argument in *Durousseau* v. *United States:* [55]

The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject. When the first legislature of the Union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the supreme court. [56]

Marshall's successor, Chief Justice Taney, likewise acknowledged the utter dependency of the Court's appellate jurisdiction upon acts of Congress: "By the Constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress; nor can it, when conferred, be exercised in any other form, or by any other mode of proceeding, than that which the law prescribes." [57]

Chief Justice Chase's statements in *McCardle* concerning the letter of article III, section 2 have already been considered.[58] Chase not only recognized Congress' power over the Court's appellate jurisdiction, but also made an important contribution to our understanding of the role of the Court: "[J]udicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer." [59]

Finally, in The *"Francis Wright,"* [60] Chief Justice Waite affirmed and extended what his predecessors had argued:

What [the appellate powers of the Supreme Court] shall be, and to what extent they shall be exercised, are, and always have been proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not.[61]

In the same opinion, Waite also referred to "the rule, which has always been acted on since, that while the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe." [62]

Not all judicial support for the opinion that the letter of article III, section 2 is clear and conclusive comes from eighteenth and nineteenth century jurists. For example, while dissenting on other issues in *Yakus* v. *United States*,[63] Justice Wiley Rutledge unequivocally affirmed that "Congress has plenary power to confer or withhold appellate jurisdiction." [64] Similarly, in *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*,[65] Justice Frankfurter noted that:

Congress need not establish inferior courts; Congress need not grant the full scope of jurisdiction which it is empowered to vest in them; Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice. Ex parte McCardle* . . . .[66]

For many, then, the words of the Constitution, the intention of the founding generation, and the unwavering opinion of the Supreme Court all clearly, consistently, and unequivocally reveal a constitutional plan for the courts:

[That plan is] quite simply that the Congress could decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts, bound as they are by the Constitution as "the supreme law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." [67]

III. ARGUMENTS AGAINST ABSOLUTE CONGRESSIONAL POWER OVER THE COURT'S APPELLATE JURISDICTION

Those who place the spirit of judicial review over the letter of article III and who insist that Congress' power under the exceptions clause is either limited or nonexistent make a variety of arguments that can be reduced to seven general headings.[68] One contention is that those who rely on the letter of article III have misconstrued the language of that article. A second contention insists that *Ex Parte McCardle*[69] is a very narrow holding with little or no application beyond its facts. A third argument asserts that the power Congress originally possessed under article III, section 2 has been effectively repealed by the passage of time. A fourth argument contends that Congress cannot make exceptions that would destroy the essential role of the Supreme Court. A fifth and related contention maintains that Congress' power to curtail the Court's jurisdiction is qualified by the constitutional principles of separation of powers and federalism. A sixth claim argues that Congress is limited in its ability to make exceptions by other constitutional provisions, such as those found in the Bill of Rights and the fourteenth amendment. Finally, a seventh argument contends that congressional contraction of the Court's appellate jurisdiction cannot be unconstitutioally motivated, that is to say Congress cannot have as its goal or objective the displacement of a disfavored judicial precedent.

What animates those who make these arguments is their conviction that the spirit of judicial review is jeopardized by the letter of article III. Because of those who contend that Congress has plenary power over the Court's appellate jurisdiction generally have been content to rely simply on the letter of the Constitution and have felt no particular obligation to rebut these arguments, these general claims have gone largely unchallenged.[70] Little effort has been made to show that the traditional concept of judicial review[71] is wholly consonant with the letter of article III. In the following analysis of these arguments, such an effort will be made.

A. The argument from textual construction

The first of the argument against Congress' plenary powers under the exceptions clause is that those who rely on the letter of article III have misconstrued the meaning of its words. Variations of this argument exist, with Leonard Ratner focusing on how the word "exceptions" was commonly used at the time of the Federal Convention,[72] and with such scholars as Irving Brant,[73] Henry Merry,[74] and Raoul Berger[75] concerning themselves with the meaning of the phrase "both as to Law and Fact."

From a survey of dictionaries existing at the time of the Federal Convention, Ratner finds that an exception was generally defined "as an exclusion from the application of a general rule or description."[76] This definition indicates that "an exception cannot destroy the essential characteristics of the subject to which it applies."[77] On this basis, Ratner argues that Congress' power to make exceptions to the Court's appellate jurisdiction is not plenary; any exceptions it makes must be narrower in application than the description of the Court's entire appellate jurisdiction.[78] This ostensible limitation on Congress' power, however, is essentially meaningless. If an exception implies some residuum of jurisdiction, Congress can meet this test by excluding everything but, for example, patent cases. As one of the interlocutors in Henry Hart's famous dialogue remarks: "This is so absurd, and it is so impossible to lay down any measure of a necessary reservation, that it seems to me the language of the Constitution must be taken as vesting plenary control in Congress."[79]

A more ingenious, if ultimately no more successful variation of this argument against Congress' plenary power under article III, section 2 focuses on the meaning of the phrase, "both as to Law and Fact." Those who make this argument refuse to concede that the framers of the Constitution intended to vest Congress with the power to effect the wholesale destruction of judicial review. Rather, they insist, the "sole purpose of the exceptions clause was to permit Congress to limit appellate jurisdiction over question of fact in cases at law."[80] Irving Brant, a noted historian, provides the most recent and sophisticated version of this argument. He contends that as a result of an unfortunate placement of commas in the phrase, "Jurisdiction, both as to Law and Fact," the words "both as to Law and Fact" appear to be a parenthetical, and the modifying clause beginning "with such Exceptions" seems to attach to "Jurisdiction," when in fact, what the entire exceptions clause was meant to modify is simply appellate jurisdiction of questions of fact.[81]

At the time of the Federal Convention, considerable diversity in legal practice existed among the states, both with respect to cases in common and civil law and particularly with respect to cases in equity and maritime jurisdiction. Re-examination of factual issues was permitted in some states, but was not permitted in others. Under its appellate jurisdiction, the Supreme Court inevitably would be called upon to review cases where questions of fact were central and at issue. This prospect, however, raised the spectre of the Supreme Court having the power to overturn a jury's findings of fact in a criminal case. According to Brant, the problem faced by the Convention was to draft a provision that would permit the Court to review questions of fact in civil, equity, and maritime cases, but that would prevent it from abusing this power by retrying facts found by juries in criminal cases. Given the tremendous diversity among the states, drafting a constitutional clause to resolve this problem was all but impossible. Therefore, Brant argues, the framers took the easy way out and drafted language (albeit, Brant concedes, poorly punctuated language) that left the whole issue for handling by the Congress through the medium of the exceptions clause. The exceptions clause thus was "fashioned to meet the principal criticism of the appellate jurisdiction, its inclusion of matters of 'fact.'"[82]

Despite Brant's ingenuity, and that of Merry and Berger as well, this interpretation of the exceptions clause ultimately fails. This interpretation cannot be reconciled with the actual words and punctuation of the Constitution. Had the framers intended what Brant alleges they intended, they obviously were possessed of the necessary skills to have conveyed clearly that intention.[83] Similarly, Brant's interpretation cannot be squared with the proceedings of the Convention. What the Committee of Detail presented to the Convention in no way suggested that Congress' power to make exceptions to the Court's appellate jurisdiction was limited to the treatment of factual issues. Quite the contrary, the only discussion in the Convention relating to the exceptions clause centered on whether the Court was to have power to review questions of fact, not whether Congress' power to curtail the Court's jurisdiction was limited to such questions.[84]

Nor can Brant's interpretation survive exposure to the post-Convention statements of Edmund Randolph and Alexander Hamilton. When the exceptions clause was before the Virgina State Ratifying Convention, Randolph, who had participated in the Federal Convention, declared that "[i]t would be proper to refer here to *any* thing that could be understood in the federal court. [Congress] may except generally both as to law and fact, or they may except as to law only, or fact only."[85] Alexander Hamilton also stressed that Congress' power to make exceptions applied to law as well as to facts: "The supreme court will possess an appellate jurisdiction, boh as to law and fact, in all the cases referred to them, but subject to any *exceptions* and *regulations* which may be thought advisable."[86] Hamilton remarked that the propriety of Congress' power to except matters of law from the Supreme Court's appellate jurisdiction "has scarcely been called into question."[87] "[C]lamors have been loud," he noted, only with respect to granting the Court any appellate jurisdiction over matters of fact.[88] In an effort to quiet the fear of those alarmed by the prospect of any appellate retrial of facts found by a jury, Hamilton declared, again clearly contrary to Brant's contention, that "the Supreme Court shall possess appellate jurisdiction, both as to law and *fact*, and that this jurisdiction shall be subject to such *exceptions* and regulation as the national legislature may prescribe."[89] All of this merely reaffirms Hamilton's assurance that if any "inconveniences" should arise from the powers the Constitution grants to the federal judiciary, Congress will have authority to make such exceptions and to prescribe such regulations as it believes necessary "to obviate or remove these inconveniences."[90]

Finally, Brant's interpretation is fundamentally at odds with an unwavering line of judicial opinion beginning with Chief Justice Ellsworth, himself a delegate to the Federal Convention and a member of the Committee of Detail, and extending to the present.[91]

B. Reliance on ex parte McCardle

A second major argument against Congress' claim to plenary power under article III, section 2 centers on the meaning of *Ex Parte McCardle*.[92] Rather than supporting Congress' claim as is commonly maintained, several scholars contend that *McCardle* concedes nothing to Congress.[93] They note that in *McCardle*, the Court carefully pointed out that the repealing act of 1868[94] did not affect judicial authority to issue writs of habeas corpus under section 14 of the Judiciary Act of 1789:

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus* is denied. But this is an error. The [repealing] act of 1868 does not except from that jurisdiction any cases but appeals from the Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.[95]

These scholars further note that this statement was reaffirmed a few months later in *Ex Parte Yerger*.[96] In *Yerger*, on a petition for habeas corpus, the Court reviewed a circuit court decision denying the writ to a civilian awaiting trial by a military commission for violating the Reconstruction

Acts. Without the slightest hesitation, the Supreme Court unanimously sustained its jurisdiction and held that the repealing act of 1868 did not affect its authority under the Judiciary Act of 1789 to issue the writ.[97] Thus, these scholars argue, *McCardle* does not sanction congressional impairment of the Court's jurisdiction:

The [repealing] statute did not deprive the Court of jurisdiction to decide McCardle's case; he could still petition the Supreme Court for a writ of habeas corpus to test the constitutionality of his confinement. The legislation did no more than eliminate one procedure for Supreme Court review of decisions denying habeas corpus relief while leaving another equally efficacious one available.[98]

These scholars also look to *United States v. Klein*,[99] decided two years after *Yerger*, in which the Court held that Congress could not enact legislation to eliminate an area of jurisdiction in order to control the results in a particular case. Klein sued in the Court of Claims under an 1863 statute that allowed the recovery of land captured or abandoned during the Civil War if the claimant could prove he had not assisted in the rebellion.[100] Relying on an earlier Supreme Court decision [101] that a presidential pardon proved conclusively that the recipient of the pardon had not aided the rebellion, Klein prevailed in the Court of Claims. While the government's appeal to the Supreme Court was pending, Congress passed a statute providing that a presidential pardon would not support a claim for captured property, and that acceptance of a pardon for participation in the rebellion, without a disclaimer of the facts recited, was conclusive evidence that the claimant had aided the enemy.[102] Futhermore, the statute provided that on proof of such pardon and acceptance, which could be heard summarily, the jurisdiction of the federal judiciary in the case should cease, and the Court of Claims should forthwith dismiss the suit of such claimant.[103] As Chief Justice Chase remarked: "The substance of this enactment is that an acceptance of a pardon, without disclaimer, shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of the rights conferred by it both in the Court of Claims and in this court on appeal." [104] The Supreme Court held the act to be unconstitutional because it subverted the judicial process by prescribing "a rule for the decision of a cause in a particular way," [105] and it also infringed upon the constitutional power of the executive by impairing the effect of a pardon.[106]

These efforts to construe *McCardle* narowly and to employ *Yerger* and *Klein* to protect the spirit of judicial review from the letter of article III, section 2, however, are unsuccessful. Neither *McCardle* nor *Yerger* in any way suggests that the Court would have been justified in invalidating the act of 1868 if the act had excepted from the Supreme Court's appellate jurisdiction cases arising under section 14 of the Judiciary Act of 1789. Quite the contrary, as Chief Justice Chase noted in *McCardle*, judicial duty entails the refusal to exercise ungranted jurisdiction as well as the obligation to exercise jurisdiction when it is conferred by the Constitution or by law.[107] *McCardle* and *Yerger* are wholly faithful to Justice Chase's understanding. In *McCardle*, the Court declined to exercise jurisdiction that had been positively excepted by the repealing act of 1868. In *Yerger*, the Court firmly exercised jurisdiction that the Judiciary Act of 1789 conferred and which the repealing act in no way limited. Thus, the Court on both occasions acted consistently with Chief Justice Marshall's observation in *Cohens v. Virginia*:[108] "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." [109]

Similarly, reliance on *Klein* is misplaced. *Klein* involved a congressional attempt to forbid the Court from giving the effect to evidence which, in the Court's judgment, such evidence should have, and directed the Court to give the evidence an effect precisely contrary.[110] In *Klein*, Congress sought to curtail the appellate jurisdiction of the Supreme Court to obtain a particular result in a specific case; by so doing, Congress "inadvertently passed the limit which separates the legislative from the judicial power." [111] Congress' action in *Klein* is altogether different from congressional contractions of the Court's jurisdiction that seek merely to shift the determination of any result, whatever that result might be, to the lower federal or state courts, both of which are also bound by the Constitution as the supreme law of the land.[112] Shifting jurisdiction to lower federal or state courts is wholly permissible, and the Court in *Klein* declared as much, acknowledging that "if this Act did nothing more . . . [than] simply deny the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient." [113]

C. The contraction of Congress' power due to the passage of time

A third argument against the letter of article III operates from the perspective of what Justice Rehnquist has called the "living Constitution with a vengeance." [114] This argument is based on the premise that congressional "control over the Court's appellate jurisdiction has in effect now been repealed by the passage of time and by the recognition that exercise of such power would be in the truest sense subversive of the American tradition of an independent judiciary." [115] C. Herman Pritchett, who is closely identified with this position, argues that while the language of article III, section 2 may have seemed reasonable in 1787, so, too, did choosing a President by indirect election.[116] Originally, the Supreme Court was just a few words in an unadopted document; today, however, it is the most respected judicial body in the world and has the authority to determine the constitutionality of acts of Congress.[117] Given these changes in conditions, "Congress can no longer claim with good conscience the authority granted by article III, section 2." [118]

The assertion that new conditions can amend the clear language and intent of the exceptions clause is subject to considerable doubt. Changing circumstances [119] and the passage of time may be considered in the interpretation and adaptation of such broadly phrased constitutional provisions as the due process and commerce clauses. These clauses were drafted expansively to allow evolving interpretations as time might require. Neither the language of the exceptions clause nor the debates of the Convention, however, indicate that the framers intended such broad adaptations of article III. Changing circumstances can neither alter nor amend the meaning of clear and unequivocal language in the Constitution.[120] Even Pritchett recognizes this, at least with respect to the other constitutional feature he regards as anachronistic—indirect election of the President. Thus, rather than contending that the Electoral College has been repealed by history, Pritchett served on and supported the policies of an American Bar Association blue ribbon commission that proposed a constitutional amendment formally abolishing the Electoral College and substituting in its place direct election of the President.[121]

Many provisions of the Constitution, of course, are phrased broadly, thus permitting flexible interpretations that adapt the document to changing circumstances. Nonetheless, even when such broad phrasing exists, the goal must be "adaptation *within* the Constitution rather than adaptation *of* the Constitution." [122] The terms of article III, however, are not phrased so broadly and no doubt exists as to the framers' intent. Unless the Court is to be permitted to disregard the outer rational limits of constitutional language—all to protect its role as principal interpretor of that language—the "passage of time theory" cannot be legitimately employed to amend the letter of the exceptions clause.

D. The "essential functions" argument

A fourth argument against Congress' power to curtail the appellate jurisdiction of the Supreme Court is that Congress cannot constitutionally make any exceptions that will destroy what is variously described as the Court's essential role or function.[123] "[T]he [exceptions] clause means 'With such exceptions and under such regulations as Congress may make, not inconsistent with the essential function of the Supreme Court under this Constitution.'" [124] This argument, however, is also fraught with difficulties. It makes the Court itself the final arbiter of the extent of its powers. The argument contends not only that the essential functions of the Court cannot be limited, but also that the Court exclusively, and not the Congress, is to determine what functions are, in fact, essential. This interpretation of the exceptions clause cannot be sustained:

It is hardly in keeping with the spirit of checks and balances to read such a virtually unlimited power into the Constitution. If the Framers intended so to permit the Supreme Court to define its own jurisdiction even against the will of Congress, it is fair to say that they would have made that intention explicit.[125]

Nothing in the text of the exceptions clause or in any Supreme Court opinion addressing this subject suggests that Congress' power under article III, section 2 is limited to making "'inessential' exceptions." [126] The distinction between the "essential" and "inessential" functions of the Court is, of course, wholly extraconstitutional. Consequently, those who draw this distinction on the Court's behalf are not limited by the letter of the Constitution but, rather, are free to define the Court and its essential role and functions as they see fit. Not surprisingly, given the absence of any constitutional restrictions (or, more precisely, given their refusal to recognize and abide by any constitutional restrictions), proponents of this interpretation advance and defend a wide variety of definitions. Thus, Henry Hart, who first propounded this argument, defines the essential role of the Supreme Court as serving as a check on the coordinate branches of government to keep them from destroying the Constitution.[127] Leonard Ratner offers a slightly different view, stressing the Court's "essential constitution-

al functions of maintaining the uniformity and supremacy of federal law." [128] In contrast, Archibald Cox asserts that the "chief function of the Supreme Court is to protect human rights." [129] Even more expansively, Paul Brest accords a special role for the Court in promoting "individual rights and decision making through democratic processes." [130]

Although considerable variety exists among these definitions of the Court and its essential role, they share one common element. Central to all formulations of this argument is an activist view of the judiciary. Only through frequent recourse to judicial review will the Court be able to perform the essential functions judicial activists assign to it. Quite naturally, proponents of the essential functions argument see Congress' plenary powers under article III, section 2 as a threat to judicial activism.[131] These proponents, therefore, strive to distort or obscure the letter of the exceptions clause, thereby rendering secure the spirit of judicial review that animates their judicial activism.[132]

The incompatibility that proponents of the essential functions argument perceive between the letter of article III and the spirit of judicial review is almost exclusively attributable to the way in which they have defined the essential role and function of the Supreme Court. Their expansive view of what the Court should do obviously is threatened by language that gives to Congress the power to except from the Court's appellate jurisdiction the cases necessary to sustain the Court's activist role.[133] This perceived incompatability, however, can be avoided entirely if the Court's essential role is defined more modestly:

Federal Courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of government. They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land.[134]

This more limited conception of the role of the Court is consistent not only with the actual provisions of the Constitution, but also with Hamilton's original defense of judicial review in *The Federalist, No. 78*[135] and Chief Justice Marshall's establishment of judicial review in *Marbury v. Madison*.[136] Moreover, because this interpretation regards the Court's power of judicial review as extending no further than to cases otherwise within its jurisdiction, which jurisdiction is subject to such exceptions as Congress shall make, this interpretation reflects the compatibility of the letter of article III and the spirit of judicial review.[137]

E. The separation of powers/Federalism argument

A fifth contention closely related to the essential functions argument is that Congress' power under the exceptions clause is limited by the constitutional principles of separation of powers and federalism.[138]

If Congress also has plenary control over the appellate jurisdiction of the Supreme Court, then . . . Congress [could] by statute profoundly alter this structure of American government. It [could] all but destroy the coordinate judicial branch and thus upset the delicately poised constitutional system of checks and balances. It [could] distort the nature of the federal union by permitting each state to decide for itself the scope of its authority under the Constitution. It [could] reduce the supreme law of the land as defined in article VI to a hodgepodge of inconsistent decisions by making fifty state courts and eleven federal courts of appeal the final judges of the meaning and application of the Constitution, laws, and treaties of the United States.[139]

This contention, too, is flawed, because it uests on a superficial understanding of the political principles of the Constitution.

Those who would limit Congress' power under article III, section 2 stress that use of the exceptions clause constitutes an attack on the status and independence of the Court and thereby jeopardizes the principle of separation of powers.[140] These criticisms are groundless. In our constitutional system, the judiciary is not supposed to be entirely independent; neither is the legislative nor executive branch. Separation of powers does not entail complete independence. The framers did not intend the branches of government to be wholly unconnected with each other;[141] rather, the framers sought to create a government in which the branches would be so connected and blended, as to give to each a constitutional control over the others.[142] The framers accomplished this blending "by so contriving the interior structure of the government . . . that its several constituent parts, . . . [are] by their mutual relations, the means of keeping each other in their proper places." [143] The result is a government consisting of three coordinate and equal branches, each performing a blend of functions, thereby balancing, as opposed to merely separating, powers.[144]

The term separation of powers is, in fact, a misnomer. The framers created not so much a government of separated powers as one of "separated institutions sharing powers." [145] This sharing of powers allows the branches to have a "mutual influence and operation on one another. Each part acts and is acted upon, supports and is supported, regulates and is regulated by the rest." [146] Thus, the three branches, including the judiciary, are intended to move "in a line of direction somewhat different from that, which each acting by itself, would have taken; but, at the same time, in a line partaking the natural direction of each, and formed out of the natural direction of the whole—the true line of public liberty and happiness." [147]

The framers recognized that power is, by nature, encroaching, whether it be legislative, executive, or judicial.[148] They solved the problem of "the encroaching spirit of power" [149] by balancing the powers assigned to each of the three branches so that each branch could effectively check, but not control, the other two. Furthermore, the framers did not give any one branch the authority to decide whether its powers encroached on the others: "[N]one of [the three branches], it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respected powers." [150]

The framers did not consider the judiciary exempt from the operation of these principles, although they did consider the judiciary to be the least dangerous of the three branches because they had given the judiciary the least amount of power.

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 its 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.[151]

Although the framers regarded the judiciary as having the least capacity, because of the very nature of its functions, to be dangerous, the framers recognized that judicial power could be arbitrary and oppressive. The framers expected that the arbitrary discretion of the courts could be "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." [152] Additionally, the framers provided the other branches with powers to check judicial enroachments. Thus, the framers provided for congressional appropriation of money for the judicial branch, presidential appointment and senatorial confirmation of judges, and congressional power to define entirely the jurisdiction of the inferior federal courts. The framers also provided for the impeachment of judges by the House of Representatives and the trial of impeached judges by the Senate—what *The Federalist* called "a complete security" against "the danger of judiciary encroachments on the legislative authority." [153] Finally, the framers of the Constitution provided the legislative branch with ample authority under article III, section 2, so that if "some partial inconveniences" were to arise as a result of the judicial branch's exercise of its powers, Congress could make such exceptions and prescribe such regulations "as will be calculated to obviate or remove these inconveniences." [154]

Thus, the framers never intended for judicial power to be absolute or for the judiciary to be completely independent. Just as they provided checks upon the legislative and executive branches, so too the framers included mechanisms to restrain the judiciary. The exceptions clause was one such mechanism.

Those who contend that Congress' power under the exceptions clause is limited by the constitutional principle of federalism betray an equally superficial understanding of the political principles of the Constitution. They contend, with Leonard Sager, that Congress cannot restrict Supreme Court supervision of state conduct if such supervision is necessary to insure uniform judicial interpretation and state compliance with federal constitutional norms.[155] If the Supreme Court were restricted by Congress in such a manner, such restriction would, they fear, reduce the supremacy clause to a virtual nullity. Sager goes so far as to argue that if the states were not answerable to the Supreme Court, the Constitution would have "little to recommend it over the Articles of Confederation." [156] This view is deficient in a number of particulars.

This view reflects a common misperception concerning the nature of American federalism. The framers relied on federalism, as they also relied on separation of powers and the multiplicity of interests in an extended republic, to achieve their constitutional objectives—the creation and operation of an efficient and powerful guarantor

of rights and liberties organized around the principle of qualitative majority rule.[157] The framers sought a "Republican remedy for the disease most incident to the Republican Government."[158] That disease was the tension between majority tyranny and democratic ineptitude.[159] The framers saw the federalism they were creating as contributing to that Republican remedy. Their federalism, however, was not merely a division of power between the national government and the state governments; it was also a blending of federal elements into the structure and procedures of the central government itself.[160] An obvious example of this blending is the mixture into the Senate of the federal principle of equal representation of all the states.[161] The framers recognized that this principle, when joined with bicameralism and separation of powers, could contribute directly to qualitative majority rule. For a measure to become law, for example a measure controlling the appellate jurisdiction of the Supreme Court, it would have to pass the Senate where, because of the federal principle of equal representation, the presence of a nationally distributed majority and the moderating tendencies associated therewith would be guaranteed.

To the framers, federalism also meant that the same relationship that existed between the citizen and the individual state also would exist, at least with regard to those functions specified in article I, section 8, between the citizen and the centralized national government. This is a crucial difference between the Constitution and the Articles of Confederation, and one which Professor Sager apparently overlooks.[162] Under the Constitution, the national government need not gain the cooperation of a state to regulate the behavior of the state's citizens, for they are also citizens of the United States. In fact, even if a state actively attempted to frustrate the wishes of the national government, the national government, through either legislative or judicial action, could reach the citizenry and hold them personally accountable for their actions. This is a significant difference between the Constitution and the Articles of Confederation: the national government can govern the individual directly and need not rely on the good will or cooperation of state intermediaries.

Similarly, if the Congress, moderated in its judgments by the nationally distributed majorities that are assured by the federal principle of equal representation of all states in the Senate, restricts the appellate jurisdiction of the Supreme Court in a certain subject matter area because Congress has concluded that the Court's decisions in that area have unduly limited the states, Congress' action can hardly be described as placing the supremacy clause in jeopardy. Rather, Congress is simply exercising its power under the exceptions clause to obviate those inconveniences that have arisen as a result of the judiciary's interventions and, in a manner that is wholly consistent with the constitutional principle of separation of powers, is determining for the national government what the states may or may not do.

The view that the Congress can limit the appellate jurisdiction of the Supreme Court without jeopardizing federalism is compatible not only with the framers' understanding but also with the actions taken by both Congress and the federal judiciary until well into the twentieth century. Thus, in the Judiciary Act of 1789, Congress did not provide for Supreme Court review of cases in which state courts invalidated state conduct on federal grounds, even if those cases invalidated state conduct under an overly broad reading of federal laws that in turn defeated other federal rights.[163] In the same Act, Congress also subjected Supreme Court review of civil cases to a jurisdictional amount,[164] a requirement that was not eliminated for all cases involving constitutional issues until 1891[165] and was not abolished with respect to Supreme Court review of all federal questions until 1925.[166] Congress did not provide for Supreme Court review of federal criminal cases until 1802, and then only for review of decisions in which an inferior federal court had divided on a question of law.[167] Congress did not grant general power to the Court to review major federal criminal cases until 1891.[168] Obviously, the opponents of Congress' exercise of its powers under the exceptions clause have placed a premium on the uniformity of constitutional interpretation and Supreme Court supervision of state conduct that has not been shared by either Congress or the Court.

F. Limits on congressional power: The Bill of Rights and other constitutional provisions

A sixth argument made against Congress' power under the exceptions clause is that this power is limited by the constitutional requirements of article I, section 9 and the Bill of Rights and is fully subject to review under these and any other constitutional provisions uniformly applicable to all acts of Congress.[169] Those who make this argument draw a parallel between Congress' plenary power under the commerce clause and its plenary power under article III, section 2. For example, just as Congress' power to regulate commerce among the several states is subject to the requirements of the first and fifth amendments,[170] so also is Congress' power to make exceptions. The due process clause of the fifth amendment plays an especially prominent role in this argument. Advocates of this argument view the fifth amendment as guaranteeing litigants an independent judicial hearing of all constitutional claims, thereby limiting Congress' power to make exceptions that will deprive litigants of this hearing and, hence, of the opportunity to petition for the remedies they seek.

Like the other arguments against Congress' power to make exceptions, this argument also is deficient. Those who make this argument are correct, of course, in pointing out that the congressional power at issue is subject to the due process clause and all other constitutional provisions uniformly applicable to acts of Congress. What they fail to consider, however, is that the independent judicial hearing they insist upon need not occur at the Supreme Court level. The requirements of the due process clause can be satisfied fully in the state and lower federal courts, even if Congress were to strip the Supreme Court of its entire appellate jurisdiction. Moreover, because the Supreme Court noted in *Cary v. Curtis*[171] that "the judicial power of the United States . . . is . . . dependent for its distribution . . . entirely upon the action of Congress, who possess the sole power . . . of investing [the inferior courts] with jurisdiction . . . in the exact degree and character which to Congress may seem proper for the public good,"[172] it would be constitutionally permissible under the due process clause for Congress to deny jurisdiction as well to all lower federal courts, provided that state courts retained jurisdiction to hear these matters.[173] State courts, after all, are bound by the Constitution as the supreme law of the land.[174] Moreover, "[i]n the scheme of the Constitution, [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones."[175] Thus, apparently nothing less than the total denial of any state judicial form would be subject to successful challenge as a violation of procedural due process.[176]

G. The prohibition on unconstitutionally motivated withdrawals of jurisdiction

Finally, a seventh argument against Congress' use of the exceptions clause to curtail the Court's appellate jurisdiction is that congressional actions in this regard cannot be unconstitutionally motivated:

When Congress manipulates jurisdiction in an effort to deny recognition and judicial enforcement of constitutional rights, it has deliberately set itself against the Constitution as the Court understands that document. Comparable behavior on the part of a mayor or police chief would constitute "bad faith," and so here. Legislative bad faith is a constitutionally impermissible motive, and it offers an independent ground for doubting the constitutionality of jurisdictional legislation.[177]

The claim that congressional use of the exceptions clause to displace a disfavored judicial precedent is unconstitutional can be sustained only by embracing the view that the Constitution is merely what the Court says it is. Sager embraces this view,[178] and he fears that "[i]f Congress enacts a selective jurisdictional limitation for cases that concern state conduct, it will be issuing an open, unambiguous invitation to state and local officials to engage in conduct that the Supreme Court has explicitly held unconstitutional."[179] Appalled by the prospect of such a strategem, he repeatedly labels it as "tawdry" and "lewd"[180] and as seducing the state judiciary to "malfeasance."[181]

This willingness to treat the Constitution as identical with its judicial gloss, however, is problematic. The mere reference to such notorious cases as *Dred Scott v. Sandford*,[182] *Plessy v. Ferguson*,[183] and *Lochner v. New York*[184] is sufficient to highlight the difficulty. If the Court was correct in its interpretations of the Constitution in these cases, then efforts to overturn these decisions by constitutional amendment, remedial legislation, or subsequent litigation were unconstitutionally motivated. If, however, the Court was mistaken in its interpretations of the Constitution in these cases, then the Constitution is not simply what the Court says it is, and some constitutional means must be available by which to rectify judicial errors.[185] Without such a means, the fate described by Abraham Lincoln in his First Inaugural Address cannot be avoided:

If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned the government into the hands of that eminent tribunal.[186]

Actually, various constitutional means do exist to correct Court misinterpretations; the exceptions clause is but one means of correction.

IV. PRACTICAL LIMITATIONS ON THE WITHDRAWAL OF JURISDICTION

At this junction, it should be apparent that the various arguments advanced against the exceptions clause are inadequate to accomplish the formidable task of displacing the clear and express words of article III, section 2. Although they are ingeniously cast and earnestly argued, these arguments can be rebutted, and Congress' power to make exceptions to the Court's appellate jurisdiction remains plenary. This conclusion, however, is unacceptable to some constitutional scholars. Irving Brant may be more graphic than most, but he is no more alarmed than many when he writes: "The mind is staggered by the thought of what would result if Congress should pass, and the Supreme Court should bow to, a law prohibiting the review of state court decisions, or cases involving the first or fourteenth amendments."[187] For Brant, the exceptions clause has "become a dagger sharpened by social conflict and pointed at the heart of the Bills of Rights. Time and again Congress has raised this dagger. Only once has it descended, but the menace continues to mount."[188] These misgivings, however, are unfounded, both because of the practical difficulties that would attend congressional contraction of federal jurisdiction and because of the moderating tendencies of a Constitution structured so that the popular branches can seldom act "on any other principles than those of justice and the general good."[189]

The practical difficulties that would accompany withdrawal of jurisdiction are considerable. First, federal courts are essential to the administration of federal law and the enforcement of coercive sanctions and private remedies. If Congress were to withdraw all jurisdiction from the federal courts, save only the Supreme Court's original jurisdiction, the final resolution of virtually all questions of federal law, constitutional and otherwise, would rest with the highest courts of the fifty states. The potential for inconsistency in their resolution of federal questions is so great, and the practical costs of such inconsistency are so high, that Congress is not likely to withdraw all federal jurisdiction, even though it is authorized by article III, section 2 to do so. If, in recognition of these constraints, the Congress decided to curtail only the Supreme Court's appellate jurisdiction, it would find that it had succeeded only in reducing, but by no means elimination, the potential for national inconsistency. The final resolution of all constitutional questions would then be left to the twelve federal courts of appeal and the probability of inconsistency in their decisions would still remain great.[190] Finally, if the Congress were to exercise its exceptions powers even more exactingly and were selectively to deprive the Supreme Court of jurisdiction to review only particular classes of cases such as busing, school prayer, or abortion, the tradition of store decisis could lead the lower federal and state courts to follow the Supreme Court decisions that originally prompted the congressional contraction:

[The courts] would still be faced with the decisions of the Supreme Court as precedents—decisions which that Court would now be quite unable to reverse or modify or even to explain. The jurisdictional withdrawal thus might work to freeze the very doctrines that had prompted its enactment, placing an intolerable moral burden on the lower courts.[191]

All of this is likely to convince Congress that "the federal system needs federal courts and the judicial institution needs an organ of supreme authority."[192]

These practical difficulties, however, are not great enough either to reassure those fearful of Congress' power under the exceptions clause or to discourage those who would have Congress exercise this power. Sager regards contractions of Supreme Court jurisdiction as "lewd winks" cast by the Congress in the state courts' direction, and he worries that state courts will be seduced to "dishonor federal precedent and refuse to recognize disfavored rights."[193] Professor Rice inquires: "What will be the practical effect of withdrawing jurisdiction from the Supreme Court and the lower federal courts?"[194] His answer, which employs the school prayer issue as an example, is hardly comforting to Sager:

Unlike a constitutional amendment, such a withdrawal would not reverse the Supreme Court's rulings on school prayer. Presumably, at least some state courts would strictly follow those decisions as the last authoritative Supreme Court pronouncement on the subject. But a new law would ensure that the Court received no opportunity to further extend its errors.

It may be expected, however, that some state courts would openly disregard the Supreme Court precedents and decide in favor of school prayer once the prospect of reversal by the Supreme Court had been removed. But that result would not be such a terrible thing. . . . [because state courts merely would be reversing] . . . Supreme Court decisions which . . . would appear so erroneous as to be virtually usurpations.

[B]ecause a statute rather than a constitutional amendment is involved, the Court's jurisdiction could readily be restored should the need for it become apparent.[195]

Although the practical difficulties attending jurisdictional contractions may or may not prove reassuring, those fearful of Congress' power to make exceptions should take considerable comfort in the fact that the Constitution is so designed and constructed as to render remote the prospect that Congress will exercise this expressly granted power either frequently or fully. Congress has only once succeeded in passing legislation excising a portion of the Court's appellate jurisdiction,[196] and this occurred in the post-Civil War period against a Court whose last exercise of judicial review was in the notorious *Dred Scott v. Sandford*[197] decision and whose membership included several justices who were on public record as believing that the Reconstruction program was unconstitutional.[198] Moreover, this excision was carried out neither with a meat-ax nor even with Brant's dagger,"[199] but with a scalpel; Congress eliminated only one procedure for Supreme Court review of the question at issue, but left an alternate review procedure untouched. Congress historically has acted quite responsibly toward the Court. It has abused neither its ability to make exceptions nor its other powers to curb the Court.[200] Such historical respect for the functions of the Court is hardly accidental.

V. CONCLUSION

The framers of the Constitution recognized that a dependence on the people and on their representative institutions were essential in a democratic republic. They nevertheless were aware of the need for precautions to insure that the people not only ruled, but that they ruled well.[201] One of the precautions upon which they relied was an independent judiciary exercising the traditional form of judicial review as articulated in *The Federalist, No. 78*[202] and as instituted in *Marbury v. Madison*,[203] thereby keeping the representative branches "within the limits assigned to their authority."[204]

The framers were well aware, however, that this precaution posed a potential threat to the political rights of the Constitution. In this regard, the Court was the least dangerous of the three branches, but it too could annoy and injure the rights and liberties of the people.[205] The Court also had to be restrained, even as it was used to restrain others. One means by which the framers sought to restrain the Court was by granting to Congress the power to make exceptions to the Court's appellate jurisdiction. The framers did not fear that Congress would abuse this power, unrestrained as it was by judicial review, for they had set in place against the tyrannical tendencies of the Congress a variety of auxiliary precautions, including separation of powers, checks and balances, bicameralism, staggered elections, federalism, and the moderating effect of a multiplicity of interests present in an extended republic.

For nearly two centuries, these precautions have worked exceedingly well. The Congress has acted responsibly, and the Court, ever mindful of the consequences that might be visited upon it if it were to attempt to substitute its pleasure for that of the legislative body,[206] generally has resisted the temptation to act as "a bevy of Platonic Guardians."[207] There is every reason to believe that these precautions will continue to work well, provided only that the letter of the Constitution—which is, after all, the very source of these precautions—remains central and governing in the minds of those who study and practice the law, and is not subordinated by them to the activist view which distills the very essence of the judicial role and constitutional legitimacy from the spirit of judicial review.

FOOTNOTES

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[1] Moynihan, *What Do You Do When the Supreme Court Is Wrong?* 57 PUB. INTEREST 3 (1979).

[2] *Id.* at 8.

[3] Proposals to employ art. III, § 2 of the United States Constitution to limit the appellate jurisdiction of the Supreme Court have been debated throughout our constitutional history. *See* R. BERGER, CONGRESS V. THE SUPREME COURT 285-96 (1969); W. MURPHY, CONGRESS AND THE COURT (1962); Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925 (1965).

A subsidiary question concerns Congress' power to curb the jurisdiction of the lower federal courts, leaving issues to be decided solely in the state courts. It is generally conceded that Congress could substantially reduce the authority of these courts or even abolish them altogether. *See* Palmore v. United States, 411 U.S. 389, 400-02 (1973); Cary v. Curtis, 44 U.S. (3 How.) 236 (1845); Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical View and New Synthesis*, 124 U. PA. L. REV. 45 (1975); Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 GEO. L.J. 839 (1976); Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981). This Article addresses Congress' power to limit the jurisdiction of the lower federal courts only in relation to the central question under consideration. *See infra* note 173.

[4] *See* S. 26, 98th Cong., 1st Sess. (1983), which would deprive lower federal courts of jurisdiction in cases involving state or local abortion law. *See also*

H.R. 618, 98th Cong., 1st Sess. (1983). Similarly, the following bills would deprive the federal courts, including the Supreme Court, of jurisdiction in cases involving voluntary prayer in public schools. S. 88, 98th Cong., 1st Sess. (1983); H.R. 525, 98th Cong., 1st Sess. (1983); H.R. 253, 98th Cong., 1st Sess. (1983). A final group of bills would, in varying degrees, limit the jurisdiction of all federal courts to order school desegregation through mandatory busing. H.R. 798, 98th Cong., 1st. Sess. (1983); H.R. 158, 98th Cong., 1st Sess. (1983)

[5] *Limiting Federal Court Jurisdiction*, 65 JUDICATURE 177 (1981).

[6] *Congressional Limits on Federal Court Jurisdiction*, 27 VILL. L. REV. 893 (1982).

[7] 6 HARV. J. L. & PUB. POL'Y (Special Issue 1983).

[8] On October 1 and 2, 1981, the American Enterprise Institute held a seminar in Washington, D.C., the topic of which was "Judicial Power in the United States: What Are the Appropriate Constraints?"

[9] The title of the Foundation's seminar, held in Washington, D.C. on June 14, 1982, was "A Conference on Judicial Reform."

[10] *Constitutional Restraints Upon the Judiciary: Hearings before the Subcomm. on the Constitution of the Senate Judiciary Comm. to Define the Scope of the Senate's Authority Under Article III of the Constitution to Regulate the Jurisdiction of the Federal Courts*, 97th Cong., 1st Sess. (1981) [hereinafter cited as *Hearings*].

[11] Sager, *supra* note 3.

[12] This Article does not consider whether these specific measures are properly drafted and technically correct. It considers only whether Congress has the power constitutionally to pass such measures. *See infra* note 19.

[13] U.S. Const. art. III, § 2, cl. 2.

[14] *See* E. Corwin & J. Peltason, Understanding the Constitution 109 (8th ed. 1979); E. Corwin, The Constitution and What It Means Today 179 (1974); Berger, *Congressional Contraction of Federal Jurisdiction*, 1980 Wis. L. Rev. 801; Roberts, *Now Is the Time: Fortifying the Supreme Court's Independence*, 35 A.B.A.J. 1 (1949); Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001 (1965). *See also* 39 Cong. Q. Weekly Rep. 947-51 (May 30, 1981) (statements of Professors Martin H. Redish, Paul Bator, and John T. Noonan).

[15] 73 U.S. (6 Wall.) 385 (1868).

[16] *Id.* at 396. *See also* J. Ely, Democracy and Distrust: A Theory of Judicial Review 16 (1980) ("The most important datum bearing on what was intended is the constitutional language itself.").

[17] 74 U.S. (7 Wall.) 506 (1868).

[18] 74 U.S. (7 Wall.) at 514.

[19] E. Corwin & J. Peltason, *supra* note 14, at 179. This Article does not address the "wisdom" of the bills discussed *supra* note 4, nor does it explore the policy questions they raise. Rather, it is limited exclusively to a consideration of Congress' constitutional power to enact such measures.

[20] *See, e.g.*, S. Rep. No. 1097, 90th Cong., 2d Sess. 155-57 (1968); J. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court 53-54 (1980); C. Pritchett, Congress versus the Supreme Court (1961); O. Stephens & G. Rathjen, The Supreme Court and the Allocation of Constitutional Power 40 (1980); Brant, *Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 Ore. L. Rev. 3 (1973); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953); Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 Minn. L. Rev. 53 (1962); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157 (1960); Sager, *supra* note 3. Even John Hart Ely, who writes that the constitutional language itself is "the most important datum" bearing upon what the Constitution means, nonetheless concludes that "Congress' theoretical power to withdraw the Court's jurisdiction over certain classes of cases is . . . fraught with constitutional doubt." Ely, *supra* note 16, at 46.

[21] *See, e.g.*, C. Pritchett, *supra* note 20, at 122; Brant, *supra* note 20, at 21. Even among those who deny that Congress has the power to curtail the Court's appellate jurisdiction, opinion is divided over whether "any legislation of this sort [is] unconstitutional as a violation of the separation of powers and as an attack on the status and independence of the nation's highest judicial tribunal," C. Pritchett, The Federal System in Constitutional Law 15 (1978), or whether legislation is unconstitutional only if it deprives the Supreme Court of its essential role of interpreting the Constitution and resolving conflicts between federal laws and between state and federal laws. *See* Hart, *supra* note 20, at 1365; Ratner, *supra* note 20, at 160-61.

[22] Brant, *supra* note 20, at 5. *See also* Ratner, *supra* note 20, at 158.

[23] C. Pritchett, *supra* note 20, at 122.

[24] Slonim, *Law Scope: Say Dormant Prayer Bill Has Broad Implications*, 66 A.B.A.J. 437 (1980) (quoting Lawrence Tribe).

[25] Brant, *supra* note 20, at 28.

[26] Raoul Berger acknowledges this bind: "The distressing fact is that Congress' power to make 'exceptions' to the Supreme Court's appellate jurisdiction is expressly conferred whereas judicial review . . . is derived from questionable implications and debatable history." R. Berger, *supra* note 3, at 4.

[27] 443 U.S. 193 (1979).

[28] *Id.* at 201.

[29] Jesse Choper adopts this position: "The theoretical underpinnings for a wide legislative power to curtail the appellate jurisdiction . . . are hardly as firm as the literal phrasing of Article III and the quite sweeping judicial language would suggest." J. Choper, *supra* note 20, at 53.

[30] 443 U.S. at 222 (Rehnquist, J., dissenting).

[31] *Id.* at 216 (Blackmun, J., concurring).

[32] Van Alstyne, *A Critical Guide to* Ex Parte McCardle, 15 Ariz. L. Rev. 229, 260 (1973). *See also* Roberts, *supra* note 14. "What is there to prevent Congress taking away, bit by bit, all the appellate jurisdiction of the Supreme Court of the United States . . .? I see nothing, I do not see any reason why Congress cannot, if it elects to do so, take away entirely the appellate jurisdiction of the Supreme Court. . . ." *Id.* at 4. For this reason, former Justice Roberts favored a constitutional amendment that would have stripped the Congress of its art. III powers. *Id. See also Hearings, supra* note 10 (testimony of Thomas R. Ascik, Paul M. Bator, Jules Gerard, Martin H. Redish, and Charles E. Rice); A. Kelly & W. Harbison, The American Constitution: Its Origins and Development 483 (4th ed. 1970); A Mason & W. Beaney, American Constitutional Law 3, 24 (6th ed. 1978); Burton, *Two Significant Decisions:* Ex Parte Milligan *and* Ex Parte McCardle, 41 A.B.A.J. 124, 176 (1955).

[33] Comm. on the Judiciary, Minority Report on the Omnibus Criminal Control and Safe Streets Act of 1967, S. Rep. No. 1097, 90th Cong., 2d Sess. 156 (1968) [hereinafter cited as Minority Report]. *See also Hearings, supra* note 10 (testimony of George J. Alexander, Edward I. Cutler, Lloyd M. Cutler, Leonard G. Ratner, and Telford Taylor).

[34] For an exception to this generalization, see Van Alstyne, *supra* note 32.

[35] The Federalist, No. 80, at 541 (A. Hamilton) (J. Cooke ed. 1961).

[36] See 2 M. Farrand, The Records of the Federal Convention 22, 46 (rev. ed. 1937).

[37] *Id.* at 106.

[38] *Id.* at 132-33.

[39] *Id.* at 173.

[40] *Id.* at 428.

[41] *Id.* at 431.

[42] *Id.*

[43] *Id.*

[44] *But see* Brant, *supra* note 20, at 7. Brant correctly points out that subsequent to Dickinson's motion, an unidentified delegate move to insert the following substitute for the clause on appellate jurisdiction: "In all the other cases before mentioned the Judicial power shall be exercised in such a manner as the Legislative shall direct." 2 M. Farrand, *supra* note 36, at 431. This motion was defeated, six states to two. Brant argues that this proposed clause "would have given Congress the extensive power it claims it possesses under the authority to make exceptions from the Court's appellate jurisdiction. It is hardly conceivable that such a motion would have been offered if the delegates believed that they had just voted to confer substantially the same power under a different wording." Brant, *supra* note 20, at 7. *See also Merry, supra* note 20, at 59; Sager, *supra* note 20, at 49-50, n.95. Brant argues that Congress is authorized under art. III, § 2 to make exceptions only to the Court's review of matters of fact. *See generally infra* notes 80-91 and accompanying text. Brant's argument fails, however, because he is mistaken in his assertion that the power to determine how the judicial power shall be exercised is substantially the same as the power to make exceptions to the Court's appellate jurisdiction. The former power, in fact, is much greater, and the delegates understood this. Brant does not appreciate that it is one thing for Congress to have power to determine what cases the Supreme Court shall hear in its appellate jurisdiction, but quite another for Congress to have power to determine what the outcome of those cases shall be.

[45] 3 Debates on the Federal Constitution 560 (J. Elliot 2d ed. 1888).

[46] Graves v. O'Keefe, 306, U.S.C. 466, 491-92 (1939) (Frankfurter, J., concurring). *See also infra* notes 178-86 and accompanying text.

[47] "The government body most ready to assert the power of Congress to deprive the Court of its appellate jurisdiction has been the Court itself." Comment, *Removal of Supreme Court Appellate Jurisdiction: A Weapon Obscenity?* 1969 Duke L.J. 291, 297 n.37. In fact, no justice has ever denied Congress' broad powers under art. III. Although Justice Douglas did declare in his dissent in Glidden Co. v. Zdanok, 370 U.S. 530, 605 n.11 (1962), that "[t]here is a serious question whether the McCardle case could command a majority today," and although this passage frequently is cited in writings that suggest that the contemporary Supreme Court would not accept congressional restrictions of its appellate jurisdiction equivalent to those upheld in McCardle, the context of Justice Douglas' dictum suggests something quite different; namely, if Congress were to attempt to deprive the Supreme Court of jurisdiction over a case that is already under judicial consideration, then it is questionable whether McCardle would be followed today. Douglas subsequently expressed his understanding of the broader question of Congress' power over the appellate jurisdiction of the Supreme Court in his concurrence in Flast v. Cohen, 392 U.S. 83 (1968): "As respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of § 2, art. III. See *Ex Parte* McCardle . . ." *Id.* at 109.

[48] *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868). For a discussion of *McCardle*, see supra notes 17-18 and accompanying text.

[49] 3 U.S. (3 Dall.) 321 (1796).

[50] *Id.* at 327.

[51] *Id.*

[52] To the extent that differences of opinion arose among them, such differences were only over the question of whether the Court's appellate jurisdiction was originally granted by the Constitution or by the Congress. Three different answers were given. The first maintained that any withdrawal of the Court's appellate jurisdiction requires Congress to make a positive exception. All constitutionally granted jurisdiction not positively except by Congress is retained by the Court. This was the view of Justice James Wilson in his opinion in Wiscart v. Dauchy, 3 U.S. (3 Dall.) at 326. The second approach was that the Court possesses no appellate jurisdiction unless positively granted by Congress. The Court's appellate jurisdiction is viewed as congressionally granted rather than as constitutionally authorized. This was the view of Chief Justice Ellsworth in *Wiscart, see supra* text accompanying note 50, and of Chief Justice Taney in Barry v. Mercein, 46 U.S. (5 How.) 103, 119-20 (1847), *see infra* text accompanying note 57. The third approach combined features of the first two. Like the first, it based the Court's appellate jurisdiction on the Constitution. However, once Congress had acted to grant the Court appellate jurisdiction, this approach followed the second approach and implicitly denied all jurisdiction not positively granted. This was the view of Chief Justice Marshall in Durousseau v. United States, 10 U.S. (6 Cranch) 307, 313-14 (1810). *See infra* text accompanying note 56. *See also* Comment, *supra* note 47, at 297-300.

[53] 7 U.S. (3 Cranch) 159 (1805).

[54] *Id.* at 173.

[55] 10 U.S. (6 Cranch) 307 (1810).

[56] *Id.* at 313-14. *See also* 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 453 (1833) ("It is apparent, then, that the exception was intended as a limitation upon the preceding words, to enable Congress to regulate and restrain the appellate power, as the public interests might, from time to time, require.").

[57] Barry v. Mercein, 46 U.S. (5 How.) 103, 119-20 (1847).

[58] *See supra* text accompanying note 18. Chief Justice Chase's opinion in *McCardle* echoed, for the most part, Justice Swayne's opinion for an equally unanimous Court in Daniels v. Rock Island R.R., 70 U.S. (3 Wall.) 250 (1854):

The original jurisdiction of this court, and its power to receive appellate jurisdiction, are created and defined by the Constitution; and the legislative department of the government can enlarge neither one nor the other. But it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects, it is wholly the creature of legislation. *Id.* at 254.

[59] *Ex Parte* McCardle, 74 U.S. (7 Wall.) 506, 515 (1868).

[60] 105 U.S. 381 (1881).

[61] *Id.* at 386.

[62] *Id.* at 385.

[63] 321 U.S. 414 (1944).

[64] *Id.* at 472-73.

[65] 337 U.S. 582 (1949).

[66] *Id.* at 655 (Frankfurter, J., dissenting). *See also* Glidden Co. v. Zdanok, 370 U.S. 530, 567 (1962); Burton, *supra* note 32, at 176; Roberts, *supra* note 14, at 4.

[67] Wechalor, *supra* note 14, at 1005-06. Under this plan, "Congress has the power by enactment of a statute to strike at what it deems judicial excess." *Id.*

[68] Not everyone who would limit Congress' power under art. III, § 2 relies on all seven of these arguments. Some of these arguments contradict each other.

[69] 74 U.S. (7 Wall.) 506 (1968).

[70] Intelligent exceptions to this generalization are Rice, *Limiting Federal Court Jurisdiction: The Constitutional Basis for the Proposals in Congress Today*, 65 JUDICATURE 190 (1981); Van Alstyne, *supra* note 32.

[71] *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). On the difference between the traditional and modern forms of judicial review, see Wolfe, *A Theory of U.S. Constitutional History*, 43 J. POL. 292 (1981).

[72] Ratner, *supra* note 20, at 168-71.

[73] Brant, *supra* note 20.

[74] Merry, *supra* note 20.

[75] R. BERGER, *supra* note 3. Berger, however, subsequently qualified his position. *See* Berger, *supra* note 14.

[76] Ratner, *supra* note 20, at 168.

[77] *Id.* at 170.

[78] Sager agrees with Ratner's interpretation:

An "exception" implies a minor deviation from a surviving norm; it is a nibble, not a bite. And there is reason to think that this sense of the term was, if anything, clearer at the time the Constitution was drafted than now. The language of Article III from which Congress draws its authority to limit the jurisdiction of the Supreme Court, thus contains only a bounded power to make exceptions. Sager, *supra* note 3, at 44.

[79] Hart, *supra* note 20, at 1364. Ratner recognizes this and concedes ultimately that "general usage . . . cannot provide a definitive interpretation," whereupon he launches into an "essential role of the Court" argument of the kind discussed *infra* notes 123-32 and accompanying text. Ratner, *supra* note 20, at 171. Sager likewise acknowledges the difficulty of textual interpretation: "To be sure, there is nothing self-evident about the precise limits of Congress' authority in such an amorphous grant, but this lack of an obvious answer invites an application of the tools of constitutional interpretation." Sager, *supra* note 3, at 44. If Sager's methodology for constitutional interpretation included some appreciation of the work of the constitutional framers and their understanding of separation of powers and federalism, his invitation to join him in applying this methodology would be more warmly received. *See infra* notes 138-61 and accompanying text.

[80] Brant, *supra* note 20, at 11.

[81] *Id.* at 5.

[82] R. BERGER, *supra* note 3, at 307. *See also* Berger, *supra* note 14: "[T]he founders merely intended by that clause to prevent the Court from revising the findings of a jury." *Id.* at 806.

[83] As Chief Justice Marshall wrote in Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833), "[the framers] would have declared this purpose in plain and intelligible language." *Id.* at 249. For example, they could have declared: "In all the other Cases before mentioned, the supreme court shall have appellate Jurisdiction, both as to Law and Fact, but with appellate Jurisdiction as to Fact subject to such Exceptions and under such Regulations as the Congress shall make."

[84] *See supra* notes 40-43 and accompanying text. Brant likewise fails to appreciate that all the controversy present in the state ratifying conventions concerning whether the Supreme Court ought even to have power to review questions of fact in its appellate jurisdiction, a controversy that Brant cites as evidence supporting his general argument, is simply not germane to the question of whether Congress has power to contract the appellate jurisdiction of the Supreme Court with respect to substantive questions of law. For similar citation of and reliance on wholly irrelevant evidence, see Merry, *supra* note 20, at 59-62.

[85] 3 J. ELLIOTT *supra* note 45, at 572. Randolph was echoing John Marshall's comments from the previous day: "What is the meaning of the term exceptions? Does it not mean an alteration and diminution? Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court." *Id.* at 560.

[86] THE FEDERALIST, No. 81, at 552 (A. Hamilton) (J. Cooke ed. 1961).

[87] *Id.* at 549-50.

[88] *Id.* at 550.

[89] *Id.* at 552. Hamilton also observed that separating law and fact in certain issues was impossible. *Id.* at 551.

[90] THE FEDERALIST, No. 80, at 541 (A. Hamilton) (J. Cooke ed. 1961). Although Brant quotes from THE FEDERALIST No. 80, he engages in a form of academic gerrymandering and conveniently overlooks this passage. *See* Brant, *supra* note 20, at 9. Brant focuses his attention instead on a passage from THE FEDERALIST No. 81:

To avoid all inconveniences, it will be safest to declare generally that the Supreme Court shall possess appellate jurisdiction both as to law and fact, and that this jurisdiction shall be subject to such exceptions and regulations as the national legislature shall prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security. *Id.*, No. 81, at 552. *See also* Merry, *supra* note 20, at 309 (also ignoring THE FEDERALIST No. 80). This passage, of course, is irrelevant to the issue of whether Congress' power under the exceptions clause is limited simply to curtailing the appellate jurisdiction of the Supreme Court in cases raising questions of fact. To prove that Congress' power extends to regulating the treatment of facts does not prove that its power is limited to such regulation. *See supra* note 84.

Despite all of this evidence, Sager maintains the following position:

[I]f the Framers of Article III had had the bad sense to believe the control of jurisdiction was a workable way to give Congress a substantive check on the federal judiciary, we might well have to live with that fact and with its implications for the constitutional shortcuts that Congress would be entitled to take. But there is no evidence that they held this belief. . . . Sager, *supra* note 3, at 42.

[91] *See supra* notes 49-67 and accompanying text.

[92] 74 U.S. (7 Wall.) 506 (1868).

[93] *See* R. BERGER, *supra* note 3, at 2-3; Hart, *supra* note 20, at 1365; Ratner, *supra* note 20, at 178-81. *See also* Rotunda, *supra* note 3, at 849-51.

[94] Act of Mar. 27, 1868, ch. 34, 15 Stat. 44. The Judiciary Act of 1789 provided all federal judges with the power to issue writs of habeas corpus. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81.

[95] 74 U.S. (7 Wall.) at 515.

[96] 75 U.S. (8 Wall.) 85 (1869).

[97] *Id.* at 96-98.

[98] Ratner, *supra* note 20, at 180.

[99] 80 U.S. (13 Wall.) 128 (1871).

[100] *Id.* at 131. The statute at issue was the Act of Mar. 12, 1863, ch. 120, 12 Stat. 820.

[101] United States v. Padelford, 76 U.S. (9 Wall.) 531 (1869).

[102] Act of July 12, 1870, ch. 251, 16 Stat. 230, 235.

[103] *Id.*

[104] 80 U.S. (13 Wall.) at 144.

[105] *Id.* at 146. The Court continued:

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the Court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself. *Id.* at 147.

[106] *Id.* at 147-48.

To the executive alone is entrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offense pardoned and removes all its penal consequences. It may be granted on conditions. In these particular pardons, that no doubt might exist as to their character, restoration of property was expressly pledged, and the pardon was granted on condition that the person who availed himself of it should take and keep a prescribed oath.

Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority, and directs the court to be instrumental to that end. *Id.*

[107] *See* 74 U.S. (7 Wall.) at 515.

[108] 19 U.S. (6 Wheat.) 264 (1821).

[109] *Id.* at 404.

[110] 80 U.S. (13 Wall.) at 147. *See also* Vaughn, *Congressional Power to Eliminate Busing in School Desegregation Cases*, 31 ARK. L. REV. 231, 244 (1977).

[111] 80 U.S. (13 Wall.) at 147.

[112] This Article in no way condones Congress' use of power to determine the outcome of any particular judicial proceeding. As James Madison recognized, such a power would clearly make the legislators "advocates and parties to the causes which they determine." THE FEDERALIST, No. 10, at 59 (J. Madison) (J. Cooke ed. 1961).

[113] 80 U.S. (13 Wall.) at 145. *See also* Rice, *supra* note, 70, at 193-94.

[114] Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693, 695 (1976).

[115] C. PRITCHETT, *supra* note 20, at 122. *See also* C. PRITCHETT, THE AMERICAN CONSTITUTION 35-36 (3d ed. 1977); Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 501-13 (1974).

[116] C. PRITCHETT, *supra* note 20, at 122.

[117] *Id.*

[118] *Id.*

[119] Eisenberg, *supra* note 115, at 504.

[120] *See* Redish & Woods, *supra* note 3:

The seventh amendment, for example, provides that in all cases where the "value in controversy" exceeds twenty dollars, the right to a jury trial at common law must be preserved. It might be argued that use of a twenty dollar floor does not today accomplish the framers' goal of precluding a jury trial in minor civil cases, for twenty dollars at the time of the drafting of the seventh amendment meant something quite different from twenty dollars today. But despite such an argument, we could not read an inflationary spiral into the terms of the seventh amendment. The seventh amendment is strict and unbending in its dictates on this matter. If we are to alter it, even in order to accomplish the framers' goal, we must do so through the amendment process. Similarly, the language and history of article III are so clear that any alteration, even to accomplish the framers' purposes, must come by amendment and not by interpretation in light of "changing circumstances." *Id.* at 74.

[121] *See* N. PEIRCE, THE PEOPLE'S PRESIDENT 161 (1968).

[122] Wolfe, *supra* note 71, at 301.

[123] *See, e.g.*, MINORITY REPORT, *supra* note 33, at 156; Brant, *supra* note 19, at 24; Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 594 (1975); Hart, *supra* note 19, at 1365; Ratner, *supra* note 19, at 160-61; Rotunda, *supra* note 3, at 845; Sager, *supra* note 3, at 42-68; White, *Reflections on the Role of the Supreme Court: The Contemporary Debate and the "Lessons" of History*, 63 JUDICATURE 162, 170 (1979).

[124] Ratner, *supra* note 19, at 172. Interestingly, those who make this argument point out that none of the cases cited in support of Congress' powers under the exceptions clause, including *McCardle*, involves what they would consider an "essential function" of the Supreme Court. *Id.* at 173-81. This fact, however, may attest more to the sense of sound congressional opinion against the wisdom of making such exceptions than to any notion that Congress lacks the power to do so. *See* Van Alstyne, *supra* note 31, at 257.

[125] Rice, *supra* note 70, at 195. For a further discussion of the exceptions clause and its relation to separation of powers and checks and balances, see *infra* notes 140-54 and accompanying text.

[126] Van Alstyne, *supra* note 32, at 257.

[127] Hart *supra* note 20, at 1365. *See also* Brant, *Supra* note 20, in which Brant argues that the Court's critical function is to prevent "the destruction or infringement of any of the mandatory requirements of the Constitution." *Id.* at 24.

Hart and Brant appear to believe that only the Supreme Court, through its employment of judicial review, is able to provide protection against the Constitution's destruction. This view ignores the operation of such constitutional mechanisms as separation of powers, bicameralism, staggered elections, federalism, and the multiplicity of interests present in an extended republic. *See* R. ROSSUM & G. MCDOWELL, THE AMERICAN FOUNDING: POLITICS, STATESMANSHIP, AND THE CONSTITUTION 6-11 (1981). *See also infra* notes 140-61 and accompanying test. Moreover, even if these other constitutional features were absent, Hart's and Brant's reliance on the judiciary still would be misplaced. As Learned Hand observed:

[T]his much I think I do know—that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish. L. HAND, THE SPIRIT OF LIBERTY 125 (1959).

[128] Ratner, *supra* note 20, at 201. *See also* Sager, *supra* note 3, at 43, 45.

[129] Cox, *The Role of Congress in Constitutional Determinations*, 10 U. CIN. L. REV. 199, 253 (1971). *See also* White, *supra* note 118. White insists that the Court's chief role is serving "as the principal elite institution protecting the people's rights." *Id.* at 170. White goes so far as to argue that the Court should "acknowledge that the source of newly invented rights is not the Constitution but the enhanced seriousness of certain values in our society." *Id.* at 168.

[130] Brest, *supra* note 123, at 594. *See also* J. CHOPER, *supra* note 19; Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 226 (1980); Ely, *supra* note 16, at 87.

[131] *See* Brant, *supra* note 20, at 27-28.

[132] *See* Van Alstyne, *surpa* note 32:

It does appear to be more than a passing strange argument to suggest that because the full evolution of substantive constitutional review may itself have been exogenous to the Constitution, the power of Congress to make exceptions of any appellate jurisdiction described in article III therefore does not extend to such review; as though the power to make exceptions applies to any appellate jurisdiction granted by article III, but not to that judicial power which the Supreme Court simply evolved in the fullness of time. *Id.* at 262-63.

[133] Their expansive view of the Court's essential role also is threatened by, and in turn threatens, other express constitutional provisions, including the prescribed means for amending the Constitution found in art. V, the delegations of power to Congress found art. I, § 8, and the enforcement sections of the post-Civil War amendments.

[134] Wechsler, *supra* note 14, at 1006. "It is not that the judges are appointed arbiters and to determine as it was upon application, whether the Assembly have or have not violated the Constitution; but when an action is necessarily brought in judgment before them, they must, unavoidably, determine one way or another." Letter from James Iredell to Richard Spaight (Aug. 26, 1787), *quoted in* R. BERGER, *supra* note 3, at 82-83. *See also* Rice, *supra* note 70: "Whatever the cogency of [the] 'essential role' test would be to a wholesale withdrawal of jurisdiction, if it were ever attempted by Congress, [this] test cannot properly be applied to narrowly drawn withdrawals of jurisdiction over particular types of cases." *Id.* at 195.

[135] THE FEDERALIST, No. 78, (A. Hamilton) (J. Cooke ed. 1961).

[136] 5 U.S. (1 Cranch) 137 (1803).

[137] *See* Chief Justice Chase's comment in *Ex Parte* McCardle, 74 U.S. (7 Wall.) 515 (1868), *supra* text accompanying note 59. *See also* Muskrat v. United States, 219 U.S. 346 (1911):

The exercise of [judicial review], the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power of the legislative branch of the government. *Id.* at 361.

[138] Sager describes the separation of powers/federalism argument as a "particular version of the essential function claim." According to this version, the Constitution "contemplates federal judicial supervision of state conduct to ensure state compliance with federal constitutional norms." Sager, *supra* note 3, at 43, 45.

[139] Ratner, *supra* note 20, at 157-58. *See also Hearings, supra* note 10, at 14 (statement of Leonard G. Ratner).

[140] *See, e.g., Hearings, supra* note 10, at 226-34 (testimony of Edward I. Cutler); C. PRITCHETT, *supra* note 20, at 15; Brant, *supra* note 20, at 28-29; Ratner, *supra* note 20, at 158.

[141] THE FEDERALIST, No. 48, at 332 (J. Madison) (J. Cooke ed. 1961).

[142] *Id.*

[143] THE FEDERALIST, No. 51, at 347-48 (J. Madison) (J. Cooke ed. 1961).

[144] As James Wilson declared in the Federal Convention: "The separation of the departments does not require that they should have separate objects but that they should act separately though on the same objects." 2 M. FARRAND, *supra* note 36, at 78. *See also* R. Rossum & G. McDowell, *supra* note 127, at 6-11; R. SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY 2-7 (1971).

[145] R. NEUSTADT, PRESIDENTIAL POWER 33 (1960).

[146] THE WORKS OF JAMES WILSON 300 (R. McCloskey ed. 1967).

[147] *Id.*

[148] THE FEDERALIST, No. 48, at 332 (J. Madison) (J. Cooke ed. 1961).

[149] *Id.* at 333.

[150] THE FEDERALIST, No. 49, at 339 (J. Madison) (J. Cooke ed. 1961).

[151] THE FEDERALIST, No. 78, at 522-23 (A. Hamilton) (J. Cooke ed. 1961).

[152] *Id.* at 529. *See also* THE FEDERALIST, No. 48, at 334 (J. Madison) (J. Cooke ed. 1961).

[153] THE FEDERALIST, No. 81, at 545-46 (A. Hamilton) (J. Cooke ed. 1961).

[154] THE FEDERALIST, No. 80, at 541 (A. Hamilton) (J. Cooke ed. 1961).

[155] Sager, *supra* note 3, at 43. *See also* Kay, *Limiting Federal Court Jurisdiction:* The Unforeseen Impact on Courts and Congress, 65 JUDICATURE 188 (1981); Ratner, *supra* note 20, at 158-61.

[156] Sager, *supra* note 3, at 48.

[157] The principle of qualitative majority rule considers not only the degree of support that a policy receives, but also the quality of the policy itself. *See generally* R. ROSSUM & G. TARR, AMERICAN CONSTITUTION: CASES AND INTERPRETATION (1983).

[158] THE FEDERALIST, No. 10, at 65 (J. Madison) (J. Cooke ed. 1961).

[159] The rival defects of majority tyranny and democratic ineptitude posed seemingly unsurmountable obstacles for constitution-makers, for the more they attempted to overcome majority tyranny by withholding the power to tyrannize, the more they rendered the government inept and powerless, and vice versa.

[160] *See* Diamond, The Federalist *on Federalism*, 86 YALE L.J. 1273, 1278-85 (1977).

[161] *See* THE FEDERALIST, No 22 (A. Hamilton) (J. Cooke ed. 1961). In this essay, Hamilton discussed federalism as it was understood until the time of the Federal Convention and described it as characterized by three operative principles:

1. The authority of the central federal government was restricted to the individual stage governments and did not reach the individual citizens composing the states. Even this authority, however, was limited; the resolutions of the federal authority amounted to little more than mere recommendations, which the states opted to observe or disregard.

2. The central federal government had no authority over the internal problems of the individual states. Its rule was limited primarily to certain external tasks of mutual interest to the member states.

3. Each individual member had an exact quality of suffrage. This equal vote was derived from the equality of sovereignty possessed by each member state.

[162] *See generally* Sager, *supra* note 3, at 45-57.

[163] Congress did not authorize the Supreme Court to review cases that invalidated state conduct on federal grounds until 1914. *See* Act of Dec. 23, 1914, Ch. 2, Stat. 790.

[164] *See* Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 84.

[165] Act of Mar. 3, 1891, ch. 517, § 5, 26 Stat. 826, 827-28.

[166] Act of Feb. 13, 1925, ch. 229, § 240(a), 43 Stat. 936, 938-39.

[167] Act of Apr. 29, 1802, ch. 31, § 6, 2 Stat. 156, 159-61.

[168] Act of Mar. 3, 1891, ch. 517, § 5, 26 Stat. 826, 827.

[169] *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 39 (1978); Hart, *supra* note 20, at 1373; Van Alstyne, *supra* note 70, at 263-64.

[170] Since National League of Cities v. Usery, 426 U.S. 833 (1976), it appears that Congress' power under the commerce clause is also subject to the dictates of the tenth amendment.

[171] 44 U.S. (3 How.) 236 (1845).

[172] *Id.* at 245. *See also* Lockerty v. Phillips, 319 U.S. 182 (1943); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); Vaughn, *supra* note 110, at 237-41.

[173] *See* Berger, *supra* note 14, at 804; Wechsler, *supra* note 13, at 1005. *See also* Redish & Woods, *supra* note 3. Redish and Woods argue that Congress' power to deny original jurisdiction to the federal courts and to vest it instead in the state courts is limited by Tarble's Case, 80 U.S. (13 Wall.) 397 (1871), in which the Supreme Court overturned a habeas corpus order by a Wisconsin state court to a federal official ordering the release of an allegedly under-age soldier from the United States Army. The Court reasoned that a state court had no power to interfere with the operations of federal officials. Redish and Woods infer from *Tarble's Case* that state courts lack jurisdiction to entertain any case that seeks to direct the conduct of federal officials through the use not only of habeas corpus but also of mandamus and injunctive powers. They later admit, however, that "Congress can probably circumvent the difficulties created by *Tarble's Case* by explicitly authorizing state court jurisdiction over the acts of federal officials." Redish & Woods, *supra* note 3, at 106. Thus, if Congress wants to preclude all lower federal court jurisdiction, it can do so without raising questions of due process, provided only it clearly authorizes state court review of those cases. *See* Sager, *supra* note 3, at 80-84.

[174] *See* Wechsler, *supra* note 14, at 1005.

[175] Hart, *supra* note 20, at 1401. *See also* Kay, *supra* note 148, at 186; Taylor, *Limiting Federal Court Jurisdiction; The Unconstitutionality of Current Legislative Proposals*, 65 JUDICATURE 199, 201 (1981).

[176] Van Alstyne, *supra* note 32, at 269.

[177] Sager, *supra* note 3, at 76-77. Sager also writes: "Harm to constitutionally protected interests occurs whenever controversial rights are singled out for exclusion from federal jurisdiction. Where the specific circumstances surrounding Congress' deliberations conspire to send an apparent message of Congressional disapproval of federal judicial doctrine, the harm is exaggerated." *Id.* at 75. *See also* Brest, *supra* note 123, at 589-94; Taylor, *supra* note 175, at 202-04.

[178] *See* Sager, *supra* note 3, at 41, 68-69, 72-73, 80, 87.

[179] *Id.* at 69.

[180] *Id.* at 41, 74, 89.

[181] *Id.* at 80. On other occasions, Sager describes the seduction as "bullying." *Id.* at 26, 64.

[182] 60 U.S. (19 How.) 393 (1857).

[183] 163 U.S. 537 (1896).

[184] 198 U.S. 45 (1905).

[185] Ironically, whereas Sager and his like-minded colleagues generally argue that the Constitution is what the Court says it is, they implicitly insist on one exception to this rule: the Constitution, or at least art. III, § 2, is not what the Court says it is, at least in *Ex Parte* McCardle, 74 U.S. (7 Wall.) 505 (1868).

[186] 7 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 3206, 3210 (1897).

[187] Brant, *supra* note 20, at 28. *See also* Merry, *supra* note 20, at 69; Ratner, *supra* note 20, at 158.

[188] Brant, *supra* note 20, at 28. The sole "descent" of this congressional "dagger" was the Act of March 27, 1868, ch. 34, 15 Stat. 44, which excised a portion of the Court's appellate jurisdiction.

[189] THE FEDERALIST, No. 51, at 353 (J. Madison) (J. Cooke ed. 1961).

[190] Wechsler, *supra* note 14, at 1006. It must be remembered, however, that if lack of uniformity among fifty states or twelve circuits concerning constitutional interpretation were to become a problem, congressional withdrawal of jurisdiction could easily be repealed by statute.

[191] *Id.*

[192] *Id.* at 1007. *See also* J. CHOPER, *supra* note 20, at 54.

[193] Sager, *supra* note 3, at 41, 68.

[194] Rice, *supra* note 70, at 197.

[195] *Id.*

[196] Act of March 27, 1868, ch. 34, 15 Stat. 44.

[197] 60 U.S. (19 How.) 393 (1857).

[198] *See* Van Alstyne, *supra* note 32, at 233-44. *See also* 3 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 193 n.1 (1922).

[199] *See supra* text accompanying note 188.

[200] The exceptions clause is not the only means by which Congress can attempt to curb the Court. For example, Congress also has power to impeach the justices; to destroy the Court's effectiveness by substantially increasing or reducing the size of its membership; to limit tenure either through constitutional amendment or statutory inducements; to reduce or eliminate staff support for the Court; to refuse salary increases for the justices in inflationary times; to require extraordinary majorities to invalidate statutes; and to require that the justices file seriatim opinions in all cases. *See* W. MURPHY, CONGRESS AND THE COURT 63 (1962). *See also* R. STEAMER, THE SUPREME COURT IN CRISIS: A HISTORY OF CONFLICT (1971).

[201] THE FEDERALIST, No. 51, at 349 (J. Madison) (J. Cooke ed. 1961). These precautions would help to insure that the government would always reflect "the permanent and aggregate interests of the community." THE FEDERALIST, No. 10, at 57 (J. Madison) (J. Cooke ed. 1961).

[202] THE FEDERALIST, No. 78 (A. Hamilton) (J. Cooke ed. 1961).

[203] 5 U.S. (1 Cranch) 137 (1803). *See generally* Wolfe, *supra* note 122, at 293-99.

[204] THE FEDERALIST, No. 78, at 525 (A. Hamilton) (J. Cooke ed. 1961).

[205] *Id.* at 522.

[206] *Id.* at 526.

[207] L. HAND, THE BILL OF RIGHTS 73 (1965).

Mr. HELMS. I thank the Senator for yielding to me.

Mr. SIMON. I thank the Senator from North Carolina.

I find the prayer referred to is not offensive. I think that 95 percent of our people would not find it offensive. But there are those who do. We are talking religion here. I do not know that much about the various divisions within the Baptist Church. I know there are enough divisions within the Lutheran Church.

One branch believes that any prayer that does not specifically mention Jesus Christ is not considered a valid prayer.

The Senator may say that is right or wrong, but the point is we cannot make that decision in Government. Let us let that branch of the Lutheran Church that believes that go ahead and believe it; let us let Baptists who believe in one thing believe it; let us let Jews who believe in one thing believe it. But let us not have Government sponsoring some things where we get enmeshed in things where I think we should not be.

Again, I have great respect for the Senator from North Carolina, but I think we are getting into quicksand here. I think we better not move in that direction.

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

Mr. GOLDWATER. Will the Senator withhold?

Mr. SIMON. I withhold.

Mr. GOLDWATER addressed the Chair.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. GOLDWATER. Mr. President, I would like to discuss this matter very briefly with my good friend from North Carolina.

I first would ask him, did he really write this bill? Is this really his?

Mr. HELMS. Yes, sir.

Mr. GOLDWATER. Mr. President, I am a little surprised that the Senator from North Carolina decided to outlaw the Supreme Court from our life. I think this is unconstitutional, even though I am not a lawyer and do not pretend to be. I have as much interest in prayer as anyone in this place, although probably I do not use it as much as I should.

The Senator is beginning to get into areas now that are frankly none of our business. As the Senator was inferring, in my State, I have 19 Indian tribes. Every one of them practices a different religion. I have Indian tribes that believe in legend. I have Indian tribes that worship gods that live up in the forests. I have Indian tribes that believe in the stars.

I do not think it is right for this Congress to tell anybody how they should pray. I believe they should be allowed to pray in any way they doggone please.

I just wanted to say to my friend from North Carolina, I am really kind of surprised that he would write this bill. If I wrote it, I would have been ashamed of it.

Mr. HELMS addressed the Chair.

The PRESIDING OFFICER. The Senator from North Carolina.

Mr. HELMS. Mr. President, I am a little surprised at my friend from Arizona, because he is describing article III of the Constitution.

All this bill does, I say to the Senator, if he reads it—and I am certainly not ashamed of it—all this bill does is to give Congress an opportunity to vote on the question of article III of the Constitution of the United States which bestows upon Congress the right and authority to limit the appellate jurisdiction of the Supreme Court in whatever manner the Congress feels the Supreme Court has exceeded its authority.

They call it "court stripping." My friend Sam Ervin did not agree with me on the issue of prayer. In one of the last conversations I had with him, he said, "JESSE, you are doing fine, but get off that prayer business." He agreed with the Senator from Arizona.

But he said, "Your approach is correct—the implementation of article III of the Constitution."

To say that it is unconstitutional to implement the Constitution puzzles me.

Mr. President, just so that it will be clear for the RECORD, I ask unanimous consent that part of article III of the U.S. Constitution be printed in the RECORD, to make certain what it provides.

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

ARTICLE III

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. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

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 a State and Citizens of another State;—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 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.

Mr. HELMS. Mr. President, let me say in conclusion that Senator Ervin did extensive research on the question of modifying, adjusting, and limiting Federal court jurisdiction. As I recall, he said the article III powers had been used by Congress on 57 occasions.

Furthermore, the Chief Justice of the United States, according to information available to me, has recommended a number of proposals that would limit the jurisdiction of the Supreme Court. I hope the Chief Justice of the United States cannot be accused of "court stripping" or of violating the U.S. Constitution.

I yield the floor and suggest the absence of a quorum.

Mr. BAUCUS. Will the Senate withhold?

Mr. HELMS. Yes.

The PRESIDING OFFICER. The Senator from Montana.

Mr. BAUCUS. Mr. President, I have listened with great interest to the discussions between the Senator from Arizona, the Senator from Illinois, and the Senator from North Carolina.

It strikes me that the discussion until now concerns the propriety of school prayer. That is a subject we can debate forever. It is a subject on which there will be no universal agreement. It is a subject which ultimately goes to the core of humanity. It is a discussion which is as important as any other we could endeavor to pursue.

Mr. President, that is not the question which is before us. The question which is before us is whether the U.S. Congress should pass legislation pre-

cluding the U.S. Supreme Court and lower Federal courts from hearing school prayer cases. We are not deciding under what circumstances school prayer is permissible or not permissible but, rather, when and under what circumstances, if ever, the Supreme Court or other Federal courts should be precluded from exercising their appellate jurisdiction or hearing cases, concerning school prayer.

The bill before us is a court-stripping bill. It strips the Federal judiciary including the Supreme Court, jurisdiction over school prayer cases. It is my firm conviction that if this bill were to become law, it would begin to eliminate the Constitution of the United States.

I listened to the arguments of the Senator from North Carolina [Mr. HELMS], suggesting that article III of the Constitution provides that the Congress may limit the jurisdiction of the Supreme Court.

The Senator is correct in that those are the words of article III, but we all know, we all learned in civics class, as we studied the history of our country, that when the Founding Fathers came to this country and wrote the Constitution of the United States, it was based upon the principle of separation of powers, of checks and balances. That is why we have an article I, which is the legislative article; article II, the executive article; and article III, the judicial article—three separate articles providing for the powers and limitations of three equal but separate branches of Government.

The fact is that if the interpretation of article III is as the Senator from North Carolina says—that is, if the U.S. Congress can constitutionally preclude the U.S. Supreme Court jurisdiction over any constitutional issue whatsoever—then in effect Congress is eliminating the Supreme Court.

Our Founding Fathers came to America to escape tyranny, to escape religious persecution, to establish certain freedoms—freedom of speech, freedom of the press, freedom to exercise religion in any way an individual wished, and the other freedoms in the Bill of Rights and the other provisions of the Constitution.

The fact is, as we well know, our Founding Fathers felt those freedoms were so important that they put them in the Constitution to be changed only by a constitutional amendment requiring two-thirds vote of both Houses of Congress and ratification by three-quarters of the States.

As a matter of fact, after looking at the Constitutional Convention debates, scholars have been unable to find any discussion on the exceptions clause of article III. There is no debate over that clause, and it is obvious why—it makes no sense for the exceptions clause to allow Congress to limit Supreme Court jurisdiction over core constitutional cases. Such a grant of power would have been a radical departure from the spirit and intent of the Constitution and, obviously, there would have been some debate over it.

In my view, the exceptions clause allows the Congress to limit appellate jurisdiction, but not the core Federal constitutional issues. To limit the core Federal constitutional issues—free speech, prayer, et cetera—would make the entire constitutional scheme nonsense.

There are many other points I could make on jurisdiction removal bills, like S. 47, but I will close today by urging my colleagues to oppose this bill and thereby preserve and protect our Constitution and our system of government.

I yield the floor.

Mr. LEAHY. Mr. President, we are once again compelled to rise to defend the most obvious, most fundamental features of our constitutional system of government. The strength of the Constitution arises from the way it disperses power among the branches of Government and the zeal with which it protects individual liberties. Make no mistake about it. This is not a debate over school prayer. That will come later. Today we are debating the temptation of one branch of Government to subdue another branch by relieving it of its authority.

This 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. Just 3 years ago, we debated and rejected the bill Senator HELMS presents today.

The arguments haven't changed. The fundamental principle we upheld then and must uphold now is that our courts, the branch of Government devoted to interpreting our Constitution and laws, must remain 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 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. Therefore, 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 bill 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 exception, 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 perpetuation of its genius fell to each one of us.

But in order to conclude that article III of the Constitution permits the Congress in the guise of carving exception, 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 Constitution 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.

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.

Perhaps every generation is bound to test the strength and the limits of the principles of an independent judiciary and the separation of powers.

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 75th 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.

I urge my colleagues to reject S. 47. Nothing less than the rule of law is at stake.

WITHDRAWING SUPREME COURT JURISDICTION OVER SCHOOL PRAYER

Mr. HATCH. Mr. President, the amendment offered by the Senator from North Carolina raises several important legal and policy issues in my mind. In the first place, the Senate has a judgment to make concerning the legal sufficiency of the Supreme Court's interpretations of the first amendment relative to prayer in public schools. For reasons I will explore in more detail hereafter, I think it is evident that the Supreme Court has departed from the intent of the authors of the first amendment establishment clause by restricting public school prayer and meditation. Although the Constitution vests in Congress some authority to make exceptions in the appellate jurisdiction of the U.S. Supreme Court, that limited power must be used very judiciously. This leads us to the crucial question presented by S. 47, specifically, whether Congress would be wise to do what it has some authority to do, namely withdraw Supreme Court jurisdiction over the subject matter of "voluntary prayer, Bible reading, or religious meetings in public schools or public buildings?" On this point, for various reasons, I have severe reservations about using in this instance the authority which the Constitution implies should be employed only in exceptional circumstances. In any event, Congress could employ, and has at its immediate disposal, better means to remedy the dislocations caused by several ill-advised Supreme Court opinions. The better means to which I refer is Senate Joint Resolution 2, a constitutional amendment permitting silent prayer or meditation in public schools. Senate Joint Resolution 2 has been approved by the Constitution Subcommittee and is currently on the Judiciary Committee calendar.

SUPREME COURT AND THE FIRST AMENDMENT

As I mentioned earlier, the Supreme Court has sharply altered the traditional understanding of the first amendment with regard to the permissibility of voluntary and appropriate school devotions. In the mid-1960's and again just a few weeks ago, the Court eliminated prayer from the classroom on the basis that it was inconsistent with the Constitution's prohibition against laws respecting an establishment of religion. These cases overturned the laws of at least 41 States. The most recent Jaffree case was particularly objectionable because it outlawed silent prayer and meditation due to the perception of a majority of the Justices that the State of Alabama had evinced an intent to endorse religion. Leaving aside for a moment the question of how a voluntary moment of silence endorses or offends any religious sentiment, a reading of the history of the Constitution clarifies that the framers would not have considered such harmless activities establishments of religion.

The author of the first amendment, himself, on the convention floor stated his intent for the establishment clause. He said:

The meaning of the words [is] that Congress should not establish a religion and enforce the observation of it by law . . . [Congress might have power] to establish a national religion; to prevent these effects . . . the amendment was intended. Twice in this brief commentary Madison emphasized that the intent of the establishment clause was to prevent Congress from elevating a single denomination to the status of a national church. The colonists had suffered at the hands of a state church in the old country and wanted to preclude religious prosecutions at the hands of an established national church. Justice Story summarized well the meaning given to the establishment clause for nearly one hundred seventy five years: The real object of the First Amendment . . . was to prevent any national ecclesiastical establishment which would give to an hierarchy the exclusive patronage of the national government.

Animated by this policy, our national heritage developed with profound religious overtones. Besides school prayer, our coinage carries the motto: "In God We Trust." Our national anthem speaks of our trust in Diety. Our pledge of allegiance avows that we are a nation "under God." On our monument walls are engraved Abraham Lincoln's Second Inaugural Address of deep theological content. Our military and Congress are served by chaplains. Our most important public meetings, including the sessions of both the House of Representatives and the Senate and, ironically, the Supreme Court, begin with an invocation of the protections of the Almighty. These venerable customs have not become suddenly inconsistent with the first amendment, nor are they harbingers of a single sanctioned national orthodoxy. They are simply the perpetuation of a rich national tradition and heritage which antedates even the Constitution.

In the wake of misguided Supreme Court interpretations, however, this long-standing concept of the establishment clause has been altered. The First Congress's language has been read not only to prohibit the Federal Government from according preferences to religious denominations but further to erect a "wall of separation" between church and State. The original intent of the first amendment that Congress be neutral between competing religious views has been transformed into the notion of neutrality between religion and irreligion.

Given the integral role of compulsory public education in the development of the values of the citizenry, I am convinced—and I believe that the great majority of Americans would share this view—that the Supreme Court's erroneous interpretations have created a regime in which the State has become antagonistic, even hostile, toward religious views. The average child spends 6 or 7 hours every day in the classroom during which his intellectual, physical, emotional, and cultural development are encouraged. Yet even a moment of silent prayerful meditation or reflection is considered unconstitutional. The student is educated in political theory and sex education, music and art, baseball and football, hygiene and home economics; indeed, he is instructed in virtually everything conducive to a constructive character, yet even a moment of silent prayer may not be part of a balanced school day. President George Washington's Farewell Address contained insightful guidance on this point:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensible supports. . . . Whatever may be conceded to the influence of refined education on the minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

The current Court's policy nonetheless mocks the intent of the framers of the first amendment. The establishment clause was simply not drafted to bar appropriate accommodations between government and religion in general. In the name of honoring the intent of the authors of the Constitution and preserving the religious prerogatives of school students and all Americans, the Congress should act to correct the Supreme Court's misconceived rulings.

ARTICLE III, SECTION 2

The language of article III itself seems to counsel Congress to use caution with regard to the Supreme Court's jurisdiction. Section 2 of article III lists the Supreme Court's original jurisdiction and then proceeds:

In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, with such exceptions, and under such regulations as the Congress shall make.

This language already seems to imply some limitations in Congress' authority. Congress could not, for instance, withdraw all appellate jurisdiction of the Supreme Court because in

that instance it would not be making an exception at all. Nor could Congress make a sweeping withdrawal of all jurisdiction to review cases dealing with the Bill of Rights. As the word "exception" implies, Congress' power relative to the entire corpus of the Court's appellate jurisdiction is limited to making rare and narrow diversions from the normal course of permitting the Court to hear appeals.

At this point, it is important as well to understand the distinction between article III, section 1, which gives Congress authority to create "from time to time * * * inferior [Federal] courts" and article III, section 2, which deals with the appellate jurisdiction of the Supreme Court. As the Supreme Court has repeatedly reaffirmed, the power to create or dissolve lower Federal courts inlcudes the power to define, limit, or withdraw lower Federal court jurisdiction. For instance, Chief Justice Earl Warren stated:

> Congress might appropriately limit litigation . . . pursuant to its constitutional authority under Article III. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331 (1966).

Chief Justice Stone stated the same principle in these words:

> The Congressional power to ordain and establish inferior courts includes the power of investing them with jurisdiction . . . and of withholding jurisdiction. *Yakus* v. *U.S.*, 321 U.S. 414 (1944).

Finally, the Supreme Court has stated more recently that:

> . . . the Constitution . . . leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress. *Allen* v. *McCurry*, 101 S. Crt. 411, 419 (1980).

Thus, withdrawals of jurisdiction like the Norris-LaGuardia Act governing labor disputes and the Tax Injunction Act governing challenges to taxing authority are enactments under article III, section 1, rather than section 2 which governs the Supreme Court's power to hear appeals.

The realization of the great responsibility placed upon Congress to shape Federal jurisdiction has always inspired careful and considered conduct. For precisely the reasons mentioned by John Rutledge of South Carolina in the 1787 Convention—that the Supreme Court assures the superiority and uniformity of constitutional policy—Congress has been and remains very cautious about using the exceptions power. This remains an uppermost consideration in my mind and in the views of most Senators as far as I can tell. This is entirely appropriate and in complete accord with the narrow applicability of the exceptions power.

Although Congress possesses a power, prudence often counsels against its use. For example, Congress has authority to plunge the Nation into a global war, but prudence counsels against precipitous use of the war declaration power. Similarly Congress has been appropriately reticent to wield its article III, section 2 power. That reticence should only be overridden when the dislocation associated with a focused restructuring of court remedies is far outweighed by the dislocations occasioned by an errant judicial policy. For instance, I might have recommended its use in the wake of the Dred Scott or Plessey versus Ferguson cases of another era. In any event the exceptions power has been and should be reserved for exceptional circumstances. (See 96 F.R.D. 245 (1982)) Alexander Hamilton wrote that the exceptions clause is a salutory means "to obviate and remove" the "inconveniences" arising from injudicious use of judicial power.

PRUDENTIAL RESERVATIONS ABOUT THIS AMENDMENT

As I have mentioned several times, the language of the Constitution suggests that Congress' article III, section 2 power ought to be used sparingly, perhaps only in "exceptional" circumstances. This requires that we make clear delinations between legal issues and policy considerations. As a matter of law, the Constitution grants Congress some authority to regulate Federal court jurisdiction, but as a matter of policy, this public school prayer issue does not, in my view, warrant the exercise of this powerful check on the Court.

I continue to feel that the Court should receive the opportunity to reconsider this error. Withdrawing jurisdiction from the Supreme Court will deny the Court the opportunity to hear other cases and thus reverse its error. Given the narrow margins of decision, the shifting positions of some Justices, and the fine distinctions in some of the recent religion case holdings, the Court should be afforded the opportunity to reconsider its recent opinions. The most efficient and appropriate way to correct a Supreme Court error is, of course, for the Court to return in a later case to a policy based more solidly on the language of the Constitution and the intent of its authors. This would be precluded by S. 47.

Another consideration counselling against withdrawal of jurisdiction is that the Court's most recent misguided pronouncements remain as binding interpretations of the Constitution. State Supreme Courts which would, in the absence of an appeal to the Federal judicial system, serve as courts of final resort would presumably continue to apply erroneous doctrines as the last authoritative expression of the Supreme Court on that subject. Some might argue that State courts could depart from Supreme Court rulings in the absence of an appeal, but there is no guarantee that those departures would return to an apt reading of the Constitution. Some State courts might stray even further from the moorings of the Constitution.

Finally, and perhaps most important, Congress has at its immediate disposal a corrective which does not suffer from the uncertainties of a jurisdiction withdrawal. In 1982, President Reagan recommended the adoption of a constitutional amendment on the school prayer issue. Hearings were held in both the 97th and 98th Congresses on his proposal. Indeed the Senate voted last Congress in favor of the amendment, but not by the two-thirds margin required for approval. The detailed consideration of this proposal led to the development of an alternative constitutional amendment proposal in 1983 concerning silent prayer or meditation. This was more than a year before the Jaffree decision which struck down Alabama's statute permitting a moment of silent prayer or meditation in public schools. This constitutional amendment proposal would have the well-defined effect of reversing the Jaffree ruling and restoring the proper meaning of the first amendment establishment clause.

This proposal, Senate Joint Resolution 2 in the current Congress, has already had the benefit of another hearing which further focuses the intent of its drafters and clarifies our intent to redirect the Court's establishment clause doctrines. Senate Joint Resolution 2 was approved by the Constitution Subcommittee earlier this year by a vote of 4 to 1. It is now on the Senate Judiciary Committee calendar where it should be considered in an orderly fashion within the next few weeks. This means that the Senate, if it so desired, could have Senate Joint Resolution 2 before it in the very near future.

The language and legislative history of Senate Joint Resolution 2 are clear and certain. This is a remedy for the missteps of the Supreme Court which does not depend on what a variety of different State courts might or might not do if presented with a case that allows them the leeway to enunciate a new policy for their State concerning religious liberties.

Given the ready availability of a superior correction and the inherent uncertainties in the withdrawal of Supreme Court jurisdiction, I would urge my colleagues to channel their efforts into that better avenue. The Supreme Court's misinterpretations of the establishment clause must be set straight. The Congress has the authority to restrict the Court's jurisdiction. But restricting the appellate jurisdiction of the Supreme Court is not in this case the best way to achieve the Senate's objective. Accordingly, I commend to the Senate Joint Resolution 2 as the better way to achieve the meritorious objectives of this amendment.

CONCLUSION

In light of these considerations, I must reluctantly vote to table S. 47. The means it employs to reach the admirable objective of correcting the Court's school prayer policy could have counterproductive consequences. Congress must exercize its authority more judiciously and not in a manner likely to be rejected by the Supreme Court itself.

Mr. THURMOND. Mr. President, I strongly support S. 47, the proposed Voluntary School Prayer Act of 1985. This important legislation would restore to our Nation's children the right to pray voluntarily in the public schools—a right which was freely exercised under our Constitution until the 1960's when the Supreme Court ruled to the contrary.

Mr. President, in the course of its history, our Nation clearly has been guided by a visible faith in God. In the Declaration of Independence our forefathers wrote:

> We hold these Truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.

In crafting the Constitution, our Founding Fathers sought, through the free exercise clause of the first amendment, to ensure that all Americans were free to worship God without Government interference or restraint. At the same time, they sought, through the establishment clause, to prevent what had originally caused many colonial Americans to emigrate to this country—an official, state religion. In their wisdom, the Founding Fathers recognized that true religious liberty precludes the Government from both forcing and preventing worship.

Until 1962, the establishment clause of the first amendment was generally understood only to prohibit the Federal Government from officially approving, or holding in special favor, any particular religious faith or denomination. I believe that this was the clear intention of the Founding Fathers.

In 1962, however, the Supreme Court ruled that devotional activities in the public schools is a violation of the first amendment, regardless of whether student participation is compulsory or voluntary.

Mr. President, we, as a nation, continue to recognize the Deity in our Pledge of Allegiance by affirming that we are a nation "under God," The coins in our pockets are inscribed with the motto, "In God We Trust." In this body, we begin our workday with the comfort and stimulus of voluntary group prayer—such a practice has been constitutionally upheld by the Supreme Court. It is absurd that the opportunity for the same beneficial experience is denied to the boys and girls who attend public schools. This situation simply does not comport with the intentions of the framers of the Constitution and is, in fact, antithetical to the rights of our youngest citizens to freely exercise their respective religions. It should be changed, without further delay, by appropriate means.

That is why I support this legislation, which would deny the Supreme Court and the Federal district courts jurisdiction in cases involving voluntary school prayer. I believe that Congress is explicitly given the authority to take this action by article III, section 2 of the Constitution. I am hopeful that this legislation will be enacted and once again our children will have the freedom to exercise in public schools what I believe to be a primary guarantee to all citizens under the Constitution—the right to pray voluntarily.

Mr. DIXON. Mr. President, S. 47 would prohibit the Federal courts, including the Supreme Court, from jurisdiction over all future cases arising from State laws or practices relating to "voluntary prayer, bible reading, or religious meetings in public schools or public buildings."

I am opposed to this court-stripping proposal.

As you know, in 1984, I opposed the administration's constitutional amendment authorizing audible, vocal prayer in our public schools. However, as an alternative to that proposal, I offered a silent prayer or silent reflection amendment.

The Dixon silent prayer or silent reflection amendment stated the following:

> Nothing in this Constitution shall be construed to prohibit individual or group silent prayer or silent reflection in public schools. No person shall be required by the United States or by any State to participate in such prayer or reflection. Neither the United States nor any State shall compose any prayer or encourage any particular form of prayer or reflection.

In addition, you may remember that the Dixon amendment would have permitted equal access to public schools by student voluntary religious groups. The provision was as follows:

> The authorization by the United States or any State of equal access to the use of public facilities by student voluntary religious groups shall not constitute an establishment of religion.

As you know, the Dixon amendment and the administration's proposal were rejected by the Senate. However, an equal access provision was enacted in the Education for Economic Security Act, Public Law 98-377, which I supported.

I believe that the 1984 Dixon silent prayer or silent reflection proposal was and is the correct approach for this Congress to take. As a lawyer, I hesitate to limit the Federal courts, including the Supreme Court, from reviewing a subject as important to this country as voluntary prayer in and equal access to our public schools.

Senator HATCH has proposed Senate Joint Resolution 2 which is currently pending in the Senate Judiciary Committee. It is very similar to the Dixon silent prayer or silent reflection proposal of 1984. Senate Joint Resolution 2 is a measure that I could support.

Mr. President, I will vote "yes" on a motion to table S. 47.

Mr. KENNEDY. Mr. President, I am strongly opposed to this legislation which would strip the Supreme Court of jurisdiction to review any State action relating to voluntary prayer in public schools.

It is an unconstitutional and unwarranted attack on the Supreme Court of the United States. The fundamental question we are facing in the Senate has nothing to do with the issue of school prayer. The sole question is whether the proper way for Congress to address the issue of school prayer is to enact legislation stripping the Supreme Court of jurisdiction to hear and decide cases on this issue. That is the wrong way to deal with the issue of school prayer, and I hope that the Senate will have the wisdom to reject this extremist attempt to deny the Supreme Court an important part of its constitutional jurisdiction.

This proposal is extraordinarily significant. It strikes at the core of the separation of powers enshrined in our Constitution. It is ironic that as we approach the bicentennial anniversary of the adoption of the U.S. Constitution on September 17, 1787, we are debating legislation that would undermine the carefully crafted checks and balances that are the genius of our Constitution.

This legislation would remove from the Supreme Court its constitutional authority to determine violations of the establishment clause. In place of the determination of fundamental constitutional protections for all U.S. citizens by one judicial body, the Supreme Court, this bill would substitute 50 different judgments by State courts on the subject of religious liberty, the cornerstone of our democracy. This result is anatheme to our constitutional form of Government and directly contrary to the intent of the framers.

Explaining the importance of the Federal judiciary, Alexander Hamilton wrote in the Federalist No. 80:

> . . . there ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them? The States, by the plan of the convention, are prohibited from doing a variety of things, some of which are incompatible with the interest of the Union and others with the principles of good government. . . . No man of sense will believe that such prohibitions would be scrupulously regarded without some effectual power in the govern-

ment to restrain or correct the infractions of them. This power must either be a direct negative on the State laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former, and I presume will be most agreeable to the States.

. . . If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradition and confusion can proceed.

The judicial review by the Supreme Court of all fundamental constitutional issues envisioned by the framers has been the rule of law for nearly 200 years.

In 1961, in his first formal address as Attorney General of the United States, Robert Kennedy emphasized America's historic debt to law as the source of freedom:

He said:

Law is the link [to] freedom, we know that it is law which creates order out of chaos. And we know that law is the glue which holds civilization together.

The bill now before us is an attempt to break that bond. It is an attack on our basic freedoms. It is an insult to the Supreme Court and an affront to the Constitution. What is at stake is the preservation of the rule of law, the foundation on which all our other liberties rest.

There is no sound precedent for this scheme to abolish Supreme Court review of sensitive contitutional questions.

In the frequently cited case of ex parte McCardle in 1868, the Supreme Court acquiesced in congressional action removing one avenue of review in habeas corpus cases. But this legislation merely repealed a specific 1867 statute authorizing certain habeas corpus claims of unconstitutional imprisonment arising out of the Civil War to be appealed to the Supreme Court. As the Court made clear in its subsequent decision in ex parte Yerger in 1869, Congress had left intact the broad authority of the Supreme Court under the Judiciary Act of 1789 to review lower decisions on habeas corpus.

In a number of other circumstances, Congress has specified the particular methods by which judicial review can be sought. But Congress has never withdrawn the jurisdiction of the Supreme Court to decide constitutional issues.

The authority of the Supreme Court to make the final determination of constitutional issues is vital to our constitutional system. The supremacy clause of article VI of the Constitution states:

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.

The framers recognized that a single supreme judicial body with authority to review State laws was essential to effectuate the supremacy of the national Constitution.

In the Federalist No. 22, Hamilton writes:

A circumstance which crowns the defects of the Confederation remains yet to be mentioned—the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation. . . . To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one SUPREME TRIBUNAL. . . . If there is in each State a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts. There are endless diversities in the opinions of men. We often see not only different courts but the judges of the same court differing from each other. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence and authorized to settle and declare in the last resort a uniform rule of civil justice.

This is the more necessary where the frame of the government is so compounded that the laws of the whole are in danger of being contravened by the laws of the parts. In this case, if the particular tribunals are vested with a right of ultimate jurisdiction, besides the contradictions to be expected from difference of opinion there will be much to fear from the bias of local views and prejudices and from the interference of local regulations. As often as such an interference was to happen, there would be reason to apprehend that the provisions of the particular laws might be preferred to those of the general laws; from the deference with which men in office naturally look up to that authority to which they owe their official existence.

As Hamilton observed, a constitutional right without a strong, independent judiciary to safeguard it is meaningless. Our constitutional freedoms have endured for nearly 200 years because the integrity of the checks and balances by the framers enshrined in the Constitution has not been undermined. Past efforts such as this proposal to overturn unpopular decisions of the Supreme Court by removing its jurisdiction in certain types of cases have been rebuffed. These schemes have failed because Congress and the American people saw the true danger in such schemes. If we strike at the Supreme Court, we strike at the heart of the Constitution and the rule of law in America. That is why the HELMS' court-stripping bill must be defeated.

Mr. LEVIN. Mr. President, I wll vote to table S. 47, the proposed Voluntary School Prayer Act of 1985. The issue before us is not whether students should be allowed to pray in public schools. The issue before us is whether the Congress should interfere with the balance of power established in the Constitution of the United States. When similar legislation was considered by the Senate in 1982 I voiced my strong opposition to any bill that would strip the Federal courts of jurisdiction to hear cases concerning constitutional issues. I said then that if the Senate approved the pending amendment stripping the Federal courts of jurisdiction over voluntary school prayer we would "* * * undermine the very integrity of the Constitution."

Legal scholars have long debated the question of whether article III of the Constitution grants the Congress authority to determine the jurisdiction of the Federal courts over constitutional issues such as whether prayer in public schools is permissible under the first amendment. Even assuming the Congress does have such constitutional authority, it would establish a dangerous precedent to withdraw jurisdiction from the Federal courts where we disagree wtih the Supreme Court's interpretation of the Consitution. If the Congress strips the Federal courts of jurisdiction over school prayer cases because we disagree with the Court's interpretation of the first amendment, then we open the door to a never-ending congressional attack on the U.S. Constitution.

Additionally, removing the jurisdiction of the Federal courts to review State court decisions interpreting the U.S. Constitution will create disparity between the States and our system of a Federal Government will be placed in jeopardy. Because the lower Federal courts and ultimately the Supreme Court will no longer have authority to review State court decisions interpreting the Constitution, the Constitution will mean something different in each of the 50 States. For example, the first amendment, which has always been considered to provide the most important freedoms and rights to Americans, will no longer provide the same protections to all Americans. Instead, the protections provided under the first amendment will vary depending on where we live. I do not believe this is what the framers of the Constitution had in mind when they provided in article III, section 1 that "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 establish," or when they provided in article III, section 2 that the Congress may make ex-

ceptions and regulations to the appellate jurisdiction of the Supreme Court. Congressional authority to limit the jurisdiction of the Federal courts under article III must be balanced against other provisions in the Constitution such as the supremacy clause. Without the Supreme Court to act as the final arbiter of the meaning of the Constitution, the supremacy clause has no force.

Mr. President, I have supported constitutional and reasonable legislative efforts to address the issue of the rights of public school students to engage in religious activities. I voted for final passage of the Equal Access Act, which requires that whenever a public school permits noncurriculum-related student groups to meet on school premises during noninstructional time, it must provide equal access to school facilities to other groups regardless of the religious, political, philosophical, or other content of the speech at such meetings. However, I cannot support S. 47 because it will undermine the U.S. Constitution which is the foundation of our system of government.

Mr. DENTON. Mr. President, I rise in strong support of S. 47. As a matter of both principle and law, I believe that the Congress must act under article III of the Constitution to correct the injustice created by the Supreme Court's continuing misinterpretation of the first amendment. The Court's recent Wallace versus Jaffree decision outlawing silent prayer in public schools illustrates the need for action.

Mr. President, I have listened with a great sense of discomfort as several of my colleagues have presented their arguments in opposition to the bill. They have contended that the exceptions clause cannot be used to deprive the Supreme Court of appellate jurisdiction in cases involving fundamental constitutional rights. No such limitation is found, however, in the language of the clause nor in the Supreme Court's interpretations of it.

The specious character of the argument is illustrated best in the matter of school prayer. The establishment clause was intended to reserve to the States the question of the establishment of religion. It is only in this century that the Court has expanded its own power to regulate the conduct of the States with respect to the establishment of religion. In other words, the Court interpreted the 1st and 14th amendments in a manner not envisioned by the framers, and now Congress is asked to accept any Court interpretation, no matter how outlandish, as a fundamental constitutional guarantee.

Mr. President, it also bothers me to hear my colleagues warn that "the Constitution will die" if we limit the jurisdiction of the Federal courts. The use of the article III power to curb a wayward judicial branch would restore vitality to the notion that the elected representatives of the people, not judicial appointees, have the right and responsibility to interpret the Constitution in a reasonable and just manner. Many of my colleagues appear to avoid the underlying issue by hiding behind timid interpretations of congressional and Executive power. Those of us who favor restoration of the right to voluntary prayer in public schools will not fall for that ruse.

I urge all of my colleagues who support voluntary prayer to support S. 47.

Mr. BAUCUS. Mr. President, today I rise in strong opposition to S. 47.

As everyone in this body knows, S. 47 is designed to remove Supreme Court and lower Federal court jurisdiction over State cases involving voluntary school prayer.

The sponsors of S. 47 say it is simply a school prayer bill. They say it is only meant to correct incorrect Federal court decisions on the meaning of the Constitution's establishment clause.

But, Mr. President, S. 47 is something far more profound than that. In reality, it is a dangerous and fundamental assault on the independence of of Federal judiciary and the continued validity of the doctrine of separation of powers. It is a legislative attack that threatens to undermine the vital role the courts have traditionally played in the American system of constitutional government.

Mr. President, I began my public service in Congress at a time when another branch of Government—the Presidency—was embroiled in a serious crisis. As a member of the so-called "Watergate class" of 1974, I am proud to have participated in fashioning the sweeping post-Watergate reforms that included the Ethics in Government Act and the campaign finance laws.

But the real legacy of Watergate is that it demonstrated to all of us the wisdom of the framers of the Constitution. We saw the strength of a system of checks and balances that provided for a Presidential impeachment hearing in the House of Representatives. We witnessed the need for the total independence of the Federal judiciary that enabled it to reach its landmark decision in United States versus Nixon.

In sum, we saw that our Government could fully respond to a crisis of major proportions within the framework provided by the Constitution.

Today, people no longer seem as concerned by the threat of an "imperial Presidency." Instead, many Americans are concerned by the threat of an "imperial judiciary." They see the courts as exceeding their constitutional authority in numerous instances:

Courts have imposed mandatory busing orders on school systems.

Courts have stepped in to prevent States from requiring prayer in schools and from prohibiting abortions.

Courts have taken over the administration of State prisons and mental institutions.

I do not wish to argue about whether this picture of the judiciary is an accurate one. I am personally troubled by those judicial decisions that do not carefully and narrowly construe legislative intent. I am equally troubled by those decisions that impose solutions that look more like statutes than case law.

But I am here today because I believe there is a growing movement in this country to address perceived judicial abuses in a manner that is far more damaging than the abuses themselves. Members of the "new right" are proposing solutions, like S. 47, that present a much greater threat to our system of Government than any potential threat we face from our courts.

During the Watergate period, Congress and the courts were very careful to proceed within their constitutionally prescribed roles. Today, those in Congress attacking the "imperial judiciary" are paying little attention to the letter or spirit of the Constitution. They are asking this Nation to embrace solutions that would seriously undermine the essential function of the courts in the American system of Government.

OBJECTIVES OF COURTSTRIPPING PROPOSALS

The framers of the Constitution designed a judicial branch that could protect the integrity of the Constitution. They also designed a judiciary that could assure that individual liberties would not be abridged. Alexander Hamilton stated in Federalist Paper 78 that it is the duty of the courts "To declare all acts contrary to the manifest tenor of the Constitution void. Without this," he observed, "All reservations of particular rights or privileges would amount to nothing."

This concept of the judicial branch was reaffirmed and expanded in Marbury versus Madison. The decision declared the basic principle that the Federal judiciary is supreme in the exposition of the law of the Constitution. One hundred and fifty years later, in Cooper versus Aaron, the court observed that the principle of Marbury:

> Has ever since been respected by this court and the country as a permanent and indispensable feature of our constitutional system.

Until recently, the role of the Supreme Court as the final arbiter of the terms of the Constitution has not been seriously challenged. Throughout our Nation's history it has been recognized that an interpretation of the Constitution by the Supreme Court could only be altered by the Court itself or by a constitutional amendment.

On four different occasions during the past 200 years, our Nation has responded to controversial Supreme Court decisions by using the constitutional amendment process. Even in the wake of the infamous Dred Scott decision, which held that black Americans were not citizens, it was recognized that the proper way to alter the decision was by constitutional amendment. Abraham Lincoln, who profoundly disagreed with the ruling in Dred Scott, nevertheless emphasized the need for a stable constitutional structure. He commented:

> We think (the Supreme Court's) decisions on constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution.

But today, several single-issue constituencies have failed to mobilize sufficient support to pass constitutional amendments to overturn constitutional decisions with which they disagree. They have responded to this failure by advocating legislative measures, like S. 47, which would effectively "end-run" the requirements of a constitutional amendment.

Their proposals would permit Congress to circumvent Supreme Court decisions by simple statute. They would have Congress respond to a court ruling it disagreed with by stripping the courts of the power to hear that category of cases. And it is this constitutional shortcut that threatens to undermine the constitutional role of the judicial branch.

IMPACT ON THE CONSTITUTION

The proponents of S. 47 and other courtstripping bills argue that the exceptions clause of article III of the Constitution provides Congress with absolute authority to carve out holes in the Supreme Court's appellate jurisdiction. Perhaps that argument is consistent with the specific letter of the Constitution. But it is clearly inconsistent with a logical constitutional structure and the spirit of that document.

Under the analysis offered by the proponents of S. 47, Congress' power over the Supreme Court is without limit. According to their theory, Congress could dismantle any part of the Constitution it wanted and paralyze the Court from reviewing the conduct.

And that's what's most disturbing about court-stripping proposals. They would allow the Supreme Court to enforce only those constitutional guarantees that a majority in Congress said it could. They would thereby entrust to the most political branch of Government the responsibility for deciding which parts of the Constitution are of fundamental importance to all Americans and which are not.

Senator BARRY GOLDWATER, who is also an active opponent of court-stripping, has commented on this problem:

> What particularly troubles me about trying to override constitutional decisions of the Supreme Court by a simple bill is that I see no limit to the practice. There is no clear and coherent standard to define why we shall control the Court in one area but not another. The only criterion seems to be that whenever a momentary majority can be brought together in disagreement with a judicial action, it is fitting to control the Federal courts . . .

Mr. President, I share Senator GOLDWATER's concerns. I can't believe that this result was intended by the framers when they included the exceptions clause in article III.

We should also consider another consequence of court-stripping proposals. They would not remove constitutional issues from the Supreme Court and give them to Congress for interpretation and enforcement. Instead, they would turn those issues over to the court systems of 50 separate States. They would throw the principle of uniform constitutional interpretation out the window—and with it, the ability of the Constitution to serve as a meaningful national document.

We are one Nation with one Constitution. The first amendment should mean the same thing in Montana as it does in North Carolina. Our constitutional protections help to bind us a people.

Jurisdictional proposals, like S. 47, would allow Congress to undo that common bond by simple statute. Again, I can't believe the framers intended to give Congress that kind of power to undermine the spirit of the Constitution.

IMPACT ON THE COURTS

In the face of these legitimate and seemingly overwhelming constitutional concerns, court-stripping bills like S. 47 are still being actively considered in Congress. This is, in large part, because some Members of Congress believe the courts have blatantly violated their constitutional authority. They see these bills as part of an effort to get the courts back into line and encourage them to engage in more "traditional" and "stable" conduct.

However, it is difficult to imagine any set of proposals more inconsistent with the goals of stability or certainty in our judicial system than the court-stripping bills. No one, not even their proponents, really knows precisely what impact they would have on a specific body of law.

These bills could have precisely the opposite effect from what they are intended to have. For instance, withdrawing Federal court jurisdiction over school prayer would not necessarily return prayer to the public schools. In fact, it would be more likely to elevate the last Supreme Court decisions on the establishment clause to the "permanent" law of the land—to freeze the Court's most recent rulings for all time.

It is true, of course, that the Supreme Court would no longer be able to enforce its previous decisions. And the sponsors of these bills are counting on the State courts to jump headlong into the breach. The jurisdiction proposals are open invitations to State court judges to alter or reverse controlling Supreme Court precedent; otherwise, the bills would have no substantive impact.

The Conference of State Court Chief Justices has commented critically on this aspect of jurisdiction removal. Their 1982 resolution opposing court-stripping observed in part:

> These proposed statutes give the appearance of proceeding from the premise that State court judges will not honor their oath to obey the U.S. Constitution, nor their obligations to give full force to controlling Supreme Court precedents.

The simple fact is that court-stripping proposals like S. 47 would remove Federal court jurisdiction without offering State court judges any real indication of what standard they should follow in the future. Should they continue to feel bound by Supreme Court precedent, or should they accept the finding of the national Congress that the Supreme Court's rulings were incorrect?

I find it ironic that those who have been complaining the most about judicial usurpation of the legislative function are now promoting legislative solutions, devoid of any substantive direction, which would invite increased activism and disparate legal rulings.

IMPACT ON CONGRESS

The impact of jurisdiction bills on the Constitution and the judicial system has been underestimated. The same is true of the impact of these bills on Congress itself. If Congress decides to enter this arena, the pressure to respond to a wider range of constitutional rulings will increase. Every constituency that feels victimized by an adverse constitutional ruling will come running to Congress for a jurisdiction withdrawal bill.

The proponents of S. 47 and other court-stripping bills suggest these fears of congressional abuse are exaggerated. They argue that the jurisdiction bills each represent a narrow "surgical" removal of a limited area of jurisdiction.

But if Congress can remove Supreme Court jurisdiction over school prayer cases, why couldn't it pass stringent gun control legislation and include a provision to prevent Supreme Court review of any case involving the right to bear arms? Why couldn't Congress impose onerous and discriminatory taxes and include a provision to prevent Supreme Court review of the constitutionality of all Federal taxation

cases? Why couldn't Congress attempt to totally preempt the States from engaging in conduct traditionally within their power and remove Supreme Court jurisdiction over the 10th amendment?

These hypotheticals are not far-fetched. They are the reasonable and logical extension of the strategy put forward in S. 47. And they should be carefully considered before Congress sets the precedent of court-stripping.

The question presented by S. 47 and other court-stripping proposals is simply this: Should we adopt measures that violate the spirit of the Constitution in order to address today's controversial political issues?

That was the same question that faced Congress in 1937 when President Roosevelt proposed to increase the size of the Supreme Court.

President Roosevelt was deeply troubled by a series of Supreme Court decisions that threatened the success of his national recovery program. He hoped to alter the composition of the Court so that the Court would uphold the constitutionality of his economic plan.

The people and Congress rose up and resoundingly defeated that plan. The American public and a majority of its representatives saw the "court-packing" plan for what it was—a significant threat to the independence of the judicial branch.

As we consider the court-stripping bill before us now, we should keep in mind the wise words of those who successfully defended the Supreme Court in 1937. Senator Burton K. Wheeler was one of those defenders, and his words apply with equal force today:

> So I say it is morally wrong to do by indirection what cannot be done by direction. It is morally wrong to change the Constitution by coercive interpretation. . . . Of course, Mr. President, there have been abuses in the Court. I have been one who has disagreed with them, and I expect to disagree with them again, but I am unwilling on the basis of some specious argument or of some subterfuge that defies the spirit of the Constitution to participate in setting one of the most dangerous precedents that has ever been conceived by this Congress or any other. . . .

Mr. GRASSLEY. Mr. President, I want to thank Senator HELMS for pursuing the issue of voluntary prayer in public schools through statutory modifications. I fully support the right of citizens to pray in the public schools.

I have cosponsored a constitutional amendment to allow this right. However, in the past, both measures have been unsuccessful.

I, generally, oppose court stripping legislation. However, since this may be my only opportunity to vote on the exercise of the rights to pray in school, I must vote against the motion to table S. 47 so that the bill can proceed and be heard on the merits.

Mr. KERRY. Mr. President, 200 years ago, the Founding Fathers of this Nation set forth principles upon which our democracy is founded. One of the most important and fundamental of those principles, embodied in our Constitution, is the system of checks and balances between the executive, legislative, and judicial branches of Government. It is our system of checks and balances which has made American democracy unique in all the world, and which has provided us with a firm protection against tyranny and the abuse of power. We need only look back as far as the events of Watergate to see how effectively this system has worked to protect American democracy.

Today, Mr. President, our system of checks and balances and the integrity of our courts are under attack. The legislation which is proposed today would strip the U.S. Supreme Court, and the Federal district courts, of any jurisdiction over cases and questions involving so-called voluntary school prayer. Of course, the effects of this legislation would not be limited to cases involving school prayer. This legislation is an assault on the integrity of our court system, and an assault on the fundamental principles of American democracy.

The sponsors of this legislation have labeled their bill the "Voluntary School Prayer Act of 1985." A better, and more accurate, title would be the "Anti-Judiciary Act of 1985." What do the sponsors of this legislation have against our judiciary? The Constitution already provides a mechanism for the changes they seek. That procedure requires a two-thirds vote of approval by the Congress, and ratification by the States. The sponsors of this legislation have not followed that constitutional procedure. Instead, they have tried to sneak around the back way and pass this court-stripping bill under the guise of a so-called school prayer amendment, requiring only a simple majority vote. Their real purpose of this bill is not to permit Americans to pray—they can already do that without the interference of government—but its purpose is to strip the courts jurisdiction over all issues where their social agenda does not coincide with the U.S. Constitution.

Mr. President, if we were to pass this so-called school prayer bill today, tomorrow we would see the far right introducing legislation to strip the courts of jurisdiction over many other issues. This bill is the first step down a road that leads to the erosion and eventual destruction of the democratic values which have made this Nation great.

Mr. President, one other point needs to be mentioned in this discussion. Over 200 years ago, Thomas Jefferson wrote that the American system of democracy is based upon a "wall of separation between church and state." For two centuries that wall has stood firm, upholding the rights of freedom and religious liberty, free from governmental interference, that all Americans enjoy. Today, the far right seeks to tear down the wall of separation and to attack the principles which Thomas Jefferson espoused. They seek to extend governmental intrusion into the most private and sensitive areas of our lives, by forcing so-called voluntary school prayer into the public school classrooms of our children. Mr. President, I support prayer and the constitutional right of every American to private prayer. But support the bill is not the way to address private prayer. Sometimes the proponents of this legislation are carried away with personal belief that America is a Christian nation. They would like to do what is expressly forbidden by the establishment clause of the U.S. Constitution—that is, to establish an official religion in this country. This so-called voluntary school prayer amendment is only a first step in that direction.

Mr. President, I hope the legislation before us today, or measures like it, may never become law. But what concerns me even more is the fact that some are willing to erode our Constitution, our freedoms, and our democratic system. Perhaps at such times we would do well to remember the words of a great American jurist, Judge Learned Hand:

> Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it.

Mr. MATHIAS. Mr. President, the bill before the Senate today, S. 47, is simply the latest step in a sustained effort during the last several Congresses to restrict the remedial powers or the jurisdiction of Federal courts.

I have opposed such jurisdictional and remedial limitations in the past; I oppose such limitations today, and I will continue to oppose them 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 in the case of Chisholm against Georgia. That decision raised a hue and cry of 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 1798, but it was done according to the procedures specified in article V of the Constitution. It was overturned by the adoption of the 11th amendment to the Constitution. Since then literally hundreds of legislative proposals have been introduced in Congress and in Senate legislatures to counteract controversial court decisions or to preclude unwanted judicial pronouncements. Often such proposals are made through the constitutionally proscribed method under article V. All too frequently however, proponents of a change in constitutional law try to achieve the effect of a constitutional amendment through the back door. S. 47 is such a back door approach.

In hearings before the subcommittees of both House and Senate Judiciary Committees during the 97th Congress, the overwhelming majority of legal scholars urged Congress not to enact any of these court jurisdiction proposals. The same arguments apply to this bill.

S. 47 is objectionable for many reasons, but one of its flaws stands out. It is wholly inconsistent with the clear and unambiguous language of article V of the Constitution which sets forth the constitutionally permissible means of amending our organic law.

To be sure, the Founding Fathers realized that constitutional changes would be needed periodically. 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, in the words of James Madison:

> Guards equally against that extreme facility, which would render the 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—in this case, a change in the establishment clause of the first amendment—sought by the proponents of S. 47. But it would be a mistake to substitute congressional legislation for the carefully crafted procedures set forth in article V.

I oppose the substantive change that would be accomplished by enactment of S. 47. The goal of this legislation is to disrupt the carefully crafted relationship between church and state that has served our Nation well for nearly two centuries. By separating government and religion, we have bolstered the legitimacy of civil authority while we have nurtured an unparalleled diversity of religious expression among our people. When proposals to weaken the establishment clause of the first amendment have been presented in the proper form, as amendments to the Constitution, I have opposed them. In this case, however, the proposal before us is fatally flawed in form as well as in content, because it attempts to alter the commands of the Constitution by simple statute.

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.

Mr. SYMMS. Mr. President, I am pleased to support S. 47, the school prayer legislation offered by my friend, Senator HELMS. The essence of this bill is to remove the further consideration of religious matters from the purview of Federal bureaucrats and politicians, to return them to the States, and to the people themselves.

Mr. President, this country was founded on prayer, by God-fearing people who knew they must preserve prayer. Many good points have been made regarding the intentions of our Founding Fathers. It is true that the framers of this Nation were unabashedly religious. They saw Divine Providence at the heart of everything they did, and their daily affairs were motivated by and in consonance with their religious convictions. The Founders intentionally omitted references to organized religion in order to keep their new Government from becoming entangled with any one church or denomination. They knew first hand the dangers of religious factionalism, and the injustices of official religious persecution that were suffered even at the hands of colonial authorities.

Nevertheless, the Founding Fathers never intended to remove religion from the hearts of those who govern, and certainly not from the lives of our schoolchildren.

Further, I happen to agree with many that we need to demonstrate to our young that we consider religion sufficiently important to insist upon the right to pray. We want them to act morally, but will not do so ourselves. We will not limit pornography, but we will limit prayer. We cannot see the need to curtail the violence and explicit sexual conduct on television, but we will prohibit prayer in our schools.

I, for one, see a clear conflict of purpose between preventing established religion and the de-facto establishment of functional atheism in the lives of our children.

Recent court actions have more than adequately protected the nonreligious sector of our society, but at the same time have clearly restricted religious activity.

While the lack of religious beliefs by certain groups is their right, I do not believe that their views should set the norm for the rest of this Nation.

Our Nation was formed by moral and religious beliefs. To allow the continued erosion of this important part of our heritage would be to undercut the raising of our children and would jeopardize the strength of our Nation and society.

No one's beliefs—religious or otherwise—are jeopardized by this prayer amendment. One characteristic of American religious freedom is its capacity to allow not only a clear and unhindered choice between a wide variety of religious expressions, but also that it allows for an unfettered and unthreatened choice between religion and no religion. We may believe what we choose.

However, as a result of well-meaning, but wrong decisions by judicial officers, our country is now subjected to an improper policy in the name of religious impartiality. Free exercise of religion has been sacrificed in favor of free exercise for the nonreligious. On this basis, our courts have moved to disallow religious prayer by those who, by virtue of their youth, are in school.

I object to this state of affairs, but it is not simply to reverse this trend that I support S. 47.

This bill is a moderate approach in addressing this problem. Its essence is to allow for freedom of choice and local control.

S. 47 cannot and will not put prayer into—or back into—anything. It will not require prayer, silent or otherwise, in any classroom. It will not require or allow the reading of the Bible or Koran anywhere. It will not establish any form of acceptable theology or spiritual practice for anyone, anywhere.

What this bill will do is remove the further consideration of this issue from the Federal level. The individual States and local school districts will once again be empowered to decide the question of religious conduct in their own schools.

I realize that some discretion may be expected on the part of school officials in the interpretation of any statute. I realize, also, that individual circumstances may present a very fine line between legitimate religious exercise and simple disruption. There are effective means, however, to deal with individual excesses on the local level, without enforcing universal criteria on a national level.

Why not place our trust in the hands of those close enough to the issue to deal responsibly with it? Have we completely lost our respect for—and trust in—the American character and sense of fair play that has made us the great Nation we are today? Must Congress continue to be em-

broiled in the daily moral affairs of the American people?

I think it is very important to reemphasize that this amendment will not require anyone to participate in any prayer or religious exercise. It will not require school boards or other State and local government agencies to permit students to pray in school. It will simply remove present obstacles which prohibit voluntary prayer nationwide. If States or school boards want to exclude prayer from their schools, they will be as free to do so as they are now. But they will also be free to permit voluntary prayer—a choice they do not have today.

Mr. CHAFEE. Mr. President, this act would remove from the jurisdiction of the Supreme Court and the district courts cases involving prayer, Bible reading, and religious meetings in the public schools. Despite the obvious religious and educational ramifications of this bill, the central issue here does not fall in either of these areas. What we are really considering here is a constitutional issue: whether or not Congress should be allowed to upset the delicate balance of power which lies at the heart of our political and legal institutions.

In stripping the Supreme Court and district courts of their jurisdiction over school prayer and religious activities in the schools, the bill attempts to circumvent the first amendment's enjoinder against laws respecting establishment of religion. I believe that the only proper and legal way to protect school prayer is to amend the Constitution, not to build an artificial, extraconstitutional shield, which is what this legislation would do.

As the forum for redress of legal grievances and the ultimate authority on interpretation of the law, the Federal judiciary has served as an independent and equal arm of our democratic system. I am opposed to the kind of court stripping called for by this bill, which is nothing more than an attempt to work around the American legal system's established channels for settlement of disputes. It is a means of protecting certain questions from the purview of the Federal courts, which have always provided a necessary counterbalance to the other two branches of Government.

By denying all Federal courts jurisdiction over certain kinds of cases, this legislation would effectively exempt certain laws from constitutional interpretation. Only by amending the Constitution may Congress grant permanent protection to certain important principles. This act attempts to create a shortcut alternative to the amending process. In so doing, it poses a serious danger to the separation of powers that has given a strong measure of equilibrium and fairness to our legal and political system for almost 200 years.

This is not the first time that court stripping has been the subject of debate here, and many of this country's most respected legal authorities have strongly opposed it as unconstitutional. These include the American Bar Association, the Conference of Chief Justices, the National Bar Association, the Federal Bar Association, the American College of Trial Lawyers, and 55 deans of leading law schools.

This act would set a dangerous precedent of special, congressionally granted exemptions for certain classes of legal actions. As some of our country's most respected legal scholars have argued, there is only one way to achieve the ends sought by this act—through constitutional amendment. Constitutional amendments regarding school prayer have come before this body in the past, and undoubtedly we will consider these kinds of measures again. That will be the appropriate time to deal with the merits of establishing organized school prayer. This legislation addresses the issue in a manner which represents an abuse of the powers of this body. I urge my colleagues to oppose its passage.

Mr. NICKLES. Mr. President, today we are voting on whether or not children will be granted religious freedom in public schools. Starting in 1962, the Supreme Court has consistently overturned the laws of the majority of States and worked to curtail voluntary religious expression in the classroom. Unfortunately, there are no indications that this trend of hostility toward religious freedom is going to abate. Congress must act to change this tendency of the Court to legislate rather than interpret the Constitution.

In December 1984, the Supreme Court took up another case dealing with school prayer. The case, Wallace versus Jaffree, presented the Justices with the opportunity to return religious freedom to schools. Those in Congress, parents across the country, and others held their breath. Perhaps this would be the long-awaited return of the pendulum back to a historical interpretation of the amendment.

Unfortunately, instead of moving back to the direction established by our Founding Fathers, the Supreme Court restricted our intended religious freedoms even further by ruling in opposition to a moment of silence in the classroom.

The case involved an Alabama law which allowed their public classrooms to start the day with a moment of silence. The authorizing legislation indicated this moment was "for meditation or voluntary prayer." The State law did not require a school system to practice such a moment of silence, nor did it require the moment be used for prayer. It was simply a statute which allowed for freedom of expression, albeit in silence, in the public classroom. Children with a religious orientation could pray. Children who wanted to think about something else could do so.

The Supreme Court held that this law establishes a religion because it mentions prayer as one possible activity during the period of silence. It is inconceivable to me that anyone could believe that mentioning prayer as an option for schoolchildren poses the threat of establishing a State religion. This does not rate as an endorsement of religion any more than mentioning meditation as one possible activity means that Alabama is endorsing meditation as a way of life for their schoolchildren.

Rather than protecting our religious freedom or even maintaining a "neutral stance" as they have asserted, I believe that this Supreme Court ruling and the others on this subject have demonstrated a hostility toward religion. They have moved this country from religious freedom to the prohibition of voluntary vocal prayers, and now to prohibiting silence that might be used for prayer in the classroom.

Given this dismal record on school prayer issues and the outlook for the future, I believe it is time to send a strong signal to the Justices through congressional action. Congress should be a reflection of America's commitment to seeing religious freedom preserved as intended by our forefathers.

When the Supreme Court ruled that vocal voluntary prayer in public schools was prohibited, they reversed the laws of over 40 States which permitted it in their classrooms. Now, in ruling that a moment of silence for prayer or meditation is unconstitutional, they have rolled over the legislative bodies of 24 States which allowed a moment of silence. Public opinion polls show that over three-quarters of the American public support voluntary prayer in public schools. The Senate has voted on this issue before and found that a majority of Senators are in support of voluntary prayer in public schools. How long will it take before the Supreme Court stops making public policy rather than interpreting the Constitution?

I support S. 47 because it would return the option to States to have voluntary prayer in their schools. But, I also cast my vote as a signal of my strong disagreement—and that of my constituents—with the U.S. Supreme Court's rulings which are moving us toward an increasingly secular society. I do not support the Government mandating participation in religious activities. I also do not support the Government prohibiting participation in religious activities. In other words, I support true freedom of religion, and not the current interpretation by the Court. I would hope that the Justices

would apply both clauses of the first amendment, which says, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Today we can move back to the balance that our forefathers intended.

Mr. MITCHELL. Mr. President, the measure before us today does not deserve to be enacted. It embodies a profoundly mistaken approach to its goal. Were it to succeed, it would undermine the independence of our judiciary.

This bill is not, as its sponsors claim, a straightforward effort to modify one aspect of the Supreme Court's jurisdiction. It is an attempt to overturn by legislation the Supreme Court's decisions on matters of constitutional law.

The bill is based on an extremely broad interpretation of article III of the Constitution. Proponents of this bill claim that article III confers upon Congress an ability to define the content and reach of constitutional rights directly.

I do not find this claim persuasive. The congressional power to enforce constitutional protections is not identical to the fundamental power to define them. Yet this bill rests on precisely such a confusion.

Since the earliest days of our Government, the Supreme Court has been the final arbiter of constitutional meaning. To the Court alone is granted the power of defining constitutional rights and guarantees. To the Congress is granted the authority to enforce them.

This bill would move us beyond that authority. It would create a congressional right to choose which constitutional rights shall enjoy the full protections of the courts and which shall not.

The Constitution grants us no authority to make such choices. So I oppose this bill on the most fundamental grounds: it is unconstitutional.

As a practical matter, this bill is nothing more than an effort to alter by legislative majority a constitutional judgment of which the proponents disapprove.

Such efforts by Congress and the Executive to control the judiciary are not new.

In the early 1900's, when the Supreme Court was routinely striking down progressive social legislation, bills were introduced to abolish "the Supreme Court's power to pass upon the constitutionality of statutes."

Later, in the 1930's, when Franklin Roosevelt's New Deal programs met resistance in the Supreme Court, he sought to pack the Court to guarantee a Court majority favoring his policies.

In the 1950's, when the Federal courts attempted to curb the witch-hunting activities of Senator McCarthy, a bill was proposed to prohibit the Federal judiciary from ruling on any statutory or agency action aimed at alleged subversives.

All these efforts have one feature in common: They represented a desire to impose a political preference on the judgments of an independent judiciary.

And fortunately for our Nation, these efforts have just one more thing in common: They failed and that is a good thing because they deserved to fail.

Today's effort differs not at all from those which came before in either its inspiration or its effects. And like those earlier attempts, it too deserves to fail.

It deserves to fail on the very practical ground that it would disrupt the uniformity of Federal constitutional interpretation. The first amendment should offer the same protections in one State as in another.

To permit the courts of the 50 States to set different interpretations of constitutional terms—whether of first amendment terms or any other—would permit, if not invite, the destruction of the Constitution as a meaningful national document.

The ultimate safeguard in our system of government is the independence of our judiciary from political control. Although this bill strikes at just one issue on which the Court's rulings are controversial, its effect would be no less than to undermine that independence. In so doing, it would strike at the separation of powers which has safeguarded our people against an overweening government for over 200 years.

It has been my privilege to serve in all three branches of this system—in the executive branch as a U.S. attorney; in the judiciary, as a Federal district court judge; and now in the legislative branch as a Senator representing Maine. I have learned on a first-hand basis that each branch has a different responsibility, and that each is necessary to make our constitutional system work.

It is only the judiciary, however, that is not—and should not be—responsive to an electoral constituency. A significant role of the independent judiciary is to protect the constitutional rights of individuals, of minorities, of our system of democratic procedures itself, even in the face of systematic political attack.

For Congress to limit the breadth of issues with which Federal courts can deal would undermine that independence.

Adoption of this bill would be to adopt the principle that the judiciary's ability to protect constitutional rights can be overruled by a simple majority of the Congress. But if Congress can determine what rights may be reviewed, Congress can effectively decide what rights exist.

This would be a profoundly radical reordering of our system. It would leave the judiciary to operate at the sufferance of the legislative majority, subject to having its powers limited at any time on any issue on which a politically or socially unpopular decision was reached.

Although such a result might make a political majority or a politically influential minority happy at the immediate outcome, it would pose no less a potential threat to its supporters than to its immediate opponents, for it would eliminate the protections that both supporters and opponents of this bill depend upon when other issues arise.

There is a constitutional method available to alter the outcome of a Court ruling when a Court ruling offends sufficiently strongly a substantial majority of our people.

That is the route of the constitutional amendment, not the back-door method of denying to the Supreme Court its fundamental authority to rule on the meaning and application of the Constitution.

The court-stripping bill before us today responds to the desire of some to short-cut that amendment process to rectify one currently-felt shortcoming in our society.

Those people share a common and mistaken perception that the independence of the judiciary is an obstacle to a higher good.

The anchor of our system remains the separate and independent judicial system, acting on statutes devised by an elected, responsive legislature, and carried out by an elected, responsive Executive. Without that anchor, the Constitution would, indeed, be all sail. Our Government—and our liberties—could be blown hither and yon by the partisan, fleeting demands of temporary majorities.

To respond to temporary dissatisfactions by taking apart the careful structure of checks and balances in our Government would be to provoke a constitutional crisis which our dissatisfaction does not warrant and for which the remedy would be more destructive than the problem.

Those who advocate such a change ignore, as they should not, the connection between methods and goals.

Ours is not a society that believes that all means are valid in pursuit of desirable goals. Rather, our society is based on the principle that some means are never acceptable, no matter what the goal.

The issue at stake in this bill is highly controversial. But even if there were broader and more general agreement upon it, the question is not the goal of the bill. It is the means by which that goal is sought.

Can any socially desirable goal—regardless what it is—take precedence

over the fundamental law of the land? Can we strengthen our society if we weaken the ability of our institutions to apply the law in practice?

Our Constitution recognizes the fact that government, law and justice will be administered by human beings. It takes account of the fact that human beings are often short-sighted, often mistaken, often profoundly wrong.

The men and women who preside over our courtrooms reflect their society and their century. They are the products of contemporary experience. And it is for that reason that our courts are insulated from popular passions, from electoral returns, from political swings to left or right. Our system seeks to limit the extent to which human prejudice is systematically imposed on society.

Our courts are insulated from popular feelings for reasons which should be all too clear to anyone familiar with the judicial horrors of our century. We need only recall the Soviet courts, which recognize such crimes as "wrecking" the Soviet economy, or "anti-Soviet slander", or "malicious hooliganism". We have only to remember the despicable and infamous Nazi courts of the 1930's which swept away 200 years of German civilization with the implementation of the Nuremberg racial laws.

Those misapplications of law are not ancient history. They did not occur in the dim reaches of time, before human rights and liberties were enunciated, before there was a body of social thought which defined and defended the value of the individual. Those perversions of justice occurred in this enlightened century—they are still occurring. They occur within our lifetimes, and they were and are carried out by individuals who were willing to place an immediate social goal above the integrity of the law itself.

If we permit our temporary passions to override our permanent interest in maintaining the primacy of law, we will have done more than make a minor modification in the application of article III. We will have taken a dangerous step in the direction of undermining the integrity of our courts. We will have created a precedent here, in the United States, whose consequences can be read in the histories of other nations swept by popular passions.

We can never remind ourselves too often that the popular view today may be anathema to the next generation.

Legislatures can be mistaken. Presidents can be mistaken. Individual judges can be mistaken. The permanent bulwark of an independent judiciary is our protection against the institutionalization of such human error. It is our major shield against the legalization of prejudices, of fleeting passions, of irrational hopes and unreasonable fears.

Those who would tamper with that bulwark not only do a disservice to their contemporaries; they undermine the protections their own children will inherit. For the sake of their children and ours, they cannot be permitted to succeed.

Mr. DOMENICI. Mr. President, while I support the right of schoolchildren to participate in voluntary prayer in our public schools, I am unable to support the measure currently before the Senate. Although one of the stated goals of the Voluntary School Prayer Act of 1985 is "[t]o restore the right of voluntary prayer in public schools," the bill would achieve its goal by divesting the Federal courts of their power to review State statutes regarding a variety of religious activities in public buildings. The goal is admirable, one I have long supported, yet the methods the bill would employ to achieve those goals could lead to an erosion of the constitutional protection of freedom of religion rather than strengthening it.

The issue here is not school prayer. If that were the issue, I would lend my wholehearted support, as I have in the past. Over the past several decades, the Federal courts have been engaged in a persistent attack on the right of children to pray in school. The rulings of various Federal courts in recent years which have invalidated State laws establishing a moment of silence for prayer or a period of voluntary prayer in public schools are distressing. The actions of various school officials in response to such rulings, such as denying student organizations meeting space in public schools where the purposes of the meetings are religious, show that such rulings do not protect freedom of religion, but rather create a climate of hostility toward religious activity by public officials.

There has been a good deal of debate on whether Congress has the power to enact a law such as the one before us. I believe that it does under article III of the Constitution. I have supported similar measures to address abuses by the courts in the past, primarily in the area of busing. Yet I cannot support this measure because I believe it will lead to an erosion in the constitutional protection of freedom of religion.

It is precisely because I desire to protect the rights of every individual to worship freely that I oppose this bill. The issue is whether we shall protect the right of each individual to worship—or not worship—the God of his or her choice. Under this bill, each State could determine its own policy on religion based on the will of the majority in that State. This bill would deprive the Federal courts of the ability to protect the rights of religious minorities by divesting the Supreme Court and all the lower Federal courts of their jurisdiction to review State statutes regarding a wide range of religious activity. Thus, it would prevent the Federal courts from remedying even the most egregious abuses of the separation of church and state, such as where the majority deprives the minority of the right to practice the religion of its choice. This sweeping away of the protection of our Federal courts will not enhance religious freedom, but rather will greatly endanger it.

In closing, let me reiterate that the issue is not whether children should be allowed to pray in school, but rather whether our judicial system will be available to protect against the establishment of one particular religion in a position of preference as compared to others. Freedom of religion is a Federal right and it should be protected by the Federal courts. I, therefore, oppose this measure.

VOLUNTARY SCHOOL PRAYER ACT OF 1985

Mr. SIMPSON. Mr. President, I now ask unanimous consent that the Senate turn to the consideration of S. 47, school prayer.

The PRESIDING OFFICER. The bill will be stated by title.

The assistant legislative clerk read as follows:

A bill (S. 47) to restore the right of voluntary prayer in public schools and to promote the separation of powers.

The PRESIDING OFFICER. Is there objection to the immediate consideration of the bill?

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

Mr. SIMPSON. Mr. President, I ask unanimous consent that the Senate proceed to vote without any intervening action on the motion to table S. 47 on school prayer unamended and that paragraph 4 of rule XII be waived.

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

Mr. SIMPSON. I yield to my fine colleague from Connecticut.

Mr. WEICKER. Mr. President, I inquire of the assistant majority leader as to whether or not he and also my good friend from North Carolina are suggesting that we proceed to my motion to table immediately? There are those who desire to speak. I do not intend to try to cut off anybody.

Mr. SIMPSON. Mr. President, on behalf of the leadership, it is our intent to do it immediately.

Mr. WEICKER. I feel rather passionately on this subject. Indeed, I might add at least it will give it the dignity it should have as a freestanding issue rather than being tacked on to the Small Business Administration authorization bill.

Mr. President, this is not the first time the U.S. Senate has been asked to put itself on record regarding prayer

in the public schools and it surely will not be the last.

But we have reached a new stage in this debate and we should be clear what is being asked by this latest incarnation of school prayer in S. 47.

The stakes have been substantially raised in this debate. I have made no secret of my strongly held belief that instituting group religious practice of any kind in the public schools is a denigration of the Constitution.

Mr. President, this goes beyond denigration. It represents destruction of the separation of powers that makes our system unique in the governments of men. Why should citizens of the United States settle for two rather than three separate but equal branches?

Perhaps because S. 47 refers so directly to an issue considered critical by the framers of the Constitution, it has aroused the opposition of not only the Nation's major religious organizations, but also the president of the American Bar Association and former Attorney General William French Smith, among others.

It's no wonder, Mr. President, that legal scholars, despite their political dispositions and however they differ over personnel on the Federal bench, agree that Congress should never be allowed to prescribe the substance to come before that bench.

That is the essence of this legislation, court stripping, a blatant attempt to usurp the role of the Supreme Court and the Federal courts.

Where do we stop should this become law? Federal laws that protect the handicapped are considered a costly nuisance by some in our society, so are those protecting minorities or the rights of those imprisoned. Do we then consider stripping Federal judicial authority over the equal protection guarantees from Federal statutes and the 14th amendment? Should first amendment protections of the free press be left to the vagaries of State courts every time a powerful judge or politician is embarrassed in the newspaper?

As to the secondary issue at stake in this bill, school prayer, the Senate spoke on this matter during the last Congress. A constitutional amendment on this matter fell short of the required two-thirds majority by 11 votes.

As I said, Mr President, the Senate spoke last year but the Constitution spoke to the matter more than 200 years ago. Anyone has a right to pray at any time anywhere in this Nation. And the right not to pray. These rights should not be diminished by Congress and they will not be if we leave the Constitution alone.

Mr. SIMPSON. Mr. President, I yield to the Senator from North Carolina.

Mr. HELMS. I thank the Senator for yielding.

Mr. President, I appreciate the cooperation of my friend from Connecticut and all other Senators in this connection.

We have debated this issue since I came to the Senate, and I appreciate the opportunity for the Senate to have a free-standing vote on this subject. I am prepared to vote.

Mr. PACKWOOD. Mr. President, I do not want to delay a vote. I want to find out from the acting leader what the situation is.

Are we having an extended vote because some people have to leave and some people are arriving? I have a few remarks I would like to make, but I do not know what previous arrangements have been made.

Mr. SIMPSON. Mr. President, the leadership is indicating that several Members on both sides of the aisle are pressed for previous commitments; and if the vote can be held as soon as possible, those commitments can be met.

To accommodate the Members on both sides of the aisle, we will extend the vote from 15 minutes to some longer period, until the Members have voted. That is the intent—to get to it immediately, if at all possible.

Mr. WEICKER. Mr. President, I move to table S. 47, and I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on agreeing to the motion to table. The yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. SIMPSON. I announce that the Senator from North Carolina [Mr. EAST] is necessarily absent.

Mr. CRANSTON. I announce that the Senator from North Dakota [Mr. BURDICK] is necessarily absent.

I also announce that if present and voting the Senator from North Dakota [Mr. BURDICK] would have voted "yea."

The PRESIDING OFFICER. Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 62, nays 36, as follows:

[Rollcall Vote No. 172 Leg.]

YEAS—62

Andrews	Danforth	Hatch
Baucus	DeConcini	Hatfield
Biden	Dixon	Heinz
Bingaman	Dodd	Hollings
Boren	Domenici	Inouye
Boschwitz	Durenberger	Kassebaum
Bradley	Eagleton	Kennedy
Bumpers	Evans	Kerry
Byrd	Glenn	Lautenberg
Chafee	Goldwater	Leahy
Chiles	Gore	Levin
Cohen	Gorton	Lugar
Cranston	Harkin	Mathias
D'Amato	Hart	Matsunaga
Melcher	Proxmire	Specter
Metzenbaum	Pryor	Stafford
Mitchell	Riegle	Stevens
Moynihan	Rockefeller	Weicker
Nunn	Rudman	Wilson
Packwood	Sarbanes	Zorinsky
Pell	Simon	

NAYS—36

Abdnor	Hecht	Nickles
Armstrong	Heflin	Pressler
Bentsen	Helms	Quayle
Cochran	Humphrey	Roth
Denton	Johnston	Sasser
Dole	Kasten	Simpson
Exon	Laxalt	Stennis
Ford	Long	Symms
Garn	Mattingly	Thurmond
Gramm	McClure	Trible
Grassley	McConnell	Wallop
Hawkins	Murkowski	Warner

NOT VOTING—2

Burdick	East

So the motion to table was agreed to.

Mr. WEICKER. Mr. President, I move to reconsider the vote by which the motion was agreed to.

Mr. EVANS. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. LONG. Mr. President, I ask unanimous consent tht the order for the quorum call be rescinded.

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

THE DEATH OF FORMER SENATOR HUEY LONG

Mr. LONG. Mr. President, it was on this day 50 years ago that my father, the late Huey Long, a Senator from Louisiana, died in Baton Rouge. There have been many articles written and much speculation concerning his death.

I concluded, Mr. President, that it is appropriate to place into the RECORD a document which I believe provides the information that most students of this question would like to have. It is a transcript taken before the coroner's inquest held on Dr. Carl Austin Weiss, Jr., and conducted by Dr. Thomas B. Bird, coroner of the parish of East Baton Rouge on September 9 and 16, 1935, in the city of Baton Rouge.

Mr. President, in the course of this transcript, there were five witnesses who said that they personally saw Dr. Weiss shoot Huey Long.

One was John Fournet, who was a Justice on the Supreme Court and who later served with distinction as Chief Justice on the Supreme Court, elected and reelected.

Another was Mr. Lawrence Wimberly, a State representative from north

Louisiana, who served for many years with distinction in the State legislature.

Another was Murphy Roden, who, in my judgment, was one of the best policemen who ever served the State of Louisiana and in later years served in other important positions, such as head of the State police in Louisiana under a subsequent administration, and who also had an important appointment in the armed services in World War II.

Another was Mr. Paul Voitier, who I had the privilege of knowing personally, who had no reason to tell anything other than the truth as he knew it.

All of these persons were willing to accept the responsibility of testifying before the coroner's inquiry.

Another witness was Mr. C.A. Riddle, and we called him Ad Riddle, as I recall it, who was a State representative at the time from Avoyelles Parish.

Mr. President, I knew these people and in my judgment these people told the truth.

There is another witness to this matter who did not see the actual shooting of my father. He saw what happened immediately after. That man was Mr. Frampton, who was a reporter for many years. I believe he was working in the Governor's office at the time this matter happened. His statement corroborates what the other five eye witnesses said.

I know there are some who would say that these witnesses who testified all had one thing in common, that they all were Huey Long supporters, overall friends of Huey Long in one respect or another. One could say they would not believe anybody who was a friend of Huey Long even though they could be a Supreme Court judge. But that, to me, does not make too much sense, Mr. President.

I ask unanimous consent that this transcript of the coroner's inquest discussing this event be printed in the RECORD at this point.

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

[Transcript of Testimony taken before the Coroner's Inquest held over the Body of Dr. Carl Austin Weiss, Jr., and conducted by Dr. Thomas B. Bird, Coroner of the Parish of East Baton Rouge, on September 9 and 16, 1935, in the City of Baton Rouge, LA]

STATE OF LOUISIANA, PARISH OF EAST BATON ROUGE

Before me, the undersigned authority, Lemuel C. Parker, a Notary Public, duly commissioned and qualified in and for the Parish and State aforesaid, personally came and appeared: Glenn S. Darsey, well and personally known to me, who, after being duly sworn, did depose and say:

That his name is Glenn S. Darsey; that he is a duly licensed and practicing attorney of the Bar of Baton Rouge, Louisiana, and a Notary Public in and for the Parish of East Baton Rouge, Louisiana, duly commissioned and qualified; that on the dates of September 9 and 16, 1935, he was the duly appointed and qualified Deputy Clerk of Court of the Nineteenth Judicial District Court of the State of Louisiana, in and for the Parish of East Baton Rouge, and official Court Reporter of said Court; that, on the dates aforesaid, he reported the testimony taken before the Coroner's Inquest held over the body of Dr. Carl Austin Weiss, Jr., and conducted by Dr. Thomas B. Bird, Coroner of the Parish of East Baton Rouge, on September 9 and 16, 1935, in the City of Baton Rouge, Louisiana; and that he does now, hereby and herewith, certify that the foregoing seventy-two (72) pages represent a true and correct transcript of said testimony.

GLENN S. DARSEY.

Sworn to and subscribed before me, aforesaid Notary Public, at Baton Rouge, Louisiana, on this 5th day of May, A.D., 1949.

LEMUEL C. PARKER,
Notary Public.

Dr. BIRD: The body of C.A. Weiss was examined by the Coroner and Jury. We found thirty bullet openings on the front of the body and twenty-nine on the back and two of the head, one penetrating the left eye and making its exit through the left ear; and other going through the tip of the nose and grazing the face. The body wounds, it was impossible to tell which were wounds of entrance and which wounds of exit there were so many in every direction.

Two bullets were recovered, one a .38 caliber and one a .45 caliber; they were just found under the skin.

Mr. E. Prampton called as a witness, being first duly sworn by the Coroner, testified as follows:

By Mr. Odom:

Q. Just narrate exactly what you saw immediately preceding the shooting at the Capitol last night. Describe in detail everything you did see.

A. Just immediately preceding the shooting I talked with Senator Long, first, on the floor of the House. then I went in the Governor's office and called my office in New Orleans; in response to questions that they asked me I telephoned Senator Long in the sergeant-at-arms office in the House. He was called to the telephone and I talked with him again. Within a minute or two he left the House and walked down the corridor to the Governor's office. I started from the Governor's office through the anteroom; just as I reached for the doorknob was when I heard the sound of a shot. As I opened the door I saw Senator Long walking down the hall clasping his side with his hands.

By Dr. Bird:

Q. A good many people said they heard two shots.

A. I heard only one at that time.

Q. I mean that first.

A. Yes. As I opened the door I saw two men struggling. One I recognized as Murphy Roden, as a State Highway policeman, and the other man, who was later identified as Dr. Carl Weiss. Murphy had his back towards the door.

By Mr. Odom:

Q. Towards the Governor's door?

A. Yes, and was in a stooping position as though he had fallen in struggling with the man. He backed away, firing as he backed away. As he backed away half a dozen or more started shooting. He pitched forward with his head in the corner near the marble pillar with his face down. He lay there and nobody touched him until the Coroner ordered the body moved.

Q. The corridor you speak of was the north side of the building on the second floor leading from the House down by the Governor's office?

A. And connected with the Senate along with other offices of State officials including that of the Governor.

Q. As I understand your testimony, you had not come into the hall when the first shot was fired?

A. No, sir.

Q. And didn't see him fire that shot?

A. I did not.

Q. Had you gotten out into the hall before the other shots were fired?

A. I was standing in the doorway. I naturally didn't step out in the hallway.

Q. Have you any way of approximating the lapse of time from the first shot to the firing of the succeeding shots?

A. It required the time for me to turn the doorknob and open the door and look out. I would say three or four seconds.

Q. The man whom you identify as firing the first shots after you looked out in the hallway, what is his name?

A. Roden, Murphy Roden.

Q. Was his fire returned by the the man who was subsequently identified as Dr. Weiss?

A. I didn't see him fire any shots.

Q. Was Dr. Weiss in plain view of you?

A. He was.

Q. As far as you could see, did he make any effort or any overt attack on the man who shot him?

A. When I opened the door he was struggling with Roden. He had a pistol in his hand.

Q. Could you tell from the nature of the struggle if Roden took it away from him?

A. They seemed to be struggling over the pistol or just quitting struggling over the pistol.

Q. When they separated could you tell whether Roden jerked away and backed off or whether the other man jerked away? How did the break take place?

A. Roden evidently jerked away. He was still in a crouching position, firing as he backed away.

Q. When he backed away, what did the other man do, Dr. Weiss?

A. Fell on the floor.

Q. Prior to the time he backed away, did Dr. Weiss make any effort to shoot Roden?

A. I don't think he had time to do it.

Q. Was there any motion of his you could construe as an overt act toward Roden?

A. I would say my first impression was Dr. Weiss with a pistol in his hand trying to either wrest it away or get it away from Roden or get in a position where he might use it. I don't know what his intentions were.

Q. You gained that Roden had the weapon and was wresting it from him?

A. No, the other man had it.

Q. The man had the weapon and Roden was trying to wrest it away from him?

A. Yes.

Q. Could you tell whether he wrested it away or turned loose and backed off?

A. I couldn't say. Murphy showed us his thumb that had evidently caught in the jam of the pistol, it evidently caught in the barrel of the pistol.

Q. Could you approximate how many shots Roden fired into Dr. Weiss?

A. I couldn't say, several times.

Q. What was the posture of Dr. Weiss at the time Roden opened fire, was he standing upright or crouching?

A. Crouching. As Roden backed away he shoved Weiss or the man away from him. He backed up and fired as he backed away.

Q. Dr. Weiss was then in a stooping position?

A. Yes, near the floor; he sank down.

Q. Prior to the shooting?

A. They were both in a stooping position.

Q. Which was nearer the floor, Roden or Weiss?

A. Weiss, I believe.

Q. You heard only one shot up until that time?

A. Yes.

Q. I appreciate it is almost impossible to space time. Have you any way of determining or estimating or approximating the time they were engaged in that struggle, hooked up together, the officer and Dr. Weiss?

A. It would be impossible to approximate or estimate it because I didn't see the beginning of it.

Q. Can you estimate or approximate the time that they were hooked up after you saw them?

A. It was practically a continuous action. The minute I opened the door the men I saw were struggling. Roden shoved the other man away and backed away and fired as he did that. He crouched and backed farther away and fired some more.

Q. As Roden fired the man fell?

A. That's right.

Q. You said some other people opened fire after that?

A. Yes.

Q. Do you know who they were?

A. No. There was a group of them there; six, I would say.

Q. Do you know any of them?

A. I am not positive; I saw so many people I am not positive.

Q. Were they what is commonly known as Senator Long's bodyguards?

A. I recognized half a dozen or more whom I knew and recognized to members of the State police.

Q. Can you say you recognized any other man who shot Dr. Weiss besides Mr. Roden?

A. It would be only a guess. Every one had a gun out. I don't know which ones.

Q. Can you tell who had guns out?

A. Paul Votier and, I believe, was firing; I think Joe Messina was, I am not positive.

Q. He was there?

A. He was there.

Q. Was that all or any one else?

A. I don't recall.

Q. Was Mr. McQuiston there?

A. He was there. I don't know whether he did any firing or not.

Q. Did he have his gun out?

A. I think he did.

Q. Was Louis Heard there?

A. I don't know him.

Q. Was Joe Bates there?

A. I don't recall seeing him.

Q. Did any one put his hands on Dr. Weiss besides Roden?

A. I couldn't say.

Q. Can you state the time between the time that Roden did the shooting and the others joined it?

A. They joined in almost simultaneously. It was almost a miracle that Roden was not hit by some of them.

Q. They were around him?

A. On all sides.

Q. Had Dr. Weiss fallen to the floor before the others opened fire?

A. Yes.

Q. The other people opened fire and shot after he was down?

A. Yes, the pistol was in his hand.

Q. He fell down?

A. Yes.

Q. On the north or the south side of the corridor?

A. At the southeast corner of the corridor, as regards the four pillars outside of the Governor's office.

Q. Was his face down flush with the floor?

A. It was partially on his arm.

Q. Was his face towards the north or south?

A. I don't recall. I couldn't see his face.

Dr. BIRD: His face was down; when I found him he had not been touched.

By Mr. Odom:

Q. Was there much of a crowd there?

A. The customary legislative crowd was there, in and out of the hall.

Q. Did you see Judge Fournet as you came out?

A. No, sir; if I did, I didn't recognize him.

Q. Did you recognize any one other than the bodyguards and Dr. Weiss and Senator Long?

A. I wouldn't remember because my attention was concentrated on the shooting and the victim of the shooting.

Q. Among these people whom you saw shooting—the crowd from whence the shots were being fired—could you see any one of the bodyguards in his entourage?

A. I didn't know the bodyguards. I think they were all officers of the State police force. Some may have been on guard duty.

Q. In other words, you don't recall seeing any one except State police?

A. Yes.

Q. They were not in uniform?

A. They were not.

Q. Were any of them in uniform?

A. No, sir.

Witness excused.

J. E. Dearmond, called as a witness, being first duly sworn by the Coroner, testified as follows:

By Mr. Odom:

Q. What is your occupation?

A. Hotelman.

Q. Were you at the Capitol last night?

A. Yes, sir.

Q. What was your business there?

A. Just visiting.

Q. Are you located in Baton Rouge or New Orleans?

A. New Orleans.

Q. Did you have any business at the Capitol?

A. No, sir.

Q. How did you happen to be there?

A. Just walking around meeting friends.

Q. Have you held any commission under the State or under the City of New Orleans?

A. Yes, sir.

Q. What was it?

A. A special commission from the Bureau.

Q. When was that?

A. Before this law was passed when they recalled all of them.

Q. Have you held any since then?

A. No, sir.

Q. Where were you when the shooting took place?

A. In the secretary to the Governor's office.

Q. Who was in there?

A. Mrs. McGuffey and some other gentleman was up there; I don't know who he was.

Q. What was the first thing that attracted your attention?

A. Senator Long walked in the office in a big hurry. He walked in and said, "We have to get all our men here tomorrow."

Q. Who said that?

A. Senator Long.

Q. Who was he addressing?

A. Nobody in particular.

Q. Who could he have been addressing?

A. He walked in and struck his head in—Mrs. McGuffey was there—he said, "We have to get all our men here tomorrow." He turned around and walked in the hall and repeated the same statement as he stepped in the corridor. Just about that time I heard one shot followed by others. I was not going to stick my head out.

Q. The first shot, you just heard one shot?

A. The way it was, one shot was not so loud.

Q. Have you any way of approximating or spacing the time between the first shot and the others?

A. Very rapidly, four or five seconds.

Q. Can you approximate how many shots there were?

A. Estimated twenty-five or thirty; that was my guess.

Q. Where the body lay, how far was that to the Governor's door?

A. From the Governor's or the Secretary's door?

Q. The secretary's door. That's the door Senator Long went out?

A. Yes, sir. I would say twenty-feet.

Q. When Senator Long came in, who accompanied him?

A. He came in and turned around the way he came and I only saw Murphy Roden.

Q.Were there others with him?

A. I imagine so.

Q. You recognized Murphy Roden?

A. Yes, sir, also Paul Voitier.

Q. They followed him out?

A. He turned around and went out the door, they naturally followed.

Q. What did Senator Long say?

A. "We will have to have all our men here tomorrow."

Q. Is that all he said?

A. Every word. He made the same statement twice. Once in the office and then I heard it as he was going out the door.

Q. Did you know Dr. Weiss?

A. No, sir, I never saw him before to know him.

Q. What was your business in the Governor's office, social or otherwise?

A. I just dropped in socially for a few minutes. I saw Mr. A.P. White, the Governor's secretary, and Bertram Barnett, the publisher of the Bienville Democrat in Arcadia.

Q. You are presently employed by the DeSota Hotel?

A. The National Hotel Company.

Q. Are you still there?

A. I was up until three—two days ago.

Q. You don't know who did the shooting?

A. No, sir, the shooting was so close to the door.

Witness excused.

[The following testimony was heard September 16, 1935.]

John B. Fournet, called as a witness, being first duly sworn by Coroner, testified as follows:

By Mr. Odom:

Q. You are Judge John B. Fournet of the Supreme Court of Louisiana?

A. Yes.

Q. You are an Associate Justice of the Supreme Court?

A. Yes.

Q. Were you present at the Capitol on last Sunday night, say, about 20?

A. Yes.

Q. Did you witness the shooting as a result of which Dr. Carl A. Weiss and Senator Huey P. Long lost their lives?

A. I did.

Q. Will you please relate in your own words just exactly what you saw and what you heard immediately preceding the occurrence and what happened immediately afterwards?

A. Well, I was in the House. I knew Huey was in the House and I wanted to see him and talk to him about something I wanted to impart to him before he left Baton Rouge. I had been in the House a good portion of the evening trying to talk to Huey; he had been there. That's the reason I was there. When he left the House I started out behind him to follow him and get any opportunity to have a conversation with him. As usual, he walks very fast; it is almost hopeless to follow him. But I wanted to talk to him especially, there were two or three things I wanted to talk to him about. When I got into the corridor I didn't see him but I asked a couple of people standing there which way the Senator had gone—when I got there, I couldn't see him—I was told that he entered the Governor's office. I walked leisurely in that direction. I met Joe Messina and we walked together. He knew where Huey was. As we approached the Governor's office, the Senator walked out and walked towards our direction. About the time he reached this big circle in the middle of the corridor——

Q. Let me interrupt you a moment. That was going back towards the House?

A. He was facing the House of Representatives, east, I think, if I have my directions correct. About that time he made some statement as to getting everybody on hand early tomorrow morning. I think. Some one answered him, came and said that has been attended to, but I don't know who answered; quite a few people were there. Some of the Bureau men were there and there were several others up there. I didn't pay much attention to those because Huey was the man I wanted to talk to. My plan was to go talk to him in his room. Just about the time he was answered that was over and there was a little pause, not another word was said, when a man of small stature, a man dressed in a white suit—he was a slender man—flashed among us. He moved hurriedly, wedged in with him, flashed a gun and shot almost simultaneously. I was right next to me. I put my hands on the man's arm and tried to deflect the bullet. I had my hat in my left hand, but I dropped it or lost it in all the excitement. As I put my hands on his arm he shot almost simultaneously. Of course, there was quite a bit of confusion. One of the boys grabbed him at the same time almost that I did; others wedged in. I shoved him as hard as I knew how. When I shoved him somebody else grabbed him. Who, I learned afterwards, was Murphy Roden. He went to the floor; I shoved him and they went down in one continuous movement; there was no cessation; they both went down. The doctor, who I learned since was a doctor, did not go all the way to the floor, as I saw it. He jerked the gun loose and the other boy, who I have learned since was Murphy Roden, grabbed it with both hands when he was trying to shoot again; he was trying to keep him from doing this. All about that time there was no cessation. I made no effort to grab the gun. When the shooting started the gun was between me and the boy who was on the floor. The boy was in this position (indicating), he was almost over him. I, naturally, stepped back a few steps, two or three; the shooting kept on without cessation.

I immediately started to look for Senator Long. I ran down the stairs and found him in the arms of Jimmy O'Connor and somebody else—I don't know who it was. He said that he was shot. We asked him where he wanted us to take him and he said to the sanitarium, of course. We walked with him to the car. My hat stayed right there where it all happened, whether I lost it when I shoved him or not, I don't know; I know it stayed right there.

Q. Judge, at the time you saw Mr. Roden grappling with the man whom you subsequently learned to be Dr. Weiss, you say he was attempting to fire his gun again?

A. Yes.

Q. Could you tell who he was trying to shoot?

A. At the time it looked like he was trying to shoot Murphy, the boy on the floor.

Q. They were grappling?

A. No, Murphy was loose at that time.

Q. I understood you to say that simultaneously with the firing of the gun that you struck the man?

A. Yes, I shoved him hard enough that he went down with the boy that was grappling with him on the floor; he was almost under him up to the wall. I shoved him completely away.

Q. Do you remember just what portion of the body the weapon—what portion of the Senator's body the weapon was pressed against?

A. That's very hard to say. It was at his front with an upward trend. The gun came from his right hip. What he drew the gun from, where it came from on him, I did not see. I had not noticed him or seen him before he fired. He drew it from the hip and straight up and straight out; the man made one step and fired.

Q. It was you who shoved him away?

A. Whether the shoving was sufficient to deflect the bullet would be only conjectural or problematical.

Q. I didn't mean that. At the time you shoved him the force of your shoving forced him to the floor?

A. He didn't go to the floor completely.

Q. Did he go to his knees?

A. He stayed in a crouching position. He always stayed that way, attempting to shoot that other way.

Q. He still had the pistol?

A. In his right hand trying to shoot it with both hands.

Q. Did Roden ever grab him?

A. Yes, Roden held on to the gun.

Q. Were you attempting to get your hands on Dr. Weiss?

A. Yes, for the second time; after I shoved him I was making an effort to grab him when they began to shoot pretty lively around there.

Q. Judge, can you tell us who fired the first shot?

A. No sir. The shooting was from my right and left. All the shooting was done almost directly to my right and left a little behind me. None of them were close to me. I did not see Murphy draw his gun from a reclining position as he got up.

Q. How did he get on the floor?

A. That's pretty hard to say; I was not watching Murphy Roden as I was afraid of the other fellow until it started generally.

Q. Can you tell whether or not Mr. Roden fired the first shot at Dr. Weiss?

Q. If it was Roden, you couldn't recognize anybody. In other words if Dr. Weiss had escaped, I could not have identified him.

Q. The man who fired at Dr. Weiss, did he fire first?

A. The man on the floor did not shoot the first shot. I don't think he was because he was shooting before that while Murphy Roden who was on the floor was attempting to get the gun.

Q. When you say the man who shot first, you are not confusing that with the first shot?

A. No, sir, that was after that.

Q. Have you any way of approximating how many shots were fired?

A. I served in the World War and I was a machine gunner. A machine gun would fire 300 to 600 bullets a minute. I would say after the shooting started it was as fast as a machine gun. In other words, there were two or three or four shooting at one time but to say how many shots were fired, would be a pure guess.

Q. Do you know what sort of weapons were used?

A. It sounded like an automatic. There may have been a single action sandwiched in between.

Q. Were any machine guns used?

A. No, sir. If there were I did not see them. They were shooting from my left and right, practically to the rear.

Q. As a matter of fact, I understand it to be your testimony that while Dr. Weiss was on the floor with the gun in his hand and while he was attempting to use it that he was shot by some one to the rear of you—who it was you don't know, but it was not Mr. Roden?

A. No, sir, that's my firm belief. I know he was on his feet. I didn't see the gun drawn from him; I saw him make the move. The other man rolled over. He went around and down. He went down slowly when the first bullet struck him; he just had a quiver of the body. While he was still doing that the shots were pouring into him from both sides.

Q. Can you describe or denote the spacing of the shots? The first shot from the next shot?

A. Yes. Very close, so close that I thought Senator Long was shot with the first two shots, until the Coroner's verdict and other people, I was of the opinion he was shot twice. The Senator was of that opinion because he said, "You kept him from hitting me the second time."

Q. Can you approximate——?

A. In fact, it was so fast, you could just guess for yourself. Any attempt to give any definite time, would have to be an expert on shots and the time of the shots. I can give you what happened and you can figure it for yourself. There was never any cessation of action, it was one continuous action. The man came straight up to Senator Long and fired. I grabbed his hand and my next move was to shove him as hard as I could; my next effort was to grab him. In the meantime, he and Murphy Roden were mixed up; then I stepped back two steps. The firing was ceasing about that time. You can figure for yourself about how fast that was. I figure they shot forty or fifty times. As fast as you could shoot three or four automatics or revolvers one after the other, whichever way you want to put it, that would be the time. In other words, I have heard worlds of people not to express an opinion, say they thought it was a machine gun, those who heard it and didn't see it.

Q. Judge, was he shot after he was down?

A. The shots were continuous; there never was a cessation. Naturally, some of the shots hit him after he hit the floor. I am convinced of that.

Q. After the continuous firing was over were there any other shots?

A. No, sir. The last shooting that was done was done by an automatic also. It was continuous, there never was any cessation at all. There seemed to be more than one shooting at one time, two or three. When it was finished it was an end to everything. There was never a complete cessation of shooting until it actually stopped. There never was such a thing.

By Mr. Porterie:

Q. There was no conversation between Senator Long and Dr. Weiss at all?

A. He never uttered a word, he never gave any warning. He walked right among us. I was close to the Senator. As Dr. Weiss made one step he shot. There was no outcry at all except by Huey, the usual scream of a man injured or shot. He grabbed his side and that was all I saw of him until I saw him downstairs. When I stepped back I started looking for him. I opened the Governor's office and looked in there for him. I thought he might have gone in there. He was not there so I came back in the corridor, and was told that he ran down the corridor and down the stairs. I ran down and caught him as he was going out the east door.

By Mr. Odom:

Q. Do you recall who was there at the time he was shot?

A. It would be hard to say; there were a bunch of us. Strange to say, I know the boys who go out with Senator Long, but I know the names of only a few. I remembered after that I saw three or four; Joe Messina, Murphy Roden, the young fellow, the man they call George, I couldn't give his name, a big man; Mr. Coleman, a bald-headed fellow, I saw him. I saw this man Louis Lesage, a Standard Oil man; he was sitting in the window. I remember seeing Mr. White after it was over; I don't remember seeing him before that. I also remember seeing Dr. Smith before. There were several boys like that, I saw Joe Bates right after. By that time a great crowd was coming in. Men were running in and peeping out from the House and other directions.

Q. You didn't see any others?

A. No, sir; I made no effort to find out, to be frank with you.

Witness excused.

Rev. Gerald L. K. Smith, called as a witness, being first duly sworn, made the following statement:

I want to say I respect your court, but I do not respect this investigation, and I brand the District Attorney of this court as one of

* * * * *

I worshiped my hero. I will say nothing here and I will not harass these boys who are here in any way.

Witness excused.

Mr. ODOM. I might add in view of this charge by this person, that I care nothing of his opinion of me or my actions. When he says I entered into a plot to kill Huey Long, he is a willful, vicious and deliberate liar.

R. William H. Cook, called as a witness, being first duly sworn by the Coroner, testified, as follows:

By Mr. Odom:

Q. Dr. Cook, you are a physician and surgeon practicing your profession in the City of Baton Rouge?

A. Yes.

Q. Were you present at the operation performed on Senator Huey P. Long on last Sunday night a week ago?

A. Yes.

Q. After the operation had been performed did you have occassion to notice his mouth?

A. Yes.

Q. Will you describe to the Coroner and Jury what you found?

A. Dr. Henry McKowen, who was giving the anesthetic, called the attention of all of us, that were present to an abrasion or brushburn on the lower lip of the Senator, and asked that some one put iodine on it which I did.

Q. Was it bleeding?

A. It was not bleeding until Dr. Henry McKowen wiped it off with a moist sponge. Then it did bleed just a little.

Q. It oozed blood?

A. That is correct.

Q. Was it a fresh abrasion?

A. It appeared to be.

Q. Of course, you have no way of telling how that was caused?

A. No, sir.

By Mr. Porterie:

Q. Doctor, an injury of that kind could readily occur to any person after a person was shot who would have to take the steps from the first floor of the Capitol down a step of four flights of stairs to the basement and might strike any sharp angles or the marble in the Capitol after being wounded as he was?

A. Any contusion or trauma could cause that abrasion.

Q. By trauma you mean a lick against a hard surface?

A. Yes.

Witness excused.

Dr. J. Webb McGehee, called as a witness, being first duly sworn by the Coroner, testified as follows:

By Mr. Odom:

Q. Doctor, you are a practicing physician in the City of Baton Rouge?

A. Yes.

Q. Did you have an engagement with Dr. C.A. Weiss for an operation in which you were to administer the anesthetic on last Monday, a week ago today?

A. I did.

Q. When was the last conversation you had with him about that operation?

A. About Friday, when I talked to him personally.

Q. Did you have a telephone message from him?

A. I had a telephone message from him Sunday night about 8:15. My wife talked to him; he wanted to know if I knew that the operation had been changed from our Lady of the Lake Hospital to the Baton Rouge General Hospital.

Q. That was 8:15 Sunday night?

A. Yes, about that.

Witness excused.

C. Sidney Frederick, called as a witness, being first duly sworn by the Coroner, testified as follows:

By Mr. Odom:

Q. Mr. Frederick, you are a practicing attorney, are you not?

A. Yes.

Q. You are the District Attorney of the St. Tammany-Washington District, are you not?

A. Yes.

Q. Were you in the Capitol on Sunday night, a week ago?

A. I was.

Q. Were you there at the time of the shooting?

A. Yes.

Q. Just where were you in the building at that time?

A. I was leaving the Governor's office and had taken perhaps two steps in the reception room when the first shot was fired; that was followed by a second shot and then by a regular fusillade of shots in rapid succession. About that time I had gotten to the small entrance to the secretary's office. The shots had not ceased at that time. I looked out of the door for just a moment because I withdrew myself from exposure at the door immediately. I saw a number of men down the corridor in some confusion. As I say, I withdrew; I waited until the shots had subsided.

Q. Did you see any of the shooting?

A. I couldn't say that I saw any particular person fire any particular shot.

Q. Did you see any person fire any shot?

A. Yes.

Q. Who did you see?

A. I am not in a position to say who fired the shot.

Q. You mean you don't know the person?

A. No, I don't mean that. I mean that I didn't look long enough to determine who fired the shot. In other words, the shooting was going on while I looked down the corridor momentarily.

Q. Did you see more than one person shooting?

A. I saw revolvers in the hands of more than one person.

Q. Did you recognize any of them?

A. No.

Q. Did you know any of them?

A. I can only answer that question by hearsay. I learned the names of two gentleman afterwards.

Q. In otherwords, you learned the names of two men you saw firing?

A. I won't say that. I learned the names of two persons I recognized in the hallway.

Q. Were they contiguous to where the shooting took place?

A. Yes.

Q. How long after the shooting was it before you saw them?

A. Momentarily.

Q. Do you mind telling us the names of these two persons?

A. Murphy Roden and Elliot Coleman.

Q. Did you see revolvers in the hands of those men?

A. I would not swear I saw a revolver in the hands of Mr. Coleman. Mr. Roden, I did.

Q. Did you see the revolver in the hands of Mr. Roden firing?

A. I couldn't answer that truthfully.

Q. Can you approximate—did you see the body of Dr. Weiss at the time of the firing?

A. I was one of the first persons to get it.

Q. Did you see the body before the firing ceased?

A. Yes.

Q. What was—just describe where the body was.

A. The body was lying in a position just across the narrow corridor that leads to the Governor's office just a few feet to the west of the double doors that entered in the Governor's office by the large marble pillar.

Q. Did you see the body when it crumpled to the floor?

A. No.

Q. When you first saw the body it was down, is that correct?

A. I would say that is approximately correct. You must understand this happened so quickly. I didn't keep my head out in that corridor any great length of time.

Q. After you saw the body on the floor did you see who was shooting?

A. I will answer that question this way: There were shots fired after the body was on the floor.

Q. Did you say the only men you identified fired after the body was on the floor to your knowledge?

A. I couldn't say.

Q. I don't remember whether you stated you saw the body when it fell to the floor?

A. No, I would say the body was on the floor.

Q. Could you approximate how many shots were fired after you saw the body on the floor?

A. Perhaps five.

Q. Could you space the shots for us, the time elapsing?

A. Very little time had elapsed between shots.

Q. Would you say more time elapsed between the second and the subsequent shots?

A. I would say that more time elapsed between the firing of the first two shots and then the firing of the shots that followed after they started to fire.

Q. After the second shot was there a continuation of the shooting?

A. It sounded very much to me like a machine gun in action.

Q. Have you heard a machine gun in action or seen one?

A. Yes.

Q. Did you see a machine gun there, Mr. Frederick?

A. No.

Q. Of course, I know it is almost impossible for one to tell under the circumstances such as that the lapse of time between shots, but could you give us any approximate idea of the time between the first and second shots?

A. I would say it was a very short space of time, almost instantly.

Q. Was there a longer space of time between the first and second shots than the second shot and the subsequent shots?

A. I think there was a longer space of time between the second and third shots than between the first two.

Witness excused.

J. T. Cockerham, called as a witness, being first duly sworn, by the Coroner, testified as follows:

By Mr. Odom:

Q. You live at Denham Springs, do you not?

A. Yes.

Q. Were you in the State Capitol last night a week ago?

A. Yes.

Q. Did you witness the shooting there as a result of which Dr. C. A. Weiss and Senator Long lost their lives?

A. No, sir.

Q. Did you hear the shooting, Mr. Cockerham?

A. Yes, I heard it.

Q. Where were you ?

A. Right close to the doors at the front entrance.

Q. You mean out in Memorial Hall?

A. Yes sir.

Q. Did you see anything at all?

A. No, sir.

Q. Did you see any of the participants?

A. No, sir.

Q. Did you see anybody going to or coming from the scene of the shooting?

A. No, sir, just the crowd rushing.

Q. You heard the shooting?

A. Yes, sir.

Q. Describe what you heard.

A. I couldn't describe just what I heard. There were several shots, I don't know how many. Of course, a fellow didn't have time to count them.

Q. Was there any space of time between the first and second shots?

A. Yes.

Q. Between the second and third shots?

A. As well as I remember, there was very little space between the second and third, I don't think much. I remember when the first shot was fired there was a little space and then another.

Q. After the firing of those shots was there continuous shooting then from that time until it was over with?

A. Yes, sir, several shots fired along behind the other.

Q. Have you any way of approximating how many shots were fired?

A. No, sir, a good many. I have no idea how many. There was so much excitement and the firing was so fast I had no way of telling how many.

Witness excused.

Cooper Jean, called as a witness, being duly sworn by the Coroner, testified as follows:

By Mr. Odom:

Q. Mr. Jean, you live in this parish, do you not?

A. Yes.

Q. Were you present in the Capitol last Sunday night a week ago?

A. Yes.

Q. Were you there at the time of the shooting we are investigating now?

A. I was.

Q. Were you a witness to the shooting?

A. No, sir, I was not.

Q. Where were you at the time of the shooting? At the main entrance as you go up into the Capitol? Out in Memorial Hall?

A. Yes.

Q. Did you see anybody going to or coming from the shooting?

A. I saw people, some were trying to go in and some coming out.

Q. Did you recognize any of them?

A. No, I did not.

Q. Have you any way of approximating how many shots were fired?

A. No, sir, I couldn't answer that.

Q. Was there any space of time between the first shot that was fired and the second shot?

A. Very little if any, very little.

Q. Was there any space of time between the second shot and the third shot?

A. I couldn't say anything about the third shot.

Q. When did the beginning of the continuous fusillade of shots take place?

A. As well as I remember, after the second shot.

Q. You didn't see it and didn't see any of the participants?

A. No, sir.

Witness excused.

Ed Sharp, called as a witness, being first duly sworn by the Coroner, testified as follows:

By Mr. Odom:

Q. Mr. Sharp, were you present in the Capitol last night a week ago?

A. Yes.

Q. Last Sunday night?

A. Yes.

Q. Were you present at the time of the shooting which is the subject of this inquiry?

A. Yes, sir.

Q. Did you see the shooting?

A. No.

Q. Where were you?

A. In the lobby, just coming down from the balcony.

Q. The lobby of the House of Representatives?

A. Right in front.

Q. Out in Memorial Hall?

A. Yes, I guess so.

Q. Did you see any of the participants in the shooting?

A. No, sir, not that I know of.

Q. Did you see any one going to or coming from the shooting?

A. People were trying to go in and some were coming back. Most of them were coming out.

Q. You didn't see any of the shooting yourself?

A. No, sir.

Q. Was there any appreciable space of time between the firing of the first and second shots?

A. Half a minute or something like that. Two shots came ahead of the others.

Q. Between the first and second shots?

A. Yes, sir.

Q. And between the second and third shots?

A. About the same time, then a volley of shots.

Q. After the third shot? After the second shot? Your didn't do in there?

A. No, sir. My daughter was with me, and when it commenced she jerked me away and soon as we got away, and I got her quiet, I walked back to see what happened. Somebody said it was firecrackers; I went to find out.

Q. That's all you know about it?

A. Yes, sir.

By Mr. Porterie:

Indicate by the snap of your fingers the cracking of the guns.

(Snap-Snap)

Q. That's the time you call half a minute a little while ago? Is that what you mean?

A. That's as near as I could get at it.

Q. That's all I wanted to know. I have no reflection on you.

A. That's all.

Witness excused.

Earl Straughan, called as a witness, being first duly sworn by the Coroner, testified as follows:

By Mr. Odom:

Q. Were you in the State Capitol last Sunday night a week ago?

A. Yes.

Q. Were you there at the time of the shooting?

A. Yes.

Q. Did you see the shooting?

A. No.

Q. Where were you?

A. About five steps before you go in the hall where the shooting had taken place.

Q. In which direction?

A. Down the hall in front of the House of Representatives.

Q. You mean in what is called the House lobby?

A. I guess that's it.

Q. Did you go out in the hallway when you heard the shooting?

A. No, sir. I was headed that way. When it started I stopped.

Q. You didn't see the shooting?

A. No, Sir.

Q. Did you see any of the participants?

A. I went in there after it was over.

Q. Describe what you saw when you went in.

A. When the shooting was over I walked down there and got almost to where the shooting occurred to see what happened. One fellow was laying on the floor in a white suit. About that time they run us all out. I didn't get up but about fifteen feet to the fellow on the floor.

Q. What did you say?

A. I say I got within about fifteen feet of the fellow laying on the floor and then they made us go out.

Q. Did you see any one there at that time?

A. Yes, several of them.

Q. Do you know who some of them were?

A. I didn't look at the faces; I probably would have but I was looking at the guns.

Q. Were they strangers to you?

A. I know some of them when I see them.

Q. Do you know any of them?

A. Not personally.

Q. Do you know who any of them are?

A. Not that I seen in there; I didn't recognize them.

Q. Have you had any of them pointed out since?

A. From what the papers say, I know several of them by their names.

Q. Who was it you saw there with guns in their hands that you knew?

A. I didn't see them, I couldn't tell.

Q. What sort of guns were they?

A. Not automatics, six-shooters, like the City Police carry here.

Q. About how many men would you say you saw with guns in their hands?

A. Four or five.

Q. You cannot identify any of them for us?

A. No, sir.

Q. Who was with you?

A. Nobody was with me. There was a crowd of people but nobody with me.

Q. Was Lloyd Straughan there?

A. Yes, sir, he is my brother.

Q. Was he there?

A. When the shooting occurred, he ran back in the balcony.

Q. Were you together when it started?

A. We were when it started.

Q. When it started he went the other way?

A. Yes, sir.

Q. Can you give us any idea how many shots were fired?

A. A couple of shots were fired and then a couple of seconds and then twenty-five or thirty; that's my version of it.

Q. Have you any way of approximating how many shots were fired?

A. No way, only guessing.

Witness excused.

C. A. Riddle, called as a witness, being first duly sworn, by the Coroner, testified as follows:

By Mr. Odom:

Q. You are a member of the House of Representatives from the Parish of Avoyelles?

A. Yes.

Q. Were you in the Capitol on the night of the shooting?

A. I was.

Q. Did you witness the shooting?

A. I think I did.

Q. Relate just what you saw, what you heard, and what you observed of the proceedings.

A. When the House adjourned, I came out the right door and turned into the first door to the right into the corridor, which is the east end. I proceeded down the corridor and noticed Senator Long come out of what I thought was the secretary's door.

Q. The secretary to the Governor?

A. Yes. He was coming up the corridor towards the east end facing me. He stopped about six feet from the set-off or setback from the column in the corridor, about the center of the square or circle in the floor of the corridor. I thought that was a good time to approach him and ask him to speak at a barbecue we were going to have in Marksville. When I reached within five or six feet of the Senator, a gun fired—it all happened about the same time. There was a young fellow holding a pistol in his hand pointed directly at Senator Long. I saw four or five inches—three or six inches—I would say, of the barrell which was very bright. Then somebody grabbed him, I think. Then it was just like touching off a bunch of firecrackers. My mind was first centered on Senator Long to invite him to speak. Then when the shot fired and I saw the gun pointed right at Senator Long's abdomen, then my mind was centered on him. Then I centered on myself.

Q. Were you looking at Senator Long at the time the shot was fired?

A. Right at him.

Q. Were you looking at the man who fired it?

A. I was looking directly at Senator Long. When the shot was fired I saw the man.

Q. Prior to that time you had not observed the man who fired the shot?

A. There were five or six men around Senator Long, none of whom I recognized because I was thinking of the Senator and inviting him to speak to us. About that time the gun fired and a body seemed to move from the right in the direction of Senator Long.

Q. Was the man who fired the shot between you and Senator Long?

A. No, he came more from a diagonal direction.

Q. You were facing Senator Long?

A. Yes.

Q. You were meeting him?

A. Yes.

Q. Some one came from the side and shot Senator Long?

A. Yes, somewhat in this direction (indicating). A body moved forward about the time the gun was pointed right at him with both hands, if I remember correctly.

Q. Did you hear any conversation or remark between Senator Long and this man?

A. None whatever. Of course, there were five or six people there. I heard nothing whatsoever. As the gun fired, Senator Long did this (indicating) and turned immediately. After he turned and marched down the corridor, then it was just like firecrackers. I couldn't describe it better than that.

Q. Did you see who did that firing?

A. You mean this fusillade?

Q. Yes.

A. No, sir, I didn't recognize any man, my attention was not on them. I thought it was a bunch of bandits or racketeers in there.

Q. When you last saw the man who shot Senator Long, was he standing up?

A. Yes, bent forward a little.

Q. Did any one put their hands on him at that time?

A. No.

Q. Did you see Judge Fournet there?

A. No, sir, I really didn't. I heard him testify and he must have been there, but I didn't see him if he was there.

Q. Did you recognize anyone who was there?

A. None whatever. My mind was centered on Senator Long. He was in a very good humor that night. I was looking at him. I loved him very much. I was thinking it would be a good time to invite him to speak at Avoyelles.

Q. Did you see this man put his hands on Senator Long, the man who did the shooting?

A. No, sir, I just saw him go forward with the gun.

Q. Did you see Senator Long put his hands on the man?

A. No, sir, I don't think they got that close. I would say they were about five or six feet away.

Witness excused.

Mrs. O.P. Kennedy, called as a witness, being first duly sworn by the Coroner, testified as follows:

By Mr. Odom:

Q. Mrs. Kennedy, you were subpoenaed as a witness and I have understood since that you said you didn't see the shooting and didn't know anything about it.

A. No, sir.

Q. Did your husband see the shooting?

A. No, sir.

Q. You don't know anything about it?

A. We were in the Capitol and did hear the shots.

Q. You were subpoenaed by mistake. I am sorry.

Witness excused.

Gordon Latham, called as a witness, being duly sworn by the Coroner, testified as follows:

By Mr. Odom:

Q. Mr. Latham, you live in Baton Rouge, do you not?

A. Yes sir.

Q. Where are you employed?

A. The Louisiana Creamery.

Q. Were you in the Capitol last Sunday night a week ago?

A. Yes, sir.

Q. Did you witness the shooting?

A. No, sir.

Q. Where were you at the time of the shooting?

A. In Memorial Hall in front of the elevators.

Q. Describe the shooting as you heard it.

A. There were two shots right close together, a little lull and then the whole volley.

Q. Did you observe anybody going to or from where the shooting was?

A. I saw Joe Messina go around the side and get in the elevator running.

Q. Was he walking or running?

A. Running.

Q. Do you know whether he went up or down?

A. No, sir, I don't.

Q. Did you go around where the shooting had taken place?

A. No, sir.

Q. Did you see Mr. Messina subsequent to that?

A. No, sir.

Witness excused.

Dr. C.A. Weiss, called as a witness, being duly sworn by the Coroner, testified as follows:

By Mr. Odom:

Q. Doctor, you are the father of the late Carl A. Weiss?

A. Yes.

Q. Were you with him on Sunday, the day he was killed, the day of that night?

A. Practically the entire day until 7:30 that night.

Q. Will you describe to the Coroner and Jury just what your son did during that day and night up until he * * * sat on * * *. A. He and his wife and baby came to the house * * * there left the baby with my wife and I so they could go to church. They went to mass at St. Joseph's Catholic Church. After mass his wife returned to our home, he stopped in Scheinuk's florial establishment to see about * * * had treated the day before. In a little while he came in with a bouquet of flowers sent to his wife in honor

of the child's birth. He came in very proud, and handed the flowers to his wife saying, "Look what Mr. Scheinuk sent to the baby" Mr. Scheinuk had told him that he had not sent the baby anything when it was born, and had done it at this time. Then they went to their own home, and took the child with them. He was to take dinner with us that day. Between the time they left and returned my wife had occasion to telephone his house twice; one time his wife answered, and the next time he answered. About one o'clock, they came in the house for dinner. We had a very enjoyable meal; he ate heartily and joked and laughed during the meal. After the meal, he asked me if we cared to go to my camp on the Amite River. I told him that I had expected to go, and had already requested my younger son to go ahead and prepare the camp and open it up. So he and his wife and baby and my wife and I took the car and went out to the camp. When we arrived there my wife and I took care of the baby while he and his wife went in swimming. They were in the water about an hour and when they came out we closed up the camp and came home. We sat on the front seat and he and his wife and baby sat on the back seat; we arrived home about 7:30. Then he left there he and his wife and the baby went to their home.

Q. That was about 7:30?

A. Yes.

Q. Did you communicate with him or his wife subsequently?

A. His wife phoned me about ten o'clock—about ten minutes to ten—and asked me if Carl was there. I told her no and she said that he had gone out to make a call.

Q. The last time you saw him was about 7:30?

A. Yes.

Q. Dr. Weiss, can you tell us whether or not your son carried a pistol when he went out at night?

A. Occasionally, he did.

Q. Did he have any reason for it?

A. Recently, we have had at least three intruders in our garage; one he had to run out and I had to run one out; one my younger son called to one night.

Q. How old a man was your son?

A. Twenty-nine.

Q. Was he of robust or slight stature?

A. Very slight. I remarked to my wife that afternoon at the camp while they were in swimming that the boy was just skin and bones. She said, "Yes, he had been working so hard. We will have to get him to take a rest." He weighed about 132 pounds; he was quite a small man.

Q. Your son was a doctor, was he not?

A. Yes.

Q. Twenty-nine years of age?

A. Yes.

Q. Would you care to sketch for the jury a history of his education?

A. He graduated from the Catholic High School when he was fifteen. He then started in the premedical school at L.S.U., and then went to Tulane. In between every year's regular session, he attended summer school. At the age of twenty-one, he graduated with his degree.

Q. He was a doctor of medicine?

A. Yes. He had already taken his Bachelor of Science degree after his second year as a medical student. After he graduated he served an internship at the Touro for two years. He then secured an appointment to the American Hosptial in Paris. In between times he spent a year in Vienna studying under the Masters. Then he completed his internship in Paris. After that he obtained a two-year internship at Bellevue Hospital in New York; the last six months at Bellevue, he was the chief interne at the clinic for ear, nose and throat.

Q. Subsequently, he came to Baton Rouge?

A. And went in private practice with me.

Q. He was a specialist?

A. Ear, Nose, and throat specialist.

Witness excuse.

Murphy Roden, called as a witness, being first duly sworn by the Coroner, testified as follows:

By Mr. Odom:

Q. There has been some suggestion in the testimony here that you were one of the participants in the shooting that took place at the Capitol. If you were and for that reason or for any other reason, it is your desire not to talk, not to testify, you have that right. You have the right to refuse to testify and the right to stand on your constitutional grounds that your testimony might incriminate yourself. If you care to testify, we will be glad to hear you.

A. I have no objection to testifying.

Q. Mr. Roden, where are you from?

A. Arcadia, Louisiana.

Q. Are you a native of Arcadia?

A. I am a native of Bienville Parish.

Q. Arcadia is in Bienville Parish?

A. Yes, that is the Parish seat.

Q. Were you present or, rather, were you employed last Sunday night a week ago by the Bureau of Criminal Identification?

A. Yes.

Q. Were you discharging your duties as such?

Q. Yes, sir.

Q. Who had assigned you your duties?

A. General Guerre, Superintendent of the Bureau.

Q. Tell us what your duties were?

A. For some time my assignment was to stay with Senator Long and see that no one harmed him.

Q. When did that begin?

A. I have been with him constantly since the 15th of January.

Q. Were you with him in Washington too?

A. Yes, sir.

Q. Were you employed by the State Bureau of Criminal Identification?

A. Yes, sir, by the State.

Q. And paid by them?

A. Yes.

Q. You were assigned by General Guerre to accompany Senator Long, and see that no one did any harm to him?

A. Yes, I also held a commission through the Metropolitan Police Force in Washington for that purpose.

Q. You were acting for what is commonly known as a bodyguard for Senator Long?

A. I suppose so.

Q. How long have you been employed by the Bureau?

A. Since the second day of January, 1928, when I was a member of the Highway Patrol under Governor Simpson. I was transferred to the Bureau on the first day of November of last year.

Q. 1934?

A. Yes.

Q. You have been continuously in the employ of the State since that time?

A. With the exception of three months in 1930 when I resigned to accept an appointment to the air corps technical school in Illinois.

Q. Tell us everything you know about the shooting of Dr. Weiss.

A. We were in the House of Representatives just as it adjourned and Senator Long was talking to Representative Mason Spencer, and then he walked out of the House and down the corridor to the Governor's office. I was walking right behind him. He walked in and I stopped at the door; I was standing right in the door. He was in there for a second or two and turned around and walked out facing me. I backed right out. He walked out to about the left side of the circle on the floor in front of the main door. At that instant he had called to some one to have everybody there in the morning at 9:30; some one told him that had been attended to. At that minute some one brushed through; at that time I was standing directly in front of Senator Long—he brushed right through; at that moment, he pulled a gun and fired at Senator Long. When he went to thrust it into Senator Long, I grabbed him with my left hand over the gun; then there was a struggle and he fell to the floor and was trying to get up again. Guns were shooting around me and my eyes were full of smoke. I received powder burns on my hands and face. I thought at that time that it was a free-for-all; I knew I had the man that shot Senator Long; I was concerned over that. Finally, I fell to the floor with him. Then I jerked loose, got up, pulled my gun and commenced firing.

Q. Had he been fired at at that time?

A. Guns were shooting; I couldn't say whether he had been hit. Evidently, they were shooting at him. I couldn't see at the time they were shooting. My eyes were full of powder and smoke.

Q. You testified you were both down on the floor?

A. Yes, sir, I stumbled; that floor is very slippery and hard to stand up on.

Q. You mean you were off balance?

A. Yes, sir, in the struggle.

Q. Did either one of you fall to your knees that you recall?

A. Probable one knee.

Q. Did you ever get the gun?

A. No, sir.

Q. Did he say anything?

A. No, sir.

Q. Did he say anything at the time he shot Senator Long?

A. No, sir.

Q. Did Senator Long say anything?

A. No, sir.

Q. Except immediately preceding the shooting?

A. He kind of let out a yell of some kind.

Q. That was after the shooting?

A. Yes, sir, the minute the bullet hit him.

Q. Did the man act as if he had been shot before you broke away from him?

A. No, sir, if he had I couldn't tell it. You understand my position. Guns were shooting and I had smoke and powder burns in my eyes and couldn't see to tell just what was going on.

Q. Could you see well enough to see if he still had the gun in his hand?

A. Yes, I knew he had because I couldn't get it away from him and he kept trying to shoot it.

Q. Who was he trying to shoot?

A. Me. He was trying to work it around to me so it would be pointed at me.

Q. How far away from him were you when you opened fire?

A. I didn't get the question?

Q. I understand that you broke away and opened fire?

A. Yes.

Q. How far away did you get before you opened fire?

A. I was right on him; as far from here to the center of the table (indicating).

51-059 O-86-13 (Pt. 17)

Q. How many times did you shoot?
A. Ten times.
Q. What kind of gun did you have?
A. A .38 Colt Super-automatic.
Q. As close as you were to him at that time you could not have missed him?
A. I don't know if my shots were effective or not.
Q. Just why did you shoot him?
A. Just why?
Q. Yes.
A. I shot him to keep from being shot.
Q. When you were trying to wrest the gun away from him what was your purpose?
A. To stop the fire. I have been a member of the National Guard for a good many years and that's the first thing they teach you, to put the enemy's gun out of commission.
Q. You didn't succeed?
A. No, sir.
Q. Why didn't you continue to try to get his gun?
A. I gave it up; I knew I couldn't do it.
Q. How old are you?
A. Thirty.
Q. What is your weight?
A. One hundred and fifty, a little less or a little more.
Q. What is your height?
A. Five feet seven and a half inches.
Q. Do you know whether or not you hit Dr. Weiss at all?
A. I wouldn't swear any one of my bullets hit him.
Q. How close were you to him when you opened fire?
A. Right close for the first shots and I continued to back away.
Q. Did you see him when his body crumpled?
A. After my gun went empty,
Q. Were any shots fired after you ceased firing?
A. I don't know; I can't answer that question. It all stopped about the same time. The whole thing was not over six seconds.
Q. Can you identify anybody who was doing any shooting?
A. I never saw a soul shooting a gun.
Q. Were the others in front of you or behind you?
A. Behind us but I was tussling with this fellow that I was trying to get the gun from.
Q. I don't suppose you have any way of estimating how many shots were fired.
A. No, sir; it would just be a guess.
Q. Were any machine guns used?
A. No, sir; there were not any machine guns there.
Q. How many shots did Dr. Weiss fire?
A. I couldn't exactly answer that. I am of the opinion that only one shot was fired.
Q. Mr. Roden, do you mind telling us what other employees of the Criminal Bureau were present?
A. George McQuiston and Joe Messina; that's all I could absolutely testify were there.
Q. At the time he was in the House were any others of the bodyguards there besides those you mentioned?
A. I couldn't say; we were hanging around the door; I had just walked in and saw he was fixing to come out. They were going to adjourn. As I walked in the door he was standing with his arm around Mason Spencer. As he came past I walked behind him..
Q. Did you see Mr. Riddle?
A. No, sir, I don't recall seeing him.
Q. Did you see Judge Fournet?
A. Yes.
Q. Was he walking with Senator Long?
A. Yes, walking down the hall with him.
Q. Did you see what he did?
A. At the time he shoved us? I would say he shoved us at the same time I grabbed the gun, or about that time.
Q. Mr. Roden, you mentioned Joe Messina and who else?
A. George McQuiston was there.
Witness excused.
Joe Messina, called as a witness, being first duly sworn by the Coroner, testified as follows:
By Mr. Odom:
Q. Mr. Messina, do you understand your constitutional rights?
A. Yes, sir.
Q. Were you present at the shooting of Senator Long in the Capitol last Sunday night a week ago?
A. I would like to make a little statement, please, before, I answer any questions.
Q. Yes, you can make a statement.
A. In the first place, Senator Long is a very close friend of mine, and, in the next place, with a plot that conspired before my friend Sidney Songy came to me and begged me to take him to Senator Long's room, that he wanted to confess a crime they wanted him to pull off. He said he couldn't do it. We got him up to Senator Long's room and he told about it. A lot of stuff was captured in that plot, bullets, guns and hand grenades. In a cowardly way Senator Long was shot. I am ready to answer any questions you want to ask.
Q. Tell what you know about the shooting.
A. It is nothing I know much until the time the shots were fired. When Dr. Weiss fired the shot I saw the Senator jump back and I knew he was killed. I immediately run up, pulled my gun out and unloaded it in Dr. Weiss.
Q. At the time you did that was he being held by Mr. Roden?
A. Two men were scuffling and I looked up to see who they were. I shot the man that shot Senator Long. I saw the pistol in his hand.
Q. Did you recognize the other man scuffling with him as Mr. Murphy Roden?
A. Yes, sir.
Q. Were they grappling at the time you fired?
A. Yes.
Q. Did you see Mr. Roden have hold of the pistol at that time?
A. No, sir, this man was free with it at that time; he jerked loose.
Q. What did he do?
A. I immediately fired?
Q. Why did you shoot him?
A. To keep him from shooting Roden or myself or any one else that might be there.
Q. Did he make any effort to shoot you?
A. That, I don't know. He had a pistol and would have shot any one there.
Q. Was the pistol pointed towards you?
A. I don't know; I don't remember much about that.
Q. Was it pointed towards Roden?
A. I don't know.
Q. Did you shoot him to keep him from shooting you or did you shoot him because he shot Senator Long?
A. One reason was he shot Senator Long; the next reason was to keep him from killing me or any one else.
Q. Which one of those reasons did you shoot him for? Because he shot Senator Long or to keep him from shooting you?
A. I thought he would kill any one in there.
Q. What was the primary reasons?
A. He had shot Senator Long and would shoot me and Roden and any one else in there.
Q. How close were you to him?
A. About the distance to this gentleman sitting right there (indicating).
Q. What did you do when you had emptied your gun?
A. I went downstairs to look for Senator Long.
Q. One witness has testified that you went in the elevator.
A. No, sir.
Q. Did you get in the elevator?
A. No, sir, I went downstairs.
Q. Do you know any one else that was shooting?
A. I was too busy watching my gun to look.
Q. Who else was in the party?
A. In what way do you mean?
Q. What bodyguards?
A. George McQuiston, Murphy Roden and myself.
Q. Did you see the man at the time he fired on Senator Long?
A. I saw him a moment after the shot was fired.
Q. Did you see him before the shot was fired?
A. I didn't notice him at that time.
Q. You didn't see him approach Senator Long?
A. I didn't see him until he fired.
Q. How far were you from Senator Long at that time?
A. Not more than eight feet, probably a little closed in the back.
Q. You were behind Senator Long?
A. I run up to see who it was. I saw them in a scuffle and recognized Murphy and began to fire on Dr. Weiss.
Q. You recognized Dr. Weiss at that time?
A. I never did know the Doctor.
Q. How close were you to him when you began to fire?
A. I must have been six or eight feet.
Q. What position was he in, standing up or down on the floor?
A. Standing up, yes, sir.
Q. Straight?
A. Yes, sir.
Q. What was he doing with his gun? In which hand was it?
A. I don't remember.
Q. Mr. Roden testified that several shots were fired before he broke loose from Dr. Weiss?
A. That's Murphy's statement.
Q. Did you fire any shots before he broke loose?
A. I didn't fire until he broke loose. When I saw who it was then I went to firing when he broke loose from Murphy with the pistol in his hand.
Q. You are employed by the State Bureau of Criminal Identification?
A. Yes.
Q. How long have you been so employed?
A. In my present position?
Q. Yes.
A. I have been with the Criminal Bureau since February.
Q. Were you detailed to go with Senator Long?
A. In Louisiana, yes.
Q. You didn't go to Washington?
A. I never did.
Q. Were you under the orders of General Guerre?
A. Yes, sir.
Q. What were your orders?
A. To stop any violence that might occur or anything.

Q. To Senator Long or any one else,

A. To Senator Long or any one else.

Witness excused.

George McQuiston, called as a witness, being first duly sworn by the Coroner, made the following statement:

I don't care to make any statements whatsoever.

Witness excused.

Louis C. Lesage, called as a witness, being first duly sworn by the coroner, testified as follows:

By Mr. Odom:

Q. Mr. Lesage, were you present in the Capitol last Sunday night a week ago?

A. Yes.

Q. Were you present at the time of the shooting?

A. Yes.

Q. Where were you?

A. In the east end window of the corridor leading up to the Governor's office.

Q. In the alleyway between the House and the Senate?

A. I was sitting in the east end corridor window.

Q. You were sitting there?

A. Yes, sir.

Q. Did you see the shooting?

A. No, sir, I did not.

Q. Describe to the gentlemen what you saw.

A. I was talking to Roy Heidelberg at the time Senator Long passed by going down the corridor. I didn't pay any further attention until the first shot was fired. I just had a second to realize or come to the conclusion that probably it was a firecracker. This shooting started almost instantly; it was not over two seconds from the time I heard the first shot. I jumped out of the window and ran into the restroom of the House.

Q. Going away or towards the shooting?

A. I had to take two or three steps towards it to get in there.

Q. When did you go in the restroom?

A. When the riot of shooting started after the first shot.

Q. Were you looking in that direction?

A. Yes.

Q. Could you see what happened?

A. No, sir, I couldn't. My eyesight is not so very good. I could see a crowd of people congregated down there; I judged it to be about opposite the Governor's office.

Q. How far would you say that was from where you were sitting?

A. Probably sixty or sixty-five feet.

Q. Can you approximate about how many shots were fired?

A. No, sir, I have no idea.

Q. Can you space the time between the first and second shots?

A. Not over two seconds.

Q. Between the second and third?

A. I didn't hear the second shot; the only one I heard was the first shot and then a riot of shooting started after that.

Q. Did you recognize any of the participants?

A. No, sir, not a soul. I didn't see a shot fired.

Q. As Senator Long passed you did you recognize anybody with him?

A. The only person I remember seeing was Joe Bates. He was a considerable little distance back of the Senator. Whether he was accompanying Senator Long or not, I don't know.

Witness excused.

Elliott D. Coleman, called as a witness, being first duly sworn by the Coroner, testified as follows:

By Mr. Odom:

Q. Where do you reside?

A. Tensas Parish near Waterproof.

Q. What is your occupation?

A. I am connected with the Bureau.

Q. How long have you been so connected?

A. Since November 15, 1934.

Q. What duties were assigned to you?

A. General criminal work. Most of my work had been in the illicit whiskey traffic and other work.

Q. Were you present in the Capitol the night of the shooting?

A. Yes.

Q. Your name has been mentioned as having been present. Were you present?

A. Yes.

Q. In what capacity?

A. I was ordered to the Capitol by General Guerre to keep down any disturbance or lawlessness that might take place.

Q. Were you attached to the personnel of the man accompanying Senator Long?

A. No, sir, no such instructions were given.

Q. Did you go down the corridor with him?

A. When he came out of the House of Representatives he appeared to be alone. I turned and walked down the corridor with him to the Secretary's office. A couple of other men came on behind a little bit; maybe one was along with me or maybe a little bit behind. Senator Long went in the Governor's office and stayed a few seconds and came out and walked towards the House. When he got nearly opposite the private entrance to the Governor's office he met a bunch coming from the other direction and stopped there. He stopped there and said something about everybody being there the next morning. About that time a party off to the side stepped right up to Senator Long, pulled a gun and fired directly at Senator Long. I ran up and struck at the man that had the pistol but in the confusion my blow landed on some one else. I struck at him again and the blow carried him back because of the impact of the blow and the man who was grappling with him. Murphy Roden had grabbed him and they fell towards the marble wall and the pillar there. The man still had the gun at that time. I jerked out my gun and fired three shots. I thought probably it was a mass attack and I wheeled around and began looking things over holding my gun like this (indicating). Senator Long grabbed his stomach and said, "I am shot."

Q. Was anything said by the man who approached Senator Long that you heard?

A. Not a word, he never said anything.

Q. Was Judge Fournet with Senator Long?

A. If he was he had just walked up; I couldn't say about that.

Q. Did any one attempt to disarm this man besides you?

A. I couldn't say positively about that. I don't think any one would have had time to do it. When the second shot was fired, I thought his gun had fired.

Q. Did you grapple with him?

A. No, sir, I had hit him a blow on the jaw and followed it up to hit him again.

Q. Do you know Murphy Roden?

A. Yes, sir.

Q. Was he grappling with the man who shot Senator Long?

A. Just after I hit him and he was down; Roden was there. I think he was the man; I am satisfied he was.

Q. You said you fired three shots. Was that before or after they broke loose?

A. Just as they broke loose. As far as doing it while he was on the floor, I know he was shot while he was up because he fell up against the marble post there and there was blood on that post high up.

Q. Was that at the time?

A. Roden was just out of line.

Q. Had they been grappling with the gun?

A. Yes, sir.

Q. He shot after they broke loose or before?

A. Afterwards.

Q. Did you see Mr. Roden shoot at all?

A. No, sir, because after I shot three shots I turned around and stood looking in the other direction. Shots passed me to my right at that time.

Q. When you turned around who did you recognize if any one, Mr. Coleman?

A. You mean when I looked back?

Q. Yes.

A. I don't think I could say I recognized anybody. I think Mr. Heard was there and Mr. George McQuiston.

Q. Did you see either one of those men firing?

A. No, sir.

Q. Did you see any one with a gun in his hand?

A. I saw Mr. Heard with a gun in his hand after the shooting was over.

Q. You say you thought it was a mass attack?

A. Yes, sir. I noticed some of our men.

Q. Did any have guns?

A. As I say, two of them. The others were off to my right.

Q. Mr. Coleman, could you say who fired the second shot?

A. No, sir, I thought his gun did.

Q. They were in rapid succession, were they?

A. Yes, sir.

Q. Was there any appreciable delay between any of the shots?

A. No, sir, they were all together right good and then it was all over.

Witness excused.

Joe Bates, called as a witness, being first duly sworn by the coroner, testified as follows:

By Mr. Odom:

Q. Mr. Bates, did you view the shooting we are investigating?

A. Yes, sir, I did.

Q. Will you kindly tell us what you saw?

A. From the time the House adjourned?

Q. Yes.

A. Just before the House adjourned Senator Long told me to be sure and have everyone of our friends notified to be at a caucus the next morning at 9:30. That's one of my duties, to always notify our men when there is to be a caucus. I notified them. Senator Long had gone on out. The House adjourned and I left the House and came in the hall; I remember seeing Mr. Lesage there in the hall; I think Mr. Lesage was talking to some man whom I thought was Mr. Heidleberg. I might be mistaken about that. I walked on down the hall and as I got by Mr. Ellender's office I heard Senator Long say something about the meeting tomorrow morning. I answered and told him they had all been notified. He came moving fastly on up.

Q. Going on towards the Governor's office?

A. Yes, sir, he was talking to Mr. Fournet.

Q. He was going towards the Governor's office?

A. No, sir, he was out in the middle of the hall. Just about then a young man whom I did not know—dressed in white—I thought he was going to shake hands with Senator Long. He was moving out and as he did he pulled a gun, went in and shot the Senator. The Senator screamed and hollered, "He shot me" and turned and moved fastly away

in a crouching position holding his stomach. I knew there were enough men there to take care of everything for what might come up. My only thought was to see where the Senator was. I thought the senator might have opened the door and gone in the Governor's office because I did not see where he went. I ran in there and hollored, "Senator Long has been shot. Tell the Governor." He was not there and I came out. All that time shooting was going on. I then thought that Senator Long might have gone farther down the hall and stumbled in the Senate lounge room; I went down there but he was not there and as I came back the shooting was over and I found out that Senator Long had gone downstairs. I came back with the idea of trying to find out who shot the Senator. He was lying there with his face down and I never did see him. I went on in the Governor's office; he wanted to go to the Senator. I came on out and went downstairs and went over to the sanitarium. I got upstairs and hung around a few minutes in the hall near the Senator's room. Joe Messina came out and said that the Senator wanted to know who shot him. I said, "I don't know." And Joe said, "He wants to know." I ran down the stairs and got in my car but I had a terrible time with the traffic.

Q. Did you see who shot Dr. Weiss?

A. No, I did not.

Q. Did you participate in the shooting?

A. No, sir, my gun was never pulled from my pocket.

Q. Who was present with Senator Long at the time of the shooting?

A. Mr. Fournet. I know who was assigned there.

Q. Who was that?

A. From our department, Mr. Roden, Mr. Messina and Paul Voitier; that's all I can tell you.

Q. Were you assigned there?

A. No, sir, I was in charge of the men. In other words, the Cossacks, as they are called, usually come to me for orders when they were on duty.

Q. Had you given them orders that night?

A. They had standing orders.

Q. Those orders were to accompany Senator Long and see that nothing happened to him?

A. They were assigned; I had nothing to do with them.

Q. You had nothing to do with giving them orders?

A. No, sir.

Q. Can you tell us how many shots Dr. Weiss fired?

A. I thought it was a low caliber weapon; I think it was only one shot.

Q. You testified that you don't know who shot Dr. Weiss?

A. No, sir.

Witness excused.

Louis Heard, called as a witness, being first duly sworn by the Coroner, testified as follows:

By Mr. Odom:

Q. Mr. Heard, you are connected with the Bureau of Criminal Identification?

A. Yes.

Q. Were you in the Capitol the night of the shooting?

A. Yes.

Q. Did you see the shooting?

A. No, sir, I was twenty-five or thirty feet from him.

Q. Tell us what you saw?

A. I saw the Senator when he left the House; I was across on the other side. When he walked out I walked out. When I got out he was in the Governor's office.

Q. How far were you away?

A. Almost at the end of the corridor. In a couple of seconds he came back out to the Governor's office like he was coming back towards the house. I turned and walked ahead of him; then I heard a shot and wheeled around and pulled my pistol out. I saw the commotion up there near the Governor's office. I turned around to see if any one else was coming up the corridor. At that time there was a whole lot of shooting.

Q. Did you see who did the shooting?

A. No, sir, there were too many people between me and where the commotion was.

Q. You testified that you yourself did not do any shooting?

A. No, sir, I did have my pistol out in my hand.

Q. Do you know who was with Senator Long when he went down to the Governors' office?

A. When he walked out of the House coming out of the door, I saw Mr. Roden, and I think, Joe Messina. Those were the only two I saw. When I got in the hall I didn't walk any farther; people were beginning to get out in the hall and the lobby.

Q. Were you assigned to go with Senator Long's party?

A. Yes, sir.

Q. Were you of the party?

A. Yes.

Q. You didn't keep up with them?

A. No, sir.

Q. From whom did you get your orders?

A. General Guerre.

Q. What were your orders?

A. To keep disorders down and not let the Senator get hurt.

Q. You were just assigned to Senator Long when he was here?

A. Yes.

Q. You didn't go to Washington?

A. No, sir.

Witness excused.

Paul Voitier, called as a witness, being first duly sworn by the Coronor, testified as follows:

By Mr. Odom:

Q. Were you present at the Capitol at the time of the shooting?

A. I was.

Q. What was your business there?

A. My business was to stay with the Senator.

Q. Were you connected with the Bureau of Criminal Identification?

A. I am.

Q. Just what were your orders?

A. To see that nothing happened to Senator Long.

Q. How long had you been assigned to him?

A. The present job I have now, I think, last October, but I am in close contact with Senator Long now for four years, probably going on five years.

Q. Since October you were assigned to stay with him continuously?

A. No, sir, four years, nearly five years. When Allen ran for Governor I met Senator Long.

Q. Did you go to Washington with him?

A. Yes, sir.

Q. Where were you when the shooting took place?

A. Three or four feet from Senator Long.

Q. Did you see the shooting?

A. Yes, sir.

Q. Did you see the man who shot him?

A. Yes.

Q. Were you facing Senator Long or the man who shot him?

A. All together I was about two feet in the rear of Senator Long and about one foot from Weiss, the man who done the shooting.

Q. Just describe what you saw.

A. Senator Long walked out of the secretary's office, the Governor's secretary's office; he said that he would like to have all of his men appear tomorrow early, talking to Mr. Bates, I think. I was in about two feet of him all the time. The Senator walked towards Mr. Bates. He stopped right in front of the main door to the Governor's office, in the circle like right there. He was about there one or two seconds when this man—I learned later he was Dr. Weiss—passed on the side of Senator Long, not saying a word. He had a gun in his right hand, if I am not mistaken, with his left hand covering it. He made two steps towards Senator Long and fired his gun. The gun must have been one or two inches from Senator Long's side when he fired the gun.

Q. What happened then?

A. Senator Long, I think, said, "I am shot." It was Judge Fournet that knocked his hand down; in the meantime, Mr. Coleman, he rushed in and punched at Weiss after Weiss fired the shot, Mr. Coleman walked in and punched at Weiss, and, I think, struck Weiss and punched again and missed Weiss. I think he hit Senator Long in the mouth right where that bruise was.

Q. Who did that?

A. Coleman, he punched Weiss, and punched——.

Q. What happened after that?

A. I backed away one or two steps and kept shooting.

Q. What was Dr. Weiss doing at the time you began shooting?

A. Struggling with Murphy Roden and Judge Fournet; Dr. Weiss was in a position like this (indicating) with his two hands on the gun trying to pull it clear. He was finding it mighty hard to pull the gun away.

Q. How far were you from him?

A. About five feet.

Q. When you opened fire, did you shoot him in the rear or in the front?

A. In front.

Q. How could you do that?

A. I shot between Judge Fournet and Murphy Roden.

Q. How many times did you shoot?

A. Four times; then I backed away and made one more shot. All the time he was on his feet.

Q. Why did you shoot Dr. Weiss?

A. It looked like he wanted to shoot everybody around there.

Q. Mostly because he shot Senator Long?

A. Yes, and to protect myself and the others there.

Q. What do you mean when you say "mostly?"

A. My answer is this: I shot him because he shot Senator Long and tried to shoot me and anybody else around.

Q. Did you see anybody else firing?

A. No, sir.

Q. What sort of pistol did you have?

A. 38.

Witness excused.

L. M. Wimberly, called as a witness, being first duly sworn by the Coroner, testified as follows:

By Mr. Odom:

Q. You are a member of the House of Representatives, Mr. Wimberly?

A. Yes, from Bienville Parish.

Q. Were you present in the Capitol the night of the shooting?

A. Yes, part of the time.

Q. Kindly relate just what part you witnessed, what you saw and what you heard.

A. Immediately after the House adjourned, I walked out of the House chamber and proceeded up the corridor towards the Governor's office. As I got part the way up there I noticed Murphy Roden back back from the door. He attracted my attention as if he were clowning, so to speak, kind of like a goose-step, marching backwards that way. Senator Long came out the door; about the time he came out and turned around he made a remark to somebody: "We have got to have all our men present in the morning." He was answered by some one who said that had been attended to. Judge Fournet had about reached Senator Long. He was proceeding in the same direction I was, from the House chamber towards the Governor's office. At that time a man approached Senator Long, passed Murphy Roden and was between Judge Fournet and Senator Long when the shot was fired. Senator Long screamed out in pain and bent over and grabbed himself in the stomach. He said, "You have shot me," and his knees sagged and he struggled out.

Q. Long's knees?

A. Yes. At that time another shot was fired and seemed to me that somebody either pushed or shoved Murphy Roden, and I since learned Dr. Weiss, backward. At that time innumerable shots were fired, more on the order of a machine gun firing. They were firing so rapidly and bullets were ricocheting down that corridor so that I turned and sought cover.

Q. How close were you to Senator Long when he was shot?

A. About the third window there (indicating).

Q. Did you hear any remarks or any conversation passed between Senator Long and the man whom you subsequently learned was Dr. Weiss?

A. I did not.

Q. Were you close enough to have heard it?

A. I did not hear any but I heard other conversation and Senator Long speaks exceptionally loud.

Q. Who did you say you saw shooting?

A. At the time several people around there; this happened very quickly, much quicker than it takes me to tell it. When the shots were fired I naturally realized I had to get out of the way; they were firing towards me.

Q. Did you identify any one who was firing?

A. No, sir, I couldn't say.

Q. What position was Dr. Weiss in when fire was open on him?

A. I would say during the time he and Mr. Roden were struggling and it appeared that there was somebody else in the scuffle when the firing took place.

Q. Was there any scuffling when the second shot was fired?

A. Yes.

Q. Did you see them when they broke away?

A. No, sir, I went out the same door I came in.

Q. More quickly?

A. More quickly but not as fast as the man behind me, and I moved rather quickly myself.

THE CAREER OF HUEY P. LONG, JR.

Mr. LONG. Mr. President—

And it is here under this oak where Evangeline waited for her lover, Gabriel, who never came. This oak is an immortal spot, made so by Longfellow's poem, but Evangeline is not the only one who has waited here in disappointment.

Where are the schools that you have waited for your children to have, that have never come? Where are the roads and the highways that you send your money to build, that are no nearer now than ever before, Where are the institutions to care for the sick and disabled? Evangeline wept bitter tears in her disappointment, but it lasted only through one lifetime. Your tears in this country, around this oak, have lasted for generations. Give me the chance to dry the eyes of those who still weep here.—HUEY P. LONG

It has been 58 years since my father stood in the shade of that beautiful oak in St. Martin Parish and asked the people of Louisiana to trust him with their hopes and aspirations. His words were not the empty, demagogic promises so often made by politicians of that day. They were the sincere words of a man who was on the verge of taking Louisiana by storm and would soon assure himself a place as the most outstanding and successful Governor in our Nation's history.

Huey Long was nothing like those Governors who had preceded him. He was a brash young man who scoffed at the status quo, which for too long had kept most of the State's population chained in poverty, disenfranchised from the elective process. To be sure, he made many bitter enemies and was almost impeached by his opponents whose excessive advantage was threatened by his successes. It cannot, however, be disputed that Huey Long was a man of his word. He kept the promises that had been so casually abandoned by others. At a time when the common man had lost much of his faith in government's ability to work for the people's good, Huey Long appeared and restored that faith.

He promised the people roads where there was mostly dirt and mud. He kept that promise, building thousands of miles of concrete, asphalt, and gravel roads in just a few short years. He promised better schools and educational opportunities for a population that was largely illiterate. He kept that promise and built an educational system which for the first time gave opportunities for learning to all children, not just the privileged few. He told the people that government would provide them health care, when they could not afford it. That promise, like the others, was fulfilled. He ensured that a newborn child in the State's charity hospital had the proper care and within a few years the mortality rate dropped by more than one-fourth.

In matters of my father's life, I am a prejudiced man. He is my hero, the one person in this world who has inspired me above all others. But prejudice does not necessarily mean that your view of the matter is distorted or without basis in fact. It simply means that you have an opinion about a matter. In that regard, my view is indeed a prejudiced one. But this view is one that also sees Huey Long as a mortal man, not perfect by any means, with weaknesses like everyone. However, I strongly believe that what motivated my father was his love for mankind and his belief that every man and woman deserved the opportunity to enjoy a good life.

It has been 50 years since my father was struck down by an assassin's bullet in the marble halls of the State capitol in Baton Rouge. Although I was only 16 years old at the time, I was old enough to understand what was happening around me and to appreciate the wisdom and good sense of my father's philosophy. His idealism and love of the common man moved me to enter politics and run for the U.S. Senate 13 years after his death. I hope that he would be proud of me today, for I have tried to champion the causes of those who need a friend in government and to work to build a system which encourages everyone to enjoy a meaningful place in our economic system.

I do not believe in those ideals mainly because they were espoused by my father. I believe in them because they are right and motivated by a deep regard for the good of this country, with compassion for those less fortunate.

As a member of the railroad commission—now known as the public service commission—as Governor of Louisiana and then as a U.S. Senator my father preached fervently of the path this Nation needed to take if our form of Government was to survive.

Huey Long believed that the Government must provide better opportunity for the rank and file Americans. Simply put, he maintained the Government should assure all citizens' potential for leading the good life. It had to stand for the proposition that those who made an effort and worked diligently would have an opportunity to make something of themselves, to have a decent income and enjoy some of the good things. To my father's way of thinking, this was not too much to ask of a government that was founded on the principle that every man has a right to life, liberty, and the pursuit of happiness.

There is no doubt that Huey Long was ahead of his time in this regard. Just examine his Share the Wealth Program. Long before this country had unemployment insurance, he was advocating a program by which the Government would help those who, by no fault of their own, lost their jobs and simply could not afford to support their families. Eventually, the leaders of this country saw the wisdom in this and enacted the proper legislation, legislation that Huey Long had been advocating for years.

He was calling for a Social Welfare Program long before President Roosevelt proposed one. In fact, when Roosevelt presented his Social Security Program, he showed he was concerned about what Huey Long was proposing. Roosevelt administered it as insurance, requiring people to contribute for a certain period of time before becoming eligible for benefits.

Remember, this was in the midst of a cruel depression. Under Roosevelt's plan, the elderly got very little immediate help. They needed assistance, but had to wait for years before the help did them much good. Huey's idea was to launch right into a major program that would immediately begin lifting people out of poverty. The fact that it could be done the way he had in mind was demonstrated in my Uncle Earl Long's time as Governor. He promised there would be an old-age pension and we did it immediately and with a substantial portion of it paid with State funds.

I believe my father was correct in maintaining that the Government did not need to take the time it did in building up reserves before helping those in need. The fact is that Social Security today is more an intergenerational transfer payment with little in the way of reserves, somewhat as Huey would have had it. He respected the insurance principle, but I know he would not have wanted millions of aged persons living for years in poverty and wretchedness.

President Johnson, who as a young Congressman was close to President Roosevelt, once acknowledged my father's contribution to Social Security.

He thought that the old folks ought to have Social Security and old age pensions and I remember when he just scared the dickens out of Mr. Roosevelt and went on a nationwide radio hookup talking for old folks' pensions.

President Johnson said in a speech in New Orleans in 1964:

And out of this probably came our Social Security system.

Huey Long was looking down the road, with great vision, toward where I still think we should be headed in this country. The whole basis of his philosophy for the Nation was that none should be too rich and none too poor.

His contribution was extraordinary on the Federal scene. He forced the Roosevelt administration to alter the course it had chosen and forced it down a path that would turn out to be the way of the future. It was a course based on the belief that our Government should provide more security and better opportunity for everyone.

Because of Huey's prodding, the Federal Government did a lot more for the average man and for the less fortunate. But there is no doubt that if Huey had had his way, the Great Depression would not have been as severe. With Huey Long leading the way, I doubt it would have taken World War II to end the needless pain and suffering that afflicted this land for 12 years.

One of the earliest stories I heard about my father happened before I was born, but is very characteristic of the kind of man he was. Before he ever sought public office, he and my mother were living in Shreveport, LA. Every morning my father would ride the street car, which ran right in front of the house, to work and back at night. But one day the company raised its fare from 5 cents to 7 cents. You might not think 7 cents is much, but at that time a nickel was like a dollar today, considering how hard it was to earn money and how little people made when they did work.

Huey was outraged and he announced that he would file suit to restore the 5 cent fare. Meanwhile, he would refuse to ride the street car, even though it rolled right in front of his house.

So every morning he would walk down the tracks about 2 miles to his little office in the First National Bank Building. At night, he would walk back home. The men working on the railroad tracks thought he must be crazy. They would call out to him and he would wave back. I am sure they must have said to themselves, "There's that crazy kid Huey Long. He thinks he's going to make them put that street car fare back to 5 cents."

Well, he won the law suit, the fare was lowered back to 5 cents and he started riding the street car again. He made no money from that case, but that is not what he wanted. He told my mother at the time:

You know, if you want to be in public office and serve the people, you need to prove to them that you can do something for them.

Getting that 7-cent fare down to 5 cents proved a point: He was a man of action. It was not too long before he was elected to the public service commission. As public service commissioner he went to work even harder to establish himself as a person who could help the rank and file of citizens.

Huey was elected to the Louisiana Public Service Commission, then called the railroad commission, about the time of my birth. The campaign for public office kept him away from home much of the time and for that reason he was not in Shreveport when I was born. When the doctor asked my mother what she wanted to name me, she told him she had decided upon Huey P. Long III, after my father who was Huey Junior. My father, however, had other ideas. When he arrived back in town, he demanded that my name be changed.

He told my mother:

I was Huey Long Jr. and I hated being little Huey all my life. I'm not going to wish that off on a son. Furthermore, when a man is in politics he almost always winds up being repudiated. It's better for the boy to have his own name so if things go badly for me, he can have his own name to make it on.

So, he insisted I be named something else. It so happened that my parents had a respected banker friend, a relative of my mother's, Russell Billiu. They gave me his name and from then on I was known as Russell.

About 20 years later, when I joined the Navy, I needed a copy of my birth certificate. It was then that I discovered my name was still officially Huey P. Long III. Nothing hurt me more than to change my name to what it had been all my life. But if I had not, people would have assumed I was trying to capitalize on my father's name. I thought since I had always been known as Russell, I ought to honor his wish and have my own name and not his.

Huey knew early in his career that he would be controversial and make quite a few enemies, but it never stopped him from doing what he thought was right. Once, he was convinced that the electric company was charging too much. So he filed a law suit and made them refund checks all over the State to people who had been overcharged. Wherever prople wanted service, he took a great interest in it and was very aggressive at making the utilities give their customers a better deal.

Huey was never one to shy away from a fight and to try to change the system when he thought it was treating people unfairly. It was not too long before he started focusing his attention on those old families who owned most of the wealth in our State who had a way of claiming too much advantage and too much privilege for themselves. The rank and file, from his point of view, were not being treated fairly. The people who had the best of it just kept on getting the best of it and those who never had much chance continued to have very little chance. He wanted to do something to change all of that and went to work campaigning for Governor on the promise that the average man was going to get a better deal.

The first time he ran for Governor he lost. I have always maintained he lost, not because he lacked the support of the people, but because it rained all day long on election day. At that time, it was impossible to find more than a few miles of good roads anywhere in the entire State.

In fact, there were hardly any gravel roads worthy of the name, much less hard surface roads. The farmers and people in the rural areas where his supporters were the most numerous were essentially immobilized by the rain, especially in north Louisiana where he was most popular.

He tells a story in his autobiography. He said a friend asked him, "Have you heard about the first box out of Red River Parish?

"No, tell me about it," he said.

"That box is for you 50 to 1."

"Then that means I'm beat," he said. "That box should have been 100 to 2."

The story was different in New Orleans. There the people could get to the polls with relative ease, without having to trudge through miles and miles of mud. In New Orleans, he lost badly, but the weather was not the only reason.

In those days, the Old Regulars' organization had New Orleans so organized that they could deliver to their candidate, even though you may be a very popular candidate running against him. In years to come, he found he would have to build himself an organization able to contend with the Old Regulars in New Orleans and eventually he did to where, shortly before his death, he was successful in defeating the Old Regulars even in the city of New Orleans, but that took years to do.

Back at that time New Orleans had the ultimate in terms of home rule and nobody, not even the Governor, dared to interfere with the city's affairs, especially its elections. So on election day, when Huey's people would cry foul or try to defend their rights, the police would come and arrest all the Long poll commissioners and haul them off to jail, leaving the Old Regulars' commissioners to do their mischief. At that point, you would be finished. They did not have to be in complete control to those polls very long to make sure that the outcome was to their ultimate satisfaction.

In addition, the Old Regulars had thousands of people on the voting rolls who did not belong there. Some were dead and some were sailors coming through town who had registered to vote. Election day would come and the the sailors would be long gone, but curiously they still voted.

Huey soon learned that if he were going to be successful and do some good for Louisiana, he must learn to beat those people at their own game. So many people talk about how ruthless Huey was and the lengths he would go to win an election. Huey Long was simply fighting fire with fire.

Four years later, in 1928, Huey ran again and this time, of course, he won. I can still recall that election day vividly. I was a young fellow, just turning 10 years of age. My sister, my brother, and I were in tears because those early returns coming in out of New Orleans were overwhelmingly against our father. He called and told my mother that he was going to win that race. He had checked all over the State and the early returns for the precincts he counted on carrying were going just the way he thought they should. That was hard to believe when you have been seeing those early returns that looked so bleak.

The following day was a very bad one for us children at school. All the kids in school were just delighted to see that our father was trailing badly and probably was going to lose the election. But to their surprise, it had all turned around the following day and Huey was ahead. My mother went out and got three newspapers and pinned the headlines—"Long Leading" and "Long Takes Lead"—on each one of us children to let our classmates know that Huey was now leading and that he had been elected.

Once elected, he went to work to fulfill his campaign promises. And he did. Among them was his commitment to provide schoolbooks for little children.

He had told the people that there would be free schoolbooks for children and he kept that promise. I can recall that when I was a youngster the schools were all segregated. But even at schools for the white children I can recall that after the young people had been there for a few days, if their parents had not been able to buy them textbooks, the teacher would ask those poor little children to leave and not come back.

Mr. President, when free schoolbooks went in, enrollment of public schools increased by 20 percent. Think of all the little children who had been losing their chance in life because their parents could not afford those books.

It is very tragic to think of all the little children who lost their chance in life because their parents could not afford to buy them school books. Huey changed that and made sure that every child in Louisiana would have text books. He made himself quite a few enemies by doing that because he forced the oil companies to pay for it by drastically increasing the severance tax. One already existed, but he contended it should be much higher. Needless to say, that caused an uproar among the opposition. A friend of mine once said that those people who were against my father were not against children having schoolbooks. They were not against good roads and they were not against good hospitals. They were not really against any of that. They hated Huey because he made them pay for all that.

Possibly more than anyone else in his time, he fully recognized that you really cannot make an omelet without breaking some eggs. He knew that you will make some enemies if you plan to make some changes in the way government operates.

For example, after he had levied the tax and had put free textbooks in the schools, the Caddo Parish School Board was still refusing to accept them, saying they did not need a handout from the State. About that time, however, the people in Caddo Parish learned that the government was planning to establish an airbase in Bossier Parish, right across the Red River. But when the parish leaders came to Huey and asked him to routinely sign over some State property for the base, he refused to sign it.

Those Caddo Parish people were just outraged because they might lose this base and the hundreds of jobs that went with it. But Huey told them, "You people are so rich up there that you say the children don't need free schoolbooks. What do you need with an Air Force base if you're that rich?"

They had to swallow their pride and permit the children to have the free books if they wanted to have Barksdale Field. I'm not sure if he would have been willing to lose the base just to get free books in the school. I suspect he was playing a bluffer's hand. But to hear the other side talk, you would have thought he had committed an impeachable offense. In fact, when an effort was made to impeach him, speakers from Shreveport were heard orating about his tyrannical methods of forcing government-owned books into the hands of proud families who wanted none of it.

But that was the way it was when it came to my father. People either loved him or despised him. There never was, or has been, much in between.

THE OLD REGULARS AND THE STATUS QUO

Those Louisianians who never had to drive a car across the State in the 1920's cannot fully appreciate what Huey did for our State. When he became Governor in 1928, there was less than 100 miles of hard-surface roads in the entire State. Today, there are more than that in every individual parish. But then, if you were to add all the concrete and all the asphalt roads together, there would be less than a hundred miles, with a few other miles under construction.

During the 4-year period he was Governor, in spite of more opposition than any Governor has ever had before or since, he still managed to build a total of 2,300 miles of hard-surface roads. Two-thirds of that was modern, concrete highway, some of the best concrete roads in the United States at that point. That is enough road to build a highway from Baton Rouge to New York, and then build another from Baton Rouge to Chicago. All of this was in one relatively small State in a period of about 3 years, because it took about a year to obtain the authorizations, money, and rights-of-way to get started.

Under his administration, the effort to build roads in Louisiana exceeded that of New York, which was a very progressive State. New York, after all,

had six times our population. Louisiana, which was 2 percent of the Nation's population, was employing 10 percent of all those people in the country who were working on road projects, which was five times the national average. Most of that was during a time of depression when a large percentage of workers in country was unemployed.

Not only did he build roads, but he built 111 bridges. Did he receive a lot of acclaim from others who were in power? Not at all. Instead, they tried to impeach him.

Today, when you hear about Huey Long, you are likely to hear that he was almost impeached as Governor. To the unknowing, it would seem that the legislature of a great State would only seek to remove a Governor from office if he had done some dastardly deed. In my father's case, however, nothing could be further from the truth. Those people were angry at him because he was out to make the rich pay more taxes so the average family could live a better life.

There were a few outlandish charges against him, but the only one that passed was one alleging he had threatened to reveal certain information that might embarrass a prominent Louisiana opposition family. His defense was that it could hardly be an impeachable offense to reveal something that is a matter of public record. If it were a public record, then anyone had access to it.

Huey's people got busy and they found 15 senators willing to sign a statement declaring that they would not vote to impeach him no matter what the evidence. Those 15 votes meant that his opponents were beaten because they would not be able to get the majority they needed to convict him.

The position of those senators was that the session had been called for a certain number of days and the time for the session had expired, so the legislature had no right to extend it, without the Governor's consent. Although they could have proceeded with impeachment as a farce and a rump trial if they wished, Huey's opponents knew that would be useless. So they gave up, reluctantly and voted to adjourn.

TO WASHINGTON

Today most Governors who are regarded as great Governors are remembered because they did something significant for roads or for education. Taking those criteria alone, Huey was more outstanding in both respects than any Governor in this country's history, to my knowledge.

He arranged it so that a young person whose family had no means whatsoever to attend Louisiana State University could get a good education by means of a large number of work scholarships. For example, students produced and prepared the food that was served on campus.

I remember so many young people, my classmates, who went to school with no more than the shirt on their back. But Huey provided opportunities for young people to work and pay for their education. And a lot of those young people have been some of the outstanding leaders in our State and Nation since that time. Today, in large measure because of Huey's leadership and example, our Government's policy is to help those young people who cannot otherwise afford a college education.

In doing what he did, he took taxes off those who were least able to pay. When Huey became Governor, there were taxes on a man's cow, his hog, just about anything the Government could find to tax. Huey eliminated those taxes on a farmer's livestock and eventually was able to enact the homestead exemption so that the first $2,000 of assessed valuation, equal to about $30,000 today, would be untaxed. That meant that most people no longer paid a tax on their homes or small farms.

Another example of Huey's compassion: During the Depression, when the little people had no income and could not find the money to pay their bills, the banks would simply foreclose on them and take what little they did have for payment. Huey provided the leadership for a debt moratorium commission, a body set up so that a man could go before it and explain that he was doing his best but that he was on hard times. The commission would usually arrange to give him more time. It would say that a person could not be foreclosed on, allow the debtor more time and would find ways to have the State use its credit to assure the bank would eventually be paid.

He went to Washington in 1932, elected by the people as U.S. Senator and began to spell out his views about his Share the Wealth Program. Incidentally, he later changed their name to "Share Our Wealth Program," feeling that all the people of the country had a claim on the wealth of this great Nation. His theory was that most of our trouble comes from greed. His view was that we have enough of everything in this great country so that most people can live a comfortable life. He believed that the country permits a few people to hog up so much of the wealth that there is just not enough left for the remainder to have a fair share.

His argument was that if you tax away some of the money that those very wealthy people have and then spread it among those who were poor by providing them a home, some furniture, and an auto and paid a pension to the aged and put the unemployed to work on some desirable public works then the rest of the people could live a decent life. Basically, he wanted to assure that every family would have a home, an automobile, a reasonable amount of furniture—enough so they could live decently. Moreover, he wanted to assure that everyone would have a job and a chance to have an education. He wanted all the elderly to have a pension when they reached their declining years.

From the day he made his maiden speech, entitled "The Doom of America's Dream," he was branded by the special interests as a dangerous populist.

He kept speaking out for that until President Roosevelt found that he was going to have to change his way of doing business to keep Huey from stealing all his thunder. When Roosevelt was first elected President, he ran on the platform that could please anybody. Liberals and the conservatives both found things they liked. But in due course, the liberals, Huey in particular, found reason to be dissatisfied, and Huey would make his speeches to the effect that Roosevelt had claimed conditions would be better although they were getting worse and continued to get worse. So much so that Roosevelt decided he was going to have to change his approach. And he decided he would support a Social Security Program which, of course, Huey was glad to vote for, although it did not do near as much for the aged as Huey would like to have done. It required building up larger reserves before they could receive the benefits they would have otherwise.

I suppose Roosevelt had promised all sorts of things when he was running for president as most candidates tend to do. But he had campaigned in such a way that many rich and conservative people thought he was their man. The working folks, too, thought that he was on their side. But in the last analysis, the people from New York, where he was from, did not expect him to do many of the things that Huey Long was talking about.

So Roosevelt got off to a very conservative start, until he and his people started looking at polls that indicated that if Huey Long kept touting his program and ran as a third party candidate, Mr. Roosevelt was not going to be reelected. Huey probably would not have won the election either, but he would have gathered enough votes so that Roosevelt would have run behind the Republican candidate. That had Roosevelt worried. I have talked to people since that day who were with Mr. Roosevelt at the time who tell me just how scared he was of the impact of my father's proposals among the people generally.

One of those people told me that he was in the White House during the days they were talking about how they

would deal with Social Security and that Roosevelt had just a great deal more to say about Huey Long than he did about Social Security. Lyndon Johnson was a good friend of President Roosevelt and he said that because of what Huey Long was saying and the way it was catching on in the country, Roosevelt felt that he had to endorse some kind of Social Security Program. It is very clear to me that my father played a major role in the birth of a system by which our Government became more humane and set out to actively pursue a policy of creating jobs, rather than to leave people idle, homeless, and hopeless.

Of course, Roosevelt did not give Huey Long credit for what was being accomplished at that time. Since then, however, I have heard from many people, even those who were once enemies of my father, who tell me there was not any doubt why Roosevelt was moving in a more liberal direction. He was doing it because he was seeing the rising star of Huey Long moving on him and if he did not do something, he might not be reelected.

There was one thing, however, that President Roosevelt did credit to Huey Long a year or so after his death. It was the National Youth Administration, the program that gave young people all across the Nation a chance to work their way through school. And since that time, we have gone beyond that to make it a great deal easier for young people to attend college.

Mr. President, I have already addressed myself to the assassination. I would like to add one aspect to that matter. I doubt that my father would have been assassinated had he not succeeded in repealing the poll tax. Prior to the time he repealed the poll tax, he was winning the elections by somewhere between 50 and 60 percent of the vote. But you could see great numbers of people who were unable to vote because they could not afford to pay the poll tax, who would vote even if they could. It stands to reason that about 75 percent or more of the whites who could not vote would have voted for him if they had been free to do so.

This repeal of the poll tax did little to help the blacks. They were barred from voting by a so-called white Democratic primary, and he did not attempt to change that at that time because he felt to do so would cause him to be crucified on a cross as it so often happened to liberal Southern politicians. But he did feel that at least he should provide the leadership to start moving in expanding the electorate, and to fix it so that the poor whites could vote. What he did almost doubled the electorate. He never lived to see the results of that. If he had, he would have been winning the electorate by more than 70 percent.

Mr. President, if he had lived in a day such as we have today of the Federal voting rights laws, the blacks who constitute about 30 percent of the population of the State would have also been privileged to vote. How would they have voted? I know how they voted when I was a condidate on the ballot. About 95 percent or more voted for me. When Earl Long was a candidate for Governor, on more occasions than one, about 95 percent of the blacks voted for him. It is fair to assume that Huey would have had about the same thing.

When the opposition saw that they were not going to be able to defeat him at the polls, that caused many of them to feel that they should consider killing the man to have their way. Mr. President, I doubt that the man who appears to have assassinated my father would have wanted to make that move had he known or at least believed what Huey really had in mind. Huey Long had thought that it was too much to keep going back and forth from Washington to Louisiana to try to help a Governor and his friends do business in the State legislature and maintain control of the State every time the opposition sought to overthrow them.

He concluded that he should help to reelect his friends, run for reelection himself at the same election, then, to use his term, "to push the boat way from the shore"—leave it with a Governor who was competent, honest, and who would not tolerate dishonesty in others and to manage the affairs in his own way. He picked out the man he thought was qualified to do that.

That man is known to us who served here for more than 30 years as a great U.S. Senator. Allen Ellender was one of the most straightlaced men I have ever known in politics in my life. If Allen Ellender had been the Governor of the State, we would not have had the scandal that occurred years after Huey Long's death. It seems very unfair to me that many in the media sought to blame him for the scandals that occurred later on, years after his death when he was not the one who was responsibile for it.

None of the corruption in the years after his death could be traced to him for the simple reason that while he was calling the signals when he was Governor and Senator he did not tolerate corruption.

The scandal would not have occurred had his so-called political heirs listened to my mother, who pleaded to them to support Allen Ellender because he was the man she knew Huey Long wanted to succeed him as Governor. Had his opposition known that he was planning to support an independent type man who was as honest as the day is long and intolerant of corruption in others, I think many of them would have looked differently upon their thoughts about him. I think that even the person who shot him would have thought differently about his desire to kill Huey Long because he did not like the way Huey Long was doing business. I think he would have been willing to tolerate Huey making speeches here in Washington and advocating his share of the wealth program had he thought he was not the dominant force in local Louisiana politics.

It may make a point to suggest that we will never achieve perfection on this side of heaven, probably because we do not deserve it. Perhaps this world was intended to be a testing place rather than the ideal. Why else do we endlessly fail to appreciate good people until they are gone, and fail to trust those who are worthy of it until it is too late? In my own case, I have been elected to the U.S. Senate on 7 consecutive times over a period of 38 years. My first election at age 30 was by a close vote, but since that time I have achieved some very large majorities. The closest of the races found me ahead of my nearest opponent by 20 percentage points and I have had majorities of as much as 87 percent, 75 percent, 66 percent, and 70 percent, some of them against opposition that may have deserved more votes than they achieved. In some cases, I have been elected without any opposition whatsoever.

Mr. President, I have won not just some, but almost all of my victories, by larger margins than my father ever achieved. That was in spite of a statewide media which was thoroughly unfair and constantly critical of Huey Long for the last 50 years when he was not alive to defend himself.

Yet, I am convinced that much of my success, even in recent years, was because of my father. How could that be? It was because those who had heard him speak more than 50 years ago, by word of mouth, had a way of expressing their favorable opinions of him in spite of uniformly adverse comment both in print and over the electronic media for 50 years.

With those who had known and supported the man, he was the greatest Governor, not just in Louisiana, but in any State, ever. Those who shared that opinion represented about 60 percent of those who were privileged to vote when Huey Long was on the scene. They represented more than 75 percent of those who were white and could not vote and about 95 percent of those who were black and also could not vote. In other words, had Huey enjoyed the benefit of the Federal voting rights laws, he would have been achieving more than 75 percent of the vote in honest elections.

Among those who were old enough to know Huey Long and recall his speeches, he still rates in the polls more popular than any other Governor. Why? I will always maintain it is

because those who knew Huey Long will always remember what he did for them. Neither they, nor I, will ever forget the price he paid for trying to make this world a better place.

He stated his dream for American eloquently in the concluding lines of his autobiography when he said:

Then no tear dimmed eyes of a small child will be lifted into the saddened face of a father or mother unable to give it the necessities required by its soul and body for life; then the powerful will be rebuked in the sight of man for holding that which they cannot consume, but which is craved to sustain humanity; the food of the land will feed, the raiment clothe and the houses shelter all the people; the powerful will be elated by the well being of all, rather than through greed.

THE 50TH ANNIVERSARY OF THE DEATH OF SENATOR HUEY PIERCE LONG

Mr. BYRD. Mr. President, 50 years ago today, September 10, 1935, Senator Huey Pierce Long of Louisiana died from an assassin's bullet. The distinguished Senator RUSSELL LONG has made some brief remarks in this regard earlier. I feel it is appropriate that this Chamber take the time today to reflect upon the memory of this great American, a distinguished Senator, the father of our own beloved colleague, Senator RUSSELL LONG.

Senator Huey Long was one of the most colorful persons ever to sit in this body. His flamboyant style and controversial methods have been portrayed in a plethora of books, movies, and songs. But the emphasis on his style and methods often distracts from the meaning of his life and political career, both of which were, tragically, far too short.

Born August 30, 1893, in Winnfield, LA. Huey Long seemed destined for a life of public service, and of helping the weak, the underprivileged, and the dispossessed. Regarding his career as a lawyer, Huey Long recalled: "Always my cases were on the side of the small man—the underdog, I have never taken a case against a poor person," he proudly proclaimed.

In 1918, at the age of 25, he was elected State railroad commissioner. In this position, he secured a reduction in telephone rates for the people of his State, prevented rate increases on street-railways, and attacked corporate abuses.

In 1928, Huey Long was elected Governor of Louisiana. His administration resulted in badly needed reforms for his State, free textbooks for the State's schoolchildren, and new bridges, paved roads, and other improvements. New hospitals were built; old ones were modernized; and his beloved Louisiana State University was vastly expanded and improved.

Taxes on the State's oil and gas industries were increased to pay for the programs of Governor Long, while the State's poll tax was abolished to increase the participation of the State's "poor whites" in the democratic process.

In 1930, Huey Long was elected to the U.S. Senate. In his maiden speech to this body, "The Doom of America's Dream," which he delivered amidst the worst days of the Great Depression, Senator Long remarked:

This great and grand dream of America that all men are created equal * * * this great dream of America, this great light, and this great hope, have almost gone out of sight in this day and time * * * there is a mere candle flicker here and yonder to take the place of what the great dream of America was supposed to be.

Senator Long planned to resurrect the fading American dream with his "share the wealth" program which proposed a homestead allowance and a minimum annual income for every American family. He further proposed to redistribute wealth through limitation of inheritances, heavier taxes on the higher brackets, old-age assistance to the elderly poor, public works, and balancing farm production with farm consumption.

Although the feasibility of some of his plans and ideas has been questioned or challenged, it is certain that he was trying to ensure that every American could and would have a life of economic security and social dignity.

If some of his proposals were infeasible, his heart and mind were in the right place. If some of his plans were in error, at least he erred in trying to make life more comfortable and better for all the people, the poor as well as the rich, the weak as well as the powerful.

As a result, Senator Huey Long developed a tremendous following, not only in Louisiana but also throughout the country. Historian David Potter writes that Senator Long "was second only to the President (Roosevelt) in political importance when he went to Louisiana * * * for a special session of the (State's) legislature." While there, on September 8, 1935, Senator Long was shot by an assassin; he died 2 days latter—50 years ago today.

Upon the death of Senator Long, Senate Majority Leader Alben Barkley said,

Life is not measured in years. Many men have lived to be 80, 90, or even 100 years old without accomplishing as much in the causes in which they believed and for which they fought as Huey Long accomplished in 40-odd years.

Then, too, there were the words of another U.S. Senator who also fell to an assassin's bullet. In his book, "Profiles in Courage," John F. Kennedy said:

Must men conscientiously risk their careers only for principles which hindsight declares to be correct, in order for posterity to honor them for their valor? I think not . . . Surely in the United States of America, where brother once fought brother, we did not judge a man's bravery under fire by examining the banner under which he fought.

Senator Huey Long, however, never considered his actions and policies to require defense or explanation. He knew what he sought, and he never asked for quarter.

I think it is appropriate, as we acknowledge the memory of this larger-than-life American, to recall some lines from his favorite poem, "Invictus"—lines which themselves adequately summarize the life and political career of Senator Long:

In the fell clutch of circumstance
I have not winced nor cried aloud.
Under the bludgeonings of chance
My head is bloody but unbowed. * * *
It matters not how strait the gate,
How charged with punishment the scroll,
I am the master of my fate;
I am the captain of my soul.

Mr. President, the Scriptures teach us to "Honor thy father and thy mother." Senator RUSSELL LONG has honored his father and his mother—by words and by deeds. In so doing, he has brought honor upon himself. All Members of this body revere Senator RUSSELL LONG. Every Member counts him as a friend. He is a great Senator, a great Louisianian, a great American. History will long honor the memory of Senator Huey Long, and we will long honor the memory of the name of Senator RUSSELL LONG after he departs from membership in this body—which he has announced he will do voluntarily at the close of the 99th Congress.

Mr. President, I yield the floor.

ANTI-APARTHEID ACTION ACT OF 1985

Mr. BYRD. Mr. President, I move to proceed to consider the conference report on H.R. 1460 and offer a cloture motion on the motion to proceed.

The PRESIDING OFFICER [Mr. HECHT]. The clerk will report the cloture motion.

The assistant 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 the motion to proceed to the consideration of the Conference Report on H.R. 1460, The Anti-Apartheid Action Act of 1985.

Edward M. Kennedy, Paul Simon, John D. Rockefeller IV, Bill Proxmire, John F. Kerry, Spark M. Matsunaga, Max Baucus, George J. Mitchell, David Pryor, John Melcher, Gary Hart, Howard M. Metzenbaum, Lawton Chiles, Dale Bumpers, Don W. Riegle, Jr., Alan J. Dixon, J. James Exon, Patrick J. Leahy, Claiborne Pell, and Alan Cranston.

Mr. BYRD. Mr. President, I withdraw the motion to proceed to the consideration of the conference report.

The PRESIDING OFFICER. The motion is withdrawn.

Mr. DOLE. Mr. President, a parliamentary inquiry. As I understand it then, the impact of this would be another cloture vote, not on the conference report but on a motion to proceed to the conference report, and this vote would occur on Thursday?

The PRESIDING OFFICER [Mr. GRAMM]. The Senator is correct.

Mr. DOLE. One hour after convening?

The PRESIDING OFFICER. After a quorum is established.

ORDER OF PROCEDURE

Mr. DOLE. Mr. President, it would be my hope that before we recess this evening we can lay down S. 1200, the immigration bill. As I understand it, the distinguished Senator from Michigan, who has a question with reference to S. 1200, is on his way to the floor.

DISCRIMINATION BASED ON ALIENAGE

Mr. LEVIN. Mr. President, I understand from our good friend Senator SIMPSON that there is going to be a hearing in the next week or 2 weeks with the House of Representatives, a joint hearing, on the question of discrimination based on alienage, which is an issue which was debated at the time this bill came up in the last Congress. As a matter of fact, we had a vote at that time on a Hart-Levin amendment relative to nondiscrimination based on alienage.

Logically, some of us have felt that that hearing should take place prior to this bill coming up, because it would provide a record upon which we could debate the issue. It is a complicated issue, by the way. It is extremely complicated. We thought it would be useful to have that hearing record prior to the debate on that amendment.

The leader wishes very much to proceed, and I surely do not want to be an impediment to that. So I talked to Senator SIMPSON about the possibility that we have some assurance that at some point prior to any conference with the House—and our friend is here right now—on this immigration bill, assuming that it gets to that point, those of us who are interested in this subject would have an opportunity, a window, on the floor of the Senate to have a vote either on a bill, or on a resolution, or on a sense of the Senate, on some matter relating to the issue of nondiscrimination based on alienage.

If the majority leader is willing to say yes, that at some point prior to conference there would be that opportunity—it could be limited to a few hours—I think it would satisfy a lot of us on both sides of the aisle who have written our good friend ALAN SIMPSON urging that there be a hearing on this subject and who are interested in this possible amendment at some point.

Mr. DOLE. Mr. President, let me indicate that the distinguished Senator from Wyoming is an expert in this area, but I would say that the leadership certainly understands the problem.

I would be willing to make the pledge to the distinguished Senator from Michigan. I hope that would permit us to lay down the bill this evening.

As the Senator indicated earlier, this might be 1 month from now; it might be 6 months from now. If the House does not pass the bill, it might not happen at all. So I am willing to agree to the request of the distinguished Senator from Michigan.

Mr. LEVIN. I think that would be helpful. That was my only problem in proceeding, because I think logic dictates that the hearing come prior to the debate. In this case, that is not possible because of the needs of the leader to proceed, and we can understand that and appreciate it. Those of us interested in this subject would like to be assured of that window prior to the conference, when we would have an opportunity—if we chose, I emphasize—to proceed to a decision by the Senate on some resolution, bill, sense of the Senate, or whatever the form would be.

Mr. SIMPSON. Mr. President, I appreciate the majority leader giving that concurrence, because I certainly will do so. I assure the Senator from Michigan that we will do that.

I think the critical point we have to remember is that when we speak of this vexing, puzzling issue of discrimination based on alienage, we are not talking about color of skin or ethnicity. That is what makes it difficult. It is a new thing which has arisen, which has not even been addressed by civil libertarians or in either body of Congress. It is a very puzzling thing. But I emphasize that it has nothing to do with color of skin or ethnicity. It is a wholly new thing based upon permanent residency or citizenship, and discrimination based on that degree of alienage.

I assure the Senator—and the majority leader has done so—that if we are allowed to go forward, we will accommodate the Members on both sides of the aisle and deal separately with that issue at a separate time, either through hearing or a sense of the Senate resolution, or perhaps even if the House passes it, then when the Senate appoints conferees, a motion to appoint conferees would be in order.

I assure the Senator that we will work toward that, so the window is there for an independent vote on a rather puzzling, extraneous, and yet important part of the issue of immigration reform.

Mr. LEVIN. It is complex. The reason we are in this puzzle is that for the first time we are prohibiting employment of someone instead of prohibiting discrimination against someone in this bill.

I do not have a perfect answer to the puzzle. My good friend puts it very well: it is a very difficult issue.

The fact that there will be that window at some point prior to conference, where we could get an expression from the Senate, if we decided to seek it, is adequate. As always, the majority leader and Senator SIMPSON are cooperative, and we are delighted to cooperate with them.

Mr. DOLE. Mr. President, I understand that the distinguished minority leader is visiting with Senator CRANSTON to see if we can lay down S. 1200. As soon as we do that, we intend to recess until noon tomorrow.

Mr. President, while we are waiting, I advise my colleagues again that the cloture vote on the conference report tomorrow will occur at 2:30 p.m., and it would be my hope that cloture will not be invoked. There are sanctions in place by virtue of the Executive order of the President signed by the President yesterday, Monday, September 9.

I again indicate to my colleagues, and I will again tomorrow, that it seems to me that we should move on to other business, set aside the conference report on the antiapartheid bill and reach some agreement when we may return to the conference report in the event that the Executive order is not complied with or in the event that some of the provisions in the Executive order dealing with Krugerrands or gold coins, or any other areas that may not be as specific as some Senators would like. In the event they are not addressed, then we would have the opportunity to call up the conference report at some specified time in the future.

I happen to believe that would be very good strategy for the Senate to adopt unanimously or at least those who support the antiapartheid legislation.

I have indicated to the distinguished Senator from Massachusetts today that I know there are a lot of politics in the air right now. Many Democrats seize upon this as a hot issue, the way to bash the President, and maybe after a few days of President bashing we can get back to the real world of how do we send a signal to the apartheid Government of South Africa.

I happen to believe that the President's initiatives are just as strong as the original Senate bill and nearly as strong as those matters contained in the conference report, and it seems to

me that it is much more important that the President be on record as he is now than having us fussing in the Senate about who will have the pride of authorship, whether it is the President of the United States or some Senator from some State. I happen to believe the President speaks for most of the people, which is more than probably many of us can say in this body.

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

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

MESSAGES FROM THE HOUSE

At 2:08 p.m., a message from the House of Representatives, delivered by Ms. Goetz, 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. 3113. An act providing for the coordinated operation of the Central Valley project and the State water project in California.

MEASURES REFERRED

The following bill was read the first and second times by unanimous consent, and referred as indicated:

H.R. 3113. An act providing for the coordinated operation of the Central Valley project and the State water project in California; to the Committee on Energy and Natural Resources.

EXECUTIVE AND OTHER COMMUNICATIONS

The following communications were laid before the Senate, together with accompanying papers, reports, and documents, which were referred as indicated:

EC-1691. A communication from the Administrator of the Energy Information Administration transmitting, pursuant to law, the eighth annual survey of proven reserves of crude oil, natural gas, and natural gas liquids; to the Committee on Energy and Natural Resources.

EC-1692. A communication from the Federal Inspector, Alaska Natural Gas Transportation System, transmitting, pursuant to law, a report on the status of the transportation system for the period April through June 1985; to the Committee on Energy and Natural Resources.

EC-1693. A communication from the Secretary of Energy transmitting, pursuant to law, notice of a further delay in the submission of the National Energy Policy Plan; to the Committee on Energy and Natural Resources.

EC-1694. A communication from the Chairman of the Nuclear Regulatory Commission transmitting, pursuant to law, the 1985 first quarter report on abnormal occurrences at licensed nuclear facilities; to the Committee on Environment and Public Works.

EC-1695. A communication from the General Counsel of the Treasury transmitting a draft of proposed legislation relating to the collection of the special tax from retail dealers in distilled spirits, wine, and beer; to the Committee on Finance.

EC-1696. A communication from the Assistant Legal Advisor for Treaty Affairs, Department of State, transmitting, pursuant to law, copies of international agreements, other than treaties, entered into by the U.S. within the 60 days previous to August 30, 1985; to the Committee on Foreign Relations.

EC-1697. A communication from the General Counsel of the U.S. Arms Control and Disarmement Agency transmitting an errata sheet and corrected pages for the Nuclear Proliferation Assessment Statement Relating to the Agreement for Cooperation Between the United States and the People's Republic of China Concerning Peaceful Uses of Nuclear Energy; to the Committee on Foreign Relations.

EC-1698. A communication from the Assistant Attorney General transmitting, pursuant to law, five revised reports on Privacy Act systems of records; to the Committee on Governmental Affairs.

EC-1699. A communication from the D.C. Auditor transmitting, pursuant to law, a report entitled "Revenue Report for June 1985"; to the Committee on Governmental Affairs.

EC-1700. A communication from the D.C. Auditor transmitting, pursuant to law, a report entitled "Review of University Supported Travel by UDC President's Spouse"; to the Committee on Governmental Affairs.

EC-1701. A communication from the Director of the Office of Personnel Management transmitting a draft of proposed legislation to restructure the Federal Employees Health Benefits Program; to the Committee on Governmental Affairs.

EC-1702. A communication from the Director of the Office of Congressional Affairs, Equal Employment Opportunity Commission, transmitting, pursuant to law, a report on the Commission's interagency coordination activities for October 1, 1983 to September 30, 1984; to the Committee on Labor and Human Resources.

EC-1703. A communication from the Secretary of Education transmitting, pursuant to law, final regulations for the Handicapped Special Studies Program; to the Committee on Labor and Human Resources.

EC-1704. A communication from the Chairman of the Task Force on Environmental Cancer and Heart and Lung Disease, transmitting, pursuant to law, the Task Force's seventh annual report; to the Committee on Labor and Human Resources.

EC-1705. A communication from the Executive Secretary of the Office of the Secretary of Defense, transmitting, pursuant to law, the report for October 1984 through May 1985 on DOD Procurement from Small and Other Business Firms; to the Committee on Small Business.

EC-1706. A communication from the Administrator of the Veterans' Administration transmitting, pursuant to law, a report entitled "Report on the Program of Independent Living Services and Assistance"; to the Committee on Veterans' Affairs.

EC-1707. A communication from the Assistant Secretary of the Smithsonian Institution transmitting, pursuant to law, the annual pension report; to the Committee on Governmental Affairs.

EC-1708. A communication from the Secretary of Agriculture transmitting a draft of proposed legislation to increase the authority of the Secretary of Agriculture to refuse to provide, or withdraw, inspection service, and to determine the degree of inspection to be conducted, in meat, poultry, and egg processing plants; to the Committee on Agriculture, Nutrition, and Forestry.

EC-1709. A communication from the Director of the Federal Emergency Management Agency transmitting, pursuant to law, the Stockpile Report for October 1984-March 1985; to the Committee on Armed Services.

EC-1710. A communication from the Deputy Associate Director of the Minerals Management Service, Department of the Interior, transmitting, pursuant to law, a report on 22 refunds of excess oil and gas royalty payments; to the Committee on Energy and Natural Resources.

EC-1711. A communication from the Director of the Office of Civilian Radioactive Waste Management, Department of Energy, transmitting, pursuant to law, a report evaluating commercial repository capacity for the disposal of defense high-level waste; to the Committee on Energy and Natural Resources.

EC-1712. A communication from the Deputy Associate Director for Royalty Management, Department of the Interior, transmitting, pursuant to law, a report on a refund of an excess oil and gas royalty payment; to the Committee on Energy and Natural Resources.

EC-1713. A communication from the Acting Assistant Secretary for Health, Department of Health and Human Services, transmitting, pursuant to law, a report on an altered Privacy Act system of records; to the Committee on Governmental Affairs.

EC-1714. A communication from the chief judge, U.S. Tax Court, transmitting, pursuant to law, the actuarial reports for the Court's retirement and survivor annuity plans for 1984; to the Committee on Governmental Affairs.

EC-1715. A communication from the Secretary of Agriculture transmitting, pursuant to law, a report on two computer matching programs relating to unemployment compensation and worker's compensation; to the Committee on Governmental Affairs.

EC-1716. A communication from the Deputy Chief, Program Liaison Division, Office of the Secretary of the Air Force, transmitting, pursuant to law, the Air Force Report on Experimental, Developmental, and Research Contracts of $50,000 or more, by company; to the Committee on Armed Services.

REPORTS OF COMMITTEES

The following reports of committees were submitted:

By Mr. THURMOND, from the Committee on the Judiciary, with amendments:

S. 40. A bill to provide procedures for calling Federal constitutional conventions under article V for the purpose of proposing amendments to the United States Constitution (with additional views) (Rept. No. 99-135).

By Mr. THURMOND, from the Committee on the Judiciary, without amendment:

S. Res. 218. An original resolution waiving section 303(a) of the Congressional Budget Act of 1974 with respect to S. 1200 as reported by the Senate Committee on the Judici-

ary; referred to the Committee on the Budget.

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. CRANSTON (for himself, Mr. DECONCINI, Mr. ROCKEFELLER, and Mr. INOUYE):

S. 1616. A bill to require the Administrator of Veterans' Affairs to provide for the conduct of an epidemiological study of the gender-specific effect of exposure to the herbicide known as agent orange on women veterans of service in the Republic of Vietnam; to the Committee on Veterans Affairs.

By Mr. WALLOP (for himself, Mr. ANDREWS, Mr. ABDNOR, Mr. SIMPSON, Mr. LAXALT, Mr. BURDICK, and Mr. MELCHER):

S. 1617. A bill to provide for more effective management of lands of the United States which are subject to conflicting claims or disputes, and to require the Secretary of the Interior to report annually thereon; to the Committee on Energy and Natural Resources.

By Mr. GORE (for himself and Mr. COCHRAN):

S. 1618. A bill to amend the Communications Act of 1934 to clarify policies regarding the right to view satellite transmitted television programming, and for other purposes; to the Committee on Commerce, Science, and Transportation.

By Mr. WILSON (for himself, Mr. DOLE, Mr. PACKWOOD, Mr. MOYNIHAN, Mr. ZORINSKY, Mr. CRANSTON, Mr. COHEN, Mr. D'AMATO, Mrs. HAWKINS, Mr. HECHT, and Mr. BOSCHWITZ):

S. 1619. A bill to amend the Internal Revenue Code of 1954 to provide that section 7872 (relating to imputed interest on below-market loans) shall not apply to loans made to the State of Israel; to the Committee on Finance.

By Mr. DURENBERGER (for himself and Mr. SIMON):

S. 1620. A bill to amend title XVIII of the Social Security Act to establish the National Council on Access to Health Care, and for other purposes; to the Committee on Governmental Affairs.

By Mr. SYMMS:

S.J. Res. 193. A joint resolution to authorize the President to issue a proclamation designating the week beginning October 20, 1985, as "The Lessons of Grenada Week"; to the Committee on the Judiciary.

SUBMISSION OF CONCURRENT AND SENATE RESOLUTIONS

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

By Mr. THURMOND, from the Committee on the Judiciary:

S. Res. 218. An original resolution waiving section 303(a) of the Congressional Budget Act of 1974 with the respect to S. 1200 as reported to the Senate Committee on the Judiciary; to the Committee on the Budget.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. CRANSTON (for himself, Mr. DECONCINI, Mr. ROCKEFELLER, and Mr. INOUYE):

S. 1616. A bill to require the Administrator of Veterans' Affairs to provide for the conduct of an epidemiological study of the gender-specific effect of exposure to the herbicide known as agent orange on women veterans of service in the Republic of Vietnam; to the Committee on Veterans' Affairs.

STUDY OF HEALTH EFFECTS OF AGENT ORANGE EXPOSURE ON WOMEN VIETNAM VETERANS

Mr. CRANSTON. Mr. President, I am today introducing, for appropriate referral, legislation that would require the Administrator of Veterans' Affairs to provide for an epidemiological study of the gender-specific health effects on women veterans of their exposure to dioxin in Vietnam. I am joined in introducing this legislation by my good friends, the Senators from Arizona [Mr. DECONCINI] and West Virginia [Mr. ROCKEFELLER], both of whom are on the Veterans' Affairs Committee and the Senator from Hawaii [Mr. INOUYE]. This study—which would complement the major epidemiological study mandated by Public Law 96-151 of the effects that exposure in Vietnam to dioxin as found in agent orange has had on veterans' health—would have to be carried out by an entity outside of the VA. I am pleased to note that an identical measure will soon be introduced in the House of Representatives by my friend from Ohio, Ms. KAPTUR, along with my colleague from California, Mr. EDWARDS, and Representatives EDGAR, DASCHLE, and PENNY, all members of the House Committee on Veterans' Affairs, where Mr. EDGAR serves as chairman of the Subcommittee on Hospitals and Health Care.

Mr. President, I have a longstanding commitment to resolving the many difficult issues relating to the exposure of our troops in Vietnam to agent orange and other toxic substances. As the chairman of the Veterans' Affairs Committee until 1981 and since that time as the ranking Democrat on the committee, I have been very active in a wide variety of legislative and oversight activities on this issue. My goal in this area has been to provide timely relief to those who are suffering health problems which may be related to their exposure while, at the same time, laying the groundwork for getting the answers to the questions that the veterans, their families, and others have about the health consequences of exposure to agent orange and other toxic substances in Vietnam. In the latter regard, I believe that the study mandated by Public Law 96-151, as modified by Public Law 97-72—both of which I authored in the Senate—should provide some very important information and I am gratified that, although there were some very regrettable delays in getting that study underway, it is now progressing reasonably well.

It has been clear for some time, however, that although that study would yield important information regarding general health issues for all veterans—male and female alike—it would not provide any information about the unique, gender-specific concerns of women Vietnam veterans about the possible impact of their exposure to agent orange. Thus, since early 1984, I have been urging various executive branch entities to utilize existing authorities to design and undertake an appropriate study of women Vietnam veterans. Unfortunately, my efforts and those of others in the Congress have been unavailing to date. This is why we are now proposing legislation that would mandate such a study.

Mr. President, so that my colleagues and others with an interest in this issue may have a better appreciation of the background leading up to this legislation, I ask unanimous consent that there be printed in the RECORD at the end of my statement the following letters: a May 2, 1984, letter to me from Dr. James Mason, director, Centers for Disease Control, responding to an inquiry made at my request; my September 18, 1984, letter to Dr. Mason; Dr. Mason's October 16, 1984, response; my January 23, 1985, letter to Charles Baker, Chair, Cabinet Council Agent Orange Working Group; Mr. Baker's March 6, 1985, response; my July 22, 1985, followup letter to Mr. Baker; an August 26, 1985, response from Dixon Arnett, acting Chair of the Working Group; and my September 9, 1985, followup letter to Mr. Arnett.

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

Mr. CRANSTON. Mr. President, I am deeply disappointed that the executive branch has not taken appropriate steps to begin a study of the effects of agent orange on women Vietnam veterans. There is no excuse for further executive branch foot dragging. It is long since past time that the very legitimate concerns of women Vietnam veterans were addressed, and I look forward to quick action in the Congress on this legislation so that those concerns will be addressed.

Mr. President, such a study, in addition to yielding important information about the health status of those women who served in the Armed Forces in Vietnam, would also shed important new light on the questions that women who were in Vietman with voluntary organizations—such as the USO and the Red Cross—have about their health as a result of their work there. For a number of years, I have been concerned that the employees of, or voluntary workers with, certain of

these organizations have not received appropriate attention from the Federal Government in response to their concerns about their health as a result of having been in Vietnam. While I am continuing with my efforts to address that issue through separate legislation—including in section 503 of S. 876 as reported by the Veterans' Affairs Committee in June of this year and passed by the Senate on July 30—I believe that the study that would be mandated by the legislation we are introducing today would be of particular relevance to these individuals and that is a further reason for my action in introducing this measure.

Mr. President, I ask unanimous consent that the text of the legislation I am introducing be printed in the RECORD following the correspondence I mentioned earlier.

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

S. 1616

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

(a)(1) the Administrator of Veterans' Affairs, through contracts or agreements with private or public agencies or persons, shall provide for the conduct of an epidemiological study of any long-term adverse gender-specific health effects in women of service in the Armed Forces of the United States in the Republic of Vietnam during the period of the Vietnam conflict as such health effects may result from exposure to—

(A) phenoxy herbicides (including the herbicide known as Agent Orange); and

(B) the class of chemicals known as the dioxins produced during the manufacture of such herbicides.

(2) In providing for the conduct of such study, the Administrator may expand the scope of the study to include an evaluation of any long-term adverse gender-specific health effects in women of such service as such health effects may result from other factors involved in such service (including exposure to other herbicides, chemicals, medications, or environmental hazards or conditions).

(3) The Administrator may also include in the study an evaluation of the means of detecting and treating adverse gender-specific health effects found through the study.

(b)(1) The study required by subsection (a) shall be conducted in accordance with a protocol approved by the Director of the Office of Technology Assessment.

(2) The Director shall monitor the conduct of such study in order to ensure compliance with such protocol.

(3)(A) Concurrent with the approval or disapproval or any protocol under paragraph (1), the Director shall submit to the appropriate committees of the Congress a report—

(i) explaining the basis for the Director's action in approving or disapproving the protocol; and

(ii) providing the Director's conclusions regarding the scientific validity and objectivity of the protocol.

(B) If the Director has not approved such a such a protocol during the 180 days following the date of the enactment of this Act, the Director—

(i) shall submit to the appropriate committees of the Congress a report describing the reasons why the Director has not given such approval; and

(ii) shall submit to such committees an update report on such initial report each 60 days thereafter until such a protocol is approved.

(4) The Director shall submit to the appropriate committees of the Congress, at each of the times specified in the second sentence of this paragraph, a report on the Director's monitoring of the conduct of such study pursuant to paragraph (2). A report under the preceding sentence shall be submitted—

(A) before the end of the six-month period beginning on the date of the approval of the protocol by the Director;

(B) before the end of the 12-month period beginning on such date; and

(C) annually thereafter until the study is completed or terminated.

(c) The study conducted pursuant to subsection (a) shall be continued for as long after the submission of the first report under subsection (d)(1) as the Administrator may determine reasonable in light of the possibility of developing through such study significant new information on the long-term gender-specific adverse health effects in women of exposure to dioxins.

(d)(1) Not later than 24 months after the date of the approval of the protocol pursuant to subsection (b)(1) and annually thereafter, the Administrator shall submit to the appropriate committees of the Congress a report containing—

(A) a description of the results thus far obtained under the study conducted pursuant to such subsection; and

(B) such comments and recommendations for administrative or legislative action, or both, as the Administrator considers appropriate in light of such results.

(2) Not later than 90 days after the submission of each report under paragraph (1), the Administrator shall publish in the Federal Register, for public review and comment, a description of any action that the Administrator proposes to take with respect to programs administered by the Veterans' Administration. Each such description shall include a justification or rationale for any such action the Administrator proposes to take. Any such proposal shall be based on the results described in the report under paragraph (1) and the comments and recommendations on that report and any other available pertinent information.

(e) For the purposes of this section, the term "gender-specific health effects in women" includes (1) effects on female reproductive capacity and reproductive organs, (2) reproductive outcomes, (3) effects on female-specific organs and tissues, and (4) other effects unique to the physiology of females.

U. S. SENATE,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, DC, September 9, 1985.

Mr. DIXON ARNETT,
Deputy Under Secretary for Intergovernmental Affairs,
Department of Health and Human Services, Washington, DC.

DEAR MR. ARNETT: I am writing in response to your August 26, 1985, letter to me regarding the status of research efforts on possible health effects in women veterans who were possibly exposed to Agent Orange during their service in Vietnam. I have the following follow-up questions to which I would appreciate your responses:

1.A. What specifically are the "Federally sponsored studies which involve female Vietnam veterans" that you referred to in your letter?

B. What is the timeable for each of these studies?

C. What is the projected relevance of each of these studies to the questions of women Vietnam veterans' health status?

D. What is the statistical power of each of these studies?

2. Is it not correct that "any findings from the ongoing male studies" will shed no light on the issue of significant, unique concern to women Vietnam veterans—namely, the possibility that their exposure to Agent Orange, or other toxic substances in Vietnam, may have affected their reproductive ability?

3. Enclosed is a copy of an August 23, 1985, letter from Dr. Donald Hopkins, Acting Director of the Centers for Disease Control, to Representative Don Edwards, in which Dr. Hopkins notes that CDC "has determined that a study focusing on the health of female [Vietnam] veterans is feasible and has prepared two draft research protocol outlines for epidemiologic studies of female veterans." Please comment on Dr. Hopkins' statement and, in doing so, please reconcile his statement with the one in your letter that "[w]hat is unclear at this time is whether there were enough women veterans exposed to Agent Orange in Vietnam to conduct a scientifically valid Agent Orange Study".

4. In view of the strong interest, which has existed for a number of years now, in attempting to come to terms with the question of the health status of women Vietnam veterans, I firmly believe that something more is called for beyond non-specific statements that the Working Group is continuing to study the issue. I therefore ask that you, in your capacity as the Acting Chairman of the Agent Orange Working Group, give me your best estimate of when there will be a difinitive decision by the Working Group on this issue.

Finally, I think it only fair to advise you that I believe that the Executive Branch has not given appropriate attention to moving forward on this issue and that I and others are preparing legislation to direct that such a study be conducted.

I look forward to your reply at your earliest convenience.

With best wishes,

Sincerely,

ALAN CRANSTON,
Ranking Minority Member.

DEPARTMENT OF HEALTH
AND HUMAN SERVICES,
OFFICE OF THE SECRETARY,
Washington, DC, August 26, 1985.

Hon. Alan Cranston,
U.S. Senate, Committee on Veterans' Affairs, Washington, DC.

DEAR SENATOR CRANSTON: I am writing in response to your inquiry addressed to Charles D. Baker, Chairman, Cabinet Council Agent Orange Working Group (AOWG), regarding research efforts on possible health effects in female Vietnam veterans following their exposure to Agent Orange. Mr. Baker resigned from Federal Government service effective August 17, 1985, and I have been appointed as the Acting Chairman of the Agent Orange Working Group.

An appropriate research design on the issue of the health effects of Agent Orange exposure on female Vietnam veterans has been extensively discussed within the Agent

Orange Working Group and its Science Panel for more than a year.

What is unclear at this time is whether there were enough women veterans exposed to Agent Orange in Vietnam to conduct a scientifically valid Agent Orange Study and whether the military records which do exist are adequate to make this determination. However, the Agent Orange Working Group is in the process of assembling various alternatives for additional research among women Vietnam veterans.

I am sure that you are aware that there are, at present, several Federally sponsored studies which involve female Vietnam veterans. Although these studies are not primarily focused on Agent Orange, they will cover some important physical and psychological health problems unique to women. In addition, any findings from the ongoing male studies will be extrapolated to women where appropriate.

I assure you that we are very concerned that female veterans receive appropriate medical care and other compensation comparable to that of male veterans for any adverse health consequences of their having served in Vietnam.

Thank you for your continued interest in this issue. I will inform you when the Agent Orange Working Group is able to make a more definitive statement regarding the feasibility of a female Agent Orange study.

With best wishes,

Sincerely,

DIXON ARNETT,
Deputy Under Secretary for Intergovernmental Affairs.

COMMITTEE ON VETERANS' AFFAIRS,
Washington, DC, July 22, 1985.

Hon. CHARLES D. BAKER,
Chair, Cabinet Council Agent Orange Working Group, Department of Health and Human Services, Hubert Humphrey Building, Washington, DC.

DEAR MR. BAKER: I am writing in followup to your March 6, 1985, response to my inquiry as to how the Federal Government might conduct research to investigate the possible health effects in female Vietnam veterans of their exposure to Agent Orange.

In your letter, you noted that the Science Panel of the Cabinet Council Agent Orange Working Group was then examining Vietnam veterans health issues for which female-veteran studies may be appropriate and feasible. Please advise me of the status of the Science Panel's review regarding issues specific to female Vietnam veterans who may have been exposed to Agent Orange, its findings to date, and the timetable for making any further decisions which must be made before a study on female Vietnam veterans can begin and for the commencement of such a study.

As you know, I believe very strongly that a study of female Vietnam veterans is extremely urgent in order to more fully understand the possible adverse health effects unique to women who served in Vietnam. In addition, I am very concerned about the delay in starting such an important study and would urge that the Science Panel move forward as quickly as possible in its review and recommendations.

I appreciate your attention to this matter and look forward to your response.

With best wishes,

Sincerely,

ALAN CRANSTON,
Ranking Minority Member.

THE UNDER SECRETARY OF HEALTH AND HUMAN SERVICES,
Washington, DC, March 6, 1985.

Hon. ALAN CRANSTON,
U.S. Senate, Washington, DC.

DEAR SENATOR CRANSTON: Thank you for your recent letter concerning possible adverse health effects of exposure to Agent Orange on women veterans who served in Vietnam and the need to include them in the epidemiological studies.

The Science Panel of the Cabinet Council Agent Orange Working Group recently examined the proposal for a study of female veterans prepared by the Centers for Disease Control (CDC). The Science Panel feels that the health needs of female Vietnam veterans should receive high priority and are concerned that this should be done in the most expeditious way. Most of the health problems encountered by men as a result of their exposure to various substances, including Herbicide Orange, while in Vietnam can be expected to affect women also. Programs adopted to cope with these problems can be and should be applied to women veterans as well.

There may be some health problems, however, that could accrue differently to female veterans exposed to the Vietnam Experience. The Science Panel feels that studies of female Vietnam veterans should focus on issues which cannot be determined from the ongoing studies of male veterans. The Science Panel also feels that specific research proposals utilizing female veteran subjects should be evaluated after hypotheses concerning health problems unique to female Vietnam veterans have been developed. The Science Panel is currently examining Vietnam health issues for which female veteran studies may be appropriate and feasible.

As I receive the results of the Panel's findings I would be happy to share the reports with you.

With best wishes.

Sincerely,

CHARLES D. BAKER.

COMMITTEE ON VETERANS' AFFAIRS,
Washington, DC, January 23, 1985.

Hon. CHARLES BAKER,
Chair, Cabinet Council Agent Orange Working Group, Department of Health and Human Services, Humbert Humphrey Building, Washington, DC. 20201

DEAR MR. BAKER: I have long had a strong interest in the issue of how the Federal Government might conduct research to investigate the possible health effects in female Vietnam veterans of their exposure to Agent Orange. Enclosed is a copy of an October 16, 1984, letter to me on this subject from Dr. James O. Mason, the Director of the Centers for Disease Control.

It is my understanding that the draft protocol outline mentioned in Dr. Mason's letter is pending in the Agent Orange Working Group and may be considered during the Group's next meeting, which is scheduled to take place in early February. I believe that it is extremely important that research be undertaken on this issue, and I strongly urge that the Working Group undertake its review of the protocol outline as expeditiously as possible. It is my strong hope that the members of the Working Group will be able to report favorably on the possibility of a study of female Vietnam veterans, either by endorsing the protocol outline as developed by CDC or by suggesting whatever changes to the outline the members believe are needed in order for a study to go forward.

Thank you for your attention to my views on this issue. I would appreciate hearing from you on this matter as soon as possible after the Working Group's February meeting.

With best wishes,

Sincerely

ALAN CRANSTON,
Ranking Minority Member.

PUBLIC HEALTH SERVICE,
CENTERS FOR DISEASE CONTROL,
Atlanta, GA, October 16, 1984.

Hon. ALAN CRANSTON,
Ranking Minority Member, Committee on Veterans' Affairs, U.S. Senate, Washington, DC.

DEAR SENATOR CRANSTON: This is in response to your letter of September 18 urging that research be undertaken soon to investigate the possible health effects of Agent Orange on female Vietnam veterans and asking about the status of such a study at the Centers for Disease Control (CDC). We appreciate your expression of satisfaction with CDC's efforts with respect to male Vietnam veterans.

As reported to you in my letter of May 2, CDC was then assessing the feasibility of conducting a study of female veterans. Based on that assessment, completed in June, a draft protocol outline for an epidemiologic study of female veterans was prepared. The Department's Agent Orange Science Panel is currently reviewing this outline. Further action will certainly be influenced by the result of that review.

Thank you for your continued interest.

Sincerely yours,

JAMES O. MASON, M.D., DR. P.H.,
Assistant Surgeon General, Director.

COMMITTEE ON VETERANS' AFFAIRS,
Washington, DC, September 18, 1984.

Dr. JAMES O. MASON,
Director, Centers for Disease Control, Atlanta, GA.

DEAR DR. MASON: As you know, I have had a longstanding interest and concern regarding the unresolved questions surrounding the health effects of Vietnam veteran exposure to Agent Orange. I am satisfied that CDC's involvement in this troubling area, particularly through the birth defects study and the major epidemiological study of Vietnam veterans, has provided and will continue to provide needed information with respect to male Vietnam veterans. However, I believe that similar efforts must be made to investigate the possible effects of this substance on the health of female Vietnam veterans and regret that such efforts have yet to be undertaken.

It is my understanding that it may be possible now to move ahead in this regard. Specifically, Dr. Peter M. Layde, Director of Agent Orange Projects at CDC, informed staff of the Senate and House Veterans' Affairs Committees on July 18 that CDC now has an accurate figure regarding the number of female Vietnam veterans as well as a means of contacting these women for purposes of determining the possible health effects of exposure to Agent Orange. Hence, I urge that the vital need for research in this area be addresed as soon as possible and would very much appreciate knowing the status of CDC's plans to undertake a female Vietnam Veteran health study.

I appreciate your consideration of this matter and look forward to a response at your earliest convenience.

With warm regards,
Cordially,

ALAN CRANSTON,
Ranking Minority Member.

PUBLIC HEALTH SERVICE,
CENTERS FOR DISEASE CONTROL,
Atlanta, GA, May 2, 1984.

Hon. ALAN CRANSTON,
U.S. Senate, Washington, DC.

DEAR SENATOR CRANSTON: This is in response to the telephone conversation between Ms. Katy Burdick of your staff and Ms. Francie de Peyster of our Washington office regarding the inclusion of female Vietnam veterans in the current epidemiologic studies of the health of Vietnam veterans being conducted by the Centers for Disease Control (CDC).

We are interested in any health problems which may occur in women as well as in men. CDC is now assessing the feasibility of conducting a study of female Vietnam veterans. Very early we considered, but decided against, inclusion of women veterans in the specific study mandated by Public Laws 96-151 and 97-72. Comparatively few women served in Vietnam in circumstances where their experiences closely paralleled those of male veterans. To include these few women in the presently designed study would be unfair to the women who agreed to participate since their participation would result in no reasonable conclusions about their health. We concluded that if a study of women were to be done, that study should be designed so that it would include enough women to allow meaningful conclusions to be drawn about them.

A scientifically valid study of women veterans would require that a comprehensive listing of those veterans be compiled, from which a sample of women would then be chosen, located, and invited to participate. We have found that compiling a list of all women who served in Vietnam is more difficult than might be expected, partly because military records of the time did not include "male/female" identification. However, we are working with the Department of Defense and other agencies to identify a large enough group of women Vietnam veterans to comprise a valid study population.

As an initial step in developing plans for a study of female Vietnam veterans, CDC has submitted a small sample of names and social security numbers of women veterans to the Internal Revenue Service (IRS), requesting IRS to provide current mailing addresses for these veterans. At one time we were concerned that we would not be able to locate a significant number of women veterans because a large percentage of women could be expected to have changed their names through marriage in the intervening years. However, the results of IRS test were quite encouraging. IRS regulations now make it possible to identify "secondary" as well as "primary" tax filers. We now believe that a sufficient percentage of women veterans, chosen from a master listing of all veterans, could be located to allow conduct of a meaningful study.

Although the success of this "locatability" test has removed one important concern about our ability to conduct a valid study of women veterans' health, another persists: identification of a suitable comparison or "control" group of women. The demographic characteristics of a control group, whose health status can be compared with those of a group of women who were exposed to the Vietnam experience, should ideally be identical with characteristics of the Vietnam-exposed group except for that exposure. But, because of the relatively small number of women who served in Vietnam, and special characteristics which we think may be associated with those who did serve there (e.g., training, "volunteer" attitude, state of physical fitness, etc.), our epidemiologists are having difficulty identifying sources of names for enough suitably qualified women, both exposed and unexposed, to comprise groups large enough to study with a hope for conclusive findings.

For example, a study of Army nurses who did serve in Vietnam should include a control group of demographically similar Army nurses who did not serve there. However discussions with the Army Nurse Corps indicate that since many nurses in the Army during the years of the Vietnam war spent at least one tour of duty there during their Army service, it may be impossible to locate a suitably large control group from the available pool of Army nurse veterans. Before including other sources in that pool (e.g., Navy, Air Force), we must carefully weigh whether there is sufficient similarity in characteristics of veterans of the other services to make their inclusion of scientifically acceptable.

The legislation which mandates CDC's investigation specifies the participation of only veterans of the Armed Services, thus precluding study of Red Cross, USO, and other nonmilitary female personnel who may have served in Vietnam as potential participants.

As a test to determine what percentage of women in the services during the Vietnam era served in that country, CDC is currently undertaking a feasibility assessment using a group of roughly 1,000 women who were on active duty at that time. This assessment, which is just beginning, will involve reviewing each individual's military service record (located at the National Personnel Records Center in St. Louis) to confirm whether or not that individual had served in Vietnam.

CDC takes very seriously its responsibility to investigate any health problems which may occur in Vietnam veterans. However, in our judgment it would have been inappropriate to attempt to study men and women in a single study. To have done so—in the knowledge that participation of women could yield no reasonable conclusions about their health—would be a disservice to the women asked to participate. We are dedicating considerable professional effort toward assessing the feasibility of a study of female veterans. If determination is made that a study can be conducted in such a way as to assess accurately and honestly the health status of women who served in Vietnam, we will promptly advise Dr. Brandt, Assistant Secretary for Health, and Secretary Heckler.

We appreciate your interest in this issue.
Sincerely yours,

JAMES O. MASON, M.D., DR.P.H.,
Assistant Surgeon General, Director.

By Mr. WALLOP (for himself, Mr. ANDREWS, Mr. ABDNOR, Mr. SIMPSON, Mr. LAXALT, Mr. BURDICK, and Mr. MELCHER):

S. 1617. A bill to provide for more effective management of lands of the United States which are subject to conflicting claims or disputes, and to require the Secretary of the Interior to report annually thereon; to the Committee on Energy and Natural Resources.

MANAGEMENT OF U.S. LANDS IN DISPUTE

● Mr. WALLOP. Mr. President, today I am introducing legislation that will clarify the status of lands which are either in the public domain or in State ownership, and that will require the Secretary of the Interior to report on negotiations for settlement of disputes concerning lands claimed by the States and administered by the Department of the Interior.

This legislation will pave the way toward resolving the long-standing cloud over federally claimed lands that lie primarily within the western public land States by permitting judicial resolution of their status without respect to the time the States filed claims.

Upon admission to the Union, all Western States were granted substantial amounts of land to be held in trust and administered for the benefit of the common schools and other public institutions. Each grant of lands made to the Western States by the U.S. Government expressly required that the States were to serve as trustees of the lands so granted for the exclusive benefit of those beneficiary institutions. Many State supreme courts and the U.S Supreme Court, in reviewing the various act of admission, have consistently held that States have a sacred duty to properly manage and protect the lands granted to them by the U.S. Government.

While Congress and the courts have placed this obligation on individual States, a current provision of the Federal Quiet Title Act eliminates, in certain limited situations, the ability of the States to fulfill their trust obligations.

In effect, the current Federal Quiet Title Act of 1972, as a result of the recent ruling by the U.S. Supreme Court in Block versus North Dakota, requires States, as well as private parties, to file lawsuits within 12 years limitation of the time they knew or should have known there was a Federal claim to the land in question. In some cases this time has been interpreted to be the date of a State's admission to the Union. While it may be reasonable to apply this restriction to private parties to prevent a flood of litigation on old claims, it results in barring the States from fulfilling their stringent obligations which Congress itself imposed upon them when they were admitted to the Union. Certainly, it is anomalous for Congress to require States to serve as trustees of State land and at the same time establish a quiet title barrier which prevents the States from fulfilling their congressionally mandated trust responsibilities.

For example, as the trustee of over 4 million acres of State-owned lands, Wyoming is convinced that it is impossible adequately to administer and protect its vital interests and obliga-

tions under the current language of the Federal Quiet Title Act. Under existing court interpretations Wyoming would have to review over 3 million diverse Federal actions in order to insure that State trust lands were not being claimed by the Federal Government.

In addition, Wyoming would have to continually monitor all ongoing Federal actions including all surface and mineral leasing, grants of rights-of-way, patent applications, land exchanges, withdrawals, special use permits, timber sales, and governmental resurveys, to name a few. Given Wyoming's checkerboard pattern of State land ownership, this is a particularly difficult task. Public lands and the public's interest therein deserve better management than that, both in the interest of efficiency and equity.

Mr. President, this legislation would end this conflict by amending the Quiet Title Act of 1972 to exempt sovereign States from the 12-year statute of limitations for filing suit against the Federal Government over disputed land claims. It would also require the direct involvement of the Department of the Interior in the settlement of State-Federal public land title disputes, which might not be concluded without the option of being able to rely on ultimate judicial resolution. Clear title to real property is essential to any State effort to properly manage and protect State-owned trust lands. Likewise, the resolution of these title disputes would also be necessary for management and protection of Federal lands since State claims remain alive even if there is no consent to sue. The inability to judicially resolve State-Federal title disputes simply makes effective land and resource management even more complex and difficult than it already is.

As a final note, I would like to add that a large and geographically diverse group of States filed amicus curiae briefs in the relevant Block versus North Dakota case: Alabama, Alaska, Arizona, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Louisiana, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, Washington, and Wyoming.

The widespread support for this legislation is indicated by the resolutions of the following organizations: National Governors Association, National Association of Attorneys General, Western Attorneys General, National Conference of State Legislatures, Western States Land Commissioners Association, and Eastern Land and Resources Council.

Mr. President, I ask unanimous consent that resolutions of each of these groups be presented in the CONGRESSIONAL RECORD. I would also ask unanimous consent that the bill be printed in the RECORD immediately following this statement.

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

S. 1617

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

SECTION 1. It is the purpose of this legislation to obtain more effective management of public lands by providing for the speedy resolution of intergovernmental title disputes involving lands to which the United States asserts title, which interfere with effective administration or disposition of public lands.

SEC. 2. The Secretary of the Interior shall report by July 1, 1986, and annually thereafter, to the Senate Committee on Energy and Natural Resources and the House Committee on Interior and Insular Affairs on the status of negotiations for the settlement of any claims by States to lands administered by the Department of the Interior.

SEC. 3. Subsection (f) of section 2409a of title 28, United States Code, is amended by inserting ", except for an action commenced by a State," after "section" and by inserting after the first sentence the following: "Any civil action under this section by a State may be commenced regardless of when such action accrued." Such subsection is further amended by striking out "Such" and inserting in lieu thereof "For purposes of this subsection, an".

NATIONAL GOVERNORS ASSOCIATION COMMITTEE ON ENERGY AND ENVIRONMENT, FEBRUARY 27, 1984

The state and federal governments share responsibility for orderly development and management of the nation's energy resources. As disputes over state or federal ownership of lands associated with these resources may preclude their development, it is in the interest of both parties to resolve such controversies.

The Quiet Title Act of 1972 applied a twelve-year statute of limitations to claims against the federal government regarding title to parcels of land. It also removed a prior prohibition, based on federal sovereign immunity, on such suits against the federal government. Under the principle that no statute of limitations runs against sovereign states, quiet title actions were brought by states against the federal government for resolution of title disputes.

The U.S. Supreme Court decision in *Block v North Dakota* (May 3, 1983), held that the twelve-year statute of limitations does apply to state claims. The effect of this decision is to leave unresolved state/federal title disputes. If the United States can successfully demonstrate that the state knew or should have known of a federal claim twelve years before the suit, the quiet title action would be dismissed without determination of its merits. The basic title issue will remain judicially unresolved.

Because energy and other resources frequently occur on publicly-owned land, the need to settle definitively federal/state title disputes is evident. Without final judgment, leasees of parcels in question will be uncertain as to their rights to occupy, and granting of leaseholds may be stymied.

Congress is currently considering legislation amending the Quiet Title Act to declare the statute of limitations inapplicable to state claims. The Governors support such legislation as necessary to provide orderly land management and domestic energy resource development.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, JUNE 26, 1983

Whereas, the federal and state governments coexist as sovereigns in our federal union; and

Whereas, the disputes over title to lands between federal and state sovereigns have caused uncertainty and impeded the orderly resolution of title disputes in the states; and

Whereas, it is in the interests of both states and the United States that such uncertainties be decided on their merits; and

Whereas, the U.S. Supreme Court has recently held that such resolutions may be precluded by the application of the statute of limitations to the claims of sovereign states against the United States; and

Whereas, it is an accepted and cardinal principle of law that no statute of limitations should run against a sovereign state; and

Whereas, if states are precluded by the statute of limitations from asserting claims against the United States, a cloud will nevertheless remain over the disputed property, thus preventing the resolution of title and seriously impeding the process of leasing and orderly utilization of the mineral resources upon such land; and

Whereas, the Supreme Court has suggested that in the absence of a solution by Congress, states having claims against the federal government could assert them by issuing leases to federally-claimed lands, asserting title to much lands and engaging in other activities calculated to confuse and impede the orderly management of such lands; and

Whereas, such controversies should be resolved by litigation on the merits; and

Whereas, it is within the power of Congress to provide for such orderly solutions by legislation,

Now, therefore, be it resolved, that this Association requests Congress to enact legislation to permit sovereign states to bring such actions in quiet title against the United States to obtain resolution of such actions on the merits, free from the procedural obstacles created by the statute of limitations.

WESTERN ATTORNEYS GENERAL RESOLUTION

Whereas, the federal and state governments coexist as sovereigns in our federal union; and

Whereas, the disputes over title to lands between federal and state sovereigns have caused uncertainty and impeded the orderly resolution of title disputes in the states; and

Whereas, it is in the interest of both states and the United States that such uncertainties be decided on their merits; and

Whereas, in *Block* v. *North Dakota*, the U.S. Supreme Court held that such resolutions may be prevented by the application of the statute of limitations to the claims of sovereign states against the United States; and

Whereas, it is an accepted and cardinal principle of law that no statute of limitations should run against a sovereign state; and

Whereas, if states are precluded by the statute of limitations from asserting claims against the United States, a cloud will nevertheless remain over the disputed property, thus preventing the resolution of title and seriously impeding the process of leasing

and orderly utilization of the mineral resources upon such land; and

Whereas, such controversies should be resolved by litigation on the merits; and

Whereas, it is within the power of Congress to provide for such orderly solutions by legislation; and

Whereas, H.R. 3917 [1] would provide for such a solution by exempting the claims of sovereign states from application of the 12-year statute of limitations in the federal Quiet Title Act;

Now therefore be it resolved, that this Association requests Congress to enact H.R. 3917 to permit sovereign states to bring actions in quiet title against the United States and to obtain resolution of such actions on the merits, free from the procedural obstacles created by the statute of limitations; and

Be it further resolved, that the secretary of this Association be directed to transmit copies of this resolution to the appropriate Committees of Congress, the U.S. Attorney General and the Secretary of Interior.

NATIONAL CONFERENCE OF STATE LEGISLATURES

The National Conference of State Legislatures supports legislation amending the Quiet Title Act to declare the statute of limitations inapplicable to state claims. Such legislation is necessary to provide orderly land management and domestic energy resource development.

The Quiet Title Act of 1972 applied a twelve-year statute of limitation to claims against the federal government regarding title to parcels of land. It also removed a prior prohibition, based on federal sovereign immunity, on such suits against the federal government. Under the principle that no statute of limitations runs against sovereign states, quiet title actions were brought by states against the federal government for resolution of title disputes.

The U.S. Supreme Court decision in *Block v. North Dakota* (May 3, 1983), held that the twelve-year statute of limitations does apply to state claims. The effect of this decision is to leave unresolved state/federal title disputes. If the United States can successfully demonstrate that the state knew or should have known of a federal claim twelve years before the suit, the quiet title action would be dismissed without determination of its merits. The basic title issue will remain judicially unresolved.

The state and federal governments share responsibility for orderly development and management of the nation's energy resources. As disputes over state or federal ownership of lands associated with these resources may preclude their development, it is in the interest of both parties to resolve such controversies. Therefore, it is important to amend the Quiet Title Act to prevent the application of the statute of limitations to state claims.

THE WESTERN STATES LAND COMMISSIONERS ASSOCIATION, JANUARY 1984

Whereas, the Federal and State Governments constitutionally coexist as sovereigns in the Federal Union; and

Whereas, numerous disputes over public land titles between the Federal and State Sovereigns presently exist and even more will unquestionably be found in the course of further survey and utilization of public lands; and

Whereas, it is in the interest both of the States and the Federal Government that such disputes be promptly and finally decided judicially to prevent serious administrative difficulty and delay in the orderly administration and utilization of the public lands of both Federal and State Sovereigns as may be required in the public interest; and

Whereas, in *Block v. North Dakota*, the United States Supreme Court held that such judicial resolution may be prevented by the application of the time limitations in the existing Quiet Title Act procedures to claims of the states, notwithstanding the accepted and cardinal principle of law that statutes of limitations do not run against claims by a sovereign state; and

Whereas, the Court also held that the application of the limitations on suit did not extinguish the underlying dispute, but that it would still continue; and

Whereas, only action by the Congress can now provide for the needed resolution of these disputes and permit the process of orderly administration and use of the sovereign lands in dispute; and

Whereas, a bill presently before the Congress (H.R. 3917) provides for the needed solution by exempting all title disputes between the two sovereigns, the State and the Federal Government from the application of the 12-year limitation period in the Federal Quiet Title Act;

Now therefore be it resolved, that this Association requests Congress to enact H.R. 3917 [1] to permit sovereign states to bring actions in quiet title against the United States and to obtain resolution of such actions on the merits, free from the procedural obstacles created by the statute of limitations; and

Be it further resolved, that the Secretary of this Association be directed to transmit copies of this resolution to the appropriate Committees of Congress, the U.S. Attorney General and the Secretary of the Interior.

EASTERN LANDS AND RESOURCE COUNCIL, APRIL 11, 1985

Whereas, disputes over title to lands between federal and state sovereigns have caused uncertainty and impeded the orderly resolutions of title disputes in the states and:

Whereas, it is in the interest of all states and the United States that such uncertainties be decided on their merits; and

Whereas, the U.S. Supreme Court held in *Block* v. *North Dakota* that the orderly resolution of title disputes between states and the federal government may be prevented by the application of the statute of limitations to the claims of sovereign states against the United States; and

Whereas, it is an accepted and cardinal principle of law that no statute of limitations should run against a sovereign state; and

Whereas, even though states are precluded by the statute of limitations from asserting claims against the United States, a cloud will nevertheless remain over the disputed property, thus preventing the resolution of title and seriously impeding the process of leasing and orderly utilization of the natural resources upon such land; and

Whereas, such controversies should be resolved by litigation on the merits; and

Whereas, the ELRC is composed or representatives of many of the Eastern States where these types of disputes may arise; and

Whereas, such legislation would achieve this result by exempting sovereign states from application of the 12 year statute of limitations in the Federal Quiet Title Act in disputes with the United States over land titles;

Now therefore be it resolved, that this Council recommends that each of the member states urges its Congressional delegation, the appropriate members of Congress, the United States Attorney General and the Secretary of the Interior to support enactment of this Federal legislation.●

[1] Identical to our companion bill, H.R. 2484, in this Congress.

[1] A similar resolution was adopted August 22, 1985, which urges its members to support H.R. 2484 and legislation having the same effect.

By Mr. GORE (for himself and Mr. COCHRAN):

S. 1618. A bill to amend the Communications Act of 1934 to clarify policies regarding the right to view satellite-transmitted television programming, and for other purposes; to the Committee on Committee on Commerce, Science, and Transportation.

SATELLITE TELEVISION VIEWING RIGHTS ACT

● Mr. GORE. Mr. President, today Senator COCHRAN and I are introducing the Satellite Viewing Rights Act of 1985. This bill is similar to provisions in legislation I introduced in the House last year, which ensure that the marketing and distribution of satellite television programming be conducted in a fair, competitive marketplace with negotiated, reasonable prices.

As my colleagues are aware, legislation which passed as part of the cable deregulation bill last year settled once and for all the issue of whether or not it is legal to manufacture, sell, and use a satellite Earth station. As long as the Earth station is maintained for private use, it is entirely legal. Public Law 98-549 is entirely clear in establishing that fact. As long as signals remain free of encryption, or scrambling, new legislation would not be necessary.

Earth station owners are willing to pay a fair price for satellite television signals. The provisions passed as part of Public Law 98-549 make it possible for programmers to be compensated for unscrambled signals when that compensation is negotiated in fair marketing agreements. Under a negotiated system of compensation for unscrambled programming, both programmers and Earth station owners benefit. Programmers would not be forced to incur the major costs of scrambling, and Earth station owners would continue to have access to a diverse range of information and entertainment programming.

However, one programmer, HBO, has already begun scrambling its signal part time, and intends to be scrambled full time in the near future. Other programmers have also stated that they expect to scramble their signal within the next year. Earlier this year HBO promised that they would not scramble until there was an

accessible system in place to sell the signal to owners of private Earth stations, and until there were sufficient signal decoders available for purchase by Earth station owners. Unfortunately, HBO has reneged on that commitment and moved ahead with scrambling.

There is no prohibition on scrambling. Programmers are free to exercise that right to protect their signals. But I believe programmers do have a responsibility to make their products available to Earth station owners at fair and reasonable rates. The vast majority of Earth station owners live in rural areas not served by cable systems. They have been passed by because they live in densely populated areas which cable companies have determined are not profitable to serve.

Many of these rural families have been able to become part of the technological revolution in television programming by purchasing a backyard Earth station. For once, new technology has come first to rural families, instead of the slow, trickle down process we have witnessed with other telecommunications improvements. I believe that is an exciting development, and one which should be encouraged. However, the intention of programmers to scramble signals, and the efforts of some to actually stifle the use of backyard Earth stations gives me deep concern.

Until very recently, some of these programmers absolutely refused to even consider selling scrambled programming to backyard dish owners, despite their assurances that their real concern was not private individuals but wholesale commercial theft of their signal property. As a principal author of the language addressing satellite programming in the cable legislation, I worked with programmers to address the concern of commercial theft. The new law substantially strengthens the sanctions against illegal signal piracy. To their credit, most programmers are not now refusing to serve backyard Earth stations. Instead, the problem now facing Earth station owners, dealers, and manufacturers is the potential for anticompetitive pricing and distribution schemes which are intended to monopolize satellite television programming and, worse, shut down Earth station sales everywhere.

The bill we are introducing today addresses this potential for anticompetitive behavior by programmers and distributors of satellite-delivered, scrambled television signals. The bill would prohibit terms and conditions in the sale and distribution of these signals which have the effect of substantially restricting the availability of programming. Any party who has been denied reasonable access to such programming would be able to petition the Federal Communications Commission for relief. The bill would not prejudice the outcome of any FCC finding, but would simply make the FCC the last-resort arbiter of disputes between programmers or distributors and those who wish to receive programming.

The best solution to the dilemma facing Earth station owners and programmers in determining a fair system for system delivery is the free, open, and competitive marketplace. I support that approach above any other. However, the potential for severe market distortion is clearly present. There is considerable vertical integration in the programming and distribution of satellite programming—many of the major programmers also own substantial interests in local cable operations. More troubling is the prospect for special consortium agreements between all programmers and all cable operators to essentially monopolize the distribution of programs to home Earth station owners.

While not all programmers or cable operators wish to shut down the sale and use of Earth stations, some of the more powerful ones have openly stated that that is their motive. That prospect is, to me, clearly anticompetitive. And because of the huge market clout of these few, their intentions deserve attention and, I believe, legislation to prevent an outcome that is patently unfair to Earth station owners. Our bill is intended to do just that.

Over the past 6 months I have had extensive discussions with programmers, cable operators, potential distributors, representatives of the Earth station industry, and others who are involved in the marketplace for satellite television programming. This marketplace may someday fall into place, and at that time no Federal presence would be required. But until that has not yet occurred, and there are clear signals that it will not occur without substantial prodding.

This bill is not a complicated or unreasonable measure. It does not mandate a compulsory license or mandatory regulation of satellite television programming, or reregulation of the cable industry. It does not prevent programmers from moving ahead with their legitimate plans to protect their signals from unauthorized commercial theft. The bill is intended to accomplish one simple goal: To make it possible for all of our constituents, whether rural or otherwise, to take part in telecommunications opportunities which are promising to reshape our society into a truly global village.

I look forward to possible hearings on this issue, and I urge my colleagues to cosponsor the Satellite Television Viewing Rights Act of 1985.●

By Mr. WILSON (for himself, Mr. DOLE, Mr. PACKWOOD, Mr. MOYNIHAN, Mr. ZORINSKY, Mr. CRANSTON, Mr. COHEN, Mr. D'AMATO, Mrs. HAWKINS, Mr. HECHT, and Mr. BOSCHWITZ):

S. 1619. A bill to amend the Internal Revenue Code of 1954 to provide that section 7872 (relating to imputed interest on below-market loans) shall not apply to loans made to the State of Israel; to the Committee on Finance.

EXEMPTING ISRAEL BONDS FROM IMPUTED INTEREST RULES

Mr. WILSON. Mr. President, I was dismayed last week to read in the Wall Street Journal a brief report on an unintended impact of the imputed interest rules that we passed as part of last years tax bill. Unfortunately, as we have focused on one major aspect of those rules—the effect on the sale of real estate—we have overlooked one small, but significant effect that certainly no one in this Chamber could have had in mind.

The problem we must address is that under the imputed interest rules, Israel bonds would become so disadvantaged that no one could afford the tax consequences of buying them.

Under present law, anyone who buys a bond is deemed to have received taxable interest at a market rate—even if the actual interest received is less than that market rate. The pros and cons of this rule have been fully debated, the central issue being whether certain debt instruments are issued at below-market rates in order to facilitate tax avoidance. Clearly, we do not need to rehash this matter, as both the Senate and the House have recently voted on it. However, no one can reasonably contend that Israel's decision to issue bonds at below-market rates is tax motivated.

Israel bonds serve a vital role in the fight against Israel's staggering financial responsibilities. At present, Israel devotes approximately two-thirds of its budget to defense and debt service. Many of the bonds that are issued do yield market rates, but as a means of lowering the costs of debt service, some bonds yield as low as 4 percent. This savings of more than 50 percent on what Israel would otherwise have to pay is of enormous importance. Furthermore, it must be evident that the people who buy these bonds do so not as a matter of tax planning, but with entirely philanthropic motives. Indeed, according to the Wall Street Journal, Israel sold more than $102 million of its bonds in the United States in 1984, and an additional $44 million worth in the first 7 months of this year.

For our tax laws to penalize such efforts—by taxing the holders of Israel bonds for income of more than twice what they actually receive—would not only be unfair, but truly counter to our national interests. It is quite apparent to this Senator that we should do all that we can to encourage volun-

tary efforts to solve Israel's almost overwhelming financial problems. And, I would hope that it is just as apparent to the entire Senate. I am pleased to announce that the Senators DOLE, PACKWOOD, MOYNIHAN, ZORINSKY, CRANSTON, COHEN, D'AMATO, HAWKINS, HECHT, and BOSCHWITZ have agreed to cosponsor the bill.

At this point, I ask unanimous consent that the bill, the Wall Street Journal article to which I have referred, as well as a copy of a letter from Ronald A Pearlman, Assistant Secretary of Treasury for Tax Policy, be inserted in the RECORD.

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

S. 1619

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

SECTION 1. SECTION 7872 OF THE INTERNAL REVENUE CODE OF 1954 SHALL NOT APPLY TO LOANS MADE TO THE STATE OF ISRAEL.

(a) IN GENERAL.—Subsection (c) of section 7872 of the Internal Revenue Code of 1954 (relating to below-market loans to which section applies) is amended by adding at the end thereof the following new paragraph:

"(4) EXCEPTION FOR ISRAEL BONDS.—This section shall not apply to bonds issued by the State of Israel.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply as if included in section 172(a) of the Tax Reform Act of 1984.

[From the Wall Street Journal, Sept. 4, 1985]

TAX REPORT

A SPECIAL SUMMARY AND FORECAST OF FEDERAL AND STATE TAX DEVELOPMENTS

Israel's 4 percent bonds pack a hidden tax wallop for U.S. buyers.

To combat tax avoidance, the 1984 tax act imputes a market interest rate to certain low-rate loans. Last month, Assistant Treasury Secretary Pearlman wrote Congress's tax committees that the act clearly—if perhaps unintentionally—applies to bonds that Israel for decades has sold to supporters. Thus, an owner of bonds bought after June 6, 1984, is treated as receiving taxable interest of the difference between 4 percent and a market rate (expected to be 10 percent to 11 percent for 1985); he also is treated as making a nondeductible gift of that sum to Israel.

The agency Israel Bonds sold $102 million of 4 percent bonds here in 1984, plus $44 million through last July; its lawyers believe Congress didn't mean to attack investments made to bolster Israel's economy, not to avoid U.S. taxes. Pearlman says the Treasury will cooperate if Congress wants to amend the law; the committee chiefs, just back from recess, haven't responded yet. (The act applies to any bond amount; Pearlman's letter apparently erred in limiting the effect to holdings exceeding $10,000.)

Legislative sources expect Congress to fashion an exemption from imputed interest for Israel bonds.

DEPARTMENT OF THE TREASURY,
Washington, DC., August 13, 1985.

Hon. BOB PACKWOOD,
Chairman, Senate Finance Committee, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Internal Revenue Service is issuing today proposed regulations under section 7872 of the Internal Revenue Code regarding interest-free and below-market loans, as enacted by section 172 of the Tax Reform Act of 1984. I enclose a copy of the regulations for your information and would like to bring three particular issues to your attention.

Section 7872 governs gifts loans, compensation-related loans, corporate-shareholder loans and tax avoidance loans. In addition to the four categories of loans specifically mentioned in the statute, section 7872(c)(1)(E) authorizes the Treasury Department to identify loans which have a significant effect on the Federal tax liability of the lender or the borrower ("significant effect loans"). Once identified by Treasury in regulations, such loans would be subject to the imputed interest rules of section 7872. Owing to the breadth of this grant of authority and the recent legislative interest in certain loans to life care facilities, which in some circumstances might constitute significant effect loans, we think it preferable not to exercise this authority at this time. Instead, the regulations request comments from define significant effect loans. Thus, the proposed regulations do not identify any significant effect loans; for the time being, section 7872 applies to only the categories of loans explicitly identified in the statute.

The proposed regulations were drafted prior to House and Senate consideration of H.R. 2475, primarily concerning the imputed interest rules, which contains certain proposed amendments to section 7872. Consequently, the regulations define the applicable Federal rate used to measure the amount of imputed interest with reference to section 1274(d) as in effect prior to the amendments contemplated by H.R. 2475. I assure you that the section 7872 regulations will be revised prior to their promulgation as final regulations to reflect any changes in current law on the definition of the applicable Federal rate and the rules applicable to life care facilities.

Finally, as we advised you last January, the below-market loan provisions of section 7872 apply to U.S. purchasers of Israel bonds if the principal amount of the bonds held by a taxpayer exceeds $10,000. Thus, interest will be imputed to the bondholders in an amount equal to the difference between interest at the applicable Federal rate and the rate of interest actually paid on the bonds, and the bondholders will be treated as making a nondeductible contribution to Israel in an equal amount. The statute clearly requires these tax consequences. To the extent that the tax treatment of Israel bonds required under section 7872 was unintended, legislative amendment may be required. We would, of course, be happy to work with the Committee in any legislative effort.

I would be happy to further discuss these or other matters arising under section 7872 at your convenience.

Sincerely,

RONALD A. PEARLMAN,
Assistant Secretary (Tax Policy).

Mr. DOLE. Mr. President, I rise to commend the distinguished Senator from California and to join him as a sponsor of legislation to exempt Israel bonds from the Deficit Reduction Act's low interest loan rules.

Since I was chairman of the Finance Committee when the Deficit Reduction Act was considered, perhaps it would be helpful if I briefly summarized my recollections on this issue. The provisions we generally refer to as the "Imputed interest" rules, in fact, addressed several different issues. One of these was the problem of no interest and low interest loans which involved, in essence, a gift, compensation to an employee or a dividend to a shareholder. In the gift area, the principal example of the problem which was of concern to the Finance Committee involved large, low interest loans between family members. At the time we considered responses to this problem, no one brought up the question of treatment bonds with low interest rates such as Israel bonds. In fact, knowing that any characterization as a gift would only result in a tax deductible charitable contribution to the Israel bond purchaser. I am confident that, if the issue had been brought before the committee, the response would have been to exempt explicitly Israel bonds from the scope of Internal Revenue Code section 7872.

Mr. President, I can assure the distinguished chairman of the Finance Committee that I will do whatever I can to make certain that this technical correction to the imputed interest rules is brought to the full Senate for disposition at the earliest opportunity. There is no reason why there should be any question in anyone's mind that section 7872 does not apply to purchases of Israel bonds.

Mr. PACKWOOD. Mr. President, today I rise to ask my colleagues to support passage of a measure designed to clarify the tax treatment of Israel bonds.

The State of Israel has for decades sold low interest government bonds to Israel's supporters abroad. This financial support enables Israel to bear an overwhelming defense and economic burden in its fight to remain an independent nation. In order to lower the debt service costs of these bonds to Israel, they are often offered at low rates of interest, with yields as low as 4 percent. This savings to Israel is of vital importance in allowing that nation to meet its responsibilities to its citizens as well as to assume a defense burden which is of great importance to the United States in the Middle East.

When the Deficit Reduction Act was passed in 1984, Congress included a provision aimed at tax avoidance transactions through the mechanism of low-interest loans. At that time, Congress was unaware of the impact of this provision on Israeli bonds. We were made aware that the Treasury

Department could not administratively exempt these bonds from the low-interest-loan rules when they issued regulations on August 15. These regulations make clear the need for legislative action.

I am particularly concerned that the issuance of these Treasury regulations will have an extremely negative impact on the sale and marketing of Israel bonds. Congress did not intend this when it passed legislation in 1984. I do not intend to allow unintended tax results to cut off this vital financial pipeline to the State of Israel. Therefore, I will make every effort to support and pass legislation that will ensure that the purchasers of such bonds are not subject to adverse tax consequences.

I also want to make it clear that I will use the earliest possible vehicle to achieve this end. I understand that heavy sales of such bonds take place during the Jewish high holy days, which are close at hand. I will make every effort to have the issue resolved before that time.

Finally, today, along with Senator WILSON of California; the distinguished majority leader, Senator DOLE, and Senator MOYNIHAN; and others, I have cosponsored legislation that will exempt these bonds from the low-interest-loan rules. I know that my distinguished colleagues have pledged as well to solve this issue quickly. The Treasury Department has also assured me that they will cooperate in this effort. I urge similar action by my colleagues in the Senate and in the House of Representatives.

Mr. MOYNIHAN. Mr. President, I rise today to join my distinguished colleagues in introducing legislation to correct an unintended consequence of recent tax legislation.

The Tax Reform Act of 1984 included a provision—presently codified as section 7872 of the Internal Revenue Code—designed to impose economically realistic tax treatment on interest-free and below-market loans. The problem is this. For decades, the Government of Israel had issued low-interest bonds to its American supporters. As presently written, section 7872 would require American purchasers of Israeli bonds to pay taxes on the difference between the bonds' return, 4 percent, and the market rate of interest on comparable obligations. In other words, bondholders would be taxed as if they had received a 9- or 10-percent return on their investment rather than the 4 percent they actually receive.

It was never the intention of Congress to include Israel's bonds among those transactions restricted by section 7872. Section 7872 was designed to eliminate certain tax abuses in loan transactions, not to disrupt the bonds sales of one of this Nation's most valued allies. The bill I join in sponsoring today should clarify this matter, by exempting obligations issued by the Government of Israel from the provisions of section 7872. I hope our colleagues will join us in swift passage of this legislation.

By Mr. DURENBERGER (for himself and Mr. SIMON):

S. 1620. A bill to amend title XVIII of the Social Security Act to establish the National Council on Access to Health Care, and for other purposes; to the Committee on Governmental Affairs.

NATIONAL COUNCIL ON ACCESS TO HEALTH CARE ACT

● Mr. DURENBERGER. Mr. President, today I am pleased to join my colleagues on both sides of the aisle, Senator SIMON, from Illinois, Representative MOORE from Louisiana, and Representative GEPHARDT from Missouri, in introducing S. 1620, the National Council on the Access to Health Care Act of 1985.

Mr. President, as we create a price-sensitive health care marketplace, we must make sure that accommodations are made in the system to assure that access to quality health services is secured for all who need care. We must adhere to the warning signals that access to health services may be deteriorating—that patients are being shifted from one hospital to the next because they lack the ability to pay for services, that poor women must come up with a $1,000 deposit before a hospital will admit them for the birth of their child. While the extent of the access problems are not well known, we do know that we never want to return to a two-tiered system, with one standard of care for those who can pay, and second, substandard one, for those who cannot.

S. 1620 amends title XVIII of the Social Security Act to establish a National Council on Access to Health Care to study just how far we've come as a Nation in assuring needed access to health care services for all Americans and what effect the recent changes in the financing of the health care industry is having on the access and quality of services.

The National Council will be composed of 15 members representing broad constituent groups including the elderly and other health care consumers as well as those in the practice of medicine and those distinguished in health care administration and financial management. The Council will study the issue of access and will report to the President and to the Congress its recommendations for legislative and/or administrative action. It is important that the States and localities participate in the Council's investigations and the Council is required to coordinate locally sponsored grassroots "mini-conferences", using the model of the White House Conference on Aging, and at least 10 regional hearings to be held throughout the country.

Mr. President, the establishment of the National Council on the Access to Health Care could not be much more timely. Our Nation's health care system is undergoing change unprecedented in the last three decades. Reform of the system is being initiated by both public and private payers of health care services introducing new incentives for cost containment, rewarding the efficient providers of care and forcing the ineffficient providers to either change or get out of the business.

I have been and will continue to be a strong advocate for this reform that is introducing consumer choice into health care delivery. Only by giving people the opportunity to choose, among competing health plans, the plan that best meets their needs for the best price will we able to keep down the costs. We are working slowly to deregulate the health care industry and as we continue a strategy of deregulation, we will be confronted by the problems of financing of health care services for the indigent.

Between 1954 and 1965, we've demonstrated our national commitment to access through the Social Security Act and through the use of the Tax Code. In 1954, Congress enacted section 106 of the Internal Revenue Code to provide a tax exclusion for an employer's contribution to an employee's health insurance plan. This provision in the Tax Code has encouraged the widespread coverage of employees in private health insurance plans. Today, the majority of the work force is now covered through their place of employment.

We have realized one of the health policy goals set out in 1954—to get the work force covered by private health insurance plans. Today, I am advocating a limit to the employer's tax-free contribution to health insurance plans to encourage consumers to buy smart in the health care marketplace by discouraging the overinsurance and overutilization that's developed through this generous tax subsidy.

Through the establishment of the Medicare and Medicaid programs in the Social Security Act in 1965, the Federal Government has provided health care to two distinct population groups where access has traditionally been a problem—the poor and the elderly. Today, the Medicare program provides health insurance coverage for 27 million elderly and 3 million disabled persons. The Medicaid program, although its benefits are unevenly distributed across the country, provides needed services to some 23 million poor Americans.

Congress has been busy working on reform of the largest health insurance

program in the country—Medicare. Medicare's new prospective payment system for inpatient hospital services represents the biggest change in the Medicare Program since its inception. The new financial incentives for cost containment is having a direct impact on hospital management strategies. In addition, the Department of Health and Human Services finally released regulations implementing a provision in TEFRA allowing Medicare beneficiaries the option to join private competitive health plans.

Business is also paying more attention to the costs of its health benefits and is encouraging employees to join competitive medical plans including Health Maintenance Organizations (HMO's) and Preferred Provider Organizations (PPO's). Both public and private payers are realizing the perverse financial incentives inherent in cost-based reimbursement and are moving in the direction of prospective payment and capitated health plans. The prepaid concept places providers at a financial risk providing the needed incentive to keep their patients healthy and out of expensive health care facilities.

And then all the evidence points to the fact that the reforms are working. In fiscal year 1984, health care costs rose only 9.1 percent—the first decrease since 1978 and the lowest rate of increase in over a decade. Medicare beneficiary's hospital length-of-stay are down substantially and the Medicare trust fund, once expected to go bankrupt this year, is now financially stable through 1997. Utilization of expensive health care services is down. Costs are down. And the system continues to provide high quality care. Now that's something we all can be proud of.

We know that consumer choice works. It brings price and benefit competition to bear on the health care marketplace. But as we continue our efforts to deregulate the health care industry, we must make sure we don't undo the achievements we've made to assure access to our country's high quality health care system for all Americans.

Despite the great progress we've made to assure access through public and private means, there are still estimates that over 30 million people have no form of health insurance whatsoever—public or private.

Plus, we still have gaping holes in our Federal health programs. Medicare still has no protection against catastrophic illness and provides no coverage for prescription drugs. In addition, the Medicaid Program currently covers less than half of those whose incomes fall below the poverty line.

Where do these people go to get care? Who pays for the cost? And how many of them are going without care until their illnesses become so severe that they have no choice but to head for the hospital emergency room?

The new cost-conscious marketplace is having a predictable effect on the hospital industry. For many years, the hospital has served as our national health insurance program. They have care for the indigent and treated the uncompensated care case load and have paid for it through their ability to cross-subsidize. The hospital passes the bill onto the patients who can pay—both public and private—and we all end up paying for the costs in the form of increased room rates and other charges.

What Medicare and other payers of services are now saying to the hospitals is that "We only want to pay for the costs of the services provided to our beneficiaries." We no longer are willing to pay for the hidden costs of graduate medical education, new technology, and the costs of caring for the indigent. And if we, as a society, decide that these are services that we are willing to pay for, then we need to make their costs explicit and pay for them. Period. We will, however, need new policies and new financing schemes to assure that doctors are trained and continue to provide the highest quality health care, that our medical system continues to advance in technology and treatment capabilities, and that all Americans are assured access to quality health care.

I firmly believe that the solution to the problem of uncompensated care lies in a more explicit acknowledgment of the national responsibility of the care of the poor. We will need to look for a rearrangement of those services currently proving cash and in-kind maintenance programs involving national, State, and local levels of government. Most explicitly, we need to assure access to high quality health care for all and not to prevent the development of a two-tier health care system. The National Council on the Access to Health Care will provide invaluable help as we work through these complex issues.

I commend the Catholic Health Association (CHA) for their efforts in development of S. 1620. I look forward to working with CHA and with my colleagues who have joined me in the introduction of the National Council on the Access to Health Care Act of 1985. 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. 1620

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

SHORT TITLE

SECTION 1. This Act may be cited as the "National Council on Access to Health Care Act".

FINDINGS

SEC. 2. The Congress finds that—

(1) society has a special obligation to assure that all individuals have equitable access to health care services;

(2) significant changes are taking place in the financing and delivery of health care services;

(3) numerous Federal, State, and private entities have studied and are studying the problems attendant to such changes;

(4) many public and private decisions regarding the organization, financing, and delivery of health care are made in the context of grave budgetary constraints without giving full attention to their long-range implications with respect to access and quality;

(5) in order to avoid serious adverse consequences of such ad hoc decisionmaking, there is a compelling need to develop a cohesive, coordinated policy to address the challenges presented by a rapidly changing system; and

(6) achieving an equitable health care system requires at a minimum—

(A) recognition that society's ethical obligation to ensure equitable access to health care for all is best met through a combination of public and private sector arrangements;

(B) recognition that efforts to contain rising health care costs are necessary but should not impinge on equitable access to health care services;

(C) recognition of the need for sufficiently comprehensive health care services to prevent disease and maintain or enhance good health, and to treat disease, injury, and disability;

(D) recognition of teaching, research, information dissemination, and public health care functions as being integral parts of the health care delivery system;

(E) a pluralistic approach which recognizes individual and institutional integrity and the adherence to ethical and religious beliefs;

(F) elimination of factors which may limit access to health care services or the quality of such services;

(G) broad community grassroots, State, and national participation in health care policy issues; and

(H) recognition that the public and private sectors have a mutual responsibility to develop and implement a national policy to assure access to health care services.

CREATION OF COUNCIL

SEC. 3. Title XVIII of the Social Security Act is amended by adding at the end thereof the following new section:

"NATIONAL COUNCIL ON ACCESS TO HEALTH CARE

"SEC. 1890. (a) ESTABLISHMENT OF COUNCIL.—

"(1) MEMBERSHIP.—(A) There is established the National Council on Access to Health Care (thereinafter referred in this section as the 'Council') which shall be composed of 15 members. The President, the Speaker of the House of Representatives, and the President pro tempore of the Senate shall each appoint 5 members, as follows:

"(i) three members who are distinguished in their representation of one or more of the following fields or constituencies: the elderly and other health card consumers, medical ethics, health insurance, labor, business, law, and the social sciences;

"(ii) one member who is distinguished in the practice of medicine or direct patient care; and

"(iii) one member who are distinguished in health care administration or health care financial management.

The President, the Speaker of the House of Representatives, and the President pro tempore of the Senate shall consult with one another prior to making appointments in order that as many as is practicable of the fields listed in clause (i) may be represented.

"(B) The Secretary of Health and Human Services, the Secretary of Defense, the Secretary of Agriculture, the Director of the Office of Science and Technology Policy, the Administrator of Veterans' Affairs, and the Director of the National Science Foundation shall each designate an individual to provide liaison with the Council. Other Federal agencies may also designate an individual for such purpose.

"(C) A vacancy in the Council shall be filled by the official who made the original appointment, or his successor.

"(2) TERMS.—Members shall be appointed for the life of the Council.

"(3) CHAIRMAN.—The Chairman of the Council shall be appointed by the President, by and with the advice and consent of the Senate, from among the members of the Council.

"(4) MEETINGS.—Nine members of the Council shall constitute a quorum for business, but a lesser number may conduct hearings. The council shall meet at the call of the Chairman or at the call of a majority of its members.

"(5) COMPENSATION.—(A) Members of the Council shall each be entitled to receive the daily equivalent of the annual rate of basic pay in effect for grade GS-18 of the General Schedule for each day (including traveltime) during which they are engaged in the actual performance of the duties of the Council.

"(B) While away from their homes or regular places of business in the performance of services for the Council, members of the Council shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5 of the United States Code.

"(b) DUTIES OF THE COUNCIL.—

"(1) STUDIES.—(A) The Council shall undertake advisbility studies of the—

"(i) development of a national health care policy to address the issues of access and quality;

"(ii) mechanisms for assigning priorities to the use of public health care resources;

"(iii) ethical and legal bases for such a policy and such priorities;

"(iv) demographic, economic societal, cultural, and aging trends of the United States population and the effects of such trends on the Nation's health needs and health care system;

"(v) differences, if any, in the quality and availability of health care services for various economic and geographic segments of the population;

"(vi) current procedures and mechanisms designed to ensure the quality and availability of health care services to all individuals;

"(vii) capital and operating costs of health care services;

"(viii) efficient and effective use of existing health care resources;

"(ix) appropriate numbers of health care personnel in the various professions and in various geographic regions;

"(x) mechanisms for integrating alternative health care services with traditional acute and longterm care facilities and services;

"(xi) proper role of Federal and State governments and others in the financing, delivering, supervising, and planning of health services; and

"(xii) appropriateness of any other matter which relates to the development or implementation of a national health care policy and which is consistent with the purpose of this Act.

"(B) The Council shall determine the priority and order of the studies required under subparagraph (A). In undertaking the studies, the Council shall coordinate locally sponsored and funded grassroots miniconferences to be held in such numbers and at such locations throughout the country as it shall deem advisable to solicit advice, comments, suggestions, and recommendations from interested individuals, organizations, and the general public. Subsequently, the Council, either as a whole or divided into as many hearing committees as it may so choose, shall convene and conduct a series of hearings in at least the 10 Federal regions of the country for the purpose of receiving the public testimony and reports from the grassroots miniconferences. The Council shall determine how such meetings shall be organized and what criteria shall be established to determine participants in the grassroots miniconferences and hearings. At the conclusion of these public forums, the Council shall publish the recommendations heard and shall give serious consideration to them in its final policy recommendations.

"(C) In order to avoid duplication of effort, the Council shall, in lieu of or as part of any study or investigation conducted under subparagraph (A), use a study or investigation conducted by another entity if the Council sets forth its reasons for such use.

"(D) Studies and investigations under this paragraph shall be coordinated by the National Academy of Sciences under contract with the Council.

"(2) REPORTS TO CONGRESS AND THE PRESIDENT.—Upon the completion of each investigation or study undertaken or utilized by the Council under this subsection, the Council shall report its findings including any recommendations for legislation or administrative action to the President and the Congress.

"(3) ANNUAL REPORTS.—Annually on the anniversary of the date of the enactment of this section, the Council shall report to the President and the Congress the results of its efforts undertaken prior to such date. The third such report shall constitute the final report of the Council and shall include its final recommendations.

"(4) PUBLICATION.—The Council shall publish and disseminate to the public information with respect to its activities.

"(C) ADMINISTRATIVE PROVISIONS.—

"(1) HEARINGS.—The Council may, for the purpose of carrying out this section, hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Council may deem advisable.

"(2) PERSONNEL.—(A) The Council may appoint and fix the pay of such staff personnel as it deems desirable. Such personnel shall be appointed subject to the provisions of title 5, United States Code, governing appointments in the competitive service, and shall be paid in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates.

"(B) The Council may procure temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS-18 of the General Schedule.

"(C) Upon request of the Council, the head of any Federal agency is authorized to detail, on a reimbursable basis, any of the personnel of such agency to the Council to assist it in carrying out its duties under this section.

"(3) CONTRACTS.—The Council, in performing its duties and functions under this section, may enter into contracts with appropriate public or private entities. The authority of the Council to enter into such contracts is effective for any fiscal year only to such extent or in such amounts as are provided in advance in appropriation Acts.

"(4) INFORMATION.—(A) The Council may secure directly from any Federal agency information necessary to enable the Council to carry out this section. Upon request of the Chairman of the Council, the head of such agency shall furnish such information to the Council.

"(B) The Council shall promptly arrange for such security clearances for its members and appropriate staff as are necessary to obtain access to classified information needed to carry out its duties under this section.

"(C) The Council shall not disclose any information reported to or otherwise obtained by the Council which is exempt from disclosure under section 552 of title 5, United States Code, by reason of paragraph (4) or (6) of subsection (b) of such section.

"(5) SUPPORT SERVICES.—The Administrator of General Services shall provide to the Council on a reimbursable basis such administrative support services as the Council may request.

"(6) DEFINITION.—For purposes of this subsection, the term 'Federal agency' means an authority of the Government of the United States but does not include the Congress, the courts of the United States, the government of the Commonwealth of Puerto Rico, the government of the District of Columbia, or the government of any territory or possession of the United States.

"(d) AUTHORIZATION OF APPROPRIATIONS.—To carry out the provisions of this section, there are authorized to be appropriated $3,000,000 for each of the fiscal years 1986, 1987, and 1988.

"(e) TERMINATION.—The Council shall be subject to the Federal Advisory Committee Act; except that, under section 14(a)(1)(B) thereof, the Council shall terminate on September 30, 1988.".

APPOINTMENT OF MEMBERS OF COUNCIL

SEC. 4. The President, the Speaker of the House of Representatives, and the President pro tempore of the Senate shall initially appoint members to the National Council on Access to Health Care not later than 60 days after the date of the enactment of this Act.●

● Mr. SIMON. Mr. President, I am pleased to join my colleagues today in sponsoring legislation which will establish a National Council on Access to Health Care. I feel confident that that mandate of the Council, its makeup and organization will result in some solid and reasonable recommendations to ensure greater access to quality health care for all Americans.

The United States spends a greater percentage of its GNP on health care than almost any other industrial nation. Such a statement seems encouraging until one realizes that, even with this level of expenditure, almost 10 percent of our population have no health care coverage and another 10 percent have inadequate health care coverage. An additional 15 percent have neither the coverage nor the resources to finance a major illness. Most of those without health coverage or with inadequate coverage are the very poor, the working poor, the unemployed, young children and the very old. With our elderly, while Medicare has provided basic health care, we have not even begun to address the quality and cost of long term health care, a problem that will only become more common in the years to come.

Over the years, we have made incremental changes in health care delivery. Medicare and Medicaid have provided sufficient health care coverage to some of the more vulnerable portions of society. Over the past 20 years, other programs like WIC and school lunch and school breakfast have also helped improve the health of young children. But a nation as rich and diverse as ours should not tolerate over 20 percent of the population having little or no access to quality health care.

It is time that we step back and take a long hard look at our present health care system, and consider what alternatives and other options we have to increase the availability of quality, affordable health care for all Americans. It is my sense that there is unanimity among both providers and consumers of health care that our present system is not working. It is also clear that solutions must combine the resources of the public and private sectors.

I believe the National Council on the Access to Health Care offers the Nation the opportunity to bring together those who represent the broadest cross section of interests in the delivery of health care policy. It allows the important process of developing a series of recommendations to improve the delivery of health care to occur outside the confines of the political process. It recognizes the importance of involving as many people as possible through local and regional conferences.

I am confident that my colleagues in both the House and the Senate will view this legislation as a necessary and productive effort. We cannot continue to attempt to fine tune a national health care policy that is inadequate and too costly. Rather, we must take the time and the energy needed to move outside the existing system and undertake the initiatives that will guarantee access to quality health care at reasonable costs for all Americans.●

By Mr. SYMMS:

S.J. Res. 193. Joint resolution to authorize the President to issue a proclamation designating the week beginning October 20, 1985, as "The Lessons of Grenada Week"; to the Committee on the Judiciary.

LESSONS OF GRENADA WEEK

Mr. SYMMS. Mr. President, I am pleased to introduce a joint resolution creating "Lessons of Grenada Week." My colleagues on the House side, Congressmen NEWT GINGRICH and SAM STRATTON, introduced this bill before the August recess in the other body, and I am pleased to say that the legislation has quickly gained numerous cosponsors.

In 1979, Grenada's constitutional Government was overthrown by Maurice Bishop, an avowed Marxist. After his takeover, Bishop boasted that his small group had grabbed control of the entire country and that he, personally, had complete authority over all Government operations in Grenada. During Bishop's rule he became increasingly close to the Soviet Union and Cuba. The Soviet construction of a 10,000-foot airstrip capable of servicing Soviet bombers is evidence of this friendship.

Documents captured by United States forces during the liberation of Grenada provide conclusive evidence that the Soviet Union and Cuba were preparing to use Grenada as a guerrilla training site and a depot for the shipment of military equipment to leftist rebels in Latin America. These documents show the strategic importance the Soviet Union and Cuba placed on the tiny island of Grenada.

This conclusion is supported by the fact that there were large numbers of Soviet, Cuban, Bulgarian, North Korean, and East German advisers on the island. Millions of rounds of ammunition, thousands of weapons, and various types of military equipment such as armored personnel carriers and antiaircraft weapons were found on the island after its liberation. In addition, the Soviet Ambassador to Grenada was a military officer with a rank equivalent to a four-star general.

Bishop was a willing Soviet puppet, who eagerly cooperated with the massive buildup of Soviet, Cuban, and Eastern bloc arms into an enormous stockpile. In 1983, however, his grip began to slip. Evidence now suggests that he was losing the favor of the Cuban Government, and that the Soviets were concerned about retaining a climate favorable to their strategic designs in Grenada. The erosion of his leadership culminated in his assassination during the bloody coup of October 19, 1983.

Although Bishop's Marxist dictatorship had an appalling human rights record, his executioner was significantly worse. Gen. Hudson Austin, who had helped Bishop gain power, immediately instituted a "shoot on sight" curfew, and tortured and jailed those who refused to bow to his barbarous regime.

The situation in Grenada after Bishop's disposal was one of utter chaos and anarchy. In the midst of this anarchy were a large number of American citizens attending a medical school on the island. As they later confirmed, their situation was tenuous and their safety was in doubt. In order to rescue these American citizens, and at the request of the Organization of Eastern Caribbean States [OECS], who feared aggression from the increasingly militant Grenada, President Reagan wisely ordered U.S. Armed Forces into Grenada.

This decision was necessary first to ensure the safety of Americans from a hostile, possibly Iran-like hostage crisis; and second, to keep our treaty commitments with our OECS allies by answering their call for protection and assistance.

In addition to rescuing our countrymen, our forces uncovered an enormous amount of Communist military equipment, seized 35,000 pounds of Communist documents, including minutes from secret meetings, secret treaties with the Soviet Union and Cuba, embassy dispatches from Moscow, and a variety of other items of immense value to scholars, our intelligence agencies, and the American public. These documents provide indisputable evidence of the deceptive and calculated manner in which the Soviet Union encourages and sponsors revolutions throughout the world.

Because of the President's bold action freedom was advanced and Communist aggression near our borders was confronted and stopped. Aside from the American students whose lives were saved, the main beneficiaries of President Reagan's decisiveness are, of course, the people of Grenada who recently held their second free election in 2 years. Because of our liberation of their country, the Grenadan people now have the political freedom to elect the government of their choice.

A "Lessons of Grenada Week" would focus our attention on the Third World exploitation which is continually practiced by the Soviet Union and their satellites. As we have seen in numerous countries around the world, this exploitation is ruthless and persistent.

In Nicaragua, we have witnessed the Sandinistas' continual persecution of their people and their attempts to exterminate the Miskito Indians. Furthermore, the Sandinistas have pledged to spread their Marxist-Leninist revolution to their peaceful neighbors by violent means, if necessary.

In Angola, Cuban troops prop up the corrupt regime which is preventing

peaceful national reconciliation and a democratically elected government. Repeal of the Clark amendment may well curb the adventurism of the Cubans in Africa, deflate Castro's prestige in Latin America, and give democratic resistance forces around the world new confidence.

Most blatant of all is the Soviet Union's destruction of Afghanistan and its people. The Soviet's burning of crops, encouragement of epidemics, destruction of hospitals and sanitation facilities, and repeated bombing of towns, villages, and other nonmilitary targets such as schools and mosques, reveals the true inhumanity of the Soviets.

The Soviets have also instituted a program of forced deportation of Afghan children. Recent reports place the number of 7- to 10-year-old Afghan children who have been sent to the Soviet Union for indoctrination at over 10,000. It is obvious that the Soviet Union's ultimate purpose is the genocide of the Afghan people and the obliteration of the Afghan culture. In this effort, the Red army is making civilians, including peasant children and women, a major target of their war efforts.

I believe that a "Lessons of Grenada Week" is an appropriate commemoration of the October rescue mission and an altogether fitting reminder of the fundamental differences between democratic societies and Communist dictatorships. "Lessons of Grenada Week" will allow the American people to reflect on the importance of the Grenada rescue mission, and, more importantly, on the need to continue to confront the spread of communism throughout the world.

ADDITIONAL COSPONSORS

At the request of Mr. CRANSTON, the name of the Senator from Ohio [Mr. METZENBAUM] was added as a cosponsor of S. 3, a bill to amend title II of the Social Security Act to provide that the combined earnings of a husband and wife during the period of their marriage shall be divided equally and shared between them for benefit purposes, so as to recognize the economic contribution of each spouse to the marriage and ensure that each spouse will have social security protection in his or her own right.

S. 7

At the request of Mr. CRANSTON, the names of the Senator from Wisconsin [Mr. PROXMIRE], and the Senator from Minnesota [Mr. BOSCHWITZ] were added as cosponsors of S. 7, a bill to amend title XIX of the Social Security Act to provide Medicaid coverage for certain low-income pregnant women.

S. 47

At the request of Mr. HELMS, the name of the Senator from South Carolina [Mr. THURMOND] was added as a cosponsor of S. 47, a bill to restore the right of voluntary prayer in public schools and to promote the separation of powers.

S. 665

At the request of Mr. HATCH, the name of the Senator from Idaho [Mr. SYMMS] was added as a cosponsor of S. 665, a bill to amend the Fair Labor Standards Act of 1938 to facilitate industrial homework, including sewing, knitting, and craftmaking, and for other purposes.

S. 797

At the request of Mr. HATCH, the names of the Senator from Minnesota [Mr. BOSCHWITZ], and the Senator from Virginia [Mr. TRIBLE] were added as cosponsors of S. 797, a bill to authorize an employer to pay a youth employment opportunity wage to a person under 20 years of age from May through September under the Fair Labor Standards Act of 1938 which shall terminate on September 30, 1987, and for other purposes.

S. 810

At the request of Mr. CRANSTON, the name of the Senator from Tennessee [Mr. GORE] was added as a cosponsor of S. 810, a bill to amend title XX of the Social Security Act to assist States in improving the equality of child-care services.

S. 855

At the request of Mr. PRYOR, the name of the Senator from Maine [Mr. MITCHELL] was added as a cosponsor of S. 855, a bill for the relief of rural mail carriers.

S. 1004

At the request of Mr. DOMENICI, the names of the Senator from Utah [Mr. GARN] and the Senator from Utah [Mr. HATCH] were added as cosponsors of S. 1004, a bill to authorize and direct the Secretary of Energy to establish a program to provide for reclamation and other remedial actions with respect to mill tailings at active uranium and thorium processing sites.

S. 1011

At the request of Mr. GRASSLEY, the names of the Senator from Oklahoma [Mr. NICKLES] and the Senator from Illinois [Mr. DIXON] were added as cosponsors of S. 1011, a bill to amend title 18, United States Code, to provide the death sentence or mandatory life in kidnapping offenses involving the murder of a minor.

S. 1012

At the request of Mr. GRASSLEY, the names of the Senator from Oklahoma [Mr. NICKLES], and the Senator from Illinois [Mr. DIXON] were added as cosponsors of S. 1012, a bill to amend title 18, United States Code, to provide mandatory minimum sentence for offenses involving the sexual exploitation of children.

S. 1013

At the request of Mr. GRASSLEY, the name of the Senator from Illinois [Mr. DIXON] was added as a cosponsor of S. 1013, a bill to require the Attorney General to modify the FBI offense classification system to provide more specific information concerning offenses involving the sexual exploitation of children.

S. 1303

At the request of Mr. PROXMIRE, the names of the Senator from Maine [Mr. MITCHELL], and the Senator from Hawaii [Mr. MATSUNAGA] were added as cosponsors of S. 1303, a bill to amend the Federal Insecticide, Fungicide, and Rodenticide Act to better protect the public from the hazards of pesticides, and for other purposes.

S. 1425

At the request of Mr. LEVIN, the name of the Senator from New York [Mr. MOYNIHAN] was added as a cosponsor of S. 1425, a bill to create a separate tariff classification for imports of pigskin footwear.

S. 1531

At the request of Mr. LAUTENBERG, the name of the Senator from Pennsylvania [Mr. HEINZ] was added as a cosponsor of S. 1531, a bill to amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to provide for improved emergency planning and notification of releases of hazardous substances, and for other purposes.

S. 1594

At the request of Mr. LAUTENBERG, the name of the Senator from New Jersey [Mr. BRADLEY] was added as a cosponsor of S. 1594, a bill to amend the Communications Act of 1934 to increase the availability of educational and informational television programs for children.

S. 1596

At the request of Mr. WARNER, the name of the Senator from Hawaii [Mr. MATSUNAGA] was added as a cosponsor of S. 1596, a bill to amend the District of Columbia Stadium Act of 1957 to direct the Secretary of the Interior to convey title to the Robert F. Kennedy Memorial Stadium to the District of Columbia.

SENATE JOINT RESOLUTION 68

At the request of Mr. DODD, the name of the Senator from Oregon [Mr. PACKWOOD] was added as a cosponsor of Senate Joint Resolution 68, a joint resolution to designate November 21, 1985, as "William Beaumont Day."

SENATE JOINT RESOLUTION 117

At the request of Mr. LEVIN, the names of the Senator from Tennessee [Mr. GORE], the Senator from Arizona [Mr. DECONCINI], the Senator from Oregon [Mr. HATFIELD], the Senator from Rhode Island [Mr. CHAFEE], the Senator from Virginia [Mr. WARNER],

the Senator from Vermont [Mr. LEAHY], the Senator from New York [Mr. MOYNIHAN], and the Senator from South Dakota [Mr. PRESSLER] were added as cosponsors of Senate Joint Resolution 117, a joint resolution designating the week beginning September 22, 1985, as "National Adult Day Care Center Week."

SENATE JOINT RESOLUTION 132

At the request of Mr. DANFORTH, the names of the Senator from Minnesota [Mr. BOSCHWITZ], the Senator from Nebraska [Mr. EXON], the Senator from Massachusetts [Mr. KERRY], the Senator from Nevada [Mr. LAXALT], the Senator from Vermont [Mr. LEAHY], and the Senator from Georgia [Mr. NUNN] were added as cosponsors of Senate Joint Resolution 132, a joint resolution designating October, 1985, as "National Head Injury Awareness Month."

SENATE JOINT RESOLUTION 156

At the request of Mr. MURKOWSKI, the name of the Senator from Ohio [Mr. GLENN] was added as a cosponsor of Senate Joint Resolution 156, a joint resolution authorizing a memorial to be erected in the District of Columbia or its environs.

SENATE JOINT RESOLUTION 158

At the request of Mr. MURKOWSKI, the names of the Senator from Michigan [Mr. LEVIN], the Senator from Illinois [Mr. SIMON], the Senator from Georgia [Mr. NUNN], the Senator from Oregon [Mr. HATFIELD], the Senator from West Virginia [Mr. ROCKEFELLER], and the Senator from Maine [Mr. MITCHELL] were added as cosponsors of Senate Joint Resolution 158, a joint resolution designating October 1985 as "National Community College Month."

SENATE JOINT RESOLUTION 181

A the request of Mrs. HAWKINS, the names of the Senator from Michigan [Mr. RIEGLE], the Senator from Michigan [Mr. LEVIN], the Senator from Kansas [Mr. DOLE], the Senator from Arizona [Mr. DECONCINI], the Senator from Massachusetts [Mr. KENNEDY], the Senator from North Dakota [Mr. ANDREWS], the Senator from Connecticut [Mr. WEICKER], and the Senator from Hawaii [Mr. INOUYE] were added as cosponsors of Senate Joint Resolution 181, a joint resolution to designate the week beginning September 1, 1985, as "National School-Age Child Care Awareness Week."

SENATE JOINT RESOLUTION 186

At the request of Mr. THURMOND, the names of the Senator from Michigan [Mr. LEVIN], the Senator from Maryland [Mr. MATHIAS], and the Senator from Maryland [Mr. SARBANES] were added as cosponsors of Senate Joint Resolution 186, a joint resolution to designate the week of September 23, 1985, through September 29, 1985, as "National Historically Black Colleges Week."

SENATE JOINT RESOLUTION 191

At the request of Mr. BUMPERS, the names of the Senator from Minnesota [Mr. BOSCHWITZ], the Senator from Tennessee [Mr. GORE], the Senator from South Carolina [Mr. HOLLINGS], the Senator from Kansas [Mr. DOLE], the Senator from Massachusetts [Mr. KENNEDY], the Senator from North Dakota [Mr. ANDREWS], the Senator from Maryland [Mr. SARBANES], the Senator from Mississippi [Mr. COCHRAN], the Senator from Arkansas [Mr. PRYOR], the Senator from New Jersey [Mr. BRADLEY], the Senator from Arizona [Mr. DECONCINI], the Senator from Massachusetts [Mr. KERRY], and the Senator from Hawaii [Mr. MATSUNAGA] were added as cosponsors of Senate Joint Resolution 191, a joint resolution to designate the month of October 1985 as "Learning Disabilities Awareness Month."

SENATE CONCURRENT RESOLUTION 47

At the request of Mr. GLENN, the name of the Senator from Tennessee [Mr. GORE] was added as a cosponsor of Senate Concurrent Resolution 47, a concurrent resolution observing the 20th anniversary of the enactment of the Older Americans Act of 1965.

SENATE CONCURRENT RESOLUTION 51

At the request of Mr. DIXON, the name of the Senator from New York [Mr. D'AMATO] was added as a cosponsor of Senate Concurrent Resolution 51, a concurrent resolution to congratulate the Society of Real Estate Appraisers on the 50th anniversary of its founding.

SENATE RESOLUTION 37

At the request of Mr. PRYOR, the name of the Senator from West Virginia [Mr. BYRD] was added as a cosponsor of Senate Resolution 37, a resolution regarding small business and agricultural representatives on the Federal Reserve Board.

SENATE RESOLUTION 183

At the request of Mr. DOMENICI, the names of the Senator from Utah [Mr. GARN], and the Senator from Utah [Mr. HATCH] were added as cosponsors of Senate Resolution 183, a resolution to express the sense of the Senate regarding maintenance of U.S. energy independence and national security interests with respect to uranium.

SENATE RESOLUTION 206

At the request of Mr. DURENBERGER, the name of the Senator from Indiana [Mr. LUGAR] was added as a cosponsor of Senate Resolution 206, a resolution to urge Federal agencies with flood control responsibilities to plan for and execute efficient and effective cooperation and technical assistance to State and local governments to mitigate the consequences of the high water levels on the Great Lakes.

SENATE RESOLUTION 218—ORIGINAL RESOLUTION REPORTED WAIVING CONGRESSIONAL BUDGET ACT

Mr. THURMOND, from the Committee on the Judiciary, reported the following original resolution; which was referred to the Committee on the Budget:

S. RES. 218

Resolved, That, pursuant to section 303(c) of the Congressional Budget Act of 1974, section 303(a) of that Act be waived with respect to S. 1200 as reported. S. 1200 as reported, the Immigration Reform and Control Act of 1985, authorizes the payment of entitlement benefits commencing during fiscal year 1989 to cover the full estimated costs to the States for public assistance to the legalized aliens, and for imprisonment costs; and Senate consideration of S. 1200 at the present time would violate section 303(a) of the Congressional Budget Act of 1974, in that the bill would provide new spending authority described in section 401(c)(2)(C) of that Act to become effective during fiscal year 1989, before the first concurrent resolution on the budget for fiscal year 1989 has been adopted. A waiver of section 303(a) of that Act is necessary to provide for the timely consideration of S. 1200.

NOTICES OF HEARINGS

COMMITTEE ON ENERGY AND NATURAL RESOURCES

Mr. McCLURE. Mr. President, I would like to announce for the information of the Senate and the public the scheduling of a public hearing before the Committee on Energy and Natural Resources to examine the impact of moratoria on Outer Continental Self leasing in Federal waters adjacent to the coastline of the State of California.

This hearing will be held on Tuesday, September 17, beginning at 10 a.m. in room SD-366 in the Dirksen Senate Office Building in Washington, DC.

Those wishing to testify or who wish to submit written statements should contact the Committee on Energy and Natural Resources, room SD-358 Dirksen Senate Office Building, Washington, DC 20510. For further information, please contact Jeff Arnold at (202) 224-5205.

AUTHORITY FOR COMMITTEES TO MEET

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

Mr. DOLE. Mr. President, I ask unanimous consent that the Committee on Commerce, Science, and Transportation be authorized to meet during the session of the Senate on Tuesday, September 10, to conduct a meeting on the nominations of Terrence Scanlon and Anne Graham to the Consumer Product Safety Commission.

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

SUBCOMMITTEE ON EDUCATION, ARTS, AND HUMANITIES

Mr. DOLE. Mr. President, I ask unanimous consent that the Subcommittee on Education, Arts, and Humanities, of the Committee on Labor and Human Resources, be authorized to meet during the session of the Senate on Tuesday, September 10, 1985, in order to conduct a hearing on the reauthorization of the Higher Education Act of 1985.

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

COMMITTEE ON GOVERNMENTAL AFFAIRS

Mr. DOLE. Mr. President, I ask unanimous consent that the Committee on Governmental Affairs be authorized to meet during the session of the Senate on Tuesday, September 10, to hold a hearing on S. 1527, the Civil Service Pension Reform Act of 1985.

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

ADDITIONAL STATEMENTS

VITAMIN A DEFICIENCY

● Mr. CHAFEE. Mr. President, I would like to bring to the attention of the Senate the following September 5, 1985, New York Times article about the perils of vitamin A deficiency among the children in developing countries. This article clearly points out the need for the legislation Senator RUDMAN and I have introduced. Our legislation, S. 1451, would earmark $30 million in the Agriculture, Rural Development, and Nutrition account of the AID budget to be disbursed over a 3-year period, for nutrition programs which reduce vitamin A deficiency. We believe the cost to be minimal in terms of the benefit it provides to children worldwide. I call on my colleagues to read the following article and add their names as cosponsors to this important legislation. I ask that the article be printed in the RECORD at this point.

The article follows:

[From the New York Times, Sept. 5, 1985]

DIET DEFICIENCY OF VITAMIN A IS REVEALED AS A MAJOR KILLER

(By Erik Eckholm)

Dietary deficiencies of vitamin A, long implicated as a cause of blindness, have now been linked to hundreds of thousands of deaths of children each year in Africa, Asia and Latin America.

New findings, described by one expert as "electrifying" in their implications, are galvanizing international efforts to combat the deficiency. The studies indicate that the vitamin deficit, which is widespread in the third world and a major cause of blindness there, is also responsible for significant increases in measles, diarrhea and other potentially deadly diseases among tens of millions of children.

International health officials are developing a plan they hope will eliminate the deficiency worldwide and, in the process, reduce childhood deaths. Experts said the findings had already rejuvenated flagging vitamin therapy programs in Bangladesh and other Asian countries.

Earlier this year, the highest incidence of vitamin A deficiency ever recorded in any population was discovered in famine victims trekking into feeding camps in Ethiopia and the Sudan. Relief officials mounted a quick response, one of many largely unheralded subplots in the larger dramas of life and death in Africa that have caught the world's conscience over the last year. Since March, physicians say, airlifted shipments of high-dose vitamin A capsules to Ethiopia and the Sudan have saved thousands of children from certain blindness and from increased illness.

On the Indonesian island of Sumatra, where inadequate consumption of vitamin A is commonplace, death rates among small children receiving vitamin A therapy were one-third lower than among other children in equally poor circumstances who did not receive the supplements, according to the most recent and conclusive of the studies linking the nutrient deficit to excessive mortality.

That insufficient vitamin A can damage eyesight has long been established. In ancient Egypt and Greece observers noted that the eyes of young children sometimes withered when they consumed an unvaried diet. Today the World Health Organization estimates that half a million children in Africa, Asia and Latin America are permanently blinded each year by xerophthalmia, from the Greek for "dry eye," resulting from inadequate vitamin A. Millions more suffer the lesser, and reversible, debility of night blindness, which causes children to stumble about at twilight. Nutritional blindness has essentially disappeared from the developed world, where diets meet minimum needs for the nutrient.

Although health officials have recognized nutritional blindness as a severe problem for decades, they have seldom granted it high priority when dispensing scarce health funds.

"When the main concern was night blindness, health ministers said, understandably, 'I feel terrible about that, but I can't put my resources into it when half our children are dying before the age of 5,'" said Dr. Alfred Sommer of Johns Hopkins University, who directed the Indonesia studies. But now, he said, in view of the evidence linking inadequate vitamin A to heightened mortality, "ending the deficiency is starting to be viewed as a mainstream activity, not a peripheral one."

The "electrifying" new evidence, said John H. Costello, director of Helen Keller International, "has rekindled interest in the vitamin A problem" among aid agencies such as the United Nations Children's Fund, which finances projects to promote the survival of children, and among third world governments. Helen Keller International, in New York, is the main private group working to prevent nutritional blindness. In Washington, legislation is pending that would more than double the Agency for International Development's vitamin A programs, to $8 million a year.

Dr. Nevin S. Scrimshaw, professor of nutrition at the Massachusetts Institute of Technology, called the Indonesia findings "very important." He said the findings had created new enthusiasm for the global strategy to eradicate vitamin A deficiency being promoted by the World Health Organization, which is now trying to raise $25 million for the first five years of the program. Many experts believe that, through vitamin-capsule distribution, nutrition education and fortification of foods with the vitamin, the deficiency could be largely eradicated even without deeper social progress.

According to Dr. Sommer, 5 million to 10 million children develop night blindness or more severe effects of vitamin A deficiency each year, and an additional 20 million suffer more subtle deficiencies that impair their health. In Asia, the deficiency has been found to be rampant in India, Bangladesh, Indonesia, the Philippines and Thailand; little is known about rates in China. In Latin America the deficiency remains a threat in Haiti and isolated pockets elsewhere. Almost nothing is known about the adequacy of vitamin A in African diets, though fragments of evidence indicate a vast problem.

FIRST SIGN IS NIGHT BLINDNESS

The first overt sign of the deficiency is night blindness. Native names for this condition in Indonesia, India and Bangladesh mean, literally, "chicken eye." Its victims, like chickens, which lack ocular mechanisms for vision in low light, tend to walk erratically in the evening dimness. Night-blind children, physicians say, often spend twilight time sitting silently in a corner to avoid embarrassment. In more advanced stages, the whites of the eyes becomes rough and wrinkled. Then the corneas dry and scar, impairing vision, and finally the corneas rupture, leaving the victim totally blind.

The primary victims are the children of the poor and landless who have least access to the green leafy vegetables, fruits, milk, eggs, liver and fish that provide the vitamin. Cultural practices often accentuate the problem. Mother's milk provides vitamin A but postweaning diets often do not. In Indonesia, most adults consume green vegetables but tend not to feed them to small children. And in Bangladesh, girls are less susceptible than boys because they nibble on vegetables, not generally fed to children, as they stir cooking pots.

Exactly how the deficiency promotes potentially deadly diseases is unclear. Experts said it might suppress the immunological system either directly or indirectly by interfering with iron metabolism, which in turn debilitates the white blood cells that attack invading disease agents. Evidence also suggests that the deficiency causes a hardening of mucous membranes in the gastrointestinal and urinary tracts as well as around the eyes. As these normally moist tissues become skinlike and cracked, a process known as keratinization, they may provide microbes with easy pathways to vulnerable organs.

During food shortages, vitamin A intake sometimes actually improves as desperate people turn to eating nutrient-rich leaves from the environment. But during severe famines and where the landscape is barren, as in parts of Africa in recent years, a chronic, subtle deficiency of the vitamin can quickly be transformed into an open ravager of eyesight. Scientists presume that the lengthy drought afflicting Ethiopia, the Sudan and other African countries has exacerbated a pre-existing dietary deficit of vitamin A. Ethiopian tribes have 27 different names for night blindness, indicating long familiarity with the problem, Dr. Sommer noted.

Last winter, as emaciated drought victims arrived at feeding centers in Ethiopia and the Sudan, veteran relief officials noticed signs of eye injury and called for an expert appraisal. In January doctors from Helen Keller International visited 10 centers in the two countries. They were appalled by what they saw: In some camps nearly 10 percent of the children showed advanced forms of eye damage such as dry patches and corneal scarring, the highest rates ever recorded anywhere. "It is certain that many children in East Africa have become blind and thousands more are in danger of becoming blind," the physicians warned.

Beyond suffering years of poor harvests, many famine victims from warring regions of Ethiopia had reached feeding camps in the Sudan only after weeks of walking through parched desert terrain. "Those that made it to the camps had been without vitamin A for a very long time," said Dr. Victoria Sheffield of Helen Keller International, who recently returned from another assessment of conditions in East Africa. Once in the camps, people received little, if any, of the nutrient in their emergency rations; even vitamin-fortified powdered milk does not provide the nutrient at high enough levels to reverse developing cases of blindness.

Within a month of its alarming January report, the New York agency arranged for two million doses of vitamin A to be sent to the Sudan and Ethiopia. Three pharmaceutical companies donated the vitamin capsules, while another private aid group, Catholic Relief Services, and the United Nations airlifted them to Africa. Officials believe the problem is under control for now, but they worry about the deficiency's effects on millions more Africans who have endured years of drought but have not visited feeding centers or health clinics ready to counter the threat.

25,000 CHILDREN STUDIED

In the late 1970's, while studying eyesight problems on the Indonesian island of Java, Dr. Sommer and colleagues found, "quite unexpectedly, that children with night blindness were dying at a much higher rate than the children next door," he said. They found that, other forms of malnutrition aside, the more severe the vitamin A deficiency, the higher the mortality, mainly from increased rates of respiratory diseases and diarrhea.

The scientists, taking advantage of a vitamin therapy program about to begin in Sumatra, then carried out a more scientifically controlled study of 25,000 children in 450 villages from 1982 to 1984. The therapy could not be introduced to all villages immediately, so the scientists were able to compare health in half the villages, where children received megadoses of vitamin A every six months, with health in the other villages, comparably poor, that had not yet received the therapy. In the one-year interval between examinations of each child, they found that the death rate among those 2 to 6 years old who had received the capsules was 35 percent lower than that among untreated children. No other differences in health care or nutrition between the two groups could be discerned. Dr. Sommer presented the Sumatra findings last month to the International Congress of Nutrition in Brighton, England.

Dr. Barbara A. Underwood of the National Eye Institute in Bethesda, Md., who is a specialist in nutritional blindness, said that scientists had generally accepted the evidence linking vitamin A deficiencies with increased disease and death, but that the magnitude of that effect was still open to question. "We are anxious to see this study replicated in other settings," she said.●

DEATH OF DR. KONSTANTIN D. FRANK

● Mr. MOYNIHAN. Mr. President, a great leader of the New York wine industry, Dr. Konstantin D. Frank, died on Saturday at the age of 86.

As an obituary appearing in Sunday's New York Times duly notes, Dr. Frank was the first viticulturist to demonstrate that Europe's finest vinifera grapes could withstand the rigors of the Northeast climate successfully. Previously, New York winemakers cultivated such hardy domestic varieties as the Concord, Catawaba, and Delaware—all exceptionally vigorous labruscas, but lacking the finesse of some of the more refined vinifera grapes, such as Pinot Noir and Cabernet.

Dr. Frank, who arrived in this country destitute 34 years ago, worked with the reknown Frenchman, Charles Fournier, at the Gold Seal Vinyards south of Geneva, on the shores of Lake Keuka. The two produced New York's first vinifera wines—a Chardonnay and a Riesling—in 1957. Offered commercially under the Gold Seal label, the two wines have been popular ever since.

Mr. President, Dr. Frank's importance to the wine industry of New York cannot be overestimated. I ask that the obituary appearing in Sunday's New York Times be printed in the RECORD.

The obituary follows:

DR. KONSTANTIN D. FRANK, 86, NEW YORK STATE WINEMAKER

(By Bryan Miller)

Dr. Konstantin D. Frank, a New York State winemaker who proved to skeptical colleagues that Europe's finest vinifera grapes could thrive in the rigorous Northeast climate, died yesterday at the Ira Davenport Hospital in Bath, N.Y., at the age of 86. He had suffered a stroke a week ago.

Before Dr. Frank's arrival, New York winemakers cultivated primarily such hardy American varieties as Concord, Catawba and Delaware grapes, which bore little resemblance to the grapes used in the fine wines of Europe.

Since colonial times, grape growers had tried unsuccessfully to transplant the European Chardonnay and Riesling grapes, which make some of the most elegant wines in the world.

Dr. Frank, a Russian immigrant with a fiery temperament, arrived in Geneva, N.Y., in the early 1950's and declared that he would succeed where all others had failed. If Riesling grapes could grow in Russia "where it gets to 40 below and your spit freezes before it hits the ground," he once said, New York State would pose no problem.

A NATIVE OF ODESSA

Dr. Frank was born in Odessa, a fifth-generation descendant of Germans invited by Czar Alexander I to bring Western culture and technology to Russia. He earned his doctorate in agricultural science at the Odessa Polytechnic.

After the 1917 revolution, in which two of his brothers were killed, Dr. Frank was appointed head of the nationalized Troubetskoy estates, whose 2,000 acres of vineyards blanketed the banks of the Dnieper River.

In 1943, when the Germans overran the Ukraine, Dr. Frank went to Vienna. After the war he moved to Bavaria, until, in 1951, destitute at the age of 52, he came to the United States, settling in Brooklyn with his wife, two daughters and son. He worked in an Automat until he saved enough money to go to the State Agricultural Station in Geneva. The only job he could find was hoeing blueberries.

WORKED WITH CHARLES FORNIER

In 1953 be found work at the Gold Seal Vineyards, south of Geneva on the shores of Lake Keuka, where his boss was the renowned Charles Fornier, a former champagne maker in France. Mr. Fornier was experimenting with hybrid grapes, trying to come up with a combination that would have the vigor of native grapes and the finesse of vinifera.

Dr. Frank and Mr. Fornier began a scientific collaboration that bore fruit—vinifera fruit—in four years. In 1957 they unveiled their first experiemental vinifera wines, a Chardonnay and a Riesling. They succeeded by grafting vinifera vines onto sturdy native roots. The two were offered commercially under the Gold Deal label and have been popular ever since.

Dr. Frank eventually went off on his own and started a winery, Vinifera Wine Cellars, with the dream of producing vinifera red wines from the grapes that make the great Bordeaux and Burgundies, Pinot Noir and Cabernet. That goal eluded him. His son, Willi, and son-in-law, Walter Volz, have assumed management of the winery in recent years.

"He certainly was a pioneer along with Charles Fornier," said Hermann J. Wiemer, who owns a winery in Dundee, N.Y., bearing his name. "His courage influenced my decision to try growing vinifera in New York State. Otherwise I would have left and gone out to California."

Mr. Wiemer described Dr. Frank as "very opinionated" and strong in his convictions. "When everybody in Geneva and at Cornell was saying his ideas were impossible, he never gave up," Mr. Wiemer said.

Dr. Frank is survived by his wife, Eugenia; three children, Willi, of Hammondsport, N.Y., Hilda Volz, of Bath, N.Y., and Hellen Schelling of Catskill, N.Y., and six grandchildren.

The funeral will be held Monday at 10 A.M. at the Bond-Davis Funeral Home in Hammondsport.●

THE BALTIC STATES

● Mr. PRYOR. Mr. President, every year this country celebrates Baltic Freedom Day and Lithuanian Independence Day even though those States are neither free nor independent. Why, then, do we go through this annual exercise?

We do it because it is important to remember how the Soviets swallowed up those nations and robbed their people of the traditions they valued so highly. As we watch Soviet actions in

eastern Europe and Afghanistan, the Baltic experience serves as a classic case study of Soviet expansionist tactics—armed invasion, obliteration of national identity, and suspension of individual rights.

The loss of their national identity and the freedom to enjoy their cultural traditions was a great blow to the citizens of Estonia, Latvia, and Lithuania, but Baltic-Americans have done their best to keep those traditions alive.

The freedom and independence we celebrate each year refer to the Baltic spirit if not to today's political reality.

That spirit is described in an article from the Wall Street Journal of July 31, written by Seth Lipsky, and I ask to have the article printed in the RECORD.

The article follows:

[From the Wall Street Journal, July 31, 1985]

BALTIC WITNESS AGAINST THE SOVIET TYRANNY

(By Seth Lipsky)

COPENHAGEN.—The community of exiled Balts put the Soviet Union on trial here last week. Before a panel of judges, convened at the Hotel Scandinavia by the World Baltic Conference, witnesses testified on Soviet crimes in Estonia, Latvia and Lithuania in the years since those nations were taken captive under the terms of Stalin's pact with Hitler. Exiles, including many assimilated into Western life, came to hear others, some recently arrived, report on the Russification of their homelands, a process that represses native culture, language and politics and replaces it with an alien ideology from Moscow. The verdict seemed clear enough. Then the group took a chartered ship up the Baltic coast to gain a glimpse of the lost lands.

As protests go, it wasn't much; the 150 or so people involved included almost no famous figures, although one legendary Soviet dissident, Vladimir Bukovsky, was on hand. But the fate of the Balts is something to think about as the glitterati gather in Finland this week to congratulate themselves on the signing a decade ago of the Helsinki Final Act. It reminds us that statesmen can sign all the documents they want, whether they be Molotov and Ribbentrop inking the 1939 Russo-German pact or Gerald Ford, Leonid Brezhnev and a few others putting their names to the 1975 Helsinki accords. Still, the claims individuals hold in their hearts have a way of haunting the diplomats.

The World Baltic Conference found its mark in Helsinki in 1973, when the ground work was under way on the now notorious Final Act. The conference, then a year old, had sent a delegation to Helsinki to press free Baltic interests. One of their number—a Latvian named Uldis Grava, who otherwise works as a marketing man for the Newspaper Advertising Bureau in New York—got invited to a press reception at the East German embassy, where he ended up face to face with the Soviet foreign minister, Andrei Gromyko. The ensuing conversation so angered Mr. Gromyko that he stalked out of the reception and had the Finnish government arrest the Baltic delegates at their hotel. It took the American secretary of state—then William Rogers—to get the Balts bailed out. They've been getting the Soviet goat ever since.

The gathering here last week is the latest example. Tass went into a tizzy. It used adjectives like "recidivist burglar" and "alcoholic troublemaker" to describe witnesses against the Russification of the Baltic nations. The Soviets sent to Copenhagen their own delegation of captive Balts, with Russian escorts, to tell local newspapers that everything back home was peaches and cream. Their claims won't emerge as credible with those who followed the testimony, some in writing, some in person, of the free Balts. They conveyed not merely the humiliation of an invasion by the Red Army such as struck the Baltic nations in 1940; they emphasized the more maddening attempts, under way in Tallin, Riga and Vilnius, to erase the concept of a nation.

A defector, Valdo Randpere, formerly assistant to the Estonian minister of justice, told how the legal code of the Russian republic was transferred to Estonia. A young Russian, Sergei Zamascikov, who was educated in Latvia, defected in 1979 and now lives in Los Angeles, described university reserve officers training classes, where future Soviet military leaders hear condemnations of Latvian ethnic traditions considered to be "bourgeois nationalism." A one-time Lithuanian communist now teaching in England, Alexander Shtromas, spoke of those "who grew old only to realize the monstrosity of the cause they chose to serve." A former Soviet tobogganer and now a Munich housewife, Rita Bruvere, told of Russians telling Latvians on an overcrowed bus in Riga: "We slaughtered too few of you fascists."

Then there was the case of an ex-agent in the Latvian KGB, Imants Lesinskis, now living in the U.S. under a new name. The World Baltic Conference wrote to him at the post-office box through which he maintains contact, and he agreed to participate. He was put on the schedule. Two hours before he was to testify in Copehhagen, he telephoned regrets, as too many spies were around. At 8:30 the next morning, though, according to a conference organizer, Mr. Lesinskis walked into the hotel. He appeared uncomfortable amid the photographers and met conference officials in private. He asked to be driven into the city. His escort of Balts drove him about town, and when he was satisfied he wasn't being tailed, he got out of the car and walked into the train station and out of sight.

So it goes on the front lines of the Cold War. On Sunday, the Baltic Star docked at Helsinki, after its charter up the coast. About 400 Balts staged what the Associated Press called "Finland's first major anti-Soviet protest" since the Warsaw Pact invaded Czechoslovakia in 1968. Mr. Bukovsky, who spent 15 years in Soviet labor camps, was the demonstration's featured speaker. The 10 years since the signing of the Final Act, Mr. Bukovsky told a crowd of 2,000, "have been marked by the communist authorities by the increased aggression, by the unprecedented arms buildup, by the support of international terrorism, by the increase of repression, by jamming radio broadcasts, by imprisoning anybody who is willing to speak out."

Few think the free Balts, in their persistent vigil, threaten the Soviets—except, it would seem, the Soviet themselves.●

GLENN OHRLIN HONORED BY NATIONAL ENDOWMENT FOR THE ARTS

● Mr. PRYOR. Mr. President, the National Endowment for the Arts this week will honor 12 master American artists with its highest award. I am most pleased that one of the recipients will be an Arkansan, Glenn Ohrlin of Mountain View. Glenn, a cowboy singer, storyteller, and illustrator, will be recognized in a ceremony on September 12, 1985, as one of the Endowment's National Heritage Fellows. I would like to share with my colleagues some of the specifics of Glenn Ohrlin's talents and life, and I ask that his biography be printed in the RECORD. I am proud to represent this individual whose many talents we have come to enjoy.

The material follows:

GLENN OHRLIN

Glenn Ohrlin was born in 1926 in Minneapolis and, at age fourteen, moved to California with his family. Two years later, he left home to become a buckaroo in Nevada, and he has been a working cowboy ever since, first as a ranch hand, then as a rodeo circuit rider, and now as the owner of a ranch near Mountain View, Arkansas where he lives in a stone house that he built himself.

Glenn Ohrlin is a master raconteur, specializing in the most outrageous tall-tales which he delivers in classic dead-pan style. He is also an excellent draftsman and illustrates his own books. The "Hell-Bound Train," with detailed and loving drawings of cowboys and their gear. He is best known, however, as a collector and performer of cowboy songs, some 100 of which he put into his own book along with his personal recollections of cowboy life and lore.

Glenn Ohrlin's song repertoire stems from material that originated in the period 1875–1925—traditional British ballads carried west, mid-19th century sentimental melodies, journalistic poetry, bawdy songs and hobo ditties. He sings them in the classic flat unornamented western style and accompanies them with simple understated guitar rhythms. This is the laconic, tough, masculine in style of western balladry at its peak, powerful and strongly affecting, in part because of its lack of adornment. It is also extremely deceptive; like many such western artists Glenn Ohrlin has a sly wit that sneaks up on you and can cloak the most outrageous sentiments with surface respectability.

During the past two years, Glenn Ohrlin has worked closely with the group of western folklorists who organized the extremely successful Cowboy Poetry Gathering in Elko, Nevada in January of this year. He represented the cowboy poets at the various meetings, during which the program was drawn up, and helped select the final list of artists to be invited. At the Gathering itself, he both performed and acted as host for several poetry readings and concerts. Scholar and singer, throughout the event, he exemplified simultaneously the art form and the artist, assuring by virtue of his lifetime devotion ot western tradition that the goals of authenticity and excellence were ever met.●

PROPOSED ARMS SALES

● Mr. LUGAR. Mr. President, section 36(b) of the Arms Export Control Act requires that Congress receive prior 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 reviewed. The provision stipulates 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 available to the full Senate, I ask to have printed in the RECORD at this point the notifications which have been received. The classified annexes referred to in several of the covering letters are available to Senators in the office of the Foreign Relations Committee, room SD-423.

The notifications follow:

DEFENSE SECURITY ASSISTANCE AGENCY,
Washington, DC, September 9, 1985.

In reply refer to: I-04584/85ct.

Hon. RICHARD C. LUGAR,
Chairman, Committee on Foreign Relations, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Pursuant to the reporting requirements of Section 36(b) of the Arms Export Control Act, we are forwarding herewith Transmittal No. 85-52 and under separate cover the classified annex thereto. This Transmittal concerns the Department of the Army's proposed Letter of Offer to Korea for defense articles and services estimated to cost $178 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. 85-52]

NOTICE OF PROPOSED ISSUANCE OF LETTER OF OFFER PURSUANT TO SECTION 36(b) OF THE ARMS EXPORT CONTROL ACT

(i) Prospective purchaser: Korea.

(ii) Total Estimated value:

	Million
Major defense equipment[1]	$138
Other	40
Total	178

[1] As defined in section 47(6) of the Arms Export Control Act.

(iii) Description of articles of services offered: Twenty-one AH-1S COBRA TOW helicopters with spare engines, concurrent spare parts, special tools, training, support personnel and test equipment.

(iv) Military department: Army (XVE).

(v) Sales commission, fee, etc., paid, offered, or agreed to be paid: None.

(vi) Sensitivity of technology contained in the defense acticles or defense services proposed to be sold: See annex under separate cover.

(vii) Section 28 report: Included in report for quarter ending June 30, 1985.

(viii) Date report delivered to Congress: September 9, 1985.

POLICY JUSTIFICATION

KOREA-AH-1S COBRA TOW HELICOPTERS

The Government of Korea has requested the purchase of 21 AH-1S COBRA TOW helicopters with spare engines, concurrent spare parts, special tools, training support personnel and test equipment. The estimated cost is $178 million.

This sale will contribute to the foreign policy objectives of the United States by helping to improve the security of a friendly country which has been and continues to be an impetus for modernization and progress in Eastern Asia. The sale of this equipment and support will enhance deterrence and contribute to the preservation of peace and stability on the Korean peninsula.

The AH-1S Cobra TOW helicopters proposed in this sale will enhance the Republic of Korea defensive capability and complement the preservation of peace and stability on the Korean peninsula, a key element in the security of Northeast Asia.

The sale of this equipment and support will not affect the basic military balance in the region.

The prime contractors will be Bell Helicopters Textron, Incorporated of Fort Worth, Texas and AVCO Corporation, Lycoming Division of Stratford, Connecticut.

Implementation of this sale will not require the assignment of any additional U.S. Government personnel: however, seven contractor representatives will be required in Korea for one year.

There will be no adverse impact on U.S. defense readiness as a result of this sale.

DEFENSE SECURITY ASSISTANCE AGENCY,
Washington, DC, September 9, 1985.

In reply refer to: I-04869/85ct.

Hon. RICHARD C. LUGAR,
Chairman, Committee on Foreign Relations, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Pursuant to the reporting requirements of Section 36(b) of the Arms Export Control Act, we are forwarding herewith Transmittal No. 85-49 and under separate cover the classified annex thereto. This Transmittal concerns the Department of the Navy's proposed Letter of Offer to the United Kingdom for defense articles and services estimated to cost $54 million. Shortly after this letter is delivered to your office, we plan to notify the news media of the unclassified portion of the Transmittal.

Sincerely,

PHILIP C. GAST,
Director

[Transmittal No. 85-49]

NOTICE OF PROPOSED ISSUANCE OF LETTER OF OFFER PURSUANT TO SECTION 36(b) OF THE ARMS EXPORT CONTROL ACT

(i) Prospective purchaser: United Kingdom.

(ii) Total estimated value:

	Million
Major defense equipment[1]	$37
Other	17
Total	54

[1] As defined in section 47(6) of the Arms Export Control Act.

(iii) Description of articles or services offered: Four PHALANX Close-in Weapon Systems (CIWS), spare parts and engineering support.

(iv) Military department: navy (LFK).

(v) Sales commission, fee, etc., paid, offered, or agreed to the 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: Included in report for quarter ending June 30, 1985.

(viii) Date report delivered to Congress: September 9, 1985.

POLICY JUSTIFICATION

UNITED KINGDOM—PHALANX CLOSE-IN WEAPON SYSTEMS

The Government of the United Kingdom (UK) has requested the purchase of four PHALANX Close-in Weapon Systems (CIWS), spare parts and engineering support. The estimated cost is $54 million.

This sale will contribute to the foreign policy and national security objectives of the United States by improving the military capabilities of the United Kingdom; furthering NATO rationalization, standardization, and interoperability; and enhancing the defense of the Western Alliance.

The sale of these four additional Close-in Weapon Systems would significantly enhance the close-in anti-aircraft warfare capability of UK ships. The UK has the military assets to utilize these systems effectively.

The sale of this equipment and support will not affect the basic military balance in the region.

The prime contractor will be the General Dynamics Corporation of Pomona, California.

Implementation of this sale will require the assignment of one additional U.S. Government representative and two contractor personnel in the United Kingdom for three months.

There will be no adverse impact on U.S. defense readiness as a result of this sale.

DEFENSE SECURITY ASSISTANCE AGENCY,
Washington, DC, September 9, 1985.

In reply refer to: I-02551/85.

Hon. RICHARD C. LUGAR,
Chairman, Committee on Foreign Relations, Washington, DC.

DEAR MR. CHAIRMAN: Pursuant to the reporting requirements of Section 36(b) of the Arms Export Control Act, we are forwarding herewith Transmittal No. 85-29 and under separate cover the classified annex thereto. This notification replaces Transmittal No. 85-23 and concerns the Department of the Navy's proposed Letter of Offer to the Federal Republic of Germany for defense articles and services estimated to cost $313 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. 85-29]

NOTICE OF PROPOSED ISSUANCE OF LETTER OF OFFER PURSUANT TO SECTION 36(b) OF THE ARMS EXPORT CONTROL ACT

(i) Prospective purchaser: Federal Republic of Germany.

(ii) Total estimated value:

	Million
Major defense equipment[1]	$261
Other	52
Total	313

[1] As defined in section 47(6) of the Arms Export Control Act.

(iii) Description of articles or services offered: A quantity of 944 AGM-88A high

speed anti-radiation missiles (HARM), associated spare and repair parts, test equipment, site survey, training, technical assistance, and support services.

(iv) Military department: Navy (AHD, amendment 1).

(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: See annex under separate cover.

(vii) Section 28 report: Case not included in section 28 report.

(viii) Date report delivered to Congress: September 9, 1985.

POLICY JUSTIFICATION

FEDERAL REPUBLIC OF GERMANY—HARM MISSILES

The Government of the Federal Republic of Germany (FRG) has requested the purchase of a quantity of 944 AGM-88A High Speed Anti-radiation Missiles (HARM), associated spare and repair parts, test equipment, site survey, training, technical assistance, and support services at an estimated cost of $313 million.

This sale will contribute to the foreign policy and national security objectives of the United States by improving the military capabilities of the FRG; furthering NATO rationalization, standardization, and interoperability; and enhancing the defense of the Western Alliance.

The FRG needs the HARM missiles to provide a defense suppression weapon to combat the missile threat faced by their TORNADO aircraft. HARM will assist in achieving air superiority by enabling their TORNADO aircraft to reach enemy targets and accomplish their tactical mission.

The sale of this equipment and support will not affect the basic military balance in the region.

The prime contractor will be Texas Instruments Corporation of Dallas, Texas.

Implementation of this sale will not require the assignment of any additional U.S. Government personnel or contractor representatives to the FRG.

There will be no adverse impact of U.S. defense readiness as a result of this sale.●

JOHN J. DRISCOLL

● Mr. DODD. Mr. President, this Thursday, September 12, will mark the end of an era for the labor movement in Connecticut. John J. Driscoll, president of the Connecticut State Labor Council, AFL-CIO, for the past 24 years, will step down on that day. At the age of 73, John Driscoll will retire as the venerable leader of the largest labor organization in my State. In honor of his retirement, I would like to share with my colleagues and with the people of the United States a short summary of his admirable life and career.

John has lived a full and remarkable life. His 50-year career in the labor movement spans the dark days following the Great Depression, through the organization of Government workers in the 1960's, to the struggles in the high technology workplace of today.

John Driscoll was born in Waterbury, CT in 1911, the son of Irish immigrants. His first ambition was to be an architect, but after a year at MIT, he transferred to Wesleyan University in Middletown, CT, where he received degrees in philosophy and English. Aiming to be a college professor, he took a fellowship in philosophy at Brown University in Rhode Island. There he started to read about what industrial unions could do for workers. Inspired by his readings, he enrolled at Harvard Law School to pursue a career in labor law. Once again, he felt he was not using his energy to the best advantage.

John eventually took a job at the Bristol Co. in Waterbury, a manufacturer of scientific instruments. He immediately began organizing the company's workers. Shortly after, he was asked to work for the National Union of Mine, Mill & Smelter Workers' local organization. He moved on to become secretary-treasurer of the State's Congress of Industrial Organizations. From there he joined the United Auto Workers. When the UAW withdrew from the AFL-CIO, he stayed on with the newly merged union.

He challenged the Communist leadership of the Mine, Mill & Smelter Workers and helped unionize brass workers in Connecticut. In 1961, he was elected president of the State Labor Council. He has held that position ever since.

The accomplishments of his tenure include obtaining legislative approval of collective bargaining for municipal and State employees and public school teachers, the Fair Employment Practices Act that prohibits job discrimination on the basis of race, creed, or color, and improvements in unemployment compensation benefits. He is a veritable walking history of the labor movement in Connecticut. He is a scholar, a brilliant strategist, a tough negotiator, a compassionate leader, and an eloquent orator. He is a tough, streetwise union organizer, known to all in Connecticut as "Mr. Labor."

Needless to say, Mr. President, we are very proud of John Driscoll in Connecticut. He will be greatly missed when he retires.

JUNK BOND TAKEOVERS

● Mr. DOMENICI. Mr. President, although the spate of stories about hostile junk bond financed takeovers no longer dominates the front pages of the daily newspaper, the threat presented to the integrity of our Nation's financial institutions and to our capital markets by the junk bond phenomenon has not abated. Takeovers financed with junk bonds continue.

Last June, I introduced S. 1286, the Junk Bond Limitation Act of 1985. The purpose of this bill is to ensure that the limitations on junk bond ownership which apply to federally chartered financial institutions are also applied to federally insured financial institutions which are State chartered. It also mandates that only the most financially secure federally insured financial institutions, those whose net worth is greater than 6 percent of their total worth, shall be permitted to invest in junk bonds. Finally, the bill makes it clear that the Federal Reserve's margin requirements apply to junk bond financed hostile takeovers.

Although my bill addresses only the most immediate and onerous aspects of the junk bond craze, there also are other detrimental aspects of the slew of takeovers financed by junk bonds. In particular, I am referring to the decreased amount of funds available for research and development by American industries and the dimunition in competition which results from corporate takeovers and takeover attempts. The petroleum division of the American Society of Mechanical Engineers has drafted an instructive statement on these effects of hostile takeovers. I ask that excerpts from the "Statement of the ASME Petroleum Division on the Detrimental Effect on the National Economy of Hostile Corporate Takeovers in the Petroleum Industry" be printed in the RECORD.

The material follows:

STATEMENT OF THE ASME PETROLEUM DIVISION ON THE DETRIMENTAL EFFECT ON THE NATIONAL ECONOMY OF HOSTILE CORPORATE TAKEOVERS IN THE PETROLEUM INDUSTRY

The free enterprise system is one of the great social inventions of mankind. It allows the economy to be optimized through companies and individuals acting in their own self-interest in a way that proves to be in the best interest of society as a whole. These adjustments include: Control of monopolies; transfer of payments by the government to the disadvantaged; and, restriction of unfair competitive activities not in the best interest of society. Utilizing a mixed economy, the United States has maintained the most stable and prosperous economy in the world.

Corporate mergers which increase the utilization of research and development and allow more efficient production are an essential and beneficial part of the free enterprise system. However, in the petroleum industry recent raids on profitable, stable companies have resulted in a substantial loss in competition and future technology. Competition insures a low and fair price of commodities to the consumer and induces industry to conduct research, development and implementation programs to obtain a temporary advantage over their competition. If competition in an industry declines, the need for investment in research and development declines also. Research and development programs are considered so important by American industry for its own viability that it spends $39.3 billion a year of corporate funds or 33% of pretax income on this effort. The expenditure of a third of corporate profits is most enlightening in that research and development efforts do not immediately result in corporate profits. Depending on the type of industry and research involved, R&D usually affects profits 5 to 30 years downstream. Therefore, a company only interested in temporary, rather than long term, profits can increase its

short term profitability by reducing or eliminating its research and development program.

After the recent takeovers of Cities Service, Gulf, Getty and General American Oil, we estimate, based on the companies' market shares, that competition has been reduced by 10 percent. If Phillips Petroleum and Unocal are taken over, total competition will be reduced by 20 percent and with reduced competition, research and development efforts will decline by 15 percent.

Although reduction in competition in the petroleum-fuel industries has, and will have if continued, an immediate effect on price competition, of more importance, is the effect on the nation's future if the loss of commercial incentive and the accompanying substantial decrease in research and development is allowed to continue. Research and development in this industry has already declined by $170 million per year and may decline further to a total of $345 million per year. This reduction is particularly harmful since the petroleum industry does comparatively little research and development at present; spending one-fifth of the American industrial average. Despite a temporary stability in fuel prices, the U.S. does face the serious problem of acquiring a future reliable and stable fuel supply through research and development.

* * * * *

Examination of the 10K reports submitted to the Security and Exchange Commission before and after the takeover of Gulf shows a drop in research and development of $70 million a year; $26 million of this drop occurred before the actual takeover while Gulf was under attack, and the rest after the takeover. Before the takeover, Gulf had one of the best diversified futuristic research and development programs in the petroleum industry. Attempting to estimate the decrease in research and development along the terms outlined above, we find that the probable future loss per year in research and development from the total takeovers of Cities Services, Gulf, Getty Oil, and General American Oil amount to approximately $173 million per year or 7.7% of the research and development budget of the oil industry. Prospective takeovers of Phillips Petroleum and Unocal with another $170 million of research and development bring the possible losses from takeovers to $343 million or a $15.4% possible loss of the total research and development budget in the petroleum-fuel companies since the beginning of the takeover efforts.

It must be emphasized that the takeover efforts do not have to be successful in order to lose R&D. As can be seen in the Gulf takeover case, substantial amounts were being lost just as result of company economies in resisting the takeover. We find also that on the stock market, which has only a short time view of things, the takeover companies (Chevron and Texaco) have suffered a serious drop in stock price. Therefore, even the stock market does not view the increase in scale of these two companies as a favorable development.

* * * * *

Finally, there is evidence that the value given to an old line company with a view to remaining competitive and viable for the future is low in the stock market. The philosophy behind the takeover of these companies in the petroleum area largely rests on the fact that, at the moment, oil costs about $10 a barrel, whereas in the latest takeovers, it is possible to obtain reserves for $5 a barrel. Such reserves, after they are developed, are likely to be sold for $25 a barrel eventually increasing over 20 years to a very high price. A company that has a long view of its operation and of the nation's future would attempt to acquire and maintain oil reserves in order to stay in business over the long haul. Recent examples of hostile corporate takeover attempts present clear evidence, however, that there is an intent to dispose of assets for the quick, short-term gain, and some current federal statutes now provide the corporate raider with advantages to reach this goal.

The use of so-called junk bonds—high-yield, high-risk, debt—appears to be a leading tool in the scheme to distribute a company's equity in a tax-favored manner that results in liquidation of the company. The plan of the breakup of such companies and the sale of reserved assets at a price close to that of development of new assets provide the leverage for destroying the company.

Federal laws that aid the substantial high-risk debt financing of hostile corporate raids need to be changed, in our opinion, because these takeovers result in the liquidation of otherwise profitable companies; and the destruction of such companies and the research and development that they provide, together with competition in the industry, make it contrary to the national interest to permit their destruction. Until some speculator thinks of a new trick, it appears to be sufficient to pass legislation which would remove the unfair advantage that allows the hostile takeover attempts to lead to a successful speculative maneuver for short-term gain.

* * * * *

Therefore, we arrive at the conclusion that a viable company with a plan to be competitive for a long time in the future is a valuable national asset because of the competition it provides and from the research, development and commercialization program that it sponsors. These companies should be preserved from unfair attack. However, we applaud increased competition and takeovers that may result in a more efficient business, a lower price of commodities, and larger research and development programs.●

ADVANCE NOTIFICATION PROPOSED ARMS SALES

● Mr LUGAR. Mr President, section 36(b) of the Arms Export Control Act requires that Congress receive advance notification of proposed arms sale 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 reviewed. The provision stipulates that, in the Senate, the notification of proposed sales shall be sent to the chairman of the Committee on Foreign Relations.

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. I ask that the official notification be printed in the RECORD in accordance with previous practice.

I wish to inform Members of the Senate that such a notification has been received.

Interested Senators may inquire as to the details of this advance notification at the office of the Committee on Foreign Relations, room SD-423.

The notification follows.

DEFENSE SECURITY ASSISTANCE AGENCY,
Washington, DC, September 9, 1985.

Dr. M. GRAEME BANNERMAN,
deputy Staff Director, Committee on Foreign Relations, U.S. Senate, Washington, DC.

DEAR DR. BANNERMAN: 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 East Asian country tentatively estimated to cost $50 million or more.

Sincerely,

PHILIP C. GAST, *Director.*

POLICY JUSTIFICATION

[Deleted.]
[Deleted.]
[Deleted.]
[Deleted.]
[Deleted.]

(U) The prime contractor has not yet been determined.

[Deleted.]

(U) There will be no adverse impact on U.S. defense readiness as a result of this sale.●

CONFIRMATION OF JACK LAWN TO HEAD DEA

● Mrs. HAWKINS. Mr. President, recently a very important Presidential nominee was confirmed by the full Senate. On July 16, 1985, Jack Lawn was overwhelmingly confirmed to be the new Administrator of the Drug Enforcement administration.

Mr. President, as chairman of both the Senate Subcommittee on Children, Family, Drugs and Alcoholism, and the Senate drug enforcement caucus, I am aware that there is no more important position in Government than Administrator of the DEA. As illicit narcotics continue to permeate our society to the extent that our national productivity is lowered, our military readiness is impaired, our children and young adults are corrupted, and our rates of violent crime are increased, it becomes obvious that illegal drugs represent our Nation's No. 1 problem. The Drug Enforcement Agency is the Government body charged with enforcing our drug control laws, and there is no one better for the job of running this vitally important agency than Jack Lawn.

An experienced law enforcement officer, Jack Lawn served with distinction and valor with the Federal Bureau of Investigation for many years, in numerous and diverse posts.

Mr. Lawn gained his invaluable expertise not only in the Criminal Investigative Division, where he was responsible for handling inquiries from the House Select Committee on Assassinations relating to the Martin Luther King, Jr., and John F. Kennedy assassinations, but he also served as Chief of the Civil Rights-Special Inquiry Section of the Criminal Investigation Division in FBI Headquarters in Washington. His distinguished career with the Federal Bureau of Investigation led to Mr. Lawn's appointment as Acting Deputy Administrator of the Drug Enforcement Administration in 1982. In a very short time, Mr. Lawn became Deputy Administrator of the DEA, and then was appointed as Acting Administrator when Bud Mullen left the post.

Mr. President, I am fortunate to have worked with Jack Lawn for a number of years, and have been nothing but impressed by his leadership, his experience, his knowledge, and his dedication. Because it is so vital to the future of our society that we effectively counteract the threat of drug abuse, it is necessary that pivotal roles, like that of Administrator of the Drug Enforcement Administration, be filled with unique and qualified individuals—individuals like Jack Lawn.

I congratulate this deserving man for his appointment to head the Drug Enforcement Administration, and I congratulate as well my colleagues in the U.S. Senate for their wisdom in expeditiously confirming Mr. Lawn to head this agency.●

THE GUARD DOG PROGRAM IN MINNESOTA

● Mr. DURENBERGER. Mr. President, the only viable population of the eastern timber wolf in the lower 48 States exists in northern Minnesota where the species is listed as threatened under the Endangered Species Act.

An ongoing conflict exists between protection of the wolf and the interests of farmers who have livestock in areas inhabitated by the wolves. There is a solution to this conflict which has yet to be tried and tested, that is, the use of specially trained guard dogs to protect the livestock. This proposal, developed by Ray Coppinger of the New England Farm Center, has the support of Fish and Wildlife Service personnel working in the field of wolf related research, the Minnesota Department of Natural Resources, environmental groups, and the farming community.

Mr. President, the House has included $45,000 for this project in H.R. 3011, the Interior and related agencies appropriation bill for 1986, and I have expressed to Senator McCLURE my hope that the Senate will see the merits of the project and retain this funding level.

Mr. President, I ask that an article on the Guard Dog Program in Minnesota be printed in the RECORD at this point.

The article follows:

[From the Minneapolis and Tribune Sunday Magazine, June 30, 1985]

DOGS VERSUS WOLVES

(By David Stamps)

Late April, and the ground in northern Minnesota is still frozen so close to the surface you can't dig a hole deep enough to bury a turnip. But above ground, things are starting to thaw by degrees.

The Ojibwa Indians, observing the annual return of warmth and color to the world, called April's full moon the Pink Moon. Something in the night air makes even the northern lights look less like the icy apparitions of winter. But there is a sound that chills the flesh like a gust straight out of January. The long, ghostly wail of a timber wolf momentarily freezes the night. Even the few early marsh frogs cease their chorus for a minute.

For Clarence Priem, who owns a herd of 180 Angus and Hereford beef cattle in northern Itasca County, the wolves, howling will grow more unsettling in coming months. Wolf pups have scarcely opened their eyes now; from May to October, when the pups must be fed and instructed in the deadly art of the pack, Priem's farm can become a target of wolves' hunting forays. Calves and occassionally an older cow are the victims. It's not easy to make a profit in the cattle business anywhere these days. Farming 720 acres adjoining wolf country doesn't make it any easier.

But this season there may be help in keeping losses down. Three years ago Priem recruited a special shepherd to live full-time with the herd. His name is Andy, short for Anatolian shepherd, one of the half-dozen breeds of guard dog imported from Europe and Asia within the last decade to protect American livestock.

Though not as penetratingly frightful as a wolf's howl, Andy's hefty "woof" is more than enough to inspire alarm in most creatures. Any nocturnal prowler that heard it would be wise to retreat as fast as four legs or two could carry it.

The sight of Andy by daylight, particularly his short, sturdy muzzle, is convincing proof that his bite is equal to his bark. This season, his first as an adult, could be when Andy proves his usefulness. At age 2 last year, not full grown, he killed two coyotes. To hear Clarence Priem's wife, Hazel, tell the story, the word kill is an understatement. He mauled them. When the dead coyotes were found, not a bone was left unbroken.

Which of itself proves noting. Contrary to hunters' tales of 50 or even 70-pound trophies, coyotes—brush wolves, they are sometimes called—weigh only about 30 pounds, less than a third of a full-grown Anatolian shepherd. Andy already weighs about 100 pounds. Wolves are another matter. Adult males can also weigh up to 100 pounds. Moreover, they hunt in packs. Many people express skepticism that a single dog could be of much use.

But then most Americans, whose idea of a guard dog is a mean German shepherd on a long chain, are unfamiliar with the specialized livestock-guarding breeds—the Anatolian shepherd herd from Turkey, Shar Planinetz from Yogoslavia, Maremma from Italy, Kuvasz and Komondor from Hungary. The great Pyrenees from Spain, introduced to the United States in the '30s as a show dog, is the only breed most Americans know even by name. Yet for centuries guard dogs in Europe and Asia have successfully protected livestock—mostly sheep and goats, but in some cases cattle—against predators, including wolves.

Americans' ignorance of guard dogs can jeopardize their survival in this country. Each year a few guard dogs are shot by hunters.

"A lot of hunters, if they saw Andy out with the herd, would shoot him and come up to the house to say they did me a big favor," says Clarence Priem. "Most people just assume any dog with a herd of cattle is chasing them. Hell, a wolf could be carrying off a heifer, and a hunter would probably drive right by and never see it."

Also contributing to the skepticism about guard dogs' effectiveness may be that most Americans are not all that knowledgeable about wolves either.

A senior official at the U.S. Fish and Wildlife Service in Washington reportedly expressed his own opinion that guard dogs would be useless against wolves because, he said, the wolves would kill the male dogs and breed the females. But that's unlikely. Wolves, one of the few members of the dog family that mate for life, seldom interbreed with dogs in the wild, though they are physically capable of doing so. When wolves kill dogs, they don't discriminate between females and males.

The key to Andy's effectiveness as a guard dog is that he may never actually fight a wolf. Wolves avoid confrontations with animals capable of fighting back. Thanks to Nature's cunning programming, a wolf understands that any disabling injury that prevents it from hunting is a fatal injury. The pack won't provide for an injured adult.

Though confident it could ultimately kill a guard dog, a wolf would be reluctant to risk injury at the jaws of an opponent like Andy. A wolf need not even see Andy or hear his deep-voiced bark to sense the wisdom of giving the farm a wide berth. A sniff of one of the many fence posts marked with Andy's urine may be enough to get the message: There's a very big canine around here.

Guard dogs' potential role as a buffer between wolves and livestock puts them in the middle of a raging controversy. The 1,200 eastern timber wolves estimated to live in northeastern Minnesota represent the only viable wolf population in the lower 48 states. In recent years that has made Minnesota the site of a heated battle between preservationists, who wish to see the wolf population protected, and the Department of Natural Resources (DNR), which in 1980 proposed a sport-trapping and hunting season as part of its bid to "manage the state wolf population."

That battle appeared to be ended in January of this year when the Eighth Circuit Court of Appeals upheld a 1984 ruling from Federal District Judge Miles Lord, who had ruled that a sport-trapping and hunting season would violate the Endangered Species Act of 1973. Minnesota wolves have been protected under that act since 1974. But reports that the Montana Department of Natural Resources is testing the legislative waters for an amendment to the Endangered Species Act to allow hunting of wolves and grizzly bears makes it very likely that the "war against wolves," as Lord called it, could continue here.

51-059 O-86-14 (Pt. 17)

So long as it does, farmers like Priem feel caught in the middle. Wolf predation of livestock is the prime reason cited by the Minnesota DNR for the need to reduce the state wolf population. Yet only a small percentage of wolves kill livestock. In 30,000 square miles of northern Minnesota wolf territory, there are about 12,000 farms that raise livestock. On average, only 20 to 30 farms per year are sites of confirmed losses to wolves.

Clarence Priem, who has been raising cattle since taking the farm over from his father 20 years ago, know this as well as anyone. Some years wolves kill a dozen or more of his cattle; the very next year there may be no losses.

As far as Priem is concerned, the point is not that wolf loss is negligible. (In one year alone, when a shortage of hay after a harsh winter forced him to turn the herd out to pasture early, he claims to have lost more than 30 head.) Rather, he believes that the number of farmers actually victimized by wolves is so small that their voices will invariably be drowned out in the preservation-vs.-management debate.

It comes as no surprise to find that Priem doesn't side with the preservationists.

"The people down in Minneapolis who want to protect the wolves, most of them have never seen a wolf. They probably never will see a wolf, and they wouldn't know the difference between a wolf and a big dog if they did see one," he says. "Myself, I don't know what good a wolf is."

At the same time, Priem doesn't care for the DNR's proposal for a sport-trapping and hunting season. "I don't think there are many hunters clever enough to kill wolves," he said. He doubts that the DNR would be as effective as the federal agents at trapping wolves. He fears they might not trap at all, requiring farmers to do the dirty work themselves.

Since 1978, when Minnesota wolves were reclassified from endangered to threatened, the Fish and Wildlife Service has been allowed to trap and kill wolves that are thought to be livestock predators. When a cow or calf is killed, Priem reports the loss to William Paul, a technician at the Fish and Wildlife office in Grand Rapids, Minn.

Paul first determines whether the loss can be confirmed as a wolf kill, in which case, thanks to 1978 stage legislation, Priem can collect reimbursement up to $400 per animal. If indeed a wolf is the culprit, Paul will set traps. Trapping is now limited to a quarter mile from the farm and to 10 days' duration, unless additional predation occurs. Wolf pups, since they do not kill large livestock, are released unharmed. In some cases the entire pack of six to eight adults may have to be caught.

In 1982, when the Fish and Wildlife Service asked Minnesota farmers who have suffered wolf predation whether they would like to try using guard dogs, Priem was one of four who accepted to offer, saying, "Take anything they give you. It can't do any harm. Hell, you could tie a red flag on a stick out in the pasture, and it might help."

As a pup, Andy was of little use the first season. The first step was to "bond" him with the cattle, which Priem accomplished by shutting him in the barn with six orphan calves. The second season he showed some promise. When a cow died, Andy steadfastly guarded the carcass for 10 days. Normally when wolves find a cow carcass they start eating at the back legs and keep eating as far as their hunger takes them, frequently to the head and shoulders. So long as Andy guarded the cow, there was no scavenging.

But while Andy kept guard at the carcass, wolves killed a calf in another pasture. The prompted a call for trapping. To keep Andy out of the traps, he was locked in the barn. Immediately the wolves moved in on the dead cow. When Andy returned to the job, Paul, the Fish and Wildlife biologist, observed him flush a wolf pup and chase it out of the pasture.

Of five dogs placed on four farms, Paul considers Andy to be one of the two that are successfully guarding livestock against wolves. (A pair of dogs at one farm tended to roam too far afield. Another dog got into trouble for unprovoked killing of neighbors' dogs.) Two successful guard dogs out of five is not a great percentage, but then there is no more guarantee that an individual guard dog will be a success than any thoroughbred racehorse will be a winner.

"It takes a complex mix of the dog's breeding, instinct, environment and training to achieve success with a guard dog," says Ray Coppinger, biology professor and director of the Livestock Dog Project at Hampshire College in Amherst, Mass.

Prompted by the grim realization that predator control of coyotes—including poison, explosive baits, even gassing of pups in dens—was costing $30 million per year and having virtually no success, some Western livestock raisers asked Coppinger and his wife, Lorna, to try to adapt European guarding species to work in this country. Ray Coppinger has imported dozens of dogs—including Andy's mother, rescued from a rock pile in Turkey, where it had been abandoned as an unwanted female pup. More than 500 dogs have been placed on farms across the country. About 250 are working in 35 states.

It's a slow process to learn what breeds respond to what training to make effective guard dogs, and the Coppingers admit that a lot of mistakes have been made in the project. But now the team claims a 70 percent success rate for dogs used to guard sheep against coyotes. Still there are no guarantees. A farmer leases a pup for $1 for the first year. If it doesn't work out or dies, the Coppingers will replace it. If it does work out, the farmer agrees to pay $120 per year plus food and veterinary expenses.

Ernest Haehnel, a Sheep raiser near Motley, Minn., considers his leasing of a Shar Planinetz from the Coppingers five years ago to be one of the better investments he's made.

"Since Boomer has been with the flock, we haven't lost a single sheep to coyotes," says Haehnel.

Haehnel wasn't losing sheep before getting Boomer, the first of the Coppingers' dogs in Minnesota, but only, he insists, because he was penning the entire flock near his house every night—a burdensome chore considering that Haehnel raises some 450 ewes. He now leaves them out all night. Haehnel is so pleased with the success of Boomer that in 1982 he leased another dog, Ben an Anatolian shepherd and littermate of Andy's, to work an adjoining 640-acre section he'd purchased.

George Jurgenson, DNR conservation officer for the area, agrees that the dogs are probably responsible for Haehnel's excellent record.

"In a good year, when there are plenty of mice for coyotes to eat, a farm the size of Ernie's could lose only nine or 10 lambs," he says. "But in a bad year it could lose 20 to 50. I think those dogs are worth their weight in gold."

Some of Haehnel's neighbors find it's hard to believe that Boomer is a guard dog, since the only time they see him is when the sheep are penned up for lambing or shearing. Then, contrary to accepted guard-dog policy, he likes to snooze in the yard.

"I'll admit the big lummox looks pretty useless when he's sleeping," says Haehnel, "but you should hear him out with the sheep at night. When he barks it's like the roar of a lion."

Except for his size—114 pounds—Boomer does not look particularly dangerous. Two common physical traits of all guard-dog breeds are their short muzzles and floppy ears, which given them the appearance of overgrown puppies. In a sense that's exactly what they are, and what makes them effective.

The result of selective breeding is perfectly illustrated by the contrasting behavior of Boomer and Haehnel's border collie, Tip. When put in with the sheep, Tip exhibits classic canine traits that have been bred to perfection in sheepherding dogs. He barks, chases and nips at the sheep. His threatening eye contact alone is enough to unsettle the flock from the other side of a fence. Boomer, arrested at a state of perpetual, albeit overgrown, puppyhood, would rather lick the ewes' faces than chase them. Even then they placidly ignore him.

"You're wasting your time to try to get him to fetch a ball or a stick," Ray Coppinger told Haehnel when he took Boomer. "Guard dogs have a puppy's typical disinterest in objects." But, like puppies, they are very fond of other creatures. A guard dog, raised with sheep or cattle, will grow up to show more affection toward them than humans, providing the owners don't treat it like a pet.

Farmers may have to reinforce a dog's early training by occasionally chasing it out of the farmyard and back to the flock. A successfully trained guard dog will come to the farmhouse once a day for food and a quick pat on the head and then return to the pasture.

But guard dogs can turn very unpuppylike when something endangers the flock. They are independent and readily show disapproval of any changes involving their stock, even a move to a new pasture.

"Boomer has to be tied up when Tip works the flock, or he would tear him to pieces," says Haehnel. He also has to be tied up when the shearer comes or when sheep are being loaded into a stock truck.

"You don't tell Boomer what to do, you ask him," says Haehnel. "I treat him the same way I do a bull or any other large male animal."

The success of dogs like Boomer has prompted the Coppingers to expand the scope of the Livestock Dog Project. Recently they have placed dogs in New Mexico to guard against mountain lions. Last year they submitted a proposal to the Fish and Wildlife Service calling for a more extensive test of guard dogs in Minnesota's wolf range. They have already purchased some cows and are training dogs to adjust to them. If funds could be made available soon, the project could start this summer.

"It could be a spectacular project," says Ray Coppinger. "It's the only kind of predator control that doesn't kill the predator. It protects both predator and prey."

The proposal calls for only $43,400, but chances for quick approval do not look promising. A quarter of a million dollars have been appropriated this year for lethal and nonlethal control of livestock predators, but unless Congress specifically instructs the Fish and Wildlife Service to do so, the

agency will probably not use any of that money for guard-dog projects.

The Fish and Wildlife Service does not support funding of the guard-dog project in Minnesota. The service agreed reluctantly to support guard-dog projects in Texas and Oregon only after intense lobbying by conservation groups.

Karen Woodsum, Great Lakes regional representative for Defenders of Wildlife, a Washington-based environmental group that leads the pro-guard-dog lobbying effort, believes that the Fish and Wildlife Service has a built-in bias in favor of lethal control methods.

"If it doesn't involve killing the predator, they don't consider it control," she says.

Though the Fish and Wildlife Service in Washington officially opposes the guard-dog project, local Fish and Wildlife staff members say that they think the project has some potential and that they would like to see it funded. They also dispute the charge that the service is against all nonlethal control methods.

"Before our budget was cut last year," says Bill Paul, "we were experimenting with a bunch of nonlethal control techniques—sirens, flashing lights, taste aversion."

Clearly it will take more than five dogs on four farms to determine their effectiveness against wolves. One farmer or four can't make all the trials and all the errors needed to determine what breed or what training will work best. The Priems admit that they did very little to train Andy other than to raise him with the orphan calves. And putting him out with cows as a pup on his own may have been a mistake, they now realize.

"The first time he tried to lick a calf, one of the cows knocked him on his butt," recalls Clarence Priem. "Then some of the others bullied him."

Andy took to the cattle despite the harsh treatment, but he now seems to prefer spending time with a herd of 150 yearlings that are kept in a separate feed lot. He patrols the farm, including the calving pasture, but mostly he stays with the younger cattle.

At best, guard dogs are probably only a partial solution to the wolf problem. Clarence Priem believes that a dog like Andy, who must be free to roam, would never work out at a farm near a highway. Though much too independent to learn tricks, guard dogs do develop their own peculiar traits. One of Andy's is to lie down in front of the school bus that stops for the three Priem children. (He has also been known to carry dead piglets from a neighboring farm into the yearling pasture and guard them as well as the cattle.)

Andy's most engaging trick is to jump into the troughs at feeding time. If Clarence Priem doesn't give him a pat on the head, he'll jump into each of the six troughs. But as soon as he gets the requisite pat, he trots away to the edge of the herd, sometimes grabbing a mouthful of feed before he goes.

"It's a big problem, and he's not the entire solution," says Priem, "but he helps. One thing I'll sure say for him, he's not just a dog. He's got his own ideas."●

PROPOSED ARMS SALES

● Mr. LUGAR. 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 reviewed. 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 notification which have been received.

The material follows:

DEFENSE SECURITY ASSISTANCE AGENCY,
Washington, DC, September 9, 1985.

In reply refer to I-04433/85ct.

Hon. RICHARD C. LUGAR,
Chairman, Committee on Foreign Relations, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Pursuant to the reporting requirements of Section 36(b) of the Arms Export Control Act, we are forwarding herewith Transmittal No. 85-50, concerning the Department of the Army's proposed Letter of Offer to Pakistan for defense articles and services estimated to cost $25 million. Shortly after this letter is delivered to your office, we plan to notify the news media.

Sincerely,

PHILIP C. GAST,
Director.

TRANSMITTAL NO. 85-50

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:

	Millions
Major defense equipment [1]	$22
Other	3
Total	25

[1] As defined in section 47(6) of the Arms Export Control Act.

(iii) Description of articles or services offered: One hundred ten M113A2 armored personnel carriers with machine guns, spare parts and related support equipment.

(iv) Military department: Army (JDO, VFG).

(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: Included in report for quarter ending 30 June 1985.

(viii) Date report delivered to Congress: 9 Sept. 1985.

POLICY JUSTIFICATION

PAKISTAN—M113A2 ARMORED PERSONNEL CARRIERS

The Government of Pakistan has requested the purchase of 110 M113A2 Armored Personnel Carriers with machine guns, spare parts and related support equipment. The estimated cost is $25 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 occupation of Afghanistan.

The Government of Pakistan will use this equipment to pursue its overall force modernization plan and to enhance its basic defense capability.

The sale of this equipment and support will not affect the basic military balance in the region.

The prime contractor will be the FMC Corporation of San Jose, California.

Implementation of this sale will require the assignment of four U.S. Government personnel to make three trips to Pakistan for a period of 21 days on each trip.

There will be no adverse impact on U.S. defense readiness as a result of this sale.

DEFENSE SECURITY ASSISTANCE AGENCY,
Washington, DC, September 9, 1985.

In reply refer to I-04434/85ct.

Hon. RICHARD C. LUGAR,
Chairman, Committee on Foreign Relations, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Pursuant to the reporting requirements of Section 36(b) of the Arms Export Control Act, we are forwarding herewith Transmittal No. 85-51, concerning the Department of the Army's proposed Letter of Offer to Pakistan for defense articles and services estimated to cost $78 million. Shortly after this letter is delivered to your office, we plan to notify the news media.

Sincerely,

PHILIP C. GAST,
Director.

TRANSMITTAL NO. 85-51

Notice of Prosposed Issuance of Letter of Offer Pursuant to Section 36(b) of the Arms Export Control Act

(i) Propective Purchaser: Pakistan.

(ii) Total estimated value:

	Millions
Major defense equipment [1]	$70
Other	8
Total	78

[1] As defined in section 47(6) of the Arms Export Control Act.

(iii) Description of articles or services offered: Eighty-eight M109A2 155mm full-tracked self-propelled howitzers with M2 .50 caliber machine guns.

(iv) Military department: Army (VFH).

(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: Included in report for quarter ending 30 June 1985.

(viii) Date report delivered to Congress: 9 Sept. 1985.

POLICY JUSTIFICATION

PAKISTAN—M109A2 155MM HOWITZERS

The Government of Pakistan has requested the purchase of 88 M109A2 155mm full-tracked self-propelled howitzers with M2 .50 caliber machine guns. The estimated cost is $78 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 occupation of Afghanistan.

The Government of Pakistan will use this equipment to pursue its overall force modernization plan and to enhance it basic defense capability.

The sale of this equipment and support will not affect the basic military balance in the region.

The prime contractor will be Bowen McLaughlin York of York, Pennsylvania.

Implementation of this sale will require the assignment of six U.S. Government personnel to Pakistan for three weeks on four separate occasions.

There will be no adverse impact on U.S. defense readiness as a result of this sale.●

IMMIGRATION REFORM AND CONTROL ACT OF 1985

Mr. DOLE. Mr. President, I ask unanimous consent that the Senate now turn to consideration of S. 1200, the immigration bill.

Mr. BYRD. Mr. President, reserving the right to object—I have no objection personally—but I am constrained to object on behalf of a Senator or Senators.

Mr. DOLE. Mr. President, I move that the Senate proceed to the consideration of S. 1200, the immigration bill.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from Kansas that the Senate proceed to the consideration of S. 1200.

ORDERS FOR WEDNESDAY, SEPTEMBER 11, 1985

ORDER FOR RECESS

Mr. DOLE. Mr. President, I ask unanimous consent that once the Senate completes its business today, it stand in recess until 12 noon Wednesday, September 11, 1985.

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

ORDER FOR RECOGNITION OF SENATOR PROXMIRE

Mr. DOLE. I further ask unanimous consent that following the two leaders under the standing order, there be a special order in favor of the Senator from Wisconsin [Mr. PROXMIRE] for not to exceed 15 minutes.

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

ORDER FOR PERIOD FOR TRANSACTION OF ROUTINE MORNING BUSINESS

Mr. DOLE. Mr. President, following the Proxmire special order, I ask unanimous consent that there be a period for the transaction of routine morning business not to extend beyond 1 p.m., with statements limited therein to 5 minutes each.

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

CLOTURE VOTE AT 2:30 P.M.

Mr. DOLE. I ask unanimous consent that at 2:30 p.m. the Senate vote on cloture on the antiapartheid conference report with the mandatory quorum call of rule XXII being waived.

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

Mr. DOLE. So there would be at least that rollcall, and I would assume, if we can turn to S. 1200, there could be other rollcall votes.

I also indicate that we will not be in late tomorrow evening—I would say 6, 6:15, 6:30.

RECESS UNTIL 12 NOON

Mr. DOLE. Mr. President, I move, in accordance with the order previously entered, that the Senate now stand in recess until 12 noon tomorrow.

The motion was agreed to; and at 7:31 p.m., the Senate recessed until tomorrow, Wednesday, September 11, 1985, at 12 noon.